**BATTERED WOMEN & FEMINIST LAWMAKING: AUTHOR MEETS READERS, ELIZABETH M. SCHNEIDER, CHRISTINE HARRINGTON, SALLY ENGLE MERRY, RENÉE RÖMKEN, & MARIANNE WESSON***

PANELISTS

*Author*

ELIZABETH M. SCHNEIDER** is the Rose L. Hoffer Professor of Law and Chair of the Edward V. Sparer Public Interest Law Fellowship Program at Brooklyn Law School. She is the author of *Battered Women and Feminist Lawmaking* (Yale University Press 2000), which won the 2000 Professional/Scholarly Publishing Award of the Association of American Publishers, Legal Category. She is the coauthor of the law school

* This article is a transcribed version of the Author Meets Readers panel discussion of Elizabeth M. Schneider’s book, *Battered Women and Feminist Lawmaking*, at the 2001 International Law and Society Conference in Budapest, Hungary on July 6, 2001. Both the readers who participated in the formal program and audience members who participated in the informal discussion and who were known to the panelists because of their work on issues of domestic violence are identified by name. Other audience members who participated in the informal discussion are not identified by name because they were not known to the panelists.

** Thanks to Christine Harrington for chairing and organizing this panel, to Sally Merry, Renée Römkens, Mimi Wesson, Isabel Marcus, Elizabeth Rapaport and Betsy Stanko for participating in the program and for their generosity in helping to put the panel transcript together in publishable form. Special thanks go to Caroline Nadal, Audrey Woo, Angela Calcagno and the staff of the Journal of Law and Policy for their extraordinary commitment and superb work in putting this article together.
casebook, *Battered Women and the Law* (Foundation Press 2001) (with Clare Dalton), and has published many articles on gender, law, civil rights, and civil procedure. She has also been a Visiting Professor at Harvard and Columbia Law Schools. Before becoming a law teacher, she clerked for District Judge Constance Baker Motley in the Southern District of New York, and was a staff attorney at the Center for Constitutional Rights in NYC, and the Constitutional Litigation Clinic at Rutgers Law School-Newark, where she litigated many landmark cases and did pioneering work on women’s rights. A graduate of Bryn Mawr College, she has an M.Sc. from The London School of Economics and a J.D. from New York University Law School.

**Chair of Panel**

**CHRISTINE HARRINGTON** is Associate Professor of Politics at New York University, and founding Director of the Institute for Law and Society and the Law and Society Program. Her research interests are in the areas of public law and law and society. She has published in *Law & Society Review*, *Law & Policy* and other journals on dispute processing (mediation and regulatory negotiation) and litigation (federal regulatory and federal appellate civil) as forms of political participation and sites of ideological production. Her book, *Lawyers in a Postmodern World: Translation and Transgression* (New York University Press 1994), examines the role of lawyers and professional power in American political development and state formation, as does *Administrative Law and Politics* (Addison-Wesley Publishing Co. 2000). Professor Harrington is currently researching and writing about the cultural politics of rights as they materialize in global preservation movements, indigenous entitlement and reparation claims in an article entitled *Untouchable Entitlement* (forthcoming).

**Readers**

**SALLY ENGLE MERRY** is Professor of Anthropology at Wellesley College and Co-director of the Peace and Justice

**RENÉE RÖMKENS** is a criminologist who is Visiting Professor in the Institute for Research on Women and Gender at Columbia University and Associate Professor in the Department of General Social Sciences at Utrecht University in the Netherlands. She also holds a Ph.D. in Psychology from the University of Amsterdam. She has a long record of research in the field of domestic violence, including the first national survey in Western Europe (Netherlands), which she conducted in the late 1980s on prevalence, social risk markers and psychological consequences of violence against women. Her recent research in the United States is in the socio-legal domain and focuses on how the powers of law operate in a criminal justice system that increasingly cooperates with other disciplines.

**MARIANNE WESSON** is Professor of Law, Wolf-Nichol Fellow, and President’s Teaching Scholar at University of Colorado. She has published articles about domestic violence, the pornography debate, and criminal law and procedure. In addition to her academic work, she provides regular legal commentary for National Public Radio’s Weekend Edition Sunday and has written two novels, *Render Up the Body* (Harper Mass Market Paperbacks 1998) and *A Suggestion of Death* (Pocket Books
Professor Wesson received her J.D. from the University of Texas School of Law. She served as law clerk to Judge William Wayne Justice of the Eastern District of Texas as well as Assistant United States Attorney for the District of Colorado.

AUDIENCE MEMBERS / DISCUSSION PARTICIPANTS

ISABEL MARCUS is Director of the Institute for Research and Education on Women and Gender and Chair of Women’s Studies at the University of Buffalo, and Professor of Law at University of Buffalo School of Law. She holds a Ph.D. in political science and a J.D. from the University of California-Berkeley. Her writing has focused on women’s issues, most recently on domestic violence. She has traveled and lectured extensively in Eastern Europe, including Lithuania and Poland, as well as the People’s Republic of China, India, and Pakistan. In 1997, she was a Fulbright Lecturer on the Faculty of Law at Babes-Bolyai University, Cluj, Romania. She has written a book, Dollars for Reform: The OEO Neighborhood Health Centers (Lexington Books 1981), and is working on a second, Dark Numbers: The Emergence of Domestic Violence as a Law and Public Policy Issue in Eastern Europe and Russia.

ELIZABETH RAPAPORT is the Dickason Professor of Law at University of New Mexico School of Law. She teaches criminal law, criminal procedure, and jurisprudence. Her scholarship reflects a longstanding interest in women in the criminal justice system and a more recent interest in executive clemency. She is currently at work on a book tentatively entitled Capital Punishment and the Domestic Discount: Gender, Family and the Death Penalty. Professor Rapaport received her J.D. from Harvard Law School and her Ph.D. from Case Western Reserve University. She taught philosophy at Boston University for ten years before attending law school.

BETSY STANKO is Director of ESRC Violence Research Programme and Professor of Criminology in the Department of Social and Political Science, Royal Holloway, University of
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London. She is the author of over sixty papers and books exploring gender and violence and decision-making of public officials. Most notable of these are *Intimate Intrusions* (Routledge 1985) and *Everyday Violence* (Pandora Press 1990). She has studied police and policing since the mid 1970s. Her most recent research on domestic violence, an area in which she has been both an activist and a researcher for twenty-five years, includes *Counting the Costs: Estimating the Impact of Domestic Violence in the London Borough of Hackney* (1998) and *Domestic Violence and Social Housing: Southwark* (2000). Last autumn, she conducted the first day count on incidents of domestic violence known to police in the U.K. In January 2002, she joined the Office of Public Services Reform, Cabinet Office, as a Principal Advisor. She is also currently the project leader of *Responding and Understanding Hate Crime*, a study examining the use of routine information about the Hate Crime for the Metropolitan Police. Funded by the Home Office, this project is the first of its kind in the U.K. and is located inside the Metropolitan Police’s Diversity Unit.

DISCUSSION

Christine Harrington

We are here today to discuss Liz Schneider’s book *Battered Women and Feminist Lawmaking*¹ and the issues this book raises

¹ Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press 2000). The book examines the pathbreaking legal process that has brought the pervasiveness and severity of domestic violence to public attention and has led the United States Congress, the Supreme Court, and the United Nations to address the problem over the last thirty years. Schneider explores how claims of rights for battered women have emerged from feminist activism, and assesses the possibilities and limitations of feminist legal advocacy to improve battered women’s lives and transform law and culture. The book chronicles the struggle to incorporate feminist arguments into law, particularly in cases of battered women who kill their assailants and battered women who are mothers. With a broad perspective on feminist lawmaking as a vehicle of social change, Schneider examines a range of subjects including criminal prosecution of batterers, the
for law and society scholars. I will first sketch out two important themes in the book and then moderate the discussion among our panelists and with the audience. Our panelists are Professor Sally Merry, who teaches anthropology at Wellesley College, Professor Marianne (“Mimi”) Wesson, who is at the University of Colorado Law School, and Professor Renée Römkenkens, Visiting Professor at Columbia University and Professor at Utrecht University in the Netherlands. The author of the book is Professor Liz Schneider from Brooklyn Law School. Professor civil rights remedy of the Violence Against Women Act of 1994, the O.J. Simpson trials, and a class on battered women and the law that she taught at Harvard Law School. Feminist lawmaking on woman abuse, Schneider argues, should reaffirm the historic vision of violence and gender equality that originally animated activist and legal work.


Law and society scholars examine the function of law in society and the symbiosis between law and society. Lawrence M. Friedman, The Law and Society Movement, 38 STAN. L. REV. 763, 775 (1986). The Law and Society Association was founded in 1964 and publishes the Law and Society Review. See The Law and Society Association, at http://www.lawandsociety.org. Its members are comprised of scholars in the areas of law, sociology, political science, anthropology, economics, and history. Id.
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Schneider will have an opportunity to make some remarks about her book, then we will hear from each panelist. Finally, we will open the discussion up to the audience.

It is hard to be systematic in my comments because I have been engaged with Liz’s argument about the dialectic between rights and politics from the time she first introduced dialectics as a feminist methodology and as a feminist epistemology for legal reform. This argument has made a profound feminist contribution to research areas in law and society, such as law and social policy, law and social change, and feminist legal theory. In the beginning of the book, Liz says, “I examine both the accomplishments and contradictions through the lens of feminist legal advocacy efforts on violence against women in the United States.” Her theoretical approach is not concerned with measuring the successes or failures of the movement. She does something more methodologically sophisticated than “gap studies,” which repeatedly (and inevitably) find that there is a “gap” between reform ideas and implementation of policy. The book examines the interrelationship between law and social movement practices in order to understand a larger problem for law and social policy—the interrelationship between rights and politics viewed in terms of the dialectic between consciousness and social change. In the case of the U.S. movement against domestic violence, Liz employs dialectics to deconstruct familiar categories in law and in society (e.g., public/private; male/female; civil/criminal; mother/child; husband/wife; etc.). She argues that these binary categories are themselves the focus of consciousness raising in the feminist movement and in feminist lawyering. In so doing, the book systematically unravels the complexity of lawmaking for feminist lawyers. She writes, “lawmaking and rights assertions can be understood as forms of

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4 SCHNEIDER, supra note 1, at 5.
5 See CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (Greenwood Publ’g Group 1985) (examining the legal formalism that results in a gap between socio-legal reform ideology and institutional practice).
the philosophical concept of praxis.” If consciousness-raising is itself a form of praxis, then the work of transcending gendered social and legal dichotomies, such as those to which I just referred, may in turn explain how new and perhaps even more emancipatory social practices for women are forged in intimate, as well as state relationships. While her analysis gives particular weight to “historical contingency” as a key factor in shaping the politics of rights, the dialectical method she employs makes a compelling argument that “rights” and “politics” are best understood as praxis.

The book examines over thirty years of work on social constructions of “violence against women”—social constructions produced by the state, by feminist scholars, by lawyers, by battered women and children, by the courts and by other social forces like economics, psychology, politics, etc. The book synthesizes disparate bodies of research from an array of disciplines on how and why particular social constructions of domestic violence dominate at particular periods in U.S. history. This aspect of the book makes another important contribution to law and society work. For here, in the deconstruction of gendered battery, Liz carves out new social space, new social understanding of law, for the survivors of domestic violence. I am referring to the survivors who did not have advocates, the survivors who did not have feminist lawyers, the survivors Professor Linda Gordon writes about in Heroes of Their Own Lives. The interdisciplinary approach Liz develops makes better

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6 SCHNEIDER, supra note 1, at 34 (citing Karl E. Klare, Lawmaking As Praxis, 40 Telos 123, 132 n.28 (1979)); Schneider, supra note 3, at 600 (explaining that “[t]he fundamental aspect of praxis is the active role of consciousness and subjectivity in shaping theory and practice, and the dynamic interrelationship that results . . . [L]awmaking can be a form of praxis; it can be constitutive, creative, and an expression of the ‘embeddedness of action-in-belief and belief-in-action.’”) (quoting Klare, supra at 132 n.28).

7 SCHNEIDER, supra note 1, at 13-28; see also infra note 25 (regarding the ever-expanding and unstable definition of violence against women).

8 LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 250-88 (Viking Penguin 1988) (delineating the gender-based causes of spouse abuse, describing difficulties of mothers in
sense of law and social policy for those of us who have survived domestic violence in the pre-1970s period—for those of us who have our stories recorded in police records as “family disturbances” or “family quarrels.” The approach provides a way to understand more fully how these social constructions operated in law and society and in women’s lives. While the book may make sense for/to survivors of domestic violence, it does not portray them as heroic or super human. To do so would embrace an individualist explanation of domestic violence and lend support to volitional policies. Instead, Liz’s analysis suggests that the survivors are representative of a human condition that moves them and us to struggle for emancipation. That condition, that vision of emancipation, is made present in how Liz writes about the detailed practices of feminist lawyering in which she is implicated.

With these two contributions in mind, one more classically academic—her analysis of the dialectic of rights and politics—and the other more general—her view of what motivates social change—I turn to Liz for her introductory comments.

Liz Schneider

Let me provide some background. The book comes out of thirty years of my work in a variety of different contexts: as a lawyer, as an activist, as a theorist, and as a law teacher. In the book I offer a critical perspective on the last thirty years of feminist legal advocacy, in which I have been involved both as a lawyer and as a theorist. The link between theory and practice has been something that has been very much a part of my life and my own work, my approach to law, my teaching. The book not
only talks about activism and experience in a number of different areas of lawmaking, but it talks about the process of change. For example, in addition to problems of litigation and lawyering, I discuss the importance of bringing some of these insights and perspectives around domestic violence into law schools and other academic fields, and the difficulty in teaching issues of domestic violence.  

The book is intended to be a kind of insider self-critical reflection—critical in raising hard questions for those of us who have been involved in this work, struggling with these questions more broadly. Since I know there are many of you in the room who have not read the book, the most important theme is that while domestic violence has been recognized as a more serious public problem, public thinking and legal work around domestic violence have become decontextualized from issues of gender. The notion of gender is what originally shaped activism and law reform on domestic violence—it is the way in which activists framed it. Domestic violence was a moment, a part of a broader problem of gender inequality. But now domestic violence has become unmoored from those issues of gender, for a whole variety of reasons, which I develop in the book. The book argues that it is necessary to reaffirm the original impetus of activism and advocacy on domestic violence, the inextricable link.

10 See SCHNEIDER, supra note 1, at 105-11, 211-12, 223-27.

11 See id. at 6, 21-28, 96-97, 101-11, 182-88, 228-32. Traditionally, feminists have argued that systemic societal female subordination produces gender violence. Id. at 5, 22-23, 228. Feminists who began the battered women’s movement, many of whom were themselves battered, viewed battered women as sisters in the larger struggle towards gender equality. Id. at 22-23, 96. They worked not only to alleviate the threat of violence, but also to address social and economic disparities that subordinate women and make them susceptible to gender-motivated violence. Id. at 22-23, 96. As the movement has gained legitimacy, Schneider argues that the link between battering and gender bias has become increasingly subverted and that lawmakers approach violence against women as if it can be solved in isolation from its historical and social contexts. Id. at 6, 27-28. Broader issues of gender such as socialization, lack of education, child care, employment discrimination, and poverty are frequently excluded from consideration in legal reform concerning domestic violence. Id. at 23-26, 183, 229-30.
between violence and equality.

*Sally Merry*

I was delighted to have a chance to read and comment on this book. Liz Schneider has provided us an invaluable overview of the key elements of feminist legal thinking about battered women. The book is well-grounded in past struggles,12 so there is a clear sense of development and change in the field. It is also rooted in feminist analysis,13 resisting the increasingly pervasive psychological and family systems models, which are coming to

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12 *Schneider*, supra note 1, at 15-23, 39, 42-45, 88-97. Schneider notes that domestic violence has been part of practically every culture throughout history. *Id.* at 13. For example, Anglo-American common law and early Roman law provided that a husband could treat his wife as property, and it was his prerogative to chastise her. *Id.* at 13.

An initial wave of advocacy in the United States during the nineteenth century achieved measured success by focusing primarily on domestic violence instead of attacking male dominance generally or asserting the woman’s inherent right to freedom and equality. *Id.* at 16, 18, 43. However, achievements did not translate into real progress, as the movement’s initial success in prohibiting public violence against women could not protect violence against women in the marital context, which courts felt was beyond their capacity to adjudicate. *Id.* at 17-18, 88-97. For example, family court judges often failed to provide a battered woman with physical protection if she filed a complaint against her batterer, asserting that family preservation was necessary and the abuse could be cured or corrected. *Id.* at 18.

The second wave of advocacy during the twentieth century was premised on the notion of a woman’s inherent right to be free from violence and led to the development of social services and increased social and economic opportunities for women. *Id.* at 21-22, 39, 42-43. Domestic violence survivors still struggle within a social framework of gender inequality, leading to their economic dependence on the batterer, the absence of social support networks to aid in mothering, lack of educational opportunities, lack of child care and, in general, their social and economic vulnerability. *Id.* at 12-13, 23.

13 Schneider’s feminist analysis encompasses not only gender-based descriptions explicitly linking gender, violence and women’s equality, but also broad descriptions of battering that explore interrelationships between coercion, power and control, and political descriptions of battering using statist imagery (such as terrorism and torture) to detail the experience of battering. *Id.* at 46-49.
dominate this field. One of its values is its commitment to this feminist approach, an approach to a large extent on the defensive in the U.S. today. I also appreciated the book because it is grounded in legal questions. What are the evidentiary difficulties of these cases? What are the preconceptions of judges? What are the biases in the way the categories of law privilege men's experiences? There is clearly a sense of looking back in this book, of assessing the past thirty years of this movement and confronting some of its ironies and the areas of resistance it has encountered.

Schneider recognizes that despite major advances in the battered women's movement, there is still a great deal of resistance and some indication that resistance is increasing. The story is one of good intentions and good interventions poorly carried out by police, judges and legal officials who are often too ambivalent about prosecuting men who are violent with their partners. The public/private divide that relegated this problem to the bedroom rather than the courtroom seems to have remained intractable, relatively unchanged despite enormous pressure to change.

I found the situation of the defense of women who kill their batterers among the most important ironies in the book. It seems to me that this problem more than any other engaged feminist legal scholars in the early part of the movement. But this problem led to a very productive reexamination of the concept of self-defense, the way it was applied to women rather than men, and

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14 Schneider argues that the development of a battered women's movement has advanced and improved women's self-determination, self-organization, and democratic participation as citizens. Id. at 20-27.

15 See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (exemplifying judicial reluctance to encroach on the marital bedroom); Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997), cert. denied, 522 U.S. 819 (1997) (affirming the dismissal of an abused woman's § 1983 suit against local police, who refused to arrest her abusive husband days before he killed himself and her children, and holding that the woman had not been deprived of her constitutional right to due process and that no constitutional duty exists for police to protect citizens from private violence). See generally Reva B. Siegel, “The Rule of Love”: Wife Beating As Prerogative and Privacy, 105 YAL E L.J. 2117 (1996).
the nature of male identity presumed by reasonable man concepts. The irony lies in the development of the explanatory framework of “battered women syndrome.” As Schneider shows well, this particular framework has reinforced images of battered women as passive, helpless victims. I think it was so successful precisely because it was so compatible with existing gender ideologies. Much as the right to abortion founded on privacy arguments has served to reinforce the domain of the family as private, this argument reinforced images of women’s passivity, even as it may have succeeded in freeing the women who killed their batterers.

Schneider also asks about the implications of using a rights approach for this problem. This is a key question, both for the United States movement, which began with some ambivalence about rights, and for the international violence against women movement. As she points out, early activists recognized the problem of using rights, but they had to rely on the law as a way to define the problem and intervene in it. As the global

16 Gender bias has long plagued the application of self-defense laws to battered women who kill; judges and attorneys tended to categorize these women as “mentally ill” or “temporarily insane” rather than to view their actions as taken in self defense and to apply a reasonableness standard. See Schneider, supra note 1, at 79-83, 113-15, 121-22. The traditional doctrine of self-defense was based on the experience of men and did not account for women’s different perceptions. Feminist legal scholars have attempted to introduce evidence to help juries understand that women who kill their batterers may act in reasonable and justifiable self-defense. Id. at 121-26.

17 Id. at 62. Schneider argues further that defining battered women as helpless victims is also dangerous because it revives the concept of excuse by “focus[ing] on the woman’s defects, the woman as subject to the ‘syndrome,’” thus implying the woman is “inherently deficient instead of affirming the circumstances of her act.” Id. at 135. The term “battered woman syndrome” triggers stereotypes for lawyers and judges and plays into the patriarchal attitudes of courts. Id. at 137. Consequently, the term “battered woman survivor” has begun to be used instead of “victim.” Id. at 76.


19 Schneider, supra note 1, at 34-45 (discussing the development and shortcomings of the rights approach to feminist lawmaking).

20 Id. at 38-45.
movement expands in the wake of the Vienna Conference of 1993\textsuperscript{21} and the Beijing Conference of 1995,\textsuperscript{22} a rights approach is


I want to emphasize three major points from the book that I found valuable, although there were many others. The first is the difficulty of defining the problem itself. There are so many labels, with so many different implications. The term “battered woman” itself is one among many, and Liz talks about which term to use. Does this mean woman as victim? Does this ignore attention to the perpetrator? What is the meaning of gender-neutral terms like “spouse assault”? I think defining the problem is critical because the solution depends on how the problem is defined. If the problem is defined as “patriarchy,” there is one set of solutions; if defined as “spouse assault,” solutions depend on family functioning. I think that this book, which begins by foregrounding that problem, is very important. Much of the struggle in the movement has actually been to create a stable definition. I think a definition is elusive because so much is at

23 SCHNEIDER, supra note 1, at 62-65, 103.
24 SCHNEIDER, supra note 1, at 45, 60-62.
25 There has been wide variety in the definition of “domestic violence.” See CAL. FAM. CODE § 6211 (West 1994) (defining domestic violence as abuse of a spouse, former spouse, cohabitant, former cohabitant, dating partner, fiancée, person with whom the abuser has a child, child of the abuser.
stake—whether this is a movement against institutions that reinforce male power and the family, or whether this is a movement about psychologically dysfunctional men or women. The continuing definitional instability is symptomatic of the importance of the problem. And because the definition of a problem inexorably points to the solution and the particular mode of intervention, the difficulty of defining the problem leads to complexity in the kinds of responses and solutions that we are seeing on the ground, which vary between psychotherapeutic approaches to much more culturally transformative ones that may begin to address problems of patriarchy. Batterer intervention programs for men provide an interesting example. Here we see the tension between the individual and the collective understanding of rights. Is battering defined as an individual violation of rights or as a violation of a collective body of individuals such as women, whose rights are being systematically denied?

This problem appears in the human rights international level as well. One of the interesting issues on the international level is the wide variation in the definition of the problem in different national and sub-group contexts. This is related to differences in the way the problem is conceptualized based on different kinship or other person related by consanguinity or affinity); John M. Burman, Lawyers and Domestic Violence: Part I, 24 WYO. LAWYER 36, 38 (2001) (defining domestic violence as “a pattern of coercive behavior . . . perpetrated by who was or is in an intimate relationship with the victim”); see also Health Resource Center on Domestic Violence/Family Violence Prevention Fund, Health Care Responses to Domestic Violence Fact Sheet, available at http://endabuse.org/programs/display.php3?DocID=25 (describing domestic violence as a pattern of coercive and assaultive behaviors, such as physical, psychological or sexual attacks, or economic coercion used by individuals against their partners); National Coalition Against Domestic Violence, What is Battering?, available at http://ncadv.org/problem/what.htm (asserting that battering is a pattern of behavior employed to exert power and control over another individual via fear and intimidation); New York State Office for the Prevention of Domestic Violence, A Power and Control Perspective, available at http://www.opdv.state.ny.us/about_dv/wheeltext.html (explaining how domestic violence entails a range of behaviors with maintenance of power and control as the goal).
systems and different ideologies about how societies are organized. For example, I just spent a little time in China interviewing practitioners and scholars working on the problem of violence against women. Although the Chinese take inspiration from Seoul, Beijing and the U.S. movement, the concern, at least in some of the literature I read, is that the problem needs to be defined differently in the context of the Chinese kinship system. One argument is that the U.S. model, which is also the European model, tends to focus on sexual relationships across a


27 See supra note 22 (describing the 1995 Beijing Conference).

28 The United States addresses problems of domestic violence using a legal rights and legislative approach. SCHNEIDER, supra note 1, at 34-54; compare the battered women’s movement in Great Britain, infra notes 71-72 and accompanying text. See also infra note 64 (describing the Violence Against Women Act).

wide variety of settings—relationships such as boyfriend/girlfriend, husband/wife, same-sex partners, and various romantic relationships—whereas in China, the grounding is in the kinship system, but the victim can be the wife, the infant girl, or the old father or mother. There is a different array and structure of kin that can be part of these battered relationships, given the nature of the patrilineal, patrilocal family structure. This kind of instability at the heart of the problem is an interesting issue to consider as the definition of the problem crosses national boundaries.

The second point in the book that I thought was very instructive and interesting is the difficulty of lawyering in this field—the really painful dilemmas and dichotomies for feminist lawyers trying to use the courts. Especially trenchant is the analysis of the struggle to move past the dichotomy between victims and agents. Again, the explanatory framework of “battered women’s syndrome” exacerbated this problem by creating women as deserving protection only if they are defined as victims. This dichotomy exists despite efforts to redefine women as survivors, which I have found in my own research is clearly the preferred term.

I was thinking about this in light of David Garland’s recent book called *The Culture of Control* in which he talks about the shift in criminal justice theory that took place in the 1970s in the United States from a focus on protecting the defendant and the defendant’s rights to a focus on defending the victim and prosecuting the perpetrator. This shift has led to longer and

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31 See, e.g., SCHNEIDER, supra note 1, at 61, 76.

longer periods of incarceration, more severe punishments, and more punitive attitudes towards defendants; yet the transition was partly engineered by a focus on the victim, who became much more central to our theorizing in the late twentieth century than he or she had been before. Ironically, the success of the feminist movement in foregrounding the victim has, in fact, contributed in some ways to this more punitive, less rehabilitative approach towards offenders of all sorts, not just batterers. I think this is one of the painful dilemmas of trying to do lawmaking in this domain. Indeed, as Schneider points out, it is only as victims that women get help in court, and even within that framework, their inability to be heard is severely circumscribed. At the same time, by emphasizing the image of this vulnerable, undeserving victim, the battered women’s movement itself may have contributed to the refocus of the criminal justice system. This is clearly one of those ironies of social transformation.

A second unintended and undesired consequence of the criminalization of battering has been the continued legal surveillance and incarceration of men of color. In my research, it turned out that the vast disproportion of men who end up in batterer’s treatment programs are poor and men of color. These are not, of course, the only men who batter, but they are the ones who end up in the criminal justice system. And, as Angela Davis asked at the first Color of Violence Conference last year, is the

33 SCHNEIDER, supra note 1, at 186 (explaining arguments that mandatory prosecution and no-drop policies can “re-victimize women by subjecting them to further coercion at the hands of the state; they increase the risk of retaliation against the victim by the batterer; and finally, they disempower women by taking their autonomy away from them”).

34 See SCHNEIDER, supra note 1, at 74-86 (regarding the issues relevant to victimization of women in feminist lawmaking and arguing that gender subordination should be understood as a process in which women can both be oppressed and offer resistance simultaneously). See also id. at 186 (regarding arguments of those who believe that “shifting the decision to prosecute from the victim to the state disempowers batterers and prevents them from further manipulating justice and endangering victims’ lives”).

35 Sally Engle Merry, Gender Violence and Legally Engendered Selves, 2 IDENTITIES: GLOBAL STUDIES IN CULTURE AND POWER 49 (1995).
criminal justice system the only way to go?36 Did white feminists who pursued this route really think about the dilemmas for women of color, whose partners have already been disproportionally subject to police and judicial surveillance? Schneider notes that this was early recognized as a problem in the feminist movement,37 and yet, it is one of those painful dilemmas that is hard to escape. In my more cynical moments, I wonder if the success of the battered women’s movement in bringing these cases to court and achieving at least minimal standards for arrest, prosecution, and even occasional incarceration is in part because it dovetailed with these other agendas, both the refocus on victims and the increase of control and surveillance over men of color. I am not making any claims about intentionality. I am only saying that this convergence of conservative and feminist interests may have facilitated feminist successes, although not in a way advocated or desired by feminists.

Although the whole book is very strong, one of the strongest chapters discusses the dilemmas of motherhood and battering.38 It has long been clear to me that there is an image of a good victim as one who calls the police, who prosecutes the case, who testifies, and who leaves. But it seems clear that there is also an image of a good mother, and this is a similarly constrained identity. Only if one behaves a certain way does one really merit the support of the criminal justice system. The good mother is the person who immediately leaves the partner, protects her children at all costs, puts the interests of her children before her own, and is the person who deserves help, not the others.39 It is a very constraining identity. I thought that this analysis was really fascinating and full of painful dilemmas for lawyering in this sphere of work.

37 SCHNEIDER, supra note 1, at 63-64, 184, 196.
38 Id. at 148-78.
39 See, e.g., id.; LINDA GORDON, HEROES OF THEIR OWN LIVES 252-64 (Viking 1988) (describing certain traits of mothers that are detrimental to receiving social agency relief).
The third point I wanted to discuss is the implication of the growing international human rights movement against violence against women. I agree with Liz that the international movement has very significantly re-politicized the problem, taken it back out of the domain of psychological definitions of individual malfunction—the Post-Traumatic Stress Disorder (“PTSD”) discussions—and moved it to a new, more political domain. Schneider makes this point clear, and I think it is a critical one. It is interesting that in the international debates, the definition of violence against women has become increasingly expansive. It now includes trafficking, rape in wartime, violence against women in refugee camps, the effects of poverty, armed conflict, globalization, and structural adjustment programs.

People talked about this very issue at the Beijing Plus Five Conference and have talked about it at other international meetings. I heard one woman from Nigeria ask at Beijing Plus Five, “Can you consider polygamy violence against women?” This was in a non-government organization (“NGO”) discussion about violence against women. The organizer said, “Sure, why


42 In June 2000, the United Nations held a five-year implementation review of the Fourth World Conference on women (Beijing Plus Five). For a detailed summary, see International Policy UN Conferences: Fourth World Conference on Women + 5, 2000, available at http://www.iwhc.org/index.cfm. (stating that “feminist advocates and activists from more than 1,000 nongovernmental organizations met with government delegates from 148 countries to review progress made since the 1995 Fourth World Conference on Women and to agree on further actions needed to accelerate implementation of the Beijing Declaration and the Platform for Action”).
not.” So, now we have polygamy as well. I heard another talk about widowhood rituals as violence against women. This is again a very large, growing, and hopefully not ultimately incoherent category of behavior. The drawback of expanding the definition of violence against women is potential incoherence.

I think the human rights framework offers another advantage that Liz suggests, and that I would like to underscore. You can think about problems as human rights violations that can then become gendered. It is a way of expanding the definition of the problem. She gives the example of Maquiladora export processing zones in Mexico where there is a human rights concern about excluding pregnant women from the workplace. This provides an opportunity to reexamine questions of equality in workplaces and exclusionary legislation concerning pregnancy elsewhere in the U.S. I have watched this in other human rights debates where issues that are not always thought of in gender terms become re-gendered. For example, there is a lot of talk about effects of conflict on populations that become refugees in armed conflict, and there is now an effort to look at the fact that this is disproportionately affecting women and children. So you can gender the effects of armed conflict. Refugees, women and children are disproportionately victims. Women are subject to violence in refugee camps; their partners have nothing to do; they have no protection; they are living under plastic sheets. Thus, they are in a sense more vulnerable to this problem.

43 SCHNEIDER, supra note 1, at 56 (using “the legal treatment of pregnant workers in the maquiladora” as an example of a problem that exists in this country as well but is not currently a focus of advocacy).


45 See generally Gardam & Jarvis, 32 COLUM. HUM. RTS. L. REV. 1, 11 (highlighting the impact of landmines in armed conflict and their effect on the world’s refugee population, the majority of which are women and children).
Globalization is increasing poverty in rural areas of the global south, and it is often women and girls who fall disproportionately into poverty.46

One of the recent interesting discussions is about the effect of AIDS, looked at in a gendered way. The rate of increase of AIDS among teenagers in southern Africa is five or six times as high for girls as for boys.47 This is probably because girls marry older, more sexually experienced men, and as wives, they cannot really ask for safe sex.48 To look at the gender dimension of these problems and to think about them globally as violence is quite interesting. In discussions of racism, again it is women of color who are more often victims. Trafficked women are often women of color.49 Those who have difficulty with exclusion from work


47 The United Nations Program on HIV/AIDS found that there are roughly 13.3 million women living in Sub-Saharan Africa with HIV/AIDS compared to 10.9 million men. Moreover, around twelve to thirteen million women become newly infected with HIV for every ten million men. Gender and HIV, United Nations Programme on HIV/AIDS (Mar. 2001), available at http://www.unaids.org/fact_sheets/files/GenderFS_en.doc. See also R.W. Johnson, Analysis: Infant Rape Captures AIDS Crisis, United Press International, Nov. 24, 2001 (stating that “statistics show that women catch HIV far more easily than men and because men tend to be attracted to younger women, the HIV rates among teenage girls are far higher than among boys,” and asserting that this knowledge of young women in their early twenties dying of AIDS has become quite common, making girls of younger and younger ages vulnerable to men who believe that only sex with a virgin will cleanse them of the spell of AIDS).


49 See, e.g., Berta Esperanza Hernandez, Latinas, Culture & Human
are not just people of color but often women of color. \(^{50}\) Again, you can see what adding gender does to this issue. I think this is a very productive way to think about a range of issues of violence against women, which brings us back to the larger, more structural kind of analysis where feminism began.

In a sense, this is the upbeat part of the book, this is the hope for the future. I wish I could be quite as optimistic as this little description of mine has just sounded, and as I think Liz wants to be, but I find reasons for some pessimism, as I said earlier. There is a lot at stake here; there is a lot of resistance globally to undermining marriage structures. \(^{51}\) I see a strong tendency to introduce the same kinds of individual rights-based approaches that we have tried and found difficult and problematic in the United States. Among others, there are efforts to establish

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\(^{51}\) Global efforts by women activists in this area have led to international conferences in Nairobi in 1985 and Beijing in 1995. In addition, activists’ efforts resulted in the appointment of a United Nations Special Rapporteur on Violence. SCHNEIDER, *supra* note 1, at 53-54. However, there has been widespread criticism of the lack of concrete results. *Id.* at 54. The United Nations Special Rapporteur on Violence recently issued a report criticizing foreign governments for a “lack of strategies of implementation on commitments to eradicate violence” and their overwhelming failure to meet international obligations to prevent, investigate, and prosecute domestic abuse. *Id.* See also Gustavo Capdevila, *Gov’t Indifferent to Domestic Violence, U.N. Says*, INTERPRESS SERV., Apr. 19, 1999; Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 794 (1998).
shelters, to have mandatory arrests, no-drop prosecution, and to
mount legal defenses for women who kill their batterers. I
recently found myself sitting in a room in Beijing talking to a
group of women who asked me, “How do I start a shelter?” On
the one hand, this is very important; on the other hand, we have
been through a lot of issues around what makes shelters work,
and it is going to be a complicated problem to make one work in
Beijing. I think this makes Schneider’s book important to the
global movement. It is valuable to show how these mechanisms
have and have not developed and functioned in the U.S. from the
perspective of a legal scholar and activist. This book is invaluable
for the global movement, and I think activists in different parts of
the world would benefit from it.

Christine Harrington

On that note of instability and hope and transition, we will
turn to Renée.

Renée Römkens

My existence is one of transition from the Netherlands to the
United States, going back and forth between the two countries. In
this context, with all its inherent disruptions, my comments
reflect this condition.

Let me first and foremost compliment Liz Schneider on her
book; it is unique and important in its presentation and analysis.
It is timely in the sense that it presents a thorough and
comprehensive history of the development of the many various
legal battles that have been fought in the American battered
women’s movement at a moment in history that feminist legal
politics in the domain of domestic violence seem to have entered
mainstream politics, certainly in the United States.\textsuperscript{52} The book
contains a wealth of information, and one of the many things I
really like about it is that it is written in a very accessible way.
When covering both developments in academic theoretical

\textsuperscript{52} Schneider, supra note 1, at 12-20, 42-45.
debates and developments in legal practice and activism in the U.S., it is a laudable accomplishment to present the material in such a way that makes it accessible to a wide audience without simplifying its complexity. In that respect, Liz Schneider’s work in general, not only this book, provides important and valuable resources to activists as well as scholars. I want to thank her for that. I very much agree with Sally that this book deserves to be read widely, both in the United States and internationally! It provides important insights about the gains and the losses that legal struggles inevitably imply.

As a feminist academic coming from the Netherlands, who has worked as a researcher in the field of domestic violence for a good part of the last twenty years, and now lives in the U.S., I will comment on Schneider’s book from a Western European perspective. What can we in a European context learn from American feminist-inspired legal developments where the topic of domestic violence has been subject to elaborate law-making as well as policy development? What kind of inspiration does the American experience offer, given that American feminist legal developments take place in a different socio-legal context compared to Western Europe? Is more legal regulation actually an advantage? Besides my praise for Schneider’s book, which is admittedly too brief, I will focus on the two issues from the book that have inspired me to critical reflection.

The first point that is particularly appropriate to raise in a law and society context concerns the relationship between social and legal developments. What are the implications of the shift that the concept of the battered woman seems to have made from a social category in the early 1970s, launched by a social and political feminist movement, to a legal category in the 1990s (particularly in the U.S.) that has entered mainstream politics? This first point touches upon Schneider’s discussion of the dialectical relationship between law and its social and educational effects. The second point is an issue that Schneider herself addresses throughout the book, but especially toward the end: what are the limits and the possibilities of the kind of political or social transformation that

53 Id. at 199-200.
law can bring about? And, most importantly, what are the dilemmas that feminist law reformers confront? In that respect, my comments might overlap with some of Sally Merry’s remarks. I will concentrate on what I consider to be the unintended consequences of legal regulation.

My first point concerns what Schneider labels the dialectical process of lawmaking. We are at the point in history when the category of the battered woman seems to have shifted in a political-strategic context from a primarily social to a predominantly legal category. The battered woman is the subject (and object) of increasing regulation that, in theory, is intended to support and/or protect victims. This regulation often has law as its basic vehicle, certainly in the U.S. What struck me throughout the book is Schneider’s emphasis on the positive facts of that shift. And she has valid reasons for so doing. The problem of wife abuse in the U.S. has definitely shifted—no matter how ambiguously—from a private problem to be dealt with in shame, if not in silence, by the individuals concerned to a social concern that receives public attention and is the subject of various public interventions. There has been a development of public concern and responsibility to intervene in which legal change has acted as an important vehicle. In that respect the book illuminates the dialectical relationship between the social and the legal domain. At the same time, Schneider presents an impressive collection of data that illustrates the underlying tension inherent in this shift. Despite the fact that battering has moved into the public domain and that the public discourse, as rhetoric and as praxis, has expanded, particularly through the invocation of law, the implementation of law to address domestic violence often relegates it to the private sphere. The DeShaney case is a very tragic example of this problem. In other words, the implementation of legal regulation of wife battering turns out to be very ambiguous and full of resistance against taking public

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54 See DeShaney v. Winnebago County Dep’t of Soc. Serv., 489 U.S. 189, 195-97 (1989) (ruling that the state lacks any affirmative obligation to prevent domestic violence or to protect individuals against it if the source of harm is private).
responsibility. Schneider emphasizes that traditional notions of privacy as justification for non-intervention sustain violence. But I think that the underlying public-private analysis disadvantages battered women in more complex and paradoxical ways than Schneider lays out in her book.

First, emphasizing the negative consequences of the ideology of privacy, i.e. as justifying non-intervention and leaving victims of battering without de facto and de jure protection, has paradoxically also led to a social and legal climate in the U.S. where legally-based criminal justice interventions in the private domain are currently advocated as necessary and legitimate, even against the wishes of the victim. The most obvious example is the institutionalization of mandatory arrest laws or no-drop policies. Mandatory arrest is critiqued as too blunt an instrument to demonstrate the state’s commitment to take responsibility for responding to wife abuse and too problematic an intervention into private life, disproportionately affecting women of color.

55 SCHNEIDER, supra note 1, at 15-20, 88-94, 97.

56 A number of commentators have noted the problems inherent in mandatory arrest laws. See, e.g., Donna Coker, Shifting the Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. DAVIS L. REV. 1009, 1042-49 (2000) (noting inappropriate arrests and prosecution of battered women under mandatory arrest laws, poor women’s exposure to state control when jurisdictions require police to report each domestic violence call as suspected child abuse, and mandatory arrest policies creating backlash against low-income women); Linda Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 HARV. L. REV. 550, 555, 565 (1999) (arguing that the very state interventions designed to help battered women often replicate the emotional abuse of the battering relationship, and that studies on mandatory arrests have shown that the frequency of repeat violence against battered women increased when those arrested were unemployed, African-American, or high school dropouts); Bruce J. Winick, Applying the Law Therapeutically in Domestic Violence Cases, UMKC L. REV. 33, 71-78 (2000) (noting the various criticisms of mandatory arrests as paternalistic, disempowering, and likely to increase violence for women who are African-American or whose abusers are unemployed); Joan Zorza, Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies, 28 NEW ENG. L. REV. 929, 930-31 (1994) (noting that the issue of mandatory arrest cannot be seen in isolation and is impacted by prosecutorial decision-making and
Nevertheless, these critiques are considered of secondary importance, and they have not changed the increasing implementation nationwide of these policies.\textsuperscript{57} Advocates argue that it is the responsibility of the state to unequivocally and firmly sanction and punish criminal, violent behavior in the family.\textsuperscript{58} The argument that the offender’s arrest and prosecution might entail an intervention in the victim’s private life that she did not intend or want is considered to be understandable at best, but irrelevant in the process of legal implementation. This is a direct consequence of the shift of wife abuse from the private to the public domain and illustrates how the underlying binary of the public and the private is upheld and has, in the implementation of its consequences, been simply turned into its opposite. In other words, the complexity and nuance in analysis, in which wife abuse is perceived as a public and private problem simultaneously, with all the complexities and ambiguities that that brings for both victims and lawmakers, has hardly been follow-through subsequent to arrest).


\textsuperscript{58} Some advocates argue that domestic violence is a public crime and therefore the state has a responsibility to “intervene aggressively” in order to “communicate[] and follow[] through on the message that the state will not tolerate violence of any sort.” Cheryl Hanna, \textit{No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions}, 109 HARV. L. REV. 1849, 1865 (1996). Some further argue that the state condones and promotes violence when it refuses to intervene. \textit{Id. See also} Matthew Litsky, \textit{Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination}, 8 N.Y.L. SCH. J. HUM. RTS. 149 (1990) (arguing for state intervention through the coordination of the legislature, police, prosecutors, and judiciary); Kathleen Waits, \textit{The Criminal Justice System’s Response to a Battering: Understanding the Problem, Forging the Solutions}, 60 WASH. L. REV. 267 (1985) (contending that “[f]ull-scale, vigorous legal response to battering remains the exception and not the rule” and recommending stronger intervention by police, prosecutors, and judiciary).
acknowledged. The problem with mandatory interventions in wife battering is that political recognition of this as a public problem risks eclipsing the private interests that women, as agents, maintain. As a response to the claim that wife battering is a social problem that requires the state to take public responsibility, the baby is sometimes thrown out with the bath water. The fact that law, notably criminal law, has been used as a major vehicle to materialize this public responsibility, only exacerbates this dynamic. Law, as the motor of regulation based on general rules and principles that operate within an either/or paradigm, is by definition not well suited to address the messy complexities of public violence in the private home.59

Secondly, this shift to defining the battered woman as a public identity—in the United States as a legal identity60—deserves to be analyzed in an American socio-legal context. Maybe we are facing a typical American development given America’s “love affair with law,” a phenomenon that is quite striking from a Western European perspective and not as prominently developed in Western Europe.61 Battering has entered the public domain in the U.S. through a rights regime. In Europe—not only in the Netherlands, but also in the U.K., where there is even more of a rights regime than in the Netherlands, Germany, France, or other European countries—we see a different approach than that used in the United States. Without wanting to sound too optimistic, in Western European countries there is more of a balance between the legal and the social category and the social policy strategies that the battered

59 See also Renée Römkens, Protecting Prosecution, CRIME & DELINQUENCY (forthcoming 2002).

60 See supra note 11 (regarding the United States battered women’s movement); infra note 64 (regarding the Violence Against Women Act of 1994).

61 See, e.g., Susan L. Miller & Rosemary Barberet, A Cross-Cultural Comparison of Social Reform: The Growing Pains of the Battered Women’s Movements in Washington, D.C. and Madrid, Spain, 19 L. & SOC. INQUIRY 923 (1994) (concluding that criminal justice respondents in the United States advocated arrests in conjunction with social services, while in Spain, these respondents were more reluctant to endorse criminal sanctions).
women’s movements have pursued in trying to devise supportive policies, such as obtaining funding for shelters and hot lines.\textsuperscript{62} In Western Europe the issue of battering has been a much more effective domain of socio-political struggle than in the U.S. It is an important point to bear in mind that when reflecting on the relevance of American feminist legal achievements in an international context. These achievements need to be socially and culturally contextualized. We have to assess critically how successful the political strategy has been to focus on legalizing the identity of the battered woman as a vehicle to gain, among other things, political and community support, public attention, and state intervention.

That brings me to the second and more general point: what are the limits and the possibilities of law? In her book, Schneider focuses on the possibilities of law. Obviously, law is an important and sometimes necessary instrument in the sense that it can facilitate the translation of a social problem into a subject of public concern and even public responsibility that provides citizens with an entitlement to public care, concern, protection or support. Schneider’s book stimulates us to think about what we need and want from law from a feminist social justice perspective. In addition to important issues that Schneider raises, we need a better understanding of the structural limitations that are inherent in law. Law is inevitably an instrument of governance, a powerful instrument in the hands of legislators, administrators, governments and their representatives, deployed in order to regulate society and its citizens. What is particularly

\textsuperscript{62} The European Union has established three priorities in combating violence: the enactment of legislation; the enforcement of that legislation; and the modification of societal attitudes and stereotypes. \textit{See EU Reaffirms Commitment to Punishing Violence Against Women}, \textit{Xinhua General News Serv.}, Mar. 7, 2002. The European Union has enacted Daphne, an action program that does not focus predominantly on criminal legal projects, unlike most VAWA grants in the United States. The E.U. program, Daphne, funds forty-seven projects aimed at “combating violence against women and children.” \textit{See} Press Release, Commission of the European Communities, The European Commission Supports Fight Against Violence to Women and Children (Dec. 20, 2000).
telling is that the legalizing tendency discussed before is so profoundly dominated by criminal law. Is the feminist social movement to be remembered for its influence on criminal law, as Sanford Kadish recently indicated? The question then becomes, if this is a victory, might it resemble a Pyrrhic victory, one that implies substantial damage? The overinvestment in criminal legal interventions within the Violence Against Women Act ("VAWA") and the grants that flow from VAWA—millions of dollars going to support pilot projects and fund research into criminal justice interventions, notably mandatory arrest, and lack of support to the civil rights remedy—is more than just an unfortunate side effect.

A criminal rights regime is by definition focused on control and punishment. It might reflect a tendency that represents the increasingly punitive attitude toward social ills and problems that is prominent in the United States.

In his recent essay on changes in the past fifty years in criminal law, Sanford Kadish views the influence of feminism on criminal law as a "social development to be remembered." Sanford Kadish, Fifty Years of Criminal Law: An Opinionated Review, 87 Cal. L. Rev. 943, 981 (1999). He points in particular to changes in rape law and in the law of self-defense. Id. at 975-79.

VAWA, passed as part of the Violent Crime Control and Law Enforcement Act of 1994, is a comprehensive effort to address the problem of violence against women through a variety of mechanisms, including increased funding for women’s shelters, a national domestic abuse hotline, rape education and prevention programs, and training for federal and state judges. SCHNEIDER, supra note 1, at 188-98. It provided for reform of remedies available to battered immigrant women, development of an innovative civil rights remedy, and a host of other provisions including criminal enforcement of interstate orders of protection. VAWA’s civil rights remedy created a federal civil rights cause of action so that all women who had been physically abused because of their gender could sue their attackers in federal court. It permitted compensatory and punitive damages as well as equitable relief. This provision, however, was held unconstitutional under United States v. Morrison, 529 U.S. 598, 627 (2000) (concluding that Congress lacked constitutional authority under the Commerce Clause to enact VAWA since gender-motivated crimes were not considered economic activity). For a more thorough discussion of Morrison, see infra note 84.

See GARLAND, supra note 32, at 52-60 (discussing a reversion to a
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violence is more the subject of post-hoc, mostly criminal legal interventions and control of perpetrators than of prevention or support of victims.\(^{66}\)

We need to be aware of the limits of law, as well as of its contradictory effects, when it comes to bringing about social transformation, or bringing about social justice, in this case for battered women. Schneider’s work points out consistently that law, most notably criminal law, is not an easy tool with which to work. Its accessibility is limited, and, as Sally Merry mentioned already, lawyering in this domain is problematic. The legal process itself brings about many subversions of the original intentions of the law. From that perspective the term “feminist lawmaking,” although relevant on a descriptive level, sounds somewhat optimistic. The law in this domain does not just provide rights as trumps to be cashed in while struggling against violence against women and for social justice. Rights are equally, if not more, instruments to control, to monitor, and to subject the rights bearers to a regime that constitutes legal identities that do not necessarily serve the interests of the rights bearers who are initially looking for support. In this domain there are many compelling examples of how laws subvert their intended support.

The “battered woman’s syndrome,”\(^{67}\) for example, is a very clear example, as are mandatory arrest laws. The term “feminist lawmaking” as the project that motivates this book pictures leading developments in this field as a politically emancipatory more punitive criminal justice system).

\(^{66}\) Domestic violence is another example of a social problem that has become subjugated through criminalization in the current “culture of control” as analyzed by David Garland. See Garland, supra note 32. For a critical analysis of the rights regime in the field of domestic violence, see Renée Römken, Law As a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women, 13 Yale J.L. & Feminism 265 (2001). See also Donna Coker, Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review, 4 BUFF. CRIM. L. REV. 801, 802-05 (2001) (arguing that the litmus test for measuring effective laws or policies for battered women should be whether legal or social service interventions enhance women’s access to material resources).

\(^{67}\) See supra notes 16-17 and accompanying text (discussing “battered woman syndrome”).
project. In doing so, it pictures the law from a slightly modernist perspective as a mechanism that brings about progress. Laws in the domain of battering certainly bring a civilizing message that it is morally wrong and illegal. Of course, I agree with the message. But using the law as an instrument to bring that message across means the invocation of an instrument that demands a considerable price. In that respect, the book appears to reflect an optimism about what law can accomplish. This same optimism that I read in it, seductive as it is, has inspired me to reflect on the limitations of law and how this might be related to politics of rights.\textsuperscript{68} From an international perspective it is important to learn lessons from these achievements in addition to the counterproductive effect of feminist legal struggles in the United States and elsewhere. This book documents a crucial part of that history and inspires us to engage in global dialogues!

\textit{Christine Harrington}

I have a question, Renée. When you stated that from the European perspective the relationship between social categories and legal categories is more balanced in contrast to the American viewpoint, I wondered whether politics regarding services have experiences similar to or different from changes in the United States. For example, has there been a professionalization of anti-domestic violence services? Liz commented that one objective she had in writing the book was to reconnect gender to violence.\textsuperscript{69} This is also part of her argument on refueling social movements and the challenges faced as a result of professionalization. Would you comment on the professionalization of services from a European view? I tend to think that in the U.S. legalization is often confused with and coupled with professionalization.

\textsuperscript{68} For a more elaborate discussion of the flipside of the politics of rights for battered women, see Römkins, \textit{supra} note 66.

\textsuperscript{69} See Schneider, \textit{supra} note 1, at 232 (arguing for the need to link violence to gender inequality).
Battered Women & Feminist Lawmaking

Betsy Stanko

If you do not mind, Chris, as an audience member I would like to respond to your question. One of the observations I have made after living in London for the last twenty years (after previously living in the U.S.) is about the differences between a U.S. and European perspective on the use of law in domestic violence situations. I have asked myself about the impact of the decline of the welfare state in the U.S. on the emergence of law as the primary remedy to many harms. In the U.K., for example, we still have a welfare state. The government not only believes in the public sector but also has a real desire to respond to the needs of people. Much of the activist feminist politics in and around the violence against women movement in the U.K. expects to engage the entire public sector, not only the arm of the law. Campaigns to involve the public sector in responses to domestic violence include a second layer of government, such as the local authority or the local health authority, in the provision of help and assistance.

70 The British government established a Social Exclusion Unit in Downing Street to create cross-departmental, integrated solutions to the problems of those who fall through the welfare net. The unit has established eighteen policy action teams to address the problems, including homelessness, poor education, crime, inner city regeneration, and drug addiction. See Social Security: Government Policy, UK: MEDIUM-TERM POLITICAL OUTLOOK, Jan. 30, 2002.

71 In the U.K. methods to cope with domestic violence engage the entire public sector. Several examples include public awareness campaigns about sexual and physical violence against women, training programs for public services providers, and distribution of leaflets and good practice guidelines instructing women and service providers on handling domestic violence. See Betsy Stanko, A Profile of Violence Against Women, Criminal Justice Conference-Violence Against Women (Nov. 24-25, 1999), available at www.homeoffice.gov.uk/domesticviolence/stanko.htm. Such public efforts have not infringed on law enforcement reform. Id.; see also infra note 72 on the high degree of police involvement in Britain’s domestic violence movement. Improving law enforcement’s understanding of domestic violence issues remains a critical objective for feminist politics in the U.K. See generally infra note 72.

72 Great Britain’s approach to domestic violence also utilizes a high
I find myself appalled by the lack of social safety net in the United States. In European life, the law and the police are only one part of a solution to domestic violence. In the U.K. we cannot even mandate arrest in domestic violence situations. But under European rights legislation, we can begin to re-conceptualize the need—indeed the duty—to protect people from harm.\footnote{See generally Subrata Paul, Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa, 7 Cardozo J. Int’l & Comp. L. 227 (1999); Susan Smolens, Violence Against Women: Consciousness and Law in Four Central European Emerging Democracies—Poland, Hungary, Slovakia, and the Czech Republic, 15 Tul. Eur. & Civ. L. F. 1 (2001).} I now hear police officers saying we have to do something more in domestic violence situations because we have a duty to protect. It is a new discourse. This is one hook that the police in particular are using to make the health service devise plans to protect people from domestic violence. So the police, as one agent of law, are challenging others in the public sector to take notice of domestic violence. This makes a huge difference in degree of involvement by the centralized government through its criminal justice system. See Rebecca Morley & Audrey Mullender, Police Research Group, Preventing Domestic Violence to Women, in Crime Prevention Unit Series: Paper No. 48, at 36 (Gloria Laycock ed., 1994). The hallmark 1990 Home Office Circular recommending police forces to develop strategies to take positive, pro-arrest action against assailants of domestic violence victims resulted in the proliferation of domestic violence units (“DVUs”); furthermore, the police were the first statutory agencies created to achieve accountability to the community with respect to domestic violence. See id. at 16-17. In addition, police policies are encouraged to maintain a pro-charge attitude when prosecuting domestic violence offenders, although these policies may not be entirely effective. Carolyn Hoyle & Andrew Sanders, Police Response to Domestic Violence, 40 Brit. J. Criminol. 14 (2000) (writing that pro-arrest and pro-charge policies do not necessarily achieve results preferred by victims themselves of cessation of violence). Community support through refuges, support groups, and crisis services has also been emphasized. See Morley & Mullender, supra at 30-34. Government policies continue to emphasize close relationships between crime-fighters and social welfare agencies, as well as police involvement. Jalna Hanmer & Sue Griffiths, Reducing Domestic Violence . . . What Works? Policing Domestic Violence, Crime Reduction Research Series (Jan. 2000), at http://www.homeoffice.gov.uk/rds/prpdifs/poldv.pdf.
finding additional space from law as a solution to domestic violence.

Marianne Wesson

There are so many wonderful things about this book I could spend my whole few minutes just talking about the things I admire. But I do not want to do that, in part because I have said many of those things in print, and in part because I would like to engage with you today on two particular issues: the question of privacy and the point both Liz and Renée have made about Americans seeming to think of legal solutions and legal remedies first before we consider other solutions to social problems. To take the second point first, I think you are quite right in this book, Liz, about the primacy Americans have placed on legal rather than other solutions, and I have wondered why that is so. The suggestion—a very useful observation—has been made that it has something to do with the sort of social safety net that exists in other countries but is increasingly dwindling in the United States. I have been thinking about this because we have been traveling around a little bit in Eastern Europe before landing here in Budapest. Everywhere we have been, we have seen castles. We visited several and were shown, among other things, treasure troves of ancestral monarchies. I kept thinking, why is it I have gone for years without seeing a castle (at least since my kid got too old to go to Disneyland), and now that I am in Europe, I spend every other day in one? We do not have such a tradition in the U.S. We have never had a king; we do not have much of a shared history.

The United States is an enormous country; it is increasingly diverse; it is very violent. Many people who live in it consider they do not share a great deal with all of their fellow countrymen. The one thing that we do share, on the whole, is a commitment to what we rather grandly call the Rule of Law. It is not always such a grand thing, and it is not always benign. Nevertheless, I think that is why we think of the law first, Renée,

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74 Wesson, supra note 1, at 23.
because we do not have anything else to appeal as a source of our commonality or our national identity. We have this phrase—it is a sexist phrase, but it is still useful—"We are a nation of laws, not men." The phrase implies that leaders and dynasties—we undeniably still have those—will come and go, but the one thing that will remain at bedrock is the rule of law. Of course, we still struggle over its meaning. But I believe that is the reason we think of the law so constantly and insistently, in a way a European finds, no doubt, peculiar.

I want to say that one of the things I admire so much about Liz's book is her optimism. I know it is hard to share it all the time. But I like reading something that reflects that "glass-is-half-full" attitude, especially after being at this conference. I have been at quite a few panels, which I felt were all good, some brilliant; however, it occurred to me that the official attitude of this conference is pessimism. There might be a generic title applicable to every panel that would be something like "an exquisitely nuanced and profoundly insightful discussion of a confessedly insoluble problem." They mostly conclude, "Huh, nothing can be done." Or perhaps the more optimistic panels conclude, "There is a great deal of work that remains to be done."

It is refreshing to encounter a divergence. I rarely encounter a piece of writing that makes me feel like I want to go do this work. Yes, of course there is a great deal of work remaining, and Liz's book serves as a useful inventory of what it might be. But it is not said in a passive voice. It is said this way: "Look, let us roll up our sleeves. There is a lot that remains to be done." So I like the way reading this book renewed in me the spirit of commitment to the solution of this problem, even though the path to a solution is not always clear.

I can only talk about this problem from my own position as an American, a lawyer, and a former prosecutor. I tend to think

75 John Adams, Thoughts on Government, Jan. 1776, available at http://odur.let.rug.nl/~usa/P/ja2/writings/tog.html ("[N]o good government [exists] but what is republican . . . [and] the very definition of a republic is 'an empire of laws, and not of men.'").
of those immediately as the aspects of my own identity that I can mobilize in thinking about solving this problem, although those are not the only helpful identities.

Now let me turn to the question of privacy and privatization. Catharine MacKinnon once said—I think she was quoting someone else—“Privacy is an injury got up as a gift.” She was talking about the interest of women, of course. I have thought about that phrase often. Usually, when people talk about privacy they are talking about the gift—something desired, something sought after. Do not get me wrong. I like my privacy as much as the next person. I have never understood why for a few years teenagers wanted to be Madonna, the woman who never has any privacy. Even when she goes to the dentist, there is someone there with a camera to record it. That just never appealed to me at all. But I do think that the regime of privacy and the increasing privatization of things once regarded as matters in the public sphere carries with it many dangers for the vulnerable, and especially for women.

I have heard a lot about privatization in attending various panels at this conference. For example, speaking globally—and I can only speak in a very general way because I do not have a lot of expertise here—I have heard a lot of talk about growing national deference to private economic arrangements. There is an entire regime of international agreements that seek to institutionalize and make permanent this deference by governments to private economic arrangements, a kind of privatization of the international economy coupled with measures designed to discourage regulation that might make it less of a brutal capitalistic enterprise. Whether that is good or bad, I do not think anyone can deny that we are seeing a trend. It is in

77 See generally Gordon A. Christenson, Federal Courts and World Civil Society, 6 J. Transnat’l L. & Pol’y 405, 431 (1997) (explaining that treaties are interpreted as self-executing when private economic or commercial interests are protected); Neil Munro, Cybercrime Treaty on Trial, Nat’l J., Mar. 10, 2001 (discussing an anti-crime treaty being drafted in Europe and how privacy advocates feel this may undermine economic growth).
part the product of a kind of utilitarian argument that seems to be at its maximum influence these days, the proposition that government is less efficient than private institutions at the promotion of certain kinds of social goods.

At this conference I have also heard about the proliferation of a regime of private decision-making, frequently by arbitration. In the United States, for example, if you sign a contract for the purchase of goods, it is very likely that, if there is any kind of formality at all to the agreement, you sign away your right to bring litigation against the manufacturer or seller of those goods. You are required, if there is a dispute, to submit to arbitration. And the agreement might even provide that the seller of the goods will designate the arbitrator. As a result, you as the consumer give away your right to a public remedy in favor of an agreement (which is extorted from you because it is the only way you can buy the camera or whatever it is you want). The purchasing public has no other choice but to submit to the privatization of dispute resolution.

Privatization arrangements also prevail in many sorts of employment agreements. We have seen in the United States

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79 See, e.g., Taubman v. Prospect Drilling & Sawing, Inc., 469 N.W.2d 335 (Minn. App. 1991) (discussing how the Minnesota Sales Representative Act, Minnesota’s version of the Uniform Securities Act, requires disputes to be submitted to arbitration); Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 492 (Tex. 2001) (discussing the requirement to submit to arbitration in the context of sales of goods). See also Richard A. Bales, A New Direction for American Labor Law, 30 Hous. L. Rev. 1863, 1912 (1994) (surveying Supreme Court cases demonstrating judicial receptiveness to arbitration clause enforcement in commercial sales contracts and judicial interpretation of the Federal Arbitration Act, 9 U.S.C. § 1-14).

Supreme Court within the last couple of years an endorsement of the legality and propriety of these kinds of arrangements, in which people sign away their right to seek a public remedy in favor of a privatized remedy.\(^8\) Our president has initiated a discussion about the desirability of privatizing much or all of our Social Security system,\(^2\) which is the system of old age pensions for people in the United States. It has always been organized as a public agency, administered by public servants who were answerable, as governmental agencies are, but powerful interests promote to substitute this public system for a private one by making security in one’s old age an individual matter of accumulating money, investing it, and then moving one’s investment around in an entrepreneurial manner. So I see a lot of evidence that this trend toward privatization is continuing and accelerating, and I wonder what that means for the movement for the protection of battered and vulnerable women and children.

One of the things that Liz talks about in her book is the Violence Against Women Act of 1994.\(^3\) But as Renée mentions, in a development that came after the book was published, the


United States Supreme Court in *United States v. Morrison* declared unconstitutional the civil rights remedy of the Violence Against Women Act, the portions that would have given women who were victims of gender-motivated violence a right to seek a private remedy in the federal courts of the United States.\(^4\) One can put forth various explanations of this decision, but to me it represents a rather subtle statement of the old premise that this kind of violence really is a private matter. It is not important enough, and it does not have significant enough nation-wide effects for the federal courts to have any jurisdiction to consider it. It has to be considered (if at all) by local courts, by local authorities. State courts are all right for those cases, but the federal courts—the big courts, the important courts, the courts that deal with momentous matters significant to the nation and the nation’s health—really do not have any jurisdiction over this rather small private matter. I am being perhaps a bit sarcastic,

\(^4\) *United States v. Morrison*, 529 U.S. 598 (2000). The plaintiff in *Morrison*, Christy Brzonkala, a freshman at Virginia Polytechnic Institute, alleged rape by two defendant varsity football players. After the university judicial committee failed to find sufficient evidence to punish them, the plaintiff brought civil suits against the university under Title IX, 20 U.S.C. §§ 1681-88, for the handling of her complaint and against both varsity football players under 42 U.S.C. § 13981, codifying § 40302 of the Violence Against Women Act of 1994, 108 Stat. 1941-42, which provides that persons may receive compensatory, punitive, declarative, or injunctive relief from those who have deprived them of their right to be free from gender-motivated violence. *Morrison*, 529 U.S. at 604. The district court dismissed the plaintiff’s case against the university for failure to state a claim, concluding that Congress lacked the power under the Commerce Clause or Section 5 of the Fourteenth Amendment. *Id.* at 604-05. In *Morrison*, the case against the football players, the Supreme Court held that Congress lacked constitutional power under the Commerce Clause even to provide a civil remedy for gender-motivated violence, which the Court said constituted intrastate non-economic activity not substantially related to interstate commerce. *Id.* at 613-18, relying on *United States v. Lopez*, 514 U.S. 549 (1995). The Court explicitly left open the possibility of Congress’ Commerce Clause powers to regulate non-economic activities affecting interstate commerce, but declined to place gender-motivated violence within Congress’ power to regulate, fearing that permitting federal regulation of such an attenuated relationship to interstate commerce would over-broaden Congress’ regulatory powers. *Id.* at 614-16.
but I think that is a defensible reading of what the court was saying in *Morrison*. And if I am right in my reading of this case together with other developments in United States constitutional law, I see a gradual but relentless enlargement of this sphere of privacy, inside of which the government may not or will not be inclined to look. I do not think that is a good thing for vulnerable people or for battered women.

You may know that the President of the United States, George W. Bush, when asked whom he would appoint to vacancies on the United States Supreme Court, if any should arise (as it is very likely that they will during his term), said he would like to appoint more justices like two of the present members of the court—Justice Thomas and Justice Scalia. So I am always interested in what these two jurists are saying and doing because it seems likely that they may be replicated before long. When I look at their decisions across a broad range of subject matters, I find that this concern with privacy, the protection of someone’s right to keep certain matters private and away from the gaze of the government, is a pervading theme, even when the question is one on which a person George W. Bush admires would take a different view. For example, Justices Scalia and Thomas are quite willing to vote against the government in matters involving criminal prosecution and in

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86 Laurie Kellman, Bush, Gore Touted Different Justices, A.P. ONLINE, Dec. 11, 2000 (“Throughout the year, Bush tried to frame the issue in terms of philosophy, saying his ideal nominees would base their judgments strictly on the words of the Constitution. Pressed to name a justice who fits that mold, Bush pointed to Scalia and Thomas.”); Stephen B. Presser, How Bush Would Fix the Supremes, CHIC. TRIB., Nov. 5, 2000 (“Bush said he wants more justices like them [Scalia and Thomas].”).
favor of the defendant when they feel that the right to privacy is implicated.\footnote{See Minnesota v. Olson, 495 U.S 91 (1990) (Scalia & Thomas, JJ., joining majority) (holding that overnight guest who stays in another’s house with the owner’s permission legitimately shares the owner’s expectation of privacy under the Fourth Amendment). But see Indianapolis v. Edmond, 121 S. Ct. 447, 458, 460-62 (2000) (Rehnquist, C.J., Scalia & Thomas, J. dissenting) (joining Chief Justice Rehnquist in rejecting the majority’s finding that City of Indianapolis’ use of drug-sniffing dogs at traffic checkpoints violated the Fourth Amendment; finding, instead, a lowered level of Fourth Amendment protection in a car, as opposed to a private residence); Minnesota v. Carter, 525 U.S. 83, 91-99 (1998) (Scalia & Thomas, J., concurring) (concurring with majority’s reasoning in denying Fourth Amendment protection from discovery of illegal activities by police officer who looked through window of the house where defendants were bagging cocaine).} I am thinking especially of a recent decision addressing whether the police could use what is called a thermal imaging device to look—not look, literally, but to sense what was going on—inside the walls of a house.\footnote{Kyllo v. United States, 533 U.S. 27 (2001) (finding warrantless thermal imaging searches in violation of the Fourteenth Amendment when used to detect emanations from the home).} Thermal imaging devices are law enforcement tools used to detect activities like the cultivation of marijuana, which uses growing lamps that generate a certain amount of heat. Prior to this decision, the Court had found that, in some remarkably similar situations, there was no violation of our Constitution’s prohibition against unreasonable searches and seizures.\footnote{Florida v. Riley, 488 U.S. 445 (1989) (holding that defendant had no reasonable expectation that his curtilage was protected from naked eye observation from a helicopter four-hundred feet above); California v. Ciraolo, 476 U.S. 207 (1986) (holding no Fourth Amendment violation when police officers trained in marijuana identification took aerial photographs of defendant’s property from a private plane prior to securing warrant); Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (holding that the EPA’s surveillance of defendant’s premises from a plane using an aerial mapping camera to enhance human vision did not constitute a Fourth Amendment violation).} In this matter, however, the Court found differently, and Justices Scalia and Thomas were careful to state their view that—they did not quite put it this way, but they might as well have—a man’s house is his castle. And inside one’s
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house, one is entitled to keep what is happening away from the view of the authorities.90

There was another very overlooked decision about a year ago, a case called United States v. Hubbell,91 which involved a rather technical question. But in their concurring opinion in that case, Justices Thomas and Scalia declared a remarkably broad view of the prohibition against unreasonable searches and seizures, suggesting that a person has a right to refuse, for example, the drawing of blood or the taking of fingerprints, or speaking for voice print analysis, very standard techniques of law enforcement.92 This is a position that the Court has not taken or even considered seriously in about forty years.93 So I see all of these decisions as presaging a trend in our Supreme Court toward greater protection of the right of privacy, at least in one’s home and one’s person.

Now this leads me to another point. Privacy is not a good that is lying around on the ground waiting for all of us to pick it up if we only are attracted to it. Privacy must be purchased like anything else. If you are not convinced, just try traveling around Europe for a while and staying some nights in lodgings that cost $25 a night and other nights in lodgings that cost $250 a night, and compare the amount of privacy you enjoy in those two kinds of lodgings. They are not the same because privacy is expensive. Privacy is far more available to those who have money to buy it than those who do not. The trend toward the enlargement of the sphere of privacy couples with my view that privacy is a good

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90 Kyllo, 525 U.S. at 28, 34.
92 Id. at 49-56 (arguing the term, “witness,” has a broader meaning than that given by the majority, such that the Fifth Amendment privilege against self-incrimination would protect against the compelled production of not only incriminating testimony but also any other incriminating evidence, thus interpreting protection against searches and seizures to include a person’s refusal to comply with certain standard techniques of law enforcement).
that can be purchased by the well-off, but is unaffordable to the poor, which deepens my concern about these developments.

In conclusion, there are various developments in American constitutional law that point toward an increasing emphasis on the preservation of a private sphere behind an impenetrable veil. The analysis Liz provides in her book of the role that privacy has played in denying protection to battered women makes these developments especially troubling to me. At one point Liz recounts going to a demonstration, I think it was in Washington, D.C., and seeing a young woman holding a sign that said, “The power to stop violence against women begins with me.”94 Liz points out that this is in one way an inspiring message, because it is empowering; it suggests that each of us has the opportunity as individuals to do things to better our lives and protect ourselves.95 It is also to some extent a discouraging message because it suggests that it is purely the responsibility of each woman to protect herself, and that public agencies and public officials have no obligations in that regard. Suppose that sign had said something just a little bit different. Suppose it had said, “The responsibility to stop violence against women belongs to you.” Or suppose it said, “The responsibility to stop violence against a woman belongs to that woman.” Now imagine that sign being held up not by a young girl but by the justices of the United States Supreme Court. I am afraid we are going in that direction. As Liz points out, we have been there, and we do not want to go back.

Christine Harrington

Liz, would you like to make a few comments, and then we will open the discussion?

Liz Schneider

Yes. Thanks to all of you for really full, rich readings of the

94 SCHNEIDER, supra note 1, at 231.
95 Id.
book. I really appreciate the closeness of your analysis, and I am really interested in your reactions. It is always this amazing feeling when you write something. You have your own sense about what it is that you have sent out into the world. There then are all these different reactions to it and readings of it. People bring their own perspectives to it. Many of you saw the film yesterday, “Live Nude Girls Unite.”\textsuperscript{96} People watched this ninety-minute film, and everybody brought something different to the discussion afterwards. Some people brought labor history, and some people brought issues of motherhood, and some people brought questions of sexuality. It is always so interesting to hear people’s responses to what one has put “out there.”

A lot of the issues that each of the readers have raised are issues about which I am continuing to think. Let me just try to highlight some of those issues. First, the point that both Sally and Renée made about criminalization is a question that I try to address in the book.\textsuperscript{97} I definitely see criminalization as a serious, serious issue, and the move to criminalize domestic violence in this country is very troubling. Indeed, the thesis of the book is that without a broader comprehension of a social welfare framework for understanding the interrelationship between violence and welfare, and women’s economic situation, and socialization, and sexual harassment, and all those things, we cannot really address the violence.\textsuperscript{98} Criminalization as a solution in itself is a big problem, and I discuss this problem in the book. Sally’s point about the convergence of issues that are coming together around criminalization is very valuable, and I agree with it. It is a very problematic move. It is a move that manifests the problem that I try to address in the book, that domestic violence is viewed as a problem in and of itself and not linked to the larger issues of women’s economic situation, gender socialization, sex segregation, reproduction, and women’s subjugation within the family. But I also think understanding the other forces that both Sally and Mimi are highlighting, which

\textsuperscript{96} LIVE NUDE GIRLS UNITE! (Julia Query & Vicky Funari, 2000).

\textsuperscript{97} SCHNEIDER, supra note 1, at 6, 181-98.

\textsuperscript{98} Id. at 6-8.
converge in that move towards criminalization, is very valuable.

The international human rights piece that Sally brings up here is really fascinating. It is particularly wonderful, Sally, because this is something that I am working on in a new paper. In the book, I leave open the way in which these issues are reframed in the international human rights context. By coincidence, I have also been in China since I wrote the book and also experienced some of the inappropriateness of the American context. But there are ways in which the human rights frame (although there is resistance to CEDAW and the human rights framework) can move beyond an individual psychological criminalizing perspective. That was a particularly important aspect of your comments, Sally. As you were speaking, I felt like we were reading each other’s minds.

To address Sally and Renée’s comments about the cultural context, I have a colleague, Judi Greenberg, who teaches at New England School of Law and who is teaching a course this summer in Ireland on Comparative Domestic Violence Law in the United States, Ireland, India and South Africa. Not only are there law school casebooks now, one of which Clare Dalton and I just published, but there are courses on comparative domestic violence. Judi just left to teach this course in Ireland for two weeks, and we talked before she left. She observed that all four


countries rely on protective orders and criminalization remedies despite the diversity of contexts and explanations of domestic violence in each country. I do not know whether that just reflects the primacy of American frameworks in other countries or even whether it is true, but I think it is an interesting observation.

Renée’s comments and Betsy’s responses regarding the greater social-welfare context, for example, of the Netherlands and the U.K., suggest the significance of cultural specificity. Of course, there is always cultural specificity, and it is important to recognize this and integrate it into our analysis. Betsy did not mention this, but the history of the battered women’s movement in the U.K., for example, has historically been a more explicitly political and activist movement than what has developed in the United States.

