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ARTICLE

FEDERALISM AND FEDERAL LIABILITY REFORM: THE UNITED STATES CONSTITUTION SUPPORTS REFORM

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Three recent Supreme Court decisions have bolstered the arguments and efforts of opponents of federal tort reform initiatives. This Article contends that these decisions do not stand in the way of liability reform at the federal level. The authors maintain that courts in the modern era have reviewed economic legislation with great deference and should continue to do so. Accordingly, neither the Commerce Clause nor the Tenth Amendment impose limitations on Congress's ability to enact tort reform measures.

Virtually every American has heard the conservative call to protect "states' rights." It is a political staple of conservative causes.[1] Ironically, however, in recent debates about federal tort reform legislation, the call to respect states' rights has been trumpeted by some very unlikely sources—liberal members of Congress[2] and consumer advocates who have traditionally sup-

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[1] *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995).

[2] *See* H.R. REP. No. 105-702, at 25–28 (1998) (minority views in House Judiciary Committee Report on Class Action Jurisdiction Act of 1998); S. REP. No. 105-32, at 64, 78–80 (1997) (minority views in Senate Commerce Committee Report on Product Liability Reform Act of 1997); S. REP. No. 104-69, at 64–66 (1995) (minority views in Senate Commerce Committee Report on Product Liability Fairness Act); H.R. REP. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act); H.R. REP. No. 104-64, at 35–36, 40–41 (1995) (minority views in House Judiciary Committee Report on Common Sense Legal

ported federal regulation of everything from food package labeling[3] to local activities like used car sales[4] and funeral home practices.[5] Both Presidents Ronald Reagan and George Bush, on the other hand, supported federal product liability reform legislation, notwithstanding their ideological preference for an expanded role for state governments.[6]

Civil justice reform has turned the world of states' rights upside down. A basic explanation for this phenomenon is political. Opponents of federal liability reform legislation enjoy pointing out an apparent inconsistency in conservative philosophy.[7] They can show that the ascent to power of the Republican-controlled Congress early in 1995 was based, in part, on a pledge that members would reduce the role of the federal government and give more policymaking authority to the states.[8] Various federal initiatives sought to "devolve power to the states in areas such as welfare, school lunch programs, legal services for the poor, speed limits on interstate highways, and other spheres in which the federal government had played a dominant role for decades."[9] Federal civil justice reform was and continues to be an exception to this pattern.

Standards Reform Act of 1995).

[3] *See* 21 C.F.R. § 101 (1995) (requiring uniform labeling of all packaged food products with ingredients and specific nutritional information).

[4] *See* Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455 (1995) (prohibiting misrepresentation of the mechanical condition of a used vehicle and requiring used car salesmen to disclose warranty information to consumers prior to sale); Odometer Disclosure Requirement, 49 C.F.R. § 580 (1995) (requiring transferor of motor vehicle to provide a written disclosure of odometer mileage and its accuracy to protect purchasers who rely on odometer readings in selecting used cars).

[5] *See* Funeral Industries Practice Rule, 16 C.F.R. § 453 (1995).

[6] *See* C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 96–98 (1983) (explaining the Reagan administration's reasons for supporting national product liability legislation); Joe Davidson, *Bill to Limit Product Liability Lawsuits by Consumers Fails in Senate, But Barely*, WALL ST. J., Sept. 11, 1992, at C13 (stating that "President Bush strongly supported [federal product liability reform legislation] and made it a hot campaign topic with a comment at the Republican convention").

[7] *See supra* note 2 and accompanying text. Conservatives also enjoy pointing out an apparent inconsistency in liberal philosophy. The same members who have expressed a resounding "no" to federal civil justice and liability reform legislation strongly support the Consumer Products Safety Commission, in part because products flow in interstate commerce. *See* Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History And Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 605–06 (1997).

[8] *See* H.R. Rep. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act).

[9] Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE J. REG. 429, 329 (1996) (describing the public policy and constitutional bases for federal involvement in tort law). *See also* Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform*, 14 YALE J. REG.

Another explanation for the prominence of federalism in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and such legislation is enacted, the U.S. Constitution may provide the only mechanism to nullify the law. Our experience in working on tort reform at the state level has taught us that, once legislation is enacted, it is likely to be challenged on constitutional grounds by the Association of Trial Lawyers of America ("ATLA") and the political allies of the organized plaintiffs' bar.[10]

We believe that there are certain rational goals of civil justice reform that, as a practical matter, can only be accomplished at the federal level.[11] The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

For example, Congress is uniquely suited to enact a national solution to provide predictability in the product liability system.[12] Predictability reduces unnecessary legal costs and allows consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, as a practical matter, cannot achieve this goal on a national level.[13] For that reason, the National Governors' Association ("NGA") has adopted resolutions on several different occasions calling for Congress to enact federal product liability legisla-

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371 (1996) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states); Robert L. Rabin, *Federalism And The Tort System*, 50 RUTGERS L. REV. 1 (1997) (characterizing 1996 federal product liability reform legislation as part of a recent series of efforts to achieve liability reform at the federal level); Nim M. Razook, Jr., *Legal And Extralegal Barriers To Federal Product Liability Reform*, 32 AM. BUS. L.J. 541 (1995) (suggesting federal liabilty reform is inconsistent with states' rights).

[10] *See* Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at S34 (discussing judicial nullification of state tort statutes); Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislators?* (Wash. Legal Found. Feb. 1997) (asserting that legislatures and courts share a role in deciding tort law rules).

[11] *See* Schwartz & Behrens, *supra* note 7.

[12] *See* Victor E. Schwartz & Mark A. Behrens, *The Road To Federal Product Liability Reform*, 55 MD. L. REV. 1363 (1996); Sherman Joyce, *Product Liability Law In The Federal Arena*, 19 SEATTLE U. L. REV. 421 (1996).

[13] *See* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS COMMODITY TRANSPORTATION SURVEY 1–7, tbl. 1 (1977) (indicating that, on average, over 70% of goods manufactured in the United States are shipped out of state and sold).

tion.[14] The American Legislative Exchange Council, a bipartisan organization of more than 3000 state legislators from all fifty states formed in principal part to protect states' rights, also supports the enactment of federal product liability reform legislation.[15]

Further, as we argue in this Article, federal liability reform has ample basis for support in the Constitution. We address arguments to the contrary[16] based on three recent decisions by the Supreme Court—*New York v. United States*,[17] *United States v. Lopez*,[18] and *Printz v. United States*.[19] While these decisions provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level.

This Article does not advocate any particular bill in the matrix of federal tort reform legislation. Rather, it responds to questions that may be raised in general about whether civil justice reform is constitutional and comports with basic principles of federalism. By focusing on such general principles, this Article is intended to have a long "shelf life" that can contribute to constitutional debates and legal challenges in the courts for many years to come.

Part I of this Article argues that Congress has the power under the Commerce Clause of the Constitution to enact federal liability reform legislation and that state courts are bound to en-

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[14] The NGA's most recent resolution stated in part:

> The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce.... Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.

S. REP. No. 105-32, at 14 (1997) (quoting NGA policy statement).

[15] *See id.* at 15.

[16] *See* Jeffrey White, *Does Products Bill Collide with Tenth Amendment?*, TRIAL, Nov. 1997, at 30; Cynthia C. Lebow, *Federalism And Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665 (1997); Jerry J. Phillips, *Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN. L. REV. 647 (1997); Andrew F. Popper, *A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PRODS. & TOXICS LIAB. 105 (1994); Beth Rogers, Note, *Legal Reform—At the Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act*, 21 U. DAYTON L. REV. 513 (1996).

[17] 505 U.S. 144 (1992) (discussing the Low-Level Radioactive Waste Policy Amendments Act).

[18] 514 U.S. 549 (1995) (discussing the Gun Free Zones Act).

[19] 521 U.S. 898 (1997) (discussing the Brady Handgun Violence Prevention Act).

force that law under the Supremacy Clause. Part II shows that, for almost a century, Congress has enacted legislation altering state tort law, and that these laws have been held constitutional time after time. Finally, Part III maintains that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the States and, therefore, is not inconsistent with the Tenth Amendment.

I. THE COMMERCE CLAUSE EMPOWERS CONGRESS TO ENACT FEDERAL LIABILITY REFORM LEGISLATION

A. *The Commerce Clause*

The Commerce Clause of the Constitution gives Congress the power to regulate commerce.[20] As the Supreme Court has said, "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[21]

The Supreme Court has identified "three broad categories of activity"[22] that Congress may regulate pursuant to its Commerce Clause authority: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce, regardless of whether the activity is local or extends across state boundaries.[23]

The Supreme Court has ruled that, while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In *Wickard v. Filburn*,[24] for example, the Court upheld Congress's regulation of

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[20] *See* U.S. CONST. art. I, § 8, cl. 3.

[21] United States v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)) (reaffirming that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits).

[22] *Lopez*, 514 U.S. at 558.

[23] *See id.* at 558–59. *See also* United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

[24] 317 U.S. 111 (1942).

the consumption of homegrown wheat because of its aggregate economic effect on the interstate wheat market. The Court explained that, "even if [the] activity [is] local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce."[25] The Court also concluded that Congress may regulate activity "irrespective of whether [the] effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[26]

B. *Federal Tort Laws*

Consistent with its power to regulate commerce pursuant to the Commerce Clause, Congress has enacted a number of laws that preempt state tort law.[27]

1. The Early Laws

As far back as 1908, Congress enacted a "tort substitute" for workers' compensation in the railroad field. The Federal Employers' Liability Act ("FELA"),[28] a misleadingly named federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employers, was upheld by the Supreme Court as a constitutional exercise of congressional power.[29]

Similarly, in 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA"),[30] a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States.[31] Congress enacted LHWCA both to provide injured employees with more

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[25] *Id.* at 125.

[26] *Id. See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States . . . .").

[27] Maritime law, though beyond the scope of this Article, is another field in which Congress has been active in setting tort policy rules. *See generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY ch. VI (2d ed. 1975).

[28] Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (1994)).

[29] *See infra* notes 78–82 and accompanying text.

[30] 33 U.S.C. §§ 901–944 (1994).

[31] *See generally* Kane v. United States, 43 F.3d 1446, 1449 (Fed. Cir. 1994) (describing workers' compensation acts).

immediate and less expensive relief than that available in a common law tort action[32] and to provide employers with liability that was "limited and determinative."[33] Again, the Supreme Court held that Congress had the constitutional power to enact this piece of federal tort legislation.[34] These are just two examples among many that illustrate Congress's active, longstanding participation in setting national tort liability rules.[35]

2. Recent Laws Setting National Tort Policy Rules: 1993–1998

Almost nine decades after the enactment FELA, the 103d Congress enacted the General Aviation Revitalization Act of 1994 ("GARA"),[36] which established an eighteen-year statute of repose, or outer time limit on bringing litigation, for accidents involving general aviation aircraft.[37] GARA was predicated on Congress's power to regulate interstate commerce. Enough time has passed to conclude that GARA has been successful in its goal of revitalizing the light aircraft industry, which could not have been accomplished by state action alone.

A March 1997 hearing of the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects.[38] John Moore, senior vice president of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986, but as a result of

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[32] *See* Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983) (holding that, although the LHWCA was enacted to help injured employees, the Act was not intended to provide compensation to injured employees for expenses that are the direct result of the employee's own post-injury misconduct).

[33] Smither & Co., Inc. v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957) (citing Bradford Electric Co. v. Clapper, 286 U.S. 145, 159 (1932)) (describing the compromises made by both employees and employers through the enactment of statutes like the LHWCA).

[34] *See infra* notes 93–103 and accompanying text.

[35] Numerous other congressional tort policy enactments that have been declared constitutional are described later in this Article. *See* discussion *infra* Part II.

[36] Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101). *See generally* David Moffitt, Note, *The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGIS. & POL'Y 215 (1995).

[37] GARA did not provide any new basis for federal court jurisdiction; cases that would have been decided by a state court before GARA became effective on August 17, 1994, remain in state court today, subject to the application of the federal "ceiling" on tort liability. GARA also did not preempt shorter state statutes of repose that may apply to bar a tort claim.

[38] *See* S. REP. No. 105-32, at 41–42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997). *See generally* Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, A.B.A. J., at 28 (Jan. 1996) ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

GARA, is now back in the single engine aircraft business.[39] At the time of the subcommittee's hearing, Cessna's small aircraft division had more than 650 employees and had plans to double employment in 1998.[40] John Peterson of the Montgomery County Action Council of Coffeyville, Kansas—the home of Cessna's new small aircraft plant—testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators.[41] The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed.[42] After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county.[43]

Similarly, Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1000 workers.[44] Likewise, John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their right to sue.[45] AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes—aircraft that had flown safely for more than two decades.[46]

The 104th Congress enacted a number of other tort and civil justice reform measures:

> The Small Business Job Protection Act of 1996[47] included a provision that: (1) holds punitive damages received in personal injury suits subject to federal income tax by eliminating the possibility for an exclusion from taxable gross income; (2) eliminates the possibility of an exclusion for personal injury damages in cases that do not involve physical injury or illness; and (3) provides that emotional distress is not by itself a physical injury or sickness;

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[39] *See* S. REP. No. 105-32, at 41.
[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] *See id.* at 42.
[44] *See id.*
[45] *See id.*
[46] *See id.*
[47] 26 U.S.C. § 104 (Supp. II 1996).

The Federally Supported Health Centers Assistance Act of 1995[48] extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers;

The Aviation Disaster Family Assistance Act of 1996[49] limited unsolicited contacts from lawyers and insurance company representatives with airline crash victims or their families;

The Bill Emerson Good Samaritan Food Donation Act of 1996[50] provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals; and

The Private Securities Litigation Reform Act of 1995[51] placed limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934.[52]

The 105th Congress continued the trend toward greater federal involvement in deciding liability rules by enacting several other tort reform laws:

The Volunteer Protection Act of 1997[53] provided limited immunity for volunteers acting on behalf of a nonprofit organization, creating a national standard of punitive damages liability for volunteers, and abolishing joint liability for noneconomic damages in tort actions involving volunteers;

The Amtrak Reform and Accountability Act of 1997[54] created a federal standard for punitive damages awards in tort cases brought against Amtrak by its passengers and capped Amtrak's tort liability at $200 million for each rail accident;

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[48] 42 U.S.C. §§ 201, 233 (Supp. II 1996).
[49] 49 U.S.C. § 1136 (Supp. II 1996).
[50] 42 U.S.C. § 1791 (Supp. II 1996).
[51] 15 U.S.C. § 77 (Supp. II 1996) (enacted over the veto of President Clinton).
[52] A product liability reform bill cleared both the House and Senate in the 104th Congress, but was vetoed by President Clinton. That legislation, among other reforms, capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or $250,000; abolished joint liability for noneconomic damages; limited the liability of product sellers to their own negligence or failure to comply with an express warranty; established a complete defense to liability if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs; reduced a defendant's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product; and set a 15-year statute of repose on litigation involving workplace durable goods (e.g., machine tools). *See* H.R. CONF. REP. No. 104-481 (1996). President Clinton vetoed the bill on May 2, 1996. *See* John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14.
[53] 42 U.S.C.S. § 14503 (Law. Co-op. 1998).
[54] 49 U.S.C.S. § 28103 (Law. Co-op. 1998).

The Biomaterials Access Assurance Act of 1998[55] provided suppliers of the raw materials and component parts used to make implantable medical devices with a mechanism to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant;

The Year 2000 Information and Readiness Disclosure Act[56] banned, with a few exceptions, the use of "Year 2000 readiness disclosure" statements by plaintiffs as evidence in court to prove the truth or accuracy of a company's assertions about dealing with the Year 2000 computer problem and protects companies from liability for Year 2000 statements they made that are alleged to be false, inaccurate, or misleading unless it is proven that the company knew the statement was false, inaccurate, or misleading and made it with an intent to deceive or mislead; and

The Securities Litigation Uniform Standards Act of 1998[57] made federal courts the sole venue for most securities class action fraud lawsuits involving fifty or more parties. The law was enacted to close a loophole in the Private Securities Litigation Reform Act of 1995.[58] That law raised the standard for filing such suits in federal courts, but was undermined when lawyers shifted their filings to state courts.[59]

C. *The* Lopez *Decision Does Not Undermine the Authority of Congress to Enact Liability Reform Legislation*

Despite the long history of congressional involvement in matters having an effect on interstate commerce, opponents of federal liability reform have questioned whether Congress has the authority to enact liability reform legislation in light of the holding of *United States v. Lopez*.[60]

In *Lopez*, the Court considered whether Congress's enactment of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to

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[55] 21 U.S.C.S. § 1605 (Law. Co-op. 1998).

[56] Pub. L. No. 105-271, 112 Stat. 2386, 2389 (1998) (to be codified at 15 U.S.C. § 78a).

[57] 15 U.S.C.S. §§ 77–78 (Law. Co-op. 1998).

[58] *See supra* text accompanying note 51.

[59] *See* S. REP. No. 105-182, at 3 (1998); H.R. REP. No. 105-640, at 8 (1998); H.R. REP. No. 105-803, at 13 (1998).

[60] 514 U.S. 549 (1995). *See, e.g.*, Phillips, *supra* note 16.

believe, is a school zone,"[61] was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "[t]he Act neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."[62]

Conceptually, *Lopez* was not a Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[63] Moreover, "respondent was a local student at a local school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm ha[d] any concrete tie to interstate commerce."[64]

The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce. These cases directly support Congress's Commerce Clause authority over liability law.[65] In fact, rather than limiting Congress's Commerce Clause authority, the *Lopez* decision can be read to support legislation that would regulate the firearms industry in a manner more explicitly connected with interstate commerce, such as a limit on the liability of gun manufacturers in order to promote the development of the firearms industry or

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[61] Pub. L. No. 101-647, § 1702(b), 104 Stat. 4789, 4844 (1990) (current version at 18 U.S.C. § 922(q)(2)(A) (1998)).

[62] *Lopez*, 514 U.S. at 551. *See also* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 1999 WL 111891, at *10 (4th Cir. Mar. 5, 1999) (holding that the Violence Against Women Act, which created a civil cause of action against private parties who commit acts of gender-motivated violence, exceeded Congress's Commerce Clause authority because the activity Congress sought to regulate—violent crime motivated by gender animus—was "not itself even arguably commercial or economic," and it "lack[ed] a meaningful connection with any particular, identifiable economic enterprise or transaction"). *See generally* Herbert Hovenkamp, *Judicial Restraint And Constitutional Federalism: The Supreme Court's Lopez And Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 633 (1996); Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995).

[63] *Lopez*, 514 U.S. at 561.

[64] *Id.* at 567.

[65] *See supra* notes 22–26 and accompanying text. *See also* Patrick Hoopes, *Tort Reform In the Wake of* United States v. Lopez, 24 HASTINGS CONST. L.Q. 785 (1997) (discussing how the *Lopez* decision represented a retreat from the Supreme Court's traditionally expansive interpretation of Congress's authority under the Commerce Clause).

an imposition of requirements on gun manufacturers to promote firearms safety.[66]

II. Federal Tort Laws Have Been and Should Be Declared Constitutional

A. *Courts Have Respected the Role of Congress in the Development Of Tort Law*

For almost a century, the Supreme Court and the lower courts have upheld numerous federal tort law statutes against constitutional challenges. The courts have uniformly held that such economic legislation comes clothed with a presumption of constitutionality that is subject to a highly deferential rational basis standard of review. In every modern case, the legislation has been found to pass constitutional muster.

1. Limitation of Shipowners' Liability Act

The Limitation of Vessel Shipowners' Liability Act and the Harter Act (collectively "the LSLA")[67] were the first major federal tort policy statutes to be challenged in the Supreme Court. The LSLA, enacted to promote commercial shipping, exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of the ship owner.[68] In addition, the LSLA limited ship owners' liability for any loss or destruction of goods aboard their ships.[69]

The Supreme Court upheld the constitutionality of the LSLA in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*[70] The case arose when the Providence Company, a defendant in state tort suits filed by the Hill Company to recover damages

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[66] *See Lopez*, 514 U.S. at 563 (indicating that Congress has the power to enact legislation regulating firearms possession explicitly connected with or having an effect on interstate commerce). *See also* Scott M. Richmond, Note, Printz v. United States: *If Congress Cannot Force State Legislatures to Implement Federal Policy, Why Should It Be Able to Force State Executives?*, 7 Widener J. Pub. L. 325, 371 (1998) ("Congress has the power, under the Commerce Clause, to regulate handgun sales involved in interstate commerce.").

[67] 46 U.S.C.A. §§ 181–196 (1994).

[68] 46 U.S.C.A. § 182.

[69] 46 U.S.C.A. § 183.

[70] 109 U.S. 578 (1883).

arising from a fire aboard one of Providence's ships, sought to limit its liability and suspend the state suits in accordance with the LSLA.[71]

The Supreme Court held that there was "no doubt that Congress had [the] power to pass the [LSLA]."[72] Quoting from an earlier decision, *The Lottawana*,[73] the Court reaffirmed Congress's "authority under the commercial power . . . to introduce such changes [in maritime law] as are likely to be needed,"[74] and indicated that it "perceive[d] no reason for entertaining any serious doubt" that Congress's power under the Commerce Clause "may be extended to the securing and protection of the rights and title of all persons dealing [in shipping]."[75] The Court added that because Congress acted within its lawful authority to regulate interstate commerce, the LSLA was "binding on all courts and jurisdictions throughout the United States."[76] The Court went on to hold that the purpose of the LSLA would be frustrated unless the institution of proceedings in a federal district court superseded the prosecution of claims for the same losses and injuries in other courts.[77]

2. Federal Employers' Liability Act of 1908

In *Mondou v. New York, New Haven & Hartford Railroad Co.*,[78] the Supreme Court upheld the constitutionality of the Federal Employers' Liability Act of 1908 ("FELA"),[79] which established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce.[80] Federal and state courts were given concurrent jurisdiction to decide FELA cases.[81]

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[71] *See id.* at 579–80.

[72] *Id.* at 589.

[73] 88 U.S. (21 Wall.) 558 (1874) (addressing Congress's power to make changes to maritime law).

[74] *Providence*, 109 U.S. at 589 (quoting *The Lottawana*, 88 U.S. at 577).

[75] *Id.* at 590 (quoting *The Lottawana*, 88 U.S. at 577).

[76] *Id.*

[77] *See id.* at 587.

[78] 223 U.S. 1 (1912).

[79] 45 U.S.C. §§ 51–60 (1994).

[80] *See supra* note 28 and accompanying text. In *Howard v. Illinois Central Railroad Co.* (the Employers' Liability Cases), 207 U.S. 463, 496–97 (1908), the Court struck down a 1906 version of FELA, finding that the 1906 Act exceeded Congress's Commerce Clause authority because it "embrace[d] . . . matters and things domestic [or intrastate] in their character."

[81] *See* 45 U.S.C. § 56. The Jones Act, 46 U.S.C.A. § 688 (1994), a FELA-like statute

In *Mondou,* railroads unsuccessfully challenged the constitutionality of the legislation on several grounds. The Court in *Mondou* held that Congress had not exceeded its Commerce Clause authority by enacting tort rules which deviated from the common law. In an oft-quoted passage, the Court held that:

> *A person has no property, no vested interest, in any rule of the common law.* That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but *the law itself, as a rule of conduct, may be changed at the will . . . of the legislature,* unless prevented by constitutional limitations. *Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.*[82]

The Court also noted that despite the fact that employer liability had traditionally been a matter of state law, Congress had a legitimate interest in replacing the patchwork of state laws with uniform, national legislation "to promote the safety of the [railroad] employees and to advance the commerce in which they are engaged."[83]

Furthermore, the Court held that the "classification" created by FELA (i.e., the distinction it makes between interstate railroad carriers, which are subject to liability, and all other parties, which are not) did not doom the statute under the Due Process Clause of the Fifth Amendment,[84] even though it could "occasion some inequalities."[85] The Court held that tort law classifications are constitutionally permissible under the Fifth Amendment as long as the classification has a rational basis.[86] Tested by that standard, the Court held, FELA was "not objectionable."[87] The Court pointed out that it had repeatedly sustained "[l]ike classifications of railroad carriers and employees for like pur-

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that permits seamen injured in the course of employment to maintain an action for damages at law, also has been interpreted to provide federal and state courts with concurrent jurisdiction to decide Jones Act cases. *See* Engel v. Davenport, 271 U.S. 33 (1926).

[82] *Mondou,* 223 U.S. at 50 (emphasis added) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[83] *Id.* at 51.

[84] The Court assumed the clause to be the equivalent of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 53.

[85] *Id.*

[86] *See Mondou,* 223 U.S. at 53.

[87] *Id.*

poses" under the Equal Protection Clause of the Fourteenth Amendment.[88]

After resolving FELA's constitutionality, the Court moved to settle FELA's preemptive effect over state laws covering railroad employer liability. The Court explained that although Congress had chosen not to regulate the field of railroad carrier liability in the past, and although the subject fell within the police power of the states in the absence of congressional action, Congress was not therefore precluded from acting.[89] To the contrary, once Congress acted, "the laws of the states, in so far as they cover the same field, [were] superseded, for necessarily that which is not supreme must yield to that which is."[90]

The Court went on to explain that FELA did not present federalism problems because Congress was not setting state policy. Rather, Congress was establishing federal policy to be implemented by the states in accordance with the Supremacy Clause. The Court held:

> [W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure.[91]

The Court added that it did not perceive that FELA would cause any appreciable inconvenience or confusion for state courts, and that in any case, such inconvenience or confusion would not change its holding:

> We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules

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[88] *Id.*
[89] *See id.* at 54–55.
[90] *Id.* at 55.
[91] *Id.* at 56–57.

> of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger.[92]

3. The Longshore and Harbor Workers' Compensation Act

In *Crowell v. Benson*,[93] the Supreme Court was asked to decide the constitutionality of the Longshore and Harbor Workers' Compensation Act ("LHWCA").[94] The LHWCA created a no-fault compensation scheme that provided fixed awards to employees injured upon the navigable waters of the United States.[95]

The Court began by holding that the federal power to alter, amend, or revise the maritime law gave Congress the authority to define the substantive rights of employees under the LHWCA (in this case, by providing for recovery in the absence of fault, establishing classifications based on type of injury, fixing the range of compensation for disability or death, and designating the classes of beneficiaries).[96]

Next, the Court addressed whether the substantive rights created by the LHWCA violated the Due Process Clause of the Fifth Amendment.[97] The Court, applying a deferential rational basis test, held that neither the classifications created by the statute nor the extent of compensation provided were unreasonable.[98] In light of the difficulties associated with determining actual damages in maritime cases, the Court held, Congress was justified in providing for the payment of damages in amounts that would reasonably approximate a claimant's probable damages.[99] The Court also noted that the plaintiff's Fifth Amendment objections were substantially similar to those which the Court had rejected in challenges to state workers' compensation laws under the Due Process Clause of the Fourteenth Amendment.[100]

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[92] *Id.* at 58–59.
[93] 285 U.S. 22 (1932).
[94] 33 U.S.C. §§ 901–950 (1994) (originally entitled "Longshoremen's and Harbor Worker's Act").
[95] *See supra* notes 30–33 and accompanying text.
[96] *See Crowell*, 285 U.S. at 39.
[97] *See id.* at 41.
[98] *See id.*
[99] *See id.*
[100] *See id.* at 42.

After upholding the constitutionality of the LHWCA's substantive provisions, the Court turned to the LHWCA's procedural requirements. The plaintiff's procedural objections to the LHWCA focused on the administrative authority conferred by the Act.[101] The Court held that the use of the administrative method to assess the cause, character, and effect of claimants' injuries fell "easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments,"[102] and did not constitute an unconstitutional invasion of judicial power.[103]

4. The Drivers Act

In 1961, Congress enacted the Drivers Act[104] to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring in the course of their employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the-job accidents.[105] "[M]oved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ,"[106] Congress decided to forbid suits against federal drivers, but to permit suits against the United States for tort liability arising out of accidents caused by a driver's negligence.[107]

a. *Private citizen and federal driver.* The Drivers Act was challenged on constitutional grounds in *Nistendirk v. McGee*,[108] a personal injury action arising out of an automobile accident between a private citizen and a federal employee (in this instance, a rural mail carrier). The plaintiff initially brought a negligence action against the mail carrier in Missouri state court. The

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[101] *See id.* at 42–45 (detailing the significant amount of discretion granted to a single deputy commissioner under the Act).

[102] *Id.* at 47.

[103] *See id.* at 54 (holding that the LHWCA's reservation of the judiciary's power to deal with matters of law appropriately preserved the exercise of the judicial function).

[104] 28 U.S.C. § 2679(b)–(e) (1994).

[105] *See* Carr v. United States, 422 F.2d 1007, 1009 (4th Cir. 1970).

[106] *Id.* at 1012.

[107] *See* 28 U.S.C. § 2679(b), (d) (1994).

[108] 225 F. Supp. 881 (W.D. Mo. 1963).

United States removed the case to federal court and was substituted as the defendant pursuant to the Drivers Act.[109] The plaintiff, seeking to obtain full damages and wanting to avoid trying the case under the Federal Tort Claims Act, moved to remand the case to state court on the ground that the Drivers Act violated the Fourteenth Amendment of the United States Constitution.[110]

The court rejected plaintiff's argument that the Drivers Act violated the Fourteenth Amendment by replacing a common law remedy with a statutory one.[111] The court noted that, in *Silver v. Silver*,[112] the Supreme Court, in sustaining the abolition of a non-paying passenger's right to sue his host for negligence, had held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[113] The court concluded that because Congress had a legitimate interest in insulating federal drivers from liability, the Drivers Act constituted a valid exercise of legislative power under the Necessary and Proper Clause of Article I.[114]

b. *Federal employee and federal driver cases.* Most of the litigation involving the Drivers Act has involved claims by federal employees injured by government drivers, since prior to passage of the Act, civilian government workers injured in the course of employment as a result of the negligence of a fellow-employee were not limited to claims against the United States under the Federal Employees' Compensation Act ("FECA").[115] They also had the right to bring a common law tort action

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[109] *See id.* at 881.

[110] *See id.* at 882. Plaintiffs also argued that the Act violated the Seventh Amendment and the jury trial provision of the Missouri Constitution. *See id.* The court quickly disposed of plaintiff's Seventh Amendment challenge, holding that "the guarantees of the Seventh Amendment do not apply" to statutory causes of action against the federal government. *See id. See also* Gustafson v. Peck, 216 F. Supp. 370, 371 (N.D. Iowa 1963) (holding that the Seventh Amendment does not guarantee a right to a trial by jury in a state court); Adams v. Jackel, 220 F. Supp. 764, 765 (E.D.N.Y. 1963) (Seventh Amendment does not guarantee a right to a trial by jury in a claim for restitution against a collector of internal revenue). The court dismissed the plaintiff's argument that the Drivers Act violated the Missouri Constitution's jury trial guarantee, noting that the argument was without merit in light of the Supremacy Clause of the United States Constitution. *See Nistendirk*, 225 F. Supp. at 882.

[111] *See Nistendirk*, 225 F. Supp. at 882.

[112] 280 U.S. 117 (1929).

[113] *Nistendirk*, 225 F. Supp. at 882 (quoting *Silver*, 280 U.S. at 122).

[114] *See id.*

[115] 5 U.S.C. §§ 8101–8193 (1994).

against the negligent co-worker.[116] Congress, however, did not "specifically consider whether or not this cause of action against a fellow government employee should survive" passage of the Drivers Act.[117] That issue was addressed by a number of courts, which uniformly held that the Drivers Act abrogated the traditional common law rule.[118] Those decisions, in turn, produced litigation challenging Congress's authority to do so.

The Fourth Circuit addressed the constitutionality of the Drivers Act in *Carr v. United States*.[119] The plaintiff, a government employee injured by a federal driver, argued that the abrogation of a government employee's common law action against a fellow employee for negligence violated the Due Process Clause of the Fifth Amendment, because the Drivers Act did not create a new benefit as a quid pro quo.[120] Furthermore, the plaintiff argued, the Drivers Act violated the Equal Protection Clause of the Fifth Amendment, because it created an impermissible distinction between federal employees injured in vehicular accidents caused by fellow employees and federal workers injured in other job-related activities. Only Drivers Act plaintiffs were specifically barred from bringing tort actions against negligent co-employees.[121]

The Fourth Circuit rejected the plaintiff's due process argument, noting that it had already been rejected by the Supreme Court.[122] Moreover, even though a common law action could no longer be brought against the United States, the Fourth Circuit said, the Drivers Act itself provided an adequate quid pro quo, because it provided plaintiff with "valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible."[123]

The court rejected the plaintiff's equal protection challenge on the ground that the classification created by the Drivers Act did not penalize the exercise of any constitutional right.[124] Therefore,

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[116] *See* Noga v. United States, 411 F.2d 943, 944 (9th Cir. 1969).
[117] *Carr*, 422 F.2d at 1010.
[118] *See* Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968); *Noga*, 411 F.2d at 943; Van Houten v. Ralls, 411 F.2d 940 (9th Cir.); Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967).
[119] 422 F.2d 1007 (4th Cir. 1970).
[120] *See id.* at 1010.
[121] *See id.* at 1011.
[122] *See id.* at 1010 (noting the Court's rejection of the argument's premise in *Silver*).
[123] *Carr*, 422 F.2d at 1011.
[124] *See id.*

the court held, the statutory classification did not have to be justified by a compelling governmental interest. Rather, it came "clothed with a presumption of constitutionality" and would be upheld as long as Congress had a rational basis for enacting the legislation.[125] The court concluded that "the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem."[126]

The Third Circuit reached a similar conclusion in *Thomason v. Sanchez.*[127] The plaintiff, a serviceman, was injured when he was struck by an automobile operated by another serviceman. He had no remedy at all against the United States, because of the so-called "*Feres* doctrine,"[128] and thus presented a highly compelling appeal.[129] The plaintiff in *Thomason* argued that he should be allowed to proceed against the defendant and the defendant's automobile insurer.[130]

The Third Circuit, however, rejected the plaintiff's argument that common law tort actions against fellow government employees had survived passage of the Drivers Act.[131] The Third Circuit also rejected the plaintiff's argument that the Drivers Act, as applied to him, deprived him of all remedies at law and, therefore, constituted a denial of due process under the Fifth Amendment.[132] Adopting the reasoning of the Fourth Circuit in *Carr*,[133] the Third Circuit held that Congress was justified in passing the Drivers Act to relieve the heavy automobile insurance burden on federal drivers.[134]

5. Black Lung Benefits Act of 1972

In *Usery v. Turner Elkhorn Mining Co.*,[135] the Supreme Court upheld the constitutionality of Title IV of the Federal Coal Mine

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[125] *Id.* at 1012.
[126] *Id.*
[127] 539 F.2d 955 (3d Cir. 1976).
[128] In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.
[129] *See Thomason*, 539 F.2d at 956.
[130] *Id.* at 957.
[131] *See id.* at 958.
[132] *See id.* at 959–60.
[133] *See supra* notes 123–126 and accompanying text.
[134] *See Thomason*, 539 F.2d at 959–60.
[135] 428 U.S. 1 (1976).

Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972.[136] The black lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease.[137] Coal mine operators challenged a number of the black lung benefit provisions as unconstitutional.

First, the operators contended that the Black Lung Benefits Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former miners who terminated their work in the industry before the Act passed. The operators argued that "the Act spreads costs in an arbitrary manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business."[138]

The Court made it clear that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality."[139] It then held that Congress was justified in its decision to provide for the retroactive application of liability under the Black Lung Benefits Act.[140] The Court stated that, whether it would have been wiser for Congress to have chosen a cost-spreading scheme that was broader or more practical under the circumstances was "not a question of constitutional dimension."[141]

Second, the coal mine operators challenged the two alternative methods set forth by Congress for proving "total disability" due to black lung disease, a prerequisite for compensation under the Act.[142] The Court held, however, that the standards adopted by Congress could not be deemed to be "purely arbitrary" and, thus, were constitutionally valid.[143]

Third, the operators argued that a provision of the Act which provided that no claim for benefits could be defeated based solely on the results of a chest x-ray violated due process. The operators argued that x-ray evidence was frequently the only

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[136] 30 U.S.C. §§ 901–962 (1994). *See generally* Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Benefits Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665 (1989).

[137] *See* 30 U.S.C. § 901 (1994).

[138] *Usery*, 428 U.S. at 18.

[139] *Id.* at 15.

[140] *See id* at 16.

[141] *Id.* at 19.

[142] *See id.* at 20.

[143] *Id.* at 29.

evidence that they could put forth to rebut a black lung claim.[144] The Court noted, however, that Congress was presented with "significant evidence" that x-ray testing was not an accurate indicator of the absence of disease.[145] Thus, "Congress was faced with the problem of determining which side should bear the burden of the unreliability."[146] The Court held that the fact that "Congress ultimately determined 'to resolve doubts in favor of the disabled miner' [did] not render the enactment arbitrary under the standard of rationality appropriate to th[e] legislation."[147]

6. The Price-Anderson Act

The Price-Anderson Act,[148] as amended in 1975, limited the aggregate liability for a single nuclear incident to $560 million to be paid from contributions from nuclear power plant operators, private insurance, and the federal government. In addition, the amended Act required operators to waive certain legal defenses in the event of an extraordinary nuclear incident.[149]

The Price-Anderson Act was critical to the development of the private nuclear power industry in the United States.[150] Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, "the potential liability dwarfed the ability of the nuclear power industry and private insurance companies to absorb the risk."[151] Without reasonable and defined limits on liability, there might not be a nuclear power industry as we know it today.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[152] individuals who lived close to proposed nuclear power plants and two organizations sought to prevent construction of the planned facilities by obtaining a declaration that the Price-

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[144] *See id.* at 31.
[145] *Id.* at 31–32.
[146] *Id.* at 32.
[147] *Id.* at 34 (quoting S. REP. No. 92-743, at 11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315).
[148] 42 U.S.C. § 2210 (1994).
[149] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 65 n.5 (1978). "The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of the risk are all waived in the event of an extraordinary nuclear occurrence." *Id.*
[150] *See id.* at 64.
[151] *Id.*
[152] 438 U.S. 59 (1978).

Anderson Act was unconstitutional.[153] After deciding that plaintiffs had standing to challenge the Act,[154] the Supreme Court addressed plaintiffs' argument that the Act violated the Due Process Clause, because of the alleged arbitrariness of the $560 million statutory ceiling on liability.[155]

The Court rejected plaintiffs' contention that the Act should be subjected to an intermediate standard of review, holding that the Price-Anderson Act was a "classic example of an economic regulation" that could only be overcome by a showing that Congress acted in an "arbitrary and irrational way."[156] In light of this standard, the Court held that the Act passed constitutional muster because the liability cap bore a rational relationship to Congress's desire to stimulate the private sector's involvement in nuclear power.[157] Importantly, the Court stated that, while any cap could be characterized as arbitrary in some sense, the decision to fix a $560 million ceiling was not the "kind of arbitrariness" that would flaw an otherwise constitutional law.[158]

Plaintiffs' remaining due process objection was that the liability limitation failed to provide a satisfactory quid pro quo for the common law rights of recovery that the Act abrogated. The Court, however, expressed doubt whether the Due Process Clause requires that a statutory compensation scheme either duplicate the recovery available at common law or provide a reasonable substitute.[159] The Court cited earlier decisions which "clearly established" that "[a] person has . . . no vested interest in any rule of the common law."[160] It also cited an earlier decision that held that the "Constitution does not forbid the . . . abolition of old [rights] recognized by the common law, to attain a permissible legislative object."[161] The Court went on to hold that, even if there were a quid pro quo requirement, the assurance of a

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[153] *See id.* at 67.
[154] *See id.* at 81.
[155] *See id.* at 84.
[156] *Id.* at 83.
[157] *See id.* at 84. *Cf.* Indemnity Ins. Co. of N. Am. v. Pan Am. Airways, 58 F. Supp. 338, 340 (S.D.N.Y. 1944) (upholding against a due process attack the Warsaw Convention, a treaty which limited the liability of airlines for injuries or deaths to aircraft passengers).
[158] *Duke Power*, 438 U.S. at 86.
[159] *See id.* at 88.
[160] *Id.* at 88 n.32 (quoting *Mondou*, 223 U.S. at 50 (quoting *Munn*, 94 U.S. at 134)).
[161] *Id.* (quoting *Silver*, 280 U.S. at 122).

$560 million fund provided a "just substitute" for the common law rights replaced by the Act.[162]

Finally, the Court held that the Price-Anderson Act did not violate the Equal Protection Clause because the "general rationality" of the Act's liability ceiling provided "ample justification for the difference in treatment between those injured in nuclear incidents and those whose injuries are derived from other causes."[163]

7. Swine Flu Act

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act")[164] was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial decisions holding polio vaccine manufacturers strictly liable for vaccine-related injuries.[165] In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season.[166] Modeled after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries.[167]

The constitutionality of the Swine Flu Act was first addressed in *Sparks v. Wyeth Laboratories, Inc.*[168] Plaintiff, who had suffered serious injuries following a swine flu immunization, alleged that the Act violated the Due Process Clause of the Fifth Amendment, because it abrogated common law causes of action against program participants.[169] The court held, however, that plaintiff had "no vested interest in any rule of the common

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[162] *Id.* at 93.

[163] *Id.* at 93–94.

[164] Act of Aug. 12, 1976, 90 Stat. 1113 (repealed 1978). *See generally* Colleen Courtade, et al., 57A Am. Jur. 2d Negligence § 540 (1989).

[165] *See* Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (holding a polio vaccine manufacturer strictly liable for failure to warn individuals receiving the vaccine); Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir.) (same).

[166] *See* Sparks v. Wyeth Laboratories, Inc., 431 F. Supp. 411, 415 (W.D. Okla. 1977) (detailing the Swine Flu Act's legislative history to explain why it was enacted in haste).

[167] *See* Act of Aug. 12, 1976, 90 Stat. 1113, 1114 (repealed 1978).

[168] 431 F. Supp. 411 (W.D. Okla. 1977).

[169] *See id.* at 416.

law."[170] Moreover, while a replacement or substitution of remedies was "perhaps not technically necessary for due process," Congress did provide "an alternative, efficacious remedy against the United States."[171] The court noted that federal statutes similar to the Swine Flu Act had "always been found to be constitutional when challenged," including the Drivers Act upon which the Swine Flu Act was modeled.[172]

Plaintiff also alleged an equal protection violation.[173] The court noted, however, that "such routine equal protection considerations as 'compelling governmental interest' or 'suspect' classifications or 'fundamental' interests [were] simply not involved" in challenges to economic legislation.[174] Thus, the court dismissed plaintiff's challenge.[175]

Finally, the court addressed plaintiff's argument that the Swine Flu Act violated the Tenth Amendment.[176] The court pointed out that plaintiff's argument rested "mainly upon cases declaring early pieces of New Deal legislation to be unconstitutional . . . [and that] the spirit if not the letter of those cases ha[d] been overruled in subsequent decisions."[177] The court stated that the Swine Flu Act simply allowed the federal government to work with the states and imposed no coercion on them.[178]

Sparks was influential in leading other courts to reject similar constitutional challenges to the Swine Flu Act. In *Wolfe v. Merrill National Laboratories, Inc.*,[179] plaintiff's "unarticulated major premise" was that the Swine Flu Act unconstitutionally compelled her participation in the program, causing her to suffer serious injury.[180] The court easily dismissed plaintiff's claim,

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[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *See id.* at 417.
[174] *Id.* at 418.
[175] *See id. See also* DiPappa v. United States, 687 F.2d 14 (3d Cir. 1982) (holding that Swine Flu Act did not violate the Due Process Clause of the Fifth Amendment). The court also rejected a Seventh Amendment challenge raised by plaintiff, stating that the right to jury trial guarantee is inapplicable where a sovereign waives its immunity and noting that the Seventh Amendment had never been held to apply against the States under the Fourteenth Amendment. *See Sparks*, 431 F. Supp. at 418–19. *See also* Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307 (5th Cir. 1978) (holding that Swine Flu Act did not violate Seventh Amendment).
[176] *See Sparks*, 431 F. Supp. at 418.
[177] *Id.*
[178] *See id.* at 420.
[179] 433 F. Supp. 231, 236 (M.D. Tenn. 1977).
[180] *Id.* at 237.

noting that she voluntarily chose to accept the benefit of the federally administered vaccine.[181] The court also discussed plaintiff's allegation that the Swine Flu Act violated the Tenth Amendment.[182] The court stated that, as a grant program, the Swine Flu Act fell within the power of Congress to spend funds for the "general welfare."[183] Accordingly, "Congress acted within its constitutionally ordained powers in passing the Act."[184]

8. Atomic Weapons Testing Liability Act

In *Hammond v. United States*,[185] the First Circuit upheld the constitutionality of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985 ("Atomic Weapons Testing Liability Act")[186] against a challenge brought by a widow for the death of her husband, a civilian employee of the Department of Defense and observer at several atomic weapons tests, from radiation poisoning. The Atomic Weapons Testing Liability Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries.[187]

The First Circuit noted that Congress had previously passed laws (the Drivers Act and the Swine Flu Act) that substituted the federal government as the defendant for particular types of tort suits and required plaintiffs to seek relief through the Federal Tort Claims Act.[188] The court also noted that when those statutes had been challenged for alleged due process violations, they were consistently evaluated under the rational basis test and declared constitutional.[189] The court then evaluated the Atomic Weapons Testing Liability Act under a rational basis standard and concluded that Congress's desire to shield government con-

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[181] *See id.* at 238.
[182] *See id.*
[183] *Id.*
[184] *Id.*
[185] 786 F.2d 8 (1st Cir. 1986).
[186] 42 U.S.C. § 2212 (1988) (repealed 1990).
[187] *See id.*; *Hammond*, 786 F.2d at 9.
[188] *See Hammond*, 786 F.2d at 12–13.
[189] *See id.* at 13.

tractors from public embarrassment arising from litigation was rationally related to its decision to abolish common law tort claims against the contractors.[190] In addition, the court reasoned that, since the government was required to pay the judgments obtained against the contractors, it was neither irrational nor arbitrary for Congress to subject all potential plaintiffs uniformly to Federal Tort Claims Act limitations.[191] Accordingly, the court held that the Atomic Weapons Testing Liability Act did not violate the Due Process Clause.[192]

The court also rejected plaintiff's Tenth Amendment challenge to the Act.[193] Plaintiff relied on *National League of Cities v. Usery*[194] to argue that, by abolishing the state common law actions against government contractors, Congress "invaded rights reserved to the states."[195] The court, however, determined that plaintiff's argument was without merit, because *National League of Cities* had been overruled.[196]

The Ninth Circuit Court of Appeals dismissed additional constitutional challenges to the Atomic Weapons Testing Liability Act in *In re Consolidated United States Atmospheric Testing Litigation.*[197] Plaintiffs, military and civilian participants in the United States atmospheric nuclear weapons testing program and their families, alleged that the Act constituted a "taking" for purposes of the Fifth Amendment, because it substituted a remedy against the government under the Federal Tort Claims Act for state tort law causes of action against government contractors who participated in the federal weapons testing program.[198] In addition, plaintiffs alleged that the Act violated the Due Process

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[190] *See id.* at 13–14.

[191] *See id.*

[192] *See id.* The court also held that the Atomic Weapons Testing Liability Act did not violate equal protection for the same reasons. *See id.* at 15.

[193] For further discussion of Tenth Amendment challenges to federal tort reform legislation, see *infra* notes 253–382 and accompanying text.

[194] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See infra* notes 267–287 and accompanying text.

[195] *Hammond*, 786 F.2d at 15.

[196] *See id.* at 15 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). The court also rejected a claim that the Act violated the prohibition against ex post facto laws, noting that the prohibition applies only to criminal or penal statutes. The court also held that the Act was not punitive, so it did not constitute a bill of attainder. Finally, the court refused to apply the Contracts Clause to the federal government. *See id.* at 16.

[197] 820 F.2d 982 (9th Cir. 1987).

[198] *See id.* at 988.

Clause of the Fifth Amendment and the separation of powers doctrine.[199]

The court began its takings analysis by noting that courts had found it "well settled" that a "plaintiff has no vested right in any tort claim for damages under state law."[200] Accordingly, denial of plaintiffs' state tort law cause of action did "not translate into a cognizable taking claim."[201] The court also pointed out that the Act did not abrogate claims arising from atomic weapons tests, but instead subjected claimants to a statutory procedure that plaintiffs could reasonably expect to apply to them.[202]

Next, the court held that, because Congress had acted within its war powers and Commerce Clause authority, and no fundamental right or suspect classification was involved, the rational basis standard of due process review applied to plaintiffs' due process claim. Under that standard, the court held, plaintiffs had not met their burden of proving that the Act was "wholly arbitrary and irrational in purpose and effect, i.e., not reasonably related to a legitimate congressional purpose."[203] According to the court, the weapons testing program had been a crucial government function from its inception, and Congress reasonably believed that relieving contractors of liability would encourage their participation in the program.[204]

Finally, the court rejected plaintiffs' separation of powers claim. The court said that legislation does not run afoul of the separation of powers doctrine unless Congress "presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds." [205] Those limitations did not exist with respect to the Atomic Weapons Testing Liability Act, because Congress did not direct courts to make certain findings or fact or require them to apply an unconstitutional law.[206]

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[199] *See id.* at 989–92.
[200] *Id.* At 988.
[201] *Id.*
[202] *See id.*
[203] *Id.* at 990 (quoting *Hammond*, 786 F.2d at 8).
[204] *See id.* at 991.
[205] *Id.* at 992 (citations omitted).
[206] *See id.* The court also held that the Act did not violate the Seventh Amendment, because "[t]here is no right to jury trial against the sovereign." *Id.*

9. National Childhood Vaccine Injury Act of 1986

The National Childhood Vaccine Injury Act of 1986[207] was enacted to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies.[208] The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons are required to file a petition in the United States Court of Federal Claims demonstrating, among other things, harm including "unreimbursable expenses ... in an amount greater than $1,000."[209]

In *Black v. Secretary of Health and Human Services*,[210] plaintiffs challenged the constitutionality of the $1,000 threshold requirement on Fifth Amendment equal protection grounds. They argued that by making eligibility for the program turn on incurring $1,000 of unreimbursable expenses, Congress made it more difficult for indigent persons to qualify for compensation, because indigents often have their medical expenses defrayed by government programs such as Medicaid.[211] The court held, however, that the Act's eligibility requirement "was not designed to disadvantage poor persons, and the fact that it may disproportionately disqualify certain groups, including indigents and persons who enjoy the benefits of other medical programs, d[id] not give rise to an equal protection violation."[212]

The court explained that drawing lines to create distinctions for eligibility in social programs was "peculiarly a legislative task" that "may be rational even if it does not do a perfect job of selecting those cases that appear to be appropriate subjects of congressional concern."[213] The court then held that "it was rational for Congress to conclude, that as a general matter, those

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[207] 42 U.S.C. §§ 300aa-1 to 300aa-34 (1994).

[208] *See generally* Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future*, 48 OHIO ST. L.J. 387 (1987); Daniel A. Cantor, Note, *Striking A Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act*, 44 AM. U. L. REV. 1853 (1995).

[209] 42 U.S.C. § 300aa-11(c)(1)(D)(i).

[210] 93 F.3d 781 (Fed. Cir. 1996).

[211] *See id.* at 787.

[212] *Id.*

[213] *Id.* at 788.

who incur only modest expenses or whose expenses are reimbursed from other sources present less compelling cases for compensation than those who incur large, unreimbursed expenses."[214] Thus, there was no constitutional flaw in the $1,000 threshold requirement, "particularly in light of the 'strong presumption of constitutionality' that attaches to legislation conferring monetary benefits."[215]

10. Price-Anderson Act Amendments of 1988

The 1988 Amendments to the Price-Anderson Act ("1988 Amendments")[216] created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal.[217] After the 1979 Three Mile Island incident near Harrisburg, Pennsylvania, plaintiffs who wished to have their tort claims remain in state court challenged the jurisdictional and removal provisions of the 1988 Amendments in *In re TMI Litigation Cases Consolidated II.* [218] They argued that the legislation violated Article III of the Constitution[219] because the public liability actions subject to the Act did not "arise under" the laws of the United States.[220]

The Third Circuit began its analysis with a close examination of the scope of Congress's power to authorize federal courts to decide nondiversity cases turning on state law rules of decision. The court noted that the Supreme Court had distinguished between "pure jurisdictional statutes" and those mixing elements of federal and state law.[221] The central teaching of those cases, the Third Circuit said, was that a nondiversity case "cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant."[222] On the other hand, courts evaluating mixed federal and state schemes have focused upon

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[214] *Id.*

[215] *Id.* (quoting Mathews v. De Castro, 429 U.S. 181, 185 (1976)).

[216] 42 U.S.C. §§ 2014, 2210 (1994).

[217] *See id.*

[218] 940 F.2d 832 (3d Cir. 1991).

[219] *See* U.S. CONST., Art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

[220] *See In re TMI Litig.*, 940 F.2d at 835.

[221] *See id.* at 849–51 (discussing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); and Mesa v. California, 489 U.S. 121 (1989)).

[222] *Id.* at 849.

congressional intent and have formulated their decisions with flexibility "in order to honor the presumption in favor of a statute's constitutionality."[223]

Turning to the 1988 Amendments at issue, the Third Circuit examined the legislative history and held that Congress had clearly expressed its intention that state law provide the content of and operate as federal law governing public liability cases resulting from nuclear incidents.[224] By federalizing state substantive law, Congress established the constitutional foundation for the Act's jurisdictional and removal provisions. The court then said that it would have reached the same conclusion even if state law itself, rather than state law operating as federal law, formed the basis for decision, because the level of federal involvement in the field of nuclear energy and the need for "uniformity, equity, and efficiency in the disposition of public liability claims" provided sufficient "federal elements" to support the legislation.[225]

The Third Circuit then turned to plaintiffs' collateral constitutional arguments that the retroactive application of the 1988 Amendments to cases already pending in state court violated principles of "federalism, state sovereignty, due process, and equal protection."[226] The Third Circuit's survey of relevant law led it to conclude that the legislation survived each of these challenges, because the provision for retroactivity was rationally related to Congress's desire to avoid inefficiencies and inconsistent outcomes in claims resulting from a single nuclear incident.[227]

11. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act")[228] amended the Federal Tort Claims Act to provide for the substitution of the United States as

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[223] *Id.* at 855.
[224] *See id.* at 855–56.
[225] *See id.* at 856–57.
[226] *Id.* at 860.
[227] *See id.* at 861. *See also* In re TMI, 89 F.3d 1106 (3d Cir. 1996) (holding that retroactive application of the 1988 Amendments did not violate due process); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (upholding constitutionality of the 1988 amendments against an Article III challenge).
[228] 28 U.S.C. § 2679 (1994).

a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment. Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in *Westfall v. Erwin*,[229] which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and discretionary in nature."[230] Congress saw the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees.[231]

The Westfall Act was challenged in *Sowell v. American Cyanamid Co.*,[232] involving a government employee who was seriously injured at work and sought to bring a negligence action against his co-employees. The Eleventh Circuit held that "the great weight of authority" supported the constitutionality of the statute.[233] The court also held that the statute's retroactive application did not render it unconstitutional, because "a legal claim affords no definite enforceable property right until reduced to a final judgment."[234] The court concluded that Congress's desire to preserve employee morale, maintain federal agencies' ability to carry out their missions, and sustain the vitality of the Federal Tort Claims Act provided a rational basis for the Westfall Act.[235]

12. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA"),[236] which created an eighteen-year statute of repose for general aviation aircraft, is the most recent congressional tort policy statute to withstand constitutional scrutiny. At least three courts have declared GARA to be constitutional "economic legislation."[237]

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[229] 484 U.S. 292 (1988).

[230] *Id.* at 300.

[231] *See generally* Daniel A. Morris, *Federal Employees' Liability Since The Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act)*, 25 CREIGHTON L. REV. 73 (1991).

[232] 888 F.2d 802 (11th Cir. 1989).

[233] *Id.* at 805. *See also* Connell v. United States, 737 F. Supp. 61 (S.D. Iowa 1990) (holding that retroactive application of the Westfall Act was not unconstitutional).

[234] *Sowell*, 888 F.2d at 805.

[235] *See id. See also* Salmon v. Schwarz, 948 F.2d 1131 (10th Cir. 1991) (holding that the Westfall Act did not violate the Seventh Amendment).

[236] Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101) (1994).

[237] *See* Rixon v. Smith, No. 96-714 (W.D. Pa. Jan. 6, 1997) (holding that GARA can

B. *Federal Tort Laws Should Be Upheld: The Mistake of* Lochner *Should Not Be Repeated*

It is important for courts to follow the significant body of case law discussed above supporting the authority of Congress to enact laws setting national tort policy objectives. Any new decision overturning federal liability legislation would create a precedent that courts in the future could utilize to nullify a wide array of federal legislation, even outside the context of tort reform.

It may be unnecessary to raise this point in light of the very strong record of success that federal liability statutes have had against constitutional challenges. Lest anyone forget, however, it is worth reflecting on a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "*Lochner* era" (after the unsound constitutional law decision, *Lochner v. New York*[238]), the Court nullified state and federal legislation that it disagreed with as a matter of public policy, using the Constitution as a cloak to cover its highly personalized decisions.[239]

Just as plaintiffs during the *Lochner* era implored the Supreme Court to utilize an expansive view of the Constitution to override legislation, claimants in the future may seek to convince courts to utilize an expansive view of the Constitution to impose their economic policy views upon the nation. Courts should reject this invitation, as they have done for almost a century in the field of federal tort law.

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be constitutionally applied retroactively); Pollack v. Agusta, S.P.A., Nos. 94-7769, 94-7770 (C.D. Cal. Dec. 6., 1995) (GARA did not violate due process or deprive plaintiffs of a property right); Schneider v. Cessna Aircraft Co., No. 542343 (Super. Ct. Sacramento Cty., Cal. July 29, 1996) (GARA does not violate due process).

[238] 198 U.S. 45 (1905). In *Lochner*, the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because *I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*

Id. at 75 (emphasis added).

[239] *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 to 8-7 (2d. ed. 1988).

The need for courts to respect Congress's authority to enact legislation setting tort policy rules is reinforced by the doctrine of *stare decisis*, and by the importance of the statutes themselves. For example, because of the National Childhood Vaccine Injury Act, diseases which once threatened to end the lives of American infants prematurely are now prevented with a routine series of childhood vaccinations.[240] Without the Price-Anderson Act, the private nuclear power industry in the United States might not have developed.[241] The General Aviation Revitalization Act of 1994 breathed life back into an important American industry. Instead of continuing on the path toward extinction, the general aviation industry is now booming. [242] The Biomaterials Access Assurance Act of 1998 will help ensure the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints, that are needed by millions of people each year.[243]

C. *The Supremacy Clause Requires States to Enforce Federal Liability Reform Legislation*

Once Congress enacts legislation pursuant to the Constitution, the Supremacy Clause[244] prohibits the states from enforcing any local laws that conflict with the statute. To the extent the various states have liability laws that interfere with, or are contrary to, federal laws enacted by Congress, the state laws are preempted.[245] As Chief Justice Marshall explained:

> [T]o such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the Constitution, . . .

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[240] *See* Denis J. Hauptley & Mary Mason, *The National Childhood Vaccine Injury Act*, 37 FED. B. NEWS & J. 452 (1990) (stating that the Act effectively controlled liability costs for vaccine manufacturers, prevented the withdrawal of crucial vaccines from the market, and averted epidemics of certain childhood illnesses in the United States.)

[241] *See Duke Power*, 438 U.S. at 64 (discussing congressional passage of the Price-Anderson Act in response to concerns that the private sector would be forced to withdraw from nuclear power production).

[242] *See supra* notes 38–43 and accompanying text.

[243] *See* H.R. REP. No. 105-549, pts. 1 and 2 (1998) (reports from the House Committee on the Judiciary and the Committee on Commerce regarding the Biomaterials Act).

[244] U.S. CONST. art. VI, § 2.

[245] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding California's Franchise Investment Law unconstitutional because it directly conflicted with federal legislation).

> [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.[246]

The Supremacy Clause also requires state courts to enforce federal laws, even though that requirement is in a sense a federal command requiring state court action.[247] In *Testa v. Katt*,[248] the Supreme Court addressed the Rhode Island Supreme Court's refusal to enforce the federal Emergency Price Control Act of 1942.[249] The Act provided a treble-damages remedy for persons who bought goods for more than the amount of the federal ceiling price and gave jurisdiction over claims under the Act to state as well as federal courts. The Supreme Court upheld the federal program, stating that the position of the Rhode Island Supreme Court "fl[ew] in the face of the fact that the States of the Union constitute a nation" and "disregard[ed] the purpose and effect" of the Supremacy Clause.[250] State courts were directed to heed the federal Act as "the prevailing policy in every state."[251] More specifically, the Court explained:

> [T]his Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claflin v. Houseman*, 93 U.S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the States as though they were laws emanating from a foreign sovereign. *Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon States, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It asserted that the obligation of States to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. . . .*[252]

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[246] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

[247] *See New York*, 505 U.S. at 178–79 (noting that the Supremacy Clause directs state courts to take action to enforce federal law, but that no comparable constitutional provision allows Congress to force state legislators to act); *Mondou*, 223 U.S. at 57–58 (1912) (stating that, in some instances, action must be taken by state courts to enforce a federally established penalty).

[248] 330 U.S. 386 (1947).

[249] Ch. 26, 56 Stat. 23 (codified at 50 U.S.C. app. § 107 (1976)) (repealed 1947).

[250] *Testa*, 330 U.S. at 389.

[251] *Id.* at 393.

[252] *Id.* at 390–91 (emphasis added).

III. Recent Tenth Amendment Decisions Do Not Undermine Congressional Authority to Enact Tort Policy Legislation

The United States Constitution grants certain powers to the Federal Government. Where federal legislation is authorized by one of those powers, "Congress may impose its will on the States."[253] All other powers are reserved for the States under the Tenth Amendment, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[254]

A. *The Traditional View: Judicial Deference to Congressional Authority*

Historically, the Supreme Court has recognized Congress's "extraordinary power" to enact legislation and has been reluctant to invoke the Tenth Amendment to limit that authority.[255] *Maryland v. Wirtz*[256] is the archetypal case adopting the traditional view that courts should not apply substantive limits on federal authority under the Tenth Amendment if Congress is exercising one of its enumerated powers and has a rational basis to do so. In *Wirtz,* the Court upheld the constitutionality of amendments to the Fair Labor Standards Act ("FLSA")[257] that required the states to adopt federal minimum wage and overtime standards for state employees of hospitals, institutions, and schools.[258] The Court refused to distinguish economic activity engaged in by

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[253] Gregory v. Ashcroft, 501 U.S. 452, 460 (1990) (discussing how the Supremacy Clause is the textual authority granting the federal government power over the states in the U.S. system of federalism).

[254] U.S. Const. amend. X. *See also* The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution . . . are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[255] *See Gregory*, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."). *See also* Laurence H. Tribe, American Constitutional Law §§ 5-20 (2d. ed. 1988).

[256] 392 U.S. 183 (1968).

[257] 29 U.S.C. §§ 203–218 (1994).

[258] *See* 29 U.S.C. § 203(d).

private persons from that engaged in by states,[259] and declared that courts should not use the Tenth Amendment to "carve up the commerce power to protect enterprises . . . simply because those enterprises happen to be run by the States."[260]

In 1976, the Court departed briefly from its longstanding reluctance to invoke the Tenth Amendment and attempted to devise affirmative limits on Congress's Article I powers. In *National League of Cities v. Usery*,[261] the Court declared that the Tenth Amendment prohibited Congress from interfering with the core sovereign functions of the states, even where those functions affected interstate commerce.[262] That case challenged the validity of the 1974 amendments to the FLSA. The Court held that, insofar as the amendments operated directly to displace the states' ability to structure "integral operations" in areas of "traditional government functions" (i.e., employee-employer relationships in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation), they were not within Congress's Article I authority.[263]

Nine years later, however, the Court overruled the *National League of Cities* case in *Garcia v. San Antonio Metropolitan Transit Authority*.[264] The *Garcia* case and a 1988 case, *South Carolina v. Baker*,[265] showed the Court's return to its previous position on the Tenth Amendment.[266]

1. *Garcia v. San Antonio Metropolitan Transit Authority*

In *Garcia v. San Antonio Metropolitan Transit Authority*,[267] the Court revisited the question of whether the Commerce Clause empowered Congress to enforce the federal wage and overtime

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[259] *See Wirtz*, 392 U.S. at 197.

[260] *Id.* at 198-99.

[261] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[262] *See National League of Cities*, 426 U.S. at 840–52.

[263] *Id.* at 852.

[264] 469 U.S. 528 (1985). *See generally* Martha A. Field, Comment, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine,* 99 Harv. L. Rev. 84 (1985) (arguing against the concept of the Supreme Court granting the states constitutional immunities as a constraint on Congress's use of its delegated powers).

[265] 485 U.S. 505 (1988).

[266] *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 289–90 (1981) (holding that the Tenth Amendment does not prohibit Congress from passing laws that preempt state regulations); FERC v. Mississippi, 456 U.S. 742, 764 (1982) (same).

[267] 469 U.S. 528 (1985).

requirements in the 1974 amendments to the FLSA against the states in areas of "traditional governmental functions."[268] The San Antonio Metropolitan Transit Authority ("SAMTA") challenged the Act's validity after "the Department of Labor formally amended its [FLSA] interpretive regulations to provide that publicly-owned mass-transit systems were not entitled to immunity under *National League of Cities*."[269]

The Court began its analysis by restating the well-settled principle that Congress's Commerce Clause authority extends to intrastate economic activities that affect interstate commerce.[270] The Court noted that, were SAMTA privately owned, it would unquestionably be obligated to follow FLSA's requirements.[271] Therefore, any constitutional exemption SAMTA could obtain from FLSA's requirements had to rest on its status as a governmental entity rather than on the nature of its operations.[272]

The Court went on to outline the prerequisites for governmental immunity set forth in *National League of Cities*, focusing in particular on the exception for "traditional governmental functions."[273] The Court said that its own attempts to articulate affirmative limits on congressional authority had failed to establish a workable standard for defining "traditional governmental functions."[274] Moreover, attempts by federal and state courts to distinguish "traditional" functions from "nontraditional" functions had proven to be "impracticable and doctrinally barren."[275] The Court also expressed skepticism that a case-by-case approach would eventually establish a workable standard, citing its own poor experience in the related field of state immunity from federal taxation.[276]

Next, the Court explored alternative ways to define state immunity, but rejected those as unmanageable as well. It conceded that making immunity turn on a "traditional" standard would prevent courts from accommodating changes in the historical functions of states.[277] In addition, the Court said that it had pre-

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[268] *Id.* at 530.
[269] *Id.* at 534–35.
[270] *See id.* at 537.
[271] *See id.*
[272] *See id.*
[273] *See id.* at 537–38.
[274] *See id.* at 539.
[275] *Id.* at 557.
[276] *See id.* at 540.
[277] *See id.* at 543.

viously rejected the idea of determining a nonhistorical standard for immunity based on the identification of "uniquely" governmental functions.[278]

The Court also expressed concern that any rule that would establish judicially imposed definitions of "traditional," "integral," or "necessary" state governmental functions would "inevitably invite[] an unelected federal judiciary to make decisions about which state policy it favors and which ones it dislikes."[279] Accordingly, the Court held:

> We, therefore now reject, as unsound in principle and unworkable in practice, a rule for state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles because it is divorced from those principles.[280]

The Court then turned to the underlying issue that confronted it in *National League of Cities*—the manner in which the Constitution insulates states from the reach of Congress's power under the Commerce Clause. The Court said that it had "no license to employ freestanding conceptions of state sovereignty"[281] in deciding when the Constitution protects "the States as States,"[282] because the Framers had chosen to ensure a role for the states in the federal system through the structure of the federal government itself.[283] The Court stated:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the political process

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[278] *See Garcia*, 469 U.S. at 545.
[279] *Id.* at 546.
[280] *Id.* at 547.
[281] *Id.* at 550.
[282] *Id.* at 554.
[283] The Court pointed out that "the composition of the Federal Government was designed in large part to protect States from overreaching by Congress." *Id.* at 550–51. The Framers thus gave the states a role in selecting the executive and legislative branches, provided for the equal representation of states in the Senate, and prohibited any constitutional amendment divesting a state of equal representation in the Senate without the state's consent. *See id.* at 551.

> rather than to dictate a "sacred province of state autonomy."[284]

The Court reinforced its conclusion that the federal political process effectively preserves the interests of the states by pointing out the high level of funding that states receive from the federal government in the form of general and program specific grants in aid.[285]

The Court then held that the federal wage and overtime requirements in the FLSA, as applied to SAMTA, were not "destructive of state sovereignty or violative of any constitutional provision."[286] SAMTA was simply being placed in the same position as other employers. The Court also pointed out that, while the FLSA would raise costs for mass-transit systems, Congress had provided countervailing financial assistance—thus reinforcing the Court's "conviction that the national political process systematically protects States from the risk of having their functions in [the area of mass-transit] handicapped by Commerce Clause regulation."[287]

2. *South Carolina v. Baker*

In *South Carolina v. Baker*,[288] the Court was asked to decide the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Act").[289] The Tax Act removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were issued in registered form.[290] Congress believed that

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[284] *Id.* at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). *See also* Thomas H. Odom, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1666 (1987) (indicating that *Garcia* is significant because it "calls for the development of new theories of federalism-based limitations on the commerce power").

[285] *Garcia*, 469 U.S. at 552–553. *See also* John E. DuMont, Comment, *State Immunity From Federal Regulation—Before and After Garcia: How Accurate Was the Supreme Court's Prediction in* Garcia v. SAMTA *that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?*, 31 DUQ. L. REV. 391 (1993) (arguing that the political process has protected the states against unduly burdensome federal regulation).

[286] *Garcia*, 469 U.S. at 554.

[287] *Id.* at 555. *See also* William A. Isaacson, Garcia v. San Antonio Metropolitan Transit Authority: *Antifederalism Revisited*, 21 U. TOL. L. REV. 147 (1989) (providing historical account of the Constitutional Convention and arguing in support of the holding in *Garcia*).

[288] 485 U.S. 505 (1988).

[289] 26 U.S.C. § 103(j)(1) (1982).

[290] *See id.*

the registration requirement would prevent tax evasion that was being facilitated through the exchange of unregistered bearer bonds.[291] South Carolina, joined by the National Governors' Association as intervenor, challenged the Tax Act, contending that it violated the Tenth Amendment because it compelled States to issue bonds in registered form.[292]

The Court began its analysis by restating its holding in *Garcia* that the Tenth Amendment provides structural rather than substantive limits on Congress's legislative authority—i.e., that states must find their protection from overreaching congressional acts through elected Members of Congress.[293] The Court acknowledged that *Garcia* left open the possibility that the Tenth Amendment could be invoked to invalidate congressional regulation of state activities where there were "extraordinary defects in the national political process," but held that those defects did not exist with respect to the Tax Act.[294] South Carolina, the Court said, did not "even allege[ ] that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[295]

The Court then addressed the states' contention that the Tax Act coerced them into enacting legislation permitting bond registration and into administering the registration scheme.[296] In support of their contention, the states cited *FERC v. Mississippi*,[297] which left open the possibility that the Tenth Amendment might limit Congress's power to compel states to regulate on behalf of federal interests.[298]

In *FERC*, the Court had upheld a federal statute requiring state utility commissions to: (1) adjudicate and enforce federal standards; (2) either consider adopting certain federal standards or cease regulating public utilities; and (3) follow certain federally

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[291] Ownership of a registered bond is recorded on a central list, and a transfer of record ownership requires entering the change on that list. Bearer bonds, on the other hand, leave no paper trail. Congress believed that bearer bonds facilitated tax evasion, because they could be used to avoid estate and gift taxes and as a medium of exchange in the illegal sector. *See Baker*, 485 U.S. at 508–509.

[292] The Court treated the Tax Act as banning the issuance of bearer bonds, because it would force States to increase the interest paid on bearer bonds to exceptionally high rates. Moreover, since the Act became effective, no State had issued a bearer bond. *See id.* at 511.

[293] *See id.* at 512.

[294] *Id.* at 512–13.

[295] *Id.*

[296] *See id* at 513.

[297] 465 U.S. 742 (1982).

[298] *See id.* at 761–64.

mandated procedures.[299] The Court had concluded that, whatever constitutional limitations might exist on the federal power to compel state regulatory activity, Congress had the power to require state utility regulatory commissions to adjudicate federal issues and to require that states regulating in a field open to preemption consider suggested federal standards and follow federally mandated procedures.[300]

The Court in *Baker* did not accept South Carolina's invitation to define whether the Tenth Amendment claim left open in *FERC* survived *Garcia* or posed constitutional limitations independent of those discussed in *Garcia*. It was able to avoid the issue by finding that the Tax Act presented the same type of legislation that was upheld in *FERC*: both statutes regulated state activities, neither sought to control or influence the manner in which states regulated private parties.[301]

The *Baker* Court concluded its Tenth Amendment analysis by rejecting the states' contention that the Tax Act impermissibly commandeered the state legislative and administrative process by requiring many state legislatures to amend their statutes in order to issue registered bonds, and state officials to devote substantial effort to determine how best to implement a registered bond system. The Court observed that being compelled to take administrative and legislative actions to comply with federal law was a common and often inevitable consequence faced by states wishing to engage in activities subject to federal regulation.[302] Furthermore, the Court bluntly pointed out that the states' theory of commandeering would "not only render *Garcia* a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases."[303]

B. *Judicially Imposed Limitations on Congressional Authority*

The Supreme Court has signaled in two recent cases that the Tenth Amendment may once again return from its basic dor-

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[299] *See* Public Utility Regulatory Policies Act of 1978, 15 U.S.C. § 3201, 16 U.S.C. § 2611 (1994).
[300] *See FERC*, 456 U.S. at 759–67.
[301] *See Baker*, 485 U.S. at 514.
[302] *See id.* at 514–15.
[303] *Id.* at 515.

mancy. In those decisions—*New York v. United States*[304] and *Printz v. United States*[305]—the Court addressed the federal government's ability to force states to implement or administer federal regulatory schemes.

1. *New York v. United States*

New York v. United States[306] involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Waste Policy Act").[307] That Act sought to address a looming national shortage of disposal sites for low-level radioactive waste by directing each state to assume responsibility "for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State" within seven years.[308] The State of New York and two counties in which disposal facilities were planned in the state sought a declaratory judgment that the Waste Policy Act was inconsistent with the Tenth Amendment.[309]

Petitioners' challenge focused on three sets of "incentives" that Congress included in the Act to encourage states to comply with their statutory obligation to attain local or regional self-sufficiency in the disposal of low-level radioactive waste.[310] Monetary incentives allowed states with disposal sites to impose a surcharge on radioactive waste received from other states. The Waste Policy Act also established an escrow account from which the Secretary of Energy allocated a portion of the monies generated by this surcharge to states that complied with the federal timetable.[311] Next, access incentives allowed states with disposal sites to increase the cost of access to the sites substantially, and then to deny access altogether, to radioactive waste generated in states that failed to meet the federal timetable.[312] Finally, the most severe incentive, the "take title" provision, required states

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[304] 505 U.S. 144 (1991).
[305] 521 U.S. 898 (1997).
[306] 505 U.S. 144 (1991).
[307] 42 U.S.C. § 2021b–j (1994).
[308] 42 U.S.C. § 2021c(a)(1)(A) (1994).
[309] *See New York*, 505 U.S. at 154. Petitioners also charged that the Act violated the Guarantee Clause of the Constitution, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV., § 4. The Court easily dismissed this claim. *See id.* at 183–86.
[310] *See New York*, 505 U.S. at 152–54.
[311] *See id.* at 152–53.
[312] *See id.* at 153.

that failed to make arrangements for radioactive waste disposal to take title and possession of waste generated within their borders and to accept liability for all damages directly or indirectly incurred by waste generators as a consequence of the state's failure to make arrangements by the federal deadline.[313]

The Court began its discussion by noting that the powers conferred in the Constitution "were phrased in language broad enough to allow for the expansion of the Federal Government's role,"[314] and that allows for enormous changes in the "scope of the federal government's authority with respect to the States."[315] The Court cited its "broad construction" of the Commerce and Spending Clauses, along with the Necessary and Proper Clause and the Supremacy Clause, as particularly important.[316] Nevertheless, the Court held, Congress is subject to the limitations contained in the Constitution. Those limitations, the Court explained, are "not derived from the text of the Tenth Amendment itself," but are found elsewhere in the Constitution (i.e., in Article I).[317]

The Court then distinguished the Waste Policy Act from statutes at issue in recently decided cases that involved the authority of Congress to subject state governments to generally applicable laws (e.g., *Garcia*).[318] Unlike the statutes at issue in those cases, the Court held, the Waste Policy Act did not seek to subject a state to the same legislation applicable to private parties, but instead attempted to "direct or otherwise motivate the States to regulate in a particular field or a particular way."[319]

The Court observed that, while it had "never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations,"[320] the "question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers."[321] The Court noted that the Constitutional Convention was convened, in part, because the Articles of Confederation did not give Congress the authority in most respects to govern the

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[313] *New York*, 505 U.S. at 153–54.
[314] *Id.* at 157.
[315] *Id.* at 159.
[316] *Id.* at 158.
[317] *Id.* at 156.
[318] *See id.* at 160–61.
[319] *Id.* at 161.
[320] *Id.* (quoting *FERC*, 456 U.S. at 761–62).
[321] *Id.* at 163.

people directly.[322] The Convention generated many proposals for the structure of the new government, "but two quickly took center stage."[323] One plan, the "Virginia Plan," allowed Congress to regulate individuals "without employing the States as intermediaries."[324] The "New Jersey Plan," on the other hand, continued to require Congress to obtain the approval of the states to legislate, as had the Articles of Confederation.[325] This plan was criticized, however, because it "might require the Federal Government to coerce the States into implementing legislation."[326] Ultimately, the Framers opted to provide for a central government in which Congress "would exercise its legislative authority directly over individuals rather than over States."[327] The Court concluded, therefore, that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[328]

On the other hand, the Court explained that, while Congress cannot compel state regulation, it is not prohibited from encouraging a state to regulate in a particular way or attempting to influence a state's policy choices through noncoercive incentives.[329] The Court identified two tangible methods by which Congress "may urge a State to adopt a legislative program consistent with federal interests."[330] First, under its spending power, Congress can attach conditions on the receipt of federal funds as a means of influencing a state's policy.[331] Second, Congress can establish a "program of cooperative federalism" in which states may choose to regulate an activity according to federal standards or to have state law preempted by federal regulation.[332]

Under these noncoercive approaches to achieving state regulation, the Court pointed out, state governments can remain responsive to the local electorate's policy preferences and accountable to the people.[333] In contrast, if the federal government

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[322] *See New York*, 505 U.S. at 163.
[323] *Id.* at 164.
[324] *Id.*
[325] *See id.*
[326] *Id.*
[327] *Id.* at 165.
[328] *Id.* at 166.
[329] *See id.*
[330] *Id.* at 166.
[331] *See id.* at 167.
[332] *Id.*
[333] *See id.* at 168.

were able to compel states to regulate, political accountability would be diminished. For instance, if members of Congress could impose unpopular policy decisions on state legislators, the state officials would "bear the brunt of public disapproval," while the federal officials who devised the program would "remain insulated from the electoral ramifications of their decision."[334]

The Court then proceeded to determine whether the Waste Policy Act's monetary, access, and take-title incentives impermissibly commandeered the states' legislative processes. The Court held that the monetary incentives included in the Act, in which Congress conditioned grants to the states upon the states' attainment of certain milestones, fell "well within the authority of Congress under the Commerce and Spending Clauses."[335] The Court also held that the access incentives in the Act, which ultimately authorized states to deny access to low-level radioactive waste generated in other states, represented a permissible exercise of Congress's commerce power.[336] Because both sets of incentives were supported by affirmative constitutional grants of power to Congress, neither was inconsistent with the Tenth Amendment.[337]

The Court found the Waste Policy Act's "take title" provision to be of a "different character" than the monetary and access incentives.[338] The "take title" provision offered states a "choice" of either regulating according to Congress's instructions or accepting ownership of waste and becoming liable for all damages waste generators suffered as a result of failure to meet the federal timetable.[339] The Court characterized the forced transfer component, standing alone, as no different than a congressionally compelled subsidy from state governments to radioactive waste producers.[340] Likewise, the requirement that states assume the liabilities of waste generators within their borders unconstitutionally directed the states to assume the liabilities of certain state residents.[341] Both types of federal actions commandeered the states for federal regulatory purposes and were inconsistent

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[334] *New York*, 505 U.S. at 169.
[335] *Id.* at 173.
[336] *See id.*
[337] *See id.* at 173–74.
[338] *Id.* at 174.
[339] *See id.* 174–75.
[340] *See id.* at 175.
[341] *See id.*

with the Constitution's division of authority between federal and state governments.[342]

Significantly, the Court drew a sharp distinction between permissible federal legislation that directs state courts to enforce federal laws and unconstitutional legislation, such as the Waste Policy Act, that directs state officials to create and enforce a congressionally mandated regulatory scheme.[343] The Court wrote:

> Some of [the cases cited by the United States in favor of the Waste Policy Act] discuss the *well established power of Congress to pass laws enforceable in state courts*. See Testa v. Katt, 330 U.S. 386 (1947); Palmore v. United States, 411 U.S. 389, 402 (1973); see also Second Employer's Liability Cases, 223 U.S. 1, 57 (1912); Claflin v. Houseman, 93 U.S. 130, 136–37 (1876). *These cases involve no more than an application of the Supremacy Clause*'s provision that federal law "shall be the Supreme Law of the Land," enforceable in every State. *More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause*. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.[344]

The Court's clarification is particularly relevant to the constitutionality of federal liability reform legislation, because these reform proposals have frequently called upon state courts to enforce federal law. Recently, some opponents of federal tort reform legislation have expansively interpreted the Court's general holding in *New York* that Congress cannot compel state legislation to suggest that Congress may lack the power to direct state judges to enforce federal liability reform legislation.[345] As the Court's opinion in *New York* demonstrates, however, federal liability reform legislation that compels state court enforcement of federal law is not in violation of the Tenth Amendment. It is

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[342] *See id.* at 177. *See generally* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994).

[343] *See New York*, 505 U.S. at 178–79.

[344] *Id.* (emphasis added).

[345] *See* White, *supra* note 16, at 34; Lebow, *supra* note 16, at 690.

constitutionally permissible. This is how FELA has worked for almost a hundred years. Congress's power to act in this regard is still intact.

The concerns the Court had with the Waste Policy Act's "take title" provision in *New York* simply do not exist with respect to federal liability reform legislation. Most importantly, federal liability reform efforts seek to "exercise . . . legislative authority directly over individuals rather than over States."[346] Like the legislation upheld in *Garcia*, and unlike the Waste Policy Act's take title provision that was struck down in *New York*, federal liability reform bills have been "generally applicable laws."[347] They have never compelled state legislation or required state legislatures to enact legislation limiting tort liability.

In addition, when Congress enacts federal tort policy legislation, there is no potential for a breakdown in the national political process due to a lack of accountability. Clearly, if Congress enacts tort reform legislation, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."[348] This fact strongly supports the constitutionality of federal liability reform legislation.

2. *Printz v. United States*

Printz v. United States[349] involved a challenge to the 1993 Brady Handgun Violence Prevention Act amendments to the Gun Control Act of 1968 ("Brady Act").[350] The Brady Act required the Attorney General to establish a national system for instant background checks on prospective handgun purchasers and commanded the "chief law enforcement officer" ("CLEO") of each local jurisdiction to conduct the background checks and perform related tasks until the national system became operative.[351] The CLEOs for counties in Arizona and Montana objected to being "pressed into federal service" and contended that

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[346] *New York*, 505 U.S. at 165.
[347] *Id.* at 177.
[348] *Id.* at 168.
[349] 521 U.S. 898 (1997).
[350] 18 U.S.C. §§ 921–925A (1994).
[351] *See id.*

the Act impermissibly compelled them to execute a federal law.[352]

The Court opened its opinion by noting that no constitutional text directly addressed the extent to which Congress may force state officials to execute a federal law.[353] Accordingly, the Court concluded that the answer to the CLEOs' challenge would have to come from historical understanding and practice, the structure of the Constitution, and the Court's jurisprudence.[354]

In support of the Brady Act's validity, the Government cited acts of Congress which required state courts to record applications for citizenship, transmit naturalization records, order deportations, and perform other miscellaneous duties.[355] The Court held that Congress's power to compel enforcement of federal law by state judges was well settled, but only "establish[ed] . . . that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[356] The Court explained:

> It is understandable why courts should be viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. . . . The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States.[357]

The Court then said that its acceptance of statutes imposing obligations on state courts did not imply that Congress could impose obligations on state executives.[358] Moreover, the Court observed that the "utter lack of statutes" imposing obligations on state executives suggested that Congress assumed it did not have the authority to compel state executive officers to carry out federal laws.[359] To complete the historical record, the Court acknowledged that "a number of federal statutes enacted within the past few decades [require] the participation of state and local officials," but that the persuasive force of these recent statutes

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[352] *See Printz*, 521 U.S. at 904–05.
[353] *See id.* at 905.
[354] *See id.*
[355] *See id.* at 905–10 (citations omitted).
[356] *Id.* at 907 (emphasis in original).
[357] *Id.* (citations omitted).
[358] *See id.*
[359] *Id.* at 907–08.

was far outweighed by the almost 200 years of congressional avoidance of the practice.[360]

Next, the Court turned to the structure of the Constitution. Pointing to its detailed discussion of the Constitutional Convention in *New York*,[361] the Court reinforced its earlier conclusion that, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[362] The *Printz* Court further concluded that, with respect to the Brady Act, the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[363]

The Court also evaluated whether the Brady Act violated the separation of powers doctrine.[364] The Court noted that, under Article II, Section 3, the responsibility for administering federal laws rests with the Executive Branch of the federal government.[365] The Court declared that the Brady Act effectively transferred this function to thousands of state CLEOs by requiring them to administer the federally mandated background checks "without meaningful Presidential control."[366] The Court viewed Congress's transfer of the federal executive power to state officials as a constitutionally impermissible reduction of the Executive Branch's power by another co-equal branch of the federal government.[367] The Court indicated that allowing such a transfer would shatter the unity of the federal executive envisioned by the Framers, because "Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[368]

Finally, the Court turned to its prior decisions on the ability of the Federal Government to commandeer state governments to administer federal laws. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*[369] and *FERC v. Mississippi*,[370] the

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[360] *Id.* at 917–18.
[361] 505 U.S. 144 (1991).
[362] *New York*, 505 U.S. at 166.
[363] *Printz*, 521 U.S. at 922.
[364] *See id.*
[365] *See id.*
[366] *Id.*
[367] *See id.*
[368] *Id.* at 923.
[369] 452 U.S. 264 (1981).
[370] 456 U.S. 742 (1982).

Court held, it sustained statutes against constitutional challenge only after establishing that they did not require the states to enforce federal law. Accordingly, the Court held, its decision in *New York*[371] striking down a provision of the Waste Policy Act that "unambiguously required the States to enact or administer a federal regulatory program . . . should have come as no surprise."[372] After rejecting the Government's attempts to distinguish the *New York* decision, the Court wrote:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[373]

The *Printz* decision does not provide a constitutional basis to nullify federal liability reform legislation. The decision makes clear that Congress cannot compel state legislatures or executives to participate in a federal regulatory or administrative scheme,[374] but it suggests no constitutional prohibition against legislation that asks state courts to enforce a federal liability law.[375] To the contrary, state courts have always been and continue to be obligated to honor such legislation. That role is entirely consistent with the Tenth Amendment and the constitutional mandate found in the Supremacy Clause.

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[371] 505 U.S. 144 (1991).

[372] *Printz*, 521 U.S. at 926.

[373] *Id.* at 935.

[374] *See* Shawn E. Tuma, Note, *Preserving Liberty:* United States v. Printz *and the Vigilant Defense of Federalism*, 10 REGENT U. L. REV. 193 (1998) (discussing the federalism doctrine as a safeguard of individual liberties).

[375] See Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?* 111 HARV. L. REV. 2180, 2185–86 (1998) (indicating that the *Printz* and *New York* decisions set forth a "clear-cut rule against federal 'commandeering' of state legislative or executive officials," but do not alter the responsibility of state courts to enforce federal laws).