Renée Römkens

Very briefly, I think part of the answer to the question of differences in Western Europe is CEDAW (the Convention of the Elimination of All Forms of Discrimination Against Women). CEDAW is a treaty by the U.N. in 1979. Various countries use the international human rights perspective more and more as a framework to say what they are doing and whether they are complying with this document. The focus of CEDAW, however, is clearly on legislation, so it has a unifying influence internationally.

Liz Schneider

As I discuss in the book, CEDAW and other international human rights documents see violence as linked to other aspects of women’s lives in ways that I think are very important.

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102 See supra notes 71-72 and accompanying text.
103 See supra notes 71 (describing the battered women’s movement in the U.K.).
104 See supra note 100.
Sally Merry

Can I just intervene quickly? The thing about CEDAW is that it is not just about legislation; it is also about substantive equality. It is about media, ritual, and the spread of cultural stereotypes, education, and jobs. It actually has a very broad structural analysis about gender and equality. So I think it is really more about social transformation than just about legislation.

Liz Schneider

CEDAW raises the question of the implications of international human rights. This is an area where there is a lot of activism and writing. Many people are doing activist work around the world and bringing knowledge and experience home regarding the difference an international human rights framework makes.

On the mandatory arrest issue, I am sympathetic with the concerns that Renée raises. I think that it is not surprising that the Supreme Court struck down the civil rights remedy of VAWA, which was the non-criminal aspect. There are other sections of the Violence Against Women Act that still stand—renewed money for shelters and other things that are being used in an affirmative way. There is no question in my mind that the

105 See supra text accompanying notes 52-68.
106 See supra note 64 (discussing Violence Against Women Act).

Despite this substantial 2002 budget increase, it still falls over $100 million short of congressional authorized funding levels for VAWA. Jan Erickson, Legislative Update: Bush and Congress Reach Out to Rich White Guys, NAT’L NOW TIMES, Summer 2001, available at http://www.now.org/nnt/summer-2001/legupdate.html. This shortfall includes approximately half the authorized VAWA budget for rape prevention and education programs and less than authorized funding for battered women’s shelters. David M. Heger, Violence Against Women Policy Trends Report 19, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER, July 5, 2001, at http://www.vawprevention.org/policy/trends/trends19.shtml. Additionally, the budget continues to provide no funding to a transitional housing program for victims despite a National Coalition Against Domestic Violence survey indicating that such a program is priority for domestic violence service providers. Id. However, the Bush Administration announced in April 2001 that it would request from Congress the additional funding of $102.5 million authorized for VAWA. Erickson, supra. In April 2001, the Senate proposed that the month of April be designated as National Sexual Assault Awareness Month, encouraging efforts to eliminate sexual violence and provide justice to sexual assault victims. S. Res. 72, 107th Cong. (2001). The House introduced the Victim’s Economic Security and Safety Act in July 2001 providing workplace protections for domestic and sexual assault victims requiring time off for physical or emotional health care and legal assistance. H.R. 2670, 107th Cong. (2001). The House, Senate, or President has not acted on either of these bills. More recently, the Bush Administration received criticism from women’s organizations alleging that his nominees for United States Attorney and the Third Circuit Court of Appeals are not capable of enforcing VAWA. See Audrey Hudson, 2nd Judicial Nominee Hit in Senate; Democrats Criticize Smith, GOP Cries Foul Over Pattern, WASH. TIMES, Feb. 27, 2002, at 1 (noting that the Third Circuit Court of Appeals nominee openly criticized VAWA on federalism grounds); Janet McConnaughey, NOW Says President’s Nominee “Inappropriate” for U.S. Attorney, BATON ROUGE STATE
privatization Mimi discussed is something that we will see only get worse. I would argue that the decontextualization of the broader gender framework in domestic violence that I discuss in the book is an example of this re-privatization, in a most problematic sense.

It is also fascinating to me that some of you read this book as so optimistic. I see the book as much more textured, describing a glass half full but also half empty. Indeed, in the book I try to struggle with what I think are some of the real limitations of law, which I now see more clearly than when I began this work. For example, many of us who began this work thirty years ago thought that getting expert testimony in on battering was going to change the rules of the game. We may not have fully appreciated the tenacity of law to reverse those insights—the way that law is one step forward and three steps backward. That is very much my own view in the book. So it is very interesting to me that it is read more optimistically by several of you. Maybe that is just the difference between the mind of the author and the minds of readers. This is the very reason that it is wonderful and valuable to have this kind of conversation.

So with that, again, thanks.

Christine Harrington

I, too, take exception to the view that Liz’s book is simply “optimistic.” In fact, I think that her theoretical analysis puts to rest this naïveté about law. There may be a tendency among lawyers to look for a fix, and if the fix does not cure the problem, they are viewed as “pessimistic”; if the fix does, they are called “optimistic.” This pessimist/optimist analysis, I think, belies the theoretically informed dimensions of this book. If there is something that is optimistic for me in reading the book, it is Liz’s continual development of the social relations and human conditions, which place people in positions of struggling for emancipation. This comes through in her own voice as author, in her description of her own life as a younger person at the

TIMES/MORNING ADVOCATE, Feb. 2, 2002, at 6B.
beginning of her movement experience all the way to today. It is this spirit we so often put into our imagined world of feminist lawmaking that gives us an angle, or standpoint, for comprehending the dialectic of rights and politics from a feminist perspective. I take exception to the optimist/pessimist debate because I do not find it fruitful in understanding the praxis.

Are there comments or questions from the audience?

Elizabeth Rapaport

I would like to ask Renée to amplify what she means by “the social category,”108 and by her critique that the social category offers a better alternative to legal strategies. Renée argues that European social democracies have adopted strategies of addressing feminist issues that are preferable to the legal strategies American feminists have adopted. I am not sure that I understand why there is an opposition or wherein it lies.

There was a time in the early history of Second Wave Feminism in the United States when many of us thought that classical socialism contained sufficient understanding of the “Woman Question,” when we believed that social reform embracing equality for women would more or less automatically achieve feminist goals.109 This classical socialist view might be a version of “the social category.” As Friedrich Engels often told working class and socialist audiences about the socialist future: when the first free man meets the first free woman, transformed social relations between the sexes would begin to appear in the new world of freedom and equality.110 Our movement revealed that issues of power and ideology are much stickier and more

108 See supra notes 11, 24-28, 55, 67, 97-98 and accompanying text (referring to the shift in classifying battered women as a social category in the 1970s to a legal category in the 1990s).


recalcitrant than we had initially understood. Renée, do you disagree with this reading of the history of the women’s movement in the United States or draw other lessons from European experience? Do you see the solution to problems of domestic violence as lying solely in a decent public commitment of resources to people in trouble, and the treatment of abusers and abused within the family in accordance with a pathologizing, medical model? What is the social category? For me it is an interesting and provocative notion, but raises the uneasy feeling that it ignores crucial lessons of our movement.

Renée Römken

My intent when I made the dichotomy—and of course every dichotomy does not give a full spectrum of the facts—was to use a provocative hypothesis about the dichotomy between social and legal categories to highlight a tendency that I see in the U.S., in this case domestic violence—how a social problem becomes the subject of legalization that may exclude other political strategies. What are we doing as feminists, as people who are committed to social justice, when law seems to become a central strategy to achieve change? What kind of strategies do we look for? I certainly do not mean to use the social category to refer to battering as a medical or psychological issue, nor do I use it as a normative category in the sense that it implies or describes a certain approach or strategy that would necessarily be better or more effective. It is a descriptive distinction at this point to highlight what I consider to be a difference in the way law operates on a social and cultural level in the U.S. and in Europe, and the kinds of foci that are subsequently created in political strategies.

See supra notes 61-62, 71-73 and accompanying text (comparing the approach of the American battered women’s movement to that of similar activists in Western Europe, who have developed a method that provides a more equal balance between the legal and social strategies used in aiding battered women).
Isabel Marcus

I want to raise the question of going beyond caselaw and legislation. Most countries have some form of legislation that deals with the question of defining injury and the appropriate court’s jurisdiction, and I don’t think that the existence of a statute is the issue. Rather the focus should be on how law, lawyers and people hold public officials accountable. In one sense law has very limited ways to achieve accountability. In the United States, there are class action lawsuits and endless litigation, but law is a rough though necessary framework for accountability. Within bureaucracies, accountability is a much more complicated issue; the sledgehammer of the law does not achieve accountability. For example, in Eastern Europe there is no notion of suing the police for violations of civil rights, including for failure to protect battered women if prosecutorial discretion is abused. If judges pressure parties to settle cases by asking whether a battered woman forgives the perpetrator, or if doctors will not give a medical certificate, a gate-keeping device to allow the woman to file a lawsuit or a complaint with the police, separate criminal code provisions will be mere law on the books. It seems to me that as one starts thinking about accountability, the grass roots activism occurring in many countries is not about rewriting the law. Rather, it is a search for institutional and cultural mechanisms and transformations for developing accountability.

Christine Harrington

That calls for greater public transparency and is more

complex than the simple question of how privacy is situated as a value for Justice Scalia. New legal mechanisms or accountability for violent behaviors can be enacted. Liz’s involvement in writing an amicus brief in support of Hedda Nussbaum, who sued Joel Steinberg for tort damages, provides one example of this. Liz argued against civil assault statutes of limitation laws to enable battered women to exercise a legal right to sue in a civil context. I also think Isabel’s points are quite good in terms of showing the life of law and the continuing, unfolding dimensions of law. This perspective gives a richer analysis of state power and NGOs and these other factors.

Renée Römken

You emphasize, Chris, the need for recognition of the importance of options other than law. And I find very interesting, for example, what has been happening in Australia, where activists are looking for alternative remedies that are more about developing social structures to hold agencies accountable.

Audience Member

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113 Nussbaum v. Steinberg, 703 A.D.2d 32 (N.Y. 2000).
114 See SCHNEIDER supra, note 1, at 94, 181-82.
115 In Australia, a report entitled Key Directions in Women’s Safety—A Co-ordinated Approach to Reducing Violence Against Women was released on February 8, 2002 by the Office of Women’s Policy recognized the need for a specific strategy to address violence against women. See Family Violence: Victorian Update, at http://www.dvirc.org.au/resources/DVUpdateVictoria.htm (last visited Apr. 21, 2002). It proposed to focus government efforts in four key areas to reduce violence against women: (1) protection and justice (focusing on reform of the criminal justice system and police response), (2) options for women (including strategies to allow women to remain in the home rather than fleeing), (3) prevention of violence (including early intervention programs targeting young men), (4) community action and coordination (including a move toward an integrated response for family violence based on the “Duluth Model,” which incorporates the criminal justice system, programs for victims, perpetrators and other services. See Domestic Abuse Intervention Project, at http://www.Duluth-model.org/daipmain.htm (last visited Apr. 21, 2002).
I am from Turkey. One thing that you brought up is human rights texts and other texts like CEDAW. I do not think it is right to imply a lack of creativity on the part of people in other countries—for not enough people care about human rights. Even if people do care, many issues exist that have to be addressed. In discussing the private/public issue you first address privacy from a social aspect. And then you address privacy in terms of economics, for example the privatization of social securities. I guess there is a benefit in this.

In Turkey, we have virginity exams. In the first sense of privacy, we cannot get rid of them. Constitutionally we are entitled to some level of privacy, but is privacy good for us? We cannot just turn it into gender equality. So the argument against privatization falls under one of economics. We are for privacy, however, because we do not want vaginal exams. In that sense, there is a certain use for privacy. I am not willing to give it up. It depends upon the particular cultural and political context.

**Liz Schneider**

I agree. One thing I want to clarify, because it is important that it not be misunderstood, is that in the book, I also discuss some of the ways in which it is important to think affirmatively

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116 In Turkey, as in other societies, women are expected to be virgins until marriage, and those accused of not being virgins must consent to virginity exams under tremendous family and police pressures. **REGAN RALPH, A MATTER OF POWER: STATE CONTROL OF WOMEN’S VIRGINITY IN TURKEY 6** (Human Rights Watch 1994). If rumors suggest a young woman is not a virgin, her family will often bring her to a state or private physician to establish either that her hymen is intact, or, if not, that it was damaged in an accident and not broken through sexual activity. *Id.*

In 1999, the government banned virginity testing of female students, but in 2001, Turkey’s conservative health minister introduced regulations permitting principals in state schools that train nurses, midwives, and other health workers to expel girls who are not virgins. Susan Fraser, **Virginity Tests Spark Outrage: Turkish Teens in Nurse School Must Submit**, CHARLESTON GAZETTE, July 19, 2001, at 5C. Once again, however, the practice has been halted. **Turkey Rescinds Law on Virginity**, RECORD, Feb. 28, 2002, at A8.
about privacy. Privacy is not just this terrible thing for battered women; it is important that privacy can also offer safety, integrity, and autonomy for women generally, as well as women who are battered. Many legal issues and many political questions have merged around these issues of privacy. Some examples include confidentiality of battered women’s names and addresses, privacy regarding the forwarding of mail, confidentiality and privacy regarding shelters and conversations with battered woman counselors. Thus, there are many contexts in which privacy for battered women is important and should be understood in that affirmative way.

None of this is simple. Sally’s first point—that the definition of the problem is so central—is the reason I start with the definition of the problem in the book. Other points that have not been mentioned in the conversation are the incredible difficulties in integrating and absorbing the lessons of the feminist arguments around domestic violence over a long period of time, the tremendous struggles judges face to do the job that they need to do, and the immense challenge to train lawyers to listen to the problems of battered women and not immediately move into a pathological perspective. I have been teaching specialized courses on domestic violence in law schools for ten years and have been training lawyers for many years on issues of domestic violence. Even lawyers who are incredibly thoughtful and sophisticated and who have done really good work have to engage in a continual process of self-reflection and self-criticism. This book is written in that spirit. I do not say this is the end of the conversation about our accomplishments and mistakes, but that a process of ongoing self-criticism and reflection is part of what it means to do this work. One constantly has to examine the new forms and manifestations of subversion, whether it is privatization or the ways in which—and I am sure Sally would agree—even the international human rights framework can be turned into its own contradiction. It is really about this as a long haul struggle, a long-term process of having to think and evaluate and rethink.

Having said that, I do want to go back to the issue that Renée
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raised about feminist lawmaking. The term “feminist lawmaking” is intended to be descriptive, not normative. Feminist legal advocates have helped develop new legal harms where they did not exist before. The law would not recognize sexual harassment\textsuperscript{118} or domestic violence as a harm if not for feminist lawmaking. Has that meant victory or even linear progress? Not at all! It has meant new struggles, new problems, new directions, and new twists in the road. But to not recognize that there has been something that has changed is, I think, not to really acknowledge the power and importance of feminist legal work over the last thirty years. We have not done enough, but we have made some incredibly important inroads. Law is not enough, but it is a start, and it can be very meaningful to many women on the ground.

\textit{Audience Member}

What are those lessons you mention? And what about looking toward the future and seeing what coordination is being done within the feminist movement or movements?

\textit{Liz Schneider}

Well, I think it is a worldwide movement now. There is an extraordinary amount of important work being done everywhere on these issues.\textsuperscript{119} The lessons involve recognizing the impact of

feminist legal advocacy around the world in transforming our understandings, and yet recognizing that that work has to be done in a self-critical way, that it has to be subject to, in a sense, the dialectics of practice, of seeing what works, of going back to theory, and going back to practice. Finally, the lessons show that this is really a long and slow process.

**Audience Member**

Is the book based on an American model?\footnote{See supra notes 28 (discussing the legal rights and legislative approach to domestic violence that is used in the United States), 64 (discussing how VAWA functions) and accompanying text.}

**Liz Schneider**

It certainly focuses largely on that American experience, but it does not suggest that the American experience can or should be imported to other countries or cultures. I have done some work on violence in other parts of the world like South Africa and China. I think it is important to link this process in the U.S. with others around the world and to see the resonances and differences in other places. It would be wonderful if similar reflection and evaluation were done in other parts of the world and in other culturally-specific contexts to consider the victories, obstacles and lessons that we have to learn to do better work for women who are battered and link violence to women’s equality.

**Christine Harrington**

Thank you all, both panelists and audience members, so much for your participation in this stimulating conversation.
INTRODUCTION

Recently, some have argued that a constitutional amendment is necessary to provide for the temporary appointment of House members to fill seats left vacant by terrorist attacks directed at Congress and resulting in large numbers of casualties. Norman Ornstein of the American Enterprise Institute, for example, has written that “[i]f a large number of House members were disabled and/or killed, the Constitution limits replacement to special elections . . . . As a general rule, I oppose constitutional amendments. But there is no other way to confront this problem.”¹ Such an amendment, H.J. Res. 67, introduced in the 107th Congress, would authorize governors to appoint persons to take the place temporarily of members who had died or become incapacitated when 25% or more of all House members were

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¹ Norman Ornstein, Worst Case Scenarios Demand the House’s Immediate Attention, ROLL CALL, Nov. 8, 2001, at 8.
unable to perform their duties.\(^2\) However, this article explores the bases for congressional authority, by statute, to provide for the quick, temporary filling of House member seats in emergencies.

As the Congressional Research Service has pointed out,\(^3\) H.J. Res. 67 is not the first proposed amendment of its kind to have been introduced. From the 1940s through 1962, the issue of filling House vacancies in the event of a national emergency generated considerable interest among some members of Congress during the “Cold War” with the Soviet Union. More than thirty proposed constitutional amendments that provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of representatives were introduced from the 79th through the 87th Congress.\(^4\) The House has never voted on any of these proposals.\(^5\)

\(^2\) See H.J. Res. 67, § 1.


\(^5\) Many of the current issues raised and policy arguments offered in support of or in opposition to the temporary appointment of representatives are the same as those that were made fifty years ago. See 100 CONG. REC. 7660 (1954) (remarks of Senator Knowland).

The proposed amendment is a form of insurance which, of course, we hope will never have to be used, but, in view of the fact that we are on notice, at least, that it would be conceivably possible to eliminate the House of Representatives . . . by a single attack on the Nation’s Capital, I believe that we can no longer, as prudent citizens and as prudent Members of the House and the Senate, ignore that possibility.

*Id.* See also *Appointment of Representatives in Time of National Emergency*, S. Rep. No. 1459, at 3 (1954) ("Acts of violence may encompass attacks by atomic or hydrogen weapons, germ warfare, or even wholesale assassination of Members of the House by less spectacular
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H.J. Res. 67 and similar proposals are based implicitly on the understanding that the Constitution does not provide a mechanism for the temporary appointment of House members following vacancies. This understanding is based on the Seventeenth Amendment to the Constitution, which provides for the popular election of senators and the filling of Senate seat vacancies through gubernatorial appointments, and the fact that there is no similar provision in the Constitution explicitly authorizing states to provide for temporary appointments of House members. Alternatively, this article explores the bases for congressional authority, by statute, to provide for the quick, temporary filling of House member seats in emergencies. By providing for the temporary filling of vacant House seats by statute, rather than by constitutional amendment, Congress could more flexibly adapt to particular emergency situations and avoid the lengthy amendment process. Neither the intent behind the Seventeenth Amendment, nor the Constitution’s voting rights provisions, prohibit Congress’ exercise of its authority under Article I, section 4, Clause 1 to provide for the temporary filling of vacant House seats either through elections by a limited electorate or possibly by appointment.

The events of September 11, 2001, have raised additional issues. Suicidal terrorists may act independently from sovereign nations and may not be deterred from using weapons of mass destruction because of the possible consequences for their own people. On the other hand, the situation in the 1950s may have been even more dire than today because a nuclear attack was expected to occur, if at all, with overwhelming force that would have destroyed much if not most of the American land mass. See 100 CONG. REC. 7661 (1954) (remarks of Senator Knowland) (“[I]n the event of an atomic attack . . . we may assume, at least for purposes of our discussion, that in the various States of the Union . . . there would be a simultaneous enemy attack. It might be very difficult even to hold elections within a period of 60 days.”).

U.S. CONST. amend. XVII.
I. THE SEVENTEENTH AMENDMENT AND CONGRESS’ AUTHORITY TO MAKE REGULATIONS GOVERNING THE TIME, PLACES AND MANNER OF HOLDING FEDERAL ELECTIONS

Prior to adoption of the Seventeenth Amendment, Article I, Section 3, of the Constitution provided that senators would be chosen by state legislatures. Because state legislatures were often in session for only small portions of the year, Article I, Section 3, provided that “during the Recess of the Legislature of any State, the executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such vacancies.”7 Debates on the Seventeenth Amendment do not indicate that the amendment was intended to do anything other than provide for the popular election of senators, with the temporary appointment language of Article I, Section 3 simply carrying over into the Seventeenth Amendment.8

7 U.S. CONST. art. I, § 3; see also THE CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE 2-3 (U.S. Gov’t Printing Office 2000).
8 The congressional debates over the Seventeenth Amendment also lend some support to the view that, at least in the minds of those addressing the question during such congressional debates, Congress already had the authority to enact a law authorizing the temporary filling of vacant House seats in the event of an emergency.

The Senate initially proposed and passed the Seventeenth Amendment that is part of our Constitution today. That amendment provides as follows:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII.

When the House considered its version of the Seventeenth Amendment, it considered a proposed amendment that denied Congress its existing constitutional authority under Article I, Section 4 of the Constitution “to alter”
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state laws governing the election of senators. The relevant portion of H.J. Res. 39 that the House considered stated that “[t]he times, places, and manner of holding elections for Senators shall be as prescribed in each State by the Legislature thereof.” See 47 Cong. Rec. 203 (1991). This amendment would have given state legislatures the exclusive authority to make laws governing the election of senators. Many congressmen opposed the change on the grounds that it denied Congress the ability to guarantee that senators would be sent to Congress in “emergency” situations. See 47 Cong. Rec. 233 (1911) (remarks of Mr. Saunders). Those who opposed such a change stressed the importance of Congress’ ability to preserve itself in the event of unpredictable future events. Congressman Cannon stated the following:

I will not vote for such an amendment . . . . The Federal Government of the United States, a Government of limited power, supreme where power is granted under the Constitution, should always have the power to perpetuate itself without regard to what any States may do in failing to perform their duty.

47 Cong. Rec. 213 (1911) (remarks of Mr. Cannon). Congressman Nye asked, “Can we afford to divest Congress of a constitutional power which in its very nature is essential to the preservation of the Nation? What emergencies may arise in the future we can not tell, nor in what State or section nor at what time.” 47 Cong. Rec. 230 (1911) (remarks of Mr. Nye). Congressman Lafferty stated, “[I]n the very nature of things it shocks the conscience or the intelligence of a lawyer . . . that Congress should surrender the power of providing for its own perpetuity.” 47 Cong. Rec. 227 (1911) (remarks of Mr. Lafferty). Congressman Saunders stated, “It has been suggested that this language [in the original Constitution giving Congress the power ‘to alter’ elections laws enacted by state legislatures] was inserted to enable the Congress of the United States . . . to preserve itself in time of emergency.” 47 Cong. Rec. 233 (1911) (remarks of Mr. Saunders). Congressman Miller stated the following:

It seems to me . . . that one great branch of Government [the Senate] is hereby surrendering its power to perpetuate and maintain itself . . . . By refusing to elect at all, [state legislatures could create a situation in which] the legislative arm of the Federal Government would be paralyzed. Many men now live who witnessed almost one-half of the States withdraw from the Union and refuse to send Members to Congress. That which happened once may happen again . . . .

47 Cong. Rec. 219 (1911) (remarks of Mr. Miller). These comments regarding the possibility that states may secede in the future and fail to conduct elections of senators and congressmen implies that Congress has the authority to enact laws providing for the temporary filling of vacant House seats when it
In other words, the history of the adoption of the Seventeenth Amendment does not indicate that Congress, in allowing for states to provide for temporary appointment of senators, intended to deny a similar mechanism to Congress—under its authority granted in other provisions of the Constitution—to fill temporarily vacant House seats. Indeed, Article I, Section 4, Clause 1 of the Constitution may provide such a mechanism. That provision states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .” Under this provision, Congress might, by statute, provide for the temporary filling of vacant House seats by either authorizing states to provide for temporary appointments of House members, by authorizing elections of House members by a restricted electorate, or by providing itself with such authority in the legislation. Congress could pass such legislation following the need to fill vacancies, even if there were only three surviving House members. Each of those situations proves impossible or difficult to conduct prompt general elections in a particular state.

In any case, the House ultimately voted to accept the original Senate-passed version of the Seventeenth Amendment and to reject a provision taking away Congress’ authority “to alter” state election laws in cases of “emergency.” See 47 Cong. Rec. 233 (1911) (remarks of Mr. Saunders). While the House, on April 13, 1911, passed a version of the Seventeenth Amendment that included an additional clause denying Congress its existing constitutional authority to alter state laws governing the election of senators, on April 23, 1911, the Senate voted to insist on its version of the Seventeenth Amendment, which did not contain such a provision, and on May 13, 1911, the House passed the Senate’s version of the Seventeenth Amendment, which is now part of our Constitution. See U.S. Const. Amend. XVII.

10 Id. (emphasis added).
11 Article 1, Section 5 provides that “a Majority of each [House] shall constitute a Quorum to do Business,” and that provision has been interpreted by Congress to mean a majority of members who have been duly sworn, chosen, and living. U.S. Const. art. I, § 5; House Manual, § 53 (“So the decision of the House now is that after the House is once organized the quorum consists of a majority of those members chosen, sworn, and living
would still constitute a quorum under House rules, after which the Senate could then pass the legislation. Further, if Congress acted after any such tragedy, it would be able to assess the actual emergency at hand instead of attempting to predict the contours of an imagined future emergency.  

whose membership has not been terminated by resignation, or by the action of the House."). Congress is authorized to interpret the rules governing its own proceedings by Article I, Section 5 of the Constitution, which provides that “Each House may determine the Rules of its Proceedings . . . .” This would be so even if massive vacancies occurred before a new House in a new Congress had adopted its rules for the session. One of the first items of business the House addresses in each new Congress is the adoption of rules that will govern its proceedings during that Congress. Until the new rules are adopted, the House operates under “general parliamentary procedure,” which allows a simple majority vote to decide an issue or close debate. See 107 CONG. REC. 239 (1961). Under the general parliamentary law that governs before the adoption of the standing rules, a quorum is established by the presence of a majority of those listed on the roll of members-elect prepared by the clerk of the preceding Congress pursuant to 2 U.S.C. § 26 (1997). The clerk does not include on that roll a member-elect who is deceased. After a quorum of members-elect is established, a speaker is elected. Once sworn, the speaker administers the oath to members-elect. At that point a quorum is a majority of those so sworn. Officers are then elected, and rules are adopted. At that point a quorum is a majority of those living and sworn or such other number as the rules might specify for a particular purpose. Therefore, a vote of as few as two out of three living and sworn members could enact the rules governing the House in a new Congress.

12 In the event that not even three House members were alive or not incapacitated, martial law could be imposed with its consequent administration either ratified or rejected by a functional Congress that is subsequently composed. According to one historian:

That martial law was not always considered oppressive is shown by the fact that citizens sometimes petitioned for it. Some Philadelphians, for instance, requested the President to declare martial law in their city at the time of [Confederate General Robert E.] Lee’s invasion to enable them to put the city in a proper state of defense. Nor should we suppose that the existence of martial law necessarily involved a condition of extensive or continuous military restraint. Beginning with September, 1863, the District of Columbia was subjected to martial law, and this state of affairs continued throughout the war, but it should not be supposed that residents of the capital city were usually conscious of serious curtailment of their
Such legislation could provide for the quick, temporary filling of House member seats in emergencies by, for example, providing that vacant House seats could be filled by an “election” with a very limited franchise in which only the governor and the highest-ranking member of each house of each state legislature may vote.13 Because the electorate in such an election would liberties. The condition of martial law was here used as a means of military security. That martial law should be declared in areas of actual military operations was, of course, not remarkable.

See James G. Randall, Constitutional Problems Under Lincoln 170 (Univ. of Ill. Press 1964) (rev. ed.).

In fulfilling constitutional responsibilities to put down insurrection, rebellion, or invasion, the president may resort to invoking martial law. His action, in this regard, is subject to judicial review. See, e.g., Ex parte Milligan, 71 U.S. 2, 142 (1866) (“Martial Law Proper . . . is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.”); Sterling v. Constantin, 287 U.S. 378, 402-03 (1932). The president may also exercise certain authority to create a condition similar to, but not actually one of, martial law:

[In the event] the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.


13 The legislation outlined here could take the following form:

Section 1. If at any time one-quarter of the Members of the House of Representatives are unable to carry out their duties because of death or incapacity, the highest ranking executive officer and the highest ranking members of each branch of the legislature of a State represented by a Member who has died or become incapacitated may elect an otherwise qualified individual to take the place of the Member as soon as practicable but in no event later than seven days after the member’s death or incapacity has been certified by the President.

Section 2. An individual elected to take the place of a Member of the
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consist of only three people, it could be conducted quickly.

Indeed, Alexander Hamilton, in Federalist No. 59, foresaw the need for the national legislature—Congress—to have the constitutional authority to preserve itself in times of crisis. When discussing Article I, Section 4, Clause 1, Hamilton wrote that “I am greatly mistaken . . . if there be any article in the whole plan [of the Constitution] more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation.”\textsuperscript{14} Failure to recognize such a principle in the Federal Constitution, Hamilton wrote, would constitute “imperfection in the system which may prove the seed of future weakness, and perhaps anarchy.”\textsuperscript{15} Hamilton continued that “[members of the Constitutional Convention] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; [but] they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.”\textsuperscript{16}

Congress cannot indefinitely suspend elections open to a larger electorate, as Article I, Section 3 of the Constitution requires that “[w]hen vacancies happen in the Representation

House of Representatives under Section 1 shall be treated as a Member of the House of Representatives and may serve until a Member is elected pursuant to a writ of election to fill the vacancy resulting from the death or incapacity.

This or similar legislation could further specify that the person chosen to fill a vacant House seat be a member of the same political party as its former occupant. Providing for the filling of vacant House seats with reference to political parties by statute also has the advantage of keeping out of the Constitution a reference to political parties. The Constitution currently contains no mention of political parties.


\textsuperscript{15} Id.

\textsuperscript{16} Id. Article 1, Section 4, Clause 1 also gives state legislatures the authority to pass legislation so providing that vacant House seats representing their state be filled temporarily, which Congress may or may not supercede by law. U.S. CONST. art. I, § 4, cl. 1.
from any State, the Executive authority thereof shall issue Writs of Election to fill such Vacancies." 17 However, a requirement that writs of election—which simply require that there be an election of some sort—must issue following a vacancy does not in itself deny Congress the authority to provide for the election, by a very limited electorate of state political leaders, of members to temporarily fill House vacancies in certain emergency situations.

II. THE CONSTITUTION’S VOTING RIGHTS PROVISIONS

Legislation providing for the election of members to temporarily fill House vacancies would also not violate the Constitution’s voting provisions. The Constitution prohibits certain discriminatory barriers to the right to vote, such as those based on race, 18 sex, 19 poll taxes, 20 or age over 18 years, 21 when such a right is extended. It does not guarantee, however, the right to vote per se. 22 It follows that Congress could pass a law limiting the franchise to certain state political leaders who could fill vacant House seats temporarily as long as access to those positions of political leadership were not impeded by discriminatory barriers based on race, sex, or age over eighteen.

Also, a unanimous Supreme Court, in Rodriguez v. Popular

17 U.S. CONST. art. I, § 3.
18 See U.S. CONST. amend. XV, § 1.
19 See U.S. CONST. amend. XIX.
20 See U.S. CONST. amend. XXIV, § 1.
21 See U.S. CONST. amend. XXVI, § 1.

Since the right to vote, per se, is not a constitutionally protected right[,] references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State’s population.

Id. See also Minor v. Happersett, 88 U.S. 162, 178 (1874) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one.").
Democratic Party, held that Puerto Rico statutes that vested in a single political party the initial authority to appoint interim replacements for vacancies in the Puerto Rico legislature until the next regularly scheduled general election do not violate the Federal Constitution, including its Equal Protection Clause. Those challenging the statutes claimed that “qualified voters have a federal constitutional right to elect their representatives to the Puerto Rico Legislature, and that vacancies in legislative offices therefore must be filled by a special election open to all qualified electors” and that because such vacancies were not so filled, other “qualified voters” were denied “equal protection.” The Supreme Court rejected both these arguments:

[T]he Puerto Rico statute at issue here does not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise... Obviously, a statute designed to deal with the occasional problem of legislative vacancies will affect only those districts in which vacancies actually arise. However, such a statute is not for this reason rendered invalid under equal protection principles. A vacancy in the legislature is an unexpected, unpredictable event, and a statute providing that all such vacancies be filled by appointment does not have a special impact on any discrete group of voters or candidates.

Neither does Article I, Section 2, Clause 1 of the Constitution require that elections, other than regularly held general elections, be open to an electorate sharing the same qualifications as those requisite for electors of “the most numerous Branch of the State

23 457 U.S. 1, 8 (1982) (stating that “it is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States”).
24 Id. at 7.
25 Id. at 10 n.10.
Legislature.”

That provision of the Constitution only requires that the “Electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature” during elections for the House of Representatives conducted “every second year,” namely in general elections regularly held, not special elections to fill vacancies until the next general election.


27 Article I, Section 2, Clause 1 provides in full that “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2. While there is some ambiguity regarding whether this qualifications clause applies only to general elections or to both general and special elections, if the latter is the case, state legislatures should be able to enact provisions for temporarily filling vacant House seats when, for example, the member’s death or incapacity has been certified by the governor. Such a law would simply declare that during a specified emergency situation, the electors of the most numerous branch of the state legislature would consist of only the governor and the highest-ranking member of each house of the state legislature.

It may be argued that Section 2 of the Fourteenth Amendment provides for a reduction in a state’s representatives in proportion to a state’s disenfranchisement of its male citizens over the age of twenty-one. Section 2 of the Fourteenth Amendment provides as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for . . . Representatives in Congress . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

This provision, however, has never been enforced, and it is unclear whether it would apply to only temporary reductions in the franchise triggered by emergency circumstances.
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III. CONGRESS’S AUTHORITY TO “ALTER” STATE REGULATIONS GOVERNING FEDERAL ELECTIONS

In arguing for the repeal of the clause in Article 1, Section 4 of our Constitution that gives Congress the authority “to alter” election laws enacted by state legislatures, Congressman Saunders argued in 1911 that “no one has ever been able to ascertain the extent of the power conferred by the present language [of the Constitution] upon the Congress of the United States.”

That statement remains true today, and Congress’ authority “to alter” election laws by providing for the temporary appointment of congressmen to fill vacant House seats is unclear. However, if through some terrible tragedy the vast majority of House members’ seats were left vacant, there is further authority for the proposition that Congress could by statute provide for temporary appointments—rather than elections by a restricted electorate—to fill vacant House seats. While some may argue that Congress’ power to “make or alter” regulations regarding the “election” of House members does not include the power to dispense with an election altogether, such an argument rests on the definition of the word “alter,” one modern definition of which today is “to make different without changing into something else.” However, the framers of the Constitution were not likely to have recognized the definition of “alter” to include something as subtle as “to make different without changing into something else.” The definition of “to alter” in A Dictionary of the English Language by Samuel Johnson, published in 1797 and on its eleventh edition at that time, is “[t]o change; to make otherwise than it is.”

28 47 CONG. REC. 233 (1911) (remarks of Mr. Saunders).
29 WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1991) (emphasis added).
30 A catalog entry from Thomas Jefferson’s library shows that Johnson’s English Dictionary was part of Jefferson’s personal collection. See THOMAS JEFFERSON’S LIBRARY: A CATALOG WITH THE ENTRIES IN HIS OWN ORDER (James Gilreath & Douglas L. Wilson eds., 1989) (emphasis added).
CONCLUSION

While it has become a sort of popular wisdom that the quick, temporary filling of House member seats in emergencies can be provided for only through a constitutional amendment, there is independent authority in the Constitution authorizing Congress, by statute, to do just that, if necessary, following a dire emergency. Neither the intent behind the Seventeenth Amendment, nor the Constitution’s voting rights provisions, prohibit Congress’ exercise of its authority under Article I, Section 4, Clause 1 to provide for the temporary filling of vacant House seats either through elections by a limited electorate or possibly by appointment.
INTRODUCTION

In the past fifty years, lawyers have become increasingly involved in attempts to reform American public education. Along the way, they have achieved an incredible string of victories. Lawyer-led reform efforts have, among other things, challenged the constitutionality of segregated schooling, created constitutional and statutory rights to education for disabled, non-English-speaking, and immigrant students, and, in some states, forced the overhaul of state school finance systems in direct opposition to the cherished American value of local fiscal control.

But law-driven reform efforts have also fallen short on at least some fronts. High segregation levels remain and may have even risen in recent years.¹ Average reading, math, and science scores for African-American students lag several years behind the average reading scores of their white counterparts.² Minority

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² For example, in 1995-96, average scores of thirteen year old black students on the reading, math, and science segments of the National Assessment of Educational Progress Tests were, respectively, thirty-one,
students are also more likely than whites to drop out of high school.\textsuperscript{3} The proportion of disabled students who fail to earn a standard high school diploma is roughly six times that of non-disabled students.\textsuperscript{4} Per-pupil spending disparities between states are large.\textsuperscript{5} Interdistrict disparities in per-pupil spending are even greater.\textsuperscript{6} Family income remains the most reliable predictor of a twenty-nine, and forty points lower than their white counterparts. See \textit{Bureau of the Census, U.S. Department of Commerce, Statistical Abstract of the United States: 2000} 178 tbl. 286 (2000) [hereinafter Statistical Abstract 2000].

\textsuperscript{3} In 1998, the white drop-out rate was 4.4\%, the black drop-out rate was 5.0\%, and the Hispanic drop-out rate was 8.4\%. The total percentage of whites, blacks, and Hispanics who had not completed high school and were not enrolled in 1998 was 13.7\%, 17.1\%, and 34.4\% respectively. See \textit{Statistical Abstract 2000, supra} note 2, at 180 tbl. 290.

\textsuperscript{4} In 1997-98, 29\% of all students with disabilities ages seventeen to twenty-one and 74\% of students with disabilities exiting the educational system (i.e., graduating, receiving a certificate of completion, reaching the maximum age for services, or dropping out) received a standard high school diploma. By comparison, the high school completion rate hovers near 90\% for non-disabled students. See \textit{U.S. Department of Education, To Assure the Free Appropriate Public Education of All Children with Disabilities: Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act} iv-34 (1998) [hereinafter \textit{U.S. Department of Education, To Assure the Free Appropriate Public Education of All Children with Disabilities}].

\textsuperscript{5} In 1999, average per-pupil expenditures in New Jersey, one of the highest spending states, was $10,420. The average in Mississippi, one of the lowest spending states, was $4,658. \textit{Statistical Abstract 2000, supra} note 2, at 172 tbl. 275.

\textsuperscript{6} A representative example is Ohio, where, during the 1995-96 school year, per pupil spending ranged from $2,346 to $13,622—a nearly six-fold difference. See Amy Ellen Schwartz, \textit{School Districts and Spending in the Schools}, Consortium for Policy Research in Education, available at \url{http://nces.ed.gov/pubs99/1999334/text3.html} (last visited Apr. 17, 2002). Similarly, in 1995, the town of Eden, Vermont spent $2979 per student, while the town of Winhall, Vermont spent $7726. \textit{See Brigham v. State}, 692 A.2d 384, 389 (Vt. 1997). The Supreme Court of Vermont noted that it was common for school districts to spend more than twice as much per student as neighboring districts. \textit{Id.} Earlier school finance suits in Montana and Texas challenged even greater inter-district disparities. The Supreme Court of Montana found a nearly eight to one differential in per-pupil spending when it
student’s educational attainment and achievement. The mixed success of lawyer-led school reform efforts has provided rich material for thinking about the limits of public law and the institutional capacity of courts to effect social and institutional change. Law-based reform efforts have also spawned critiques. Some blame legalization because legal decrees produce inflexibility and force schools to devote precious resources to compliance matters, leaving inadequate resources to provide a sound educational product to needy students. Some critics go further and argue that any additional advancement of educational equity will require institutional shocks to the system that no incremental reform program can deliver. These critics struck down that state’s school finance system in 1989. See Helena Elementary Sch. Dist. No. 30, 651 S.W.2d 90, 92 (Mont. 1989). That same year, per-pupil spending in Texas ranged from $2,112 to $19,333. See Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).

7 See infra note 87 and accompanying text.


9 “Legalization” has been described as having three main features: “[A] focus on the individual as the bearer of rights, the use of legal concepts and modes of reasoning, and the provision of legal techniques such as written agreements and court-like procedures to enforce and protect rights.” See David Neal & David L. Kirp, The Allure of Legalization Reconsidered: The Case of Special Education, in SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 343, 344 (David L. Kirp & Donald N. Jensen eds., 1986). For a critique of legalization, see David L. Kirp, Introduction: The Fourth R: Reading, Writing, 'Rithmetic—and Rules, in SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 1, 4 (David L. Kirp & Donald N. Jensen eds., 1986) (summarizing debates about whether rights- and rule-mindedness undermines professional authority, creates inflexibility, and produces adversarial tension between parents and teachers); JOEL E. HENNING, MANDATE FOR CHANGE: THE IMPACT OF LAW ON EDUCATIONAL INNOVATION 231 (1979) (summarizing survey research and reporting that many respondents “view the law and courts as failing to provide appropriate support and as frustrating the schools’ educational goals”).

typically point to school choice, vouchers, and the application of market discipline as the surest way to wring additional equity from the system.  

Jay Heubert and contributors confront these and other issues in a recent edited volume entitled *Law & School Reform: Six Strategies for Promoting Educational Opportunity*. The principal aim of *Law & School Reform* is to “tell the story of the growing involvement of lawyers in America’s public schools in the past half century” and suggest “possible future roles” for lawyers in “law-driven school reform.” The scope of the volume is impressive, as is the list of contributors. The volume is also the first of its kind to juxtapose the many law-driven school reforms of the past fifty years. The resulting bird’s eye view provides an ideal platform for considering the role of law and lawyers in school reform efforts as a whole.

The volume’s sole failing is that Heubert does not adequately capitalize on the unique perspective his volume offers. Relying on the impressive scope of *Law & School Reform*, this review (“[A] structural assault on the education status quo is almost assuredly a necessary condition for the generation of much needed and desired education reform.”).


12 JAY P. HEUBERT, ED., LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY (Yale Univ. Press 1999).


14 A partial list of the contributors includes Martin Gerry, a former director of the Office for Civil Rights in the U.S. Department of Health, Education, and Welfare, Thomas Hehir, former director of the Office of Special Education at the U.S. Department of Education, Harold Howe II, a former U.S. Commissioner of Education in the Johnson Administration and chair of the Educational Testing Service, Martha Minow, a Harvard Law School professor, Gary Orfield, a professor of education and social policy at Harvard University and the leading academic voice on the issue of desegregation, Carola and Marcelo Suarez-Orozco, both professors of human development and psychology at Harvard University, and Paul Weckstein, a co-director of the Center for Law and Education in Washington, D.C.
attempts to fill that analytic gap. I argue that lawyers involved in efforts to expand educational equity—including academic lawyers like Heubert—have too often failed to acknowledge both the contested premises and the unintended consequences of civil-rights-based litigation in the area of education. In fact, the successful civil rights assault on racial segregation and the categorical exclusion of disabled and other student groups from public schooling has given way to a world in which resource allocations, not access, determine educational equity. Reform-minded lawyers need to realize that, beyond the dismantlement of Jim Crow and the opening of schoolhouse gates to excluded groups, an important legacy of the law-driven reform efforts of the past half-century has been the exacerbation of what many increasingly see as a perverse allocation of educational resources among the many student groups who make claims on scarce resources. Of particular note is the relative allocation of resources to students with disabilities as opposed to student groups who suffer from other forms of disadvantage.

The blind spot for lawyers has been understanding how law-driven reform efforts fit together and, in particular, how legal mobilizations in one policy area shape resource allocations elsewhere in the educational system. This failure is understandable. Lawyers tend to operate as part of particular legal mobilizations on behalf of particular groups. Lawyers also remain bound by professional-ethical obligations that demand zealous pursuit of localized client interests. A third possible explanation is that the inclusionary impulse of Brown v. Board of Education\(^\text{15}\) is so strong within legal and political culture that it tends to cloud more policy-analytic thinking about how to allocate scarce resources within the American system of public education. Whatever the cause, the law and education field seems to suffer from a disconnect between lawyers and policy analysis. This review thus adds a voice to emerging scholarly analysis that critiques the allocation of resources in the American educational system and the ways in which civil rights-oriented school reform efforts have contributed to that state of affairs.

\(^{15}\) 347 U.S. 483 (1954).
This review proceeds as follows. Part I provides an overview of the volume and highlights the principal arguments advanced by Heubert in his introductory essay: that lawyers should develop more policy-specific knowledge and should in turn deploy that knowledge in non-adjudicative and collaborative settings. Part II offers a brief critique of both tenets of Heubert’s prescription. Part III breaks through the more compartmentalized accounts of different law-driven school reforms offered in *Law & School Reform* and sketches a broader and more dominant story. In particular, I argue that law-driven school reforms over the past half-century—particularly those that derive from civil rights-based mobilizations—highlight an important tension between bureaucratic and inclusionary reformist impulses. The former impulse focuses on targeted resource infusions as a way of maximizing educational outcomes. The latter is a legal-cultural inclusionary impulse that extends from the integration vision articulated in *Brown*. This tension is particularly important in light of the declining significance of race as a basis for resource claims, and the parallel expansion of the importance of other protected characteristics—particularly disability—as a basis for redistributions. Understanding this tension, I argue, provides the best lens for understanding the civil rights paradox at the heart of law-driven school reforms. Part IV asks whether lawyers are to blame for the current state of affairs and how they might avoid such problems going forward. In the end, I conclude that lawyers have little comparative advantage in much of what lies ahead, but that lawyers might still play a key role by policing a political process that can sometimes skew redistributions and by helping to make whatever political choices emerge from that process more transparent within the system as a whole.

I. **OVERVIEW OF LAW & SCHOOL REFORM**

What are “law-driven school reforms”? *Law & School Reform* focuses on six: desegregation; school finance reform; immigrant education; special education; school-linked service integration; and enforceable rights to quality education. The book methodically steps through the different approaches, devoting a
chapter to each. The first four of these are distinct legal reform movements with well-established advocacy communities and long histories of mobilization both inside and outside courtrooms. The latter two are not and fit awkwardly with the rest of the volume. For example, service integration, as presented by Martin Gerry,16 is an effort to link the provision of social services and other child supports to public schools. While school-linked service provision is increasingly pervasive in urban school reform efforts in particular,17 it is unclear how the approach is in any way “law-driven.” Similarly, Paul Weckstein’s contribution provides a useful roadmap of state and federal statutory and constitutional provisions that together create “enforceable rights to quality education.”18 But the chapter is little more than a laundry list, and nowhere is a distinct legal movement or a significant lawyer-led reform opportunity discernible. These final two chapters simply distract attention from the otherwise fascinating connections that exist among the first four law-driven reform approaches that form the meat of the book.

Heubert spells out his editorial vision in the opening chapter. He seeks to “take stock systematically of a key set of law-based school reform efforts, each aimed at increasing educational opportunity.”19 Law & School Reform is meant to chart future reform avenues by offering up a variety of interdisciplinary perspectives on the origins, current status, and future prospects of individual reform efforts. Heubert’s principal thesis, however,

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is built around trend analysis and his sense that reform-minded lawyers currently face a much more nuanced and complex set of educational policy questions than their forebears. Lawyers involved in the civil rights movements of the 1950s, 60s, and 70s deployed morally clear-cut rights claims in the fight against the segregation of African-Americans and the outright exclusion of the disabled and immigrants from public schools. Current legal struggles, by contrast, center on much subtler and more contested questions of how to implement and thus give content to rights previously won. As Heubert writes, the initial focus on overcoming segregation and categorical exclusion has given way to a “greater emphasis on serving children more effectively within schools and on helping students meet high standards for academic achievement.” It is this critical shift in focus—from ensuring access from without to ensuring quality of instruction from within—that creates both challenges and opportunities for reform-minded education lawyers.

The most illustrative example of the complexities and challenges of rights implementation is the education of the

20 Id. at 9, 16.
21 For a thorough account beyond that provided in LAW & SCHOOL REFORM, see R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 135-59 (1994).
23 Heubert, supra note 19, at 3.
24 Another way to think about the contrast between rights creation and rights implementation is that the former involves adjudication of rights in a context in which most of the relevant facts are stipulated to, and the court’s only job is to decide whether they constitute a violation of legal norms. The latter involves adjudication in a context in which the court must ascertain and interpret the relevant facts in the first instance. Brown, then, is a paradigmatic example of rights creation, insofar as the parties stipulated to the existence of de jure discrimination, and the announced rule did not go beyond announcing that such a practice violated equal protection. Current litigation efforts, by contrast, involve rights implementation because courts must ascertain and interpret a variety of facts that are difficult to get a handle on, because of the difficulty of measuring outcomes, determining which remedies are implementable, and penetrating school bureaucracies.
disabled. Hehir and Gamm’s chapter on special education recounts how early victories in federal courts, including \textit{PARC v. Commonwealth} and \textit{Mills v. Board of Education}, and the passage of the Education for All Handicapped Children Act (‘‘EHA’’) in 1975—now referred to as the Individuals with Disabilities Education Act (‘‘IDEA’’)—created legally enforceable rights to a “free and appropriate education” in “the least restrictive environment.” At the school level, the newly-minted rights sparked nearly three decades of lawyer-supervised design of Individualized Education Programs (“IEP”) and the ongoing evolution of caselaw defining “appropriate education” and the extent of accommodation and “mainstreaming” that school

\begin{itemize}
\item The passage of the Education for All Handicapped Children Act in 1975 further consolidated the special education provision. 20 U.S.C. §§1400-1487 (1994 & Supp. V 1999). Renamed the Individuals with Disabilities Education Act in 1990, the IDEA is currently the primary source of federal aid to state and local school systems for programs and services for infants, toddlers, children, and youth with disabilities. The IDEA creates a statutory right to a “free appropriate public education” to all children with disabilities. \textit{Id.} at § 1412(a)(1). Under the IDEA, states have the primary responsibility for providing special education programs and services to school-age children with disabilities.

\item The IDEA requires that special education and related services be provided on an individualized basis in accordance with the disabled child’s individualized education plan (‘‘IEP’’). 20 U.S.C. § 1412(a)(4). Under the IDEA, schools must develop an IEP for every disabled student. \textit{Id.} The plan includes a written statement of the child’s educational needs and specific goals, methodologies, and evaluation procedures for meeting them, and must contain “specially designed instruction to meet the unique needs of children with disabilities.” \textit{Id.} at § 1414(d)(1)(A). In addition, schools must ensure that due process protections are in place to ensure compliance on the part of local education agencies. If there is a dispute between parents and school authorities about the content of an IEP, then parents can appeal the proposed IEP to an administrative hearing officer, and if still unsatisfied, to the state or federal courts. \textit{Id.} at § 1415(f), (g), (i).
districts are legally obligated to provide to students with disabilities. While early litigants faced the daunting task of minting new rights, subsequent generations of education lawyers have worked to ensure the proper implementation of those rights at the ground level.

One reason that the elaboration of rights in the school equity context has proven so complex is that rights implementation requires the institutional engagement of schools. Earlier legal challenges to segregation and categorical exclusions could be done at a remove from the daily activities and operation of schools. Jim Crow policies barring African-American students from white schools, for example, could be met with the abstract claim that the Equal Protection Clause forbids categorization based on race. Indeed, the peculiar power of rights claims flows in part from the fact that rights exist as abstract trumps that are removed from complicated institutional contexts.

But the implementation of rights in the current education context increasingly requires lawyers to understand and argue by reference to the professional practices and norms of teachers and administrators. For example, the contributions by Gary Orfield and Paul Weckstein both describe litigation arising from claims that many school districts perpetuate intra-school racial

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30 Important Supreme Court decisions include the following: Cedar Rapids Comm. Sch. Dist. v. Garrett F., 526 U.S. 66 (1999) (requiring school district to provide full-time nursing services to disabled student during school hours); Honig v. Doe, 484 U.S. 305 (1988) (holding that the IDEA forbids schools from expelling students for behaviors related to their handicaps); Board of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (defining “free appropriate public education”). The remaining caselaw is too numerous to summarize here. For a comprehensive summary of recent caselaw on diagnosis and placement, see Perry A. Zirkel, Special Education Law Update VII, 160 ED. LAW REP. 1 (2002).

31 See Ronald Dworkin, Rights As Trumps, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) (“Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”); see also Thomas C. Grey, Cover-Blindness, 88 CALIF. L. REV. 65, 67 (2000) (offering an interpretive account of employment discrimination law that sets up a similar contrast between abstract and more contextualized rights claims).
segregation by creating tracks within the curriculum and separating students into groups based on “purported differences in student ability.” However, to claim that a school district’s practice of ability grouping has a segregatory effect requires litigants and the legal system to engage the school as an institution to root out and assess the extent to which the challenged practices serve the purported end of ability grouping and the extent to which they provide cover for racial discrimination. The same is true with respect to bilingual education and programs that serve Limited English Proficient (“LEP”) children. In both cases, making out a successful legal claim is no longer an abstract proposition about access to public institutions, but instead requires courts to fuse legal doctrine and complex analysis of educational and pedagogical practice.

Heubert seems to identify a similar aspect of institutional engagement when he asserts that the interaction of law and education has been characterized in recent years by a “significant convergence of legal standards and educational norms.” In particular, present-day reform efforts are greatly complicated by the fact that rights and remedies are increasingly defined by reference to educational practices and student outcomes. Molly McUsic’s contribution on school finance reform provides the clearest example. Over the past thirty years, legal challenges to state school financing formulas have arisen in response to the sometimes enormous inter-district disparities in per-pupil spending that result from the funding of public education through local property taxes. Early state constitutional challenges to school finance regimes relied upon state equal protection clauses and so-called education clauses. Dubbed the “equity” approach,

32 Weckstein, supra note 18, at 341; see also Larry P. v. Riles, 343 F. Supp. 1306, aff’d, 502 F.2d 963 (9th Cir. 1974).
33 Heubert, supra note 19, at 4.
34 Id. at 32.
35 For an up-to-date listing of cases brought, see Molly S. McUsic, The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation, in LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 90 n.8 (Jay. P. Heubert ed., 1999).
36 See Peter Enrich, Leaving Equality Behind: New Directions in School
plaintiffs boldly argued that state constitutions required equality under the law and therefore a leveling of school finance.37

Successive waves of school finance reform have followed an “adequacy” approach, relying on the same coupling of state equal protection clauses and education clauses as did earlier “equity” lawsuits, but arguing instead for a more limited right to a constitutionally “adequate” education.38 In some successful lawsuits, state supreme courts have actively engaged in the process of defining educational “adequacy,” going so far as to construct a list of basic competencies that must be taught in order for the system as a whole to pass constitutional muster.

37 See McUsic, supra note 35, at 89; see also Enrich, supra note 36, at 106-08, 125-26.


39 In Rose v. Council for Better Education, the Kentucky Supreme Court spelled out seven “essential competencies” that a minimally adequate education would instill in its students, stating the following:

An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization

(ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices

(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation

(iv) sufficient self-knowledge and knowledge of his or her mental and
Similarly, in its effort to fashion remedies in the state’s long-standing school finance litigation, the New Jersey Supreme Court recently sanctioned the wholesale adoption of a specific school reform package called “Success for All” as a way to meet obligations under the state constitution. These examples illustrate the fact that legal standards such as “adequacy” acquire meaning only by reference to educational practices and professional norms. The inevitable result is greater institutional engagement of schools by the legal system.

Having exhaustively demonstrated the law’s increasing institutional engagement of schools and the convergence of legal standards and educational norms, Heubert sets forth two related proposals for lawyers seeking to deploy law to advance educational equity. First, he asserts that lawyers must develop a greater understanding of the nuts and bolts of education policy if they wish to contribute to the lawyer-educator collaboration that he sees as critical to the success of present-day reform efforts. Second, Heubert argues that lawyers who wish to contribute to school reform must develop non-adjudicative skills and learn to “function effectively in the larger political process, as legislators, regulators, mediators, and consensus builders.” By developing more policy-specific knowledge and deploying that knowledge in non-adjudicative and collaborative settings, Heubert believes that

physical wellness
(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage
(vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
(vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.


41 Heubert, supra note 19, at 6-7.
42 Id. at 5.
lawyers can continue to make inroads against persistent educational inequities.

II. A CRITIQUE

Heubert’s claim that lawyers can better represent clients in education-related litigation with a stronger substantive policy background has superficial appeal. After all, who could argue with greater policy learning on the part of lawyers bringing education-related claims? To the extent that Law & School Reform facilitates broader understanding of how law and policy interact, the book will likely advance equality of educational opportunity at the margins. But Heubert’s call for greater policy learning, lawyer-educator collaboration, and non-adjudicative reform approaches as a means of dramatically advancing educational equity is naively optimistic. Many of the contributors to Law & School Reform tend to overstate the reach of law in past education reform efforts, fail to specify the advantages of non-adjudicative approaches to reform, gloss over contentious empirical debates among educational policy experts about the effectiveness of particular policies, and overstate consensus on important values issues. Many of these weaknesses result from a failure to see that educational policy debates are beset by empirical indeterminacy and deep values conflicts. As a consequence, the move to non-adjudication and collaboration risks consigning lawyers to the dismal role of debate mediator. Indeed, reading Law & School Reform, one wonders whether lawyers, law, and legal institutions can retain any comparative advantage at all over other policy actors in future reform efforts.

A. Non-Adjudication and Comparative Disadvantage

Non-adjudicative approaches to social and institutional reform have come into fashion in the last two decades, piggybacking on broader shifts in the law away from legal adversarialism and toward alternative dispute resolution (“ADR”).43 The

43 JONATHAN MARKS ET AL., Dispute Resolution in America:
attractiveness of such non-adjudicative approaches has been enhanced by the perceived shortcomings and social costs of more litigation-focused approaches to institutional and social reform.\footnote{See generally Thomas F. Burke, Litigation and Its Discontents: The Struggle over Lawyers, Lawsuits, and Legal Rights in American Politics (forthcoming 2002) (detailing anti-litigation reforms adopted in the United States since the late 1960s); see also Rosenberg, supra note 8, at 336.}

The move to non-adjudicative approaches has also been occasioned by a sustained assault on “judicial activism” and concern about an “imperial judiciary” in response to growing judicial involvement in the reform of public institutions.\footnote{Nathan Glazer, Toward an Imperial Judiciary, 41 Pub. Interest 104, 104 (1975).}

Public law litigation, critics have zealously argued, violates core principles of separation of powers and produces perverse policy results because courts lack the institutional capacity to carry out broad remedial tasks.\footnote{See Donald L. Horowitz, The Courts and Social Policy 18 (1977) (arguing that the relevant question in the expansion of judicial oversight of public policy matters is not “whether courts should perform certain tasks but . . . whether they can perform them competently”); Jeremy Rabkin, Judicial Compulsions: How Public Law Distorts Public Policy 20 (1989) (“Courts are entirely unequipped to act as ongoing, freestanding guardians of administrative performance.”). But see Ralph Cavanaugh & Austin Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 Law & Soc’y Rev. 371, 373 (1980) (arguing that critiques based on institutional competency “underestimate the demonstrated ability of courts to evolve new mechanisms and procedures in response to implicit or explicit societal demands”); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282 (1976) (rebutting critics of the public law model and arguing that public law litigation is both workable and inevitable in an increasingly regulated society).}

Nevertheless, beginning in 1954 with the Supreme Court’s decision in \textit{Brown v. Board of Education},\footnote{347 U.S. 483 (1954).} federal courts have become increasingly involved in remedial oversight of basic functions of state and local governments. Judicial remedial involvement accelerated throughout the 1960s.
and 70s as a wide range of judicial decrees implemented reforms in public institutions beyond schools, including jails,\textsuperscript{48} prisons,\textsuperscript{49} mental health facilities,\textsuperscript{50} and housing projects.\textsuperscript{51}

Most contemporary calls for non-adjudicative reform approaches aim, at least in part, to respond to the foregoing criticisms. But as a definitional matter, it is not at all clear that the new approaches advocated by Heubert and the contributors to \textit{Law & School Reform} are really non-adjudicative in any strong sense.\textsuperscript{52} Indeed, most of the non-adjudicative approaches cited by proponents involve consent decrees and judge-imposed “dialogic remedies.” They are clearly “quasi-adjudicative.” And even purely non-adjudicative negotiations involving lawyers and


educators but no actual judicial intervention are conducted in the “shadow of the law” with the threat of litigation hanging over the proceedings throughout.53

Most significantly, Law & School Reform provides no real explanation why quasi-adjudicative approaches to school reform will necessarily yield better results than past litigation efforts. Establishing the mixed success of past litigation efforts is easy enough. Indeed, there is substantial evidence that litigants involved in reform efforts may have overestimated the reach of courts in the public educational system. For example, desegregation litigation has had only mixed success, given continuing high levels of segregation. Similarly, even though substantial time and energy have been devoted to school finance litigation efforts over the past thirty years, the empirical evidence in states where school finance challenges prevailed suggests that courts’ ability to influence education spending is mixed.54 In states like Connecticut, Texas, and New Jersey, the typical result has been serial litigation with extensive judicial-political dialogue but insignificant narrowing of spending inequities between school districts.55 The principal reason for the mixed success of school finance reform efforts is political: the allocation of dollars to school districts is dictated by complicated funding formulas that


54 Compare McUsic, supra note 35, at 105 (“[M]ost data indicate that the school finance regimes adopted under court order have generally led to more equitable funding.”), William N. Evans, Schoolhouses, Courthouses, and Statehouses After Serrano, 16 J. Pol’y Analysis & Mgmt. 10, 28 (1997) (same), and Alan Hickrod, The Effect of Constitutional Litigation on Education Finance, 18 J. Educ. Fin. 180, 207-208 (1992) (same) with Michael Heise, State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis, 63 U. Cin. L. Rev. 1735, 1763 (1995) (“When the results are considered together, the picture that emerges does not support the general assumption that state supreme court decisions involving equity lawsuits that invalidate school finance systems result in increased educational spending.”).

are periodically revised and precisely mirror the political balance of power in a given state. Governors and legislatures resent the reformers’ efforts to use courts to circumvent the elected branches and to force their hand on basic resource allocation issues. By contrast, in states like Kentucky, where significant mobilization took place prior to the state supreme court’s decision, the legislature responded to the court’s decree with a near-total overhaul of the state’s educational system.56 Lacking the sword and purse, and dependent on other branches for implementation, courts engaged in school reform efforts have had substantial difficulty implementing decrees without an accompanying political mobilization.

The problem is that non- and quasi-adjudicative reform efforts have probably not fared any better than more traditional litigation efforts in meeting reformers’ goals. Reform efforts have yielded mixed results when courts have combined litigation with non-adjudicative approaches at the remedial stage. The recent utilization of a so-called “dialogic remedy” failed to make much headway in the remedial process following the Connecticut Supreme Court’s decision in Sheff v. O’Neill.57 In that case, having declared unconstitutional the “de facto racial and ethnic segregation”58 of students in Hartford public schools, the court deferred to the legislative and executive branches to “put the search for appropriate remedial measures at the top of their respective agendas.”59 The resulting statewide public engagement process sputtered and died, with no significant change in the delivery or finance of public education in Connecticut’s racially


57 678 A.2d 1267 (Conn. 1996).

58 Id. at 1271.

isolated inner-city schools.\textsuperscript{60} Similarly, the court presiding over school finance reform in Alabama appointed a facilitator to work with the parties on a proposed remedial order and at least initially managed to cobble together an “impressive consensus” on reform directions.\textsuperscript{61} However, consensus quickly unraveled and the shape of reforms quickly became a partisan and hotly-contested issue. Substantial litigation has ensued.\textsuperscript{62}

As a final point, Heubert and the other contributors fail to address the possibility that the checkered success of past reform efforts stems from the fact that public schools are particularly complex bureaucracies, rather than from the inherent limitations of public law litigation as a reform vehicle. The standard critique of public law litigation is that courts are peculiarly unsuited to the task of institutional reform.\textsuperscript{63} But it may also be the case that schools are much more resistant to reform efforts than other public institutions. For example, organizational theorists see schools as “loosely coupled” bureaucratic forms that lack the clear lines of authority and accountability that ensure productivity in other bureaucratic environments.\textsuperscript{64} Much of what goes on in


\textsuperscript{62} Id.; see also, Martha I. Morgan et al., \textit{Establishing Education Program Inadequacy: The Alabama Example}, 28 MICH. J.L. REF. 559, 562-63 n.15 (1995) (describing the post-trial litigation).

\textsuperscript{63} See supra note 46.

\textsuperscript{64} See Karl E. Weick, \textit{Educational Organizations as Loosely Coupled Systems}, 21 ADMIN. SCI. Q. 1, 1 (1976); see also JAMES Q. WILSON, \textit{BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT} 158-71 (1989) (arguing that, as public bureaucracies, schools are particularly vulnerable to goal, output, and outcome uncertainty).
schools takes place behind closed doors by teachers who enjoy significant discretion over day-to-day activities. In addition, as “open systems,” schools must mediate and overcome clashes between a wide range of stakeholders, including state and local professionals, teachers and their unions, elected officials, school boards, administrators, parents and their associations, students, community activists, the media, business leaders, and foundations. The resulting lack of accountability and pursuit of proximate goals by interested parties makes change difficult. This is true whether the change at issue involves implementation of a consent decree or attempts to alter particular teacher practices in the classroom.

In the end, any effort to effect substantive and lasting reform is difficult because it is notoriously difficult to dislodge schools’ “accustomed practice and organization.” And this is probably true whether would-be reformers employ adjudicative or quasi-adjudicative means. Thus, the assumptions and analysis that undergird Heubert’s call for more non-adjudicative and collaborative activity clearly need further examination and support.

B. Policy Learning and a Dismal Role for Lawyers

Equally problematic is the second component of Heubert’s call for a “new legalization” of school reform efforts—greater

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66 See Marilyn Gittell, School Reform in New York and Chicago: Revisiting the Ecology of Local Games, 30 Urb. Aff. Q. 136, 138 (describing the role of various interest groups and stakeholders in education decentralization experiments in Chicago in the late 1980s and New York City in the late 1960s); see also Marion Orr, The Challenge of School Reform in Baltimore: Race, Jobs, and Politics, in Changing Urban Education 93 (Clarence Stone ed., 1998) (arguing that urban schools are patronage machines and thus subject to rent-seeking by interest groups, especially teacher unions).

LAWYERS AND EDUCATIONAL EQUITY

policy learning on the part of lawyers.\textsuperscript{68} The reality is that most lawyers are perfectly capable of understanding core debates within education policy circles. Most can intelligently read the semi-technical academic literature that characterizes such debates, or at least the voluminous law review literature that summarizes various positions within such debates.\textsuperscript{69} On this point, Heubert’s claims that few education lawyers “know the fields of education and educational administration”\textsuperscript{70} and that “few know how to read and understand educational research”\textsuperscript{71} are unconvincing. Instead, an equally plausible argument can be made that any additional policy learning will merely reveal that most areas of educational policy and practice are beset by empirical indeterminacy and deep value-based contentions.\textsuperscript{72} Given the depth of disagreement on a range of empirical and values-based questions, lawyers and legal institutions appear to be left with a dismal role—mediating value clashes and interpreting statutory language against the backdrop of expert disagreement on efficacy.

The extent of the impasse is not made clear in \textit{Law & School Reform}, particularly since several of the contributors, true to the lawyerly cast of the book, adopt a brief-like tone and gloss over major areas of contention. For example, Gary Orfield cites social scientific research that purports to demonstrate the educational gains that flow from racial integration.\textsuperscript{73} He neglects to cite

\begin{itemize}
\item \textsuperscript{68} Heubert, supra note 19, at 6-7.
\item \textsuperscript{69} Michael Rebell, a lawyer himself, has written a number of law review articles that capably and clearly summarize highly technical debates in education policy circles. See Michael A. Rebell & Robert L. Hughes, \textit{Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach}, 25 J.L. & EDUC. 523 (1996).
\item \textsuperscript{70} Heubert, supra note 19, at 6 (citing A. Trotter, \textit{Flagrante Dilecto}, AM. SCH. BOARD J., Dec. 1990, at 12-18).
\item \textsuperscript{71} Heubert, supra note 19, at 6.
\item \textsuperscript{72} Heubert seems to acknowledge this fact when he states that “establishing illegal discrimination will be more difficult when there is disagreement among educators and researchers about the value or necessity of the educational policy or practice in question.” \textit{Id.} at 17. But he fails to develop the point.
\item \textsuperscript{73} ORFIELD, supra note 1, at 41.
\end{itemize}
equally persuasive studies that demonstrate that the educational gains that accompany racial integration efforts are in fact quite small in the grand scheme of things and even difficult to prove empirically.74 Martin Gerry’s chapter on “service integration” reads like a brief in support of a community-centered and social service-oriented approach to public school reform that has increasingly drawn criticism from education scholars and practitioners alike.75 Even the fundamental goal of school finance reform—the narrowing of inter-district disparities in per-pupil spending—has been criticized by a line of scholarship that calls into question whether school spending has any appreciable effect on student outcomes.76 Similar empirical contentions characterize ongoing debates over special and bilingual education, particularly the question of the relative amount of time students should spend

74 See D AVID ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 59-116 (1995) (summarizing research on the harms of segregation and the benefits of integration, citing the inconsistent results obtained by social scientific studies, and questioning the effect of desegregation on academic achievement in particular).

75 See AMERICAN INST. FOR RESEARCH, AN EDUCATOR’S GUIDE TO SCHOOLWIDE REFORM 4, app. C (1999) (concluding that only three of twenty-four whole-school reform programs considered can muster convincing proof of positive effects on student achievement); PAUL T. H ILL & M ARY B ETH CELIO, FIXING URBAN SCHOOLS 13-17, 28-30 (1998) (arguing that many reform programs are premised on under-specified causal theories of how program components will increase student learning); David M. Engstrom, Note, Post-Brown Politics, Whole-School Reform, and the Case of Norfolk, Virginia, 12 STAN. L. & POL’Y REV. 163, 164 (2001) ("[C]urrent urban school-reform efforts have suffered from a steady proliferation of reform packages that lack a convincing link to improved academic achievement.").

76 Dubbed the “cost-quality debate,” economists have churned out a number of rigorous empirical studies finding that school spending has little to no explanatory power with respect to student outcomes. These studies utilize a “production function” approach and regression analysis and conclude that there is no systematic relationship between educational inputs and outputs. See, e.g., E RIC A. H ANUSHEK & C HARLES S. B ENSON, MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS 25-49 (1994); Eric A. Hanushek, When School Finance “Reform” May Not Be Good Policy, 29 HARV. J. LEGIS. 423 (1991).
in separate versus mainstream classrooms.77

Disagreement on values questions is equally prevalent. For instance, bilingual education policies raise deep questions about citizenship, assimilation, and cultural difference in a democratic society.78 Similarly, the political right’s embrace of color-blindness as an organizing principle—and its resulting opposition to affirmative action—is based at least in part on a judgment that color-blindness will better serve the interests of white and

77 In the disability area, for example, experts disagree on a host of important variables, particularly the relative efficacy of mainstream as against special instruction. Special education experts cast the debate in terms of “inclusion” versus “placement diversity.” See Rebell, supra note 69, at 537. Advocates of the inclusionist perspective argue that teachers often lack a sound pedagogic basis for referral of particular students to special education, that special education programs are overly narrow and have little impact on student achievement, and that special placement has a stigmatizing effect that counters whatever small educational gains that eventuate. Proponents of placement diversity, by contrast, maintain that separation based on needs and special interventions—including individualized instruction, smaller classes, and highly trained teachers—produce important educational benefits. See Douglas Marston, The Effectiveness of Special Education: A Time Series Analysis of Reading Performance in Regular and Special Education Settings, 21 J. SPECIAL EDUC. 13, 13 (1987-88); Conrad Carlberg & Kenneth Kavale, The Efficacy of Special Versus Regular Class Placement for Exceptional Children: A Meta-Analysis, 14 J. SPECIAL EDUC. 295, 304 (1980). They also minimize the concern with stigma, arguing that labeling is only damaging when it comes about through inappropriate interventions. See Judith D. Singer, Should Special Education Merge with Regular Education?, 2 EDUC. POL’Y 409, 412 (1988). For a nice overview, see David L. Kirp et al., Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 CAL. L. REV. 40 (1974). Participants in bilingual education policy debates make many of the same moves. See Sonja Diaz-Granados, Note, How Can We Take Away a Right We Have Never Protected, 9 GEO. IMMIGR. L.J. 827, 831 (1995) (comparing the “maintenance approach,” which emphasizes “a continuation of content area education within the bilingual program,” and a “transitional approach,” which “concentrates on quickly mainstreaming LEP students); see also ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 92 (1986).

minority citizens alike over the long-term. Deep value clashes are also apparent in a variety of education policy areas not addressed by Law & School Reform. A good example is the implementation of “percent plans” in Texas, California, and Florida. High school students who graduate in, respectively, the top 10%, 4%, or 20% of their high school classes receive guaranteed admission—and in some cases, scholarship money—to any of the state’s flagship public universities. Proponents argue that such plans are a facially neutral means of increasing diversity in public higher education without using race-conscious admissions policies. Others argue that percent plans are a cop-out, given that successful fulfillment of one of the plans’ principal goals of increasing diversity depends on continuing racial segregation at the secondary school level. Percent plans might also be open to criticism on the grounds that the plans send ill-prepared students to the state’s top schools, forcing those universities into the business of remedial education.

79 See, e.g., TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996). Thus, affirmative action debates are in part just disagreement over empirical outcomes rather than values. One can imagine opponents in the debate arriving at the same vision of what a good society would look like in twenty years, but disagreeing as to whether affirmative action will get us there more efficaciously than color-blindness.


81 See Banks, supra note 80, at 1033-34. The United States Court of Appeals for the Eleventh Circuit has also expressed implicit support for “percent plans.” Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1259 (11th Cir. 2001) (describing percent plans as one of several “innovative strategies” for increasing university diversity).

82 See Jeffrey Selingo, What States Aren’t Saying About the “X-Percent Solution,” CHRON. HIGHER EDUC., June 2, 2000, at A31 (citing critics of percent plans who argue that use of high schools with large minority populations “exploits educational segregation while doing nothing to make schools better” and “discourage[s] states from integrating high schools”).

83 Id. (reporting that even proponents of percent plans acknowledge that many students will not be ready for college and will be directed into summer
In addition to the specific program areas referenced in *Law & School Reform*, present-day education debates suffer from deeper—and perhaps even more intractable—empirical and values-based contention about what constitutes “equity” in the first place. As a society, we might wish to advance equity by remedying past resource deprivations, by weighing the relative prospective benefits of spending more on some students than others, or by creating greater equality of educational outcomes.84 But any effort to “equalize” immediately runs into specification problems. Application of a strict equality principle might require the leveling of educational inputs—in other words, spending the same amount of dollars per pupil. Like the “equity” approach in school finance litigation, this is probably only aspirational given political realities. Alternatively, educational equity might be measured in terms of providing a minimal floor of educational services to each student, perhaps calculated to obtain a set of valued outcomes, as in the “adequacy” approach adopted by school finance litigants.85 This seems more reliable, but the adequacy approach to school finance finessesthe relationship between inputs and outputs and assumes that a given quantum of education will ensure a given level of achievement and will thus be equally valuable to all students.86

The problem is particularly pronounced in the educational context because social scientists know surprisingly little about the relationship between educational inputs and outputs or the extent remedial classes).


85 See supra note 38 and accompanying text.

86 Inputs include teachers, curriculum, and other learning tools—in short, the stuff of the educational process. Outputs range from short-term achievement measures to long-term measures of vocational success and general life chances. As an aside, a number of political theorists have grappled with the relationship of inputs to outputs—particularly the fact that some individuals may be able to derive more of a given output from a fixed quantity of input—and have thus tried to look at equity of goods and services in terms of what “functionings” that a given good like education will facilitate. See AMARTYA SEN, INEQUALITY REEXAMINED xi (1995).
to which academic achievement drives broader life chances. The most robust social scientific finding of the past four decades is an enduring and high correlation between academic achievement and family socio-economic status.\textsuperscript{87} A “familiar corollary” of this finding, as McUsic points out, is that “income and education of parents of fellow students is also highly correlated with performance.”\textsuperscript{88} The conclusion drawn by most experts is that income and education together create “social capital” or “cultural capital,” which can significantly improve overall educational outcomes.\textsuperscript{89} Second, the amount of resources available to schools matters, but perhaps not as much as one would expect. For instance, social scientists continue to squabble over the extent to which “money matters” in fostering high educational achievement. Although many economists argue that per-pupil spending has little to no effect on academic achievement,\textsuperscript{90} other studies have found that school inputs such as teacher salaries exert at least some influence on academic achievement.\textsuperscript{91} Equally

\textsuperscript{87} The most recent comprehensive treatment of the issue is SUSAN E. MAYER, WHAT MONEY CAN’T BUY: FAMILY INCOME AND CHILDREN’S LIFE CHANCES (1997). Classic treatments include JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) and CHRISTOPHER JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972).

\textsuperscript{88} One reason might be that relatively wealthier parents serve as “education connoisseurs” who agitate for quality; another commonly cited theory of causation is that poor children in relatively wealthier schools are confronted with role models of academic success. See McUsic, supra note 35, at 129; James S. Liebman, Voice, Not Choice, 101 YALE L.J. 259, 301 (1991).

\textsuperscript{89} See COLEMAN, supra note 87. Coleman coined the term “social capital”—sometimes referred to alternately as “cultural capital”—in an attempt to label the mysterious relationship between social privilege and educational attainment and achievement.

\textsuperscript{90} See HANUSHEK, supra note 76.

\textsuperscript{91} The teacher salary finding is particularly important because it suggests that expenditures may be driving outcomes, assuming that relatively wealthier schools have greater resources to identify and attract the most highly skilled teachers from the available teacher pool in a given area. Thus, it may not be absolute expenditures, but rather relative expenditures within a teacher labor pool that matters most, a fact that would foil most economistic regressions of
mixed results obtain in studies of early childhood education programs, even those that involve sustained commitment of enormous resources. Similarly, and as mentioned previously, there is little consensus on the efficacy of special education and bilingual instruction or the impact of desegregation on the academic achievement of African-Americans. The upshot is that it is probably indeterminate which groups stand to benefit and by how much under different resource configurations.

In the concluding contribution to *Law & School Reform*, Weckstein optimistically claims that we currently have the necessary knowledge to effect substantial educational equity. But the reality is that educational outcomes depend on a staggeringly complex web of variables and value judgments that, despite the best efforts of education experts to find consensus, remain deeply contested. One could try to dress up Heubert’s call for greater lawyer-led mediation of expert disputes with Rawlsian rhetoric and to portray lawyers as heroically overseeing the realization of “overlapping consensus.” But it is also questionable whether lawyers have any comparative advantage in such an enterprise. In short, a better-read education bar is not likely to break through the empirical and values impasse in education policy circles, even if lawyer-mediated reform efforts can help force choices between, say, relatively more or less mainstreaming of special education and bilingual students.

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92 While programs such as Head Start have been criticized for their failure to demonstrate long-term effects, a number of other, more intensive early childhood programs have shown at least some medium- and long-term effects on academic achievement and life chances. See W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 FUTURE OF CHILDREN 25, 32-33, 38-39 (1995).

93 See supra notes 74, 77 and accompanying text.

94 Weckstein, supra note 18, at 307.

III. THE LARGER PICTURE

If there is reason to be skeptical about the value of the prescriptive proposals advanced in *Law & School Reform*, the book nonetheless does a great service in describing the current policy landscape. Criticisms aside, the essays in *Law & School Reform* together begin to sketch a larger and more dominant story that goes beyond Heubert’s narrow prescriptions for advancing educational equity reform. For instance, a crucial trend in law and education evident in the various contributions to the book is the declining significance of race-based resource claims. In addition, Molly McUsic’s insightful overview of school finance issues shows that lawyers have presided over the evolution of a system of federal mandates on behalf of disabled and limited English proficient students that exacerbates resource disparities for poor and minority students within the multi-tiered system of school finance that prevails in the United States.96 The overall trend might be described as a comparative strengthening of the resource claims of the disabled and a comparative weakening of claims based on race and class. While this trend is unfortunate from the perspective of minority and poor students, it also demonstrates two very different impulses in tension in law-driven school reform efforts. One is a bureaucratic impulse that focuses on targeted resource allocations as a way of improving educational outcomes. The other is a legal-cultural inclusionary impulse that extends from the peculiar power of the integration ideal as articulated in *Brown v. Board of Education*.97 Understanding this tension is an important first step in understanding the larger picture of law-driven school reform’s effect on educational equity over the past fifty years.

A. The Declining Significance of Race-Based Resource Claims

*Brown v. Board of Education* sits at the very top of the canon

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of American legal thought.98 But nowhere else in American law is the continuing rhetorical power of a court decision matched by so little remaining power as a reform tool. Indeed, an important part of the larger backdrop against which law-driven reform efforts have evolved over the second half of the twentieth century is the declining significance of race as a basis for resource claims.

Evidence of the decline comes from a number of different quarters, but most explicitly in the demise of desegregation and affirmative action at the hands of an increasingly skeptical federal judiciary. Law & School Reform opens with the issue of desegregation. But Gary Orfield’s lengthy chapter focuses on the resegregation of American schools and the increasingly deaf ear of the federal judiciary to desegregation claims.99 In general, court-ordered desegregation plans that regulate student assignments are on the wane.100 Even the African-American community is increasingly agnostic about the value of continued desegregation efforts.101 The outlook is equally bleak on the


100 In the last ten years, for example, courts have closed school desegregation cases in Buffalo, Denver, Savannah, Oklahoma City, Wilmington, and Charlotte-Mecklenburg and have constructed “exit plans” for Dallas, Kansas City, and Little Rock. See Wendy Parker, The Future of School Desegregation, 94 NW. U. L. REV. 1157, 1157-58 (2000). Note, however, that Parker argues that widespread claims that desegregation efforts are dead are overstated. Id.

101 Recent public opinion surveys have shown that an overwhelming majority of African-American parents believe that “the higher priority of the nation’s schools should be to raise academic standards rather than focus on achieving more diversity and integration.” See PUB. AGENDA, TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS 31 (1998) (reporting results of a survey conducted by Public Agenda and the Public Education Network); see also, Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 528 (1980) (suggesting that the interest of blacks in quality education might be better served by “focusing on ‘educational components’”
affirmative action front. As an example, in what may prove to be the final triumph of the color-blindness principle in equal protection jurisprudence in education, the University of Michigan is currently fighting a rear-guard action in its effort to retain an admissions program that relies on weak racial preferences. 102

Another marker of the shift away from race-based claims is that much of the important doctrinal innovation over the past two decades has been confined to non-race-based policies. For instance, while the Supreme Court foreclosed school finance reform efforts in the federal courts in San Antonio Independent School District v. Rodriguez, 103 the constitutionality of school finance regimes has produced interesting doctrinal developments at the state level and has served as a leading example of an expanded state court role in constitutional adjudication—dubbed the “new judicial federalism.” 104 At the same time, the federal

102 See Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001); Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000). Both cases are currently before the Sixth Circuit Court of Appeals. The Fifth Circuit has already held that similar affirmative action admissions programs at the University of Texas are unconstitutional. See Hopwood v. Texas, 78 F.3d 932 (1996); see also Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001) (calling the question of diversity-goals “an open question,” and striking down the affirmative action program on tailoring grounds). The Ninth Circuit has determined, however, that diversity is a compelling enough state interest for affirmative action at the University of Washington to pass muster. See Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000) (upholding affirmative action and finding diversity to be a compelling state interest). The Supreme Court is likely to grant certiorari in the Michigan case and will determine whether Powell’s plurality opinion in Regents of the Univ. of Cal v. Bakke, 438 U.S. 265, 305 (1978), is still good law.

103 411 U.S. 1 (1973) (holding that equal educational funding is not a fundamental right under the Equal Protection Clause of the Fourteenth Amendment).

104 For discussion of the “equity” and “adequacy” approaches to school finance litigation, see supra notes 37-38 and accompanying text. For general discussion of the “new judicial federalism,” see Douglas S. Reed, Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism, 32 LAW & SOC’Y REV. 175, 176 (1998). For an early articulation, see William J. Brennan, Jr., The Bill of Rights and the States:
courts have decided a neverending string of cases that define the boundaries of accommodations required under the IDEA and The Bilingual Education Act.  

By contrast, race has seen little state-level doctrinal innovation with the possible exception of an isolated effort to combine school finance and race issues in *Sheff v. O’Neill*. Moreover, the limited doctrinal development relating to race has actually worked to narrow available race-based legal claims. During the most recent term, the Supreme Court handed down *Alexander v. Sandoval*, settling a long-standing question of whether litigants can bring claims under a disparate impact standard in Title VI implementing regulations. The Court answered no and, in one fell swoop, eliminated the legal tool most used by education lawyers to challenge discriminatory practices in a variety of policy areas, including bilingual education, intra-district racial segregation, and the critical

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107 678 A.2d 1267 (Conn. 1996).

108 *Id.* In *Sandoval*, the Court held that § 602 of Title VI of the Civil Rights Act does not authorize a private right of action under a disparate-impact standard as provided by implementing regulations, forcing litigants to bring suit under § 601 under the more restrictive intentional discrimination standard. Of course, and as Justice Stevens pointed out in dissent, the Court’s holding is “something of a sport” for the moment, *id.* at 300 (Stevens, J., dissenting), so long as plaintiffs are able to bring such claims under § 1983. However, the Court recently granted certiorari on a case that squarely raises the question. *See* Gonzaga Univ. v. Doe, 122 S. Ct. 865 (2002).


110 *See* Orfield, * supra* note 1.
new area of racial impact in standardized testing. The result is that education lawyers currently face a steadily shrinking toolkit from which they can draw in bringing equal protection and other race-based anti-discrimination claims.

The federal courts have clearly done the most to scale back the reach of Brown, but the trend away from race-conscious policies is equally evident outside the legal establishment. Indeed, concern with overall educational quality moved ahead of race on most policy agendas after an unremitting series of reports beginning in the 1980s warned of a “rising tide of mediocrity” in American public education. Of particular note has been the increasing dominance of the standards-based approach to education reform at the state and federal levels and the proliferation of “whole-school reform” models that provide an off-the-rack reform template to individual schools. The result is that the past two decades have witnessed an extraordinary amount of education reform activity within state legislatures, universities, private foundations, and big-city school districts, but comparatively less policy activity that aims to foster racial


113 The standards movement aims to link student performance on standardized tests to well-enforced rewards and sanctions as a means of creating incentives for school reform and signaling locations within the system where additional resources need to be devoted. See Helen F. Ladd, Introduction, in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORMS IN EDUCATION 5 (Helen F. Ladd ed., 1996).

114 See Engstrom, supra note 75.
integration or that specifically funnels resources to minority students.\footnote{Hess reports that an estimated 3,000 school-reform measures were implemented in the 1980s. By 1984, 275 state-level task forces were focusing on education. \textit{See} FREDERICK M. HESS, SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM 9 (1999). The sheer number of edited volumes devoted to the topic further evidences the high volume of urban school policy discussion. \textit{See}, \textit{e.g.}, CHANGING URBAN EDUCATION (Clarence Stone ed., 1998); NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION (Diane Ravitch & Joseph Viteritti eds., 1997); STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY (Marilyn Gittell ed., 1998).}

\textbf{B. Federalism-Based Resource Disparities}

A second aspect of the larger picture painted by the various contributions to \textit{Law & School Reform} is the extent to which law-driven reform efforts in one area of educational policy interact with reform efforts in other areas and sometimes produce unintended consequences. The bird’s eye view provided by the contributors to \textit{Law & School Reform} brings this fact into relief. For example, an important legacy of law-driven reform efforts is that legal mobilization on behalf of disabled students and, to a lesser extent, limited English proficient students, has produced a federal statutory rights scheme that exacerbates resource disparities for poor and minority students.

On this point, the most valuable contribution to \textit{Law & School Reform} comes from Molly McUsic, who convincingly argues that the current system allocates resources in ways that shortchange students in poor school districts.\footnote{McUsic, \textit{supra} note 35, at 92-93.} McUsic summarizes the “three central features” of resource inequalities in the American system as follows:

The legal system that delivers this order of educational inequality is a unique combination of unfunded federal mandates affecting local districts unequally, state legal structures that deliver and fund education on a geographical basis (segregating children largely by race
and class), and a subsidized system of private schools that serves fewer than 10 percent of schoolchildren.\textsuperscript{117} While most lawyers and educators are familiar with the advantages conferred by private schooling and the resource disparities that arise from local fiscal control, substantially fewer are probably aware of the allocational impact of unfunded federal mandates relating to special and bilingual education.\textsuperscript{118}

The allocational impact of federal mandates such as IDEA stems from the failure of the federal government to fund the cost of such mandates at anything above token levels.\textsuperscript{119} Reliable estimates of total special education spending by local school districts as mandated by IDEA and § 504 of the Rehabilitation Act exceed $58 billion, more than $33 billion above the cost of providing nonspecial education to those students.\textsuperscript{120} Thus, disabled students receive a little less than one-fifth of total resources in the system, even though disabled students represent less than one-tenth of the total student population.\textsuperscript{121} But Congress has never provided more than 13\% of special education funding (in 1980), and throughout the 1990s paid between 7\% and 8\%.\textsuperscript{122} The result is that, of the $33 billion in marginal expenditures for special education students, Congress foots the

\begin{itemize}
\item \textsuperscript{117} Id. at 89.
\item \textsuperscript{118} For a general discussion of unfunded mandates, see Julie A. Roin, \textit{Reconceptualizing Unfunded Mandates and Other Regulations}, 93 N.W. L. REV. 351 (1999).
\item \textsuperscript{119} The foregoing discussion is taken largely from McUsic, \textit{supra} note 35, at 95-97.
\item \textsuperscript{120} See Jay G. Chambers et al., \textit{What Are We Spending on Special Education in the U.S.?}, Center for Special Education Finance (Feb. 1998), available at http://csef.air.org/papers/brief8.pdf (last visited Apr. 18, 2002).
\item \textsuperscript{121} Total education expenditures at the federal, state, and local level in 1998 were $328 billion. \textit{See Statistical Abstract 2000, supra} note 2, at 172 tbl. 275. The total number of students ages six to twenty-one served under IDEA in 1996-97 was 5,235,952. \textit{See U.S. Department of Education, To Assure the Free Appropriate Public Education of All Children with Disabilities, supra} note 4, at ii-16. The total student enrollment in the United States in 1997 was nearly fifty-two million. \textit{See Statistical Abstract 2000, supra} note 2, at 151 tbl. 239.
\item \textsuperscript{122} McUsic, \textit{supra} note 35, at 95.
\end{itemize}
bill for approximately $2 billion. The remaining $31 billion falls to states and local school districts. Similarly, in the last year that the Department of Education issued a report to Congress, more than 2.3 million limited English proficient students received services under the Bilingual Education Act; the federal government paid for the cost of educating only about 251,000, or less than 11%, of them.123

The perverse effect of token federal funding of federal mandates is fewer resources for poor, minority, and non-special education students. The reason is that enforceable federal rights under IDEA and the Bilingual Education Act require school districts to allocate resources first to special education and bilingual students, with the remainder going toward the education of nonspecial education students.124 In addition, special education and limited-English proficient students tend to be concentrated in relatively poorer school districts.125 The result is that poorer districts must allocate a disproportionate share of total resources to compliance efforts under federal mandates.126 As McUsic explains, the “predictable result” of this arrangement is that “a greater share of elementary and secondary school spending over the past twenty years has been allocated to special needs leaving a shrinking share available for nonspecial education.”127 And in poor school districts in particular, unfunded federal mandates leave substantially fewer resources for below-average students—particularly what Mark Kelman and Gillian Lester call “garden variety bad readers”128—who might make equally compelling claims to scarce educational resources.

124 McUsic, supra note 35, at 97.
125 Id.
126 Id.
127 Id.
C. Competing Reform Impulses and the Peculiar Legacy of Brown

A final theme one might glean from the assembled contributions to Law & School Reform is that law-driven school reform efforts of the past five decades display a deep tension between two very different reformist impulses. One is a bureaucratic impulse that uses highly targeted resource infusions as a means of maximizing the educational outcomes—and thus the life chances—of specific student groups. This impulse extends to efforts to advance educational equity by raising achievement levels of African-Americans, the poor, the disabled, the limited English proficient, or any other group perceived to be in a position to benefit from additional resources.

Another equally powerful impulse is a legal and cultural impulse extending from Brown v. Board of Education\(^{129}\) and the broader civil rights movements of the post-war period. The Brown impulse is a broader inclusionary vision and, while also aimed at increasing the life chances of disfavored and disadvantaged groups, is also deeply concerned with a broader republican vision of equality that sees the participation of excluded groups in mainstream democratic discourse and social and economic life as ultimately redounding to the benefit of all.\(^{130}\) Reform efforts aimed at desegregation and the education of disabled and LEP students are founded at least in part on this broader inclusionary vision.

As a policy analysis matter, the two reformist impulses seem to pose a basic incommensurability problem.\(^{131}\) How can reformers weigh the relative value of educational achievement


\(^{130}\) See, e.g., Suzanna Sherry, Responsible Republicanism: Educating for Citizenship, 62 U. Chi. L. Rev. 131 (1995) (exploring the possibility of a constitutional right to education through analysis of the requirements of “republican citizenship”).

\(^{131}\) See Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 796 (1994) (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.”).
against the values of democratic solidarity, tolerance, or appreciation of human difference that comes with the integration of students of color and students with disabilities into mainstream classrooms?¹³² No unitary metric accounts for how policymakers actually think about the two kinds of benefits. As a result, judging the desirability of different law-driven reform avenues requires reformers to weigh costs and benefits at two very different levels of abstraction.

Of course, critics may argue in response that this incommensurability problem is not insurmountable. Incommensurability need not entail incomparability as a matter of policy analysis. Legislators and other policymakers, for example, frequently weigh costs and benefits between policy outputs to which most economists would attach the incommensurability label. Similarly, critics may point out that the alleged tension between bureaucratic and inclusionary reform impulses is little more than a disagreement about the proper institutional mission of public schools. For instance, some commentators have long argued that schools are too often used as instruments for realizing a broader social vision and that this takes schools away from a more appropriate and more focused pedagogical mission.¹³³ As an example, the “back to basics” movement that swept education policy circles in the 1980s and 1990s was, at least in part, an effort to refocus the mission of public schools.¹³⁴ But others—going all the way back to John Dewey—see moral and political

¹³² Scholars are equally concerned with various “soft” variables, including the extent of stigma that attaches to separate instruction. See Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law 35-39, 81-86 (1992) (arguing that “least restrictive environment” determinations in the special education context pose a difficult “choice between specialized services and some degree of separate treatment on the one side, and minimized labeling and minimized segregation, on the other”).


¹³⁴ Id.
instruction as central to the educational mission of public schools.\footnote{See generally John Dewey, Experience and Education (1997).}

Law & School Reform, however, places competing reform approaches side-by-side and helps make the case that the tension is real and has had important distributive implications. Indeed, what the contributions to Law & School Reform together suggest, and what is particularly ironic in the education context, is that judicial foreclosure of race-based resource claims has meant that the powerful vision of social inclusion articulated in Brown currently bolsters resource claims made by disabled students, but not resource claims made by poor or African-American students, the latter of whom were its original intended beneficiaries. One peculiar and ironic legacy of Brown, then, is fewer educational resources for African-Americans.

IV. THE ROLE OF LAWYERS

A. Are Lawyers to Blame?

To what extent are lawyers culpable in any of the above? To be sure, identifying trends is not the same as assigning blame. One might argue that the role played by lawyers in past school reform efforts is perfectly understandable. For instance, it is well known that the systemic distributional consequences of individual litigation efforts are a traditional blind spot for the judicial system as a whole.\footnote{See Horowitz, supra note 46, at 32-62 (describing the problems of information, vision, and piecemeal adjudication that are unique to the judicial process).} In addition, lawyers advocate on behalf of particular groups of clients in pursuit of particular outcomes. And, in so doing, lawyers remain bound by professional-ethical obligations that demand zealous pursuit of client interests. Lawyers as a whole also tend to view the social world through the lens of the creation and vindication of rights. Given that the dominant legal understanding sees rights as trumps that immunize
individual rights-bearers from majoritarian decision-making, it is perhaps unfair to argue that lawyers should be better attuned to the global budgeting process that drives most social policymaking in non-legal, non-rights-oriented contexts.

Also, the traditional blindness of lawyers to the distributional consequences of law-driven school reform efforts may not be grounds for critique at all, but rather should be seen as laudable and entirely consistent with the institutional role of lawyers. We might even believe that the lawyers-as-hired-guns model maximizes institutional performance of the judicial system, whether as a truth-seeking device or as a forum for resolving competing resource claims. And to the extent that lawyers engaged in law-driven school reform efforts are self-consciously practicing so-called “cause lawyering,” it would be difficult to critique education lawyers for attempting to connect morality to law, particularly if such efforts ultimately legitimate the profession and the legal system as a whole. In short, to lay blame at the feet of education lawyers requires a deeper—and likely unsuccessful—critique of the lawyerly craft and institutional role.

B. The Future of Law-Driven School Reform

The more important question is, how might law-driven reform efforts advance educational equity in the future? At the end of the day, Law & School Reform provides very little concrete guidance to education lawyers going forward. The prescriptions are simply too narrow. Reading Law & School

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139 See Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998).
Reform, one cannot help but think that law-driven reform efforts will never again impact educational equity to the same extent that earlier, Brown-inspired challenges did. Instead, future reform efforts will likely center on the much more mundane task of optimizing resource allocations within the system as a whole. And without denigrating what remains an important task, what is most depressing from a lawyerly perspective is that it is not clear why lawyers and litigation enjoy any comparative advantage in any of the tasks that lie ahead.

That said, Law & School Reform is a valuable contribution to the literature because it is the first volume of its kind to juxtapose the various approaches through which lawyers, law, and legal institutions have engaged the educational system in an effort to advance educational equity. The book thus represents a coherent attempt to do what legal scholars and policy advocates have only recently started to do—to think hard about how different legal movements fit together and judge the relative efficacy of available law-driven reform approaches. Here is where Law & School Reform promises to spur interesting debate. And here is where Heubert’s take on the issues is not so vulnerable to critique as it is to the thought that he might have productively taken his call for policy learning even further.

Policy learning may be precisely what is needed because much of the explanation for trends in the allocation of educational resources is political. Legal scholarship has only just begun to critique the political presuppositions and theories of anti-

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140 Of course, recent scholarship also argues that Brown may have been less effective than most lawyers had thought, see Rosenberg, supra note 8, at 49-54 (summarizing data on the relationship of the Court’s Brown decision and actual desegregation of public schools), or even counterproductive, see Michael Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 10-11 & n.10 (1994) (arguing that racial change would have come regardless of Brown, and that the Court’s decision may have actually forestalled federal legislative change by crystallizing southern white resistance).

141 See, e.g., James E. Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 254, 256 (1999) (assessing the relative efficacy of desegregation and school finance reform and arguing for more of the former).
LAWYERS AND EDUCATIONAL EQUITY

discrimination that underpin redistributive claims in the education policy context. Some have argued that the disabled are a readily identifiable and socially salient subset of the student population, and that their claims for resource infusions are strengthened because of the ease with which disabled students can be constructed as a plausible deserving group. In addition, and as Heubert observes, “Minority children, poor children, and immigrant children do not enjoy as much political or legal support as do children whose defining characteristic—disability—cuts across all economic classes and racial groups.” The disabled clearly enjoy an enormous amount of political power, at least relative to other more diffuse and less well-organized groups. In addition, the IDEA was pushed through Congress with surprisingly little opposition, buffeted in part by middle class parents in search of additional resources and a less stigmatizing label for their under-achieving children. Finally, it is worth noting that legislative efforts on behalf of the learning disabled took place in a post-1960s Washington policymaking environment that is seen by many political scientists as increasingly receptive to narrow interest group claims.

142 The most thoughtful contribution by far is Kelman & Lester, supra note 84. However, Kelman and Lester focus exclusively on special education and, in particular, those students labeled “learning disabled” (“LD”), and do not compare special education and race-based claims. For a broader treatment of the “difference dilemma” at the heart of redistributive politics, see Minow, supra note 132.

143 On this point, see Kelman & Lester, supra note 84, at 197. The authors claim that this construction matters most of all because it takes advantage of a basic distinction that underpins nearly all American welfare state politics—between the deserving and undeserving poor. See also Michael B. Katz, The Undeserving Poor: From the War on Poverty to the War on Welfare 10 (1989); Michele L. Landis, Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State, 33 Law & Soc’y Rev. 257, 257 (1999).

144 Heubert, supra note 19, at 16.

145 See James Q. Wilson, Political Organizations (1973).

146 See Kelman & Lester, supra note 84.

147 The IDEA emerged during the post-1960s dispersal of power in the Washington policymaking environment that some political scientists have
Programs that serve minority and poor students, by contrast, suffer from a form of “entitlement creep,” a familiar phenomenon whereby government programs—particularly means-tested benefits—gradually creep up the socio-economic ladder and are distributed to claimants eager to take advantage of government largesse.\textsuperscript{148} Title I of the Elementary and Secondary Education Act was initially conceived as a means of topping up education spending and funneling additional federal resources to poor and, in particular, heavily African-American districts.\textsuperscript{149} The program has evolved, however, in very different directions. As McUsic points out,

[T]he same political forces that shape and preserve the current legal regime also shaped Title I, turning it, in effect, into a pork barrel program with funds for every congressional district, and thereby turning federal funds

\textsuperscript{148} See ROBERT E. GOODIN & JULIAN LE GRAND, NOT ONLY THE POOR: THE MIDDLE CLASSES AND THE WELFARE STATE 3 (1987) (arguing that the non-poor play a major role in “creating, expanding, sustaining, reforming, and dismantling the welfare state” and that their involvement is at least in part driven by their desire to capture programs for their direct benefit).

\textsuperscript{149} See 20 U.S.C. § 6301 (1994); McUsic, \textit{supra} note 35, at 94.
intended to be more or less equalizing across states and districts into payments that were more or less equal across states and districts.\(^{150}\)

As of 1993, McUsic continues, approximately 90% of the nation’s school districts and 71% of all public elementary schools received Title I funding.\(^{151}\)

At a time when the educational system is wrestling with fundamental questions of “who gets what, when, how,” it seems that the most productive activities in which lawyers can engage are proactive, challenging dialogue about future policy options and pressing for a fair allocation of resources within the political process that may or may not be skewing redistributions in unintended ways. As an example, lawyers are already playing an important role in rapidly proliferating litigation challenging the establishment and placement of charter schools.\(^{152}\) Thus, lawyers can make a critical contribution by ensuring that reform approaches do not disproportionately aid the better-off at the expense of the worse-off. In addition, the organization and delivery of public education is clearly in for substantial change in the coming years. Non-legal scholars have begun to stake out a position that calls for a re-alignment of the entire system of school finance at all three levels of government.\(^{153}\) And on January 8, 2002, President Bush signed into law the “No Child Left Behind Act,” described by some as the most sweeping federal school measure since passage of the Elementary and

\(^{150}\) McUsic, \textit{supra} note 35, at 94.

\(^{151}\) \textit{Id.} at 94.

\(^{152}\) \textit{See, e.g.}, Tomiko Brown-Nagin, \textit{Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education}, 50 \textit{Duke L.J.} 753, 758 n.15 (documenting litigation challenging charter schools that are “status identifiable” and thus aim to prevent actual and prospective charter schools from disproportionately aiding elites or practicing various forms of discrimination).

\(^{153}\) \textit{See, e.g.}, \textit{Kenneth K. Wong}, \textit{Funding Public Schools: Politics and Policies} 1-2 (1999) (arguing that the key to maximizing the performance of the educational system as a whole is the creation of decision rules that better align and allocate resources among levels of government).
Secondary Education Act in 1965. Changes to the system will undoubtedly provide opportunities and challenges for reform-minded lawyers.

CONCLUSION

In the end, Law & School Reform is an outstanding and much-needed contribution to the field of law and education scholarship. It is notable that the book bills itself as being “not solely for legal experts or scholars but for a general audience of educators, advocates, policy makers, parents, and scholars interested in school reform.” For general audiences, the book elegantly covers a tremendous amount of territory. Unfortunately, for lawyers seeking to use their lawyerly skills to increase educational equity, the book probably falls short as a how-to guide. Even so, this may be the ultimate strength of Law & School Reform, particularly given what lies ahead. Indeed, what emerges from the juxtaposition of different reform approaches in Law & School Reform is a sense that lawyers can contribute greatly to the advancement of educational equity not by becoming more informed about the nuts and bolts of specific education practice areas or by initiating additional litigation, but rather by becoming better and more persuasive policy wonks. By continuing to think about how legal strategies interact, what kinds of educational equity are worth pursuing, and which groups are likely to emerge as winners and losers in the political process, lawyers can continue to broaden and deepen educational equity in ways that balance the competing impulses within prior law-driven

154 See Helen Dewar, Landmark Education Legislation Gets Final Approval in Congress, WASH. POST, Dec. 19, 2001, at A8. Among other things, the bill mandates standardized testing for all students from grades three through eight, imposes sanctions against schools that do not demonstrate steady improvement over a twelve year period, provides failing schools with additional money for tutoring and other services, increases the federal share of special education costs, and sets into motion a limited form of school choice, whereby students in perpetually failing schools will be free to attend neighboring schools if their own schools fail to meet performance goals. Id.

155 Heubert, supra note 19, at 8.
reform efforts. By making available in a single volume nearly fifty years of law-driven school reform efforts, *Law & School Reform* almost certainly helps to move education lawyers down that path.
CONFIDENTIALITY IN THE CHURCH OF THE TWELVE STEPS

George J. Barry*

INTRODUCTION

Every state in the nation, as well as the U.S. territories of Guam, Puerto Rico and the Virgin Islands, currently recognizes a need to protect the confidential communications between a person and his or her spiritual advisor.1 With no basis in state common

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1 State statutes designating specific religious leaders to whom the religious privilege applies seem unavailing in light of courts’ expanding view of the type of organizations that qualify as a religion or a religious organization. See, e.g., Warner v. Orange County Dep’t of Prob., 115 F.3d 1068, 1075 (2d Cir. 1996) (holding that Alcoholics Anonymous is a religious organization for the purpose of applying the Establishment Clause). The variations range from the vague, “[a] member of the clergy or other minister of any religion,” MINN. STAT. § 595.02 (2001), to the exclusive, “any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister,” GA. CODE ANN. § 24-9-22 (2001), to the commendable, but laughable, “minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, or regular minister of religion of any religious organization or denomination usually referred to as a church,” TENN. CODE ANN. § 24-1-206 (2001).

The term “spiritual advisor” is commonly used in the privilege statutes to describe the job of the sacerdotal functionaries of the various religions. See N.Y. C.P.L.R. 4505 (McKinney 2001). For example, the New York statute states, “Unless the person confessing or confiding waives the privilege,
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law,\textsuperscript{2} this recognition has assumed statutory form,\textsuperscript{3} creating what

clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor." \textit{Id}. (emphasis added). This note, therefore, adopts the term "spiritual advisor" to be used interchangeably with "clergy" to represent the person performing a particular spiritual service within the context of a religious organization that recognizes that person as one capable of performing such services.

\textsuperscript{2} \textit{See}, \textit{e.g.}, Keenan v. Gigante, 390 N.E.2d 1151, 1154 (N.Y. 1979) (noting that the privilege did not exist at common law and holding that communications between a prisoner and a priest are not protected by statutory privilege when the testimony of the priest would not "jeopardize the atmosphere of confidence and trust which allegedly enveloped the relationship" between the priest and the communicant); Claudia G. Catalano, Annotation, \textit{Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Adviser}, 93 A.L.R.5th 327 (2001) (noting that state courts have unanimously acknowledged that the religious privilege did not exist at common law).

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is commonly referred to as the “priest-penitent,” 4 “clergy-penitent,”5 or simply “religious”6 privilege. The federal government also recognizes a religious privilege. Declining to codify the privilege explicitly,7 Congress instead adopted Federal

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857 (2001); VA. CODE ANN. § 8.01-400 (Michie 2001); WASH. REV. CODE § 5.60.060 (2001); W. VA. CODE § 57-3-9 (2001); Wis. STAT. § 905.06 (2001); WYO. STAT. ANN. § 1-12-101 (Michie 2001).

4 See, e.g., ALA. CODE § 12-21-266 (2001).
7 The Supreme Court proposed a statutory privilege to Congress as Federal Rule of Evidence 506, which failed to pass. CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 26 FEDERAL PRACTICE AND PROCEDURE § 5611 (1992). The rule stated the following:

a) Definitions. As used in this rule:

(1) A “clergyman” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

PROPOSED FEDERAL RULES OF EVIDENCE WITH SUPREME COURT ADVISORY COMMITTEE REPORT, HR 5463 JUDICIARY COMMITTEE REPORT, AND AMENDMENTS TO FEDERAL RULES OF CIVIL AND CRIMINAL PROCEDURE 84 (John R. Schmertz, Jr., ed., 1974) [hereinafter PROPOSED FEDERAL RULES OF EVIDENCE]. When proposed Rule 506 was before Congress for a vote, it foundered without much debate; however, while in the drafting stages, Arkansas Senator John L. McClellan (D) submitted a letter objecting to the proposed rule’s broad definition of clergyman. WRIGHT & GRAHAM, supra, § 5611. In response to his objections, which are thought by some to have been motivated by racism, the advisory committee altered the language of its note.
Rule of Evidence 501, which enables the federal judiciary to create evidentiary privileges “in the light of reason and experience.” Although Rule 501 prompted expeditious development of a religious privilege, the federal judiciary had following the text of the rule to narrow the application of the privilege. Id. The note reads in pertinent part:

[I]t is not so broad as to include all self-denominated “ministers.” A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis.

PROPOSED FEDERAL RULES OF EVIDENCE, supra, at 84-85; see also In re Grand Jury Investigation, 918 F.2d 374, 385 n.13 (adopting rejected Rule 506’s definition of clergy and limiting the privilege in a similar fashion). Ultimately, Congress rejected Rule 506, along with seven other specific evidentiary privileges, including the attorney-client privilege, psychotherapist-patient privilege, and “husband-wife” privilege, and three general rules proposed by the Court. See generally PROPOSED FEDERAL RULES OF EVIDENCE, supra.

8 FED. R. EVID. 501 (2002). Rule 501, enacted in 1974, states the following:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.

9 United States v. Luther, 481 F.2d 429, 432 (9th Cir. 1973) (interpreting proposed Rule 506 to determine that a member of the clergy must be a natural person and not a corporation); In re Verplank, 329 F. Supp. 433, 436 (C.D. Cal. 1971) (determining that non-ordained counselors, recruited by a minister who was ordained by the United Presbyterian Church and was employed to counsel students about the Vietnam War draft, fell within the definition of clergy under proposed Rule 506).
already recognized the privilege, or a variation thereof, long before Congress had addressed the issue.\(^\text{10}\)

Of the various evidentiary privileges in existence (e.g., attorney-client, doctor-patient, and psychotherapist-patient), the religious privilege has been the least controversial and most widely accepted.\(^\text{11}\) Nevertheless, the privilege has not been entirely free from controversy, and it has evolved through the relatively sparse caselaw on both the state and federal levels to protect communications meeting three general requirements:\(^\text{12}\) (1) the person communicating with her spiritual advisor must do so with a reasonable expectation of confidentiality;\(^\text{13}\) (2) the spiritual advisor must be, or reasonably be thought by the communicant to

\(^{10}\) See Totten v. United States, 92 U.S. 105, 107 (1875) (stating that public policy would not permit at trial the disclosure of the “confidences of the confessional”); McMann v. Sec. & Exch. Comm’n, 87 F.2d 377, 378 (2d Cir. 1937) (recognizing “penitential” communications as privileged).

\(^{11}\) See, e.g., In re Grand Jury Investigation, 918 F.2d at 381 (“The history of the proposed Rules of Evidence reflects that the clergy-communicant rule was one of the least controversial of the enumerated privileges, merely defining a long-recognized principle of American law.”); JOHN HENRY WIGMORE, 5 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2396 (2d ed. 1923) (noting that Jeremy Bentham, “the greatest opponent of privileges,” supported the religious privilege).

\(^{12}\) Some opinions have recognized a fourth requirement, that the communication be penitential or confessional in nature, as may be required by the ecclesiastical doctrine of a particular religion. See, e.g., People v. Edwards, 248 Cal. Rptr. 53 (Cal. Ct. App. 1988) (holding that confidential communication between criminal defendant and Episcopalian priest was not privileged when not of a penitential nature); State v. Buss, 887 P.2d 920 (Wash. Ct. App. 1995) (“Washington’s statutory privilege only applies if Buss’ statements were a confession in the course of discipline enjoined by the church.” (internal citations and ellipsis omitted)). This requirement is largely rejected by more recent decisions; courts have expanded the privilege to apply broadly to communication reasonably expected to remain confidential. See, e.g., In re Grand Jury Investigation, 918 F.2d at 386 (noting that the religious privilege has evolved from protecting private confessions to encompassing a wide range of communications with clergy); State v. Martin, 975 P.2d 1020 (Wash. 1999) (abrogating Buss, 887 P.2d 920).

\(^{13}\) See In re Grand Jury Investigation, 918 F.2d at 386 (holding that the presence of a third party does not defeat the reasonable expectation of privacy when the third party is necessary for the furtherance of the communication).
be, a member of the clergy; and (3) the spiritual advisor must be acting in his or her professional capacity.

Courts have addressed, though not fully answered, questions regarding each of these requirements. The least litigated issue is what qualifications are necessary to be considered a spiritual advisor as required by state statutes and federal courts. In most cases, a person’s status as spiritual advisor is assumed. This assumption likely stems from a common understanding that most people claiming the privilege are attempting to protect information revealed to recognized leaders of widely accepted religions. Thus, courts need only address this issue when the

14 Most statutes granting the religious privilege protect communicants who may have been misled into believing the person with whom they were communicating was a spiritual advisor to whom the privilege applied. See, e.g., IDAHO CODE § 9-203 (Michie 2001); N.M. R. EVID. § 11-506 (Michie 2001); N.Y. C.P.L.R. 4505 (McKinney 2001).

15 See In re Verplank, 329 F. Supp. 433, 436 (C.D. Cal. 1971) (invoking the religious privilege to protect speech between college students and counselors providing spiritual counseling during the Vietnam War draft when the counselors had been appointed by an ordained minister of the United Presbyterian Church working as a college chaplain).

16 See United States v. Gordon, 493 F. Supp. 822, 823 (N.D.N.Y. 1980) (holding communication with a priest acting in the capacity of a member of a corporation’s board of directors not privileged); State v. Barber, 346 S.E.2d 441, 445 (N.C. 1986) (finding that a de facto clergyman was not acting in a professional capacity during a casual conversation with a friend).

17 See generally In re Grand Jury Investigation, 918 F.2d 374 (determining whether communication with a clergy member was confidential when in the presence of a third party); see also Gordon, 493 F. Supp. at 823 (holding that a priest was not acting in his “spiritual capacity” when discussing business matters with the defendant); In re Verplank, 329 F. Supp. at 436 (noting that, while ordination might not be required for a person to qualify as a clergy member, “the person to whom the status is sought to be attached [must] be regularly engaged in activities conforming at least in a general way with those of... an established Protestant denomination, though not necessarily on a full-time basis”) (citing proposed Rule 506 advisory committee’s note).

18 WRIGHT & GRAHAM, supra note 7, § 5613.

19 Id.

20 Despite the recognition and acceptance of numerous religions within the United States, the majority of statutes creating the religious privilege
status of the spiritual advisor is tenuous at best.\textsuperscript{21}

In \textit{Cox v. Miller},\textsuperscript{22} the United States District Court for the Southern District of New York squarely addressed the issue of who qualifies as a spiritual advisor.\textsuperscript{23} The court found that New York’s religious privilege shields communications within the self-help setting of Alcoholics Anonymous (“A.A.”),\textsuperscript{24} and its reasoning will likely protect communication within numerous organizations adopting A.A.’s hugely successful “Twelve Steps” to recovery.\textsuperscript{25} In its opinion, the court explicitly determined that A.A. members are spiritual advisors as that term is used and identify spiritual advisors as “clergy” or “clergymen” and limit their explicit definition of those terms to ministers, priests, and rabbis. \textit{See, e.g.}, ARK. CODE ANN. § 16-41-101 (Michie 2001). This note assumes the lists of statutorily denoted religious leaders are not exhaustive. The few cases discussing the issue support such an assumption. \textit{Compare} Reutkemeier v. Nolte, 161 N.W. 290, 293 (Iowa 1917) (holding that elders of a Presbyterian church constituted clergy), \textit{with} Rutledge v. State, 525 N.E.2d 326, 328 (Ind. 1988) (holding that a member of the Gideons, a religious organization of business people who hand out free Bibles, who was teaching prisoners about the Bible was not clergy). Furthermore, this note proposes to expose the privilege’s limitations when a person’s status as a spiritual advisor is suspect.

\textsuperscript{21} \textit{See, e.g.}, Eckmann v. Bd. of Educ., 106 F.R.D. 70, 72-73 (E.D. Mo. 1985) (holding that a nun who was recognized by the Catholic Church as holding the position of “spiritual director” was clergy for privilege purposes); Manous v. State, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (holding that a psychic was not a clergy member regardless of any self-characterization as a spiritual advisor); State v. Alspach, 524 N.W.2d 665, 668 (Iowa 1994) (holding that the defendant failed to prove his brother was a member of the clergy despite his view that his brother was a spiritual advisor); \textit{Rutledge}, 525 N.E.2d at 328 (holding that a member of the Gideons was not clergy).

\textsuperscript{22} 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

\textsuperscript{23} \textit{See infra} Part I.C (discussing Cox, 154 F. Supp. 2d 787).

\textsuperscript{24} \textit{See} N.Y. C.P.L.R. 4505 (McKinney 2001).

\textsuperscript{25} According to the most recent information released by A.A., as of Jan. 1, 2002, its membership comprised 100,766 groups containing a total of more than 2,000,000 individuals, with approximately 1,162,112 members in the United States. Alcoholics Anonymous, \textit{Membership}, at http://www.alcoholics-anonymous.org/english/E_FactFile/M-24_d4.html (last visited Apr. 2, 2002). A.A. acknowledges that the strictures of anonymity and the general lack of formal organization complicate attempts to maintain accurate statistical records. \textit{Id.}
defined in the statute. In so doing, the court extended both the New York statutory privilege and the federal common law privilege beyond what “the light of reason and experience” could ever possibly have revealed.

Part I of this note includes a discussion of the formation of A.A. and the judicial recognition of A.A. as a religious organization. In addition, Part I briefly introduces the Cox decision. Part II explores the Cox reasoning in depth, revealing the factual and legal flaws pervading the court’s decision. These flaws help bring to light two primary reasons why the religious privilege, absent legislative approval, has no place in the A.A. setting: (1) despite its designation as a religious organization, A.A. does not fit within the framework of the religious privilege; and (2) public policy cannot endorse a judiciary willing to put the addiction recovery interests of a criminal confessor above those of his or her fellow recovering confidant. Part III addresses the concerns of the critics who support expanding the religious privilege to encompass A.A. and demonstrates that their arguments are replete with speculation and unsupported by

28 Currently, the Second and Seventh Circuits are the only federal circuits to have recognized A.A. or groups adopting A.A.’s principles as religious organizations for the purpose of determining whether the Establishment Clause permits the government to compel attendance at those organizations’ meetings. See Warner v. Orange County Dep’t of Prob., 115 F.3d 1068 (2d Cir. 1996) (discussed infra Part I.B); Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (holding that Narcotics Anonymous is a religious organization). The issue, therefore, is far from settled and beyond the scope of this note. Nevertheless, the author accepts the Second and Seventh Circuits’ conclusion, which has been welcomed by some commentators. See, e.g., Derek P. Apanovitch, Note, Religion and Rehabilitation: The Requisition of God by the State, 47 DUKU L.J. 785 (1998) (discussing the various religious aspects of A.A.); Rachel F. Calabro, Note, Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?, 47 DEPAUL L. REV. 565 (1998) (arguing that A.A.’s adoption of traditional religious concepts qualifies the organization for Establishment Clause protection).

29 Cox v. Miller, 154 F. Supp. 2d 787 (S.D.N.Y. 2001)
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science. This note concludes that protecting communication within A.A. by expanding religious privileges, an extreme solution for a virtually non-existent problem, is unnecessary in light of the protection provided by the Free Exercise Clause of the United States Constitution.

I. ESTABLISHING THE CHURCH OF THE RECOVERING ALCOHOLIC

A.A. takes no official position on public issues. Despite being the subject of several court opinions, A.A. has adhered to this principle and has refrained from issuing an official statement challenging or praising the judicial portrayals or the consequences arising therefrom. In order to understand A.A., it is, therefore, necessary to explore the history and principles guiding the development and survival of what is arguably the world’s largest self-help organization.

30 See generally Thomas J. Reed, The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members, 70 St. John’s L. Rev. 693 (discussing various rationales, including the expansion of the religious privilege, for protecting confidential speech within A.A.); Jessica G. Weiner, Comment, “And the Wisdom to Know the Difference”: Confidentiality vs. Privilege in the Self-Help Setting, 144 U. Pa. L. Rev. 243 (1995) (arguing in favor of an evidentiary privilege to protect speech within A.A.); see also infra Part III (discussing critics’ views).

31 U.S. Const. amend. I.

32 See Alcoholics Anonymous World Services, Inc., Twelve Steps and Twelve Traditions 176 (soft-cover edition 1981) [hereinafter Twelve Steps and Twelve Traditions] (stating, as A.A.’s tenth tradition, “Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy”).

33 Id. (“As by some deep instinct, we A.A.’s have known from the very beginning that we must never, no matter what the provocation, publicly take sides in any fight, even a worthy one.”); see also Jim Fitzgerald, Judge Voids Manslaughter Conviction, AP Online, Aug. 2, 2001, available at 2001 WL 25489398 (stating that an A.A. spokesman said that A.A. would not comment on the Cox decision); Frank J. Murray, Courts Hit Sentencing DWIs to A.A., Fault Religious Basis, Wash. Times, Nov. 4, 1996, at A10, available at 1996 WL 2970041 (stating that A.A. would not comment on various courts’ opinions finding that the organization was religion-based).

34 See supra note 25 (noting A.A.’s size in terms of members).
A.A.’s history is a description of the Second Circuit opinion that designated A.A. a religious organization and an introduction to the case that inspired this note.

A. Alcoholics Anonymous: Laying the Groundwork

Although its history extends back before its official creation, A.A.’s present-day roots began to form when Bill Wilson met Dr. Bob Smith; both were professionals desperately seeking refuge from alcoholism. Together, applying principles adopted from other recovery groups, they began to create what would become A.A.’s doctrinal foundation. Dr. Smith and Mr. Wilson oversaw the establishment of three A.A. groups, one located in Akron, another in Cleveland, and the third in New York City. Central to the groups’ existence was the belief that the members needed to (1) acknowledge a lack of control over their lives and their alcohol problem, (2) recognize that they were at the lowest point in their lives, (3) turn their lives over to a “higher power,” and (4) believe that these steps would eventually lead to a life of sobriety. These four core beliefs evolved into the now-popular “Twelve Steps,” first published in the 1939 book

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35 See Reed, supra note 30, at 708-14 (discussing, inter alia, the history of A.A.).
36 See ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS, xv-xvii (3d ed. 2001) [hereinafter ALCOHOLICS ANONYMOUS].
37 Id.
38 Id.
39 Id. at 25.
40 See Reed, supra note 30, at 708-14 (discussing, inter alia, the history of A.A.).
41 TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 5-9.

A.A.’s Twelve Steps are as follows:
1. We admitted we were powerless over alcohol—that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understood him.
“Alcoholics Anonymous,”42 which were meant as suggestions for alcoholics trying to recover.43 In 1950, A.A.’s organizers adopted the “Twelve Traditions”44 as principles guiding the

4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God as we understood him, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

Id.

42 ALCOHOLICS ANONYMOUS, supra note 36.
43 Id. at 59.

A.A.’s Twelve Traditions are as follows:
1. Our common welfare should come first; personal recovery depends upon A.A. unity.
2. For our group purpose there is but one ultimate authority—a loving God as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern.
3. The only requirement for A.A. membership is a desire to stop drinking.
4. Each group should be autonomous except in matters affecting other groups or A.A. as a whole.
5. Each group has but one primary purpose—to carry its message to the alcoholic who still suffers.
organization itself.\textsuperscript{45} While the founders intended the Twelve Steps to guide an individual member to recovery, the Twelve Traditions served to guide an individual in contributing to A.A.’s overall success and survival.\textsuperscript{46} They were not, however, established or subsequently interpreted as a strict set of rules.\textsuperscript{47} Rather, like the Twelve Steps, the Twelve Traditions were unenforceable guidelines for the individual members whose own interests A.A. was meant to serve.\textsuperscript{48}

We believe there isn’t a fellowship on earth which lavishes more devoted care upon its individual members; surely there is none which more jealously guards the individual’s right to think, talk, and act as he wishes. No A.A. can compel another to do anything; nobody can be punished or expelled. Our Twelve Steps to recovery are

\begin{itemize}
\item[6.] An A.A. group ought never endorse, finance, or lend the A.A. name to any related facility or outside enterprise, lest problems of money, property, and prestige divert us from our primary purpose.
\item[7.] Every A.A. group ought to be fully self-supporting, declining outside contributions.
\item[8.] Alcoholics Anonymous should remain forever nonprofessional, but our service centers may employ special workers.
\item[9.] A.A., as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve.
\item[10.] Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy.
\item[11.] Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of press, radio and films.
\item[12.] Anonymity is the spiritual foundation of all our traditions, ever reminding us to place principles before personalities.
\end{itemize}

\textit{Id.}

\textsuperscript{45} \textit{Id.} at 18.

\textsuperscript{46} \textit{Id.} at 129; see also \textit{Alcoholics Anonymous}, \textit{supra} note 36, at xix (describing the rationale that led to the adoption of the Twelve Traditions as the need to develop “principles by which the A.A. groups and A.A. as a whole could survive and function effectively”).

\textsuperscript{47} \textit{Twelve Steps and Twelve Traditions}, \textit{supra} note 32, at 129.

\textsuperscript{48} \textit{Id.}
suggestions; the Twelve Traditions which guarantee A.A.’s unity contain not a single “Don’t.” They repeatedly say “We ought . . .” but never “You Must!”49

B. Problematic Reasoning Spawns a Religion

A.A. views itself as a secular organization.50 It is not affiliated with, nor does it endorse, any religion or religious group.51 Indeed, theists and atheists can apply A.A.’s principles.52 Regardless, the judicial community has begun viewing A.A. as a religious organization.53

49 Id.

50 See, e.g., ALCOHOLICS ANONYMOUS, supra note 36, at xx (“Alcoholics Anonymous is not a religious organization.”); 44 Questions, pamphlet P-2, at 19 (Alcoholics Anonymous World Services, Inc., 1952) (“A.A. is not a religious society.”); This is AA, pamphlet P-1, at 7 (Alcoholics Anonymous World Service, Inc., 1984) (“We are not reformers, and we are not allied with any group, cause, or religious denomination.”).

51 See supra note 44 (stating A.A.’s sixth tradition).

52 See TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 27 (“You can, if you wish, make A.A. itself your higher power.”).

53 See, e.g., Griffin v. Coughlin, 673 N.E.2d 98, 101-05 (N.Y. 1996) (holding that a prison requiring inmates to attend a rehabilitation program that incorporated A.A. and N.A. in order to receive various benefits constituted an excessive entanglement in religion); In re Garcia, 24 P.3d 1091, 1094 (Wash. Ct. App. 2001) (holding that A.A.’s religious content precludes the government from coercing an inmate to attend A.A. meetings). It is not clear whether courts adopting this view have technically designated A.A. as a religion, as opposed to simply a secular organization incorporating spiritual ideals into its suggestions for achieving sobriety. For example, in Warner v. Orange County Dep’t of Prob. the Second Circuit refers to A.A.’s “substantial religious component,” 115 F.3d 1068, 1070 (2d Cir. 1996), “religion-infused meetings,” id. at 1074, and “religious exercises,” id. at 1075. The court also referred to A.A. as a “religious program,” id., and describes A.A. meetings as “intensely religious events.” Id. Additionally, the Warner court distinguished between A.A. meetings and a public school offering a commencement prayer. Id. at 1076. A subsequent Second Circuit case interpreted Warner as having characterized A.A. as a religion. See DeStefano v. Emergency Hous. Group, 247 F.3d 397, 407 (2d Cir. 2001) (upholding the district court’s finding, which was based on Warner, that A.A. is “a religion for Establishment Clause purposes”) (internal quotations omitted). The Cox
Most cases holding that A.A. is a religious organization involve a prisoner or probationer bringing suit on the grounds that the government required him or her to attend A.A. meetings or meetings of other recovery programs adopting court shared this view. Cox v. Miller, 154 F. Supp. 2d. 787, 792 (S.D.N.Y. 2001) (“Our Court of Appeals has subsequently held in the context of an Establishment Clause case that A.A. is a religion . . . .”). This note accepts, for now, the Cox court’s interpretation, but utilizes the term “religious organization” when referring to A.A.

Presently, not all courts addressing the issue agree that A.A. is a religious organization. See, e.g., Boyd v. Coughlin, 914 F. Supp. 828, 833 (N.D.N.Y. 1996) (“The mere reference to spirituality, or the use of terms that may be commonly associated with religion, without more, cannot change the character of A.A. or N.A. . . . from that of aiming to treat chemically dependent individuals to that of advancing or inhibiting religion as a principal or primary purpose.”); Jones v. Smid, No. 4-89-CV-20857, 1993 WL 719562, at *4 (S.D. Iowa, Apr. 29, 1993) (holding that A.A.’s religious content does not transform it into a religious organization); Salaam v. Collins, 830 F. Supp. 853, 863 (D. Md. 1993) (classifying A.A. as a “secular self-help . . . organization[ ]”); Stafford v. Harrison, 766 F. Supp. 1014, 1016-17 (D. Kan. 1991) (holding that A.A.’s spiritual content and reference to a “Higher Power” are not sufficient to deem A.A. a religion; therefore, requiring an inmate to attend meetings of program based on A.A. did not violate the Establishment Clause); Youle v. Edgar, 526 N.E.2d 894, 899 (Ill. App. Ct. 1988) (dismissing an argument that A.A. is a “quasi-religious organization,” noting that “[t]he primary function of Alcoholics Anonymous is to cope with the disease of alcoholism”); State v. Boobar, 637 A.2d 1162, 1169-70 (Me. 1994) (holding that the religious privilege is inapplicable to A.A. communication).

In addition, some opinions raise the issue but fail to reach a definitive decision. See O’Connor v. State, 855 F. Supp. 303, 307-08 (C.D. Cal. 1994) (noting A.A.’s “religious overtones” but never making clear whether the court viewed A.A. as a religious organization for Establishment Clause purposes, emphasizing that the “principal and primary effect of encouraging participation in A.A. is not to advance religious belief but to treat substance abuse”) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

DeStefano represents the exception. 247 F.3d 397. This case was brought in the Second Circuit after Warner, which initially deemed A.A. a religious organization. See Warner, 115 F.3d 1068. The plaintiff in DeStefano, then mayor of Middletown, N.Y., sued as a taxpayer on the grounds that the state was funding a private alcoholic treatment facility that incorporated A.A. meetings into its program. DeStefano, 247 F.3d at 401.
principles similar or identical to the Twelve Steps. For example, in *Warner v. Orange County Department of Probation*, the Second Circuit held that a probationer could not be compelled to attend A.A. meetings against his will when he had no foreknowledge of A.A.’s “intensely religious events” and he had not waived his objection to attending the meetings. As support for its unilateral transformation of A.A. into a religious organization, the Second Circuit cited the various

The court upheld *Warner* but found that the state funding of a large, purely secular alcohol treatment program that merely incorporated A.A. as a part of the program did not, by itself, violate the Establishment Clause of the U.S. Constitution. *Id.* at 408-09.

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55 See Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (holding that N.A. is a religious organization). Although A.A. is not affiliated with any other organization, it cooperates with those wishing to adopt A.A.’s methods to combat addiction. See, e.g., supra note 44 (quoting A.A.’s sixth tradition); Information on Alcoholics Anonymous, form F-2 (Alcoholics Anonymous World Service, Inc. 1999). For example, Narcotics Anonymous (“N.A.”) has adapted A.A.’s Twelve Steps and Twelve Traditions to conform to its own mission. See The Toronto Area of Narcotics Anonymous, *Twelve Steps of Narcotics Anonymous*, at http://www.torontona.ca/12%20steps.htm (last visited Feb. 21, 2002); The Toronto Area of Narcotics Anonymous, *Twelve Traditions of Narcotics Anonymous*, at http://www.torontona.ca/12%20traditions.htm (last visited Feb. 21, 2002).

56 115 F.3d 1068.

57 *Id.* at 1075.

58 *Id.* at 1074.

59 The term “unilateral” serves a dual purpose. First, although the Second Circuit was not the first to hold that a twelve step program constituted a religious organization for Establishment Clause purposes, it was the highest federal court to apply that distinction specifically to A.A. The Seventh Circuit, in *Kerr v. Farrey*, had already determined that Narcotics Anonymous was a religious organization. 95 F.3d at 480. *Kerr* addressed an inmate’s claim that the state had violated his constitutional rights by coercing him to attend N.A. meetings. *Id.* at 473. The court found that the meetings centered on N.A.’s own version of the Twelve Steps, which, nearly identical to A.A.’s, included references to God. *Id.* at 474. The court stated that regardless of one’s interpretation of God, N.A. had incorporated into its program a “religious concept of a higher power.” *Id.* at 480. The state, therefore, could not coerce prisoners to attend N.A. meetings. *Id.* Second, the term “unilaterally” is used here to draw attention to the fact that the Second Circuit, while appearing to
references within the Twelve Steps to “God” or a “Higher Power,” as well as the Southern District of New York’s factual findings that the A.A. meetings at issue incorporated “Christian” prayers. The court did not indicate which factor was decisive—the references to God or the use of prayer. Consequently, it is not clear whether the court viewed the language of the Twelve Steps alone as sufficient for A.A. to qualify as a religious organization, or whether something more, such as the incorporation of prayer, is necessary.

Although the Second Circuit has not clarified the issue, were it to do so it would likely find that the Twelve Steps language alone is insufficient to deem A.A. a religious entity. The Warner court quoted passages from the Twelve Steps, but it is not clear that the court did anything more than selectively choose only

act on A.A.’s behalf by affording a special degree of constitutional protection, operated without any input by A.A, which has always adhered to the view that it is a secular organization. See supra note 50 (referring to the various statements A.A. has made regarding its secular nature).

Warner, 115 F.3d at 1070. The court noted that A.A.’s second, third, fifth, sixth, seventh, and eleventh steps contain either or both references. Id.; see also supra note 41 (listing the Twelve Steps).

Warner, 115 F.3d at 1070; see also Warner v. Orange County Dep’t of Prob., 870 F. Supp. 69, 71 (S.D.N.Y. 1994) (describing the “Lord’s Prayer” as being “specifically Christian”). The meetings Warner attended began with the “Serenity Prayer,” which the district court determined was “non-denominational.” Id. It states, “Lord, grant me the serenity to accept the things that I cannot change, the courage to change the things I can, and the wisdom to know the difference.” Id. Additionally, the district court found that the meetings ended with the “Lord’s Prayer.” Id. The King James version of the Bible translates the Lord’s Prayer:

Our Father which art in heaven, Hallowed be thy name.
Thy kingdom come, Thy will be done in earth, as it is in heaven.
Give us this day our daily bread.
And forgive us our debts, as we forgive our debtors.
And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen.


Warner, 115 F.3d at 1070.

Id.
those passages supporting its view that A.A. is a religious organization.\textsuperscript{64} If this is true, the case sets an unnerving precedent. While judicial interpretation of an organization’s doctrine might be necessary to draw legal conclusions, the judiciary should in so doing ensure that the process is a diligent effort to uncover the truth.\textsuperscript{65} Applying standards similar to canons of statutory interpretation, a court should necessarily extend its investigation beyond the ambiguous verbiage of the Twelve Steps in order to give effect to A.A.’s intent.\textsuperscript{66} Consequently, the court would find that A.A. considers it appropriate to look to the organization itself as one’s “Higher Power.”\textsuperscript{67} Thus, within the A.A. framework, the terms “Higher Power” and “God” assume entirely generic characteristics.\textsuperscript{68} Mere reference to a Higher

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  \item[\textsuperscript{64}] \textit{Id}.
  \item[\textsuperscript{65}] \textit{See} Nix v. Whiteside, 475 U.S. 157, 174 (1986) (describing the U.S. “system of justice” as “dedicated to a search for truth”); \textit{see also} United States v. Roberson, 859 F.2d 1376, 1378 (9th Cir. 1988) (stating that federal courts “construe evidentiary privileges narrowly” because they “obstruct the search for truth”); \textit{In re} Cueto, 554 F.2d 14, 15 (2d Cir. 1977) (“[T]he public has a right to every person’s evidence. There are a small number of constitutional, common-law and statutory exceptions to that general rule, but they have been neither ‘lightly created nor expansively construed, for they are in derogation of the search for truth.’”) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).
  \item[\textsuperscript{66}] \textit{See}, e.g., New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 662 (1875) (“Statutes must be interpreted according to the intent and meaning of the legislature.”).
  \item[\textsuperscript{67}] \textit{Twelve Steps and Twelve Traditions, supra} note 32, at 27.
  \item[\textsuperscript{68}] \textit{See} \textit{American Heritage Dictionary} 756 (3d ed. 1996) (defining “generic” as “relating to or descriptive of an entire group or class; general”). In this context, since one following the Twelve Steps can view either one’s interpretation of God or the A.A. group itself as one’s higher power, then in the A.A. framework, the A.A. group would be analogous to God. In religious terms, it would be difficult, if not impossible, to draw an acceptable comparison between the A.A. group and a divine entity. Since both can be considered as one’s higher power, however, it would seem that to the recovering alcoholic following A.A.’s guidelines, either God or the A.A. group would serve generally as a source, beyond the individual, to which one looks for strength and guidance. \textit{See} Richard D. Land & Michael K. Whitehead, \textit{Do Students Have a Prayer After Lee v. Weisman, 6 U. Fla. J.L.}
Power or God within the Twelve Steps, without more, is hardly sufficient to label A.A. a religious organization, lest the Twelve Steps become to the twenty-first century what the “neck verse” was to the seventeenth.69

69 The term “neck verse” refers to the test once utilized in England to determine whether a criminally accused person was a member of the clergy and, thus, deserving of the “benefit of clergy,” which precluded administration of the death penalty. HAROLD POTTER, POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 362-63 (A.K.R. Kiralfy ed., 1958). Until the early eighteenth century, benefit of clergy was conferred upon only those who could read, the presumption being that clergy were the only literate members of society. See Sir Frank Kermode, Justice and Mercy in Shakespeare, 33 HOUS. L. REV. 1155, 1163 (1996). To establish literacy, the court required an accused to read or recite a particular biblical verse. POTTER, supra, at 362. As the literacy rate increased, however, and knowledge of the verse became widespread, the neck verse became unreliable, eventually serving to aid even those who were prohibited by law from becoming ordained. Id.

Had the Warner court determined that the mere presence of words evoking the concept of “God” within the credo or doctrine of an organization was, by itself, enough to label that organization religious, the Establishment Clause would take on new meaning. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984) (O’Connor, J., concurring) (referring to the United States’ adoption of “ ‘In God We Trust’ on coins, and opening court sessions with ‘God save the United States and this honorable court’ ” as “government acknowledgements of religion,” as opposed to endorsement of religion). In Lynch, the Court held that a city’s inclusion of a Nativity scene within its Christmas display did not constitute government endorsement or advancement of religion and, thus, violate the Establishment Clause when the purpose and the overall effect of the display were secular. Id. at 681-83. The Court noted that the display, aside from the Nativity scene, also included “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads ‘Seasons Greetings’ . . . .” Id. at 671. The court went on to say the following:

It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this
As the Second Circuit stated in *Warner*, however, something more was present at the meetings the plaintiff attended—Christian prayers. This appears to have tipped the scales in favor of recognizing A.A. as a religious organization. But, the *Warner* court would be compelled to view the religious references within A.A.’s Twelve Steps in relation to their “setting,” as the Supreme Court did in *County of Allegheny*, before determining that A.A. is a religious organization. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

*Id.* at 686. Later holding that a county and city’s display depicting the Nativity violated the Establishment Clause, the Court, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, interpreted *Lynch* to require an evaluation of the setting of the religious symbol. 492 U.S. 573, 598 (1989). The display at issue in *County of Allegheny* contained only the Nativity scene encased in a “floral frame.” *Id.* at 599. It follows that the *Warner* court would be compelled to view the religious references within A.A.’s Twelve Steps in relation to their “setting,” as the Supreme Court did in *County of Allegheny*, before determining that A.A. is a religious organization. *Id.* Otherwise, any organized group could conceivably incorporate the concept of God, even superficially, within its bylaws or motto, and enjoy the constitutional status of a religious organization. Such a course would render the Establishment Clause as meaningless as the neck verse, which was abolished in 1707. See Potter, *supra*, at 363.

*Warner*, 115 F.3d at 1075.

*Id.* Looking beyond the Twelve Steps, the *Warner* court stated the following:

The A.A. program to which Warner was exposed had a substantial religious component. Participants were told to pray to God for help in overcoming their affliction. Meetings opened and closed with group prayer. The trial judge reasonably found that it “placed a heavy emphasis on spirituality and prayer, in both conception and in practice.” We have no doubt that the meetings Warner attended were intensely religious events.

*Id.* (emphasis added). In a footnote following the above passage, the *Warner* court noted that the district court had focused much of its attention on the prayers at the A.A. meetings in question. *Id.* n.6.
court disregarded the fact that each of the 100,766 A.A. groups currently operating worldwide is entirely autonomous,72 needs only two people to exist73 and completely controls the content and format of its meetings.74 Thus, the Second Circuit’s determination that, as a matter of law, A.A. in its entirety is a religious organization sweeps aside one of the crucial support structures enabling A.A. to exist and succeed—its antidogmatism.75 Despite the label affixed by the Second Circuit, A.A. continues to hold itself out as a loosely organized secular society comprised of groups of alcoholics gathered for the sole purpose of removing alcohol from their lives.76

72 See supra note 44 (quoting A.A.’s fourth and seventh traditions).

73 See TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 146-47. A.A.’s sponsorship method and tradition four suggest that at least two people are necessary to form a “group.” See id. There are, however, “lone” members who maintain contact with the General Service Office in New York. This Is A.A., supra note 50, at 19. Furthermore, A.A.’s explanation of tradition three states that a person is a member of A.A. if she “says so.” TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 139. The desire to stop drinking is the only requirement. Id.

74 TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 146 (“[E]very A.A. group can manage its affairs exactly as it pleases.”).

75 A complete analysis of the Warner decision is beyond the scope of this note. While the author does not entirely agree with the Second Circuit’s decision, he does accept the decision’s precedential value in recognizing A.A. as a religious organization.


Alcoholics Anonymous is a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from alcoholism.

The only requirement for membership is a desire to stop drinking. There are no dues or fees for A.A. membership; we are self-supporting through our own contributions. A.A. is not allied with any sect, denomination, politics, organization or institution; does not wish to engage in any controversy; neither endorses nor opposes any causes. Our primary purpose is to stay sober and help other alcoholics achieve sobriety.
C. The Sheep Follows the Shepherd Down the Slippery Slope

By extending New York’s religious privilege to protect communications within A.A., the Southern District of New York offers a glimpse of the potentially far-reaching problems that will inevitably arise from the Second Circuit’s Warner decision. On December 6, 1994, Paul Cox was convicted of a double homicide he had committed six years before in Westchester County, N.Y. In 1988, Mr. Cox, after an evening of heavy drinking, entered his former childhood residence and repeatedly stabbed Shanta Chervu and her husband Lakshman Rao Chervu with one of their own kitchen knives. A palm print and a fingerprint were the only pieces of physical evidence left at the scene of the crime. Despite committing the acts in what he later claimed was the midst of an alcoholic blackout, Mr. Cox had the wherewithal to dispose of the weapon and his bloody clothes upon returning home, where he lived with his parents. The crime remained unsolved for several years.

In 1990, Mr. Cox began attending A.A. meetings. During the course of his recovery, Mr. Cox revealed to “at least eight fellow A.A. members” his belief that he had killed the Chervus. He later claimed that his blackout on the night of the murders prevented him from knowing for a fact that he was the killer.

Alcoholics Anonymous can also be defined as an informal society of more than 2,000,000 recovered alcoholics in the United States, Canada, and other countries.

Id.

77 Cox v. Miller, 154 F. Supp. 2d 787, 792 (S.D.N.Y. 2001); Warner v. Orange County Dep’t of Prob., 115 F.3d 1068 (2d Cir. 1996).
78 Cox v. Miller, 154 F. Supp. 2d at 788.
79 Id.
80 Id. at 789.
81 Id.
82 Id.
83 Id.
84 Id. at 789-90.
85 Id.
Still, he made no effort to dispel the uncertainty. Among those in whom Mr. Cox confided his secret was Ms. H, who lived with Mr. Cox and attended A.A. meetings with him. After Mr. Cox told Ms. H of his questionable past, Ms. H divulged this information to her psychologist, who then advised her to seek the advice of counsel. On the advice of her attorney, Ms. H then told the district attorney what she knew. The law enforcement authorities questioned the other A.A. members and, based on the information gained, established the probable cause necessary to arrest Mr. Cox. Mr. Cox was charged with and convicted of

96 Id.
97 See id. at 790 (noting that the prosecutor and the trial court maintained the anonymity of the testifying A.A. members by identifying them by the first letter of their last name).
98 Id.
99 Id.
100 Id.

Although this note focuses on the Cox court’s determination that communication within A.A. is privileged, the Cox opinion is troubling for other reasons. Ultimately, the court granted Mr. Cox habeas corpus based on its finding that Mr. Cox’s fingerprints, procured solely as a result of probable cause established by the compelled statements of his fellow A.A. members, were, thus, wrongfully obtained. Cox, 154 F. Supp. 2d at 792, 793. Because the fingerprint and palm print Mr. Cox left behind were the only pieces of physical evidence linking him to the crime, the court determined that without that evidence law enforcement would have been unable to establish the probable cause necessary to arrest Mr. Cox in the first place. Id. Consequently, the court held that the evidence should have “been suppressed as ‘fruit of the poison tree.’” Id. (quoting, without attribution, Nardone v. United States, 308 U.S. 338, 341 (1939)).

Justice Frankfurter, in Nardone, first coined the poetic metaphor to which the Cox court referred. Nardone, 308 U.S. at 341. Since then, the term has been used to illustrate the principle that information gathered from evidence wrongfully obtained is tainted and, thus, inadmissible. See, e.g., Florida v. White, 526 U.S. 559, 565-66 (1999) (holding that a warrantless search did not violate the criminal defendant’s Fourth Amendment rights and, thus, the evidence obtained therefrom was not tainted); Harrison v. United States, 392 U.S. 219, 222 (1968) (holding that a criminal defendant’s testimony was tainted, and thus inadmissible, when “impelled” by the desire to overcome the effects of illegally obtained confessions); People v. Powers, 732 N.Y.S.2d 779, 780 (N.Y. App. Div. 2001) (holding that “oral admission” offered by a
manslaughter in the first degree and sentenced to a maximum of fifty years in prison. The Appellate Division of the New York Supreme Court affirmed the conviction, and the Court of Appeals of New York denied Mr. Cox leave to appeal. Mr. Cox then petitioned the U.S. District Court for the Southern District of New York for a writ of habeas corpus on the grounds that, inter alia, law enforcement authorities had no probable cause to arrest him absent the A.A. members’ testimony, use of which Mr. Cox claimed violated his constitutional rights under the First and Fourteenth Amendments. Specifically, Mr. Cox criminal defendant after police searched his apartment pursuant to a warrant that was later found invalid was admissible. This principle was, perhaps, first elucidated by Justice Holmes, who wrote, “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.” Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (emphasis added). Regarding an exception to the rule, Justice Holmes continued, “[T]his does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government’s own wrong cannot be used by it in the way proposed.” Id. Whether the “fruit of the poison tree” principle applies to privileged communication, however, is unclear. At least one court has observed that “no court has ever applied this theory to any evidentiary privilege.” United States v. Marashi, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (refusing to address a claim that evidence allegedly procured as the result of violations of the spousal privilege should be suppressed); see also United States v. Squillacote, 221 F.3d 542, 560 (4th Cir. 2000) (discussing and quoting Marashi with approval). For support, the Marashi court looked to United States v. Lefkowitz, which stated in a footnote that information obtained indirectly from privileged communication, when the privilege was not constitutionally grounded, such as the marital privilege, would not be considered tainted. Marashi, 913 F.2d at 731 n.11. See Lefkowitz, 618 F.2d 1313, 1319 n.8 (9th Cir. 1980). The Cox court’s summary disposition of the matter, therefore, was disingenuous, and the issue, though beyond the scope of this note, is ripe for the picking.

92 Cox, 154 F. Supp. 2d at 788; see also N.Y. PENAL LAW § 125.20 (Consol. 2002) (defining and proscribing first degree manslaughter).
94 People v. Cox, 728 N.E.2d 985 (N.Y. 2000).
95 See U.S. CONST. amend. I; U.S. CONST. amend. XIV. The First
argued that communication with A.A. members was confidential and protected by New York’s religious privilege. Based on the Second Circuit’s holding that A.A. is a religious organization, the district court concluded that the Establishment Clause could not sustain applying the religious privilege to other established religions and not A.A., a judicially established religion. Consequently, the court granted Mr. Cox his writ, though it withheld issuance until the Second Circuit could review the district court’s decision. Presently, the judicially established church of A.A. still stands, and the Cox opinion will surely serve as a measuring stick to see how far the Second Circuit will allow the Warner opinion to slide down the slippery slope.