3. Driver's Privacy Protection Act Cases

Recent federal appellate and district court decisions striking down a federal law regulating the disclosure of information contained in motor vehicle registration records have been heavily influenced by the *Printz* and *New York* decisions.

In *Condon v. Reno*,[376] the Fourth Circuit permanently enjoined federal enforcement of the Driver's Privacy Protection Act of 1994 ("DPPA").[377] The DPPA restricted the states' dissemination and use of personal information contained in state motor vehicle records and imposed criminal and civil liability on state officials who failed to comply with the federal restrictions.[378] The court concluded that the DPPA exclusively regulated the disclosure of information contained in state motor vehicle records, and therefore could not be categorized as a law of general applicability permissible under *Garcia*.[379] Instead, the DPPA violated the Supreme Court's holding in *New York* that the federal government cannot compel state executives to administer a federal regulatory program.[380]

Similarly, in *Oklahoma v. United States*,[381] the court enjoined federal enforcement of the DPPA on Tenth Amendment grounds. Contrary to the provisions of the federal DPPA, Oklahoma law made motor vehicle records a matter of public record.[382] Relying primarily on *New York* and *Printz*, the court held that the DPPA impermissibly sought to "treat the Oklahoma Department of Public Safety as a subdivision of the United States" by requiring the Department to "create and maintain systems" to enforce the DPPA's provisions.[383]

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[376] 155 F.3d 453 (4th Cir. 1998). *See also* Travis v. Reno, 12 F. Supp. 2d 921 (W.D. Wis. 1998), *rev'd*, 163 F.3d 1000 (7th Cir. 1998) (holding that the Driver's Privacy Protection Act violated the Tenth Amendment because it forced state officials and state employees to administer and enforce a federal regulatory scheme). *But see* Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998) (ruling that the Driver's Privacy Protection Act was authorized pursuant to Congress' Commerce Clause authority and did not violate the Tenth Amendment because, rather than requiring the state to enforce a federal regulatory scheme preventing the disclosure of driver records, the Act merely prohibited the state from releasing such records for impermissible purposes).

[377] 18 U.S.C. §§ 2721–2725 (1994).

[378] *See id.*

[379] *See Condon*, 155 F.3d at 463.

[380] *See id.* at 459.

[381] 994 F. Supp. 1358 (W.D. Okla. 1997).

[382] *See id.* at 1360.

[383] *Id.* at 1363.

Like the *New York* and *Printz* cases, the reach of the DPPA cases is limited to situations where state executives (as opposed to state courts) are forced to implement federal policy or where Congress escapes political accountability by forcing state legislators to enact a regulatory scheme. They have no bearing, directly or indirectly, on congressional enactment of a tort law that would be applicable in both federal and state court proceedings.

CONCLUSION

For almost a century, Congress has enacted legislation setting national tort policy rules, and these laws have been declared constitutional time and time again as legitimate exercises of Congress's Commerce Clause authority. Future challenges to federal tort legislation are bound to fail as well, unless courts unwisely choose to abandon that substantial body of well-reasoned precedent. The United States Supreme Court's decisions in *New York*, *Lopez*, and *Printz* do not change this conclusion.

The *Lopez* opinion discussed the Commerce Clause, but it is not truly a Commerce Clause case. As the Court explained, the Gun-Free School Zones Act at issue was a criminal statute that regulated handgun possession. "[B]y its terms," the statute "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms."[384] The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce—cases that directly support Congress's Commerce Clause authority over liability law.

The *New York* and *Printz* decisions provide limits on the federal government's power over the states, but they do not preclude the enactment of civil justice reform at the federal level. In fact, the opinions make clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states. They expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state

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[384] *Lopez*, 514 U.S. at 561.

executive officials to administer a federal regulatory scheme. While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not.

ARTICLE

CORRUPTION MOVES TO THE CENTER: AN ANALYSIS OF NEW YORK'S 1996 SCHOOL GOVERNANCE LAW

LYDIA SEGAL*

In this Article, Professor Lydia Segal discusses the recent trend of re-centralization in the New York City public school system. She first analyzes the justifications given for decentralization and examines the corruption and poor school performance that resulted from the new system. The author argues that while re-centralization efforts have attempted to combat these problems, the revamped system has also introduced the potential for new forms of corruption.

In December 1996, the New York state legislature passed a bill overhauling school governance in New York City that undid nearly thirty years of school decentralization, also known as community school control.[1] The law was a response to decades of investigations that revealed rampant corruption. Most of the city's thirty-two decentralized elected community school boards had become fiefdoms where jobs were often handed out to friends or sold for cash, and contracts were sometimes awarded to the companies giving the biggest bribes.[2] Meanwhile, school libraries were often bare, buildings were in disrepair, and many teachers lacked basic teaching supplies.[3] To stem the problem, New York legislators stripped community school boards of control over jobs and budgets, consolidated power in the chancellor and central school bureaucracy, and strengthened the investigation and punishment of corruption.

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[1] *See* N.Y. EDUC. LAW § 2590 (McKinney Supp. 1999).

[2] *See* Joseph Berger, *Scandals at the School Boards Led To Loss of Their Powers*, N.Y. TIMES, Dec. 18, 1996, at A1; Nina Bernstein, *Textbook Contract Focus of Probe*, NEWSDAY, Jan. 28, 1989, at 4. For a detailed description of the scandals, see *infra* Part I.A.

[3] *See* Nick Chiles, *Queens Schools Education Fails With Little Fees*, NEWSDAY, Feb. 18, 1990, at 5; Patricia Hurtado, *Schools Ask Library Aid*, NEWSDAY, May 21, 1986, at A8; Sarah Kershaw, *Crew Makes $1.55B Request*, NEWSDAY, Apr. 2, 1998, at A8.

New York's reforms reflect a concern common to a growing number of school systems across the nation. School districts as varied as those of Chicago;[4] Jersey City;[5] Newark;[6] Letcher County, Kentucky;[7] and Lawrence, Massachusetts[8] have compiled distressing investigative records charging school officials with misconduct ranging from kickbacks to political patronage. Meanwhile, legislative reformers are left to grapple with the problems. Most have adopted at least one of the anti-corruption strategies commonly used since the turn of the century, including improving the investigation of wrongdoing, stiffening penalties, and tightening oversight by central civil service bureaucracies.[9] Kentucky,[10] New York City,[11] and Chicago,[12] for example, have recently established offices with broad powers to investigate school corruption. Cleveland has centralized the procurement, maintenance, and repair of school computers in its central school bureaucracy to combat corruption.[13] Other jurisdictions have required fiscally beleaguered school districts to undergo regular audits of school spending and administration in order to deter

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[4] *See, e.g.*, BETTER GOVERNMENT ASSOCIATION, STAFF WHITE PAPER ON CHICAGO PUBLIC SCHOOLS (1995) (unpublished report) (describing corruption in local school councils in Chicago); John Gorman & Patrick Reardon, *Handshake, $20 Bill Gives Birth to Scandal*, CHI. TRIB., Apr. 11, 1989, at 1.

[5] *See, e.g.*, STATE DEP'T OF EDUC.OF N.J., JERSEY CITY SCHOOL DISTRICT LEVEL III REPORT (1988); Ezra Bowen, *When Schools Become Jungles: New Jersey Moves to Take Over a Failing Urban System*, TIME, June 6, 1988, at 70.

[6] *See, e.g.*, STATE DEP'T OF EDUC.OF N.J., COMPREHENSIVE COMPLIANCE INVESTIGATION OF THE NEWARK SCHOOL DISTRICT (1994).

[7] *See* Lonnie Harp, *Audit Spurs Board To Eye Takeover of Ky. District*, EDUC. WEEK, May 25, 1994, at 16.

[8] *See* Kate Zernike, *DeNucci Orders Audit of Schools in Lawrence*, BOSTON GLOBE, Jan. 7, 1997, at A1.

[9] For a description of traditional corruption control strategies, see SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978), 167–88; Frank Anechiarico & James B. Jacobs, *Visions of Corruption Control and the Evolution of American Public Administration*, 54 PUB. ADMIN. REV. 465 (1994).

[10] *See* Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476 (establishing an independent school investigative office as an arm of the legislature); Lonnie Harp, *Kentucky Watchdog Office Is 'SWAT Team' for Education Reforms*, EDUC. WEEK, June 2, 1993, at 1.

[11] In 1990, New York City established an independent office to investigate schools. *See infra* text accompanying note 69.

[12] In 1994, Chicago established an independent school investigative office modeled on New York City's. *See* Ann Bradley, *F.B.I. Agent Fills New Chicago Post To Probe Waste, Fraud*, EDUCATION WEEK ON THE WEB, Apr. 27, 1994 (visited Mar. 13, 1999) <http://www.edweek.org>.

[13] *See* Peter Schmidt, *Programmed For Failure*, EDUCATION WEEK ON THE WEB, Jan. 12, 1994 (visited Mar. 14, 1999) <http:/www.edweek.org>.

fraud.[14] Still others have increased anti-theft technology to guard against larceny of school supplies.[15]

The broadest anti-corruption reform involves the consolidation of power in central school bureaucracies at the expense of locally elected school boards and other decentralized bases of political power. This recent reform trend has its roots in the centralization movement of the early 1900s. School bureaucracies originally became popular at that time when reformers of the Progressive Era centralized authority to buffer schools from political patronage and graft by urban politicians.[16] In the 1960s and 1970s, however, growing numbers of critics began to see school bureaucracies as averse to the desegregation of schools and as unresponsive to the plight of minority children.[17] During that time, community leaders demanded that power be decentralized to local constituents, who, they argued, understood the needs of children better than remote bureaucrats.[18] Thus, the recent shift toward school centralization runs counter to a thirty-year trend of decentralization of school governance as well as the current movement to devolve government in general.[19]

The radical school decentralization of the 1960s and 1970s first occurred in New York City. With assistance from the Ford Foundation, Mayor John Lindsay established three demonstration districts in 1967 to give local parents enhanced power over schools.[20] In one of these districts, Brooklyn's Ocean Hill-Brownsville, racial tensions exploded. The mostly black school

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[14] New Jersey's 1985 school takeover law, for instance, requires the state to scrutinize a failing district's financial records as well as its test scores. *See* N.J. STAT. ANN. §§ 18A:7A-49(b), 18A:7A-41 (West 1989). Similarly, a California law required the oversight of a state-appointed trustee to monitor the financial recovery plan of the Oakland School District. *See* Thomas Toch, *Seizing Control of School Disasters*, U.S. NEWS & WORLD REP., Oct. 23, 1989, at 69.

[15] *See, e.g., In Schools, Cost of Crime Also Measured in Dollars*, ORLANDO SENTINEL-TRIB., Aug. 20, 1995, at K6.

[16] *See* DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980, at 107–09 (1982).

[17] *See* DAVID ROGERS, 110 LIVINGSTON STREET REVISITED xi–xii (1982); Marilyn Gittell, *Problems of School Decentralization in New York City,* URB. REV., Feb. 1967, at 4.

[18] *See* Robert C. Maynard, *Black Nationalism and Community Schools*, *in* COMMUNITY CONTROL OF SCHOOLS 100 (Henry M. Levin, ed., 1970).

[19] Advocates of devolution have made a strong case that it enhances managerial flexibility, worker innovation, and agency responsiveness. *See* DEREGULATING THE PUBLIC SERVICE: CAN GOVERNMENT BE IMPROVED? (John J. DiIulio, Jr., ed., 1994); D.R. SHELDON, ACHIEVING ACCOUNTABILITY IN BUSINESS AND GOVERNMENT: MANAGING FOR EFFICIENCY, EFFECTIVENESS, AND ECONOMY 32 (1996).

[20] *See* Lydia Segal, *The Pitfalls of Political Decentralization and Proposals for Reform: The Case of the New York City Schools*, 57 PUB. ADMIN. REV. 142 (1997).

governing board tried to dismiss certain teachers and administrators, leading to bitter strikes by the mostly white teachers' union and a city-wide racial conflict.[21] To avert riots, Mayor Lindsay appointed a panel to draft a city-wide blueprint for school decentralization.[22] After intense lobbying, the state legislature decentralized the city's schools in 1969, creating "no less than thirty nor more than thirty-three" locally elected school boards.[23] Soon many other districts like Detroit and Washington, D.C., also decentralized, giving local citizens varying degrees of power over schools.[24]

Due to a number of failed decentralization projects, however, many districts have recently started to re-centralize school governance. The result has been the dismantling or weakening of locally elected school boards. In some districts, mayors have gained the upper hand and replaced elected boards with their own appointees;[25] in others, educational professionals like chancellors and superintendents have gained power;[26] in yet other cases, state departments of education have won authority at the expense of local boards.[27] But whatever shape re-centralization assumes, it is usually seen as a way both to curb corruption and improve scholastic achievement.

The most extensive attempt to address corruption and poor student performance through re-centralization has occurred in New York City. The 1996 law passed by the New York state legislature vested broad new powers in the city's top school execu-

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[21] The teacher strikes began after Rhody McCoy, administrator of the Ocean Hill-Brownsville governing board, sent letters dismissing 19 teachers. When the teachers tried to return to their schools, the board blocked their entry and shut the schools down in protest. *See* DIANE RAVITCH, THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK PUBLIC SCHOOLS 362–78 (2d ed. 1988).

[22] *See* MARIO FANTINI ET AL., COMMUNITY CONTROL AND THE URBAN SCHOOL 100–40 (1970).

[23] *See* N.Y. EDUC. LAW § 2590-b(2-b) (McKinney 1995).

[24] *See* GEORGE R. LANOUE & BRUCE L. R. SMITH, THE POLITICS OF SCHOOL DECENTRALIZATION 95, 119 (1973).

[25] In Boston and Chicago, school boards elected on a city-wide basis have been replaced with mayorally appointed ones. *See* Vanessa Gallman, *More Mayors Taking Control of Failing School Systems*, THE POST AND COURIER (CHARLESTON, S.C.), Nov. 21, 1996, at A5; Neal Peirce, *Big-City Schools Fall Victim to Bureaucracy and Mismanagement*, ST. LOUIS POST-DISPATCH, Dec. 3, 1996, at 11B.

[26] *See* Richard Burr, *State Takeovers Display Mixed Education Results*, THE DETROIT NEWS, Feb. 9, 1997, at B5.

[27] In Kentucky and New Jersey, new legislation permits the state departments of education to take over failing schools and districts. *See, e.g.*, Lynn Olson, *From Risk to Reform: Kentucky Moves To Enact Reform Plan*, EDUCATION WEEK ON THE WEB, Apr. 21, 1993 (visited Mar. 14, 1999) <http://www.edweek.org>.

tives and relegated school boards primarily to helping schools achieve standards set by central headquarters.[28]

Should New York's law, the country's most comprehensive effort to combat school corruption to date, serve as a model for other school districts contending with growing corruption records, or are there more effective solutions to these problems? Since no two school districts are structurally alike or are afflicted by corruption in exactly the same ways, no single model should be applied everywhere. However, reformers could benefit from a better understanding of New York's model. This Article provides an in-depth examination of New York's school governance law, what it seeks to accomplish, and how it will impact corruption in the city's educational system.

Part I of the Article provides an overview of the corruption scandals that instigated reform. Part II examines the law's primary anti-corruption strategy—stripping school boards of power—and its likely impact on school board corruption. Part III discusses new opportunities and incentives for corruption created by the 1996 law and questions whether the Board of Education's ("BOE") improved surveillance, oversight, and accountability mechanisms are adequate safeguards against these new opportunities. Finally, Part IV offers detailed suggestions for reform.

I. PUTTING NEW YORK'S NEW SCHOOL GOVERNANCE LAW INTO CONTEXT

A. *The Scandals that Rocked the New York City School System*

The scandals that eventually triggered New York's 1996 school governance law began shortly after the state decentralized power from New York City's BOE to community school boards in 1969. These nine-member boards, elected every three years from their school district communities, were put in charge of elementary and junior high schools in their districts, while the

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[28] *See* N.Y. EDUC. LAW, § 2590-e(3) (McKinney Supp. 1999). Although city school boards continue to be responsible for preparing and publicizing yearly school district report cards, *see* N.Y. EDUC. LAW, § 2590-e(8) (McKinney Supp. 1999), boards may no longer "determine matters" relating to educational policy or instruction of students. *See* N.Y. EDUC. LAW, § 2590-e(3) (McKinney 1995) (superseded). These powers have now been transferred to the chancellor and superintendents. *See* N.Y. EDUC. LAW § 2590-f(1)(k) (McKinney Supp. 1999).

BOE retained control over high schools, special education, and a host of other city-wide programs and services.[29]

Advocates of school decentralization assumed that as central bureaucrats' control over education weakened, concerned parents and sympathetic community residents would fill the void and run for the school board.[30] However, the advocates did not anticipate that school board candidates would be motivated by tangible opportunities for personal enrichment. Many people ran for the wrong reasons or, once elected, became mired in deal-making.[31] Tellingly, most board members did not even send their children to the schools in their districts.[32] With control over hundreds of district employees, ranging from $8,000-a-year school aides who monitor halls and lunchrooms to $110,000-a-year district superintendents, rogue boards could easily pressure school employees to campaign for them by promoting those who did and harming those who did not.[33] Board members also enlisted employees to make campaign contributions, work on telephone banks, turn out to vote, and run their personal errands.[34] Patronage soon became systemic, and explicit coercion was no longer needed. It became clear to employees that those who campaigned advanced in the school hierarchy while those who did not were often demoted, transferred, fired, or passed over for promotion.[35]

School boards also offered excellent launching pads for those with aspirations for higher political office. Board members often

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[29] *See* Segal, *supra* note 20, at 142.

[30] *See* Robert Lyke, *Representation and Urban School Boards*, *in* COMMUNITY CONTROL OF SCHOOLS, *supra* note 18, at 138.

[31] *See* Segal, *supra* note 20, at 145–47; BRONX COUNTY GRAND JURY REPORT, POLITICS IN OUR SCHOOL SYSTEM: A CORRUPTING INFLUENCE 10 (1986) (unpublished report) [hereinafter BRONX COUNTY GRAND JURY REPORT].

[32] *See, e.g.*, ANTHONY ALVARADO & DAVID DINKINS, IMPROVING THE ODDS: MAKING DECENTRALIZATION WORK FOR CHILDREN, FOR SCHOOLS, FOR COMMUNITIES, REPORT OF THE MANHATTAN BOROUGH PRESIDENT'S TASK FORCE ON EDUCATION AND DECENTRALIZATION 62–63 (1987) [hereinafter IMPROVING THE ODDS].

[33] *See, e.g.*, Ralph Blumenthal & Sam Howe Verhovek, *Patronage and Profit in Schools: A Tale of a Bronx District Board*, N.Y. TIMES, Dec. 16, 1988, at B1; Neil A. Lewis & Ralph Blumenthal, *Power Base vs. Schools in Brooklyn District*, N.Y. TIMES, Feb. 10, 1989, at A1. Although teachers are appointed centrally, boards could still pressure them through control of promotions and overtime. *See* Segal, *supra* note 20, at 142.

[34] *See* SPECIAL COMMISSIONER OF INVESTIGATION ("SCI") FOR THE NEW YORK CITY SCHOOL DISTRICT, POWER, POLITICS AND PATRONAGE: EDUCATION IN COMMUNITY SCHOOL DISTRICT 12, at 67 (1993) [hereinafter SCI, POWER, POLITICS AND PATRONAGE].

[35] *See, e.g.*, Segal, *supra* note 20, at 145; SCI, POWER, POLITICS AND PATRONAGE, *supra* note 34, at 72–73.

persuaded their loyal armies of school employees to campaign for them in elections for other offices.[36] By using school staff to perform campaign chores and school supplies to print campaign materials, board members could run elections for negligible amounts of money.[37] Board members could also mobilize their armies to do favors for higher politicians, thereby gaining entrance into powerful party machines.[38]

Holding school board positions also enabled members to unfairly advantage their families. Nepotism was rampant; board members often handed out no-show jobs to their relatives.[39]

With control over multi-million dollar district budgets, school board positions also offered multiple opportunities for illicit material gain. One board member, for instance, collected over $18,000 from a textbook publisher, and meals, cash, and a white cashmere coat from other vendors.[40] Another received cameras, television equipment, and other items.[41] Yet another board member took $50,000 from book vendors.[42]

School board corruption directly interfered with student learning. With deal-making as board members' top priority, children's education suffered. In a secretly recorded conversation, one board member from Brooklyn's Community School District 27 claimed, "I've never heard the word 'children' or 'education' enter into our discussions in the last few years . . . [w]ith anybody."[43] Or, as another board member explained to an undercover informant: "I'm a political leader, that's why I'm here . . . . I make sure my people get f—ing jobs."[44] Indeed, in another dis-

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[36] *See, e.g.*, Joseph Berger & Elizabeth Kolbert, *New York Schools and Patronage: Experience Teaches Hard Lessons*, N.Y. TIMES, Dec. 11, 1989, at A1.

[37] *See Second School District 9 Board Member Pleads Guilty*, UNITED PRESS INT'L, July 11, 1989.

[38] *See, e.g.*, Neil A. Lewis, *School Board Found Failing to Meet Goals*, N.Y. TIMES, Dec. 5, 1988, at A1; Matthew Purdy, *Web of Patronage in Schools Grips Those Who Can Undo It*, N.Y. TIMES, May 14, 1996, at A1.

[39] *See, e.g.*, SCI, POWER, POLITICS AND PATRONAGE, *supra* note 34, at 4–5; BOE Office of Inspector General Case No. 1813 (June 4, 1990) (unpublished case file) (finding that virtually all non-pedagogical positions in the Bronx's District 9 were filled based on school board nepotism); BOE Office of Inspector General Case No. 939 (Nov. 14, 1988) (unpublished case file) (describing nepotism in District 12 in the Bronx).

[40] *See* BOE Office of Inspector General Case No. 142 (1987-88) (unpublished case file).

[41] *See* William J. Cook, Jr., *Corruption and Racketeering in the New York City School Boards*, *in* HANDBOOK OF ORGANIZED CRIME IN THE UNITED STATES 280 (Robert J. Kelly, et al. eds., 1994).

[42] *See* Bernstein, *supra* note 2, at 4.

[43] JOINT COMMISSION ON INTEGRITY IN THE PUBLIC SCHOOLS, THE NEW TAMMANY HALL 41 (1990) [hereinafter THE NEW TAMMANY HALL].

[44] *Id.* at 9.

trict, the school board forced students to switch reading textbooks three times in five years as different publishers offered the board increasingly greater kickbacks.[45] Deprived of the pedagogical continuity necessary for effective learning, students' reading scores plummeted.[46] Another academically beleaguered district hired a superintendent who, while a teacher several years prior, missed class for an entire semester to campaign for the school board without even informing the principal where he was.[47] In yet another district, the school board ousted a superintendent whose extensive educational reforms had just begun to improve the district's fledgling academic scores.[48]

School decentralization advocates had mistakenly assumed that the local political process would ensure that board members act in the best interests of the students by forcing them out of office if they failed to do so.[49] However, because board members were not held accountable when students failed to learn, they were able to divert resources from education to corrupt activities with virtual impunity.

In reality, political patronage, combined with low voter turnout and election fraud, made it nearly impossible for local residents to oust corrupt board members.[50] School board elections, like most local elections,[51] drew few voters. With turnouts averaging 5.2% of eligible voters,[52] board members could easily maintain their positions with as few as 238 votes.[53] Thus, a rogue board member could almost be assured of prevailing based solely on the votes of those to whom he had promised jobs. Moreover, school board election procedures were so corrupt that board members could get supporters to vote multiple times, register nonexistent voters, and cast absentee ballots.[54] This virtually en-

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[45] *See* Bernstein, *supra* note 2, at 4.

[46] *See id.*

[47] *See* BRONX COUNTY GRAND JURY REPORT, *supra* note 31, at 12.

[48] *See* Sam Dillon, *Bronx Board Ordered to Reverse an Ouster*, N.Y. TIMES, Feb. 10, 1994, at B6.

[49] *See* David Hart, *Theories of Government Related to Decentralization and Citizen Participation*, 33 PUB. ADMIN. REV. 616 (1972).

[50] *See, e.g.*, Leonard Buder, *Voters Re-elect 6 to 2 Boards Under Inquiry*, N.Y. TIMES, May 18, 1989, at B1.

[51] *See* ROBERT E. LANE, POLITICAL LIFE: WHY AND HOW PEOPLE GET INVOLVED IN POLITICS 343 (1965); Purdy, *supra* note 38, at A1.

[52] *See* Anemona Hartocollis, *Board of Education Tackles Its Complicated Election Process*, N.Y. TIMES, Nov. 18, 1997, at B4.

[53] *See* Lydia Segal, *When Learning Comes Last*, 6 CITY J. 11 (1996).

[54] *See* SCI, FROM CHAOS TO CORRUPTION: AN INVESTIGATION INTO THE 1993 COMMUNITY SCHOOL BOARD ELECTION 20–23 (1993) [hereinafter SCI, CHAOS].

sured their victory regardless of opposition by discontented residents.

Nor could the Chancellor hold school board members responsible for lack of educational achievement. The 1969 decentralization law failed to clarify the extent of the Chancellor's authority to oust or suspend board members based on substandard student performance. While the decentralization law permitted chancellors to oust board members for specific violations and crimes,[55] most who attempted to do so solely on scholastic grounds were often successfully sued.[56] Neither could parents hold board members accountable for their children's education. Since New York generally did not offer parents a choice of schools, parents could not protest the school board by abandoning the worst-performing schools.[57]

B. *The Mounting Pressure to Combat Corruption*

As communities in the 1980s began to hear lurid tales of corruption—from the principal who sold drugs at school[58] to the school custodian who flew corporate jets while he was supposed to be on duty[59]—fighting corruption became an urgent concern of legislators. Extensive media coverage of the scandals focused on the inherent flaws of the school board.[60] As a result, most calls for reform aimed at narrowing the powers of school boards.[61] One of the first such calls came from a 1986 Bronx grand jury that found that patronage and election fraud had become a way of life in many Bronx school districts.[62] Soon, state commis-

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[55] *See* N.Y. EDUC. LAW, § 2590(l) (McKinney 1995) (superseded) (empowering the chancellor to order any school board member who failed to comply with any law or directive to take required action or face removal or suspension).

[56] *See* Peel v. Crew, No. 96 CIV. 7154, 1996 WL 719378 (S.D.N.Y. 1996); Dillon, *supra* note 48, at 36 (discussing a court decision that did allow former Chancellor Ramon Cortines to force a school board to rehire a superintendent).

[57] *See infra* Part IV.C.

[58] *See, e.g.*, Ronald Sullivan, *Jury Convicts Ex-Principal in Drug Case*, N.Y. TIMES, Jan. 27, 1990, at A5.

[59] *See* SCI, A SYSTEM LIKE NO OTHER: FRAUD AND MISCONDUCT BY THE NEW YORK CITY SCHOOL CUSTODIANS 16 (1992) [hereinafter SCI, SCHOOL CUSTODIANS].

[60] *See, e.g.*, Wayne Barret & Lynnell Hancock, *Scammed and Delivered: Have the School Scandals Doomed Decentralization?*, VILLAGE VOICE, Dec. 6, 1988, at 10; Mark Mooney, *Sex for Jobs in Schools for Scandal*, N.Y. POST, Nov. 28, 1988, at 6; Jack Newfield, *Keeping Clubhouses Out of Schoolhouses*, N.Y. DAILY NEWS, Nov. 28, 1988, at 39.

[61] *See, e.g.*, Editorial, *Overhauling School Decentralization*, N.Y. TIMES, Jan. 2, 1989, at A22; *A Program for School Reform*, N.Y. POST, Nov. 11, 1988, at 31.

[62] *See* BRONX COUNTY GRAND JURY REPORT, *supra* note 31, at 23.

sions, city investigative commissions, the teachers' union, the Mayor, the Governor, and state legislators and proposed overhauling school governance.[63]

However, nothing significant came of these proposals until December of 1996. Instead, legislators responded to the scandals with piecemeal reforms. For instance, after investigations in 1988 revealed that board members pressured school employees to campaign for their political clubs, legislators prohibited board members from holding other elective offices while holding a school board seat.[64]

Politicians further focused on improving the process for investigating school corruption. For example, in 1989, in the midst of an uproar over findings that a principal had been selling crack cocaine in his school,[65] Mayor Edward Koch established a temporary commission, the Gill Commission, to study the problem.[66] After a sixteen-month probe, this Commission released two reports: one revealed widespread corruption in the school system,[67] and the other revealed that the BOE's internal investigators, who were beholden to board members for their jobs and raises, routinely turned a blind eye to significant incidents of school corruption.[68]

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[63] In 1991, a state commission headed by State Senator John Marchi recommended curtailing school boards' hiring powers. *See* Nick Chiles, *Cuomo Pushes School Reform*, NEWSDAY, Apr. 7, 1993, at 8. In June 1994, the Mayor's advisor, Edward Costikyan, proposed that the BOE be dismantled and replaced with five borough boards. *See The Chancellor's Response*, N.Y. TIMES, Aug. 22, 1994, at A12. In 1996, the Mayor put forth another plan, endorsed by the Governor and a number of state senators, to put schools under his immediate control. *See* Clifford J. Levy, *The Unmaking of a Deal: How School Reform Failed in Albany,* N.Y. TIMES, July 21, 1996, at A21. In spring 1996, the State Assembly voted to eliminate local school boards. *See* Steven Lee Myers, *An Assembly Plan Would Dismantle City School Board*, N.Y. TIMES, Feb. 16, 1996, at A1.

[64] *See* N.Y. EDUC. LAW § 2590(c)(4)(a) (McKinney Supp. 1999). This reform was a response to the 1986 Bronx Grand Jury recommendations. *See* BRONX COUNTY GRAND JURY REPORT, *supra* note 31. In another example of piecemeal reform, legislators required board members to disclose gifts received or relatives working for the school system. *See* N.Y. EDUC. LAW § 2590(e)(5)(a) (McKinney Supp. 1999). And in 1995, after removed board members kept winning re-election, legislators permanently barred board members convicted of felonies or removed for malfeasance from running for the board. *See* N.Y. EDUC. LAW § 2590(c)(4)(b) (McKinney Supp. 1999).

[65] *See* JOINT COMMISSION ON INTEGRITY IN THE PUBLIC SCHOOLS, INVESTIGATING THE INVESTIGATORS 3–25 (1990).

[66] The Gill Commission, chaired by attorney Kevin Gill, was officially called the Joint Commission on Integrity in the Public Schools.

[67] *See generally* THE NEW TAMMANY HALL, *supra* note 43.

[68] *See* JOINT COMMISSION ON INTEGRITY IN THE PUBLIC SCHOOLS, INVESTIGATING THE INVESTIGATORS, *supra* note 65, at 2.

In response to reports of failed reform attempts, Mayor David Dinkins created a new agency, the Special Commissioner of Investigation for the New York City School District ("SCI"), to investigate school corruption in 1990.[69] SCI was to be independent of the BOE and report directly to the City Department of Investigation and the Mayor.[70] It was given vast investigative powers, including the authority to arrest, subpoena, take testimony, grant immunity, and make recommendations for systemic reform.[71] Though SCI's issuance of public reports dramatically accelerated the pace of reform, proposals for major governance upheaval continued to languish in Albany.

One reason for state congressional inaction was that the two houses of the state legislature, the Assembly and Senate, could not agree on the nature of the problem. The Democrat-dominated State Assembly tended to view school board corruption as the primary problem and thus wanted to eliminate boards altogether and expand the BOE's power.[72] The Republican-controlled State Senate, on the other hand, viewed corruption and inefficiency in the BOE as the dominant problem and therefore wanted to dismantle the BOE, making only minor changes to school boards.[73] The political entanglement was further complicated when, in 1996, Mayor Rudolph Giuliani and a number of state senators clamored to give the Mayor control over the BOE.[74]

In 1996, however, a number of events precipitated an agreement between the opposing sides. First, Mayor Giuliani dropped his bid for control of the schools (which the Assembly had vigorously opposed)[75] and instead threw his support behind a proposal to tighten school board power and expand the Chancellor's authority.[76]

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[69] *See* N.Y. Mayoral Exec. Order No. 11, June 28, 1990; N.Y. BOARD OF EDUCATION RESOLUTION (1990). In creating this permanent investigative agency, Mayor Dinkins adopted the Gill Commission's recommendations.

[70] *See* N.Y. Mayoral Exec. Order No. 11, *supra* note 69.

[71] *See id.*

[72] *See* Purdy, *supra* note 38, at B4.

[73] *See id.*

[74] *See id.*

[75] *See* James Dao, *Giuliani Drops Bid for Power Over Schools*, N.Y. TIMES, Nov. 23, 1996, at A21. Additionally, the 1996 death of Guy Vellela, probably the most influential State Senator opposed to weakening school boards, enhanced the chances of a compromise.

[76] *See id.* Without Mayor Giuliani's support, reform would probably not have been feasible. Stories of school board corruption and poor student performance proliferated before Giuliani was elected. Chancellor Crew's predecessor, Chancellor Cortines, had

Second, an event occurred in 1996 that allowed the Mayor and Chancellor to impress upon the state legislature the urgency of giving the Chancellor the power to act against corrupt boards.[77] Chancellor Rudolph Crew had ordered Community School Board 12 in the South Bronx—one of the most corrupt in the city—not to appoint as a superintendent an individual who had a dismal record as a teacher and assistant principal in the district. When the board defied his order, the Chancellor replaced three board members with three of his own trustees.[78] The school board countered with a lawsuit charging that the Chancellor had violated the Voting Rights Act.[79] The U.S. Department of Justice ("DOJ") agreed with the school board. The DOJ not only required the Chancellor to select different trustees for District 12, but it also required him to obtain DOJ pre-clearance from before replacing board members with trustees in the future.[80]

Thus, on December 18, 1996, the state legislature finally passed a school governance bill,[81] effective April 1997,[82] that empowered the Chancellor to remove board members in academically floundering districts, take over under-performing schools and districts, and remove failing principals and superintendents.[83]

Unlike decentralization, the new law placed its faith back in professional administrators. Instead of voters deciding through their elected board members whether schools were performing

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unsuccessfully demanded the power to remove principals and other staff in troubled elementary and middle schools. *See* Sam Dillon, *16 High Schools Marked For Remedial Measures*, N.Y. TIMES, Apr. 30, 1994, at A27. The key ingredient that Cortines lacked, which Crew had, was mayoral support.

[77] As Chancellor Crew told *The New York Times*, "District 12 really sort of symbolizes the failing of the system, or the failing of the Legislature." Pam Belluck, *Ousted School Officials Return, But Crew, Digging In, Bars Them*, N.Y. TIMES, Nov. 19, 1996, at A1.

[78] *See Peel*, No. 96 CIV. 7154, 1996 WL 719378. Chancellor Crew used his power under N.Y. EDUC. LAW § 2590-l.

[79] 42 U.S.C. § 1973c.

[80] *See* Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Paul Crotty, Corporation Counsel (June 24, 1996) (on file with author). The DOJ determined that N.Y. EDUC. LAW § 2590-l required pre-clearance under § 5 of the Voting Rights Act for each enactment. Further, the Chancellor had the burden of showing that his selection of trustees was free of discriminatory purpose and effect. *See id.*

[81] *See* Pam Belluck, *School Bill Adds to Borough Power*, N.Y. TIMES, Dec. 19, 1996, at A1.

[82] *See Today's News Update*, N.Y.L.J., Jan. 24, 1997, at 1. The governor signed the bill into law in January 1997 to take effect on March 31, 1997. However, it could not be enforced until April 2, 1997, when the DOJ found that it did not violate the Voting Rights Act. *See* Jacques Steinberg, *Crew, His Power Affirmed, Pledges a Local Partnership*, N.Y. TIMES, Apr. 3, 1997, at B3.

[83] *See Today's News Update*, *supra* note 82, at 1.

up to par, under the new law, the Chancellor could decide whether schools were performing adequately and could take decisive action if they were not. Although measures allowing the Chancellor to hold superintendents and principals accountable for poor student performance were intended to improve student learning, such measures also discouraged corrupt practices by giving educators incentives to ensure that resources were channeled into education rather than diverted into corrupt practices. Indeed, in his official statement supporting the bill, Governor George Pataki announced that the measure would fight "widespread abuses" like "patronage" and "corruption," as well as create "a governance structure that fosters leadership" and "promotes accountability."[84]

The new law stripped school boards of virtually all executive and administrative authority and consolidated power in the Chancellor and his subordinates, including BOE administrators and district superintendents.[85] The hope was that, without control over personnel and budget, boards would no longer have the requisite tools for using their positions to campaign and thieve.[86] Legislators also included in the bill an array of provisions designed to combat corruption—additional audit requirements, improved oversight through internal controls, and stiffened penalties.[87]

II. How the School Governance Law Sought to Curb School Board Corruption and its Likely Impact

A. *Measures to Address Political Patronage and Fraud*

Following the new legislation, school boards lost nearly all their hiring authority. Most significantly, boards lost the power to hire superintendents, who serve as the districts' educational and managerial linchpins. Under the new law, the Chancellor selects district superintendents.[88] Although board members *rec-*

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[84] Governor's Program Bill No. 5, Memorandum, 1996 Extraordinary Session (summarizing the purpose of the new bill).

[85] *See* N.Y. Educ. Law § 2590-e (McKinney Supp. 1999).

[86] *See* Steven Lee Myers, *An Assembly Plan Would Dismantle City School Board*, N.Y. Times, Feb. 16, 1996, at A1.

[87] *See* N.Y. Educ. Law § 2590-h (McKinney Supp. 1999).

[88] *See* N.Y. Educ. Law, §§ 2590-h(30), 2590-e(1) (McKinney Supp. 1999). Under the 1969 decentralization law and former Chancellor Reg. C-37, school boards selected superintendents; the Chancellor merely had veto power.

ommend candidates for superintendent by presenting a list of up to four finalists chosen by a parent screening committee, the Chancellor makes the final choice.[89] If the Chancellor is not satisfied with the school board's finalists, he may ask the board to submit additional candidates until he finds an acceptable one.[90] However, the Chancellor cannot entirely ignore the board's recommendations and independently select superintendents.

Also pursuant to the new law, superintendents control hiring of the remaining district jobs that boards used to control, including principals, assistant principals, and teacher aides.[91] Further, superintendents are no longer required to inform board members of who they are interviewing for principal positions; rather, candidates' names are confidential.[92] To deter school boards from pressuring superintendents to make particular appointments, the legislature provided that any board member who "willfully, intentionally or knowingly" interferes with the "hiring, appointment or assignment of employees other than as specifically authorized" can be removed from the board and permanently disqualified from a wide range of municipal posts.[93]

With respect to district budgets, superintendents, not school boards, control the purse strings under the new law.[94] Superintendents decide which contracts to approve, which textbooks to buy from the Chancellor's pre-approved list, which new programs to create, and which minor repairs to authorize.[95] Superintendents are also in charge of the operation of cafeteria services, social centers, and recreational and extracurricular programs.[96] In addition, they decide how to allocate discretionary funds on various resources, ranging from teachers' positions to

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[89] School boards continue, however, to "employ" superintendents, that is, to authorize their contracts. *See* N.Y. EDUC. LAW § 2590-e(1) (McKinney Supp. 1999).

[90] *See id.*

[91] *See* N.Y. EDUC. LAW §§ 2590-f(1)(c) (McKinney Supp. 1999) (superintendent has the power to appoint, promote, and discharge all district-hired employees); 2590-f(1)(d) (McKinney Supp. 1999) (superintendent has the power to appoint supervisory personnel); 2590-f(1)(e) (superintendent has the power to appoint or reject principal candidates) (McKinney Supp. 1999).

[92] *See* Memorandum from Burton Sacks, Chief Executive, Community School District Affairs, Sept. 15, 1997 (on file with author) [hereinafter Sacks Memorandum].

[93] N.Y. EDUC. LAW § 2590-l(2-a) (McKinney Supp. 1999).

[94] *Compare* N.Y. EDUC. LAW § 2590-e(1)(b)(3) (McKinney 1995) (superceded) *and* N.Y. EDUC. LAW § 2590-f(1) (McKinney Supp. 1999). *See also* Sacks Memorandum, *supra* note 92, at 5 (superintendents are now in charge of district budgetary decisions).

[95] *See* N.Y. EDUC. LAW §§ 2590-f(1)(j), 2590-f(1)(k) (McKinney Supp. 1999).

[96] *See* N.Y. EDUC. LAW §§ 2590-f(1)(m), 2590-f(1)(l) (McKinney Supp. 1999).

computers.[97] Board members cannot even determine what portion of the district budget to allocate for their own staff and supplies. Although they may *suggest* staff raises, superintendents retain the ultimate decision-making power.[98]

B. *The Likely Consequences of the New Law on School Board Corruption: Reducing, but Not Eliminating, the Problem*

By depriving boards of the tools used to engage in patronage and fraud, the school governance law is likely to lessen not only these types of corruption but others as well. As the stakes of school board contests are lowered, election fraud and similar crimes are likely to decline. In fact, although the new law includes a number of provisions aimed at stemming election fraud,[99] conceivably the primary reason such fraud will decline is that school boards have become increasingly irrelevant. Indeed, voter turnout in May 1997, one month after the new law took effect, was the lowest in the history of decentralization,[100] which seems to reflect the reduced importance of school board elections. Furthermore, because school boards today have little power, they are unlikely to attract profiteers.

However, the 1996 law still left opportunities for school board members to practice political patronage. For example, although board members no longer appoint superintendents, no superintendent can be hired unless the board *recommends* him to the Chancellor.[101] As past investigations demonstrate, the power to recommend a candidate for a high-level position can be a formi-

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[97] *See* Jacques Steinberg, *The Newest Power Broker In New York: District Superintendents Are Supposed to Change the Public Schools. Can They?*, N.Y. TIMES, Aug. 31, 1997.

[98] *See* Sacks Memorandum, *supra* note 92. Also, boards can no longer retain counsel. *See id*; *compare* N.Y. EDUC. LAW § 2590-e(1)(b)(10) (McKinney 1995) (superseded) *and* N.Y. EDUC. LAW § 2590-f(1)(c) (McKinney Supp. 1999).

[99] For instance, legislators passed a provision increasing the disclosure requirements board members had to make about the sources of financial contributions to their school board elections. *See* N.Y. EDUC. LAW § 2590-e(5)(a)(3) (McKinney Supp. 1999). Also, they made it easier to remove board members for failing to fully disclose campaign contributions. While in the past, board members could be removed only if they "willfully" failed to make full disclosure, they can now be removed if their failure to disclose is "willful or repeated." *Compare* N.Y. EDUC. LAW § 2590-e(1)(b) (McKinney 1995) (superseded) and current N.Y. EDUC. LAW § 2590-e(5)(b) (McKinney Supp. 1999).

[100] *See* Anemona Hartocollis, *Board of Education Tackles Its Complicated Election Process*, N.Y. TIMES, Nov. 18, 1997, at B4.

[101] *See* N.Y. EDUC. LAW § 2590-h(30) (McKinney Supp. 1999). *See also* Chancellor's Reg. C-37, Feb. 26, 1997, at 12.

dable tool for extortion.[102] Under current hiring procedures, a screening committee composed mostly of parents in the district interviews applicants for superintendent, rates them, and submits a list of at least five finalists to the school board for consideration.[103] The school board then sends the names of up to four of these finalists to the Chancellor who makes the final selection.[104] Board members could inform superintendent candidates that unless they comply with patronage demands, their applications will never reach the Chancellor for his review.[105] Once superintendents are hired, boards can veto their reappointments by not recommending them anew.[106] Unless a superintendent is obviously unsuitable,[107] the current Chancellor seems unlikely to oppose a school board's recommendation, especially one with strong local support.[108]

Board members have other ways to influence who gets hired as superintendent. For instance, they can influence the hiring criteria,[109] which is a power they have allegedly wielded to purposefully include or exclude candidates from consideration.[110] Board members also serve as nonvoting members of the screening committee. In this capacity, they review resumes and help determine which applicants will be interviewed[111]—tools they once used for patronage.[112] Additionally, the complexity of hiring procedures provides opportunities for crafty board members to manipulate lay screening committee members to vote for their preferred candidates.

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[102] *See* THE NEW TAMMANY HALL, *supra* note 43, at 101.

[103] *See* Chancellor's Reg. C-37, *supra* note 101, at 8–10. The screening committee's voting members include district parents (who must form the majority and whose precise number is fixed by the school board), one teacher representative, one school support personnel representative, and one administrative representative. *See id.* at 6.

[104] *See id.* at 10–12.

[105] Although the Chancellor can ask the school board to provide additional names if he is not satisfied with its recommendations, *see id.* at 12, the board can refrain from recommending a particular candidate by finding others instead.

[106] *See* THE NEW TAMMANY HALL, *supra* note 43, at 103.

[107] For instance, Chancellor Crew blocked District 12's school board from appointing Alex Castillo, who was dismissed from consideration after providing the District 12 superintendent with a no-interest loan. *See* Bronx Grand Jury Report, *supra* note 33.

[108] For further discussion of this point, see *infra* note 124.

[109] Boards may help the screening committee establish criteria to "address local concerns" for superintendents. *See* Chancellor's Reg. C-37, *supra* note 101, at 7.

[110] *See, e.g.*, BOE Office of Inspector General Case No. 1502/09 (June 1990) (unpublished case file, on file with NYC BOE) (describing how the District 11 school board altered job criteria for superintendents to benefit the candidate it wanted to hire).

[111] *See* Chancellor's Reg. C-37, *supra* note 101, at 7 (up to two board members may sit on the screening committee).

[112] *See, e.g.*, SCI, POWER, POLITICS AND PATRONAGE, *supra* note 34.

The new law's provision prohibiting board members from "willfully, intentionally or knowingly" interfering with hiring[113] is not likely to deter patronage. Although the penalties for violating this section are stringent,[114] the law will probably not impact the subtle political pressure that pervades the administrations of public schools. Judges are generally loathe to countenance patronage prosecutions without evidence of an explicit threat of harm or quid pro quo.[115] Board members would, thus, never be punished for merely praising or criticizing a prospective applicant to the superintendent, even though this could be implicitly coercive.

Consequently, although the new law intends to reduce school board influence and incidents of fraud by board members, it still leaves room for boards to practice patronage. However, engaging in such patronage practices is now more difficult than under the former system where board members had direct control over district hiring. To hire a particular superintendent today, board members would need to manipulate or persuade a majority of the screening committee, which can include more than fifteen people, to select their preferred candidate. While this is certainly possible, such political patronage would be more difficult to execute today than it was before the passage of the 1996 law.

III. New Incentives and Opportunities for Corruption Created by the 1996 Law and the Adequacy of its Anti-Corruption Measures

By passing the 1996 law, legislators limited the discretion of those officers who engaged in the majority of corrupt practices—local school board members. However, this reduction in board member discretion received an expansion in the discretion of others that enhanced *their* opportunities to engage in corruption.[116] While the new law will likely decrease the prevalence of graft in local school boards, it may shift the problem to the central BOE, community superintendents, and their school district offices.

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[113] N.Y. Educ. Law § 2590-l(2-a) (McKinney Supp. 1999).

[114] *See id.*

[115] *See* Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 Rutgers L. Rev. 507 (1998) [hereinafter Segal, *Difficulties Prosecuting Political Patronage*].

[116] *See* Rose-Ackerman, *supra* note 9, ch. 9.

For example, the new law gives superintendents the same incentives and opportunities to engage in patronage previously enjoyed by school board members. Superintendents now retain virtually unchecked power to hire and fire. In fact, they can more easily engage in corruption than could school boards under decentralization regimes. While boards had to secure a majority of votes in order to hire a principal or select a contract, superintendents can act unilaterally.

As the law shifts more control and responsibility to the BOE, opportunities for corruption are likely to arise there as well. Since decentralization began in the 1960s and 1970s, the media spotlight has largely focused on patronage scandals in local school boards. But at the same time, widespread corruption within the BOE and local district offices, which are themselves mini-bureaucracies,[117] has gone relatively unnoticed. For example, incidents of theft, fraud and kickbacks repeatedly damaged the credibility of the BOE's former Bureau of Supplies.[118] Further, cover-ups and nepotism have been reported in other divisions at the BOE.[119] The BOE's custodial system has sparked a succession of scandals since 1942.[120] In addition, fraud and gross incompetence have plagued the BOE's Office of School Food and Nutrition Services Authorities,[121] as well as the BOE's Division of School Facility's Leasing Unit.[122]

The likelihood that corruption will increase in the BOE and among superintendents and their district offices depends not only on their opportunities and incentives for corruption, but also on whether the 1996 law provides effective deterrents. The following Sections are devoted to examining this issue.

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[117] *See* Steinberg, *supra* note 97.

[118] *See* SCI, PAPER, PENCILS, AND PLANES TO THE CARIBBEAN: CORRUPTION IN THE PURCHASING OF SCHOOL AND OFFICE SUPPLIES (Oct. 1994) [hereinafter SCI, PAPER, PENCILS]; Marcia Chambers, *School Supplies Unit Faces Its Fourth Inquiry*, N.Y. TIMES, Apr. 30, 1978, at A42.

[119] *See* SCI, AN INVESTIGATION INTO THE SEX CRIME CONVICTION OF FORMER PERSONNEL ADMINISTRATOR JERRY OLSHAKER AND THE CONCEALMENT OF THE CONVICTION BY THE DIVISION OF PERSONNEL (Oct. 1991).

[120] *See* SCI, SCHOOL CUSTODIANS, *supra* note 59.

[121] *See* SCI, AN INVESTIGATION INTO THE MISMANAGEMENT AND DELIVERY OF FOOD SERVICES BY THE BOARD OF EDUCATION OF THE CITY OF NEW YORK (June 1995).

[122] *See* SCI, INVESTIGATION INTO BOARD OF EDUCATION LEASED PROPERTIES (Sept. 1996).

A. *Superintendents—The Next Local School Bosses?*

1. New Incentives for Corruption by Superintendents

In view of the hundreds of district jobs and multi-million-dollar budgets that superintendents now control, it is no stretch to envision superintendents as the next local school bosses.[123] They stand to gain a great deal if they divert even a fraction of their district resources for themselves. Moreover, doling out patronage would enable superintendents not only to enhance their political status and enrich their families, but also to buy job security. By dispensing jobs to district parents, friends of politicians, and BOE officials, superintendents could build loyal networks of supporters to help them if the Chancellor should decide not to renew their contracts. For example, Chancellor Crew has certainly shown that he is susceptible to demands of local constituents.[124]

Furthermore, corruption by superintendents is not hard to envisage because it is not new. Investigations have revealed that a number of superintendents committed fraud.[125] One superintendent reportedly subverted a screening committee so that the school board would select a certain principal.[126] In one widely publicized case, District 32 board members relied on their superintendent to obtain funding to create do-nothing pilot pro-

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[123] School-based budgeting, the new system designed to shift certain spending decisions from the BOE to individual principals, is unlikely to diminish superintendents' ability to profit from district budgetary control. Superintendents will still be in charge of allocating discretionary funds to principals in their districts and must approve all school-based budgets. *See* N.Y. EDUC. LAW § 2590-f(1)(h) (McKinney Supp. 1999).

[124] Since the law went into effect, Chancellor Crew has withdrawn from almost every difficult political battle with local boards and parents. For example, when the parents at Public School 41 wanted to pay for an extra teacher from their own pockets in order to keep class sizes down in the fall of 1996, Chancellor Crew initially rebuffed them. He insisted that it was unfair to allow middle-class parents to pay for a teacher when poor parents could not afford to do so. However, shortly after the parents filed a lawsuit, Crew agreed to hire an extra teacher. *See* Anemona Hartocollis, *Chancellor to Keep Teacher in Her Job In Parents' Victory*, N.Y. TIMES, Sept. 26, 1997, at A1. About two weeks later, Crew again acceded to the demands of another group of vocal parents for an extra teacher. *See* Hartocollis, *Again, Parents Faulting Class Sizes Are Appeased*, N.Y. TIMES, Oct. 8, 1997, at B2.

[125] *See, e.g.*, Nina Bernstein, *Legalities May Block Removal of Medina*, NEWSDAY, Dec. 10, 1988, at 2 (describing how a superintendent diverted money to create a $56,000 slush fund for his personal use); Sylvia Moreno, *Stein Asks for Criminal Probe of Bronx School District Chief*, NEWSDAY, Aug. 6, 1991, at 8 (describing findings that a superintendent stole district funds to pay for personal expenses, including life insurance premiums and meals).

[126] *See* BOE, Office of Inspector General Case No. 595 (1986-87) (unpublished case file, on file with NYC BOE).

grams to employ their relatives.[127] Today, moreover, superintendents have even more to gain from corruption than they did under decentralization: as sole bosses of their districts, they no longer have to share any of the stolen funds with the board.

2. Disincentives for Corruption by Superintendents

a. *New provisions to strengthen oversight and internal surveillance.* Although the opportunities for superintendent corruption are serious, the school governance law offers several mechanisms to alleviate these alarming possibilities. First, legislators sought to tighten managerial oversight in the school system and improve internal surveillance. Drawing on the New York State Governmental Accountability, Audit, and Internal Control Act of 1987, a statute designed to promote oversight and integrity in all state agencies,[128] legislators required the Chancellor to hire thirty-two new "internal control officers" to act both as auditors and "managerial facilitators."[129]

In their role as auditors, internal control officers execute regular audits and work with the Auditor General to conduct random audits of school districts at least once every two years in order to combat "fraud, waste and mismanagement."[130] While audits are believed to deter such wrongdoing by uncovering incidents of major fraud and conflicts of interest,[131] managerial oversight is believed to discourage low-level fraud by working to ensure compliance with official procedure.[132]

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[127] *See* THE NEW TAMMANY HALL, *supra* note 43, at 98.

[128] N.Y. STATE FIN. LAW § 2-a (McKinney 1995). The New York State Governmental Accountability, Audit, and Internal Control Act of 1987 [hereinafter NY Gov't Accountability Act], requires implementation of a comprehensive system of internal control and auditing throughout the state government. The law is intended to safeguard the "effective and efficient use of government resources and ensure the integrity of accounting systems." *Id.* at § 2.

[129] N.Y. EDUC. LAW § 2590-h(37) (McKinney Supp. 1999). Internal control officers are to implement a new "system of internal controls, including internal administrative controls and internal accounting controls" to identify weaknesses in fiscal policy and develop strategies to rectify them. *Id.* While a number of city, state, and federal agencies already audit and investigate the BOE, the hope was that internal control officers would enhance the detection of wrongdoing and abuse. *See* Telephone Interview with Fong Chan, Associate Director of Legislation, Office of Deputy Chancellor for Instruction, Board of Education (Jan. 23, 1998).

[130] N.Y. EDUC. LAW § 2590-h(37) (McKinney Supp. 1999).

[131] *See* JOHN KLEINIG, ETHICS OF POLICING 220 (1996).

[132] While audits are usually directed at wrongdoing such as fraud, rather than incompetence, managerial oversight targets both incompetence and corruption. *See id.* at 220–23.

In their capacity as managerial facilitators, the BOE's internal control officers help the Chancellor oversee the school system by giving him up-to-date information about the responsibilities and efficacy of his chief subordinates, thereby helping him to reduce waste and abuse.[133] Under the BOE's proposed policy, division chiefs and district superintendents are to provide internal control officers with a description of their responsibilities, the procedures for completing those responsibilities, and an assessment of the risk to the school system should they fail to perform each responsibility according to proper procedure.[134] For instance, the chief of the billing division might list one of his tasks as paying bills within a certain number of days and assess the risk of failing to do so as being "very high." About once every three months, internal control officers ask these administrators whether they have completed their tasks according to proper procedure and then report back to the Chancellor.[135]

Legislators additionally sought to improve superintendents' managerial oversight of their districts by authorizing each to hire one or more "district fiscal officers" to monitor school expenditures pursuant to school-based budgeting procedures.[136] School-based budgeting, which was implemented in the fall of 1998 in all city schools, is intended to decentralize budgeting and allow principals to make certain purchasing and spending decisions, subject to the superintendent's review and approval.[137] District fiscal officers are to provide superintendents with information on whether principals are following the rules of proper resource allocation.[138]

b. *The likely impact of new provisions to strengthen oversight and surveillance.* While a step in the right direction, the law's measures to improve oversight and surveillance are unlikely to have a large impact on corruption by superintendents. Consider the provisions permitting superintendents to hire fiscal officers

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[133] *See* Telephone Interview with Fong Chan, *supra* note 129.

[134] This process, known as "risk assessment," is one of the principal tasks of internal control officers.

[135] *See* Telephone Interview with Fong Chan, *supra* note 129.

[136] N.Y. EDUC. LAW § 2590-f(1-i) (McKinney Supp. 1999).

[137] *See* N.Y. EDUC. LAW § 2590-r (McKinney Supp. 1999). The Chancellor's school-based budgeting regulations must provide for revenue allocation among community districts and their schools and allow the principal of each school to propose an expenditure budget. *See id.*

[138] *See* N.Y. EDUC. LAW §§2590-f(1)(I), 2590-r (McKinney Supp. 1999).

to monitor district finances. These officers are supposed to examine school-based spending by individual principals and local district offices. Fiscal officers are not, however, investigators or field auditors who visit schools and conduct in-person interviews.[139] They do not telephone vendors to verify whether receipts are authentic, much less visit sites to see whether goods have actually been delivered. Field officers merely gather receipts and documents to determine whether the proper procedures for spending money have been followed.[140] As discussed below, field auditors are far more likely to uncover fraud than are officers who examine forms in their offices.

Moreover, even if fiscal officers did uncover fraud in their district, they probably would not expose it because they work directly for the superintendent, who runs the district. Further, New York City public school history suggests that fiscal monitors are no guarantee of fiscal integrity in school-district bureaucracies. One of the most scandal-ridden districts in the city, District 9, was forced to accept BOE fiscal monitors for years; however, this had no apparent effect on the mounting records of fraud and corruption.[141] Thus, there is little reason to believe that the installation of fiscal officers will reduce corruption now. For the aforementioned reasons, the law's provision for district fiscal officers will probably do little to stem fraud by superintendents.

The new law's attempts to improve the investigation of superintendents and their district office staff members are also unlikely to have much impact on corruption. Although the law required, and legislators provided the funds for, the BOE to hire thirty-two new internal control officers to conduct regular audits and to assist in random audits of community school districts,[142] the BOE had hired only six new auditors as of April 1998.[143] It is doubtful whether so few additional auditors can make a difference in deterring fraud in the system's extensive bureaucracies, especially considering the tremendous influx of paperwork and corruption opportunities that school-based budgeting will generate in more than 1,000 schools. Furthermore, internal control

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[139] *See* Telephone Interview with Diane Byron, Office of Auditor General, Board of Education (Apr. 15, 1998).

[140] *See id.*

[141] *See, e.g.*, Rose Marie Arce, *Politics as Usual: Fear Relapse in Bronx School District*, N.Y. DAILY NEWS, Apr. 3, 1989, at 3.

[142] *See supra* text accompanying note 129.

[143] *See* Telephone Interview with Diane Byron, *supra* note 139.

officers, who act as both managerial facilitators and auditors, face an inherent conflict of interest that could diminish their effectiveness in ferreting out fraud: as facilitators, they are rewarded for *preventing* problems and having a *cooperative relationship* with management, while as auditors, they are rewarded for *exposing* problems and having a more *adversarial* relationship with the employees they investigate.[144]

Further, the BOE's six new internal control officers, like most of its existing fifteen auditors, are to act as desk auditors, not field auditors.[145] Desk auditors primarily check whether documents are properly completed and signed. Field auditors, on the other hand, visit sites and interview people in the field to determine whether receipts are authentic and goods were actually delivered.[146] Investigations suggest that the threat of serious investigation by field auditors can be crucial to deterring corruption. As one dishonest administrator who faced the prospect of a serious field investigation told an undercover vendor in a secretly recorded conversation, "Don't shortchange [i.e., under-deliver] while I'm here."[147] The administrator was concerned that a crooked colleague of hers had "blow[n] it . . . in front of the Chancellor," who had dispatched investigators.[148] Because desk audits are less probing than field audits, the BOE's new internal control officers are unlikely to be a major deterrent to corruption.

Patronage by superintendents is also unlikely to be exposed or punished by BOE auditors, outside investigators, or prosecutors. Patronage has always been difficult to unearth and prosecute.[149] Now, patronage problems by superintendents will be even harder to uncover than were abuses by school board members under the former law. While board members needed the agreement of at least five other members in order to hire most of their patronage appointees, superintendents can keep their dealmaking between themselves and their hirees.

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[144] *See generally* ANTHONY DOWNS, INSIDE BUREAUCRACY 149 (1967). Indeed, the BOE's Office of Auditor General has been criticized for being unclear on whether its main mission was "to uncover wrongdoing" or "to advise the system on how to improve budget, purchasing, payroll and other business and personnel practices." IMPROVING THE ODDS, *supra* note 32, at 164.

[145] *See* Telephone Interview with Diane Byron, *supra* note 139.

[146] *See id.*

[147] SCI, PAPER, PENCILS, *supra* note 118, at 22.

[148] *Id.*

[149] *See generally* Segal, *Difficulties Prosecuting Political Patronage*, *supra* note 115.

c. *New mechanisms to hold superintendents accountable for pupil performance.* Another way in which the school governance law could potentially check corruption by superintendents is by holding them accountable for student achievement. Under the former decentralization regime, most superintendents were, in effect, not accountable for student learning. The Chancellor had little power to intervene in failing districts, and most school boards were content as long as the superintendent helped them obtain patronage and kickbacks.

Under the new law, however, superintendents report to the Chancellor rather than the school boards.[150] Furthermore, legislators empowered the Chancellor to fire failing superintendents.[151] In doing so, the New York legislature has followed a nationwide movement to improve public-sector efficiency by focusing evaluations on whether workers have completed their tasks satisfactorily—referred to as "performance accountability"[152]—rather than focusing on whether they complied with proper procedures—referred to as "compliance accountability."[153]

Although performance accountability is usually thought of as a way to improve efficiency and not as a means to fight corruption,[154] it could indirectly reduce certain types of corruption.

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[150] *See* N.Y. EDUC. LAW § 2590-f (McKinney Supp. 1999).

[151] *See* N.Y. EDUC. LAW § 2590-h(30-a) (McKinney Supp. 1999). Other performance accountability reforms in the new law include empowering the Chancellor to remove or transfer principals for "persistent educational failure," N.Y. EDUC. LAW § 2590-h(25) (McKinney Supp. 1999), and to intervene in failing schools, *see* N.Y. EDUC. LAW § 2590-h(31) (McKinney Supp. 1999).

[152] *See* MICHALE BARZELAY & BABAK ARMAJANI, BREAKING THROUGH BUREAUCRACY: A NEW VISION OF MANAGEMENT IN GOVERNMENT (1992); PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY, 3, 11–12 (1993); SHELDON, *supra* note 19. Performance accountability reforms in education have included the creation of clear standards by which performance may be gauged and systematic penalties and rewards that give employees incentives to improve. *See* Richard F. Elmore et al., *The New Accountability in State Education Reform: From Process to Performance*, *in* HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION (Helen F. Ladd ed., 1996) at 65, 73 [hereinafter HOLDING SCHOOLS ACCOUNTABLE]

[153] According to Max Weber's model of traditional bureaucracy, compliance accountability ensures that workers do what they are told and that supervisors watch them. *See* ROSE-ACKERMAN, *supra* note 9, at 166.

[154] *See generally* Helen F. Ladd, *Introduction*, and Charles T. Clotfelter & Helen F. Ladd, *Recognizing and Rewarding Success in Public Schools*, *in* HOLDING SCHOOLS ACCOUNTABLE, *supra* note 152 at 1, 2, 5. Compliance accountability, on the other hand, is regarded as a tool to root out corruption. *See* SUSAN H. FUHRMAN & RICHARD F. ELMORE, CONSORTIUM FOR POLICY RESEARCH IN EDUCATION RESEARCH, RULING OUT RULES: THE EVOLUTION OF DEREGULATION IN STATE EDUCATION POLICY 20 (1995); LIGHT, *supra* note 152, at 14.

First, to the extent that some types of corruption cause poor student scores and employees are answerable for those results, employees will have incentives to avoid those types of corruption.[155] Second, since poor results are likely to draw greater scrutiny from management under a performance accountability system, performance accountability could also deter corruption by heightening management's visibility.[156] Additionally, if findings of poor performance are viewed as a sign of potential corruption and thus trigger investigations, performance accountability could increase the likelihood that wrongdoing will be detected.[157]

To hold superintendents accountable for performance, the Chancellor has required them to provide him annual District Comprehensive Educational Plans ("DCEPs").[158] A DCEP is an agreement between the Chancellor and the superintendent in which the superintendent lists all the educational goals he intends to implement in his district and describes how and when he will attain them.[159] Each goal must be accompanied by a timetable and an "action plan" describing how the superintendent will attain it.[160] For example, a superintendent might pledge to increase the percentage of third-graders scoring at or above the national average in reading and math by three to five points by June 1999 by implementing an early intervention program.[161]

DCEPs, which are the cornerstones of the Chancellor's effort to comply with the law's requirement that he establish "mandatory educational objectives,"[162] are intended to enable him to hold superintendents to their listed goals and timetables.[163] As an

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[155] *See* John A. Gardiner & Theodore R. Lyman, *The Logic of Corruption Control*, *in* POLITICAL CORRUPTION: A HANDBOOK, 827, 830 (Arnold J. Heindenheimer et al. eds., 1993).

[156] *See id.* at 832.

[157] Just as performance audits that uncover waste and inflated prices can signal the need for management to investigate further, so, too, could findings of poor performance. *See* SHELDON, *supra* note 19, at 42–44.

[158] *See* BOE, Office of the Chancellor, Guide to Completing District Comprehensive Educational Plans 3 (1998) (unpublished guide on file with BOE) [hereinafter BOE, DCEP Guide].

[159] *See id.* at 18. DCEP goals concern instructional and administrative leadership, professional development, pupil support services, and parent community involvement. *See id.* at 15–16. Superintendents' DCEP goals must be consistent with the Chancellor's city-wide goals and be approved by him. At the same time, superintendents are encouraged to tailor their goals to their districts' particular needs. *See* Telephone Interview with William Casey, Chief Executive for Programs Development and Dissemination, Board of Education (Feb. 6, 1998).

[160] *See* BOE, DCEP Guide, *supra* note 158, at 15, 18.

[161] *See id.* at 18.

[162] *See* N.Y. EDUC. LAW § 2590-h(8) (McKinney Supp. 1999).

[163] *See* Telephone Interview with William Casey, *supra* note 159.

addendum to the superintendent's contract, the DCEP is a binding agreement between the superintendent and the Chancellor.[164] If the superintendent does not abide by his DCEP, he breaches his contract and may be removed.[165]

Additionally, the new law allows the Chancellor to remove under-performing schools and districts from superintendents' control. If a school or district is "persistently failing to achieve educational results and standards" or is in a state "of uncontrolled or unaddressed violence," the Chancellor can supersede the superintendent's decisions, force him to implement a "corrective action plan," and, if he fails to implement the plan, assume control of the school or district.[166]

d. *The likely impact of new performance accountability mechanisms on corruption.* The likelihood that the law's accountability provisions will reduce corruption by superintendents depends on the type of corruption involved, the ease and consistency with which the Chancellor can uphold and enforce performance standards, and the Chancellor's will to punish poor performance.

First, for the school governance law to deter corruption, corruption must directly harm the dishonest official's performance evaluation. For example, superintendents are to be evaluated primarily on their attainment of DCEP goals, which involve matters ranging from student test scores to attendance rates.[167] Some types of corruption will affect these measurements, while others will not. For instance, systemic political patronage is likely to undermine superintendents' ability to lift student test scores because patronage encourages payroll padding and the diversion of money from the classroom to administration. The most patronage-ridden New York City school boards spend the

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[164] *See* N.Y. EDUC. LAW § 2590-1(1)(a) (McKinney Supp. 1999).

[165] The Chancellor may remove, suspend or supersede failing superintendents "for cause," N.Y. EDUC. LAW § 2590-e(1) (McKinney Supp. 1999), which includes breaching their contracts. According to Assemblyman Steven Sanders, who headed the education committee that helped draft the school governance legislation, the law was intended to give the Chancellor wide discretion in terminating a superintendent's contract. *See* Somini Sengupta, *Crew Rejects a Board's Pick for Top Post*, N.Y. TIMES, June 27, 1997, at B1.

[166] N.Y. EDUC. LAW § 2590-h(31) (McKinney Supp. 1999). The Chancellor can also intervene in schools and districts that fail to improve in accordance with standards approved by the seven-member city Board of Education or the state Board of Regents. *Id.*

[167] *See* BOE, DCEP Guide, *supra* note 158, at 2.

most per capita on administrators but the least on teachers.[168] Moreover, by making merit irrelevant, systemic patronage increases the risk that low quality personnel will be hired, thus further impairing student achievement.[169]

Larceny, on the other hand, is likely to harm superintendents' ability to raise test scores only in limited cases. Studies show that money spent in the classroom, such as on hiring quality teachers and reducing class size, directly affects learning, while spending on administration rarely does.[170] Thus, if larceny is directed against the classroom, it will probably harm superintendents' evaluations more than if it is directed against a bloated school district administration.[171] Yet other forms of corruption, like falsely over-representing educational accomplishments, may enhance superintendent evaluations. Thus, performance accountability will deter only certain types of corruption.[172]

However, to deter corrupt acts like patronage or the theft of classroom supplies, mechanisms must exist that enable management to enforce standards in meaningful ways. This means that standards that employees are expected to meet must be clear and the consequences for failing to meet them must be harsh.[173] If standards are unclear, their enforcement is likely to be inconsistent. Furthermore, they will not provide a clear deterrent because employees will not know when they will be punished for poor performance. Erratic enforcement of standards could even *encourage* corruption among employees who perceive that they can escape punishment.[174] Moreover, erratic enforcement of stan-

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[168] *See* Segal, *Pitfalls*, *supra* note 20, at 147.

[169] This tendency is suggested by many school investigations. *See, e.g.*, SCI, POWER, POLITICS, AND PATRONAGE, *supra* note 34, at 115; STATE DEPT. OF ED. OF NEW JERSEY, COMPREHENSIVE COMPLIANCE INVESTIGATION REPORT FOR THE JERSEY CITY SCHOOL DISTRICT (1988); Sam Dillon, *Testing Power, Cortines Will Seize 6 Bad Schools*, N.Y. TIMES, Apr. 29, 1994 at A1; Liz Willen, *Ultimatum On Principal*, NEWSDAY, July 29, 1994, at A26.

[170] *See* Eric Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 EDUC. RESEARCHER 45, 45–51 (1989).

[171] *See* BRUCE S. COOPER & ROBERT SARREL, MANAGING FOR SCHOOL EFFICIENCY AND EFFECTIVENESS: IT CAN BE DONE IN NEW YORK CITY 4–7 (1990) (a study of how dollars diverted from the classroom in NYC hurt education); Michael Fischer, *Fiscal Accountability in Milwaukee's Public Elementary Schools: Where Does the Money Go?* 3 WISCONSIN POLICY RESEARCH INSTITUTE REPORT 1, 19 (1990) (a similar study in Milwaukee).

[172] For performance accountability to deter corruption, corruption must also hurt rogue employees' evaluations in the short-term, not just the long-term. Otherwise, employees could avoid the consequences of their acts by transferring to other positions in the agency or leaving the system altogether.

[173] *See* KLEINIG, *supra* note 131, at 220.

[174] On the other hand, such erratic enforcement could also *discourage* corruption if

dards increases opportunities for corruption by management. As experts have pointed out, clarity in an agency's policy goals and decision-making process lessens opportunities for favoritism and payoffs.[175] Thus, unclear performance standards are likely to increase corruption by both employees and management.

The 1996 law required the Chancellor to establish "clear" standards and "mandatory" objectives.[176] However, the standards that have been set for superintendents are neither clear nor mandatory. For example, to comply with their DCEPs, superintendents do not necessarily need to attain the goals listed. They merely need to *try* to attain them by implementing the prescribed strategies in accordance with the prescribed time-tables.[177] As a result, superintendents can get away with corruption that undermines DCEP goals simply by showing that they *tried* to achieve those goals.

Additionally, when evaluating superintendents who fail to meet DCEP goals, the Chancellor's own guide to DCEPs suggests that he should take into consideration a multitude of extenuating factors, such as the district's demographics, poverty rates, teacher turnover rates, paucity of library books, and overcrowding.[178] While it is *possible* to design an accountability system that fairly assesses an educator's contribution to student learning after factoring out external factors, the literature suggests that it is difficult and controversial.[179] Because the current system is so unclear, management may fail to enforce it vigorously for fear of being seen as unfair or opening itself to litigation. Furthermore, once superintendents know that they can get away with poor performance by blaming it on external factors, they will be more willing to take the risk of engaging in harmful corruption. Unfortunately, there is no indication that the chancellor plans to devise a fair, objective way to factor out extenuating circumstances from superintendents' performance evaluations.

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employees fear that almost *anything* they do could trigger punishment for poor performance. However, standards that are unclear are usually subject to lengthy litigation and may thus never be enforced. Therefore, erratic enforcement of unclear standards is more likely to encourage, rather than discourage, corruption.

[175] *See* Gardiner & Lyman, *supra* note 155, at 830.

[176] *See* N.Y. EDUC. LAW § 2590-h(8) (McKinney Supp. 1999).

[177] *See* BOE, DCEP Guide, *supra* note 158, at 2.

[178] *See id.* at 11.

[179] *See* Charles T. Clotfelter & Helen F. Ladd, *Recognizing and Rewarding Success in Public Schools*, *in* HOLDING SCHOOLS ACCOUNTABLE, *supra* note 154, at 23 and 63.

The standards regarding when the Chancellor can intervene and assume control of a failing school or district are also unclear. Although the law provides for take-overs when a school or district is "persistently failing to achieve educational results" or is in a state "of uncontrolled or unaddressed violence," no regulations articulate what these phrases mean.[180] This uncertainty creates opportunities for inconsistent enforcement by the Chancellor, which can spawn favoritism and corruption.

The opportunities for corruption are further exacerbated by the fact that the enforcement of these unclear performance standards is not mandatory. Although the 1996 law requires the Chancellor to establish "mandatory" educational objectives,[181] his objectives are, in fact, merely hortatory. The Chancellor has chosen to interpret the word "mandatory" in the law to mean that educators should simply *try* to reach goals and standards.[182] No matter how dismal test results may be, the Chancellor does not *have* to remove a superintendent or intervene in failing schools and districts.[183]

Even though the 1996 law established accountability mechanisms, they will not affect superintendents' conduct unless the chancellor has the will and vision to enforce them.[184] As Professor John Kleinig has noted, the key to whether an organization is accountable depends on the "willingness" of its administrators to be held accountable and to conscientiously implement structural

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[180] N.Y. EDUC. LAW § 2590-h(31) (McKinney Supp. 1999). The Chancellor has chosen to interpret this standard for intervention separately from the "persistent educational failure" standard for removing or transferring principals under N.Y. EDUC. LAW § 2590-i(2)(a) (McKinney Supp. 1999) in order to maximize his flexibility. While the standard for firing principals for persistent educational failure under § 2590-i(2)(a) has been defined in regulations, the standard for intervening in schools and districts that are "persistently failing to achieve educational results" under § 2590-h(31) has not. Moreover, although the law states that the "results" referred to in § 2590-h(31) may be designated by the city board or the state board of regents, no such results have been specified.

[181] *See* N.Y. EDUC. LAW § 2590-h(8) (McKinney Supp. 1999).

[182] *See* Telephone Interview with Fong Chan, *supra* note 129.

[183] The chancellor has the "powers and duties" to intervene, but he need not. The law simply says that the chancellor "*may*" require the principal of a failing school to prepare a corrective action plan and "*may*" assume control of the school if it does not implement it. N.Y. EDUC. LAW § 2590-h(31) (McKinney Supp. 1999). Indeed, other than promulgating objectives, the only other mandatory requirement for the chancellor under the law is that he "*shall*" monitor the implementation of the corrective action plan for failing schools—but he does not need to do this unless he wishes to intervene in the first place. *See id.*

[184] *See* KLEINIG, *supra* note 131, at 211; Anemona Hartocollis, *Crew's Powers Go Untapped, Critics Assert*, N.Y. TIMES, Dec. 29, 1997, at B1.

accountability mechanisms.[185] For employees to have incentives to avoid corruption, they must believe that harmful conduct *will* have repercussions.

Many indeterminable factors, such as a chancellor's character and the trends of the times, affect whether he will have the determination to hold superintendents accountable for performance. One way to predict the effect of these factors is to examine the current chancellor's record under the new law and the records of other education officials with similar powers to hold educators accountable for their results.

Thus far, Chancellor Crew has been remarkably reluctant to use his new powers to hold superintendents accountable. This is especially telling because, before the law was passed, Crew stressed that he urgently needed the power to hire effective superintendents and to fire those who had negligent records, many of whose contracts were about to expire.[186] However, although the law passed in time for Crew to take action, he let the opportunity pass. He neither vetoed school board recommendations to renew the contracts of sub-par superintendents nor stopped other boards from ousting superintendents with proven track records.[187] In some cases, the Chancellor initially opposed board recommendations but backed down when confronted with strong political and parental opposition.[188] Thus, the Chancellor's own track record suggests that a chancellor's willingness to enforce accountability will be tempered by factors such as his desire to preserve peace within the system.[189]

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[185] *See* KLEINIG, *supra* note 131, at 211. In fact, without this willingness to be held accountable, structural accountability mechanisms may "even function as a shield against accountability, since they provide an appearance, but not the reality, of accountability." *Id.*

[186] While lobbying for the school reform bill, Chancellor Crew said that he would condition the re-appointment of superintendents largely on their district's performance on test scores. *See* Sengupta, *supra* note 165, at B1; Sengupta, *Timing Allows Crew To Respond Quickly*, N.Y. TIMES, Dec. 18, 1996, at B9 [hereinafter Sengupta, *Respond Quickly*]; Jacques Steinberg, *Crew, His Power Affirmed, Pledges a Local Partnership*, N.Y. TIMES, Apr. 3, 1997, at B3.

[187] *See* Sengupta, *Respond Quickly*, *supra* note 186.

[188] For instance, after initially rejecting the superintendent recommended by School Board 26, one of the city's highest performing districts, he accepted her when faced with angry local board and parental protests. *See* Sengupta, *supra* note 165, at B1. Crew similarly retracted his disapproval of School Board 28's nominee when it became clear that board support for him was strong and unanimous. *See* Sarah Kershaw, *Showdown In District 28?: Board Refuses Crew's Bid For More Choices*, NEWSDAY, Sept. 17, 1997, at A25.

[189] Even though Chancellor Crew has Mayor Giuliani's support, such support may be withdrawn to the extent the Mayor's constituents are dissatisfied with the Chancellor's policies.

Other education executives with power to hold educators accountable display a similar lack of will to enforce performance accountability sanctions. Despite tough talk about performance accountability in school districts across the nation, administrators are rarely willing to impose serious sanctions.[190] Politicians and executives generally prefer to take the least aggressive measures available, such as placing failing schools on state "watch" lists, requiring educators in low-achieving schools to devise improvement plans, and assigning distinguished educators to work with low-performing schools.[191] Under-performing schools are rarely closed, and educators are infrequently removed for incompetence.

In New York, recent Commissioners of Education have demonstrated this reluctance to apply serious sanctions to under-performing schools. Although the Commissioner has a legal obligation to shut down schools on the state's watch list if their average scores on state-wide exams do not improve within three years,[192] many schools linger on the list for much longer.[193] The Commissioners have almost uniformly chosen to "redesign" failing schools rather than shut them down.[194] When a school is redesigned, at most fifty percent of the staff may be transferred to other schools.[195] A new replacement school can start with a completely new staff.

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[190] For a discussion of performance accountability in education in various school districts today, *see* Elmore, et al., *supra* note 152, at 66–68.

[191] *See* Lynn Olson, *Failing Schools Challenge Accountability*, EDUC. WEEK, Mar. 25, 1998, at 1, 14.

[192] When a school falls below certain benchmarks on state-wide exams, the Commissioner may place it on the state's watch list. Such schools are called schools under registration review ("SURR"). *See* 8NYCRR 100.2(p)(4). Once on the SURR list, a school has three years to improve. *See* 8NYCRR 100.2(p)(5)(iii)(v). If the school does not improve within three years, "the commissioner *shall* recommend to the Board of Regents that the registration be revoked . . . ." *Id.* (emphasis added). No public school may operate without state registration. *See* 8NYCRR 100.2(p).

[193] *See* John Hildebrand, *Shape Up or Close—NY Plan: Give Worst Schools 2-year Deadline*, NEWSDAY, Nov. 2, 1995, at A4.

[194] If a school does not improve within three years, the Board of Education may redesign or reorganize it under a corrective action plan overseen by the state. *See* 8NYCRR 100.2(p)(9)(ii). From 1989 through February 1996, the Board of Education redesigned twelve SURR schools. *See* Fax from the Board of Education, Division of Assessment and Accountability (Mar. 2, 1998) (on file with author). *See also* Sam Dillon, *16 High Schools Marked For Remedial Measures*, N.Y. TIMES, Apr. 30, 1994, at 27.

[195] The United Federation of Teachers' contract with the City Board of Education requires redesigned schools to offer at least 50% of existing staff jobs to teachers from the "impacted school" in order of seniority. *See* AGREEMENT BETWEEN THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND THE UNITED FEDERATION OF TEACHERS, Oct. 16, 1995, art. 18(G)(3). Staff who are transferred must be given the broadest placement choice available within the district. If no

One reason education executives rarely resort to more serious sanctions for poor performance is their desire to keep peace with unions. Education officials and politicians have been affected by the protests that unions have orchestrated when their members have been threatened with punishment for poor performance.[196] In Kentucky, for instance, after widespread teacher complaints over laws permitting staff to be placed on probation in "schools in crisis," the legislature voted to suspend the provision for two years.[197] Legislators also backed down from their mandate to have outside auditors score student writing portfolios when teachers protested that the outside scores were lower than those they awarded.[198]

Another reason education executives do not often resort to the toughest sanctions is that they usually adopt pro-union policies that require intervention attempts before failing school staff members may be fired.[199] Furthermore, education executives rarely resort to more serious sanctions for poor performance because education laws and school policies are usually designed to preempt them. Most states have laws or policies that shower failing schools with special resources and attention, thus enabling them to lift performance measures enough to avert penalties, even if only temporarily. In New York City, for instance, the Chancellor preempted the closure of twelve of the city's worst schools by taking them under his wing in a specially created chancellor's district and infusing them with $7.79 million.[200] Besides diluting the use of performance accountability, such laws and policies can even encourage corruption because rogue officials know that they can deplete school resources through crimes like larceny and fraud and, as a result, receive more money from the government.

The pattern displayed by New York's education commissioners and others suggests that central authorities such as New York City chancellors will favor non-confrontational measures rather

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other vacancies exist, tenured staff must be given administrative jobs at the same salary. Only after it has offered jobs to teachers and staff from the old school can the redesigned school hire new staff. *See id.*

[196] *See* Elmore, et al., *supra* note 152, at 85–86.

[197] *See id.* at 71, 86. While certain sanctions were suspended, rewards were not. *See id.* at 86.

[198] *See id.* at 86.

[199] *See* Olson, *supra* note 191, at 14.

[200] *See id.* The additional funding resulted in smaller class sizes, more library books, better technology, and programs to help literacy, math, and technology.

than more serious sanctions when holding educators accountable for poor school performance. For the Chancellor, for example, this might translate into overriding the decision of a superintendent whose district fails rather than firing him.[201] Since performance-based accountability is likely to deter corruption only if poor evaluations have serious consequences, a reluctance to impose such consequences will signal that employees can engage in wrongdoing with virtual impunity.

Even if the Chancellor had the will to punish superintendents for poor performance, it would be unrealistic to expect that he could effectively oversee, let alone closely monitor, the progress of each of the system's forty-plus superintendents in meeting their DCEP goals. It is impractical to expect any chancellor who oversees an $8 billion-plus school system, is responsible for overseeing tasks ranging from school construction to procurement, and must navigate the city's treacherous political waters, to catch and punish superintendent cover-ups. Plus, superintendents are likely to hide problems from the Chancellor,[202] which will further decrease the chancellor's oversight capabilities.

It is also questionable whether the BOE can effectively help the Chancellor monitor superintendents' performance. The BOE has historically been a notoriously poor overseer and manager.[203] Some of its most serious areas of mismanagement directly impinge upon its ability to measure superintendents' performance. In 1987, for instance, a borough presidential task force found that the BOE was unable and unwilling to help the Chancellor evaluate whether school districts were meeting his then-minimum educational standards.[204] The task force found that the BOE evaluated districts only when it *had to*, such as to renew funding for federal programs.[205] Even then, its evaluations were

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[201] He might also decline to take over persistently failing schools or decide to take them over but transfer few or no original staff members.

[202] *See, e.g.*, SCI, TREATING THE VICTIM AS THE ACCUSED: INTERIM ACTING PRINCIPAL JEWEL MOOLENAAR'S SERIOUS MISHANDLING OF THE COMPLAINT OF A SEXUALLY ABUSED CHILD AT CS 129X (1992). In general, subordinates in hierarchical organizations tend to be reluctant to pass on unfavorable and complete information. *See* Charles A. O'Reilly, III & Karlene H. Roberts, *Information Filtration in Organizations: Three Experiments*, 11 ORGANIZATIONAL BEHAVIOR AND HUMAN PERFORMANCE 253 (1974).

[203] For some examples of BOE mismanagement, see, e.g., SCI, CHAOS, *supra* note 54, at 116–22; Patricia Hurtado, *Grammar Lost in the Translation*, NEWSDAY, June 8, 1991, at 10.

[204] *See* IMPROVING THE ODDS, *supra* note 32, at 148.

[205] *See id.* at 149.

mostly pro forma, empty exercises in filling out forms.[206] The BOE administrator in charge of the evaluations did not even know who was supposed to monitor schools' compliance with minimum standards.[207] Even after the Chancellor convened a special commission to tighten scholastic standards, BOE administrators still had no idea what they would do if districts failed to meet them.[208]

In addition, more recent exposés show that the BOE has been chronically unable to keep accurate statistics of student enrollment and incidents of school violence.[209] Since the BOE has not done anything to address these different areas of mismanagement, it is unlikely to be able to measure superintendents' performance accurately, thus making it improbable that it could effectively deter corruption by superintendents.

B. *The Central BOE—A Haven for More Corruption?*

1. Corruption Opportunities Resulting from Fragmentation of Authority, Poor Communication, and Inadequate Technology

The most common response to decentralized scandals is to strengthen the central hierarchy and diminish the discretion of local employees.[210] Centralization, however, may simply shift the problem "upstairs," depending on the structure and integrity of the bureaucracy in question. When legislators drafting the New York school governance bill removed power from local school boards and gave it to the BOE and superintendents, they apparently imagined that the BOE embodied the bureaucratic ideal where review of lower-level decisions by competent upper-echelon administrators would reduce many types of corruption. Instead, it is very difficult for anyone to review the decisions of BOE division chiefs because their tasks are extremely special-

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[206] *See id.* at 154.

[207] *See id.* at 148.

[208] *See id.* at 153.

[209] *See, e.g.*, Susan Edelman, et al., *Classroom Bungle; Mystery of Missing 55,000 Students; Schools Can't Account for the Absentees;* N.Y. POST, Mar. 1, 1998, at 8 (describing the Board Of Education's failure to account for 55,000 students who were registered but had not shown up for class); Susan Edelman & Maria Alvarez, *Rikers School for Teens Accused of Padding Its Rolls*, N.Y. POST, May 24, 1998, at 20 (describing a city school that illegally received millions of dollars by padding its attendance records).

[210] *See* ROSE-ACKERMAN, *supra* note 9, at 174.

ized.[211] Investigations reveal that the head of one BOE division rarely knows what another division head does.

The Chancellor is similarly uninformed about the duties of BOE division chiefs. Overwhelmed by responsibilities, paperwork, and complex data, he has little time and ability to review his subordinates' decisions.[212] Moreover, to obtain cogent information about his subordinates' decisions, the chancellor is generally at the mercy of the bureaucracy's entrenched division chiefs, who are known to guard their turf fiercely. Even if the division chiefs *want* to make certain information available to the chancellor, they are often unable to obtain it themselves. As information passes up the BOE hierarchy, it is often distorted or lost because of incompetence, mismanagement, low-level corruption, or the system's notoriously antiquated filing system.[213] These problems are aggravated by the short tenure of chancellors. With little time on the job, chancellors do not have the opportunity to develop trusting relationships with their subordinates that might mitigate dysfunctional communication.[214]

This fragmented structure has permitted some division chiefs to run their divisions as personal fiefdoms for their own benefit.[215] At the same time, the lack of review *within* divisions has also permitted lower-level employees to engage in wrongdoing. Thus, by re-centralizing power in the BOE, legislators may have unwittingly created a haven for corruption.

2. Impact of Improved Oversight and Surveillance on Corruption Stemming from the BOE's Fragmentation, Poor Communication, and Poor Technology

The 1996 law's provisions that improve oversight and surveillance are unlikely to diminish opportunities for corruption in

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[211] When many subordinates have high levels of expertise, organizations tend to be horizontal rather than vertical, and upward communication is inhibited. *See* RICHARD H. HALL, ORGANIZATIONS; STRUCTURE AND PROCESS (1982).

[212] The sheer size of a bureaucracy may add to its unmanageability and make it easy to conceal wrongdoing. *See* KLEINIG, *supra* note 131, at 211.

[213] *See, e.g.*, SCI, PRIVATE INTEREST OVER PUBLIC TRUST: AN INVESTIGATION INTO CERTAIN IMPROPRIETIES BY THE LEADERSHIP AT THE DIVISION OF SCHOOL SAFETY 27–31 (July 1992) [hereinafter SCI, PRIVATE INTEREST].

[214] *See generally* O'Reilly & Roberts, *supra* note 202.

[215] *See, e.g.*, SCI, PRIVATE INTEREST, *supra* note 213. (describing how personal friendships and financial dealings among top officials at the Board of Education compromised the bureaucratic reporting and review process and resulted in patronage and nepotism).

the BOE. The new internal control system is unlikely to deter corruption or improve the quality of information passed up through the bureaucracy. For information on the goals of various BOE divisions and progress made towards them, internal control officers depend entirely on division chiefs rather than independently verifying the information they receive. However, division chiefs are unlikely to list goals at which they are likely to fail. They are even more unlikely to disclose corruptive practices conducted by themselves or their subordinates. Given the fragmented structure of the BOE, it will be difficult for the Chancellor to know whether the information he receives from internal control officers is accurate. Furthermore, since the BOE has only hired six internal control officers for the entire city, these officers will be even less likely to significantly assist the Chancellor with his oversight and surveillance duties.

3. Corruption Resulting from Regulatory Bottlenecks

The new law has also failed to adequately address BOE corruption that stems from bottlenecks created by "red tape."[216] The literature shows that such bottlenecks often lead to corruption because they provide incentives for contractors, and other parties to offer payoffs.[217]

The BOE has already been plagued by a number of scandals stemming from bureaucratic bottlenecks. Exposés show that a number of BOE educators resorted to fraud to avoid the delays and frustration inherent in the BOE's regulation-laden process for ordering supplies.[218] For example, to buy computer diskettes, a school employee must first peruse the Bureau of Supply's ("BOS") voluminous catalog to determine whether the BOE has a contract for diskettes. If it does not, the employee has to obtain three bids.[219] Then the employee has to apply to BOS for the paperwork to order the diskettes, which could take as long as a

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[216] Instead of simplifying the BOE, the 1996 law *added* another layer of bureaucracy to it. The law provides for five new borough deputies to act as liaisons between the BOE and their respective city borough presidents on borough-specific educational issues. *See* N.Y. EDUC. LAW § 2590(h)(32) (McKinney Supp. 1999).

[217] *See* LIGHT, *supra* note 152, at 230; ROBERT KLITGAARD, CONTROLLING CORRUPTION 193, (1988).

[218] *See* SCI, PAPER, PENCILS, *supra* note 118, at 66.

[219] Three telephone bids are required for amounts between $25 and $5,000. Three written or faxed bids are required for amounts between $5,001 and $10,000. *See* BOE, STANDARD OPERATING PROCEDURE MANUAL, at 25.

month. Once the paperwork is complete, the school forwards it, along with three bids if necessary, to the district office for review. This review could take over a year.[220] From there, the paperwork goes to the BOE Financial Management Center, where it remains "buried on a desk . . . , under dozens of similar documents" for lengthy periods until the funds are encumbered.[221] Only then can the BOE mail the order to the vendor, who usually requires a minimum of three to seven weeks for delivery. If there is a mistake in the paperwork, moreover, it has to be sent back to the school, where the process starts all over again.

To avoid these hassles, employees conspired with vendors to create illegal "credit pools." An employee would order supplies from a vendor on the understanding that the goods would not be delivered. The vendor would deposit the money that the BOE paid for the fictitious goods in an account referred to as a credit pool, which the vendor and employee could spend as they pleased.[222] Employees who wanted to order items unavailable through the BOE, needed items delivered quickly, or just wanted to avoid the hassles of obtaining three bids simply asked their vendors to deliver the items and charge their credit pools.[223] While many educators used credit pools to advance academics, others used them to bilk the BOE. For instance, some quickly realized they could use credit pools for personal enrichment, like paying their rent.[224] Vendors also profited from credit pools by charging inflated prices for goods.

4. Impact of Law's Efforts to Reduce Regulatory Bottlenecks

Cognizant of some of these bureaucratic incentives for corruption, legislators added provisions to the 1996 law that require the Chancellor to develop a new procurement policy to "guard against favoritism, improvidence, extravagance, fraud and corruption."[225] As part of this effort, the Chancellor tried to streamline the procurement process. He permitted superintendents and select school personnel to buy supplies and services directly

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[220] *See* Jim Dwyer, *School District's Forte Is Larceny, Not Books*, NEWSDAY, May 8, 1991, at 2. Purchase orders for *Charlotte's Web*, *My First Thesaurus*, and other children's books languished in one district office, unprocessed, for over one year.

[221] SCI, PAPER, PENCILS, *supra* note 118, at 9.

[222] *See id.* at 2.

[223] *See id.* at 6.

[224] *See id. at* 23.

[225] NY EDUC. LAW § 2590-h(36) (McKinney Supp. 1999).

from local vendors if they could show that the supplies were cheaper than what the BOE could offer.[226] The Chancellor also sought to speed up the purchasing process by permitting designated local employees to buy goods through "fast track," a new electronic purchasing system.[227] So long as goods are on the BOE's "master list," which includes only the goods and services for which the BOE has contracted in advance, authorized employees may place an order on their computers.[228] Delivery takes three to seven weeks, instead of six months, as used to be the case. Moreover, because materials may now be delivered reasonably soon after an order is placed, fast track made it unnecessary for the BOE to stockpile goods in its warehouse, which was known as the "sieve" because it was hopelessly ridden with thievery.[229]

While an excellent first step, neither the direct local purchasing option nor fast track goes far enough to diminish bureaucratic incentives for corruption. Although the direct local purchasing option permits certain *local* employees to buy goods directly from vendors,[230] *central* bureaucrats have no such option. Thus, central administrators will still have incentives to bypass regulations and illicitly order goods from vendors.

Fast track also fails to streamline the payment process. Invoices must still wind their way through the billing location, the BOE's Office of Purchasing Management, and the City Comptroller, who eventually mails the check to the vendor.[231] Thus, vendors still have incentives to engage in fraud in order to secure quick payments. School employees also have incentives to engage in corruption if they want to buy goods that are not on the BOE's master list since fast track does not apply to these goods.

The BOE's specific new safeguards against procurement fraud are also unlikely to stop abuse. Under the new policy, the BOE is to make a payroll deduction if any community school district employee buys goods directly from a vendor but cannot provide auditors with a receipt.[232] However, a receipt is no guarantee against theft. A receipt merely shows that a purchase was made.

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[226] *See* Telephone Interview with Louis Benevento of the BOE, Office of Purchasing Management, Jan. 27, 1998.

[227] *See id.* Authorized employees must enter a security code to make an order.

[228] *See* Telephone Interview with Louis Benevento, *supra* note 226.

[229] SCI, PAPER, PENCILS, *supra* note 118, at 62.

[230] *See* N.Y. EDUC. LAW §§ 2590(h)(36), 2590-i(1)(h) (McKinney Supp. 1999).

[231] *See* Telephone Interview with Louis Benevento, *supra* note 226.

[232] *See id.*

It does not show for whom the purchase was made or where the goods went. A serious effort to uncover wrongdoing requires frequent, unannounced field audits that involve auditors visiting sites to determine whether goods were delivered.

Lastly, outside of school procurement, the new law did not address incentives that the excessive bureaucracy provides for corruption, such as the incentives in the areas of custodial services, leasing, school construction, and food services.

C. *Other Corruption Incentives Created by the New Law*

As with any system that seeks to reward officials' successes and punish their failures, the new school governance law will provide incentives for certain officials to fraudulently overstate performance. Such a system could spawn unethical behavior of varying degrees. At worst, officials will adulterate test results, obstruct investigations of student performance or violence, and falsify attendance and drop-out records. At best, they may simply encourage under-performing students to stay home during tests, or they may funnel non-qualifying children into bilingual or special education classes where they may not be tested.

In New York City, for instance, the BOE excused large numbers of hard-to-teach children from city-wide tests in 1998.[233] In addition, principals, whose performance has been placed under increased scrutiny by the new law, have tampered with students' test results.[234]

Similar patterns surfaced in other school districts that introduced performance accountability. In Connecticut and New Orleans, principals were caught tampering with test results.[235] In Western Michigan, about seventy percent of students with reading problems did not take the annual state tests after a principal encouraged them to apply for exemptions.[236]

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[233] *See Cheating, Confusion and Chancellor Crew*, N.Y. POST, July 13, 1998, at 24.

[234] *See* Raphael Sugarman, *A Principal—Cheating?*, N.Y. DAILY NEWS, June 28, 1998, at 13.

[235] *See* Bess Keller, *In Age of Accountability, Principals Feel the Heat*, EDUC. WEEK, May 20, 1998, at 1.

[236] *See id.*

IV. SUGGESTIONS FOR REFORM

A. *Enhancements of the 1996 School Governance Law*

The 1996 school governance law represents one of the most ambitious efforts in the nation to address school corruption. Insofar as it aims to stem corruption by local school board members, it will probably succeed. However, it will probably increase corruption in the BOE and among superintendents unless safeguards are established to reduce incentives and opportunities for wrongdoing.

While legislators attempted to address some of these problems they did not go nearly far enough. Consider internal surveillance. To seriously deter fraud in the central BOE and community school district offices, the Chancellor needs to do much more than hire six internal control officers for the entire $8 billion-plus school system. He needs to hire many more auditors and require them to perform more frequent and comprehensive field audits. Officials would take fewer chances to engage in fraud if they thought auditors were more likely to make unannounced visits.

In addition, reducing chronic mismanagement and corruption in the BOE requires reform of the internal control system. Such reforms should include improving the flow of information within the bureaucracy, making division chiefs accountable to the chancellor, simplifying the BOE's review and reporting structure, and modernizing the BOE's antiquated filing and computer systems.

More must be done to reduce corruption caused by complicated procurement regulations. First, procurement procedures are too cumbersome and time-consuming for central administrators. This problem will continue to provide incentives for corruption because contractors have to wait too long to get paid within the system. Second, legislators must address corruption resulting from over-regulation of other BOE functions, such as school maintenance and leasing.

Furthermore, the law does not provide adequate safeguards against corruption by superintendents. District fiscal officers are not independent enough from superintendents to ferret out fraud in their offices. In addition, the law's new performance accountability measures, while among the most aggressive in the nation, are unlikely to provide superintendents with strong enough in-

centives to avoid wrongdoing. The Chancellor should clarify performance standards for superintendents and make them mandatory, not hortatory. Reformers should also make it easier for the chancellor to hold superintendents accountable for results by removing some of the procedural hurdles that the 1996 law erected. Specifically, they should repeal the superintendents' new right to appeal dismissals and supersessions by the Chancellor to the City Board of Education,[237] as well as the right of any school or district taken over by the Chancellor to appeal.[238] Reformers could further strengthen the use of performance accountability by mandating additional audits of any school or district with sub-par performance.

B. *Overhauling the BOE*

In light of the many opportunities for corruption in the central BOE, it is disappointing that legislators drafting the 1996 law did not explore alternative ways to reduce corruption other than through centralization. While some of the recommendations above, like increasing the number of field auditors, could probably reduce corruption in the current system, other recommendations, such as those to reduce mismanagement, will be hard to implement without overhauling the current system.

Reformers have been trying for years to reduce mismanagement at the BOE without much success. It is doubtful whether anyone ever could under the BOE's current framework. It will always be difficult to improve oversight within the BOE as long as chancellors remain in office for no longer than three or four years, administrators' responsibilities continue to require highly specialized knowledge, and division chiefs continue to be protected by the civil service. However, none of these three conditions is likely to change under the current school governance structure. First, given that the chancellor is hired and fired by a seven-member central city board beholden to six often warring politicians,[239] it is hard to envisage any chancellor lasting much

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[237] *See* N.Y. EDUC. LAW § 2590(l)(2) (McKinney Supp. 1999).

[238] Any school or district in which the Chancellor so intervenes—whether by superseding inconsistent decisions of the principal, community board or superintendent, or by assuming joint or direct control of the operation of the school or district—may appeal to the city board. *See* NY EDUC. LAW § 2590(h)(31) (McKinney Supp. 1999).

[239] *See* NY EDUC. LAW § 2590(g) (McKinney Supp. 1999). The five borough presidents each appoint one member to the seven-member central board of education, while

longer than four or five years. Second, given the sheer breadth and complexity of the BOE's current responsibilities, it is unlikely that the requirements for highly specialized knowledge will diminish. Third, while removing civil service status from division chiefs would force them to be accountable to the chancellor, this would require legislative reform that is not politically realistic today. For all these reasons, the current framework is unlikely to change. Therefore, the head of one specialized division will probably always be able to avoid effective oversight by the head of another, and it will always be hard for the chancellor to meaningfully review his subordinates' decisions.

These obstacles to corruption control suggest that a better solution might be to overhaul the system. Instead of centralizing power in the BOE, reformers could limit its functions primarily to setting minimum standards, disseminating information about them, monitoring schools for performance, auditing them, and performing certain city-wide functions like building new schools. Instead of BOE administrators, principals would operate schools and have control over their own staffs and budgets. Superintendents would in turn help oversee schools in their districts. Decentralizing control over functions like personnel, custodial services, procurement, and food services is likely to reduce regulatory bottlenecks, and thus decrease corruption stemming from red tape.

While this proposed governance structure would increase the chances that *principals* will engage in theft and fraud, reformers could discourage such wrongdoing by improving investigation processes of principals. Auditors could conduct regular and unannounced field audits to ensure schools' financial integrity. Principals could be required to keep records showing how they spend their money and be held liable for missing records.

Additionally, reformers could give principals incentives to avoid corruption that harms learning by holding them strictly responsible for student performance. While the 1996 law tries to hold principals accountable for performance by enabling the chancellor to remove them for "persistent educational failure,"[240] these provisions suffer from many of the same pitfalls as the provisions to hold superintendents accountable. First, the standards principals must meet are unclear. Under BOE regulations,

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the Mayor appoints two members. *See id.*

[240] NY EDUC. LAW § 2590(h)(25) (McKinney Supp. 1999).

no principal should be classified as a "persistent educational failure" without considering his *efforts*,[241] which opens the door to inconsistent enforcement and favoritism. Second, the enforcement of performance standards for principals is not mandatory. The Chancellor does not have to remove or transfer principals who are persistent educational failures.[242]

C. *Accountability through the Market*

Reformers should also develop a system to hold principals and superintendents accountable through the market.[243] The performance accountability model adopted in the 1996 law relies on the Chancellor to set performance standards, determine whether schools meet them, and step in if they do not. No matter what improvements reformers make to the current performance accountability system, the inherent weakness of this model is that its implementation will always depend upon the will and capacity of a single person—the Chancellor. As this paper has argued, the Chancellor's *will* to act will be tempered by political considerations, such as his desire to keep the peace with unions and local constituents. And the Chancellor's *capacity* to act will be hampered by the sheer breadth and magnitude of his responsibilities as head of the nation's largest school system.

A market model of performance accountability would not be subject to such vagaries. Under such a model, superintendents and principals would be directly accountable to parents, who would be able to choose where to enroll their children.[244] The

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[241] BOE, Removal and Transfer of Principals for Persistent Educational Failure, Conflicts of Interest and Ethics Violations 3 (Dec. 10, 1997) (unpublished draft).

[242] *See* NY EDUC. LAW § 2590(h)(25) (McKinney Supp. 1999) (providing that the chancellor "may" cause the transfer or removal of failing principals).

[243] There are basically two types of performance-based accountability mechanisms. One makes officials accountable to administrators within the organization's administrative framework. The second makes them accountable to consumers. The 1996 law opted for the first type of accountability. School choice is an example of the second. *See* Helen F. Ladd, *Introduction*, *in* HOLDING SCHOOLS ACCOUNTABLE, *supra* note 152, at 15–16.

[244] *See generally* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990). Although New York City students can theoretically choose schools within the public school system, most schools take very few students from outside their jurisdictions. It is common for parents to line up overnight for a chance to get their children admitted to popular schools. *See, e.g.*, Randal C. Archibold, *For a Popular School, Parents Spend a Night in Line in the Rain*, N.Y. TIMES, Mar. 10, 1998, at B4. Under this limited choice system, market forces can play no role in determining which schools should survive, since students have no alternative but to attend even the worst schools if they live in their jurisdictions.

central school bureaucracy would supply them with information about different schools' results in a variety of areas, such as average test scores, graduation rates, and drop-out rates. By voting with their feet, parents would provide feedback to school officials about their performance. If too few students enrolled in a school, it would be shut down.

To deter corruption, union policies and due process procedures would have to be amended so that if a school closed for under-enrollment, senior school officials would not have an automatic right to transfer to another school. Otherwise, rogue officials could escape accountability by hopping from school to school.

Because not all parents choose schools for their children based on scholastic performance[245] and because schools may lure students with perks that have nothing to do with academics, such as offering patronage jobs to parents,[246] performance accountability should not be based entirely on the market. Thus, in addition to giving parents choice, the BOE should also monitor schools for performance to ensure that they meet basic minimum standards. If they do not, such schools should be shut down as soon as children are offered better alternatives. Having a market model and a central oversight model functioning side by side in this manner will vastly increase the chances that officials who harm learning by committing crimes will face the consequences of their conduct.[247]

Since performance accountability can only guard against certain types of corruption, intensive field audits and investigations will also be required to safeguard individual schools' financial integrity. Although such radical measures are required when any system has sunk as low as the BOE, sunset clauses should be added to guard against demoralizing effects on staff. Further, because performance accountability creates incentives for officials to fraudulently overstate achievement and conceal failure, auditors should verify graduation rates, drop-out rates, and other statistics that are used to gauge school performance. To

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[245] *See* John F. Witte, *School Choice and Student Performance*, *in* HOLDING SCHOOLS ACCOUNTABLE, *supra* note 152, at 149–76.

[246] Corruption investigations in the city's poorest districts suggest that some parents are more concerned about employment opportunities and perquisites than a top education for their children. *See* SCI, POWER, POLITICS, AND PATRONAGE, *supra* note 34, at 35–39.

[247] *See generally* Chester Finn, Jr., & Diane Ravitch, *Magna Charter? A Report Card on School Reform in 1995*, POLICY REV., Fall 1995, at 41.

guard against cheating, an outside group should administer, monitor, and grade city-wide examinations.

D. *Conclusion*

As school districts around the nation ponder how to fight corruption, the limitations of New York's school governance law should stand as a warning: consolidating power in a central bureaucracy may merely shift the problem from one area of the school system to another depending on the dysfunctions of the particular school bureaucracy. Reformers should consider safeguards against corruption at the center as well as alternatives to centralization. Otherwise, scandals will begin to emerge from central school bureaucracies, and this will probably prompt calls for school decentralization all over again.

ARTICLE

THE SUPREME COURT'S DECLINING RELIANCE ON LEGISLATIVE HISTORY: THE IMPACT OF JUSTICE SCALIA'S CRITIQUE

MICHAEL H. KOBY*

In 1982, Jorge Carro and Andrew Brann published a study of Supreme Court citations to legislative history from 1938 to 1979 that indicated the Court had grown increasingly reliant on such history in cases calling for statutory interpretation. In this Article, Michael Koby updates the Carro and Brann piece, studying the period from 1980 to 1998, paying particular attention to the possible impact of the appointment in 1987 of Justice Antonin Scalia, a strict textualist who vigorously criticizes the reliance on legislative history. After reviewing the data, Koby concludes that Scalia's critique has indeed been a significant factor in an overall decline in the use of this interpretive tool.

With the appointment of Justice Antonin Scalia in 1987, the United States Supreme Court had its first active opponent of using legislative history in statutory interpretation.[1] Prior to his appointment, the Court had increasingly relied upon legislative history in its opinions.[2] More than a decade after Justice Scalia's arrival on the Court, it is now useful to assess whether or not he has had any impact. As this Article will show, Justice Scalia and the critique he represents contributed significantly to a sharp reduction in the Court's use of legislative history.

Part I of the Article describes the study of Supreme Court citations to legislative history documents conducted by Jorge Carro and Andrew Brann in 1982. Part II of the Article reviews the scholarly literature on the use of legislative history, with particular focus on the last twenty years. Finally, Part III replicates Carro and Brann's longitudinal study of Supreme Court citations for the past two decades, examining the types of legis-

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[1] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997).

[2] See Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 297–306 (1982).

lative history documents used and the pattern of use by individual justices. The Article concludes that there has been a significant decrease in the Supreme Court's reliance on legislative history documents, attributable at least in part to Justice Scalia's criticism of its use.

I. THE CARRO AND BRANN STUDY

The benchmark statistical study on the use of legislative history by the United States Supreme Court is *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis* by Jorge Carro and Andrew Brann.[3] In their study, the authors sought to determine whether there had been an increase in the use of legislative history documents by the Supreme Court (as reflected in its written opinions) and what factors may have caused this increase.[4]

Carro and Brann tracked and charted the use of legislative historical documents by the Supreme Court from 1938 to 1979,[5] tabulating the number of times each type of legislative history document was used or cited by the Court.[6] Their study documented the Supreme Court's ever-increasing willingness to use legislative history argumentation when tailoring its opinions. In 1938, for example, U.S. Supreme Court opinions contained a scant nineteen citations to legislative history documents.[7] By 1979, that number had increased to 405.[8]

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[3] *See id.* The article contains a substantial and detailed statistical analysis beginning with a brief overview of the literature on the judiciary's use of legislative history in statutory interpretation. *See id.* at 294–306. Based on their review of the literature, Carro and Brann "detect[ed] a firm evolution that [went] from the almost absolute rejection of the use of legislative history in statutory interpretation to an almost absolute acceptance." *Id.* at 296.

For other interesting, but unrelated, surveys of Supreme Court opinions see Neil M. Berstein, *The Supreme Court and Secondary Source Material: The 1965 Term,* 57 GEO. L.J. 55 (1968) (analyzing secondary source material cited in the majority, concurring, and dissenting opinions of the 1965 term); THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM (1978) (study of Supreme Court opinions to see how many contained cases originally mentioned in oral arguments or in parties' briefs); Charles A. Johnson, *Citations to Authority in Supreme Court Opinions,* 7 LAW & POL'Y 509 (1985).

[4] *See* Carro & Brann, *supra* note 2, at 297.

[5] *See id.* at 297–306.

[6] *See id.* at 304.

[7] *See id.* at 303.

[8] *See id.* Usage generally increased over the period studied, peaking in the years 1973 and 1974, with 416 and 445 citations respectively. *See id.* From 1975 to 1978, citations averaged around 300 per year and in 1979, the final year of their study, there were 405

Carro and Brann also examined the impact of justices' ideologies on their use of legislative history. They found that some justices generally regarded as liberal tended to use legislative history argumentation more often than those deemed more conservative.[9] The authors' analysis of a few selected justices indicated Justices Brennan and Marshall cited legislative history documents nearly twice as frequently as their more conservative counterparts, Justices Burger and White.[10]

While Carro and Brann did not examine in detail what produced the dramatic increase in legislative history citations, there appear to be a number of factors at work. For one, the tremendous growth of government brought about by New Deal legislation contributed to the increase.[11] With the subsequent increase in the scope and application of the new legislation, statutes changed from being narrow and finely tuned, to more loosely termed directives, subject to federal agency regulation.[12] These changes in the nature of statutes made it increasingly necessary for the Court to interpret statutory language and to rely on legislative history.[13] For example, in 1941, the Supreme Court made use of legislative history to interpret the word "hire" under the National Labor Relations Act.[14] Similarly, in 1944, the Supreme Court clarified the meaning of "public utility" as used in the Emergency Price Control Act in part by relying on House committee hearings.[15]

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citations. *See id.* at 305. The authors pointed out that certain legislative topics (federal tax, for example) had a dramatic effect on the number of citations in a particular year. *See id.* at 299–301.

[9] *See id.* at 306 (noting the use of legislative history by Justices Blackmun, Brennan, Burger, Marshall and White).

[10] *See id.*

[11] President Franklin Roosevelt's New Deal programs marked a dramatic increase in the use of legislation to address the social and economic problems of society. *See* Frank Grad, *The Ascendancy of Legislation: Legal Problem Solving In Our Time*, 9 DALHOUSIE L.J. 228 (1985). The "flurry" of New Deal legislation prompted the increased use of legislative history for research purposes. *See* Stephen G. Margeton, *Of Legislative History and Librarians*, 85 LAW LIBR. J. 81 (1993).

[12] *See* Grad, *supra* note 11, at 252–53.

[13] *See* Margeton, *supra* note 11, at 82. As legislative programs became increasingly common, so did the practice of courts interpreting statutes by reviewing their passage. *See id.*

[14] *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). The Court referred to a House committee report in seeking to understand legislative intent. *See id.* at 186 (citing H.R. REP. No. 74-1147, at 19 (1937)). "Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. [This] is why all relevant aids are summoned to determine [the intent of the legislature from the] meaning [of the words used.]" *Id.* at 186.

[15] *See* Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944). The Court looked to

The increased availability and accessibility of congressional documents also contributed to growth in citations to legislative history. The expansion of the U.S. Government Depository Library Program[16] and the work of private and government librarians in compiling legislative histories[17] greatly increased the availability of legislative history documents. In addition, finding aids such as *The Union List of Legislative Histories*[18] and *Sources of Compiled Legislative Histories*,[19] and new research tools like the Congressional Information Service, made legislative history documents more accessible than ever before.[20] Today, the amount and accessibility of legislative information on the Internet holds out the promise of making these documents almost universally available.[21]

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legislative history to determine what types of businesses were exempt under the Act. *See id.* at 151 (citing *Price Control Bill: Hearings Before the Committee on Banking and Currency*, 77th Cong. 444 (1941)). *See also* Colgate-Palmolive-Peet Co. v. United States, 320 U.S. 422, 425, 429 (1943) (interpreting "first domestic processing" in the Revenue Act of 1934 by examining legislative history).

[16] The Federal Depository Library Program dates back to 1813, but was expanded enormously during the period covered by the Carro and Brann study. *See, e.g.*, Act of June 25, 1938, Pub. L. No. 75-70, 52 Stat. 1206 (increasing Congressional documents distributed to depository libraries); The Depository Library Act of 1962, Pub. L. No. 87-579, 76 Stat. 352 (increasing number of depository libraries); Act of Aug. 10, 1972, Pub. L. No. 92-368, 86 Stat. 507 (adding the highest state appellate courts to the depository program); Act of Apr. 17, 1978, Pub. L. No. 95-261, 92 Stat. 199 (allowing law libraries of accredited law schools, both public and private, to become depositories). For a concise history of the Federal Depository Library Program, see JOE MOREHEAD & MARY FETZER, INTRODUCTION TO UNITED STATES GOVERNMENT INFORMATION SOURCES 48–55 (4th ed. 1992); Sheila M. Garr, *Snapshots of the Federal Depository Library Program*, 15 ADMIN. NOTES, Aug. 15, 1994, at 6–14.

[17] Because of their proximity to Capitol Hill and the difficulty of physically collecting the documents, Washington, D.C. law firms and federal agencies pioneered the practice of developing in-house libraries of compiled legislative histories. *See* Margeton, supra note 11, at 82–89.

[18] *See* LAW LIBRARIANS' SOCIETY OF WASHINGTON, D.C., UNION LIST OF LEGISLATIVE HISTORIES (6th ed. 1991). The *Union List*, first published in 1950, is a directory of the collections of compiled legislative histories found in the libraries of major Washington, D.C., law firms and federal agencies. *See id.*

[19] *See* NANCY P. JOHNSON, SOURCES OF COMPILED LEGISLATIVE HISTORIES (1993) (listing available compiled legislative histories published in hard copy, microform, or in the appendices of legal treatises).

[20] *See* Margeton, *supra* note 11, at 94–96; *see also* Gregory C. Harness, *Accessing Congressional Materials*, *in* MANAGING THE PRIVATE LAW LIBRARY 397, 408–09 (Sharon French & Susanne Gehringer eds., 1988).

[21] Public Internet sites like the Library of Congress' *Thomas* legislative information page have made the texts of legislative materials from recent Congresses readily available. *See* Library of Congress, *Thomas* <http://thomas.loc.gov>. The Congressional Information Service has expanded its extraordinary indexing and abstracting service by adding full-text retrieval and other features to its Internet site. *See* Congressional Information Service, *Congressional Universe* <http://www.cispubs.com/conguniv.welcome.htm>.

Given the increasing availability and accessibility of legislative history documents, one might expect that an extrapolation of Carro and Brann's figures would demonstrate a further increase in legislative history citations over the nearly twenty-year period since the original study. However, with the addition to the bench of Justice Scalia, a fervent detractor of the reliance on legislative history, a few important questions arise. Would the pattern of legislative history use diminish despite the increasing availability of these documents? If so, how severe would the impact be? Would any new patterns of usage by individual justices emerge? This Article attempts to answer these questions by comparing the use of legislative history in the years before and after Justice Scalia's appointment, from 1980 to 1998.

To find the answers, this study substantially replicates the statistical analysis pioneered by Carro and Brann for the nearly two decades since the end point of their study. The original study indicated the predominance of four types of legislative history documents in Supreme Court opinions: (1) committee reports; (2) congressional debate; (3) committee hearings; and (4) the text of bills.[22] This study, therefore, limits itself to these major legislative history documents. The methodology employed involved the use of computer-assisted legal research to capture the citations to these legislative documents. Each citation was then verified in the official *United States Reports*, tabulated, and charted.

II. A Survey of the Scholarly Literature on the Use of Legislative History

Before turning to the results of the statistical study, this Article first provides context by surveying the scholarly literature regarding the use of legislative history. Following the publication of Carro and Brann's study, a substantial amount of literature emerged discussing the use of legislative history as a tool of statutory interpretation by both the Supreme Court and the lower federal courts.[23] Much of the literature argues for or against the

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[22] *See id.* at 305, tbl.II (charting the use of specific legislative history documents).

[23] *See, e.g.*, George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 Duke L.J. 39; Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 Hofstra L. Rev. 1125 (1983); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Allison C. Giles,

use of legislative history as a method of statutory interpretation. Other scholars have looked closely at how the Supreme Court relied on legislative history during a given period of time, taking "snapshots" of specific Court terms and analyzing the Supreme Court's use of such history during that term.[24]

A. *The Case for Legislative History*

The use of legislative history has many avid supporters among judges and legal scholars.[25] Justice Stephen Breyer, for example, described the value of legislative history in *On the Uses of Legislative History in Interpreting Statutes.*[26] Breyer, then Chief Judge of the Court of Appeals for the First Circuit, outlined what he considered to be the five essential uses of legislative history. According to Breyer, legislative history must be used in order for the Court to: (1) avoid an absurd result, (2) illuminate and correct drafting errors, (3) ascertain specialized meanings, (4) identify a reasonable purpose, and (5) choose among reasonable inter-

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The Value of Nonlegislators' Contributing to Legislative History, 79 GEO. L.J. 359 (1990); Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43 (1988); Garth L. Mangum, *Legislative History in the Interpretation of Law: An Illustrative Case Study*, 1983 BYU L. REV. 281; Leigh Ann McDonald, *The Role of Legislative History in Statutory Interpretation: A New Era After the Resignation of Justice William Brennan?*, 56 MO. L. REV. 121 (1991); Bernard S. Meyer, *Some Thoughts on Statutory Interpretation with Special Emphasis on Jurisdiction*, 15 HOFSTRA L. REV. 167 (1987); Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181 (1986); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380 [hereinafter Mikva, *A Reply to Judge Starr's Observations*]; Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 U. KAN. L. REV. 815 (1990); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990). Most of these articles refer to Carro and Brann's study.

[24] *See, e.g.*, Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 n.1 (1983).

[25] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862–63 (1992) (supporting the use of legislative history as an essential tool for effective judicial decision-making). *See also* Mikva, *A Reply to Judge Starr's Observations*, supra note 23. Judge Mikva argued, "[W]e as judges have to look at the committee reports and at other clues . . . . We cannot just tell Congress that they could have said it more plainly and that until they do, we are not going to enforce it. We can't say, 'We pass.'" *Id.* at 382.

[26] *See* Breyer, *supra* note 25, at 847.

pretations of a politically controversial statute.[27] Breyer cites numerous examples where the use of legislative history served as a necessary tool in reaching a reasonable result.[28]

While Breyer recognized that there exists the potential for abuse by judges and lawmakers, he maintained that such a potential does not justify eliminating the analysis of legislative history from judicial decision-making. To prevent its misuse, Breyer suggests a more conscientious examination of legislative history.[29] "Care, not drastic change, is all that is warranted."[30] He further argues that any significant change in the extent to which courts employ legislative history would prove harmful.[31]

One of the least controversial uses of legislative history arises when courts must examine the intent of the drafters in order to avoid an absurd result.[32] For example, in *Green v. Bock Laundry Mach. Co.*,[33] the Supreme Court considered whether Federal Rule of Evidence 609,[34] which provides for the admissibility of a witness's prior conviction, was applicable in civil cases.[35] The Court looked to the history of Rule 609 in an effort to uncover a particular purpose for the drafters' use of the word "defendant" rather than the word "accused."[36] After studying the legislative history supporting Rule 609, the Court held that to apply the rule to civil cases would be completely unreasonable.[37] Even Justice Scalia agreed with the use of legislative history in *Green*.[38] Scalia stated that it was acceptable for a judge to consult history "to verify that what seems . . . an unthinkable disposition . . .

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[27] *See id.* at 848–61.

[28] *See id.*

[29] *See id.* at 847.

[30] *Id.* at 874.

[31] Breyer maintained that legislators, the bar, the courts, and those whom legislation will likely affect, all expect courts to use legislative history as a guide. Thus, "changing interpretive horses in midstream would defeat the expectations of the legislators who enacted a statute, and, if the change were sufficiently sudden and radical, it could defeat the expectations of the voters as well." *Id.* at 872.

[32] *See id.* at 849. Breyer illustrates that even the most vocal critics do not generally argue with looking to legislative history where problematic statutory language would lead to an unreasonable result.

[33] 490 U.S. 504 (1989).

[34] Rule 609(a)(1) was enacted as part of the Federal Rules of Evidence by Pub. L. No. 93-595, 88 Stat. 1926, 1935 (1975).

[35] FED. R. EVID. 609(a)(1) provides for the admissibility of a witness's prior convictions where the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."

[36] *See* Breyer, *supra* note 25 at 849. (discussing whether a use of the word "accused" in place of "defendant" would have properly limited the scope of the rule).

[37] *See Green*, 490 U.S. at 520.

[38] *See id.* at 527 (Scalia, J., concurring).

was indeed unthought-of, and thus to justify a departure from the ordinary meaning of the word[s]."[39]

Proponents of the use of legislative history argue further that as statutes of increasing complexity are enacted, legislative history becomes an invaluable tool for interpreting specialized meanings.[40] Courts are constantly asked to clarify and apply specialized terms in order to resolve disputes.[41] Abner Mikva, who has served as a member of Congress and as a judge, argues that a statute's meaning is not going to be discerned at all "if the judges and courts do not look at the legislative history."[42] Mikva reasons that while there are "435 prima donnas in the House and 100 prima donnas in the Senate," the members understand the use of language and the "name of the game is to get them to agree on a single set of words."[43] The language of a statute may admittedly be vague, and therefore judges construing the enacted statute "cannot afford to ignore those obvious tools [such as legislative history] which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute."[44]

Those who advocate the use of legislative history in judicial decision-making view it as an essential tool for judges, enabling them to properly interpret, clarify, and apply the law. In fact, Justice Breyer fears that usurping a judge's power to use legislative history would sever an essential channel of communication between those who create the law and those who interpret and enforce it.[45] Breyer maintains that the use of legislative history serves one of the most important goals of our legal system—creating and maintaining laws "consistent with the reasonable expectations of those who live within it."[46]

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[39] *Id.*

[40] *See* Breyer, *supra* note 25, at 851.

[41] *See* Mikva, *A Reply to Judge Starr's Observations*, *supra* note 23, at 382 ("We are struck with the proposition that Congress is going to pass laws that require interpretation, deal with more and more complicated subjects and involve more and more technical expertise.").

[42] *Id.* at 382 (arguing that the tendency of Congress "to pass complicated, multifarious bills in devious ways" makes the use of legislative history necessary to judicial interpretation).

[43] *Id.* at 380.

[44] *Id.* at 386.

[45] *See* Breyer, *supra* note 25 at 856.

[46] *Id.*

B. *The Case against Legislative History*

Not all legal scholars are as enthusiastic about the increased reliance on legislative history. In general, there are two basic critiques of the use of legislative history as a means of statutory interpretation. First, opponents argue that the use of legislative history is inconsistent with the Constitution's requirements for enacting a law.[47] The Bicameralism and Presentment Clauses of the Constitution require that a statute pass both houses of Congress and receive the President's approval or a two-thirds majority in both Houses to override his veto. Those who argue against the use of legislative history find the language of the statute itself to be the law—not legislative history in the form of committee reports, floor and hearing colloquies, or insertions made by lobbyists who supported the original bill.[48] Critics of legislative history thus argue that its use distorts "the voice of the statute itself."[49]

The second major criticism of legislative history is that such history lacks reliability.[50] Since the nomination and confirmation of Justice Scalia to the Supreme Court, this criticism has increasingly permeated Supreme Court opinions. On such grounds, Justice Scalia has mounted a strong attack on excessive judicial reliance on legislative history.[51]

For example, in *Blanchard v. Bergeron*,[52] Justice Scalia chastised the Court for its reliance on legislative history in arriving at

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[47] *See* Breyer, *supra* note 25, at 862–63 (discussing chief concerns of those opposed to the use of legislative history in the interpretation of statutes).

[48] *See* Starr, *supra* note 23, at 375. *But see* Mikva, *A Reply to Judge Starr's Observations*, *supra* note 23, at 380, 385 (arguing for the use of committee reports as a reliable source of congressional intent to resolve fine ambiguities of a statute).

[49] Starr, *supra* note 23, at 375. Starr argues that looking beyond the statute raises the danger of creating legal authority where none is warranted and interferes with our democratic system of governing. *See id.* at 374. He claims that legislative history has the potential to minimize and/or ignore the role of the Executive Branch by creating laws that the President would not have signed, and that it tends to politicize the role of the federal judiciary by giving courts the power to create winners and losers in the legislative process. *See id.* at 376. Starr urges courts to heed the words of Justice Cardozo: "'We take the statute as we find it.'" *Id.* at 375.

[50] *See, e.g.*, Mangum, *supra* note 23, at 281 (demonstrating the "general inadequacy" of legislative history through analysis of the legislative process leading to the enactment of the Job Training Partnership Act of 1982); *see also* Hatch, *supra* note 23, at 45 (maintaining that because committee reports are often written by staff, courts "ought to accord such reports very little, if any, significance").

[51] *See* Bruce Fein, *Scalia's Way*, 76 A.B.A.J., Feb. 1990, at 38–41 (discussing Justice Scalia's numerous Supreme Court opinions that use dissenting and concurring opinions to attack the use of legislative history).

[52] 489 U.S. 87 (1989) (Scalia, J., concurring).

its decision. He found such reliance remarkable and unnecessary:

> That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of *Congress* displays the level of unreality that our unrestrained use of legislative history has attained.... As anyone familiar with modern-day drafting of a congressional committee report is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant ... but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.[53]

Justice Scalia further criticizes legislative history because it fails to account for the increasingly decentralized nature of the legislative process where members of Congress often do not write or even read the legislation on which they vote. In his recent essay, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*,[54] Justice Scalia emphasizes this point by referring to a United States Senate colloquy that illustrates the problem:

> MR. ARMSTRONG.... My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?
>
> MR. DOLE. I would certainly hope so ....
>
> MR. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?
>
> MR. DOLE. Did I write the committee report?
>
> Mr. Armstrong. Yes.
>
> MR. DOLE. No; the Senator from Kansas did not write the committee report.

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[53] *Id.* at 98–99 (emphasis in original).
[54] *See* Scalia, *supra* note 1, at 32.

> MR. ARMSTRONG. Did any Senator write the committee report?
>
> MR. DOLE. I have to check.
>
> MR. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?
>
> MR. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked . . . .
>
> MR. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?
>
> MR. DOLE. I am working on it. It is not a bestseller, but I am working on it.
>
> MR. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?
>
> Mr. Dole. No.
>
> . . .
>
> MR. ARMSTRONG. [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.[55]

Scalia has demonstrated himself to be the most consistent and acerbic critic of legislative history.[56] He complains that when

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[55] *Id.* at 32 (quoting 128 CONG. REC. 16,918–19 (1982)).

[56] *See, e.g.*, United States v. Estate of Romani, 118 S.Ct. 1478, 1489 (1998) (Scalia, J., concurring) ("I have in the past been critical of the Court's using the so-called legislative history of an enactment . . . to determine its meaning. Today, however, the Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme.") (citations omitted). Scalia, joined by Justice Thomas, berated the Court for its reliance on legislative history in one case, calling it "the last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction." United States v. Thompson/Center Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J. concurring). During a floor debate concerning the 1991 Civil Rights Act, Senator Danforth expressed agreement with Justice Scalia's views on the use of legislative history. "Justice Scalia was correct, in my opinion. Any judge who tries to make legislative history out of the free-for-all that takes place on the floor of the Senate is on very dangerous grounds. . . . It is a muddle. It is going to remain a muddle." 137 CONG. REC. S15,346 (1991). Scalia's crusade against the use of legislative history seemed to reach a "feverish pitch" during the 1992 term. *See* Stephanie Wald, *The Use of Legislative History in Statutory Interpretation: Cases in the 1992 U.S. Supreme Court Term; Scalia Rails but Legislative History Remains on Track*, 23 SW. U.L. REV. 47,61 (1993); *see also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1992) (Scalia, J. concurring) (calling majority's use of legislative history "not merely a waste of research time and ink; it is a

judges deviate from a steadfast approach to the "plain meaning" rule[57] they ascribe extra-textual meanings to legislation and thereby dilute the efficacy of laws.[58] Scalia's attack on the Court's excessive reliance on legislative history has been so successful that William Eskridge has referred to the establishment of a "new textualism" that the Court has at least partially adopted.[59]

Justice Scalia is not alone in his critique of the use of legislative history. The Executive Branch has also advanced arguments against its use.[60] For example, the U.S. Department of Justice's

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false and disruptive lesson in the law . . . undermines the clarity of law, and condemns litigants . . . to subsidizing historical research by lawyers.") Scalia argues that using legislative history allows judges to create an intent for the legislature where none existed. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511. Scalia states:

> [T]he quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon [an administrative] agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which congress can legislate.

Id. at 517.

Justice Brennan often opposed Justice Scalia's position, consistently looking beyond unambiguous race and sex discrimination wording to find that discrimination against non-minority employees was acceptable when it was used to give minorities positions in which they were statistically underrepresented. *See, e.g.*, Steelworkers v. Weber, 443 U.S. 193 (1979).

[57] "Plain meaning" interpretation of a statute requires looking solely to the text of a statute to understand the intent of the legislature. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1881 (1998). The legislature's intent is determined by looking at the individual words within the statute, the punctuation within the statute, and the surrounding words in the sentence; through this process, the true meaning of the legislation can be gleaned. *See* United States Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 454–55 (1993) ("[The] text [of a statute] consists of words living 'a communal existence,' . . . the meaning of each word informing the others and all in their aggregate taking their purport from the setting in which they are used. . . . [I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy. Statutory construction is a holistic endeavour, . . . and, at a minimum must account for a statute's full text, language as well as punctuation, structure, and subject matter.").

[58] *See* United States v. Taylor, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part) ("[I]it must be assumed that what the Members of the House and Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said. This text is eminently clear, and we should leave it at that.").

[59] *See* Eskridge, *supra* note 23, at 623 ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant.").

[60] *See* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 385 (1985); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLA-

Office of Legal Policy has examined the problem of using legislative history from a federal perspective and has attempted to develop basic principles for its use in what it calls "actual meaning interpretation."[61] This interpretation provides that legislative history should be used as evidence of linguistic purpose only when the most plausible contextual meaning of statutory language cannot otherwise be clearly discerned.[62] The Office of Legal Policy argues that this will force courts to focus on the text, and thereby discourage Congress from passing "improper acts of legislation."[63] According to the report, this is desirable because Congress should have no power to influence the interpretation and application of its legislation other than through the enactment of statutory language.[64]

C. *The "Snapshot" Articles*

Some authors have examined the Supreme Court's use of legislative history by looking closely at specific years. Judge Patricia M. Wald, for example, authored her own study after taking "judicial notice" of Carro and Brann's work.[65] Judge Wald's article, however, is not a longitudinal study like Carro and Brann's. Rather, it depicts a "snapshot" of a single term, the 1981-82 term, and examines, in detail, the use of legislative history argumentation that.

Judge Wald found that the Court referred to legislative history in nearly half of the term's opinions. This ratio, she concluded,

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TIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989) [*hereinafter* OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY]; *Statutory Interpretation and the Uses of Legislative History, Hearing Before the House Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the Comm. on the Judiciary*, 101st Cong. (1990). *See generally* Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INT. L. REV. 57.

[61] OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY. The report further argues that legislative history specifying the application of general statutory language should not be binding, and that legislative history should not be used to fill in statutory gaps. *See id.*

[62] *See id.* at 3.

[63] *Id.* at iii (quoting James Madison, and arguing that the primacy of actual meaning over intended meaning "corresponds to the constitutional separation of the power of interpreting legislation (judicial and executive) from the power of enacting legislation (legislative)").

[64] *See id.*

[65] *See* Wald, *supra* note 24, at 195. Judge Wald notes that there were only 19 such citations in the 1938 term, but by the late 1970s, that number had risen to between 300 and 400 references per term.

suggested that the Court was departing from the "plain meaning" rule, as it was increasingly willing to examine legislative history.[66] Despite this increasing use of legislative history citations, she observed a continuing uneasiness with this approach: "[L]egislative history is often rejected in favor of, or at least filtered through canons, presumptions, or principles considered overriding by a majority of the Court."[67] Nevertheless, she concluded that, although the Court still made reference to the "plain meaning" rule, the rule had "been effectively laid to rest."[68] In Judge Wald's opinion, "no occasion for statutory construction now exists when the Court will not look to legislative history."[69]

In *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*,[70] Judge Wald took a second snapshot of the Court's use of legislative history. She admitted that her "funeral ceremony in 1983 for the Plain Meaning Rule was premature."[71] According to Wald, because of Scalia's aggressive attack on legislative history, the "basically sensible approach of the courts toward using legislative history that ha[d] prevailed in recent decades [was] under heavy attack from the Supreme Court."[72] Judge Wald maintained that the debate over the proper use of legislative history instigated by Justice Scalia, and joined by Justice Kennedy, was of "pressing concern to all of us who care about how laws are made and interpreted."[73]

Similarly, Eskridge noted that although the use of legislative history had been the Court's "traditional resolution" of statutory interpretation, such use had declined in the 1988 and 1989 Terms.[74] Because of Justice Scalia's "intellectual boldness," as well as his stature as an "intellectually aggressive member of the Court," Eskridge concluded that the Court had become more

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[66] *See* Wald, *supra* note 24, at 195.
[67] *Id.* at 207.
[68] *Id.* at 195.
[69] *Id.* For a discussion of the hierarchy of sources in the Court's use of legislative history, see Eskridge, *supra* note 23, at 636. Professor Eskridge discusses the "Hierarchy of Legislative History Sources" that he developed with Professor Philip Frickey. In ascending order from least authoritative to most authoritative, Eskridge and Frickey rank the following sources: (1) subsequent legislative history; (2) legislative inaction; (3) views of nonlegislator drafters; (4) floor and hearing colloquy; (5) rejected proposals; (6) sponsor statements; (7) committee reports. *See* Eskridge, *supra* note 23, at 636.
[70] *See* Wald, *supra* note 24, at 279.
[71] *Id.* at 281.
[72] *Id.* at 279.
[73] *Id.*
[74] *See* Eskridge, *supra* note 23, at 624–25.

willing to ignore legislative history, preferring to rely more heavily on structural arguments and canons of statutory interpretation.[75]

In a 1992 article, Justice Breyer found that in 1989, the Court decided ten out of sixty-five cases of statutory interpretation without any reference to legislative history at all.[76] In the 1990 Term, the Court decided nineteen out of nearly fifty-five statutory cases without any reference to legislative history.[77]

One year following Breyer's study, Stephanie Wald, the Supervising Deputy Attorney General of the California Department of Justice, published an article analyzing the use of legislative history by the Supreme Court in the 1992 Term.[78] Wald argued that the debate between proponents of using legislative history and those supporting the new textualism reached its "crescendo" during that term.[79] Despite the attack mounted by Justices Scalia and Thomas on what they viewed as the Court's "excessive reliance on legislative history,"[80] Wald contended that the two justices were unable to deter the rest of the Court from using legislative history and were still members of the minority.[81]

In studying the Court's opinions from the 1992 Term, including concurring and dissenting opinions, Wald found that in all but six cases addressing a federal statute, the Court used legislative history, even where the "plain meaning" of a statute was held to be apparent.[82] All of the justices, apart from Justices Scalia and Thomas, whether of "liberal" or "conservative" leanings, referred to legislative sources either to "shore up" a textual approach, or to otherwise support some aspect of a holding.[83]

After discussing Justice Scalia's criticism, Wald cited authority establishing that the other justices, including Justices Rehnquist, Kennedy (formerly believed to share Scalia's hostility toward legislative history), Souter, and O'Connor, "show no

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[75] *Id.* For an example of the more traditional forms and canons of statutory construction, see Karl N. Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 1950 VAND. L. REV. 395. For an exhaustive treatment of the various aspects of statutory construction, see NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 46.01 (5th ed. 1992).

[76] *See* Breyer, *supra* note 25, at 846.

[77] *See id.*

[78] *See* Wald, *supra* note 56.

[79] *See id.* at 47.

[80] *Id.*

[81] *See id.* at 70.

[82] *See id.* at 47.

[83] *See id.* at 70.

inclination to join in Justice Scalia's challenge."[84] Additionally, Wald pointed out that Justice Ginsburg stated in her confirmation hearing that she and Justice Scalia were "not on the same island" with regard to the use of legislative history.[85]

III. FINDINGS ON THE USE OF LEGISLATIVE HISTORY BY THE SUPREME COURT AS A METHOD OF STATUTORY INTERPRETATION FROM 1980 TO 1998

With the preceding discussion as context, this Article turns to the results of the statistical study on the use of legislative history from 1980 to 1998.

A. *Overall Use Of Legislative History*

Table I below examines the number of legislative history citations by year. In addition, it tracks the total number of cases heard and the number of interpreting statutes.

The content of Table I indicates a number of trends. First of all, the number of cases[86] heard each term by the Supreme Court has substantially decreased during the period of time covered by this study.[87] In 1980, the Supreme Court heard 156 cases. By

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[84] *Id.* at 67.

[85] *Id.* at 69.

[86] This figure includes both signed and per curium cases.

[87] Commentators cite varying reasons for the dramatic decline in the number of cases being decided by the Supreme Court over the past decade. The leading, or at least the most popular, reason given for the shrinking docket appears to be a 1988 statute that eliminated much of the Court's mandatory jurisdiction, those cases the Court had no discretion to refuse. *See* Supreme Court Case Selections Act, Pub. L. No. 100-352, 102 Stat. 662 (1988); 28 U.S.C.A. §§ 1252–1257 (West 1993) (containing insightful commentaries on the how the Act affected Supreme Court jurisdiction); Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals,* 121 F.R.D. 81, 81, 90–91, 94–97 (1989) (summarizing and detailing the changes in scope of the Court's mandatory jurisdiction as a result of the 1988 Act); Linda Greenhouse, *Supreme Court's Case Docket Getting Smaller All the Time,* HARRISBURG PATRIOT & EVENING NEWS, Mar. 8, 1992, at D3 (noting that the 1988 statute gave the Court almost complete control over it own docket of cases). Hence, "[a]fter years of complaining about their own work load, the justices, [aided by the 1988 law], may have [simply] taken matters into their own hands . . . ." Greenhouse, *supra,* at D3.

Another reason may be that the number of applications for review to the Supreme Court is steadily rising. *See* Paul M. Bator, *What Is Wrong with the Supreme Court?,* 51 U. PITT. L. REV. 673, 680 n.16 (1990). The greater the number of applications to the Court, the more time it must spend sifting through the applications in an effort to decide which cases merit review. *See id.* Logic dictates that the more time the Court spends sifting through the mountain of applications filed, the less time it has to spend

TABLE I: LEGISLATIVE HISTORY CITATIONS BY YEAR

Year	Legislative History Citations	Total Cases Heard	Cases Interpreting Statutes
1980	479	156	89
1981	499	154	80
1982	444	184	77
1983	776	183	75
1984	784	184	65
1985	796	175	88
1986	415	172	72
1987	380	175	79
1988	402	167	79
1989	411	170	83
1990	253	146	70
1991	266	125	55
1992	152	127	54
1993	178	116	67
1994	169	99	52
1995	110	94	51
1996	217	90	50
1997	103	90	59
1998	79	94	49

1998, that number had decreased to 94 opinions. The decline began in 1987 and accelerated in the early 1990s.

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on those cases that will ultimately be argued and decided on the merits. *See id.*; *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 33–34 (1993) ("In 1972 the Federal Judicial Center Study Group on the Case Load of the Supreme Court recommended establishment of a national court of appeals, the primary function of which would be to sift out and deny perhaps 80 percent of the petitions for certiorari which were clearly not worthy of Supreme Court review, sending the rest on to the Supreme Court to make the final selection. The premise was that the Court was overloaded with work and that the burden of examining almost 4000 cases per year to determine merely whether they should be heard unduly impaired the ability of the Justices to concentrate on the ones deserving their attention.") (citations omitted).

Linda Greenhouse, a noted Supreme Court reporter, also speculated that "the shrinking docket might reflect a conservative Court's notion that the judiciary should not necessarily have the last word on every subject." Greenhouse, *supra*, at D3. Greenhouse noted further that the long stretch of Republican appointments to the federal bench during the 1980s and early 1990s restored a kind of "homogeneity" among the lower federal courts/circuits, thereby reducing conflicts among the lower courts that ultimately could have been resolved by the Supreme Court, if at all. *See id.*

This decline in the number of cases is certainly a factor in the reduction of citations to legislative history documents in Supreme Court opinions over the same period of time. However, it is not the only, and perhaps not the most, significant factor. Though the number of cases has dropped by almost fifty percent, the number of citations to legislative history has dropped even more precipitously.

Looking at the boundary years of Table I (1980 and 1998) provides a quick snapshot of the decline. During these years, the number of opinions declined from 156 to 94, a decrease of 39.74%. The number of citations to legislative history, however, declined from 479 to 79, a decrease of 85.5%. While no conclusion can be reached by looking at only two years, the great disparity between the figures for 1980 and 1998 suggests that the considerable decrease in citations to legislative history cannot be accounted for solely by the decline in the number of opinions issued.

Carro and Brann's tables did not track the number of cases that involved statutory interpretation. Doing so, however, provides a useful framework for a closer analysis of the Court's pattern of legislative history usage. While the total number of cases has decreased significantly, the percentage of cases interpreting statutes has remained relatively proportional.[88] Thus, the significant drop in legislative history citations cannot be explained by a similarly significant drop in the percentage of cases involving statutory interpretation.

Examining more closely the period before the appointment of Justice Scalia, from 1980 to 1986, there seems to be a relatively consistent ratio between the total number of opinions and the number of legislative history citations. During this period, there were a total of 1208 opinions and a total of 4193 legislative history citations. This represents a ratio of 3.47 citations per opinion.[89]

For the twelve-year period since the appointment of Justice Scalia, there have been a total of 1493 opinions and a total of 2720 legislative history citations, representing a ratio of 1.87 citations

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[88] The percentages of cases interpreting statutes for each year—1980: 57%; 1981: 51.9%; 1982: 41.8%; 1983: 41%; 1984: 35.3%; 1985: 50.3%; 1986: 41.9%; 1987: 45.1%; 1988: 47.3%; 1989: 48:8%; 1990: 47.6%; 1991: 44%; 1992: 42.5%; 1993: 57.8%; 1994: 52.5%; 1995: 54.2%; 1996: 55.6%; 1997: 65.5%; 1998: 52.1%.

[89] The average number of legislative history citations per case heard for the years from 1980 to 1986—1980: 3.07; 1981: 3.24; 1982: 2.41; 1983: 4.24; 1984: 4.26; 1985: 4.55; 1986: 2.41.

per opinion. Within the last four years, from 1995 to 1998, this ratio has dipped to an even lower 1.38 citations per opinion.[90]

While it is tempting to give Justice Scalia complete credit for the decrease in the use of legislative history documentation, there are additional factors complementing his critique that might have contributed to this pattern. One such factor is the influence of Republican Presidents Ronald Reagan and George Bush on the makeup of the Court. As indicated previously, more conservative justices tend to shy away from using legislative history, unlike their more liberal counterparts.[91]

Another factor that might contribute to a change in the number of legislative history citations generated in a given term is the types of cases before the Court during that term. For example, a major revision of the tax code might well require the Court to scrutinize the intricacies of a typically complex piece of legislation for several years after its passage.[92] Legislative history would likely receive greater attention in these types of cases. Like the Carro and Brann study of 1982, however, this study focuses on broad patterns of legislative history usage, rather than examining the specific caseload characteristics of particular terms of the Court.

When all factors are taken into consideration, the figures in Table I indicate that Scalia and the critique he represents have had a significant impact on the Court's use of legislative history. Scalia's criticism has not only blunted the growth of use of legislative history, but has led to its substantial decline.

B. *Relative Use of Legislative History Sources*

Table II charts the citation to specific legislative documents from 1980 to 1998. The table suggests that Scalia's critique has not led to a substantial decline in the use of any particular document of legislative history.

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[90] The average number of legislative history citations per case heard for the years included in this study—1980: 3.07; 1981: 3.24; 1982: 2.41; 1983: 4.24; 1984: 4.26; 1985: 4.55; 1986: 2.41; 1987: 2.17; 1988: 2.41; 1989: 2.42; 1990: 1.73; 1991: 2.13; 1992: 1.20; 1993: 1.53; 1994: 1.71; 1995: 1.17; 1996: 2.41; 1997: 1.14; 1998: 0.84.

[91] *See supra* note 9 and accompanying text. This will be addressed more closely in the discussion of Table III *infra*.

[92] *See* Carro & Brann, *supra* note 2, at 300, 305 (citing the impact that taxation/revenue decisions had on the use of legislative history citations during the years covered in their study).

Like the Carro and Brann study, Table II attempts to isolate the individual documents that are cited most frequently. Carro and Brann had demonstrated the predominance of four documents: (1) committee reports[93] (combining House and Senate reports), which accounted for 48% of the total of all legislative history citations from 1939 to 1979; (2) congressional debate[94] published in the *Congressional Record* and formerly in the *Congressional Globe*, which accounted for 22% of all legislative history citations; (3) committee hearings[95] (both House and Senate), which accounted for 14% of all citations; and (4) text of bills,[96] which accounted for eight percent.[97]

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[93] Reports are committee publications of its findings, recommendations, and proposals. "The most important documents of legislative history are the reports of the Congressional committees of each house, and the reports of conference committees held jointly by the two houses." ROBERT C. BERRING, FINDING THE LAW 179 (10th ed. 1995). The report will accompany the relevant bill when the bill is returned to the respective congressional houses for debate and/or a vote. *See id.* Since it is presumed that all voting members have read the report, the report is particularly strong evidence of a shared Congressional intent. *See id.*

[94] The *Congressional Record* is the essential benchmark source for floor debates in Congress. *See* BERRING, *supra* note 93, at 181. "The *Congressional Record* provides a more or less verbatim transcript of the legislative debates and proceedings, subject, however, to revision of their remarks by the individual legislators." *Id.* The *Congressional Record* is published daily while either house is in session. *See id.* Floor debate relevant to a pending bill can occur at any time, but such debates usually take place after the bill has been reported out by a committee. *See id.* at 180. The text of congressional debates has not always been published in the *Congressional Record*. The following is a chronological list of the publications that have recorded the debates in Congress: *Annals of Congress* (March 4, 1789 to May 27, 1824); *Register of Debates* (December 6, 1824 to October 16, 1837); *Congressional Globe* (December 2, 1833 to March 3, 1873); *Congressional Record* (December 1, 1873 to Present). *See* LAW BOOKS AND THEIR USE 27 n.6 (6th ed. 1936); MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 235 (9th ed. 1989).

The practice of relying on legislative debates, as opposed to other forms of legislative history, for aid in ascertaining legislative intent for purposes of statutory interpretation, has been widely criticized. *See* COHEN, *supra*, at 239 (referring to the "calculated use of prepared colloquies designed to manufacture evidence of legislative intent").

[95] Citations to hearings are references to the transcripts of testimony presented to a congressional committee. *See* CHRISTINA L. KUNZ, ET AL., THE PROCESS OF LEGAL RESEARCH 233 (4th ed. 1996). "The hearings, as published, consist of transcripts of testimony before a particular committee or subcommittee, questions by the legislators and answers by witnesses, exhibits submitted by interested individuals or organizations, and sometimes a print of the bill in question." BERRING, *supra* note 93, at 177. "As evidence of legislative intent, hearings rank below committee reports and the variant texts of bills." *Id.*

[96] Documents cited as legislative history include bills since bills are nothing more than legislative proposals. *See* BERRING, *supra* note 93, at 167; BLACK'S LAW DICTIONARY 167 (6th ed. 1990). Bills may be, and often are, amended many times prior to enactment of the actual statute. *See* BERRING, *supra*, at 170. "Variations in the text of the bill as it is introduced, . . . as amended, and as passed, may be helpful in determining its meaning." *Id.* "The deletion or insertion of particular language in the text implies a legislative choice and thus may reveal the intent of the legislature." *Id.*

[97] *See* Carro & Brann, *supra* note 2, at 304.

TABLE II: DOCUMENTS CITED IN LEGISLATIVE HISTORY CITATION 1980–98*

Source	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	Total
House Bill	37	35	27	54	48	28	14	14	12	18	4	5	11	7	15	7	42	2	3	383
H.R. Hearing	40	30	21	32	23	41	8	10	10	13	14	9	5	6	8	6	7	4	10	297
H.R. Report	60	68	35	204	180	210	70	94	99	128	83	104	35	57	25	37	45	18	12	1558
H.R. Conf. Report	1	2	0	0	0	0	0	0	0	0	0	0	0	1	0	0	5	2	0	11
Senate Bill	27	28	10	22	31	21	13	6	10	9	7	3	10	8	25	3	45	4	0	282
S. Hearing	28	49	33	26	35	49	15	17	16	14	19	12	7	5	15	16	6	13	1	376
S. Report	67	67	44	197	239	240	163	122	118	121	71	94	55	53	50	26	40	40	21	1828
S. Conf. Report	1	3	1	0	11	8	3	2	0	2	0	1	0	0	2	0	0	0	0	34
Cong. Record	205	206	262	213	215	194	126	109	137	97	48	30	29	32	28	15	27	16	32	2021
Cong. Globe	13	11	11	28	2	5	3	6	0	9	7	8	0	9	1	0	0	4	0	117

* Table II uses the following abbreviations: "H.R." refers to the House of Representatives; "Conf.", Conference; "S.", Senate; "Cong.", Congressional.

This current study finds essentially the same pattern. Although the actual percentages may be slightly different, the primacy of these documents remains essentially unchanged. Committee reports account for approximately fifty percent of all legislative history citations from 1980 to 1998, while citations to congressional debate make up approximately thirty percent of all legislative history citations. Finally, citations to committee hearings and the text of bills each account for approximately ten percent of all legislative history citations during the period of the study.

Thus, both studies reach the same conclusion. Committee reports and congressional debate remain the overwhelmingly predominate sources of legislative history. While the overall use of legislative history may be in decline, the relative amount each type of document is used remains constant.

C. *Use of Legislative History by Individual Justices*

In their 1982 study, Carro and Brann conducted a very selective sampling of the the use of legislative history by Justices who were clearly identifiable as either conservative or liberal. Their conclusion, based upon this minimal sample, was that liberal justices cite legislative history documents significantly more than conservative justices do.[98]

If this pattern holds true, one would naturally expect fewer citations to legislative history from the current Supreme Court[99]

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[98] *See id.* at 306 (noting the use of legislative history by Justices Blackmun, Brennan, Burger, Marshall and White).

[99] The following is a list of the Supreme Court justices on the Court from 1980 to 1998. Chief Justice Rehnquist: William Hubbs Rehnquist was appointed Associate Justice in 1971 by President Nixon, and in 1986 was appointed Chief Justice by President Reagan. *See* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 373 (Melvin I. Urofsky ed., 1994) [hereinafter THE SUPREME COURT JUSTICES]. Justice Rehnquist believes in strict construction of the Constitution as well as statutes. *See id.* The Chief Justice is known for having an overall conservative philosophy. *See* JOAN BISKUPIC & ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 955 (3d ed. 1997). Justice Stevens: John Paul Stevens was appointed in 1975 by President Ford. *See* THE SUPREME COURT JUSTICES, *supra*, at 409. Observers of the court have always struggled to place a political/ideological label on Justice Stevens. *See id.* at 409–10. Stevens has often been described as a centrist, a moderate, or an independent. *See id.*; BISKUPIC & WITT, *supra* at 956. Justice O'Connor: Sandra Day O'Connor was appointed as an Associate Justice in 1981 by President Reagan, becoming the first woman ever to sit on the Supreme Court. *See* THE SUPREME COURT JUSTICES, supra, at 339. While living in Phoenix, Arizona, in the 1950s and 1960s, O'Connor became active in Republican politics. *See* BISKUPIC & WITT, *supra*, at 956. "On the Court, O'Connor was at first solidly in the conservative wing, voting in most

cases with fellow Arizonian William H. Rehnquist. Over time she has moved to the center." *See id.* at 957. Justice Kennedy: Anthony Mcleod Kennedy was nominated Associate Justice in 1987 by President Reagan. *See id.* at 958. Kennedy is both Catholic and Republican and over the years has earned a reputation as a conservative justice. *See id.* Kennedy's appointment followed the Senate's rejection of Robert H. Bork. *See* THE SUPREME COURT JUSTICES, *supra*, at 277. "While Justice Kennedy has taken conservative positions in many constitutional areas, he has also shown a streak of independence which has caused him to part company occasionally with those at the core of the Rehnquist Court's right wing, the Chief Justice and Justices Scalia and Thomas." *Id.* Justice Scalia: Antonin Scalia was appointed to the Court in 1986 by President Reagan. *See* BISKUPIC & WITT, *supra*, at 957. Like Justice Kennedy, Scalia is also Roman Catholic. *See id.* Over the years, Scalia has established himself, by most measures, as the most conservative member of the Court. *See* THE SUPREME COURT JUSTICES, *supra*, at 397. Scalia has also taken "a strong interest in the interpretation of statutes, arguing that the only legitimate guide for judges is the actual text of a statute and its related provisions," thereby excluding the use of legislative history. *See* BISKUPIC & WITT, supra, at 957–58; THE SUPREME COURT JUSTICES, *supra*, at 398; 2 ALMANAC OF THE FEDERAL JUDICIARY 21–22 (Christine Housen et al. eds. 1998). Justice Thomas: Clarence Thomas was appointed to the Court in 1991 by President Bush, replacing Thurgood Marshall, who had retired. *See* BISKUPIC & WITT, *supra*. at 475. Thomas is a conservative Republican, as well as a Catholic, who most often votes with Scalia and Rehnquist. *See id.*; ALMANAC OF THE FEDERAL JUDICIARY, *supra*, at 27. Justice Ginsburg: Ruth Bader Ginsburg was appointed by President Clinton in 1993. *See* BISKUPIC & WITT, at 961. "A sidebar to a 1991 *American Lawyer* article listed Ginsburg among 15 'First-Rate Centrists.'" ALMANAC OF THE FEDERAL JUDICIARY, *supra*, at 10. Justice Breyer: Stephen Gerald Breyer was appointed by President Clinton in 1994. *See* BISKUPIC & WITT, *supra*, at 962. Breyer's friends in Washington are "an unusual assortment of Democrats and Republicans, liberals and conservatives." ALMANAC OF THE FEDERAL JUDICIARY, *supra*, at 6. At least one publication has described Breyer as a centrist. *See id.* at 8. Justice Souter: David Hackett Souter was appointed to the Court in 1990 by President Bush. *See* BISKUPIC & WITT, *supra*, at 959. "Initially part of the conservative bloc, Souter has moved to the left of center on the modern conservative court." *Id.* "[H]e has not fallen in jurisprudential lockstep with the conservatives of the Rehnquist Court as expected, but has instead emerged as a swing vote." *See* THE SUPREME COURT JUSTICES, *supra*, at 405. Justice Marshall: Thurgood Marshall was appointed to the Court in 1967 by President Johnson, becoming the first black justice to sit on the Supreme Court. *See* BISKUPIC & WITT, *supra*, at 950–51. Marshall, a champion of the civil rights era, retired from the Court in 1991. *See id.* Justice Powell: Lewis Franklin Powell, Jr. was appointed to the Court in 1971 by President Nixon. *See* BISKUPIC & WITT, *supra*, at 953. Powell, who had a reputation for being somewhat of a moderate, retired from the Court in 1987. *See id.* Justice Blackmun: Harry Andrew Blackmun was appointed to the Court in 1970 by President Nixon. *See id.* at 952. "[B]eginning with his authorship of the Court's 1973 ruling in *Roe v. Wade*, 410 U.S. 113 (1973) Blackmun moved in a steadily more liberal direction." *Id.* Blackmun retired from the Court in 1994. *See id.* Justice Brennan: William Joseph Brennan, Jr. was appointed to the Court in 1957 by President Eisenhower. *See id.* at 944–45. Brennan believed in adapting the words of the Constitution to meet present day needs; he believed the only way to read the Constitution was as a 20th-century American. *See* THE SUPREME COURT JUSTICES, *supra*, at 51–52. Brennan retired in 1990. *See id.* at 49. Justice Burger: Warren Earl Burger was appointed, as a Chief Justice, to the Court in 1969 by President Nixon. *See* BISKUPIC & WITT, *supra*, at 951. A conservative, Burger was an outspoken critic of the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See* THE SUPREME COURT JUSTICES, *supra*, at 69. Burger retired from the Court in 1986, and was replaced as the Chief Justice by Rehnquist. *See* BISKUPIC & WITT, *supra*, at 951. Justice White: Byron Raymond White was appointed to the Court in 1962 by President Kennedy. *See id.* at 947. After joining a solidly liberal Court, White became known for his strong dissents, including dissents in *Miranda* and *Roe v. Wade*. *See id.* at 948. White retired from the Court in 1993. *See id.* at 948. Justice Stewart: Potter Stewart was appointed to the Court

because of its more conservative character. Thus, even without Justice Scalia's critique, a decrease in the use of legislative history would be expected. Precisely how much influence is to be attributed to Scalia and how much is to be attributed to the increasing conservatism of the justices is nearly impossible to ascertain. The best that can be done empirically is to document that both play a substantial role.

Table III tabulates the number of cases in which justices made at least one reference to legislative history in opinions they authored. To give the figures context, the second number indicates the total number of opinions that the individual justice authored that year. For the purposes of this study, the term "opinion" includes majority, dissenting, and concurring opinions that the individual justices wrote. Thus, opinions in which justices have "joined" are not included in these statistics.

In the period from 1980 to 1998, conservative justices did in fact cite legislative history much less frequently than did liberal justices.[100] For example, liberal Justice Brennan wrote an average of 45.4 opinions from 1980 to 1990. Of those opinions, Brennan cited legislative history documents in an average of 25.7 opinions per term. Similarly, liberal Justice Marshall cited legislative history in an average of 21.5 opinions per term, having authored an average of 35.7 per term. Conversely, conservative Justice Rehnquist, who authored an average of 26.6 opinions per year, cited legislative history documents in an average of only 8.7opinions per year. Finally, Justice Scalia, as expected, while authoring an average of 34.5 opinions per term, cited legislative history in an average of only 3.3 opinions per year.

One way of estimating Scalia's influence on this trend is to map the use of legislative history by the justices who were on the Court before and after Scalia began his attack in 1986. Only three justices fit this profile—Justices Rehnquist, Stevens and

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in 1958 by President Eisenhower. *See id.* at 947 "On the Court Stewart was described as a 'swing justice,' moving between the liberal and conservative factions. *Id.* at 948. Stewart retired in 1981. *See id.*

[100] The following figures represent the average number of opinions in which the individual justices cited to legislative history during the years in which they were on the Court. These averages only include the years covered by this study, 1980 to 1998. For example, Justice Rehnquist cited to legislative history in an average of 8.7 opinions per year from 1980–1998 (his tenure spans the entire period of this study). Justice Stevens cited to legislative history 22.47 times; O'Connor, 14.35; Kennedy, 6.55; Scalia, 3.33; Thomas, 3.43; Ginsburg, 5.17; Breyer, 10.75; Souter, 9.25; Marshall, 26.33; Powell, 18.25; Blackmun, 23.33; Brennan, 29.10; Burger, 18.43; White, 19.21; Stewart, 22.5.

TABLE III: TOTAL NUMBER OF OPINIONS IN WHICH JUSTICES CITED LEGISLATIVE HISTORY/TOTAL NUMBER OF OPINIONS AUTHORED[†]

JUSTICE	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Rehnquist	23/44	16/40	17/39	19/41	11/36	17/33	5/37	10/26	6/24	7/23	2/22	7/19	5/22	14/21	6/16	1/16	0/15	0/14	0/17
Stevens	17/47	15/53	13/56	37/54	52/68	42/58	27/68	28/62	28/42	31/52	18/60	29/42	19/45	15/44	16/33	12/34	9/35	8/32	8/30
O'Connor	—	—	18/35	19/34	24/36	23/36	17/36	24/42	17/36	18/33	16/29	7/13	13/37	2/31	6/27	3/29	2/15	5/22	5/16
Kennedy	—	—	—	—	—	—	—	—	2/14	6/29	3/35	10/16	4/26	4/24	13/21	4/15	12/18	3/12	3/20
Scalia	—	—	—	—	—	—	—	2/42	10/42	1/44	7/44	3/23	6/43	1/30	3/33	1/24	4/26	1/28	1/35
Thomas	—	—	—	—	—	—	—	—	—	—	—	—	1/22	3/23	5/21	6/23	6/22	2/16	2/17
Ginsburg	—	—	—	—	—	—	—	—	—	—	—	—	—	—	10/27	4/23	4/18	8/17	8/22
Breyer	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	12/16	9/19	2/26	2/27

[†] This includes majority, concurring, and dissenting opinions authored by each justice.

TABLE III (CONTINUED): TOTAL NUMBER OF OPINIONS IN WHICH JUSTICES CITED LEGISLATIVE HISTORY/TOTAL NUMBER OF OPINIONS AUTHORED

JUSTICE	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Souter	—	—	—	—	—	—	—	—	—	—	—	6/8	8/21	11/22	16/27	3/18	5/20	5/19	5/21
Marshall	22/42	19/26	20/24	30/47	21/33	23/32	28/52	27/37	12/29	23/32	14/33	19/41	—	—	—	—	—	—	—
Powell	22/48	18/39	14/51	23/35	14/36	13/24	20/39	13/38	—	—	—	—	—	—	—	—	—	—	—
Blackmun	34/51	24/41	18/44	26/44	22/31	17/23	26/40	18/42	25/28	25/48	21/34	13/32	14/32	14/30	16/26	—	—	—	—
Brennan	24/41	27/38	12/44	33/46	32/55	38/52	24/48	18/48	27/39	26/42	22/46	—	—	—	—	—	—	—	—
Burger	18/28	19/26	16/34	19/24	11/18	16/28	14/34	—	—	—	—	—	—	—	—	—	—	—	—
White	13/34	20/31	16/44	24/36	16/33	24/32	6/42	16/38	27/44	14/34	7/31	14/18	20/25	11/23	—	—	—	—	—
Stewart	21/32	17/38	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—

O'Connor. Presumably, the justices' judicial philosophy has remained relatively stable over this period, and any fluctuations in their pattern of legislative history use may be attributable to the critique of Justice Scalia.

Justice Rehnquist presents a good example of this influence. From 1980 to 1986, Rehnquist wrote an average of 35.6 opinions per year, and cited legislative history in an average of 15.4 opinions per year. In the period following Scalia's appointment, from 1987 to 1998, he authored an average of 19.6 opinions per year and cited legislative history in only 4.8 opinions per year. Justice Stevens also followed this declining pattern. From 1980 to 1986, Stevens authored an average of 57.7 opinions per term and cited legislative history in an average of 29 opinions per year. From 1987 to 1998, he authored an average of 42.6 opinions per year and cited legislative history in only 18.4 opinions per year.

V. Conclusion

In their 1938 to 1979 study, Carro and Brann were able to "detect a firm evolution that [went] from the almost absolute rejection of the use of legislative history in statutory interpretation to an almost absolute acceptance."[101] From 1980 to the present, however, there has emerged a clear and unmistakable pattern of decline in the use of legislative history by the Supreme Court. While the pattern is most acute in the decisions of more conservative justices, moderate and liberal justices are also citing to legislative history less often. Clearly, the critique of Justice Scalia has made a large contribution to this trend. While it is premature to conclude that legislative history will cease to be a tool of statutory interpretation, Justice Scalia's criticism has, at a minimum, caused his fellow justices to give pause before they rely on, and cite to, legislative history.

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[101] Carro and Brann, *supra* note 2, at 296.

ARTICLE

MURDER BY OMISSION: CHILD ABUSE AND THE PASSIVE PARENT

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WENDY L. MACFARLANE**

Under most states' criminal laws, a parent who causes the death of his child through abuse or neglect can be charged with murder. However, few states have laws that allow for murder charges to be brought against the non-abusing parent. In this Article, the authors propose a model statute that holds the passive parent as liable as the parent who actually causes the child's death. The authors also argue against the passive parent's use of Battered Woman's Syndrome as a defense, suggesting that both parents bear the responsibility for protecting their child's welfare.

> A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.
>
> —John Stuart Mill, *On Liberty*[1]

On June 22, 1996, two-year-old Joselin Hernandez died by her father's hands. It was the end of a short, tortured life for the little girl, who was mistreated almost from birth. According to the District Attorney who prosecuted the case, Joselin's father, Rogelio, took pleasure in abusing his daughter.[2] He joked and

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[1] JOHN STUART MILL, ON LIBERTY 11 (1859).

[2] *See* Transcript, People v. Rogelio Hernandez and Gabriela Hernandez, No. CR40152, Nov.17, 1997, at 33–67 (opening statement of Dorothy Corona, Ventura County Deputy District Attorney) [hereinafter Transcript].

smiled as he smacked the toddler in the mouth with a spoon to force her to eat.[3] He made Joselin jump to him in a pool but would move away just before catching her.[4] He would then laugh as Joselin sank under the water and struggled to surface.[5] During these episodes, Joselin's mother, Gabriela, took no action, allowing Rogelio to inflict physical and mental abuse on Joselin.[6]

When Joselin was treated for her first injuries at six weeks of age in the summer of 1994, she had numerous broken ribs, two fractured ankles, third-degree burns, bruises, and other signs of abuse on her small body.[7] Ventura County Child Protective Services ("CPS") was contacted.[8] CPS removed Joselin from her parents and placed her in the care of her maternal grandmother.[9] During this time, Joselin grew into a happy, well-developed toddler.[10] CPS required Rogelio and Gabriela to attend classes and therapy sessions as a precondition of regaining custody of Joselin.[11] However, the parents failed to attend many sessions, and after Joselin's first overnight visit with them in October 1995, she returned with bruises.[12] Nevertheless, CPS sent Joselin back to Gabriela and Rogelio in March 1996.[13]

After regaining custody, the Hernandezes became even less cooperative with CPS and did not keep appointments. Despite compelling evidence of additional injuries, case workers did not examine Joselin for signs of abuse.[14] Joselin died three months after being returned to her parents, and just ten days after she was last seen by CPS.[15]

Rogelio was charged with first-degree murder.[16] Such a charge is not uncommon in California. What is uncommon, however, is

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[3] *See id.* at 49.
[4] *See id.* at 44–45.
[5] *See id.* at 45.
[6] *See id.* at 66–67.
[7] *See id.* at 39–40.
[8] *See id.* at 42.
[9] *See id.*; *see also* Catherine Saillant, *All The World Knew*, VENTURA STAR (Ventura, Cal.), June 22, 1997, at A8.
[10] *See* Transcript, Nov. 17, 1997, at 43–44 (Corona).
[11] *See* Saillant, *supra* note 9, at A8.
[12] *See* Transcript, Nov. 17, 1997, at 46 (Corona).
[13] *See id.* at 48.
[14] *See* Transcript, Dec. 17, 1997 (Linda James, parent aide assigned by CPS). When James saw Joselin on May 14, 1996, Joselin's hand was bandaged up to her wrist due to a burn. *See id.* at 38. Joselin also had stitches on her forehead and swollen, red eyes. *See id.* at 38–39. James testified that at the time of her last visit on June 11, 1996, Joselin was quiet, but that she did not inspect for injuries. *See id.* at 43.
[15] *See* Saillant, *supra* note 9, at A8.
[16] Rogelio was charged with felony murder for torture under CAL. PENAL CODE § 189

that Gabriela was also charged with first-degree murder, as an aider and abettor of her daughter's murder.[17] In most cases of death by child abuse, only the person who actually inflicts the injuries is charged with murder; the parent who fails to protect the child is rarely charged as an aider and abettor unless she[18] too has inflicted injuries.[19] Rather, that parent is generally charged with child endangerment, felony child abuse, or a similar, though lesser, crime.[20]

There is, however, no logical or legal reason for failing to charge all parents, guardians, or caretakers with murder when they know of the abuse yet fail to protect their children.[21] Domestic

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(West Supp. 1999).

[17] *See* Tamara Koehler et al., *Verdict In The Joselin Hernandez Case*, VENTURA STAR, Jan. 15, 1998, at A8.

[18] To maintain consistency with the facts of the *Hernandez* case, this Article will use feminine references for the passive parent and masculine references for the abusing parent. The authors recognize that often these roles are reversed; this semantic convention was chosen only for the sake of clarity.

[19] This parent may be charged with a lesser offense or granted immunity in exchange for testifying against the principal. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 17 (1995) [hereinafter A NATION'S SHAME]. Too often, however, the other parent is not held accountable. The death of six-year-old Lisa Steinberg is perhaps the most famous case where the mother escaped prosecution altogether. Lisa was the adopted daughter of Hedda Nussbaum and Joel Steinberg. She was beaten to death by Steinberg in 1987. *See We Did Drugs As Girl Died, Mom Says*, CHI. TRIB., Dec. 4, 1988, at 16. After Steinberg beat Lisa unconscious, he laid the child on the bathroom floor and went out to dinner; Nussbaum stayed home but did not call for help. *See id.* When Steinberg returned from dinner, he and Nussbaum spent the next several hours in the bedroom smoking cocaine. *See* Mary T. Schmich, *At Steinberg Trial, Aggression Issues Take Center Stage*, CHI. TRIB., Dec. 11, 1988 at 5. More than 12 hours after the beating, Nussbaum called 911. *See id.* All charges against Nussbaum were dropped in exchange for her testimony against Steinberg. *See No Murder Charges Against Nussbaum*, NORTHERN N.J. REC., OCT. 27, 1988, at A3.

[20] *See, e.g.*, CAL. PENAL CODE § 273a (West 1997) (willfully causing harm or injury to child); D.C. CODE ANN. § 22-901 (1996) (cruelty to children); ILL. COMP. STAT. ANN. § 5/12-4.3 (West 1997) (aggravated battery of a child); MD. CODE ANN. 27, § 35C (Michie 1996) (causing abuse to child); N.Y. PENAL LAW § 260.10 (West 1997) (endangering the welfare of a child); TEX. PENAL CODE ANN. § 22.041 (West 1995) (abandoning or endangering child). For example, in Missouri the mother of four-month-old Demetrick was charged with felony child endangerment for allowing her son's abuse, although she did not inflict any injury. *See* Bill Bryan, *Father Faces Murder Charge In Baby's Death Mother Also Faces Felony Charges*, ST. LOUIS POST-DISPATCH, Mar. 3, 1998, at A1. In Indiana the mother of four-year-old Hope was charged with neglect of a dependent in connection with her daughter's death. *See* Kim L. Hooper, *Mother Arrested At Graveside During Service For Daughter*, INDIANAPOLIS STAR, Oct. 26, 1995, at D2. The mother was not present when the girl was beaten to death by the mother's boyfriend. *See id.* However, only one month earlier the boyfriend had beaten the girl, and raped and beaten the mother. *See id.*

[21] Obviously, there were many people who failed to protect Joselin. CPS, despite evidence of abuse and lack of cooperation, returned Joselin to her parents. Additionally, the District Attorney's Office failed to file child abuse charges in 1994, when the abuse was first documented. Nevertheless, the primary responsibility for this tragedy lies with

abuse of children is increasingly common in the United States, with more than one million children abused or neglected every year.[22] Since 1991, 10,000 children have died at the hands of their parents or caretakers,[23] and conservative estimates indicate that five children die every day from abuse or neglect committed by those obligated to protect them.[24] While social services, public education, and intervention programs may be able to help alleviate part of this growing problem,[25] they alone are not enough. After all, although Joselin's situation was being supervised by CPS, Joselin fell through the cracks. Legislatures must thus allow authorities to adequately punish parents whose failure to protect their children causes abuse, neglect, and death.[26]

This Article argues that the Hernandez tragedy illustrates why parents who fail to protect their children from abuse leading to death should be considered as culpable as those who inflict abuse, and charged with murder. Part I details the facts and the trial of this tragic case. Part II discusses the statutory and common law relevant to child abuse, revealing the inability of the current legal regime to appropriately punish a passive parent who allows her child to be abused. Part III considers the Battered Woman Syndrome ("BWS") defense and concludes that it should be inapplicable in child abuse cases. Finally, Part IV pro-

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the Hernandezes.

[22] *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996) (estimating that 1,553,800 children were abused or neglected in 1993); U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1995: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1997) (more than one million children were identified as victims of abuse or neglect in 1995) [hereinafter CHILD MALTREATMENT].

[23] *See* A NATION'S SHAME, *supra* note 19, at xxiii.

[24] *See id.* at 9. According to the Population Reference Bureau, homicide rates among children age four and under have hit a 40-year high. *See id.* at 8.

[25] *See id.* at xxxiii.

> Child welfare and law enforcement agencies have an explicit statutory mandate to intervene to protect children when the family does not provide that protection. However, if the system is going to save children, this responsibility must be greatly broadened and seen as a collaboration among law enforcement, social service, public health, and education systems.

Id.

[26] When it comes to deaths of children due to physical assault or neglect at the hands of parents or caretakers, society has responded in a strangely muffled way. *See id.* at 7. The criminal justice system often responds poorly to child fatalities. "Prosecutors often reduce child homicides, including those of a heinous nature, to lesser crimes or do not charge perpetrators at all. Prosecutors are hampered in part by murder statutes that do not fit many child fatalities." *Id.* at xxix.

poses a model statute to make clear that a passive parent can, and should, be charged with murder.