II. Why Law and Policy Must Remove the Gag from A.A.

The Cox decision is the first in the nation to apply the Amendment of the U.S. Constitution, ratified in 1791, reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The Fourteenth Amendment, ratified in 1868, reads, in pertinent part, as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

96 Cox, 154 F. Supp. 2d at 790.
97 Warner v. Orange County Dep’t of Prob., 115 F.3d 1068 (2d Cir. 1996).
98 Cox, 154 F. Supp. 2d at 792 (“There is no principled basis for a court to hold that A.A. is a religion for Establishment Clause purposes, and yet that disclosure of wrongs to a fellow member as ordained by the Twelve Steps does not qualify for purposes of a privilege granted to other religions similarly situated.”).
99 Id. at 793.
100 Warner, 115 F.3d 1068.
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religious privilege to communication within A.A. 101 Given that numerous organizations have adopted A.A.’s Twelve Steps, 102 it is likely that they will be recognized as religious organizations as well. 103 Consequently, if the Cox opinion is accepted, the religious privilege would also apply to these groups. This must not happen. The Cox decision is based on faulty factual analysis and legal reasoning, and public policy demands that the religious privilege not be extended to communications between A.A. members. 104

101 Cox, 154 F. Supp. 2d 787.
103 See, e.g., Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (holding that N.A. is a religious organization).
104 See infra Part II.B (discussing the policy implications of the Cox decision).
A. Dismantling Cox

The district court’s decision in Cox is flawed for a number of reasons. It not only mischaracterizes A.A.’s structure and methods, but it also completely overlooks a Supreme Court limitation on the judiciary’s ability to develop evidentiary privileges, thus ignoring the obvious boundaries of the religious privilege.105 Similarly, although the court quotes the New York statute granting the religious privilege,106 it then misinterprets a New York decision in order to circumvent the explicit legislative requirements.107 As a result, the Cox court establishes a precedent with no legal, logical or social support whatsoever.

1. Misunderstanding A.A.

The Cox opinion makes several statements describing A.A. in a way that could only have resulted from misunderstanding the organization and the principles that have ensured its survival and notable success.108 Although it is questionable whether and how far courts should delve into a particular organization’s doctrine, the Second Circuit’s opinion in Warner established precedent for doing so, at least with respect to determining whether an organization is, in fact, religious.109 The Cox court followed the Second Circuit’s example, even to the extent of not fully analyzing A.A.’s doctrine before arriving at its unfortunate conclusion.110

105 See infra Part II.A.3 (discussing the restraints on the federal judiciary in developing evidentiary privileges).

106 Cox, 154 F. Supp. 2d at 790; see also N.Y. C.P.L.R. 4505 (McKinney 2001). The New York statute requires a communication to be of a confessional or confidential nature revealed to a member of the clergy who is acting in her professional capacity as a spiritual advisor. Id.


108 See supra note 25 (noting A.A.’s size in terms of members).

109 Warner v. Orange County Dep’t of Prob., 115 F.3d 1068, 1070 (2d Cir. 1996) (discussing the references to “God” in the Twelve Steps).

110 See Cox, 154 F. Supp. 2d at 789.
Beginning with the statement “initially A.A. was a self-help group which did not consider or represent itself as an established religion, but helped many Alcoholics, who continued to belong to and worship with their own churches or other religious groups while belonging to A.A.,” the Cox court reveals all too quickly the inadequacy of its inquiry. The quoted sentence implies two false facts: (1) A.A. now considers itself to represent a religion, and (2) A.A. members are necessarily religious and affiliated with a church. These are boldly inaccurate assumptions. While some courts may have intervened to dub A.A. a religious organization, A.A. has always held itself out as secular and has never endorsed any religion. Furthermore, the members of A.A. do not necessarily belong to a religious organization, as A.A. welcomes anyone seeking sobriety regardless of his or her theological beliefs. Thus, the district court’s initial

The Twelve Steps must be accomplished one by one, beginning with the first step. A new member will be sponsored and assisted by one or more existing members of the organization. Members interact on a first name basis only. The entire relationship is both anonymous and confidential. Members are forbidden from telling outside statements made at a meeting. The eighth step requires the new member to have “made a list of all persons we had harmed and became willing to make amends to them all.” Step five, preliminary to step eight, required that the new member have “admitted to God, to ourselves, and to another human being the exact nature of our wrongs.”

Id. (quoting the Twelve Steps) (alterations in original). It is interesting to note that, while the district court treated A.A.’s Twelve Steps as though they were binding on the members and enforced by the organization, the fact that Mr. Cox revealed his secret to no fewer than eight fellow A.A. members, as opposed to simply “another human being,” as the court emphasized, seems not to have caused the court any hesitation. Cox, 154 F. Supp. 2d at 789-90.

111 Id. at 789 (emphasis added).
112 See supra note 53 (discussing cases that have found A.A. to be a religious organization).
113 ALCOHOLICS ANONYMOUS, supra note 36, at xx; 44 Questions, supra note 50, at 19; This Is AA, supra note 50, at 7.
114 See TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 139; see also supra Part I.B (discussing the gradual judicial perception of A.A. as a religious organization despite A.A.’s contrary position and its provision of interpretive guidance for atheist members).
characterization is clearly incorrect.

Having set the pace, the Cox court stays on a misguided course throughout its opinion, stating that A.A. members are “forbidden” from revealing statements made at the meetings,\(^\text{115}\) that A.A. “impos[ed]” its discipline on Mr. Cox,\(^\text{116}\) and that the organization requires the Twelve Steps to be followed in a particular manner.\(^\text{117}\) Although anonymity might be a driving force behind A.A.’s success, as with the other traditions, the extent to which A.A. members maintain anonymity is entirely self-determined.\(^\text{118}\) A.A. makes no demands; therefore, it cannot forbid its members from discussing the meetings or the information conveyed therein.\(^\text{119}\) Similarly, A.A. lacks the desire and the authority to impose itself on anyone.\(^\text{120}\) Nor does A.A. attempt to dictate to members how they must work through the Twelve Steps.\(^\text{121}\) Rather, A.A. expressly states that individuals

\(^{115}\) Cox, 154 F. Supp. 2d at 789.

\(^{116}\) Id.

\(^{117}\) Id. (“The Twelve Steps must be accomplished one by one.”).

\(^{118}\) See Twelve Steps and Twelve Traditions, supra note 32, at 184.

The anonymous nature of A.A. was initially meant to protect alcoholics who, for various reasons, wanted to conceal their association with the group. \(^{119}\) Id. Hence, A.A. members refer to one another by only their first name and last initial. Understanding Anonymity, pamphlet P-47, at 10 (Alcoholics Anonymous World Services, Inc., 1981). For example, A.A. literature refers to one of its cofounders, Mr. Wilson, as Bill W. \(^{120}\) See, e.g., id. at 7. Mr. Wilson and Dr. Smith were aware of the consequences being labeled an alcoholic could have on businesspeople, professionals, and those desiring to maintain a particular social status. \(^{119}\) Id. at 5. In the 1930s and 40s, when A.A. was a fledgling organization and the disease of alcoholism was not well understood, people were wary of the social stigma of being associated with an organization for recovering alcoholics. \(^{121}\) Id. at 5-7. Although much more is now known, A.A.’s principle of anonymity is still important in light of the social stigma that persists today. \(^{119}\) Id.; see also supra note 44 (quoting A.A.’s twelfth tradition).

\(^{119}\) Twelve Steps and Twelve Traditions, supra note 32, at 129 (“No A.A. [sic] can compel another to do anything; nobody can be punished or expelled.”).

\(^{120}\) Id.

\(^{121}\) See 44 Questions, supra note 50, at 16 (“The absence of rules, regulations, or musts is one of the unique features of A.A. as a local group
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should accomplish the steps in whatever manner they feel comfortable. 122 A.A.’s Twelve Steps and Twelve Traditions are merely suggestions for those seeking sobriety. 123 A member has no obligation to A.A., legal or otherwise, other than those she may create for herself. 124 Consequently, the A.A. member is—or was, before Cox—free to tell the world everything that happened at the meetings. 125 Although the member who does this may not feel welcome at future meetings with the same group, any effort to exclude her would violate many, if not all, of A.A.’s principles. 126

and as a worldwide fellowship.”).

122 Id.

123 See TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 129. Although theoretically true, A.A.’s explanation of tradition one states that A.A. members will eventually come to realize on their own that the steps are necessary for the alcoholic’s survival. Id. at 130-31.

124 Id. at 129.

125 Id. The Cox opinion strips A.A. members of their ability to participate in the criminal justice system by reporting known criminal activity as is expected of responsible citizens. See infra Part II.B (discussing the policy implications of the Cox decision). The psychological effects of this judicial segregation could cost recovering alcoholics their sobriety. See, e.g., Kathleen T. Brady & Susan C. Sonne, The Role of Stress in Alcohol Use, Alcoholism Treatment, and Relapse, 23 ALCOHOL RES. & HEALTH, No. 4, 263-71 (1999) (noting a relation between the physiological effects of stress, social factors and alcohol relapse); James R. McKay, Studies of Factors in Relapse to Alcohol, Drug and Nicotine Use: A Critical Review of Methodologies and Findings, 60 J. OF STUD. ON ALCOHOL, No. 4, at 566 (1999) (stating that the various methodologies all conclude that, inter alia, interpersonal and emotional issues contribute to relapse).

126 See generally TWELVE STEPS AND TWELVE TRADITIONS, supra note 32. One of the underlying principles of A.A. is the acceptance of flawed individuals. Id. at 139. A.A. explains tradition three:

A.A. is really saying to every serious drinker, “You are an A.A. member if you say so. You can declare yourself in; nobody can keep you out. No matter who you are, no matter how low you’ve gone, no matter how grave your emotional complications—even your crimes—we still can’t deny you A.A.”

Id. Thus, A.A. serves as a den of equality, where persons admittedly at the lowest point in their lives can seek the support of others without fear of being judged. Id. Breaching an obligation some members may view as sacred
2. Cox Misinterprets the New York Court of Appeals

Beyond mischaracterizing A.A., the Cox opinion overstates the applicability of the New York decision in *People v. Carmona*. In *Carmona*, the New York Court of Appeals discussed the applicability of the religious privilege to communications between the defendant, who was a confessed killer, and two ministers. Without making reference to the religion practiced by the ministers who had spoken to the defendant, the *Carmona* court discussed the evolution of the religious privilege, stressing its modern-day application to communications taking place beyond the realm of the Catholic confessional. The *Carmona* court stated that the privilege applies to confidential communication with ministers of all religions, and that the only test for determining whether the communication is privileged is “whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.”

The status of the ministers in *Carmona*, however, was never in question; therefore, the issue was neither discussed nor dismissed as unnecessary.

In contrast, the chief issue before the Cox court was whether A.A. members are “professional . . . spiritual advisor[s]” as required by New York’s religious privilege. The district court in *Cox* quoted verbatim much of the *Carmona* court’s discussion, arguably would only serve as a symptom of a member’s illness. *Id.* at 141. “[E]xperience taught us that to take away any alcoholic’s full chance was sometimes to pronounce his death sentence, and often to condemn him to endless misery. Who dared to be judge, jury, and executioner of his own sick brother?” *Id.*

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128 *Id*.
129 *Id.* at 961.
130 *Id.* at 962.
132 *Id.* The lack of treatment afforded the issue, however, suggests otherwise. See infra II.A.4 (discussing the Cox court’s conversion of A.A. in order to apply the religious privilege).
relying heavily on the usurped text and little else. In doing so, the Cox opinion ultimately afforded too much weight to a largely inapposite case.

133 See Cox v. Miller, 154 F. Supp. 2d at 791 (S.D.N.Y. 2001). The Cox court quoted the following passage from Carmona:

Although often referred to as a “priest-penitent” privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants. Nor is it confined to “penitential admission[s] . . . of a perceived transgression” or “avowals made ‘under the cloak of the confessional.’” On the contrary, in enacting CPLR 4505, the Legislature intended to recognize “the urgent need of the people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance” without regard to the religion’s specific beliefs or practices. While the privilege may have “ha[d] its origins in the Roman Catholic sacrament of Penance, in which a person privately confesses his or her sins to a priest [and t]he priest is enjoined by Church law . . . to maintain the confidentiality of the confession,” the New York statute is intentionally aimed at all religious ministers who perform “significant spiritual counseling which may involve disclosure of sensitive matters.” Indeed, the drafters of the current codification struck the concluding phrase from the predecessor provision, which made the privilege applicable to communications made “in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs” because the phrase was ambiguous and rendered it “doubtful whether the rule applies to any confessions other than those to a Catholic priest.” Accordingly, what is more appropriately dubbed the “cleric-congregant” privilege is applicable to ministers of all religions, most of which have no ritual analogous to that of the Catholic confession. Despite the concurrence’s “four canon” analysis, New York’s test for the privilege’s applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.

Id. (internal citations omitted) (emphasis added).

134 See generally Carmona, 627 N.E.2d 959. More recent New York cases demonstrate that Carmona did not eliminate the requirement that the communication be made to a member of the clergy as the Cox court implies. See, e.g., Lightman v. Flaum, 761 N.E.2d 1027, 1031 (N.Y. 2001) (noting that New York’s religious privilege “applies to confidential communications made by congregants to clerics of all religions”) (citing Carmona, 627 N.E.2d 959).
3. Testimonial Privileges Should Be Strictly Constrained

The Cox opinion disregards the limitations the Supreme Court has placed on the federal judiciary’s ability to develop evidentiary privileges. In Trammel v. United States, the Supreme Court

\[135\] See generally Cox, 154 F. Supp. 2d 787. The Cox opinion quotes N.Y. C.P.L.R. 4505 and discusses one New York case addressing the statute. Id. at 790-91. The district court, however, made no reference to Federal Rule of Evidence 501, which provides the federal judiciary the ability to create and develop evidentiary rules “except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court.” Fed. R. Evid. 501. Nor did the court address Federal Rule of Evidence 1101(c), which states, “The rule with respect to privileges applies at all stages of actions, cases, and proceedings.” Fed. R. Evid. 1101(c); see also Fed. R. Evid. 1101(c) advisory committee’s note (stating that “singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules”). The conclusion that the Cox court should have incorporated federal law into its opinion is further supported by Duckworth v. Owen, II, a case in which the Supreme Court denied certiorari to a state prisoner convicted of state crimes who claimed that the Seventh Circuit, in an unpublished opinion, erred in holding that the Federal Rules of Evidence, and not a particular state’s (in that case, Indiana’s) evidentiary rules, apply in a federal habeas decision. 452 U.S. 951, 951 (1981). Although the Supreme Court’s denial contains no textual material, the dissenting opinion is enlightening. See id. at 951 (Rehnquist, J., dissenting). Noting that whether the federal rules of evidence applied in this case was the only question presented, the dissent states, “No one would disagree with the conclusion of the Court of Appeals that Indiana rules of evidence do not apply in a federal habeas proceeding.” Id. at 953 (emphasis added); see also Procolla v. Beto, 319 F. Supp. 662, 670 (S.D. Tex. 1970) (noting, in a case involving a state prisoner convicted of state crimes, that federal evidentiary rules govern federal habeas corpus hearings”). In a case with issues similar to Cox, Edney v. Smith, Judge Jack Weinstein reviewed a state prisoner’s petition for habeas corpus grounded on a claim that the trial court violated his Sixth Amendment rights by allowing his psychiatrist to testify against him. 425 F. Supp. 1038 (E.D.N.Y. 1976). The petitioner argued that the court violated the state physician-patient privilege, which he claimed was of a constitutional nature. Id. at 1039. Noting that the privilege did not exist at common law but that most states had adopted the privilege, Judge Weinstein looked to federal law regarding the physician-patient privilege to determine whether the petitioner’s claim had merit. Id. at 1039-45.
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curtained the right of a husband to prevent his wife from voluntarily testifying against him by claiming spousal privilege.137 In so doing, the Court described the restraint courts should exercise in the development of evidentiary privileges:

Testimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man’s evidence. As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally

Not only did the Cox court fail to address the applicable federal statutory guidelines, the court also failed to address the primary Supreme Court decision that limits judicial involvement in the creation or expansion of evidentiary privileges. See Trammel v. United States, 445 U.S. 40, 50 (1980) (admonishing federal courts to narrowly construe evidentiary privileges). Furthermore, the Cox court made no indication whatsoever as to the standard of review the court was applying. See generally Cox, 154 F. Supp. 2d 787.

137 Prior to 1980, Hawkins v. United States was the controlling case with respect to the federally established spousal privilege. Trammel, 445 U.S. at 41, 42 (calling for a re-examination of Hawkins); see also Hawkins, 358 U.S. 74 (1958). In Hawkins, the Court acknowledged the longstanding common-law rule that husbands and wives were incompetent to testify either for or against one another. Id. at 74, 75. The Court then pointed out that Funk v. United States had altered the common law rule somewhat by allowing spouses to testify for each other. Hawkins, 358 U.S. at 76; see also Funk, 290 U.S. 371 (1933). The Hawkins Court stated, however, that Funk did not alter the rule that spouses could not testify against one another. Hawkins, 358 U.S. at 76. Upholding this rule and refusing to distinguish between compelled and voluntary testimony, the Court held that in the interest of protecting the sanctity of marriage, one spouse would not be permitted to testify even voluntarily against the other. Id. Despite government arguments that a marriage involving a spouse willing to testify against the other was already doomed, the Court refused to allow government action to catalyze divorce and stated that “adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.” Id. at 78. Noting both the state legislative trend of altering the spousal privilege to allow spouses to voluntarily testify against one another and the accepted state practice of offering a spouse immunity from prosecution for testifying against the other spouse, the Trammel Court modified Hawkins to allow spouses to voluntarily testify against one another. Trammel, 445 U.S. at 53.
predominant principle of utilizing all rational means for ascertaining the truth.\textsuperscript{138}

Not only did the Cox opinion fail to address the Trammel decision, the district court also ignored the principle adopted therein by the Supreme Court. Had the district court made any effort to “strictly construe[]” New York’s religious privilege as Trammel requires,\textsuperscript{139} it could not have determined that the members of A.A. qualify as clergy. Even ignoring other jurisdictions’ applications of the privilege, which might also have persuaded the court to alter its course, it would be difficult to argue that the New York legislature would consider A.A. members clergy when it expressly requires Christian Science practitioners to be “duly accredited” for the privilege to apply.\textsuperscript{140} Rather than follow legislative limitations and realism to their logical ends, however, the district took it upon itself to ordain more than a million unsuspecting A.A. members.\textsuperscript{141}

4. Forcing a Square Peg into a Round Hole

The Cox court applied Carmona in an effort to circumvent the statutory requirement that the person with whom the communication is made be a “clergyman, or other minister of any religion or duly accredited Christian Science practitioner.”\textsuperscript{142} This requirement, however, is not completely ignored. The district court satisfied itself by finding, without explanation, that members of A.A. are “ordained by the Twelve Steps” and that “all members exercise the office of clergyman.”\textsuperscript{143} Thus, the court found that the Establishment Clause, which at a minimum

\textsuperscript{138} Id. at 50.

\textsuperscript{139} Id. Trammel requires federal courts to consider whether expanding the particular privilege would serve a “public good transcending the normally predominant principle” of discovering the truth. Id. This note concludes that expanding the religious privilege to speech within A.A. causes more public harm than good.

\textsuperscript{140} N.Y. C.P.L.R. 4505 (McKinney 2001).

\textsuperscript{141} See supra note 25 (noting A.A.’s size in terms of members).

\textsuperscript{142} N.Y. C.P.L.R. 4505 (McKinney 2001).

\textsuperscript{143} Cox v. Miller, 154 F. Supp. 2d 787, 792 (S.D.N.Y. 2001).
prohibits the government from preferring one religion over another, requires the religious privilege to apply to A.A. just as it applies to the “traditionally recognized forms” of religion.  

The *Cox* court characterizes A.A. members as clergy in order to apply the religious privilege, yet fails to clearly elucidate its rationale for doing so. Like a parent arguing with a child, the court supports its position with an unarticulated, “because I said so.” Any effort to explain further would have revealed the court’s unjustifiable reasoning. The court proceeds as follows: (1) assuming a communication occurs with the requisite reasonable expectation of confidentiality, the religious privilege protects communication with a Catholic priest acting in his professional capacity; (2) the government cannot show a preference for Catholicism, a “traditional” form of religion, over A.A., an organization newly designated as religious; therefore, (3) the religious privilege must apply to A.A.

Viewed separately, each point lacks controversy. The first, however, that the privilege applies to a priest acting in his
professional capacity, does not lead logically to the second, that the privilege applies to a particular religion. Rather, the first point demonstrates that the privilege applies to communication with a particular individual who is recognized by a religious institution as one qualified to offer spiritual advice. In other words, the fact that the privilege would apply to qualified communication with a priest demonstrates the religious privilege’s individual applicability. Communication with a Catholic priest is protected, as is communication with a cleric within the Protestant, Jewish, and Muslim religions. To then conclude the privilege applies to Catholicism, Protestantism, Judaism and Islam and, therefore, must apply to A.A. without reference to anyone recognized by A.A. as a spiritual advisor converts the privilege from a principle applying individually to one having an organizational application. If this were true, the privilege would expand uncontrollably, applying not only to the priest, but also to the church secretary or perhaps even to communication between two parishioners. This not only defeats the limiting principle adopted by the Supreme Court in Trammel, but it also diminishes the authority of the fifty state legislatures, each of which have adopted a definition of clergy that requires more than a mere desire to lend a sympathetic ear.

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149 All of the statutory religious privileges apply to persons within religions, not religions categorically. See supra note 3 (citing state statutes conferring the religious privilege).

150 See supra note 1 (discussing legislative attempts to enumerate the leaders of religions to whom the religious privilege would apply).

151 See, e.g., CAL. EVID. CODE § 1033 (Deering 2001) (defining clergy as “a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization”); CONN. GEN. STAT. § 52-146b (2001) (limiting Connecticut’s privilege to confidential communication with “a clergymen, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry”); OR. REV. STAT. § 40.260 (2001) (defining a clergy member as “a minister of any church, religious denomination or organization or accredited Christian Science practitioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church,
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Judicial interpretations of the religious privilege also support the notion that more is needed for a person to qualify as clergy. Although they have been unwilling to identify any specific requirements, courts should limit the application of the religious denomination or organization, has a duty to keep such communications secret”).

152 In In re Verplank, a California district court found that communication between college students and counselors qualified for the religious privilege. 329 F. Supp. 433, 436 (C.D. Calif. 1971). A minister ordained by the United Presbyterian Church who had been hired to counsel students regarding the Vietnam draft had recruited non-ordained counselors to assist him with what became an overly burdensome task. Id. at 434-36. To determine whether the privilege protected communication between the students and the non-ordained counselors, the court looked to the advisory committee’s notes for proposed Federal Rule of Evidence 506 and found that the non-ordained counselors’ work conformed sufficiently with that of an ordained minister of an “established Protestant denomination to the extent necessary to bring [the counselors] within the privilege covering communication to clergymen.” Id.; see also PROPOSED FEDERAL RULES OF EVIDENCE, supra note 7, at 84. In Rutledge v. State, the Supreme Court of Indiana refused to apply the privilege when the communication in question occurred between an inmate and a member of the Gideons, an organization of businessmen who passed out Bibles. 525 N.E.2d 326 (Ind. 1988). The Gideon member in this case regularly spoke with inmates about the Bible and “being forgiven for their sins.” Id. at 327. The makeup of the organization and the fact that it was not affiliated with any church were the chief factors persuading the court that the privilege was inapplicable. Id. at 328. The Supreme Court of Iowa, in Reutkemeier v. Nolte, determined that confidential communication with the elders of a Presbyterian church was privileged. 161 N.W. 290 (Iowa 1917). The elders, the court found, held a position within the church equal to that of the minister, who was also an elder. Id. at 292-94. Elected by the members of the congregation, the church elders were together responsible for governing the church affairs and were often called to carry out duties of the minister when no acknowledged minister was available. Id. at 293. These characteristics proved persuasive. Id. The Iowa Supreme Court later refused to apply the privilege to communications that transpired between a criminal defendant and his brother, despite the defendant’s claim that he looked to his brother for spiritual guidance. See State v. Alspach, 524 N.W.2d 665 (Iowa 1994). The court found that the brother did not qualify as clergy, regardless of the defendant’s perceptions. Id. at 668; see also Manous v. State, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (finding that a self-proclaimed psychic was not a member of the clergy as defined by Georgia’s religious privilege).
privilege to situations involving a cleric who is recognized by the religious organization to which that person belongs as one qualified to provide spiritual guidance.  

Perhaps recognizing this, the Cox court was compelled by its desired outcome to determine that A.A. members are clergy. The central A.A. organization recognizes no leaders. A.A. has no formal structure other than its services

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153 See, e.g., Reutkemeier, 161 N.W. at 292-94 (examining the literature and doctrine of the Presbyterian Church to determine if the church viewed the elders as clergy to whom the religious privilege applies). Furthermore, such a requirement is implied by the various statutory definitions of spiritual advisors. See, e.g., ALA. CODE § 12-21-166 (2001) (defining “clergyman” as “any duly ordained, licensed or commissioned minister, pastor, priest, rabbi or practitioner of any bona fide established church or religious organization and shall include and be limited to any person who regularly, as a vocation, devotes a substantial portion of his time and abilities to the service of his respective church or religious organization”); HAW. R. EVID. 506 (2001) (“A member of the clergy is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization . . . .”); 735 ILL. COMP. STAT. 5/8-803 (2001) (defining clergy as “a clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs”); N.Y. C.P.L.R. 4505 (McKinney 2001) (requiring, for purposes of the religious privilege, Christian Science practitioners to be “duly accredited”); R.I. GEN. LAWS § 9-17-23 (2001) (prohibiting a “duly ordained minister of the gospel, priest, or rabbi” from revealing confidential communications).

154 The Cox court’s grossly inaccurate description of A.A. and its holding without reasoning that A.A. members are “ordained” by the Twelve Steps lead to this observation. See Cox, 154 F. Supp. 2d 787, 792 (S.D.N.Y. 2001); see also supra Part II.A.1 (discussing the Cox court’s factual findings with respect to A.A.’s relationship with its members).

155 See supra note 44 (stating A.A.’s ninth tradition, which allows for the creation of “service boards or committees”); see also The A.A. Group, pamphlet P-16, at 23 (Alcoholics Anonymous World Services, Inc., 1990) (describing the members of these committees as “officers” who are “usually . . . chosen by the group for limited terms of service. As Tradition Two reminds us, ‘Our leaders are but trusted servants; they do not govern.’ These jobs may have titles. But titles in A.A. do not bring authority or honor; they describe services and responsibilities.”).
board, no requirements for either individual members or the groups’ internal leaders other than the desire to recover from alcoholism, no training of any sort for anyone within the organization, and, most importantly, no recognition by the organization of any individual in a position to provide counseling, spiritual or otherwise, other than to offer personal experience to help guide others to sobriety. It is clear,

156 See TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 146-49.

157 Supra note 44 (stating A.A.’s third tradition). Although A.A. suggests that a member wishing to sponsor another alcoholic first attain several months of sobriety, there are, in fact, no requirements or restrictions with respect to who can become a sponsor. See Questions and Answers on Sponsorship, pamphlet P-15, at 10 (Alcoholics Anonymous World Services, Inc., 1983). “There is no superior class or caste of sponsors in A.A. Any member can help the newcomer learn to cope with life without resorting to alcohol in any form.” Id. at 13.

158 Id. at 10.

An A.A. sponsor does not provide any such services as those offered by a social worker, a doctor, a nurse, or a marriage counselor. A sponsor is simply a sober alcoholic who helps the newcomer solve one problem: how to stay sober.

And it is not professional training that enables a sponsor to give help—it is just personal experience and observation.

Id.

159 Id. A.A. has grown through the years partly as a result of its founders’ belief that once A.A. members achieve sobriety, they should help others reach the same goal. See supra note 41 (stating A.A.’s twelfth step). This method evolved into what A.A. now refers to as “sponsorship.” See generally Questions and Answers on Sponsorship, supra note 157. A.A. describes sponsorship as “an alcoholic who has made some progress in the recovery program shar[ing] that experience on a continuous, individual basis with another alcoholic who is attempting to attain or maintain sobriety through A.A.” Id. at 7. At first glance, the support provided by a sponsor may appear to parallel that of a clergy member. The guidance sponsors provide, however, is severely curtailed by two limiting factors. Sponsors receive no formal training whatsoever in either alcohol recovery or spiritual matters. Id. And, although sponsors may share the same end—sobriety—their spiritual beliefs may differ greatly from those to whom they provide help, as membership mandates only the desire to stop drinking and does not depend on any particular religious beliefs. See supra note 44 (stating A.A.’s third tradition).
therefore, that an A.A. member is not qualified by A.A. to provide spiritual guidance. Furthermore, since A.A. membership requires neither sobriety nor adherence to the Twelve Steps, finding that A.A. members are somehow ordained is puzzling, to say the least.

The Cox decision must falter beneath the weight of appellate level scrutiny. Its perception of A.A. is misguided at best, as is its interpretation of the New York Court of Appeals’ Carmona decision. These initial misunderstandings and an obviously scattered rationale led the district court to ordain A.A. members, burdening them with an unsolicited privilege, the breadth of which now conflicts with Supreme Court and state legislative dictates.

B. A Legal Crack in A.A.’s Foundation

The impact the Cox decision will have on A.A. members should give any advocate of A.A. and similar groups cause for concern. First, the Cox court erects yet another barrier between Sponsors are struggling with their own sobriety and are under no obligation to work through the Twelve Steps before sponsoring another member, though A.A. does encourage sponsors to first become sober. Questions and Answers on Sponsorship, supra note 157, at 13-14. Yet, no matter how long a sponsor may be sober, A.A. recognizes that even sponsors, by the very nature of alcoholism, are at risk of slipping from sobriety. See, e.g., Twelve Steps and Twelve Traditions, supra note 32, at 113-14 (discussing the danger of relapse that accompanies many of life’s disappointments). The organization, therefore, incorporates what it calls the “24-hour plan,” which reminds alcoholics of their powerlessness and discourages even members who have long been sober from making claims of future sobriety. This is AA, supra note 50, at 14. The “24-hour plan” encourages members to focus only on staying sober for the next twenty-four hours. Id.

A situation where an individual A.A. group looks to a particular member as a spiritual leader would serve as a better example of when the religious privilege might apply. Nonetheless, the district court in Cox did not limit its opinion to particular cases. See generally Cox v. Miller, 154 F. Supp. 2d 787 (S.D.N.Y. 2001).

Twelve Steps and Twelve Traditions, supra note 32, at 139. (“The only requirement for A.A. membership is a desire to stop drinking.”).

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alcoholics and active participation in society, which is already complicated by the unpopular social stigma accompanying alcoholism.\(^{163}\) It accomplishes this by forcing upon them a “privilege” that prevents A.A. members from testifying to information gained within the A.A. setting and precludes law enforcement from utilizing any information provided voluntarily by A.A. members.\(^{164}\) Thus, A.A. members are prohibited from carrying out duties commonly associated with being a good citizen.\(^{165}\) Second, the court creates what some jurisdictions have deemed a fiduciary relationship,\(^{166}\) the breach of which can result

\(^{163}\) *Twelve Steps and Twelve Traditions*, *supra* note 32, at 184-87 (stating that part of the reason anonymity is so important to members is a fear of the social stigma that might be attached); *see also* *Understanding Anonymity*, *supra* note 118, at 5-6 (discussing the need for anonymity).

\(^{164}\) *Cox*, 154 F. Supp. 2d at 792-93 (holding that the evidence gathered from the information the A.A. members provided should have been suppressed).

\(^{165}\) *See* Roberts v. United States, 445 U.S. 552, 557 (1980) (“The citizen’s duty to raise the hue and cry and report felonies to the authorities was an established tenet of Anglo-Saxon law at least as early as the 13th Century.”) (internal quotations omitted); Roviaro v. United States, 353 U.S. 53, 59 (1957) (noting that the government’s ability to conceal an informer’s identity is necessary in light of citizens’ duty “to communicate their knowledge of the commission of crimes to law-enforcement officials”); United States v. Jefferson, 252 F.3d 937, 940 (7th Cir. 2001) (“[C]itizens have an obligation to communicate their knowledge of the commission of crimes to law enforcement officials.”); Lightbourne v. Dugger, 829 F.2d 1012, 1020 (11th Cir. 1987) (noting “the duty that is imposed upon all citizens to report criminal activity”); United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (“It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”) (quoting Miranda v. State of Arizona, 384 U.S. 436, 477-78 (1966)) (internal quotations omitted). *But see* United States v. Zimmerman, 943 F.2d 1204, 1214 (10th Cir. 1991) (“It is well established that a person who sees a crime being committed has no legal duty to either stop it or report it.”).

\(^{166}\) *See*, e.g., *Black’s Law Dictionary* 626 (6th ed. 1990) (defining “fiduciary or confidential relation” as broadly “embracing . . . technical fiduciary relations and . . . informal relations which exist wherever one person trusts in or relies upon another” and stating that “[s]uch relationship arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely
Consequently, the Cox court has determined that A.A. members are clergy, thereby establishing a precedent for other jurisdictions to impose civil liability on either A.A. members whose breach of confidentiality is considered a breach of a fiduciary duty or possibly on A.A. itself. See, e.g., Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 430-32 (2d Cir. 1999) (upholding the trial court’s finding of a fiduciary relationship between the plaintiff and the Diocese and holding that the First Amendment does not bar claims against religious organizations for breach of fiduciary duties); Sanders v. Casa View Baptist Church, 134 F.3d 331, 338 (5th Cir. 1998) (holding that the First Amendment does not bar claims against clergy for either malpractice or breach of fiduciary duties); Doe v. Hartz, 52 F. Supp. 2d 1027, 1061-62 (N.D. Iowa 1999) (stating that whether a spiritual counselor has a legally cognizable fiduciary duty “depends upon factual circumstances, not upon professional standards of conduct for the average reasonable male member of the clergy” and holding that breach of fiduciary duty claims against clergy are not “barred ab initio” ).

Although these cases arise in the context of claims of sexual abuse, at least one court has acknowledged the possibility of a duty arising from a breach of confidentiality. See F.G. v. MacDonnell, 696 A.2d 697 (N.J. 1997). The plaintiff in F.G. brought claims against a church rector and his assistant. Id. at 699-700. Like the courts above, the claim against the church rector arose from allegations of sexual misconduct. Id. at 700. The claim against the rector’s assistant, also a member of the clergy, however, concerned a letter he published detailing the facts of the relationship between the plaintiff and the rector and circulated to the members of the congregation. Id. The plaintiff claimed she had revealed the details to the assistant rector in confidence. Id. at 701. The court held that, generally, the First Amendment does not bar a claim against a clergy member for breach of fiduciary duties. Id. at 703. Thus, the court upheld the claim against the rector for breach of fiduciary duties with respect to the sexual relationship. Id. at 705. Furthermore, the F.G. court held that the claim against the assistant for breach of confidentiality would stand if the trial court could determine the existence of a breach by referring to nonreligious, “neutral principles.” Id. But see Lann v. Davis, 793 So. 2d 463, 465-66 (La. Ct. App. 2001) (holding that a claim against a clergy member for breach of fiduciary duty equated to a claim for clergy malpractice and, as such, was barred by First Amendment); Teadt v. Lutheran Church Mo. Synod, 603 N.W.2d 816, 822-24 (Mich. Ct. App. 1999) (refusing to create a fiduciary duty for clergy, stating that such a duty would be impossible to define); Lightman v. Flaum, 761 N.E.2d 1027, 1032 (N.Y. 2001) (holding that New York’s religious privilege did not create a fiduciary duty); Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S.2d 661, 662 (N.Y. App.
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that alcoholic criminals who wish to unburden their souls have a
greater right to recover from their affliction than do those
alcoholics in whom the criminals wish to confide. Cox allows
alcoholics to reveal their criminal secrets to fellow alcoholics
who might not be psychologically capable of maintaining a
relationship requiring confidentiality.168 This could prove
instrumental to recovering criminals, whose unburdened
consciences are free to focus on remaining sober, yet detrimental
to recovering confidants.169 Thus, Cox turns on its head the
principle that those who fail to live by society’s standards
sacrifice their interests in freedom to forward the interests of the

Div. 2000) (holding that the First Amendment barred claims against clergy for
breach of fiduciary duties, which the court equated to malpractice); Hawkins
v. Trinity Baptist Church, 30 S.W.3d 446, 453 (Tex. App. 2000) (holding that
the First Amendment barred courts from establishing a fiduciary duty owed by
clergy members).

168 See Cox, 154 F. Supp. 2d at 790. The facts of Cox demonstrate the
plausibility of an A.A. confidant who is unable to carry the burden of
confidentiality encouraged by A.A. Id. Ms. H, struggling with what Mr. Cox
had told her, felt compelled to reveal the information to her own psychologist.
Id. Thus, it follows that if the criminal A.A. member divulges criminal secrets
to a non-criminal A.A. member precluded by law from revealing this
information, the criminal A.A. member is, arguably, benefited by
unburdening his soul while the non-criminal A.A. member must bear the
weight of harboring knowledge of the confessor’s crimes. See generally Julie
D. Lane & Daniel M. Wegner, The Cognitive Consequences of Secrecy, 69 J.
PERSONALITY & SOC. PSYCHOL. 237 (1995) (discussing the psychological
effects of harboring secrets).

169 As if overcoming alcoholism were not difficult enough, the confidant
struggling with her own sobriety now must either sacrifice her civic duty to
disclose criminal activity or face potential civil liability should she be unable
to carry out the duty created by Cox. See supra note 167 (discussing decisions
finding a clergy fiduciary duty). Such a psychological dilemma may well
undermine the recovering alcoholic’s sobriety. See, e.g., Brady & Sonne,
supra note 125; Sandra A. Brown et al., Severity of Psychosocial Stress and
Outcome of Alcoholism Treatment, 99 J. ABNORMAL PSYCHOL. 344, 344-48
(1990) (distinguishing between the effects of severe and mild stress on the
ability of the alcoholic to remain abstinent and finding, inter alia, that
alcoholics who relapsed after treatment had experienced more severe stress
than the subjects who did not relapse); McKay, supra note 125, at 566.

Were this not true, the criminal justice system would transmogrify; for if criminals have a greater interest in sobriety, it follows that they have a superior interest in liberty as well. See supra note 170 (stating the number of criminals being held in local jails and state and federal prisons).

By expanding the religious privilege to communication within A.A., the Cox court usurped the A.A. member’s control over her own recovery. If Cox is persuasive, A.A. members in jurisdictions recognizing a spiritual advisor’s fiduciary relationship will no longer decide for themselves whether to maintain the confidential relationships encouraged by A.A. Largely as a result of A.A.’s unwillingness to apply pressure to its members and its support of individual autonomy, A.A.’s methods have been “extremely successful internationally, [resulting in] more than a million members in the United States alone.” Now, the responsibility to maintain confidentiality has been forced upon them by a decision that is overly confident in an alcoholic’s ability to maintain both confidentiality and sobriety.

A person afflicted with the disease of alcoholism always risks

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171 Were this not true, the criminal justice system would transmogrify; for if criminals have a greater interest in sobriety, it follows that they have a superior interest in liberty as well. See supra note 170 (stating the number of criminals being held in local jails and state and federal prisons).

172 See supra Part II.A (discussing A.A.’s relationship with its members).

173 See supra note 167 (discussing cases finding a fiduciary duty for clergy).

174 TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 173 (“Neither its General Service Conference, its foundation board, nor the humblest group committee can issue a single directive to an A.A. member and make it stick, let alone mete out any punishment.”).

drinking again. 176 Medical studies on alcoholism have shown that stress is a major factor contributing to a recovering alcoholic’s slip from sobriety. 177 Of course, every alcoholic is different. Some may be able to handle a lot of stress. 178 Others may slip easily from sobriety as the result of simple, day-to-day pressures. 179 The act of keeping a secret itself may serve as the proverbial straw. 180 The law has now determined that all alcoholics within A.A. are capable of coping with the stress of knowing and not being able to reveal that a fellow member has committed atrocities for which they have not been held accountable. 181 Prior to Cox, A.A. encouraged confidentiality but never guaranteed it; therefore confidentiality could never be

176 See, e.g., Billie Jay Sahley & Katherine M. Birkner, Alcoholism and Its Treatment, TOWNSEND LETTER FOR DOCTORS AND PATIENTS, July 1, 2000, at 62 (“The greatest majority of alcoholics cannot become social drinkers again because they tend to relapse into heavy drinking.”).

177 See Brady & Sonne, supra note 125; Brown et al., supra note 169; McKay, supra note 125.

178 See Brady & Sonne, supra note 125.

179 See id.

180 See Lane & Wegner, supra note 168, at 239.

Thought suppression and intrusive thoughts occur cyclically, each in response to the other. Secrecy sets the stage for the formation of a feedback system in which each attempt to suppress the secret produces intrusive thinking of that very secret, which in turn engenders increased efforts at thought suppression. This process can quickly turn into a self-sustaining cycle in which obsessive preoccupation with thoughts of the secret develops. Once this preoccupation cycle is set into motion, moreover, removing secrecy from the equation will not necessarily stop the obsessive preoccupation with the secret. After the person has identified the thought of a secret as intrusive and unwanted, suppression can maintain the intrusiveness (and the intrusiveness can maintain the suppression). Secrecy’s cognitive consequences may persevere long after the secrecy itself is gone.

Id.

181 Supra note 168 (discussing the potential psychological impact the Cox decision could have on non-criminal alcoholics attempting to recover through A.A.).
reasonably expected. That fact by itself should preclude expanding the religious privilege to A.A.

The law now, in effect, demands that members of A.A. guarantee confidentiality and, as a result, has determined that the criminal’s interest in sobriety supercedes that of the non-criminal A.A. member. Public policy cannot tolerate such a distortion of the legal system. It is also quite possible that A.A., as it has existed since 1939, will be unable to tolerate the pressure now being applied as a matter of law. This result would certainly prove harmful to society’s interests, contravening both utilitarian principles and Supreme Court precedent.

182 Not only would the Constitution leave the law powerless to force a religion to guarantee confidentiality, but the fact that a person in such a situation could have no expectation of confidentiality also would mandate against applying the religious privilege, which requires just such an expectation. See United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (upholding the trial court’s decision to admit into evidence an inmate’s letter to a priest when the letter contained no indication that it was meant to remain confidential).

183 Although the parameters of the privilege vary somewhat from state to state, each statute granting the privilege requires an expectation of confidentiality. See supra note 3 (listing the state statutes).

184 See supra notes 168-69 and accompanying text.

185 See, e.g., In re Grand Jury Investigation, 918 F.2d 374, 383 (3d Cir. 1990) (“[T]he privilege protecting communications to members of the clergy, like the attorney-client and physician-patient privileges, is grounded in a policy of preventing disclosures that would tend to inhibit the development of confidential relationships that are socially desirable.”); see also J.S. Mill., UTILITARIANISM 55 (Roger Crisp ed., Oxford University Press 1998) (1863) (“The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.”). In his introductory analysis of Mill’s work, Roger Crisp summarizes the Greatest Happiness Principle by explaining that “the ultimate end is the greatest balance of pleasure over pain, to be assessed by competent judges. This being the end of human action, it is also the end of morality, which consists of those rules that will best further the end.” Id. at 37. John Henry Wigmore’s four criteria for protecting confidential communications, discussed infra Part III, which have been applied in numerous jurisdictions, are described as utilitarian. See, e.g., Am. Civil Liberties Union of Miss., Inc. v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981) (“This Court adopted Wigmore’s
religious privilege to A.A. communication, therefore, is unsupported by both law and public policy.

III. RESPONDING TO CRITICS

Supporters of expanding the religious privilege to A.A. generally invoke Dean Wigmore’s criteria for recognizing an evidentiary privilege. They also argue that A.A. members essentially function as clergy and, therefore, deserve similar treatment. Finally, some have expressed concern that without the protection of the religious privilege A.A. will suffer by becoming an easily accessible law enforcement tool. While this

classic utilitarian formulation of the conditions for recognition of a testimonial privilege in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).); Marshall v. Spectrum Med. Group, 198 F.R.D. 1, 4 (D. Me. 2000) (stating that when determining whether information is privileged “this court must consider Wigmore’s classic utilitarian formulation”); see also Developments in the Law: Privileged Communications: II. Modes of Analysis: The Theories and Justifications of Privileged Communications, 98 Harv. L. Rev. 1471, 1472 (1985) (describing Wigmore’s criteria as “essentially utilitarian” and describing the utilitarian approach as “assert[ing] that communications made within a given relation should be privileged only if the benefit derived from protecting the relation outweighs the detrimental effect of the privilege on the search for truth”). Wigmore was dean of faculty at Northwestern University School of Law from 1901 to 1929. William R. Roalfe, John Henry Wigmore 45-184 (1977). His treatise on evidence, which laid the foundation for modern evidentiary law, was first published in 1904 and “was promptly recognized as an outstanding publication . . . .” Id. at 77. “[A]nd Wigmore quickly rose from the rank of a promising but somewhat obscure scholar and teacher to the rating of one of the great masters of the law.” Id. at 79 (inner quotations omitted).

186 See supra Part II.A.3 (discussing Trammel v. United States, 445 U.S. 40 (1980)).
187 See generally Reed, supra note 30; Weiner, supra note 30.
188 See generally Reed, supra note 30; Weiner, supra note 30.
189 See Jimmy Breslin, Without a Shield, A.A. May Not Survive, Newsday, June 14, 1994, at A2 (quoting an A.A. member, identified only as a priest, as stating after Mr. Cox’s conviction, “As I understand it, they subpoenaed people for a double homicide. That’s rare. But once you make Alcoholics Anonymous people talk about one thing, what is to stop the authorities from deciding that they can come around for anything, an income
fear is not entirely irrational, expanding the religious privilege is excessive and ultimately unnecessary in light of the constitutional protection afforded all religious organizations.

A. Dean Wigmore’s Criteria Fail to Support Protecting A.A. Communication

Dean Wigmore identified four criteria he viewed as necessary to establish an evidentiary privilege:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.190

In the A.A. context, however, attempting to apply the four criteria requires a level of speculation that could not be tolerated in light of the public policy argument discussed in Part II. First, whether an expectation of confidentiality can exist within A.A. is highly uncertain.191 The organization imposes no consequences on

tax case.”). Another rationale proffered is that the information conveyed in A.A. and similar self-help settings is protected by the penumbral right to privacy. See Reed, supra note 30, at 746-51; Weiner, supra note 30, at 267-70.

190 8 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961).

191 As has already been noted, A.A. has no authority over its members, who are free to follow or dismiss A.A.’s suggestions. See TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 173. “Groups have tried to expel members, but the banished have come back to sit in the meeting place, saying ‘This is life for us; you can’t keep us out.’” Id. Nowhere in the Twelve Steps or Twelve Traditions is the word or concept of confidentiality mentioned. See
individuals for failing to follow its suggestion that communication
be considered confidential. Nor should society assume that
alcoholics, by attending A.A. meetings, are willing to subject
themselves to the responsibilities that accompany the confidential
relationship.

Next, it is unclear whether the expectation of confidentiality
is necessary for the relationships within A.A. to survive. Although some evidence suggests that people are more honest
when guaranteed confidentiality, A.A. has never guaranteed
confidentiality; therefore, it cannot be argued that a lack of
such a guarantee would negatively affect A.A.’s membership or
effectiveness. In fact, it is equally reasonable to assume that the
members of A.A. require and relish the freedom from the
responsibility of having to harbor the knowledge of the criminal
deeds of another. The founders of A.A. recognized the need to
not pressure the alcoholic. The law, far less knowledgeable in
such matters, is in no position to determine otherwise.

Regarding the fourth criterion, prohibiting A.A. members

supra note 41 (listing A.A.’s Twelve Steps); see also supra note 44 (listing
A.A.’s Twelve Traditions).

192 TWELVE STEPS AND TWELVE TRADITIONS, supra note 32, at 173.

193 See supra Part II.A.1 (discussing A.A.’s relationship with its members).

194 See supra note 191 (discussing A.A.’s lack of authority over its members); see also Alcoholics Anonymous, The Importance of Anonymity, at
visited Feb. 23, 2002) (“An A.A. member may, for various reasons, ‘break
anonymity’ deliberately at the public level. Since this is a matter of individual
choice and conscience, the Fellowship as a whole obviously has no control
over such deviations from tradition.”).

195 Furthermore, there is equally compelling evidence that some secrets
are better unrevealed. See Anita E. Kelly & Kevin J. McKillop, Consequences
of Revealing Personal Secrets, 120 PSYCHOL. BULL., No. 3, 450-65 (stating
that revealing secrets, which is largely considered therapeutically beneficial,
may actually damage the confessor when the secret revealed causes the
confidant to react negatively).

196 See supra note 191 (discussing A.A.’s lack of authority over its members).

197 See Twelve STEPS AND TWELVE TRADITIONS, supra note 32, at 129
(stating that A.A. has no rules).
from revealing knowledge of criminal behavior would actually prove harmful to recovering alcoholics, who may be emotionally unable to handle the burden the religious privilege places on them. The privilege, therefore, actually injures those the Cox court may have been trying to protect. Any injury that may result to the personal relationship between A.A. members can hardly compare. Compounded with the barrier evidentiary privileges place between courts and the truth they seek, it is difficult to see any benefits arising from imposing the religious privilege on A.A. members.

Ultimately, the third criterion is the only one that survives analysis. It would be difficult, if not impossible, to argue that A.A. does not benefit society. Although A.A. keeps no detailed records of membership, the organization claims to have millions of members throughout the world. Alcoholism is a source of crime, misery, and physical illness that can lead to self-destruction and death. Likewise, alcoholism poses enormous economic costs on society. Because A.A. reduces those costs while imposing no realizable social costs of its own, society should “sedulously foster[]” A.A. and the relationships that develop therein. Nevertheless, the satisfaction of this criterion alone cannot justify applying the religious privilege to communications within A.A.

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198 See supra note 25 (noting A.A.’s size in terms of members).
199 See Jill Neimark et al., Back from the Drink, PSYCHOL.TODAY, Sept. 1994, at 46 (stating that in the United States each year, 40,000 people die from alcoholism and that alcoholism is implicated in 30% of suicides overall and 46% of suicides among teenagers).
200 Id. (stating that the monetary costs to the country are $80 billion annually).
201 Id.; see also J.H. WIGMORE, supra note 190, at § 2285.
202 J.H. WIGMORE, supra note 190, at § 2285.

Only if these four conditions are present should a privilege be recognized. That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition sometimes demanded for them.

Id.
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B. Courts Do Not Adhere to the Functionalist Approach

Commentators also argue that the religious privilege should apply to A.A. based on the purpose A.A. members serve each other. Since A.A. members provide essentially the same service as clergy members, the argument goes, A.A. members should enjoy a similar right to privileged communication. In addition to the myriad reasons why A.A. members are not the equivalent of clergy, the functionalist approach, in light of the Supreme Court’s ruling in Trammel, suffers from a more obvious deficiency—the proverbial slippery slope. That is to say, accompanying the functionalist rationale is the potential for burdensome litigation seeking to further expand the privilege. For example, litigants have already tried to argue—unsuccessfully—that the religious privilege applies to a psychic or to family members to whom a person may look for spiritual guidance. If the religious privilege did apply to such relationships, one could then argue, for example, that the lawyer-client privilege should apply to a criminal seeking legal advice from a bail bondsman. Such arguments would burden the courts tremendously by forcing them to create exceptions in order to administer justice, when, as Trammel clarifies, the administration of justice is the rule and protected communication the

203 See AMERICAN HERITAGE DICTIONARY, supra note 68, at 734 (defining “Functionalism” as follows: “(1) The doctrine that the function of an object should determine its design and materials; (2) A doctrine stressing purpose, practicality, and utility.”).

204 See Reed, supra note 30, at 737 (analogizing A.A. members and clergy); Weiner, supra note 30, at 270-72 (discussing “the functionalist rationale” for extending the religious privilege to A.A.).

205 See supra note 204 (citing commentators proffering this view).

206 See supra Part II.4 (distinguishing A.A. members from members of the clergy).

207 See Manous v. State, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (holding that the religious privilege did not apply to communication between a criminal defendant and his psychic); State v. Alspach, 524 N.W.2d 665, 668 (Iowa 1994) (holding that a criminal defendant’s brother did not qualify as clergy despite defendant’s view of his brother as a spiritual advisor).
exception.208

C. Extending the Privilege Is Unnecessary

Finally, creating explicit legal protection for speech within A.A., although already shown to violate public policy, is a drastic and unnecessary solution to a problem not yet proven to exist. In addition to the utilitarian and functionalist positions discussed,209 some believe that the Cox trial exemplifies the abuse that will result without the privilege.210 Although Ms. H voluntarily approached the district attorney to reveal the information Mr. Cox had told her, the others within Mr. Cox’s A.A. group were forced to testify.211 Critics arguing for application of the religious privilege to A.A. claim that such a measure is necessary to prevent prosecutors from abusing their position by subpoenaing A.A. members and compromising A.A. confidentiality.212 Yet, in their haste, these critics forget about Ms. H and other A.A. members whose dedication to maintaining the confidential relationships encouraged by A.A. is secondary to their psychological well-being.213 Furthermore, the six-and-a-half-year interim between Mr. Cox’s conviction, which was reported nationwide,214 and his grant of habeas corpus offered no

208 See supra Part II.A.3 (discussing Trammel v. United States, 445 U.S. 40 (1980)).
209 See supra Parts III.A-B (discussing and dismissing the various rationales for extending the religious privilege to communication within A.A.).
210 See supra note 189 (noting the alarmist concern that failure to protect communication within A.A. will result in the organization’s demise).
211 See Reed, supra note 30, at 700 (stating that the Cox conviction was the first incident where A.A. members were compelled to testify).
212 See supra note 189 (noting the alarmist concern that failure to protect communication within A.A. will result in the organization’s demise).
213 Cox v. Miller, 154 F. Supp. 2d 787, at 790 (S.D.N.Y. 2001) (stating that Ms. H first revealed to her psychologist the information Mr. Cox had told her).
214 See, e.g., Geraldine Baum, Whether in a Support Group, Therapy or Church, People Seek Comfort in Anonymous Confession, L.A. Times, June 24, 1994, at E1; Editorial, Confidentiality Not Guaranteed in All Kinds of
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indication that the critics’ concerns of overzealous, encroaching prosecutors are remotely realistic.\(^{215}\)

Nevertheless, the possibility of a situation like Cox arising again is not beyond comprehension, and the social benefits A.A. confers certainly weigh in favor of protecting those A.A. members who view confidentiality as fundamental to their recovery.\(^{216}\) Clearly, extending the religious privilege to A.A. risks compromising the spirit of freedom and autonomy ingrained in nearly every aspect of one of the world’s most successful self-help organizations.\(^{217}\) Conversely, absent the privilege, A.A. members remain free from the pressures the privilege creates, free to focus on becoming and remaining sober and, if they so choose, free to preserve the confidential, anonymous relationships encouraged by A.A.\(^{218}\) Assuming the Second and Seventh Circuit decisions recognizing twelve step programs as religious organizations are upheld and found persuasive elsewhere,\(^{219}\) the Constitution will protect A.A. members from abusive law enforcement.\(^{220}\)


\(^{215}\) See Reed, supra note 30, at 700 (stating that the Cox conviction was the first incident where A.A. members were compelled to testify). Research has thus far uncovered no other cases where A.A. members were forced to testify or where law enforcement officials were accused of infiltrating A.A. meetings.

\(^{216}\) See supra Part III.A (discussing Dean Wigmore’s criteria for establishing an evidentiary privilege).

\(^{217}\) See supra Part I.A (discussing the history of A.A.).

\(^{218}\) See supra note 118 (discussing the theory behind A.A.’s principle of anonymity).

\(^{219}\) See Warner v. Orange County Dep’t of Prob., 115 F.3d 1068 (2d Cir. 1996); Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996).

\(^{220}\) See, e.g., Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”); see also, Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (holding that the state could not compel defendants, Amish parents, to send their children to school past the eighth grade when such practice violated their
The Free Exercise Clause of the Constitution prevents courts from compelling A.A. members to testify with respect to information revealed in the practice of their “religion.” 221 This is true to the extent that the government has no compelling interest and cannot accomplish its ends through a means tailored to protect fundamental First Amendment rights. 222 In Wisconsin v. Yoder, the Supreme Court stated, “Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” 223 Relying on the Constitution will not only protect A.A. members in a fashion similar to the religious privilege, but it also will protect those A.A. members who long to be free from the restraints the religious privilege imposes. 224

221 U.S. CONST. amend. I; see supra note 53 (discussing cases equating A.A. with religion).

222 See supra note 220 (citing cases discussing government infringement of the free exercise of religion).

223 Yoder, 406 U.S. at 215.

224 Obviously, not every member is dedicated to the principle of confidentiality within A.A. That is not to say that no A.A. members adhere to a self-imposed obligation to maintain the confidential relationship out of a belief that it is fundamental to the practice of A.A.’s Twelve Steps and Twelve Traditions. In Thomas, the Supreme Court addressed a similar situation. 450 U.S. 707. The plaintiff in Thomas was a Jehovah’s Witness who had been employed in the steel industry. Id. at 710. Originally, he had been involved in the fabrication of sheet steel. Id. But when the company he worked for closed his division, Mr. Thomas was transferred to a division requiring him to participate in the manufacturing of tank turrets for the military. Id. According to Mr. Thomas, his religion would not permit him to contribute directly to the manufacture of armaments, though he felt that he could be involved in the production of materials that may find their way to military use more indirectly. Id. at 711. Not all within his religion were in agreement. Id. at 710. A fellow Jehovah’s Witness had told Mr. Thomas that working on weapons did not violate his religion’s doctrine. Id. Mr. Thomas was nonetheless convinced, and his convictions caused him to ask to be laid off. Id. When this request was refused, he quit and sought unemployment benefits. Id. The matter found its way to the Supreme Court of Indiana, which held that a denial of benefits did not violate the Free Exercise Clause when the belief claimed to have been infringed was nothing more than a “personal philosophical choice.” Thomas v. Review Bd. of the Ind. Employment Sec.
CONCLUSION

Although the Cox opinion will not likely be affirmed on appeal and Mr. Cox will remain in prison to pay for his crimes, the district court’s bewildering decision provides a glimpse of what the future may hold for A.A. and other groups adopting the Twelve Steps. The legal system seems increasingly intent on viewing A.A. as a sectarian organization. While the Warner and Farrey decisions arguably are the grossest examples of the establishment of religion, they seem less so when confined to their facts. Although the Second Circuit in Warner distinguished between the religious events at A.A. and a prayer at a high school graduation, it would be wise for the court to readdress this aspect and reconsider its position. Analogizing A.A. meetings that incorporate religious aspects with a public school attempting to incorporate a prayer would result in less confusion while reaching the identical end sought, preventing the government from endorsing religion in the broadest sense of the

Div., 391 N.E.2d 1127, 1131 (Ind. 1979). Reversing the Indiana court’s decision, the Supreme Court held, *inter alia*, that it was not necessary for Mr. Thomas’ belief to comport with the beliefs of other Jehovah’s Witnesses for his belief to rise to a religious status. *Thomas*, 450 U.S. at 715, 716.

Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.

*Id.*

225 See supra Part I.B (discussing the gradual judicial perception of A.A. as a religious organization despite A.A.’s contrary position and its provision of interpretive guidance for atheist members).

226 See Warner v. Orange County Dep’t of Prob., 115 F.3d 1068 (2d Cir. 1996); Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996).

227 Warner, 115 F.3d at 1076 (citing Lee v. Weisman, 505 U.S. 577 (1992), which found that non-sectarian prayer given at a public high school graduation violated the Establishment Clause).
Whether the Second or Seventh Circuits do ultimately limit their views on this issue, the fact remains that the religious privilege is inapplicable in the A.A. context.\textsuperscript{229} Although the courts may choose to maintain the view that A.A. is a religion, it should be viewed as a religion without recognized leaders or spiritual advisors.\textsuperscript{230} In light of congressional and Supreme Court limitations on the development of evidentiary privileges and common sense reading of state religious privileges, unless the various legislatures decide otherwise, protecting communication within A.A. should be left to the Constitution’s Free Exercise Clause. The \textit{Cox} court chose to ignore Congress and the Supreme Court, and its application of New York law was disingenuous, to say the least. Furthermore, its effects could be disastrous for the millions of people whose very survival depends on A.A. The \textit{Cox} opinion should, therefore, serve the legal community not as a persuasive argument or precedent, but as a mistake not to be repeated.

\textsuperscript{228} \textit{Weisman}, 505 U.S. at 589 (“The First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.”).

\textsuperscript{229} \textit{See supra} Parts II-III (discussing the numerous reasons why the religious privilege should not be extended to communication within A.A.).

\textsuperscript{230} \textit{See supra} Part II.A.4 (distinguishing between A.A. members and members of the clergy).
STYLE PIRACY REVISITED

Safia A. Nurbhai*

INTRODUCTION

The fashion industry is an international multi-billion dollar business, one in which sales of general merchandise and apparel alone were estimated at $784.5 billion dollars in 1999.¹ The public today is aware of high-end designers from cable stations and entertainment shows that center on fashion, as well as from various magazines and Internet sites.² Consumer knowledge of high-end fashion spurs the demand for designer products. As a result, style piracy—the copying of a designer’s original designs, “thereby securing, without expense, the benefit of his artistic

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² Television stations such as the Style Channel, Metro TV, and Entertainment Television have various shows centered on fashion design. Metro TV airs fashion shows twenty-four hours a day during Fashion Week. Television shows, such as Access Hollywood and Extra, critique the dresses worn by Hollywood stars at awards shows, such as the Oscars. Magazines such as Vogue and Cosmopolitan advertise designer fashions in each issue.
work” has become more popular. In fact, style piracy has become “a way of life in the garment business.” Copying, or “knocking off,” the work of creative designers is “standard operating procedure for many [companies] both large and small.” Not surprisingly, many designers oppose “knocking off” and continue to seek federal legislation to protect their works.

Design pirates sometimes use covert methods to uncover what other designers are creating. “It is not uncommon for design pirates to sneak into a designer’s fashion show in Paris (or raid the studio’s trash for sketches) and have ‘knock-offs’ available in New York the next day.” In Johnny Carson Apparel, Inc. v. Zeeman Mfg. Co., the plaintiff researched and developed a suit with “a distinctive design combination [on the] pocket treatment and stitching.” The designer spent substantial time and money to create and promote this suit, and, as a result, the item

5 Id. at 150.
8 Id.; Stuart Jay Young, Freebooters in Fashions: The Need for a Copyright in Textile and Garment Designs, 9 Copyright L. Symp. (ASCAP) 76, 103 n.10 (1958).
11 Id. at 588.
became quite popular. The defendant purchased one of plaintiff’s suits, had it copied by his designers, and returned the original suit for a refund. Thereafter, cheaper copies appeared on the market.

Design piracy is unfair to designers and detrimental to competition. It is unfair to allow design pirates to reap the benefits of the original designer’s creativeness, labor and risk-taking.

Copying destroys the style value of dresses which are copied. Women will not buy dresses at a good price at one store if dresses which look about the same are offered for sale at another store at half those prices. For this reason, copying substantially reduces the number and amount of reorders which the original creators get. With this uncertainty with respect to reorders, original creators cannot afford to buy materials in large quantities as they otherwise would. This tends to increase the cost of their dresses and the prices at which they must be sold.

Reputation for honesty, style, and service is an important asset of retailers. Copying often injures such a reputation. A customer who has bought a dress at one store and later sees a copy of it at another store at a lower price is quite likely to think that the retailer from whom she bought the dress lacks ability to select distinctive models and that she has been overcharged. Dresses are returned and


14 Id. The court held that while there is a great similarity in the style of the plaintiff’s and defendants’ suits, defendants had a right to copy the style. Id. at 593. The decisive question was whether defendant’s methods of promotion created a likelihood of confusion in the public mind as to the source of the garments. Id. at 594. The court found that there was “no evidence of actual confusion.” Id. at 595. The court found that the defendants, while acting with an improper intent, carried out their promotional scheme in such an inept fashion—whether deliberately or not—that plaintiff’s rights were not disturbed. Id.

15 Id. at 595. “Plaintiff discontinued the model at least in part in response to complaints from its dealers about cheap imitations.” Id. at 593.

16 See Hagin, supra note 12, at 364.
customers are lost.\textsuperscript{17}

“Recent studies suggest that industrial design... cannot yield long-term rewards to innovators if the short-term profits from successful innovation are consistently appropriated by free-riders who do not share the costs and risks of the creative process.”\textsuperscript{18} As a result, over time, the designers whose talents and designs are being pirated will “be driven out of target markets by cut-throat competitors who never adequately fund the process of design innovations.”\textsuperscript{19}

Those opposed to the idea of apparel designs receiving any type of governmental protection argue that there is both a public welfare and an economic interest in allowing garments to be copied and sold at a cheaper price.\textsuperscript{20} Arguably, the copyist is satisfying a public demand by supplying consumers with copies because the consumer is either unable or unwilling to spend the money necessary for the originals.\textsuperscript{21} This reflects a process known as the style cycle that has long been recognized in the fashion industry.\textsuperscript{22}

According to this theory, the wealthy class sets the fashion trends because they wish to be distinctive.\textsuperscript{23} A second group of consumers emulates the first group and so on down the chain.\textsuperscript{24} The lower classes buy cheaper adaptations of the styles.\textsuperscript{25} Presumably, by the time a style reaches the masses, the trend has become commonplace and has already become abandoned by the trendsetters.\textsuperscript{26}

\textsuperscript{17} See id. at 364-65 (citing Wm. Filene’s Sons Co. v. Fashion Originators’ Guild of Am., 90 F.2d 556, 558 (1st Cir. 1937)).
\textsuperscript{19} Id. at 284.
\textsuperscript{20} Kenneth D. Hutchinson, Design Piracy, 18 HARV. BUS. REV. 191, 194 (1939-40).
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 195.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
Although the style cycle theory still exists, modern-day technology has given the masses access to copies of original designs much sooner than in the past. With the advent of television and the Internet, the fashions worn by the wealthy class are seen immediately and can be copied overnight. While some imitation is desirable for fashion to proliferate, Congress needs to set a limit. Unless designers feel secure that they will profit from their creations, their incentive to create new works will dwindle.

The Copyright Act is the appropriate form of protection for apparel designs because “one purpose of copyright protection is to provide equity to the artist,” which “allow[s] the creator of a work of art to enjoy the rewards of his effort” and encourages artistic creation. One of the most substantial things that design pirates steal is the original designer’s equity because the pirates sell imitations of the original design at cheaper prices; thus, some have called for copyright law to be amended to include protection for apparel designs.

The issue of design protection is “one of the most significant and pressing items of unfinished business” of copyright revision. This note explores the history of design protection in the United States and critiques the current state of the law as

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28 *Id.*
31 See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded... The immediate effect of our copyright law is to secure a fair return for an ‘author’s creative labor.’”).
33 See *id.* at 874.
34 See Bharathi, *supra* note 30, at 1670.
applied to the protection of garment designs. It also recommends that Congress add a new chapter to Title 17 of the U.S. Code specifically geared toward the protection of apparel designs. Congress should extend the boundaries of copyright protection in order to encourage the “progress of science and useful arts”36 and to reward the efforts of fashion designers.

I. HISTORY OF DESIGN PROTECTION

A. Protection Under the Early Copyright Statutes

The Copyright Act of 1976 only protects “original works of authorship.”37 The first copyright statute, passed in 1790, protected only maps, charts, and books.38 Over the years, however, copyright protection was extended to “literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, other audiovisual works, and sound recordings.”39 Since its inception, copyright law has continued to evolve.40 Specifically, protection has been extended as technology has advanced.41

Although three-dimensional objects were granted copyright protection in 1870, when protection was granted to “painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts;”42 the phrase “fine arts” excluded designs of useful articles, such as apparel designs.43 In 1909 the Copyright Act was revised, and the word

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36 The Constitution expressly gives Congress the right “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.
38 1 Stat. 124 (1790).
40 See Hagin, supra note 12, at 346-47.
41 See id.
43 See Young, supra note 8, at 81.
“fine” was dropped. It thus appeared that useful articles could gain protection. To the disappointment of fashion designers, however, although the new law did not differentiate between “fine arts” and arts that have a useful function, a 1910 Copyright Office regulation did. Regulation 12(g) provided:

Works of art—This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented.

No copyright exists in toys, games, dolls, advertising, novelties, garments, laces, woven fabrics, or any similar articles. At the time, the prospect of protection for fashion design seemed hopeless because garments undeniably serve a utilitarian purpose. Thus, the fashion industry decided to take matters into its own hands.

In 1935 the Fashion Originator’s Guild of America formed a trade association of garment manufacturers and retailers whose mission was to protect designers from style piracy. Retailers and manufacturers signed a “declaration of cooperation” wherein they pledged to deal only in original creations. The Guild had an extensive design registration bureau, and as part of the

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44 See id.
45 In § 5(g) of the 1909 Act, “works of art; models or designs for works of art” were listed among articles eligible for copyright protection.
46 See Young, supra note 8, at 81-82.
47 See id. at 82 (citing Weil, AMERICAN COPYRIGHT LAW 625 (1917)). In White v. Lombardy Dresses, 40 F. Supp. 548, 551, (S.D.N.Y. 1941), the court said, “It may be that new designs ought to be entitled to a limited copyright, but that remedy is with Congress.”
48 See Young, supra note 8, at 83.
49 See id. at 106.
50 See id. at 107.
enforcement procedures, the bureau sent its most potent weapon, the little red card, to all “non-cooperating retailers.”

52 Guild members were forbidden from dealing with a red-card holder under penalty of large fines.

The Guild was highly effective. In fact, in 1936, the Guild controlled 60% of the market for women’s clothes that cost at least $10.75 and 38% of all women’s garments wholesaling at $6.75 and up.

54 Although the Fashion Originator’s Guild of America was successful in combating design piracy, the Guild was shut down in 1941 by the Supreme Court because its collective practices were found to violate the Sherman Anti-Trust Act. Thus, the garment industry was left with the Copyright Act of 1909 as its only source of protection.

In 1949 the Copyright Office expanded the scope of articles to which copyright protection was available by broadening the definition of “works of art.”

56 The amendment read as follows:

§ 202.8 Works of art. (Class G)-(a) in general. This class includes works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings, and sculpture.

At the time, many hoped the Copyright Office would eventually

52 See Young, supra note 8, at 107.

An extensive design registration bureau containing the designs registered by Guild members was maintained. The [red] cards were sent to all members from time to time bearing on their face, the name of a “non-cooperating” retailer. Henceforth all other members of the Guild were forbidden to deal with that retailer under penalty of large fines.

Id.

53 Fashion Originators’ Guild of Am., 312 U.S. at 463.

54 Id. at 462.

55 Id. at 467-68. The Court’s rationale was that the Guild’s practices substantially lessened competition and tended to create a monopoly.


57 37 C.F.R. § 202.8(a) (1952).
broaden its definition of works of art to include apparel designs because garments contain artistic expression, but the Copyright Office did no such thing. Instead, the Copyright Office and the courts took the position that fashion’s dominant function is utilitarian. Advocates for the protection of apparel designs, on the other hand, maintained that while clothing does cover the human body, its primary market value rests not in its function, but in its appearance.

In 1954, the U.S. Supreme Court ratified the 1949 regulation in *Mazer v. Stein*, the leading case on the copyrightability of useful articles. In *Mazer*, the Supreme Court upheld the copyrightability of a statuette despite the fact that it had been reproduced for mass-market distribution and sold as a lamp base. The Court held that the statuette qualified as a "work[] of art" eligible for copyright protection even though it served a functional purpose and had been distributed as part of a utilitarian object.

Because the preparation of a statuette requires artistic skill, the Court found that the statuette qualified as fine art without defining a "work of art." The Court stated that "[i]ndividual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art," thus leading an increased number of industrial designers to seek protection under § 5(g) of the 1909 Act. To clarify that all ornamental useful articles could

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58 See Young, supra note 8, at 83.
60 Id.
62 Id. at 202.
63 Id. at 213. The Court also held that eligibility for design patent protection did not preclude copyright protection. Id. at 217.
65 Mazer, 347 U.S. at 214.
66 61 Register of Copyrights Ann. Rep. 12 (1958). The number of "works of art" registered under § 5(g) of the 1909 Act swelled from 3,170 in 1954 to greater than 5,000 in 1958. Id.
not gain protection, the Copyright Office enacted Regulation § 202.10(c) to narrow the Supreme Court’s open-ended extension of copyright protection:

If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration.67

The “sole intrinsic function” test was applied in Ted Arnold Ltd. v. Silvercraft Co.,68 where the court recognized copyright protection for the casing of a pencil sharpener simulating the appearance of an antique telephone. The court stated, “[W]e would not agree with defendant that its ‘sole intrinsic function . . . is its utility.’ Customers are paying fifteen dollars for it, not because it sharpens pencils uncommonly well, but because it is also a decorative conversation piece.”69

Unfortunately, the regulation failed to address the “linedrawing problem inherent in delineating the extent of copyright protection available for works as applied art.”70 In fact, the “sole intrinsic function” test continues to confuse the law.

B. The Copyright Act of 1976

The 1976 amendments to the Copyright Act codified the Supreme Court’s holding in Mazer.71 The House Committee report noted that “[u]nless the shape of . . . [the] industrial product contains some element that, physically or conceptually,

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69 Id. at 736.
71 See Schalestock, supra note 27, at 118.
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can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”

While physical separability, in which the functional part of an object must be physically detachable from the artistic part, is quite simple to apply, conceptual separability is not. It is clear, however, that the 1976 Act generally denies protection to apparel designs because they are categorized as “useful articles” under § 101. Under current copyright law, a sufficiently original design on fabric can be granted copyright protection; however, an

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73 See id. (citing Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc., 832 F. Supp. 1378, 1392 (C.D. Cal. 1993) (holding the artistic labeling of a perfume box as physically separable from the utilitarian aspects of the perfume itself, thereby avoiding a conceptual separability analysis)).

74 Conceptual separability is defined as follows:

Conceptual separability means that the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work . . . independent of the shape of the useful article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article.


75 See Samara Bros., Inc. v. Wal-Mart Stores, Inc., 165 F.3d 120, 132 (1998) (holding that pattern designs depicting familiar objects, such as hearts, daisies, and strawberries, are entitled to very narrow copyright protection; however, “their registrations provide a presumption of validity, which Wal-Mart has failed to overcome”), cert. granted, 529 U.S. 205, 216 (2000) (holding that “in an action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a product’s design is distinctive, and therefore protectible, only upon a showing of secondary meaning”). See also Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc., 169 F. Supp. 142, 143 (S.D.N.Y. 1959) (holding design printed upon a dress fabric is a proper subject of copyright, both as a work of art and as a print); Dan River, Inc. v. Sanders Sale
original apparel design receives no such protection due to its usefulness. Although apparel works emphasize style and appearance instead of utility, and even though competitiveness turns on originality in the fashion industry, the doctrine of conceptual separability does not provide copyright protection for apparel. The prevailing opinion is that products, such as ladies’ dresses or any other industrial products, cannot be copyrighted if they do not contain some element that physically or conceptually can be identified as separable from the utilitarian aspects of the article.

C. Title II of the Copyright Act of 1976

Over the years, numerous bills have been introduced in Congress aimed at obtaining more protection for ornamental designs of useful articles beyond just apparel. With respect to the Copyright Act of 1976, design protection appeared as Title II of the general copyright revision bill. Title II was meant to protect the “original ornamental design of a useful article.” Designs that were seen as “staple or commonplace [or] dictated solely by a utilitarian function of the article were excluded.”


See Schalestock, supra note 27, at 122-23 (citing 56 Fed. Reg. 56530-02 (Nov. 5, 1991)).


For example, the district court in Whimsicality, Inc. v. Rubie’s Costumes Co. noted that extending copyright protection to high fashion designs would be ‘contrary to well established case law, Copyright Office and historical precedent.’” Hagin, supra note 12, at 350-51 (citing Whimsicality, 721 F.Supp. at 1575).

See Young, supra note 8, at 103.


Id. § 202. In an effort to win congressional approval, the three-
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Title II, the Design Protection Act of 1975, was not passed by the House “because the new form of design protection provided by Title II could not truly be considered copyright protection.”

Although the House Report noted that the bill failed to designate a specific agency to administer the system, there was a more fundamental objection. The Department of Justice was concerned, as was the court in Fashion Originators’ Guild of America v. FTC, that Title II would create a new set of exclusive rights, the benefits of which did not necessarily outweigh “the disadvantage of removing such designs from free public use.” To date Congress has passed no bills, but the history of design protection and current sui generis acts, such as the Digital Millennium Copyright Act, provide hope that another chapter could be added to Title 17.

dimensional shape of wearing apparel was also excluded. Id. § 202(3).

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83 See H.R. Rep. No. 94-1476, at 50.
84 312 U.S. 457 (1941).
85 See H.R. Rep. No. 94-1476, at 50. See also FOGA v. FTC, 312 U.S. 457 at 465. The court in Fashion Originators’ Guild of America v. Federal Trade Commission issued a cease-and-desist order to the Fashion Originators’ Guild because the organization tended to create a monopoly in violation of the Sherman and Clayton Acts. The court found that the Guild deprived the public of the advantages that flow from free competition, stating, in part, the following reasons:

||It narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the Guild’s program to an organized boycott; takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs.

Id. (internal citations omitted). Similar to the court in FOGA v. FTC, Congress rejected Title II because “it feared creating a new monopoly for industrial design.” See Frenkel, supra note 72, at 543.

87 See Frenkel, supra note 72, at 577.
II. THE CURRENT STATE OF THE LAW

A. Why Copyright Protection is the Best Alternative

Copyright protection appears to be the best solution to design piracy because “the primary purpose of copyright law is to secure ‘the general benefits derived by the public from the labors of authors.’” Additionally, copyright law is flexible, and it has already been expanded to afford architects protection in their works. “Critics have observed that the VHDPA could ‘easily be expanded’ to cover industrial design, including ‘clothing designs.’” Another benefit of copyright protection is that the application process for protection is “cheap and expeditious.”

Apparel designs cannot effectively be patented for a number of reasons, the most practical of which is time. Before the Patent and Trademark Office will issue a patent, a search of prior art is required, which could take several months. Due to the short life of apparel designs, a work may have little or no commercial value by the time a design patent is granted. In fact, in Jack Adelman, Inc. v. Sonners & Gordon, Inc., the U.S. District Court for the Southern District of New York noted the practical inadequacy of patent protection for dress designs because of the short life span of designs and the rigorous

88 See Schmidt, supra note 7, at 874.
89 “The Digital Millennium Copyright Act (‘DMCA’) contains as a part of it the Vessel Hull Design Protection Act (‘VHDPA’).” See Frenkel, supra note 72, at 576.
90 See Frenkel, supra note 72, at 577 (citing Letter from Peter Jazsi of the Digital Future Coalition to Pat Roberts, United States Senator 2 (Aug. 24, 1998) (on file with Loyola of Los Angeles Law Review)).
92 Id.
93 Id.
94 Fashion designs usually have a shelf life of only a few months because trends quickly go out of style. Id.
95 See Young, supra note 8, at 90.
requirements and time involved in obtaining a patent.\textsuperscript{96} In addition, the patent application process is expensive and complex.\textsuperscript{97} Many designers, especially new designers, cannot afford to apply for such protection.\textsuperscript{98} Because patent protection is not suitable for apparel protection, fashion designers should be able to look to some variation of copyright law for protection against piracy and compensation for their creations.\textsuperscript{99}

\textbf{B. The Confusing Conceptual Separability Test}

A fashion designer seeking copyright protection must convince a judge that his design is not useful or that the useful part of the item is separable from the artistic part.\textsuperscript{100} As a result, “[n]umerous tests have evolved in the utility and separability areas; however, none of these tests provides a clear, predictable path for protection of apparel designs.”\textsuperscript{101}

\textit{1. The Sole Intrinsic Function Test}

Under the sole intrinsic function test, “copyright is denied to an article if its “sole intrinsic function . . . is its utility.”\textsuperscript{102}

\textsuperscript{96} 112 F. Supp. 187 (S.D.N.Y. 1934). The court stated as follows: The patent law provides for protection to those who create dresses of novel design, Title 35 U.S.C.A. §73, now 35 U.S.C.A. §171, but as a practical matter in many instances this fails to give the needed protection, for designs and patterns usually are short-lived and with the conditions and time incidental to obtaining the patent, this protection comes too late, if at all. \textit{Id.} at 190. The court ultimately held that a copyright on a dress-design drawing gave the copyright holder the exclusive right to make copies or reprints of the drawing only, but no exclusive rights to produce the dress itself; that is, the copyrightable work was the drawing, not the resulting dress style. \textit{Id.}

\textsuperscript{97} See Brown, \textit{Copyright-like Protection}, supra note 91, at 310.

\textsuperscript{98} See Hagin, \textit{supra} note 12, at 355-56.

\textsuperscript{99} See \textit{id.} at 374-75.

\textsuperscript{100} See Frenkel, \textit{supra} note 72, at 544.

\textsuperscript{101} See \textit{id.} at 544.

\textsuperscript{102} Ralph S. Brown, \textit{Design Protection: An Overview}, 34 UCLA L. REV.
understand the current copyright analysis for industrial designs, one must be aware of the different ways courts have interpreted Regulation § 202.10(c). Esquire, Inc. v. Ringer, the leading case advocating the sole intrinsic function test, was decided under the 1909 Copyright Act and is key to understanding the regulation.¹⁰³

In Esquire, the lower court granted copyright protection to the designer of modern light fixtures when he brought a mandamus action to require registration of his design.¹⁰⁴ Copyright registration had been denied on the theory that the fixtures did not contain “elements, either alone or in combination, which are capable of independent existence as a copyrightable pictorial, graphic or sculptural work apart from the utilitarian aspect.”¹⁰⁵ The court stated that “the lamp’s intrinsic function was not solely its utility because the lights served to decorate, as well as to illuminate, especially during the day, when they were exclusively decorative.”¹⁰⁶ The court deemed the fixture copyrightable even though it recognized the Register’s fear that a grant of copyright in this instance would “open the ‘floodgates’ to copyrighting ‘myriads of industrial designs of everything from automobiles to bathtubs to dresses.’”¹⁰⁷

While the lower court’s decision appears to give apparel designers a glimmer of hope, since the court disregarded the Copyright Office’s concerns about “opening the floodgates” to tempt creators of industrial designs, this hope was destroyed when the decision was reversed on appeal.¹⁰⁸ Swayed by legislative intent inherent in the fact that the seventy-odd design protection bills introduced in Congress since 1914 had failed to be enacted, the Register’s concern that the floodgates would open, and the Register’s expertise in such matters, the court

¹⁰³ 37 C.F.R. § 202.10(c) (1956).
¹⁰⁴ 591 F.2d 753, 795 (D.C. Cir. 1978).
¹⁰⁵ 414 F. Supp. at 940.
¹⁰⁶ 591 F.2d at 798-99.
¹⁰⁸ Id. (citing Esquire, 414 F. Supp. 941).
decided that the registration had been properly denied.\textsuperscript{109}

The appellate court justified its reversal by stating that an object is characterized as useful when it has “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”\textsuperscript{110} This new language narrowed the reach of the copyright statute and ruled out the protection of articles, such as light fixtures, with dual intrinsic functions.\textsuperscript{111} The court glossed over the notion of “conceptual separability” as irrelevant to the case at hand.\textsuperscript{112}

2. The Primary-Subsidiary Test

Under the primary-subsidiary test, copyright protection can be granted if the design’s primary purpose is ornamental and its utilitarian purpose is subsidiary.\textsuperscript{113} The Second Circuit’s first major opinion discussing conceptual separability\textsuperscript{114} originated in \textit{Kieselstein-Cord v. Accessories by Pearl, Inc.},\textsuperscript{115} a case that the Second Circuit described as being on the “razor’s edge of copyright law.”\textsuperscript{116}

In \textit{Kieselstein-Cord}, the Copyright Office and the courts granted copyright protection to the designer of ornamental belt buckles because “the primary ornamental aspects of the . . . buckles [were] conceptually separable from their subsidiary utilitarian function.”\textsuperscript{117} The court went on to state that “these are not ordinary buckles; they are sculptured designs cast in precious metal—decorative in nature and used as jewelry, principally [as]
ornamentation. “118 It is difficult to understand why apparel designs cannot get protection in light of this approach. Many top fashion designers create garments, especially for the runway, that are decorative in nature and principally ornamental, which illustrates that some designs can have conceptually separable elements.119

Copyright protection was granted to costume jewelry in *Trifari, Krussman & Fishel, Inc. v. Charel Co.*120 when the court used a primary-subsidiary test to determine if the jewelry was protectible under copyright law. The court stated the following:

> In the case of costume jewelry, while the overall form is to some extent pre-determined by the use for which it is intended, the creator is free to express his idea of beauty in many ways. Unlike an automobile, a refrigerator, or a gas range, the design of a necklace or of a bracelet may take as many forms as the ingenuity of the artist may conceive.121

Jewelry is viewed as ornamental, rather than utilitarian, because it is artistic and decorative.122 Advocates of apparel design protection would argue that the design of a garment, like jewelry, “may take as many forms as the ingenuity of the designer may conceive.”123 Unfortunately, the courts have failed to recognize to date that many garments express beauty and are often seen as “wearable art” in today’s society.124

### 3. The Inextricably Intertwined Test

Another interpretation of conceptual separability has been coined the “inextricably intertwined test,”125 wherein an article is

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118 *Id.* at 993.
122 *Trifari*, 134 F. Supp. at 553.
125 See Frenkel, *supra* note 72, at 548.
denied copyright protection if the “aesthetic and artistic features . . . are inseparable from [its] use as [a] utilitarian article.” 126 This test evolved from a Second Circuit case, Carol Barnhart, Inc. v. Economy Cover Corp., 127 in which the court denied copyright protection to copied mannequins of partial human torsos.128 The court distinguished Kieselstein-Cord on the ground that the artistic design of the belt buckles was “wholly unnecessary to [the] performance of the utilitarian function.”129 The court found that the artistic elements of the mannequin torsos were “inextricably intertwined” with the torsos’ utilitarian features, and, therefore, were not copyrightable.130 This test makes conceptual separability such a high hurdle for industrial design that few works, if any, could gain copyright protection.131

4. The Denicola/Brandir Artistic Judgment Test

The Second Circuit in Brandir International, Inc. v. Cascade Pacific Lumber Co.132 adopted what is known as the “Denicola/Brandir artistic judgment test.”133 Professor Denicola stated that “the dominant feature of modern industrial design is the merger of aesthetic and utilitarian concerns” and proposed a sliding scale between art and utility.134 He believed that the more

126 Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985).
127 Id.
128 Id. at 418.
129 Id. at 419.
130 Id.
131 See Frenkel, supra note 72, at 548 (citing Aoki, supra note 113, at 340).
132 834 F.2d 1142 (2d Cir. 1987).
133 Robert Denicola is a professor of law at the University of Nebraska. “He surveyed the different tests for conceptual separability and concluded that none of the tests truly captured the purpose of separability—to divide copyrightable art from uncopyrightable industrial design.” See Frenkel, supra note 72, at 550 (citing Robert C. Denicola, Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles, 67 MINN. L. REV. 707, 739 (1983)).
134 See Denicola, supra note 133, at 707, 739.
an artist is concerned with utilitarian considerations, the less right the work has to copyright protection. Judge Oakes restated the Denicola test as follows:

If design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separate from the utilitarian elements. Conversely, where design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences, conceptual separability exists.

The court found that no conceptual separability existed because the aesthetic aspects of a bicycle rack were the same as the functional aspect.

Judge Oakes’s restatement of the Denicola test has been criticized for two reasons. First, while Professor Denicola’s approach seems to create a sliding scale between artistic influence and functionality, Judge Oakes seems to require that industrial design be a result of either “artistic judgment” or “functional influences.” Furthermore, the test is difficult to apply because it requires judicial analysis of artistic judgment. Judges are ill suited to assess artistic judgment because they are not necessarily skilled in that area, and conflicting rulings are likely. It should be noted, moreover, that the two interpretations of the Denicola test potentially conflict: Professor Denicola’s interpretation allows protection for garment designs reflecting more aesthetic considerations than utilitarian ones, while Judge Oakes’s interpretation of the test denies protection to articles in which functional considerations are manifested.

This conflict is illustrated in Whimsicality, Inc. v. Rubie’s

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135 See Denicola, supra note 133, at 739.
136 Brandir, 834 F.2d at 1145.
137 Id. at 1146-47.
138 See Frenkel, supra note 72, at 551.
139 See id.
140 See id. at 552.
141 See id. at 551.
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Costume Co.\textsuperscript{142} and National Theme Productions, Inc. v. Jerry B. Beck, Inc.\textsuperscript{143} In Whimsicality, the Second Circuit cited Brandir and found that the artistic and utilitarian functions of clothing merge.\textsuperscript{144} Thus, the court concluded that Halloween costumes could not be protected.\textsuperscript{145} On the other hand, in National, a California district court citing Brandir held that the function of costumes had little to do with their design and granted the costumes protection.\textsuperscript{146} The court went on to state that “the Second Circuit improperly applied the Denicola test . . . which will cause decisions to turn upon largely fortuitous circumstances.”\textsuperscript{147} Although the interpretation of the Denicola test in National could eventually protect garments, the standard is largely subjective and will continue to result in inconsistent decisions.\textsuperscript{148}

In a more recent decision, Severin Montres, Ltd. v. Yidah Watch Co.,\textsuperscript{149} a district court in California used the Brandir test to analyze whether a watch should be afforded copyright protection. The plaintiff, the licensee of the Gucci trademark for the purpose of creating watch designs,\textsuperscript{150} created the Gucci-G watch, a watch with its rectangular frame forming a three-dimensional letter G,\textsuperscript{151} while the defendants made a J-watch and an E-watch.\textsuperscript{152} The defendants claimed the frame was functional and could not be copyrighted.\textsuperscript{153} The district court, however, relied on National and held “where design elements can be identified as reflecting the designer’s artistic judgment exercised

\textsuperscript{142} 891 F.2d 452 (2d Cir. 1989).
\textsuperscript{143} 696 F. Supp. 1348 (S.D. Cal. 1988).
\textsuperscript{144} See Whimsicality, 891 F.2d at 455.
\textsuperscript{145} Id.
\textsuperscript{146} See National, 696 F. Supp. at 1353-54.
\textsuperscript{147} Id. at 1353 (quoting Brandir, 834 F.2d at 1151(Winter, J., concurring in part and dissenting in part)).
\textsuperscript{148} See Frenkel, supra note 72, at 551.
\textsuperscript{150} Id. at 1264 n.1.
\textsuperscript{151} Id. at 1265.
\textsuperscript{152} Id. at 1263.
\textsuperscript{153} Id. at 1265.
independently of functional influences, conceptual separability exists.”154

The court held that the watches were copyrightable because it believed that the “plaintiff’s artistic expression contained enough artistic design to be unique and protectable under the Brandir test.”155 Under the Severin analysis, artistic apparel designs might be protectible if certain design elements, such as the sleeve or neckline configuration, or the cut of the garment, could be “identified as reflecting the designer’s artistic judgment exercised independently of the functional influences,” namely covering up the body.156

5. The “Lack of Test” Approach

“Of course, having a confusing test may be better than having no test at all. The Ninth Circuit seems to have exactly that—no test.”157 In Fabrica Inc. v. El Dorado Corp.,158 the Ninth Circuit merely cites the statute and its legislative history. In this case, Fabrica sought copyright protection for a folder of carpet samples.159 The court found that “no element of the folders . . . can be separated out and exist independently of their utilitarian aspects.”160 This case-by-case approach is undesirable because the court does not clearly explain its reasoning for failing to afford protection to the design in question, and thus fails to provide guidance to designers.161

C. Fashion Today

Apparel designs are not ordinary useful articles, especially

154 Id. (quoting National Theme Productions, 696 F. Supp. at 1353 and citing Brandir, 834 F.2d at 1145).
155 See Frenkel, supra note 72, at 553.
156 See id.
157 See id.
158 697 F.2d 890 (9th Cir. 1983).
159 Id. at 892.
160 Id. at 893.
161 See Frenkel, supra note 72, at 553.
today when apparel is meant to be admired, analyzed, and viewed.\footnote{162} In Poe v. Missing Persons,\footnote{163} for example, an art student created a “swimsuit” made of clear plastic filled with crushed rock.\footnote{164} The designer called her work a “soft sculpture” representing a swimsuit, while the defendants characterized the work as merely a swimsuit.\footnote{165} The court held that the work could be afforded copyright protection because it was not clear “by looking at [the suit] whether a person wearing this object could move, walk, swim, sit, stand, or lie down without unwelcome or unintended exposure.”\footnote{166}

Raising an important issue, the Poe court stated that “given the bizarre nature of what sometimes passes for high fashion, there may be a legitimate issue even as to the threshold question of utility.”\footnote{167} Professor William Fryer of the University of Baltimore School of Law observed, “[W]hat some persons consider a costume is another person’s ordinary wear.”\footnote{168} Apparel designs and costumes are often indistinguishable today, making it difficult to determine whether a garment is utilitarian clothing or a non-utilitarian costume.

The difficulty of distinguishing between costume and high-end fashion is evident from viewing fashion shows and couture collections.\footnote{169} Many of the designs created for “appearances” are

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\begin{itemize}
  \item[162] See Hagin, supra note 12, at 348.
  \item[163] 745 F.2d 1238 (9th Cir. 1984).
  \item[164] Id. at 1242.
  \item[165] Id. at 1239.
  \item[166] Id. at 1242. Various apparel designs have been displayed in museums to be viewed as art. See Hagin, supra note 12, at 348. Similar to the Kieselstein-Cord belt buckles that were exhibited at the New York Metropolitan Museum of Art, Poe’s creation was displayed at the Los Angeles Institute for Contemporary Art. Id. In 2000, Giorgio Armani’s designs were displayed at the Guggenheim Museum in New York City. Ogale Idudu, High Fashion as Art: Couture in Limelight At London’s V&A—“Radical Fashion” Goes from Simple to Wild, WALL ST. J. EUROPE, Oct. 19, 2001, at 28, available at 2001 WL-WSJE 28845671.
  \item[167] See Schalestock, supra note 27, at 123.
  \item[168] See id. (citing Comment on file at the U.S. Copyright Office, Docket No. RM 90-7).
  \item[169] See Mencken, supra note 9.
\end{itemize}
intended to make an artistic statement. Style, rather than durability, is the dominant competitive factor in the fashion industry today. In addition, Halloween costumes are often designed to imitate the attire of others. An actor could wear an original garment in a movie or to an award show, and copies of that garment could be made for some to wear as a costume and for others to wear as everyday attire.

D. Piracy in the Apparel Industry

Design piracy in the apparel industry is a tremendous problem. For example, the “Copycat King” Victor Costa grossed approximately $50 million in 1988, and Jack Mulqueen grossed more than $200 million in 1981, mostly from copying the creations of other designers. Congress has not passed legislation that affords copyright protection to the

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170 See id.
176 Jack Mulqueen was an apparel manufacturer that made most of its money from sales of garments that the company’s president readily admitted were copies of original creations of other designers. See Schmidt, supra note 7, at 863.
177 See id.
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apparel industry as it has done for other industries.\(^{178}\) In fact, Congress has explicitly excluded apparel designs from the proposed bills.\(^{179}\) The purpose of the Design Anti-Piracy Act of 1989, introduced by Representatives Kastenmeier and Moorhead, was to protect original designs of useful articles against unauthorized copying.\(^{180}\) Representative Moorhead stated that “[t]he bill would exclude protection for designs compose[d] of three dimensional shapes and surfaces with respect to apparel.”\(^{181}\)

Affording copyright protection to original apparel works would inspire designers to be more creative and would contribute to the “[p]rogress of [s]cience and useful [a]rts.”\(^{182}\) Over the years, Congress has carefully and gradually extended the reach of the Copyright Act to include an increasing number of artistic works.\(^{183}\) Since courts have found that designs on clothing may be


\(^{179}\) See Hagin, supra note 12, at 347.


\(^{181}\) Id. (statement of Rep. Moorhead).

\(^{182}\) See Hagin, supra note 12, at 342, 368-69.

\(^{183}\) See id. at 348 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (“The history of copyright law has been one of gradual expansion in the types of works accorded protection.”)). Former Register of Copyrights Barbara Ringer has noted the following:

Copyright law revision may be changing from a senagenary event into something resembling a continuous process. In the course of the last twenty years, copyright has emerged as one of the most important areas of American property law. As this society moves deeper and deeper into that phase of economic life called “post-industrialism,” . . . the extent to which copyrightable creations are protected by exclusive property interests can become central to
sufficiently original to receive copyright protection, it would be appropriate for Congress to take a step further and afford the design of original garments similar treatment.

III. RECOMMENDED SOLUTION

A. Current Copyright Protection

The United States is a signatory to the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement, which provides its members with minimum standards of intellectual property protection. Although former President Clinton stated that the existing intellectual property laws in the United States are sufficient to protect industrial designs, design piracy is a big problem in this country, and current law inadequately addresses it. Because the United States has only complied with the minimum requirements of the Berne Convention, foreign fashion designers do not receive the same protection in the United States as they do overseas.

Under international rules, the creative works of fashion designers are protected for a limited term under copyright law.
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But works that are protected in Europe do not receive the same protection against design piracy when they are shown in the United States.\textsuperscript{190} Thus, when European designers show their works in the United States they are risking that the works may be copied and reproduced for sale.\textsuperscript{191} In fact in the United States the copier is even allowed to use the original designer’s name in the advertisement to increase sales.\textsuperscript{192} Congress should look to countries such as France and the United Kingdom, which provide copyright protection to garment designs, as models and similarly extend copyright protection to industrial designs.\textsuperscript{193}

\textbf{B. The Garment Design Protection Act}

To extend copyright protection specifically to apparel designs, Congress should amend Title 17 of the U.S. Code with a new chapter, The Garment Design Protection Act of 2002.\textsuperscript{194} The procedural provisions should follow those laid out in Representative Moorhead’s and Representative Kastenmeier’s version of the Design Protection Act of 1989, which was intended to protect industrial designs.\textsuperscript{195}

\textsuperscript{190} See Bharathi, supra note 30, at 1676.

\textsuperscript{191} See Mencken, supra note 9, at n.4 (citing Societe Yves Saint Laurent Couture v. Societe Louis Dreyfus Retail Mgmt., [1994] ECC 512, 18 May 1994, (Paris) (“The French court ruled in favor of Yves Saint Laurent for ‘counterfeiting and disloyal competition’ against Ralph Lauren for copying a black tuxedo dress that was created in 1966. Saint Laurent was awarded $395,000 in 1994.”); PARADISE, supra note 6, at 77.

\textsuperscript{192} See Mencken, supra note 9, at n.73 (stating that a copier may mark his clothing as being “inspired” or “copied” from a certain designer without fear of trademark infringement or false advertising).

\textsuperscript{193} See discussion supra note 189.

\textsuperscript{194} See infra Appendix.

There are several basic problems with the current copyright law as applied to apparel designs. For example, as the Copyright Act is written, apparel designs are not defined in § 101. Accordingly, garment designs should be defined in the new chapter as “the design of a garment, including the cut of the fabric and the overall appearance and not including the fabric design.” For purposes of the Garment Design Protection Act, an article should be deemed a “useful article” if the intrinsic utilitarian function exceeds the garment’s intention to portray the appearance of the article or to convey information. To determine an article’s usefulness, considerations should include the cut of the fabric, the style, the length and the garment’s overall appearance.

An important feature of the Garment Design Protection Act would be the establishment of a new office, the United States Garment Design Protection Office (“GDPO”). The GDPO would handle all the administrative functions and duties required by the act, so as to not overburden the Copyright Office. The administrator of the GDPO would have the responsibility of carrying out and delegating all official duties of the GDPO. The administrator and the subordinate officers and employees of the GDPO would be appointed by the Librarian of Congress and would act under the librarian’s general direction and supervision.

Furthermore, the administrator and all the subordinate officers who would determine whether garments are entitled to protection would be required to have a sufficient knowledge of apparel design and would have to pass a vigorous examination, just as patent office employees are required to have a scientific background and pass the patent bar exam. GDPO employees would receive the registration fees required to apply for garment design protection.

Additionally, a new standard of originality tailored to the

197 See infra Appendix § 1(a)(2).
198 See infra Appendix § 1.
199 See infra Appendix § 7.
200 See infra Appendix § 8.
fashion industry is necessary to protect apparel designs. To demonstrate originality, a designer would be required to show that his or her apparel design is not a copy of another’s work by showing that the design is not currently registered with the GDPO. To encourage designers to register their works, a piracy claim could not be brought on behalf of an unregistered work. “Upon such a showing and in return for creating (or re-creating) public interest, and a current market for the design, copyright protection would issue.” Unlike with patents, prior works would not have to be submitted to the GDPO. Because the decision-makers at the GDPO would have a substantial background in apparel design, they would be able to make educated decisions about whether the designs meet the originality standard. The administrator would consider the garment as a whole; only those garments exhibiting creativity would be protected, while purely functional, uncreative, “two-sleeves-and-a-body” designs would be denied protection. The administrator’s preliminary originality and functionality determination could be contested by an accused design pirate in an infringement action.

Once a design is approved for protection by the GDPO,

See Schmidt, supra note 7, at 876.
See id. at n.112:
Almost no garment design can ever really be considered “brand new”: garment designs generally consist of elements already “discovered.” “Old” elements are incorporated either in a new combination or at a time when such elements are not generally in vogue. Often, then, the appeal of garment designs lies solely in the re-creation of public interest in a design from the past.

See id. at n.105.
See id. at 876.
See id. at 877.
notice would have to be given. Notice should consist of the words “Protected Design” or the letter “F” within a circle, the year of the date on which protection for the design commenced and the name of the proprietor. The notice would be located and applied so as to give reasonable notice of design protection while the garment is passing through its normal channels of commerce. Tags affixed to the garment would fulfill this requirement.

If a designer knowingly attempts to deceive the public by giving false notice, he or she would be fined up to $500 for every offense. Any person could sue for the penalty, and in such event, one-half of the fees would go to the person suing and the other to the GDPO.

Another basic problem with the current copyright law protection as applied to apparel designs is that the period of copyright protection—the author’s life plus seventy years—is inappropriate in view of the “seasonal and capricious nature of fashion and consumer tastes.” As Rocky Schmidt has advocated previously, a one-year term should be implemented to provide a reasonable time period for designers to make a profit on their designs. Since most trends go out of style after three months, this time period should suffice.

The shortened term of protection would serve several purposes. First, it would align copyright protection with the fickle nature of the industry. Second, a shortened term would encourage courts to find infringement without fear that such a finding would be tantamount to granting a long monopoly in the

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206 See infra Appendix § 9(a).
207 See infra Appendix § 9.
208 See infra Appendix § 16.
210 Wm. Filene’s Sons Co. v. Fashion Originator’s Guild of Am., 90 F.2d 556, 558 (1st Cir. 1937).
211 See Schmidt, supra note 7, at 877.
212 See id.
213 See infra Appendix § 5.
214 See Schmidt, supra note 7, at 877.
design. Third, “a one-year term should provide enough time for most designers to recover substantial ‘rewards’ for their creations.” Finally, the designer would be more likely to apply for protection if he or she believed that the courts would effectively enforce the law.

To ensure that the GDPO does not violate the Sherman Act, as did the Fashion Originator’s Guild of America, this article proposes, as has Rocky Schmidt, that a compulsory licensing system be designed to limit the risk of monopolies. Upon registering a design, the designer would own the design exclusively for one month; however, upon publishing, selling, or showing the design in public, the designer would be required to license it. The license fee arrangement would be similar to that of the blanket licenses for sound recordings used by the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), which the Supreme Court has found not violative of the Sherman Act.

The GDPO would control the collection and distribution of the licensing fees, as well as police the stores, the Internet, magazines, and all other possible clothing distribution arenas to

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215 See id.
216 See id.
218 Under a compulsory licensing system, “once a designer ma[kes] his designs public, the world would be free to copy them. [However,] the copyist would be required to pay a small royalty or ‘license fee’ to the original designer.” See Schmidt, supra note 7, at 878.
219 See infra Appendix § 6.
220 ASCAP and BMI issue blanket licenses to copyrighted musical compositions for a fee. “Blanket licenses give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term.” Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 1 (1979).
221 Broadcast Music, Inc., 441 U.S. at 19 (holding that “[a]lthough the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act”).
ensure that no copied material is being sold or displayed without payment of the requisite licensing fees. “The compulsory royalty system could . . . be converted into a system whereby licensing fees fund a ‘pool’ used to bring enforcement actions and police the use of designs.”222 A small percentage of the licensing fees would go to the GDPO.223

If the GDPO, or another party, believes that a copier has infringed a protected apparel design, the GDPO would notify the designer. First, the designer may request a hearing in front of the GDPO’s Anti-Piracy Panel (“APP”), which would hear infringement claims. The APP would consist of lawyers trained in intellectual property law.224 Thereafter, either party could appeal the APP’s decision by bringing a civil action in district court.

When an infringement action is brought before the APP, the alleged infringer could pay the applicable licensing fees to avoid liability. If he or she refuses, the proprietor of the design could then seek a preliminary injunction in court; however, the APP would not have the authority to grant such an order. At this point, the court could appoint a member of the APP to serve as a court-appointed master.225 The master would determine preliminarily whether infringement had occurred. If the master determined that infringement had occurred, the court could enjoin the alleged infringing party from further sales of the offending apparel until final resolution of the case. If the master finds preliminarily that infringement did not occur, the copyright holder could, of course, proceed with the litigation in front of the APP, but without an injunction preventing the other party from manufacturing or selling the allegedly pirated apparel.226 The

222 Hagin, supra note 12, at 384 (citing Schmidt, supra note 7, at 879 n.136).
223 See infra Appendix § 8(d).
224 See infra Appendix § 7(c).
225 It is well within the court’s power to provide for a master to make determinations of fact in areas that are outside of the court’s expertise. See Aufrichtig, supra note 217, at 176-77 (citing Wisconsin v. Illinois, 449 U.S. 48 (1980)). See infra Appendix § 14(b)(2).
226 See Aufrichtig, supra note 217, at 176-77.
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parties also could resolve the matter by arbitration.  

As in all copyright infringement actions, it would not be infringement to make, have made, import, sell, or distribute any article embodying a garment design created without knowledge of a protected garment design. After proving that he or she is innocent, the accused infringer would be permitted to sell the remainder of his or her merchandise and either cease sales or pay the licensing fees.

Whenever the alleged infringer introduces an earlier design that is identical or substantially similar to the protected design, the party alleging infringement would have the burden of affirmatively establishing its originality. After originality is established, the degree of similarity between the protected design and the alleged infringing design would be evaluated.

In evaluating whether infringement had occurred, the master would consider a number of factors. First, he or she would have to determine whether the allegedly infringing design is an exact copy of the protected design. If it were not, the master would determine whether significant stylistic features of the original garment are found in the second. If so, the master would compare the cut, sleeve and garment length, collar or waist, fit, and other similar features of the garments. The fabric design and necessary accessories, such as zippers and buttons, should not be included in this preliminary evaluation. The final preliminary test would be a comparison of the overall look and style of the two garments. If the master believes that, based on the foregoing, there is a basis for infringement, he or she should advise the court and specify his or her reasoning. If the master does not find enough similarity to warrant a finding of likely infringement, he or she should indicate the degree of similarity found.

Should the case proceed to trial before the APP, after the court has either granted or denied the preliminary injunction,

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227 See infra Appendix § 14(c).
228 See infra Appendix § 11.
229 See infra Appendix § 11.
230 An exact copy would violate infra Appendix §11(d).
231 See Aufrichtig, supra note 217, at 180.
both parties should provide all supporting documents, including any design drawings, relating to the development of the respective garment designs. The parties also should provide documents tending to substantiate the period of time involved in developing and manufacturing the garment. Testimony of other employees who took part in designing the garment would be admissible as well. This could provide circumstantial evidence of the defendant’s independent effort.

The master’s preliminary evaluation should play a substantial role in the APP’s and the court’s analysis, should the case be appealed. If the master finds that the defendant developed a substantially similar garment in a suspiciously short period of time, or soon after the plaintiff first showed the design (either publicly or at a private show), the APP should find copyright infringement. Of course, evidence that the design was copied from a prior work by a third party would be a valid defense.

A prevailing plaintiff could be awarded the infringer’s profits resulting from the sale of the copies if it is found that the infringer’s sales are reasonably related to the use of the claimant’s design. In such a case, the plaintiff would only be required to prove the infringer’s sales, and the infringer would be required to prove his or her expenses against such sales. In any action, the APP may, in its discretion, allow for the recovery of full costs by or against any party other than the United States or an officer thereof. The APP also may award reasonable attorneys’ fees to the prevailing party as part of the costs. Additionally, the APP may award punitive damages as it sees fit. Finally, the APP may order that all infringing articles and

See id. at 181.
See id. at 180.
See id.
See id.
See id.
See id.
See id.
See id.
See id.
See infra Appendix § 15(c).
any patterns, models, or other means specifically adapted for making the infringed garment be delivered for destruction or other disposition, as the APP may direct.  

To date, the Copyright Office, the courts and Congress have feared (not without reason) that if apparel designs receive copyright protection, other industrial designers would demand similar protection; they fear the formation of monopolies, which will cause prices to soar. However, implementation of a licensing scheme should allay this fear. Although Congressman Kastenmeir suggests that “the argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirements of the intellectual property clause,” copyright protection for original apparel designs would benefit the economy and consumers as well as designers. As Ralph Brown has stated, “[W]hen one places the case for limited protection for the ornamental design of useful objects in the context of other limited monopolies in intellectual property, the case is not an unreasonable one.”

241 See infra Appendix § 15.
242 Brown, Copyright-like Protection, supra note 91, at 323.
243 A licensing scheme, such as the one discussed in this note, would greatly reduce the threat of monopolies; designers would be willing to license their designs for royalties or a fixed fee. See Hagin, supra note 12, at 386. This would keep the cost of licensed imitations relatively low, and consumers would still be able to get designer look-a-likes at cheaper prices.
244 Brown, Copyright-like Protection, supra note 91, at 323.
245 A federal law would give the courts a bright-line rule when deciding apparel design cases, thus providing more consistency for future decisions. In addition, designers who are afforded protection for their creations would be assured greater profits, and, in turn, would be likely to create more designs. Bharathi, supra note 30, at 1670. This would not only increase domestic revenue for the United States, but revenue abroad as well. Id. at 1669-70. Protection for apparel designs would also increase competition because the imitators would begin to create their own original designs.
246 Brown, Copyright-like Protection, supra note 91, at 323.
CONCLUSION

Extending copyright law to afford protection for apparel designs would benefit society, designers and consumers. Apparel designs are no longer merely utilitarian in nature, rather designers must “creat[e] art to fit the framework of the human form [that] often involves creativity (e.g., movement, fluidity), and [demands that the designer] create within the confines of wearability.” Copyright law needs to adapt to changes in society because “copyright protection for fashion works is crucial to competitiveness.” The current copyright law should be adapted to protect apparel designs, and the “proposed amendment better comports with equitable and competitive norms than does current copyright doctrine applied to this area.” The works of fashion designers should be protected because protecting original designs would rid the U.S. apparel industry of free-riders, thus creating a truly level playing field—the very essence of fair competition.

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247 Mazer v. Stein, 347 U.S. 201, 219. “[The] encouragement of individual effort by personal gain is the best way to advance public welfare . . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” Id.

248 See Hagin, supra note 12, at 354.

249 See id. at 387.

250 See id.

251 See Brown, Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition, 33 J. COPYRIGHT SOC’Y 301, 313-20 (1986).
Appendix A

United States Code: Title 17

Other Provisions

A Proposed Bill for the Protection of Apparel Designs
To strengthen the intellectual property laws of the United States by providing protection for original apparel designs against unauthorized copying.

Section 1. Designs Protected

(a) Designs protected.

(1) In general. The designer or other owner of an original design of a useful article, which makes the article attractive or distinctive in appearance to the purchasing or using public, may secure the protection provided by this Act upon complying with and subject to this Act.

(2) Apparel Designs (also referred to as Garment Designs). The design of a garment, including the cut of the fabric and the overall appearance, and not including the fabric design, is subject to protection under this Act, notwithstanding Section 2(d).

(b) Definitions. For the purpose of this Act, the following terms have the following meanings:

(1) A design is “original” if it is the result of the designer’s creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles, which is more than merely trivial and has not been copied from another source. In determining originality, considerations should include but not be limited to the cut of the fabric, the style, the length and the garment’s overall appearance.

(2) A “useful article” is a garment design that in
normal use has an intrinsic utilitarian function exceeding the intention to portray the article or to convey information or an article that is solely useful.

(3) The “design of a useful article,” hereinafter referred to as a “design,” consists of those aspects or elements of the article, including its three-dimensional features of shape, that make up the appearance of the article. The design must be fixed in a useful article to be protectable under this Act.

Section 2. Designs Not Subject to Protection

Protection under this Act shall not be available for a design that is—

(a) not original;
(b) staple or commonplace, such as standard geometric figures, familiar symbols, emblems, or motifs; or other shapes, patterns, or configurations that have become common, prevalent, or ordinary;
(c) different from a design excluded by Subsection (b) above, only in insignificant details or in elements which are variants commonly used in the relevant trades; or
(d) dictated solely by a utilitarian function of the article that embodies it.

Section 3. Revisions, Adaptations, and Rearrangements

Protection under this Act shall be available notwithstanding Subsections 2(b) through (d), if the design is a substantial revision, adaptation, or rearrangement of said subject matter. Such protection shall be independent of any subsisting protection in subject matter employed in the design, and shall not be construed as securing any right to subject matter excluded from protection under this Act or as extending any
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subsisting protection under this Act.

Section 4. Commencement of Protection

The protection provided for a design under this Act shall commence upon the date of publication of the registration pursuant to Section 13(a), or the date the design is first publicly exhibited anywhere in the world, whichever occurs first.

Section 5. Term of Protection

(a) In general. Subject to Subsection (b) and the provisions of this Act, the protection herein provided for a design shall continue for a term of one year from the date of the commencement of protection as provided in Section 4.

(b) Upon expiration or termination of protection in a particular design, as provided in this Act, all rights under this Act in said design shall terminate, regardless of the number of different articles in which the design may have been utilized during the term of its protection.

Section 6. Ownership, Transfer, and Licensing

(a) The exclusive rights in an apparel design subject to protection under this Act belong to the registrant of the apparel design.

(b) The owner shall retain exclusive rights in the design for the period of one month after registration. After said time has expired, the owner must license the design rights to any qualified requesting retailer or licensee. Such rights may be licensed by operation of law, may be bequeathed by will, and may pass as personal property by the applicable laws of intestate succession.

(c) Any document pertaining to an apparel design may be recorded in the United States Garment Design Protection
Office ("GDPO") if the document filed for recordation bears the actual signature of the person who executed it or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document. The Administrator of the GDPO (the "Administrator") shall, upon receipt of the document and the fee specified by the Administrator, record the document and return it with a certificate of recordation. The recordation of any license under this paragraph gives all persons constructive notice of the facts stated in the recorded document concerning the transfer or license.

(1) The GDPO shall be responsible for making sure that copies are being sold only by those retailers who have paid the licensing fees to copy the particular apparel designs. Those retailers who are found to be selling a garment that is substantially similar to a protected design will be subject to an infringement action as specified by Section 11 of this Act.

Section 7. The Garment Design Protection Office Responsibilities, and Organization

(a) All administrative functions and duties under this Act, except as otherwise specified, are the responsibility of the Administrator. The Administrator, together with the subordinate officers and employees of the GDPO, shall be appointed by the Librarian of Congress and shall act under the Librarian's general direction and supervision.

The Administrator and all subordinate officers who make decisions about which garments shall receive protection, must have a sufficient understanding of past and present apparel designs, and must pass a vigorous examination given by the Administrator.

(b) In addition to the functions and duties set out elsewhere in this Act, the GDPO shall perform the following functions:

(1) Effectively decide which garments meet the
requirements necessary to receive copyright protection pursuant to this Act and control the registration process for protectable garments;
(2) Control the collection and distribution of the licensing fees;
(3) Police stores, the internet, magazines, and all other possible clothing distribution arenas to ensure that no copied material is being sold or displayed without a valid license.

(c) The GDPO shall have a separate department, the Anti-Piracy Panel ("APP"), that shall hear and decide claims of infringement. This department shall consist of lawyers trained in the area of intellectual property. If a party wishes to appeal the APP’s decision, the case shall be brought to an appropriate court of jurisdiction.

Section 8. Garment Design Protection Office Fees

(a) The Administrator shall, by regulation, set reasonable fees for the filing of applications to register designs under this Act, taking into consideration the cost of providing these services.
(b) The Administrator shall, by regulation, set reasonable fees for the licensing of protected apparel designs.
(c) The employees of the Garment Design Protection Office shall be paid with the monies received through the registration process.
(d) A reasonable percentage of the licensing fees, the amount of which is to be determined by the Administrator, will be set aside for the compensation of the GDPO employees.

Section 9. Design Notice

(a) Whenever any design for which protection is sought under this Act is publicly exhibited, as provided in
Section 12(b), the proprietor shall, subject to the provisions of Section 12, mark the design or have the design marked legibly with a design notice consisting of the following three elements (the “Design Notice”):

(1) the words “Protected Design” or the letter “F” within a circle;

(2) The year of the date on which protection for the design commenced; and

(3) The name of the proprietor, an abbreviation by which the name can be recognized, or a generally accepted alternative designation of the proprietor; any distinctive identification of the proprietor may be used if it has been approved and recorded by the Administrator before the design marked with such identification is registered.

After registration, the registration number may be used instead of the elements specified in (2) and (3) hereof.

(b) The Design Notice shall be so located and applied as to give reasonable notice of design protection while the garment is passing through its normal channels of commerce. This requirement may be fulfilled through use of tags affixed to the material.

(c) When the proprietor of a design has complied with the provisions of this Section, protection under this Act shall not be affected by the removal, destruction, or obliteration by others of the Design Notice on an article.

Section 10. Effect of Omission of Design Notice

The omission of the Design Notice prescribed in Section 9 shall not cause loss of protection, but damages or profits shall not be recoverable under the provisions of this Act in any action for infringement, with the exception of actual proof that the infringer was notified of the design protection and continued to infringe thereafter, in which event damages or profits may be recovered only for
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infringement after such notice.

Section 11. Infringement

(a) It shall be infringement of a design protected under this Act for any person, without the consent of the proprietor of the design, by conduct in or affecting commerce during the term of such protection, to—

(1) make, have made or import, for sale or for use in trade, any infringing article as defined in Subsection (d) hereof; or

(2) sell or distribute for sale or use in trade any such infringing article, provided that a seller or distributor of any such article who did not make or import the same shall be deemed to be an infringer if—

(i) he or she induces, or acts in collusion with a manufacturer to make, or an importer to import such article (merely purchasing or giving an order to purchase in the ordinary course of business shall not itself constitute such inducement or collusion); or

(ii) he or she refuses, or fails upon the request of the proprietor of the design, to make a prompt and full disclosure of his or her source of such article, and he or she orders or reorders such article after having received notice by registered or certified mail of the protection subsisting in the design.

(b) It shall not be infringement to make, have made, import, sell, or distribute, any article embodying an apparel design created without knowledge of a protected apparel design.

(c) A person who incorporates into his or her own product of manufacture an infringing article acquired from others in the ordinary course of business or who, without knowledge of the protected design, makes or processes an infringing article for the account of another person in the
ordinary course of business shall not be deemed an infringer except under the conditions of clauses (i) and (ii) of Subsection (a)(2) of this Section. Accepting an order or reorder from the source of the infringing article shall be deemed ordering or reordering within the meaning of Clause (ii) of Subsection (a)(2) of this Section.

(d) An “infringing article” as used herein is any article, the design of which has been copied from, and is substantially similar to, the protected design without the consent of the proprietor, provided that an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture or similar medium shall not be deemed to be an infringing article. An article is not an infringing article if it embodies, in common with the protected design, only elements described in Subsections (a) through (d) of Section 2.

(e) The party alleging rights in any action or proceeding concerning an apparel design shall have the burden of affirmatively establishing its originality whenever the opposing party introduces an earlier work, which is identical to such design, or so similar as to make a prima facie showing that such design was copied from such work.

Section 12. Application for Registration

(a) Protection under this Act shall be lost if application for registration of the design is not made within one month after the date on which the design was first made public.

(b) A design is made public, either by the designer or with his or her consent, when an existing useful article embodying the design is anywhere publicly exhibited, publicly distributed or offered for sale or sold to the public.

(c) Application for registration may be made by the designer and shall contain such information as required by
the GDPO.

(d) The application for registration shall be accompanied by a drawing or other pictorial representation of the useful article having one or more views, adequately displaying the design in a form and style suitable for reproduction and shall be accompanied by the prescribed fee.

(e) More than one design may be included in the same application under such conditions as may be prescribed by the Administrator. For each design included in an application the fee prescribed for a single design shall be paid.

Section 13. Certification of Registration

Certificates of registration shall be issued in the name of the United States under the seal of the Office of the Administrator and shall be recorded in the official records of the Office. The certificate shall state the name of the useful article, the date of filing of the application, the date of registration and the date the design was made public, if earlier than the date of filing of the application, and shall contain a reproduction of the drawing or other pictorial representation of the design. If a description of the salient features of the design appears in the application, the description shall also appear in the certificate. A certificate of registration shall be admitted in any court as prima facie evidence of the facts stated in the certificate.

Section 14. Remedy for Infringement

(a) The proprietor of a design shall have remedy for infringement by means of a hearing in front of the APP. Parties may appeal by bringing a civil action in front of the U.S. district courts or any other court of appropriate jurisdiction.

(b) At the time an infringement action is brought, the alleged infringer may pay the applicable licensing fees to
avoid an action. If this option is refused, the designer of the protected design may attempt to get a preliminary injunction.

(1) Any court having jurisdiction under this Act may, in its discretion, grant injunctions in accordance with the principles of equity to prevent infringement, including prompt relief through temporary restraining orders and preliminary injunctions.

(2) The Courts may appoint a master from the APP to make a preliminary decision about whether the design is likely to infringe. If the master finds the design is likely to infringe, the court can enjoin the alleged infringing party from further sales of the offending design until resolution of the case. If the master finds the design is not likely to infringe, the copyright holder may proceed with the litigation but without a preliminary injunction preventing the other party from manufacturing or selling the allegedly pirated apparel.

(c) The parties to an infringement dispute under this Act, within such time as may be specified by the Administrator by regulation, may determine such contest or any aspect thereof by arbitration. Such arbitration shall be governed by the provision of title 9, United States Code, to the extent such title is not inconsistent with this Section. The parties shall give notice of any arbitration award to the Administrator, and such award shall, as between the parties to the arbitration, be dispositive of the issues to which it relates. The arbitration award shall be unenforceable until such notice is given. Nothing in this Subsection shall preclude the Administrator from determining whether a design is subject to registration in a cancellation proceeding pursuant to this Act.

Section 15. Recovery for Infringement

(a) The claimant may be awarded the infringer’s profits resulting from the sale of the copies if it is found that the
infringer’s sales are reasonably related to the use of the claimant’s design. In such a case, the claimant shall be required to prove only the infringer’s sales and the infringer shall be required to prove its expenses against such sales.

(b) In any action under this Act, the APP, in its discretion, may allow the recovery of full costs by or against any party other than the United States or an officer thereof. The APP may also award reasonable attorney’s fees to the prevailing party as part of the costs.

(c) The APP may award punitive damages to the prevailing party as it sees fit.

(d) The APP may order that all infringing articles, and any patterns, models or other means specifically adapted for making the same be delivered up for the destruction or other disposition as the APP may direct.

Section 16. Penalty for False Marking

(a) Whoever, for the purpose of deceiving the public, marks upon, or applies to, or uses in advertising in connection with any article made, used, distributed, or sold, the design of which is not protected under this Act, a Design Notice as specified in Section 9 or any other words or symbols importing that the design is protected under this Act, knowing that the design is not so protected, shall be fined not more than $500 for every such offense.

(b) Any person may sue for the penalty, in which event, one-half shall go to the person suing and the other to the use of the GDPO.

Section 17. Relation to Other Laws

Nothing in this Act shall affect any right or remedy held by any person under chapters 1 through 9 of title 17, or under title 35 of the United States Code, or under any
common law, unfair competition law, trademark law or other rights or remedies, if any, available to or held by any person with respect to a design whether or not registered under this Act.

Section 18. Liability for Action on Registration Fraudulently Obtained

Any person who brings an action for infringement knowing that registration of the design is obtained by a false or fraudulent representation materially affecting the rights under this Act shall be liable in the sum of $1,000.00, or such part thereof as the court may determine, as compensation to the defendant, to be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney’s fees of the defendant as may be assessed by the court.

Section 19. Severability Clause

If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act or the application to other persons or circumstances shall not be affected thereby.

Section 20. Time of Taking Effect

This Act shall take effect immediately after enactment.

Section 21. No Retroactive Effect

Protection under this Act shall not be available for any design that has been commercially exploited as provided in Section 11(b) prior to the effective date of this Act.
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Section 22. Short Title

This Act may be cited as “The Garment Design Protection Act of 2002”.
REGULATING ROOMMATE RELATIONS: PROTECTION OR ATTACK AGAINST NEW YORK CITY’S TENANTS?

Laurel R. Dick*

INTRODUCTION

On December 20, 2000, the New York State Division of Housing and Community Renewal (“DHCR”) promulgated an amendment to the Rent Stabilization Code (“the code”) that governs all rent stabilized housing in New York City. This amendment, section 2525.7 of the code, took on a task that was novel to rent regulation in New York, the regulation of roommate relations. It prohibits tenants from charging their roommates more than a “proportionate” share of the rent under any circumstance. An analysis of the statutory history demonstrates that this provision’s novelty is not creative innovation, but rather an unauthorized interference with the protected tenant-roommate...

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* Brooklyn Law School Class of 2003; B.A., Grinnell College, 1997. The author would like to thank Professor George Johnson, David Robinson, and especially Edward Josephson. She would also like to thank Greg for his patience and support.


2 § 2525.7.

3 Id.
While an examination of the current state of the rental market shows that protection of roommates is warranted, interference is not necessarily protection. Interference with the tenant-roommate relationship can only be justified if the regulation puts the remedy in the hands of the proper party—the roommate—and limits its effects to real, unjustified profiteering by tenants at the expense of their roommates. Section 2525.7 (“the proportionality provision”) has done neither of these things, but has instead created the potential for large-scale eviction of tenants and the simultaneous eviction of their roommates.

Part I of this note describes the regulatory context in which the proportionality provision was promulgated including relevant New York statutes, codes and caselaw. Part II explains the two main flaws in the design of the provision as a roommate protection. Finally, Part III demonstrates that protection of roommates against gross overcharge is justified only if it is done in a way that actually protects the roommate and does not infringe unnecessarily on the rights of the primary tenants. Part III also includes proposals for designing a roommate protection provision that is successful to those ends—a difficult but workable task.

I. BACKGROUND

In 1983, DHCR was given authority by the New York State Legislature to administer the Rent Stabilization Law in New York City through the code. In promulgating the proportionality provision, DHCR made a significant departure from the usual approach to the tenant-roommate relationship taken by the state legislature through the Rent Stabilization Law, and by the courts

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4 See N.Y. REAL PROP. LAW § 235-f (McKinney 2001). See infra note 24 (explaining how DHCR’s promulgation lacked authority).
5 See infra Part II.A-B.
6 See infra Part II.A-B.
7 Omnibus Housing Act, 1983 N.Y. Laws 403, § 3.
in their decisions.\textsuperscript{8} Section 2525.7 of the Rent Stabilization Code states:

The rental amount that a tenant may charge a person in occupancy pursuant to section 235-f of the Real Property Law shall not exceed such occupant’s proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodation. For the purposes of this subdivision, an occupant’s share shall be determined by dividing the legal regulated rent by the total number of tenants named on the lease and the total number of occupants residing in the subject housing accommodation. However, the total number of tenants named on the lease shall not include a tenant’s spouse, and the total number of occupants shall not include a tenant’s family member or an occupant’s dependent child. Regardless of the number of occupants, tenants named on the lease shall remain responsible for payment to the owner of the entire legal regulated rent. The charging of a rental amount to an occupant that exceeds that occupant’s proportionate share shall be deemed to constitute a violation of this Code.\textsuperscript{9}

The New York State Legislature last expressed its stance on the tenant-roommate relationship in 1983 with the enactment of the Omnibus Housing Act, which amended several statutes governing rental housing.\textsuperscript{10} In its legislative findings it stated that in order to protect those households in which unrelated roommates live together “for reasons of economy, safety and companionship,” it had become necessary to declare a tenant’s right to have a roommate.\textsuperscript{11} Based on this finding of necessity,

\textsuperscript{8} See infra Part I (detailing the history of New York City’s treatment of the tenant-roommate relationship).

\textsuperscript{9} N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7(b) (2001). Section (a) reads, “Housing accommodations subject to the RSL and this Code may be occupied in accordance with the provisions and subject to the limitations of section 235-f of the Real Property Law.” Id. § 2525.7(a).

\textsuperscript{10} Omnibus Housing Act, 1983 N.Y. Laws 403.

\textsuperscript{11} Id. § 1 (stating “that unless corrective action is taken by the legislature, thousands of households throughout this state composed of unrelated persons
the legislature enacted section 235-f of the Real Property Law which states in part:

2. It shall be unlawful for a landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to a tenant or tenants or to such tenants and immediate family. Any such restriction in a lease or rental agreement entered into or renewed before or after the effective date of this section shall be unenforceable as against public policy.

3. Any lease or rental agreement for residential premises entered into by one tenant shall be construed to permit occupancy by the tenant, immediate family of the tenant, one additional occupant, and dependent children of the occupant provided that the tenant or the tenant’s spouse occupies the premises as his primary residence.\(^\text{12}\)

This provision was intended to overrule a court of appeals decision in which the court found that a lease restricting occupancy to the tenant and her immediate family did not violate the State Human Rights Law or New York City Human Rights Law, which prohibit discrimination on the basis of marital status.\(^\text{13}\)

who live together for reasons of economy, safety and companionship may be placed in jeopardy").

\(^{12}\) N.Y. REAL PROP. LAW § 235-f (McKinney 2001).

\(^{13}\) Hudson View Prop. v. Weiss, 450 N.E.2d 234, 235 (N.Y. 1983) (reasoning that the landlord had “not discriminated against the tenant in violation of [s]tate or city Human Rights Law” because the eviction was triggered “not because the tenant is unmarried, but because the lease restricts occupancy of her apartment, as are all apartments in the building, to the tenant and the tenant’s immediate family”).

See Omnibus Housing Act (Memorandum of Senator John B. Daly), 1983 N.Y. Laws 403. See also id. § 1 (declaring “that recent judicial decisions refusing to extend the protection of the human rights laws to unrelated persons sharing a dwelling place will exacerbate this serious problem”). These memoranda refer to Hudson View Properties, 450 N.E.2d 234, which cited both the New York State Human Rights Law, N.Y. EXEC. LAW § 296-5(a) (McKinney 2001), cited in Hudson View Prop., 450 N.E.2d at 235, and the New York City Human Rights Law, Administrative Code of City of New York § B1-7.0-5(a), cited in Hudson View Prop., 450 N.E.2d at 235.
At the same time, the legislature enacted separate findings and prohibitions with regard to a tenant subletting to another person during her absence from the premises. Finding that “speculative and profiteering practices on the part of certain holders of apartment leases [were] leaving many subtenants without protection and removing many housing accommodations from the normal open market,” the legislature included in the Omnibus Housing Act an amendment to the Rent Stabilization Law regulating subletting. This amendment limited the amount of time a tenant could sublet a regulated apartment in New York City to a period of two years and the rent at which a tenant could sublet to the amount charged by the landlord plus 10% for furnishings. Examining these two provisions clearly shows that the legislature treated the acts of taking in roommates and subletting differently.

Since the changes were enacted, the courts have reinforced the distinctions laid out in the law between subletting and taking in roommates. In 520 East 81st St. Associates v. Roughton-Hester, the appellate division held that, in contrast to overcharging a sublettor, overcharging a roommate was not a proper cause for eviction and dismissed a petition for eviction on those grounds. The court pointed to the legislature’s clear intent

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15 Id. § 1.
17 Id. The amendment states that the regulation:

[Permits subletting of units subject to this law pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the stabilized rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant’s furniture; (b) the tenant can establish that at all times he or she has maintained the unit as his or her primary residence and intends to occupy it as such at the expiration of the sublease . . . (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease.

18 520 East 81st St. Assocs. v. Roughton-Hester, 555 N.Y.S.2d 70, 73
to differentiate a sublease from a tenant-roommate arrangement when regulating tenants’ actions.\textsuperscript{19} It also reasoned that, “many ‘roommates’ are not strangers but individuals who choose to live together, apportioning costs according to their respective financial abilities, and other considerations.”\textsuperscript{20} The court in \textit{Roughton-Hester} also based its decision on the fact that there was no law explicitly governing the rent a tenant charges her roommate.\textsuperscript{21}

The reasoning behind \textit{Roughton-Hester} holds strong today. While DHCR has promulgated the proportionality provision since \textit{Roughton-Hester} was decided in 1990, it is only a regulatory provision.\textsuperscript{22} In fact, there is still no legislatively enacted law governing rent between tenants and roommates in New York City.\textsuperscript{23} As a result, tenants and tenant organizations have argued convincingly that DHCR had no legislative grounding when it passed the proportionality provision and that it overstepped its authority.\textsuperscript{24}

\begin{quote}
(App. Div. 1st Dep’t 1990) (holding that “neither the lease nor any law governing rent stabilized apartments permit a landlord to evict a tenant for earning a profit from the rent charged a roommate”); see also \textit{Handwerker v. Ensley}, 690 N.Y.S.2d 54 (App. Div. 1st Dep’t 1999) (denying injunction against a nonpayment proceeding when the roommate had requested the injunction on the theory that he was being overcharged).
\end{quote}

\textsuperscript{19} \textit{Roughton-Hester}, 555 N.Y.S.2d at 72 (stating that “[t]he Legislature enacted separate provisions pertaining to subtenants and roommates and specifically indicated its intention to eliminate profiteering in subleases while remaining silent as to such practices committed by a tenant vis-a-vis a roommate”).

\textsuperscript{20} \textit{Id.} at 73.

\textsuperscript{21} \textit{Id.} at 72.


\textsuperscript{23} See supra notes 10-17 and accompanying text (recounting the history of lawmaking around roommates and sublettors).

\textsuperscript{24} See, \textit{e.g.}, Petitioners-Plaintiffs’ Memorandum of Law in Support of Petition at 19-21, Brooklyn Hous. & Family Serv. v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County
The “Findings and Declaration of Emergency” introducing New York City’s Rent Stabilization Law states that one of this law’s purposes is “to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health.” When enacting the limitations on subletting covered under the Omnibus Housing Act of 1983, the legislature reaffirmed its goal of protecting all tenants against profiteering by expressing this intent in its legislative findings, and by providing subtenants with the remedy of treble damages against an overcharging tenant. Moreover, when a tenant overcharges her subtenants and the landlord has constructive knowledge that the tenant holds only an “illusory tenancy” because she has
been absent from the premises for more than two years, the courts have crafted their decisions to protect the subtenant.\textsuperscript{29} They have found that the subtenant has the right to the tenancy.\textsuperscript{30} The proportionality provision, on the other hand, contains no such remedy that evinces the purpose of protecting roommates against profiteering.\textsuperscript{31} The language of the provision is entirely silent as to the remedy for a roommate overcharge.\textsuperscript{32}

Even without looking at the underlying Rent Stabilization Law, the code itself does not allow for eviction under its new proportionality provision. The code states that, “[a]s long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or removed from any housing accommodation . . . except on one or more grounds specified in this Code.”\textsuperscript{33} Unless prior approval of DHCR has been obtained, an action to recover possession of a rent-stabilized unit based on wrongful acts of the tenant may only be commenced based on one of the grounds listed in section 2524.3 of the code.\textsuperscript{34} Roommate overcharge is not listed as one of the 1998) (defining an “illusory tenancy” as one where “the rent laws have been violated in a way that has permitted the prime tenant to ‘rent . . . [the apartment] for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the Rent Stabilization Law’” (quoting Avon Furniture Leasing v. Popolizio, 500 N.Y.S.2d 1019, 1022 (App. Div. 1st Dep’t 1986))).

\textsuperscript{29} Id. (defeating a holdover proceeding against the sublettors and re-assigning the tenancy to them after the primary illusory tenants had moved out).

\textsuperscript{30} Id. See also Skeeter v. Clark, N.Y.L.J., Mar. 23, 2001, at 20:3 (Civ. Ct.) (defeating a holdover proceeding against the sublettor and re-assigning the tenancy to her despite lacking the landlord’s permission to succeed to the tenancy).

\textsuperscript{31} See supra note 9 and accompanying text (quoting the language of the proportionality provision).

\textsuperscript{32} See supra note 9 and accompanying text (quoting the language of the proportionality provision).


\textsuperscript{34} N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.3 (2001). These grounds include failure to cure a substantial violation of the lease, creation of a
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grounds for eviction.\textsuperscript{35} In fact, DHCR’s own general counsel stated that the provision was never meant to provide a new cause for eviction.\textsuperscript{36} Thus, the code mandates that the proportionality provision cannot serve as grounds for eviction.

Nevertheless, the fact that the language of the provision does not specify a remedy has led to confusion. The first and only case decided under this new provision, \textit{RAM I LLC v. Mazzola}, read the remedy of eviction of the entire household into the proportionality provision.\textsuperscript{37} This case concerned an eviction action brought by a landlord against a tenant who charged her roommate almost $300 per month above the rent for the entire apartment for the rental of one bedroom.\textsuperscript{38} In this decision, Judge Schachner denied a motion to dismiss for failure to state a cause of action reasoning that the proportionality provision provides a cause for eviction when a tenant charges her roommate more than her proportionate share of the rent.\textsuperscript{39} The court distinguished nuisance in the building, substantial damage to the building, harassment of the landlord or other tenants, use of the unit for illegal activities, refusal to allow the landlord necessary access, refusal to renew an expired lease, and violation of the limits on subletting. \textit{Id.}

\textsuperscript{35} \textit{Id.} It should be noted that a tenant earning money from her apartment is not in substantial breach of her lease. In order for business use to be a substantial breach of a residential lease, and therefore grounds for eviction under § 2524.3, the use “must materially affect the character of the building, materially damage or burden the property or materially disturb the other tenants.” Haberman v. Gotbaum, 698 N.Y.S.2d 406, 410 (Civ. Ct. 1999). Activities that have been allowed under this standard include a private art studio, \textit{Haberman}, 698 N.Y.S.2d 406, a private office, \textit{Nissen v. Wang}, 431 N.Y.S.2d 984 (Civ. Ct. 1980), and a family childcare facility, \textit{Sorkin v. Cross}, N.Y.L.J., Apr. 24, 1996, at 27:3 (Civ. Ct.).

\textsuperscript{36} \textit{Live at Five} (WNBC-TV broadcast June 5, 2001). \textit{See also} Affidavit of Marcia Hirsch, DHCR General Counsel, In Support of Response at ¶ 282, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001) (stating that “DHCR’s interpretation of § 2525.7 is that it vests roommates with the right to file a complaint against the tenant rather than create a new cause of action for eviction”) [hereinafter Hirsch Affidavit].

\textsuperscript{37} \textit{Mazzola}, No. 01-294, 2001 WL 1682829, at *1.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Mazzola}, N.Y.L.J., June 8, 2001, at 21:1, \textit{aff’d & remanded}, No. 01-
Roughton-Hester on the grounds that the proportionality provision was not in existence at the time of that decision. The petition upheld by the court read, in part, that “[t]he serious nature of this violation, charging a roommate a monthly sum in excess of the entire monthly rent for the whole apartment, constitutes illegal profiteering and as such, does not lend itself to, nor is it susceptible of cure.” While the succinctness of the housing court’s decision obscures its reasoning to some extent, the court appears to have accepted this landlord’s characterization of Ms. Mazzola’s actions as “profiteering” to not only find a cause for eviction that is not explicitly provided in the provision, but also to find that cause for eviction incurable.

II. THE PROPORTIONALITY PROVISION’S FAILURES

The main flaws in the proportionality provision as it now stands, and as it has been applied, are twofold. First, it places the remedy in the wrong hands. Rather than giving the roommate a

294, 2001 WL 1682829 (holding that “[g]iven the language of Section 2525.7(b) of the Rent Stabilization Code, . . . respondent’s motion to dismiss the petition is denied”).

40 Id. (stating erroneously, “Roughton-Hester even mentions that at the time there was no law governing rent stabilized tenants which dealt with the issue of a tenant who earns a profit from a roommate. With the recent amendment this is no longer true”).


DHCR has responded to this decision by taking a step back, see quotation by Marcia Hirsch, supra note 36, but qualified its denunciation of the decision so that its stance is somewhat unclear: “[h]owever, it should be noted that Ram I LLC presents the kind of egregious situation where the roommate paid not only more than her proportionate share but more than the tenant was paying.” Hirsch Affidavit, supra note 36, at ¶ 282.

43 See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001) (giving overcharged tenants a right to reimbursement with interest from their landlords); N.Y. UNCONSOL. LAW § 26-511(c)(12) (McKinney 2001)
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claim for reimbursement against the primary tenant, it gives the landlord a cause for eviction of the entire unit, including the roommate.\(^44\) Second, it provides no exemptions for justified disproportionalities.\(^45\) Given the current housing market, low-income tenants are justified in charging their roommates greater than proportionate rents when needed in order to sustain their tenancies.\(^46\) An examination of four major schools of thought on the justifications behind rent regulation enlightens this analysis: the redistribution of wealth, the preservation of stable communities, the protection of the “personhood” interest that a tenant holds in her home, and the maintenance of a fair market free from speculation and profiteering.\(^47\) An application of these theories to the problem of roommate relations reaffirms the ways in which the proportionality provision is flawed in its design and recent interpretation.

A. The Remedy Must Not Lie with the Landlord

By construing the proportionality provision as providing a just cause for eviction, the *Mazzola* court gave the remedy for an overcharge to the wrong party.\(^48\) Under *Mazzola*, landlords stand to profit from the discovery of a roommate overcharge, while

\(^{44}\) *Mazzola*, No. 01-294, 2001 WL 1682829. *But see supra* note 36 (quoting DHCR as denying intent to be used as a cause for eviction).

\(^{45}\) *See infra* Part II.B.

\(^{46}\) *See infra* Part II.B.1 (describing the current economic straits of New York City tenants in relation to rent levels).

\(^{47}\) *See* Margaret Jane Radin, *Residential Rent Control*, in *PERSPECTIVES ON PROPERTY LAW* 410 (Robert C. Ellison et al. eds., 2d ed. 1995) (summarizing and comparing the first three justifications); Timothy L. Collins, “*Fair Rents*” or “*Forced Subsidies*” Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide, 59 *ALB. L. REV.* 1293 (1996) (summarizing the fair market objective). *See infra* Part II.A (discussing the relevance of the redistribution of wealth and community preservation theories to the proportionality provision); Part II.B (discussing the relevance of the fair market objective and personhood interest theories).

\(^{48}\) *Mazzola*, No. 01-294, 2001 WL 1682829.
roommates are given no remedy and ultimately face eviction themselves upon the discovery of their “disproportionate” rent burden.\(^49\) Because this provision only benefits landlords at the expense of tenants and their roommates, the proportionality provision cannot find its justification in statutory enactments intended to protect tenants from profiteering.\(^50\)

The sentiment voiced by the court in *Mazzola*, that a tenant who overcharges a roommate wrongly profiteers off of her landlord’s assets, is one that is echoed by the media.\(^51\) The *Mazzola* court’s recognition of a cause for eviction in roommate overcharging received significant media attention—presented to the public both as the justifiable curtailment of a tenant’s “profit center”\(^52\) and, in contrast, as the opportunism of a landlord at the expense of a disabled old lady.\(^53\) One article reported that the tenant, Ms. Mazzola, owned a second house in Westport Connecticut worth $490,000 to $640,000 that was yielding $33,000 per year in rental income.\(^54\) At the same time, the article stated, the landlord was deprived of the $10,000 monthly market

\(^{49}\) *Id.* The bias in this placement of the remedy is particularly transparent given that the penalty that a landlord faces for overcharging a tenant is mere reimbursement of the tenant with interest. N.Y. COMP. CODES R. & REGS. tit. 9, § 2526.1 (2001).

\(^{50}\) See *supra* note 25 and accompanying text (quoting the purposes of the Rent Stabilization Law). Clearly, § 235-f of the Real Property Law also fails to provide the justification needed by DHCR to restrict a tenant’s right to take in roommates upon penalty of immediate eviction. The court of appeals has emphatically affirmed that “it is undeniable that this section was passed to protect tenants and occupants, not landlords.” Capital Holding Co. v. Stravrolakes, 662 N.Y.S.2d 14, 15-16 (App. Div. 1st Dep’t 1997), aff’d, 707 N.E.2d 432 (N.Y. 1998) (holding that § 235-f does not create a cause for eviction in the taking in of more than one unrelated roommate), cited in Petitioners-Plaintiffs’ Memorandum of Law, *supra* note 24, at 56.

\(^{51}\) See, e.g., John Tierney, *A Room and a View (Libertarian)*, N.Y. TIMES, June 12, 2001, at B1 (asking, “Does Joan E. Mazzola deserve to join the list of New York’s 10 Worst Tenants?”).

\(^{52}\) *Id.*


\(^{54}\) Tierney, *supra* note 51, at B1.
rent potential of this Park Avenue apartment because Ms. Mazzola was paying the stabilized rent of $1,847.77 per month.\footnote{Id. But see infra notes 90-92 and accompanying text (presenting mitigating facts and conflicting stories as to Ms. Mazzola's resources and roommate arrangement).} This argument, that tenants who are not properly using their tenancies wrongly deprive landlords of the market rent for those years of tenancy, can be seen in other contexts as well.\footnote{See, e.g., John Chipman, Bogus NYC Tenant Sued for $5M: Lived 30 Years in Flat Leased to Friend at Bargain Rate, NAT'L POST, Aug. 24, 2001, at A11. The story tells of a landlord who recently sued a tenant who had been living under the leaseholder's name for more than thirty-five years. His claim for $5 million, the difference between the tenant's rent and lucrative market rents in the neighborhood, has not yet been decided. Id. Despite the fact that the occupant had not been trying to hide his identity, paying rent directly to the landlord, the judge saw the tenant as exploitive: "[he] has received a largesse for an extremely long time by paying an artificially low rent in a highly desirable neighborhood." Id.} In Mazzola, this sentiment motivated the form that the remedy took—eviction.\footnote{Mazzola, No. 01-294, 2001 WL 1682829, at *1.} However, placing the remedy for roommate overcharge in the hands of the landlord is neither justified, because it is the roommate whom the provision seeks to protect, nor wise, given the repercussions.\footnote{A quick analysis of the government takings doctrine demonstrates that the placement of the remedy in the hands of the roommate rather than the landlord constitutes neither a physical taking nor a regulatory taking in the context of the New York City housing market. U.S. CONST. amend. V, amend. XIV.}
home owners stood to receive by selling their right to a regulated tenancy, did not make for a physical taking. *Yee*, 503 U.S. at 529-30. This is suggestive of the argument that to allow tenants to overcharge their roommates constitutes a per se taking by transfersing profits. That argument is clearly defeated by *Yee*. The *Yee* Court, however, did not decide whether such regulation constituted a regulatory taking. *Id.* at 538.

Regulation of private property constitutes a violation of the Fifth Amendment takings clause through the Fourteenth Amendment as a regulatory taking “if it denies an owner economically viable use of the property (a per se regulatory taking), or if it does not substantially advance legitimate State interests.” Rent Stabilization Assoc. of New York City v. Higgins, 630 N.E.2d 626, 83 N.Y.2d 156, 173 (1993). Landlords’ profits are in no way extinguished by rent stabilization in New York City. According to a Rent Guidelines Board report, the New York City agency that annually sets maximum stabilized rent increases, the average rent-stabilized landlord made a net income (excluding income tax and debt service) of $177,000 per building in 1999. *RENT GUIDELINES BOARD, 2001 INCOME AND EXPENSE STUDY* 8, available at http://www.housingnyc.com (Apr. 10, 2001).

The courts have found that a regulation advances a legitimate state interest, except in situations where they cannot find a close causal nexus between the property being regulated and the stated purposes of the regulation. *See, e.g.*, Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989) (finding that a city ordinance requiring residential hotel owners to renovate and rent out their units at regulated rates rather than to demolish or convert them was not closely related to the purpose of alleviating homelessness, because the rooms would not be limited to formerly homeless or potentially homeless individuals), *cited in* Collins, *supra* note 47, at 1297. As explained below, one of the principal purposes of the New York City rent regulation system is to protect tenants against an unfair housing market of scarcity and unnaturally high rents. As Justice Antonin Scalia pointed out in *Pennell v. City of San Jose*, “When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs.” *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (concurring in part, dissenting in part) (arguing, however, that the rent ordinance clause at issue was an unconstitutional taking because any exorbitant returns would be curtailed by other parts of the ordinance), *cited in* Collins, *supra* note 47, at 1304. Thus, the fair market objective constitutes the necessary causal nexus between the protection of tenants and the regulation of landlords. *Id.*, *cited in* Collins, *supra* note 47, at 1304. This same reasoning supports giving the remedy for a roommate overcharge to the roommate rather than the landlord. As argued in greater detail below, because current rent levels are governed more by scarcity and market forces than by regulation, allowing tenants to charge their...
Because of the multitude of shared living situations among rent stabilized tenants, landlords may have great latitude in choosing who to evict under the proportionality provision, and can do so based on what they stand to gain from the eviction. In fact, landlords stand to gain a considerable sum due to the recently enacted vacancy allowance of 20%. They can bring an eviction under the proportionality provision even when a roommate is satisfied with her rental arrangement.

Many disproportionate roommate arrangements are voluntary and negotiated in the context of a personal relationship. For this reason, unmarried couples, particularly gay and lesbian couples, will be disparately impacted by the proportionality provision. Like married couples, many unmarried couples divide rent and roommates “disproportionate” rents in some circumstances must be allowed in order to protect tenants from those market forces. See infra Part II.B.1.

See Lambert, supra note 53, at B1. As many as 15.8% of rent stabilized tenants have roommates. One source cites 8.3% of rent stabilized tenants according to the 2000 Census, equaling approximately 83,000. Affidavit of John Seley in Support of Petition, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001). Another source cites 158,238 rent-stabilized tenants in 1999, Lambert, supra note 53, at B1, which would seem to equal approximately 15.8% of the group.

N.Y. UNCONSOL. LAW § 26-511(c)(5-a) (McKinney 2001). For two-year leases after a vacancy, a landlord can increase the monthly rent by 20%. The formula is a little more complicated for one-year leases that follow a vacancy. Id. The fact that a 20% increase above a low-rent unit may not be considerable is made up for by two additional allowances. First, a landlord who had a long-term tenant and was unable to collect a vacancy allowance within the last eight years is allowed upon termination of that tenancy to collect a 0.6% increase for each year since the last vacancy allowance. Id. Second, upon the vacancy of a unit that was renting for $300 to $500 per month, the landlord can increase the rent by $100. Id.