I. *PEOPLE V. HERNANDEZ*

A. *The Facts*

Almost from birth, Joselin Hernandez was in danger. Born a healthy infant to Rogelio and Gabriela Hernandez in May 1994, she experienced more physical suffering in her first few weeks of life than most children do in their entire adolescence. At six weeks of age she was taken to the emergency room,[27] where doctors found more than ten rib fractures, two fractured ankles, multiple scratches, and burns on her hands, feet, mouth, and buttocks.[28]

Rogelio explained these injuries to investigators by saying that Joselin was accidentally burned with battery acid as she lay on his lap while he repaired his stereo.[29] Gabriela said Joselin's ribs may have been broken when she pushed on Joselin's stomach to clear her bowels.[30] Rogelio said that cats may have caused the scratches;[31] however, Gabriela said she may have scratched Joselin's neck because she held the child by the neck to bathe her.[32] Neither parent had an explanation for the bruises.

Joselin was placed in protective custody shortly after arriving at the hospital by Ventura County Child Protective Services ("CPS"). CPS successfully petitioned to remove Joselin from her parents' custody temporarily and placed her in the care of her grandmother, Amor Nieto.[33] To regain custody, Rogelio and

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[27] On July 14, 1996 Joselin was taken by ambulance to St. John's Regional Medical Center. *See* Transcript, Apr. 14, 1997, at 11, 24 (Officer Robert Coughlin).

[28] *See* Transcript, Dec. 18, 1997, at 92–93, 97–98 (Dr. Paul Russell).

[29] *See* Transcript, Nov. 18, 1997, at 197 (Detective Doug Wiley); Transcript, Apr. 14, 1997, at 16–17 (Coughlin).

[30] *See* Transcript, Dec. 20, 1996, at 63–64 (Wiley). Gabriela said that Maria Duarte, her "botanica," a homeopathic healer, had told her to apply pressure to Joselin's stomach so that the baby would not have continuous bowel movements. *See id.* Detective Wiley testified that Duarte reported that she told Rogelio to massage a mixture of lard and sugar into Joselin's stomach to relieve constipation, but that she never spoke to Gabriela. *See id.* at 67.

[31] *See id.* at 34.

[32] *See id.* at 63.

[33] *See* Saillant, *supra* note 9, at A8. Cathy DeLaTorre-Martinez at Child Protective Services was assigned to the case. *See id.*

Gabriela were required to complete parenting classes, attend therapy, and allow a parent aide to visit their home regularly.[34]

During the time away from her parents, Joselin thrived under her grandmother's care. She gained weight and exhibited no signs of abuse.[35] Meanwhile, the Hernandezes missed several therapy appointments and arrived late to others.[36] Despite these lapses, CPS allowed Joselin's parents to take her home for overnight stays in October 1995.[37] Joselin's reprieve from abuse was thus short-lived. Soon after the weekend visits started, Mrs. Nieto found bruises on Joselin's stomach and head.[38] Although the visits were suspended until Christmas, CPS determined that the abuse could not be proven and the parental weekend visits resumed.[39]

In March 1996, just before her second birthday, CPS returned Joselin to her parents.[40] The Hernandezes had been meeting with a parent aide, Linda James, and had purportedly learned appropriate child care methods, including proper nutrition and discipline.[41] Nevertheless, despite properly caring for another child,[42] being aware of the injuries abuse can cause, and having once lost custody of their daughter, the Hernandezes continued to heap abuse upon Joselin.

Over the next three months Gabriela and Rogelio failed to keep many of their scheduled appointments with James, the parent aide.[43] Friends and neighbors reported further injuries inflicted on Joselin to CPS, and James personally knew of a burn to Joselin's hand.[44] These bruises and burns were similar to those

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[34] *See id.*

[35] *See* Transcript, Nov. 17, 1997, at 43–44 (Corona).

[36] *See* Saillant, *supra* note 9, at A8.

[37] *See* Transcript, Nov. 17, 1997, at 46 (Corona).

[38] *See id.*

[39] *See* Saillant, *supra* note 9, at A8.

[40] The law requires a decision about a child's permanent home be made within two years after the child is removed from her parent's custody. At this point, Joselin had lived with her grandmother for more than 18 months. *See id.*

[41] James was assigned to the Hernandez case by CPS on January 23, 1996. *See* Transcript, Dec. 17, 1997, at 4 (James). Beginning January 30, 1996 she scheduled weekly appointments to visit the Hernandez home; these visits were to continue for six months. *See id.*

[42] Rogelio Jr., the couple's son, was apparently well cared for and there were no signs of abuse. According to Miguel Nieto, Gabriela's father, Rogelio Jr. was never mistreated as Joselin was. *See* Interview with Dorothy Corona, Deputy District Attorney, November 18, 1997.

[43] *See* Transcript, Dec. 17, 1997, at 10 (James). The appointments were either canceled or no one was home when the parent aide arrived. *See id.*

[44] *See id.* at 31–33.

Joselin had suffered previously. While James reported the injuries to the case supervisor, Cathy DeLaTorre-Martinez, she did not recommend that the toddler be removed from the home.[45] In fact, in the spring of 1996, CPS recommended that the Hernandezes permanently regain custody of Joselin.[46]

On May 14, 1996 during one of her last visits with the Hernandezes, James examined Joselin's four-week-old burn and noted that it was not scabbed.[47] She also noticed that Joselin had stitches on her forehead and swollen red eyes.[48] According to James, Rogelio had spoken to DeLaTorre-Martinez about the burn and the head injury.[49] He claimed that Joselin was burned by hot water in the bathtub while they were in Mexico[50] and that Joselin had injured her head when she fell off a milk crate while playing video games.[51] DeLaTorre-Martinez, however, neither called anyone in Mexico to corroborate the burn story nor checked with anyone about Joselin's fall from the milk crate.[52]

The last time James saw Joselin was on June 11, 1996.[53] Although four weeks had passed since her last visit, the aide did not examine Joselin for signs of abuse.[54] On June 22, 1996, Joselin died.[55] An autopsy revealed that repeated blows to Joselin's abdomen had caused her bowels to split, spilling toxins throughout her body.[56] At the time of her death, she also had an untreated broken arm, strangulation marks, and bite wounds to both knees.[57] On this basis, Rogelio was charged with felony-murder by torture[58] and Gabriela was charged with murder as an aider and

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[45] *See* Saillant, *supra* note 9, at A8.
[46] *See id.*
[47] *See* Transcript, Dec. 17, 1997, at 38 (James).
[48] *See id.* at 39.
[49] *See id.* at 40.
[50] *See id.* at 33.
[51] *See* Saillant, *supra* note 9, at A8.
[52] *See id.*
[53] *See* Transcript, Dec. 17, 1997, at 43 (James).
[54] *See id.* The Hernandezes canceled three visits that had been scheduled between May 14 and June 11, 1996. *See id.* at 42.
[55] *See* Saillant, *supra* note 9, at A8.
[56] *See id.*
[57] *See id.*
[58] *See* Koehler, *supra* note 17, at A1. California has no statute specific to child abuse homicide and courts have rejected the felony-murder doctrine in fatal child abuse cases. *See, e.g.*, People v. Smith, 678 P.2d 886, 891 (Cal. 1984) (holding that acts constituting child abuse were an integral part of child's death and thus felony child abuse offense merged into the homicide); People v. Caffero, 255 Cal. Rptr. 22, 24–25 (Ct. App. 1989) (ruling that felony child abuse was not appropriate predicate to application of felony-murder rule).

abettor.[59] Gabriela was unsuccessful in her attempt to have her trial separated from Rogelio's, and their joint trial began on November 17, 1997.

B. *The Trial*

At trial, Rogelio's attorney argued that this was simply a case of underage adolescents who could not handle the responsibilities of parenthood.[60] He further contended that the parents did not seek medical care for Joselin because of their cultural belief in non-traditional medicine.[61] Rogelio, it was thus argued, may have abused and neglected his daughter, but this did not rise to the level of murder.[62] The defense claimed that his actions did not constitute torture and were not premeditated.[63]

Gabriela's attorney planned a defense of duress, claiming that she suffered from Battered Woman Syndrome. During opening statements, her attorney referred to the abuse she suffered as a child by different family members.[64] According to her attorney, Gabriela was easily manipulated and controlled by Rogelio and was unable to confront him.[65] This defense was ultimately abandoned, however, because Gabriela did not testify.[66] Instead,

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[59] Rogelio was also charged with felony child abuse causing death, felony child abuse, cruelty to a child, and misdemeanor child abuse. *See* Koehler, *supra* note 17, at A8. Gabriela was also charged with felony child abuse causing death, felony child abuse, misdemeanor child abuse, and cruelty to a child. *See id.*

[60] *See* Transcript, Nov. 17, 1997, at 68 (opening statement of Doug Daily, attorney for Rogelio Hernandez). At the time of Joselin's birth, Rogelio and Gabriela were 15 and 16 years of age, respectively. *See id.* at 68.

[61] *See id.* at 69. The defense referred to the Hispanic culture's use of "Botanicos." *See id.* "Botanico" means botanist and "botanica" means botany, or a store where medicinal herbs are sold. *See* SIMON & SCHUSTER'S SPANISH DICTIONARY 991 (2d ed. 1997). However, the word is also used to refer to a "healer." Miguel Nieto, Gabriela's father, stated that when he and his family lived in Mexico they visited a healer when a family member was ill. *See* Transcript, Dec. 27, 1996, at 687–88 (Miguel Nieto). In Joselin's case, the Botanica gave the parents ointment to put on Joselin's burn, but only after recommending they take the child to a doctor. *See* Transcript, Nov. 17, 1997, at 50 (Corona). More than once, Rogelio and Gabriela told investigators they took Joselin to a Botanica because they did not have medical insurance. *See id.* at 52. However, Joselin was covered by Medi-Cal and her parents had taken the child to her regular pediatrician on several occasions. *See id.* at 41.

[62] *See* Transcript, Nov. 18, 1997, at 69 (Daily). After Rogelio was sentenced, Daily stated, "[t]his (death) was not the product of premeditated, planned torture." Koehler, *supra* note 59, at A8.

[63] *See* Transcript, Nov. 18, 1997, at 68 (Daily).

[64] *See* Transcript, Nov. 17, 1997, at 73–74 (opening statement of William Maxwell, attorney for Gabriela Hernandez).

[65] *See id.* at 75.

[66] The court prohibited the defense expert from admitting the basis for her opinion

Gabriela's attorney argued that Joselin died from a congenital intestinal disease and that Gabriela did the best she could to seek medical care.[67]

The jury rejected all these arguments. Rogelio was found guilty of first-degree murder and was sentenced to three life terms.[68] Gabriela was found guilty of second-degree murder for failing to protect her daughter, and received fifteen years to life.[69] Both defendants have appealed.[70]

II. COMMON AND STATUTORY LAW

State law has a long history of dealing with the crimes of child abuse and murder. However, the specific situation of death by child abuse, particularly as it relates to the passive parent, is rarely covered by the common law or the criminal statutes of most states. This Section will first discuss a parent's general duty of care toward her child under both civil and criminal law and its implications for the passive parent in abuse cases. The Section will then examine the common law requirements for holding the passive parent liable as a principal as opposed to an aider and abettor.

Finally, the Section will analyze three distinct statutory approaches to holding passive parents liable for murder in death by child abuse cases. Depending on the state, a passive parent may be charged as an accomplice to murder under: (1) a general homicide statute; (2) a homicide statute that includes provisions for death by child abuse; and (3) a specific homicide by child abuse statute. The discussion will highlight the need for a new

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that Gabriela suffered from Battered Woman Syndrome. The court held that such an admission would deny Rogelio's Sixth Amendment right to confront his accusers. *See* Transcript, Nov. 17, 1997, at 2. Therefore, although the expert could testify regarding Battered Women Syndrome, she could not admit the basis for her opinion unless Gabriela also testified. *See id.* at 5–6.

[67] *See* Koehler, *supra* note 59, at A8.

[68] Twenty-five years to life for first-degree murder, 15 years to life for felony child abuse causing death, and a life term for torture. *See* Abstract of Judgment-Prison Commitment, Feb. 27, 1998 (Rogelio Hernandez).

[69] *See* Abstract of Judgment-Prison Commitment, Feb. 27, 1998 (Gabriela Hernandez). The jury did not find Gabriela guilty as an aider and abettor because it was unsure of the amount of abuse about which she had knowledge. *See* Interview with Dorothy Corona, Deputy District Attorney, Mar. 3, 1998.

[70] *See* Rogelio Hernandez, Notice of Appeal, Mar. 30, 1998; Gabriela Hernandez, Notice of Appeal, Mar. 20, 1998.

comprehensive murder by child abuse statute that provides clear liability for the acts or omissions of the passive parent.

A. *Duty of Care*

Historically at common law, there was no general duty to protect others from harm[71] or to aid another person in peril.[72] In modern times, however, the law has recognized an affirmative duty to exercise reasonable care where a "special relationship" exists between the plaintiff and defendant.[73] "Special relationships" have been found between innkeepers and their guests, landholders and their invitees,[74] and between a psychiatrist and his patient's foreseeable victim.[75]

Under the common law and statutes of most states, a parent has a legal duty to protect her child and do whatever may be necessary for that child's care, maintenance, and preservation.[76] A

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[71] *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965). "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Id.*

[72] *See* WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW, § 3.3 (Westlaw 1998).

[73] *See* RESTATEMENT (SECOND) OF TORTS § 314A. Special relationships that give rise to a duty to aid or protect are:

> (1) A common carrier is under a duty to its passengers to take reasonable action
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> (a) to protect them against unreasonable risk of physical harm, and
>
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

[74] *See id.*

[75] *See* Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976) (en banc). In *Tarasoff*, although a patient confided to his psychiatrist his intention to kill a third party, the psychiatrist failed to warn anyone of the patient's intent to kill. *See id.* at 339–40. After the patient later killed the threatened third party, the victim's parents sued the psychiatrist for failing to warn the victim of the danger. *See id.* at 340. The court held that a psychiatrist who determined that his patient presented a danger to a particular person has an obligation to use reasonable care to protect the foreseeable victim. *See id.* at 347–48. Reasonable care meant only warning the foreseeable victim or the police of the possible danger. *See id.* at 347.

[76] *See* 59 AM. JUR. 2D *Parent & Child* § 14 (1996).

> It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation. The child has the right to call upon the

parent may not endanger her child's life or health,[77] abandon the child,[78] deny or fail to seek medical care for a sick child,[79] or deprive a child of necessary food, clothing, or shelter.[80] A parent also has a legal duty to financially support her minor children,[81] provide for the child's education,[82] and supervise the child's activities.[83] Parents therefore have clear legal duties to protect their children, and the discharge of this duty requires affirmative performance.[84] When a parent breaches these legal duties—for example, by failing to protect her child from abuse—she may be liable under both civil and criminal law.

1. Civil Liability

Parents may be civilly liable for negligence for failing to protect their children from abuse. Recently, for instance, a number of courts have found mothers liable for failing to protect their

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parent for the discharge of this duty, and public policy will not permit or allow the parent to divest himself irrevocably of his obligations in this regard or to abandon them at his mere will or pleasure.

Id. See also People v. Peters, 586 N.E.2d 469, 476 (Ill. App. Ct. 1991) (custodial parents have affirmative duty to protect and provide for their minor children); People v. Walden, 293 S.E.2d 780, 785 (N.C. 1982) (parents have affirmative legal duty to protect and provide for their minor children).

[77] Endangering a child's life or health is often the basis for imposing criminal liability on a parent or guardian. For example, under Delaware law, neglect is defined as "threatening or impairing the physical, mental or emotional health and well-being of a child through inadequate care or protection, nontreatment or abandonment . . ." DEL. CODE ANN. tit. 11, § 1103(c) (1995). The definition of abuse also includes "negligent treatment." *Id.* § 1103(a); *see also* IND. CODE ANN. § 35-46-1-4(a) (1998).

[78] *See, e.g.*, IND. CODE ANN. § 35-46-1-4(a)(2); ALASKA STAT. § 11.51.100 (1998).

[79] Parents are under a legal duty to provide medical attention for their children. *See, e.g.*, 59 AM. JUR. 2D *Parent & Child* § 48 (1996); Walker v. Superior Court, 763 P.2d 852, 868 (Cal. 1988) (failure to seek medical attention may constitute felony child endangerment); Howell v. State, 350 S.E.2d 473, 476 (Ga. Ct. App. 1986) (denial of necessary and appropriate medical care can constitute cruelty to a child).

[80] *See, e.g.*, IOWA CODE ANN. § 726.6 (West 1997); 59 AM. JUR. 2D *Parent & Child* § 14 (1996).

[81] *See* 59 AM. JUR. 2D *Parent & Child* § 41 (1996). The court may order either or both parents owing a duty of support to pay an amount the court deems reasonable or necessary. *See* 24 AM. JUR. 2D *Divorce and Separation* § 1035 (1997).

[82] *See* 59 AM. JUR. 2D *Parent & Child* § 46 (1996) ("It is the natural and legal duty of a parent to give his children education").

[83] Parents are legally responsible for the supervision and control of their children so that the child's behavior does not place her in danger. *See* 62 AM. JUR. 2D *Premises Liability* § 214 (1998). Although parents are not strictly liable for damages caused by their children, many states recognize a parental duty to control children and impose liability for breach of that duty. *See id.*

[84] *See, e.g.*, Commonwealth v. Howard, 402 A.2d 674, 676 (Pa. Super. Ct. 1979) (requiring affirmative performance of duty); Palmer v. State, 164 A.2d 467, 473 (Md. 1960) (obligation of a parent to provide for the care and welfare of a minor is not a perfunctory one, to be performed only at the voluntary pleasure of the parent).

children from sexually abusive spouses.[85] In *Richie v. Richie,* the plaintiff won a jury award against her parents for $2.4 million.[86] She accused her father of molesting her on a weekly basis between the ages of twelve and seventeen, and accused her mother of ignoring the abuse despite overwhelming evidence that it was occurring.[87] In Texas, the mother of two girls who were molested by their stepfather was found fifty percent responsible for a $3.4 million award.[88] Likewise, in California, a judge held foster parents jointly and severally liable for the sexual abuse of their foster daughter by the foster father,[89] finding the foster mother negligent for failing to protect the child.[90]

2. Criminal Liability

Parents can also be criminally prosecuted, under a number of different theories, for failing to protect their children from abuse.[91] For example, in *Muehe v. State,* a mother was found guilty of neglect of a dependent for failing to protect her four-

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[85] *See, e.g.,* Richie v. Richie, No. 91-03635 (Minn. Dist. Ct. 1992) (holding mother liable for failure to protect children from spouse's abuse).

[86] *See id.* The parents were jointly liable for $1.4 million in compensatory damages; the father was liable for $1 million in punitive damages. *See id.*

[87] *See id.* The complaint alleged that the mother discovered her husband missing from their bed on several occasions and saw him coming out of the child's room. *See id.*

[88] *See Elliot v. Dickerson,* No. 91-1524-B (Tex. Dist. Ct. 1992); *see also* Mark Hansen, *Liability for Spouse's Abuse,* 79 A.B.A.J. 16 (1993); Mary Hull, *Mother Held Liable For Stepfather's Sexual Abuse,* TEX. LAW., Oct. 26, 1992, at 10; Julie Gannon Shoop, *Mother Liable for Failure to Protect Child from Sexual Abuse,* TRIAL, Jan. 1993, at 16, 109. The judge in the *Elliot* case found that the mother had been put on notice of the abuse and had failed to take any corrective action. *See Elliot,* No. 91-1524-B. The victims testified they told their mother early on about the abuse, but their stepfather denied it and their mother told the girls to resist his advances if it happened again. *See id.* After serving a little more than 2 years of an 18-year prison sentence, the stepfather returned to live with the girls' mother, who thereby forfeited her right to visit her children. *See id.*

[89] *See* National Union Fire Ins. Co. v. Lynnette C., 228 Cal.App.3d 1073, 1075 (Cal. Dist. Ct. App. 1991). The victim's foster parents were covered by a liability insurance policy issued to the county's department of social welfare by the plaintiff insurance company. *See id.* The insurance company contended that neither foster parent was covered under the policy for the allegations in the victim's complaint. *See id.* at 1076. The court held that the foster mother's negligence did not preclude insurance coverage. *See id.* at 1086.

[90] *See id.* at 1086.

[91] A parent's failure to protect his or her child from abuse is "tantamount to neglect of that child." Muehe v. State, 646 N.E.2d 980, 983 (Ind. 1995) (finding criminal liability for failure to protect child). *See also* State v. Williquette, 370 N.W.2d 282, 284–85 (Wis. Ct. App. 1985) (holding parent criminally liable for failure to protect child, concluding that omission may constitute aiding and abetting when the defendant has a legal duty to act and the omission aids in the execution of the crime).

teen-year-old daughter from her father's incestuous acts.[92] The court stated that "[a] person knowingly commits neglect of a child when she is subjectively aware of a high probability that she placed the child in a dangerous situation."[93] In *Muehe*, the mother knew that her husband had previously molested and had sexual intercourse with their daughter, and the court found "[u]nder such circumstance[s], [the mother had] a clear duty to remove [the child] from the situation in order to avoid injury, or at the very least, to report her suspicions to the proper authorities."[94] Thus, the court held that "a parent's failure to take appropriate steps to protect his or her child from the abuse of the other parent is tantamount to neglect of that child . . . ."[95]

In *Commonwealth v. Howard*, the defendant's five-year-old daughter was abused over a period of several weeks and ultimately died from multiple injuries to her head and chest.[96] The court upheld the defendant's conviction for involuntary manslaughter, finding that her failure to protect her child was "reckless or grossly negligent under the circumstances."[97] While the defendant argued that she lacked reasonable notice of her duty to act because some of the injuries that caused her child's death were internal,[98] the court stated that "the breach of duty here [was] not the failure to seek medical attention but the failure to do anything to protect the child from [the abuser's] savagery."[99]

Despite the fact that a passive parent can be prosecuted for a number of different crimes, there remains a need for a statute that holds all parents adequately accountable for both acts and omissions resulting in the death of their children by abuse. While statutes imposing criminal liability for passive child abuse currently exist in every state,[100] they typically classify the crimes

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[92] *See Muehe*, 646 N.E.2d at 983.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *See* Commonwealth v. Howard, 402 A.2d 674, 675 (Pa. Super. Ct. 1979).

[97] *Id.* at 676. "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." *Id.* at 676 (quoting 18 PA. CONS. STAT. § 2504).

[98] *See id.* at 676 n.2.

[99] *Id.* (citations omitted). "She [the defendant mother] never evicted or even discouraged [the abuser]. She never reported anything to the public authorities." *Id.* at 678.

[100] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-604.01, 13-1105(a)(2), 13-3619, 13-3623 (West 1997); CAL. PENAL CODE § 273A (West 1997); COLO. REV. STAT. § 18-6-401 to -401.2 (West 1997); D.C. CODE ANN. § 22-901 to -902 (1996); FLA. STAT. ANN. ch. 827.03-.071 (West 1997); ILL. COMP. STAT. ANN. ch. 720 § 5/12-4.3, 115/53, 150/4

as misdemeanors.[101] Further, while some states do provide that a parent's omission resulting in death may support a murder or manslaughter conviction in certain circumstances,[102] this is the exception rather than the rule.[103]

B. *Principals versus Aiders and Abettors*

When one parent abuses a child, including submitting the child to abuse that leads to death, the other parent may generally be charged as a principal or as an accomplice to various different crimes. Traditionally, a party to a felony was classified as either: "(1) principal in the first degree;[104] (2) principal in the second degree;[105] (3) accessory before the fact;[106] or (4) accessory after

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(West 1997); MASS. GEN. LAWS ANN. ch. 265, § 13J (West 1997); MICH. COMP. LAWS ANN. §§ 750.135, 750.136b (West 1997); N.J. STAT. ANN. § 9:6-3 (West 1997); N.Y. PENAL LAW § 260.10 (West 1997); OHIO REV. CODE ANN. § 2919.22 (West 1997); TEX. PENAL CODE ANN. § 22.04-.041 (West 1997); VA. CODE ANN. § 63.1-248.1 to -248.17 (Michie 1997); WASH. REV. CODE ANN. §§ 9A.16.100, 9A.42.010-030 (West 1997).

[101] For examples of state statutes that classify failure to protect as a misdemeanor, see KAN. STAT. ANN. § 21-3608 (1996); ME. REV. STAT. ANN. tit. 17-A, § 554 (West 1996); MISS. CODE ANN. § 97-5-40 (1996); MONT. CODE ANN. § 45-5-622 (1996); N.H. REV. STAT. ANN. § 639:3 (1995); N.Y. PENAL LAW § 260.10 (West 1997); VT. STAT. ANN. tit. 13, § 1305 (1996). Other statutes classify the offense as a felony, but impose a maximum sentence of five years or less. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.136b (West 1997) (four years maximum); MINN. STAT. ANN. § 609.378 (West 1997) (five years maximum); MO. REV. STAT. § 568.045 (1998) (five years maximum); OR. REV. STAT. § 163.205 (1996) (five years maximum); 18 PA. CONS. STAT. ANN. § 4304 (West 1997) (two years maximum).

[102] *See* LAFAVE & SCOTT, *supra* note 72, § 3.3. When an individual dies by reason of another's failure to act, the crime may be murder or manslaughter depending upon the state of mind applicable to the crimes. *See id.* § 3.3(e). It is murder when an individual fails to aid a person to whom he owes a duty and he knows that such failure will be "certain or substantially certain to result in death or serious bodily injury." *Id.* If the individual "does not know that death or serious injury is substantially certain to result, but the circumstances . . . involve a high degree of risk of such death or injury if he does not act," his failure to act may only be involuntary manslaughter. *Id.*

[103] Under some statutes, a parent's omission may constitute a more serious crime if committed intentionally, knowingly or recklessly, or with criminal negligence. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3623 (West 1997); COLO. REV. STAT. ANN. § 18-6-401 (West 1997); FLA. STAT. ANN. § 827.02 (West 1997); IND. CODE ANN. § 35-46-1-4 (Michie 1996); NEB. REV. STAT. ANN. § 28-707 (Michie 1996); NEV. REV. STAT. ANN. § 200.508 (Michie 1996).

[104] *See* LAFAVE & SCOTT, *supra* note 72, § 6.6. "The one who, with the requisite mental state, engages in the act or omission concurring with the mental state which causes the criminal result." *Id.*

[105] Requires the actor *be present* during the commission of a crime and "aid, counsel, command or encourage the principal in the first degree in the commission of that offense." *Id.* § 6.6(b).

[106] The one who "orders, counsels, encourages, or otherwise aids and abets another to commit a felony and who is *not present* at the commission of the offense." *Id.* (emphasis supplied). Thus, "the primary distinction between accessory before the fact and principal in the second degree is presence." *Id.*

the fact."[107] The distinctions among the first three have generally been abolished by statute.[108] Most statutes now provide that all persons implicated in the commission of a felony may or shall be indicted, tried, and punished as principals.[109]

Accomplices to crimes are generally labeled as "aiders and abettors," with variations in terminology among states. "Aiding and abetting" refers to the circumstances in which one person (the accomplice) becomes liable for the crime of another (the principal).[110] The accomplice's liability is derivative; it is incurred by contributing to the principal's violation of the law.[111] The accomplice's liability rests on the violation of law by the principal, the legal consequences of which the accomplice incurs because of her own actions.[112] Although accomplice liability generally requires an affirmative act—not just a failure to act—some states provide that one may become an accomplice by failing to prevent a crime when one has a legal duty to act.[113] The assistance given need not contribute to the criminal result in such a way that, but for the assistance, the result would not have ensued.[114] It is sufficient "if the aid merely renders it easier for the principal actor to accomplish the end intended by him and the aider and abettor. . . ."[115]

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[107] *Id.*

[108] An accessory after the fact is not considered an accomplice in the felony because her involvement occurs only after the felony was completed. *See id.*

[109] *See* 40 AM.JUR.2D *Homicide* § 28. *See, e.g.*, CAL. PENAL CODE § 971 (West 1997); TEX. PENAL CODE ANN. § 7.01 (West 1995).

[110] This is not to be confused with vicarious liability, which imposes liability on one party for the wrongs of another based solely on the relationship between the parties. *See* BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

[111] *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study In The Interpretation Of Doctrine*, 73 CAL. L. REV. 323, 337 (1985).

[112] *See id.*

[113] *See* LAFAVE & SCOTT, *supra* note 72, § 6.7. Aiding and abetting statutes that recognize omission and/or a legal duty to prevent an act include ALA. CODE § 13A-2-23 (1996); ARK. CODE ANN. § 5-2-204 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-301 (West 1997); DEL. CODE ANN. tit. 11, § 271 (1996); HAW. REV. STAT. ANN. § 70-222 (Michie 1996); KY. REV. STAT. ANN. § 502.020 (Banks-Baldwin 1997); N.J. STAT. ANN. § 2C:2-6 (West 1997); N.D. CENT. CODE § 12.1-03-01 (1997); OR. REV. STAT. § 161.155 (1996); TENN. CODE ANN. § 39-11-402 (1996); TEX. PENAL CODE ANN. § 7.02 (West 1997). Omission was recognized by case law in *State v. Austin*, 172 N.W.2d 284 (S.D. 1969) (holding that acquiescence could constitute aiding and abetting), and *Mobley v. State*, 85 N.E.2d 489 (Ind. 1949) (recognizing parent's failure to protect). *But see* MASS. GEN. LAWS ANN. ch. 274, § 2 (West 1997) (mere omission to protect is insufficient); State v. Eddy, 519 A.2d 1137 (R.I. 1987) (holding that mere negative acquiescence is not sufficient).

[114] *See* LAFAVE & SCOTT, *supra* note 72, § 6.7.

[115] *Id.*

Generally, holding a person liable as either a principal or an accomplice requires proof of both an act or omission and a state of mind.[116] The state of mind, or intent, required to establish criminal conduct is defined by the statute creating the offense. A crime that requires "specific intent" is defined such that to be guilty of the crime, the defendant must intend to produce the specified result.[117] A crime that requires "general intent" requires only an intent to engage in certain conduct.[118] Because the issue of intent goes to the heart of the passive parent's culpability in death by child abuse cases, a brief discussion of the requirements of specific and general intent precedes a full analysis of aider and abettor liability.

1. Specific Intent

"Specific intent" most commonly designates a special mental element that is required above and beyond the requirement to engage in the proscribed conduct.[119] For example, common law burglary requires the breaking and entering of a dwelling of another.[120] It must also be established that the defendant acted with specific intent to commit a felony therein.[121] Similarly, the crime of first-degree murder requires the specific intent to kill.[122]

A homicide may be still classified as first-degree murder without the intent to kill where the homicide occurred during the commission of an enumerated felony. Such a homicide is known as felony-murder.[123] Although some states include death by child abuse as an enumerated felony within their murder statutes, most states reject this doctrine.[124]

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[116] LAFAVE & SCOTT, *supra* note 72, § 3.4. The basic premise that some mens rea is required for criminal liability is expressed by the Latin *"maxim actus not facit reum nisi mens sit rea"* (an act does not make one guilty unless his mind is guilty). *Id.*

[117] *See* LAFAVE & SCOTT, *supra* note 72, § 3.5(a); *see also* People v. Tocco, 525 N.Y.S.2d 137 (N.Y. Sup. Ct. 1988). A "specific intent" crime requires that the actor intend "that certain further consequences flow from his act." *Id.* at 140.

[118] *See* LAFAVE & SCOTT, *supra* note 72, § 3.5(a).

[119] *See id.*

[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] *See* 40 AM. JUR. 2D *Homicide* § 64. The intent necessary to make the killing murder is constructively imputed by the intent incident to the initial felony. *See id.*

[124] *See* Angela M. Stewart, *Murder by Child Abuse*, 26 WILLAMETTE L. REV. 435, 440 (1990).

2. General Intent

"General intent"[125] crimes require that the accused merely intend the act that constitutes the crime;[126] the accused need not intend the result. For example, a battery requires the unlawful application of force.[127] The offense may be satisfied by the general intent to apply force; intent to cause injury is not required.[128] In the case of child abuse or neglect, it is not required that the parent intend the result of her act, only that the "parent was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child."[129]

Parents who fail to protect their children may thus be held liable for child abuse under general intent statutes. Such statutes require only that the parent intend to do the act (or omission) that results in abuse—they do not require that the parent intend for the child to be abused. Rather, the court need only find that the parent intentionally failed to protect the child from the abuse.

Where a statute requires a general criminal intent, a guilty intent may be inferred from the act. In *McGahee v. State*,[130] for ex-

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[125] "General intent" is often synonymous with criminal intent, the general notion that some form of mental state is a prerequisite to guilt. *See* LAFAVE & SCOTT, *supra* note 72, § 3.5.

[126] *See* People v. Whitfield, 15 Cal.Rptr.2d 4, 10 (Cal. Ct. App. 1992), *aff'd*, 868 P.2d 272 (Cal. 1994); *see also Tocco*, 525 N.Y.S.2d at 140 ("A 'general intent' crime . . . penalizes, in itself, the intentional doing of a proscribed act.").

[127] Criminal battery is the unlawful application of force to the person of another. BLACK'S LAW DICTIONARY 245 (6th ed. 1990).

[128] *See* LAFAVE & SCOTT, *supra* note 72, § 7.15(c).

[129] Smith v. State, 408 N.E.2d 614, 621 (Ind. 1980). The court upheld the conviction of a mother for involuntary manslaughter and neglect for failing to protect her son from the abuse of her live-in boyfriend. *See id.* at 616–17. Under the statute at issue "a person having the care, custody, or control of a dependent who knowingly or intentionally places the dependent in a situation that may endanger his life or health" commits neglect of a dependant, a Class D felony. *Id.* at 619 (quoting IND. CODE § 35-42-1-4 (Supp. 1979)). Involuntary manslaughter is defined as "a person who kills another human being while committing or attempting to commit a Class D felony." *Id.* The court held that the words "knowingly" or "intentionally" required the State to prove only that the defendant was "aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child." *Id.* at 621. *See also* Childers v. State, 680 P.2d 598 (Nev. 1984) (upholding a mother's conviction for abuse and neglect for failing to protect her child from her boyfriend's abuse). The child abuse statute imposed liability for willfully causing or permitting a child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect. *Id.* at 599 n.1. The court affirmed the lower court's interpretation of "willfully" as "simply a purpose or willingness to commit the act or to make the omission in question." *Id.* at 599. Further, the word "willfully" did "not require in its meaning any intent to violate law, or to injure another or to acquire any advantage." *Id.* at 599 n.2.

[130] 316 S.E.2d 832 (Ga. Ct. App. 1984).

ample, the defendant was convicted of cruelty to children for beating her six-year-old daughter.[131] The offense was defined as "maliciously" causing "a child under the age of eighteen cruel or excessive physical or mental pain."[132] On appeal, the defendant argued that there was not sufficient evidence of the requisite statutory intent because she was disciplining her daughter and did not mean to hurt her.[133] The court held that her intent was "a question of fact to be determined upon consideration of 'words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.'"[134] Thus, the defendant's act of beating her daughter was sufficient to infer that defendant intended to cause the child cruel or excessive physical or mental pain.

3. Aider and Abettor Liability for Murder

In addition to committing an act or omission, an accomplice, to be criminally liable, must also have the requisite mental state required for the crime of which she is to be convicted.[135] Thus, accomplice liability,[136] under the common law and a majority of statutes, requires proof that the accused had knowledge of, or shared, the principal's intent and specifically intended, by her conduct, to aid, abet or assist in the commission of the criminal act.[137]

Parents have been found guilty under accomplice liability for aiding and abetting rape,[138] assault,[139] and occasionally, mur-

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[131] *Id.* at 833.

[132] *Id.* (quoting GA. CODE ANN. § 16-5-70(b)).

[133] *See id.* at 833–34.

[134] *Id.* at 834 (quoting GA. CODE ANN. § 16-2-6). *But see* State v. Lucero, 647 P.2d 406 (N.M. 1982) (holding that because child abuse is a strict liability crime, the defendant's intent is not relevant).

[135] *See* LAFAVE & SCOTT, *supra* note 72, § 6.7.

[136] "Accomplice" as used herein describes all persons who are accountable for crimes committed by another, either by act or omission.

[137] A person is liable as an accomplice if she "(a) gave assistance or encouragement or failed to perform a legal duty to prevent it (b) with the intent thereby to promote or facilitate commission of the crime." LAFAVE & SCOTT, *supra* note 72, § 6.7. *See* State v. Williams, 623 A.2d 800 (N.J. Super. Ct. App. Div. 1993) (finding defendant guilty of aiding and abetting arsonist he had hired to burn defendant's own vehicle).

[138] *See* State v. Ainsworth, 426 S.E.2d 410 (N.C. Ct. App. 1993). The court held that defendant's conviction for aiding and abetting first-degree rape of her 12-year-old son was supported by evidence that defendant was lying in the same bed while an adult woman was engaged in intercourse with her son and defendant made no attempt to prevent the rape of her son. *See id.*

[139] *See* State v. Walden, 293 S.E.2d 780 (N.C. 1982). The court affirmed defendant's conviction for aiding and abetting assault with a deadly weapon of her one-year-old son

der[140] of their children. In murder cases, however, it has proven extremely difficult to prove that the parent specifically intended to promote or assist in the abuse, and ultimately, the death of her child. Some courts have nevertheless been willing to infer from the circumstances that the parent was aware of the consequences of failing to protect her child, and that her omission by itself indicated a specific intent to aid the abuser.

An instructive example is *People v. Peters*, where a mother was convicted of murdering her infant son under a theory of accountability.[141] The court stated:

> The accountability statute mandates that the person charged must have the intent to promote or facilitate the offense. Intent may be gleaned from knowledge. A person who knows that his or her child is in a dangerous situation and fails to take action to protect the child, presumably intends the consequences of the inaction.[142]

In *Peters*, the appellate court ruled that the evidence supported the trial court's finding that "the defendant intended to facilitate the offense because she knew that [her boyfriend] was abusing her son."[143] Once she became aware of the abuse of her son, thus, "the defendant, as his mother, had a duty to protect her son from further abuse."[144] By failing to remove her son from an abusive and dangerous environment, the defendant, aware of the consequences of her inaction, facilitated further harm to the child.[145]

In the *Hernandez* case, therefore, Gabriela could be held to have the requisite intent as an accomplice to murder. Gabriela knew that Rogelio had been abusing Joselin and that her own failure to act would result in more abuse. Given the Hernandezes' history, it could therefore be inferred that Gabriela will-

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where she was present when the son was beaten with a belt but failed to take reasonable steps to prevent the assault. *See id.* The Court held that "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed." *Id.* at 787.

[140] *See* People v. Peters, 586 N.E.2d 469 (Ill. App. Ct. 1991).

[141] *See id.* at 470. "A parent who knowingly fails to protect its child from abuse may be prosecuted under the accountability statute and, thereby, becomes legally accountable for the conduct of the abuser." *Id.* at 476. Similar to the *Hernandez* case, approximately one month prior to the child's death, the defendant kept the child away from persons who suspected abuse and canceled doctor appointments.

[142] *Id.* at 476. In the *Hernandez* case, Gabriela knew the abuse could cause injuries, and she had numerous opportunities to tell the parent aide about any suspected abuse.

[143] *Id.*

[144] *Id.*

[145] *See id.*

fully failed to protect Joselin from Rogelio's abuse. Establishing specific intent in such a manner would, however, require a litany of inferences and circumstantial evidence.

Under felony-murder statutes, both the principal and the accomplice are equally guilty of murder even if they did not specifically intend to kill the victim.[146] The parties need only have the requisite intent to commit the underlying felony.[147] Classifying child abuse homicide as felony-murder, however, does not resolve the problem of convicting the accomplice parent.

Under such a doctrine, the prosecution would still have to prove aider and abettor liability—that the accomplice parent intended to promote or facilitate the perpetrator by her omission, and/or shared the perpetrator's intent. For Gabriela, thus, to be convicted of felony-murder as an aider and abettor, the state had to prove that she failed to protect Joselin with the intention of assisting Rogelio in torturing the child.

If Gabriela believed that acting to prevent Rogelio from abusing their daughter would only increase the violence toward Joselin or herself, then it might be argued that Gabriela intended Joselin to be abused, in order to prevent harm to herself or greater harm to Joselin. To that extent, Gabriela may have possessed the requisite intent. This is certainly a tenuous ground on which to base a successful prosecution. Yet, under current law it is the only theory under which parents like Gabriela could be held fully accountable. The felony-murder doctrine is therefore not very helpful, as it too requires compiling numerous inferences and statutes to convict.

4. Summary

When a child dies from abuse at the hands of another, there is only a remote chance that a passive parent will face any charges at all.[148] Even when that parent is charged as a principal with neglect or child endangerment for failing to protect her child, the punishment is grossly inadequate since such crimes are generally

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[146] *See* People v. Solis, 25 Cal. Rptr. 2d 184 (Cal. Ct. App. 1993) (upholding conviction for second-degree murder as an aider and abettor for driving car from which principal fired gun).

[147] *See* LAFAVE & SCOTT, *supra* note 72, § 6.7.

[148] "[N]obody speaks loudly enough for the children when [child abuse homicides] occur. The system created in the United States to ensure that adult homicides are thoroughly identified, investigated, and prosecuted is failing to serve infants and children who die of maltreatment." A NATION'S SHAME, *supra* note 19, at 39–40.

classified as misdemeanors.[149] Even more remote is the likelihood that the passive parent will be charged with manslaughter or murder.[150]

When the charge is in fact murder, the parent may be culpable as an accomplice under aider and abettor or complicity statutes. However, these statutes generally require an affirmative act, not merely a failure to act. Further, most statutes require that the accomplice specifically intended to promote or facilitate the offense. Therefore, the trier of fact must navigate a series of statutes, a type of legal connect-the-dots, to convict the defendant as an accomplice. First, the state must show that the omission was equivalent to an affirmative act. Second, the state must show that the parent knew her failure to act would result in serious bodily injury. Third, the state must show that by failing to protect her child from abuse, the parent specifically intended to assist in committing the homicide.[151]

Under the current laws of most states, therefore, child abuse homicide is inadequately punished. It is important, however, to recognize that "[m]urder is no less a crime because a child, rather than an adult, is the victim."[152] The U.S. Advisory Board on Child Abuse and Neglect has concluded that "[s]tates should enact 'felony murder or homicide by child abuse' statutes for child abuse and neglect," and that states that currently define child abuse crimes as a misdemeanor should reclassify them as felonies.[153] Yet even these changes will not facilitate prosecution of the parents or caregivers who fail to protect children from abuse. A single statute is needed that classifies child abuse homicide as murder and includes liability for the accomplice's omission.

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[149] *See supra* text accompanying notes 100–101.

[150] One of the reasons prosecutors suggest lesser pleas is an absence of a felony murder statute with which to charge the accused for the child's death. *See* A NATION'S SHAME, *supra* note 19, at 58. In addition, prosecutors face "major hurdles" in trying parents and caretakers for murder by abuse. *See id.* at 58. Jurors often cannot believe that parents would seriously (hurt or) kill children, and spouses and relatives "side with the perpetrator and delay or cripple investigations." *Id.*

[151] When the charge is manslaughter the prosecution must overcome the same hurdles of omission, but the level of intent differs. For manslaughter, the element of criminal intent is replaced with criminal or culpable negligence. *See, e.g.*, Dominique v. State, 435 So.2d 974 (Fla. 1983). This means action that "evidences a reckless disregard for human life or safety equivalent to an intentional violation of the rights of others." *Id.*

[152] A NATION'S SHAME, *supra* note 19, at 66.

[153] *See id.* at 70.

C. *Accomplice Liability under General Homicide Statutes*

Many states—twenty-three—do not distinguish death by child abuse from other forms of homicide.[154] Thus, when child abuse results in death, the defendants must be shown to have specifically intended that the child be killed, or to have acted in conscious disregard for the life of the victim, to be convicted of murder.[155] The specific intent requirement for murder in such cases is usually proven by circumstantial evidence, such as willful infliction of serious injuries upon the child.[156]

For the principal, this proof is fairly simple—if circumstances show he intended to inflict serious injury (such as hitting, biting, kicking and burning), then the specific intent requirement is satisfied. Proving intent of the accomplice parent is usually much more difficult. As discussed, the accomplice must be shown to have shared the principal's knowledge of the risk of injury and the principal's intent to inflict injury.[157] Proving the accomplice parent's knowledge of the principal's intent is often hard because it requires showing that the accomplice parent recognized the assault for what it was—an intent to injure the child. Such

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[154] *See* ALA. CODE § 13A-6-2 (1996); CAL. PENAL CODE § 189 (West 1997); CONN. GEN. STAT. ANN. § 53a-54a (West 1997); D.C. CODE ANN. § 22-2403 (1997); HAW. REV. STAT. ANN. § 707-701 (Michie 1996); IND. CODE ANN. § 35-42-1-3 (Michie 1996); KY. REV. STAT. ANN. § 507-010 (Banks-Baldwin 1996); MD. CODE ANN. art. 27, § 407 (Michie 1996); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1997); MO. ANN. STAT. § 565.020/021 (West 1997); MONT. CODE ANN. § 45-5-102 (1996); NEB. REV. STAT. § 2-303 (1996); N.H. REV. STAT. ANN. § 630:1a/b (1995); N.J. STAT. ANN. § 2C:11-3 (West 1997); N.M. STAT. ANN. § 30-2-1 (Michie 1997); N.C. GEN. STAT. § 14-17 (1996); OHIO REV. CODE ANN. § 2903.02 (West 1997); 18 PA. CONS. STAT. ANN. § 2502 (West 1997); S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1996); S.D. CODIFIED LAWS ANN. § 22-16-7 (Michie 1997); VT. STAT. ANN. tit. 13, § 2301 (1996); VA. CODE ANN. § 18.2-32 (Michie 1997); WIS. STAT. ANN. § 940.01 (West 1997).

[155] First-degree and second-degree murder respectively. *See, e.g.*, People v. Klvana, 15 Cal. Rptr. 2d 512, 526 (Cal. App. 2d 1992) ("Second degree murder based on implied malice is committed when the defendant does not intend to kill, but engages in conduct which endangers the life of another, and acts deliberately with conscious disregard for life.").

[156] *See* 21 AM. JUR. 2D *Criminal Law* § 130 (1998); *See, e.g.*, Moore v. State, 291 A.2d 73, 77 (Md. Ct. Spec. App. 1972) (ruling that absent actual intent to injure, malice may be inferred when defendant willfully inflicted serious multiple injuries on stepchild which had a natural tendency to cause great bodily harm); People v. Burden, 140 Cal. Rptr. 282 (Ct. App. 1977) (holding that malice is implied when the circumstances show that the defendant does an act which involves a high degree of probability that it will result in death); McGahee v. State, 316 S.E.2d 832 (Ga. Ct. App. 1984) (holding that premeditated and deliberate intention to inflict a cruel act is not required to prove malice).

[157] *See* State v. Rundle, 500 N.W.2d 916 (Wis. 1993) (holding that "the state must prove that the defendant aided and abetted the perpetrator in the intentional and reckless abuse of the child").

parents are frequently in a state of denial regarding the abuser's intent.[158]

The *Hernandez* case illustrates the application of accomplice liability in this context. As parents, Rogelio and Gabriela owed a legal duty to protect Joselin. However, both parents placed the child in a situation that was likely to endanger her health—Rogelio by shaking, hitting, biting and burning Joselin; and Gabriela by failing to take steps to prevent, or at least report, the abuse. Rogelio's acts of abuse were clearly malicious and thus rose to the level of murder.[159]

Although Rogelio's acts directly caused Joselin's death, Gabriela should also be guilty of murder as an accomplice. Gabriela breached her duty to Joselin. She took affirmative actions to prevent Joselin's abuse from being discovered and she failed to act to prevent further abuse.[160]

Nevertheless, the prosecution must also show that Gabriela had actual knowledge of the consequences of her inaction, and that this inaction facilitated further harm to Joselin.[161] The jury must conclude that by her omission, Gabriela failed to protect Joselin when it was reasonably possible for her to do so.[162]

Based on the facts in *Hernandez*, it can be inferred that Gabriela acted in conscious disregard for Joselin's life when, after regaining custody of her daughter, she failed to prevent or at least report Rogelio's abuse. Gabriela's conduct cannot be excused because she did not intend to hurt the child or had no actual hatred or ill will in her heart.[163] Gabriela knew of Ro-

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[158] *See* Christine Adams, *Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial*, 12 YALE L. & POL'Y REV. 519, 520 (1994) ("Even in the face of clear evidence that her partner is [sexually] abusing her child, a mother who is in denial may simply stand by and allow the abuse to continue, often for a period of years.").

[159] *See* Worden v. State, 603 So.2d 581 (Fla. Dist. Ct. App. 1992). Defendant was charged with felony-murder for beating his nine-month-old son to death. *Id.* at 582. The Court held that the evidence supported a finding of intent to commit the underlying felony of aggravated battery. *Id.* at 582–83. "Given the extensive evidence of recent abuse, there was no possibility that appellant intended only to strike [his son] and not hurt him seriously." *Id.* at 583. Similarly, Rogelio could not credibly argue that he did not intend to cause Joselin serious bodily harm. He knew his abuse had previously caused broken bones and other injuries, and he had been instructed by the parent aide how to properly discipline his daughter.

[160] For example, Gabriela canceled numerous scheduled appointments with the parent aide. *See supra* note 43. After custody was reinstated, Gabriela did not take Joselin to a doctor for her new burns and injuries, although she had medical insurance. *See supra* note 61.

[161] *See Peters*, 586 N.E.2d at 469 (Ill. App. Ct. 1991).

[162] *See id.*

[163] *See McGahee*, 316 S.E.2d at 832 (Ga. App. 1984).

gelio's past abuse and was aware of the injuries such abuse could cause.[164]

Therefore, Gabriela should be equally guilty for Joselin's murder. Under the current legal regime, however, it is very difficult to clear the legal hurdles to actually convict Gabriela of murder. In addition, in cases without a record of documented past abuse, it is even more difficult to infer that the accomplice parent intended to promote and assist the child abuse.[165]

D. *Accomplice Liability under Homicide Statutes with Child Abuse Provisions*

Currently, twenty-nine states include child abuse within their murder statutes.[166] These statutes require that death result from the commission of child abuse,[167] an attempt to commit great or serious bodily injury,[168] or other felonious abuse or battery on a

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[164] Gabriela had met with an assigned parent aide who instructed her how to properly care for a child. *See supra* note 41.

[165] However, two of the states that have specific "death by child abuse" statutes require at least one previous act of abuse for the statute to apply. *See* DEL. CODE ANN. tit. 11, § 633 and § 634 (1996); WASH. REV. CODE ANN. § 9A.32.055 (West 1997); *See also* S.C. CODE ANN. § 16-3-85 (Law. Co-op. 1996) (past pattern of abuse may be considered for sentencing). In states where omission satisfies the intent requirement, the jury can imply, by the passive parent's failure to act, that they intended the principal's criminal conduct to continue. However, this requires the jury to first infer the principal's intent, then infer that the accomplice shared that intent. The absence of published cases on accomplice liability in this context speaks to its disuse.

[166] *See* ALASKA STAT. § 11.41.100 (1996); ARK. CODE ANN. § 5-10-102 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-1105 (West 1997), COLO. REV. STAT. ANN. § 18-3-102 (West 1997); DEL. CODE ANN. tit. 11, § 633 and § 634 (1996); FLA. STAT. ANN. § 782.04 (West 1997); GA. CODE ANN. § 16-5-1 (1997); IDAHO CODE § 18-4003 (1997); ILL. COMP. STAT. ANN. § 5/9-1 (West 1997); IOWA CODE ANN. § 707.2 (West 1997); KAN. STAT. ANN. § 21-3436 (1996); LA. REV. STAT. ANN. § 14:30 (West 1997); ME. REV. STAT. ANN. tit. 17-a, § 202 (West 1996); MICH. COMP. LAWS ANN. § 750.316 (West 1997); MINN. STAT. ANN. § 609.185 (West 1997); MISS. CODE ANN. § 97-3-19 (1996); NEV. REV. STAT. ANN. § 200.030 (Michie 1996); N.Y. PENAL LAW § 125.25 (West 1997); N.D. CENT. CODE § 12.1-16-01 (Michie 1997); OKLA. STAT. ANN. tit 21, § 701.7 (West 1997); OR. REV. STAT. § 163.115 (1996); R.I. GEN. LAWS § 11-23-1 (Michie 1996); S.C. CODE ANN. § 16-3-85 (Law. Co-op. 1996); TENN. CODE. ANN. § 39-13-202 (1996); TEX. PENAL CODE ANN. § 19.02 (West 1997); UTAH CODE ANN. § 76-5-203 (1997); WASH. REV. CODE ANN. § 9A.32.055 (West 1997); W. VA. CODE § 61-8D-2 and § 61-8D-2a (1997); WYO. STAT. ANN. § 6-2-101 (Michie 1997).

[167] *See* FLA. STAT. ANN. § 782.04 (West 1997); KAN. STAT. ANN. § 21-3436 (1996); MICH. COMP. LAWS ANN. § 750.316 (West 1997); MINN. STAT. ANN. § 609.185 (West 1997); NEV. REV. STAT. ANN. § 200.030 (Michie 1996); N.D. CENT. CODE § 12.1-16-01 (Michie 1997); OKLA. STAT. ANN. tit. 21, § 701.7 (West 1997); OR. REV. STAT. § 163.115 ((1996); TENN. CODE ANN. § 39-13-202 (1996); WYO. STAT. ANN. § 6-2-101 (Michie 1997).

[168] *See* ALASKA STAT. § 11.41.100 (1996); ILL. COMP. STAT. ANN. 5/9-1 (West 1997); LA. REV. STAT. ANN. § 14:30 (West 1997); N.Y. PENAL LAW § 125.25 (West 1997); TEX. PENAL CODE ANN. § 19.02 (West 1997).

child.[169] Under these statutes, intent to cause death is *not* required; the perpetrator need only possess the general intent to commit the underlying felony.[170]

Thus, in the case of death by child abuse, the principal's intent need only be to inflict bodily injury.[171] It is sufficient that the principal acts recklessly or under circumstances manifesting extreme indifference to human life.[172] Similarly, the accomplice need not intend to encourage or facilitate the offense ultimately committed, in this case, death.[173] However, the accomplice must at least share the principal's essential criminal intent.[174]

Therefore, an accomplice need only act knowingly[175] or recklessly[176] to satisfy the intent to facilitate the commission of the crime. In child abuse cases, since a person intends the conse-

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[169] *See, e.g.*, IDAHO CODE § 18-4003 (1997); IOWA CODE ANN. § 707.2 (West 1997); MISS. CODE ANN. § 97-3-19 (1996).

[170] This type of homicide is usually referred to as felony-murder. *See* 40 AM. JUR. 2D *Homicide* § 72. A homicide perpetrated during the commission or attempted commission, of a felony, or specified felonies, shall be deemed first-degree. *Id.* Most states include it under crimes constituting first-degree murder, while some refer specifically to felony-murder. *See, e.g.*, FLA. STAT. ANN. § 782.04 (West 1997) (aggravated child abuse resulting in death is one of the enumerated felonies under the murder statute); OR. REV. STAT. § 163.115 (1996) (murder by child abuse is felony-murder). *See also* State v. Stewart, 663 A.2d 912 (R.I. 1995) (examining legal responses to fatal child abuse, particularly Oregon's statute).

[171] *See* 40 AM. JUR. 2D *Homicide* § 72. Where the killing occurs in the commission of any of the specified crimes, the intent to kill is immaterial. *Id.*

[172] *See, e.g.*, IOWA CODE ANN. § 707.2 (West 1997), MINN. STAT. ANN. § 609.185 (West 1997); N.Y. PENAL LAW § 125.25 (West 1997); OR. REV. STAT. § 163.115 (1996).

[173] LAFAVE & SCOTT, *supra* note 72, at § 6.7.

[174] *Id. See* ARK. CODE ANN. § 5-2-203 (Michie 1995); CONN. GEN. STAT. ANN. § 53a-8 (West 1997); D.C. CODE ANN. § 22-105 (1997); MONT. CODE ANN. § 45-2-103 (1996); N.Y. PENAL LAW § 20.00 (West 1997); N.D. CENT. CODE § 12.1-03-01 (1996); OHIO REV. CODE ANN. § 2901.21 (West 1997); OR. REV. STAT. § 161.155 (1996) (intent to promote may be determined by circumstantial evidence); 18 PA. CONS. STAT. § 306 (1997). *See also* NEV. REV. STAT. ANN. § 195.020 (Michie 1996) (lack of intent is no defense); Sandstrom v. Montana, 442 U.S. 510 (1979) (presuming that a person intends the ordinary consequences of his voluntary acts).

[175] *See* State v. Wyatt, 482 S.E.2d 147 (W. Va. 1996). *See also* Johnson v. State, 606 S.W.2d 752 (Ark. 1980). Under MODEL PENAL CODE § 2.02(2)(b) (proposed official draft 1962), a person acts knowingly with respect to a material element of an offense:

> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

[176] Under MODEL PENAL CODE § 2.02(2)(c) (proposed official draft 1962):

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

quences of his or her actions,[177] the consequence of an act of omission is that whatever is occurring will continue.[178] This omission by the accomplice parent satisfies the general intent requirement because the consequences of failing to act constitutes knowing or reckless behavior, and such an omission in a child abuse situation expresses an extreme indifference to human life.[179] Thus, the parent, as an accomplice, shares the principal's intent and should be equally guilty of the crime.

Although the accomplice parent can be liable under these jurisdictions' statutes, this result occurs only by adding several statutes together. The state must begin with the murder statute, and then add accomplice liability and omission. Although this is an improvement over statutes that do not make the distinction of murder by child abuse, such prosecutions require sophisticated legal analyses to find the accomplice parent as guilty as the principal. Many jurors may not be capable of understanding such a substantive and complex assessment of the law and its application to the facts of these cases.[180]

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[177] *See Sandstrom*, 442 U.S. 510; *see also Peters*, 586 N.E.2d at 475.

[178] *See, e.g.*, State v. Rundle, 500 N.W.2d 916 (Wis. 1993) (dissenting opinion). The defendant's "presence during and failure to stop his wife's abusive acts was an objective fact which aided his wife in the execution of a crime. [The defendant] also obviously intended his conduct to in fact render such assistance." *Id.* at 921.

[179] *See* State v. Russell, 848 P.2d 743 (Wash. Ct. App. 1993), *rev. denied*, 122 Wash.2d 1003 (1993).

[180] It has been reported that "[s]tudy after study has shown that jurors do not understand the law they are given, often performing at no better than chance level on objective tests of [legal] comprehension." Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 540 (1992) (citing R.P. Charrow & V. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979)). This misunderstanding extends both to procedural law as well as substantive law. Further, although understanding improves for procedural knowledge when assisted by judicial instruction, on an absolute level it remains quite poor (less than 50% correct); and for substantive law knowledge, it stays poor even after such instructions. Reifman et al., *supra* at 546–47. Similar difficulties appear extant for appropriate application in civil trials. *See, e.g.*, Bryan A. Liang, *Medical Malpractice: Do Physicians Have Knowledge of Legal Standards as Juries Do?*, 3 UNIV. CHI. L. SCH. ROUNDTABLE 59, 75 (1996); Liang, *Assessing Medical Malpractice Jury Verdicts: A Case Study of an Anesthesiology Department*, 7 CORNELL J. L. & PUB. POL'Y 121, 136–38 (1997) (postulating that juries may be making decisions in medical malpractice cases on the basis of a misunderstanding of, or factors other than, the law).

E. *Accomplice Liability under Homicide by Child Abuse Statutes*

Currently, five states have distinct homicide by child abuse statutes.[181] These statutes separate child and adult homicides, recognizing the need for additional protection for children.[182] However, as the following analysis will illustrate, this protection is still inadequate, often allowing the passive parent to escape liability.

1. Delaware

Delaware classifies "murder by child abuse or neglect" by degrees: "(a) a person is guilty of murder by abuse or neglect in the first degree when that person recklessly causes the death of a child and has engaged in an act or previous pattern of abuse and/or neglect of such child."[183] The crime is second-degree murder by abuse or neglect if committed with criminal negligence.[184]

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[181] *See* DEL. CODE ANN. tit. 11, § 633 and § 634 (1995); S.C. CODE ANN. § 16-3-85 (Law. Co-op. 1998) (first-degree murder if person causes death of child under 11 years while committing child abuse or neglect and death occurs under circumstances manifesting extreme indifference to human life; or if person knowingly aids or abets another person in the same); UTAH CODE ANN. § 76-5-203(1)(d) (1998) (first-degree murder if death by child abuse of a child under 14 years); § 75-5-208(1)(a) (1998) (second-degree murder if person recklessly causes death of person under 17 years); WASH. REV. CODE ANN. § 9A.32.055 (West 1997) (first-degree murder if under circumstances manifesting extreme indifference to human life, person causes death of a child under 16 years [or a dependent adult] and previously engaged in pattern of assault or torture of said child [or adult]); W. VA. CODE § 61-8D-2 (1997) (first-degree murder if person maliciously and intentionally causes death of child by failure or refusal to supply necessary food, clothing, shelter or medical care; or if person knowingly allows any other person to maliciously and intentionally fail or refuse to supply [such care]); W. VA. CODE § 61-8D-2a (felony punishable by 10–40 years if any parent maliciously and intentionally inflicts upon child substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby causing the death of such child; or knowingly allows any person to maliciously and intentionally inflict [such abuse]).

[182] States define a child as a person as young as 10 years and as old as 18. *See* DEL. CODE ANN. tit. 11, § 633 (1995) (13 years); S.C. CODE ANN. § 16-3-85 (Law. Co-op. 1998) (10 years); UTAH CODE ANN. § 76-5-208 (1998) (16 years); WASH. REV. CODE ANN. § 9A.32.055 (West 1998) (15 years); W. VA. CODE § 61-8D-1(2) (1997) (17 years). Washington also includes dependent adults in their "homicide by abuse" statute. WASH. REV. CODE ANN § 9A.32.055 (West 1998) (homicide by abuse applies to developmentally disabled person or a dependent adult). Generally, many states include dependent adults or the elderly in their abuse statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3623 (West 1998), IND. CODE ANN. § 35-46-1-4 (Michie 1998), KY. REV. STAT. ANN. § 508.100 (Michie 1990), N.H. REV. STAT. ANN. § 639.3 (1996), OR. REV. STAT. § 163.205 (1990).

[183] DEL. CODE ANN. tit. 11, § 634 (1995).

[184] *Id.* § 633.

Both crimes require a "previous pattern" of abuse and/or neglect.[185] The statute defines "previous pattern" to mean "2 or more incidents of conduct: a. That constitute an act of abuse and/or neglect; and b. Are not so closely related to each other or connected in point of time and place that they constitute a single event."[186]

Under Delaware law, then, if a person abuses or neglects a child, has previously done so on at least two prior separate occasions, and the child dies, that person is charged with murder as a principal. Although a separate statute imposes liability for failure to act,[187] Delaware's "death by child abuse" statute also expressly imposes liability for conduct based on abuse or neglect.[188] The term "neglect" is defined by Delaware law to include circumstances where the child's custodian has the ability to provide adequate care or protection, but does not or will not do so.[189] Thus, a parent's failure to protect a child from abuse constitutes neglect, making the parent as culpable as the abuser.

It seems then, that the parent who fails to protect, the accomplice parent, need not share the principal's intent. The intent requirement is satisfied simply by showing the accomplice parent acted "recklessly" or "with criminal negligence."[190] Thus, this

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[185] *Id.* §§ 633(a), 634(a).

[186] *Id.* §§ 633(b)(3), 634(b)(3). "'Abuse' means causing any physical injury to a child through unjustified force . . . , torture, negligent treatment, sexual abuse, exploitation, maltreatment, mistreatment or any means other than accident." *Id.* § 1103(a). "'Neglect' means threatening or impairing the physical, mental or emotional health and well-being of a child through inadequate care or protection, nontreatment or abandonment by the child's custodian . . . when such custodian . . . has the ability and financial means to provide adequate care or protection, but does not or will not do so." *Id.* §1103(c).

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> A person is guilty of an offense committed by another person when:(1) Acting with the state of mind that is sufficient for commission of the offense, the person causes an innocent or irresponsible person to engage in conduct constituting the offense; or (2) Intending to promote or facilitate the commission of the offense the person: a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or c. Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so; or (3) The person's conduct is expressly declared by this Criminal Code or another statute to establish the person's complicity."

Id. § 271.

[188] *Id.* §§ 663, 634. Delaware law also imposes liability on conduct which includes a voluntary act or the omission to perform an act. *Id.* § 242.

[189] *Id.* § 1103(c).

[190] *Id.* §§ 633(a), 634(a). Unfortunately, there are no published cases on this statute. However, the wording of the statute does not require that the neglectful parent share the abuser's intent.

statute supports the premise that a parent's omission alone is sufficient to satisfy the intent requirement in child abuse situations due to the high duty of care owed to the child.[191]

While a parent's failure to protect her child from abuse can be the basis for first-degree murder,[192] however, the statute defines "child" as a person who has not yet reached the age of fourteen.[193] Under the state's Criminal Code, specifically "offenses relating to children," "child" is defined as any individual eighteen years of age or less.[194] This reduced age requirement denies a fourteen-year-old the same rights as a thirteen-year-old, although both are below the age of majority.

In addition, the statute's language provides a loophole that may allow defendants raising a Battered Woman Syndrome ("BWS") defense[195] to escape liability. Delaware law states:

> (c) 'Neglect' means threatening or impairing the physical, mental or emotional health and well-being of a child through inadequate care or protection, nontreatment or abandonment by the child's custodian or other person in whose temporary custodial care the child is left, when such custodian or other person has the *ability* and financial means to provide adequate care or protection, but *does not or will not do so.*[196]

A major premise of the BWS defense is that a battered woman's free will has been usurped by her abuser.[197] Accepting this premise allows a victim of BWS to claim that she lacks the requisite ability to ameliorate her child's "neglect."

2. South Carolina

Under South Carolina law, a person who aids in the commission of a felony is subject to the same punishment as the principal felon,[198] and criminal liability is imposed for acts of omission.[199] Notwithstanding these provisions, South Carolina's "homi-

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[191] *See Muehe*, 646 N.E.2d at 983. However, by requiring more than omission and that the child's custodian have the "ability" to provide adequate protection, section 1103 creates a loophole for defendants raising a duress defense to escape liability.

[192] *See* DEL. CODE ANN. tit. 11, § 634.

[193] *See id.* §§ 633(b)(1), 634(b)(1).

[194] *See id.* § 1103(e).

[195] *See infra* note 283 and accompanying text.

[196] DEL. CODE ANN. tit. 11, § 1103 (emphasis added).

[197] *See* Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699 (1997).

[198] *See* S.C. CODE ANN. § 16-1-40 (Law. Co-op. 1988).

[199] Under the state's definition of child abuse, "harm" to a child's health or welfare

cide by child abuse" statute specifically provides for a lesser penalty for accomplices than for principals.[200]

The South Carolina statute declares a person guilty of homicide by child abuse when he causes the death of a child while committing child abuse or neglect.[201] The term "abused or neglected child" means a child whose death results from the acts or omissions of the child's parent.[202] Thus, a parent's failure to act may result in his or her liability as a principal.

For accomplice liability to attach, the statute requires that the accomplice knowingly aid and abet another to commit child abuse or neglect.[203] Again, a parent's failure to protect is equivalent to an affirmative act and he or she should be liable as a principal.[204] However, it is not clear whether the omission satisfies the state's accessory statute[205] or the aiding and abetting requirement of the child abuse statute, which subjects the parent to a lesser penalty. For example, if a mother goes into another room or otherwise ignores the beatings, is she guilty of abuse by omission (failing to protect the child), or is she an accomplice who knowingly aided and abetted the abuser? In the latter case, the mother is subject to a lesser punishment.

Although neglect by either the principal or the accomplice makes him or her liable for murder in the first degree, the accomplice is subject to a lesser penalty. This is inconsistent with state law regarding all other accomplice liability.[206] It also negates the special relationship between parent and child, and in fact, diminishes the duty owed to the child. Although the ac-

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can occur when the person responsible for the child's welfare "(a) inflicts or allows to be inflicted upon the child physical or mental injury . . . ." *Id.* § 20-7-490(3).

[200] *Id.* § 16-3-85. The aider and abettor "must be imprisoned for a term not exceeding twenty years nor less than ten years," whereas the principal may be imprisoned for life but not less than a term of 20 years. *Id.* § 16-3-85(B).

[201] *See id.* § 16-3-85 (a) (1).

[202] "'Abused or neglected child' means a child whose death results from or whose physical or mental health or welfare is harmed or threatened with harm, . . . by the acts or omissions of the child's parent, guardian, or other person responsible for his welfare." *Id.* § 20-7-490(2).

[203] The statute indicates that: "(A) A person is guilty of homicide by child abuse who . . . : (2) knowingly aids and abets another person to commit child abuse or neglect as defined in Section 20-7-490 and the child abuse or neglect results in the death of a child under the age of eleven." *Id.* § 16-3-85.

[204] "A person who aids in the commission of a felony . . . by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon." *Id.* § 16-1-40.

[205] *See id.*

[206] *See* W. VA. CODE § 61-11-6 (1997).

complice parent is in the best position to protect the child, her failure to do so is deemed a lesser offense. The result is a decreased incentive for the most appropriate person to take care of and protect the child.[207]

Further, the statute applies only to a child under the age of eleven. Thus, a ten-year-old is afforded greater protection than an eleven-year-old child. Elsewhere in South Carolina's Code of Laws, "child" is defined as a person under the age of eighteen.[208]

3. Utah

Utah's murder statute classifies death by child abuse as first-degree murder when committed against a child under the age of fourteen.[209] A separate statute classifies the same offense as either second or third-degree murder when committed against a child under the age of seventeen.[210] Generally, Utah extends liability to an accomplice only when there is specific intent to aid.[211] However, the child abuse statute applies not only to the principal, but to any person who causes *or permits* another to inflict serious physical injury upon a child.[212] Thus, it would seem that accomplice liability would attach only if that person failed to act for the specific purpose of aiding the principal.[213]

This statute affords children only partial protection from negligent parents. If a child's murder is the result of child abuse and the child is under the age of fourteen, the crime is first-degree murder. However, if the victim is between the ages of fourteen and seventeen, the charge cannot be more serious than second-degree murder. This distinction is inexplicable and unjustifiable; the rights of the child are diminished when it is a lesser crime for a parent to kill the child after the child's fourteenth birthday.

4. Washington

Washington's "homicide by abuse" statute requires that death be caused "under circumstances manifesting an extreme indif-

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[207] *See Muehe*, 646 N.E.2d at 980.
[208] *See* S.C. CODE ANN. § 20-7-490 (Law. Co-op. 1996).
[209] *See* UTAH CODE ANN. § 76-5-203 (1998).
[210] *See id.* § 76-5-208.
[211] *See id.* § 76-2-202.
[212] *See id.* § 76-5-109(2), (3).
[213] There are no published cases under this statute.

ference to human life"[214]—neither premeditation nor intent is required.[215] The state common law requires that an accomplice act with knowledge that she will promote the commission of the crime and agree to aid the principal.[216] However, an accomplice "need not participate in each element of the crime, nor need he share the same mental state that is required of the principal. Rather, it is the intent to facilitate another in the commission of a crime by providing assistance through his presence or his act that makes the accomplice criminally liable."[217] Clearly then, an accomplice need not share the principal's intent. It is unclear, however, whether a parent's failure to act would be equal to providing assistance to the principal under the statutory and common law requirements. The only published case addressing this statute does not discuss accomplice liability.[218]

Washington's statute is weak because it fails to specifically impose liability for omission.[219] Currently, for accomplice liability to attach, the accomplice must aid another "[w]ith knowledge that it will promote or facilitate the commission of the crime."[220] Including omission as a violation of the statute would avoid the requisite problems of proving this intent.[221] Under some circumstances, an omission could be shown to satisfy the statute's ex-

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[214] WASH. REV. CODE ANN. § 9A.32.055 (West 1998).

> (1) a person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under sixteen years of age, . . . and the person has previously engaged in a pattern or practice of assault or torture of said child [or] person under sixteen years of age.

Id.

See also State v. Pettus, 951 P.2d 284, 288 (Wash. 1998) *rev. denied*, 960 P.2d 904 (Wash. 1998). "Extreme indifference to human life" was shown when the defendant "fired a gun from a moving car numerous times while traveling through a residential neighborhood and near a school." *Id.*

[215] *See* State v. Russell, 848 P.2d 743, 748 (Wash. Ct. App. 1993) (affirming a father's conviction of homicide by abuse of his 20-month-old son). This is the only published case under this statute.

[216] *See* WASH. REV. CODE ANN. § 9A.08.020(3)(a)(ii).

[217] State v. Galisia, 822 P.2d 303, 307 (Wash. Ct. App. 1992) (citations omitted). Defendant argued there was insufficient evidence to support conviction for aiding and abetting possession of cocaine with intent to deliver, because he did not help his codefendants obtain the cocaine. *Id.* at 307.

[218] *See Russell*, 848 P.2d at 748.

[219] Washington's complicity law states that "a person is an accomplice of another person in the commission of a crime if: . . . (b) his conduct is expressly declared by law to establish his complicity." WASH. REV. CODE ANN. § 9A.08.020. Thus, the legislature could have included omission in the statute.

[220] *Id.* § 9A.08.020.

[221] For a discussion of problems with proving intent, see *supra* Parts IIB.1–.4.

treme indifference to human life requirement,[222] such as failing to provide medical care or food.

However, the statute applies only to a person who "has previously engaged in a pattern or practice of assault or torture of said child . . . ."[223] Therefore, a parent or guardian who has not actually assaulted the child, but has only failed to protect the child from such assault, does not fall within the statute. To convict a parent for her omission under the statute would require a three-step process: first, a finding that the parent knew her omission would facilitate the crime, and that she aided the abuser by such omission; second, the state would have to define torture to include abuse; and, third, such omission must be accepted as constituting an extreme indifference to human life. As in the previous common law analysis, this requires compiling inference upon inference to hold the accomplice parent liable. Thus, it is not as likely that an accomplice parent will be held as accountable as the perpetrator, even if she is equally guilty. By punishing only the person who actually inflicts the injury, other (as well as future) children are left to the mercy of the same parent who failed to protect the victim.[224]

5. West Virginia

West Virginia has two separate statutes relating to child homicide.[225] Murder of a child is classified as first-degree murder when death is caused by a parent's failure to supply the child with necessary food, clothing, shelter or medical care.[226] However, death of a child by a parent through child abuse is also a felony but does not rise to the level of first-degree murder.[227]

Both statutes specifically apply to the parent who knowingly allows another to either refuse necessities or intentionally inflict physical pain on the child.[228] Because state law imposes the same

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[222] *See* WASH. REV. CODE ANN. § 9A.32.055.
[223] *Id.* § 9A.32.055(1).
[224] *See, e.g.*, Bryan, *supra* note 20, at A1.
[225] *See* W. VA. CODE § 61-8D-2, 61-8D-2a (1997).
[226] *See id.* at § 61-8D-2.
[227] *See id.* at § 61-8D-2a. Section 61-8D-2a(c) imposes punishment for not less than ten nor more than 40 years. Apparently, a parent's failure to supply his or her child with food, clothing, medical care, and shelter is a greater crime than failing to protect the child from abuse. *See id.*
[228] *See id.* §§ 61-8D-2(b), 16-8D-2a(b).

liability for an accomplice as for the principal,[229] these statutes avoid the problem of finding accomplice liability. Thus, there is no need to combine the homicide statute with accomplice liability by omission to determine whether the parent who fails to protect can be prosecuted the same as the principal. Although the criminal penalties do not extend to the level of first-degree murder, West Virginia provides the most direct statute for finding the accomplice parent liable for his or her failure to protect.

Further, West Virginia properly holds the parent who fails to protect her child equally as guilty as the person who inflicts the actual injury.[230] The problem with the statute is the state's classification of child homicide. Under the statute, when a child dies as a result of a parent's refusal or failure to supply necessities, the crime is classified as first-degree murder.[231] However, if death is a result of child abuse, the statute only imposes a prison term of ten to forty years.[232] Thus, beating one's child to death (or allowing another to do so) is considered *less* of a crime than withholding food, clothing, shelter and medical care.[233] Both acts and omission are equally abhorrent, and both forms of child homicide should be considered murder in the first degree.

Thus, none of these statutes clearly holds both the perpetrator and the accomplice parent liable for the harm imposed on their

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[229] *See id.* § 61-11-6.

[230] Thus, there is no need to satisfy aider and abettor liability requirements. However, the only West Virginia case regarding this statute suggests that BWS testimony may be admissible to negate criminal intent in child abuse homicides. *See* State v. Wyatt, 482 S.E.2d 147 (W. Va. 1996). In that case, Julie Wyatt was convicted of murder and of child abuse and neglect under West Virginia Code 61-8D-2(a) and (b) for failing to protect her boyfriend's child. *See id.* at 534. Wyatt lived with Kevin Browning and his two sons. *See id.* Wyatt's principal defense was that her condition as a battered woman interfered with her ability to care for the child—she was afraid to report the abuse or otherwise deal with the situation prior to the fatal incident. *See id.* In an ambiguous opinion, the Supreme Court of Appeals recognized that the principal use of BWS has been in the context of self-defense but stated that it can be a factor that may negate criminal intent. *See id.* However, as the dissent pointed out, prior cases on the issue of negating criminal intent have involved the relationship between the batterer and the battered individual, not harm to a third innocent person. *See* State v. Wyatt, 489 S.E.2d 792, 795 (W.Va. 1997) (Workman, J., dissenting).

The dissent argued that opinion testimony on BWS is properly limited to the context of self-defense claims by a defendant claiming to be a battered woman. *See id.* at 798. However, permitting the defense in child abuse cases is imprudent. *See id.* "I cannot adhere to the view that [the victims of domestic violence] can escape legal accountability for harming other innocent third parties, especially children who must rely on their caretakers for protection." *Id.*

[231] *See* W. VA. CODE § 61-8D-2.

[232] *See id.* § 61-8D-2a. This is the same penalty as that for second-degree murder. *See id.* § 61-2-3.

[233] *See id.* § 61-8D-2.

child. In fact, with the exception of West Virginia, the statutes fail to criminalize a parent's omission. The parent either escapes liability altogether or is charged with a much lesser offense. Either way, the parent is not held to the level of care he or she owes to the child.

Although these states recognize omission as an affirmative act, the intent requirement may undermine prosecution of the accomplice parent. Hence, there is a clear need for statutory authority that holds the passive parent accountable. Further, in cases where the accomplice parent's defense is BWS, liability may not attach because this duress defense mitigates the crime. This factor must be taken into account to ensure that children are fully protected under the law.

III. THE BATTERED WOMAN SYNDROME

In recent years, numerous women whose children have been killed by their husbands or boyfriends have sought to employ the Battered Woman Syndrome as a defense to murder charges. A BWS defense would mitigate these women's duty to protect their children from harm. This Section discusses the empirical invalidity of BWS and explains why BWS should not be allowed as a defense in death by child abuse cases.

A. *The Concept*

Lenore Walker first introduced BWS in 1979 in *The Battered Woman*,[234] and provided further elaboration in her 1985 book, *The Battered Woman Syndrome*.[235] Dr. Walker's theory identifies common experiences among battered women—the cyclical nature of the battering relationship and the concept of "learned helplessness."[236] These concepts are used to explain why a battered woman can commit heinous and otherwise inexplicable crimes.

The Cycle Theory refers to three phases that typify a battering relationship: (1) a "tension-building phase"; which escalates into

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[234] LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER, BATTERED WOMAN].

[235] LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter WALKER, SYNDROME].

[236] *See* WALKER, BATTERED WOMAN, *supra* note 234, at 49.

(2) an "acute-battering incident"; which is followed by (3) a "loving contrition phase."[237] In the first phase, the woman allows slapping and other relatively minor abuse to occur in order to placate the batterer and thus prevent greater abuse.[238] In the second phase, the batterer becomes enraged and increases the violence—the results of the abuse include broken bones or internal injuries.[239] In the third phase, the batterer becomes remorseful and promises never to abuse the victim again.[240] Despite the batterer's reform, this loving phase dissipates and the cycle repeats itself.[241]

Drawing from the research of Dr. Martin Seligman, Walker proposed the theory of "learned helplessness" to explain why a woman does not leave the battering relationship.[242] Seligman placed laboratory dogs in cages and repeatedly shocked them at random.[243] There was no place in the cage to avoid the shock and the dogs could not escape.[244] Eventually, the dogs became passive and submitted to the shocks without resistance.[245] Walker applied this theory to battered women, explaining that over time, the women's experiences in attempting to control the violence produces learned helplessness and depression as the "repeated battering, like electrical shocks, diminish the woman's motivation to respond."[246]

BWS has helped to expose the pervasive domestic violence problem in the United States and to increase resources for victims of domestic violence.[247] However, although BWS has been widely accepted by the courts, the legal and empirical support for the syndrome have been sharply criticized.[248] For example,

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[237] *See* WALKER, SYNDROME, *supra* note 235, at 95–104; WALKER, BATTERED WOMAN, *supra* note 234, at 55–70.

[238] *See* WALKER, SYNDROME, *supra* note 235, at 95–96; WALKER, BATTERED WOMAN, *supra* note 234, at 55–70.

[239] LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42–43 (1989).

[240] *See* WALKER, SYNDROME, *supra* note 235, at 96.

[241] *See id.* at 96.

[242] *See id.* at 86.

[243] *See* Martin Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968).

[244] *See id.*

[245] Many dogs overcame their helplessness after they were dragged from their confinement; other dogs, however, did not. *See id.* at 260–61.

[246] WALKER, SYNDROME, *supra* note 235, at 87 (quoting WALKER, BATTERED WOMAN, *supra* note 234, at 49).

[247] *See* David L. Faigman, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 68 (1997).

[248] *See* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTI-

Walker's methodology for researching the Cycle Theory violated some of the most elementary aspects of the scientific method.[249] Walker's interview technique did not disguise the hypotheses, thus allowing the subjects to easily guess what the researchers hoped to find, and respond accordingly.[250] Further, the interviewers also knew the "correct" outcome and they documented their own interpretations of the subjects' answers, rather than the subjects' actual responses.[251]

Even given these biases, Walker's data does not support her conclusion of a distinct behavioral cycle.[252] The division of the separate phases offers little evidence regarding the number of women who experienced all three phases as a "cycle."[253] More disturbing is the fact that her research never ties the Cycle Theory to the critical matter of the women's fear of harm.[254] Thus, "the research fails to indicate what percentage of women experience the violence as 'a cycle' and, [critically,] what consequences flow from knowing that the violence was cyclical (or for that matter non-cyclical)."[255]

The concept of learned helplessness has also not been well received. In addition to prima facie criticisms that it belittles women,[256] it suffers from empirical inaccuracies.[257] Walker based her theory on dogs that were rendered helpless by being sub-

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MONY, § 8-1.1.3, 320 (1997) (David L. Faigman, *et al.* eds., 1997); Faigman, *supra* note 247, at 68 (observers are realizing that the evidence purportedly supporting the battered woman syndrome is without empirical foundation). For specific explanations of the empirical research, see Regina Schuller and Patricia A. Hastings, *The Battered Woman Syndrome and Other Psychological Effects of Domestic Violence Against Women: Scientific Status*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, § 8-2.1.1. *See also* Hope Toffel, *Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 368 (1996) ("Battered Woman Syndrome . . . has managed to perpetuate harmful stereotypes about women rather than given them a way of justifying their actions as reasonable self-defense.")

[249] *See* Faigman, *supra* note 247, at 76.

[250] *See id.* at 77.

[251] *See id.*

[252] *See id.*

[253] *See id.* at 77–78.

[254] *See id.* at 78.

[255] *Id.*

[256] In presenting BWS, lawyers and experts mainly stress the psychological response of learned helplessness. *See* Toffel, *supra* note 248. "As a result, the law 'excuses' battered women's actions as a form of irrational behavior." *Id.* at 369.

[257] *See, e.g.*, Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 LAW & HUM. BEHAV. 273, 280 (1992); OLA W. BARNETT & ALYCE D. LAVIOLETTE, IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY 105–07 (1993).

jected to electric shock.[258] Over time, the animals became resistant to learning to control their environment.[259] Therefore, "one would predict that if battered women suffered from learned helplessness, they, [too,] would not assert control over their environment."[260] Indeed, on the basis of the theory, one would not predict the ultimate assertion of control—killing the batterer.[261] Further, there is no empirical basis for believing that battered women even suffer from such helplessness.[262]

B. *The Theory's Use*

Both the Cycle Theory and learned helplessness are generally used as essential aspects of a defendant's claim of self-defense in prosecutions for crimes they have committed. In criminal law, self-defense justifies an otherwise unlawful act when the defendant reasonably believes he or she is faced with imminent death or great bodily harm.[263] The premise of the self-defense doctrine is that "where an individual cannot resort to the law in response to aggression, he may use reasonable force to protect himself from physical harm."[264] Defendants use BWS theories to explain the reasonableness of the defendant's belief in the necessity for self-defensive action and to explain why the defendant believed retreat was not possible.[265]

Most self-defense claims are evaluated on the objective reasonableness of the defendant's belief that she was in imminent danger.[266] Under this *objective* test, the defendant must have believed self-defense was necessary, and this belief must be reasonable by the standards of the ordinary person.[267]

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[258] *See* Seligman, *supra* note 243, at 260–61.

[259] *See id.*

[260] Faigman, *supra* note 247, at 79.

[261] *See id.*

[262] *See id.*

[263] The four traditional requirements of self-defense are: (1) at the time of the act, the actor must have believed that he or she was in imminent danger of unlawful bodily harm; (2) he or she must have used a reasonable amount of force to respond to the threatened danger; (3) he or she cannot have been the aggressor; and (4) under some circumstances he or she must have had no opportunity to safely retreat. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW § 5.7 (2d ed. 1986 & 1997 Supp.).

[264] FAIGMAN, *supra* note 248, at 322 .

[265] *See* Faigman, *supra* note 247, at 73–74.

[266] *See* LAFAVE & SCOTT, *supra* note 263, § 5.7(c); 40 AM. JUR. 2D *Homicide* § 154 (1996).

[267] "The rule adopted by most of the courts is that the apprehension of danger and be-

In contrast, the lesser accepted *subjective* test requires only that the defendant honestly believed that self-defense was necessary, and the fact that the belief was unreasonable will not defeat the defendant's claim.[268] If the defendant's belief was honest but not "reasonable," the defense becomes one of "imperfect" self-defense;[269] and the defendant is not guilty of murder, but of the lesser crime of manslaughter.[270]

The distinction, however, between the objective and subjective tests is often blurred.[271] In self-defense cases, the defendant's honest belief in the need to use deadly force is relevant to her intent whether the jurisdiction applies an objective or subjective test.[272]

C. *Battered Woman Syndrome and the Duress Defense*

Although BWS is commonly raised in cases of self-defense, it is increasingly used by defendants for crimes committed in complicity with their abusers but for which they claim duress, such as child abuse.[273] Duress is a common law defense used to justify crimes other than murder.[274] To constitute duress, the pressure must consist of "threatening conduct which produces in

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lief of necessity which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man would, under the circumstances, have entertained." *See* LAFAVE & SCOTT, *supra* note 263, at 433 (footnotes omitted).

[268] *See id.* § 5.7(c).

[269] *See id.; see also* People v. Humphrey, 921 P.2d 1,6 (Cal. 1996) ("If the belief subjectively exists but is objectively unreasonable, then it is imperfect defense."); People v. Bacigalupo, 820 P.2d 559, 569 (Cal. 1992) (en banc) (holding that an "honest but unreasonable belief in the need to defend oneself provides an 'imperfect defense' to a charge of murder").

[270] *See* LAFAVE & SCOTT, *supra* note 263, § 5.7(i); People v. Flannel, 160 Cal. Rptr. 84, 90 (Cal. 1979) (reasoning that a defendant who killed under an honestly held but mistaken belief that his own life was in peril, could not harbor malice, the requisite mental state for murder).

[271] *See* FAIGMAN, *supra* note 248, at 331–32 n.75 (*citing* State v. Rundle, 693 P.2d 475, 479 (Kan. 1985)) ("The objective test is how a reasonably prudent battered wife would perceive . . . [the decedent's] demeanor"). *See also* Bechtel v. State, 840 P.2d 1, 11 (Okla. Crim. App. 1992) (using a "hybrid" standard, "combining both the objective and subjective standards" of reasonableness). "Self-defense is a defense although the danger to life or personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger of death or great bodily harm." *Id.*

[272] *See* FAIGMAN, *supra* note 248, at 332.