See supra note 9 and accompanying text (quoting statutory language).

See supra note 20 and accompanying text (quoting the Roughton-Hester court’s finding on the personal nature of roommate arrangements).

other living expenses according to who is best able to pay them, or for other personal reasons. Unlike married couples, however, unmarried couples who live in apartments where only one partner’s name is on the lease, and where the unnamed partner pays the greater portion of the rent, will have the burden of proving that they are family if they are to defend against an eviction action alleging a violation of the proportionality provision. That burden is likely to be a significant one, requiring the help of a lawyer and disclosure of intimate details of the couple’s relationship.

Giving landlords the benefit of a roommate overcharge action

\[64\] Id. at 5-6.

\[65\] See N. Y. REAL PROP. LAW § 235-f(1)(b) (McKinney 2001) (defining an “occupant,” as referred to in the proportionality provision, as “a person, other than a tenant or a member of a tenant’s immediate family, occupying a premises with the consent of the tenant or tenants”), cited in LAMBDA Memo, supra note 63, at 5.

\[66\] LAMBDA Memo, supra note 63, at 6-11. The legislature has constructed a definition of family in relation to succession rights that was meant to incorporate same-sex couples. Rent Regulation Reform Act, 1997 N. Y. Laws 116, § 21; N. Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(o)(2) (2001). The new definition of family calls for an examination of “emotional and financial commitment” evidenced by such factors as longevity of the relationship, sharing of expenses, intermingling of finances, jointly attending family functions and celebrations, formalizing legal obligations, holding themselves out to the public as family members, regularly performing family functions, and other evidence evincing “the intention of creating a long-term, emotionally-committed relationship.” Id. That definition has also been found to apply to other contexts. LAMBDA Memo, supra note 63, at 6. However, the burden of demonstrating that a relationship qualifies under this definition can be overwhelming and intrusive. See, e.g., Classic Properties, L.P. v. Martinez, 646 N.Y.S.2d 755, 755-56 (App. Term 1st Dep’t 1996), cited in LAMBDA Memo, supra note 63, at 11 (offering photographs, intimate correspondence, and affidavits as proof of a twenty-four year relationship); Strassman v. Estate of Eggena, 582 N.Y.S.2d 899 (App. Term 1st Dep’t 1992), cited in LAMBDA Memo, supra note 63, at 11 (involving two-and-a-half years of litigation). Statutory family status may be even harder to prove in the context of the proportionality provision than in the context of succession rights, because those couples defending against this sort of eviction are less likely to be long-term couples with intermingling finances. LAMBDA Memo, supra note 63, at 13.
also gives them reason to harass their tenants and a tool by which to do so. This harassment may cause a tenant tremendous stress, and may cause her to move even without the process of an eviction proceeding. Disproportionate rents are not always easy to prove without the cooperation of the roommate. Because tenants can conceal rent-sharing arrangements by paying with one check, a landlord may have to use creative means of finding out a roommate’s rent when attempting an eviction. Many of these means may border on harassment. The New York Apartment Law Insider, for example, advises landlords to hire a private investigator and to collude with the roommate. One landlord attempted to investigate by sending a letter that failed to allege any evidence of disproportionate rent charges, but still demanded that the tenant “account to this office for any and all sums collected by you from roommates.” It is unclear whether the Mazzola court’s interpretation of the proportionality provision gives landlords the right to demand information on roommate arrangements.

Even without these practical infirmities, the theoretical approaches to rent regulation would reject the placement of the remedy in the hands of landlords. Proponents of the

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68 Id.
69 See Court OKs Eviction of Tenant Who Overcharges Roommate, N.Y. Apartment L. Insider, Aug. 2001, at 11 [hereinafter Court OKs Eviction] (stating that “[i]t’s not always easy to find out whether a tenant is overcharging a roommate”).
70 N.Y. Comp. Codes R. & Regs. tit. 9, § 2525.7(b) (2001) (stating that “[r]egardless of the number of occupants, tenants named on the lease shall remain responsible for payment to the owner of the entire legal regulated rent”).
71 Court OKs Eviction, supra note 69, at 11.
73 See infra note 171 (discussing the repercussions of such an interpretation).
redistribution of wealth theory defend a tenant’s use of a landlord’s assets to her own gain.\textsuperscript{74} If a housing market is subject to high demand and low supply, landlords will make high economic rents (rents above a rate of return that is considered reasonable on an average investment).\textsuperscript{75} Under such circumstances, rent control and stabilization will cause a transfer of wealth from the landlord to the tenants without an accompanying decrease in supply that comes from lowering rents to below a reasonable rate of return.\textsuperscript{76} The current New York City housing market provides high economic rents and, even under rent stabilization, provides substantial profits.\textsuperscript{77} According to this approach, because wealth should be more equally apportioned and because most tenants are poorer than their landlords, rent regulation is a justified means to that end.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{74} Radin, supra note 47, at 412 (attributing this standpoint to “‘pure’ welfare economists”).
\item \textsuperscript{75} \textit{Id}.
\item \textsuperscript{76} \textit{Id}. (positing that there is no “allocative inefficiency” when “landlords have high economic rents, so that rent control causes a ‘mere’ wealth transfer from landlords to tenants”).
\item \textsuperscript{77} INCOME AND EXPENSE STUDY, supra note 58, at 8. According to a report by the Rent Guidelines Board, the New York City agency that annually sets maximum stabilized rent increases, the average rent stabilized landlord made a net income (excluding income tax and debt service) of $177,000 per building in 1999. \textit{Id}. “As operating costs have consumed less revenue in recent years, inflation-adjusted [net operating income] in 1999 was nearly 18\% more than the average found in 1989.” \textit{Id}. See also OFFICE OF THE PUBLIC ADVOCATE, RENT DESTABILIZATION STUDY II: AN ANALYSIS OF THE FAIRNESS TO LANDLORDS OF RENT INCREASES GRANTED BY THE RENT GUIDELINES BOARD FOR STABILIZED APARTMENTS 4, available at http://www.housingnyc.com (May 18, 1997) [hereinafter RENT DESTABILIZATION STUDY].
\item \textsuperscript{78} For those people who do not believe that the landlord’s “search for profits is no different from that of other providers of goods and services,” as Irving Welferd believes, redistribution of wealth through the housing market seems particularly appropriate. See Irving Welferd, \textit{Poor Tenants, Poor Landlords, Poor Policy}, in PERSPECTIVES ON PROPERTY LAW 374, 374 (Robert C. Ellison et al. eds., 2d ed. 1995). Disbelief in such a sentiment may be fueled, for example, by the recognition that rents are mostly returns on an investment rather than earnings from work. See ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS 96, 188 (6th ed. 1992) (attributing this critique to
Likewise, because the tenant is often the party in need of greater wealth, the rent regulation scheme cannot justly be used to prevent a tenant from “profiteering” off of the landlord’s assets by renting out part of her apartment at a profit.79 Thus, regulation of the tenant-roommate relationship must not focus on the landlord’s welfare.

There are flaws with the wealth redistribution justification.80 Because New York City’s rent stabilization is available to all but the wealthiest tenants, this redistribution is not directed at those who need it most.81 Redistribution of wealth has not been the primary impetus behind New York City’s rent regulation scheme.82 A more sensible scheme, under this reasoning, would give the lowest-income tenants the greatest benefits.83 Moreover, arguably not all landlords are wealthy. Some struggle to get by and are nevertheless subject to the same rent regulation scheme as those landlords who are making significant profits.84

the economic philosophers David Ricardo and Henry George); INCOME AND EXPENSE STUDY, supra note 58, at 2, 6 (reporting that out of the average unit rent of $706, arguably only $220 goes to some sort of landlord “work”—i.e., labor, maintenance, and administration costs combined). It may also reflect a sense of injustice that tenants feel when paying rents that, because of tax favoritism for homeowners, are close to what those tenants would be paying in mortgage payments were they able to place a down payment on a house. Zucker, supra note 67, at 133.

79 See Radin, supra note 47, at 412 (explaining that proponents of wealth redistribution are strictly concerned with the wealth transfer from landlords to tenants).

80 See generally Collins, supra note 47 (arguing that viewing rent regulation as a subsidy could make it vulnerable to challenge under the takings doctrine).

81 Zucker, supra note 67, at 124.

82 See infra notes 119-26 and accompanying text (documenting evidence of the fair rent objective throughout New York City’s rent regulation history).

83 See Zucker, supra note 67, at 124.

84 See, e.g., Welferd, supra note 78 (arguing that most landlords are small-scale operators earning small incomes off of low-income tenants). The New York City Rent Stabilization Code, however, allows for rent increases by reason of a landlord’s economic hardship in certain circumstances, such as when the landlord’s annual gross rents do not exceed her annual operating costs by at least 5%. N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(c)
However, another approach, the community preservation theory, also confirms the error made by the Mazzola court in assigning the remedy to the landlord. The community preservation theory is based on the understanding that communities have value beyond the mere conveniences that they provide; communities play a strong part in shaping the identities of their members. Thus, communities are valuable to society and should be preserved. Using the community preservation theory to inform a solution to roommate overcharge supports the protection of both tenants and roommates. For example, a large group of those tenants who charge their roommates more than a “proportionate” share of the rent are likely to be senior citizens who have often lived in their units and in their communities for many years. On the other hand, roommates may also be long-term residents; even new roommates may more likely be community members than new tenants because shared housing opportunities are generally advertised locally and informally, if at all. Thus, both parties need protection if the community is to be (2001). See also N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(b)(1) (2001).

Radin, supra note 47, at 417-18.

Id.

Id. at 418 (stating that “[w]e suppose from our knowledge of life in this society that the personal utility attributable to living in an established close-knit community is very high . . . and that personhood is fostered by living within an established community of other persons”).

UNDER ONE ROOF: ISSUES AND INNOVATIONS IN SHARED HOUSING 11 (George C. Hemmens et al. eds., SUNY Series in Urban Public Policy 1996) [hereinafter UNDER ONE ROOF].

See ZANY’S NEW YORK CITY APARTMENT SALES AND RENTAL GUIDE 314-15 (Courtney Andrialis and Janet Beard eds., 2001 ed.) [hereinafter ZANY’S] (recommending word-of-mouth as the most effective means of finding a compatible roommate). Moreover, a 1999 study in New York City found that 42% of renters moving into low-rent apartments (renting for under $600 per month) learned of the apartment by word-of-mouth. RENT GUIDELINES BOARD, INCOME AND AFFORDABILITY BRIEF: HOW RECENT MOVERS FIND APARTMENTS IN NEW YORK CITY 2, available at http://www.housingnyc.com (Jan. 1999). While that study excluded roommate situations, this economical method of advertising arguably would be used just as frequently by tenants as by low-revenue landlords. Id.
preserved. While it is not clear which party the community preservation theory favors in the tenant-roommate relationship, it is clear from this approach that eviction of the entire household cannot be the proper remedy for a roommate overcharge.

B. Exemptions Must Be Made Where Justified

At the same time that one New York Times journalist portrayed Ms. Mazzola and her fellow tenants as profiteers, another reported conflicting facts and also brought to light the mitigating circumstances behind her actions.90 The article reported that Ms. Mazzola subsisted on only $12,000 per year and suffered from emphysema and heart ailments.91 Moreover, Ms. Mazzola provided her roommate with food, use of the common rooms, and daily maid service.92

These contrasting media representations raise the question as to whether those tenants charging disproportionate rents should be differentiated based on their reasons for doing so—based on whether they are capitalists or little old ladies struggling to get by. Low-income tenants are more likely to be justified in charging their roommates disproportionate rents for several reasons. First, in today’s housing market low-income tenants need to take in roommates in order to subsist.93 Second, low-

90 See, e.g., Lambert, supra note 53, at B1.
91 Id.
92 Live at Five (WNBC-TV broadcast June 5, 2001).

A number of my clients can only afford to remain in their apartments by obtaining roommate [sic]. Among those clients is an elderly Holocaust survivor whose only source of income is less than $800.00 per month from Social Security Retirement. Her rent is higher than her income. The only way she has been able to remain in an apartment she has occupied for over 30 years is by having a roommate who pays more than 50 percent of the rent.

Id. at ¶ 7. See also Lambert, supra note 53, at B1.
income tenants face greater repercussions as a result of eviction.94 Third, low-income tenants may be more likely to engage in informal exchanges that equalize a roommate arrangement but are not exempted by DHCR in its definition of “disproportionate” rents.95 And, finally, low-income tenants have less access to legal information and representation, and so are less capable of avoiding a disproportionate arrangement and of defending against an eviction on that basis.96 Therefore, a roommate overcharge provision that fails to recognize justifications for overcharging is unfair to those rent stabilized tenants who are the poorest.97

1. Economic Need

Because they cannot afford to pay even half of their monthly rent, many low-income rent stabilized tenants must take in a roommate at a disproportionate rent.98 Recent annual rent-increase allowances for rent stabilized apartments have outpaced tenant household income increases.99 The New York City Rent Guidelines Board reports, “When looking at both rent costs and income, statistics indicate that it is increasingly difficult for those

94 See Ken Karas, Note, Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York, 24 COLUM. J.L. & SOC. PROBS. 527, 531 (1991) (stating that “[m]any tenants who are threatened with eviction risk not only losing their current homes, but also dislocation from their communities to the streets and shelters”).
95 See UNDER ONE ROOF, supra note 88, at 10-11.
97 See generally Karas, supra note 94, at 527-32.
98 See Burger Affidavit, supra note 93; Lambert, supra note 53. See also RENT GUIDELINES BOARD, 2001 INCOME AND AFFORDABILITY STUDY 4, 6, available at http://www.housingnyc.com (Apr. 24, 2001) (reporting that higher rates of overcrowding in rent stabilized units demonstrate that economic need has forced rent stabilized tenants to take in roommates).
99 Zucker, supra note 67, at 154 n.31. In the 1990s, New York City rents in general increased by 10.8% while tenants’ incomes rose by only 2.8%. In the late 1990s, the real median household income for rent stabilized tenants decreased 0.5%. J.A. Lobbia, The 8.7 Percent Solution, VILLAGE VOICE, May 22, 2001, at 26.
households with lower incomes to afford housing without some government assistance. In 1997, the New York Supreme Court in Jiggetts v. Dowling found that the shelter allowance paid to recipients under the Aid to Families with Dependent Children ("AFDC") program in New York City "[did] not bear a reasonable relationship to the cost of housing in New York City," and ordered that it be increased. The court based this finding on evidence of the scarcity of units renting within the shelter allowance and the prevalence of AFDC recipients renting at a level above their shelter allowance. Even though it has been two years since the court's order to issue new subsidies was affirmed by the appellate division, the State Commissioner of Social Services has yet to do so. Thus, while the shelter allowance was unreasonable in 1987, when the Jiggetts suit was initiated, it is even more unreasonable today at the same level of $312 per month for a family of four.

Despite little to no increase in real income for tenants over the last decade, the Rent Guidelines Board has increased rents

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100 INCOME AND AFFORDABILITY STUDY, supra note 98, at 4.
103 Jiggetts v. Dowling, 689 N.Y.S.2d 482.
105 Id. (noting also that 25,000 families are receiving court-ordered enhanced interim shelter allowances in metropolitan New York in order to avoid eviction, which demonstrates that the shelter allowance level is not adequate).
steadily each year.\textsuperscript{106} The board’s annual decision is based principally on the price of goods and services that landlords purchase, often exaggerated by temporary spikes in fuel prices, inaccurate quotes by vendors, and embellished figures reported by the landlords themselves.\textsuperscript{107} In recent years, the Rent Guidelines Board has routinely granted landlords rent increases higher than the cost of operating indicated by the Commensurate Rent Increase formula.\textsuperscript{108} Legal methods of raising rents beyond those levels set by the Rent Guidelines Board include a 20\% vacancy allowance,\textsuperscript{109} a vacant apartment renovation pass-through,\textsuperscript{110} and a pass-through for building-wide major capital improvements (“MCIs”).\textsuperscript{111} Tenants have a remedy to rent overcharges, both in the form of illegal rent increases and illegal

\textsuperscript{106} Lobbia, \textit{supra} note 99, at 26.

\textsuperscript{107} \textit{Id.} (reporting that “landlords’ actual costs are often less than the prices vendors quote to RGB researchers” as well as on the effects of temporary fuel spikes); \textit{INCOME AND EXPENSE STUDY}, \textit{supra} note 58, at 5 (stating that, according to audit results, reports by landlords are generally exaggerated by 8\%).

\textsuperscript{108} According to a 1997 report, the Rent Guidelines Board had done this for eighteen of the preceding twenty-two years. \textit{RENT DESTABILIZATION STUDY}, \textit{supra} note 77, at 4-5.

\textsuperscript{109} \textit{N.Y. UNCONSOL. LAW § 26-511(c)(5-a)} (McKinney 2001). The fact that rent collections reported by rent stabilized landlords have increased by figures greater than that allowed by Rent Guidelines Board allowances demonstrates that landlords are taking advantage of these additional means of raising rents. \textit{INCOME AND EXPENSE STUDY}, \textit{supra} note 58, at 4.

\textsuperscript{110} \textit{N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(1)} (2001). When a unit is vacant, a landlord does not need any approval to make improvements to such things as kitchen and bathroom fixtures, doors, and windows and to increase the base monthly rent for that unit by one-fortieth of the cost of those improvements. \textit{Id}.

\textsuperscript{111} \textit{N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(2)(i)} (2001). Entire apartment complexes can be affected by MCIs. For example, the owner of Peter Cooper Village on Manhattan’s East Side recently applied for a $44 rent increase for each room of the 2,480 units to pay for rewiring all of the buildings. Many of the complex’s tenants are long-term elderly residents living on fixed incomes, for whom a $132 monthly increase (for a one-bedroom apartment) is a large burden. David Kirby, \textit{Tempers Flare over a Rent Rise at Peter Cooper Village}, \textit{N.Y. TIMES}, July 30, 2000, § 14, at 8.
initial rents, through a claim filed with DHCR.\textsuperscript{112} If an overcharge is found by DHCR in a hearing on the claim, DHCR will order the landlord to reimburse the tenant for the overcharged amount plus interest.\textsuperscript{113} Because of a backlog of claims at DHCR, however, rent overcharge claims are rarely addressed before a complaining tenant moves out of the apartment.\textsuperscript{114} This results in very few illegal rents being curbed and contributes to the phenomenon of rising rents in New York City.\textsuperscript{115} As a result, almost 48\% of New York City tenants spend more than one-third of their income on rent, and 18\% spend more than half of their income on rent.\textsuperscript{116} These current realities are the result of New York City’s narrow conception of rent regulation. Particularly of late, New York City’s rent regulation

\begin{enumerate}
\item[112] N.Y. Comp. Codes R. & Regs. tit. 9, §§ 2522.1, 2526.1 (2001). Section 2526.1 states the following:

\begin{quote}
Any owner who is found by the DHCR, after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess, except as provided under subdivision (f) of this section . . . . If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the DHCR shall establish the penalty as the amount of the overcharge plus interest.
\end{quote}

§ 2526.1(a)(1).

\item[113] Id.

\item[114] Zucker, supra note 67, at 121 n.28.

\item[115] Id.

\item[116] Lobbia, supra note 99, at 26. See also Income and Affordability Study, supra note 98, at 5. These numbers are likely to be exacerbated by the World Trade Center disaster, which has had strong unemployment effects on low-wage workers. A report by the Fiscal Policy Institute states that an estimated 60\% of the 79,700 workers who were laid off as a result of the disaster had an average hourly wage of only $11.00 ($22,880 annual income). The five occupations most impacted by layoffs were waiters/waitresses, janitors/cleaners, retail workers, food preparation workers, and cashiers. Fiscal Policy Institute, World Trade Center Job Impacts Take a Heavy Toll on Low-Wage Workers: Occupational and Wage Implications of Job Losses Related to the September 11 World Trade Center Attack 2, tbl.3, available at http://www.fiscalpolicy.org/Nov5WTCreport.PDF (Nov. 5, 2001).
\end{enumerate}
scheme has been pared down to the bare minimum required by the two theories that have been most strongly advanced throughout the city’s history with rent regulation—the fair market objective\textsuperscript{117} and the preservation of a tenant’s personhood interest.\textsuperscript{118}

New York’s history with rent control and rent stabilization demonstrates that the legislature’s objective, arguably, has always been to prevent unfair profiteering by owners at times when the market makes that profiteering possible.\textsuperscript{119} The rent control program began during the housing shortage of the World War II era, caused by a shift in production away from housing and toward materials needed for the war.\textsuperscript{120} When rent stabilization was introduced in the 1960s, it protected some of the best and newest of New York’s housing rather than limiting itself to low-income housing, the supply of which had already been increased by the construction of public housing.\textsuperscript{121}

Both rent control and rent stabilization are still subject to discontinuance today in the event that the citywide vacancy rate exceeds 5\%.\textsuperscript{122} And the current Rent Stabilization Law still claims prevention of profiteering as one of its primary purposes:

The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York . . .; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing; . . . that such action is

\textsuperscript{117} See infra notes 119-26 and accompanying text (defining the fair market objective).

\textsuperscript{118} See infra notes 127-41 and accompanying text (defining the personhood interest).

\textsuperscript{119} See Collins, supra note 47.

\textsuperscript{120} Id. at 1312.

\textsuperscript{121} Id. at 1313.

\textsuperscript{122} N.Y. UNCONSOL. LAW §§ 26-414, 8623(b) (McKinney 2001), cited in Collins, supra note 47, at 1314.
necessary to prevent the exactions of unjust, unreasonable and oppressive rents and rental agreements and to *foretell profiteering, speculation and other disruptive practices* tending to produce threats to the public health, safety and general welfare.

One commentator calls this the “fair rent objective” and finds that it also explains recent amendments to the Rent Stabilization Law.124 Today in New York City, rents are high and the vacancy rate is low, making those apartments that are affordable to low-income tenants even more scarce than the vacancy rate of 3.19% suggests.125 Thus, in order to protect low-income tenants against exorbitant rents, those tenants should be allowed to take in roommates as they need them.126

A second justification for rent regulation that is relevant in the context of New York’s regulatory history is the “personhood” interest that a tenant holds in her home.127

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124 Collins, [*supra* note 47], at 1300. This explains why in 1993 a luxury decontrol amendment was designed to take out of regulation those tenants earning greater than $250,000 annual income while at the same time paying greater than $2000 in monthly rent. There is a scarcity of low-rent apartments available for less than $2000 per month, and for this reason, Collins explains, the legislature did not decontrol them even when occupied by rich tenants earning greater than $250,000 annually. *Id.* at 1317-19. However, this example demonstrates that a fair rent objective alone cannot explain the amendment because its effects were purposely limited to high-income tenants. Moderate-income tenants paying greater than $2000 per month did not have their units deregulated. A separate justification must have played a role in this limitation—either redistribution of wealth or the recognition that affordable rents are needed to preserve the tenure rights of low-income tenants but not high-income tenants. See Zucker, [*supra* note 67], at 135-37 (noting the relationship between rent levels and tenure).
125 See [*infra* note 147] (citing the vacancy rates for lower-rent apartments).
126 The Rent Guidelines Board explained the 5.5% increase in average building rent collections for rent stabilized buildings in 1999 as “most likely propelled by fewer vacancies and strong rent collections as demand for rental housing continued to outstrip supply.” [*INCOME AND EXPENSE STUDY, supra* note 58, at 9.]
127 Radin, [*supra* note 47, at 414. The findings behind the Emergency Price Control Act of 1942 expressed the purpose of preventing the “uprooting
Proponents of this view argue that a person’s interest in her home “is morally entitled to more weight than purely commercial landlordin” because a person’s “individuality and selfhood become intertwined” with her home. Control over resources in the external environment, such as an apartment or house, gives a person an important sense of achievement and well-being. The U.S. Constitution affirms the special importance of the home by making it the locus of the right to privacy. Under this reasoning, taking in a roommate differs drastically from subletting because the tenant not only has a personal relationship with her roommate, as noted by the appellate division in Roughton-Hester, but maintains a personal relationship to her home. A subletting tenant’s personhood interest in her home fades as she takes a new home for up to two years and her apartment approaches “fungible property,” defined as property “held merely instrumentally or for investment and exchange.”

The aspect of the New York rent regulation system that most directly reflects an interest in the personhood justification is the tenant’s tenure rights. Tenure rights, in relation to housing, derive from the recognition that as tenants become long-term occupants of their homes, they develop “a right not to be

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129 Margaret Jane Radin, Property and Personhood, in PERSPECTIVES ON PROPERTY LAW 8, 8 (Robert C. Ellison et al. eds., 2d ed. 1995).
130 Id. at 17.
131 520 East 81st St. Assocs. v. Roughton-Hester, 555 N.Y.S.2d 70, 73 (App. Div. 1st Dep’t 1990) (reasoning that “[m]any roommates are not strangers, but individuals who choose to live together, apportioning the costs according to their respective financial abilities, and other considerations”).
132 Radin, supra note 47, at 415.
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uprooted, a right to call their place of residence a home with some of the same sense of permanence with which a homeowner uses the term.” 134 The most important tenure right is the requirement that a landlord have a just cause for eviction. 135 Eviction control, however, is not the only regulation necessary to ensure tenure rights because there is always a level at which a tenant’s rising rent will force her to move. 136

The New York State Assembly seems to have focused on the personhood interest as its principal justification for regulating landlord-tenant relations in its recent enactments, but has done so in a way that neglects the effects of rent levels on tenure. 137 For example, the Rent Regulation Reform Act of 1997, the most recent set of amendments to the Rent Stabilization Law, codified the more liberal definition of family eligible for succession rights that was part of the Rent Stabilization Code. 138 Under this act, a tenant’s ability to pass on her home to her family is fortified. At the same time, however, the act limits a succeeding tenant’s right to the regulated rent level to only the first succeeding family member. 139 Any subsequent succeeding family members can be charged the vacancy bonus. 140 Thus, the legislature has focused on longevity over affordability. In this same act, the only other provision that could be characterized as pro-tenant is a new protection for tenants against certain types of landlord harassment intended to cause a tenant to vacate her apartment illegally. 141

134 Zucker, supra note 67, at 127-28 (arguing for a system in which landlords would have to pay their tenants “insurance” for the loss of their tenure rights if they were to evict their tenants without cause).
135 Id. at 128.
136 See id. at 137. Limits on rent increases also reflect the goal of protecting personhood interests by allowing tenants to plan for predictable rent increases so that they are not forced out by them. Id. at 128.
137 See infra notes 138-45 and accompanying text.
138 See supra note 66 (outlining the statutory definition).
140 Id.; see also supra note 60 (describing the 20% vacancy allowance).

An owner is guilty of harassment of a rent regulated tenant when with intent to cause a rent regulated tenant to vacate a housing
Thus, the legislature again has demonstrated its concern for insuring the personhood interests of existing tenants. In his memorandum in support of the Rent Regulation Reform Act of 1997, Governor George Pataki voiced the prediction that “3 of every 4 apartments are expected to reach market levels as a result of the far-reaching reforms included in the bill,” including the vacancy bonus of 20%, supplemental vacancy bonuses, and luxury decontrol. To anyone cognizant of the effects of rent levels on a tenant’s ability to find adequate housing and of a tenant’s periodic need to move, it is surprising to read the governor’s repeated assertions in the same memorandum that “the bill continues to protect more than 99 percent of all currently regulated tenants and their families.” The governor’s concern is evidently focused upon a tenant’s interest in her established home, not upon the existence of adequate choices for a tenant in her housing search. This narrow focus has clearly contributed to the lack of affordable units in New York City.

accommodation, such owner: 1. With intent to cause physical injury to such tenant, causes such injury to such tenant or to a third person; or 2. Recklessly causes physical injury to such tenant or to a third person.

Id.

142 GOVERNOR’S PROGRAM BILL MEMORANDUM #72, A.8346, Ch. 116 (New York State Legislative Annual 1997), at 74.


144 GOVERNOR’S PROGRAM BILL MEMORANDUM #72, supra note 142, at 77.

145 See Shaila K. Dewan, Deregulation by Landlords Is Increasing, Study Says, N.Y. TIMES, Feb. 17, 2002, § 1, at 37 (quoting one of the study’s authors as saying that “[t]he ability of anyone moving within the city or to the city to find a rent-regulated apartment is gone”). See also Zucker, supra note 67, at 130 (“[H]ome is a place to establish identity. Identity requires change as much as continuity . . . . The goal should be to nurture identity by enlarging tenant choice.”).
2. Disparate Impact of Eviction

A low-income tenant who is evicted from her apartment loses more than a middle- or upper-income tenant who is evicted.\footnote{See Karas, supra note 94, at 527.} That tenant’s search for a new apartment will be much more difficult because of a greater scarcity of apartments that low-income tenants can afford.\footnote{In 1999, the vacancy rate for apartments renting under $400 per month was 1.26\%, rising slightly to 2.53\% for apartments renting at $400-$499, and to 2.86\% for apartments renting at $500-$599 per month. INCOME AND AFFORDABILITY STUDY, supra note 98, at 4.} In fact, homelessness is a dangerous repercussion of evicting low-income tenants.\footnote{Karas, supra note 94, at 532.} Studies show that 27.5\% to 60\% of homeless families became homeless as a result of eviction.\footnote{Id. at 532-34.} From another viewpoint, among those tenants supported by public assistance who are evicted from their apartments, an estimated one-quarter will become homeless.\footnote{Id. at 545-46.}

Commentators on rent regulation argue that a low-income tenant loses more when she is evicted, even when that eviction does not lead to homelessness, because low-income tenants invest more “psychic equity” into their apartments.\footnote{Zucker, supra note 67, at 134; see also EDGAR O. OLSEN, THE IMPACT OF VACANCY DECONTROL IN NEW YORK CITY: THE FIRST ESTIMATES FROM THE 1996 HOUSING AND VACANCY SURVEY 19, available at http://www.housingnyc.com/research/html_reports/olsen.html (Nov. 1997).} “Psychic equity” has been defined as something that is derived “from the effort, attachment, and commitment required to turn one’s house or
apartment into a home.”

Because their choices are limited, low-income tenants invest more psychic equity into making an apartment a home. This argument holds true for tangible investments as well. Rent stabilized tenants generally spend more time and money on both acquiring their apartments and on maintaining their apartments, since rent stabilized landlords are less likely to provide needed repairs. These arguments elucidate the concept of the “personhood” interest discussed above.

The fact that a tenant has taken in a roommate does not devalue those arguments. A tenant who takes in a roommate does not lose her personhood interest in the apartment even by charging her roommate a rent greater than the entire rent. A tenant’s personhood interest derives from the importance of her home to her sense of self. While the investment value of her apartment increases, its personal value does not consequentially decrease. Psychic equity may in fact be increased by the taking in of a roommate in that the process of finding an acceptable roommate to help pay the rent is a considerable investment.

3. Informal Exchange

Tenants who take in roommates frequently offer something in exchange for a higher portion of the rent such as furnishings, utilities, food, chores, childcare, freedom from paying a security

152 Zucker, supra note 67, at 134.
153 Id. at 135-36.
154 Olsen, supra note 151, at 19. See also 1999 Housing and Vacancy Survey, Table: Number of 1999 Maintenance Deficiencies, Rent-Occupied Housing Units, available at http://www.housingnyc.com (last visited Mar. 23, 2002) (reporting U.S. Census research that 56.5% of unregulated units were free from deficiencies, while only 40% of stabilized units were).
155 See Radin, supra note 47, at 414-15. See supra notes 127-32 and accompanying text (defining the personhood interest).
156 Radin, supra note 47, at 414-15.
157 See generally id.
158 Zucker, supra note 67, at 134.
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deposit, and freedom from committing to a long-term lease.\textsuperscript{159} When the rent paid by a tenant is not actually disproportionate, there is obviously no wrong warranting interference. A study conducted in three low-income neighborhoods in Chicago in the 1980s suggests that this sort of in-kind exchange is more common among low-income tenants.\textsuperscript{160} It may also be more common between those who have social or familial ties, and in situations where the primary tenant is a senior citizen.\textsuperscript{161} Despite the fact that an in-kind exchange can make a roommate arrangement that is actually proportionate appear disproportionate, the strict language of the proportionality provision does not exempt these roommate arrangements from its restriction.\textsuperscript{162} In fact, the proportionality provision does not even allow for a greater share of the rent to be paid by a roommate who occupies a greater number of the rooms.\textsuperscript{163}

4. Lack of Representation

While landlords are represented by counsel in approximately 80% to 90% of summary eviction proceedings, tenants are represented in only 10% to 15% of such proceedings.\textsuperscript{164} The

\textsuperscript{159} See UNDER ONE ROOF, supra note 88, at 10; Burger Affidavit, supra note 93.

\textsuperscript{160} UNDER ONE ROOF, supra note 88, at 17.

\textsuperscript{161} Id. at 10; George C. Hemmens & Charles J. Hoch, Shared Housing in Low Income Households, in UNDER ONE ROOF, supra note 88, at 17; Jay Romano, Rent Rules: Codification or Stretch?, N.Y. TIMES, Feb. 24, 2002, § 11, at 5 [hereinafter Rent Rules].

\textsuperscript{162} N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2001) (“For the purposes of this subdivision, an occupant’s proportionate share shall be determined by dividing the legal regulated rent by the total number of tenants named on the lease and the total number of occupants residing in the subject housing accommodation.”).

\textsuperscript{163} Id. § 2525.7. See also Romano, supra note 42, § 11, at 5.

overwhelming majority of unrepresented tenants are poor, and many are people of color.\textsuperscript{165} Moreover, the presence or absence of representation profoundly affects the outcome of legal proceedings.\textsuperscript{166} Lack of representation is likely to have a particularly strong effect in cases concerning the proportionality provision because the interpretation of this provision is still open for argument.\textsuperscript{167} For example, the housing court in \textit{Mazzola} interpreted the provision in relation to the concept of profiteering, holding that a tenant is subject to eviction without the opportunity to cure when that tenant charges her roommate a rent greater than the entire unit rent.\textsuperscript{168} The decision, however, does not stipulate the results for tenants who charge their roommates greater than a “proportionate” amount but less than the entire rent.\textsuperscript{169} Moreover, DHCR’s own general counsel disagrees with the court’s interpretation of the remedies provided by the provision, calling reliance on the \textit{Mazzola} court’s decision

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\item tenants in housing court where pressured negotiations between landlords’ lawyers and tenants are the norm).
\item \textsuperscript{165} Lacrete, 585 N.Y.S.2d at 958. One study found that only 17.3\% of black tenants and 18.6\% of Hispanic tenants were represented by lawyers whereas 32.7\% of white tenants were. Female tenants were represented slightly less often than male tenants. Engler, supra note 164, at 108 n.130.
\item \textsuperscript{166} Carol Seron et al., \textit{The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment}, 35 L. & Soc’y Rev. 419 (2001). This recent study, comparing a treatment group to a control group, found drastic differences even though only 56\% of the treatment group was given legal representation (compared to 4\% of the control group). Of the treatment group, 32\% had judgments entered against them, compared to 52\% of the control group; 24\% had warrants of eviction entered against them, compared to 44\% of the control group; and 19\% were able to stipulate for a rent abatement due to repair problems, compared to 3\% of the control group. \textit{Id.} at 427.
\item \textsuperscript{167} See Karas, supra note 94, at 549-50 (“Without mastering the relevant statutory provisions or case law, no tenant can conceivably hope to raise an effective defense against eviction.”).
\item \textsuperscript{168} RAM I LLC v. Mazzola, N.Y.L.J., June 8, 2001, at 21:1 (Civ. Ct.), 
\item \textsuperscript{169} \textit{Id.}
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to create a cause for eviction “misplaced.” Thus, there is room for argument, but these arguments will only be successfully made by tenants who are represented by counsel.

170 Hirsch Affidavit, supra note 36, at ¶ 282. See also supra note 36 (quoting DHCR’s interpretation of the provision as providing a claim to the overcharged roommate).

171 See infra notes 177-81 and accompanying text (detailing Baltimore housing court study). Another legal issue that has yet to be resolved in the court’s treatment of the provision as grounds for eviction is the tenant’s accountability to the landlord for her actions. One landlord’s attorney wrote the following to his client’s tenant:

[You] are herewith demanded to . . . forthwith account to this office for any and all sums collected by you from your roommates or other persons who have occupied the apartment in the last two years. Unless I receive this information by close of business on February 6, 2001, Landlord will move to terminate your tenancy based on wrongful conduct and seek your eviction from the Subject Premises.

Exhibit A, Affidavit of Sara Jane Swanson in Support of Petition, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001). See also Rent Rules, supra note 161, § 11, at 5 (quoting one tenant activist as fearing that the provision “allows the landlord to pry into [tenants’] personal finances” even before bringing an eviction action). The decision in Mazzola left open the question of whether landlords have the right to order their tenants to report their roommate arrangements upon demand or face eviction. It also left open the question of whether this reporting requirement can be written into a lease and whether such reports could be treated as admissions if they were to reveal disproportionalities of rents.

Such an interpretation would remove a large burden from the landlord in proving that a tenant is subject to eviction under the proportionality provision because a landlord would find it easy to gather the facts needed to commence an eviction. See N.Y. REAL PROP. ACTS. § 741(4) (McKinney 2001) (requiring that every petition to recover real property “[s]tate the facts upon which the special proceeding is based”); Gianni v. Stuart, 178 N.Y.S.2d 709, 711 (App. Div. 1st Dep’t 1958) (“A tenant is entitled to a concise statement of the ultimate facts upon which the proceeding is predicated so that the issues, if any there be, are properly raised and can be met.”); City of New York v. Torres, 631 N.Y.S.2d 208, 209 (App. Term 1st Dep’t 1995) (finding that facts were insufficient for an eviction action where landlord stated only that the building was “in a condition which endangers the life, health or safety of the occupants,” rather than alleging specific dangerous conditions). An interpretation of the provision as allowing landlords to demand information on
Access to pre-litigation information is equally disparate. Fifty percent of rent stabilized tenants do not even know that their units are regulated, information that is necessary to even begin understanding the applicable laws.\textsuperscript{172} DHCR has made no effort to inform tenants and tenant advocates of the implications of the proportionality provision; it has not published any operational bulletin or other written explanation to inform the public of the proportionality provision’s relevance and application.\textsuperscript{173} Because tenants can conceal rent-sharing arrangements by paying with one check, this disparity of access to information becomes especially important.\textsuperscript{174} Informed tenants will know not to pay with two checks that disclose the amount of rent paid by each party. Furthermore, compliance also requires a certain level of education and proficiency in the English language.\textsuperscript{175} Proper calculation of the proportionality formula requires a close reading of the statutory language and some mathematical ability.\textsuperscript{176}

A study of the Baltimore housing court found that the failure of tenants to successfully defend their cases was due in large part their tenants’ roommate arrangements would also create disparate treatment between those tenants who know of the proportionality provision and have made the decision to lie to their landlords about their roommate arrangements, and those who do not. See generally Rent Rules, supra note 161.

\textsuperscript{172} Olsen, supra note 151, at 18-19 (attributing this ignorance, in part, to the misperception that high regulated rents engender).

\textsuperscript{173} Telephone Interview with Helpline Personnel, DHCR Rent Helpline (on Oct. 18, 2001). The staff at the Rent Helpline informed the author that the only written explanation of the roommate proportionality provision was the code itself. Id.

\textsuperscript{174} See supra note 70 (citing the statutory basis for paying with one check).

\textsuperscript{175} See Zucker, supra note 67, at 144 (“Given that illiteracy among the poor runs around three times higher than the level for the general population, understanding the fine-print legalese of the existing lease may not be possible for many.”); Karas, supra note 94, at 534-35.

\textsuperscript{176} See supra note 9 and accompanying text (citing the statutory language of the proportionality provision). See also Karas, supra note 94, at 548-50; Seron, supra note 166, at 431 (surmising that the calculation of rent owed is one of the important functions that a tenant’s lawyer plays in their representation).
to their inability to be accommodated by the culture of the
court. Poor tenants are more likely to understand the world in a
relational way, taking into account the entire history of relations
between people, which contrasts with a rule-oriented perspective
applied by the courts. To these tenants, “rules are a series of
‘they say,’ the power of which is felt in the paucity of relief to be
had from the law’s abstractions and categories, made by people
authorized to say what the law is.” Thus, tenants have
difficulty translating rules and laws into their rights. Even
when informed of their rights, unrepresented tenants in this study
remained silent about their rights when standing before a
judge.

Despite the familiar adage that ignorance of the law is no
excuse, the courts have traditionally been sympathetic to ignorant
and unrepresented parties when disparate representation has led
disparate results. For example, a tenant’s ignorance of the
law can constitute good cause for vacating a stipulation when a
tenant has unknowingly waived valid defenses to an eviction
proceeding. The New York housing courts routinely set aside
stipulations for this reason. One court stated, “Although
stipulations are highly regarded by the courts and not lightly cast

177 Barbara Bezdek, Silence in the Court: Participation and Subordination
178 Id. at 586-87.
179 Id. at 591.
180 Id.
181 Id. at 561, 591.
182 Zucker, supra note 67, at 145 n.85 (“[O]ne of the fundamental
justifications for government intervention is to reduce the costs and extent of
asymmetric information.”).
183 In re Estate of Frutiger, 272 N.E.2d 543 (N.Y. 1971) (setting forth a
“good cause” standard).
(where pro se tenant had waived defenses under the Spiegel Act and the Fair
Rent Collection Practices Act); 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d
956 (Civ. Ct. 1992) (where pro se tenant had agreed to pay rent in excess of
the legal regulated amount); Sicherman/Pomp v. Jenkins, 567 N.Y.S.2d 566
(Civ. Ct. 1989) (where pro se tenant had waived the defense of warranty of
habitability and improper rent amount).
aside, the court may do so in appropriate cases upon a showing of good cause. This is especially true where, as here, there is an unsophisticated tenant not represented by counsel and completely unaware of defenses available to them [sic]."185

Additionally, ethical rules prevent parties from taking advantage of unrepresented persons by limiting communications between an attorney and an unrepresented person whose interests are contrary to the interests of the attorney’s client.186 Advice-giving, for example, is prohibited.187 If an unrepresented party perceives a statement made by the other party’s lawyer to be advice, that statement is unethical regardless of whether it was intended as advice.188 Thus, the rules of ethics recognize the potential for misunderstandings by unrepresented parties and defer to their interpretation of the lawyer’s statements in order to best protect them.

Based on this argument, a tenant should not necessarily be excused from complying with regulations simply because she is ignorant of them, but where possible, regulations should seek to avoid disparate impacts on those who are unrepresented. For example, in constructing a roommate protection, it may not be enough to provide tenants with an affirmative defense when their overcharge is justified.189 Tenants might not benefit from, for

185 Dearie, 676 N.Y.S.2d at 897 (citation omitted).
186 New York Code of Professional Responsibility DR 7-104(A)(2), cited in Engler, supra note 164, at 85, 101. Disciplinary bodies in New York have the authority to impose sanctions including reprimand, referral to the court with a recommendation for censure, suspension, or disbarment. N.Y. COMP. CODES R. & REGS. tit. 22, § 605.14(a)(4) (1990), cited in Engler, supra note 164, at 133 n.254. Unfortunately, Engler argues, the existing rules are frequently violated in part because the reporting responsibility does not lie with an independent body, but with clients and colleagues who have no incentive to file complaints against lawyers who mistreat unrepresented tenants. Engler, supra note 164, at 133-34.
188 Engler, supra note 164, at 99.
189 See Bezdek, supra note 177, at 561 (observing that whether a tenant held a legal defense and was cognizant of it was not the determining factor in her success in housing court).
example, an allowance for sharing the rent burden among family members, or an exemption in the case of economic hardship, because the majority of tenants will not be successful in arguing such defenses in court. Likewise, tenants should be given the opportunity to cure their errors without the grave repercussion of losing their homes. The proportionality provision, in contrast, has been read to provide an incurable basis for eviction, giving an unrepresented tenant no chance to pay back an overcharge before she is evicted.

III. A Proper Solution

Both DHCR and the Mazzola court have erred in their design of a roommate overcharge provision, but the question remains whether one should exist at all. As set forth in Roughton-Hester, the tenant-roommate relationship is often a personal one and, arguably, should not be regulated. However, examining the tenant-roommate relationship from the perspective of several rent regulation theories demonstrates that some protection of roommates from overcharge is warranted. In some respects, the primary tenant’s access to the coveted commodity of housing in a tight housing market warrants treatment somewhat similar to the treatment given landlords. Under the reasoning of the fair market objective, it is clear that a tenant who takes advantage of the housing shortage to charge a roommate exorbitant rents can be prevented from doing so under the same justification that prevents a landlord from doing so. Indeed, this reasoning was...
used to justify limits on a tenant’s right to overcharge a sublettor. By promulgating a properly designed roommate overcharge provision, DHCR would therefore act within the Rent Stabilization Law’s stated purpose “to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health,” and would thus avoid overstepping its authority. As laid out above, however, that provision needs to take into account the tenant’s economic needs. Moreover, under both the community preservation and redistribution of wealth theories, it is not clear that a roommate is less deserving of protection than a primary tenant. The justifications that provide support for a tenant’s overcharging her roommate, therefore, should have limits.

A. The Exemptions Must Be Limited

A careful analysis of the justifications for rent overcharge can delineate the limits of those justifications. For example, while a tenant’s economic need may justify her taking in a roommate at a disproportionate rent, the purpose of constructing such an exemption is to allow tenants to afford their escalating rents. That justification, therefore, does not apply when a tenant’s rent from her roommate goes to pay expenses other than rent. Rent from a roommate beyond the level needed to pay the tenant’s rent

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195 See supra notes 14-17 and accompanying text (analyzing the purposes behind statutory limitations on subletting).
197 See supra note 24 and accompanying text (applying the ultra vires doctrine to the promulgation of the proportionality provision).
198 See supra Part II.B.1.
199 See infra Part III.A.
200 See supra Part II.B.1.
201 See supra note 58 (discussing the governmental takings doctrine). It may be argued that those expenses should be subsidized as well, many of them being just as essential to living as housing. That subsidy, however, should not come from other renters in need of housing or by means of the protection of rent regulation. See supra note 196 and accompanying text (quoting the Rent Stabilization Law’s stated purpose).
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is true profiteering. It is difficult to determine that level for every individual, and such a determination would be prohibitively cumbersome in a court or administrative proceeding, requiring formulas akin to those used by welfare agencies and documentation of all income and any extraordinary expenses. One approach would be to set that level at the unit’s entire rent. The rent that a tenant earns from her roommate above the unit’s rent, as a rule, does not go toward protecting her housing in an unfair housing market, and should not be protected by rent regulation.

An alternative would be to set that level at the average welfare assistance payment for a household equal in size to the tenant’s, on the assumption that the welfare shelter allowance is a good indicator of the minimum income that a household would be able to contribute toward rent. Thus, the roommate could bring an overcharge action if she were paying a rent greater than the entire unit rent minus the shelter allowance for which the tenant might be eligible. There are several problems, however, with this more conservative formula. First, it is not an accurate indication of minimum household income because not all tenants are eligible for welfare; therefore, some of the poorest tenants might be deprived of their tenancies despite a legitimate justification. Second, the complexity of the formula would

202 See, e.g., BARRY STROM, PUBLIC BENEFITS IN NEW YORK § PA, at 123-206 (1998 ed.) (describing the process of calculating eligibility and benefits for the Family Assistance and Safety Net Assistance programs over the course of more than eighty pages).
203 See supra note 196 and accompanying text (quoting the Rent Stabilization Law’s stated purpose).
204 See Anderson, supra note 104, at 1:2 (reporting the current monthly shelter allowance for a family of four in Manhattan as $312).
205 See generally N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001) (prescribing the following overcharge action that a tenant may take against a landlord: “[a]ny owner who is found by DHCR . . . to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay the tenant a penalty equal to three times the amount of such excess”).
206 See STROM, supra note 202, § PA, at 11, 61-106. The 1996 welfare reforms put into effect a sixty-month lifetime limit on receipt of Family
cause the same problems discussed above for tenants with less education and without legal representation.\(^{207}\)

The similar statuses of tenants and their roommates also limit the justifications under which a tenant’s interests should be protected at any cost. For example, the community preservation theory supports the protection of long-term tenants and recognizes their need to take in roommates at disproportionate rents over time as tenant incomes may decrease with retirement, and as rents increase.\(^{208}\) Nonetheless, this theory also supports the protection of roommates. As discussed above, roommates may be long-term members of the community even if they have not lived in their units for a long time because of the informal means by which tenants typically advertise for roommates.\(^{209}\) Likewise, the redistribution of wealth perspective does not clearly favor the tenant over her roommate so as to justify limitless overcharging.\(^{210}\) While statistics on their relative wealth are not available, there is no reason to believe that people seeking rooms to rent are generally richer than those who already have stabilized apartments and are seeking roommates. Thus, a roommate overcharge protection is warranted to prevent unjustifiable redistribution of wealth from roommates to tenants.\(^{211}\)

**B. Provision Design**

Economic need, informal exchange, and ignorance of the law should all be recognized as justifications for overcharging a roommate under any code that attempts to regulate roommate relations, both because these reasons excuse the tenant and because exemptions based on these reasons prevent disparate

\(^{207}\) *See supra* note 176 and accompanying text.


\(^{209}\) *See ZANY’s, supra* note 89, at 314-15.

\(^{210}\) Radin, *supra* note 47, at 412.

\(^{211}\) *See Collins, supra* note 47, at 1305.
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effects on low-income tenants. Those exemptions, however, are limited by the extent to which the protection of roommates is also warranted. Thus, as the discussion above has already demonstrated, designing a roommate overcharge provision to encompass all of these goals is somewhat difficult.

An important consideration in the remedy must be the innocence of the roommate. The case law around succession rights, for example, recognizes that “[i]mproprieties committed by the departed household member . . . cannot defeat the right of the remaining household member to succeed to the tenancy.” Likewise, the roommate is an innocent party when the primary tenant charges her an excessive rent, and should be treated as such. Transfer of the tenancy to the roommate who has been overcharged is one potential remedy that recognizes the roommate’s innocence. A problem with this remedy is that it, unfortunately, creates an incentive for collusion both at the expense of the primary tenant and at the expense of the landlord. The landlord may approach the roommate and encourage her to disclose the facts of her rental agreement in order to have the primary tenant evicted and to give the roommate the right to the tenancy. This danger, however, can be mitigated by giving the tenant an opportunity to cure the overcharge by lowering the roommate’s rent to an amount equal to or below the entire unit rent within ten days of receiving notice from the landlord.

212 See supra Part II (explaining how such circumstances justify exemption).
213 See supra notes 27-30 and accompanying text (contrasting the remedies given subletors when primary tenants are found to be profiteering at their expense).
215 See supra notes 27-30 and accompanying text (citing the use of this remedy when a subletting tenant is found to have an “illusory tenancy”).
216 See Court OKs Eviction, supra note 69, at 11 (“Once the roommate learns that the tenant is violating the law, try to get his cooperation.”).
217 See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.3(a) (2001)
addition, collusion might be discouraged by permitting no vacancy allowance to be added to the roommate’s new base rent, thus removing the landlord’s incentive to collude. 218

On the other hand, the vacancy allowance is needed to protect the landlord against collusion between the tenant and roommate. For example, a tenant who plans to move out of her unit permanently, but would like to give a friend the opportunity to have this rent-stabilized unit without competing with others, might spuriously overcharge that friend and cause her own eviction. This would provide a means of avoiding the requirements put in place for succession rights. 219 This danger could be mitigated by limiting the remedy of transferring the tenancy to the roommate to cases in which the roommate had lived in the unit for more than one or two years, creating a veritable succession right for the roommate. Giving the roommate a right to the tenancy, however, differs in an important respect from a succession right or the reassignment of the tenancy to a sublettor where an illusory tenancy is found. It evicts from her home a tenant who still lives in that home and has a personhood interest in it. 220 For these reasons, the transfer of the tenancy to the roommate is not the best remedy for a roommate overcharge.

A roommate overcharge provision should instead provide roommates with a cause for reimbursement in cases where they are being charged a rent greater than the entire unit rent. 221 In this way, those tenants who cannot afford even half of their rent

(allowing eviction on the grounds of a violation of a substantial obligation of the lease only when the tenant has “failed to cure such violation after written notice of the owner that the violations cease within 10 days”).

218 See supra note 60 and accompanying text (outlining the statutory vacancy allowance).

219 See supra notes 138-40 and accompanying text (discussing succession rights).

220 See supra notes 127-32 and accompanying text (defining the personhood interest).

221 See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001) (providing tenants with a cause of action for reimbursement against landlords charging illegal initial rents and illegal rent increases).
will not be penalized for taking in roommates out of economic need. This also avoids the inevitable disparate repercussions that an eviction action poses to poor tenants, who are less likely to be represented and more likely to become homeless upon losing their tenancy. This solution allows tenants who are ignorant of the regulation at least some opportunity to correct their errors without losing their homes. Moreover, access to information and legal representation is likely to be more equal between a tenant and her roommate than between a landlord and tenant, making the tenant-roommate dispute more equitable than that between a landlord and tenant. Finally, the informal exchange of resources in the place of rent should be an affirmative defense to a roommate overcharge if greater or equal in value to the overcharge. It should be clearly written into the provision so that tenants and judges are aware of it.

CONCLUSION

The roommate proportionality provision was enacted with two debilitating flaws. These errors show the true nature of the provision as a tool for weakening tenant rights in the guise of expanding protections to roommates. As applied by the courts

222 See supra Parts II.B.2, 4.
223 See supra notes 164-66 and accompanying text (citing a great gap in representation between landlords and tenants).
224 See supra Part II.B.3.
225 But see supra notes 177-81 and accompanying text (citing Bezdek’s assertion that tenants do not successfully argue affirmative defenses unless represented).
226 See supra Part II.A-B (explaining that the remedy must not lie with the landlord and that there must be exemptions for overcharging when the tenant is justified in doing so).
227 Court OKs Eviction, supra note 69, at 10. At least some landlords give no thought to the protection of roommates through the provision. One landlord newsletter informed its readers of the following options:

Most leases bar tenants from violating the law. So if a tenant overcharges a roommate in violation of the code, you can also seek the tenant’s eviction based on breach of the lease. But there’s a downside to this strategy . . . a court might give the tenant a chance
thus far, the provision places the remedy for an overcharge in the hands of the landlord rather than the roommate.\textsuperscript{228} It gives the landlord a means by which to evict entire units instead of giving roommates protection against overcharge akin to those that primary tenants hold.\textsuperscript{229} Moreover, the misapplication of this provision prevents roommates from choosing disproportionate rental arrangements even if more affordable to them, and prevents unmarried couples from sharing their rent as they see fit.\textsuperscript{230} Additionally, the provision sets forth a resolute prohibition against disproportionate rents that does not allow for needed exceptions.\textsuperscript{231} If applied without an opportunity to cure, without consideration of the desperate economic straights of many New York City tenants, and without adjustments for informal exchanges, the provision will unjustly prevent many tenants from maintaining and affording their homes.\textsuperscript{232} For these reasons, the provision cannot stand as written.

The purpose of the Rent Stabilization Law is “to prevent exactions of unjust, unreasonable, and oppressive rents and rental agreements and to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health, safety, and general welfare.”\textsuperscript{233} While proponents of the proportionality provision jumped on the term “profiteering” in

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\item to correct the lease violation by returning the overcharge amount and charging the roommate a lower rent in accordance with the code requirements. That’s why it’s better to sue to evict the tenant for violating the code.
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\textit{Id.}

\textsuperscript{228} RAM 1 LLC v. Mazzola, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep’t Dec. 28, 2001), at *1.

\textsuperscript{229} \textit{See supra} note 205 (citing statutory basis for the tenant overcharge action).

\textsuperscript{230} \textit{See LAMBDA Memo, supra} note 63.

\textsuperscript{231} \textit{See supra} note 9 and accompanying text (quoting language of proportionality provision); Part II.B (arguing that some sort of exemptions or accommodations are needed in cases of economic need, disparate impact, informal exchange, and lack of representation).

\textsuperscript{232} \textit{See supra} Part II.B.

\textsuperscript{233} N.Y. UNCONSOL. LAW § 26-501 (McKinney 2001).
order to justify the eviction of a large number of tenants living with roommates, the scarcity of affordable units today requires that the statutory language be applied more carefully.\textsuperscript{234} Because so many tenants must take in roommates at disproportionate rents in order to afford their homes, and because the repercussions of eviction in this market are so harsh, eviction of those tenants is undoubtedly a "disruptive practice" that would produce a threat to the public welfare.\textsuperscript{235}

Likewise, leaving roommates with no protection against those tenants who are truly profiteering by charging them greater than the unit rent would be inconsistent with the purposes of the Rent Stabilization Law. By adopting a limited and effective roommate protection, DHCR would avoid Governor Pataki’s shortsighted assumption that to protect current tenancies is to protect all tenants.\textsuperscript{236} Tenants navigating today’s housing market must frequently become roommates to existing tenants.\textsuperscript{237} The protection of roommates, therefore, insures that all tenants have adequate choices of affordable rooms and units.

For all of these reasons, the proportionality provision should be invalidated and roommates should be given the benefit of a cause of action in overcharge against their primary tenants when they are being charged rent greater than the entire unit rent and are not receiving in return additional services of equal or greater value to that overcharge.

\textsuperscript{234} See, e.g., \textit{supra} note 41 and accompanying text (characterizing Ms. Mazzola’s actions as “profiteering”). \textit{See also supra} note 147 (describing the scarcity of affordable units).

\textsuperscript{235} \$ 26-501.

\textsuperscript{236} \textit{See supra} notes 142-45 and accompanying text (citing Governor Pataki’s optimistic assessment of the Rent Regulation Reform Act of 1997).

\textsuperscript{237} \textit{See supra} note 59 (citing high rates of apartment sharing).
WHAT’S MINE IS MINE, BUT WHAT’S YOURS SHOULD ALSO BE MINE: AN ANALYSIS OF STATE STATUTES THAT MANDATE THE IMPLANTATION OF FROZEN PREEMBRYOS

Diane K. Yang*

INTRODUCTION

In recent years, the advancements in reproductive technology have led to a surge in the number of couples seeking fertility treatments such as in vitro fertilization ("IVF").¹ IVF is one of many artificially assisted conception procedures available to infertile couples.² In a country where one in every five couples is

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² Although a vast majority of the cases involve disputes between couples who later separate, there have been instances where unmarried individuals have also sought the use of IVF to conceive children. See discussion infra note 211 (discussing a criminal case where a bachelor hired a surrogate to undergo
infertile, the United States has emerged as a leader in disputes involving the custody of frozen preembryos created by artificial conception procedures. Currently, however, there are no federal statutes that provide a uniform consensus on resolving the disputes over the ownership of preembryos. In an effort to create predictability and eliminate confusion over future disposition of preembryos, several states have enacted legislation requiring specific treatment of preembryos in the event of death, separation, divorce of the commissioning couple, or any other unforeseen circumstances.

The different views regarding the status of preembryos have caused debate and unpredictability. The lack of direction from a

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3 Courts and commentators addressing this topic identify the fertilized egg at the developmental stage when cryopreservation takes place in different ways. Some courts, for example, use the term “pre-zygote,” while others use the term “preembryo.” See, e.g., J.B. v. M.B., 783 A.2d 707, 708 (N.J. 2001) (noting that the term “preembryo” rather than “embryo” should be used when the ova are frozen); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (using the term “pre-zygote”). Furthermore, the New Jersey court found that because “[a] preembryo is a fertilized ovum up to approximately fourteen days old (the point when it implants in the uterus),” it uses that term in place of “embryo” because “preembryo is technically descriptive of the cells’ stage of development when they are cryopreserved (frozen).” J.B., 783 A.2d at 708 n.1 (internal citation omitted). Since these terms are legally indistinguishable, the terms “pre-zygote,” “preembryo” and “fertilized egg” will be used interchangeably throughout this note.

4 See Daniel I. Steinberg, Note, Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos, 7 B.U. PUB. INT. L.J. 315, 317 (1997). Other leaders in custody disputes include Israel and the United Kingdom. See, e.g., Helene S. Shapo, Frozen Pre-Embryos and the Right to Change One’s Mind, 12 DUKE J. COMP. & INT’L L. 75, 76-7 (2002) (finding that ART procedures are commonplace in these countries and briefly discussing the significant custody cases that arose in each locale).

5 These states include Florida, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Hampshire, New Mexico, and Pennsylvania. See infra note 158 (describing the restrictions in each state).

6 David H. Fiestal, Note, A Solomonic Decision: What Will Be the Fate of Frozen Preembryos?, 6 CARDOZO WOMEN’S L.J. 103, 107-08 (1999) (noting that a few states have passed statutes to address the disposition of frozen preembryos).
majority of state legislatures forces socially vital issues such as one's procreative freedom and the status of a preembryo to be decided and determined by judges who represent the opinions and morals of a select few rather than society at large. Although it is common in family law for judges to decide the legal direction and standards of particular problems, it is best for legislators, who represent the public, to decide the issues and impose uniformity in the law. Furthermore, judges have been forced to sift through an array of complicated factors pertaining to consent agreements, contracts, and other legal matters with little statutory guidance, creating a confusing and contradictory body of caselaw. With more than 100,000 frozen preembryos stored in IVF clinics throughout the country, a number growing at a rate of 18.8% annually, legislative guidance is needed. Couples attempting IVF are entitled to direction from the legislature prior to undergoing the procedure. The legislatures should enact statutes that thoroughly address the disposition of these preembryos in a way that ensures maximum procreative freedom.

Although a few states have enacted specific statutes to deal with the issue of frozen preembryos, each differs widely as to the legal status of and rights attributed to these cells. Part I of this note provides an introduction to the IVF procedure and describes how frozen preembryos are created. Part II focuses on present caselaw and how the state courts have dealt with the issue of custody disputes. Part III describes and analyzes state legislative


8 Id.

9 See Lori B. Andrews & Nanette Elster, Regulating Reproductive Technologies, 21 J. LEGAL MED. 35, 59 (2000); see also Jackie Jadrnack, Legal Chill Surrounds Frozen Embryos, ALBUQUERQUE J., Apr. 1, 2001, available at 2001 WL 17938689 (stating that there are an estimated 100,000 to 200,000 frozen preembryos being stored in fertility clinics throughout the country).

10 See discussion infra Part III (discussing and comparing the Florida, Louisiana, and New Mexico statutes).
responses regarding the disposition of frozen preembryos and analyzes the scope of protection state laws provide and more importantly, the priorities of each law. It also argues that the Florida statute, which requires couples to determine the disposition of their preembryos in a signed agreement prior to IVF,\footnote{FLA. STAT. ANN. § 742.17 (West 2001) (requiring the commissioning couple and the treating physician to enter into a written agreement that provides for the disposition of the cells).} is the best approach to this sensitive issue because it encourages participants to make conscious and thoughtful decisions. Although some may argue that such agreements defining familial relationships violate public policy, these agreements should nevertheless be encouraged because they ensure that parties will not be forced to accept outcomes they did not anticipate.\footnote{See supra note 7 (noting that since judges voice their objections to state intrusions, this creates ambiguity as to what the court might do if a custody case over preembryos should come before the court).} Finally, this note concludes that state statutes are essential in providing guidance for the future of IVF programs, and it proposes a revised version of Florida’s statute mandating disposition agreements. Ultimately, this note predicts that as use of IVF and other assisted reproductive procedures increase in popularity, the potential for debate and controversy will also intensify. Thus, the state legislatures should take a pro-active position to determine the future of IVF programs, maximize individual procreative rights, and establish predictability for future IVF participants.

I. IN VITRO FERTILIZATION AND THE CREATION OF EXCESS PREEMBRYOS

In the United States, approximately 6.1 million people,\footnote{American Society for Reproductive Medicine, ASRM: Frequently Asked Questions About Infertility, available at http://www.asrm.org/Patients/faqs.html (last visited Apr. 28, 2002) [hereinafter ASRM: Frequently Asked Questions].} or about 10% of the population that is of reproductive age, are
affected by infertility. Since 1978, when the first child conceived by IVF was born, the use of artificial reproductive technologies ("ARTs") has grown into a largely unregulated, billion-dollar industry. More than 45,000 American babies have been conceived through IVF since its introduction in the United States.

IVF begins with administering fertility drugs to the woman to stimulate egg production. The eggs are extracted from her ovaries and placed in a petri dish to be combined with sperm to fertilize the egg. Once fertilization has taken place, the cell begins to divide. After the preembryo reaches the four-to-eight cell stage, it is transferred into the woman’s uterus. Following the development of cryopreservation in 1981, physicians have been able to obtain more eggs with one extraction procedure and can now create and store extra preembryos. Because only about one in every four preembryos implanted results in a successful pregnancy, the unavoidable result of IVF is the creation of extra

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14 Infertility is defined as “the failure of a couple to conceive after one year of intercourse without using contraception.” Id.
19 See id.
20 See id.
21 See id.
22 Cryopreservation is the freezing of preembryos in liquid nitrogen at either the two-, four- or eight-cell stage of development. Arado, supra note 15, at 244 (citing Marcia J. Wurmbrand, Note, Frozen Embryos: Moral, Social, and Legal Implications, 59 S. CAL. L. REV. 1079, 1083 (1986)).
23 Andrea M. Siegel, Comment, Legal Resolution to the Frozen Embryo Dilemma, 4 J. PHARMACY & L. 43, 46 (1995).
24 Id.
preembryos. These surpluses are cryopreserved to ensure that there are enough preembryos for use in future implantation. Since human eggs cannot be frozen independently and still remain viable, many cryopreserved cells exist as either frozen preembryos or as sperm. While eggs can only be frozen for a short time, preembryos and sperm can be stored indefinitely.

There are primarily three different views attributed to preembryos and these various beliefs fuel the controversies over frozen cells. One group believes that preembryos constitute life; others believe that preembryos are the property of the people who supplied the gametes; and another group would give them a special interim status. Some argue that the party who wishes to use the preembryos should be given sole control of the cells, and others think that the party who wishes to avoid procreation should prevail.


26 The average number of embryos transferred into a uterus before pregnancy is 3.1 embryos per procedure with only about 21.7% of such pregnancies resulting in live births. See id.

27 See Kathleen R. Guzman, Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth, 31 U.C. DAVIS L. REV. 193, 219 (1997). Scientists currently believe that oocyte freezing and thawing, the process where the cells are cryopreserved and later defrosted in preparation for an IVF procedure, are the most difficult feats of reproductive technology to complete successfully because of the delicacy of the egg’s chromosomes. Unlike sperm, the egg’s chromosomes are less resilient and unlikely to replace the procedure of embryo freezing. Id. at 219 n.93.

28 Id.

29 Id.

30 See, e.g., Jill Melchoir, Comment, Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties, 68 U. CIN. L. REV. 921, 924 (2000) (arguing that the intentional creation of embryos strongly implies a contract to procreate); Alise R. Panitch, Note, The Davis Dilemma: How to Prevent Battles over Frozen Preembryos, 41 CASE W. RES. L. REV. 543, 545 (1991) (arguing that the law should respect the special status of preembryos and that the appropriate outcome should always be in favor of the spouse who decides to implant).

31 See, e.g., Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (finding that “the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means
A. The “Preembryo as Person” Viewpoint

Those who view preembryos as persons argue that “a person’s unique genetic makeup is complete as soon as that person is conceived”; and, therefore, they object to the intentional destruction of fertilized eggs. They adopt a “parens patriae” viewpoint using the “best interest of the child” inquiry. Louisiana and New Mexico, adopting this view, have enacted perhaps the most restrictive and controversial statutes. Both states mandate the implantation of excess preembryos by either the gamete providers or by a surrogate couple. Louisiana’s statute

other than use of the preembryos in question”); Michelle F. Sublett, Note, Frozen Embryos: What Are They and How Should the Law Treat Them, 38 CLEV. ST. L. REV. 585, 616 (1990) (arguing that should a dispute between the gamete providers occur, there should be a presumption in favor of letting the preembryo expire over a gamete provider’s wish to bring the embryo to life since no human life has developed).


Parens patriae is “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability to prosecute the suit.” BLACK’S LAW DICTIONARY 1137 (7th ed. 1999).

See, e.g., LA. REV. STAT. ANN. § 9:129 (West 2001) (finding that a human preembryo is a juridical person and shall not be intentionally destroyed by anyone including its gamete providers and fertility clinic that generated its existence); N.M. STAT. ANN. § 24-9A-1[g] (Michie 2001) (defining a “fetus” as the product of conception until birth), [3][a] (stating that a fetus cannot be subject to any activity that places it at risk unless the activity is for the health needs of that particular fetus and the fetus is minimally placed at such risk).

Although the New Mexico statute is similar to that of Louisiana because it also requires the implantation of preembryos, New Mexico has not gone as far as to define them as persons with separate individual rights. The problem with both states’ implantation requirement is that they deprive the procreative rights of IVF participants without a sufficient state interest. See Kramer v. Union Free Dist., 395 U.S. 621, 627 (1969) (holding that limiting fundamental rights can only be justified by a compelling state interest).
regarding IVF and the status of preembryos is the most comprehensive, but it is also the most questionable as to whether it will pass constitutional scrutiny.\textsuperscript{35} Currently, Louisiana is the only state that defines a preembryo as a “juridical person,”\textsuperscript{36} and as a separate legal entity\textsuperscript{37} that can “sue or be sued.”\textsuperscript{38} Under this statute, the preembryo is not the property of its progenitors, IVF physicians, or clinical facilities that generates or maintains its existence.\textsuperscript{39} Instead, if the donors of the sperm and egg renounce their parental rights to the preembryo for in-utero implantation, the preembryo must be made available for adoption.\textsuperscript{40}

There is academic support for the view that a preembryo should be given the rights of a person because, under this view, the preembryo is a human life.\textsuperscript{41} Supporters of this belief would give a preembryo all the rights and privileges of a human being from the moment of conception.\textsuperscript{42} They believe that a preembryo should be considered a life because it is a grouping of living

Second, the requirement of implantation prioritizes legislative intent over medical concerns as to the best interest of the patients since the statutes do not provide for medical exceptions when a physician would ordinarily refrain from implanting more embryos than necessary because of the patient’s own physical condition. See generally N.M. STAT. ANN. § 24-9A-1-[7] (Michie 2001). See also KY. REV. STAT. ANN. § 311.715 (Banks-Baldwin 2001) (stating that publicly funded IVF programs cannot conduct procedures that would intentionally destroy the embryo).

\textsuperscript{35} See generally LA. REV. STAT. ANN. §§ 9:124–130.
\textsuperscript{36} See, e.g., § 9:123.
\textsuperscript{37} See, e.g., § 9:125.
\textsuperscript{38} See, e.g., § 9:124.
\textsuperscript{39} See, e.g., § 9:126.
\textsuperscript{40} See id.
\textsuperscript{41} Symposium, Pushing the Boundaries: An Interdisciplinary Examination of the New Reproductive Technology, 45 LOY. L. REV. 239, 240-41 (1999) (noting that the fertilized cell is a “germinated genetic embodiment of a novel human life. The newly united cell, or zygote, is a fertilized human ovum and has the potential to develop into a human person.”).
cells, forming the basic units of human life. They further argue that a preembryo has the same rights of a living being because its conception resulted from an intentional act to reproduce. In addition, they claim that scientific evidence supports this view, that if allowed to develop, a preembryo may become a human life.

This argument, however, is extreme. Preembryos and embryos are lost naturally each day. Such occurrences are not contemplated as a loss of life, but rather a loss of genetic cells. Many opponents argue further that the loss of cells “should not change merely because the loss occurs through the IVF process.” They contend that certain legalized birth control methods, such as “morning after” pills and intrauterine devices (“IUDs”), essentially cause the same loss of embryos by

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44 Id.
45 Id.
46 Id.
48 Id.
49 Id.
51 Scientists are still unclear as to how IUDs work to prevent pregnancy, but some believe that they produce macrophages, white blood cells that destroy sperm. See Contraception: Medical School to Test New IUD Contraceptive, DRUG WEEK, Jan. 19, 2001, available at 2001 WL 17573310.
preventing its attachment to the uterine wall.\textsuperscript{52} While there are other legalized methods to destroy preembryos, it follows that preembryos created through IVF are no different and thus, are not and should not be afforded similar legal protections as a human life.

\textbf{B. Frozen Preembryos Invoke a “Special Interim Status”}

Many people agree that preembryos exist in an uncertain legal status. They are cells that do not enjoy protection as “persons” under federal law,\textsuperscript{53} but cannot be considered property because of their potential to become life. As a result of this potential, many scholars view preembryos as deserving a special status.\textsuperscript{54} To these scholars any other legal treatment or categorization—such as deeming them as “property”—would offend morals and ethics.\textsuperscript{55} Some courts have also accepted this viewpoint. In \textit{Davis v. Davis},\textsuperscript{56} for example, the Tennessee Supreme Court held that preembryos were neither property nor life, but rather occupied a “special interim status.”\textsuperscript{57}

\textsuperscript{52} Schaefer, \textit{supra} note 47, at 95.

\textsuperscript{53} See also Jennifer M. Dehmel, \textit{Note, To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?}, 27 \textit{CONN. L. REV.} 1377, 1383 (1995) (“In Roe v. Wade, the United States Supreme Court interpreted the word ‘person’ as used in the Fourteenth Amendment to exclude the unborn. Although ‘person’ is not defined in the Constitution, the Court held that ‘use of the word is such that it has application only postnatally.’”).

\textsuperscript{54} See \textit{Davis v. Davis}, 842 S.W.2d 588, 588 (Tenn. 1992) (acknowledging that even the American Fertility Society, an organization of over 10,000 physicians and specialists working with problems of infertility, has categorized embryos as occupying an interim status group). See also Jennifer L. Carlow, \textit{Note, Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Freedom and Reproductive Technology}, 43 \textit{DEPAUL L. REV.} 523, 526 (1994).


\textsuperscript{56} 842 S.W.2d at 594-98; see also \textit{infra} Part II.A (discussing the specific facts and holding of the case).

\textsuperscript{57} 842 S.W.2d at 597 (“We conclude that preembryos are not, strictly
Professor John Robertson supports the view of providing special status for preembryos and advocates the use of contract theory to resolve custody disputes. As a leading defender of the use of contracts, he argues that they provide the only way to adequately protect a couple’s interest in procreative autonomy. He claims that enforceable contracts will minimize potential disputes and create more efficient IVF programs because of their ability to establish certainty and predictability as to the disposition of preembryos. Professor Robertson recognizes that these agreements give both parties the opportunity to decide and determine their reproductive future. By equating advance agreements with living wills and donor cards, he concludes that such directives are permissible. Moreover, he argues that they protect “one’s current interests and autonomy... [by] speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”

58 Professor of Law, University of Texas at Austin. Faculty Profiles, University of Texas, School of Law, available at http://www.utexas.edu/law/faculty/jrobertson (last visited Apr. 28, 2002). Professor Robertson has written numerous articles and books on bioethical issues and is currently Chair of the Ethics Committee of the American Society for Reproductive Medicine. Id.

59 John A. Robertson, Prior Agreements for Disposition of Frozen Embryos, 51 OHIO ST. L.J. 407, 414 (1990). Furthermore, Robertson states that “[c]lear rules for disposition of embryos is [sic] necessary to meet the needs of infertile couples, to minimize disputes, and to facilitate efficient IVF program operation.” Id. at 409.

60 Id.

61 Id.

62 Id. at 415 n.29. A living will is defined as follows: An instrument, signed with the formalities necessary for a will, by which a person states the intention to refuse medical treatment and to release healthcare providers from all liability if the person becomes both terminally ill and unable to communicate such a refusal.