[273] *See id.* at 337; United States v. Homick, 964 F.2d 899, 905–06 (9th Cir. 1992); United States v. Marenghi, 893 F. Supp. 85, 92–95 (D. Me. 1995).

[274] *See* LAFAVE & SCOTT, *supra* note 263, § 5.3(b).

the defendant: (1) a reasonable fear of; (2) immediate (or imminent); (3) death or serious bodily harm."[275]

The defendant must have acted under a reasonable fear of immediate death or serious bodily injury to herself, or to a member of her family.[276] Threatened future harm or serious bodily harm, or a threat which produces an unreasonable fear of immediate death or serious bodily harm, is not sufficient.[277] Further, the Supreme Court has stated, "[u]nder any definition of [the defenses of duress and necessity] one principal remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail."[278]

There is a current trend to broaden the application of BWS as a component of the defense of duress to many crimes.[279] Women charged as accomplices in crimes such as fraud,[280] drug trafficking,[281] and gun possession[282] have all claimed that their criminal acts resulted from the pressure to comply with a batterer's demands in order to avoid further beatings.[283] Acceptance of this theory would vitiate any responsibility of the passive parent, even if there were a murder by omission child abuse statute in place.

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[275] *Id.*

[276] *See id.* Even though a person has committed the illegal act and has the requisite mental state, such violation of the law is justified because she has thereby avoided a harm of greater magnitude. *See id* § 5.3(a). Thus, public policy favors the commission of a lesser harm when this will avoid a greater harm. *See id* § 5.3(c).

[277] *See id* § 5.3(b).

[278] United States v. Bailey, 444 U.S. 394, 410–11, (1980).

[279] *See* FAIGMAN, *supra* note 248, at 337.

[280] *See* United States v. Homick, 964 F.2d 899 (9th Cir. 1992) The district court excluded expert witness testimony regarding BWS because of procedural default. *See id.* at 905. The Ninth Circuit concluded that the exclusion was harmless error because the BWS defense was unavailable under the circumstances of the case. *See id.*

[281] *See* United States v. Brown, 891 F. Supp. 1501 (D. Kan. 1995) (admitting evidence of BWS to support defendant's defense of duress). *But see* United States v. Sixty Acres in Etowah County, 930 F.2d 857, 860–61 (11th Cir. 1991) (rejecting the defense of duress based on evidence of BWS because defendant could not show immediate harm).

[282] *See* United States v. Willis, 38 F.3d 170 (5th Cir. 1994), *cert. denied*, 515 U.S. 1145, (1995). The court concluded that evidence of BWS was not relevant because it was "inherently subjective"; thus, it did not provide insight into "whether a person of reasonable firmness would have succumbed to the level or coercion present in a given set of circumstances." *Id.* at 175.

[283] BWS is used to assess "the blameworthiness of the defendant's decision to engage in criminal activity rather than to risk the physical abuse she faces." Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 626 (Spring 1994). She should be excused from criminal culpability because either, her "free will was overcome by the threat of harm to her, so that she had no criminal intent, or she voluntarily acted to avoid what she perceived to be the lesser of two evils (i.e., committing the unlawful act versus being beaten.)" *Id.*

There is no established consensus among courts regarding the precise elements of duress.[284] However, many of the legal issues that arise in duress cases resemble those found in self-defense cases, including the immediacy of the threat and the subjective versus objective nature of the defense.[285] In *United States v. Homick*,[286] the Ninth Circuit held that "[t]he battered woman defense is a species of the defense of duress, which has three elements: (1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat would be carried out, and (3) no reasonable opportunity to escape the threatened harm."[287] BWS testimony is offered as relevant to each of these elements.[288]

The duress defense generally requires an objective standard of reasonableness in determining the defendant's apprehension of the threat. The defense is available only if the defendant's judgment and apprehension of the threat comported with that of a reasonable person. Some courts have therefore not admitted BWS evidence in duress cases. In *United States v. Willis*,[289] the Fifth Circuit emphasized that the "requirements [of duress] are addressed to the impact of a threat on a *reasonable* person."[290] The court explained:

> To consider the Battered Woman Syndrome evidence in applying . . . [the] test . . . would be to turn the objective inquiry that duress has always required into a subjective one. The question would no longer be whether a person of ordinary firmness could have resisted. Instead, the question would change to whether this individual woman, in light of the psychological condition from which she suffers, could have resisted.[291]

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[284] *See, e.g.*, *Bailey*, 444 U.S. at 410–11. *But see* Model Penal Code § 2.09(1) (Proposed Official Draft 1962). "It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been able to resist." *Id.*

[285] *See* FAIGMAN, *supra* note 248, at 337.

[286] 964 F.2d 899 (9th Cir. 1992).

[287] *Id.* at 905.

[288] *See* FAIGMAN, *supra* note 248, at 337.

[289] 38 F.3d 170 (5th Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995).

[290] *Id.* at 175 (emphasis added).

[291] *Id.* at 176. *But see* Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992) (holding that the district court's refusal to provide expert witness funds to a defendant claiming a duress defense, attempting thereby to establish lack of requisite intent, infringed upon her due process rights).

Those who support the use of BWS testimony seek to provide a type of "imperfect duress" defense,[292] where subjective inquiry regarding the reasonableness of the defendant's state of mind would be necessary in each case.[293] The relevance of BWS in duress cases, according to this perspective, arises from its power to establish the required elements of imminence, honesty in belief, and lack of escape opportunities. BWS testimony seeks to explain why a woman might believe she was in "imminent harm," why she reasonably believed a threat would be carried out, and why she failed to leave the abuser before the criminal acts became necessary.[294] Thus, it is argued, the jury could consider the reasonableness of the defendant's belief in light of evidence that she suffers from BWS.[295] This would serve to limit the responsibility of the passive parent.

In self-defense cases, BWS may be admitted to negate criminal intent with respect to force used against the batterer by the victim. However, it normally does *not* apply when the defendant has caused harm to a third party. Indeed, many statutes recognize this distinction and allow evidence of BWS only in the former case.[296]

Judges too are reluctant to admit BWS testimony where the defendant has used violence against a third party. For example, in *State v. Mott*,[297] the Arizona Supreme Court held that expert

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[292] *See* Monacella, *supra* note 197, at 738–39 (advocating a subjective approach). *See also* Heather R. Skinazi, *Not Just a "Conjured Afterthought": Using Duress As a Defense For Battered Women Who "Fail To Protect,"* 85 CALIF. L. REV. 993, 1024 (1997) (advocating a standard whereby "duress is determined by considering whether, under the totality of the circumstances (including past abuse), the threat (implicit or explicit), or the use of force, was such that the actor believed she could not resist, and a reasonable person similarly situated could not resist").

[293] *See* Monacella, *supra* note 197, at 699.

[294] *See* FAIGMAN, *supra* note 248, at 340. *But see* State v. Riker, 869 P.2d 43, 51 (Wash. 1994) (holding that duress requires "immediate" harm, while self-defense requires "imminent" harm).

[295] *See* Skinazi, *supra* note 292, at 1012.

[296] *See, e.g.*, OHIO REV. CODE ANN. § 2901.06(B) (West 1997), which provides in pertinent part:

> If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the 'battered woman syndrome' and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question.

See also MD. CODE ANN. CTS. & JUD. PROC. § 10-916 (Michie 1996); WYO. STAT. ANN. § 6-1-203 (West 1997). *But see* S.C. CODE ANN. § 17-23-170 (West 1997) (BWS admissible to support defense of duress).

[297] 931 P.2d 1046 (Ariz. 1997), *cert. denied*, 117 S. Ct. 1832 (1997).

testimony challenging the element of knowledge or intent in child abuse cases was inadmissible.[298] The defendant was found guilty of first-degree murder for the death of her two-and-a-half-year-old daughter Sheena.[299] While Sheena was with the defendant's boyfriend she reportedly fell off a toilet and struck her head.[300] Despite the child's unconscious state, the defendant did not take Sheena to the hospital for more than twelve hours.[301] She died from a large brain hemorrhage several days later.[302] Doctors found numerous cigarette burn marks between Sheena's fingers and other signs of abuse.[303] The defendant admitted to knowing that her boyfriend had abused Sheena in the past, and that she did not believe the child had fallen.[304] However, the defendant "never reported the abuse because she did not want [her boyfriend] to get in trouble, and she dressed Sheena to hide the bruising."[305]

The defense offered BWS expert testimony to challenge the element of knowledge or intent.[306] The expert "concluded that defendant was a battered woman and that being a battered woman was relevant to her ability to protect her children."[307] Further, the expert explained that the defendant's status as a battered woman prohibited her from being able to decide to seek medical attention for the child.[308] The BWS evidence was thus offered "to demonstrate that defendant was not capable of forming the requisite mental state of knowledge or intent."[309]

The court concluded that such evidence was inadmissible because it "was not offered as a defense to excuse her crimes, but rather . . . to negate the mens rea [intent] element of crime."[310] It stated that use of such expert psychiatric evidence was relevant

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[298] *See id.*

[299] *See id.* at 1047–48.

[300] *See id.* at 1048.

[301] *See id.*

[302] *See id.*

[303] *See id.* There were numerous bruises and abrasions on her head and body, including a "branding" burn on the bottom of her foot and whip marks on her upper thigh and buttocks. *See id.*

[304] *See id.*

[305] *Id.* at 1049.

[306] *See id.*

[307] *Id.*

[308] *See id.* at 1050.

[309] *Id.* Arizona classifies child abuse resulting in death as felony-murder. *See, e.g.*, State v. Lopez, 847 P.2d 1078 (Ariz. 1993); ARIZ. REV. STAT. ANN. § 13-1105 (West 1997).

[310] *Mott*, 931 P.2d at 1050.

only to a "diminished capacity" defense,[311] and that such defenses were not recognized in Arizona.[312]

D. *Battered Woman Syndrome and Public Policy*

The parent/child relationship exhibits a unique paradox—children are most vulnerable to abuse by the very persons who have the highest duty to protect them, their parents. As one court has stated:

> [A] parent's failure to take appropriate steps to protect their child from the abuse of the other parent is tantamount to neglect of that child, not to mention moral complicity with the base crime being perpetrated upon the child by the other parent. In a situation where it is the other parent perpetrating the abuse upon the child, the non-abusing parent is under an even greater duty to take steps necessary to prevent the abuse. First, the parent has a higher probability of knowing about the abuse because he or she lives with both the victim and the abuser. Second, the relationship of the child-victim to the parent-abuser presents additional problems that do not arise when the abuser is a stranger. Due to the added problems inherent in a parent-child abuse situation, the non-abusing parent, as the only advocate for the child, has a greater responsibility to prevent such abuse when it becomes or should have become evident to that parent.[313]

Scientific support for BWS is weak.[314] To allow BWS to exculpate a parent who breaches her legal duty to protect her child simply vitiates that duty. Proponents of an imperfect duress defense seek to excuse the battered woman from her omission because her perception was distorted.[315] According to these advocates, sufferers of the syndrome cannot form the requisite intent because their free will is compromised.[316]

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[311] *See id.* at 1050.

[312] *See id.* at 1051.

[313] *Muehe*, 646 N.E.2d at 983–84.

[314] *See* Faigman, *supra* note 247, at 67. "[I]t is now obvious that the BWS is not good science nor does it generate good policy." *Id.* The evidence purporting to support BWS is without valid empirical foundation. *See id.*; *see generally* Schuller & Vidmar, *supra* note 257, at 356 (Lenore Walker's cycle theory of violence is not characteristic of all battering relationships).

[315] *See* Skinazi, *supra* note 295, at 997 ("[m]odifying duress to incorporate the approach to reasonableness used by self-defense is consistent with the duress defense's underlying excuse rationale"); *see also* Monacella, *supra* note 197, at 724.

[316] *See* Monacella, *supra* note 197, at 741.

Duress, however, is rarely recognized as a complete defense to homicide. In at least seventeen states, it is unavailable.[317] At common law, duress was not a defense to intentional killing.[318] Case law, in the absence of statutes, has generally held that duress cannot excuse an intentional killing or an attempt to kill.[319] Even those jurisdictions that recognize a duress defense for murder hold that the defense is unavailable if the actor intentionally, knowingly or recklessly places herself in a situation in which it is probable that she would be subject to duress.[320] The duress defense is also unavailable if the actor does not take advantage of a reasonable opportunity to escape.[321] This requirement applies uniformly, even if the charge is felony child-abuse.[322]

By submitting to abuse or allowing her child to be abused, a woman seems to place herself in a situation in which she is

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[317] The defense of duress is unavailable under the following statutes: ALA. CODE § 13A-3-30 (Michie 1996) (for murder or aggravated homicide); ARIZ. REV. STAT. ANN. § 13-412 (West 1997) (for homicide or serious physical injury); COLO. REV. STAT. § 18-1-807 (West 1997) (for murder); DEL. CODE ANN. tit. 11, § 641 (1996) (duress defense may reduce murder to manslaughter); GA. CODE ANN. § 16-3-26 (1997) (for murder); IND. CODE ANN. § 35-41-3-8 (Michie 1996) (for felony offenses); KAN. STAT. ANN. § 21-3209 (1996) (for murder or voluntary manslaughter); ME. REV. STAT. ANN. tit. 17-a, § 103-a (West 1996) (for intentional homicide); MICH. COMP. LAWS ANN. § 750.316 (West 1997) (duress is not a defense); MINN. STAT. ANN. § 609.08 (West 1997) (for murder); MO. ANN. STAT. § 562.071 (West 1997) (for murder); N.J. STAT. ANN. § 2C:209 (West 1997) (duress defense may reduce murder to manslaughter); N.D. CENT. CODE § 12.1-16- 01 (Michie 1997) (duress defense may reduce murder to manslaughter); OR. REV. STAT. § 161.270 (1996) (for murder); TEX. PENAL CODE ANN. § 8.05 (West 1997) (for felony offenses); WASH. REV. CODE ANN. § 9A.16.060 (West 1997) (for murder or manslaughter); WIS. STAT. ANN. § 939.46 (West 1997) (duress defense may reduce first-degree homicide to second-degree homicide).

[318] *See* 40 AM. JUR. 2D *Homicide* § 119; LAFAVE & SCOTT, *supra* note 72, § 5.3.

[319] *See* LAFAVE & SCOTT, *supra* note 72, § 5.3. *See also* Wright v. State, 402 So.2d 493 (Fla. Dist. Ct. App. 1981) (holding that defense of duress was not available against a charge of first-degree murder on a theory of aiding and abetting).

[320] *See, e.g.*, People v. Gimotty, 549 N.W.2d 39 (Mich. 1996). *See also* ARK. CODE ANN. § 5-2-208 (1996); CONN. GEN. STAT. ANN. § 53a-14 (West 1997); LA. REV. STAT. ANN. § 14:18 (West 1997); 18 PA. CONS. STAT. ANN. § 309 (West 1997); S.D. CODIFIED LAWS ANN. § 22-5-1 (1997); TENN. CODE ANN. § 39-11-504 (1997); UTAH CODE ANN. § 76-2-302 (Michie 1997). In some jurisdictions mere negligence is a bar to a duress defense if the defendant is charged with an offense for which negligence suffices to establish culpability. *See* LAFAVE & SCOTT, *supra* note 72, § 5.3.

[321] *See, e.g.*, *Homick*, 964 F.2d at 905.

[322] The duress defense requires that "the defendant did not have a reasonable legal alternative to violating the law." United States v. Webb, 747 F.2d 278, 285 (5th Cir. 1984), *cert. denied*, 469 U.S. 1226 (1985). *See also* United States v. Bailey, 444 U.S. 394, 410-11 (1980); Sam v. Commonwealth, 411 S.E.2d 832 (Va. 1991) (holding that trial court properly refused to instruct jury on duress, where evidence showed that defendant had reasonable opportunity to avoid any further participation in crimes and to obtain aid from police or warn his family before any threats against his family could be carried out).

likely to be subject to duress. It is a weak argument that such a woman is trying to protect the child from some greater harm. If BWS is characterized by increasing cycles of violence, the battered woman should arguably realize that submission will not result in less abuse, but more—just as it has previously.

No one except the abuser himself benefits when a woman fails to protect her child. Indeed, use of the duress defense neither discourages the mother from entering another battering relationship nor encourages her to protect the child from further abuse.[323] To deter passive acceptance of known child abuse, the duress defense should not be permitted in cases when a child *dies* as a result of the abuse. To require otherwise would create the bizarre incentive to let the child die before seeking help. Such a result is unconscionable.

In *Hernandez*, Gabriela might have been afraid to come to her daughter's aid because of the fear that Rogelio would harm either herself or Joselin. Initially, there were no negative consequences of Gabriela's failure to act. She had regained custody of her daughter, despite the abuse. Gabriela might even have had a relatively clear conscience, as she was not doing the beating. Further, Gabriela might have feared losing her other child if she reported the abuse.

To allow BWS to excuse Gabriela's breach, however, would protect no one. It would create no incentive for battered women to report abuse, and it could subject her son and any future children to a fate similar to Joselin's. Gabriela breached her duty to protect Joselin when she failed to take steps to protect the toddler from Rogelio's abuse. Further, Gabriela knowingly and recklessly remained in a situation likely to subject her to duress. Gabriela was fully aware of the potential consequences of not taking advantage of the many opportunities to report Rogelio's further abuse to CPS, and of choosing to remain living with him while he abused their daughter. But ultimately, whether she reasonably or unreasonably believed that she was in imminent harm, duress does not excuse homicide.

The parent who fails to protect her child must be held accountable for her omission. When there is a history of child abuse, BWS should be no defense. The law holds much more attenuated parties, such as physicians, educators and other third

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[323] *See Elliot*, No. 91-1524-B.

parties, responsible for not reporting child abuse.[324] Those with the highest duty and the most special relationship to the child should be accountable as well.

Heather Skinazi, a proponent of BWS, states that "[c]onvicting a non-abusing battered mother for failure to protect will not benefit children, rather it only serves to revictimize both mother and child who have suffered enough abuse. No child should be wrenched from a loving and good parent simply because that parent has been battered."[325] However, this argument mislabels the non-battering parent. A parent who fails to protect her child from abuse is no more a "loving and good parent" than the abuser. Further, as Skinazi herself notes, "in homes where mothers are victims of domestic violence, about seventy percent of fathers or father-substitutes also beat the children."[326] One who intentionally places herself in an abusive relationship should not be characterized as a victim of that relationship. By focusing on the rights of the parent, Skinazi ignores the child's rights. Such a view only re-victimizes the child by failing to create an incentive for the parent to report or stop the abuse. Thus, in the absence of a clear legal pronouncement, such a perspective sacrifices the rights of the child for the rights of the parent.

In one of the first cases considering duress where a battered woman was charged with failure to protect her child, *United States v. Webb*,[327] the court refused to admit expert testimony explaining why a battered woman might not be able to leave her batterer and seek protection. In that case, June Webb was convicted on two counts of injury to a child by failing to obtain medical care for her six-year-old son, Steve.[328] The evidence re-

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[324] All states impose mandatory reporting requirements on professionals who have evidence of child abuse. These professionals include medical personnel, school personnel, law enforcement agencies, clergy, and daycare workers. For a comprehensive list of requirements of each states, see LEONARD KARP AND CHERYL KARP, DOMESTIC TORTS, 269–94 (Supp. 1993). Even these preventive measures fail to help children, as often those required to report abuse fail to do so. Twenty-two percent of mandated reporters, including pediatricians, school principals, therapists, and day care operators, do not report suspected cases of abuse. *See* A NATION'S SHAME, *supra* note 19, at 40. These individuals cite lack of hard evidence of abuse and neglect—which is not required to make a report—and their belief that "I can do better than the system." *See id.* Further, a recent study found that 69% of professionals in medicine and law enforcement who suspected child abuse did not report it, although the law requires them to do so. *See id.*

[325] Skinazi, *supra* note 295, at 999.

[326] *Id.* at 995; *see also* A NATION'S SHAME, *supra* note 19, at 12.

[327] 747 F.2d 278 (5th Cir. 1984).

[328] *See id.* at 281. She was convicted under Texas' "injury to a child" statute. *See id.* at 280. The statute provides in pertinent part: "(a) a person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission,

vealed that Keith, June's husband,[329] repeatedly beat her and their son Steve.[330] Their son finally succumbed to the beatings and scaldings he had endured, and Keith buried his body in the desert.[331] Almost one month later, June reported Steve's death to the authorities and accused Keith of causing her son's death.[332] In court, June claimed she did not report the death sooner because Keith had threatened to kill her, her other children, and her family in Delaware if she reported him.[333]

Skinazi argues that the jury's verdict in *Webb* hinges on the court's use of an objective standard of reasonableness.[334] She contends that BWS would explain why June Webb was unable to report the child abuse until one month after her son's death.[335] However, Skinazi omits from her analysis certain facts that might very well explain the verdict independently of the objective reasonableness standard. For example, June did not continuously live with or even near Keith.[336] She enlisted in the Army and lived alone in Germany for two years.[337] Despite Keith's prior physical abuse, the two reconciled when June returned from Germany.[338] Leaving her children in Delaware, June moved with Keith to Texas, and the beatings resumed.[339] After a few months Keith's legal wife and her four children arrived, as did June's two children.[340] These nine lived together in a three-bedroom house, June being the sole source of support.[341] Meanwhile, Keith continued to abuse June and began to abuse their six-year-old son.[342]

There is no evidence that June was forced to reconcile with Keith after she returned from Germany, nor is there evidence

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engages in conduct that causes to a child who is 14 years of age or younger . . . ; (1) serious bodily injury; (2) serious physical or mental deficiency or impairment; . . . or (4) bodily injury." *Id.* at 283 n.6.

[329] The two were not legally married but had two children and lived together. Keith was legally married to another woman who lived with them at the time of the killing. *See id.* at 280–81.

[330] *See id.*

[331] *See id.* at 281.

[332] *See id.*

[333] *See id.*

[334] *See* Skinazi, *supra* note 295, at 1007.

[335] *See id.*

[336] *See Webb*, 747 F.2d at 280–81.

[337] *See id.* at 280.

[338] *See id.*

[339] *See id.*

[340] *See id.* at 281.

[341] *See id.*

[342] *See id.*

that she was forced to bring her own two children to live in the home. And as June was the household's sole source of monetary support, she was not financially dependent on Keith. It is arguable whether June was emotionally dependent on Keith—indeed, she lived alone for two years prior to moving to Texas.

Texas law states that duress is unavailable as a defense if the actor intentionally, knowingly, or recklessly placed herself in a situation in which it was probable that she would be subjected to compulsion.[343] In light of the facts, it is understandable how a jury might believe that June's feelings of duress, whether or not her apprehensions were reasonable, were nonetheless self-imposed. BWS may explain why June was unable to leave her situation, but it can not explain why she placed herself in such a situation initially.

IV. A STATUTORY PROPOSAL

The current legal environment does not allow for the effective prosecution of a parent who fails to protect her child from abuse. The common law fails because accomplice liability requires proof of specific intent to assist or facilitate perpetration of the crime. Statutory law classifying child abuse homicide as murder exists in only a few states. Further, while these statutes facilitate prosecution of the principal, they seldom address the conduct of the non-abusing parent who fails to protect the child. What is worse, the use of BWS undermines the favorable common and statutory law that does exist by excusing such non-abusing parents from liability.

A statute is therefore needed that allows for the murder prosecution of principals, accomplices, and others who cause the death of a child, either by direct abuse or by a failure to protect the child from abuse. Such a statute would clearly define the responsibilities of the passive parent while accounting for the weaknesses of the current legal system, including the potential use of duress as a defense. We propose the following:

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[343] *See* TEX. PENAL CODE ANN. § 8.05 (West 1997).

MURDER BY CHILD ABUSE

A. A parent, guardian or custodian is guilty of murder by abuse or neglect in the first degree if that person maliciously or intentionally engages in abuse or neglect that results in the death of a child under that person's care, custody or control.

B. A parent, guardian or custodian is guilty of murder by abuse or neglect in the first degree if that person knowingly allows any third person to maliciously or intentionally engage in abuse or neglect that results in the death of a child under the care, custody or control of the parent, guardian or custodian.

C. A parent, guardian or custodian is guilty of murder by abuse or neglect in the first degree if that person recklessly allows any third person to maliciously or intentionally engage in abuse or neglect that results in the death of a child under the care, custody or control of the parent, guardian or custodian, when the parent, guardian or custodian has knowledge that the third person has engaged in an act or previous pattern of abuse or neglect of such child.

D. A parent, guardian or custodian is guilty of murder by abuse or neglect in the second degree if that person recklessly engages in abuse or neglect that results in the death of a child under that person's care, custody or control.

E. A parent, guardian or custodian is guilty of murder by abuse or neglect in the second degree if that person knowingly allows any third person to recklessly engage in abuse or neglect that results in the death of a child under the care, custody or control of the parent, guardian or custodian.

F. For the purpose of this section:

1. "Child" shall mean any person under 18 years of age.

2. "Abuse" shall mean causing substantial physical pain, illness or any impairment of physical condition by other than accidental means.

3. "Neglect" means threatening or impairing the physical, mental or emotional health and well-being of a child by fail-

ing or refusing to supply such child with necessary food, clothing, shelter or medical care.

4. "Previous pattern" of abuse and/or neglect shall mean one or more incidents of conduct that

a. Constitute an act of abuse and/or neglect, and

b. Are not so closely related to each other or connected in point of time and place that they constitute a single event.

5. A conviction is not required for an act of abuse or neglect to be used in prosecution under this section including an act used as proof of the previous pattern as defined in F (4). A conviction for any act of abuse or neglect including one which may be relied upon to establish the previous pattern of abuse and/or neglect does not preclude prosecution under this section. Prosecution under this section does not preclude prosecution under any other section of the Code.

G. It shall not be a defense for any person charged with murder under this statute that they could not or did not entertain a criminal intent.

This statute addresses the problems, discussed earlier, associated with current child abuse homicide statutes, and fills the void left by general murder statutes and common law. Separately classifying these types of homicides provides prosecutors with a specific statute under which to charge the abusive parent, removing the burden of trying a unique crime under an unsuitable statute.[344]

Section A classifies death by child abuse as first-degree murder when a parent intentionally causes the death of his or her child.

Under sections B and C, a parent may be charged with first-degree murder when death results from her failure to protect her child from a person she knows to have previously abused the child. In the majority of cases in which a child dies from abuse, the non-abusing parent was aware that the child had been previously abused.[345]

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[344] Prosecutors concede that "charges of child homicides are routinely reduced to lesser crimes" because "existing murder statutes do not fit many child abuse . . . fatalities." A NATION'S SHAME, *supra* note 19, at 43.

[345] Recent studies demonstrate that "many infants suffer numerous beatings before dying, suggesting they may have been seen by an official, a family member, or neighbor who might have intervened to save them." *Id.* at 16.

Sections B and C avoid the common law problem of accomplice liability by treating the non-abusing parent as a principal. Both parents are charged with the same crime. Further, there is no requirement that a non-abusing parent act with specific intent to aid or facilitate the abuse.

The terms "knowingly" and "recklessly" in these sections protect parents who either act carelessly or simply fail to properly investigate a caretaker's background. The term "knowingly" is defined by the Model Penal Code as being aware of the nature of the conduct, the attendant circumstances, and that the conduct is "practically certain" to cause the specified result.[346] Thus, an individual must be aware that her failure to protect her child will result in the child's death. This awareness is easily proven in cases where past abuse is documented by social services and law enforcement agencies. It may also be shown circumstantially, such as when the non-abusing parent acts to hide evidence of abuse.

The term "recklessly" is defined by the Model Penal Code as conscious disregard of a "substantial and unjustifiable risk."[347] The risk must be such that given the nature and purpose of the actor's conduct and the circumstances known to her, such disregard is a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[348] This definition does not require an individual to be certain of the result of abuse, but only aware of the high degree of risk to the child. An individual acts recklessly, for example, by leaving her child with a person known to have previously engaged in abuse.

Under Sections D and E, child abuse homicide is mitigated to second-degree murder when a parent acts recklessly. These sections would cover cases such as those in which dangerous drugs were left within a child's reach.

Section F defines the terms used in the statute. A "child" includes all persons who have not yet reached the legal age of majority. There should be no arbitrary distinction between minors of different ages.

"Abuse" and "neglect" describe conduct that is normally associated with those terms.

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[346] MODEL PENAL CODE § 2.02(2)(b) (Proposed Official Draft 1962).
[347] *Id.* § 2.02(2)(c).
[348] *Id.*

"Previous pattern" of abuse or neglect is used to protect the parent who is not aware of the abuse. In order to qualify as a "previous pattern," the abusive acts must occur sufficiently far apart in time as to allow the non-abusing parent to notice what is happening. For a babysitter's abuse to qualify as a "previous pattern," then, the abusive acts must be separated by time in which the parent is present, as opposed to being separated by a number of hours.

A conviction for an act of abuse or neglect is not necessary to qualify such acts as a "previous pattern." It will be enough to establish a "previous pattern" of abuse that the non-abusing parent was aware of such a pattern.

Section G prohibits the use of duress as a defense to prosecution under this murder statute. The prohibition is consistent with the common law limitation denying the defense in murder cases. Furthermore, precluding duress defenses avoids disputes regarding whether the standard of reasonableness is to be subjective or objective.

Under current law, BWS evidence can be used in self-defense cases to negate a defendant's criminal intent with respect to violence against her abuser. Such cases are not addressed by the proposed statute. It is sufficient for our purposes that when the victim is the child rather than the abuser, the duress defense will not be available. Although battered women may be generally less able to protect their children, this tragic phenomenon will not constitute a legal defense to crimes against those children.[349]

V. CONCLUSION

Child abuse is a widespread social plague in the United States—more than one million vulnerable children are subject to physical and emotional abuse each year.[350] The current legal environment does not sufficiently protect these children. We have proposed a solution in the form of a child abuse homicide statute. Deterring parents from engaging in, or passively accepting, the abuse of their children will go far toward solving the problem we have outlined. Justice Anthony M. Kennedy has stated the following:

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[349] *See Wyatt*, 489 S.E.2d at 798 (Workman, J., dissenting).
[350] *See* CHILD MALTREATMENT, *supra* note 22.

> Our society is a compassionate one and so it is tempted to excuse the individual from responsibility because of past injustice or persisting social ills. A concern with these deficiencies is necessary if we are to improve our society, but this concern ought not be carried so far that the idea of personal, moral responsibility is eroded. We must not obscure the basic principle.
>
> When our nation accounts to history, we will not have the defense of diminished capacity. And when our heroes are counted, they will be ones who recognized that individual responsibility is a celebration of freedom, not its denial.[351]

Indeed, we must recognize and enforce this individual responsibility by criminalizing passive acceptance of child abuse.

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[351] Anthony M. Kennedy, *Law and Belief*, TRIAL, July 1998, at 23, 24.

STATUTE

A MODEL ACT FOR THE DEMOCRATIZATION OF BALLOT ACCESS

THE APPLESEED CENTER FOR ELECTORAL REFORM
THE HARVARD LEGISLATIVE RESEARCH BUREAU*

Many states have restrictive and complex ballot access laws that make it difficult for non-major party candidates to appear on federal or state election ballots. The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau propose a Model Act to democratize ballot access that would broaden participation in political discourse, increase voter choice, and eliminate unnecessary barriers for third-party and independent candidates for public office.

If voter turnout in elections is any indication of a democracy's health, then the United States is facing a major problem. In 1998, only 36.1% of eligible population voted,[1] the lowest turnout since the wartime election of 1942.

In the 1998 election, the highest turnout by a nine percent margin was in Minnesota, where almost sixty percent of the electorate voted and Reform Party candidate Jesse Ventura was elected governor.[2] A connection between the presence of a viable third party candidate and high voter turnout is hardly coincidental. Third parties and independents have traditionally played an important role in energizing voters and offering alternative viewpoints to those of the major parties.[3]

Yet today the restrictive and complex ballot access laws of most states make it extremely difficult for non-major party candidates to secure a spot on the general election ballot for state or federal office. In order to qualify for the ballot in all fifty states for the 1996 Presidential election, a third party candidate had to

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* The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau are student organizations of Harvard Law School. Members who contributed to this Model Act are Jennifer Boll, Ian Downes, Dmitriy Evseev, Michael Mirarchi, and Neal Suit. The authors wish to thank Richard Winger, E. Joshua Rosenkranz, David Sullivan, Richard Parker, and Arthur Block for their assistance.

[1] *See* Committee for the Study of the American Electorate, *Press Release* (Nov. 6, 1998) <http://www.epn.org/csae/cgans4.html>.

[2] *See id.*

[3] *See* Walter D. Burnham, *The Changing Shape of the American Political Universe*, 59 AM. POL. SCI. REV. 7, 22–23 (1965) (attributing the decline in voter turnout in the early twentieth century to the collapse of third parties).

spend $1.6 million, while a major party candidate had to spend less than one-fifth as much.[4] Some states require more than 100,000 registered voters to sign a party's petition for ballot access.[5] Others impose an onerous filing fee, mandate an early petition deadline, or simply have no available method for a third party to qualify for the ballot.[6] Still other states limit the number of candidates on the ballot by the sheer complexity of their laws.[7]

The goal of this Model Act is to initiate reform in the state regulation of ballot access by offering a model set of provisions that could be adopted with only minor modifications in any of the fifty states. Each section of the proposed legislation is followed by commentary, examining the rationale behind particular rules chosen.

Ballot access regulation must first be understood in historical context. The origin of the restrictions in many states is largely in the "Red Scare" of the first part of the twentieth century.[8] During that time, fearing that Socialists or Communists would become significant political rivals, the major parties enacted legislation intended to deny them this opportunity.[9] For example, in the early twentieth century, the Illinois legislature increased the petition signature requirement from 1000 to 25,000 signatures, and added a requirement that 200 signatures be collected from each of fifty counties.[10] This measure was successful in preventing the Communist Party, which had a significant base of support in

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[4] *See* E. JOSHUA ROSENKRANZ, VOTER CHOICE '96: A 50-STATE REPORT CARD ON THE PRESIDENTIAL ELECTIONS 4 (1996).

[5] For example, Minnesota requires a number of signatures equal to five percent of votes cast in the preceding election, which is 105,268 signatures. *See* Richard Winger, How a New, Fully Qualified Party May Be Recognized, 2000 Election (Dec. 2, 1998) (unpublished chart on file with authors).

[6] Connecticut, Illinois, Indiana, Iowa, Kentucky, New Jersey, New York, Pennsylvania, Virginia, Washington, and West Virginia have no procedure by which a group may become a qualified party prior to any particular election. *See id.* Instead, these states allow independent candidates to choose a party name when they gain a spot on the ballot. For a discussion of this practice, known as "piggybacking," see *infra* Comment to Section 2.2.

[7] New York's ballot access laws are infamous for their complexity. *See infra* note 61 and accompanying text.

[8] Ray Arsenault, a historian at the University of South Florida, cites the Bolshevik Revolution, the presidential candidacy of Robert LaFollette (Progressive Party) in 1924, and the popularity of Florida's anti-Catholic gubernatorial candidate as factors prompting the legislature to fashion one of the most restrictive ballot access laws in the nation. *See* William March, *Events Outside Florida's Control Prompted Restrictive Political Law*, TAMPA TRIB., Feb. 1, 1999, at 1.

[9] *See* ROSENKRANZ, *supra* note 4, at 14.

[10] *See id.*

Chicago, from obtaining a ballot position in any of the next four statewide elections.[11]

Today, the nature and severity of the restrictions vary from state to state in a haphazard manner, but the justifications advanced in favor of limiting ballot access rights are fairly uniform. The state interest in access restrictions is primarily framed in terms of preventing voter confusion, deterring frivolous candidacies, and promoting political stability.[12]

Whether voters are truly confused by having to choose from a large number of candidates on the ballot has yet to be established, however. Even assuming this is the case, a fairly low threshold would suffice to prevent ballot overcrowding, as well as to deter frivolous candidates. As Richard Winger, a leading expert on ballot access, points out, "[I]n the 1912 general election, [before most ballot access restrictions were enacted,] the average election ballot had 4.1 candidates for Congress."[13] Today, when third parties are much weaker, it is unlikely that even the most permissive ballot access rules would result in an overcrowded ballot.

While the recent Supreme Court decision in *Buckley v. American Constitutional Law Foundation*[14] eliminates a minor hurdle to ballot access, the Court has generally given states wide latitude in shaping their ballot access provisions. Prime examples of the Court's laissez-faire approach to ballot access are its decisions in *Jenness v. Fortson*,[15] deciding that Georgia's petition signature requirement of five percent of registered voters did not act to freeze the political status quo and was therefore constitutional, *Storer v. Brown*,[16] upholding California's party disaffiliation requirement for independent candidates, and *Burdick v. Takushi*,[17] holding that Hawaii was not required to provide write-in space on their ballot. Analysis of these decisions has led one author to argue that "minor parties will not succeed in reducing state barriers to political participation through future court challenges."[18]

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[11] *See id.*

[12] *See* Anderson v. Celebrezze, 460 US 780, 788 (1983).

[13] *See* Richard Winger, *What Are Ballots For?* (1988) <http://www.ballot-access.org/winger/wabf.html>.

[14] 119 S. Ct. 636 (1999) (striking down Colorado's requirement that petition signature gatherers be registered voters as a violation of the First Amendment).

[15] 403 U.S. 431, 439 (1971).

[16] 415 U.S. 724, 736 (1974).

[17] 504 U.S. 428, 447 (1992).

[18] Benjamin Black, Note, *Developments in the State Regulation of Major and Minor*

He thus concludes that, "if the answer to increasing ballot access lies anywhere, it appears to be in the hands of state legislatures."[19]

As the political bodies responsible for creating ballot access restrictions in the first place, state legislatures are the most logical vehicle to undertake reform. Legislators, however, are not likely to initiate change without public pressure. As one Texas Republican official commented, "The one thing Democrats and Republicans agree on [is] they don't want more parties . . . they would rather continue to fight with one another."[20]

Fortunately there are several recent trends pointing toward voter support for greater ballot access. In 1998, a record number of voters—more than thirteen percent—registered as neither Democrat nor Republican.[21] This percentage has been increasing steadily in the latter half of this century, from about 1.54% in 1962.[22]

Voter dissatisfaction with the two major parties has been increasing according to other indicators as well. A Roper Poll conducted on the eve of the 1992 election showed that 63% of those surveyed were in favor of the creation of a third party to challenge the Republicans and Democrats.[23] In 1944, only 14% shared that opinion.[24] Another sign of dissatisfaction with the political status quo comes from Florida, where voters in the last election passed Revision 11 with 64% of the vote, eliminating the state's onerous petition requirements for third parties.[25]

The relaxation or even elimination of ballot access restrictions is not likely to cause the demise of the two-party system.[26] As long as U.S. elections are based on a winner-take-all model, rather than proportional representation, it is likely that there will be two parties that dominate the political landscape.[27] Further-

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Political Parties, 82 CORNELL L. REV. 109, 112 (1996).

[19] *Id.* at 181.

[20] *See* ROSENKRANZ, *supra* note 4, at 12. "While legislators may tussle over rules that advantage one major party over another, they can readily agree on rules that award both major parties significant advantages over upstarts." *Id.* at 74.

[21] *See* Committee for the Study of the American Electorate, *supra* note 1.

[22] *See id.*

[23] *See* Black, *supra* note 18, at 180.

[24] *See id.*

[25] *See* Richard Winger, *Florida Voters Wipe out Mandatory Petitions*, BALLOT ACCESS NEWS, Nov. 8, 1998, at 1 (calling Florida's Revision 11 the biggest victory for ballot access reform since 1968).

[26] *See* Black, *supra* note 18, at 176.

[27] *See id.*

more, the tremendous advantages that the the Republican and Democratic parties possess in terms of organizational structure and financing virtually guarantee that they will continue to be stronger than their opponents in the foreseeable future.

This reality does not mean, however, that third parties do not have a vital role to play in our political system. On the contrary, "history has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted."[28] Third parties "have been a major force behind policy innovations, including direct election of senators, women's suffrage, nomination through party primaries, the eight-hour work day, child labor laws, federal farm aid, and the graduated income tax."[29]

The goal of this Model Act is to allow voters a greater choice of candidates on election day by eliminating needless complexity and restrictions faced by potential candidates in most states. It is hoped that by adopting these rules, state legislatures will increase voter participation in the democratic process. Before that happens, however, both proponents and opponents of greater ballot access must engage in the long-overdue national debate on the current state of ballot access restrictions.

MODEL ACT FOR THE DEMOCRATIZATION OF BALLOT ACCESS

SECTION 1. STATEMENT OF PURPOSE

(a) The purposes of this Act are to:

(1) broaden meaningful participation in the political discourse;

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[28] Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957).

[29] Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*. 28 HARV. J. ON LEGIS. 167, 168 (1991); *see also* GEORGE MAGAZINE, ET AL., THE BOOK OF POLITICAL LISTS 235 (Blake Eskin, ed. 1998) (noting that the Prohibition and Socialist parties advocated women's suffrage, the Prohibition and Populist parties supported the direct election of senators, and the Socialist Party backed public works programs along the lines of the New Deal programs eventually created).

(2) increase voter choice; and

(3) eliminate the unnecessary barriers for third party and Independent candidate ballot access.

(b) This Act shall be liberally construed to effectuate its purpose.

SECTION 2.1. METHODS OF RECOGNITION FOR A POLITICAL PARTY

A Political Party shall qualify to place candidates for any Office on the general election ballot by:

(a) petition, pursuant to Section 2.1.1;

(b) voter registration, pursuant to Section 2.1.2; or

(c) past election results, pursuant to Section 2.1.3.

COMMENT: In some states, simply paying a filing fee is sufficient for a candidate or party to obtain a position on the ballot.[30] This Act rejects filing fees as a method of ballot access.[31] One of the goals of the methods of ballot access listed in Section 2.1 is to ensure that candidates and parties on the ballot have sufficient popular support.[32] A filing fee, however, simply measures a party's ability to pay, which is often not an accurate indicator of public support. A filing fee will not effectively deter frivolous candidacies, since wealthy candidates without popular support will be able to obtain a position on the ballot.[33] Nor will a filing fee guarantee

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[30] *See* ROSENKRANZ, *supra* note 4, at 46.

[31] The Supreme Court has held that states that allow filing fees as methods of ballot access must provide candidates with alternative means of securing a spot on the ballot. *See* Bullock v. Carter, 405 U.S. 134 (1972).

[32] As the New York Bar Association's Special Committee on Election Law recognized, "The opportunity to run for . . . office should be restricted only by the requirement of a minimum showing of public support to insure that the ballot will not be cluttered with frivolous candidates." THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON ELECTION LAW, BALLOT ACCESS IN NEW YORK 2 (1990).

[33] The Supreme Court noted in *Bullock* that if a filing "fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal." *Bullock*, 405 U.S. at 146; *see also* Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J., 1281, 1289 (1997) ("Mer-

ballot access to a party or candidate that has popular support, but lacks financial resources. Although the costs of campaigning and media access may effectively prevent such parties from gaining significant support, this does not mean that a party's ability to pay a filing fee will be a better indicator of popular support than petitions, success in previous elections, or percent of voters registered with the party.

States that continue to impose burdensome signature requirements on third parties should retain the filing fee as a method of ballot access. In states that do allow parties to secure a spot on the ballot by paying a filing fee, parties often use this method instead of a petition so as to avoid the expense of petition drives.[34] In Florida, for example, which had a three percent signature requirement for a congressional candidate to obtain access to the primary ballot, and a filing fee of five percent of the congressional salary as an alternative, 300 candidates qualified between 1978 and 1988 for the Democratic or Republican congressional primaries through. the filing fee, and not a single candidate qualified by petition.[35] One of the purposes of Section 2.1.1, which substantially lowers signature requirements for most states, is to reduce the costs of completing a successful petition drive. Lowering these costs would eliminate the practical need for a filing fee as the least burdensome method of ballot access in some states.

SECTION 2.1.1. PETITION

(a) A Political Party shall qualify to place candidates for any Office on the general election ballot by filing a petition with the state.

(1) The petition shall:

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chants and other entrepreneurs have been known to run for public office simply to make their names known to the public.") (quoting Lubin v. Panish, 415 U.S. 709, 717–18 (1974)).

[34] *See* ROSENKRANZ, *supra* note 4, at 46.

[35] *See* Brown, *supra* note 33, at 1299–1300. Brown also notes that to qualify for a congressional primary in Georgia in 1996, a candidate was required to obtain, on average, more than 2500 signatures. *See id.* at 1300. No candidate qualified by petition, and all 32 qualifying candidates paid the $4,008 fee. *See id.*

(A) contain a number of valid signatures equal to or greater than 0.1% of the voters registered in the state on January 1 of the election year;

(B) include the name, address, date of birth, and social security number of each person circulating the petition;

(C) contain the Political Party name, list of officers, and contact information; and

(D) be filed before August 15 of the election year.

(2) Each page of the petition shall:

(A) contain the name of the Political Party;

(B) state that the signers thereof desire that the Political Party shall be qualified to place candidates for any Office on the general election ballot;

(C) be circulated by any person 18 years or older at the time the person circulates the petition;

(D) contain the name of the person circulating that page;

(E) be signed and dated by the person circulating that page, attesting that each signature on that page:

(i) was affixed in the person's presence;

(ii) is the signature of the person whose name it purports to be, to the best of the circulator's knowledge; and

(iii) is a valid signature pursuant to Subsection (3), to the best of the person's knowledge; and

(F) comply with any form prescribed by the state, except that no such form shall require information in addition to that required by this Act.

(3) A valid signature shall be:

(A) affixed by a person registered to vote in the state;

(B) affixed between January 1 and August 15 of the election year;

(C) accompanied by the signer's name;

(D) accompanied by the signer's address; and

(E) accompanied by the date signed.

(b) There shall be no requirements other than those of Subsection (a) for a Political Party to qualify to place candidates for any Office on the general election ballot by filing a petition.

(c) A Political Party that does not meet the requirements of subsection (a) shall qualify to place a candidate for any District-level Office on the general election ballot if the Political Party files a petition which meets the requirements of Subsection (a), except (a)(1)(A) and (a)(3)(A), and:

(1) The petition shall contain a number of valid signatures equal to or greater than 0.1% of the voters registered in the state and eligible to vote for that District-level Office on January 1 of the election year; and

(2) a valid signature shall be affixed by a person registered to vote in the state and eligible to vote for that District-level Office.

(d) If a petition fails to meet the requirements of Subsections (a)(1)(A) or (a)(1)(D) then the petition shall not qualify a Political Party to place candidates on the general election ballot.

(e) If a page of the petition fails to meet the requirements of Subsection (a)(2), then the signatures on that page will not

be counted toward meeting the requirement of Subsection (a)(1)(A).

(f) If a signature fails to meet the requirement of Subsection (a)(3), then that signature will not be counted toward meeting the requirement of Subsection (a)(1)(A).

(g) If a petition or signature fails to meet the requirements of Subsections (a)(1)(B), (a)(1)(C), (a)(3)(C), or (a)(3)(D), then the Political Party shall be given seven days to cure said failure from the date the Political Party is notified.

COMMENT: This section requires that a party's petition be signed by at least 0.1% of the registered voters of a state. It would require approximately 550 signatures in Rhode Island, and approximately 14,700 signatures in California.[36] This requirement is intended to serve several purposes. First, it is intended to lower unduly burdensome restrictions which prevent serious candidates with popular support from gaining access to the ballot. Overly burdensome signature requirements impose tremendous costs on parties,[37] requiring that third parties with limited resources devote a large part of their resources toward simply obtaining a spot on the ballot. The commercial cost of soliciting signatures commonly ranges from $0.85 per signature to $2.00 per signature.[38] Second, the Act is intended to restrict ballot access so that only those parties with sufficient popular support qualify to nominate candidates.[39] This will prevent frivolous candidacies, and also lower the risk of voter confusion which may result from an over-crowded ballot.

The 0.1% requirement is twice as high as the required percentage if the party seeks to qualify through the registration method. The reason for this difference is the greater difficulty in

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[36] These numbers are calculated based on the number of registered voters in the 1996 general election. *See* ROSENKRANZ, *supra* note 4, at 98, 168.

[37] *See* Black, *supra* note 18, at 169 ("The cost of signature drives is the central mechanism to thwarting minor-party ballot access.").

[38] *See* Brown, *supra* note 31, at 1304; *see also* ROSENKRANZ, *supra* note 4, at 84.

[39] In states requiring that more than one percent of the number of registered voters sign a petition, there have never been more than four new parties or statewide independent candidates in a single election qualifying by petition. *See* RICHARD WINGER, BALLOT ACCESS 96 (1998) (unpublished manuscript for Brennan Center for Justice on file with authors). Additionally, states requiring more than 25,000 petition signatures have never had more than four new parties or statewide independent candidates qualify in a single election through petitioning. *See id.*

convincing someone to register with a party. Unlike registering with a party, which may indicate a certain loyalty and commitment to the party platform, signing a petition is simply an expression of support for allowing a party to place candidates on the ballot.[40]

The 0.1% requirement will raise the required number of signatures in eight states.[41] It will, however, substantially lower the requirement in most states. Nineteen states currently have signature requirements over one percent—the highest is that of Oklahoma, which has a five percent requirement, amounting to approximately 43,680 signatures.[42]

The August 15 filing deadline is intended to provide candidates with ample opportunity to solicit petition signatures. Based on the 1998 general election filing deadlines, the Model Act would postpone the deadline in thirty-seven states.[43] Four states had filing deadlines as early as March for the 1998 general election.[44] Providing parties with adequate time to gather signatures is a fair way to measure popular support, since the amount of support a party enjoys has little correlation with the party's ability to gather signatures in a small window of time. Allowing parties sufficient time to petition also reduces the cost of petitioning,[45] leaving parties with more resources to spend on substantive issues.

Because issues taken up by third parties will often not receive media attention until the general election nears, early filing deadlines can prevent a party from using its public support to gain ballot access. Furthermore, voters may not turn to third parties as alternatives until the major parties have already nominated their candidates.[46] Early filing deadlines make it difficult

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[40] For further comparison of the petition and voter registration methods, see *infra* Comment to Section 2.1.2.

[41] *See* Winger, *supra* note 5.

[42] *See id.*

[43] *See* Eileen Canavan, *1998 U.S. Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access* (last modified Aug. 12, 1998) <http://www.fec.gov/ pubrec/alpha.htm>.

[44] *See id.*

[45] "For a variety of reasons, the costs [per signature] escalate when the candidate or the party does not have the luxury of time. Urgency requires the deployment of more personnel, more expensive means of transportation, and more expensive modes of signature gathering." ROSENKRANZ, *supra* note 4, at 84.

[46] The fact that many third parties do not hold primaries allows for a later filing deadline. *See* ROSENKRANZ, *supra* note 4, at 23. ("[m]ost third parties cannot overcome the statutory thresholds for participating in state-run primary elections . . . .").

for candidates to obtain the requisite number of signatures,[47] both because they limit the window of time during which a party must complete its petition drive, and because the general election is often too far in the future. New parties, historically, have formed late in the election year, sometimes organizing as late as July or early August.[48]

A deadline later than August 15 would be a better indicator of a party's support at election time, but may not leave adequate time for states to administer the election.[49] Another problem with a later deadline is that it would not give voters enough time to evaluate the viability of particular parties and their candidates. Advancing the filing deadline beyond August 15, in states where it would be administratively feasible to do so, however, would not be inconsistent with the goals of this legislation, as long as voters still have a reasonable amount of time to evaluate the petitioner's candidacy.[50]

Permitting parties to begin petitioning at any time after January 1 of the election year, as provided under Section 2.1.1(a)(3)(B), allows a party ample time to collect the requisite number of signatures. An earlier starting date would be unnecessary, and signatures gathered any earlier would not necessarily represent the popular support that a party enjoys closer to the election.

This Section requires the circulator to be at least eighteen years of age and to provide personal information, since the petition circulator also serves as a witness to the signatures.[51] This Act rejects any additional restrictions, such as requiring candidates of the same party to circulate separate petitions.[52] Illinois, for example, prohibits people who circulate petitions to place a candidate on a primary election ballot from circulating petitions

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[47] *See Anderson*, 460 U.S. at 780 (striking down a March 15 filing deadline for a general election on First Amendment grounds).

[48] *See* Winger, *supra* note 39, at 97 ("Historically, new parties of significance have been formed as late as July or August of an election year . . . .").

[49] *See id.* at 98, noting that "[a] deadline later than mid-August would make it difficult for some states to prepare absentee ballots in time to mail them to overseas voters, particularly military voters in difficult-to-reach spots (notably, in submarines around the world's oceans)."

[50] In 1998, for example, Nebraska, New Hampshire, and Vermont all had September filing deadlines for congressional elections. *See* Canavan, *supra* note 43.

[51] Requiring that the petition circulator serve as a witness is intended to eliminate the need for any other means of attesting to the authenticity of the signatures, such as notarization, which is "an expensive and burdensome task with no apparent usefulness." Winger, *supra* note 39, at 99.

[52] *See* National Prohibition Party v. Colorado, 752 P.2d 80, 84 (Colo. 1988) (upholding such a requirement).

in the general election.[53] The policies underlying signature requirements are not served by placing burdens on those who can circulate petitions, since the amount of support for a party has no relation to who circulates the petition. Furthermore, restrictions on who may circulate a petition may violate the First Amendment right to petition.[54]

The only restriction on who may sign a petition is that the signer be registered to vote in the state.[55] This facilitates the administration of the petition process, making it easier to verify that the people who signed the petition are indeed eligible to vote in the state. Apart from this limitation, the Model Act imposes no other requirements on who may sign a petition. By signing a petition, people are simply making the statement that they support the party obtaining a spot on the ballot. The Act does not require petition signers to swear that they are members of the party whose petition they are signing, that they will vote for the party's candidate, or that they will become party organizers—all requirements that states have imposed.[56] Because third parties often serve to enrich the political debate and bring to light issues which the major parties are slow to address, people should be able to support more than one party's efforts to gain ballot access.[57] Thus, there is no requirement that a person may only sign one petition. Furthermore, voters who sign the petition of a party may still vote in the primary of another party.[58]

The only information that the Act requires about a person who signs a petition is that person's name, address, and the date he or

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[53] *See* Winger, *supra* note 39, at 98–99 (describing the Illinois and other requirements, such as West Virginia's requirement that circulators complete a "credential" process involving a picture ID card which the circulator must display while petitioning).

[54] For example, in *Buckley*, the Supreme Court struck down a Colorado law limiting petition circulators to registered voters. *See Buckley*, 119 S. Ct. at 636.

[55] This requirement would not apply in North Dakota, which does not have a voter registration system. *See* Federal Election Commission, *State Voter Registration Requirements* (visited Feb. 17, 1999) <http://www.fec.gov/pages/Voteinst.htm>. However, the requirement should help ease the administrative burden of verifying voter eligibility in other states.

[56] *See* Smith, *supra* note 29, at 176; Black, *supra* note 18, at 171.

[57] "Permitting an individual to sign more than one petition for the same office rests upon the philosophic notion that in signing a petition of a candidate an individual is merely declaring that he or she wants that candidate to run in the primary election. Signing the petition does [not] necessarily mean that the signatory intends to vote for the candidate . . . ." THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON ELECTION LAW, *supra* note 32, at 20.

[58] In *Socialist Workers Party v. Hechler*, 890 F.2d 1303 (4th Cir. 1989), the court upheld a statute prohibiting voters who signed the petition of one party from voting in another party's primary.

she signed the petition. States have required that signers include information that they may not want to share, such as their social security number, date of birth, and occupation.[59] States have also required information that most signers are unlikely to know, such as their voting district or voter affidavit number.[60] New York, for example, has required signers to include their election district, assembly district, and ward.[61] This Act rejects these requirements because they constitute unnecessary obstacles to the successful completion of a petition drive. Such requirements often needlessly raise the costs of the petition process by forcing parties to look up and fill in missing information after the fact.[62] Furthermore, additional requirements would make the process of verifying signatures more difficult, because states will have unnecessary information that requires verification. A voter's name and address should be sufficient to verify that the voter is registered to vote in the election. Any additional requirements create an unnecessary risk that a party which demonstrates popular support will be unable to obtain access to the ballot.

Section 2.1.1(b) rejects the practice of some states that require filing fees for parties seeking to qualify for ballot access through a petition.[63] Filing fees may be justified as a way to defray the costs incurred by the state in processing petitions and administering the state's elections. Popular elections are a democratic institution, however, and the costs of democracy should be borne by the entire population, not just the parties that choose to participate.[64]

Unlike the law in some states, this Act imposes no requirements on where the signatures must come from within a state.[65] Since the purpose of the petition method of ballot access is to

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[59] *See* Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and the Ballot Access for Independent Candidates*, 7 BYU J. PUB. L. 281, 286 (1993); Winger, *supra* note 39, at 100.

[60] *See* Porto, *supra* note 59, at 285–86; Winger, *supra* note 39, at 100.

[61] *See* Schulz v. Williams, 44 F.3d 48, 56–59 (2d Cir. 1994) (upholding this requirement).

[62] *See* Smith, *supra* note 29, at 176–77.

[63] *See supra* Comment to Section 2.1.

[64] In *Bullock*, the Supreme Court rejected the argument that filing fees imposed on candidates seeking access to a primary ballot are necessary to finance primary elections. *See Bullock*, 405 U.S. at 148–49 ("The financial burden for general elections is carried by all taxpayers .... It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth.").

[65] For an example of a geographic distribution requirement for a party to qualify statewide *see* N.Y. Election Law § 6-136(1) (McKinney 1998).

allow parties with sufficient public support to obtain a ballot line, there is no reason for geographic distribution requirements. On election day, support is measured irrespective of the geographic distribution. In states whose population is concentrated in a large metropolitan area, a candidate could theoretically win an election without satisfying the distribution requirements.

By eliminating geographic distribution requirements, the Model Act also eliminates a major expense of completing a petition drive. Canvassing an entire state to meet distribution requirements is an inefficient use of party resources. A third party that exhausts its budget on a burdensome petition drive will lack the means to promote its agenda once it has obtained a spot on the ballot.

A party that meets the requirement of Section 2.1.1(a) may place candidates on the ballot for any office, as defined in Section 3(b). A party that does not wish to run a full slate of candidates, however, may choose instead to qualify to place candidates for particular district-level offices on the ballot by filing a separate petition for each district. Where a party's petition meets the requirements of Section 2.1.1(c), that party may qualify to place candidates on the ballot for any district-level office.

If a party enjoys strong support in a particular election district, that party should be able to place candidates on the ballot for offices in that district without having to meet the signature requirements to qualify statewide. Having district-level qualification promotes local autonomy, which in turn allows parties to develop around local issues and shape the political debate in areas where the party's platform has significant support.

The Act provides no private right of action for one party to challenge another party's signatures, thus eliminating the risk of costly, frivolous, and politically motivated challenges. A party's resources are most efficiently allocated if they are used to draw the public's attention to the substantive issues which the party seeks to address.[66]

In states such as Illinois and New York, where the job of verifying petition signatures is left to private challenges to the petition, the decision to scrutinize a petition is often politically motivated.[67] For example, a candidate in New York recently brought an action challenging the petition of a candidate seeking a spot

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[66] *See* ROSENKRANZ, *supra* note 4, at 84–85.
[67] *See* Winger, *supra* note 39, at 99.

on the 1998 Republican primary ballot on the grounds that the petition lacked page numbers.[68] During the 1986 primary alone, 200 candidates in New York were denied access to the primary ballot because of defects in their petitions.[69] Private challenges to petitions provide candidates with a way of defeating their opponents through litigation instead of an election.[70]

Random sampling should suffice to verify the validity of a petition. If a high percentage of invalid signatures exists, the petition should be verified systematically until the number of validated signatures meets the requirement of Section 2.1.1(a)(1)(A), or the number remaining is insufficient to meet this requirement. Parties will be allowed to add signatures until August 15 to compensate for disqualified signatures.

Certain errors, such as failure to meet the signature requirement or failure to meet the filing deadline, should disqualify a petition. Subsections (e), (f), and (g), however, are intended to minimize the effects of errors, both by limiting the consequences of an error, and by giving parties time to cure nonmaterial defects in a petition. For example, parties should be able to correct minor typographical errors since such errors have no bearing on a party's popular support.

SECTION 2.1.2. VOTER REGISTRATION

A Political Party shall qualify to place candidates for any Office on the general election ballot by voter registration if, on August 15 of the election year, the number of voters registered in the state in the name of that Political Party shall be equal to or greater than 0.05% of the total number of voters registered in the state as of January 1 of the election year.

COMMENT: This Section is modeled on the election law of Delaware, which provides for recognition of a political party statewide if that party has a registration equal to "at least 5/100 of one percent" of the total voter registration of the state on a

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[68] *See* Collins v. Kelly, 678 N.Y.S.2d 791 (3d Dep't 1998) (allowing the candidate to photocopy the petition and include page numbers).

[69] *See* Katherine E. Schuelke. *A Call for Reform of New York State's Ballot Access Laws*, 64 N.Y.U. L. REV. 182, 183 (1989).

[70] *See id.* at 182 ("In New York State, many election contests are decided by detached judges in courtrooms rather than by interested voters on election day.").

specified date.[71] This is an appropriate method for attaining statewide ballot access because it satisfies the state's valid interest in assuring that parties on the ballot have a certain degree of popular support. The District Court of Delaware recognized the legitimacy of voter registration as a method of ballot access when it stated that this method of party recognition "limit[s] the parties on the ballot to those who have demonstrated some degree of popular support, thereby insuring that the ballot is not filled with an abundance of candidates serving only to divide and confuse rather than to consolidate the support of the populace."[72] In Delaware in 1996, for a party to have qualified by voter registration, it would have needed to register approximately 180 voters. In a larger state like California, a registration of .05% would be approximately equal to 7400 voters.[73] The requirement provided for in the Act is a reasonable one, especially when considered in light of the history of Delaware's statute. Since its institution in 1978, Delaware has never had more than four minor parties recognized statewide for a given election.[74]

In contrast, Maryland imposes a particularly onerous registration requirement, mandating that a party register a number of voters equal to or greater than one percent of the total registered voters in the state.[75] This registration requirement imposes an unreasonable burden on third parties, evidenced by the fact that no third party has ever qualified under this provision to be included on Maryland's ballot.[76] In fact, as Joshua Rosenkranz reports, "no third party in history has ever gotten on the ballot through party registration where the registration requirement was more than 1% of the total state registration."[77]

States have generally recognized that requiring parties or independent candidates to collect petition signatures in order to get on the ballot is an effective way to ensure that the party's place on the ballot is popularly supported. Registering voters in a party is at least as effective as the petition signature method in

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[71] DEL. CODE ANN. tit. 15, § 3001 (1993).
[72] Commoner v. Du Pont, 501 F. Supp. 778, 782 (D. Del. 1980).
[73] *See* ROSENKRANZ, *supra* note 4, at 98, 104.
[74] *See* Winger, *supra* note 39, at 95.
[75] *See* MD. CODE ANN., ELECTIONS, § SB 123 (West Supp. 1998).
[76] *See* Richard Winger, How Many Votes Must a Party Poll to Remain on the Ballot? (Nov. 11, 1998) (unpublished chart on file with authors).
[77] ROSENKRANZ, *supra* note 4, at 58.

demonstrating a "significant modicum of [popular] support"[78] for a party's place on the ballot. As Richard Winger points out:

> [M]embership in a party is meaningful. When a voter chooses to register as a member of a new or small particular party, he generally gives up the right to vote in major party primaries. Furthermore in most states, registration records are open to the public, and it is likely that anyone who joins a new or small party, knowing that such membership can be known to the neighbors, sincerely supports that party.[79]

Providing alternative methods of ballot access through voter registration and petition reflects the varied justifications for allowing greater ballot access. The main reason for the inclusion of the petitioner signature method is that the presence of non-major parties and independent candidates in an election provides for a more comprehensive and vibrant debate on the issues, regardless of which candidate actually wins the election. Historically, third parties and independent candidates have been successful in forcing major parties to address issues that might ordinarily be left out of campaign discourse.[80] Thus, an individual who supports broader political discussion may be willing to sign a party's petition even though they do not intend to vote for that party's candidate. When individuals place their signature on a party's petition, they are indicating that they support *the idea* that a candidate or party should be allowed on the ballot, not necessarily that they support that specific party for political office.

Whereas petition signatures may indicate only support for alternative viewpoints in general, voter registration indicates stronger commitment to a party's platform. A party that can convince voters to change their party affiliation is very likely to receive their support in the general election. Parties that can demonstrate this degree of popular loyalty should be included on the ballot along with parties that petition for ballot access.

Several states provide for ballot access through satisfaction of party registration requirements. In addition to Delaware, a party may also qualify statewide using this method in thirteen other states.[81] Colorado recently passed a provision to its election code

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[78] *Jenness*, 403 U.S. at 442.

[79] Winger, *supra* note 39, at 94.

[80] *See supra* note 29 and accompanying text.

[81] In 1996, this method was available in Arizona, California, Connecticut, Delaware, Florida, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Nevada, Oregon, Ten-

which allows a party to appear on the ballot if at least 1000 voters register in the party.[82] Colorado's ballot access scheme is similar to the one proposed in this Article in that it provides for ballot access by third parties through a variety of methods. A party in Colorado may qualify through the collection of petition signatures,[83] the aforementioned party registration method, or through satisfaction of continuing recognition requirements.[84]

A distinct advantage of the registration method over other available means is the simplicity of its administration. Because voter registration mechanisms are already in place in almost every state, this method for ballot access could be easily administered.

A potential barrier to implementing the party registration method is that twenty-two states do not allow voters to choose a party affiliation on the voter registration forms.[85] However, any state can easily institute a system such as the one proposed in this Section by providing space on the voter registration forms for the voter to write in the name of the party with which she wishes to register. There is no need for a state to modify its registration forms to accommodate each new party seeking to gain recognition; a blank line would suffice.[86]

Ironically, in states where the voter registration method is easiest to implement, new parties may have difficulty persuading voters to change their party affiliation. It would be easiest to institute this mechanism in states that have closed primaries in which voters choose a party affiliation. In these states, however, there may be a strong disincentive for individuals to register with a third party because doing so would prevent the voter from participating in a major party primary.

It should be noted that the Model Act does not allow for district-level qualification by the voter registration method. Under this Section, a party must qualify to nominate for all offices statewide, or not at all. Permitting district-level qualification

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nessee, and Texas. *See* ROSENKRANZ, *supra* note 4, at 54.

[82] *See* COLO. REV. STAT. ANN. § 1-4-1303 (West Supp. 1998).

[83] *See id.* at § 1-4-1302.

[84] *See id.* at § 1-4-1303.

[85] These states are Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *See* Winger, *supra* note 39, at 96. Most of these states hold open primaries, allowing voters to participate in the primary of their choice. *See id.*

[86] *See id.* at 95.

would place an administrative burden on the state by requiring a calculation of the number of voters registered in a party to be made in each district. In addition, the number of voters that would need to be registered in order to qualify a party in a single voting district may be too low to indicate a significant degree of support for a party, even within that district.

Apart from this limitation, the inclusion of the voter registration method in this Model Act is designed to allow those parties that have shown the requisite modicum of popular support to appear on the ballot by persuading a significant number of voters to affiliate with that party. As Justice Warren stated in *Reynolds v. Sims*,[87] "the right to vote freely for the candidate of one's choice is of the essence of a democratic society"[88] and this method is perhaps best representative of that fundamental right.

SECTION 2.1.3. PAST ELECTION RESULTS

(a) A Political Party shall qualify to place candidates for any Office on the general election ballot by past election results if its candidate for any Statewide Office in either of the two preceding general elections received at least 1% of the total votes cast for that Office.

(b) A Political Party that does not meet the requirements of Subsection (a) shall qualify to place a candidate for District-level Office on the general election ballot in any district in which any of its candidates for District-level Office in either of the two preceding general elections received at least 1% of the total votes cast for that Office.

COMMENT: This provision is designed to allow a party that has demonstrated a sufficient level of popular support to remain on the ballot for a subsequent election without requiring that party to follow any of the other qualification procedures provided for in this Model Act. Currently, forty-seven states provide for some form of continuing recognition based on past election results.[89] This Section permits a party to achieve continuing recognition for all offices statewide as well as recognition in subse-

[87] 377 U.S. 533 (1964)
[88] *Id.* at 555.
[89] *See* ROSENKRANZ, *supra* note 4, at 57.

quent elections only for those specific offices for which it received the requisite votes. Although continuing recognition at the district level is not the current law in most states, there is no reason, except the potential administrative burden, that should prevent a party from achieving continuing recognition for a specific office only.[90]

Using the results of a party's candidate for any statewide office, rather than for a specific statewide office, such as governor,[91] will allow parties greater liberty to choose the offices for which they will nominate candidates. Because keeping frivolous candidates from crowding the ballot and confusing voters is the strongest state interest in limiting ballot access, states should not create incentives for parties to run candidates even if those candidates are not viable. In addition, counting the votes for any statewide office protects the integrity of a party where its credibility might be undermined if it were forced to nominate a candidate in whom it does not truly believe simply to satisfy the statutory requirements for continuing recognition.

The allowance of the results of any of the two previous elections, rather than just the preceding one, is similar to the laws in Wisconsin[92] and Colorado.[93] It is designed to take into account the differences in popular participation that occur throughout the election cycle. Levels of participation is often higher in years in which there is a presidential election. Furthermore, a party's support may crystallize for a specific election in cases where a party has a particularly popular candidate, and the party's continuing recognition should take this into account.

The requirement that a party poll one percent of the vote in a previous election represents an adequate number of votes to indicate substantial support for that party and its place on the ballot. After a party has qualified to be on the ballot by obtaining the requisite petition signatures, many states require a party to poll a much higher percentage of votes to remain on the ballot.[94]

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[90] Connecticut permits the continuing recognition of a "minor" party for a single office. *See* CONN. GEN. STAT. ANN. § 9-372(6) (West Supp. 1998). Alabama permits a party to be recognized within a single county if it polls 20% of the votes cast in that county. *See* ALA. CODE § 17-16-2 (1975).

[91] West Virginia, New York, Texas, South Dakota and Alaska use the Office of Governor. *See* Winger, *supra* note 76.

[92] *See* WIS. STAT. ANN. § 5.62(1)(b) (West 1996).

[93] *See* COLO. REV. STAT. ANN. § 1-4-1303 (West Supp. 1998).

[94] For example, in Alabama a party can qualify to be on the ballot if it files a petition containing the signatures of three percent of "qualified electors." *See* ALA. CODE § 17-

This system requires a party that did not receive the much higher percentage of votes in the general election to once again go through the costly process of obtaining petition signatures in order to get back on the ballot. Because the party has already satisfied the requirement once, it probably could do so again. Thus, this system imposes an unnecessary set of costs on the third party. "[O]nce a party has demonstrated a modicum of support, the failure of a party to poll a much higher percentage on election day does not mean the party lacks the necessary electoral support required for ballot access in the next election."[95] Only when the party fails to achieve a very minimal level of popular support in a general election should it be forced to go through the qualification process again. A party that receives one percent of the popular vote for an office has demonstrated a modicum of popular support and should be entitled to remain on the ballot. Indeed, this one percent requirement is the law in several states[96] and was the proposed requirement for federal elections under the Voter Freedom Act sponsored by Representative Ron Paul (R-Texas) in 1997.[97]

SECTION 2.2. INDEPENDENT CANDIDATES

(a) An Independent candidate for a particular Office shall qualify to appear on the general election ballot for that Office by filing a petition with the state.

(1) The petition shall:

(A) contain a number of valid signatures equal to or greater than 0.1% of the voters registered in the state on January 1st of the election year and eligible to vote for the Office sought by the Independent candidate;

8-2.1 (1975). However, in order to remain on the ballot under the state's continuing recognition method, the party must poll 20% of the votes cast in the last general election. *See id.* at § 17-16-2. If this scheme was in place in Maine for the 1998 election for Governor, neither the Republican Party (19%), nor the Democrats (12%) would be qualified for the next election. *See* Maine Division of Elections, *General Elections Tabulations, November 3, 1998—Governor, By County and Town* (last modified Nov. 3, 1998) <http://www.state.me.us/sos/cec/elec/gen98gv.htm>.

[95] Black, *supra* note 18, at 168.

[96] *See* Winger, *supra* note 76 (indicating that one percent is the threshold in Michigan, Wisconsin, Oregon, Connecticut, Kansas, Nevada, West Virginia, and Georgia).

[97] *See* Voter Freedom Act of 1997, H.R. 2477, 105th Cong., § 3.

(B) include the name, address, date of birth, and social security number of each person circulating the petition;

(C) be filed before August 15 of the election year.

(2) Each page of the petition shall:

(A) contain the name of the Independent candidate and the Office sought by that candidate;

(B) state that the signers thereof desire that the Independent candidate shall be qualified to appear on the general election ballot for that Office; and

(C) comply with the requirements of Subsection 2.1.1(a)(2)(C)–(F).

(3) A valid signature shall comply with the requirements of Subsection 2.1.1(a)(3).

(b) There shall be no requirements other than those of Subsection (a) for an Independent candidate to appear on the general election ballot.

(c) If a petition fails to meet the requirements of Subsections (a)(1)(A) and (a)(1)(C) then the petition shall not qualify an Independent candidate to appear on the general election ballot.

(d) If a page of the petition fails to meet the requirements of subsection (a)(2), then the signatures on that page will not be counted toward meeting the requirement of Subsection (a)(1)(A).

(e) If a signature fails to meet the requirement of Section 2.1.1(a)(3) then that signature will not be counted toward meeting the requirement of Subsection (a)(1)(A).

(f) If a petition or signature fails to meet the requirements of Subsection (a)(1)(B), Sections 2.1.1(a)(3)(C), or 2.1.1(a)

(3)(D), then the Independent candidate shall be given seven days to cure said failure from the date the Independent candidate is notified.

(g) A candidate who qualifies pursuant to this Section shall appear on the general election ballot with the label "Independent."

COMMENT: Candidates who do not affiliate with a political party may qualify to appear on the ballot by the same petition procedure as political parties. Prescribing the same method of ballot access for partisan and independent candidates promotes simplicity and neutrality, and eliminates the incentives for candidates to choose a party label after qualifying through the independent procedure. Under this Model Act, a party may qualify to run candidates statewide under Section 2.1.1(a) or within a district under Section 2.1.1(c), while an independent candidate may qualify to run for a particular office using the same substantive requirements under Section 2.2. If signature requirements were higher for party qualification, such requirements might create incentives for candidates to run as independents. On the other hand, if signature requirements were higher for independent qualification, this might create incentives for candidates to affiliate with a political party. Prescribing equal petition requirements promotes neutrality with regard to party affiliation; in this way, the state neither promotes nor discourages political parties.

While facially equal petition requirements are intended to place equal burdens on parties and independent candidates, their effects may differ in practice. A party submitting a petition may run candidates for all state offices, whereas an independent candidate may qualify for only one such office. The costs of a party petition, then, might be spread among a number of different candidates, while an independent candidate must bear those costs alone. However, the effects of cost spreading may be offset to some extent by the costs related to the organization of a party. Overall, the relative burdens of a particular petition requirement would be difficult to predict, so facially equal requirements are recommended in the interests of simplicity.

"Piggybacking" is not allowed under Section 2.2(g). Piggybacking occurs when a candidate gains access to the ballot as an

independent, but is listed on the ballot with a party label.[98] In states where party ballot access requirements are more difficult to meet than those prescribed for independent candidates or where no procedure exists for a party to gain access to the ballot,[99] piggybacking represents an attractive option.[100] Unlike the laws of such states, Section 2.2 of this Model Act provides a procedure for a party to qualify to place candidates on the ballot, and this procedure is no more difficult than the procedure available to independent candidates. Furthermore, piggybacking could introduce complexities into the continuing recognition procedure.[101] In light of these considerations, piggybacking is not permitted.

SECTION 2.3. WRITE-IN CANDIDATES

(a) Every general election ballot shall provide a space for write-in candidates.

(b) Votes for a write-in candidate shall be counted only if the write-in candidate files, on a form submitted to the state no later than five days before the general election, a statement of intent to qualify as a write-in.

COMMENT: Although the ballot access requirements in the preceding sections of this Act are designed to provide fair access to the ballot, circumstances may arise in which a candidate must resort to a write-in campaign. For example, on October 19, 1998, Tennessee state senator Tommy Burks (D-Tenn.) was killed.[102] His opponent, Byron "Low Tax" Looper, was charged with his murder.[103] Since it was less than thirty days from the election, neither Burks nor Looper could be replaced on the ballot with another candidate.[104] Burks's wife, Charlotte, mounted a successful write-in campaign and won the election, receiving an over-

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[98] See ROSENKRANZ *supra* note 4, at 25.
[99] *See supra* note 6.
[100] *See* ROSENKRANZ *supra* note 4, at 25.
[101] For example, a candidate qualifying through the independent procedure may list a non-existent party which would be recognized to nominate candidates for any state office in subsequent elections.
[102] *See Slain Lawmaker's Widow is Elected,* WASH. POST, Nov. 4, 1998, at A28.
[103] *See id.*
[104] *See id.*

whelming ninety-seven percent of the vote.[105] Without the possibility of a write-in candidacy, the Tennessee voters would have been forced to abstain or vote for an accused murderer. If only one voter had voted for the accused murderer he would have been elected. Write-in candidacies allow for meaningful voter choice when unforeseen circumstances essentially disqualify those who appear on the ballot.[106]

Even in the absence of exigent circumstances, write-in voting can provide an important avenue of political expression. As Justice Kennedy observed, "The fact that write-in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful."[107]

Because write-in candidacies impose administrative burdens on the state in tallying votes, a registration requirement is included. New Mexico requires that write-in candidates file a declaration of intent with the state sixty-three days before the general election,[108] while Wyoming requires write-in candidates to file two days before the election.[109] Requiring that a write-in candidate file with the state five days before the general election gives the state enough time to prepare to count the write-in ballots for qualified candidates and allows for the possibility of exigent circumstances which might occur in the weeks preceding the election.

SECTION 2.4. CANDIDATE ELIGIBILITY

(a) Any candidate who appears on the primary ballot of a Political Party, but is not chosen as the candidate for that Political Party for the general election, shall be eligible to appear on the general election ballot as the candidate of any Political Party, as an Independent candidate pursuant to Section 2.2, or as a write-in candidate pursuant to Section 2.3.

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[105] *See id.*

[106] Justice Kennedy, in *Burdick*, recognized the value of write-in voting in exigent circumstances when he wrote in dissent, "[w]rite-in voting can serve as an important safety mechanism in those instances where a late-developing issue arises or where new information is disclosed about a candidate late in the race." *Burdick*, 504 U.S. at 444–445 (Kennedy, J., dissenting).

[107] *Id.* at 447.

[108] *See* N.M. STAT. ANN. § 1-12-19.1 (Michie 1995).

[109] *See* WYO. STAT. ANN. § 22-5-501 (Michie Supp. 1998).

(b) A person's membership or non-membership in a Political Party shall not disqualify that person from appearing on the general election ballot as the candidate of any Political Party, as an Independent candidate pursuant to Section 2.2, or as a write-in candidate pursuant to Section 2.3.

COMMENT: Section 2.2(a) is intended to prohibit so-called "sore loser bans." Sore loser bans typically prevent candidates from running as an independent or moving to a different party in the same election in which they lost the nomination of their party of choice.[110] States institute sore loser bans to promote the integrity of the party nomination process and prevent party factionalism.[111] Even in the absence of a sore loser ban, however, major party candidates may be deterred from compromising their relationship with the major party simply to appear on the ballot in one election. Candidates who are willing to break away from the party are likely to have significant popular support and therefore ought to appear on the ballot.

There may be a danger that eliminating sore loser bans will compromise the integrity of non-major parties. This could occur if a non-major party nominates a candidate based upon that candidate's popularity, gained by participating in another party's primary, rather than based upon their ideological compatibility. However, a party should be allowed to decide if the benefit of running a particular candidate outweighs the risk of compromising its credibility.

Most importantly, the Supreme Court has described the right of qualified voters to cast their votes effectively as one of "our most precious freedoms."[112] Sore loser bans not only prohibit candidates from appearing on the ballot, but they also deny voters the opportunity to vote for the candidate of their choice. Whatever benefits sore loser bans may provide, they are outweighed by the detrimental effects they have on a voter's right to cast an effective vote and a party's right to nominate its chosen candidate.

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[110] *See* Winger, *supra* note 39, at 101.

[111] *See Burdick*, 504 U.S. at 439 (upholding Hawaii's prohibition of write-in candidacies on the basis of the State's interest in "averting divisive sore-loser candidacies").

[112] *Anderson*, 460 U.S. at 787 (quoting Williams v. Rhodes, 393 U.S. 23, 30–31 (1968)).

Section 2.4(b) is intended to repeal the disaffiliation requirement present in many states' laws. Disaffiliation requirements typically prohibit political parties from nominating candidates who are not members of that political party. For example, in Colorado, non-major parties may not nominate anyone who has been registered as a Democrat or Republican within the twelve months preceding the nomination.[113]

Disaffiliation requirements impede a political party's right to nominate the candidate of its choice. Some political parties focus on one or two issues. These issue-oriented parties may wish to nominate better known candidates who are members of other political parties, but who may share the view of the issue-oriented party. Moreover, a requirement such as Colorado's limits potential candidates' ability to change their party affiliation by not permitting them to run under another party's banner for the twelve months following the change.

Legitimate interests supporting disaffiliation requirements are difficult to articulate. Preventing party factionalism may provide one justification. However, the right to cast an effective vote and the freedom to associate to advance political beliefs protected by the First and Fourteenth Amendments is more important than the state's interest in preventing party factionalism. The Supreme Court, in *Tashjian v. Republican Party of Connecticut*,[114] stated, in dicta, that it would be unconstitutional for a state to prohibit political parties from nominating non-members.[115] In 1992, the Court confirmed that there is a constitutional right to create and develop new political parties.[116] In light of the clear public interest in promoting the freedom to develop new political parties and supporting the right of citizens to cast an effective vote, disaffiliation requirements should not be included in ballot access laws.

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[113] *See* COLO. REV. STAT. ANN. § 1-4-1304 (West 1998).

[114] 479 U.S. 208 (1986).

[115] *See id.* at 215 ("Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals.").

[116] *See* Norman v. Reed, 502 U.S. 279, 280 (1992) ("The right of citizens to create and develop new political parties derives from the First and the Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging all voters' opportunities to express their own political preferences.").

SYMPOSIUM: THE DEATH PENALTY DEBATE

CAPITAL PUNISHMENT LEGISLATION IN MASSACHUSETTS

In February 1999, Governor Paul Celluci introduced House Bill 3963 to reinstate the death penalty in the Commonwealth of Massachusetts, setting the stage for another pitched battle over capital punishment. Just two years earlier, the death penalty failed by one vote in the Massachusetts House of Representatives when Representative John Slattery changed his vote at the last minute. This Essay discusses the history of capital punishment in Massachusetts, federal and state constitutional restrictions on death penalty statutes, and the debate over Bill 3963.

"At heart this is a moral problem, not a technical problem," Evan Slavitt, the General Counsel of the Massachusetts Republican Party, remarked at the *Harvard Journal on Legislation*'s symposium on capital punishment legislation in Massachusetts.[1] Indeed, popular debates on the death penalty tend to focus on morality. Francis Marini, the Minority Leader in the Massachusetts House of Representatives, commented that for the worst crimes, "there is no punishment short of death that is just."[2] Opponents likewise frame the debate in similar terms. Amnesty International's Joshua Rubenstein, for instance, called the death penalty "a form of torture."[3]

Yet for all of its moral components, the death penalty does have a distinctly "technical" problem. As Ann Lambert, legislative counsel for the American Civil Liberties Union of Massachusetts noted, "what we're talking about with legislation and with lawyers is dealing with a system that actually operates on the ground, in the real world."[4] Indeed, the "technical" aspect of death penalty legislation may explain some of the paradoxes in the debate over capital punishment in Massachusetts. Public

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[1] Transcript, Symposium, The Death Penalty Debate: Capital Punishment Legislation in Massachusetts, Apr. 12, 1999, at 39 (unpublished transcript on file with the *Harvard Journal on Legislation*) [hereinafter Symposium]. Excerpts from the symposium proceedings are published *infra* at pp. 505–29.

[2] *Id.* at 24.

[3] *Id.* at 50.

[4] *Id.* at 48.

opinion polls show that Massachusetts citizens generally support the death penalty.[5] In fact, voters specifically endorsed capital punishment in a 1968 ballot referendum and a 1982 constitutional amendment.[6] Nevertheless, the Commonwealth has not executed anyone since 1947, and the legislature—the General Court—has been unable to successfully restore the death penalty since the U.S. Supreme Court and the Massachusetts Supreme Judicial Court ("SJC") struck down the state's death penalty statute as unconstitutional in the 1970s.[7]

At least part of the problem is technical—technicalities in proposed death penalty bills can win or lose individual votes in the legislature and can separate a constitutional statute from a unconstitutional one. For this reason, the text of Massachusetts House Bill 3963,[8] which Governor Paul Cellucci submitted to the legislature in February 1999, is instructive. Although it eventually lost by seven votes, Bill 3963 is a prime example of the judicial-legislative interaction over capital punishment in the Commonwealth, and the vacillation that has defined Massachusetts capital punishment history.

Section I of this Essay reviews the historical context of the death penalty debate in Massachusetts. Section II examines federal and state constitutional restraints on capital punishment legislation. The Essay concludes by analyzing Bill 3963 in detail.

I. HISTORY OF THE DEATH PENALTY IN MASSACHUSETTS

A. *Early Massachusetts History*

The death penalty was firmly established in colonial America[9] and existed in Massachusetts long before it became a state.[10] The

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[5] *See, e.g.*, Scot Lehigh, *Celluci Riding High, Poll Says*, BOSTON GLOBE, Nov. 2, 1997, at A1 (*Boston Globe*/WBZ-TV public opinion poll indicating 61% of voters supported the death penalty, while only 28% opposed it.)

[6] *See* JOHN J. CONTE, CAPITAL PUNISHMENT IN MASSACHUSETTS 6–7, 14–15 (1987).

[7] *See The Death Penalty: The State and National Picture*, BOSTON GLOBE, Oct. 28, 1997, at A12.

[8] H.B. 3963, 181st Gen. Ct., Reg. Sess. (Mass. 1999).

[9] *See* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 4–5 (1991). The first recorded legal execution in the colonies took place in 1622 when Daniel Frank was executed for theft in Virginia. *See* Andrea E. Girolamo, Note, *Punishment or Politics? New York State's Death Penalty*, 7 B.U. PUB. INT. L.J. 117, 118 (1998).

[10] *See* UNPAID SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS, H. 2575, 150th Gen. Ct., Reg. Sess. 98 (Mass. 1959)

British common law system, which the American colonies followed, mandated imposition of the death penalty for certain crimes.[11] In 1641, under the Body of Liberties, the Massachusetts Bay Colony punished ten crimes with death,[12] and over the next forty years, eleven more offenses were added to the list.[13] Despite the long list of crimes punishable by death, however, the Colony executed only fifteen people before 1660.[14] With the ambivalence that would typify Massachusetts' position on capital punishment, the willingness to enact death penalty statutes was accompanied by a reticence to actually execute convicts.[15]

B. *1800–1967*

In the nineteenth century, a number of states, including Massachusetts, moved to restrict punishments involving physical violence.[16] Death penalty abolitionist movements gained support throughout the country,[17] and several states totally or partially abolished capital punishment.[18] In Massachusetts, reformers succeeded in limiting the offenses punishable by death to first-degree murder, although their effort to completely do away with the death penalty failed.[19]

[hereinafter REPORT].

[11] *See* Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23, 24 (1996).

[12] The crimes punished with death included idolatry; witchcraft; blasphemy; slaying of a human; bestiality; sodomy; adultery; man-stealing; false witness in capital cases; and conspiracy. *See* REPORT, *supra* note 10, at 98.

[13] The additional offenses: rape of a married woman; rape of a single woman (at discretion of the court); cursing or smiting of a natural parent by a child aged 16 or over; a rebellious son aged 16 or over (repealed as a capital crime in 1672); burglary (third offense); highway robbery (third offense); arson; heresy; return of a Jesuit after banishment; return of a Quaker after banishment; piracy and mutiny; and military services with an enemy or against allies. *See id.*

[14] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42 (1993).

[15] For a brief period in the late 1700s, however, the death penalty was actively employed by the Colony to execute "witches" convicted in the now infamous Salem witch trials. *See id.* at 44–46.

[16] In 1805, the Massachusetts legislature abolished whipping, branding, the stocks, and the pillory. *See* FRIEDMAN, *supra* note 14, at 74.

[17] *See* Furman v. Georgia, 438 U.S. 238, 338 (Marshall, J., concurring) (describing mounting abolitionist efforts throughout the century, including the existence of abolition societies in Massachusetts, New York, Pennsylvania, Tennessee, Ohio, Alabama, Louisiana, Indiana, and Iowa).

[18] In 1846, Michigan became the first state to abolish capital punishment. *See id.* Wisconsin followed in 1853. *See id.* Rhode Island partially abolished the penalty in 1852. *See id.*

[19] *See* JOINT SELECT COMMITTEE, REPORT, S. 149, 107th Legis. Sess. 3–4 (Mass. 1851). This would remain the law in Massachusetts, although not without controversy, until

The Progressive Era brought continued attempts to abolish the death penalty, despite a sharp increase in number of executions nationwide.[20] In the early 1900s, various Massachusetts governors and legislators spoke out against the death penalty, although the legislature as a whole continued to affirm it.[21] The contested execution of Italian anarchists Nicola Sacco and Bartolomeo Vanzetti on August 23, 1927 exacerbated the controversy.[22]

In step with a national reduction in the number of executions from the 1940s on,[23] the last execution in Massachusetts occurred in 1947.[24] Although convicted murderers continued to be sentenced to death, the convicts either spent their entire lives on death row or had their sentences commuted by the governor.

C. *1967–1997*

Despite the growing opposition to the death penalty, which culminated nationally in an unofficial moratorium on the death penalty in 1967,[25] Massachusetts citizens continued to support

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1951.

[20] The increase is likely tied to augmented state involvement. Until the late 19th century, most executions were carried out on the local level. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 9 (1987). By the early to mid-20th century, the states became responsible for imposing the death penalty. *See id.* With this change came a national upswing in the use of the death penalty. During the 1890s there were 155 recorded executions. *See id.* In the 1920s, in comparison, the number jumped to more than 1,000. *See id.*

[21] In 1907, Senator James H. Vahey introduced a bill to allow for a verdict of guilty "without capital punishment." *See* REPORT, *supra* note 10, at 105. The bill was quashed by the Joint Committee on the Judiciary. *See id.* In 1916, Governor Samuel McCall, who spoke out repeatedly against the death penalty, urged both Houses to pass pending legislation proposing the abolition of the death penalty. *See id.* at 106. A year later, an attempt to eliminate the death penalty at the state's Constitutional Convention failed in the Judiciary Committee. *See id.*

[22] On April 15, 1920, during a holdup in Braintree, Massachusetts, a paymaster and his guard were murdered. *See* FRIEDMAN, *supra* note 14, at 369. Sacco and Vanzetti, both Italian immigrants and confessed anarchists, were charged with the crime. *See* ALAN BRINKLEY, AMERICAN HISTORY 648 (1995). The evidence brought against Sacco and Vanzetti was questionable, and they were convicted in a trial of "extraordinary injudiciousness, before an openly bigoted judge." *Id.*

[23] The number of executions nationally declined gradually during the 1940s, and more rapidly during the 1950s. *See* AMNESTY INTERNATIONAL, *supra* note 20 at 9. By the mid-1960s, the death penalty had fallen into disfavor throughout the nation, and its use was rare. *See id.*

[24] Edward Gertson and Philip R. Bellino were electrocuted for killing Robert "Tex" Williams. *See The Death Penalty: The State and National Picture*, *supra* note 7, at A12.

[25] The moratorium was a result of both public dissatisfaction with the death penalty and pending Supreme Court cases on the constitutionality of the death penalty. *See* PATERNOSTER, *supra* note 9, at 18. From 1930, when the U.S. Department of Justice began collecting statistics on executions, to the 1967 moratorium, 3,859 prisoners had been executed in the United States. *See* University of Alaska Anchorage, *Justice Center*

capital punishment. In 1968, for instance, the public voted in favor of retaining capital punishment in a ballot referendum.[26] The results of the referendum dramatically shifted momentum from the opponents of the death penalty to the proponents, and left a lasting mark on the nature of the debate.

Despite their affirmation of the death penalty through the referendum, however, throughout the next decade voters elected governors with strong anti-death penalty stances.[27] This produced a conflict between the legislature and the governor, as the General Court tried to craft death penalty bills that would pass both chambers with strong enough margins to defeat gubernatorial vetoes.

In the midst of this public debate over the death penalty in Massachusetts, the U.S. Supreme Court in 1972 undermined the validity of capital punishment in *Furman v. Georgia*.[28] In *Furman*, the Supreme Court struck down Georgia's death penalty statute as unconstitutionally arbitrary.[29] The same year, the Court, in *Stewart v. Massachusetts*, invalidated the discretionary portions of Massachusetts' death penalty statute, leaving in place only the *mandatory* application of capital punishment in rape-murder cases.[30]

Massachusetts's relatively slow reaction to *Furman* reflected ambivalence about the death penalty.[31] In 1973, in reaction to several high-profile murders,[32] the General Court passed legislation extending Massachusetts's existing mandatory death penalty for rape-murder to include nine other categories of crime.[33] Governor Francis Sargent vetoed the bill, saying he would only sign legislation that was limited to the killers of law enforcement

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Web Site: Focus on the Death Penalty (last modified Feb. 2, 1999) <http://www.uaa.alaska.edu/just/death/history.html>. About 60% of the total executions took place in the South, with the highest state count 366 in Georgia. *See* AMNESTY INTERNATIONAL, *supra* note 20, at 10.

[26] *See* CONTE, *supra* note 6, at 6–7. Forty-nine percent voted in favor of capital punishment, with 31% opposed. *See id.*

[27] Governors John Volpe, Francis Sargent, and Michael Dukakis all spoke out against the death penalty. *See id.* at 7.

[28] 408 U.S. 238 (1972).

[29] *Furman*, 408 U.S. at 309.

[30] *See* Stewart v. Massachusetts, 408 U.S. 845 (1972) (per curiam).

[31] Twenty other state legislatures had reacted to *Furman* when Massachusetts took action. *See* Joel C. Moyer, *The Death Penalty in Massachusetts*, 8 SUFFOLK U.L. REV. 632, 643 (1974).

[32] *See id.* at 665–66. On October 2, 1973, two people, including an innocent pedestrian, were shot and killed. *See id.* On October 3, 1973, a young woman was drenched with gasoline and burned by six youths. *See id.*

[33] *See id.*

officers and tested for constitutionality by the Supreme Judicial Court.[34] The House and the Senate tried in the next two years to override gubernatorial vetoes of similar legislation, falling only a few votes short each time.[35]

In 1975, the SJC ruled in *Commonwealth v. O'Neal*[36] that Massachusetts' mandatory death penalty provisions violated the Cruel and Unusual Punishment Clause of the Massachusetts Declaration of Rights,[37] officially eliminating the death penalty in Massachusetts.[38] The *O'Neal* decision opened an era of often hostile argument between the legislature and the judiciary over the death penalty, which the SJC resumed by reviewing proposed legislation to reinstate the death penalty in 1977. In *Opinion of the Justices to the House of Representatives*,[39] the Court ruled broadly that the Massachusetts Constitution's prohibition of cruel or unusual punishment outlawed the use of the death penalty unless it could be proven that the punishment contributed more to a legitimate state purpose such as deterrence than life imprisonment.[40] The Court acknowledged that the evidence on the deterrence effect of the death penalty was inconclusive,[41] challenging proponents to demonstrate otherwise.

The General Court wasted no time in reacting to the SJC's challenge. In the next legislative session, the legislature adopted Chapter 488, which directly attacked the Court's opinion:

> It is hereby declared that the value of capital punishment as a deterrent for crime is a complex issue the resolution of which properly rests with the general court, which has evaluated the results of statistical studies. . . . It is hereby further declared that the ability of the people of the Commonwealth to express their preference through their duly

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[34] *See id.* at 666. The Governor made this pledge knowing that it was virtually impossible for the SJC to review legislation and return its results quickly enough to allow the Governor to sign the legislation during his limited time. *See id.* at 668.

[35] The General Court passed legislation identical to the 1973 bill in 1974. *See* CONTE, *supra* note 6, at 7–8. Although the House easily overrode a gubernatorial veto, the Senate fell two votes short of the two-thirds majority needed to override the governor. *See id.* In 1975, similar legislation vetoed by Governor Dukakis fell one vote short in the Senate. *See id.*

[36] 339 N.E.2d 676 (Mass. 1975).

[37] *See* MASS. CONST. ART. XXVI.

[38] *See O'Neal*, 339 N.E.2d at 680.

[39] 364 N.E.2d 184, 186–87 (Mass. 1977).

[40] *See id.* at 186–87.

[41] *See id.* at 190.

> elected representatives must not be shut off by the intervention of the judicial department. . . .[42]

Governor Edward King signed the legislation into law.[43] The SJC reacted to the legislation quickly. In *D.A. for the Suffolk District v. Watson*,[44] the Court ruled that the Massachusetts Declaration of Rights provided greater protection than the U.S. Constitution, and that Chapter 488 violated this stricter standard because it was unacceptably cruel under contemporary standards of decency.

Realizing that mere legislation was ineffective, death penalty proponents tried to tie the hands of the SJC with a constitutional amendment. In 1982, the state held a referendum on a proposed constitutional amendment stating: "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death."[45] With an even larger margin than in 1968, voters approved the referendum, with fifty-four percent in favor and thirty-five percent opposed.[46]

Invigorated by the new constitutional provision, the General Court quickly enacted a death penalty bill, Chapter 554, which Governor King signed.[47] Included in the legislation was a provision authorizing capital punishment for the murder of an on-duty police officer.[48] In an odd twist of fate characteristic of Massachusetts's struggle with the death penalty, State Trooper George Hanna was shot and killed less than three months after Chapter 554 took effect.[49] Hanna was the first Massachusetts trooper to be killed in the line of duty in more than thirty years.[50] The prosecution of Hanna's murderer in *Commonwealth v. Colon-Cruz*[51] became the test for the legislation enacted under the amended Constitution.

In *Colon-Cruz*, the SJC found that, in permitting the death penalty only after a jury trial, the statute unconstitutionally discouraged defendants from asserting their right to a jury trial because they could escape the death penalty by pleading guilty, thereby avoiding trial.[52] The Court's decision reflected the deep

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[42] Quoted in CONTE, *supra* note 6, at 12.
[43] *See The Death Penalty: The State and National Picture, supra* note 7, at A12.
[44] 411 N.E.2d 1274 (1980).
[45] Quoted in CONTE, *supra* note 6, at 14–15.
[46] *See id.*
[47] *See id.* at 1.
[48] *See id.*
[49] *See id.*
[50] *See id.*
[51] 470 N.E.2d 116 (Mass. 1984).
[52] *See id.* at 124.

division over the proper fate of the death penalty in Massachusetts. According to one scholar:

> The judges claimed they were only deciding the "law," but this was a fairly transparent fig leaf. There seems to be, in short, a sharp conflict between, on the one hand, the general public, which wants the death penalty . . . and, on the other hand, a minority that finds it repellent, and a tiny band of zealots who would move heaven and earth to get rid of it.[53]

In the 1980s and 1990s, Massachusetts governors took an active role in setting the death penalty agenda. Democratic Governor Michael Dukakis promised to veto any death penalty bill placed on his desk;[54] while Republican Governor William Weld introduced his own death penalty bill in almost every legislative session.[55] In the first vote in almost ten years, Governor Weld's 1994 submission was approved by the Senate 22 to 18, but failed in the House by a vote of 70 to 86.[56] Similar bills introduced by Governor Weld failed in 1995 and 1996.[57]

D. *1997*

Another dramatic vote occurred in 1997, in the wake of several highly publicized violent crimes, including the murder of ten-year-old Jeffrey Curley.[58] Both chambers initially *passed* their death penalty bills—the House by a narrow 81 to 79 vote—and many opponents, including House Speaker Thomas Finneran, appeared to have accepted defeat.[59] To reconcile slight differences in the House and Senate bills, members of the two chambers negotiated a final piece of legislation that maintained the fifteen capital crimes identified by the House, and incorporated many protections suggested by the Senate.[60] When the final

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[53] FRIEDMAN, *supra* note 14, at 322–23.

[54] *See The Death Penalty: The State and National Picture, supra* note 7, at A12.

[55] *See id.*

[56] *See id.*

[57] *See id.*

[58] *See, e.g.*, Doris Sue Wong and Adrian Walker, *Vote is 81-79; Bill Differs from Senate's*, BOSTON GLOBE, Oct. 29, 1997, at A1 (referring to "a stunning succession of grisly murders . . . [that] created enormous pressure on legislators to vote to legalize state executions"). The most publicized was the murder that month of ten-year-old Jeffrey Curley, who was smothered with a gasoline-soaked rag, sexually molested, and dumped in a river. *See id.*

[59] *See* Doris Sue Wong, *Finneran Says He Will Not Try to Block Measure*, BOSTON GLOBE, Oct. 30, 1997, at A18.

[60] *See* S.B. 1983, 180th Gen. Ct., Reg. Sess. (Mass. 1997).

bill came up for a vote in what some expected to be a mere formality,[61] Representative John Slattery, who had previously voted for the legislation, announced that he would vote against it.[62] His switch caused an 80-to-80 deadlock, and the bill failed.[63] Slattery, who had made his support for the death penalty a major issue in his first campaign three years earlier, pointed to two factors in his reversal. First, he believed that an ambiguity in the law would allow for the execution of minors.[64] Second, he argued that the recent conviction of British au pair Louise Woodward made him fear that the jury process could allow innocent defendants to be convicted and sentenced to death.[65]

Following the vote, Governor Cellucci insisted that Massachusetts would join the thirty-eight states that have the death penalty.[66] "[T]he battle is not over," he said, and promised to use the next legislative session to reinstate capital punishment.[67]

II. CONSTITUTIONAL VIABILITY OF DEATH PENALTY LEGISLATION

Before turning to Bill 3963, this Essay summarizes the federal and state constitutional constraints on death penalty statutes in Massachusetts.

A. *Federal Constitutional Constraints*

The U.S. Supreme Court in 1878 first reviewed the constitutionality of a state's capital punishment statute in *Wilkerson v. Utah*.[68] In *Wilkerson*, the Court took the constitutionality of capital punishment itself for granted and restricted its review to the

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[61] *See id.*

[62] *See* Adrian Walker & Doris Sue Wong, *Momentum for a State Law is Halted as House Member Changes His Mind*, BOSTON GLOBE, Nov. 7, 1997, at A1; Frank Phillips, *Legislator's Switch Draws Scorn, Praise*, BOSTON GLOBE, Nov. 7, 1997, at A1.

[63] *See* Walker & Wong, *supra* note 62, at A1.

[64] *See id.*

[65] *See* Adrian Walker & Kathy McCabe, *Calm at the Eye of the Storm*, BOSTON GLOBE, Nov. 8, 1997, at A10. Woodward was convicted of second-degree murder for her role in the "shaken baby syndrome" death of an eight-month-old. *See* William F. Doherty, *Woodward Takes Comfort*, BOSTON GLOBE, Nov. 8, 1997, at A1.

[66] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE CAPITAL PUNISHMENT 1997 (1998).

[67] Scot Lehigh & Frank Phillips, *Aftermath of Death Penalty Bill's Defeat; Cellucci, Other Leaders Trade Barbs*, BOSTON GLOBE, Nov. 8, 1997, at A1.

[68] 99 U.S. 130 (1878).

method of execution.[69] The Court held that the Eighth Amendment prohibition against cruel and unusual punishment prohibited only torture and similar unnecessary cruelty,[70] but did not bar the shooting of convicts.[71] Similarly, in 1890, the Court unanimously approved the use of the electric chair in *In re Kemmler*.[72] The Court stated:

> [P]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than mere extinguishment of life.[73]

The Supreme Court did not address the issues that shaped the framework for modern death penalty statutes like Bill 3963 until the next century. Perhaps the most important Supreme Court decision regarding the death penalty is *Furman v. Georgia*.[74] In *Furman*, the Court considered a Georgia statute that gave nearly unlimited discretion to the judges and juries involved in sentencing.[75] The majority found that the unbridled discretion made application of the statute unconstitutionally arbitrary and capricious.[76] Since most laws were similar to Georgia's, *Furman* essentially found all death penalty statutes unconstitutional.[77]

The *Furman* decision was marked by a distinct lack of consensus. The vote was five to four in favor of finding the Georgia bill unconstitutional, and each of the nine justices wrote his own opinion, ranging from Justice Brennan and Justice Marshall, who found capital punishment inherently cruel and unusual punishment,[78] to Justice Douglas, who focused on the death penalty's discriminatory application to minorities and the poor.[79] Since the Court did not speak with one voice, there was great uncertainty regarding the implications of the case. Indeed, the one of the clearest statements of the *Furman* holding came in a

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[69] *See id.*
[70] *See id.* at 136. Methods found objectionable by the court included embowellment, burning, beheading, or and quartering. *See id.*
[71] *See id.* at 135.
[72] 136 U.S. 436 (1890).
[73] *Id.* at 447.
[74] 408 U.S. 238 (1972).
[75] *See id.* at 309.
[76] *See id.*
[77] *See* AMNESTY INTERNATIONAL, *supra* note 20, at 14.
[78] *See Furman*, 408 U.S. 305.
[79] *See id.* at 245.

later case. In *Gregg v. Georgia*,[80] the Court stated that *Furman* held that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[81]

The *Furman* ruling led to the vacating of more than 600 death sentences throughout the country,[82] and forced states to rewrite death penalty legislation to limit the discretion given to judges and juries in capital trials. States found two ways to accomplish this goal. Twenty-one states reintroduced mandatory death sentences for certain crimes.[83] Eleven others created systems of guided discretion in which the jury was given guidelines on the offense and defendant characteristics that might affect sentencing.[84]

Both types of statutes were tested in the Supreme Court during 1976. In *Woodson v. North Carolina*,[85] the Court ruled that statutes mandating capital punishment for all persons convicted of first-degree murder were unconstitutional.[86] The Court extended the ruling in *Roberts v. Louisiana*,[87] holding that the death penalty could not be mandatory even for a narrow category of offenses, such as the murder of an police officer in the course of duty.[88]

In *Gregg*, and its companion cases, *Jurek v. Texas*[89] and *Proffitt v. Florida*,[90] however, the Court upheld guided discretion.[91] The statute upheld in *Gregg* provided for a bifurcated trial. At the first stage, only the defendant's guilt or innocence was determined.[92] Sentencing was reserved for a separate hearing, in which the judge or jury could consider a broad range of aggravating and mitigating factors.[93] The statute also provided for "special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death."[94] With these protections, the Court was apparently satisfied that the arbitrariness of pre-*Furman* statutes would be eliminated. Effectively

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[80] 428 U.S. 153 (1976).
[81] *Id.* at 188.
[82] *See* AMNESTY INTERNATIONAL, *supra* note 20, at 14.
[83] *See id.* at 16.
[84] *See id.* at 15–16.
[85] 428 U.S. 280 (1976).
[86] *See id.* at 305.
[87] 431 U.S. 633 (1977).
[88] *See id.* at 637.
[89] 428 U.S. 262 (1976).
[90] 428 U.S. 242 (1976).
[91] *See Gregg*, 428 U.S. at 153.
[92] *See id.* at 162.
[93] *See id.* at 163–66.
[94] *Id.* at 166.

reinstating the death penalty, *Gregg*'s ruling that the death penalty was not inevitably unconstitutional led to a flurry of legislative activity, as other states rapidly copied the bifurcated trial approach.[95]

The reinstatement of capital punishment did not end the Supreme Court's involvement with death penalty statutes, as it soon turned its attention to issues of administration. In *Lockett v. Ohio*,[96] the Court found that a state could not limit mitigating factors to a specific list.[97] The Court ruled that the sentencing authority had to be free to consider as a potential mitigating factor any information relevant to the defendant's character or record or to the circumstances of the offense that the defendant presents as a basis for a sentence less than death.[98]

In the 1980s, the Court's emphasis shifted once again, this time from the administration of the death penalty to eligibility for the punishment. In *Thompson v. Oklahoma*,[99] for example, the Court found that minors under the age of sixteen at the time the offense was committed could not be constitutionally executed.[100] In *Ford v. Wainwright*,[101] the Court established that it is unconstitutional to execute an individual that has been ruled insane.[102]

The Court also addressed issues of racial discrimination. In *McClesky v. Kemp*,[103] the Court considered whether minorities could be subjected to the death penalty even in light of statistical data substantiating Justice Douglas's fear that minorities receive harsher treatment.[104] McClesky was a black death row inmate

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[95] Executions resumed in 1977 after a cessation of almost a decade. The first to be executed was Gary Gilmore, who was executed by a firing squad in Utah on January 17, 1977. *See* PATERNOSTER, *supra* note 9, at 18.

[96] 438 U.S. 586 (1978).

[97] The only three mitigating circumstances in the Ohio statute were: (1) the victim induced or facilitated the offense; (2) the offender was under duress, coercion, or strong provocation; or (3) the defendant had a psychosis or mental deficiency. *See id.* at 438 U.S. at 607.

[98] *See id.* at 604. *But cf.* Booth v. Maryland, 482 U.S. 496 (1987) (holding that it is not appropriate for the sentencing authority to consider a victim impact statement, which describes the personal characteristics of the victim and the impact of the crime on the victim's family).

[99] 487 U.S. 815 (1988).

[100] *See also* Stanford v. Kentucky, 492 U.S. 361 (1989) (ruling that it is not necessarily unconstitutional to execute a minor who was over the age of sixteen when the offense was committed).

[101] 477 U.S. 399 (1986).

[102] *Cf.* Penry v. Lynaugh, 492 U.S. 302 (1989) (holding it is not categorically unconstitutional to execute a mentally retarded person).

[103] 481 U.S. 279 (1987).

[104] Of the 3,335 prisoners held on death row at the end of 1997, 1,406 were black. *See*

convicted of killing a white police officer during the armed robbery of a store.[105] On appeal of his sentence, McClesky asserted that his right to equal protection under the laws had been violated.[106] As evidence, he presented statistics on capital punishment in Georgia showing that black defendants convicted of killing white victims were more likely to be given the death sentence than other defendants.[107] The Court ruled, however, that in order for McClesky's sentence to be reversed, he would have to prove that the sentencing authority had a discriminatory purpose in his particular case.[108] Broad statistical data could not prove a violation of constitutional rights in any one case, or reveal a discriminatory purpose on the part of a state.[109]

Future judicial analysis of the death penalty remains uncertain. Abolitionist movements remain strong, even though the Court has stated that the death penalty is not per se unconstitutional.[110] Even some supporters of capital punishment on a theoretical level have suggested a temporary ban while procedural problems can be resolved.[111] Just two years ago, the American Bar Association recommended a moratorium on the death penalty until further measures to improve fairness and reduce the risk of sentencing innocent persons to death are implemented.[112] Further, as the Supreme Court has repeatedly remarked in considering capital punishment,[113] the law is meant to change as society changes. "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[114]

BUREAU OF JUSTICE STATISTICS, *supra* note 66, at 1.

[105] *See McClesky*, 481 U.S. at 282.

[106] *See id.* at 291.

[107] The statistics, taken from the Baldus study, were based on 2,000 murder cases during the 1970s. *See id.* at 286–87. Controlling for 39 nonracial variables, researchers found that Georgia defendants charged with killing whites were 4.3 times as likely to get the death penalty as those charged with killing blacks, and that black defendants were 1.1 times as likely to receive a death sentence as whites. *See id.*

[108] *See id.* at 297.

[109] *See id.*

[110] *See, e.g.*, Abraham McLaughlin, *Across the U.S. New Doubts Surface on the Death Penalty*, CHRISTIAN SCI. MONITOR, Feb. 24, 1999 at 1.

[111] *See id.* (explaining that the release of an Illinois man from death row upon the confession of another man prompted Chicago Mayor Richard M. Daley, a death penalty proponent, to suggest a temporary ban on executions).

[112] *See* American Bar Association, *Resolution 107* (1997).

[113] *See, e.g.*, *Furman*, 40 U.S. at 247 (Douglas, J., concurring); *Penry*, 492 U.S. at 331; South Carolina v. Gathers, 490 U.S. 805, 889, 892 (1989).

[114] Trop v. Dulles, 356 U.S. 86, 101 (1958)

B. *Massachusetts Constitutional Constraints*

Limits imposed on death penalty legislation by Massachusetts courts are less developed, in part because the state's de facto lack of a death penalty since 1947.[115] As discussed, the SJC has faced the issue only a few times since *Furman*, addressing mandatory sentencing in *O'Neal* and racial discrimination in *Watson*.

The effect of those cases on current legislation is unclear, however, as they all were based on the state Constitution before it was amended in 1982 to provide that " "No provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death."[116] For judicial guidance, then, current legislators must look to *Colon-Cruz*, the SJC's only ruling on a death penalty statute since the 1982. As noted, the SJC in *Colon-Cruz* held that a statute allowing the death penalty to be imposed only after a jury trial impermissibly burdened the defendant's right to a jury trial and right against self-incrimination,[117] since the defendant could avoid a death sentence by pleading guilty and not standing trial. "The inevitable consequence," the Court wrote, "is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury."[118]

In *Colon-Cruz*, Chief Justice Hennessey's concurring opinion summarized three areas of constitutional concern in death penalty legislation—vagueness, appellate review, and proportionality.[119] While he himself insisted that he meant to "imply no opinion as to the merits of any of these arguments,"[120] the majority found his summary useful. The majority stated that Hennessey's "comments and suggestions may alert the Legislature to other issues it may wish to consider, should it decide to take

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[115] *See* CONTE, *supra* note 6, at 2 (1987).

[116] MASS. CONST. art. CXVI

[117] *See Colon-Cruz*, 470 N.E.2d at 124. In making this determination, the SJC found that the 1982 amendment did not prohibit it from examining the death penalty altogether. *See id.* at 121. While the amendment meant that death penalty might not itself be facially unconstitutional, any particular death penalty statute could still be examined for other constitutional concerns. *See id.* Death penalty statutes must still meet basic requirements for due process and proportionality. *See id.* at 123 (the amendment does not provide "total insulation of death penalty legislation from constitutional review").

[118] *Id.*

[119] *See id.* at 131 (Hennessey, C.J., concurring).

[120] *Id.*

further legislative action."[121] Hennessey's concerns, as well as the other federal and state constitutional restraints, offer valuable insight into the crafting of the 1999 death penalty bill.

IV. HOUSE BILL 3963

In February 1999, Massachusetts Governor Paul Cellucci submitted House Bill 3963 to the legislature.[122] Although the bill eventually failed by a vote of 80 to 73,[123] its text offers insight into the process of drafting a statute on an issue as constitutionally sensitive and politically volatile as capital punishment. A large number of the bill's major provisions can be traced directly to specific state or federal judicial concerns and previous legislative attempts to enact the death penalty.

Bill 3963 provided for two-stage trials as approved in *Gregg*: if the first stage produced a plea or verdict of guilty, the bill required a "pre-sentence hearing" to determine whether the death penalty was appropriate.[124] At that hearing, the jury would hear evidence as to whether one of sixteen aggravating factors was present in the crime,[125] as well as "all additional relevant evidence in mitigation of punishment."[126] If the jury then determined that one (or more) of the aggravating factors was present, it would weigh that factor (or factors) against all of the mitigating evidence, and "determine whether, in view of all the relevant circumstances of the offense and of the defendant, the sentence shall be life imprisonment or death."[127] If the jury unanimously

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[121] *Id.* at 118 n.5.

[122] Although Governor William Weld supported the death penalty, he never made it a major legislative issue. *See* Scot Lehigh, *In End, Legislators Bow to Times*, BOSTON GLOBE, Oct. 29, 1997, at A1. Governor Cellucci, in contrast, has been at the forefront of the 1999 debate—he announced it, testified at committee hearings for it, and tried to influence the timing of the vote on the House floor. *See, e.g.*, Frank Phillips & Scot Lehigh, *Cellucci Begins New Effort to Enact Death-Penalty Bill*, BOSTON GLOBE, Feb. 17, 1999, at B2; Brian MacQuarrie, *Deep Disputes Drive Death Penalty Hearing*, BOSTON GLOBE, Mar. 23, 1999, at A1; Frank Phillips, *Cellucci Urges Delay for Death Penalty Vote*, BOSTON GLOBE, Mar. 18, 1999, at B3.

[123] *See* Ellen J. Silberman & Joe Baatenfeld, *Gov Blasts Finneran as House Kills Death Penalty*, BOSTON HERALD, Mar. 30, 1999, at 1.

[124] *See* H.B. 3963, 181st Gen. Ct., Reg. Sess. § 4 (279)(68) (1999). Mandatory sentences were outlawed in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in part because they ignore aggravating and mitigating circumstances. Thus, Bill 3963 makes direct reference to aggravating and mitigating factors.

[125] *See* H.B. 3963, § 4(279)(68).

[126] *Id.* at § 4(270)(68).

[127] *Id.*

decided on death, and the trial judge concurred,[128] the decision would undergo a mandatory review by the SJC.[129] Unless the SJC found reason for remand or reversal, the defendant would face death by lethal injection.[130]

The discussion that follows traces Bill 3963's provisions.

A. *Phase I*

1. Eligibility

The fingerprint of recent legislative history on Bill 3963 is evident, as the bill makes clear that minors cannot be executed—the death penalty can only be applied to "an individual who has attained the age of eighteen years at the time of the murder."[131] In making this provision explicit, the bill corrects for what may have been the death penalty's downfall in 1997. No such language existed in the final version of the 1997 bill,[132] and Representative Slattery—whose last-minute change of heart caused the bill to fail—said his switch was motivated by this ambiguity.[133] Rather than lose another close vote because of correctable ambiguity, the 1999 drafters did not leave this to chance.

2. Indictment

Bill 3963 requires the indictment to "specify which of the aggravating circumstances . . . are alleged to be present."[134] In requiring the indictment to state *which* aggravating circumstances are being alleged, this language clarifies the parallel provision in the original 1997 bill that the Senate approved. The language in that bill seemed to require the prosecution only to state *that there were* aggravating circumstances, but did not require the prosecution to *identify* them.[135] Recognizing the ambiguity, draft-

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[128] *See id.* at § 4(279)(71)(b).
[129] *See id.* at § 4(279)(72).
[130] *See id.* at § 2(279)(60).
[131] *Id.* at § 4 (279)(68).
[132] S.B. 1983, 180th Gen. Ct., Reg. Sess. (1997).
[133] *See* Walker & Wong, *supra* note 62, at A1 ("Slattery was swayed by his conviction that the law would apply to those under 18. ").
[134] H.B. 3963, § 1(265)(2A).
[135] The bill required that the indictment "specify whether the aggravating circumstances . . . are alleged to be present." S.B. 1983, § 5(265)(2A).

ers corrected the provision in the final version of the 1997 bill,[136] and retained it in this year's bill. An indictment that fails to indicate the specific aggravating factors being alleged raises one of the concerns Chief Justice Hennessey raised in *Colon-Cruz*.[137] By not precisely identifying the aggravating factor, an indictment would risk violating the "art. 12 [of the Massachusetts Constitution] command that 'the accused should understand, from the indictment, that he is charged with an offense aggravated by the fact of a prior conviction,' or by other statutory aggravating factors."[138]

3. Pleading

After being indicted, and either retaining or being appointed counsel,[139] the defendant decides how to plead. The drafters learned a lesson from *Colon-Cruz* and crafted H.B. 3963 so that pleading guilty, and thus waiving one's right to the jury trial, cannot save a defendant from facing the death penalty. Rather, the pre-sentence hearing would follow either "[u]pon a plea or verdict of guilty of murder."[140]

B. *Phase II: The Pre-Sentence Hearing*

Once guilt has been established, either at trial or in a plea, the sentencing phase of a capital case begins.

1. Mitigating Factors

Bill 3963 provides that at the pre-sentence hearing, "the jury shall hear all additional relevant evidence in mitigation of punishment including evidence relevant to any statutory mitigating circumstance . . . and evidence relevant to any other aspect of the

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[136] *See* S.B. 2003, 180th Gen. Ct., Reg. Sess. § 7(265)(2A) (1997) ("[T]he indictments shall specify the aggravating circumstances . . . which are alleged to be present by specifying with particularity which aggravating circumstance or circumstances set forth in said section 69 are being alleged.")

[137] *See supra* text accompanying notes 120–121.

[138] *Colon-Cruz*, 470 N.E.2d at 133 (Hennessey, C.J., concurring).

[139] If the defendant is unable to afford counsel, the state must appoint and pay for two lawyers for both the trial and appeals process. These lawyers must meet minimum requirements in training and have experience represented defendants in felony or death penalty cases. *See* H.B. 3963, § 3(211D)(16).

[140] H.B. 3963, § 4(279)(68).

defendant's character or record or any of the circumstances of the offense that the defendant or the commonwealth may proffer."[141] Thus, the bill both explicitly identifies relevant categories of mitigating circumstances, and also admits *any other* evidence that might be offered toward that end.

In doing so, the bill responds to both state and federal restraints. Addressing the vagueness of the statute in *Colon-Cruz*, Chief Justice Hennessey pointed to the law's failure to specify "whether the judge is simply to instruct the jury to consider 'any other relevant mitigating ... circumstances,' or whether the judge must specify those circumstances."[142] Bill 3963's answer to the problem is that the judge must do *both*. This is consistent with guidelines laid out in *Lockett* and is similar to language used in New York's much-praised[143] death penalty statute.[144]

Thus, the jury, in considering mitigating circumstances, need not pick out any particular factor or factors as relevant. In allowing consideration of mitigating evidence as a whole, Bill 3963, like the New York statute, "reliev[es] the jury of any need to establish unanimity on individual mitigating circumstances."[145] Nevertheless, the Massachusetts bill may come close to violating Chief Justice Hennessey's concern about vagueness. Inasmuch as the bill "does not specify the burden of proof to be applied [in establishing the existence of] mitigating circumstances,"[146] it risks violating Massachusetts' "due process require[ment] that the penalty provision of a criminal statute must be drawn with sufficient definitiveness to foreclose speculation

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[141] *Id.* at § 4(279)(68). Statutory mitigating circumstances exist if the defendant: (1) lacked prior criminal convictions; (2) killed the defendant's co-conspirator in a crime; (3) acted under duress or control that substantially affected the defendant's judgment; (4) experienced incapacity due to disease, emotional illness, brain damage, or intoxication; (5) was over the age of 75; (6) previously had been battered or otherwise abused by the victim; (7) or experienced post-traumatic stress syndrome from war. *See id.* at § 4(279)(69)(b).

[142] *Colon-Cruz*, 470 N.E.2d at 132 (Hennessey, C.J., concurring).

[143] *See* Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283, 295 (1996) (calling the statute "splendidly fastidious" to constitutional requirements).

[144] *See* N.Y. CRIM. PROC. § 400.27(9)(f) (jury must consider "any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.").

[145] Weisberg, *supra* note 143, at 295–96. The wording is in line with *Mills v. Maryland*, 486 U.S. 367 (1988), in which the Court held that jurors' inability to agree on the existence of particular mitigating circumstances may not preclude them from considering mitigating evidence.

[146] *Colon-Cruz*, 470 N.E.2d at 131 (Hennessey, C.J., concurring).

as to its meaning."[147] While it is unclear whether this failure to include a burden of proof for mitigating circumstances would render an enacted bill unconstitutional, it does indicate that the bill is not challenge-proof, and that the legislature might not have paid as close attention to SJC concerns as it could have.

2. Aggravating Factors

The jury also hears evidence of any aggravating circumstances. Unlike mitigating factors, however, which may include "evidence relevant to any . . . aspect of the defendant's character,"[148] aggravating factors are limited to the "*statutory* aggravating circumstances . . . alleged in the indictment," and the state may use "only such evidence in aggravation of punishment as the commonwealth has made known to the defendant prior to his trial."[149]

The treatment of aggravating factors in Bill 3963 appears to be well within constitutional requirements. Since aggravating circumstances must be "alleged in the indictment" and evidence in their support must have been "made known . . . prior to trial," the bill addresses Chief Justice Hennessey's concern regarding the defendant's right to have his crime "fully and plainly, substantially and formally, described to him."[150] Further, by allowing only statutorily defined factors to be considered, Bill 3963 stops well short of Supreme Court constitutional concerns.[151]

The aggravating factors themselves[152] come almost verbatim from the final 1997 bill, with two exceptions. Bill 3963 narrowed

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[147] Commonwealth v. Bongarzone, 455 N.E.2d 1183, 1189 (Mass. 1983).

[148] H.B. 3963, § 4(279)(68).

[149] *Id.* (emphasis added).

[150] MASS. CONST. art. XII.

[151] In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court allowed prosecutors to include non-statutory aggravating circumstances, provided that at least one statutory aggravating circumstance has been proven. "[T]he Constitution does not require the jury to ignore other possible aggravating factors." *Id.* at 878. Here, as in the New York statute, the consistent reference to "statutory aggravating circumstance" leaves no room for other considerations. *See* N.Y. CRIM. PROC. LAW § 400.27(3).

[152] The aggravating factors include: (1) murder of a police officer or law enforcement official killed in the line of duty; (2) murder committed by an inmate while incarcerated; (3) murder of a judge, juror, witness or prosecuting attorney; (4) murder by someone previously convicted of first- or second-degree murder; (5) murder by someone with two or more prior convictions which would qualify for the death penalty; (6) contract killing; (7) murder committed while attempting to avoid arrest; (8) murder involving torture; (9) murder of multiple victims; (10) murder committed by the use of a bomb or similar device; (11) murder committed in conjunction with rape, kidnapping, assault with intent to rape, robbery, arson, home invasion or stalking; (12) murder

the 1997 provision making it an aggravating factor to murder as part of a "pattern of physical abuse of the victim by the defendant"[153] to include only domestic abuse,[154] and added as an additional factor that "the victim of the murder was under the age of 14 at the time the murder was committed."[155] This latter provision appears to stem from the publicity and anger that the murder of Jeffrey Curley aroused during the 1997 debate.[156]

3. Weighing the Factors

Once the jury has determined that an aggravating circumstance is present, Bill 3963 provides that "it must then consider all of the evidence presented to it relevant to any of the mitigating circumstances . . . and determine whether, in view of all the relevant circumstances of the offense and of the defendant, the sentence shall be life imprisonment or death."[157] The bill gives no other guidance on how the jury should make this determination, other than to say that a death sentence requires a unanimous finding.[158]

This introduces some uncertainty, but the tangled web of judicial history might make it difficult to do better. On one hand, a death penalty bill might be void for vagueness any time that it "provides the jury with very little guidance on how to conduct the weighing of aggravating and mitigating circumstances."[159] On the other hand, however—and this may be the weightier restraint—the bill must meet the *Woodson* requirement that it not impose mandatory death sentences, and that juries be allowed

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committed in the course of illegal drug trafficking; (13) murder of a child under the age of fourteen; (14) murder in violation of a restraining order; (15) murder where a history of domestic violence existed between the victim and the defendant; and (16) murder committed in the presence of the victim's child, mother, father, brother, sister or spouse. *See* H.B. 3963, §4(279)(69)(a).

[153] S.B. 2003, § 14(279)(69)(a)(14).

[154] *See* H.B. 3963, § 4(279)(69)(a)(15).

[155] *See id.* at § 279(69)(a)(13).

[156] *See* Phillips, *Celluci Urges Delay for Death Penalty Vote*, *supra* note 122, at B3 (referring to the Curley murder as one that "drove the death penalty debate that fall"); Wong & Walker, *supra* note 58, at A1 (saying that the Curley murder "created enormous pressure on legislators to vote to legalize state executions"). In promoting this year's bill, for example, Governor Cellucci argued that Massachusetts citizens "know what justice demands for 10-year-old Jeffrey Curley from Cambridge, who will never play another Little League game, never get married, and never grow old." Governor Paul Cellucci, Editorial, *Restore Death Penalty*, BOSTON GLOBE, Mar. 28, 1999, at D7.

[157] H.B. 3963, § 4(279)(68).

[158] *See id.*

[159] *Colon-Cruz*, 470 N.E.2d at 132 (Hennessey, C.J., concurring).

sufficient room to consider individual circumstances. The balancing test may be the most constitutionally safe method, as any attempt to create a more mechanical procedure could risk violating *Woodson*. Indeed, even the highly praised New York statute offers only nominal additional guidance, suggesting that aggravation must outweigh mitigation "beyond a reasonable doubt."[160]

C. *Appellate Issues*

If the jury does determine that the death penalty is appropriate, Bill 3963 provides for a mandatory review and appeals procedure beginning with the trial judge reviewing the entire record and making any observations it "deems pertinent to the question of the appropriateness of the sentence."[161] The judge could, subject to appeal by the state, "set aside the sentence of death and impose a sentence of life imprisonment without parole."[162] If the sentence stands, it faces mandatory review by the SJC, which can reverse or remand the case if it finds, among other things, either that the sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor" or that "the evidence of mitigation warranted the imposition of a life sentence rather than a sentence of death."[163] This review would be based on a record and transcript that have been made "as complete as possible."[164]

However, because of the ambiguities of the mitigating circumstances, that complete record may be insufficient. One of Chief Justice Hennessey's concerns in *Colon-Cruz* was whether an appellate court charged with reviewing a sentence for the influence of passion and prejudice—as this bill requires—could fulfill its duty with an ambiguous record. He noted with frustration that the statute at issue in *Colon-Cruz* did "not even require that the jury make written findings on mitigating circumstances," and stated:

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[160] N.Y. CRIM. PROC. LAW § 400.27(11)(a).

[161] H.B. 3963, § 4(279)(71)(b).

[162] *Id.*

[163] *Id.* at § 4(279)(72). The SJC may also reverse or remand if the evidence does not support the jury's finding of an aggravating circumstance, or if the evidence does not warrant a death sentence. *See id.*

[164] *Id.* at § 4(279)(71)(a).

> [B]ecause "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," there is a substantial issue as to whether [the statute] adequately provides for preservation of a sufficient record on appeal.[165]

The SJC would have no method of determining, according to Hennessey's argument, whether or not the jury was influenced by passion or prejudice if the record did not reflect the consideration of mitigating factors.

D. *What the Bill Left Out*

While much of the text Bill 3963 responds to specific judicial or political constraints, provisions that were *not* included in the final bill are of equal interest. Two are particularly relevant to the discussion of how technicalities matter. First, the bill contains no provision regarding racial discrimination in the application of the death penalty. Second, the bill lacks a provision requiring the state to compile and to report the financial cost of death penalty litigation.

1. Racial Discrimination

As discussed, racial discrimination in the application of the death penalty is a controversial issue. Studies have indicated that the death penalty is imposed in a racially unbalanced manner[166] and the *McClesky* issue of whether the death penalty is unfairly targeted at minorities is unlikely to disappear soon.[167] In Massachusetts, the SJC in 1980 held that capital punishment's racially discriminatory application made it unconstitutional under the state's cruel and unusual punishment prohibition.[168] While that holding's current validity may be in doubt because of the 1982 constitutional amendment, it is clear the racial discrimination is a sensitive subject in the discussion of the death penalty.

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[165] *Colon-Cruz*, 470 N.E.2d at 132 (Hennessey, C.J., concurring) (citation omitted).

[166] *See supra* note 104.

[167] *See* Abraham McLaughlin, *supra* note 110, at 1 (noting the Nebraska Supreme Court's pending case on the issue).

[168] *See Watson*, 411 N.E.2d at 1283 ("[E]xperience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks. For these reasons the death penalty is unconstitutionally cruel under art. 26 of the Declaration of Rights.").

The legislature tried to address the issue in the final 1997 bill, which required the SJC to review whether "the sentence of death was imposed in a racially discriminatory manner."[169] That language was watered down from the original Senate bill, which stated: "The death penalty shall not be sought or imposed in a racially discriminatory pattern and no person shall be put to death pursuant to any law if such person's death furthers such a pattern."[170] To demonstrate the existence of such a pattern, the bill noted that "ordinary methods of statistical proof shall suffice and it shall not be necessary to show discriminatory motive, intent or purpose on the part of any individual or institution."[171]

The 1999 bill abandoned such provisions, however, requiring no review for discrimination in the individual case or in the system as a whole, although House Minority Leader Francis Marini has suggested that Republican leadership would not be opposed to adding such measures.[172] While these safeguards are not constitutionally mandated, equal protection considerations suggest the wisdom of at least the requirement of a review for discrimination in individual cases.[173] The drafters' failure to include it—especially given that it would have no opposition from death penalty proponents—seems somewhat puzzling.

2. Accounting

While the political cost of the bill's failure to include racial safeguards may be unknown, Governor Cellucci did cost himself at least one vote by refusing to include an accounting mechanism in this year's bill. This, too, was a residual issue from the 1997 legislation, which would have required annual reports "setting out the costs incurred . . . for the investigation, prosecu-

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[169] S.B. 2003, § 15(279)(72).

[170] S.B. 1983, § 5C(2D)(a).

[171] *Id.* at § 5C(2D)(c). The statistical proof required to make a prima facie case of such a pattern is only that the death penalty: "is being sought or imposed or implemented (1) upon persons of one race with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with or convicted of capital murder; or (2) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among persons against whom capital murders have been committed." *Id.* at § 5C(2D)(d).

[172] Symposium, *supra* note 1, at 65–66 ("We would accept any amendment to make the thing more palatable to a few representatives who would enact it.").

[173] Slavitt has suggested that the SJC's power to review for "prejudice," H.B. 3963, § 4(279)(72), met this discrimination concern. *See* Symposium, *supra* note 1, at 70–71. When compared to the 1997 proposal, however, this is rather slim.

tion, defense, trial, and appeal of all cases in which the commonwealth has sought the death penalty."[174] This provision, which responds to the argument frequently made by death penalty opponents regarding the expense of capital punishment, would have created a mechanism to help determine the actual cost of execution.

The measure was excluded in 1999, however, and became an issue in committee hearings on the bill. Representative Harold Naughton, who had voted for the death penalty in 1997, expressed serious concerns about financial issues.[175] Claiming that Governor Cellucci failed to provide cost estimates, Naughton switched his vote.[176] If the state aims to guarantee "due process," he asked, "why is [cost] such a tough question to answer?"[177] Naughton thus became the key vote in the Joint Committee on Criminal Justice's nine to eight refusal to endorse the bill, a vote that appeared to doom its prospects in the full House.[178]

The lack of the accounting provision was not the sole reason for the bill's defeat, by a vote of 80 to 73, on March 29, 1999. The bill lost one more vote because one of its supporters was out of town,[179] and six seats were vacant when Speaker Finneran called the vote.[180] With a full House, then, the vote could theo-

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[174] S.B. 2003, § 17.

[175] *See* Brian MacQuarrie, *Death Bill Gets a 'No'; Loss Seen in House*, BOSTON GLOBE, Mar. 24, 1999, at A1.

[176] *See id.*

[177] *See id.* ("Naughton . . . said he counts himself as a supporter of the death penalty. But if the governor wants his vote, Naughton said, financial considerations must be weighed.").

[178] *See id.* Minority Leader Marini doubts that this was Rep. Naughton's real motivation, pointing out that Naughton voted *against* Marini's motion to send the bill to the Ways and Means Committee for an actual accounting of the cost. *See* Symposium, *supra* note 1, at 80–81.

[179] *See* Hilary Sargent, *Lawmaker's Absence from Death Penalty Vote is Noticed*, BOSTON GLOBE, Mar. 31, 1999, at A24. Rep. Steven Angelo, who serves both as town manager and state representative, explained. "I missed getting back to Boston by an hour-and-a-half. I was in Washington, D.C., fulfilling my [other] responsibility as town manager. . . . It's the first time in nine months that I've had a conflict."

[180] *See* Brian MacQuarrie, *Mass. House Rejects Death Penalty Again*, BOSTON GLOBE, Mar. 30, 1999, at A1. Governor Cellucci chastised Speaker Finneran, a death penalty opponent, for calling the vote before the seats could be filled in special May elections. *See id.* "This rush to get to the vote," Celluci said, "is a clear indication that the opponents are worried about the special elections. But we should let those people have a voice." Scot Lehigh & Frank Phillips, *Foes Seek Fast Vote on Death Penalty*, BOSTON GLOBE, Mar. 17, 1999, at B1. In defending the decision to bring the vote, however, House Majority Leader William Nagle argued that it would be practically impossible to wait until the House was at full membership. See Phillips, *Cellucci Urges Delay for Death Penalty Vote*, *supra* note 122, at B3 ("[W]e expect to have more vacancies later this year. We could be dealing with this forever.").

retically have been a tie—and, but for Representative Naughton's refusal, the bill even could have passed.

CONCLUSION

Certainly, the death penalty is a moral issue, and at one level of debate the technicalities are irrelevant. As Speaker Finneran admitted, for some people—himself included—"there probably are no circumstances . . . where we could amend [Bill 3963] to a point where we'd feel comfortable enough embracing it."[181] At another level, however, technicalities are important. Bill 3963 should not be read in a vacuum of theory, apart from the concrete political and judicial history that preceded it in Massachusetts and across the country.

The story of capital punishment in the Commonwealth is always set close to the middle, with no one faction ever gaining control. At the same time, the drafting of death penalty legislation is invariably an effort to withstand constitutional scrutiny. Constrained by the U.S. Supreme Court, careful not to offend the SJC, and tightly written to entice wavering supporters, Bill 3963's text—its technicalities—offers a fitting next chapter to the Massachusetts death penalty story.

The death penalty debate in Massachusetts is far from over. Minority Leader Francis Marini promised that the recent House vote was "not quite the last word," and suggested that the issue could be introduced in the Senate later this year.[182] The governor's office is even more determined, promising that the death penalty will some day exist in Massachusetts.[183] Said an aide, "Whether it's this year, or next year, or the year after that," death penalty legislation will not be abandoned.[184]

—Brian Hauck
Cara Hendrickson
Zena Yoslov

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[181] Symposium, supra note 1, at 67.

[182] *See* Ellen J. Silberman, *GOP Targets State Senate for Death Penalty Vote*, BOSTON HERALD, Mar. 31, 1999, at 19. While the bill's loss would normally prevent the issue from being re-introduced during this legislative session (the next session will begin in 2001) introducing the bill in the Senate, where it has not yet been introduced, could force the House—out of courtesy towards the other chamber—to take up the issue again. *See id.*

[183] *See* MacQuarrie, *supra* note 175, at A1.

[184] *Id.*

SYMPOSIUM: THE DEATH PENALTY DEBATE

PANEL DISCUSSION

On April 12, 1999, the Harvard Journal on Legislation *held a public symposium on recent legislative efforts to reinstate the death penalty in the Commonwealth of Massachusetts. The participants included state legislators, practitioners, and activists on both sides of the capital punishment debate. The following transcript of the symposium has been annotated by the* Journal *to provide additional background information. The speakers' remarks have also been edited for length.**

MODERATOR:

Carol Steiker is associate dean and professor at Harvard Law School. She is the author of numerous articles on capital punishment and constitutional criminal procedure.

PANELISTS:

Thomas M. Finneran (D-Boston) is Speaker of the Massachusetts House of Representatives. Representative Finneran has served as a state representative from the 12th Suffolk District since 1979 and was elected Speaker in 1996.

Francis L. Marini (R-Hanson) is Minority Leader of the Massachusetts House of Representatives. He was elected to the 6th Plymouth District in 1994 and became Minority Leader in January of 1999.

John P. Slattery (D-Peabody) has represented the 12th Essex District in the Massachusetts House of Representatives since 1995. During the 1997 debate on restoring the death penalty in Massachusetts, his last-minute decision to vote against the death penalty bill caused a deadlock, bringing about the bill's failure.

Evan Slavitt is general counsel of the Massachusetts Republican Party and partner at the Boston law firm of Gadsby & Han-

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* The symposium was made possible, in part, with assistance from principal sponsors Katten, Muchin & Zavis and Mayer, Brown & Platt.

nah, LLP. Mr. Slavitt is the co-author of *Massachusetts Evidence* and *Massachusetts Criminal Law*. Before entering private practice, Mr. Slavitt was a trial attorney in the Antitrust Division of the U.S. Department of Justice and also served as an Assistant U.S. Attorney for the District of Massachusetts.

Ann Lambert is legislative counsel for the ACLU of Massachusetts. She has worked for the ACLU for more than twenty years and was involved in *District Attorney for the Suffolk Dist. v. Watson*,[1] in which the Massachusetts Supreme Judicial Court struck down the state death penalty statute as constituting cruel and unusual punishment, and *Commonwealth v. Colon-Cruz*,[2] in which the same court struck down a revised death penalty statute on self-incrimination and jury trial grounds.

Joshua Rubenstein is the Northeast regional director of Amnesty International, USA. He has lectured on international human rights throughout the United States and has testified on the use of the death penalty before state legislative committees and in Massachusetts.

REMARKS

PROFESSOR CAROL STEIKER: Welcome. The death penalty is a subject that never fails to evoke passionate responses in citizens—whether or not they're lawyers. Legislatures and courts, both in and outside of the United States, have long struggled with the legal and social issues presented by the ultimate penal sanction. At this point in time the trend among industrialized democracies is away from the death penalty. Indeed, the United States is the only such nation to retain it. But retain it we do. Forty American jurisdictions currently have the death penalty: thirty-eight states, the federal government, and the United States military.[3] Thirteen jurisdictions continue to reject the death penalty: twelve states and the District of Columbia. As one of those states, Massachusetts continues to wrestle with the issue in its

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[1] 411 N.E.2d 1274 (Mass. 1980).

[2] 470 N.E.2d 116 (Mass. 1984).

[3] *See generally* THE DEATH PENALTY IN AMERICA 36–40 (Hugo Adam Bedau, ed. 1997) (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming).

State House, on its streets, in its classrooms, houses of worship, and private homes. . . .

Since 1984, we have not had a valid death penalty on the books, but there have been regular attempts to bring back the death penalty with new legislation. Many of these votes have been quite close but not successful. The most dramatic vote was at the end of 1997, when the death penalty briefly prevailed in the House by a vote of 81 to 79, the closest possible vote that there could be.[4] And while the bill was in committee, Representative John Slattery, who is here today, changed his vote, leading to an 80 to 80 tie in the House, which counts as a defeat of the death penalty under Massachusetts law.[5]

This year, the legislature again voted on the death penalty, and it was defeated just two weeks ago in the House by a vote of 80 to 73.[6] But Governor Cellucci has vowed to carry on Governor Weld's tradition of attempting to reinstate the death penalty and has stated that he will seek to introduce the bill again, in, I believe, 2001, which is the next time it is permissible for him to reintroduce a bill on the same topic.

We're very lucky today to have with us here some of the most important and persuasive people in the death penalty debate in Massachusetts to talk to one another and to you about the death penalty debate in Massachusetts.

This is an all-star panel. We couldn't ask for people who have more knowledge, experience, and persuasive power on these issues. I ask you to welcome first the Speaker of the House.

SPEAKER FINNERAN: Thank you very much for the introduction. I find it helpful to go back a little bit in time and to try and give a better perspective to my thinking on this issue and the evolution of that thinking. . . . Governor Cellucci's public career and my public career are fairly—they're not precisely parallel, but it's fairly close. He has a few more years of service than I do with regard to legislative service. When Governor Cellucci first started in the legislature, he was a consistent vote against the death penalty. He was an opponent of the death penalty. When I

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[4] *See, e.g.*, Adrian Walker & Doris Sue Wong, *No Death Penalty by One Vote; Momentum for a State Law Is Halted as House Member Changes His Mind*, BOSTON GLOBE, Nov. 7, 1997, at A1.

[5] *See id.*

[6] *See, e.g.*, Brian MacQuarrie, *Mass. House Rejects Death Penalty Again*, BOSTON GLOBE, Mar. 17, 1999, at B1.

first started in the legislature, I was a proponent of the death penalty. . . .

One might ask how two public officials who started off on different sides of the issue can have this trajectory that crosses over, and now I'm an opponent and the Governor is a proponent . . . . Speaking for myself, my epiphany, if you will, my moment of evolution, came somewhere in the mid-1980s. Again, we were beginning to approach what almost becomes an annual event in the legislature, the debate and discussion and the tolling of the vote on the death penalty, when I had the opportunity to meet a fellow by the name of Bobby Joe Leaster.

Bobby Joe Leaster is a young fellow, almost exactly my age, one difference being that he's black and I'm white, but other than that, both American citizens, and our paths in life happened to cross through really a combination of odd circumstances and some common friends. I had an opportunity to meet and sit down and speak with Bobby Joe Leaster. He's a gentleman who was accused of a crime here in the Commonwealth of Massachusetts, was tried and was convicted,[7] and some . . . fifteen years later . . . . Bobby Joe Leaster's innocence was established. He was exonerated.[8]

I had a chance to meet this fellow, and perhaps what struck me most were the potentially parallel tracks that he and I may have followed in life. He had spent, as I say, fifteen or sixteen years . . . in prison for a crime he did not commit. He obviously had been denied all the things, all the joys and opportunities that most of us, including myself, take for granted: the opportunity to fall in love, to get married, to raise a family, perhaps to go to law school, to start a career, as I did, both in public life and as a practicing attorney. And yet this gentleman harbored not a trace of bitterness, not a trace of anger, not a trace of regret, and really embodied probably the most noble attributes that one could ever hope to find in any human being, particularly a human being who's been put through the trials and tribulations that he had undergone.

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[7] *See* Commonwealth v. Leaster, 287 N.E.2d 122 (Mass. 1972); *see also* Leaster v. Commonwealth, 432 N.E.2d 708 (Mass. 1982) (denying prisoner leave to appeal to Supreme Judicial Court for postconviction relief); Commonwealth v. Leaster, 479 N.E.2d 124 (Mass. 1985) (same).

[8] Following Leaster's exoneration in 1986, Representative Finneran sponsored a state budget measure to create a $1 million fund to compensate Leaster for his wrongful imprisonment. The fund was approved in 1992. *See* Don Aucoin, *State Gives Leaster 1st Payment As Apology for Years in Prison*, BOSTON GLOBE, Nov. 13, 1992, at 22.

My epiphany was based upon this simple observation that this gentleman [might] potentially have had his life taken from him on the basis of a vote that I had taken. Not without thinking; I don't want to imply that my vote, in the early part of my legislative career, had not been thought out. But I had never really quite come to grips or come face-to-face with not just the remote statistical possibility of error being made in our judicial system, but indeed, over a long period of time, given enough cases, what I would now refer to as the *probability* of error occurring. It's not a probability in any individual case, but given the statistical volume, it does become a probability over a period of time. I felt very, very uncomfortable with the fact that an innocent human being may have had their life taken from them based upon a vote that I had cast in favor of that particular possible punishment.

And so I changed my vote, and I'm very, very comfortable now in voting against the death penalty, recognizing that here in Massachusetts, the penalty that exists and is on the books for somebody who is convicted of first-degree murder is life in prison without benefit or possibility of parole. The door closes, and you do not see the light of day again. That, to me, is not only a very, very significant and I think quite appropriate punishment; what it clearly does is reserve for all of us, as human beings in this society here in the Commonwealth of Massachusetts, the option and the opportunity to revisit those few areas—one hopes there would be none, but it's more likely to be an occasional situation—to revisit those areas where mistakes may occur, as it indeed did incur with the Bobby Joe Leaster case.

I often think that one of the things that drives many folks, including myself in the early part of my legislative career, to embrace capital punishment—and I don't mean to suggest we embrace this, as I said earlier, without thinking, thinking through all the implications of it—but I think one of the things that drives us is an understandable rage and an understandable revulsion at certain acts that are so depraved, so horrific, that it is in fact a normal, rational, human reaction to suggest that the taking of the life of the person who committed the crime is in fact an appropriate response .... Clearly in a military situation, we don't cringe from the fact that life sometimes, unfortunately, has to be taken. Clearly in a situation of self-defense, we don't say, "Gee, there's a moral prohibition against me defending myself, my wife, my family, and the like from some type of assault that

carries with it the components of deadly force." The part that I'm always intrigued by is not only, however, the depravity of the act in question, but it is the horror we feel for the innocence of the victim. It's the innocence of the victim I think that grabs each and every one of us by our heart, and indeed by our soul, and propels us many times, propels us in a direction that seems to cry out for revenge and satisfaction for the taking of that innocent person's life.

For me, really the quandary is simply this: Should I, in my revulsion to the taking of that innocent life, embrace and vote for a system that I have become convinced will take another person's innocent life? We have to recognize in our own failings, and perhaps even flailings through life, whether it's as a legislator or as a governor or as lawyers and the like, we are going to make mistakes. That is both individual and that is collective. . . .

So for me, on balance, given the history, given the personal relationship that I've developed with Bobby Joe Leaster, my own thoughts as to positions I had taken earlier in my career, that I potentially at least was a part of the cranking up of a machinery, a state-sanctioned machinery that I concluded would inevitably take another person's innocent life, I thought, "Let's treat those who we have deemed guilty with the ultimate firmness and lock them away from our midst and deny them all freedom, deny them all liberty, but also make sure we protect ourselves against the inappropriate extinction of life based upon an erroneous conviction."

It may sound a bit flip, and certainly nobody should make a flip comment with regard to a debate on a topic of such magnitude and gravity, but I have suggested, not to Governor Cellucci but to Governor Weld, that for those who have been not only inappropriately convicted but then . . . inappropriately executed, a gubernatorial pardon, a posthumous pardon doesn't really mean a great deal. At least with the system we have in place today, if in fact such an erroneous conviction does occur, we can, as we did in the case of Bobby Joe Leaster, confer the appropriate freedom and the appropriate liberty on an individual who lost seventeen years of his life thereabouts. As tough as that is for Bobby Joe Leaster and his family and all of us as a society to accept and to reflect upon, I think it is a much, much better option for all of us, rather than to reflect upon the fact that an inno-

cent person's life could have been, and indeed I predict would be, taken if in fact we embrace capital punishment. Thank you.

REPRESENTATIVE MARINI: Thank you, Mr. Speaker. You've persuaded me and I've changed my mind. No, not really. My name is Fran Marini, I'm the Minority Leader of the House, and I'm a death penalty proponent. And I'll give you three good reasons why.

One, I believe that the death penalty has a deterrent effect. My common sense tells me that sometimes some people would be deterred by their own potential execution, and we would save innocent lives by exacting the death penalty. And I'll give you an example from real life, an anecdotal example. . . .

On December 5, 1993, Stephen Robbins bludgeoned and stabbed his wife to death in Wellfleet as their two young children lay sleeping in their beds.[9] [On his way] to the police station after his arrest, [Robbins] said to Sheriff Cummings, who at that time was a state policeman, "If we had the death penalty, I wouldn't have killed her, because I don't want to die." Now, maybe he didn't mean that, but what reason would he have to lie? And that dead lady in Wellfleet isn't theoretically dead, she's really dead. And I would suggest to you, if you apply your own life experience and your own common sense, you come to the same conclusion that I do, that at least sometimes the potential threat of your own execution would make you think twice before you killed another human being. That reason, and that reason alone, is enough, in my mind, to justify my support of the death penalty.

Now, it's true that in any endeavor engaged in by human beings, mistake is possible. But I extend to the Speaker, I am willing to work with him to try as best we can, as fallible human beings, to enact a statute that will minimize that potential. And . . . at least sometimes, the potential doesn't exist. Colin Ferguson—there's no chance that he wasn't the guy.[10] I mean, he was in a railroad car, he was caught red-handed in the midst of his crime. So there's no potential for executing the wrong person. And there are other examples where we know people for a fact are the

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[9] *See generally* Jordana Hart, *Hyannis Man Surrenders After Wife Killed*, BOSTON GLOBE, Dec. 6, 1993, at 21 (describing the Robbins murder).

[10] *See generally* John T. McQuiston, *Rail Gunman To Spend Life Behind Bars*, N.Y. TIMES, Mar. 23, 1995, at B1 (discussing Ferguson case).

guilty, are the perpetrators. So there's no excuse that we may execute the wrong person. Let's narrow that class of murderer, first-degree murderer that we know for a fact: the person who kills the convenience store clerk all the while being videotaped by a security camera; the person who shoots a policeman and is recorded doing it with the camera in the police cruiser. Let's execute those people. There's no chance that they're innocent.

Secondly, if you look at the State of Texas, the state that executes more people than any other state,[11] . . . the murder rate has dropped forty-four percent. . . . That's 1,178 fewer people murdered every single year. Now, can I attribute every one of those to the reinstated death penalty? No, I can't. Some of them are because the economy is doing better; some of them are probably because Texas is doing some things to minimize violent crime, education, whatever. But let's say it's ten percent. That's over 100 people a year. One hundred innocent people a year. . . . If it's one percent, that's over ten innocent lives a year that we're saving by the deterrent effect of the death penalty. . . .

In addition to the deterrent effect of the death penalty, which I firmly believe there is, here's the real reason why I support the death penalty. Here's the nub of the issue. Here's the truth of the matter. The people who would choke to death a ten-year-old child in the back seat of a car and have sex with his dead body—there is no punishment short of death that is just. Locking them away, even if we could believe that they would never get out, that they would never find God, that they would never teach a reading class to their fellow inmates, even if we could believe that, getting up every day and seeing the sunshine, reading the *Globe*, having a cup of coffee, Jeff Curley isn't doing any of those things, and neither probably are Jeff Curley's parents.[12] Even in prison, you'll make friends and interact with others. On weekends, your family can come and visit. You can read poetry, literature. You can listen to music. You can watch films. Jeff Curley can't do any of those things. The only punishment that is just for that crime is death. That's a fundamental belief that I have. If you don't share it, and you think that taking someone's

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[11] *See* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1997 (1998).

[12] Ten-year-old Jeffrey Curley was murdered in 1997, touching off a renewed push to reinstate the death penalty in Massachusetts. *See* Doris Sue Wong & Adrian Walker, *Vote is 81-79: Bill Differs From Senate's*, BOSTON GLOBE, Oct. 29, 1997, at A1. He was smothered with a gasoline-soaked rag, sexually molested, and dumped in a river. *See id.*

liberty away equates to a cold-blooded sexual murder of a ten-year-old boy or girl, or the bludgeoning to death, as happened in Representative Slattery's district, of a woman who happened to go into a convenience store and two guys saw her, were attracted to her, and proceeded to follow her to her car, grab her, and bludgeon her to death with a rock,[13] if you think life in prison is sufficient punishment for that crime, then you're against the death penalty. I don't.

Finally, I would say this, that depending on the poll, anywhere from sixty-nine percent to seventy-five percent of our people believe that we should have the death penalty in our state.[14] I am sent here by the people in my district to represent them. When they clearly express their wishes, it is my job to implement it if I can. It is not my job to thwart the will of the people. In fact, in Massachusetts, we have the right of initiative petition. Our people have adopted a change to our constitution to allow the death penalty.[15] They clearly want the death penalty. Yet we have probably the two men in Massachusetts (indicating Speaker Finneran and Representative Slattery) who prevented the death penalty from being enacted in 1997 right here with us today. . . .

So for those reasons, and those reasons alone, I believe that Massachusetts should and further will enact a death penalty in our state. Thank you.

REPRESENTATIVE SLATTERY: Thank you. First, let me say that I'm very proud to stand here before you and be one of the two men who stopped the death penalty from coming to Massachusetts. And I'm very happy to have done that; I think it would have been wrong for this Commonwealth. And it's wrong for this country. And the Speaker has been someone who stood for that—for the past twenty years, Mr. Speaker? And we have examined this issue in the State House on many occasions. And my good friend the Minority Leader, Franny Marini, he's a classmate of mine. So we came into the legislature together, and I know how he thinks. He's very, very passionate about the death

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[13] *See generally* Anne Driscoll, *She's Running For Suzanne*, BOSTON GLOBE, June 14, 1998, North Weekly Section, at 15 (discussing Suzanne Rosetti murder).

[14] *See, e.g.*, Scot Lehigh, *Cellucci Riding High, Poll Says*, BOSTON GLOBE, Nov. 2, 1997, at A1 (*Boston Globe*/WBZ-TV public opinion poll indicating 61% of voters supported the death penalty, while only 28% opposed).

[15] *See generally* JOHN J. CONTE, CAPITAL PUNISHMENT IN MASSACHUSETTS 14–15 (1987) (discussing constitutional amendment).

penalty. And that's his right. We don't spend our time up at the legislature trying to convince one another where we should be voting; we just try to inform one another of the real results, of the real impact, of the real consequences of a vote, and allow each one of us to make our own decisions.

Now, I happen to have followed the same route as the Speaker on the death penalty. I started out as a proponent of it and I have become an opponent of it. And I think that's the route you see for many of the legislators, because when you get elected the first time, you tend to vote on the death penalty not [from] a thoughtful place but as an emotional decision. And I don't say that because some people aren't thoughtful about it when they're proponents for the death penalty, but many of us get elected, and we're filled with the kind of rage that you saw the Minority Leader exhibit when he was up here, reliance on anecdotal stories, of particular instances that move us passionately and emotionally, and you want retribution. But when you boil it down to its smallest kernel, that's what the proponents of the death penalty have, and that's all they have, because all of the rational, reasonable arguments militate against the death penalty.

My good friend talked about deterrence. The death penalty does not deter. It's not even accepted as a legitimate argument across the country anymore that it's a deterrent. Governor Cellucci, who made the death penalty the centerpiece of his election effort,[16] who has made it a priority of his administration,[17] came before the Criminal Justice Committee[18] on which I serve, and I said, "Governor, prove to me that the death penalty is a deterrent. Cite me any statistics, any numbers, that support your position that it's a deterrent. Because you say that's why we need it, it deters." He couldn't cite a single figure. All he could say was, "Well, I know that the person who's executed will never kill again." Well, we also know if he's put in prison for life imprisonment without parole, he'll never be loose and never kill again. And the Governor's response is, "Yeah, but somebody can commute that sentence and that killer can get out." Well, you know, that is really a facetious argument, because you can commute a

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[16] *See generally* Frank Phillips & Scot Lehigh, *Malone, Cellucci Spar over Leadership Style*, BOSTON GLOBE, Feb. 6, 1998, at C13.

[17] *See generally* Frank Phillips & Scot Lehigh, *Cellucci Begins New Effort to Enact Death-Penalty Bill*, BOSTON GLOBE, Feb. 17, 1999, at B2.

[18] *See generally* Brian MacQuarrie, *Deep Disputes Drive Death Penalty Hearing*, BOSTON GLOBE, Mar. 23, 1999, at A1 (describing hearing on death penalty bill).

death sentence and that person can get out. So commutation is not the issue. The issue is, does it deter. And all the evidence shows that it doesn't. . . .

My good friend cites Texas. I have no idea why he would do that. [Last year] Texas execute[d] more people than the rest of the country combined,[19] yet it has one of the highest violent crime rates and one of the highest murder rates in the country.[20] In Massachusetts, we don't have the death penalty; we have the lowest murder rate for an urban state in the country and one of the lowest murder rates in the country for any kind of state.[21] Over the past six years we have reduced violent crime dramatically,[22] and we've done it without the death penalty. And we've done it because of thoughtful and effective criminal justice policies that have emanated from the Speaker, from the House, from the Senate, and yes, even from the Governor. Working together, we've made Massachusetts safe.

You have to ask yourself, in Texas, where their death penalty is in effect and they have many more murders per capita than we do here in the Commonwealth of Massachusetts,[23] are the residents of Texas safer than the residents of Massachusetts? Louisiana and Florida, two other states, much higher murder rate, much higher violent crime rate than Massachusetts,[24] have the death penalty[25] . . . . Ask yourself, if it's a deterrent, why are the residents of Massachusetts safer than the residents of Florida and Louisiana?

It's simply not a deterrent. It's not even a legitimate point to make. There's no support for it. In fact, most of the proponents of the death penalty won't even talk about that anymore; it's resolved down to what the death penalty is all about. It's resolved down to, we want justice. And my good friend talked about that. And he described a particular brutal slaying that occurred that we're all familiar with, the Curley case.[26] And he says, in that particular instance, death is the only possible justice. And there

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[19] *See* SNELL, *supra* note 11.

[20] *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1997 (1998).

[21] *See id.*

[22] *Compare id.* with FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991 (1992).

[23] *See* FEDERAL BUREAU OF INVESTIGATION, *supra* note 20, at 515.

[24] *See id.*

[25] *See* SNELL, *supra* note 11, at 515.

[26] *See supra* note 12 (discussing Curley case).

are probably many in the room who agree with that. The problem is, when your arguments are based on particular anecdotes or particular cases, the problem is, you need to enact a death penalty legislation that is general in context.

The Governor's bill this year [has] sixteen categories.[27] The Committee for Public Counsel Services took a survey in 1998, how many murder cases in 1998 assigned to the Committee for Public Counsel Services would the Governor's bill have applied to? Now, you all heard him. He stood up and he said, "My bill applies only to those most horrific cases. It won't apply in general, just to those cases that really cry out for the death penalty." Well, the CPCS survey tells us that his bill applied to seventy-eight percent of the murders committed in the Commonwealth of Massachusetts, not to those most horrific crimes, not to that anecdotal crime that tugs at the heartstrings and calls for justice. It applied to almost every murder committed in the Commonwealth of Massachusetts. It was not limited in scope. It was very broad. So you have to ask yourself, why would we pass a death penalty bill that's so very broad, if it has no deterrent effect, and if you're not going to get justice for the very few that we think did it? Because we can never know that they did it. Videotapes can be fixed. DNA is not dispositive. Evidence and eye witnesses have recanted their testimony. You've read the cases, I'm sure . . . .

We just had a recent case out in Norfolk County, [Edmund] Burke.[28] Said they had the dental plates. They have them; he's the guy; he killed the woman. We had a prosecutor's race with the district attorney going on, very political, not that politics enter into it, I guess, but very political. The D.A. who was in office at that time, he wanted to continue to try [Edmund] Burke, even though DNA evidence showed that he couldn't have been the killer. But they had other evidence, they said.

Now, how would you have been sure in that case? How would you have known whether he did it or not, if DNA evidence proved he wasn't the person who did it, but dental impressions seemed to indicate that he was the person who did it? I think what it exemplifies for us is that you can never be sure. And we cannot draft legislation which will ensure that we will be sure.

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[27] *See* H.B. 3963, 181st Gen. Ct., 1999 Reg. Sess. (Mass. 1999).

[28] *See generally* Cindy Rodriguez, *DNA May Make, Break Walpole Murder Case*, BOSTON GLOBE, Jan. 9, 1999, at B1 (dicussing Burke case).

It's an impossibility. When you get to anecdotal, you'll say, "Well, what if it was your daughter or your son that was killed?" I can't tell you how many times I've heard that question over the past two years. And would I be enraged and want to kill the person? Yeah, I bet I would. I love my family, and anybody who touches them, I'd want to defend them, and if you hurt them badly enough, I'd want to kill you, I admit that. But, you know, when I think about that, I think about something that Mario Cuomo said, and I think it's very telling in the death penalty debate. He said, "Shouldn't government be something better than what we are at our worse moments?" We don't make business decisions when we're enraged. We don't make personal decisions when we're enraged. And governments shouldn't do that either.

Government has a responsibility and an obligation to have a deliberative, thoughtful process. And I do commend the Speaker for how he conducted himself two years ago during the death penalty debate. Very intense atmosphere, very intense. We had Mr. Curley up at the State House hollering for the death penalty. We had several other murder victims' families up there hollering for the death penalty.[29] It was driven in the media. And there was an intense pressure to bring it to the floor and an intense pressure to vote in favor of it. And yet the Speaker said, "We need to put it off because it should be a thoughtful and deliberative process."[30] And that's what government is all about. In the end, unfortunately, the vote was taken under those circumstances, with all of the emotions and the passions, but it did fail.[31] And it failed, in my opinion, for a very simple reason; and that is, if you accept the death penalty, you accept that innocent people will be killed. There's no two ways about it. And I personally am not willing to have that on my conscience, because it's a risk we don't have to take.

We have an appropriate punishment. Life imprisonment without parole; they never get out. And despite the fact that they get up in the morning and they get something to eat, I ask any of you who have ever been over to MCI Cedar Junction, or if you've been to any of the correctional facilities in the Commonwealth of Mas-

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[29] *See generally* Scot Lehigh, *As Members Debated Other's Worked Halls*, BOSTON GLOBE, Oct. 29, 1997, at A23.

[30] *See, e.g.*, Doris Sue Wong, *House to Vote on Death Penalty; Finneran Relents on Postponement*, BOSTON GLOBE, Oct. 23, 1997, at A1.

[31] *See* Walker & Wong, *supra* note 4, at A1.

sachusetts, if you'd like to spend the day there. I've been there. It's terrible. You don't want to be there. And if you spend your whole life in there, and you know you're never going to get out, then it's a sense of hopelessness, I think, that is an appropriate punishment. You're forced to reflect on the deed that you did that put you there for the rest of your life, and the only way you're coming out of that prison is in a wooden box.

Another representative in the House, Paul Caron from Springfield, the first time I ever heard the phrase, he refers to life imprisonment without parole as "death by incarceration," and it's true. In Massachusetts, over the past I think twenty years, we've had forty-seven first-degree convicted murderers die in prison. They weren't commuted; they never got out; their lives were wasted; they had to face that everyday; and they died in prison. That is an appropriate punishment. And it's appropriate because we don't want to execute innocent people. We don't need to take that risk.

I sat with Rolando Cruz and Freddie Pitts. Freddie Pitts is a gentleman from Florida.[32] Rolando Cruz is a gentleman from Illinois. Both were on death row; both were wrongly convicted. Freddie Pitts within months from being executed was released .... In fact, [Illinois' death penalty statute] is very close to the death penalty bill filed by the Governor this year. It had all the same procedural protections—double sentencing phase, two attorneys for each phase, court-funded fees for experts, all of the same protections. Rolando Cruz was convicted of a first-degree murder in a very sensational, highly publicized case that calls out for a defendant: very poor part of town, Latino-American charged with killing a young, rich white woman. Police swept through the Latino area and arrested Rolando Cruz because he fit the description. [Ten] years had him on death row. And what do we find out? Overzealous police investigation. Overzealous prosecution. Failure to provide exculpatory evidence to the defense as required. Some discussion that the judge knew about this and took no action. And now we have indictments. Not only is Rolando Cruz free, but we have indictments against the investigating officers [and] the prosecutor[s] in that case ....[33] And

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[32] *See generally* Mike Williams, *Florida Moves To Make Peace With Falsely Convicted Men; Payments of $500,000 Approved By Lawmakers for Two Who Spent 12 Years on Death Row*, ATLANTA J.-CONST., May 1, 1998, at 11C (discussing Pitts case).

[33] *See generally* Richard Willing, *Ill. Prosecutors Accused of Framing Innocent Man*, USA TODAY, Mar. 24, 1999, at 9A (discussing Cruz case).

no amount of procedural protections would have spared Rolando Cruz, because no amount of procedural protections can cover for human error. On this particular issue I've come to believe very deeply that human error happens all the time in our judicial system, and we will execute innocent people.

Now, when we talk anecdotally, as my good friend the Minority Leader has, it moves us. We say, "If that was my son or my brother, I'd want the person executed." But I'll just leave you with this. That statement was made to Freddie Pitts in my presence. And they said, "Well, we know you were on death row, and we know you were released, and we know it wasn't because of a flaw in the process but because somebody confessed. What would you want if somebody killed your son, your baby boy? Wouldn't you want the death penalty?" And he said, "That's not the question. The question is, what would you want if it was your son who was innocent and was about to be executed for killing my baby boy?" Very difficult question to answer, isn't it? That's why we don't need the death penalty in Massachusetts. Thank you.

MR. SLAVITT: Good afternoon, everybody. Unlike the previous three speakers, I'm not a representative of anybody. I don't even represent my wife's views who's diametrically opposed to me on this. Now, [the *Harvard Journal on Legislation*] asked us . . . to focus on Governor Cellucci's bill, but in many ways I can't do that, because I don't think that's the way to approach this problem. At heart, this is a moral problem, not a technical problem. And that means I'm not going to be talking about many of the technical issues that often come up in death penalty debates.

For example, I won't be talking about the mode of execution and whether any particular mode is or is not the right way to do it. Although I'm hesitant, I will set aside the issue of disparate impact, because I think disparate impact is not inherent in the death penalty and is something that can be set aside, and that most of the people who are opposing the death penalty would oppose it even if we were debating this in the context of North Dakota or Iceland where there was no meaningful disparate impact issue. I also set aside the constitutional issues, because, in my view, those have been largely satisfied. There is a general feeling or at least a large enough number of people who believe the death penalty is appropriate, so it cannot be a priori ruled

cruel and unusual. I also think that the United States Supreme Court has made clear that the federal Constitution permits it, and as you have heard, the state Constitution permits it as well. Finally, I would set aside, without taking a position on it one way or the other, the issue of deterrence, because I think that deterrence is in and of itself not enough to be for the death penalty . . . .

Ultimately, the problem is one of a moral dimension, which makes it very difficult to debate, because it is hard to debate fundamental issues of moral dispute. At some core level, these are the issues that you either believe in or you don't believe in. So my purpose to some extent this afternoon is to, in my view, clarify the dimension of this dispute.

First of all, as I understand, in many ways the principal argument against the death penalty—and this is something of a straw man, but let me say it anyway—there's an absolute prohibition in these opponents' minds against society intentionally and knowingly taking the life of another. Now, in my view, that does not hold water. Society commonly takes the life of another when it believes it's justified, not just in war, as we are currently going through now, where we are not only killing actual armed opponents but we know there are bombings, we'll be killing innocent people who have nothing to do one way or another with what is going on, but whenever we build a bridge, we know that statistically approximately two construction workers are going to die just so society can get across the Charles River a little bit more easily.

. . . [S]ociety kills people when it is justified. And that to deny that is to deny one of the real dimensions of what society does and what historically society has always done. The idea that it is different to kill somebody from a plane because you don't know who they are and it's less intentional somehow, to me that makes the killing less justifiable than war. At least with the death penalty, society has a particular reason to single somebody out. Ultimately, therefore, in my view, the argument society has no right to take life does not succeed. Society has the right to take life; the question is, when.

Similarly, the other issue which has been raised by two of the previous speakers, the issue of mistake, this is not really a technical issue, it is a moral issue, because I agree with the proposition that no system can be designed that will avoid any possi-

bilities of mistake . . . . So to say that there are going to be mistakes is really to say, this is an absolute no, we will never be able to have a system that is satisfactory. I would also hazard that in many ways for many—and I say nothing in particular about the two prior speakers—but for many people, mistake is really a stalking-horse. That if you put to them the proposition, let us assume omniscience, a perfect system, or let us assume a confession, confirmed by DNA where there is no doubt, many opponents of the death penalty would still say, "Nonetheless, I still say society should not act." But for those who really rest their opposition on mistake, the question ultimately becomes, is the mere possibility of mistake—no, is the mere certainty that at some point somewhere an innocent person will be executed—enough to justify saying, society may never act in this dimension for any reason? And that is the ultimate core issue.

I would frame the issue in some sense in a provocative way: To me, when you look at the value of life, you must value not only the life of the person at issue, as the perpetrator of the crime, but society must make clear its value of the life of the victim. And that it has not only the right, but I would even assert the obligation, in certain circumstances, to say to somebody who has committed a crime of particular offense, "You must die." The only way we as a society can value the life of the victim, the only way that we as a society can demonstrate our commitment to the civilized values, the values that make this a civilization rather than simply a whole bunch of people hanging out together, is to say, "You cannot live under the same sky that we live under."

The Speaker mentioned people going into prison where they will never see the light of day. But of course that's not true. Every day they will wake up, and they will look out the window, and they will see the light. There will be a prison, but they will see the light of day. And I would assert to you that that is not enough. That at the moral level, that is not enough. In fact, let me frame it a little bit more provocatively, since I can't get voted out of office. Ultimately, in some ways on the death penalty debate, society has lost its concept of evil. We perceive crimes as errors, errors of judgment, errors of emotion, but we have lost the fundamental concept that there is good and evil, and that society has an obligation to fight evil, to fight it extremely, to fight it strenuously, to say, "This was a crime that contained evil in it,

and we must reach for the death penalty in order to demonstrate our commitment to the values opposite, to the value, if you will, of good." I think it is important for opponents of the death penalty to recognize, as I'm sure they do, that the decision not to act, the decision to exclude categorically the death penalty, is a decision that has its own moral component, its own withholding of the ability to make judgments. And judgments are, after all, what we as civilized, rational people are asked and required to make every day.

Representative Slattery said, "All of the proponents of the death penalty have left are anecdotal stories. They're about specific crimes." I say to you that it is the specific crime. It is the specific victim. It is the individual who cries out for justice. It is the individual for whom society owes this obligation, this responsibility to protect the value that we place on their life. And it is this individual crime that gives society not only the right to act but the obligation to act. Representative Slattery says that is all that I have. In my view, that is enough. And it is more than enough. So at the end of the day, when you consider the death penalty, and you consider these arguments, recognize that underneath all the mechanical arguments of this bill or that bill, there is a glacier, or even a subcontinent—whatever the analogy is—conflict between how morally society can act and how society has obligations to act, even though it is difficult, even though it is distasteful, because the core value of society, the point of society, is to say to the world, and to history, and to each other, "We hold certain things to be apparent."

And I assert to you, even though the victim is now dead and can no longer speak and can no longer be protected, society has an obligation still to protect that life, the value of that life, and demonstrate its commitment to life by saying to some people, "You may no longer live."

MS. LAMBERT: "Legislative counsel" means lobbyist. I've been a lawyer in death cases; now I function for the ACLU as a lobbyist, and the lobbyist's brief is information. It's not filed with the court, but it's information. And rather than discuss philosophy . . . , I'd like to talk with you about the information that I think people listened to this year, because they had an opportunity to listen to it when this issue was taken up in the legislature outside of the

very difficult circumstances that were presented in October and November of 1997.

This is maybe a perverse way of looking at the situation in Massachusetts. But I see the Commonwealth of Massachusetts as the happy, but perverse beneficiary of the experiments with the death penalty in thirty-eight other states. We've seen what the system looks like when it's up and running in thirty-eight other states. We've had an opportunity to look at the data, and I think that it was the examination of what the real death penalty looks like that led so many people in Massachusetts to understand that it's not something that we want in the Commonwealth.

I understand attorney Slavitt's presentation of a system that he sees as just and as the only way of responding to a murder, that society, if it values life, has to take the life of the person who took life. That's a discussion that is taking place up here (indicating), and it's an interesting discussion. I participate in those discussions. But what we're talking about with legislation and with lawyering is dealing with a system that actually operates on the ground, in the real world; do we want to begin to construct a death penalty system in Massachusetts? And I think it is what it looks like as a system in thirty-eight states that led people to understand, believe, and believe fervently, that that's an enterprise that we don't want to engage in in Massachusetts.

Evan put aside disparate impact. He's right. I plead guilty to saying that—to believing that—I'm opposed to the death penalty, even if that argument, that reality, I would say, washed out. But look at the thirty-eight states. I mean, there's just no denying that the system is skewed against racial minorities[34] and the poor.[35] There's just no denying it. You can't quarrel with it.

Mistakes. You can't quarrel with the fact that it's been demonstrated that seventy-eight people have been exonerated and released from prison, although they had originally been sentenced to death and were on death row, because it's been discovered by volunteer journalism students, by investigative reporters, by hard-working lawyers who were volunteers, that they didn't do it.[36] They just didn't do it.

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[34] *See, e.g.*, Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

[35] *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Penalty not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

[36] *See generally* SOUTHERN CENTER FOR HUMAN RIGHTS, CAPITAL PUNISHMENT ON

And there's nothing technical that we can import into the system or write into the law that's going to wash away that problem. DNA testing only affected, as I understand it, about sixteen of those seventy-eight cases. We've got these mistakes. We've executed what, 503 people in the United States since 1976? Well, you know, seventy-eight people have been released, although they were originally sentenced to death. What's the error rate in that? You know, do the math. Would you fly on an airline that had a one-in-seven failure rate? This is what the system really looks like when it operates.

And we've been the beneficiaries of that in Massachusetts. I thank people like the Speaker, like Representative Slattery, who have looked at that, who have given thoughtful attention to whether or not we should invest the Commonwealth's money, intellectual energies, drafting energies, criminal justice resources, into building a system to implement the death penalty. They've arrived at an answer that I think is the right one, and that answer is no.