BLACK’S LAW DICTIONARY 945-46 (7th ed. 1999).

63 Robertson, supra note 59, at 415 n.28. He also argues that the use of prior agreements for preembryos is similar to the use of living wills and donor cards in that one’s current interests and autonomy may be served by the ability to direct future events when the person is no longer able to decide. Id.

64 Id. at 415.
future events when the person is unable or unavailable to decide.”

The recognition and enforcement of these contracts maximizes procreative liberty because the outcome is based on the mutual consent and control of both parents. Without such authority, procreative rights are infringed because the “decisions about [the pre]embryos will be made by others in ways that might insufficiently value the reproductive concerns of the persons involved.” If the prior agreement is not binding, the IVF program, the court, or the legislature will determine the disposition of the frozen preembryos. This may result in a disposition contrary to the parents’ intent and thus, interfere with procreative interests. In his view, couples will only be able to rely on such agreements for the future disposition of their preembryos with universal acceptance of such agreements.

Professor Carl Coleman is perhaps one of the strongest opponents to the idea of creating contractual obligations to determine the disposition of frozen preembryos. He expressly rejects the constitutionality of such agreements, arguing that contracts violate inalienable rights inherent to all individuals, such as the right to procreate freely. He claims that an agreement restricts a couple’s choice because the terms of the contract, although once agreed upon, may no longer reflect the

65 Id. at n.28.
66 Id.
67 Id. at 415.
68 Id. at n.28.
69 Id. at 415.
70 Professor Coleman was formerly the Executive Director of the New York State Task Force on Life and the Law, a nationally recognized interdisciplinary commission. He has served on numerous governmental and bar association committees. He currently chairs the Special Committee on Treatment Decisions of the New York State Bar Association’s Health Law Section and is an Associate Director of the Health Law and Policy Program at Seton Hall. Biography, Seton Hall Law On-Line, available at http://law.shu.edu/faculty/fulltime_faculty/colemaca/coleman.htm (last visited Apr. 28, 2002).
71 Coleman, supra note 32, at 56, 88-90.
72 Id. at 57.
couple’s present intent or desire. He further argues that the decision to procreate or avoid procreation is such a significant fundamental right that only upon the mutual consent of both parties should a preembryo be either carried to term or destroyed.

C. Frozen Preembryos as Property Viewpoint

Those who consider preembryos as matrimonial assets or “property,” equate preembryos as the personal property of their gamete providers. Under this reasoning, preembryos can be treated just as any other asset and thereby can be owned, destroyed, gifted, or donated. Supporters of this viewpoint place the desires and interests of the gamete providers above that of the preembryo. Although this idea has existed for quite some time, many jurisdictions have been hesitant to define preembryos as property.

One of the most popular theories that supports the view of preembryos as property is the “sweat equity” rule. The idea is

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73 Id. at 126.
74 Id. at 82.
75 Guzman, supra note 27, at 207.
76 Id.
77 Id.
78 See, e.g., Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992) (refusing to define the status of preembryos as anything more than interim); but see York v. Jones, 717 F. Supp. 421 (E.D.Va. 1989) (holding that preembryos are the property of their gamete providers for purposes of a cryopreservation agreement).
that a woman should have sole decision-making authority with respect to the fate of her preembryos.\(^{80}\) In numerous articles and publications, scholars have recognized the argument that a woman retains this decision-making right.\(^{81}\) By extending the holding of *Roe v. Wade*,\(^{82}\) these scholars argue that since a woman has the right to choose if and when to abort a pregnancy, she should have the same freedom to control her frozen preembryos.\(^{83}\) Applying this reasoning, a frozen preembryo artificially sustained in liquid nitrogen is no different from a fetus in the womb; therefore, the woman should retain the right to determine its fate.\(^{84}\) Regardless of whether the father wishes to procreate or avoid procreation, the woman retains ultimate decision-making authority.\(^{85}\) Although this theory has supporters,\(^{86}\) the reasoning is questionable and is subject to criticism.

There are several flaws with the “sweat equity” argument. First, although *Roe v. Wade* recognized the negative impact upon a woman if she were forced to choose between carrying an

\(^{80}\) See Andrews, *supra* note 79, at 406. Those who favor this idea claim that during IVF, women endure a physically and emotionally invasive procedure, while men merely surrender sperm, a relatively simple and easy task. *Id.* Since women undergo a more painful and difficult procedure, they should be granted with the decision-making rights. *Id.*

\(^{81}\) See generally *supra* note 79 (noting the various scholars who have written about a woman’s right to make the decision regarding the disposition of her preembryos). See also Marcia J. Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. Cal. L. Rev. 1079, 1095-96 (1986) (noting that there are scholars who believe that a woman’s interest in privacy, bodily autonomy, and limiting lineal descendants would entitle her to dispose of her preembryos as she deems fit).

\(^{82}\) *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the expansion of privacy rights would cover the right of a woman to have an abortion).


\(^{84}\) Proponents of the “sweat equity” rule support a woman’s right to decide the fate of preembryos because it is through her that preembryos are formed. Thus, it is assumed that supporters would also view frozen preembryos as no different from fetuses. *See id.*

\(^{85}\) *Id.*

\(^{86}\) *Id.*
unwanted pregnancy or entering into motherhood, its holding legalizing abortion was based on the fundamental right of privacy. Frozen preembryos, stored in a clinic are significantly different from a fetus sustained within the womb; thus, the principles behind Roe are not triggered. Unlike in Roe, there is no privacy interest because there is no burden or interference with the woman’s body or personal autonomy. Moreover, the legal status of a preembryo differs greatly depending on whether it is in the womb or in a frozen state. While there are criminal statutes to protect fetuses in the womb from intentional abortions by a third party, it is not a criminal offense to accidentally or intentionally destroy a preembryo outside of the uterus.

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87 Roe, 410 U.S. at 153.
88 Id. at 154 (stating that “the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation”).
89 Id. at 153. In Roe, the Court recognized various psychological, mental, and physical burdens on a woman if the state forced her into unwanted motherhood. Id. All of these factors pertain to a woman’s bodily autonomy. Thus, frozen preembryos would not violate the privacy principles defined in Roe since these cells are removed from the woman’s body.
91 Melchoir, supra note 30, at 950 (noting that a frozen preembryo exists outside of the womb and since the bodily integrity of the woman is not violated, state laws can prohibit its destruction where it otherwise could not if the preembryo was attached to a uterine wall).
92 See, e.g., Fla. Stat. Ann. § 782.09 (West 2001) (stating that “[t]he willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother”); Ill. Comp. Stat. 720 ILCS 5/9-1.2(3)(b) (West 2001) (providing that it is a crime to kill any individual of the human species from fertilization until birth other than by a lawful abortion); La. Rev. Stat. Ann. § 14:32.5 (West 2001) (providing that feticide is the killing of an unborn child); N.M. Stat. Ann. § 30-5-3 (Michie 2001) (providing that a criminal abortion is any act, not justified as a medical termination, that ends a woman’s pregnancy); N.Y. Penal Law § 125.00 (Consol. 2001) (defining homicide as any conduct that causes the death of a person or an unborn child who is more than twenty-four weeks from the moment of conception).
93 Currently, there are no statutes that impose criminal sanctions on a
couple, therefore, can sue for monetary damages for the destruction of their preembryos,94 but a physician who destroys a preembryo could not be charged with murder.

Another flaw in the “sweat equity” theory is that under it men and women are not afforded equal rights. Even though Roe gives women the right to control the procreative process with respect to traditional pregnancies, the decision does not vest greater rights to women than men.95 Instead, “Roe and its progeny are cited for the principle that the right to procreate and the right not to procreate are independent rights, each equally protected in the interest of either gender.”96 Because the statuses of fetuses and preembryos are not equivalent under the law, the interest in the fate of the preembryo is the same among both gamete providers, man and woman. Neither party, therefore, should gain sole control over the preembryos on the basis of sex alone, as supporters of the “sweat equity” theory would argue. Just from these few viewpoints, it is evident that the status of the preembryo remains unclear.

II. BACKGROUND OF CASELAW

Cases with unforeseen circumstances, where the interested

person who destroys an embryo. Although there are criminal sanctions for intentional feticide, many of these jurisdictions define a fetus, for the purposes of imposing criminal charges, as those beings that have reached a specific point of development. See supra note 92.

94 See, e.g., Del Zio v. Presbyterian Hosp., 1978 U.S. Dist. LEXIS 14450, at **3-6 (S.D.N.Y. Nov. 14, 1978). In this case, the couple’s physician, believing that Mrs. Del Zio could not reproduce naturally, suggested that the couple attempt conception by IVF, a relatively new and experimental treatment at the time. Id. at **2-3. The chairman of obstetrics and gynecology, however, learned of the experimental procedure within his department and ordered the culture destroyed. Id. at *3. The plaintiffs filed suit for both conversion and intentional infliction of emotional distress. Id. at *4. The jury awarded the plaintiffs $50,000 in damages for the second claim only. Id. at *11.

95 Walter, supra note 79, at 962; see also Andrews, supra note 79, at 407.

96 Walter, supra note 79, at 962.
parties have not made any agreements as to the disposition of their preembryos, such as when death or divorce occurs, have become increasingly problematic. Although there have been precedent-setting cases involving disputes over the disposition of these preembryos in states such as Tennessee, New York and New Jersey, state legislatures should provide the courts with greater guidance in this area. Today judges rather than the gamete providers are deciding matters pertaining to procreational rights.

A. Davis v. Davis: Supreme Court of Tennessee, 1992

Davis v. Davis was the first major case decided by a state’s highest court with regard to the custody of preembryos. In Davis, the Tennessee Supreme Court agreed with the appellate court that there is a constitutional right to avoid procreation when no pregnancy has taken place. The Davises could not procreate naturally and attempted six IVF procedures, none of which led to

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97 See, e.g., Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding that there is an equal right to both procreate and avoid procreation and that the interests of each party must be weighed).


99 See, e.g., J.B. v. M.B., 783 A.2d 707 (N.J. 2001) (holding that even if the husband and wife in this case had entered into an unambiguous agreement regarding the disposition of their frozen preembryos, because it is against public policy, the court will not enforce an agreement that would compel one donor to become a parent against his or her will).

100 See infra Part III (discussing the different legislation regulating IVF).

101 Davis, 842 S.W.2d at 589.

102 Id. at 589, 590, 601. The Tennessee Supreme Court stated that it granted review of the case not because it disagreed with the basic legal analysis utilized by the intermediate court, but because the issue was of great importance. Id. at 590. The court went on to hold that there is a fundamental right to privacy so that “no other person or entity has an interest sufficient to permit interference with the gamete-providers’ decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.” Id. at 602.
a pregnancy.\textsuperscript{103} As a result, seven extra frozen preembryos were created.\textsuperscript{104} When the Davis marriage dissolved, the couple could not agree on the disposition of the preembryos.\textsuperscript{105} The parties had not executed a prior written agreement to govern the disposition of the preembryos in the event of divorce.\textsuperscript{106} While Mary Sue Davis wanted to either retain the preembryos for her own use or donate them to a childless couple, Junior Davis vehemently opposed fathering a child and having it raised by others.\textsuperscript{107} Concluding that the preembryos were “human beings,”\textsuperscript{108} the trial court gave custody to Mary Sue for the purpose of carrying them to term through implantation.\textsuperscript{109} The appellate court reversed the decision, finding that the husband’s interest in avoiding procreation was constitutionally protected and that there was no compelling state interest to justify the transfer against the will of Junior Davis.\textsuperscript{110} Although the Tennessee Supreme Court agreed with the intermediate court’s decision of avoiding forced procreation, it disagreed with its legal analysis and created a new legal framework to provide guidance in this area.\textsuperscript{111}

The Tennessee Supreme Court refused to define a preembryo
as either property under the sole control and disposition of its progenitors,\textsuperscript{112} or as a person who is afforded separate legal interests.\textsuperscript{113} Instead, the court decided that a preembryo occupied an interim level status in which it is entitled to special respect due to its potential for life.\textsuperscript{114} Holding that preembryos lacked the same legal protections afforded to fetuses,\textsuperscript{115} the court found that, as a matter of law, progenitors should have primary decision-making authority regarding their preembryos.\textsuperscript{116} The court determined that the right of procreational autonomy is composed of two equal rights: the right to procreate and the right to avoid procreation.\textsuperscript{117} The court further held that “[a]n interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood.”\textsuperscript{118} The court concluded that because Mary Sue ultimately did not want to use the preembryos herself, Junior’s right to avoid procreation outweighed her wish to have the cells donated.\textsuperscript{119} If Mary Sue had desired to use the preembryos herself, however,

\textsuperscript{112} Id. at 596 (holding that a preembryo is not “property” since it has the “potential for developing into independent human life, even if it is not yet legally recognizable as human life itself”).

\textsuperscript{113} Id. at 595 (pointing out that the legality of abortion indicates that while preembryos “are accorded more respect than mere human cells because of their burgeoning potential for life . . . they are not given legal status equivalent to that of a person already born [even though they may have reached viability]”).

\textsuperscript{114} Id. at 597 (stating that “preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life”).

\textsuperscript{115} Id. at 596-97. To further emphasize the difference between preembryos and fetuses, the court pointed out that while “[l]eft undisturbed, a viable fetus has an excellent chance of being brought to term and born live . . . a preembryo in a petri dish, [even if] later transferred, has only a 13-21 percent chance of achieving implantation.” Id. at 595 n.19.

\textsuperscript{116} Id. at 597.

\textsuperscript{117} Id. at 601.

\textsuperscript{118} Id. at 603 (citing that the courts have previously addressed abortion cases, which deal with the question of gestational parenthood, as well as questions pertaining to child-bearing and child-rearing aspects of parenthood).

\textsuperscript{119} Id. at 604.
the court would then have considered whether she could have biological children through alternate means.\textsuperscript{120}

Although the couple did not execute a prior written agreement as to the disposition of the preembryos upon divorce, the court nevertheless presumed such agreements to be valid and enforceable.\textsuperscript{121} The court found that if the initial contract could be later modified by mutual accord,\textsuperscript{122} these agreements would protect parties against unconscionable risks.\textsuperscript{123} Furthermore, enforcement of such agreements would ensure that the progenitors retain authority over the disposition of their preembryos.\textsuperscript{124} The \textit{Davis} decision was remarkable not only because it was the first case to address this issue,\textsuperscript{125} but also because the court in \textit{Davis} thoughtfully set forth an analytical framework for determining the status and fate of frozen preembryos.

\textsuperscript{120} Id. (holding that such other means can include attempts at IVF or adoption).
\textsuperscript{121} Id. at 597 (stating that the conclusion that agreements should be enforced is premised on “the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition”).
\textsuperscript{122} Id.
\textsuperscript{123} Id. The court recognized that infertile couples are highly emotional: [T]he parties’ initial “informed consent” to IVF procedures will often not be truly informed because of near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds. Providing that the initial agreement may later be modified \textit{by agreement} will . . . protect the parties against . . . the risks they face in this regard.
\textsuperscript{124} Id.
\textsuperscript{125} \textit{Davis} was the first major case to reach a state’s highest court and to address the problems that arise with frozen preembryo disposition. Although the couple in the case did not execute a prior written agreement as to the disposition upon divorce, the court suggested that an agreement could be sustained so long as it could be modified by mutual accord in the future. \textit{Id.} at 597, 604.

Six years after the Davis decision, the New York Court of Appeals supported the validity of predisposition contracts in Kass v. Kass. Like Davis, Kass involved a dispute between a divorcing couple over their frozen preembryos. The wife wanted to use the preembryos after the divorce to become pregnant. The husband, citing to a consent form the parties signed before the IVF procedure, claimed that the couple had agreed to donate the preembryos for scientific research.

The court unanimously held that the consent form signed by both parties demonstrated the couple’s intent to donate the excess preembryos to scientific research, and therefore, the agreement should be enforced. Furthermore, it held that agreements in

126 696 N.E.2d 174 (N.Y. 1998) (holding that predisposition agreements upon the divorce of the progenitors are valid).
127 Id. at 177.
128 Id. at 176. The couple underwent numerous IVF attempts and signed the consent agreement right before the final procedure. Id. The second part, entitled “INFORMED CONSENT FORM NO. 2 ADDENDUM NO. 2-1: CRYOPRESERVATION-STATEMENT OF DISPOSITION,” stated the following:

We understand that it is IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. We are to indicate our choices by signing our initials where noted below.

1. We consent to cryopreservation of all pre-zygotes which are not transferred during this IVF cycle for possible use by us in a future IVF cycle.

2. In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one):
   (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.

Id. at 176-77 (emphasis in original).
129 Id. at 175, 176-77.
130 Id. at 180. Similarly, other prior written directives, such as living
general must be enforced to promote important policy goals. First, the court found that advance directives encourage parties to think through possible consequences of their actions and to carefully detail their wishes in writing. Second, such expressions minimize ambiguity and “maximize procreative liberty by reserving to the progenitors the authority to make, what is in the first instance a quintessentially personal [and] private decision.” Third, having enforceable written agreements ensures the predictability and certainty necessary for the continuance of IVF programs. Lastly, the court recognized that if the public realizes and understands that courts will enforce such agreements, it underscores the “seriousness and integrity of the consent process.”

Although the Court of Appeals of New York strongly favors the use of written agreements, it suggested in a footnote that
had the appellant raised the claim that the agreement was invalid because of a significant change in circumstances, or that procreation was no longer desired, it would have been unenforceable as a violation of public policy. Although it is understandable for any court to refrain from making a per se rule, this court-created exception renders New York’s approach as to the enforceability of such contracts undeterminable. This footnote weakens what could have been a powerful position for the validity of advanced directives. Consequently, couples who have such covenants are still unable to predict whether their agreements are enforceable or binding.


In a recent New Jersey Supreme Court decision, the court reaffirmed the general consensus that agreements are valid in custody disputes over frozen preembryos despite finding the specific contract in the case to be invalid because of ambiguity. In J.B. v. M.B., the wife, J.B., wanted to destroy the where the intangible costs of any litigation are simply incalculable.

\[137\] Id. at 179 n.4 (stating that the “[p]arties’ agreement may, of course, be unenforceable as violative of public policy . . . . Significantly changed circumstances also may preclude contract enforcement.”). The court noted however, that since these particular arguments and issues were not argued by Maureen Kass, it would not resolve these outstanding issues in the current case. Id.

\[138\] This differs from the dictum in Davis, which allowed for modification of the contract by mutual accord. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992). In Davis, the court presumably would enforce a pre-existing agreement between the parties despite changed circumstances in the absence of modification. Id. In contrast, the Kass court reserved the ability to declare a contract invalid if finding a change of circumstances or intentions. Kass, 696 N.E.2d at 179 n.4. Thus, the Kass court was less deferential to the agreement between the parties. Arguably it was more deferential to the parties’ present intent, taking account of changed circumstances. The disposition of preembryos, however, is best left to the parties’ intentions manifested in an agreement that they can later modify, rather than the post facto judgment of a court.

The husband, M.B., urged the court to enforce the contract they made prior to IVF.\footnote{140} The contract stated that if the couple divorced, all unused preembryos would be relinquished to the custody of the clinic unless there was a separate determination by the courts as to “who takes control and direction of the tissues.”\footnote{141} In arguing for the validity of the agreement, M.B. insisted that it was the couple’s mutual desire to give the preembryos to the clinic so that they could be donated to an infertile couple.\footnote{142}

While the intermediate appellate court held that any agreement between the parties to use or donate the preembryos would be unenforceable as a matter of public policy,\footnote{143} the New Jersey Supreme Court found no clear agreement between the parties and the clinic as to the intended disposition of the preembryos.\footnote{144} Since there was no clear demonstration as to the meaning of the agreement, the court concluded that the wife’s right to avoid procreation was stronger than the husband’s wish to donate\footnote{145} and ordered the preembryos destroyed.\footnote{146} The court

\footnote{140} Id. at 710.
\footnote{141} Id.
\footnote{142} Id. Furthermore, in his cross-motion, M.B. claimed that, as Catholics, he and his wife had many long and serious conversations regarding the entire process, and it was their mutual intention to donate any unused preembryos to infertile couples. Id.
\footnote{143} J.B. v. M.B., 751 A.2d 613, 618 (N.J. Super. Ct. App. Div. 2000) (holding that even if the agreement was unambiguous, the court would not compel one gamete donor to become a parent against his or her will and that “[a]s a matter of public policy . . . forced procreation is not an area amenable to judicial enforcement”).
\footnote{144} The court stated that “the thrust of the document signed by J.B. and M.B. is that the . . . Center obtains control over the preembryos unless the parties choose otherwise in a writing, or unless a court specifically directs otherwise in an order of divorce,” and that the agreement contained conditional language and thus, was ambiguous. J.B., 783 A.2d at 713.
\footnote{145} Id. at 717 (holding that because the husband retains the capacity to father children, “M.B.’s right to procreate is not lost if he is denied an opportunity to use or donate the preembryos . . . . We will not force J.B. to become a biological parent against her will.”); see also Davis, 842 S.W.2d at 589 (holding that a husband’s right to avoid procreation outweighed a wife’s desire to donate the preembryos to an infertile couple).
further held that formal, unambiguous contracts adequately indicating the parties’ intentions are enforceable if each party maintains the right to change his or her mind about the terms of disposition in the future. The court, however, did not describe the elements of a disposition agreement that would adequately indicate the parties’ intention, nor did it specify sufficiently some of the public policy concerns that would invalidate such agreements.

Although these three cases demonstrate that the highest state courts of Tennessee, New York, and New Jersey would likely enforce clear, unambiguous agreements regarding custody of frozen preembryos, many other states have yet to address this issue. This unpredictability as to the courts’ reaction to such agreements is exacerbated by the fact that other jurisdictions explicitly reject such contracts. As with many issues dealing with the intricacies of family law, courts may invalidate

146 J.B., 783 A.2d at 720. The court indicated that if M.B. chose to pay the cost of cryopreservation, it would allow the preembryos to be frozen indefinitely. Id.

147 Id. Furthermore, although the court did not express an opinion as to situations in which a party who is no longer fertile seeks the use of the stored preembryos against the wishes of his or her partner, the court noted that adoption might be a consideration in future judicial determinations over the custody of frozen preembryos as an alternative to infertile individuals attempting to have children. Id. Not only is this concept fatally flawed but it also restricts one’s freedom to procreate. Although the law recognizes adopted children as having the same legal status as if they were biological, in this context, the possibility of having one’s own biological children by gaining custody of his or her frozen preembryos should not be equated with the possibility of adoption for various reasons. See, e.g., David L. Theyssen, Note, Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?, 74 Ind. L.J. 711, 724-29 (1999) (noting that adoption for many prospective parents can be difficult and can cost as much as IVF; hence, courts should not assume that a party may just adopt to achieve parenthood without sufficient evidence verifying the likelihood of this possibility).

148 A.Z. v. B.Z., 725 N.E.2d 1051, 1051 (Mass. 2000) (holding that even if disposition agreements were clear and unambiguous, the court will not compel one to become a parent against his or her will as a matter of public policy).
agreements because of public policy. This should not, however, be taken to mean that the legislatures cannot design statutes that provide clear and informative model consent agreements. With such legislative actions, even if the courts invalidate agreements because of specific public policy conflicts, the agreement, at least, would not be void because of ambiguous terms.

In fact, it would be more beneficial to the IVF industry if agreements were invalidated for public policy reasons rather than for ambiguous terms. Invalidating agreements because of public policy concerns gives clinics, attorneys, and IVF participants an understanding that contracts should not be used because the courts will not accept such arrangements. Voiding disposition agreements because of ambiguous terms or circumstances, however, as many courts have done, does little to provide guidance to future parties and still leaves open the question as to what constitutes an agreement that will be upheld by the courts. Without direction from state laws as to the validity of such agreements or guidance as to an appropriate, enforceable contract, courts will continue to provide a non-uniform body of law. This lack of uniform guidance will continue until legislatures enact comprehensive statutes that will sufficiently maximize procreative rights and define the status of a preembryo.

III. LEGISLATION

Currently, the federal government minimally regulates the IVF industry. The existing regulations were drafted in response to public outcry for correct statistical data in Assisted

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149 Shapiro, supra note 7, at 118.

150 See, e.g., J.B., 783 A.2d at 714 (stating that “a formal, unambiguous memorialization of the parties’ intentions would be required to confirm their joint determination”).

151 Meena Lal, Comment, The Role of the Federal Government in Assisted Reproductive Technologies, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 533 (1997) (indicating that the Assisted Reproductive Technology Programs Act is the only federal act regulating the industry).
Reproductive Technology ("ART") procedures, rather than as a result of congressional action. In the late 1980s, the general public expressed concern that some IVF clinics exaggerated their success rates. These allegations by IVF participants and critics eventually led Congress to pass the Fertility Clinic Success Rate and Certification Act of 1992. The act, among other things, requires clinics to report annually its pregnancy rates and authorizes the Center for Disease Control to develop and oversee certification procedures of IVF facilities. Despite the federal government’s attempt to protect IVF participants, the federal statute fails both to keep up with the growing advances in ART procedures and to address core ethical issues. In fact, the lack

152 Id. (noting that the federal act was enacted to require the reporting of success rates and for the development of a state-run certification program of embryo laboratories); see also Note, In Vitro Fertilization: Insurance and Consumer Protection, 109 Harv. L. Rev. 2092, 2106 (1996) (noting that "[t]he number of clinical pregnancies achieved also matters to consumers because, by comparing that number to the number of live births, a woman can estimate her risk of experiencing the physical and emotional traumas of miscarriage").


154 42 U.S.C. § 263 (2001). The act was proposed on November 26, 1991 and passed on October 8, 1992. See H.R. Rep. No. 102-1096, at 26 (1992). The House report states that the purpose of the act is to "provide the public with comparable information on the effectiveness of infertility services and to assure the quality of these services by providing for the certification of embryo laboratories." Id.


156 By requiring the reporting of success rates, the enactment of the Assisted Reproductive Technology Programs Act protects the public from potentially misleading information from fertility laboratories and clinics about their statistics and ability to help infertile couples conceive.

157 ART advances that have yet to be fully addressed by federal regulation include the following: (1) Gamete Intrafallopian Transfer ("GIFT"), where fertilization occurs in the body rather than in a laboratory as in IVF; (2) Zygote Intrafallopian Transfer ("ZIFT"), where the preembryos are placed directly into the fallopian tube; and (3) cryopreservation, the freezing and storage of bodily cells. See, e.g., Jean M. Eggen, The "Orwellian Nightmare"
of federal legislation regarding the legal status of frozen preembryos and the validity of predisposition contracts suggests a conscious decision by the federal government to avoid the issue. This failure has caused a great deal of discrepancy and inconsistency among the states.\textsuperscript{158}

The ART and IVF industries are subject to many different standards of compliance created by different statutory laws.\textsuperscript{159} Statutes, such as those enacted in Louisiana\textsuperscript{160} and New Mexico,\textsuperscript{161} that protects preembryos create problems for the

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\textsuperscript{158} Currently, nine states have enacted statutes that attempt to resolve some of the problems associated with IVF. FLA. STAT. ANN. § 742.17 (West 2001) (requiring the commissioning couple and the treating physician to enter into a written agreement that provides for the disposition of the cells in the event of death, divorce, or other unforeseen circumstances); ILL. COMP. STAT. 510/6(7) (2001) (providing that no person shall sell or experiment on a human ovum unless it is therapeutic to the fetus produced thereby); KAN STAT. ANN. § 65-6702 (2000) (allowing the use of any drug or device that prevents implantation of an embryo); KY. REV. STAT. ANN. § 311.715 (Banks-Baldwin 2001) (prohibiting the use of public funds for IVF treatment if such procedures result in the intentional destruction of a human embryo); LA. REV. STAT. ANN. § 9:129 (West 2001) (providing that an in vitro fertilized human ovum exists as a juridical person and shall not be intentionally destroyed); MO. ANN. STAT. § 1.205(1) (West 2001) (providing that life begins at the moment of conception); N.H. REV. STAT. ANN. § 168-B:1, B:13-16 (2001) (defining terms of eligibility for IVF treatment, limiting the usage of preembryos, and requiring the judicial pre-authorization of all written consent agreements); N.M. STAT. ANN. § 24-9A-[1]-[7] (Michie 2001) (stating that all preembryos created must be implanted); PA. STAT. ANN. tit. 18, § 3213 (2001) (providing for IVF reporting requirements).

\textsuperscript{159} Andrews, \textit{supra} note 79, at 406. Without clear, uniform laws among the states, physicians are reluctant to perform such procedures since it is uncertain whether they may be prosecuted for any subsequent loss of preembryos. \textit{See also} Jadack, \textit{supra} note 9 (noting that in New Mexico with “the absence of clear law, fertility clinics find themselves wondering exactly where their liability lies”).

\textsuperscript{160} LA. REV. STAT. ANN. §§ 9:126, 129 (West 2001) (finding that an in vitro fertilized human ovum exists as a juridical person and cannot be destroyed intentionally).

\textsuperscript{161} N.M. STAT. ANN. § 24-9A-[1]-[7] (stating that all preembryos created
continued use of IVF. \textsuperscript{162} When left to create their own laws, states may create “vague duties for physicians or establish extremely high standards of care . . . [which] may make it unlikely that physicians will offer the techniques.” \textsuperscript{163} Louisiana’s statute making preembryos “juridical person[s],” \textsuperscript{164} for example, may deter specialists from even offering the most basic IVF procedure for fear of future prosecution by the state.

On the otherhand, Florida’s statute is the antithesis of Louisiana and New Mexico’s implantation requirement. Florida allows for the destruction of preembryos and encourages parties to sign predisposition agreements prior to IVF in cases of divorce, death, or any other unforeseeable circumstances. \textsuperscript{165} If a written agreement is absent, the custody of the gametes will

\textsuperscript{162} For example, the state of Illinois enacted a law providing that physicians who fertilized a woman’s egg outside her body “shall, [for purposes of an 1877 child abuse act] with regard to the human being thereby produced, be deemed to have the care and custody of a child.” Andrews, supra note 79, at 398. As one can imagine, this statute created great hindrances for IVF doctors in the state. \textit{Id}. The main concern was that physicians were uncertain as to how the courts would interpret the extent of their care over the preembryos. \textit{Id}. In an industry where simple procedures could potentially destroy an embryo, physicians were concerned that routine processes, such as the freezing and thawing of extra preembryos, would be considered a prosecutable offense. \textit{Id}.

\textsuperscript{163} \textit{Id}. at 399-400.

\textsuperscript{164} See supra note 34. “As a juridical person, the . . . ovum shall be given an identification by the medical facility . . . which entitles such ovum to sue or be sued.” \textit{La. Rev. Stat. Ann.} § 9:124. One author defines Louisiana’s “juridical person” status to preembryos as that which grants such cells the right to subsist; therefore, they cannot be intentionally destroyed. Kevin U. Stephens, \textit{Reproductive Capacity: What Does the Embryo Get?} 24 S.U. L. Rev. 263, 269 (1997).

\textsuperscript{165} See \textit{Fla. Stat. Ann.} § 742.17 (providing that “[a] commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple’s eggs, sperm and preembryos in the event of a divorce, death of a spouse, or any other unforeseen circumstance”). \textit{See also Kan. Stat. Ann.} § 65-6702 (complimenting the Florida statute in considering the disposal of preembryos lawful when the donors jointly decide it).
remain with the individual who provided them. In cases dealing with preembryos, decision-making authority regarding disposition must be based on the mutual consent of both parties. In addition to mandating predisposition agreements, Florida is the only state that has enacted legislation that explicitly recognizes the validity of these contracts.

Intervention by state legislatures to create some consistency and uniformity among the states is inevitable. Although some states have enacted their own statutes as a result of the absence of federal guidelines, many of these statutes differ greatly as to the definition of life, the rights and status of a preembryo, and the ability of IVF participants to choose the fate and disposition of their gametes.

IV. ANALYSIS

With only a vague line of U.S. Supreme Court cases addressing issues of abortion and the right to procreate (some dating back well over twenty years), and with virtually no guidance from the federal government, it is no surprise that the current state of the law over frozen preembryos is unsettled. Although some states have made a valiant attempt to address this issue by enacting their own legislation, statutes that mandate implantation, such as those in Louisiana and New Mexico, are problematic. The right to procreate is significant, and this dilemma can only be alleviated with contractual enforcement.

Since contracts can be invalidated if they violate public policy

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167 See id. § 742.17(2).
168 Coleman, supra note 32, at 74.
169 Ellen Waldman, Disputing over Embryos: Of Contracts and Consents, 32 Ariz. St. L.J. 897, 940 (2000) (arguing that the legislation be enacted to oversee the contracting process in order to achieve its assumed goal of enhancing procreative liberty).
170 See discussion infra Part III (discussing and comparing the Florida, Louisiana, and New Mexico statutes).
171 See discussion infra Part III (discussing why certain state statutes are problematic).
or constitutional principles, legislators should provide guidelines for appropriate disposition agreements. Advance disposition agreements provide individuals with the opportunity to set forth and establish their own personal interests, viewpoints, and ethics for either procreation or the avoidance of procreation. If statutes similar to Florida’s are enacted, the participants’ interests, as reflected by their agreement, would be the courts’ primary concern if litigation occurs. Advance directives, therefore, sidestep the need to classify preembryos as either persons or property. The court need only determine the circumstances and intent of the parties prior to signing the agreement.172 Furthermore, only a statute such as Florida’s can withstand constitutional scrutiny because it does not force one to procreate against his or her will and ensures that prior agreements respecting the participants’ wishes are enforced.

A. Mandatory Implantation Requirements Infringe on Procreative Rights

Those states that mandate the implantation of preembryos generally perceive the cells as “persons.”173 Once the legal status of a preembryo is upgraded by statute to that of a “person,” a legitimate interest is created requiring the state’s protection.174 Furthermore, mandatory preembryo donation may have considerable impact on IVF and may deter couples from participating in treatment altogether. This may rob them of their chance to ever reproduce.175 Louisiana’s statute mandating implantation or donation severely limits the choices available to the gamete providers.176 Furthermore, all options that are valid under Louisiana law have grave detrimental consequences for the

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172 See Robertson, supra note 59, at 414.
173 See, e.g., LA. REV. STAT. ANN. § 9:129 (providing that an in vitro fertilized human ovum exists as a juridical person and shall not be intentionally destroyed); N.M. STAT. ANN. § 24-9A-[1]-[7] (stating that all preembryos created cannot be harmed and, thus, cannot be destroyed).
174 Arado, supra note 15, at 252.
175 See Andrews, supra note 79, at 400.
176 LA. REV. STAT. ANN. § 9:129.
participants. In Louisiana, the couple can either give up their preembryos for adoption and suffer the psychological burden of knowing that their biological children exist somewhere, or they can use all of their preembryos to avoid donation and incur a dangerous risk to the woman’s health if multiple pregnancies occur.

Although Louisiana’s statute holds that a preembryo exists as a “juridical person,” to bestow this legal status upon these cells is problematic under current caselaw. One concern is that even fetuses, which are more advanced and developed than preembryos, are not held to be persons under the United States Supreme Court decisions interpreting the Constitution or

177 Robertson, supra note 59, at 405.
178 Id. See discussion infra note 224.
180 Once the zygote, a fertilized egg, is formed, it begins to divide and attaches itself to the uterine wall while it continues to divide for a period of eight weeks. See Stephens, supra note 164, at 266-67. Only after the main organs are developed has the preembryo become a fetus. See id. at 267. See also Joel N. Ephross, Note, In Vitro Fertilization: Perspectives on Current Issues, 32 JURIMETRICS J. 447, 459 (1992) (stating that “[a]n embryo may have a unique genetic identity, but lack the ‘cluster of features’ associated with a person; or, lack sufficient potential for development to be cognizant of independent protection”).
181 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992) (holding that personal autonomy recognizes limits on governmental power to mandate medical treatment); City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416, 438 n.27 (1983) (holding that the state is free to require certain types of abortions to be performed only in hospitals); Roe v. Wade, 410 U.S. 113, 156-59 (1973) (noting that “no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment”); Roe, 410 U.S. at 162 (stating that “the unborn have never been recognized in the law as persons in the whole sense”); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (stating that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”).
182 U.S. CONST. AMEND. XIV, § 1. The Fourteenth Amendment of the U.S. Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” Id.
among the scientific community. 183 In Roe v. Wade, the Supreme Court specifically held that the state’s interest in potential life should only be considered from the point of viability. 184 Furthermore, scientific data supports the notion that pregnancy does not occur at the moment of conception but rather at the point when the preembryo attaches to the uterine wall. 185 Under the Roe precedent, therefore, it is troubling that Louisiana’s statute deeming frozen preembryos as separate legal entities would withstand constitutional scrutiny since the preembryos are neither attached to a uterine wall nor within a woman’s womb.

Despite this troubling concept, however, statutes defining preembryos as “juridical persons” may be held constitutional since such laws are distinct from “right to abortion” cases. 186 Under current caselaw, states can define preembryos and fetuses as persons with protective rights so long as their interpretation does not interfere with a woman’s bodily integrity. 187 Louisiana’s definition of a preembryo, therefore, may withstand constitutional scrutiny since frozen preembryos are not sustained in a woman’s body and will not trigger the privacy interests enunciated in Roe. 188 Statutes that define preembryos as persons and require mandatory implantation of cells interfere with a person’s procreative rights and thus, may offend the Fourteenth Amendment. 189 The Supreme Court has held that procreation is

183 Roe, 410 U.S. at 153.
184 Id. at 160. Viability is usually held to be the time when the fetus reaches twenty-eight weeks or about seven months. Id.
185 Guzman, supra note 27, at 207. Since fetuses are not recognized as persons under the law, one must ask if a frozen preembryo within a glass tube, sustained only with the use of liquid nitrogen, can be recognized as an independent entity by any state or court.
186 Rao, supra note 90, at 1479.
187 Id.
188 Melchoir, supra note 30, at 950 (noting that since frozen preembryos exist in petri dishes, “[t]he bodily integrity of the woman would not be breached if she were not allowed to destroy her frozen embryos as it would be if she were not allowed to have an abortion”).
189 U.S. CONST. AMEND. XIV, § 1. See also Roe v. Wade, 410 U.S. 113
“fundamental”\(^{190}\) and “one of the basic civil rights of [persons].”\(^{191}\) To interfere with this right, therefore, requires a compelling state interest.\(^{192}\) Although disputes over frozen preembryos differ from the previous cases addressed by the Supreme Court, absent language or decisions to the contrary, there is no reason to suspect that the right to procreate or avoid procreation with respect to IVF violates the fundamental freedoms established by the Court. Directives that force couples to either use their preembryos or forfeit them for adoptive implantation restricts one’s freedom to procreate or avoid procreation.\(^{193}\)

Another problem with mandatory implantation statutes is that they “infringe on procreative rights of IVF participants without identifying an interest that the state seeks to protect.”\(^{194}\) To justify this interference with procreative liberties, the burden of proof is on the government to demonstrate that there is both the compelling need for the law and that the restriction is not overly broad.\(^{195}\) Although the state can argue that it has an interest in protecting life, this purported interest is not compelling under current caselaw or scientific opinions. It is not practical, moreover, since preembryos have not reached the minimum

\(^{190}\) Id. at 156.

\(^{191}\) Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that an Oklahoma statute that provided for the sterilization of criminals who were convicted more than two times for certain felonies was unconstitutional on the grounds of equal protection since convicted felons were not treated equally).

\(^{192}\) See Roe, 410 U.S. at 155. The Court, citing Kramer v. Union Free Dist., 395 U.S. 621, 627 (1969), held that where fundamental rights are concerned, limiting these rights can only be justified by a “compelling state interest.” Id.

\(^{193}\) See Clifton Perry & L. Kristen Schneider, Cryopreserved Embryos: Who Shall Decide Their Fate?, 13 J. LEGAL MED. 463, 469-74 (1992) (providing a constitutional analysis of landmark cases that have established an individual’s right to procreate and avoid procreation).

\(^{194}\) Cynthia Reilly, Constitutional Limits on New Mexico’s In Vitro Fertilization Law, 24 N.M. L. REV. 125, 128 (1994).

\(^{195}\) See Andrews, supra note 79, at 400.
developmental stage necessary to constitute “life.”

Furthermore, statutes that require gamete providers to donate their preembryos to other couples for implantation serve as a dual infringement on procreative rights. If couples choose not to use their preembryos, not only must they relinquish their rights in determining the disposition of their own biological DNA, but also by mandating implantation, they face having a biological child carried and reared by a complete stranger. Mandated implantation requirements “place upon gamete providers the burden of knowing that they may have a living genetically related child.” This strikes at the very notion of individual rights and procreative freedom. This also may lead to great judicial inefficiencies when courts are constantly called upon to make ad hoc determinations regarding the best interest of the child in each and every case.

As the Tennessee Supreme Court noted, unlike a viable fetus in its mother’s womb who has an excellent chance of being brought to term and born alive, a preembryo that is transferred by IVF has only a 13% to 21% chance of achieving implantation. Even if implanted successfully, only 56% to 75% of these pregnancies result in live births. Moreover, despite the presumed statutory goal of maternal and fetal protection, mandatory implantation may actually work to the detriment of

196 See Elizabeth G. Patterson, Human Rights and Human Life: An Uneven Fit, 68 TUL. L. REV. 1527, 1529, 1550 (1994) (“[A] human who has not yet been born, reached viability, or satisfied some other criterion for the beginning of life, is not considered a person in whom human rights inhere . . . . Traditionally, the law has not treated the fetus as a person.”).


199 Davis v. Davis, 842 S.W.2d 588, 595 n.19 (Tenn. 1992).

200 Id.

both beings.\textsuperscript{202} By substituting a physician’s individualized decision-making judgment as to the best interest of the woman with a legislative mandate, these statutes may harm the recipient by forcing the implantation of less suitable preembryos.\textsuperscript{203} In addition, the Supreme Court has recognized that the “full vindication of the woman’s fundamental right necessarily requires that her physician be given ‘the room he needs to make his best medical judgment.’”\textsuperscript{204} Without devising a mechanism for medical conventions, these statutes invite burdensome medical predicaments and may frustrate the established “medical protocol[s] designed to ensure the health of the mother or fetus that might discourage a physician from implanting every [pre]embryo.”\textsuperscript{205} Even though the state may require implantation, the possible risk of multiple gestations may “require a mother and her physician to abort some or all of the fetuses after the preembryos are implanted.”\textsuperscript{206} There is no doubt that such an occurrence would defeat the purpose of having a statute in the first place.

Although Louisiana’s law seems to protect these “persons,” it does not provide clear guidelines for preembryos after they are donated.\textsuperscript{207} While adoption laws exist to guard the interests of children already born,\textsuperscript{208} states that mandate preembryo donation

\textsuperscript{202} Reilly, supra note 194, at 128.

\textsuperscript{203} Stephens, supra note 164, at 269 (claiming that if Louisiana does not modify its position of treating preembryos as juridical persons, “modifications in the law need to be made to allow for . . . defective preembryos and other tort problems such as medical liability”).


\textsuperscript{205} Id.

\textsuperscript{206} Id.

\textsuperscript{207} LA. REV. STAT. ANN. § 9:129.

\textsuperscript{208} While there are agencies to protect adopted or foster children, it is unclear whether such precautions are taken to ensure that adoptive parents of frozen preembryos are providing safe and healthy environments for the resulting children. See, e.g., The New York State Department of Health, Adoption and Medical Information Registry, available at http://www.health.state.ny.us/nysdoh/vr/reginfo.htm (last visited Apr. 28, 2002) (stating that the web site provides three services that do the following: (1) help adoptees obtain
do not have similar protections to secure the interests of children conceived from anonymously donated preembryos.\textsuperscript{209} This lack of state legislation can have a severe impact on everyone involved. Issues such as unknown medical histories,\textsuperscript{210} possible abuse and

\begin{quote}
information about their birth parents; (2) facilitate the exchange of information between adoptees and their birth parents; and (3) enable adoptees to obtain medical information). While many states have agencies that oversee the process of adoption and provide services for adoptees to obtain crucial information about their medical history and past, there does not seem to be similar authorities for children born from donated preembryos. To adopt a child in New York State, adoptive parents must meet certain conditions, obtain consent from appropriate authorities, and comply with general provisions relating to adoptions. See New York State Bar Association, \textit{Adoption in New York}, available at http://www.nysba.org/public/pamphlets/adoption.html (last visited Apr. 28, 2002). There are no similar precautions and monitoring authorities established for donated preembryos.

\textsuperscript{209} See, e.g., N.M. STAT. ANN. § 32A-5-2 & [3] (2001) (establishing a framework for child protection, economic security and legal equivalency for adoptive children but defining an “adoptee” as “a person who is the subject of an adoption petition”). Frozen preembryos given to surrogate parents are not within the definition of “adoptee” under the act, and, thus, they do not seem to be protected under New Mexico adoption laws.

\textsuperscript{210} In addition to the possibility of intermarriage, most preembryos will be adopted and carried to term anonymously. See Heidi Forster, \textit{The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States}, 76 WASH. U. L.Q. 759, 760 (1998) (noting that one option for fertility clinics is to give the preembryos anonymously to other couples who carry them to gestation). Thus, adoptive parents would most likely not have knowledge of the child’s biological lineage or medical history. This may pose serious medical concerns for the child in the future. Dennis J. Doherty, \textit{Frozen Embryos: The Birth of a Legal Controversy}, 65 WIS. LAW. 15, 17 (1992) (noting that states could apply their adoption framework to cases of frozen preembryos so that such precautions and genetic relations could be recorded to resolve potential problems). Without knowledge of the child’s propensity for inheritable disorders, physicians and the child’s surrogate parents are not in the best position to make medical decisions on their behalf. \textit{Id}. Although this lack of knowledge is true even in traditional adoptions, with the issue of mandatory adoption of frozen preembryos, the state can rectify this potential problem by making allowances for the disclosure of medical background information of the gamete providers prior to them giving up their preembryos for adoption. Unfortunately, it appears that these statutes do not
neglect by unfit surrogate parents, the increased number of dispersed biological siblings, and the possibility of intermarriage or incest are all questions that the statutes of Louisiana and New Mexico are ill-prepared to address.

The possibility for abuse and neglect, moreover, may be magnified in states where couples are required to donate their preembryos to surrogate parents who have not been effectively screened. For example, in one tragic occurrence in Pennsylvania, a bachelor, James Austin, hired a surrogate mother to carry his child. The Infertility Center of America (“ICA”) matched Austin with a surrogate who was impregnated with his

make such authorizations or considerations before forcing these couples to donate.

See, e.g., Huddleston v. Infertility Ctr. of Am., 700 A.2d 453 (Pa. Super. Ct. 1997) (holding that the surrogate mother did have standing to sue for the wrongful death of her newborn even though she was paid by the baby’s father, a bachelor, to carry his child to term).

Unlike sperm banks that have enacted policies to reduce the possibility of multiple children from one donor by setting limits to the number of children a donor can father or mandating that his sperm not be released to a woman within the same area, there are no visible safeguards for adopted preembryos. See, e.g., Rainbow Flag Health Service, Known Donor Insemination, available at http://www.gayspermbank.com (last visited Apr. 28, 2002) (claiming that its sperm bank limits the use of donor sperm to impregnate only four women). See also The Sperm Bank of NY, Inc., Become a BioGenetics Exclusive Donor, available at http://www.sperml.com (last visited Apr. 28, 2002) (limiting the number of pregnancies from a specific sperm donor to two per state in non-anonymous donations). As such, it may be possible for women in the same county or even town to implant and gestate biological siblings without knowledge or consideration of the possible future ramifications. Furthermore, it seems none of the states keep records tracking how many “sibling” preembryos are implanted and result in births. This lack of clear precautions and data keeping opens the door to the possibility of incest and familial strains upon all persons involved.


Id.

See, e.g., supra note 208.

sperm. An ICA representative even accompanied Austin when he went to the delivery room to claim his newborn son. Austin, in addition, received counseling and assistance from the clinic that matched him with the surrogate. Despite these efforts, Austin killed the newborn shortly after its birth.

States with mandatory implantation statutes value preembryos as “persons” and believe that such restrictions would result in born life. Given the current state of abortion laws in this country and the lack of demand for donated preembryos, Louisiana’s goal to promote life by mandating implantation seems futile. If a couple in Louisiana or New Mexico wishes to destroy the preembryos rather than donate them, they can exercise their right to implant the preembryos and subsequently terminate the pregnancy by a legal abortion. Moreover, couples

217 Id.
218 Id. at 456.
219 Id. at 455.
220 Nolan, supra note 201.
221 As with the right to procreate, there is an equally large number of cases supporting the notion of the right to avoid procreation. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut statute prohibiting the use of contraceptives was unconstitutional because it invaded the privacy rights of married couples); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the holding of Griswold to establish the right to privacy for unmarried couples); Carey v. Population Servs. Int’l, 431 U.S. 678, 687 (1977) (holding that “[r]ead in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusions by the State”).

In Roe, the Court found that this right extended to include abortion decisions. Roe v. Wade, 410 U.S. 113 (1973). In expanding privacy rights to include the right of abortion, the Court considered the negative consequences that would result should the right to terminate an unwanted pregnancy be infringed by the government. Id. at 153. This reasoning supports the notion that the right not to procreate should be respected by the government and that the state’s interest in the potential life of preembryos is insufficient to justify forced adoptive implantation. See supra Part IV.A.

222 Coleman, supra note 32, at 64.
223 Nolan, supra note 201.
224 Although this situation is highly impractical and unlikely to occur, this scheme is perfectly permissible and legal under Louisiana and New Mexico
can simply go to a different jurisdiction where the restrictions and regulations are better suited to their own principles to undergo IVF. Whatever minimal interest the state has in potential life is further undermined by the low probability that the birth of a child would result by the prohibition on abandonment. Thus, it is not clear that retaining these preembryos for donation will accomplish the state’s goal in yielding more births. Given all these deterrents, it seems that the goal of encouraging new life is futile.

**B. Benefits of Advance Disposition Agreements**

As an alternative to the harsh statutes of Louisiana and New Mexico, the Florida statute mandating the validity and use of disposition agreements provides the best means for resolving some of the most difficult disputes over frozen preembryos. Enforcing such agreements provides maximum procreative liberty and ensures that IVF participants fully consider the ramifications of their actions. As long as couples have the ability to modify the agreement whenever they change their minds, the contract should be valid and enforced.

There are some courts as well as scholars who believe that advance disposition agreements should not be enforced state laws and would allow couples to circumvent inane mandatory implantation requirements.

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225 See Guzman, supra note 27, at 219.
226 See Coleman, supra note 32, at 64.
227 See, e.g., J.B. v. M.B., 783 A.2d 707, 708 (N.J. 2001) (holding that even if the husband and wife had entered into an unambiguous agreement regarding their frozen preembryos, because it is against public policy, the agreement would not be enforced); A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that the court would not enforce an agreement that would compel one donor to become a parent against his or her will as a matter of public policy).
228 See Coleman, supra note 32, at 57; see also Note, Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 Harv. L. Rev. 136, 1941 (1986) (noting that “[b]ecause the law permits different methods of disposal for different rights, courts cannot rely on some imagined internal structure or logic in a system of rights to deduce inalienability”).
because they violate public policy or infringe upon one’s freedom to procreate. Many argue that because advance agreements are decided prior to IVF, they should not be binding upon individuals who subsequently change their minds as to the disposition method originally selected. Although the individual’s circumstances and state of mind prior to and after IVF may drastically change, human indecisiveness and uncertainty are variables in any contract. While individuals may be indecisive about the disposition of their frozen preembryos, this issue requires prudent decision-making and predictability. As with every contract, individuals should understand the terms of the agreement and anticipate possible circumstances. Divorce, death of the participants, and the possibility of future infertility are all conceivable situations, and the effect of these events can be provided for in a written agreement. Contracting encourages potential parents to consider these possibilities and decide disposition issues prior to creating preembryos or dissolving the relationship.

Furthermore, courts have enforced agreements within the familial setting. Like antenuptial agreements or divorce stipulations, disposition agreements provide individuals with

229 See Coleman, supra note 32, at 66 (arguing that such disposition agreements are unenforceable because they attempt to restrict rights that are inalienable).

230 See id.


232 Id. at 31-32.

233 Id. at 32.

234 Id. An antenuptial agreement is defined as follows:

A written contract between two people who are about to marry, setting out the terms of possession of assets, treatment of future earnings, control of the property of each, and potential division if the marriage is later dissolved. These are fairly common if either or both parties have substantial assets, children from a previous marriage, potential large inheritances, high incomes, or have been “taken” by a prior spouse.

predictability and assurance that prior consensus will be honored. Although antenuptial agreements and divorce stipulations focus on establishing economic stability and certainty while disposition agreements address more personal issues, both types of agreements carry similar psychological, emotional, and financial burdens. Much like any other binding agreement pertaining to one’s personal life, an advance disposition contract will always be emotional and difficult.

Despite the possible stress of executing such agreements on couples, contracts determining the disposition of the preembryos provide them with relief from the current state of legal limbo. The benefits of contractual agreements in relation to frozen preembryos are multifold. First, contractual agreements set out a coherent legal framework for participants in which they can address the possibilities and circumstances that may occur as a result of creating preembryos. Florida’s statute recognizing the validity of such agreements allows people to conform their conduct to the rules set out by the legislature beforehand and, if the rules are not to their liking, to forgo IVF altogether.  

Second, agreements permit couples to decide the fate of their gametes in a way that conforms to their personal feelings and beliefs. Florida’s statute, which requires couples to decide the fate of their preembryos before they are created, ensures that the parties discuss issues that are of personal significance to them and guarantees that the contract best reflects their concerns. Agreements ensure that the individual progenitor’s values and beliefs are incorporated into the agreement from the beginning. By enforcing agreements, advance directives also reduce the possibility that the parties will be forced to accept a never-anticipated result since both parties provided consent. This mutual agreement should be respected and enforced by the state and the courts rather than be taken apart and scrutinized by third parties unrelated to the dispute or concerns of the parties involved.

Third, advance disposition agreements promote practicality

235 Apel, supra note 231, at 32.
236 Id.
and efficiency. By encouraging IVF participants to sign enforceable agreements, courts would no longer be called upon each time a dispute arises. When a dispute occurs without an agreement in place, not only will one party lose custody of the preembryos, but everyone involved will be forced to pay legal fees and await judicial appeals.\(^{237}\) While the caselaw on such disputes is inadequate to address these issues, statutes are the best means to resolve potential conflicts and promote judicial efficiency. In order to maximize the benefits of the agreements, IVF participants must have assurances from the legislature and the courts that the agreements will be valid and enforceable. If statutes explicitly mandate advance contracts and provide for their enforceability, there will be fewer disputes over frozen preembryos.\(^{238}\) Because frozen preembryos are unique and can have great impact on the lives of the parties involved, the need for greater legislative guidance and enforcement is compelling.

V. PROPOSAL

The federal legislature’s lack of guidance regarding frozen preembryo disposition has forced the states to address this issue, creating uncertain and inconsistent results nationwide.\(^{239}\) This lapse in the interpretation of state law is the greatest threat to the IVF industry, forcing physicians and participants to wonder about the legality of their actions and the disposition of their genes.\(^{240}\) Having familial disputes resolved before gestation to ensure a consistent and stable environment for future growth and development benefits preembryos. Laws mandating their disposition, therefore, are important to provide individuals with proper notice as to the potential liabilities that may arise from their actions and to establish a stable home environment for a child conceived by IVF.

\(^{237}\) *Id.*

\(^{238}\) *Id.*

\(^{239}\) *See id.*

\(^{240}\) *See discussion supra* note 162 (discussing instances where physicians are unclear as to the legal implications of IVF and its processes).
The primary reason for the need to clarify legal parentage before birth is to ensure that there is a secure home for the child. The current law regarding legal parentage of preembryos created by ARTs poses danger to a child because it leaves the question of who his or her parents are unanswered. The confusion over who has the decision-making authority and responsibility for the child is the most significant risk. Establishing clear legal parentage is important in defining the relationship between the child, donors, surrogate mothers, and the intended rearing parents. Despite the desperate situation with regard to frozen preembryos in the law, the federal government has still refused to tackle these issues. Although states have enacted their own statutes, many of these laws are constitutionally questionable.\textsuperscript{241}

Florida’s approach to this debate is the best solution because it encourages prudent decision-making and would give the gamete providers predictability.\textsuperscript{242} This approach ensures that neither party will be forced to sustain a highly unanticipated or greatly compromised outcome. By allowing couples to choose whether to carry the preembryo to term or to destroy it, the Florida statute maximizes procreative freedom by giving decision-making authority to the individuals who provided the gametes.\textsuperscript{243} Florida’s statute appropriately gives IVF participants this authority, as they are directly affected by any resulting disposition of the preembryos.\textsuperscript{244}

Although Florida’s statute is the best statute currently available, some amendments could be incorporated. First, to

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\textsuperscript{241} See \textit{supra} Part III (discussing certain state statutes that may be constitutionally questionable because they overly restrict one’s right to procreate).

\textsuperscript{242} See \textit{supra} note 7 (noting that such agreements would enable the couple to determine the disposition of their cells).

\textsuperscript{243} \textit{Fla. Stat. Ann.} § 742.17 (West 2001). This mutual agreement, solidified in a written agreement, ensures that the preembryos will be disposed of in a manner consistent with both progenitors’ wishes.

\textsuperscript{244} See Eggen, \textit{supra} note 157, at 700 (noting that the intervention of third parties “causes the donor couple to relinquish at least a portion of their interest in reproductive privacy, as their preembryos no longer will be used for their own procreation”).
FROZEN PREEMBRYO STATUTES

prevent possible incest or intermarriage, statutes attempting to provide legislative guidance should also provide for confidential record keeping in preembryo adoption. Gamete providers should provide their names and any other relevant medical history to the state for recordation. Second, proper monitoring agencies should be established to ensure that adoptive parents are mentally, physically, and financially fit to carry preembryos to term and beyond. This would include updating or amending any existing adoption laws currently in place to include and protect the children born from adopted preembryos. In addition, the donative parents should be relieved of all the parental and financial responsibilities for the resulting child. Third, the legislation should mandate the signing of disposition agreements to determine the control of these preembryos upon divorce, death, and other possibilities. This would also require the legislation to provide model consent agreements with clear, unambiguous terms for clinics and IVF participants to follow.

Another concern is the possibility that one spouse becomes infertile and may need the preembryos to procreate. In Davis, although the Tennessee Supreme Court was opposed to forced procreation, it carved out an exception for those who could not have biological children without the use of the frozen preembryos.245 Although advance directives allow couples to plan for future infertility, courts may still be uneasy about invalidating such agreements knowing that the individual can only have biological children through IVF. As a revision to Florida’s statute, this note proposes an amendment requiring clinics to divide sperm so that some of these gametes are frozen in their independent state while the rest are used to create preembryos. Because sperm can be stored safely in the frozen state while eggs cannot,246 an infertile man would have the opportunity to have

245 Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). The Tennessee Supreme Court held that if an agreement was available, it should be adhered to. Id. If no agreement exists however, the courts should weigh the interests of the parties regarding the use of the preembryos. Id. Unless the party does not have a reasonable opportunity to become a parent without using the preembryos, generally, the party wishing to avoid procreation will prevail. Id.

246 See Guzman, supra note 27, at 219.
biological children without using the frozen preembryos and without infringing on the woman’s right to avoid procreation. Although this is only effective if the man is rendered infertile, this simple procedure would at the very least ensure that disposition agreements would be upheld in these particular situations. If the man has agreed to destroy the preembryos upon divorce and later becomes infertile, the contract could still be honored since the man can always access his frozen sperm to procreate with a willing participant.

States should also require informed consent and counseling for all potential IVF participants. This would ensure that the participants know both the benefits and risks of ARTs so that they are able to make appropriate treatment decisions. Counseling would educate individuals about the serious implications of these procedures, such as the psychological stress of infertility treatment, its success rates, any religious or ethical concerns, the possibility of multiple pregnancies, and the possible need for selective reduction. Informed consent and counseling ensure that participants are educated about the psychological commitments and ramifications of the treatment they are considering. Both encourage thought and reflection by the couple and may potentially indicate to the individuals whether they are good candidates, emotionally and psychologically, for ARTs. On a similar note, a brief waiting period prior to IVF

247 Lori B. Andrews & Lisa Douglass, Symposium on Biomedical Technology and Health Care: Social and Conceptual Transformations, 65 S. CAL. L. REV. 623, 630 (1991) (stating that some clinicians have even recommended that couples undergo psychological counseling as part of infertility treatment).

248 Id.

249 Ephross, supra note 180, at 450 (noting that counseling helps couples to cope with the stress that may arise from their ethical and cultural backgrounds).

250 Mary V. Rorty & Joann V. Pinkerton, Elective Fetal Reduction: The Ultimate Elective Surgery, 13 J. CONTEMP. HEALTH L. & POL’Y 53, 64 (1996) (noting that with infertility treatments, there is a great chance that multiple pregnancies may occur, forcing couples to contemplate the possibility of selective reduction).

251 Id.
should also be encouraged by the states so that the parties can ponder and reflect on their agreement and still have the opportunity to modify or reconsider aspects of their contract before IVF. As one author notes, “it is the function of adequate counseling and some common sense, to assist people to make the best decisions possible, even under what some may view as less than ideal circumstances.”

CONCLUSION

Although courts and scholars have been unable to agree on the future of frozen preembryos, there is uniform consensus that legislation needs to be enacted to alleviate the current state of confusion. While the federal government has failed to keep up with the growing advances in reproductive technologies, states have acted to provide direction. With little caselaw and guidance from the legislatures, however, these statutes do little to address the underlying concerns and issues brought forth by frozen preembryos. Disposition agreements should be recognized because they encourage thoughtful decision-making and preserve the intent of the IVF participants. Moreover, a model consent agreement should be provided to the participants.

Although courts are free to invalidate an agreement if it

252 The success of waiting periods in other controversial areas has been well documented. For example, state imposed waiting periods have resulted in a greater number of gun permit rejections, since local authorities have more time to conduct thorough background checks on applicants. William Recktenwald & Jan Crawford, Brady Bill Not As Tough As 25-Year-Old Illinois Gun Law, Chi. Trib., Nov. 23, 1993, at A1, A8. A waiting period of two-years before marriage has been recommended for covenant marriages. A study found that out of 700 Louisiana couples who were married in 1999, half of them in covenant marriages, only 25% of those who had waiting periods divorced. Marilyn Serafini, Get Hitched, Stay Hitched, Nat’l J., Mar. 9, 2002, available at 2002 WL 7094794.

253 Apel, supra note 231, at 32.

254 Hopefully, with more states enacting statutes to deal with this issue, the varying laws will compel the federal government to finally address this matter and provide some clarity.

255 Robertson, supra note 59, at 414.
violates public policy, a model agreement will prevent unenforceability because of ambiguous terms. If invalidation of an agreement should occur, it is more beneficial that the agreement be held unenforceable because it violates a specific public policy concern as opposed to being held invalid for ambiguity. Violation of public policy informs participants that such agreements would not be upheld. If a court decides that the terms of the agreement are ambiguous, however, it is unclear as to what would make an agreement valid or unambiguous and whether the courts would accept such agreements. Presenting a model consent agreement would reduce the burden on the courts to determine the legality of the contract terms. Courts could just look to the agreement and determine its implication on public policy.

Mandatory implantation, moreover, should be avoided because it is constitutionally questionable and invokes a slew of problems and concerns. Other states should recognize the superiority of Florida’s statute and adopt a similar framework with some revisions for the regulation of ART and IVF procedures. The advances made in ARTs and IVF cannot be expected to keep pace with the federal government’s sluggishness in enacting regulations to provide guidance in this area. Hence, it is time for the state legislature to provide the public and the courts with clear direction as to the future of this scientific field. Only with responsible action by legislatures can this ambiguous array of caselaw and statutes ever be amended and rectified.
GRAY CLOUD OBSCURES THE RAINBOW: WHY HOMOSEXUALITY AS DEFAMATION CONTRADICTS NEW JERSEY PUBLIC POLICY TO COMBAT HOMOPHOBIA AND PROMOTE EQUAL PROTECTION

Rachel M. Wrightson*

Homophobia is far too complex a phenomenon to have a singular explanation. Gay people are stigmatized by several sources, including religion, social mores, and . . . the law. Eliminating one cause of stigmatization among many may not be a panacea but would be a step in the right direction.

— Christopher R. Leslie

INTRODUCTION

Contemporary defamation law has been characterized as plagued with infirmities and ripe for reform. Modern attempts at

* Brooklyn Law School Class of 2003; B.A., Northwestern University, 1998. The author would like to thank Professor Nan Hunter and the staff of the Journal of Law and Policy. She also acknowledges Eric D. Sherman for his generous contribution of sources cited herein.


2 See Robert M. Ackerman, Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution, 72 N.C. L. REV. 291 (1994). According to Ackerman, “one of the most uncertain areas of modern American jurisprudence, the law of defamation remains largely a mystery to commentators and practitioners alike.” Id. at 291. He further stated, “the law of defamation is in disarray. It is confusing. It is unclear.” Id.
clarification have unabashedly begun with the assumption that the current framework for the law of defamation and libel “isn’t working well for anyone.”

In the context of such confusion, it is not surprising that the question of whether calling someone gay is defamatory has not been uniformly analyzed or answered by the courts. In *Gray v. Press Communications, LLC*, the Appellate Division of New Jersey determined that an imputation of homosexuality is reasonably susceptible to a defamatory meaning. This comment combines an analysis of relevant legislation and caselaw to conclude that *Gray* was wrongly decided. New Jersey’s current legislation and prior court rulings do not support the conclusion that reference to an individual as a homosexual lowers the community’s estimation of the individual’s reputation. Additionally, *Gray* is inconsistent with

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at 293. Ackerman’s article reviews the “infirmities that plague contemporary defamation law in the United States” and sets forth an analysis of Uniform Correction or Clarification of Defamation Act as proposed and withdrawn in 1993. *Id.* at 294.


5 775 A.2d 678 (N.J. Super. Ct. App. Div., 2001), *cert. denied*, 788 A.2d 774 (N.J. 2001). The appellate division reversed the trial court’s dismissal of plaintiff’s defamation suit and found that a radio call-in show host’s characterization of a former host of children’s shows as “the lesbian cowgirl” was reasonably susceptible of a defamatory meaning. *Id.* at 684.

6 *Id.*

7 New Jersey’s legislature has enacted a number of laws that provide legal protection for the rights of gays and lesbians in the state, and New Jersey courts have broadly construed many of the state laws to provide redress to the lesbian, gay, bi-sexual and transgender individuals. See *infra* Part II (discussing and analyzing a sampling of these enactments and cases).
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the New Jersey court system’s progressive approach to protecting the rights of gays and lesbians, and ultimately has deleterious effects upon the state’s concerted effort to promote equal protection of gays and lesbians.

This comment focuses on the extent to which defamation law purportedly reflects community standards and on the judge’s role in a defamation suit to either condone or condemn societal disapprobation of allegedly defamatory characteristics. Part I reviews the elements of defamation law, the pleading requirements in New Jersey for a defamation claim, and examines New Jersey legislation and caselaw relevant to issues of sexual orientation. Part II places Gray in the context of statutory language and caselaw and concludes that Gray was wrongly decided because it is inconsistent with the state’s position on sexual orientation and the law. This section also argues that Gray has a deleterious effect upon equal protection of gays and lesbians in society and perpetuates homophobia. Part III proposes a model for how the court should have examined the issue in Gray to avoid the harmful effects of allowing an imputation of homosexuality to be actionable in a court of law.

I. DEFAMATION LAW AND IMPUTATIONS OF HOMOSEXUALITY AS DEFAMATORY

Defamation has long been viewed as an amorphous, if not elusive, tort. Throughout history, the legal boundaries of defamation law have changed, and conclusions about whether

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8 See Lyrissa Barnett Lidksy, Defamation, Reputation and the Myth of Community, 71 WASH. L. REV. 1, 17-20 (1996). Lidsky first notes that “the prevailing American rule asks whether the statement was defamatory in the eyes of a substantial and respectable minority [in the community].” Id. at 17. She also states that “[i]dentifying what is respectable encourages judges to make normative judgments about the desirability of the beliefs of subgroups within the general community.” Id. at 20. See also infra Part I.D (explaining judicial discretion in defamation actions).

9 PROSSER & KEETON, THE LAW OF TORTS 771-72 (5th ed. 1984). Dean Prosser began his discussion of the law of defamation by proposing that “there is a great deal of the law of defamation which makes no sense.” Id. at 771-72.
allegedly defamatory statements are actionable have varied in
time and place. In certain instances, statements that may have
been actionable as defamatory per se in one generation or context
are no longer regarded as defamatory at all. For example,
statements suggesting that an individual is a fascist, or a racist
were once actionable but are now properly dismissed as non-defamatory. The notion that
religious, racial, or ethnic labels are susceptible of a defamatory

10 Thomas F. Daly, Defamation, 19 AM. JUR. TRIALS § 2 (1972); see also Fogle, supra note 4, at 172 (noting, “the notion that what is considered
defamatory is continuously evolving has been widely recognized”).

11 Michael Mayer, The Libel Revolution: A New Look at
Defamation and Privacy xvi (1987) (noting that “the categories [of
defamation] change as yesterday’s derogatory phrase becomes today’s
innocuous aside or even compliment”).

12 Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) (finding a written
statement asserting that a periodical and a newspaper column frequently print
news items and interpretations picked up from openly fascist journals was not
libelous, since issue of what constitutes an “openly fascist” journal is matter of
opinion).

13 Grant v. Reader’s Digest Ass’n, 151 F.2d 733 (2d Cir. 1945) (calling a
lawyer a communist sympathizer was defamatory); Toomey v. Farley, 156
N.Y.S.2d 840, 845 (1956) (finding that to charge one with being a communist
or with having communist affiliations and sympathies is defamatory, justifying
an action for libel); but see Peter F. Carter-Ruck & Richard Walker,
Carter-Ruck on Libel and Slander 37 (3d ed. 1985) (hereinafter Carter-
Ruck) (noting that “it is probable now that such a statement [of communism]
would be held to be defamatory. . . . [I]t is essential to consider the attitude of
the country, as a whole and at the time, to the particular political party of
which it is alleged the plaintiff is a member.”); see also Mark A. Franklin
seems to have gone from being nondefamatory before World War II to being
defamatory during the McCarthy era and the Cold War, and perhaps now to
being nondefamatory again”).

14 See, e.g., Stevens v. Tillman, 855 F.2d 394, 402 (7th Cir. 1988)
(“Accusations of racism no longer are ‘obviously and naturally harmful.’ The
word has been watered down by overuse, becoming common coin in political
discourse.”). For a general examination of categories, see Mayer, supra note
11, at 33-38.

15 See Carter-Ruck, supra note 13, at 37 (noting that calling someone
Roman Catholic during the reign of Charles II was actionable for defamation,
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meaning has also been largely rejected.\textsuperscript{16} For example, in the early 1900s false statements that a white person was African-American were regularly deemed defamatory.\textsuperscript{17} Although there is no caselaw expressly overruling these cases, such suits have largely ceased.\textsuperscript{18} Modern opinions assume that such an allegation is not defamatory at all.\textsuperscript{19}

One commentator interpreted dismissal of these actions as judicial attempts to avoid sanctioning discriminatory attitudes.\textsuperscript{20} Another unequivocally stated that the range of statements courts have labeled as defamatory proves that defamation law is founded on social prejudice.\textsuperscript{21} At a minimum, the fact that judges dispose of some defamation claims, rather than submitting questions to a jury, “reflect a belief that what is actionable as defamation is

\textsuperscript{16} See, e.g., Bradshaw v. Swagerty, 563 P.2d 511, 514 (Kan. Ct. App. 1977) (“The term ‘nigger’ is one of insult, abuse and belittlement harking back to slavery days. Its use is resented, and rightly so. It nevertheless is not within any category recognized as slanderous per se.”); Arturi v. Tiebie, 179 A.2d 539, 543 (N.J. Super. Ct. App. Div. 1962) (Sullivan, J.A.D., concurring) (determining that reference to plaintiff as a “dirty guinea,” a slang expression for an Italian immigrant, though crude and objectionable, was not defamatory).


\textsuperscript{18} For further discussion of this phenomenon, see Lidksy, supra note 8, at 29-33.

\textsuperscript{19} See Thomason v. Times-Journal, Inc., 379 S.E.2d 551 (Ga. Ct. App. 1989) (refusing to concede that plaintiff may have suffered from social prejudice of others where plaintiff sued over the publication of a false obituary that gave a funeral home listing that catered to a primarily “black clientele [sic]”); see also Bradshaw, 563 P.2d at 514 (finding that the term “nigger” was not defamatory per se and dismissing claims where plaintiff had not pled special damages in accordance with state law); Lidksy, supra note 8, at 9.

\textsuperscript{20} Fogle, supra note 4, at 174 (“For example, the law of defamation may ignore racism in our society because to do otherwise would sanction it.”).

\textsuperscript{21} Lidksy, supra note 8, at 28.
freighted with policy considerations.”

This evolution in the categories of defamation illustrates that contemporary courts may properly dismiss even those claims that may have been actionable in prior eras.

To a certain extent, a modern court sitting in judgment of a defamation suit is entitled to pick and choose which cases to entertain and which to dismiss. Courts are not required to accept social prejudices as they find them.

A. Common Law and Constitutional Components of Defamation

Defamation is founded in the twin torts of libel and slander, both designed to effectuate society’s “pervasive and strong interest in preventing and redressing attacks upon reputation.” At common law, “[t]he gravamen or gist of an action for defamation is damage to the plaintiff’s reputation.” The law “is not concerned with the plaintiff’s own humiliation, wrath or sorrow,” and “the damages sustained by a defamed plaintiff are not to his personal feelings, but rather to those losses which accompany an interference with one’s social, business, religious or familial relations.” A cause of action cannot be sustained simply because one feels insulted or angered by an epithet or

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22 FRANKLIN, supra note 13, at 305.
23 See supra notes 10-18 and accompanying text (detailing the evolution of the categories of defamatory terms).
24 Lidsky, supra note 8, at 34.
25 Id.
26 Rosenblatt v. Baer, 383 U.S. 75, 87-88 (1966) (holding that in order to recover for damages allegedly sustained as a result of a news column allegedly imputing mismanagement on the part of a public official, the plaintiff was required to show that the asserted implication was specifically “of and concerning” him, and jury instructions permitting him to recover upon a finding merely that he was one of a small group, only some of whom were implicated, were erroneous).
28 PROSSER & KEETON, supra note 9, at 771.
29 Id. at 843.
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statement.\textsuperscript{30}

As a rule, the common law has not attempted to define reputation,\textsuperscript{31} but substantial effort has been expended to articulate the outlines of this elusive concept.\textsuperscript{32} The harm inflicted upon one’s reputation has been characterized as “an impairment of a ‘relational’ interest, \textit{i.e.}, denigrat\[ing\] the opinion which others in the community have of the plaintiff and invad\[ing\] the plaintiff’s interest in his \ldots good name.”\textsuperscript{33} Put another way, “[d]efamation is that which tends to injure the reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the person is held, or to excite adverse, derogatory or unpleasant feelings or opinions about him.”\textsuperscript{34} It is commonly understood that a defamation action affords a remedy for damage to one’s general, public image.\textsuperscript{35}

Further, the generally accepted definition is that “a communication is defamatory if it tends to harm the reputation of another so as to lower him or her in the opinion of the community or to deter third persons from associating or dealing

\textsuperscript{30} Id.