MR. RUBENSTEIN: Good afternoon. My name is Josh Rubenstein, I'm the Northeast regional director of Amnesty International. You may ask, why does an organization devoted to freeing prisoners of conscience and working against torture, working for fair trials for political prisoners, oppose the death penalty? After all, so much of the argument in favor of the death penalty rests on our identification with the victims and the families of those victims. And if there's any organization in the world that is devoted to working for the victims of arbitrary arrest, of torture by governments and non-state actors, of ethnic cleansing, it's Amnesty International. And yet we are firmly convinced that the death penalty is wrong and should be abolished universally.

First and foremost, we regard it simply as a form of torture. And just as we do not permit torture by any state, we do not justify it under any conditions, we should not justify the death penalty. Now, you may wonder, how can that be torture? Well, we all recognize that in Pinochet's Chile, when an opponent of the

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THE 25TH ANNIVERSARY OF *FURMAN V. GEORGIA* 23 (1997); RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE DEATH PENALTY: THE INCREASING DANGER OF EXECUTING THE INNOCENT (1997), *available at* <www.essential.org/dpic/inn.html>; DIETER, DEATH PENALTY INFORMATION CENTER, RECENT CASES OF INNOCENCE AND POSSIBLE INNOCENCE UPDATES THROUGH APRIL 16, 1999 (1999), *available at* <www.essentail.org/dpic/dpicrecinnoc.html>.

government would be kept in detention and in the middle of the night taken to a small room and strapped to a table and in the presence of doctors subjected to electric shock, in order to give them pain but not to kill them, we understand that's a form of torture. But if in the State of Georgia, in the middle of the night, a prisoner is taken to a small room and strapped to a chair and in the presence of doctors subjected to electric shock in order to kill him, isn't that torture?

Now, you may accept that argument or you may choose not to accept that argument, but for us, that is an issue of principle that governs our position on this issue. But having said that, we cannot help but insist that those of you who are in favor of the death penalty look it in the eye, and see how it actually works, not only here in the United States but internationally as well. Why is it that we believe that eighty-four percent of all judicial executions in the world today are carried out in China, Iran, Saudi Arabia, and the United States of America?[37] I challenge you to name five democratic countries that have the death penalty. What is the connection between restoring democracy in different countries and abolishing the death penalty?

In Portugal in 1976 after the fall of the Salazar dictatorship.[38] In Spain in 1978 after the demise of Franco.[39] In Nicaragua in 1979 after the overthrow of the Somoza dictatorship.[40] In 1987 in Haiti after the Duvaliers were kicked out.[41] In Romania in 1989 after the execution of Ceausescu and the fall of that communist government.[42] In 1990 in the Czech Republic,[43] in Hungary,[44] and also in Namibia after it gained its independence.[45] In 1992 in Paraguay after Stroessner was throw out.[46] In South Africa in 1995 when the apartheid system was finally put to rest.[47]

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[37] *See* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 1997 (1998), *available at* <www.amnesty.org/ailib/aipub/1998/ACT/A5100198.htm.>

[38] *See* AMNESTY INTERNATIONAL, THE DEATH PENALTY LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES (1999), *available at* <www.amnesty.org/ailib/aipub/1999/ACT/A5000199.htm.>

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See id.*

Let me point out in this context that Hong Kong abolished the death penalty in 1993, and after Hong Kong was returned to Chinese rule in 1996, it was made clear that keeping abolition of the death penalty was part of maintaining Hong Kong as a distinct democratic system within the framework of the People's Republic of China.[48] What was it that those societies understood about the death penalty? They understood that it was part of the repressive machinery of those states. And that when democracy was established or restored, the death penalty had to be abolished. Can we really say that similar history should be ignored here in the United States?

I understand Massachusetts is not Alabama, where Walter McMillian was arrested and put on death row for five months before he was brought to trial. He was convicted, sentenced to death, and after another five or six years on death row, he was released because he was innocent.[49] You can find it on the front page of the *New York Times*,[50] and you can look it up.

I understand Massachusetts is not Florida, where there was the case which was referred to earlier of Freddie Pitts and Willie Lee.[51] They were the only two gentlemen ever adopted by Amnesty International who were on death row in the United States. We adopted them as prisoners of conscience. Why? They confessed at their trial. They confessed the murder at their trial in the mid-'60s. Why? Because the police beat them up so badly and convinced them that the only way they could save their lives was to plead guilty. And they were convicted at a second trial where they at that point professed their innocence. And then later it turned out in fact they were innocent and they were released.

I understand Massachusetts isn't California, where Mr. O.J. Simpson was accused of killing two people and the prosecution did not even seek the death penalty. Why? Obviously, we all know why. He was wealthy; he was well known. They knew they would have a hard enough time gaining a conviction, so they did not even seek an execution. If he had been convicted, he would not have been executed.

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[48] *See id.*

[49] *See* Colman McCarthy, *Narrow Escape from the Electric Chair*, TAMPA TRIB., Oct. 29, 1995, at 4 (discussing McMillian case).

[50] *See* Peter Applebome, *Alabama Releases Man Held on Death Row*, N.Y. TIMES, Mar. 3, 1993, at A1.

[51] *See* text accompanying notes 32–33.

But look at the Susan Smith case in South Carolina. We all remember that she drowned her two children and then claimed that a young black man had hijacked her car.[52] But let's just think for a moment. What if the story she concocted were true? What if in fact her car had been hijacked by a young black man, who inadvertently took the children and then in a panic, realizing he hadn't just stolen a car but he had kidnapped these two kids, in a panic he threw the car into the pond, he drove the car into the pond, killing the children. And then he had been arrested. Do you think he would have gotten thirty years in jail?

And now ask yourself: What was the worse crime, the crime she committed or the crime she concocted? In my mind, and I'm a parent, the crime she committed was a far more severe crime than the crime she concocted. And the people of South Carolina decided they did not want to execute her.[53]

If you have the death penalty, in Massachusetts or any other jurisdiction in this country, you will only execute people who do not have good lawyers. You will, by and large, only execute people who kill white people. Blacks who kill white people primarily, and whites who kill white people, but those who kill black people face a very slim chance of ever being executed. There are some states in some jurisdictions that have never carried out an execution of a white person for the murder of a black person. There are jurisdictions where whites have been executed for killing a black person, but the crime was not the crime of murder, the crime was for destruction of property. The black individual was a slave, and killing a slave was the destruction of property, and that took place in Mississippi, but it was not the crime of murder. Everybody here understands that that's how the system has worked and will continue to work.

Finally, much reference has been made to the issue of innocence. When our friends from the legislature vote, they know that there is a mural in the legislature of Judge Samuel Sewall, who presided at the trial of the witches in seventeenth-century Massachusetts, and there is a portrait of Judge Sewall in the legislature asking for forgiveness from his colleagues because he had participated in those trials. He understood that he had participated in something that was wrong, and he asked his col-

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[52] *See generally* Rick Bragg, *Arguments Begin in Susan Smith Trial*, N.Y. TIMES, July 19, 1995, at A10 (discussing Smith case).

[53] *See id.*

leagues for forgiveness. One would hope that none of our present legislators would ever have to face a time when they would have to seek forgiveness from their colleagues for such a vote.

But let me remind you just a bit more about the history of our state, because there is more than just a legislative history. And there is more than just the executing of witches, men and women in seventeenth-century Massachusetts. This is also the state that executed Sacco and Vanzetti, a case that still resonates in our Commonwealth.[54] Oh, and by the way, . . . there was a person actually sentenced to death in the 1970s. His appropriate name was Lawyer Johnson. Mr. Johnson was convicted of murder and sentenced to death in the early 1970s. A year later when he gained the right to a new trial, on the day that trial began, the prosecutor walked in and asked for the case to be dismissed. Because in fact Mr. Johnson was innocent and they had no case against him.[55] That was the last person to be sentenced to death in Massachusetts.

I have to say, speaking for myself, there are people who commit crimes and deserve to be boiled in oil. There is no debate about that. But as much as I have a moral belief against the death penalty, in the end, I don't think that's what the issue is. The issue is, what prerogative do you give the state?

We know we give the state the right to levy taxes. Sometimes it's okay, sometimes not so okay, but that's a prerogative we give the state. We know we give the state the power to educate our children, and we know they do pretty well, not so well; it's an inconsistent record. That's what we expect. And in the winter we ask the state to clear our highways of snow, and sometimes they do well and sometimes not so well. I'm not making a trivial argument here, because the same government institutions and the same political leaders that we ask to carry out these other functions, if we had the death penalty, we would be asking them to carry out this function of investigation, of arrest, of prosecution, of conviction, and ultimately carrying out the sentence.

That's what this is about. And that's why this list of former dictatorships turned to democracy decided that this was a prerogative they did not want their governments to have anymore,

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[54] *See generally* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 369 (1993) (history of the Sacco and Vanzetti case).

[55] *See generally* Scott Lehigh & Frank Phillips, *Views of Cellucci, Professor Characterize Death Penalty Issue*, BOSTON GLOBE, Mar. 22, 1999, at B4 (discussing Johnson case).

period. And I suggest to you that we have enough history in this country and in this state to realize that we should not take their promise that if we give them the right to carry out executions again, that this time they'll get it right. Thank you.

RECENT LEGISLATION

ANTITRUST AND BASEBALL

Taking advantage of the excitement of Major League Baseball's thrilling and historic 1998 season,[1] Congress, after attempting to enact similar legislation in its prior two sessions, passed the Curt Flood Act of 1998,[2] which partially repeals baseball's long-standing exemption from federal antitrust laws. With memories of the disastrous 1994 baseball strike still fresh,[3] members portrayed the Act as a way to prevent future labor unrest and protect baseball fans.[4] Despite the symbolic value of the Act, however, it will fail to fulfill such lofty rhetoric because of its narrow construction and current legal principles at the intersection of antitrust and labor law.

The Curt Flood Act repeals Major League Baseball's exemption from federal antitrust laws as they affect labor relations between owners and players.[5] Specifically, the Act amends the Clayton Act[6] by subjecting any business practices "directly re-

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[1] *See* Shira Springer, *It Was a Blast: McGwire, Sosa Made Deep Impression in Powerful Year*, BOSTON GLOBE, Dec. 26, 1998, at F1 (recounting baseball records broken during the season and Mark McGwire and Sammy Sosa's pursuit of the home run record).

[2] 15 U.S.C.A. § 27a (West Supp. 1999).

[3] On August 12, 1994, major league baseball players went on strike, resulting in the cancellation of 249 regular season games and, for the first time in 90 years, the playoffs and World Series. *See, e.g.*, Peter Schmuck, *Strike Three! Baseball Calls Off the Season*, BALT. SUN, Sept. 15, 1994, at 1A. For an overview of the issues underlying the strike, see ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 175–200 (1998). Play resumed only after Judge Sonia Sotomayor issued an injunction that led to the resumption of negotiations between owners and players. *See* Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246 (S.D.N.Y. 1995); *see also infra* notes 72, 77, 81 and accompanying text.

[4] *See, e.g.*, 143 CONG. REC. S420 (daily ed. Jan. 21, 1997) (statement of Sen. Daniel Patrick Moynihan (D-N.Y.)) ("[The Act] should help to prevent future strikes . . ."); 144 CONG. REC. H9944 (daily ed. Oct. 7, 1998) (statement of Rep. Jim Bunning (R-Ky.)) (noting the Act's importance for baseball fans).

[5] Subjecting this aspect of baseball to antitrust laws will not automatically result in liability for violations. Under "rule of reason" analysis, courts balance the competitive benefits against the restraints on trade of the conduct of professional sports enterprises. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (interpreting the Sherman Act to prohibit only "unreasonable" restraints of trade); Broadcast Music Indus. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979) (holding that the practical realities of any industry are critical to determining what restraints are reasonable); *see also* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (finding restrictions on televising college football games unreasonable).

[6] 15 U.S.C. §§ 12–27 (1994). The Clayton Act itself amends the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1994). Enacted in 1890, the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of

lating to or affecting employment of major league baseball players . . . to the antitrust laws to the same extent such . . . practices . . . would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce."[7]

The Act circumscribes its application by enumerating certain practices that fail to affect employment within the meaning of the statute, such as labor issues concerning umpires[8] and minor league players,[9] the relationship between the major and minor leagues,[10] and broadcasting rights.[11] Significantly, Congress retained the antitrust exemption for two of baseball's most contentious internal management issues: franchise ownership matters (including expansion and relocation decisions) and relations between owners and baseball's commissioner.[12] In light of these continuing exemptions from antitrust law, understanding the limited reach of the Curt Flood Act requires an examination of the nature and scope of baseball's antitrust exemption, the rights that antitrust laws confer on other professional athletes, and the legislative history of the Act.

Baseball's exemption from the antitrust laws originated in 1922, when the Supreme Court decided *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[13] In 1914, after playing one season as a minor league, the

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trade or commerce," and authorizes the federal government to restrain violations. *See* 15 U.S.C. §§ 1, 4. With passage of the Clayton Act in 1914, Congress created a cause of action for private parties to enforce the antitrust laws and recover treble damages. *See* 15 U.S.C. § 15(a) (1994).

[7] 15 U.S.C.A. § 27a(a).

[8] *See* 15 U.S.C.A. §27a(b)(5). The language of this section actually extends to all individuals other than major league players employed in the business of baseball, such as vendors and front office management.

[9] *See* 15 U.S.C.A. §27a(b)(1). Thus, the Act does not affect the amateur or first-year player draft.

[10] *See* 15 U.S.C.A. §27a(b)(2). The Act's effects on the minor leagues proved among the thorniest issues for Congress to resolve. Accordingly, the Act takes great pain to maintain the minor leagues' antitrust exemption. *See infra* notes 83 and 86 and accompanying text.

[11] *See* 15 U.S.C.A. §27a(b)(4). Specifically, the Act preserves the antitrust exemption for broadcasting agreements protected by the Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–1295 (1994). For a description of the relationship between the Sports Broadcasting Act, the business of baseball, and the game's antitrust exemption, see ANDREW ZIMBALIST, BASEBALL AND BILLIONS 151–52 (1992).

[12] *See* 15 U.S.C.A. § 27a(b)(3). This section also expressly exempts licensing of intellectual property rights and marketing from the Act.

[13] 259 U.S. 200 (1922). Eight years earlier, a New York trial court forecast creation of the exemption. *See* American League Baseball Club of Chicago v. Chase, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914) (concluding that the business of baseball was not engaged in interstate commerce and, therefore, not subject to federal antitrust laws).

Federal League sought to compete directly with the major leagues. Recognizing the upstart competitor as a direct threat to control of the player labor market, the major leagues retaliated with an aggressive litigation strategy against defecting players[14] and a set of inducements to keep players.[15] By 1915, the rival owners had reached a settlement resolving the feud.[16] Ned Hanlon, owner of the Federal League Baltimore Terrapins, filed an antitrust suit rather than accept the deal, which essentially bought out Federal League owners.[17] After Hanlon obtained $80,000, trebled to $240,000, in damages at trial, the court of appeals reversed on the ground that a game of baseball is not itself commerce and its effects on interstate commerce are merely incidental.[18] Similarly, the court rejected the claim that the "reserve clause"[19] in major league players' contracts illegally interfered with interstate commerce on the ground that the contract restrictions did not directly affect the Federal League's interstate operations.[20] Writing for a unanimous court, Justice Holmes affirmed the reasoning of the appellate court and concluded that baseball exhibitions are "purely state affairs."[21] In its

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[14] Major league owners sought injunctions and damages against 81 players who left for the Federal League. *See, e.g.*, ABRAMS, *supra* note 3, at 54–55.

[15] For example, owners agreed to recognize the players' union, pay for uniforms, paint outfield fences green so batters could see the ball better and avoid injury, and raise salaries. *See* GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 122 (1994).

[16] Negotiations occurred when, in response to an antitrust suit brought by the Federal League, the trial judge, reputed trustbuster Kenesaw Mountain Landis, announced that he viewed the attack against baseball as "a blow to a national institution." *Id.* at 123. When baseball changed its governance structure by establishing the Office of the Commissioner of Baseball in 1921, the owners appointed Judge Landis the first commissioner. *See, e.g.*, ABRAMS, *supra* note 3, at 55, 94–95. Landis's appointment came in response to the infamous 1919 Black Sox scandal, in which the Chicago White Sox conspired with gamblers to throw the World Series. *See, e.g.*, WARD & BURNS, *supra* note 15, at 133–45.

[17] *See, e.g.*, ABRAMS, *supra* note 3, at 56.

[18] *See* National League of Prof'l Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681, 682, 684–85 (D.C. Cir. 1920).

[19] The contracts of every major and minor league baseball player provided that the player would play only for his club and enter a contract with the same club "for the succeeding season at a salary to be determined by the parties to such contract." *Id.* at 687. Thus, the contract "reserved" the services of the player to the club in perpetuity and required other organizations to respect and enforce its terms. For a discussion of the economic effects of the reserve clause and the owners' justifications for it, see, for example, ABRAMS, *supra* note 3, at 45–48, 50–53.

[20] *See Federal Baseball*, 269 F. at 686–88.

[21] Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922). For an assessment that this reasoning fit the jurisprudential context of its day, see, for example, ABRAMS, *supra* note 3, at 58–60. *But see* Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271, 274 (1923) (Holmes, J.) (holding that federal courts have jurisdiction over claims involving the interstate transportation

opinion, the Supreme Court made no mention of the reserve clause.[22]

In 1953 the Supreme Court revisited baseball's antitrust exemption in *Toolson v. New York Yankees, Inc.*,[23] and charged Congress with ultimate responsibility for baseball's legal status. After the Yankees reassigned minor leaguer George Toolson to another club, Toolson filed suit challenging the reserve clause under antitrust law. In a terse per curiam opinion, the Supreme Court reaffirmed the authority of *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws"[24] and noted that "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws."[25]

The Supreme Court's most recent discussion of baseball's antitrust exemption, *Flood v. Kuhn*,[26] set in motion events culminating in passage of the Curt Flood Act. Following the 1969 season, the St. Louis Cardinals traded outfielder Curt Flood to the Philadelphia Phillies after he asked for a $30,000 raise.[27] Un-

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of vaudeville acts and distinguishing *Federal Baseball* on the ground that "what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently").

[22] At least one commentator has suggested that the Supreme Court's decision, reached in the wake of the Black Sox scandal, *see supra* note 16, resulted from its desire to see the game survive. *See* Eldon L. Ham, *Congress Takes a Swing at Baseball Monopoly*, CHI. DAILY L. BULL., Nov. 20, 1998, at 5; *see also* H.R. REP. NO. 103-871, at 3 (1994) ("Whether this action in 1922 was the Court's way of attempting to bolster the game in the wake of the 'Black Sox' scandal . . . is unknown.").

[23] 346 U.S. 356 (1953) (per curiam).

[24] *Id.* at 357. This aspect of the opinion dispelled any notion that *Federal Baseball* had implicitly been overruled. In *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), the court allowed an antitrust suit brought by players who had defected to the Mexican League against owners who blacklisted the players upon their return to proceed. Rather than risk losing their exemption, the owners settled and granted an amnesty. For an overview of the episode see WARD & BURNS, *supra* note 15, at 353–54.

[25] *Toolson*, 346 U.S. at 357. Believing that the antitrust laws fully applied to baseball, Justices Burton and Reed dissented in *Toolson*. They noted that the decision in *Federal Baseball* rested on the narrow finding that the major leagues then had not been engaged in interstate commerce, a finding belied by subsequent developments in the game. *See id.* at 360. Moreover, the dissent argued that developments in Commerce Clause jurisprudence following *Federal Baseball* and the broad construction of the Sherman Act counseled against continuing baseball's antitrust exemption. *See id.* at 360–65.

[26] 407 U.S. 258 (1972).

[27] A three-time all-star, Curt Flood played in St. Louis for 11 seasons and had become the team's co-captain in leading the Cardinals to a World Series championship in 1967 and a National League championship in 1968. He batted over .300 six times, ended his career with a .293 batting average and a .987 fielding percentage, won seven Gold Glove awards, and enjoyed a stretch of 226 consecutive games without an error. *See, e.g.*, 143 CONG. REC. S420 (daily ed. Jan. 21, 1997) (statement of Sen. Moynihan); ABRAMS, *supra* note 3, at 64–65; WARD & BURNS, *supra* note 15, at 409–10.

willing to abandon off-season business in St. Louis and play before Philadelphia's racially antagonistic crowds,[28] Flood petitioned Commissioner Bowie Kuhn to allow him to solicit offers from other teams.[29] Kuhn stood by the terms of the reserve clause—Flood could play for Philadelphia or not at all. Flood opted to sit out the 1970 season and challenge the reserve clause in court.[30]

After lower courts entered judgment against Flood on the authority of *Federal Baseball*,[31] the Supreme Court, in its most extensive treatment of the legal issues involved,[32] found that baseball was a business engaged in interstate commerce and that, with the game's "reserve system enjoying exemption from the federal antitrust laws, baseball is . . . an exception and an anomaly."[33] Nonetheless, citing the "positive inaction" of Congress,[34]

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[28] *See* ABRAMS, *supra* note 3, at 65 (describing fans in Philadelphia as "being hard on black players"); *see also* WARD & BURNS, *supra* note 15, at 411 (same).

[29] *See* WARD & BURNS, *supra* note 15, at 411 (reprinting the text of Flood's letter to Kuhn).

[30] In 1971, St. Louis and Philadelphia made a deal with the Washington Senators that enabled Flood to return to the game while he pursued his suit. The time off hurt Flood's skills, however, and after 13 games he retired. *See, e.g.*, 143 CONG. REC. S420 (daily ed. Jan. 21, 1997) (statement of Sen. Moynihan). Had Flood not prematurely ended his career he would have had a legitimate chance at induction into baseball's Hall of Fame. *See, e.g.*, Jerry Crasnick, *Around the Bases: Awareness Requires Work, Players Need to Recognize Game's Past*, DENV. POST, Apr. 6, 1997, at C15.

[31] The district court denied Flood's request for an injunction to allow him to become a free agent. *See* Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970). After trial, the court entered judgment for the defendants. *See* Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970). The Second Circuit felt "compelled to affirm," but acknowledged that *Federal Baseball* "was not one of Mr. Justice Holmes' happiest days." Flood v. Kuhn, 443 F.2d 264, 265–66 (2d Cir. 1971).

[32] Writing for a five-justice majority, Justice Blackmun reviewed at length the Court's baseball-related jurisprudence and congressional attempts to ratify or overturn baseball's antitrust exemption. As a prologue to the opinion, Justice Blackmun included his famous paean to baseball, a long tribute to the game surveying its history, reprinting a handful of well-known poems about the game, and listing 88 baseball legends. *See* Flood v. Kuhn, 407 U.S. 258, 260–64 (1972). Chief Justice Burger and Justice White refused to join this section of the opinion. *See id.* at 285–86.

[33] *Id.* at 282. This statement represents a concession that the Court was treating baseball differently than other sports. *See, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957) (distinguishing professional football from baseball and applying federal antitrust laws to the former); Harwood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (holding that professional basketball does not enjoy an exemption from federal antitrust laws). As a result of this anomalous treatment, "baseball is the only industry in the United States that claims an exemption from the antitrust laws without being subject to alternative regulatory supervision." S. REP. No. 104-231, at 2 (1996). *But see id.* at 25 (dissenting views of Sens. Hank Brown (R-Colo.) and Dianne Feinstein (D-Cal.)) (listing aspects of three other industries so exempted in whole or in part from the antitrust laws).

[34] *Flood*, 407 U.S. at 283. In part, the Court's decision rested on conceptions of its own institutional incapacity to fashion a remedy that operated only prospectively in application. *See id.*

the Court extolled the virtues of stare decisis and reaffirmed its reasoning in *Toolson* that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[35]

In the years since *Flood*, the judiciary has debated the scope of baseball's antitrust exemption and reached sharply conflicting results. Most courts have read the Supreme Court's baseball trilogy as exempting the entire business of baseball from federal antitrust laws.[36] Recently, however, several courts have limited the scope of the exemption to the reserve clause. This trend began in *Piazza v. Major League Baseball*,[37] a lawsuit arising out of the efforts of a group of investors to purchase the San Francisco Giants and relocate the franchise to Tampa Bay, Florida.[38] In circumscribing the scope of baseball's exemption, the *Piazza* court relied on language in *Flood* apparently limiting the decision to the reserve clause[39] and analyzed principles of stare decisis to limit *Flood* to its specific facts.[40]

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[35] *Id.* at 285. The Court noted that "[i]f there is any inconsistency or illogic" in adhering to its precedents, "it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." *Id.* at 284. Thus, even as the Court undermined the factual basis of Justice Holmes's opinion in *Federal Baseball*, it affirmed his famous aphorism:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from the blind imitation of the past.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[36] *See* Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978) ("[T]he Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from federal antitrust laws."); *see also* Portland Baseball Clubs, Inc. v. Kuhn, 491 F.2d 1101, 1103 (9th Cir. 1974) (per curiam) (upholding dismissal of an antitrust suit challenging an arbitration award compensating the Pacific Coast League for establishment of a major league team in its territory); Professional Baseball Schools and Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982) (per curiam) (upholding dismissal for lack of jurisdiction of a minor league team's antitrust suit).

[37] 831 F. Supp. 420 (E.D. Pa. 1993).

[38] When major league owners rejected the investors' $115 million offer and accepted a $100 million bid from an ownership group committed to keeping the Giants in San Francisco, the investors brought suit. *See id.* at 423–24.

[39] The court pointed to the Supreme Court's statement in *Flood* that "[f]or the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the antitrust laws," *Flood*, 407 U.S. at 259. *See also supra* note 33 and accompanying text.

[40] The court distinguished between "rule stare decisis," in which lower courts are bound by both the Supreme Court's selection of a legal standard and the result reached under that standard, and "result stare decisis," in which courts are limited only to following a result based on the facts of a case. Interpreting *Flood* as invalidating the rule of *Federal Baseball* and *Toolson*, the *Piazza* court concluded that only fact-specific results of the Supreme Court's baseball jurisprudence remained for it to follow. *See Piazza*, 831 F. Supp. at 437–38.

During a subsequent state antitrust investigation of the Giants' proposed sale, the Florida attorney general sought documents from the National League, which resisted on the ground that franchise ownership issues fall within the ambit of baseball's antitrust exemption. Noting that *Piazza* ran "against the great weight of federal cases regarding the scope of the exemption,"[41] the Florida Supreme Court nonetheless concluded that the exemption applied only to the reserve clause.[42] Similarly, a Minnesota state court limited the scope of the exemption in connection with the Minnesota attorney general's ongoing antitrust investigation of the Twins' threat to relocate to North Carolina unless the team could receive public financing to construct a new stadium.[43] Other courts, however, have rejected the reasoning of *Piazza* and its progeny, either preferring to side with the majority approach[44] or emphasizing language in *Flood* indicative of a broad exemption for the "business of baseball" more generally.[45]

In the context of this debate, passage of the Curt Flood Act necessarily entailed congressional ratification of an expansive interpretation of the scope of baseball's antitrust exemption. Despite the intentions of the Act's sponsors[46] and Congress's efforts to craft a narrow repeal of the exemption,[47] the language of the Act itself conflicts with *Piazza* by placing franchise ownership

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[41] Butterworth v. National League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1025 (Fla. 1994).

[42] *See id.* The *Butterworth* court's reasoning closely follows that of the *Piazza* court.

[43] *See* Minnesota Twins Partnership v. Minnesota, No. 62-CX-568 (Minn. Dist. Ct. Apr. 20, 1998). Earlier this year, the Minnesota Supreme Court heard arguments in the case. *See* Robert Whereatt, *High Court Hears Arguments on State's Baseball Inquiry*, STAR TRIB. (Minneapolis-St. Paul), Feb. 4, 1999, at 3B.

[44] *See* New Orleans Pelicans Baseball, Inc. v. National Ass'n of Prof'l Baseball Leagues, 1994 WL 631144, at *8–9 (E.D. La. 1994) (noting that the *Piazza* court's reasoning was "impressive," but refusing to ignore the weight of authority to the contrary).

[45] *See* McCoy v. Major League Baseball, 911 F. Supp. 454, 456–58 (W.D. Wash. 1995) (pointing to language in *Flood*, *see supra* note 35 and accompanying text, in dismissing an antitrust suit and refusing to limit the scope of the exemption in the face of congressional acquiescence).

[46] *See, e.g.*, 144 CONG. REC. H9945–46 (daily ed. Oct. 7, 1998) (colloquy between Sens. Paul Wellstone (D-Minn.), Orrin Hatch (R-Utah), and Patrick Leahy (D-Vt.)). During an exchange on the Senate floor, Sen. Wellstone sought to clarify the effect of the Act on Minnesota's antitrust investigation, *see supra* text accompanying note 43. In response, Sens. Hatch and Leahy, two sponsors of the Act, both indicated that it would have no impact on *Piazza* or its progeny. *See id.*

[47] The Act states that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those" directly relating to the employment of major league baseball players. 15 U.S.C.A. § 27a(b).

issues beyond the reach of federal antitrust laws.[48] Although the sponsors of the Act did not wish to affect the law outside the narrow ambit of major league labor relations, the plain language of the Act undermines that intent.[49]

Moreover, even if courts interpret the Act as placing ultimate authority in the judiciary for resolution of the scope of baseball's antitrust exemption outside the labor relations arena, passage of the Act itself belies *Piazza*'s claim that the exemption extends only to the reserve clause. Even after the demise of the reserve system in 1975,[50] the actors most directly affected did not view the game as subject to antitrust laws.[51] Thus, under the reasoning of *Piazza*, the entire Act would be surplusage. The Supreme Court has left baseball's status under the antitrust laws to Congress, and in codifying an antitrust exemption for franchise ownership issues Congress superseded *Piazza*.

Congress further diminished the Act's efficacy by failing to account for recent changes in principles at the confluence of antitrust and labor law that determine when professional athletes can pursue antitrust remedies. To some degree, the pro-competitive policies underlying antitrust law conflict with congressional sup-

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[48] *See supra* note 12 and accompanying text. Specifically, the Act "does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to . . . any conduct, acts, practices, or agreements . . . relating to or affecting franchise expansion, location or relocation, [or] franchise ownership issues." 15 U.S.C.A. § 27a(b)(3).

[49] *See* Reynolds Holding, *Do Baseball Bigwigs Deserve Special Treatment? Why, Exactly, Should Those Who Already Have It Easy Be Further Protected by a Monopoly?*, S.F. CHRON., Nov. 22, 1998, at 5Z1 (arguing that the Act arrests judicial reexamination of the scope of baseball's antitrust exemption).

[50] Following the 1975 season, pitchers Dave McNally of the Montreal Expos and Andy Messersmith of the Los Angeles Dodgers filed grievances with major league baseball's newly established arbitration board challenging the reserve clause in their contracts by claiming that owners could only renew contracts for one year, not indefinitely as had been the practice. McNally and Messersmith argued that since they had played out the club's option year they were now free agents. After arbitrator Peter Seitz sided with the players, the owners fired him and filed suit. When federal courts upheld his decision in *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976), the era of free agency replaced the moribund reserve clause. For an overview of the episode, see, for example, ABRAMS, *supra* note 3, at 115–19, 123–33; WARD & BURNS, *supra* note 15, at 434–35, 443–47. For an economic analysis of free agency in baseball, see, for example, ZIMBALIST, *supra* note 11, at 75–104.

[51] *See, e.g., Major League Baseball Antitrust Reform: Hearings on S. 53 Before the Senate Comm. on the Judiciary*, 105th Cong., at 10 (1997) [hereinafter *Hearings*] (prepared statement of Donald A. Fehr, Executive Director, Major League Baseball Players Association) (stating that owners regard players as having no rights under antitrust law and that players have sought the same rights accorded to other professional athletes under antitrust law).

port for collective bargaining.[52] Congress has reconciled this conflict by statutorily insulating certain union activity from antitrust challenges.[53] Likewise, courts recognize a nonstatutory labor exemption from antitrust laws for certain agreements and coordinated actions taken in the context of a collective bargaining relationship.[54] In a 1996 decision,[55] the Supreme Court ruled that the nonstatutory labor exemption continues even after negotiations reach an impasse.[56] In other words, unionized employees cannot challenge management's unilateral imposition of terms or conditions of employment under antitrust law. Generally, then, a union must decertify in order for its members to bring an antitrust action.[57] Because the Curt Flood Act fails to circumscribe the scope of the nonstatutory labor exemption,[58] partial application of antitrust laws to baseball will have little effect on labor relations between players and owners.[59]

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[52] *See* National Labor Relations Act, 29 U.S.C. § 151 (1994) (declaring the promotion of collective bargaining the official policy of the United States).

[53] The Clayton Act specifically exempts union activity from antitrust law. *See* 15 U.S.C. § 17 (1994); *see also* Norris-LaGuardia Act, 29 U.S.C. §§ 101–110, 113–115 (1994) (preventing the use of antitrust laws to interfere with authorized strikes and labor organizing).

[54] For an overview of the nonstatutory labor exemption and its relation to baseball's antitrust exemption, see S. REP. No. 104-231, at 8–9; H.R. REP. No. 103-871, at 16–19. For further discussion of the nonstatutory labor exemption, see, for example, Robert A. McCormick, *Labor or Antitrust? Let the Players Choose*, 4 VILL. SPORTS & ENT. L.J. 39 (1997).

[55] *See* Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (upholding the imposition after impasse of fixed salaries for development squad players in the National Football League).

[56] Under federal labor law, declaration of an impasse after good faith negotiations allows management to implement its last offer unilaterally. *See, e.g., id.* at 238–39 (summarizing interpretations of the National Labor Relations Act's prohibition against bargaining in bad faith that allow for an employer's imposition of its final offer under certain circumstances).

[57] *See, e.g.*, ABRAMS, *supra* note 3, at 202–03. Under the right circumstances, decertification may prove less severe than it sounds. For example, a union could decertify, pursue an antitrust claim to obtain treble damages, then seek recertification as the employees' collective bargaining representative. The football players' union chose this path to pursue an antitrust case against National Football League owners. *See, e.g.*, Powell v. National Football League, 764 F. Supp. 1351 (D. Minn. 1991); Mark Asher, *NFLPA Regains Certification as Players Union*, WASH. POST, Apr. 2, 1993, at C5 (summarizing the gain from the union's strategy as the advent of free agency in professional football and $195 million in damages).

[58] The Act expressly provides that none of its terms "shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws." 15 U.S.C.A. § 27a(d)(4).

[59] *See* ABRAMS, *supra* note 3, at 201–03 (describing the Act as having little practical effect); ZIMBALIST, *supra* note 11, at 179 (indicating that repealing baseball's antitrust exemption will have "no direct effect" on labor relations because of the nonstatutory labor exemption); *Flood Act Lessens Baseball's Antitrust Protection*, BOSTON GLOBE, Oct. 28, 1998, at C3 (reporting the limited implications of the Act because of the non-

As the judiciary wrestled with the scope of baseball's antitrust exemption after *Flood*, the business of baseball evolved dramatically. Frustrated with their reception in the courts, players turned to collective bargaining and arbitration, which produced considerable victories in the form of higher salaries and free agency,[60] but carried a significant price: unprecedented labor unrest.[61] Since 1972 "there have been eight consecutive work stoppages (strikes and lockouts) in major league baseball, more than in the other three major team sports (football, basketball and hockey) combined."[62] As labor tensions became more frequent and more severe[63] and players continued to insist that the antitrust exemption left no alternative to striking,[64] Congress took notice.

Since *Federal Baseball*, Congress had attempted on numerous occasions either to codify or to repeal baseball's antitrust exemption.[65] Faced with the threat of a highly visible and protracted strike in an already volatile election year, Congress in 1994 made its first serious efforts to limit the antitrust exemption and began the legislative process that culminated in passage of the Curt Flood Act. In an abortive effort to forestall the strike, Senator Howard Metzenbaum (D-Ohio) aggressively championed legislation to repeal the exemption outright[66] as well as an

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statutory labor exemption). *See also infra* notes 89–92 and accompanying text.

[60] *See, e.g.*, ABRAMS, *supra* note 3, at 69. For analysis of player salaries, see, for example, ZIMBALIST, *supra* note 11, at 75–104. For an overview of the emergence of free agency, see *supra* note 50.

[61] Since assuming leadership of the player's union in 1966, Marvin Miller had begun strengthening the union and relying more on the economic clout of the players than on litigation. In 1972, this approach produced the first strike of players from every team in American sports history. *See, e.g.*, WARD & BURNS, *supra* note 15, at 424, 426.

[62] *Hearings*, *supra* note 51, at 10 (prepared statement of Fehr). Following the 1998–99 National Basketball Association's 190-day lockout, which resulted in 870 lost games and threatened the first cancellation of an entire season, basketball may have replaced baseball as the professional sport with greater labor problems. *See, e.g.*, Greg Logan, *Buzzer Beater: Last Minute Agreement Keeps NBA Season Alive*, NEWSDAY, Jan. 7, 1999, at A7 (describing lockout). *But see infra* note 96 (forecasting labor discord for baseball).

[63] For a summary that shows the most notable baseball work stoppages generally increasing in length, see ZIMBALIST, *supra* note 11, at 20.

[64] *See, e.g.*, S. REP. No. 104-231, at 10 (quoting statement of Fehr that players have only two options when negotiations with owners fail: accept the owners' offer or strike).

[65] *See Flood*, 407 U.S. at 281, 282 n.17 (noting that between the Court's decision in *Toolson* in 1953 and 1972 legislators introduced more than 50 bills relating to baseball's antitrust exemption and that Congress held nine related hearings); H.R. REP. No. 103-871, at 20 n.99 (listing 22 bills and resolutions introduced and six congressional hearings held between 1972 and 1994); H.R. REP. No. 82-2002, at 230 (1952) (opposing approval of four bills proposing to confer upon baseball and all professional sports complete antitrust immunity).

[66] *See* Professional Baseball Antitrust Reform Act of 1993, S. 500, 103d Cong. (1993)

amendment limiting the repeal to labor-management relations.[67] After this bid failed in committee[68] and the strike began, Representative Mike Synar (D-Okla.) introduced significantly scaled-back legislation[69] that became the first bill limiting the scope of baseball's antitrust exemption to pass committee.[70]

Despite the futility of congressional efforts in 1994 and a shift in partisan control of the House and Senate,[71] the strike's failure to end the labor dispute[72] assured that the question of baseball's antitrust status remained on Congress's agenda.[73] In addition to congressional reluctance to intervene in a strike,[74] the 1994 legislation raised concerns about the effects of applying antitrust law to franchise relocation decisions and the relationship between the major and minor leagues.[75] In response, Senator Orrin

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(prospectively applying antitrust laws one year after the effective date to the entire business of baseball except for matters governed by the Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–1295).

[67] *See, e.g.*, Dave Kaplan, *Antitrust: Bill to Avert Baseball Strike Thrown Out by Senate Panel*, 52 CONG. Q. WKLY. REP. 1700 (1994) (describing the amendment and its consequence of allowing players and owners to resolve disputes in court or through other mediation procedures).

[68] The Senate Judiciary Committee defeated the substitute amendment to the bill on a vote of 10–7 on June 23, 1994. *See id.*

[69] *See* Baseball Fans and Communities Protection Act of 1994, H.R. 4994, 103d Cong. (allowing players to challenge under antitrust law terms and conditions of employment unilaterally imposed by owners).

[70] *See Flood*, 407 U.S. at 281 (noting that all prior legislation that passed one house of Congress would have expanded the antitrust exemption). After the owners canceled the World Series, the House Judiciary Committee acted swiftly and approved the bill on a voice vote, with seven members filing dissenting views. *See* H.R. REP. No. 103-871, at 5, 41–45.

[71] *See, e.g.*, David S. Broder, *A Historic Republican Triumph: GOP Captures Congress; Sharp Turn to the Right Reflects Doubts About Clinton, Democrats*, WASH. POST, Nov. 9, 1994, at A1 (reporting election results that gave Republicans control of the House for the first time in 40 years and the Senate for the first time in eight years). One commentator attributed the Republican victory to public anger over the baseball strike. *See* Jamie Malanowski, *Our Season of Discontent*, N.Y. TIMES, Nov. 17, 1994, at A25 (speculating that baseball owners conspired to elect a Republican Congress to preserve their antitrust exemption).

[72] Although Judge Sotomayor's injunction ordered owners and players to resume negotiations over a new collective bargaining agreement, the parties did not resume discussions until 1996 and did not enter into a new collective bargaining agreement until May 14, 1997. *See, e.g.*, ABRAMS, *supra* note 3, at 195–96, 200.

[73] In this regard, the work of the 103d Congress did not prove futile. The report produced by the House Judiciary Committee, with its extensive analysis of the history and scope of the antitrust exemption, and its detailed discussion of central issues in the repeal debate, such as baseball's relationship with the minor leagues and franchise relocation, formed the basis of subsequent repeal efforts. *See* H.R. REP. No. 103-871.

[74] *See, e.g., id.*, at 41 (dissenting view of seven members) ("Congress should not intervene in an ongoing collective bargaining dispute unless a national security interest is involved.").

[75] *See, e.g., id.* at 44–45 (noting that outright repeal of the exemption would expose franchise relocation decisions to challenge and expressing concern that application of

Hatch (R-Utah) tailored legislation in the 104th Congress to retain baseball's exemption with regard to these matters.[76] Nonetheless, the failure of the owners and players to reach a new collective bargaining agreement after the strike[77] again postponed congressional action.[78]

On the day after Curt Flood died in 1997,[79] Senator Hatch reintroduced the same bill in the 105th Congress as the Curt Flood Act.[80] Later that year, when the players and owners officially resolved their labor dispute,[81] the new collective bargaining agreement contained a provision calling upon the parties to cooperate in lobbying Congress to clarify that antitrust laws apply to major league labor relations matters.[82] Despite the spirit of cooperation expressed in the new agreement, the legislation continued to stall

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antitrust law to the minor leagues would eliminate the incentive for the major leagues to subsidize the minors by ending the minor-league reserve clause).

[76] *See* Major League Baseball Antitrust Reform Act of 1995, S. 627, 104th Cong. § 2 (preserving, in addition, baseball's antitrust exemption for the amateur draft and matters covered by the Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–1295).

[77] *See supra* note 72.

[78] *See, e.g.*, S. REP. No. 104-231, at 19 (minority view of Sen. Arlen Specter (R-Pa.)) ("Congress should not act while the labor situation remains uncertain."); 143 CONG. REC. S418 (daily ed. Jan. 21, 1997) (statement of Sen. Hatch) (arguing that prior Congresses failed to take up baseball's antitrust status believing "that it should not be discussed during a labor dispute"). The owners' lobbying efforts may also have deferred consideration of the bill. *See* Ed Henry, *Major League Lobbying: Baseball Owners, Players Slug It Out on Capitol Hill*, PLAIN DEALER (Clev.), Nov. 10, 1996, at 1H (stating that during the first half of 1996 the owners spent $630,000 on lobbying while the players spent $196,000). For a summary of the parties' 1997 lobbying activities, see Center for Responsive Politics, *Lobbyist Spending in Washington* (visited Apr. 8, 1999) <http://www.crp.org/lobbyists/profiles/14588.htm> (placing Major League Baseball's lobbying expenditures at $300,000); *id.* <http://www.crp.org/lobbyists/profiles/17989.htm> (commissioner's office, $465,981); *id.* <http://www.crp.org/lobbyists/profiles/14589.htm> (players' union, $260,000).

[79] *See, e.g., Curt Flood, Ex-Cards Star, Labor Pioneer, Dies at 59*, ST. LOUIS POST-DISPATCH, Jan. 21, 1997, at 1A (reporting Flood's death from throat cancer).

[80] *See* Curt Flood Act of 1997, S. 53, 105th Cong. *See also* 143 CONG. REC. S418 (daily ed. Jan. 21, 1997) (statement of Sen. Hatch). Sen. Strom Thurmond (R-S.C.), and Sens. Leahy and Moynihan co-sponsored the bill. *See id.*

[81] *See supra* note 72.

[82] *See, e.g.*, S. REP. No. 105-118, at 3–4 (citing article 28 of the new collective bargaining agreement) (1987). Congress adopted the language of this provision in defining the purpose of the substitute amendment to the Curt Flood Act adopted by the Judiciary Committee. *See id.* at 1–2. Under the terms of the collective bargaining agreement, partial repeal of the antitrust exemption accelerates the termination date of the agreement. Had Congress failed to act, the agreement provided for termination on December 31, 2000, instead of October 31, 2000. The owners preferred the earlier date because it enhances their bargaining position by enabling them to negotiate individual player contracts under the terms of a new collective bargaining agreement and granting them additional time to negotiate and declare an impasse. *See Hearings*, *supra* note 51, at 11 (prepared statement of Fehr); *see also* Murray Chass, *Deal Struck on Antitrust Bill*, N.Y. TIMES, July 30, 1998, at C3. For the legal significance of impasse in labor law, see *supra* note 56.

over concern that it failed to protect the minor leagues adequately.[83] Nonetheless, as chairman of the Judiciary Committee, Senator Hatch pressed forward with the legislation[84] and eventually hammered out precise language to which the owners, players, and the minor leagues could all agree,[85] and which affords the minor leagues several protections. Significantly, the compromise removed the inference that Congress believed the antitrust laws fully apply to baseball.[86] Thus, the legislative process yielded a narrowly circumscribed Act.[87]

Despite hopes that the Act would stave off future labor unrest in baseball,[88] the Curt Flood Act as passed will likely prove ineffective at preventing future strikes or lockouts because practical considerations nullify its few achievements. Although the Act allows the players to decertify their union and bring an antitrust suit,[89] the strength of the Major League Baseball Players Association[90] and the union's success in securing treble damage

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[83] *See Hearings*, *supra* note 51, at 5–6 (outlining a chronology of events from introduction of the Curt Flood Act through June 16, 1997, relating to the Committee's efforts to fashion a compromise to safeguard the minor leagues); S. REP. NO. 105-118, at 9–10 (1997) (detailing the minority views of four senators dissenting in part over concerns about the effect of the bill on the minor leagues). With over 150 teams, scattered throughout 40 states, the minor leagues were well positioned to leverage legislative support. *See* 144 CONG. REC. H9943 (daily ed. Oct. 7, 1998) (statement of Rep. Hyde (R-Ill.)); Henry, *supra* note 78, at 1H.

[84] In addition to holding hearings on June 17, 1997, the Judiciary Committee approved the bill as amended by a vote of 11-6 on July 31, 1997. Sen. Herb Kohl (D-Wis.), the owner of the Milwaukee Bucks professional basketball team, recused himself. *See* S. REP. NO. 105-118, at 5. On October 29, 1997, Sen. Hatch filed a report on the bill with the Senate. *See id.* at 1.

[85] *See* 144 CONG. REC. S9495–96 (daily ed. July 30, 1998) (statement of Sen. Hatch) (including supporting letters from interested parties). The substitute amendment the Senate and House each finally passed on voice votes embodies this agreement. *See id.* at S9494 (reprinting Amendment No. 3479).

[86] The amended bill encompassed language from the collective bargaining agreement and indicated that the purpose of the legislation was to "clarify" that the antitrust laws applied to major league labor relations matters. The compromise changed "clarify" to "state." *See* Curt Flood Act of 1998, S. 53, 105th Cong. § 2; *see also* 144 CONG. REC. S9496 (daily ed. July 30, 1998) (statement of Sen. Hatch). Thus, this change tacitly signals congressional acceptance of an antitrust exemption for other aspects of the business of baseball.

[87] On July 30, 1998, the Senate passed the bill as amended. *See* 144 CONG. REC. S9498. On October 7, 1998, the House followed suit. *See* 144 CONG. REC. H9946 (daily ed. Oct. 7, 1998). The President signed the bill on October 27, 1998. *See* Acts Approved by the President, 34 WEEKLY COMP. PRES. DOC. 2194 (Nov. 2, 1998).

[88] *See supra* note 4.

[89] *See supra* notes 54–59 and accompanying text.

[90] *See, e.g.*, ABRAMS, *supra* note 3, at 178 (describing the union as "the strongest trade union in the country"); Hal Bodley, *Harsh Brawl Penalties Will Send Right Message*, USA TODAY, June 5, 1998, at 11C (describing the union as "by far the strongest in all sports").

remedies through collective bargaining[91] render this option unrealistic, if not altogether impracticable.[92]

Perhaps the authority of the Department of Justice under the Act to enjoin antitrust violations will facilitate federal intervention to avert future labor unrest.[93] On the other hand, the threat of federal action alone is unlikely to cow owners or embolden players in light of the failure of direct presidential efforts to mediate a settlement of the most recent conflict.[94] Moreover, because federal law already provided tools for intervention in baseball's labor disputes,[95] the Act merely introduces the Justice Department as another prospective player in the game's labor wars in limited circumstances.

Even the symbolic value of the Act, when considered in a broader context, loses its luster. The threat of renewed labor unrest[96] has undermined the goodwill that resulted from owner-player cooperation in lobbying for passage of the Act. Despite congressional sentiment against ratifying an antitrust exemption for baseball,[97] the Act codifies a fairly broad antitrust immunity

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[91] Following a series of cases in which arbitrators determined that the owners colluded regarding free agent signings in violation of the collective bargaining agreement, and which produced a $280 million settlement for the union, the union negotiated treble damage payments in the subsequent collective bargaining agreement to achieve the effect of an antitrust remedy for future violations. *See, e.g.*, ABRAMS, *supra* note 3, at 137–50; ZIMBALIST, *supra* note 11, at 179 (noting that this change in the collective bargaining agreement obviates the union's need for an antitrust remedy).

[92] One commentator described the decertification strategy pursued by the National Football League Players Association as "suicidal" for the baseball players' union. *See* ABRAMS, *supra* note 3, at 203.

[93] Although the Act limits standing to major league players, it does not affect the broader provisions of the antitrust laws that give the United States standing to enjoin or seek damages for antitrust violations. *See* 15 U.S.C.A. § 27a(c); 15 U.S.C. §§ 4, 25. Therefore, the Justice Department may bring suit under the Act. *See, e.g.*, 144 CONG. REC. H9944 (daily ed. Oct. 7, 1998) (statement of Rep. Hyde).

[94] *See, e.g.*, ABRAMS, *supra* note 3, at 187–89 (providing an overview of the efforts of former Labor Secretary William Usery and President Clinton to mediate the dispute).

[95] Indeed, the National Labor Relations Board provided the impetus for resolving the most recent strike by seeking an injunction. *See supra* notes 3 and 72.

[96] *See, e.g.*, Phil Rogers, *If Labor Strife Reigns, It'll Be So Long for Longball King*, CHI. TRIB., Feb. 25, 1999, at 1 (reporting players' expectations that labor confrontation is inevitable when the current collective bargaining agreement expires); Alex Truex, *Going For Broke: Dismantling a Winner Becomes Baseball's Economic Catch-22*, HOUS. CHRON., Feb. 14, 1999, at 1 (reporting that baseball owners are reexamining proposals for a salary cap following resolution of the basketball lockout); Frederick C. Klein, *On Sports: A Belabored Season*, WALL ST. J., Jan. 8, 1999, at W5 (predicting future labor strife as a result of increasing economic disparity between clubs with large and small payrolls).

[97] *See, e.g.*, S. REP. NO. 104-231, at 15 ("The Committee [by passing S. 627] . . . does not intend to imply that more comprehensive change is not also justified—or to imply that the courts should not act decisively themselves to limit further baseball's exemption in appropriate cases.").

for the game and interrupts the judiciary's most recent reexamination of the issue.[98] Above all else, the Curt Flood Act memorializes the judiciary's blind deference to an anomaly of its own making and a legislative process that diluted the efficacy of congressional action after Congress had finally succeeded in overcoming its own chronic passivity.

—*J. Philip Calabrese*

[98] *See supra* notes 36–45 and accompanying text.

CAMPAIGN FINANCE REFORM

Despite overwhelming public support for campaign finance reform,[1] federal legislation has stalled in Congress.[2] The best hope for meaningful reform therefore lies with the states, and, in the absence of state legislation, in the ballot initiative process.[3] In 1998, Massachusetts voters approved a new law that could dramatically lower the influence of money in elections.[4] The Massachusetts Clean Elections Law creates a voluntary, publicly funded alternative option for funding campaigns for all state offices.[5] The citizen-initiated reform is a wise step toward "equal and meaningful participation in the democratic process"[6] that demonstrates the possible promise of the ballot initiative tool. Due to a state constitutional limit on direct democracy, however, the law must also receive appropriations.[7] The reluctance of Massachusetts legislative leaders to pass reform before the ballot question, or to implement the law in the wake of its overwhelming passage, illustrates the problem of legislative entrenchment that frequently stands in the way of campaign finance reform.

Most campaign finance reformers are motivated, at least in part, by a desire to achieve access to participation in the political process for all citizens.[8] The preamble to the Massachusetts

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[1] *See infra* notes 17–19 and accompanying text.

[2] *See* Andrew B. Kratenstein, Recent Legislation, 36 HARV. J. ON LEGIS. 219, 219 n.1 (1999) (recounting how the McCain-Feingold bill banning soft money could not break a Senate filibuster, fulfilling the popular belief that Congress will not change a system that 90% of Americans want reformed); Sen. Russell D. Feingold, *Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote,"* 35 HARV. J. ON LEGIS. 377, 383 nn.17–18, 386 n.31 (1998) (explaining various versions of the McCain-Feingold bill that were introduced and brought to the floor during the 105th Congress).

[3] *See* Dana Milbank, *Campaign-Finance Reformers Pin Hopes on the States*, WALL ST. J., Dec. 26, 1997, at A10 ("good-government types are shifting their efforts to state campaigns"); *Morning Edition: Campaign Finance Reform Ballot Measures*, (NPR radio broadcast, Nov. 9, 1998), *available in* WESTLAW, 1998 WL 3309297 ("right now the only viable model out there is the state strategy").

[4] *See* 1998 Mass. Legis. Serv. 395 (West).

[5] MASS. GEN. LAWS ch. 55A (Supp. Dec. 1998).

[6] 1998 Mass. Legis. Serv. 395 § 1.

[7] *See, e.g.*, MASS. CONST., Amend. XLVIII, pt. 2, § 2 ("No measure that . . . makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition.").

[8] *See, e.g.*, Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 23 ("[E]ach citizen must have a fair and reasonably equal opportunity not only to hear the views of others as these are published or broadcast, but to command attention for his own views"); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority Of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1165 (1994) ("The key First Amendment issue at stake in this debate is not the right of the wealthy to spend up to the heavens, but the right of all citizens, poor

Clean Elections law states that the current system "threatens the democratic principle of 'one person, one vote' by allowing large contributors to have a disproportionate influence on the political process, thereby diminishing the rights of citizens of all backgrounds to equal and meaningful participation in the democratic process."[9] Because the Supreme Court found in *Buckley v. Valeo* that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,"[10] reformers have instead turned to public financing of campaigns as a means of ensuring equal access.[11] Clean Elections laws have now been enacted by popular vote in three states, Arizona, Maine, and Massachusetts, and by legislation in Vermont.[12]

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and wealthy alike, to speak and participate meaningfully in the electoral process."); Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 467, 470 (1994) (discussing the harm caused by need of candidates for either personal wealth or wealthy supporters); Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392, 1399 (1994) (distinguishing between spheres of economic markets and politics and arguing that campaign finance laws are justified to assure political equality and reasoned political deliberation); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (arguing that equalizing political speech is consistent with the First Amendment); Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, p. 71 (proposing a public voucher system of funding political campaigns to seek "equal citizenship" in the face of "market inequality"); Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 117 (1997) ("[F]ostering equal political participation is a sufficiently compelling interest to justify some regulation of campaign spending"); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality* 82 COLUM. L. REV. 609, 638–42 (1982).

[9] 1998 Mass. Legis. Serv. 395 § 1(a)(1). Other purposes cited for reforming the system include lowering the cost of campaigns, enabling voters and candidates to hear and be heard, eliminating corruption and the public perception of corruption, making elected officials accountable to all voters, decreasing the spending advantage of incumbents and encouraging competitive elections, and freeing candidates from spending time fundraising. *See id.* § 1(b)(2)–(7). The law's purposes are similar to national model legislation advanced by the national group Public Campaign. *See* Public Campaign, *Annotated Model Legislation for Clean Money Campaign Reform* (last modified Dec. 1997) <http://www.publicampaign.org/model_bill/bill_intro.html>.

[10] 424 U.S. 1, 48–49 (1976) (per curiam) (striking down expenditure limits on federal campaigns).

[11] Public funding does not violate First Amendment concerns because it facilitates rather than abridges speech, helping to "enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *See id.* at 92–93. *Buckley* also permitted conditioning acceptance of public funds on agreement by the candidate to abide by expenditure limits. *See id.* at 57 n.65.

[12] *See* Kratenstein, *supra* note 2, at 219–20 (detailing Vermont law); Steve Yozwiak et al., *State Lottery Stays, Cockfighting Goes*, ARIZ. REPUBLIC, Nov. 4, 1998, at A11 (Arizona law); Michael E. Campion, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L. REV. 2391 (1998).

The Massachusetts Clean Elections Law has three central provisions that attempt to reduce or counteract the influence of wealthy interests in state politics. First, it provides a set amount of public money for candidates in primary and general elections who abide by fixed spending limits, and accept contributions no greater than $100. Public money makes up about 80% of allowed spending.[13] In order to demonstrate public support, candidates are required to obtain a number of qualifying contributions of $5 to $100 from registered voters in their district.[14] Second, the law reduces the effect of unregulated federal "soft money" on state elections by eliminating transfers from national parties to state political parties.[15] Third, the law institutes electronic disclosure of campaign contributions to candidates and political committees.[16]

The public desire for such election finance reform was clear in the legislative session before the 1998 elections. A Gallup poll in 1996 found that 64% of those surveyed supported full public financing of Congressional elections, the highest support for the proposition since the wake of the Watergate scandal.[17] In a February 1997 Gallup poll, 70% responded that the current way campaigns are financed "needs to be completely overhauled" or "needs major changes."[18]

Massachusetts residents in particular were overwhelmingly in favor of reform. A survey in March 1998 found that seventy-five percent of likely voters supported the Massachusetts Clean Elections Law.[19] Even after respondents were told of the cost of a

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[13] MASS. GEN. LAWS ch. 55A, § 6-9. The spending limits for primary and general election combined range from $30,000 for state representative candidates to $3,000,000 for gubernatorial candidates. The private contribution limits range from $6,000 for a state rep. candidate to $450,000 for a candidate for governor. *See id.*

[14] *Id.* § 1,4 (requiring a specified number of qualifying contributions of at least $5 and under $100, ranging from 6000 for a candidate for governor to 200 for a candidate for state representative).

[15] 1998 Mass. Legis. Serv. 395, § 6.

[16] MASS. GEN. LAWS ch. 55, § 18C.

[17] *See* Public Campaign, *Clean Money Campaign Reform* (visited Apr. 11, 1999) <http://www.publicampaign.org/cleanmoney.html> (citing an August 1996 survey conducted for the Center for Responsive Politics).

[18] *See* Public Campaign, *PACs, Parties and Potato Chips: Myths and Misconceptions About Reforming the Campaign Finance System* (visited Apr. 11, 1999) <http://www.publicampaign.org/ppp/myth1.html> (citing a CNN-*USA Today* poll).

[19] *See* Scot Lehigh, *Money Still Talks Loudest on Beacon Hill*, BOSTON GLOBE, Apr. 12, 1998, at B1; Lauren Markoe, *Support Seen for Finance Reform: Plan Would Be Voluntary*, PATRIOT LEDGER (Quincy, Mass.), Sept. 23, 1998, *available in* WESTLAW, 1998 WL 8101900.

clean elections system and the arguments against it, 64% of those polled still favored it.[20]

Campaign finance reform continues to be justified as a way to combat the ever-increasing cost of campaigns and the decreasing competition for incumbents with large war chests. U.S. Senate and House candidates raised slightly more money and spent nearly as much in 1998 as in 1996, remarkable for a mid-term election, in spite of fewer open seats and fewer competitive races in the House.[21] In most House districts, incumbents went "to the polls with a financial advantage of historic proportions," with nearly two-thirds of incumbents having a fundraising advantage of ten to one or more over their opponents.[22] Analysis by the Center for Responsive Politics showed that business interests outspent organized labor by a factor of nearly twelve to one in 1997-98 and 1995-96, and that ideological contributions by individuals represented only a tiny fraction of the money contributed to candidates and parties.[23]

In Massachusetts, two-thirds of the legislative races were uncontested in 1996, and the candidate with more money won 92% of the time.[24] During the legislative session leading to those races, registered lobbyists and PACs contributed $2.2 million, more than a quarter of the $8.5 million collected in contributions of over $100.[25] Donors giving $100 or more made up nearly three-quarters of the total $11.4 million contributed, but less than one percent of the state's eligible voters.[26] Business donors

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[20] *See* Brian C. Mooney, *Campaign Reform Faces Ballot Test*, BOSTON GLOBE, Sept. 19, 1998, at B3.

[21] *See* Federal Election Commission, *1998 Congressional Financial Activity Declines*, Dec. 29, 1998 (visited Apr. 11, 1999) <http://www.fec.gov/press/cn3098tx.htm> (reporting an increase in fundraising from $659.6 million to $665.1 million and a decrease in spending from $626.4 million to $617.1 million).

[22] Center for Responsive Politics, *Who Paid For This Election?* (visited Apr. 11, 1999) <http://www.crp.org/pubs/whopaid/bigpic/intro.htm>.

[23] *See id.* at <http://www.crp.org/pubs/whopaid/bigpic/sum05.htm>; *see also* DAN CLAWSON ET AL., DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY (1998) (using interviews with corporate contributors to political campaigns to show how business interests influence and undermine democracy).

[24] *See* Milbank, *supra* note 3 (statement of David Donnelly, Director of Massachusetts Voters for Clean Elections).

[25] *See* GEORGE PILLSBURY ET AL., MASSACHUSETTS MONEY & POLITICS PROJECT, CAPITOL GAINS: BIG DONORS IN THE STATE LEGISLATURE 4–5 (1998) [hereinafter CAPITOL GAINS]; Lehigh, *supra* note 19.

[26] *See* CAPITOL GAINS, *supra* note 25, at 4. Furthermore, "the greatest number of individual and PAC donors" came from industries such as "health care, construction, real estate, food and alcohol, banking and finance, and insurance—all subject to significant state regulation." *Id.*

contributed seven times as much as labor interests.[27] Special interest contributions often add unnecessarily to the war chests of incumbents, with 63% of the large-donor contributions going to unopposed incumbents.[28] This system of funding electoral campaigns undermines the belief that voters and candidates without access to large donors can participate widely in the political process.[29]

In spite of the clear need and tremendous public desire for dramatic reform, neither Congress nor the Massachusetts state legislature responded to their constituents. The U.S. Senate could not even muster the support to pass the McCain-Feingold bill banning soft money,[30] which is a far less comprehensive reform than the clean elections model.[31] Full public funding of campaigns reduces the role of private money in elections considerably more than systems of partial public financing and matching funds available for some offices in many states.[32] Legislators at both the state and national level had the opportunity to pass broad reform. In Congress, Senators John Kerry and Paul Wellstone introduced a bill for fully funding congressional elections.[33] In Massachusetts, the ballot initiative process provides an opportunity for the legislature to vote on petitions that have met the threshold level of signatures and avoid the ballot question. Even though Massachusetts Voters for Clean Elections had publicized its polling data, mobilized thousands of volunteers and garnered over 100,000 signatures, legislative leaders refused to enact any type of reform.[34]

The reason for this legislative inaction is clear: entrenched incumbents are unlikely to pass campaign finance reform that

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[27] *See id.* at 17.

[28] *See id.* at 22.

[29] *See id.* at 39–40.

[30] *See supra* note 2.

[31] *See* Public Campaign, *supra* note 18, at <http://www.publicampaign.org/ppp/myth7.html> (explaining that only 11% of the total amount of money spent in federal elections in 1996 was "soft money").

[32] *See* Carey Goldberg, *Two States Consider Boldly Revamping Campaign Finance*, N.Y. TIMES, Oct. 19, 1998 at A1, A12 (claiming that Massachusetts and Arizona initiatives "go far beyond" other campaign finance reforms). For an overview of state campaign financing systems, see Federal Election Commission, *Campaign Finance Law 98: States with Special Tax or Public Financing Provisions*, (visited Mar. 13, 1999) <http://www.fec.gov/pages/chart4.htm>.

[33] *See* Public Campaign, *supra* note 17.

[34] *See* Scot Lehigh, *Petition Drive Now Only Hope for Public Election Financing*, BOSTON GLOBE, May 6, 1998, at B12.

would lessen their advantage over challengers.[35] Professor Michael Klarman has convincingly argued that on certain issues, the interest of legislators in remaining in office conflicts with the sentiments of those who elected them. Responding to the wishes of the electorate would directly contravene the desire of most representatives to perpetuate their stay in office.[36] Klarman calls this conflict "legislative entrenchment," or "the agency problem of representative government."[37] A stark example of the problem is term limits for legislators, which, while enormously popular among voters, if passed would require officeholders to voluntarily relinquish their jobs.[38]

Campaign finance reform is an acute case of legislative entrenchment. Incumbent legislators have strong incentives either to pass legislation that will further advantage incumbents or to take no action and benefit from the status quo.[39] Every current member of Congress and the Massachusetts state legislature won election through the existing system, and is therefore likely to have incentives to maintain it.[40] Incumbents have often argued that the public does not support public financing, but this argument is likely only a pretext for denying their challengers an equal chance.[41]

One remedy for the democratic ills of legislative entrenchment in general, and the dominance of moneyed interests in particular,

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[35] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522–23, 536–39 (1997).

[36] *See id.* at 502–04. Klarman distinguishes the entrenchment problem from public choice theory, which makes a broader claim that legislators are not responsive to the majority of their constituents on most or all issues because they are responsive to special interest groups that provide funding for their campaigns. *See id.* at 438. Public choice adherents and anti-entrenchment advocates (who otherwise believe that legislators act in a majoritarian fashion) would agree that legislators act in an anti-majoritarian fashion in specific contexts of legislative entrenchment. *See id.* at 502 n.55. For arguments that most legislators seek to be reelected, see generally MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977) (concluding that this model of Congressional action explains observations of congressional behavior); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

[37] Klarman, *supra* note 35, at 498, 502; *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (discussing agency problem in light of a structural analysis of the bill of rights.)

[38] *See* Klarman, *supra* note 35 at 503, 509–13.

[39] *See id.* at 536–38. "The one thing that virtually all commentators agree upon, though, is that legislators drafting campaign finance legislation will seek to enhance the advantages of incumbency . . . [T]he most entrenching sort of campaign finance reform may be none at all." *Id.* at 537.

[40] *See Clean Elections in Massachusetts*, BOSTON GLOBE, July 2, 1998, at A18.

[41] *See A Grass-Roots Message on Reform*, N.Y. TIMES, Oct. 20, 1998 at A30.

may be the ballot initiative.[42] It is available in twenty-three states and the District of Columbia.[43] One of the principal reasons that these direct democracy provisions were created was out of concern that wealthy interests were dominating the political process.[44] The proponents of creating an initiative process in Massachusetts in 1917 argued that it would "diminish the impact of corrupt influences on the legislature, undermine bossism, and induce legislators to be more attentive to public opinion and the broader public interest."[45] Voters in six states approved campaign finance reform ballot measures in 1996, including in Maine, where voters passed the first clean election law in the country.[46]

The initiative process was designed to allow all citizens a chance to have access to the political process, without a representative impediment in their way. It provides the means not only to overcome the influence that moneyed interests have on the political process, but also to enact popular laws in the public interest which harm the self-interest of current legislators. Term limit laws, for instance, were enacted in twenty-two states via ballot initiative and in only two via legislation.[47]

Ballot initiatives, however, have themselves become distorted by the influence of wealthy special interests, which have frequently been able to spend large sums of money to alter public opinion prior to a ballot initiative.[48] Citizens' groups have de-

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[42] A ballot initiative is a law or constitutional amendment initiated by the citizens through the petition process. A referendum is a law that is either pending before or has been passed by a legislature that is then submitted to the voters. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY 2 (1989) (defining these terms while introducing a study of their effects, along with that of recall, on American politics).

[43] *See id.* at 47. An additional seven states have other forms of direct democracy, either referenda or recalls of elected officials, but no provision for ballot initiatives. *See id.*

[44] *See id.* at 10 ("Demand for more democracy occurs when there is growing distrust of legislative bodies and when there is a growing suspicion that privileged interests exert far greater influences on the typical politician than does the common voter."); STEVEN D. LYDENBERG, COUNCIL ON ECONOMIC PRIORITIES, BANKROLLING BALLOTS UPDATE 1980: THE ROLE OF BUSINESS IN FINANCING BALLOT QUESTION CAMPAIGNS 13 (1981) ("The initiative process was established specifically to counteract influences which special interests have over the legislative process.").

[45] CRONIN, *supra* note 42, at 53.

[46] *See* SAMUEL ISSACHAROFF, THE LAW OF DEMOCRACY: LEGAL STRUCTURE AND POLITICAL PROCESS 677 (1998).

[47] *See* Klarman, *supra* note 35 at 509–13 ("(T)he correlation between adoption of term limits and the existence of state constitutional mechanisms for bypassing the legislature is nearly perfect; virtually every state possessing a popular initiative and referendum mechanism has adopted legislative term limits through that process, while every state but one lacking such a mechanism has failed to do so. This could be a coincidence, but I doubt it. More likely, this is legislative entrenchment par excellence.").

[48] *See id.* at 123 (finding that "[a]lthough money is not always a decisive factor, it is

layed clean elections ballot initiatives in several states out of fear that business-backed groups planned to spend money opposing the measures.[49] The amount of money spent on ballot question campaigns is not determinative, however, even though it affects many outcomes.[50]

One way to overcome moneyed interests is through legitimate grassroots campaigns, the type of citizen-supported efforts that the proponents of direct democracy envisioned.[51] Progressive government reforms can also be passed through the initiative process when the moneyed interests have higher priorities on their agenda, such as their "pocketbook" issues of minimum wage laws or environmental regulations.[52]

The passage of the Massachusetts Clean Elections Law involved both of these factors. The campaign to pass it was a legitimate grassroots effort, involving more than 6000 volunteers and collecting donations from 2500 different sources.[53] Relying

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always an important one, and big money, well spent, can usually defeat ballot questions"); LYDENBERG *supra* note 44, at 17–18 (finding that the corporate-backed side usually outspent its opponents, when it did, won about 80% of the time in initiatives in 1978 and 1980, and concluding that "(t)he advantages which money can provide... are almost certainly greater than the advantages which any other single factor can provide"); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18, 23 (1997) ("A handful of studies suggests that the amount of money spent in a campaign is crucial in determining the outcome of the vote."); Daniel Hays Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. REV. 505, 608 (1982) (finding that well-financed groups could defeat ballot propositions regardless of initial popular support). The perverse result of wealth influencing attempts at populist lawmaking has partly been imposed by the Supreme Court, which has found that contributions and expenditures on ballot questions implicate First Amendment concerns. Because the Court found that there was no compelling interest in preventing corruption or the appearance of corruption as there was in candidate elections, state laws reducing the role of money in ballot measures were struck down. *See* Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) (striking down limits on contributions to committees formed to support or oppose a ballot question); *see also* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down a Massachusetts state law that prohibited corporate spending on referenda).

[49] *See* Milbank, *supra* note 3.

[50] *See* CRONIN, *supra* note 42, at 116 ("[T]he side with more money does not always prevail."); Garrett, *supra* note 44, at 23 ("[A]lthough full campaign coffers are helpful, they do not guarantee success.").

[51] *See* CRONIN, *supra* note 42, at 116, 202 ("Well-organized grass-roots campaigning can make a difference."); Garrett, *supra* note 44, at 23 ("Well-funded voices are loud, but so are the voices of other highly-motivated groups that can deploy cadres of dedicated volunteers.")

[52] *See* Garrett, *supra* note 48, at 23. Garrett explains that "the salience of issues for public debate and decision ... turns largely on how organized interests spend their money." *Id.* Decisions *not* to spend money on an issue have as great an impact as their decisions *to* spend money.

[53] *See* David Donnelly, *'Yes on 2' Wins With 67%*, CAMPAIGN UPDATE (Mass. Voters for Clean Elections), Dec. 1998, at 1.

mostly on 3500 volunteers, the campaign in support of the law collected more than 120,000 signatures, well over the 70,000 needed to qualify for the ballot.[54] In addition, the state business lobby in Massachusetts decided not to fight Question 2 because other issues took higher priority.[55] Opponents of the law also knew that the legislature had to appropriate money for the reform and would likely water it down in the process.[56] Thus, in this instance, the lack of organized, funded opposition to the ballot measure actually allowed the "big money out of politics" side to outspend its opponents.[57]

Critics of the Clean Elections Law raise several objections. One argument against the law is that it is too expensive.[58] The committee report on the proposed ballot question argued that "there are far more important uses of limited public money."[59] House Speaker Thomas M. Finneran has stated that publicly funding political campaigns is "a frivolous use of very limited and therefore very precious public dollars."[60] A voluntary tax check-off and appropriations from the state legislature funds the law, and the expected price tag is about $14 million per year initially.[61] After the year 2002, appropriations to the elections fund

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[54] *See* Markoe, *supra* note 19; Mass. Voters for Clean Elections, *Road to Victory: The Campaign to Win Clean Elections*, CAMPAIGN UPDATE (Mass. Voters for Clean Elections), Dec. 1998, at 2–3.

[55] *See* Milbank, *supra* note 3. A spokesman said that the group decided not to oppose the law because "we've got our hands full." *Id.*

[56] *See* Lauren Markoe, *Campaign Funding Law Faces Hurdles: Court Challenge, Price Tag are Problems*, PATRIOT LEDGER (Quincy, Mass.), Nov. 7, 1998, *available in* WESTLAW, 1998 WL 22470705 ("[T]he leader of 'No on 2,' Stephen Roop, said Friday that his group may challenge the law if the Legislature doesn't improve it . . . 'But if they don't alter its fundamental structure, that's another thing,' said Roop.").

[57] *See* Carolyn Ryan, *Deep Pockets Back Campaign 'Reformers,' Big $ Behind Getting $ Out of Politics*, BOSTON HERALD, Oct. 14, 1998, at 1 (criticizing Mass. Voters for Clean Elections for "raising cash from the rich and powerful in huge sums"); John J. Monahan, *Question 2 Asks Public to Pay for Campaigns*, TELEGRAM & GAZETTE (Worcester, Mass.), Oct. 25, 1998, *available in* WESTLAW, 1998 WL 2750301 (contrasting the initiative's "highly organized" supporters with its "low-key" opponents). Although critics expected the proponents of clean elections to limit their large-dollar contributions, there is a difference between giving money to limit the future influence of money on the system and making a contribution to a candidate to influence the system.

[58] *See* Goldberg, *supra* note 32, at A12 ("Opponents question whether taxpayers really want to spend millions of dollars to finance . . . campaigns."); Ted Bunker, *Price of Reform is Too High*, BOSTON HERALD, Jan. 18, 1999; Markoe, *supra* note 56 ("Some lawmakers complain that [the proposition's] price tag . . . is too high.").

[59] H.B. 182-5547, 2d Legis. Sess. (Mass. 1998), *available in* LEXIS, 1997 MA H.B. 5547 (Report of the Joint Committee on Ways and Means on the Initiative Petition).

[60] Scot Lehigh, *State Funds for Elections Held Unlikely 'Frivolous' Use of Tax Dollars, Finneran Says*, BOSTON GLOBE, Apr. 16, 1998, at A1.

[61] *See id.*

cannot exceed 0.1% of the state budget,[62] a price that voters decided was worthwhile in order to have elected leaders that are responsive to all voters and less indebted to the few large contributors who currently finance campaigns.[63]

Another argument made by opponents of the reform is that citizens should be able to support whom they choose.[64] Speaker Finneran argues the law will mean "our tax money goes to people we would never ever support."[65] The Clean Elections Law does allow for private contributions showing support, however, and candidates can opt out altogether. Opponents of the law have even tried to argue that the law is unconstitutional,[66] but voluntary public financing systems have been clearly constitutional since *Buckley*.[67]

Opponents of the law also make other, somewhat contradictory arguments against it. The spending limits are too low, some say, which would hurt challengers who would not have enough money to get their message out.[68] All the law does, however, is prevent one side from dramatically outspending another—challengers and incumbents can still spend as much as they desire, their opponents will simply get matching public funds up to double the spending limit. In addition, incumbents usually dramatically outspend challengers,[69] so the effect of the law is primarily to bring challengers closer to the spending level of incumbents. Since the spending limits are based on the amounts winning campaigns have spent in the past, it is not likely that

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[62] MASS. GEN. LAWS ch. 55A, § 14(d).

[63] *See supra* note 26 and accompanying text.

[64] *See* Goldberg, *supra* note 32, at A12 (statement of Stephen Roop, treasurer of "No on 2") ("[The Clean Elections Law would be] a forced contribution to every candidate who makes the ballot.").

[65] Adrian Walker, *Ballot May Only Be First Test for Public Campaign Funds*, BOSTON GLOBE, Oct. 31, 1998, at B4.

[66] *See id* ("[T]he idea of the state equalizing candidates with our money is almost surely unconstitutional.").

[67] *See supra* notes 10–11 and accompanying text. Although a full examination of the constitutionality of the Massachusetts law is beyond the scope of this Recent Legislation, it is worth noting that the law does not include mandatory spending caps as the Vermont Clean Elections law does or regulation of "issue advocacy" as the Maine and Vermont Clean Elections laws do. *See* Kratenstein, *supra* note 2; Campion, *supra* note 12. Although those laws may be constitutional as well, the Massachusetts law is less likely to get tied up in constitutional litigation.

[68] *See* Scot Lehigh, *Cellucci, Birmingham Now Back Clean Elections Funds*, BOSTON GLOBE, Nov. 6, 1998, at B4 (statement of State Senate President Thomas Birmingham) ("How can somebody limited to about $50,000 win?"); Brian C. Mooney, *Path to Clean Races May Be a Bit Messy*, BOSTON GLOBE, Nov. 7, 1998, at B3 ("[T]he voluntary spending caps for many . . . offices are too low to encourage participation.").

[69] *See supra* note 28 and accompanying text.

candidates will be unable to get their message out.[70] Others have argued that the spending limits are not high enough to encourage participation, that the law will not reduce campaign spending, that the qualifying system is too difficult for candidates, and that the system will encourage fringe candidates with little public support.[71] Of course, these things cannot all happen at once. The most likely consequences of the law are that it would free many candidates from fundraising and it would encourage more candidates to run despite the large war chests of many incumbents. Given a chance to flourish, the Clean Elections system will likely reveal that many of the arguments against the law are made by beneficiaries of the current system cynically claiming the law will hurt challengers in order to maintain the status quo.

The policy arguments surrounding ballot initiatives are usually resolved at the ballot box, as the voters decide whom to believe. In this case, 67% of voters in 1998 cast ballots for publicly funded elections.[72] The claims of reformers were further supported by the fact that two-thirds of the legislative races were again uncontested that year.[73] Candidates for state-wide office spent a record-breaking $27.8 million, with the heaviest spender, Republican gubenatorial candidate Paul Cellucci ($7 million) victorious.[74] Because the Massachusetts Constitution prevents ballot initiatives from appropriating money, however, the will of the voters must be affirmed by sitting legislators.[75] In a disgraceful yet unsurprising development, it is unclear that sitting legislators will enact the explicitly expressed desire of 67% of their constituents.

Immediately following the election, two state leaders who had been skeptical of the law, Governor Cellucci and Senate President Thomas Birmingham announced that they would support it by funding it.[76] Speaker Finneran, however, was not swayed by the popular vote and said that he would fund the law only "[i]f

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[70] *See* Frank Phillips and Scot Lehigh, *Speaker's Trips Soil Clean Elections Law*, BOSTON GLOBE, Jan. 26, 1999, at B1 (comparing spending caps favorably to average spending in competitive Massachusetts House and Senate races).

[71] *See* Monahan, *supra* note 57 ("The 'No on 2' campaign has . . . criticized the measure because . . . it could bring a flood of fringe candidates.").

[72] *See* Donnelly, *supra* note 53; McMillan, *supra* note 3.

[73] *See* McMillan, *supra* note 3.

[74] *See* Martin Finucane, *Record Spending on Statewide Campaigns*, ASSOCIATED PRESS POLITICAL SERVICE, Nov. 24, 1998, *available in* WESTLAW, 1998 WL 7467385.

[75] *See supra* note 7 and accompanying text.

[76] *See* Lehigh, *supra* note 68.

the members want to do it."[77] Further, Senate President Birmingham claimed there were several problems with the new law that might require the legislature to modify it.[78]

Governor Cellucci did not include funding for the law in his annual budget.[79] This inaction worries proponents of the law, who dislike the prospect of trying to fund the four-year election cycle in one year and worry that "funding delayed is . . . funding denied."[80] Further, potential candidates who are willing to limit their private fundraising do not have a clear signal that public funding will be available in 2002.[81] Proponents of the law thus claim that Governor Cellucci has placed political calculations above following the will of the voters, choosing not to fund a system that could aid future opponents.[82] At the time of publication, legislative budgets had not yet been proposed.

At the same time that the Massachusetts state officeholders were unresponsive to the voter-approved law, they were quickly able to pass purported reform legislation designed to aid their own prospects for state office. This so-called emergency legislation, which Democratic legislative leaders and Governor Cellucci enacted Thanksgiving eve, prevents federal officeholders from using their campaign accounts when running for state office.[83] The immediate

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[77] *Id.*; *see also* Mooney, *supra* note 68.

[78] *See* Mooney, *supra* note 68.

[79] *See* Frank Phillips, *Election-law Backers Fault Cellucci on Budget*, BOSTON GLOBE, Jan. 30, 1999, at B3; Timothy J. Connolly, *White's Cause: Clean Elections Law*, TELEGRAM & GAZETTE (Worcester, Mass.), Feb. 14, 1999, *available in* WESTLAW, 1998 WL 2757114. A spokesman for the Governor explained that "We support the law, but we did not think it appropriate to fund it this year... We are trying to keep our eye on the bottom line and we just didn't think it was necessary. The law will be adequately funded in the future." *Id.* The Governor claimed that money could not be appropriated in the fiscal year 2000 budget that's not going to be spent until 2002. *See* Phillips, *supra*.

[80] Connolly, *supra* note 79 (statement of Kenneth R. White).

[81] *See* Phillips, *supra* note 79 (statement of David Donnelly, the director of Massachusetts Voters for Clean Elections).

[82] *See id* (accusing Cellucci of basing "the decision to fund [the Clean Elections Law] . . . on a political decision.").

[83] *See* S.B. No. 1796, 1998 Mass. Legis. Serv. Ch. 394 § 2 (Mass. 1998) (West) (codified at MASS. GEN. LAWS ch. 55 § 7) (requiring federal campaigns to refund past contributions and then re-solicit the contributions to a state campaign fund); Frank Phillips, *Legislature Erects Hurdle for Federal Officeholders Eyeing State Seats*, BOSTON GLOBE, Dec. 1, 1998, at B9 [hereinafter Phillips, *Legislature Erects Hurdle*]; Frank Phillips, *Campaign Finance Bill Slips into Law: Some Mass. Congressmen Could Be in for Surprise*, BOSTON GLOBE, Nov. 26, 1998, at B1; Wayne Woodlief, *Mass. Dems Knife Their D.C. Buddies*, BOSTON HERALD, Dec. 1, 1998, at 23 ("Some pols speculated this little twist must be payback to the congressmen who endorsed [the Clean Elections Law] . . . . Others speculated [House Speaker] Finneran or [Senate President] Birmingham might want to run for governor.").

political consequences were to make it more difficult for two Massachusetts Congressmen (Representatives Joseph Kennedy and Martin Meehan) with sizable federal campaign accounts to run for governor in 2002. Their difficulties ease the path for the reelection of Governor Cellucci or possibly the Democratic nomination of Birmingham or Finneran.[84]

The experience of the Massachusetts Clean Elections ballot initiative affirms the legislative entrenchment problems endemic to campaign finance reform. Despite clearly demonstrated public support for publicly financing elections, incumbent officeholders have not yet funded the reforms that the voters have created. At the same time, the leaders of the state government have passed an alleged reform that will make it difficult for possible rivals holding Congressional seats to run for state-wide office. Fortunately for reformers, many of the states with ballot initiative mechanisms do not contain the limit on appropriations that required the Massachusetts ballot question to be funded by the legislature. Although the reluctance of leaders in Massachusetts to follow the will of the people provides a startling example of legislative entrenchment, the ability of citizens to enact the Clean Elections law should provide inspiration to campaign finance reformers across the nation in their quest for equal and meaningful participation in the democratic process.

—*Kevin Deeley*

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[84] *See* Phillips, *Legislature Erects Hurdle*, *supra* note 83. Senate President Birmingham defended the law on the grounds that the law simply created parity between state and federal officeholders since state officeholders are unable to transfer funds to federal campaign accounts. *See id.*

HEALTH CARE AND ERISA

While the Clinton Administration has struggled to pass health care reform of any substance during its tenure,[1] the issue remains a critical one in the minds of many Americans. Most efforts have focused on changing the legal protections afforded Health Maintenance Organizations ("HMOs"), whose frugality at the expense of their members' health is well-documented.[2] The Democrat-sponsored Patients' Bill of Rights Act ("PBRA"),[3] like many of its predecessors, was defeated in 1998 largely because of a controversial provision that would have amended the Employee Retirement Income Security Act ("ERISA")[4] to enable patients to sue HMOs for medical malpractice.[5] The bill will be reconsidered by the new Congress again this year, and it should be passed.[6] Narrowing the scope of ERISA preemption would be welcome to physicians and patients alike. Allowing patients to sue HMOs is a socially, legally, and medically astute reform.

Under current law, HMOs are generally exempt from the legal rules of negligence. If an HMO can prove it meets ERISA's two requirements—first, that it constitutes a "plan" within the meaning of the statute,[7] and second, that the state law in question (in this

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[1] *See generally* Bert A. Rockman, *The Clinton Presidency and Health Care Reform*, 20 J. HEALTH POL. POL'Y & L. 399 (1995). To his credit, this is not for a lack of effort on President Bill Clinton's part. *See, e.g.*, Amy Goldstein, *Clinton to Propose Health Program for Uninsured*, WASH. POST, Jan. 18, 1999, at A2 (describing several of President Clinton's rejected proposals).

[2] *See, e.g.*, GEORGE ANDERS, HEALTH AGAINST WEALTH: HMOS AND THE BREAKDOWN OF MEDICAL TRUST 1–12 (1996) (recounting an instance where an HMO forced a couple to drive their ailing infant 42 miles to a hospital where the HMO received a 10% discount); Nancy Ann Jeffrey & Ron Winslow, *Health*, WALL ST. J., Mar. 8, 1999, at B1 (reporting an $89 million jury verdict against an HMO when it denied a bone-marrow transplant to a 40-year-old breast cancer patient who later died); Jamie Court, *Inside the $120M Ruling Against Aetna*, SACRAMENTO BEE, Feb. 23, 1999, at B7 (reporting a $120 million jury verdict against an HMO).

[3] Patients' Bill of Rights Act of 1998, S. 1890, 105th Cong.

[4] Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (1998).

[5] *See* S. 1890 §§ 201-202.

[6] *See generally* Geri Aston, *Patient Protection Debate Back on Agenda*, AM. MED. NEWS, Feb. 22, 1999, at 5, 7 (describing the various patient protection proposals currently pending on the Congressional calendar). President Clinton recently spoke in an effort to increase public support for the reform. *See* Katharine Q. Seelye, *Clinton Urges Petition Drive to Pass Health Plan*, N.Y. TIMES, Apr. 10, 1999, at A11.

[7] ERISA enumerates two plans that are covered. The type often considered to include HMOs, the welfare benefit plan, provides employees with "medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death, or unemployment." 29 U.S.C. § 1002(1). The description is broad—more than one-half of all American workers receive health care through employee benefit plans governed by ERISA. *See* Brooks Richardson, Comment, *Health Care: ERISA Pre-emption and HMO Liability—A Fresh Look at ERISA Pre-emption in the Context of Subscriber Claims*

case, the right to sue for the tort of medical malpractice) "relate[s] to" the plan[8]—it can claim that ERISA preempts the malpractice suit.[9]

In practice, the HMO asserts a statutory right of removal to federal court,[10] where a judge decides whether the ERISA preemption clause applies. If it does, the plaintiff will lose her opportunity to receive punitive or consequential damages. All that will be recoverable is the actual cost of a procedure, no matter how severe a patient's injury or how evident her pain and suffering.[11]

Though almost certain to fail because of ERISA preemption, medical malpractice claims against HMOs are increasing rapidly,[12] due in no small part to the expanding decision-making capacity of the HMO in the American health care system.[13] Two theories are commonly used in an attempt to evade preemption and justify HMO liability in tort—respondeat superior and ostensible agency. Under respondeat superior, employers are held liable for the negligence of their employees, to the extent that the employees were acting within the scope of their employment. Thus, an HMO that directly employs physicians, technicians, nurses, and other workers would be held liable for the acts of those employees.