\textsuperscript{32} See generally Robert C. Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 CAL. L. REV. 691 (1986). The author sketches three distinct concepts of reputation that the common law of defamation has at various times in its history attempted to protect—reputation as property, as honor, and as dignity—and explores how each weighs in the balance against the constitutional interest in freedom of expression. \textit{Id.}

\textsuperscript{33} Lumberman’s Mut. Cas. Co. v. United Serv. Auto Assoc., 528 A.2d 64, 67 (N.J. Super. Ct. App. Div. 1987), construing HARPER & JAMES & GRAY, LAW OF TORTS § 5.1 (2d ed. 1986). The court further noted that “the mere fact that the plaintiff’s feelings and sensibilities have been offended is not enough to create a cause of action for defamation.” \textit{Id.}

\textsuperscript{34} PROSSER & KEETON, supra note 9, at 773.

\textsuperscript{35} See Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 516 A.2d 220, 224 (N.J. 1996) (comparing defamation to an action for product disparagement and noting that “defamation \ldots affords a remedy for damage to one’s reputation” while the latter was characterized as “an offshoot of the cause of action for interference with contractual relations, such as sales to a prospective buyer”) (internal citations omitted). This assertion was confirmed by New Jersey’s highest court. \textit{Id.}
with him or her.” 36 To be defamatory, therefore, a statement
must not only be reasonably calculated to injure the victim’s
reputation37 but must tend to lower the plaintiff in the opinion of
respectable members of the community.38 Therefore, to establish
whether a statement is defamatory, the decision-maker must first
examine the community in whose opinion the plaintiff claims to
have been diminished.39 The determination of what constitutes the
community in which a statement is made is an essential factor in
assessing defamation liability.40 Although the process of defining
the boundaries of a “community” and the distillation of the
values held by “respectable members” therein is difficult, it
involves crucial public policy decisions that, when not directly
addressed by the courts, brings a lack of clarity into defamation
law.41

In the United States, defamation law is governed by a
balancing test whereby common law theories of a right to protect
one’s reputation are measured against constitutional protection of
the First Amendment exercise of free speech.42 Because of the
strong interest in uninhibited debate on public issues, courts now
recognize that the First Amendment protects statements made
concerning public officials or public figures, unless those

37 See Daly, supra note 10, at § 2.
38 50 AM. JUR. 2D Libel and Slander § 1.
39 Lidsky, supra note 8, at 7.
40 Id.
41 Id. at 7-9 (suggesting that because defamation plays an important role
in setting the boundaries of community and choosing between competing
values, “the determination of community values and community identity
allows courts to advance policy goals by constructing by fiat a ‘respectable’
community that shares little in common with the actual community”). Lidsky
further argues that instead of constructing an artificial community through the
defamatoriness determination, courts should make explicit what are essentially
public policy choices. Id.
Court first articulated this rule in 1964. Id. New Jersey courts have reaffirmed
this holding. See, e.g., Lynch v. N.J. Educ. Ass’n, 735 A.2d 1129, 1135-37
(N.J. 1999); Brill v. Guardian Life Ins. Co. of Am., 666 A.2d 146, 152-55
(N.J. 1995).
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Statements are made with knowledge that they were false or with reckless disregard of whether they were false. With respect to public figures, the burden of proof in defamation actions is higher than the “preponderance of the evidence” standard in other civil actions. To satisfy this higher standard, “a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth.” This judicially imposed standard requires that courts confronted with defamation suits brought by public figures apply stricter scrutiny than required in other civil actions. This higher legal bar functions as an additional hurdle for plaintiffs in defamation actions and is an important means of protecting and encouraging free speech.

B. Pleading Defamation in New Jersey: Standards and Requirements

Although the basic elements of defamation remain consistent from state to state, there are many variations of what constitutes sufficient pleading and proof of each element. In New Jersey,

44 N.J. STAT. ANN. § 2C:1-13(f) (West 2002) (“In any civil action commenced pursuant to any provision of this code the burden of proof shall be by a preponderance of the evidence.”).
46 GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 55 (1996) (“In a typical civil case, a party must prove the elements of his claim by a preponderance of the evidence.”).
48 See generally James R. Pielemeier, Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation, 133 U. PA. L. REV. 381, 384-92 (1985). Pielemeier reviews the variations in state defamation laws and examines the constitutional questions that arise in selecting the applicable law in multi-state publication and litigation. Id. His
principles of common law along with Constitution-based decisions of the United States Supreme Court govern libel and slander.49 Apart from the statute of limitations, only three statutory provisions deal expressly with the law of defamation in New Jersey.50 One provision delineates the nature and extent of the privilege attaching to “the publication of judicial or other proceedings;”51 a second limits the amount of damages recoverable from print media defendants in the absence of malice;52 and a third relieves a broadcaster from liability for statements made by a candidate for public office under specified circumstances.53

In New Jersey, plaintiffs are advised to consider a number of factors when drafting a complaint for defamation.54 Among those items are residence of the plaintiff and other jurisdictional facts, the making of the alleged defamatory statement, the publication of the defamatory statement, the inducement, when the statement

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50 N.J. STAT. ANN. § 2A:14-3 (West 2002). The statute requires that an action for defamation be commenced within one year of publication. Id.

51 N.J. STAT. ANN. § 2A:43-1 (West 2002). Newspapers may publish official statements by police department heads and county prosecutors on investigations in progress or ones completed by them that are accepted in good faith by the publisher. The privileged character of the statements will be a good defense to any libel action, unless malice in fact is shown. Id.

52 N.J. STAT. ANN. § 2A:43-2 (West 2002). Only actual damages may be recovered from print media defendants in the absence of malice in fact or failure to retract the libelous charge publicly and within a reasonable time after having been requested to do so by plaintiff. Id.

53 N.J. STAT. ANN. § 2A:43-3 (West 2002) A broadcaster is relieved from liability for statements made by a legally qualified candidate for public office when the broadcast is made under provisions of federal law denying the broadcaster the power to censor. Id.

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Complained of is not actionable per se, and an averment of general damages resulting from the publication complained of or an averment of special damages, when the matter complained of is not defamatory per se. In short, a plaintiff is required to articulate his or her claim by specifying the statement claimed to be defamatory, the context and communication of the statement, an explanation of how the plaintiff was affected by the statement, and the damage inflicted by the statement.

Like many jurisdictions, New Jersey applies a higher burden of proof when the plaintiff in a defamation suit is a public figure. In these instances, there must be proof “that the statement was made with actual malice, that is, with knowledge that the statement was false or with reckless disregard of whether or not it was false.” This strict standard applies because the public has an interest in obtaining knowledge about public figures, and thus such figures should expect information of their lives and activities to be broadly disseminated.

The threshold issue in a defamation case is whether the statement at issue is reasonably susceptible of a defamatory meaning. It is for the court to determine whether a

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55 In such a case, the actionable character of the defamatory statement and the manner in which it affects the plaintiff should be shown. Id.
56 Id.
57 Id.
60 Id. at 272-73, quoting Sweeney v. Patterson, 128 F.2d 457, 458 (1942) (“The interest of the public [in cases that impose liability for reports of conduct of officials] outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information.”).
61 See Gray, 775 A.2d at 683, citing Decker v. Princeton Packet, 561
communication is capable of bearing a particular meaning. To make this determination, statements are construed together with their context. If a published statement has only one meaning and that meaning is defamatory, the statement is libelous as a matter of law. Conversely, if the statement has only a non-defamatory meaning, it cannot be considered libelous, thereby justifying dismissal of the action. In cases, however, where the statement is capable of being assigned more than one meaning, one of which is defamatory and another that is not, the question of whether its content is defamatory is resolved by the trier of fact.

These basic rules seem straightforward at first glance, but in fact there are “substantial hurdles” to successfully litigating a defamation suit. Specifically, litigation is complicated when a defendant moves for summary judgment prior to trial. When a defendant seeks summary judgment on the ground that a statement is not defamatory, the question is presented to the

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62 See Gray, 775 A.2d at 683 (“Initially, the question is one of law to be decided by the court.”). See also RESTATEMENT, supra note 36, § 616. (“The court determines what items of harm suffered by the plaintiff as the result of the publication of the defamatory matter may be considered by the jury in assessing damages; the jury determines the amount of damages to be awarded for those items.”). Additionally, “the meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.” Id. § 563.

63 Id. § 616 cmt. d. Comment d. notes the following:
In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may be reasonably understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. So too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood.

Id.

64 Id.


66 Id. at 290-91.

67 Boies, supra note 47, at 1297.
judge as a preliminary concern.68 The judge, therefore, is the initial arbiter to determine if a jury is required to settle a dispute. Practically speaking, this means that a judge will decide whether it is permissible for a jury to attach a defamatory meaning to a given statement.69 The discretionary element of a potentially defamatory meaning is not left entirely to the jury under these circumstances, because a judge decides whether a question may be submitted to the jury in the first instance.70

C. Imputations of Homosexuality as Defamation

The history of imputations of homosexuality as defamatory has been exhaustively explored elsewhere.71 For the purposes of this comment, a sampling of cases are used to illustrate the conclusions reached in various jurisdictions.72 A number of state courts have held that an imputation of homosexuality is

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68 See infra Part I.B (noting that a threshold issue in any defamation suit is whether the statements can be reasonably construed as defamatory and pointing out the procedural aspects of a motion for summary judgment).

69 Judges determine whether an allegedly defamatory statement lowers the plaintiff in the eyes of respectable people. See supra Part I.A. This determination has been characterized as “an open invitation to judges to assess which subgroups . . . are or are not worthy of the law’s attention . . . . the judge can brand a community as unworthy of respect by either denying its existence or by pronouncing it simply too antisocial for its values to be countenanced.” Lidsky, supra note 8, at 20.

70 Brill v. Guardian Life Ins. Co. of Am., 666 A.2d 146, 156-7 (N.J. 1995). In deciding whether to grant summary judgment, the motion judge must consider whether the evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. In a defamation action, the threshold issue is whether the language used is reasonably susceptible of a defamatory meaning. Id. See also Decker v. Princeton Packet, 561 A.2d 1122, 1125 (N.J. 1989) (“Initially, the question is one of law to be decided by the court.”).


72 See infra notes 73, 74; see also infra Part III (analyzing a defamation case from New South Wales, Australia and discussing the relative merits of the approach employed).
slanderous per se, actionable without proof of special damages. Alternatively, some courts have found such accusations actionable as defamatory per quod and have required proof of special damages. Although the United States Supreme Court has not directly addressed this issue, the question of homosexuality as defamation was tangentially addressed in at least two instances. Additionally, at least one court has found that to be called anti-homosexual is defamatory. In short, there is no consensus on the issue of whether an imputation of homosexuality is actionable.

73 Defamation per se is “a statement that is defamatory in and of itself and is not capable of an innocent meaning.” BLACK’S LAW DICTIONARY 427 (7th ed. 1999). See, e.g., Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993); Nowark v. Maguire, 255 N.Y.S.2d 318 (2d Dept. 1964); Buck v. Savage, 323 S.W.2d 363 (Tex. Ct. App. 1959).

74 Defamation per quod is a statement that “either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable per se.” BLACK’S LAW DICTIONARY 427 (7th ed. 1999). See, e.g., Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. App. Ct. 1977); Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902 (Minn. Ct. App. 1987); Morissette v. Beatte, 17 A.2d 464 (R.I. 1941).

75 Linn v. United Plant Guard Workers, 383 U.S. 53, 65 n.7 (1966) (declining to limit liability in labor disputes to “‘grave’ defamations—those which accuse the defamed person of having engaged in criminal, homosexual, treasonable or other infamous conduct’”); Paul v. Davis, 424 U.S. 693 (1976) (Brennan, J., dissenting). Brennan argued that the majority opinion was too broad because it held that no due process security would exist in a statute constituting a commission to conduct ex parte trials of allegedly defamatory statements “so long as the statement was limited to the public condemnation and branding of a person as a Communist, a traitor, an ‘active murderer,’ a homosexual, or any other mark that ‘merely’ carries social opprobrium.” Id. at 721.

76 Vail v. Plain Dealer Publ’g Co., 649 N.E.2d 182 (Ohio 1995). The Ohio Court of Appeals found that the plaintiff, a candidate for state senate, stated actionable claims for defamation and intentional infliction of emotional distress based on a newspaper columnist’s description of her as “dislik[ing] homosexuals,” of “engag[ing] in an ‘anti-homosexual diatribe,’” and of “foster[ing] homophobia” in an attempt to be elected. Id. at 184. The Ohio Supreme Court reversed, finding that the columnist’s statements were protected under the Ohio Constitution because they represented a point of view that was “obviously subjective” and that “the ordinary reader would accept [the] column as opinion and not as fact.” Id. at 184, 186.
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as defamatory.

D. Judicial Discretion in Defamation Actions

In 1986, the Supreme Court ruled again that public figures bringing suit for libel must provide clear and convincing evidence of actual malice to avoid defendant’s summary judgment. Thus, the “clear and convincing” evidentiary standard must be applied at the appellate as well as the trial level. In light of the necessary balance between society’s interest in protecting individuals and the interest in promoting free speech under the First Amendment, the bar for a defamation claim is necessarily high and “because non-meritorious defamation claims have a tendency to compromise or chill the exercise of First Amendment values . . . a court should not be reluctant to grant summary judgment if the defamation claim lacks merit.” The extent to which defamation law has a chilling effect upon the First Amendment cannot be determined with any mathematical certainty. However, at least one leading commentator was willing to declare that the effect is “significant.” The First Amendment balancing test, therefore, is rightfully considered alive and well in the courts.

Considering the impact upon the media, allowing homosexuality to remain on the list of legally offensive terms may have the practical effect of deterring press coverage of the

Boies, supra note 47, at 1208.
Liberty Lobby, 477 U.S. at 255-56.

[Whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages . . . where the factual dispute concerns actual malice . . . .]

[T]he appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Id.
gay rights movement.\footnote{See Fogle, supra note 4, at 175 (noting that “the threat of defamation claims has a similar ‘chilling effect’ on the naming of homosexuals”). As a practical matter, it can be assumed that media outlets and resources would be unwilling to provide news coverage of an event if that coverage carried with it a probable risk of liability in subsequent defamation suits. The mainstream press has consistently avoided naming individuals who have been “outed” by the gay community, claiming a fear of libel litigation. \textit{Id.} at 175. Fogle further argues that “[t]he chilling effect that defamation suits have on the media coverage of outing has dramatic societal implications including using defamation suits (1) in the political arena and (2) to support attitudes that are contrary to public policy.” \textit{Id.} at 175.} In communities that have passed legislation indicating an acceptance of homosexuality, the media could justifiably conclude that threat of defamation suits arising out of media coverage of gay events is lessened.\footnote{\textit{Id.} at 195.} Burdening such media outlets with the “chill” of potential litigation would therefore be unwarranted. Decisions in defamation suits that take local and state legislation into account can facilitate the exercise of free speech by sending a clear, consistent message from the courtroom to the press room.

\textbf{E. Gray in Context}

The fact that defamation law exists to protect one’s reputation, taken together with the contention that individual plaintiffs in defamation suits are not primarily motivated by economic recovery, supports a common understanding that defamation suits generally arise when someone is hurt or angry.\footnote{See Boies, supra note 47, at 1209.} One can justifiably wonder, then, why a plaintiff who has personally appeared in a number of gay pride events, and who lives in a community with legislation that strives to eliminate discrimination based on sexual orientation should be sufficiently hurt and angry to pursue potentially costly litigation based on a single statement that she is gay.\footnote{See discussion \textit{infra} Part I.E.1. New Jersey legislation and caselaw are remarkably protective of the rights of gays and lesbians under the law. For discussion of Sally Starr’s participation in Gay Pride events, \textit{see infra} Part II.} It is also a mystery that a court
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that once stated that “[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society” and that evinced a desire to “eradicate the cancer of unlawful discrimination of all types” would decline to further this goal when presented with the opportunity to do so.85 This context of apparent inconsistencies generated a judicial decree that now has the dubious distinction of further confusing defamation law as well as detracting from an effective, concerted effort to further equal protection for gays and lesbians.86

1. New Jersey Legislation

The legislative history and framework in New Jersey reflects a long-standing effort to broaden the scope of the equal protection doctrine. The New Jersey Legislature codified its commitment to equality by enacting the Law Against Discrimination (“LAD”) in 1945, “some twenty years before the effective date of [federal anti-discrimination law] Title VII.”87 The LAD was amended in 1991 to include sexual orientation.88 New Jersey’s sodomy statute was repealed in 1979.89


86 For further discussion of the residual effects of Gray on the clarity of defamation law and gay rights, see infra Part II.B.3.


88 NJ STAT. ANN. § 10:5-4 (West 2002). The statute includes “affectional or sexual orientation.” Id. It reads as follows:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons.

Id.

89 N.J. STAT. ANN. §§ 2A:143-1, 2A:143-2 (repealed 1979). This is relevant because some courts have relied on sodomy laws to conclude that an
Unlawful Discrimination statute provides legal redress for discrimination based on sexual orientation. The Prevention of Domestic Violence Act affords the same protection to victims in a same-sex relationship as in other relationships covered by the act. New Jersey’s Hate Crimes Law includes sexual orientation. At a minimum, New Jersey’s current legislative framework clearly indicates a desire to protect the legal rights and interests of lesbians and gays in the state.

Furthermore, the mission statement of the New Jersey Human Relations Council includes “developing proposals for the State to combat crime based on race, color, religion, sexual orientation, ethnicity, gender, or physical, mental or cognitive disability.” The council assists other legislative bodies “in [their] efforts to foster better community relations throughout the State.” The executive committee of the council “shall include ten public members who shall be representative of the various ethnic; religious; national origin; racial; sexual orientation; gender; and disabilities organizations [of the] state.” By establishing this commission, the legislature not only codified the state’s desire to “promote prejudice reduction,” but also explicitly welcomed—indeed required—the inclusion of homosexuals in the state’s representative government. The commission was charged with the mission to eliminate “all types of discrimination” by fostering imputation of homosexuality is defamatory per se because it infers the commission of a crime. See Head v. Newton, 596 S.W.2d 209, 210 (Tex. 1980); Buck v. Savage, 323 S.W.2d 363, 369 (Tex. Ct. App. 1959). At least one member of the current New Jersey Supreme Court acknowledged that “the 1979 repudiation of New Jersey’s sodomy statutes . . . is further evidence of the evolution in social thinking about homosexuality.” Dale v. Boy Scouts of Am., 734 A.2d 1196, 1244 (N.J. 1999) (Handler, J., concurring).

90 N.J. STAT. ANN. § 10:5-1 (West 2002).
91 N.J. STAT. ANN. § 2C:25-17 (West 2002).
92 N.J. STAT. ANN. § 2C:43-7 (West 2002).
93 See N.J. STAT. ANN § 52:9DD-8 (West 2002). The committee was established by statute in 1997 to perform planning and coordinating functions in conjunction with other legislative organizations. Id.
94 Id.
95 N.J. STAT. ANN. § 52:9DD-8(b) (West 2002).
96 N.J. STAT. ANN. § 52:9DD-8(a) (West 2002).
“good will, cooperation and conciliation among the groups and elements of the inhabitants of the community.”

2. Sexual Orientation in New Jersey Courts

New Jersey caselaw reveals a similar desire to promote equal protection of gay and lesbians in the state. New Jersey courts have “recognized the arbitrariness of discriminating against individuals solely because of their sexual orientation.” The high court recently reiterated that “New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.” This same opinion declared that New Jersey has “long been a leader” in combating the problems faced by gays and lesbians in society. Although the following list is by no means exhaustive, there are a number of landmark cases that illustrate the New Jersey courts’ commitment to preventing discrimination based on sexual orientation and promoting equal protection for gays and lesbians under the law.

As early as 1974, the Supreme Court of New Jersey noted that the “[f]undamental rights of parents may not be denied,

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97 N.J. STAT. ANN. § 10:5-10 (West 2002).
98 Dale v. Boy Scouts of Am., 734 A.2d 1196, 1228, citing One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 235 A.2d 12, 18-19 (1967). In One Eleven Wines & Liquors, the New Jersey Supreme Court reversed the suspension and revocation of liquor licenses to three establishments patronized by “apparent homosexuals.” One Eleven Wines & Liquors, 235 A.2d at 19. The opinion is not entirely a beacon of flattery for gays and lesbians, considering the inclusion of a statement that “in our culture homosexuals are indeed unfortunates,” but the court did find unpersuasive the Division of Alcoholic Beverage Control’s argument that permitting “apparent homosexuals” to congregate at a bar threatened public welfare. Id. at 18.
99 Dale, 734 A.2d at 1227, citing Peper, 389 A.2d at 478.
100 Dale, 734 A.2d at 1227.
limited or restricted on the basis of sexual orientation, per se.”

New Jersey was the first state in the nation to specify that gay and unmarried couples will be measured by the same adoption standards as married couples, and that no couple will be barred from adopting because of their sexual orientation or marital status. Recently, the Supreme Court of New Jersey applied the “psychological parent” doctrine to allow a biological mother’s same-sex former domestic partner to qualify as a statutory “parent” so that the former partner was entitled to visitation.

102 In re J.S. & C., 324 A.2d 90, 92 (N.J. Ch. Div. 1974), aff’d, 362 A.2d 54 (N.J. Sup. Ct. App. Div. 1976). In a dispute between mother and father over the extent of divorced father’s visitation rights, the court held that granting visitation rights to homosexual father would serve the best interests of the children. Id. It should be noted, however, that the court imposed a limitation on the father’s visitation rights based on a finding that “the lack of understanding and controversy which surrounds homosexuality, together with the immutable effects which are engendered by the parent-child relationship, demands that the court be most hesitant in allowing any unnecessary exposure of a child to an environment which may be deleterious.” Id. at 97.

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In \textit{Enriquez v. West Jersey Health Systems}\footnote{777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).} a unanimous three-judge panel of the New Jersey Appellate Division ruled that an individual who encounters employment discrimination because she is transgendered may have a claim under the state’s LAD.\footnote{Id. The trial court rejected plaintiff’s claim on the ground that gender dysphoria could not be a handicap under the LAD. The appellate court first detailed what the record disclosed concerning the plaintiff’s gender dysphoria or transsexualism, and stated the following: Essentially, plaintiff claimed that she felt like a woman trapped in a man’s body from a very early age, and that she was called upon to act manly even though she did not feel masculine. This is consistent with general clinical findings regarding other transsexuals. Transsexuals do not alternate between gender roles; rather, they assume a fixed role of attitudes, feelings, fantasies, and choices consonant with those of the opposite sex, all of which clearly date back to early life. Id.}
This case is especially relevant because although the LAD bars discrimination on the basis of “sex,” the “definitions” section of the statute does not include transgendered individuals. Additionally, the plaintiff’s claim of gender discrimination was distinct from sex discrimination claims covered by the LAD. The court found other state courts’ decisions excluding transsexuals’ gender discrimination claims “too constricted” and adopted a reading that “sex discrimination under the LAD includes gender discrimination so as to protect the plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.” It is interesting to note that the court revived language used in a 1976 case, stating that “a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character.” This explicit recognition of sexuality as a component of one’s psychological makeup and identity indicates that New Jersey courts view sexual orientation as encompassing more than behavior or sexual activity. This analysis is more comprehensive than some courts have been willing to recognize.

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108 See 10 N.J. PL. & PR. FORMS § 85A:3 (1996), Employment Relations Chapter 85A. Discrimination. “‘Affectional or sexual orientation’ means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.” Id.; see also N.J. STAT. ANN. § 10:5-5(hh), Law Against Discrimination Definitions (West 2002).

109 Enriquez, 777 A.2d at 377.

110 Id.

111 Id. at 378.


113 See generally Fogle, supra note 4, at 181-82. Some courts have
The plaintiff in *Enriquez* also brought an action under the portion of the LAD that provides relief for those who suffer unlawful discrimination because of a handicap. The court began by noting that the state’s LAD should be liberally construed, containing fewer restrictions than the correlating federal statute. Accordingly, the court determined that New Jersey’s legislature did not preclude protection to those with gender dysphoria. Turning again to other jurisdictions, the distinguished between sexual orientation and the acts, whether sexual or otherwise, that are associated with that orientation, thus declining to state explicitly that sexual orientation is an intrinsic part of one’s identity and psychological constitution. *Id.* at 182. (characterizing this as a means of side-stepping the “difficult issue” in defamation cases and citing, for illustration, *Buck v. Savage*, 323 S.W.2d 363 (Tex. Ct. App. 1959), and *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981)).

Federal cases construing Title VII of the Civil Rights Act of 1964 in light of sexual harassment claims based on gender stereotypes are also highly illustrative on this point. Readers interested in this topic are encouraged to examine *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny. See generally Toni Lester, Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court’s Decision in *Oncale v. Sundowner*, 29 N.M. L. REV. 89 (1999).

114 *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365, 379 (N.J. Super. Ct. App. Div. 2001). The relevant statute in *Enriquez* was N.J. STAT. ANN. § 10:5-5(q). Specifically, the court interpreted and applied the portion that provides a person can be handicapped if he or she suffers from “mental, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.” *Id.* at 379.

115 *Id.*


117 *Enriquez*, 777 A.2d at 376 (“Thus, gender dysphoria is a recognized mental or psychological disability that can be demonstrated psychologically by accepted clinical diagnostic techniques and qualifies as a handicap under the LAD.”). For the definition of gender dysphoria set forth by the court, see *supra* note 107.
court noted a “split on this issue” in other states, and reiterated that New Jersey’s statute should be construed to “eradicate the evil of discrimination in New Jersey.” The court also referred to current understanding and approaches to gender dysphoria by psychiatrists and medical practitioners. This willingness to acknowledge new trends in other professional fields aided the court’s conclusion that gender dysphoria qualifies as a handicap under the LAD. This illustrates the merits of judicial decisions that incorporate contemporary, evolving research on, and acceptance of, issues pertaining to sexual orientation.

In 2001, the New Jersey appeals court overturned a lower court ruling and allowed a lesbian to hyphenate her name to include that of her same-sex partner. In Bacharach, the court remarked that although public policy judgments are essentially irrelevant to application for change of name, “to the extent that public policy may be gleaned from the actions of our legislature and the decisions of our Supreme Court, [there is] no basis for declining a name change which would enable an applicant to adopt a hyphenated surname to include the name of her same-sex partner.” Moreover, the court explicitly stated that, in light of current legislation and judicial decrees, the legitimacy of same-sex relationships is “well established by both statutory and decisional law.” Thus, analysts of the New Jersey Court of Appeals can conclude that judges are likely to look toward legislation to ensure that their decisions comply with the state’s public policy, even when those decisions are admittedly not founded in policy considerations.

Perhaps the most notable example of the New Jersey court’s progressive approach towards homosexuality is the Supreme

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118 Enriquez, 777 A.2d at 380.
119 Id. at 10.
120 Id.
121 Id.
123 Id. at 584.
124 Id.
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Court’s decision in Dale v. Boy Scouts of America. 125 Although the critical question in deciding whether the Boy Scouts violated the LAD by terminating Dale’s membership was whether the Boy Scouts may be deemed a “place of public accommodation,” 126 the state supreme court gave substantial consideration to legislative history and intent as it pertained to furthering fundamental equality and protection of the rights of gays and lesbians in the state. 127 The court noted that, “at a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination . . . . New Jersey has long been a leader in this effort.” 128 Construing the state’s LAD to cover sexual orientation, they found that “the scope of the statute is reflective of the breadth of the underlying problems we face as a society.” 129 The language and spirit of Dale can be reasonably interpreted as indicating the court’s interest in placing the state at the forefront of gay rights. That the New Jersey Supreme Court’s decision was ultimately reversed by the United States Supreme Court further illustrates that the state’s courts and legislature seek to provide more protection to gays and lesbians than other jurisdictions. 130

II. GRAY CLOUD OVER THE RAINBOW

Sally Starr Gray, also known as “Our Gal Sal,” has been in

125 Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999). Dale has been the subject of a substantial amount of scholarly writing entirely beyond the scope of this comment. This reference to the case highlights the New Jersey Supreme Court’s analysis as illustrative of the Court’s position on gays and lesbians in the state.

126 Id. at 1208.

127 Id. at 1207-30. Chief Justice Poritz’s majority opinion in Dale provides a comprehensive, thorough analysis of the state’s LAD as it intersects with the State and Federal Constitution, as well as how the LAD had been construed in prior decisions to effectuate legislative intent. Id.

128 Id. at 1227.

129 Id. at 1227 n.15.

130 Id.
show business since the early 1940s. In recent years, she has complemented her career as an entertainer with personal appearances at numerous public events, including events hosted by gay and lesbian rights groups and AIDS organizations. The incident that gave rise to Gray v. Press Communications involved a call-in radio show broadcast on a New Jersey radio station. On July 24, 1998, the show focused on children’s television shows and callers were asked to discuss their favorite childhood program. One caller identified the Sally Starr show as one of her two favorite shows, and co-host Jeff Diminski commented, “That was the lesbian cowgirl I think.” When she learned of the comment, Starr immediately contacted the program director and complained. Diminski then retracted the statement. Despite this apology, Starr filed suit claiming that the broadcast defamed her.

133 The show was co-hosted by Jeff Diminski, who was also named as a defendant in the action, and broadcast on FM 101.5, which was licensed by Press Communications, LLC. Gray v. Press Communications, LLC, 775 A.2d 678, 681 (N.J. Super. Ct. App. Div. 2001).
134 Id. at 681.
135 Diminski reiterated, “The lesbian cowgirl, Sally Starr.” For a full transcript of the relevant exchange, see id.
136 Id. at 682.
137 Specifically, Diminski stated, “It has been very informative today. We have learned about sex offenders’ rights. We learned about diamonds. We learned that Sally Starr is not a lesbian.” Id. This retraction is relevant because New Jersey state law requires that a plaintiff prove either “malice in fact or that defendant, after having been requested by plaintiff in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, shall recover only his actual damage proved and specially alleged.” N.J. STAT. ANN. § 2A:43-2 (West 2002).
A. Gray Road to the Courthouse

Sally Starr was born in Kansas City, Missouri on January 25, 1923.\(^{138}\) She made her show business debut when she was twelve years old and sang and performed, primarily for live audiences, until the late 1940s when she began a career in broadcast radio.\(^{139}\) Starr’s television career began in 1950 when she began hosting the daily children’s show “Popeye Theater.”\(^{140}\) In the mid-1960s Starr expanded her career to include appearances in feature films, audio recordings, and a series of children’s stories published in conjunction with her television program.\(^{141}\) “Popeye Theater” was cancelled in 1971.\(^{142}\) Starr’s career currently consists of making personal appearances and hosting a three-hour country classic radio show.\(^{143}\) Starr has also made public appearances at various gay pride events.\(^{144}\)

\(^{138}\) See Biographical Profile, supra note 131. Her parents were Charles and Bertha Beller. She changed her name legally to Sally Starr in 1941. Id.

\(^{139}\) In addition to recording commercials for the Pepsi-Cola Company, Starr and her husband performed on radio programs such as “Hayloft Hoe-Down,” which was broadcast from the old Town Hall in Center City Philadelphia. Id.

\(^{140}\) The show was broadcast out of Philadelphia. The format consisted of cartoons, comedy acts, and live appearances by such entertainers as Roy Rogers and Dale Evans, Chuck Connors, Dick Clark, Jerry Lewis, Tim Conway, Jimmy Durante, Nick Adams, and The Three Stooges. Id.

\(^{141}\) Starr appeared in “The Outlaws are Coming,” the last feature film to be made by The Three Stooges at Columbia Pictures, and had roles in such movies as “The In Crowd,” “Mannequin On the Move,” and “Holiday Journey.” She also performed with Bill Haley and the Comets and recorded country and western music on the Haley’s label, Clymax. Id.

\(^{142}\) Id.


\(^{144}\) Gray, 775 A.2d at 681. The opinion noted as follows:
Prior to trial, a preliminary hearing was conducted to address defendant’s motion for summary judgment. Starr’s attorney conceded that she is a public figure and the judge determined that she could not prevail without meeting the higher standard of “demonstrat[ing] by clear and convincing evidence, that defendant’s statement was accompanied by actual malice.” The trial judge did not address the question of whether or not an imputation of homosexuality is defamatory. Rather, the judge was convinced by defense counsel’s construction of the actual malice standard as requiring “reckless disregard” and a “high degree of awareness of probable falsity of the statement.”

Plaintiff’s counsel attempted to discredit Diminski’s basis for belief that Starr was a lesbian, while defense counsel posited that the high burden of proof did not allow for a flexible standard and was not met. Because the record did not establish malice

“[Starr] also did personal appearances for the AIDS Foundation . . . . She also stated that she appeared in the Philadelphia Gay Pride Parade, where her participation was limited to riding on the back of a convertible and waving to people. Additionally, she made several paid appearances at an outdoor festival in Philadelphia, held in connection with the Gay Pride festivities.

Id. The irony of this was not lost on all commentators. See, e.g., Arthur S. Leonard, ‘Lesbian’ Still Defames in New Jersey, LGNY, NEWSPAPER FOR LESBIAN & GAY N.Y., July 9-19, 2001.

Gray, 775 A.2d at 682. In this context, malice requires that the statement was made “with knowledge of the probable falsity of the statement.”

Id.

See Respondent’s Brief, supra note 132, at 4-6. It should be noted here that both respondent’s brief and respondent’s petition record the spelling of defendant’s name as “Jeff Deminki,” while the spelling used in the court’s opinion is “Diminski.” For purposes of clarity and consistency, this comment uses the spelling employed by the court.

Respondent’s Brief, supra note 132, at Da4.

Plaintiff’s counsel stated that Diminski “found out at a cocktail party. He was washing his car, someone made a comment to him. He was at a comedy club and he thought he heard something. These were the basis [sic] of his belief, if it was actually worthy of belief.” Id. at Da3.

Defense counsel stated, “My colleague says that the reckless disregard standard is a mutable standard, is a flexible standard, but it is not, Your
“by anything close to clear and convincing evidence,” summary judgment was granted.151

On appeal, Starr argued both that the term “lesbian cowgirl” was reasonably susceptible of a defamatory meaning, and that a reasonable fact-finder could conclude that Diminski knew his statement was false.152 Despite the fact that plaintiff’s first contention was not ruled upon by the trial court, the appellate division examined Starr’s claim and agreed that an accusation of homosexuality is actionable as defamatory.153 The case was remanded on the determination that a reasonable fact-finder could conclude that Diminski’s actions constituted actual malice.154 This decision, however, precludes future defendants from arguing that an accusation of homosexuality is not defamatory because further proceedings cannot be inconsistent with the appellate division’s opinion.155 Moreover, the defendant’s petition for certification of the decision was denied.156

Honor.” Id.

151 Id. at Da4-5.

152 See Gray v. Press Communications, LLC, 775 A.2d 678, 681 (N.J. Super. Ct. App. Div. 2001). At his deposition, Diminski mentioned three occasions in which he had heard plaintiff was a self-identified lesbian, though he was unable to identify the individuals who made these statements. Id.

153 This is significant because it is a well-settled practice that appellate courts may decline to address an issue if it was not ruled upon in the first instance by the motion judge. Gray, 775 A.2d at 685, citing Subcarrier Comm’n, Inc. v. Day, 691 A.2d 876, 882-83 (N.J. Super. Ct. App. Div. 1997).


155 Id. It should also be noted that, by virtue of stare decisis, the court’s statements on this question are binding upon lower courts throughout the state. As such, any discussion or further analysis of this matter in New Jersey’s court systems is effectively shut down by the court’s minimal treatment of the matter. For further discussion, see infra Part II.3.

156 Gray, 775 A.2d 678, cert. denied, 788 A.2d 774 (N.J. 2001). Defendant’s Petition for Certification of and Appeal from Final Judgment with the Supreme Court of New Jersey was denied without opinion. Id.
B. Gray, Not Black and White

Gray addressed whether an imputation of homosexuality could be defamatory as a matter of first impression for New Jersey courts. As such, there was no controlling precedent, and the court was entitled to arrive at whatever conclusion it deemed appropriate. Confronted with the same question, many courts have assessed contemporary social mores by way of local and state legislation. The Gray court did not mention New Jersey’s legislative framework, and instead looked to six other jurisdictions’ opinions on this issue for guidance. The court’s reliance upon these decisions, however, was inherently flawed. Of those decisions, three were issued in states that either still have sodomy laws or had sodomy laws at the time of the decision. Furthermore, opinions that it found persuasive rested

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157 Gray, 775 A.2d at 683-84 (“Our research has failed to disclose a case in New Jersey considering whether an accusation of homosexuality is defamatory.”).

158 See, e.g., Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1991) (reversing trial court decision that imputation of homosexuality was slander per se and finding “no empirical evidence in [the] record demonstrating that homosexuals are held by society in such poor esteem”). To support this contention, the court referred to the repeal of the state’s sodomy law, an executive order prohibiting anti-gay discrimination in public employment, as well as nondiscrimination ordinances in Denver and Boulder, Colorado. Id. at 1025. The case was remanded to determine whether, in the context that it was made, the statement was defamatory at all. Id. at 1026.


upon archaic reasoning that New Jersey’s state law rejected years ago.  

As explained above, the community in which a statement is uttered uniquely governs the boundaries of defamation law. It has long been noted that changes in social sensibilities as well as varying judicial attitudes in the fifty plus jurisdictions—federal and state—account for sharp contradictions and controversy in the determination of what is or is not defamatory. Therefore, while it is conceivable that decisions from other courts correctly reflect the public policy of those jurisdictions, opinions of homosexuality vary depending on the region of the country. For example, one could, at the very least, expect that the opinion commonly held about homosexuality in Texas in 1980 would differ drastically from that in New Jersey in 2001. So illustrated, the potential for substantial variation in public policy between states and across decades surely renders the persuasive value of certain defamation decisions questionable at best. The Gray court’s decision neither explored what motivated the out-of-state decisions nor indicated why they would be persuasive.

Because defamation suits purport to provide an opportunity to

For a complete, current list of State sodomy laws, see American Civil Liberties Union, State by State Breakdown of Sodomy Laws, available at http://www.aclu.org/issues/gay/sodomy.html (last visited Apr. 13, 2002).

161 New Jersey’s sodomy law was repealed in 1979. See supra note 89.

162 Fogle, supra note 4, at 172.

Therefore, finding that a statement is defamatory at a particular place and time should not govern the determination of whether a similar statement is defamatory at a different place and time. Instead, the impact a particular statement is likely to have on a plaintiff’s reputation should be considered in the context in which it is published.

Id.

163 MAYER, supra note 11, at 34.

164 Fogle, supra note 4, at 179.

165 This analogy is not arbitrarily drawn. Of the six cases referenced, the Gray court cited to a 1980 case from the Texas Court of Appeals. See supra note 159; see also Gray, 775 A.2d at 684.

166 As noted, the court cited to the cases without explaining why they were selected. Gray, 775 A.2d at 684.
vindicate one’s harmed reputation, it is essential that courts identify the plaintiff’s community and its norms to gauge the interaction between the statement uttered and values of the audience.\(^\text{167}\) This does not necessarily render extra-jurisdictional opinions entirely irrelevant, but it does indicate that sound judicial opinions cannot be furnished in utter absence of contextual analysis.

It is equally well established that the existence of a judicial remedy for injury to reputation is entirely a matter of state law.\(^\text{168}\) In 1976, the United States Supreme Court held that a plaintiff’s “interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions.”\(^\text{169}\) The Supreme Court of New Jersey has also explicitly rejected the proposition that the state constitution creates a right to maintain a defamation action.\(^\text{170}\) Therefore, to the extent that a New Jersey court chooses to authorize a cause of action for defamation, it may also limit a plaintiff’s ability to prove his or her claim in order to promote other social purposes without regard to other states’ conclusions.\(^\text{171}\)

1. **New Jersey Legislation Regarding Sexual Orientation**

Judicial opinions often refer to state and local legislation to determine whether public statements are actionable as defamatory.\(^\text{172}\) There is substantial reason to give great weight to

\(^\text{167}\) Lidksy, *supra* note 8, at 1.


\(^\text{170}\) *Maressa*, 445 A.2d at 384-385.

\(^\text{171}\) *Id*.

\(^\text{172}\) See, *e.g.*, Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991) (examining state and local human rights codes and concluding that “the
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gay rights legislation to determine community acceptance of homosexuality. At least one author has argued that gay rights laws indicate both the community’s desires to fully incorporate gays and lesbians into the community, as well as a condemnation of homophobic behavior. It is not unrealistic to conclude that legislation passed by popularly elected representatives reflects those legislators’ desire to further the governmental interest that the law serves. The long-standing existence of gay rights laws may illustrate a community’s commitment to such issues and indicate the community’s acceptance of homosexuality. Thus, in communities with comprehensive gay rights protection, any harm to one’s reputation suffered by an imputation of homosexuality would not be inflicted by a majority of citizens and could be disregarded as negligible by courts.

community view toward homosexuals is mixed’’; Nazeri, 860 S.W.2d at 312 (pointing to same-sex sodomy statute to conclude that “despite the efforts of many homosexual groups to foster greater tolerance and acceptance, homosexuality is still viewed with disfavor, if not outright contempt, by a sizeable proportion of our population’’); Donovan v. Fiumara, 442 S.E.2d 572, 575 (N.C. Ct. App. 1994) (noting that state sodomy statute applies equally to heterosexuals and homosexuals and concluding that referring to a person as gay is not tantamount to imputing the commission of a crime).

173 See Fogle, supra note 4, at 188.

174 See, e.g., Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1, 38 (D.C. 1987) (finding that the Council of the District of Columbia “acted on the most pressing of needs when incorporating into the Human Rights Act its view that discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims. The eradication of sexual orientation discrimination is a compelling governmental interest.’’). In Gay Rights Coalition, the court reversed the trial court’s ruling that relieved Georgetown University of its statutory obligation to provide tangible benefits without regard to sexual orientation. Id. at 39; see also Fogle, supra note 4, at 185 (“The relevance of state and city laws to determine the defamatory nature of the imputation of homosexuality is predicated upon the concept that the laws of a given jurisdiction reflect the moral values of that jurisdiction.’’).

175 Fogle, supra note 4, at 189.

176 See Ben-Oliel v. Press Publ’g Co., 167 N.E. 432 (N.Y. 1929) (concerning the publication of a newspaper article that contained errors about Palestinian customs, which only people knowledgeable about such customs
The Gray court did not refer to New Jersey legislation to determine community standards on sexual orientation, although the decision noted society’s increasing acceptance of freely exercising one’s sexual preferences. Neither did the court examine whether the statement actually injured the plaintiff. Yet, the decision now includes homosexuality in the category of defamatory statements, regardless of legislative intent. Indeed, the entire issue was disposed of in a single paragraph. Because defamation law is designed to protect a person’s reputation, the defamatory nature of a comment must be properly evaluated in terms of the person’s reputation in the community. Courts do a disservice to the clarity of defamation law when the question of how homosexuality harms one’s reputation is not given full treatment.

If the Gray court had examined the state laws, it would not have likely recognize and thus conclude that plaintiff was a “fraudulent ignoramus”). See also Fogle, supra note 4, at 188.

177 Gray v. Press Communications, LLC, 775 A.2d 678, 684 (N.J. Super. Ct. App. Div. 2001). After examining how accusations of homosexuality have been treated by other jurisdictions, the court conclusively stated that “[a]lthough society has come a long way in recognizing a person’s right to freely exercise his or her sexual preferences, unfortunately, the fact remains that a number of citizens still look upon homosexuality with disfavor.” Id. at 684.

178 Id.

179 Interestingly, if the court had examined this issue, it would have found that although Ms. Starr’s complaint sought five million dollars in damages, she claimed to have lost no more than $8,000 in cancelled personal appearance contracts. See Respondent’s Brief, supra note 132, at 9.

180 See Respondent’s Brief, supra note 132, at 9.

181 A similar argument has been made to critique judicial analysis holding that because homosexual activity may indicate a lack of chastity in a woman, imputation of homosexuality was slanderous without proof of damages. Fogle, supra note 4, at 183, citing Schomer v. Smidt, 170 Cal. Rptr. 662, 666 (Cal. Ct. App. 1980).

182 Fogle, supra note 4, at 180-84. Fogle further argues that some courts have side-stepped the question of how homosexuality damages one’s reputation and have disposed of the question by other mechanisms, such as misapplying sodomy laws to equate homosexuality to criminal or other distasteful behavior. Id.
have found support for their conclusion “that a number of citizens still look upon homosexuality with disfavor.” As noted above, New Jersey adopted anti-discrimination laws well before the federal government, and the legislature has drafted statutes that explicitly protect the rights of gays and lesbians in the state in myriad areas. Americans commonly assume that legislation passed by popularly elected representatives embodies the will of the majority, if not the populace at large.

Specifically, laws prohibiting bias reflect a community’s unwillingness to tolerate such behavior. This begs the question whether is it truly harmful to reputation to charge variance from heterosexual practices, while at the same time society establishes laws forbidding discrimination for such orientation. At the very least, the legal status of gays and lesbians in New Jersey is relevant in determining whether the community has accepted homosexuals as a group. Moreover, if New Jersey’s Law

183 Gray, 775 A.2d at 684.
184 See supra Part I.E.1 (contrasting New Jersey’s LAD with Federal Anti-Discrimination Law Title VII).
186 See generally Nan D. Hunter, Sexual and Civil Rights: Re-Imagining Anti-Discrimination Laws, 17 N.Y.L. SCH. J. HUM. RTS. 565, 567 (2000). Hunter suggests that progress in equality rights is a product of movements and campaigns that in turn establish the cultural dynamics of equality statutes. Id. She further states that “[w]hen legislatures extend the civil rights model to a new group, a powerful sense of social legitimacy is conferred. This sense of legitimacy develops, in part, because legislation can be enacted only after the group has reached a certain level of social acceptance.” Id. at 567. See also Fogle, supra note 4, at 185-92 (discussing the relevance of gay rights legislation as a reflection of popular attitudes towards homosexuality).
187 Fogle, supra note 4, at 186-87. Fogle argues that, “although the law cannot prohibit individual prejudice, it can prohibit discriminatory behavior . . . Eradicating discrimination on the basis of sexual orientation indicates a compelling interest on the part of the jurisdiction adopting such a statute to protect the status of gays and lesbians.” Id.
188 Id. at 192. Fogle notes that “using the legal status of a group of people to determine whether a statement is defamatory has been applied in other
Against Unlawful Discrimination is meant to have any teeth, its very existence must be read to indicate that residents have decided to treat gays, lesbians and heterosexuals equally. In short, the legislative intent is to dismiss precisely the type of opinions that Gray tacitly permits, if not rewards. Judicial declaration that homosexuality harms one’s reputation is therefore entirely antithetical to the will of the majority as expressed in legislation.

2. Progressive Judicial Decisions in New Jersey Caselaw

New Jersey caselaw simply does not support the court’s decision in Gray. The cases explored in this comment provide a brief look at the current supreme and appellate courts’ apparent effort to provide progressive solutions to the problems gays, lesbians, and transgendered people face in contemporary society. Taken together, they indicate the cumulative effort expended by New Jersey courts to combat homophobia and insure equal protection in the state. Such an effort is frustrated by the over-simplified analysis in Gray that unnecessarily concluded that homosexuality is reasonably susceptible to a defamatory meaning because “a number of citizens still look upon homosexuality with subgroups within the general population.” Id., citing Ledsinger v. Burmeister, 318 N.W.2d 558 (Mich. Ct. App. 1982) (holding that calling someone a “nigger” was not defamatory at all).

189 See Petition, supra note 160, at i. This contention was one of the two main propositions advanced by the defendant in its petition for certification. The other main argument was that the appellate division misapplied the constitutionally imperative actual malice standard developed by the United States and New Jersey Supreme Courts. See id. Defendants specifically stated that “[i]gnoring New Jersey’s efforts to end discrimination on the basis of sexual orientation, the appellate division erred in holding that an imputation of homosexuality could be defamatory.” Id. at 16.

190 Allowing a defamation plaintiff to prevail has been considered the equivalent of legally sanctioning the position asserted in his or her claim. See infra Part I (discussing dismissal of certain claims to avoid condoning discriminatory attitudes).

191 See generally Fogle, supra note 4, at 186-87.
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disfavor.”192 These cases also bolster the legislative and statutory analysis set forth in this comment. Taken together, they illustrate that the state courts acknowledge legislation as a manifestation of “public policy” in New Jersey, and that the highest court in the state takes pride in maverick decisions affording broad protection to gays and lesbians.193

A common justification for exercising judicial restraint on policy issues is that proper redress should be achieved through political venues and lobbying.194 This approach may be effective when, for example, an individual seeks legislative change.195 When, as in Gray, however, the applicable legal standard is a uniquely judicial determination,196 there is perhaps no alternate means to affect the desired change.197 Thus, even lesbians and gays who are active in legislative lobbying and advocacy groups must presumptively stand idly by while courts sanction an individual’s estimation of homosexuality as a negative characteristic.198


193 See supra Part II (discussing New Jersey cases and legislation that further equal protection for gays and lesbians in the state).

194 One argument is that substantive changes in the law should be achieved through the political process rather than by judicial fiat. See, e.g., Patrice S. Arend, Defamation in an Age of Political Correctness: Should a False Public Statement That a Person Is Gay Be Defamatory?, 18 N. Ill. U. L. Rev. 99, 114 (1997) (arguing that “[a]s society ‘evolves’ and recognizes that homosexuality is not offensive, fewer cases will be brought to the courts . . . This allows the law to change gradually to serve the role of stimulating social change, while at the same time doing what it is intended to do—protect people.”).

195 This approach may be effective in cases where the desired remedy is repealing, altering or amending an act of legislation. However, as noted, New Jersey’s defamation law is not codified in statute and is therefore governed by common law ideals and decisional law. See supra Part I.B.

196 See supra Part I.B (noting that it is for the court to determine whether a communication is reasonably susceptible of a defamatory meaning).

197 Whether or not a plaintiff is allowed to proceed with a defamation claim is discretionary by the court. See supra Part I.B.

198 As previously discussed, the court determines whether a statement is defamatory as a threshold issue. See supra Part I.B. Because this decision will
The New Jersey defamation law is not codified in a statute, and is therefore uniquely amenable to judicial revisions.\textsuperscript{199} This places an additional burden on courts to be more careful when determining whether a statement is defamatory. The appellate court in \textit{Gray} had a real opportunity to inject an element of badly needed intellectual rigor into caselaw on defamation. In an area of the law containing “such anomalies and absurdities for which no legal writer has had a kind word,”\textsuperscript{200} this would have been a service not only to the state of New Jersey, but also to other jurisdictions that may eventually have to decide the same issue.\textsuperscript{201} The decisions of other state courts that have casually interpreted homosexuality in defamation cases could, therefore, mean essentially nothing.

To be sure, some courts have not been eager to validate progressive points of view in cases dealing with homosexuality.\textsuperscript{202} However, as noted above, New Jersey courts have certainly not been adverse to rejecting out-of-state decisions construing identical questions pertaining to sexual orientation.\textsuperscript{203} There is, be made based on the judgment of the court, it is distinctly unlike legislative initiatives and enactments, which may be affected by political lobbying and voting constituent groups.

\textsuperscript{199} See \textit{supra} Part I.B (explaining that New Jersey’s defamation law is governed by common law ideals and judicial decree).

\textsuperscript{200} \textit{PROSSER & KEeton}, \textit{supra} note 9, at 771-72.

\textsuperscript{201} As noted, courts and commentators agree that defamation standards change from one generation to the next. Some commentators have projected that the time will arrive when stating that someone is gay or lesbian does not reflect negatively upon their reputation. See, e.g., \textit{MAYER}, \textit{supra} note 11, at 35; \textit{Arend}, \textit{supra} note 194, at 114 (stating that “as the gay community becomes even more visible and achieves greater political power, the stigma attached to homosexuality will undoubtedly disappear”).

\textsuperscript{202} See, e.g., \textit{supra} notes 71-72 (citing cases which have found imputation of homosexuality to be defamatory).

\textsuperscript{203} By the time \textit{Dale} was litigated, other jurisdictions had applied narrow definitions to public accommodation laws and found that the Boy Scouts did not constitute a “place of public accommodation.” See \textit{Welsh v. Boy Scouts of Am.}, 993 F.2d 1267 (7th Cir. 1993), \textit{aff’d} 787 F. Supp. 1511 (N.D. Ill. 1992), \textit{cert. denied}, 510 U.S. 1012 (1993); \textit{Randall v. Orange County Council, Boy Scouts of Am.}, 952 P.2d 261 (Cal. 1998); \textit{Curran v. Mount Diablo Council of the Boy Scouts of Am.}, 952 P.2d 218 (Cal. 1998);
therefore, no reason why the New Jersey court should act as though it is not in a position to be selective and judgmental when it comes to accepting social prejudices. By treating as self-evident that being falsely called a lesbian may be harmful to one’s reputation, the \textit{Gray} court implicitly condones homophobia.\footnote{In the same manner that upholding a defamation claim that a white person is African-American would sanction racist beliefs, judicial recognition of defamation suits based on an imputation of homosexuality sanctions homophobia. \textit{See generally} Fogle, supra note 4, at 176.} Sound judicial discretion should be applied to ensure that defamation decisions comply with the state’s public policy. Given that the current trend of the New Jersey courts is to liberally construe state laws to provide legal redress to those who suffer discrimination based on sexual orientation, \textit{Gray} was inconsistent and should have been reversed.

3. \textit{The Many Shades of Gray}

To the extent that implications can be drawn from \textit{Gray}, one must consider the standards required to sustain a defamation action as set forth above in conjunction with the role of judicial discretion to ensure that defamation decisions comply with the state’s public policy. Given that the current trend of the New Jersey courts is to liberally construe state laws to provide legal redress to those who suffer discrimination based on sexual orientation, \textit{Gray} was inconsistent and should have been reversed.


The Boy Scouts of America [“BSA”] has faced numerous court challenges to its exclusionary membership policies under state public accommodations laws. Through these challenges, brought on behalf of girls, atheists, and homosexuals, four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have held that BSA is not a place of public accommodation. In a groundbreaking decision, however, the Supreme Court of New Jersey departed from these decisions in unanimously holding that BSA does fall within the scope of New Jersey’s LAD.

\textit{Id.}
discretion.\textsuperscript{205} The thrust of this analysis concludes that allowing defamation suits of this nature is tantamount to declaring homosexuality offensive; it permits juries to award damages on a necessary presumption that one is damaged by such imputations.\textsuperscript{206} This position has been suggested elsewhere,\textsuperscript{207} though this comment takes a moderate view concluding that “depriving individuals of a tort remedy for defamation is an inappropriate and inefficient method for changing public attitudes about homosexuality.”\textsuperscript{208} It should be noted, however, that caselaw and legislation within a specific jurisdiction may indicate a public acceptance of homosexuality that negates a finding that one is injured when publicly labeled as homosexual.\textsuperscript{209} Therefore, in jurisdictions where the conditions of the latter proposition are met, pro-active judicial decisions in defamation suits are neither unwarranted nor unprecedented.\textsuperscript{210}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{205} See supra Parts II.A, II.B, II.D for the applicable legal standards in defamation actions, New Jersey’s statutory and common law requirements, and judicial discretion in determining whether a defamation claim is cognizable.
\item \textsuperscript{206} See supra Part II.A (explaining that defamatory statements are those that harm one’s reputation).
\item \textsuperscript{207} See Arend, supra note 194, at 111.
\item \textsuperscript{208} Id. at 113-14.
\item \textsuperscript{209} Fogle, supra note 4, at 176. Fogle utilized a comparison between statements that a white person is African-American and those labeling a heterosexual as homosexual. He noted the following:
\begin{quote}
[T]he two examples differ in the degree to which society has determined to treat people of color and gays equally. In the first instance, equal protection laws have been established throughout the nation to protect employment, housing, and other rights. Such laws concerning gays and lesbians are largely absent at the federal level and local protection varies greatly in different regions of the country. Therefore, it would not be logical to treat allegations that someone is white the same way as allegations that someone is not heterosexual, except where the jurisdiction has adopted a similar attitude regarding the two populations.
\end{quote}
Id. (internal citations omitted).
\item \textsuperscript{210} Additionally, because decisions in defamation suits inherently reflect the competing policy tensions between one’s desire to protect his or her reputation and society’s interest in protecting First Amendment rights, the fact
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At least one commentator has argued that courts should never deny economic recovery to those who consider themselves harmed by an accusation of homosexuality.211 Such a bright-line rule, however, unnecessarily overlooks affirmative steps taken by a particular jurisdiction’s legislative and judicial systems to expunge the legal system of discriminatory treatment of gays and lesbians.212 Further, such a rule neglects the fact that merely allowing homosexuality to remain on the list of legally “offensive” terms may have a deleterious effect upon how the community at large views gays and lesbians.213 Finally, because plaintiffs who bring defamation suits are not necessarily motivated by financial factors, a court that dismisses a defamation suit does not always risk leaving a person financially damaged.214

The court’s conclusion in Gray has far-reaching effects upon that plaintiffs in defamation suits tend to have non-economic motives should be carefully considered. See Boies, supra note 47, at 1298.

211 Arend, supra note 194, at 114.

212 See supra Parts I and II for analysis of relevant New Jersey legislation and caselaw.

213 See generally Ryan Goodman, Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics, 89 Cal. L. Rev. 643 (2001). Similar arguments have been made about the impact of “unenforced” sodomy laws upon a community’s treatment of homosexuals. Goodman borrowed from sociolegal studies of law founded in constitutive theories and analyzed the ways in which sodomy laws “operate in daily life by shaping interpersonal relations, influencing daily habits and helping define civic identity.” Id. at 666.

214 Boies, supra note 47, at 1298-99.

Defamation actions, particularly those that involve individuals, usually have strong noneconomic motives. Defamation litigation usually arises when someone is hurt. They are hurt and they are angry. They may or may not have suffered a calculable economic loss, but they are often going to be less motivated by that loss, and less constrained by the economic costs of litigation, than most potential plaintiffs.

Id. But see Post, supra note 32, at 694. In expounding upon the “reputation as property” theory of defamation law, Post points out that perhaps “the value of reputation is determined by the marketplace in exactly the same manner that the marketplace determines the cash value of any property loss.” Id.
all individuals who attribute to themselves the status of being a homosexual. While the defendant in Gray referred to Starr as “the lesbian cowgirl,” he did not claim that she engaged in homosexual acts, frequented gay bars or even affiliated herself with openly gay individuals. This is a decidedly status-based imputation, distinct from a public statement that one engages in specific, possibly reprehensible, or even criminal acts. Further, New Jersey’s high court has recognized that homosexuality is a trait inseparable from personal identity. Therefore, regardless of how lawfully or respectfully an individual may conduct him or herself, Gray has the practical effect of hanging a label of opprobrium upon the entire class of individuals who identify themselves as homosexual. Put another way, Gray provides

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215 See generally Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (stating that discrimination against immutable characteristics such as homosexuality will cause “significant damage to the individual’s sense of self”).

216 Interestingly, if the defendant had stated that Ms. Starr was affiliated with gay individuals or organizations, this would have been true and therefore not actionable as defamatory because, as noted, Ms. Starr admitted that she appeared in Philadelphia Gay Pride Parade and in the accompanying outdoor festival. See supra note 132.

217 Some courts have noted this status-act distinction. See, e.g., Donovan v. Fiumara, 442 S.E.2d 572 (N.C. 1994) (claiming falsely that plaintiffs were gay or bisexual did not carry with it an automatic reference to any particular activity and therefore was not tantamount to charging that individual with the commission of a crime under state sodomy law sufficient for classification as defamatory per se); Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. App. Ct. 1977) (stating that defendant’s reference to plaintiff as a “fag” could reasonably only be interpreted to assert plaintiff was homosexual and statement therefore did not import commission of homosexual acts). See also Mayer, supra note 10, at 35 (“A charge of child abuse, molestation or rape involves distinguishable criminal conduct or a decidedly loathsome character and must remain a proper subject for relief.”).

218 See In re J.S. & C., 324 A.2d 90 (N.J. Super. Ct. App. Div. 1976) As early as 1976, New Jersey’s high court recognized that a person’s sex or sexuality embraces an individual’s gender, one’s self-image, and his or her deep psychological or emotional sense of sexual identity and character. Id.

219 See Peck v. Tribune, 214 U.S. 185 (1909) (holding that words that impute conduct calculated to injure a plaintiff in the eyes of a considerable and
legal permission to condemn any individual who identifies herself as homosexual on the basis of her status alone.

To better understand the impact of *Gray*, one should engage in an intellectual exercise. First, note that statements are only actionable as defamatory if they are false.220 It is self evident, then, that an individual who has openly acknowledged him or herself as gay or lesbian could not maintain a defamation action for public statements referring to him or her as such, regardless of any real or actual harm to their reputation.221 At first glance, this seems a simple conclusion. In light of *Gray*, however, openly gay individuals in New Jersey must now live not only without legal recourse to redeem their potentially damaged reputation, but must also accept the fact that society can, with the blessing of the court, view their status as gay as less than desirable. In fact, no matter how much pride a gay or lesbian person takes in his or her identity, judicial decree now tells all homosexuals in New Jersey that revealing their sexual orientation may lower their reputation in the minds of respectable members of the community.222 *Gray* effectively relegates gays and lesbians respectable class of the community, though not in the eyes of the whole community, are libelous).

220 Truth is an affirmative defense to defamation. LAURENCE ELDREDGE, THE LAW OF DEFAMATION 323 (1977). See also 22 AM. JUR. 3D Proof of Facts § 305 (1993) (noting that a publication must contain a false statement of fact to give rise to liability for defamation).

221 An individual who has previously stated or admitted his or her homosexuality would have disclosed it as fact, thus precluding him or her from bringing a cause of action against one who would publish an imputation of his or her homosexuality, because only false statements are defamatory. See id.; see also Hein v. Lacy, 616 P.2d 277 (Kan. 1980) (finding statements that the plaintiff favored the legalization of homosexuality and the decriminalization of marijuana not defamatory because they were substantially true inasmuch as they reflected plaintiff’s voting record as a state senator).

222 See Fogle, supra note 4, at 173. One of the limitations on the law of defamation is that a statement is only deemed defamatory “if it prejudices a person in the eyes of a substantial number of ‘right-minded’ people.” Id. Fogle uses the analogy of racial or ethnic remarks to illustrate that by dismissing certain defamation claims courts may “implicitly [label] racists as ‘wrong-thinking.’” Id.
in a position of political and legal second-class citizenship.

Cast in this light, the practical effects and future impact of Gray can be fully examined. First, to the extent that Gray offers protection to anyone, it is only to those members of society who consider themselves defamed by a label of homosexuality.Obviously, however, a plaintiff’s reputation “could only be injured in the eyes of homophobic individuals.” In the event that a heterosexual in New Jersey wishes to redeem his or her reputation by removing the stigma of homosexuality, he or she may do so. This may be considered a rare event, given that in the history of New Jersey’s courts such an action has been before the court only once. Homosexuals, however, may live their entire adult lives identifying themselves as gay, lesbian, bi-sexual or transgendered. The damage done to the psyche of those who have already “come out” in a community is far more enduring than to those who are subject to a single, false statement that they are gay or lesbian. Similarly, finding that homosexuality as a status is defamatory may deter people from privately, let alone publicly, acknowledging their homosexuality.

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223 This logically comports with the analysis laid out above, that plaintiffs in defamation suits are not primarily motivated by financial desires, but rather are seeking to clear their reputation of an allegedly defamatory implication. An individual would necessarily have to consider his or her reputation harmed to be motivated to sue in the first instance. See supra note 214 and accompanying text. See also, Fogle, supra note 4, at 176.

224 Fogle, supra note 4, at 176; see also, Lidsky, supra note 8, at 34.

225 This is true at least with respect to New Jersey appellate courts with reported decisions, inasmuch as this was a question of first impression before the Gray court. See supra note 157.

226 The mutability of sexual orientation has been the subject of numerous legal, medical and academic studies. This comments restricts analysis to those who have publicly acknowledged their sexual orientation as other than heterosexual.


228 Halley, supra note 227, at 945-46 (“The legal and social burdens imposed on homosexual identity deter individuals whose desires and behavior are entirely or partially homosexual from acknowledging that fact.”).
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In a legal context, because a statement that one is homosexual is actionable as defamatory when false, defamation law provides harbor only for those willing to publicly denounce and litigate against such a statement.\(^\text{229}\) While this legal consequence may be correct in suggesting that those who disclose their homosexuality do not regard it as harming their reputation, practically speaking, it leaves only two options for self-identified homosexuals: they must either (1) acknowledge and subjectively regard their homosexuality as degrading or (2) hide it.\(^\text{230}\) This not only places a premium on heterosexuality, but simultaneously functions as legal deterrent for those who wish to be openly gay. It is easy to see, then, that while other groups are free to promulgate hatred through spreading lies that a heterosexual is gay, gays and lesbians have very little opportunity to expunge their own identities of this judicially-imposed pejorative meaning.\(^\text{231}\) It has been noted that, because of harsh societal penalties, many homosexual persons conceal their sexual orientation.\(^\text{232}\)

Accordingly, the Gray rule may have the practical effect of politically silencing gays and lesbians, as it results in the removal of homosexuals from open political activity.\(^\text{233}\) This would only diminish any perspective or sensitivity by the heterosexual majority for concerns of the homosexual community.\(^\text{234}\) Given that the New Jersey legislature has explicitly encouraged gays and lesbians to participate in the state’s political forum, it is hard

\(^{229}\) As noted in supra note 220, truth is an affirmative defense to defamation. Furthermore, although anyone may consider his or her reputation to have been harmed by a statement, it is self-evident that no one is required to litigate.

\(^{230}\) This sort of “rock and a hard place” analysis has been noted by at least one commentator with regard to government policy of firing all homosexuals. See Halley, supra note 227, at 957, construing Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986), aff’d in part, rev’d in part on other grounds, sub nom, Webster v. Doe, 486 U.S. 592 (1988).

\(^{231}\) See Jantz v. Muci, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (stating that homosexuals face severe limitations on their ability to protect their interests by means of the political process).

\(^{232}\) Halley, supra note 227, at 957.

\(^{233}\) Id.

\(^{234}\) Id.
to imagine that this effect is desired.\textsuperscript{235} Additionally, inasmuch as \textit{Gray} legally sanctions negative perceptions of gays and lesbians, it also implicitly tolerates, and may well foster, homophobia in New Jersey.\textsuperscript{236} Though defamation is a civil wrong and does not carry the impact of attributing criminal status to a class of individuals, the fact remains that judicial determinations in defamation suits unequivocally label certain acts or classes of people as undesirable.\textsuperscript{237} Allowing homosexuality to remain on the list of “legally offensive” terms may prevent gays and lesbians from reporting bias or hate crimes against them.\textsuperscript{238} In a jurisdiction that has articulated an interest in protecting homosexuals from this very type of isolation, it is antithetical for a court to declare that one person’s legally protected, public acknowledgement of homosexuality is another’s cause for a lawsuit.

Further, the harmful seeds sowed by judicial decree in defamation suits have especially subversive results because, unlike anti-gay legislation or active discrimination by specific organizations, a judicial declaration that attaches stigma to a particular class cannot be redacted by political lobbying or advocacy.\textsuperscript{239} Gay rights organizations have successfully affected
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legislative approaches to numerous causes in New Jersey. As noted, the legislative and judicial branches of the state government have been receptive to passing and interpreting laws so as not to advance discriminatory attitudes or initiatives. Defamation law, however, is unique because there is not, and perhaps cannot be, a mechanism to attack the discrimination that it undoubtedly fosters. In a single decision, Gray now effectively provides the legal legs upon which individuals who wish to advance anti-gay and homophobic agendas may stand. Because control over the boundaries of defamatory categories is placed in the hands of judges, only a decree from the bench can eradicate the myriad, pervasive effects of Gray.

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240 Numerous groups are active in lobbying for gay rights and electing officials supportive of gay and lesbian initiatives in New Jersey. For examples of state and local organizations and their political efforts, see e.g., New Jersey Stonewall Democrats, at http://www.geocities.com/njstoned/WTC.html (outlining mission statement of coalition of lesbian, gay, bisexual and transgendered individuals effecting change within the state Democratic Party) (last visited Mar. 24, 2002); New Jersey Lesbian and Gay Coalition, at http://www.njlgc.org (detailing efforts of non-profit organization committed to sexual orientation-based discrimination through public advocacy, education, political action and legal reform) (last visited Mar. 24, 2002); Gay and Lesbian Political Action and Support Groups, at http://www.gaypasg.org/Projects/STOP%20HARASSMENT%20AND%20BULLYING.htm (outlining work done to pass bills in the New Jersey Senate and Assembly that would implement sexual orientation provisions of the state’s LAD to further safe schools and community violence prevention by requiring school districts to adopt harassment and bullying prevention) (last visited Mar. 24, 2002).

241 See supra Parts I.E.1, I.E.2 (examining New Jersey legislation and caselaw relevant to sexual orientation).

242 Courts do not recognize a cause of action where the allegedly defamatory statement is directed at a group. See, e.g., Neiman Marcus v. Lait, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (“Where the group or class disparaged is a large one, absent circumstances pointing to a particular plaintiff as the person defamed, no individual member of the group or class has a cause of action.”) (quoting RESTATEMENT OF TORTS § 564(c)).

243 As noted in supra Part I.B., it is for the court to determine whether a statement is defamatory in the first instance.
III. A More Comprehensive Proposal: Shedding Light in a Gray Area

Although courts in the United States are divided as to whether a false imputation of homosexuality is defamatory per se or defamatory per quod,244 no court has concluded that an accusation of homosexuality is not actionable under any circumstance.245 A recent case from New South Wales, Australia, *Rivkin v. Amalgamated Television Services*, however, concluded that a jury is no longer allowed to decide on the defamatory character of imputations that a person may be homosexual.246 While this opinion is from an international jurisdiction, the mechanisms applied by the court are enlightening. *Rivkin* referred to the framework of state and federal legislative provisions to determine the community’s view on homosexuality.247 Significantly, the legislation presently in place in New Jersey nearly mirrors that of the jurisdiction in *Rivkin*.248 Unlike the *Gray* court, the *Rivkin*

244 Defamation per se is “a statement that is defamatory in and of itself and is not capable of an innocent meaning.” BLACK’S LAW DICTIONARY 427 (7th ed. 1999). Defamation per quod is a statement that that “either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable per se.” BLACK’S LAW DICTIONARY 427 (7th ed. 1999).

245 See supra Part I.C (reviewing caselaw finding imputations of homosexuality to be either defamatory per se or per quod).


247 Id. at *5. Specifically, the court noted that the former proscription of homosexual conduct between consenting males adults was abolished by amendment in 1984. The Anti-Discrimination Act includes unlawful discrimination on the grounds of homosexuality in a wide range of contexts and includes a provision making it unlawful to incite hatred towards, serious contempt for, or severe ridicule of a person on the grounds of homosexuality. The Property (Relationships) Legislation Amendment Act broadened the definition of “de facto relationship” to include homosexual relationships, thus providing for court orders adjusting property rights between homosexual couples upon the termination of a domestic relationship. Id.

248 See supra Parts I, II. For a comprehensive overview and state-by-state comparative analysis of New Jersey’s laws on sexuality-related topics, readers are encouraged to examine *Overview of State Sexuality Laws* generated by the
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court found that “it is no longer open to contend that the shared social and moral standards with which the ordinary reasonable member of the community is imbued include that of holding homosexual men . . . in lesser regard on account of that fact alone.”249 The facts underlying Rivkin are distinguishable, but the court’s conclusion and analysis are instructive.250

The Supreme Court of New Jersey recently stated, “the human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination.”251 It would seem reasonable to conclude, therefore, that the court is amenable to progressive solutions like those employed in Rivkin to cure social ills. At a minimum, the state courts have acknowledged the legal impact upon the political and social reality of what it means to be an openly gay individual. The court should have utilized existing legislation and


249 Rivkin, 2001 NSW LEXIS at *7 (emphasis added). The court allowed plaintiff to re-plead his case, and submitted to the jury an amended contention that defendant had abused his position of power in an employee-employer relation by engaging in a homosexual affair with a third party. Id.

250 Id. at *1-2. The defendant in Rivkin was responsible for airing a television broadcast that suggested the plaintiff was criminally liable for the death of a woman who was the partner of a man the program alleged to be engaged in a homosexual relationship with the plaintiff. Id. Based on the broadcast, Mr. Rivkin sued the television station. In addition to the imputation of homosexuality, he pled that three additional imputations in the program were defamatory. Id. The court acknowledged defendant’s challenge to the charges involving homosexuality as the following:

[U]ntil relatively recent times the charge that a man had had homosexual intercourse with another would, without more, have been capable of being defamatory of him. However, [defendant] submitted that there had been a change in the social and moral standards of the community such that, as a matter of law, it could not be said that right thinking members of the society generally would hold that the mere fact of homosexual intercourse lowered a man in their estimate.

Id. at *5. The plaintiff successfully pled that various other imputations within the television broadcast should be submitted to the jury. Id.

recent caselaw as a reflection of community and legal values to
determine that an imputation of homosexuality is actionable as
defamatory.

CONCLUSION

It is widely accepted that defamation law is an odd and
confusing conglomeration of varying standards and procedures. Rather than lending reason and clarity to the realm of defamation law, Gray has the dubious distinction of further muddying the “intellectual wasteland” of inconsistent rulings and unenlightened decisions. While commentators urge for closer judicial scrutiny to prevent abuse of defamation law, Gray clearly overlooked the need for legal reform. The Supreme Court of New Jersey should have re-examined Gray to insure that judicial decisions are consistent with the broader efforts of the legal system.

Similarly, the social phenomenon of homophobia cannot feasibly be attributed to a single source. A reconsideration of Gray would have effectuated the court’s articulated goal of expunging society of sexual orientation-based discrimination. Some commentators have expressed expectation, and even hope, that homosexuality will one day go the path of other categories into the annals of defamatory anachronisms. No court in the United States has risen to the challenge.

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252 See generally Prosser & Keeton, supra note 9, at 771-72.
253 See Post, supra note 32, at 691.
254 Mayer, supra note 11, at 214 (stating that “courts must be tough in defining defamatory language to prevent abuse of the law . . . . Short of false and malicious statements clearly causing actual damages many defamation cases could well be summarily dismissed.”).
255 See generally Leslie, supra note 1, at 105.
256 See, e.g., Mayer, supra note 11, at 35; Arend, supra note 194, at 114; Fogle, supra note 4, at 166; Lidsky, supra note 8, at 36.
257 See, e.g., Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991) (holding that allegation of homosexuality is not slander per se and questioning, in dicta, whether such allegation should even be defamatory at all); see generally, 50 Am. Jur. 2D Libel and Slander § 199 (1995) (articulating the various positions taken by state and federal courts, all of which held that imputations of homosexuality are either defamatory per se or
New Jersey stood in the unique position to provide substantial and effective analysis to this question.\textsuperscript{258} This comment does not suggest that a reversal of \textit{Gray} would have erased homophobia from the fabric of society, or even from the state of New Jersey. A more enlightened analysis of the policy issues at stake in \textit{Gray}, however, may have provided grounds for a reversal, which would have been a step in the direction of removing the scourge of sexual orientation based discrimination.\textsuperscript{259} In light of current legislation and the strongly worded decisions previously rendered by New Jersey courts, it is lamentable that the archaic conclusion of \textit{Gray} was allowed to stand.

\textsuperscript{258} The petition for certification of the appellate court’s decision was denied. \textit{See supra} note 156.

\textsuperscript{259} Leslie, \textit{supra} note 1, at 105.