Against HMOs, 49 OKLA. L. REV. 677, 689–90 (1996) (citing Jack. K. Kilcullen, *Groping for the Reins: ERISA, HMO Malpractice, and Enterprise Liability*, 22 AM. J.L. & MED. 7, 9 (1996)).

[8] 29 U.S.C. § 1144(a) ("the provisions of this subchapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan").

[9] *See* 29 U.S.C. § 1144.

[10] While a claim of federal preemption is not usually sufficient to furnish removal jurisdiction on a federal court, in situations where federal law has "completely preempted" state law, removal is proper. *See, e.g.*, RICHARD FALLON, DANIEL MELTZER, AND DAVID SHAPIRO, HART & WECHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 949 (4th ed. 1996). ERISA is a situation where the "complete preemption" doctrine applies, and therefore removal will almost always be validated. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

[11] *See* Greg Otterson, Comment, *Medical Malpractice for Texas HMOs: The End of a "Charmed Life?"* 39 S. TEX. L. REV. 799, 809–10 (1998).

[12] *See generally* Michael Higgins, *Second Opinions on HMOs*, A.B.A J., Apr. 1999, at 60, 62–63 (discussing the various strategies plaintiffs' lawyers are using in attempts to circumvent ERISA).

[13] *See* Robert J. Conrad, Jr., & Patrick D. Seiter, *Health Plan Liability in the Age of Managed Care*, 62 DEF. COUNS. J. 191 (1995) (noting that "[t]he number of malpractice claims against HMOs will continue to increase dramatically as relationships between health care providers and plans evolve under managed care and the lines of demarcation between provider and plan grow less distinct."). *See also* Curtis D. Rooney, *The States, Congress, or the Courts: Who Will Be First to Reform ERISA Remedies?*, 7 ANNALS HEALTH L. 73, 90–91 (1998).

Under the respondeat superior theory of tort, however, a health care provider using independent contractors can escape liability. HMOs and hospitals have therefore had an incentive to hire independent contractors rather than permanent employees.[14] Recently, however, this escape valve has been eliminated by some courts via the ostensible agency theory, in which an HMO can be held liable if it represents an individual as its agent or if it creates the appearance that a health care worker is its agent.[15]

Some states have also attempted to pierce the ERISA veil and hold HMOs liable through state statutes. However, if such statutes "relate to" the plan, they too are preempted by ERISA and essentially irrelevant. Because "relate to" is an especially malleable term, state regulation is virtually impossible. As Justice Scalia has noted, "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."[16]

ERISA's legislative history provides very little mention, let alone definition, of the "relate to" clause. The common law has therefore defined whether a state regulation "relate[s] to" the Act, and thus whether states can regulate health insurance plans at all.[17] Leaving the scope of the exemption to the common law, however, subjects it to varying interpretations throughout the country. The result, as Justice Scalia has noted, is that ERISA preemption case law is convoluted and ultimately unsatisfactory:

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[14] Of course, this strategy has not always worked for HMOs in the past, and serious policy considerations mitigate against courts' providing this incentive. *See generally* Jennifer Anderson, Comment, *All True Histories Contain Instruction: Why HMOs Cannot Avoid Malpractice Liability Through Independent Contracting With Physicians*, 29 McGEORGE L. REV. 323, 333 (1998).

[15] For an in-depth discussion of the ostensible agency and respondeat superior theories and how they relate to the question of HMO liability, see L. Frank Coan, Jr., Note, *You Can't Get There From Here—Questioning the Erosion of ERISA Pre-emption in Medical Malpractice Actions Against HMOs*, 30 GA. L. REV. 1023, 1030–36 (1996), Conrad & Seiter, *supra* note 13, at 195–96. For a discussion on the evolution of respondeat superior and its effect on health care reform legislation, see Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 383–84 (1994).

[16] California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 117 S. Ct. 832, 843 (1997) (Scalia, J., concurring).

[17] *See* Otterson, *supra* note 11, at 810–11. *See also* Anderson, *supra* note 14, at 338–39 (1998) (noting that "HMOs have worn [the undefinable nature of the "relate to" provision] like a badge, using it to tout their immunity from suit"); Conrad & Seiter, *supra* note 13, at 197 (stating that there is no clear definition of "relate to," and no method by which to define it).

> Since ERISA was enacted in 1974, this Court has ... decided ... no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA preemption of various sorts of state law .... Today's opinion is no more likely than our earlier ones ... to bring clarity to this field—precisely because it does obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned.[18]

Likewise, Justice Stevens has expressed dismay at the myriad of ways that courts have interpreted ERISA preemption. Dissenting in *District of Columbia v. Greater Washington Board of Trade*,[19] Stevens stated that courts have erred in interpreting ERISA and that, had no ERISA common law existed at the time the case was decided, the Court undoubtedly would have found that health benefits for employees receiving workers' compensation were "entirely unregulated by ERISA."[20] Stevens was particularly skeptical of the oft-invoked "relate to" clause and admitted he would be more comfortable with a traditional balancing approach:

> In my opinion, a state law's mere reference to an ERISA plan is an insufficient reason for concluding that it is preempted. ... the Court should pause to consider, first, the wisdom of the basic rule disfavoring federal preemption of state laws, and second, the specific concerns identified in the legislative history as the basis for federal preemption.[21]

In light of the fact that preemption completely eliminates the possibility of state HMO regulation, Justice Stevens was unequivocal in his hope for ERISA reform on a federal level: "I think it is time to take a fresh look at the intended scope of the preemption provision that Congress enacted."[22]

Many ERISA preemption cases seem to further Justice Stevens' argument. *Lancaster v. Kaiser Foundation Health Plan*[23] is demonstrative of the piecemeal application of ERISA case law. The court in *Lancaster* ruled on five issues. The court held that ERISA did not preempt malpractice claims regarding the failure to diagnose the patient-plaintiff's brain tumor; that ERISA completely preempted negligence and fraud claims against the HMO

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[18] *Dillingham*, 117 S. Ct. at 842–43 (Scalia, J., concurring).
[19] 506 U.S. 125 (1992).
[20] *Id.* at 136 (Steven, J., dissenting).
[21] *Id.* at 137–38.
[22] *Id.* at 135.
[23] 958 F. Supp. 1137 (E.D. Va. 1997).

regarding its capitated pay structure (in a capitated system, physicians are paid according to their commitment to cost containment for the HMO); that ERISA did not preempt a vicarious liability claim against the HMO; that ERISA preempted general negligence and fraud claims against the HMO; and finally, that ERISA preempted negligence claims against the HMO and its physicians for concealing the capitated pay structure.[24]

Similarly problematic is the Supreme Court's opinion in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, in which the Court held that an "indirect economic influence" does not trigger preemption.[25] While potentially helpful to putative plaintiffs who have been injured, the Court gave no indication on how judges are to distinguish a direct influence from an indirect influence. As a result, plaintiffs have largely remained stalled behind the ERISA wall.

ERISA common law has become a tangled web of irrational presumptions and strained interpretations. Even courts that have ultimately enforced ERISA preemption have expressed discomfort about doing so.[26] Justice Stevens is correct; Congress needs to reinterpret the most conflicted portions of the Act.[27]

Congress intended that ERISA be a pro-employee act, and its two central aims were admittedly worker-conscious. ERISA was designed to end the unfair administration of employee benefit plans and to ensure that such benefit plans were adequately funded. At the time of its adoption, ERISA was heralded as "nothing less than a pension 'bill of rights' to which every

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[24] *See id.*

[25] New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 646, 668 (1995).

[26] *See, e.g.*, Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1338–39 (5th Cir. 1992) (holding plaintiff's claims pre-empted by ERISA while noting that leaving plaintiff without remedy was disturbing). According to Judge (now Chief Judge) King's thorough opinion, ERISA pre-emption "eliminates an important check on the thousands of medical decisions routinely made in the burgeoning utilization review system," which makes for a decline in deterrence of sub-par medical decision-making. *Id.* at 1338. Second, "if the cost of compliance with a standard of care . . . need not be factored into utilization review companies" cost of doing business, bad medical judgments will end up being cost-free to the plans that rely on these companies to contain medical costs." *Id.* Therefore, ERISA plans will lack the incentive to contract with companies that can deliver high quality services as well as reasonable prices. *See id.* Additionally, a system that bases a higher priority on compensation for malpractice would "ease the tension" between beneficiary and plan, whereas the current system simply exacerbates it. *Id.* Finally, the court noted that "cost containment features such as the one at issue in this case did not exist when Congress passed ERISA." Judge King concluded that ERISA has become an antiquated law in need of reform. *Id.*

[27] *See id.* at 1339 (noting that "Congress, not the courts," should reevaluate ERISA because of institutional competence concerns).

worker—regardless of his (or her) occupation, salary or status—is entitled."[28] Indeed, ERISA was labeled an employee's "emancipation proclamation."[29] Congress intended that any benefit achieved by ERISA preemption of conflicting state laws would be directed at employees and their families rather than employers.[30] In the case of HMO liability preemption, however, ERISA has directly harmed those it was intended to help—employees who have been injured by monetary constraints on their HMO benefits or by the poor decisions of HMO administrators.

Even the controversial "relate to" provision was not the result of prolonged, reasoned debate, but of "legislative oversight."[31] When drafted originally, the preemption clause simply prevented state legislatures from passing laws concerning "the subject matters regulated by this act."[32] The language passed unquestioned through both the Senate and the House, but it was amended in a joint committee to mandatory preemption of "any and all state laws relating to any employee benefit plan."[33] The new language was disclosed only ten days before the final vote on ERISA.[34]

The preemption clause has been interpreted to signify that Congress intended that employee benefit plans be regulated by the federal government rather than by individual state governments,[35] a response to the nationalization of American industry whereby corporations and employees often cross state lines. It was supposed to simplify benefit plan regulation by codifying the rules for plan administration under federal law.[36] Nevertheless, ERISA has resulted only in muddled case law, making it virtually impossible for states to regulate benefit plans.

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[28] *Id.*

[29] Larry J. Pittman, *ERISA's Pre-emption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority,* 46 FLA. L. REV. 355, 358–59 (1994). *See also* Otterson, *supra* note 11, at 809–10 (arguing that ERISA was intended "to protect . . . the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information"); Anderson, *supra* note 14, at 328, 339 (noting that some managed care executives have stated that the preemption clause as interpreted by the courts is beyond Congressional intent).

[30] *See* Pittman, *supra* note 29, at 359–60.

[31] Anderson, *supra* note 14, at 335.

[32] Richardson, *supra* note 7, at 694.

[33] *Id.*

[34] *Id.*

[35] See Angela M. Easley, Comment, *A Call to Congress to Amend ERISA Pre-emption of HMO Medical Malpractice Claims: The Dissatisfactory Distinction Between Quality and Quantity of Care,* 20 CAMPBELL L. REV. 293, 299 (1998).

[36] *See id.* at 299–300.

At the time of ERISA's passage in 1974, no member of Congress could have predicted the burgeoning effect HMOs would have on the American medical system or even that such organizations would be held to constitute "plans" under ERISA.[37] Indeed, the U.S. Department of Labor attorneys responsible for overseeing the Act's administration contend that the preemption of state laws enabling patients to sue HMOs for malpractice is not what Congress intended when it codified 29 U.S.C. § 1144: "There is not a scintilla of evidence that Congress intended to preempt such laws, much less evidence which demonstrates that preemption was the clear and manifest purpose of Congress."[38]

The clear and manifest purpose of Congress can be served now through passage of the PBRA. Adopting the PBRA's ERISA Amendment will serve Congress's original intent and would also rectify several problems that the proliferation of HMOs and their ability to escape liability have caused in the American health care and legal systems. Currently, because ERISA blocks suits against a patient's HMO, patients must sue their individual physician to have a chance of recovery.

The current malpractice system, however, hardly fulfills the mission of corrective justice for either victim or accused. Despite the increasing bureaucratic centralization of the American health care system and the fact that medical decisions are often made by businessmen rather than doctors, physicians rather than health care providers are assigned blame in malpractice suits. But blame—not financial liability—is all that is assigned, as

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[37] In fact, officials at the U.S. Department of Labor—the agency responsible for administering ERISA—contend that HMOs are not really "plans" under 29 U.S.C. § 1002. *See, e.g.*, Amicus Curiae Reply Brief of the Secretary of Labor, Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995) (No. 94-1373), *available at* <http://www.dol.gov/dol/pwba/public/pubs/ab/ascii065.txt> (visited Mar. 23, 1999) ("ERISA plans are non-profit, tax-exempt entities. Here, the ERISA plan is the arrangement established by [plaintiff's] employer . . . whereby [the employer] undertook to provide health benefits to its employees through the purchase of HMO memberships for them . . . . [The employer] did not "establish" [the HMO], and [the HMO] is not the plan. Rather, [the HMO] is an independent, for-profit corporation that provides medical services to . . . plan participants in exchange for a fixed fee or premium") (citations omitted). *See also* Amicus Curiae Reply Brief of the United States Department of Labor, Nascimento v. Harvard Community Health Plan, Inc., 1994 WL 879465 (Mass. Super.) (No. 94-2534), *available at* <http://www.dol.gov/dol/pwba/pubs/ab/asciinas. txt.> (visited Mar. 23, 1999) ("the HMO is not an ERISA plan, it is a separate corporation that provides services to a plan. Differing state laws on vicarious liability affect only the HMO's liability; the plan has no liability"); Richardson, *supra* note 7, at 702–03 (stating that while ERISA plans are nonprofit organizations that qualify for tax-exempt status, HMOs are for-profit corporations, not organized or administered by employers).

[38] Amicus Curiae Reply Brief, *Nascimento*, *supra* note 37.

physicians are not asked to pay damages out of their own pockets; rather, their insurers pay. Indeed, physicians do not even bear the monetary costs of litigation; the insurer selects and pays for the physician's attorney and has the final say on whether to settle or to contest the claim.[39]

This could be somewhat corrective if physicians' personal liability were reflected in insurance premiums. Individual records, however, are not taken into account when setting premiums. Rather, all physicians within the same specialty in a particular geographic area generally pay the same premium irrespective of the number of times, if at all, they have committed malpractice.[40]

For the victim, too, the malpractice system is unsatisfactory. A patient-plaintiff's chance of success in court does not necessarily correlate with the strength of his case. Even if a "deserving" plaintiff is compensated, a large portion of his award will likely be immediately diverted for attorney's fees. Further, medical malpractice tort claims take on the average eighteen months to reach conclusion, the eighteen months in which the patient is often neediest.[41] As such, Troyen Brennan, a professor at Harvard Law School and at Harvard Medical School, has aptly compared the medical malpractice recovery system to "giving tickets to a lot of people who weren't speeding, but letting a lot of speeders go by."[42]

HMO liability for malpractice also would curb both medical and legal costs. It certainly would decrease the costs of malpractice litigation by eliminating the need for multiple defendants, multiple attorneys, or multiple insurers supervising litigation. Settlement would be more common, since only one party would have to agree to the terms of settlement rather than multiple, sometimes conflicting, actors.[43]

HMO liability would also decrease malpractice costs. When President Clinton first proposed the PBRA, the Physician Insurer Association of America was concerned that if HMOs were held liable for malpractice, individual physicians' need for malprac-

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[39] *See* Abraham & Weiler, *supra* note 15, at 399.

[40] *See id.*

[41] *See* Jeffrey O'Connell & James F. Neale, *HMO's, Cost Containment, and Early Offers: New Malpractice Threats and a Proposed Reform,* 14 J. CONTEMP. HEALTH L. & POL'Y 287, 295–96 (1998).

[42] *Id.* (citing JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME, INJURIES, INSURANCE AND INJUSTICE 131 (1987)).

[43] *See* Abraham & Weiler, *supra* note 15, at 406.

tice insurance would decrease.[44] HMOs faced with liability might have incentives to set up their own insurance programs rather than pay the skyrocketing premiums charged by private insurance sources. This would have several effects. More money could be spent on medical care, and fewer doctors would be discouraged from performing experimental but potentially helpful measures rather than safe, stopgap procedures. Indeed, doctors now are often forced to raise prices on individual procedures to cover the costs of liability insurance; freedom from that constraint might enable them to serve their patients better through less attention to cost.[45]

Because HMOs provide cost containment mechanisms such as pre-authorization requirements, second surgical opinions, limitations on length of stay, restrictions on provider choice, and capitation, they play an integral role in the medical decision-making process and should be forced to internalize the costs created by their actions.[46] Subjecting individual physicians to liability for decisions made by HMOs is unfair and has little deterrent value. For instance, HMOs often limit a patient's access to specialists, forcing general practitioners to offer specialized treatment that they are often unequipped to provide.[47] In such a case, the limiting HMO rather than the physician should bear the bulk of the liability when disaster strikes.

Likewise, HMO-capitated pay structures make it financially beneficial for a physician to order as few tests and to perform as few procedures as possible. When an institutional pay system has forced doctors to commit malpractice to stay financially viable, it is irrational to punish physicians while allowing the HMO to continue to reward the cost-cutting that holds such dangerous implications for the patient.[48] HMOs not only fund patient services—they manage patient care and control treatment decisions—and should be treated as such.

Finally, HMOs often represent themselves as intrinsically linked with the health care providers they hired. Courts often look to advertisements and promotional materials to determine

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[44] *See id.* at 382.

[45] *See id.*

[46] *See* Conrad & Seiter, *supra* note 13, at 191.

[47] Anderson, *supra* note 14, at 329. And when doctors perform such specialized procedures, they are held to the standards of a specialist if later sued for malpractice. *See, e.g.*, Jenkins v. Payne, 465 S.E.2d 795, 799 (Va. 1996).

[48] *See* Anderson, *supra* note 14, at 328–29.

how closely aligned an HMO is with its staff. This began in the mid-1960s, when courts began to apply liability to hospitals,[49] and similar reasoning has been applied to HMOs.[50] When an HMO attracts business based on an advertised close relationship with its staff, it should be held liable for the errors of that staff.[51]

The HMO treatment climate makes it difficult to determine which employee might have committed a mistake leading to injury. An individual physician is often a member of a larger group of medical personnel, including nurses, staff members, and other physicians, assigned to a single patient. The days of the family doctor making individual house calls have been replaced by HMO group action. Thus, when something goes wrong, it is often difficult to assign liability to one member of the group.[52] HMO liability would serve to rectify this conflict; instead of individual liability, the agency employing all the workers on the patient's case would be held liable.

The Patients' Bill of Rights Act would amend ERISA to allow patients to sue negligent HMOs for malpractice. Passage of this bill will force HMOs to take responsibility for their actions, contain legal and medical costs, and enable malpractice victims to be duly compensated. Forcing HMOs to internalize their own costs would, however, do more than merely help compensate those injured as a result of HMO frugality. It would also help reform the legal system governing medical malpractice claims to benefit doctors, patients, and insurers alike. As such, the Patients' Bill of Rights is a prudent piece of legislation that would help mitigate against the impact of the unfortunate, but inescapable, "monetarization of medical care."[53]

—*Suzanne Carter*

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[49] *See, e.g.*, Sword v. NKC Hosps., Inc., 661 N.E.2d 10, 12–13 (Ind. Ct. App. 1996) (looking to defendant hospital's advertisements and finding that they portrayed anesthesiologists as hospital agents, thus holding the hospital liable for the anesthesiologists' errors).

[50] *See, e.g.*, Boyd v. Albert Einstein Med. Ctr., 547 A.2d 1229 (Pa. Super. 1988) (applying a *Sword* type philosophy and holding an HMOs liable for its express representations of quality and complete care).

[51] *See, e.g.*, Pacificare of Oklahoma, Inc. v. Burrage, 59 F.3d 151, 164 (10th Cir. 1995) (holding that ERISA does not pre-empt lawsuits against HMO based on arguments that they did not measure up to their promised quality).

[52] *See* Abraham & Weiler, *supra* note 15, at 413.

[53] Eli Ginzberg, *The Monetarization of Medical Care,* NEW ENG. J. MED., May 3, 1984, 1162, 1164 ("[T]o rely on the market to discipline money-grubbing professionals is to overestimate what the market should be asked to do or is capable of doing.").

FEDERAL MANDATE PROCEDURES

On January 19, 1999, the U.S. House of Representatives passed House Bill 350, the Mandates Information Act.[1] The Act would require Congress to gather more data about certain types of private sector costs generated by new legislation, and add an extra procedural step when Congress passes new laws that would create large or uncertain costs.[2] Supporters of the bill hailed it for increasing transparency and accountability in lawmaking and argued that it heralded a new era of reflection and consideration in congressional action. Critics, however, denounced it for obfuscation and warned it would help strip vital protections from the environment, public health, and other areas of federal vigilance. Still before the Senate, the Act, if passed, could significantly affect the way laws are made.

This Recent Legislation essay first briefly discusses the mandate reform movement and the ways in which the branches of the federal government have responded to that movement. The essay then describes the previous federal legislation upon which the Mandates Information Act intends to build. Finally, the essay analyzes the content of and debate over House Bill 350, and concludes that it should not be passed in its present form.

Like other terms of political art, the phrase "unfunded mandate" carries different meanings for advocates striving toward different goals. The idea of the unfunded mandate was born in the study of relations among federal, state, local, and tribal governments. Unfunded mandates in the federal context were defined as federal laws that force states to incur costs or forgo revenues without providing compensating federal funds.[3] State taxpayers, therefore, bear the costs.[4]

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[1] H.R. 350, 106th Cong. (1999).

[2] *See infra* notes 29–35 and accompanying text.

[3] *See* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1156 (1997). Professor Adler uses for "mandate" the more precise definition of "any federal statutory, regulatory, or judicial instruction that (1) directs state and local governments to undertake a specific action or to perform an existing function in a particular way, (2) imposes additional financial burdens on states and localities, or (3) reduces state and local revenue sources." *Id.*

[4] The distinction between federal taxpayers (who pay for funded intergovernmental mandates) and state taxpayers (who pay for unfunded ones)—essentially the same people—may seem arbitrary. Supporters of fiscal federalism, however, argue that federal taxes affect all Americans evenly, while federal mandates may burden particular states more than others. Furthermore, Congress may prefer to shift the responsibility for increased taxes onto state legislatures. Such shifting could decrease democratic accountability and distort policy. *See* New York v. United States, 505 U.S. 144, 169 (1992)

Lately, however, the term "unfunded mandate" has been applied to every federal law that imposes costs on any subject, private or public. Discussions should, however, distinguish unfunded *intergovernmental* mandates (as defined above) from unfunded *private* mandates (traditional regulation of the private sector). Each raises different policy concerns, but legislators, courts, and commentators often confuse the two.

The opponents of unfunded intergovernmental mandates became particularly vocal during the early 1990s. In October 1993, for example, state and local officials declared National Unfunded Mandates ("NUM") Day to gain publicity for the federalism concerns associated with unfunded mandates, and their cause gained considerable support from members of Congress.[5] Indeed, although congressional leadership, responding unfavorably to the publicity, ultimately prevented its passage, the legislation that later became the Unfunded Mandates Reform Act of 1995 was first proposed in 1993.[6]

The Executive and Judicial Branches also responded to the states' concern with unfunded intergovernmental mandates. In 1987, President Ronald Reagan issued Executive Order 12612,[7] which required federal agencies to "[i]dentify the extent to which [any new regulation] imposes additional costs or burdens on the States . . . ."[8] In 1993, newly elected President Bill Clinton issued Executive Order 12875,[9] which required for any agency regulation imposing costs "upon a State, local, or tribal government [either] funds necessary to pay the direct costs incurred . . . in complying with the mandate . . . [or] prior consultation with representatives of [the] affected . . . governments."[10]

("[W]here the Federal Government directs the States to regulate . . . state officials . . . [may] bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

[5] *See* Timothy J. Conlan et al., *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, PUBLIUS: J. FEDERALISM, Summer 1995, at 23–24.

[6] *See id.* at 31.

[7] 52 Fed. Reg. 41685.

[8] *Id.*

[9] 58 Fed. Reg. 58093.

[10] *Id.* President Clinton subsequently revoked Exec. Orders 12612 and 12875, and replaced them with a new system less deferential to state, local and tribal governments. *See* 3 CFR Exec. Order 13083. Public and Congressional reaction to this maneuver caused him to suspend Exec. Order 13083, presumably reinstating the earlier orders. *See* 3 CFR Exec. Order 13095. For a description of the controversy, see, e.g., David S. Broder, *White House to Rewrite Federalism Order, Now With State-Local Input*, WASH. POST, July 29, 1998, at A19.

Additionally, the Supreme Court, in several recent, high-profile cases, placed limits on the federal power to impose certain types of costs on states. Under the doctrine established in these cases, Congress may pass general laws that affect the states along with, for example, all other employers or all other property owners.[11] Congress may not, however, "commandeer" state legislatures[12] or executives[13] to execute federal policies. Congress does retain the authority to make federally granted funds conditional on obedience to the federal will.[14] Such conditions usually, although not always, convince states to cooperate.[15]

House Bill 350 takes its form from the Unfunded Mandates Reform Act of 1995,[16] a key provision of the Republican Contract with America.[17] Although a Republican election issue, the law received broad bipartisan support, as well as a signature from President Clinton.[18] Its provisions primarily limit the costs that the federal government can impose on state, local, and tribal governments.

Title I of the 1995 Act contains the strongest anti-mandate provisions. It requires the Congressional Budget Office ("CBO") to estimate the costs to state, local, and tribal governments of new legislation,[19] and to determine whether those costs exceed

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[11] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (upholding Fair Labor Standards Act with respect to state employers).

[12] *See New York,* 505 U.S. at 169 (striking down federal regulation of hazardous waste that had ordered state governments, under certain circumstances, to take title to such waste).

[13] *See* Printz v. United States, 521 U.S. 898 (1997) (striking down federal handgun control regulation that had ordered local law-enforcement officers to perform background checks on handgun purchasers).

[14] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 222 (1987) (holding that Congress can condition highway funds on states' establishment of a drinking age of 21).

[15] For example, in recent years some states rejected federal education funding through the Goals 2000 program out of fear that the funding would lead to "federal intrusion" in state education policy decisions. Linda Feldmann, *Conservatives Question 'True Goal' Of Goals 2000 Education Guidelines*, CHRISTIAN SCI. MONITOR, June 8, 1995, at 1 (quoting then-Gov. George Allen (R) of Virginia). All states now accept Goals 2000 money (including New Hampshire, the last hold out). *See* Lois R. Shea, *Goals 2000 Funds Open Programs at Many Schools*, BOSTON GLOBE, June 29, 1997, New Hampshire Weekly Section, at 1. (quoting a New Hampshire teacher calling Goals 2000 a "string-free grant").

[16] Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

[17] *See Senate Okays Putting Money with Mandates,* ST. PETERSBURG TIMES, Jan. 28, 1995, at 1A (identifying unfunded mandates bill as key provision of Contract with America).

[18] *See* Ann Devroy & Helen Dewar, *Hailing Bipartisanship, Clinton Signs Bill to Restrict Unfunded Mandates,* WASH. POST, Mar. 23, 1995, at A10 (quoting the President calling the unfunded mandates bill a "model on how we have to continue to change the way Washington does business").

[19] The Unfunded Mandates Reform Act exempts from its requirements a number of

$50 million.[20] The CBO must also estimate the costs of legislation to the private sector, and determine whether those costs exceed $100 million.[21] When legislation exceeds the $50 million intergovernmental threshold, any member of Congress may raise a point of order against it; twenty minutes of debate follow, at the end of which members vote on the point of order.[22] Legislation that fails to gather a simple majority proceeds no further.

Titles II and III of the 1995 Act reinforce the core provisions of Title I. Title II codifies Executive Order 12875, ordering federal agencies to minimize the costs of agency regulations to state, local, and tribal governments and to consult with those governments before imposing such costs.[23] Title III funded the Advisory Commission on Intergovernmental Relations to study then-existing federal unfunded intergovernmental mandates and to recommend needed changes.[24]

So far, members of Congress have been reluctant to invoke the procedural blocks of Title I and, when they have, their efforts have met with intermittent success. As shown by the vote to increase the minimum wage before the 1996 elections, the point of order cannot prevent a determined congressional majority from passing large new mandates.[25] Of course, supporters of the Unfunded Mandates Reform Act never claimed the law would hinder a determined congressional majority.[26]

Nevertheless, internal and external observers of Congress attribute to the 1995 law substantial effects on several major pieces of legislation. In testimony before the House Rules Committee, James L. Blum, Acting Director of the CBO, identified several bills of the 104th and 105th Congresses for which the CBO initially projected an unfunded intergovernmental mandate exceeding the $50 million threshold that were later

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types of legislation, including enforcement of constitutional and civil rights, audits and accounting requirements, emergency assistance, national security, and Social Security. *See* 2 U.S.C. § 1503 (Supp. I. 1995).

[20] *See* 2 U.S.C. § 658c(a)(1) (Supp. I. 1995).

[21] *See* 2 U.S.C. § 658c(b)(1) (Supp. I. 1995).

[22] *See* 2 U.S.C. § 658d(a) (Supp. I. 1995).

[23] *See* 2 U.S.C. §§ 1531-1538 (Supp. I. 1995).

[24] *See* 2 U.S.C. §§ 1551-1556 (Supp. I. 1995).

[25] *See* Minimum Wage Increase Act of 1996, 29 U.S.C. § 206(a) (Supp. II. 1996).

[26] Some supporters went so far as to emphasize the ability of a majority to legislate despite the point of order. *See, e.g.*, 141 CONG. REC. S62 (daily ed. Jan. 4, 1995) (statement of Sen. John Glenn (D-Ohio), introducing the bill that was to become the Unfunded Mandates Reform Act) ("[T]he bill does not prohibit Congress from passing unfunded Federal mandates. There may be times when it is appropriate to ask State and local governments to pick up the tab for Federal mandates.").

revised to fit below the limit.[27] The Act affects unfunded private mandates less, however. Since such mandates escape the point-of-order enforcement mechanism, members of Congress tend to root them out of proposed legislation with less vigor.[28]

The Mandates Information Act of 1999 amends Title I of the Unfunded Mandates Reform Act in several ways, each affecting congressional consideration and debate of new legislation. First, House Bill 350 would require the CBO to estimate, for each proposed piece of legislation,[29] costs to consumers, workers, and small businesses, and to use these estimates when calculating the costs entailed in federal regulation of private sector enforcement of the bill.[30]

Second, House Bill 350 would allow the unfunded mandate point of order against any proposed law for which the CBO cannot estimate intergovernmental or private-sector costs.[31] Presently, if the Director of the CBO determines that the Office cannot make "a reasonable estimate" of the costs of legislation, members may not raise points of order.[32] House Bill 350, however, would allow members of Congress to raise a point of order against such legislation.[33]

Third, House Bill 350 would allow members to raise a point of order against any proposed law creating unfunded private mandates exceeding $100 million.[34] At present, the CBO provides information about private-sector costs, but members can raise a

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[27] *See Hearings on H.R. 350: Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 106th Cong. (1999) (statement of James L. Blum, Acting Director, Congressional Budget Office) [hereinafter Blum]. One example Blum gave was a requirement that health insurers provide parity in mental health coverage. *See id.*; Mental Health Parity Act of 1996, Pub. L. No. 104-204, 110 Stat. 2944 (codified in scattered sections of 26 and 42 U.S.C.) (modified by restricting the ways in which mental health coverage was required to be equal to those of health coverage provided).

[28] *See id.* ("The track record for private-sector mandates is a bit different.").

[29] Types of legislation exempted under 2 U.S.C. § 1503 would remain exempt. *See supra* note 18.

[30] *See* H.R. 350 § 4(a)(1).

[31] *See id.* § 4(a)(2).

[32] 2 U.S.C. § 658d(a)(1) (Supp. I. 1995).

[33] It would also broaden the definition of an unfunded mandate in another way by overruling an existing CBO interpretation of the Unfunded Mandates Reform Act of 1995. Under the new rule, new conditions for funding tied to existing federal programs that did not include "new or expanded" ways for recipient governments to continue providing services under the affected program would be considered unfunded mandates. *See* H.R. 350 § 5; *see also* 2 U.S.C. § 658(5)(B) (current law that Section 5 would amend); 145 CONG. REC. H426 (daily ed. Feb. 4, 1999) (statement of Rep. Jim Moran (D-Va.)) (describing the provision and supporting it).

[34] *See* H.R. 350 § 4(a)(3).

point of order only if a bill or legislative provision would impose more than $50 million in unfunded intergovernmental mandates.[35]

Sponsors of House Bill 350, led by Rep. Gary Condit (D-Cal.), first introduced a similar measure in the 105th Congress.[36] Then, as now, the measure passed the House;[37] the corresponding bill in the Senate, however, never left committee. The Senate Budget Committee and the Senate Governmental Affairs Committee each held hearings, but neither reported the legislation.

In passing the House,[38] House Bill 350 weathered two amendment challenges by narrow margins. An amendment offered by Rep. Sherwood Boehlert (R-N.Y.) would have weakened considerably the procedural blocks created by the Act to unfunded private mandates.[39] In contrast, an amendment offered by Rep. Henry Waxman (D-Cal.) would have created similar blocks to different legislative acts—those weakening environmental protections—which, Waxman contended, deserved scrutiny equal to or greater than that given unfunded private mandates.[40]

Proponents of House Bill 350 argue that the bill's analysis requirements will increase the amount and quality of information in congressional debates over new legislation. As Blum testified, the Unfunded Mandates Reform Act has "worked as intended" and has increased "[b]oth the demand for and the supply of information about the costs of federal mandates . . . ."[41] On the House floor, supporters of House Bill 350 emphasized the provisions promoting the gathering of extra information as key to the effect and spirit of the Act.[42]

Opponents reply that the information made available by House Bill 350 will be biased and inaccurate. The CBO now relies extensively on state and local officials in calculating the costs of intergovernmental mandates.[43] House Bill 350 might force the

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[35] *See* 2 U.S.C. § 658d(a)(2) (Supp. I. 1995).

[36] *See* H.R. 3534, 105th Cong. (1996).

[37] *See* 144 CONG. REC. H3451-52 (daily ed. May 19, 1998) (vote on H.R. 3534).

[38] *See* 145 CONG. REC. H560 (daily ed. Feb. 10, 1999) (by a vote of 274-249).

[39] *See id.* at H551 (the Boehlert amendment was defeated 210-216).

[40] *See id.* at H557 (the Waxman amendment was defeated 203-216).

[41] Blum, *supra* note 27.

[42] *See* 145 CONG. REC. H427 (daily edition Feb. 4, 1999) (statement of Rep. Porter Goss (R-Fla.)) ("H.R. 350 . . . is based on the very simple yet powerful truth that more information is better than less.").

[43] *See* Theresa A. Gullo & Janet M. Kelly, *Federal Unfunded Mandate Reform: A First-Year Retrospective,* 58 PUB. ADMIN. REV. 379, 384 (1998) (noting that the CBO "relies heavily on in-depth telephone contacts with state and local officials and on communications with various interest groups" in satisfying current requirements).

CBO to rely on information provided by affected industries for estimates of new bills' costs. Regulated industries may overestimate costs of new legislation, either as a conscious strategy or out of simple myopia, as some argue they have done in the past.[44]

Proponents argue further that House Bill 350's expanded point of order requirements will force members of Congress to consider the costs of regulation and make explicit choices about imposing those costs on the private sector.[45] Explicit choices render legislators more accountable to voters for their decisions. Accountability to voters for regulatory costs as well as for tax costs may be particularly vital in an era of fiscal restraint and smaller government; Congress might otherwise heavily burden the private sector to appear active but escape budget constraints.[46]

Opponents respond, however, that the Act will focus unduly on the costs of regulation, while ignoring its benefits.[47] Therefore, members will be more accountable for choices to regulate, but less accountable for choices to deregulate. Why, opponents ask, should deregulation hold privileged status in congressional debate?[48] Opponents of a particular piece of legislation might use a point of order to eliminate a bill by pointing to evidence of its

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[44] *See Hearings on H.R. 350: Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 106th Cong (1999) (statement of Maura Kealey, Deputy Director, Public Citizen's Congress Watch) ("[H.R. 350] would either result in creating an ambitious new analytical program at CBO or—as would more likely be the case—in reliance on studies completed by others . . . [and would] invite fishing expeditions to attribute projections of consumer price increases, lost wages, jobs and benefits, and small business closures to the enactment of public safeguards for consumers, workers and the environment.").

[45] *See* 145 CONG. REC. H424 (daily edition Feb. 4, 1999) (statement of Rep. John Linder (R-Ga.)) ("[H.R. 350 would] force Members and committees to pay attention to the costs on businesses and consumers . . . force Members to review reliable information from the CBO[, and] . . . increas[e] congressional accountability by requiring Congress to be informed fully of the effect of mandates before enacting them into law.").

[46] *See Hearings on H.R. 350: Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 106th Cong (1999) (statement of Angela M. Antonelli, Director, Roe Institute for Economic Policy Studies) ("[I]n an era of fiscal budget restraint . . . the more hidden costs of private sector mandates can become a politically appealing alternative to new government programs and higher direct taxes.") [hereinafter Antonelli].

[47] *See* 145 CONG. REC. H425 (daily edition Feb. 4, 1999) (statement of Rep. John Moakley (D-Mass.)) ("[H.R. 350 would] tilt[] the playing field against some of our Nation's finest laws, laws to feed the hungry, protect public safety, protect public health, clean up pollution, enforce civil rights, and even compel parents to support their children. These laws have costs, but they also provide enormous benefits.").

[48] *See* H.R. REP. NO. 106-5, at 18 (1999) (dissenting views) ("[H.R. 350] should not be weighted to influence or direct a particular type of policy solution.").

costs as justification without confronting evidence of its benefits (or of the costs of inaction).[49]

Several points about the Mandates Information Act of 1999 deserve special mention. Although the bill grows out of the perceived success of the Unfunded Mandates Reform Act, and incorporates its methods, the purposes of the two differ markedly. The intergovernmental mandates dealt with by the earlier act were decisions by the federal government that directly imposed costs on state government. The underlying rationale for caution in intergovernmental regulation involves both the constitutional importance of federalism[50] and its associated policy values.[51]

Therefore, Congress might want to treat intergovernmental mandates differently from all other federal regulations and impose special procedural barriers for such laws. These arguments do not support House Bill 350, which would, if used successfully against any significant number of the bills it could affect, cut a broader swathe through federal powers.[52] Friends and enemies of House Bill 350 alike should recognize its potential as a general purpose anti-regulatory bill, as opposed to the narrower provisions of the Unfunded Mandates Reform Act.

In addition, the effects of House Bill 350 on congressional debate would vary with the ways members of Congress used it. The bill's supporters argue that the point of order guarantees twenty minutes of debate over any private-sector unfunded mandates.[53] If used at the end of a debate, House Bill 350 would add twenty minutes of deliberation. If, however, an opponent of a

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[49] *See* 145 CONG. REC. H424 (statement of Rep. Boehlert) ("[U]nder H.R. 350, if any private interest opposed a bill, a Member could raise a point of order that could limit debate to a mere 20 minutes, 10 minutes on each side.").

[50] *See New York*, 505 U.S. at 157 (arguing that even were federalism bad policy, the Constitution would still require it).

[51] *See Printz*, 521 U.S. at 36 (attributing to the Founders the conviction that "using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict"). The opposite idea, that too much central control of the states would work entirely too well and would create an overly strong federal government, is often used to reach similar conclusions. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

[52] *See* Blum, *supra* note 27. According to Blum, since the enactment of the Unfunded Mandates Reform Act of 1995, twenty-six proposed bills (of which two passed) have contained unfunded intergovernmental mandates exceeding the existing statutory threshold, while seventy-four (of which seventeen passed) have contained unfunded private mandates exceeding the H.R. 350 threshold. *See id.*

[53] *See* Antonelli, *supra* note 46 ("[T]he Mandates Information Act proposes . . . to give any Member the right to make the House devote just 20 *more* minutes to . . . a proposed, new private sector mandate with significant costs.") (emphasis added).

particular measure invoked the point of order early in a long debate, the twenty-minute limit might instead curtail the debate, forcing the bill to an early vote in a hostile frame.[54]

This threat has existed since the Unfunded Mandates Reform Act went into effect in early 1996, and the point of order has not, in this context, become an offensive weapon.[55] Supporters of House Bill 350, therefore, have that history on their side. Nevertheless, the provision of the new law that permits a point of order where the CBO has been unable to estimate the effects of legislation could make it much more powerful, making its critics' fears more plausible.

The Mandates Information Act may fail in the 106th Congress either in Senate committee, as it did in the last term, or through a Presidential veto.[56] Although House Bill 350 won by a healthy margin in the House, passing by a vote of 274 to 149,[57] it fell short of the two-thirds majority required to override a possible veto.

If passed, House Bill 350 has a greater chance than did the Unfunded Mandates Reform Act to change greatly congressional procedure and American law. The range of policies it covers and its relative strength against new regulation could give it a major role in the regulatory conflicts of the near future.

Because House Bill 350 could have such broad effects, it should not be passed because of a belief in the aphorism that more information is always better. Nor should it be passed without a more careful examination of whether it would lead members of Congress to obtain more information or merely to weigh differently the information they already possess.[58] Finally, it

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[54] *See* 145 CONG. REC. H424 (statement of Rep. Boehlert) (giving the example of the debate over the Clean Water Act of 1995, which lasted a day and a half, and claiming that H.R. 350 could have "shut down debate after only 20 minutes, 10 minutes on each side, 600 seconds").

[55] One exception to this statement was the use of a point of order against a motion to recommit, a procedural tool of the minority. *See* H.R. REP. NO. 106-5, at 18 (dissenting view) (recalling the move as "an offensive breach of fair play" but adding that the "experience was, fortunately, not the norm").

[56] *See* Jonathan Riskind, *Bill Tough on Unfunded Mandates*, COLUMBUS DISPATCH, Feb. 11, 1999, at 2G (quoting an Administration veto threat).

[57] *See* 145 CONG. REC. H560 (daily ed. Feb. 10, 1999).

[58] Without new information, H.R. 350 could lead merely to CBO reports that repeat assessments created by interests that would bear the costs of a proposed law. *See supra* notes 43–44 and accompanying text. Since the bill provides no new resources to gather information, it could result at most in redistribution of existing CBO resources. The Unfunded Mandates Reform Act of 1995, in contrast, authorized $4.5 million per year through 2002 in new funding to CBO to carry out its admittedly broader instructions. *See* 2 U.S.C. § 1516 (Supp. I. 1995).

should not be passed without a better answer to the question implied by the Waxman amendment—why Congress should necessarily move more carefully to pass a new regulation than to remove an existing one through a concealed rider. The Senate may yet fix these problems; if not, however, it should not pass House Bill 350 at all.

—Gregory G. Rapawy

SAME-SEX MARRIAGE

On November 3, 1998, Hawaii voters overwhelmingly passed a referendum amending the state's constitution to give the legislature the power to reserve marriage to opposite-sex couples.[1] This referendum came after years of battling between the state legislature and the state courts over the regulation of marriage.[2] The constitutional amendment deprives same-sex couples of their rights under the Equal Protection Clause of the Hawaii Constitution to demand a compelling state interest when the legislature deprives lesbians and gay men of rights granted to heterosexuals.[3] While bound to enforce the amendment, the Hawaii Supreme Court can, and should, protect this group by failing to apply the amendment retroactively and forcing the legislature to enact laws executing their newly given power.

In December, 1990, Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melilio were denied applications for marriage licenses solely because they were same-sex couples.[4] They filed a complaint, seeking a "judicial declaration that the construction and application of Hawaii Revised Statutes ('HRS') § 572-1 to deny an application for a license to marry because an applicant couple is of the same sex is unconstitutional."[5] The trial court dismissed the case, ruling that the plaintiffs had failed to state a claim upon which relief could be granted.[6]

The Supreme Court of Hawaii, however, in a plurality decision in *Baehr v. Lewin*, remanded the case, ruling that because HRS § 572-1 restricts marriage to opposite-sex couples, thereby regulating marriage on the basis of sex, the lower court should

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[1] The vote was 69.2% in favor of the amendment and 28.6% opposed. *See* Office of Elections, 1998 Election Results, *Summary Reports: Statewide* (last modified Nov. 4, 1998) <http://www.hawaii.gov/elections/facts/98conam.htm>.

[2] The tension between the two branches of government is illustrated in the 1994 Hawaii Session Laws, where the legislature asserted that the regulation of marriage is a policy matter that is the responsibility of the legislature or a constitutional convention, not the courts. *See* 1994 Haw. Sess. Laws, Act 217, §§ 1, 8. The legislature explicitly denounced the Hawaii Supreme Court's ruling in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), that Hawaii's marriage law is subject to strict scrutiny because it establishes a sex-based classification. *See id.*

[3] *See generally* William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423 (1993) ("[P]rohibitions against same-sex marriage help to preserve the subordination of gays, lesbians, and bisexuals within society.").

[4] *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. 1996).

[5] *Id.*

[6] *See Lewin*, 852 P.2d at 52.

apply strict scrutiny analysis.[7] Under the strict scrutiny test, a statute is presumed to be unconstitutional, leaving the state with the burden of demonstrating a compelling interest for its sex-based classification.[8]

The legislature harshly criticized the court's decision, decrying the court's judicial activism and stating that the court "substitut[ed] its own judgment for the will of the people of this State."[9] The legislature further accused the court of deliberately misinterpreting the word "sex" in the context of Article 1, § 5 of the Hawaii Constitution; the legislative intent was for "sex" to refer to "gender," not "sexual orientation."[10] The legislature directed the judiciary to consider the legislative intent, as explicitly laid out in the 1994 Session Laws, in "reviewing and interpreting" HRS § 572-1.[11]

On remand, in *Baehr v. Miike*, the circuit court held that the evidence presented by the state to justify the sex-based classification in HRS § 572-1 was insufficient to constitute a compelling state interest, failing strict scrutiny.[12] Thus, the state was enjoined from denying marriage licenses to same-sex couples.[13]

In light of the circuit court's ruling, the legislature proposed a constitutional amendment to the Hawaii constitution to make it clear that the legislature has the authority to limit marriage to opposite-sex couples.[14] On November 3, 1998, the constitutional referendum appeared on the ballot and was adopted.[15] The circuit

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[7] Under the Equal Protection Clause of the Hawaii Constitution, "state-sanctioned discrimination against any person . . . on the basis of sex" is prohibited. HAW. CONST., art. 1, § 5 (1998); *see Baehr*, 852 P.2d at 47. Sex-based classifications receive "intermediate" scrutiny when viewed under the lens of the U.S. Constitution. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

[8] *See Baehr*, 852 P.2d at 63–64.

[9] 1994 Haw. Sess. Laws, Act 217, §§ 1, 8.

[10] *See id.* "If the delegates to the respective conventions had intended 'sex' to mean 'sexual orientation', there most likely would have been a lively discussion on this issue. The fact that there is no debate at all on this issue lends strong credence to the implication that 'sex' meant 'gender'." *Id.*

[11] 1994 Haw. Sess. Laws, Act 217, §§ 1, 8.

[12] *See Miike*, 1996 WL 694235, at *21.

[13] *See id.* at *22. The circuit court followed the directives of the Hawaii Supreme Court, rather than responding to the legislature's criticism of that decision. *Id.*

[14] *See* H.B. 117, 19th Leg. (Haw. 1997).

[15] The question on the ballot was: "Shall the Constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?" *Id.*

court's determination that HRS § 572-1 is unconstitutional has been appealed; state supreme court review is still pending.[16]

A state constitutional amendment ratified by the people is invalid if prohibited by the federal Constitution.[17] The Fourteenth Amendment and its Equal Protection Clause, therefore, could stand in the way of the Hawaii amendment.

Under equal protection jurisprudence, strict scrutiny analysis will apply only if the law in question disadvantages a suspect class or impinges on a fundamental right.[18] In *Loving v. Commonwealth of Virginia*, the U.S. Supreme Court struck down a Virginia statute prohibiting interracial marriage on both equal protection and due process grounds, describing marriage as a "basic civil right."[19] However, the fundamental right to marry has historically been linked to procreation,[20] and the Supreme Court has never expanded the right to marry further. Additionally, the U.S. Supreme Court has never considered sex to be a suspect class subject to strict scrutiny.[21]

When neither a fundamental right nor a suspect class is targeted, the rational basis test is applied. A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational

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[16] The circuit court's ruling has been stayed while review is pending. *See* David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3, 6 (1998) (*citing* Baehr v. Miike, No. 20371 (pending)).

[17] *Cf.* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985), cited in *Lewin*, 852 P.2d at 60 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order . . . action violative of the [federal] Equal Protection Clause.").

[18] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993); F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

[19] Loving v. Commonwealth of Virginia, 388 U.S. 1, 12 (1967) (holding Virginia antimiscegenation statute unconstitutional). The court held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* (*citing* Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942)).

[20] *See, e.g.*, *Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race."); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("[I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."). *Cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding no constitutional right to engage in sodomy).

[21] *See Frontiero*, 411 U.S. at 691–92 (holding that sex-based classifications should be subject to 'intermediate' scrutiny). Accordingly, sex-based classifications are only legitimate if they serve "important governmental objectives" and are "substantially related to the achievement of those objectives." *United States v. Virginia*, 116 S. Ct. 3364 (1996) (holding that the Virginia Military Institute's exclusion of women violates the Equal Protection Clause).

basis for the classification."[22] Accordingly, the Hawaii amendment is presumed valid and will be declared enforceable if the state can assert any reasonable rationale underlying it.

Applying the rational basis test, the Supreme Court recently struck down a different constitutional amendment targeting lesbians and gay men in *Romer v. Evans*.[23] The Court there held that the amendment, which made government action to protect lesbians and gay men as a class more difficult, lacked "a rational relationship to legitimate state interests."[24]

The Colorado amendment, however, was far more broad than the Hawaii amendment, rendering *Romer*'s application to the Hawaii provision unclear.[25] The *Romer* Court relied strongly on the statement that "[t]he breadth of the Amendment is too far removed from [the State's] particular justifications that we find it impossible to credit them."[26] Hawaii's interests in limiting marriage to opposite-sex couples seem more closely related to its narrow amendment than Colorado's justifications for Amendment 2[27] and, thus, it is likely that Hawaii's justifications for its amendment would survive the rational basis test.[28] The amend-

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[22] *Beach Communications*, Inc., 508 U.S. at 313. *See also* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").

[23] 517 U.S. 620, 632 (1996). However, the Court there noted that "the amendment seems inexplicable by anything but animus toward the class that it affects," suggesting a heightened form of rational basis scrutiny. *Id.*

[24] *Id.*

[25] Amendment 2 in Colorado sought to make virtually impossible any protection of the rights of lesbians and gay men, whereas in Hawaii the amendment sought only to prohibit same-sex marriage.

[26] *Romer*, 517 U.S. at 635. The Supreme Court has upheld narrow statutes targeted at lesbians and gay men. *See, e.g., Bowers*, 478 U.S. at 196 (holding that public morality was a sufficiently rational basis to justify a Georgia sodomy statute).

[27] The *Romer* decision initially sparked speculation that the Supreme Court would increase the protections afforded lesbians and gay men, with one commentator suggesting that *Bowers* had implicitly been overruled. *See* Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 374 (1997). However, a recent Sixth Circuit case, for which the Supreme Court denied certiorari, held that a Cincinnati City Charter Amendment mandating the removal of lesbians and gay men from antidiscrimination ordinances passed the rational basis test and was thus constitutional. *See* Equality Foundation of Greater Cincinnati, Inc., v. City of Cincinnati, 128 F.3d 289, 295 (6th Cir. 1997), *cert. denied*, 1998 WL 248349 (1998). In light of this case, *Romer* seems *sui generis* and hopes for hightened constitutional protections for lesbians and gay men unlikely to come to fruition.

[28] The State interests presented in *Baehr v. Miike* included fostering procreation within marriage and assuring the recognition of Hawaii marriages in other jurisdictions. *See Miike*, 1996 WL 694235, at *3. These interests are likely to satisfy the rational basis test. First, the Supreme Court has linked the right to marry to interests in procreation. *See supra* note 19. Second, the federal Defense of Marriage Act provides that states are not required to honor same-sex marriages in other jurisdictions. *See* Defense

ment, therefore, would probably not be held to violate the Equal Protection Clause of the federal Constitution.[29]

The Equal Protection Clause of the Hawaii Constitution, however, is broader than that of the federal Constitution. In *Baehr v. Lewin*, the Supreme Court of Hawaii noted the longstanding principle that it is "free to accord greater protections to Hawaii's citizens under the state constitution than are recognized under the United States Constitution."[30] Though the U.S. Supreme Court has not held that sex is a suspect classification, in *Baehr v. Lewin* the Supreme Court of Hawaii held that "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution."[31] The court justified its interpretation on the ground that the Hawaii Constitution, unlike the U.S. Constitution, has an Equal Rights Amendment.[32]

Given that the circuit court held that the sex-based classification of HRS § 572-1 violated the Equal Protection Clause of the Hawaii Constitution, the constitutional amendment creates a clear contradiction within the Hawaii Constitution. In interpreting a constitutional amendment, considerable deference is given to the intent of the framers of the amendment and the people who ratified it.[33] In that light, courts favor a construction that renders every word

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of Marriage Act, 1 U.S.C.A. §7; 28 U.S.C.A. §1738(C) (1995).

[29] *See generally* Richard A. Posner, *Should there be Homosexual Marriage? And if so, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997) (asserting that if the Supreme Court held that same-sex couples are constitutionally entitled to marry, "its moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support. It would be an unprecedented example of judicial immodesty."); Richard F. Duncan, *"They Call me 'Eight Eyes'": Hardwick's Respectability, Romer's Narrowness, and Same-Sex Marriage*, 32 CREIGHTON L. REV. 241, 248 (1998) ("until a new national consensus develops and withstands the test of time, the *Glucksberg* methodology [and its *Bowers*-like deference to history and tradition in establishing constitutional rights] counsels the Court to defer to the give and take of the democratic process and to the judgment of Congress and state legislatures.").

[30] *Lewin*, 852 P.2d at 65–66 (*discussing* Holdman v. Olim, 581 P.2d 1164 (Haw. 1978)).

[31] *Id.* at 67.

[32] *See id.* The court reasoned from Justice Brennan's plurality opinion and Justice Powell's concurring opinion in *Frontiero* that "had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the Frontiero Court would have subjected statutory sex-based classifications to 'strict' judicial scrutiny." *Lewin*, 852 P.2d at 67.

[33] *See, e.g.*, Diamond v. Parkersburg-Aetna Corp., 122 S.E.2d 436 (W.Va. 1961) (holding that the court had a duty to give the constitutional amendment the meaning and effect intended by the framers and the people who ratified it); In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund, 913 P.2d 533, 538 (Colo. 1996) ("a court's duty in interpreting a constitutional amendment is to give effect to the will of the people adopting such amendment"); Bowens v. Superior Court, 820 P.2d 600 (Cal. 1991) (holding that in interpreting constitutional provisions adopted by initiative, the court's primary task is to give effect to the intent of the voters).

and every part operative, unless a contradiction is irreconcilable.[34] When a contradiction does exist, "a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision."[35] Hawaii's constitutional amendment granting the legislature the power to limit marriage to opposite-sex couples is quite specific, and any contradiction can be averted by considering the amendment as an exception to the Equal Protection Clause. As a result, the Hawaii Constitution is unlikely to protect same-sex couples if and when the Hawaii legislature decides to use the power granted to it and prohibit same-sex marriages.

However, if the Hawaii amendment is not self-executing and cannot be applied retroactively, same-sex couples should be able to marry in Hawaii until the legislature explicitly prohibits the practice. Thus, the resolution of these issues will determine whether or not the plaintiffs in *Baehr v. Lewin*, and other same-sex couples, might have the a short-term opportunity to marry in Hawaii.

A constitutional amendment is self-executing when it requires no further legislative action to operate. A constitutional amendment satisfies this requirement if

> it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.[36]

The test used to discern the framers' intentions is whether the amendment contemplates legislative action.[37] In *State v. Rodrigues*, the court held that a constitutional provision creating the position of an independent grand jury counsel was not self-executing because it did not provide the procedures for appointing counsel; rather, the provision indicated that an independent counsel was to be appointed "as provided by law."[38] The language of the provision suggested that its framers contemplated

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[34] *See Diamond*, 122 S.E.2d at 442.

[35] *Bowens*, 820 P.2d at 605.

[36] State v. Rodrigues, 629 P.2d 1111, 1113 (Haw. 1981) (*citing* Davis v. Burke, 179 U.S. 399, 403 (1900).

[37] *See id.* at 1114 (*quoting* Wann v. Reorganized School Dist. No. 6 of Francis County, 293 S.W.2d 408, 411 (Mo. 1956)). *See also* Knowlton v. Ward, 889 S.W.2d 721, 726 (Ark. 1994).

[38] *Rodrigues*, 629 P.2d at 1113.

more specific legislation to effectuate the policy, leaving the issue to be decided by the legislature.

The 1998 amendment to Hawaii's Constitution grants the legislature the "power to reserve marriage to opposite-sex couples."[39] The language of this amendment does not provide any rules for giving the principle espoused the force of law; in fact, by granting the legislature the "power" to regulate marriage in a particular way, it seems to call upon the legislature to take action. The amendment does not insist that the legislature limit marriage to opposite-sex couples, it merely grants them the power to do so. The amendment, thus, contemplates legislative action.

If the Supreme Court of Hawaii finds that the amendment requires that new legislation be passed to effectuate it, and it affirms the circuit court's ruling in *Baehr v. Miike*, then same-sex marriage could be temporarily legal in Hawaii. The Hawaii legislature has not enacted legislation limiting marriage to opposite-sex couples since the ratification of the constitutional amendment in November.[40] If there is no currently existing law that should be applied retroactively, therefore, same-sex couples could have at least a brief window of time to obtain marriage licenses in Hawaii.

The constitutional amendment, however, may merely validate existing law. HRS § 572-1 indicates that a valid marriage contract is only one made between a man and a woman.[41] The constitutional amendment, passed by the 1997 legislature, is a direct response to the circuit court's ruling in *Baehr v. Miike* that the provision was unconstitutional. The argument could be made that the legislature's previous exercise of the power to limit marriage gives the constitutional amendment effect. The critical issue, therefore, is whether the anti-same-sex marriage statute would be enforceable from the date of ratification of the amendment or applied retroactively from the date the statute was passed.

Courts, overall, have been reluctant to give retroactive application to constitutional amendments; most states require a clear intent in the terms of the amendment in order to overcome the

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[39] H.B. 117.

[40] The legislature appears to be waiting for the Hawaii Supreme Court to decide *Baehr v. Miike* before it takes any further action.

[41] *See* Haw. Rev. Stat. § 572-1 (1985).

presumption that constitutional amendments are only to be applied prospectively.[42] The hurdle to overcome in order for a constitutional amendment to be applied retroactively is high. In *Fragala v. Dubea*, the Louisiana Court of Appeals ruled that an amendment redefining forced heirs as descendants twenty-three years old or younger did not apply retroactively, despite the fact that the amendment was almost identical to a statute which had been found unconstitutional.[43]

The primary problem with retroactive legislation is that "it can deprive citizens of legitimate expectations and upset settled transactions."[44] It could be argued that in the case of same-sex marriage, same-sex couples never had a legitimate expectation of the right to marry. Marriage has traditionally been viewed by the courts as a union between a man and a woman, and when the court has described marriage as a fundamental right, it has linked marriage with procreation.[45] However, simply because no state has recognized the rights of same-sex couples to marry does not mean that same-sex couples should not expect to be treated in accordance with their constitutional guarantees. If the Supreme Court of Hawaii would have affirmed the circuit court's ruling that HRS § 572-1 violated the Equal Protection Clause of the (pre-amendment) Hawaii constitution, same-sex couples like the *Baehr v. Lewin* plaintiffs had a legitimate expectation under the constitution to be granted marriage licenses.

The text of the bill for the proposed amendment to the Hawaii Constitution does not suggest that the amendment should be applied retroactively; in fact, it states that "[t]his amendment shall take effect upon compliance with article XVII, section 3, of the Constitution of the State of Hawaii."[46] If the Hawaii Supreme Court affirms the circuit court's ruling in *Baehr v. Miike*, the plaintiffs will likely be granted marriage licenses because they had a constitutional entitlement to the licenses when they applied for them in 1991.

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[42] *See, e.g.*, In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund, 913 P.2d 533 (Colo. 1996); Fragala v. Dubea, 680 So.2d 1345 (La. Ct. App. 1996); U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994).

[43] *See Fragala*, 680 So.2d 1345.

[44] Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L. J. 271, 296 (1998) (*quoting* General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)).

[45] *See supra* note 19.

[46] H.B. 117 § 5.

Overall, when state constitutional amendments like H.B. 117 are used to change policy, marginalized political groups can be closed off from the political process.[47] If a minority wants to change the policy enacted through constitutional amendment, it must go through amendment procedures that may be problematic because "[m]isinformation and prejudice has tremendous influence on the passage of constitutional initiatives."[48] This concern with closing people out of the political process was expressed by the U.S. Supreme Court in *Romer*. The Court ruled that

> [Amendment 2] imposes a special disability upon [lesbians and gay men] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability.[49]

The Court went on to hold that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[50]

Though the Hawaii constitutional amendment does not go as far as Amendment 2 in Colorado, same-sex couples will find it harder to change Hawaii's marriage policy (or avoid the legislature's changing of the policy) as a result of the amendment. By allowing the legislature to prohibit same-sex marriage without demonstrating a compelling state interest for doing so, the amendment dilutes the votes of a minority. The problem, however, is not as severe with Colorado Amendment 2 because the amendment only grants the legislature the "power" to reserve marriage to opposite-sex couples; it does not require them to do

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[47] Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Changes*, 64 FORDHAM L. REV. 535, 539 (1995) ("Through this 'constitutional legislation,' citizens and their representatives can prevent state courts as well as current and future political majorities from meddling with their policies, principles, or programs even when the proposals are inconsistent with the public good and the rights of other citizens."). *Cf.* Eskridge, *supra* note 3, at 1507 (homophobia, like white supremacy, "rest[s] upon hate and fear, seeking to isolate a group of worthy people from full citizenship."); Coolidge & Duncan, *supra* note 16, at 15 (statutes and amendments prohibiting any recognition of same-sex marriages "may in fact represent an attempt by citizens and their elected representatives to actually participate in the great debate about marriage, rather than have it decided for them somewhere else, by someone else.").

[48] Ku, *supra* note 47, at 578 (*citing* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 21 (1978)).

[49] *Romer*, 517 U.S. at 631.

[50] *Id.* at 633.

it. Same-sex couples can still lobby the legislature not to exercise this power; they need not rely solely on constitutional amendment procedures to change state policy. Nonetheless, if the Supreme Court of Hawaii affirms the circuit court's ruling, which held that same-sex couples are protected from sex-based classification in the granting of marriage licenses, the amendment will have deprived same-sex couples of constitutional protection which had existed prior to November 3, 1998.

To protect minorities against the will of the majority as expressed through constitutional amendments, heightened scrutiny may be appropriate.[51] However, "[t]o argue that an amendment to a constitution is unconstitutional is hopelessly circular."[52] State courts, however, can apply established principles of interpretation to ensure that individual rights are being protected to the maximum extent possible. For example, by applying constitutional amendments only prospectively and only holding that they are self-executing if the intent is clear, the Hawaii Supreme Court can protect the rights of same-sex couples as protected under the pre-amendment Hawaii Constitution. Though the court may not be able to strike down the 1998 amendment as unconstitutional, it can limit its application, which will provide same-sex couples with at least a limited opportunity to obtain marriage licenses.

The struggle for the right to marry in Hawaii has led to a tense battle between the legislature and the judiciary; in accordance with the principles of republican democracy, however flawed they may be, the voters have won. The Hawaii Supreme Court, however, also has a responsibility: to protect the constitutionally granted rights of minorities. At the very least, the court can grant the plaintiffs in *Baehr v. Lewin* a temporary opportunity to get marriage licenses by not applying the amendment retroactively. By doing so, the court can ensure that the rights of the plaintiffs in this case are not quashed due to legislative action taken subsequent to their filing for marriage licenses. While institutionally the court cannot overturn a clearly applicable constitutional amendment, however unfortunate, it can fulfill its role in the system by affirming *Baehr*.

—*Philip L. Bartlett II*

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[51] Ku suggests that federal and state courts could play a larger role in analyzing amendment procedures and protecting individual rights. *See* Ku, *supra* note 47, at 584.
[52] *Id.* at 540.

BOOK REVIEW

UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW. By Stephen J. Schulhofer.[1] Cambridge, Mass.: Harvard University Press, 1998. Pp. 318, preface, model statute, notes, index. $27.95 cloth.

In *Unwanted Sex*, Stephen Schulhofer argues that current rape laws are ineffective safeguards of an individual's right to sexual autonomy, a right that he describes as core to any "free society" (p. 86). He first examines threats, coercive "offers," and abuses of power, trust, and professional authority to show that the American legal system fails to protect one's basic right to choose or refuse to engage in sexual relations (pp. x–xi). Schulhofer then offers a sophisticated model statute that distinguishes between "sexual assault," "aggravated sexual assault," and "sexual abuse" and redefines the legal meaning of consent (pp. 283–84). *Unwanted Sex* approaches the difficult issues of sexual abuse and sexual assault with pragmatism and compassion, sensibly analyzing the failure of both law and social norms to protect sexual autonomy. Overall, Schulhofer offers a progressive framework for changing American attitudes about what constitutes rape[2] and strengthening sanctions against rape assailants.

Schulhofer's conception of sexual autonomy as an entitlement forms the core of the book's thesis. He defines sexual autonomy as "the freedom of every person to decide whether and when to engage in sexual relations" (p. 99), a freedom limited by the rights of others. The right to sexual autonomy has two facets: the

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[1] Julius Kreeger Professor of Law and Criminology and Director of the Center for Studies in Criminal Justice, University of Chicago Law School.

[2] To illustrate the diversity of attitudes toward rape that are shaped in part by culture, age, and gender, Schulhofer excerpts interviews and personal accounts from other works on rape law (p. 47). *See* TIMOTHY BENEKE, MEN ON RAPE 36, 54, 60 (1982); Lynne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 221–21 (1988); ROBIN WARSHAW, I NEVER CALLED IT RAPE 91 (1988); Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 144, 1454–55 (1993). Schulhofer suggests that because there is no clear social norm that defines rape or the appropriate use of aggressiveness and force in sexual relations, rape law reform has "proceeded cautiously," developing only vague standards of "consent," "force," and "reasonableness" along the way (p. 48). Unfortunately, Schulhofer's point is weakened by his failure to utilize any recent interviews or commentaries (most were published 11 to 17 years ago). With the media spotlight on sexual assault and harassment in the late 1990s, it is quite possible that attitudes as to what constitutes rape have changed significantly.

right to pursue, and the right to refuse sexual relations (p. 99). Sexual autonomy, he suggests, is "central to the life of a free person," and yet, unlike similar fundamental rights, remains unprotected by law (p. x).[3]

Schulhofer begins his book with vivid illustrations of the legal system's failure to protect and support sexual autonomy through its current notions of consent, force, and resistance (pp. 4–5). As he relates stories of acquaintance rapes (pp. 4–5, 7–9), stranger assaults (pp. 1–2, 7), and sexual encounters between school authorities and students (pp. 2–3), lawyers and clients (p. 6), prison guards and inmates (p. 6), physicians and patients (p. 11), and work supervisors and employees (p. 12), Schulhofer attacks the myth that the law has become overprotective of rape victims. He argues that current legal and social standards undermine an individual's ability to protect her body and sexual choices from unwanted influence (p. 16).

Despite the popular perception that the feminist anti-rape movement has effectuated successful rape law reform (p. 18),[4] Schulhofer contends that such legislative changes have been overrated (p. 40). Most state criminal laws still restrict safeguards to protections against direct physical violence (p. 46), and federal sexual harassment legislation provides remedies only against institutions (such as schools or businesses) and not against individual abusers (p. 41).[5] Schulhofer finds this status quo unacceptable

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[3] Specifically, Schulhofer compares the right of sexual autonomy to the rights of "property, labor, informational privacy, [and] the right to vote" (p. x). However, these rights, and others perhaps even more "fundamental," remain vulnerable to judicial interpretation and statutory restriction. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that there is no fundamental right for homosexuals to engage in acts of consensual sodomy). *See also* Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (finding that Washington's assisted-suicide ban is rationally related to legitimate government interests and suggesting that there is no right to "commit suicide"); Whalen v. Roe, 429 U.S. 589 (1977) (holding that patient identification provisions of a New York law under which a central computer file tracked all prescriptions of dangerous but legitimate drugs do not violate the right to privacy). Thus, Schulhofer's core conception of sexual autonomy as a fundamental right is one of the least well-supported arguments in the book. Schulhofer's thesis could have been strengthened by a consideration of the constitutional issues surrounding sexual autonomy. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (overturning a conviction under a law banning the distribution of contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to privacy in marital relations); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that "marriage and procreation are fundamental" liberties).

[4] Schulhofer argues that "opponents of rape reform" such as Christina Summers, Katie Roiphe, and Camille Paglia have fueled this misperception (p. 10).

[5] Because Title VII and Title IX do not explicitly impose any duty on individual supervisors and teachers, courts have found that Congress intended to limit liability for discrimination to institutions (p. 177). *See, e.g.*, Nelson v. Temple University, 920 F.

and begins his search for "a way to identify the kinds of sexual pressure that should be left unregulated and the kinds that can justifiably be outlawed or restrained by law" (p. 59).

Schulhofer partly attributes misdirected societal and legal reform efforts to a "gender gap in sexual communication" (p. 62). Drawing from studies of American sexual attitudes, Schulhofer finds that men and women define "force" and "consent" differently. Because of this schism in male and female perceptions, the "reasonableness" standard imposed by criminal law is ineffective in protecting a woman's sexual autonomy (pp. 62–63). Schulhofer claims that the vagueness of legal standards of consent effectively give priority to the male interest in sexual advances backed by physical strength and power (p. 67).

Schulhofer also notes that under current law, "[e]conomic pressure, emotional demands, nonviolent threats, and the coercive leverage of social status and professional authority" are permissible means of achieving submission to sexual demands (p. 82). Because rape law currently extends only to physical threats and use of force, many feminist critics contend that the legal definition of force should be broadened to include nonphysical power as well (pp. 82–85).[6] In a respectful and thoughtful response to these critics, Schulhofer observes that virtually all social interactions involve "some degree of economic or emotional power," and that defining force to include uses of such power would render acceptable and unacceptable pressures indistinguishable, while misdirecting reform efforts (pp. 82–83). Schulhofer also criticizes the "moderate feminist" approach to rape law, suggesting that its emphasis on valid consent is too broad and undeveloped a standard for viable enforcement (p. 84). Further, Schulhofer rejects proposals by feminist scholars Lois Pineau[7] and Martha Chamallas[8]—both of whom start from conceptions of legitimate sexual relations and then establish broad conditions for valid consent—maintaining that neither

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Supp. 633, 655 (E.D. Pa. 1996); Williams v. Banning, 72 F.3d 552 (7th Cir. 1995).

[6] *See, e.g.*, CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 173–75, 245 (1989).

[7] *See* Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217 (1989) (arguing that when sexual encounters are not mutually satisfying, "communicative" experiences, a woman's participation is involuntary).

[8] *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 SO. CAL. L. REV 777 (1988) (positing that only procreation, emotional intimacy, and physical pleasure constitute legitimate reasons for a woman to want sex and that any other inducements should invalidate consent).

theory translates into a viable framework for legal enforcement (pp. 84–85).

Just as he characterizes feminist attempts at reform as misguided, Schulhofer expresses dissatisfaction with judicial innovations in rape law, claiming that even "progressive" judges direct reform efforts at expanding the definition of force through broad statutory interpretation, instead of at protecting sexual autonomy (p. 88). Schulhofer focuses his analysis on Pennsylvania and New Jersey, states where courts "sought to bridge the many gaps in existing rape law" (p. 88) through statutory interpretation.

In 1986, the Pennsylvania Supreme Court held that the statutory requirement of forcible compulsion "includes not only physical force or violence but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against a person's will" (p. 89).[9] Schulhofer argues that this holding is overbroad, potentially stretching forcible compulsion to include legitimate inducements, such as appeals for emotional intimacy (p. 89). Further, he suggests that the vague Pennsylvania test is weakest in that it encourages subjective judgements on the part of law enforcement officials, judges, and juries as to what constitutes compelling force, thus producing inconsistent enforcement (p. 90). Although the New Jersey approach focuses on "nonconsent" instead of force,[10] Schulhofer concludes that it also fails to provide clear distinctions between legitimate and illegitimate inducements of consent (pp. 96–97). Without such enforceable distinctions, the right to sexual autonomy cannot be fully protected.

After establishing his theoretical framework, surveying rape law literature, and analyzing failed social, statutory, and judicial reforms, Schulhofer begins a substantive discussion of the influences and relationships that affect an individual's exercise of sexual autonomy. First, Schulhofer turns to issues of sexual coercion and bargaining. He argues that sexual autonomy must be protected against threats and coercive, even if nonthreatening, offers (pp. 118–20). A threat "is a proposal to make a person worse off than she has a right to be," whereas an offer presents the possibility of making the person better off in exchange for performance of a requested action (p. 120). Schul-

[9] Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986).
[10] *See* In re M.T.S., 609 A.2d 1266 (N.J. 1992).

hofer acknowledges the difficulty in distinguishing between legitimate and illegitimate offers, suggesting that an offer is coercive if it puts rights at risk (pp. 132, 162). However, by defining "rights" as "legally protected entitlements" (p. 132), Schulhofer leaves this criterion for identifying coercive offers vague and problematic.[11]

In this section, Schulhofer successfully appeals to his reader's common sense through frequent use of examples and analogies. However, his empirical support loses some credibility through careless use of real-life sexual bargaining stories. For example, he relates an episode in which a Louisiana police officer threatened to arrest a parked couple unless the woman had sex with him. Schulhofer states that if this officer had demanded money, he would have been found guilty of extortion, "but in most states he would not be guilty of any crime for demanding to be paid in sex instead" (p. 145). Schulhofer does not mention until the endnotes, however, that Louisiana successfully convicted the officer of extortion under a statute that prohibits the use of threats to obtain anything of value or any advantage (p. 297).[12] The Louisiana statute may be an anomaly, but a better choice of examples would have strengthened Schulhofer's discussion about the weakness of current extortion laws in protecting sexual autonomy against coercion and threats.

Schulhofer continues his analysis with a pragmatic approach to deceptive but noncoercive inducements. He notes the rarity of criminal punishments for use of deception as an inducement (p. 152), but suggests that there are few objective methods of determining what constitutes deception as opposed to "puffing" or "storytelling" (p. 158). Certain egregious misrepresentations can be identified—impersonation, for example, or misrepresentation of health risks or diseases—and should be regulated (pp. 158–59). However, Schulhofer recognizes that other types of misrepresentations, such as those about love, marital status, or future intentions, are less conducive to a bright-line test because they involve expressions of emotion or commitment, which are difficult to regulate legally (pp. 154–59).

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[11] Although Schulhofer broadly describes "legally protected" rights as including property, privacy, and reputation (p. 132), such "entitlements" are often under-protected or ignored in state law. Thus, his criterion for determining when offers are coercive (and thus violative of an individual's right to sexual autonomy) is particularly unsound since it depends upon the often insufficient provisions of individual states' laws.

[12] *See* State v. Felton, 339 So.2d 797, 799 (La. 1976).

The next several chapters of *Unwanted Sex* focus on sexual abuses by authority figures such as work supervisors, teachers, prison guards, psychiatrists, doctors, and lawyers. With regard to supervisors and teachers, Schulhofer sharply criticizes federal antidiscrimination laws such as Title VII of the Civil Rights Act of 1964[13] and Title IX of the Education Amendments of 1972[14] as "weak," "loophole-ridden," and "misdirected" (p. 181). Title VII and Title IX ban discrimination on the basis of race, color, religion, sex, or national origin by business entities[15] and schools[16] respectively, but impose no legal duties on individual supervisors and instructors (pp. 175–77, 192). From Schulhofer's perspective, the primary failing of Title VII and Title IX is that they do not directly protect sexual autonomy—the law fails to ensure that an employee or student's consent to sex is not coerced (p. 181). In response to this flaw, Schulhofer contends that certain types of sexual encounters between teachers and students and between supervisors and employees should be per se illegal, even when the student or employee consents (p. 172). For example, to partly address sexual abuses in the high school setting, Schulhofer's model statute provides that consent is invalidated, and an actor is guilty of sexual abuse, when the victim is between sixteen and eighteen years of age and the actor has some type of supervisory or disciplinary authority over her (p. 283).

However, because he recognizes that individuals may legitimately choose to initiate relationships with supervisors or authority figures (p. 184), Schulhofer does not turn to criminal law for other sanctions against supervisors and teachers who become involved with employees and students. Instead, he suggests a number of non-criminal provisions. First, Schulhofer proposes that sexual harassment remedies be extended to suits against individuals as well as corporate entities and schools (pp. 185, 201). Second, Schulhofer argues that corporations should develop more stringent policies for regulation of intra-firm relationships, noting that guidelines of this sort are "much less intrusive than formal legal rules" (p. 187).

In the context of educational institutions, Schulhofer stops short of recommending that all faculty-student relationships be

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[13] 42 U.S.C. §§ 2000e to 2000e-17 (1994).
[14] 20 U.S.C. §§ 1681–1688 (1994).
[15] 42 U.S.C. § 2000e-2(a)(1) (1994).
[16] 20 U.S.C. § 1681 (1994).

banned (pp. 198–99). Such bans, as currently implemented in several universities across the country, are "broader than necessary to prevent implicit coercion or conflicts of interest" (p. 199). As an alternative, Schulhofer proposes that university guidelines institute a flat ban on sexual relationships between professors and current students—regardless of which party initiated the relationship—to protect students from coercion (p. 201). Schulhofer contends that such a ban would violate neither the student or teacher's sexual autonomy in the long run because as soon as the term ended, both parties would be free to act on their attraction to one another (p. 201).

In contrast to his balanced analysis of supervisor-employee and teacher-student relationships, Schulhofer adamantly argues for a universal ban on all sexual contact between prison inmates and prison guards or staff (p. 205). Commenting that voluntary and involuntary prison relationships are difficult to distinguish, Schulhofer does not even attempt such a distinction (p. 204). Instead, he claims that legitimate sexual autonomy is not compromised through an outright ban on inmate-guard relationships since inmates' rights to sexual freedom are suspended while in prison (p. 205).[17] Thus, Schulhofer focuses on protecting the other aspect of sexual autonomy—the freedom to refuse sexual contact—from coercion by invalidating any consent given by a prisoner to a guard or supervisor (p. 205). In addition to criminal sanctions against guards who engage in sexual relations with prisoners, Schulhofer sensibly suggests that prison reform and administrative procedures are vital to effective prevention of, and enforcement against, abuse.

Schulhofer adopts a similar bright-line approach to psychotherapist-patient relationships. He reasons that the emotional vulnerability of mental health patients, coupled with the trust they instill in their therapists, is conducive to exploitation and coercion (pp. 210–11). Further, sexual relations between therapists and patients damage the therapy itself and can have lasting negative emotional and psychological effects on the patient (pp. 216–17, 222).[18] Schulhofer believes that these conditions make a patient's valid consent to sexual relations difficult or

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[17] Inmates may also lose other "fundamental" rights, such as the right to vote. *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that disenfranchisement of felons is constitutional).

[18] *See, e.g.*, KENNETH S. POPE & JACQUELINE C. BOUHOUTSOS, SEXUAL INTIMACY BETWEEN THERAPISTS AND PATIENTS 22–25, 60 (1986).

even impossible (p. 223); any consent that is given may be a response to coercion or the result of deficient information and bad advice (p. 226). Although he adequately supports this contention with examples, statistics, and hypotheticals, Schulhofer also admits this proposal's potential infringement on legitimately autonomous choices (p. 223). Ultimately, Schulhofer resorts to paternalism in justifying such legal sanctions, as "patients are best treated as incapable of giving valid, informed consent to sex with their therapists" (p. 223).

Unlike the criminal consequences he suggests for psychotherapists who abuse the authority and trust that their professional positions give them, Schulhofer only recommends ethical sanctions against particular doctor-patient and lawyer-client relationships. Schulhofer distinguishes between these sets of relationships by noting that emotional or sexual involvement does not necessarily interfere with medical or legal services (p. 237). Further, since many legal, medical, and dental services do not require emotional openness or continuity of treatment, clients and patients may not be subject to the same vulnerability and risk that mental health patients face (pp. 237, 250). Consequently, Schulhofer posits that a patient or client's consent is not intrinsically defective (pp. 237, 250).

In analyzing the effects of a ban on doctor-patient and lawyer-client relationships, Schulhofer implicitly applies a balancing test—weighing the harm done to an individual's freedom to choose sexual partners and sexual relations against the protection of an individual's right to be free from sexual coercion. Although he proposes criminal penalties for doctors and lawyers who coerce or threaten patients and clients (pp. 251, 284), Schulhofer concludes that other criminal prohibitions would unduly burden individuals' rights to choose sexual partners. Instead, Schulhofer suggests that professional associations and licensing boards regulate doctor-patient and lawyer-client relationships, tailoring rules to situations in which "emotional content, personal disclosure, and difficulty of exit combine to create special risks of coercion and exploitation" (p. 253).

Schulhofer next devotes an entire chapter to dating issues. Here, he revisits the debate over what constitutes "consent," and critiques both feminists and critics of the antirape movement alike. He specifically criticizes the "Take Responsibility" ap-

proach[19] as oversimplifying a woman's understanding of her desires (p. 260). Further, ambiguities in the language of dating can impair a woman's ability to clearly express her desires and intentions (p. 264). Schulhofer thus points out that the "Take Responsibility" approach is insufficient "in a world of mixed messages, wishful thinking, and male assumptions about what women's reluctance means" (p. 264).

To support the argument that the word "no" can have ambiguous meanings in dating relationships, Schulhofer utilizes several research studies, but also makes statistical assertions that he fails to support with citations. For example, he posits that at least sixty percent of women in "most studies" say "no" only when they mean it, yet he does not cite the studies he consulted to reach this conclusion (pp. 266–67). Despite this slight damage to the credibility of his empirical research, Schulhofer's substantive point is still clear: some women may say "no" even when they mean "yes," thus indicating that a "verbal-yes" rule might prevent sexual relations that both parties actually desire (pp. 267, 272). Schulhofer sensibly recognizes that any standard for communicating consent will have costs. Ultimately, he chooses a middle course in which a woman can indicate her willingness to engage in sexual relations through either affirmative words or actions so that body language, as well as verbal signals, can signify consent (pp. 272–73).

Schulhofer's proposed model statute addresses many of his concerns about the current law's failure to protect sexual autonomy. Schulhofer defines three categories of offenses: aggravated sexual assault, sexual assault, and sexual abuse, respectively felonies of the first, second, and third degree. In defining sexual assault and aggravated sexual assault, he preserves the "force" element currently required in most jurisdictions. Schulhofer also diverges from tradition and creates a new offense, "sexual abuse," that applies when the actor lacks the consent of the victim but does not use physical force. Schulhofer suggests that consent is given when "at the time of the act of sexual penetration there are actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration" (p. 283), thus

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[19] Advocates of the "Take Responsibility" approach, most of them critics of the anti-rape movement, argue that women need to act like independent, liberated adults and make their sexual desires explicit (p. 261). *See, e.g.*, ELIZABETH FOX-GENOVESE, FEMINISM IS NOT THE STORY OF MY LIFE 164 (1995); KATIE ROIPHE, THE MORNING AFTER xiv, 84, 101 (1994); NAOMI WOLF, FIRE WITH FIRE 192–93 (1994).

avoiding the pitfalls of the "no means no" standard while codifying the need for affirmative actions to signify consent.

Schulhofer's model statute also provides a sophisticated itemization of situations in which consent cannot be given freely or is nullified by the actor's threats. Most of these provisions represent intuitive and progressive steps toward comprehensive rape legislation. For example, one cannot obtain the victim's consent by representing that the sex is for the purpose of medical treatment,[20] by leading the victim to believe that he is a person with whom the victim has previously been intimate,[21] or by threatening to inflict harm on a third party (pp. 283–84).

However, the statute has shortcomings. First, it does not explicitly address coercive lawyer-client relationships, which Schulhofer previously contends "should be treated as a serious criminal offense" (p. 251). Second, while Schulhofer crafted this model statute partly in response to the vague language in current rape laws, he fails to define or clarify vague language in his own proposal. For example, the model statute provides that consent is not freely given if the actor threatens to "violate any other right of the victim or inflict any other harm that would not benefit the actor" (p. 284); this vague wording could require extensive judicial interpretation. In another subsection, Schulhofer does not define the phrases "physically helpless, mentally defective, or mentally incapacitated," all of which are conditions of the victim that nullify consent (p. 283). Further, even if Schulhofer implicitly defers to common legal interpretations of the latter two phrases,[22] he then effectively denies "mentally defective" or "mentally incapacitated" individuals of their fundamental right to sexual autonomy.[23] His model statute negates consent given by

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[20] *See, e.g.*, Boro v. Superior Ct., 163 Cal. App. 3d 1224 (Cal. Ct. App. 1985) (holding that fraudulent inducements do not invalidate a person's consent to sexual intercourse, even though in this case, the victim was led to believe that she had a fatal disease that could only be cured through intercourse with a man pretending to be a doctor) (pp. 152–53).

[21] *See, e.g.*, People v. Hough, 607 N.Y.S.2d 884 (Dist. Ct. 1994) (holding that a man who had intercourse with a woman while impersonating his twin brother could not be prosecuted for sexual misconduct because he did not use force).

[22] Mental incapacity "is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life." BLACK'S LAW DICTIONARY 986 (6th ed. 1990). Mental defectiveness, or insanity, is defined as "a condition which renders the affected person unfit to enjoy liberty of action because of the unreliability of his behavior with concomitant danger to himself and others." *Id.* at 794. In law, this condition negates the individual's legal responsibility or capacity. *See id.*

[23] In Schulhofer's defense, he does argue that "fully autonomous choice requires

these individuals, thus criminalizing any sexual relations in which they engage. Without clarification, this provision of the model statute seems overbroad, paternalistic, and contradictory to Schulhofer's goal of valuing the "unambiguous right" of "every person" to choose or refuse sexual contact (p. x).

Unwanted Sex represents an important step in the scholarly discussion of rape law issues. By rejecting traditional frameworks for analyzing sexual assault and abuse, Schulhofer pragmatically conveys his ambitious vision of a society that values and protects every individual's right to sexual autonomy. However, the book could have drawn additional depth and credibility from a more careful selection of examples and anecdotes, and from a more complete discussion of the finer distinctions and provisions in the model statute, some of which seem arbitrary. Furthermore, even though he limits the scope of his reform efforts to the United States, Schulhofer fails to consider the diverse cultural attitudes and mores within our country that may undermine his notion of sexual autonomy as a fundamental right. Finally, Schulhofer could have strengthened his thesis through a careful exploration of sexual autonomy issues in constitutional law. Despite these minor weaknesses, *Unwanted Sex* succeeds in showing the inefficacies of current rape law paradigms that focus on force and consent while offering a sophisticated and compassionate alternative.

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mental capacity" (p. 111), which suggests that mentally incapacitated individuals are not capable of exercising the right to sexual autonomy. Still, this conflicts with his previous statements that sexual autonomy is a fundamental right—on par with the right to vote—to which every person is entitled protection (pp. x, 282). Here, Schulhofer protects one aspect of these individuals' right to sexual autonomy (the right to refuse to engage in sexual relations) at the expense of the other aspect (the right to pursue sexual intimacy). Law can only exclude fundamental rights to a protected class with a "compelling state interest." If sexual autonomy is truly a "fundamental right" in the constitutional sense, then Schulhofer should offer a compelling state interest in the exclusion of the "physically helpless, mentally defective, or mentally incapacitated" from enjoyment of this right.