DOMESTIC VIOLENCE IN LEGAL EDUCATION AND LEGAL PRACTICE: A DIALOGUE BETWEEN PROFESSORS AND PRACTITIONERS*

PANELISTS**

KRISTIN BEBELAAR is an Associate with Gulielmetti & Gesmer, P.C., where she practices family law, real estate law, and general civil litigation. Prior to law school, she was the Children’s Program Coordinator at La Casa de las Madres, a San Francisco shelter for battered women, and she later worked in a special project of the San Francisco District Attorney’s Office to improve child sexual abuse investigations. She graduated from Brooklyn Law School in 1996. After law school, she worked as a staff attorney at the HIV Project of South Brooklyn Legal Services, where she represented low-income, HIV-positive clients in family, housing, health, discrimination and estate law matters.

STACY CAPLOW is Professor of Law at Brooklyn Law School and the Director of the Law School’s Clinical Education Program. Since 1976, she has taught diverse clinics at Brooklyn

* This article is a transcription of a program held at Brooklyn Law School on April 15, 2002. The event was sponsored and coordinated by Brooklyn Law Students Against Domestic Violence (BLSADV), a feminist student organization at Brooklyn Law School, to address the importance of incorporating gender issues, including domestic violence, into law school curriculum.

** Professor Chantal Thomas, Professor of Law at Fordham University School of Law, participated in this program; her remarks are not reproduced in this article.
Law School, including a criminal defense clinic, an inmate counseling clinic, a prosecutors clinic, and several externships. A former staff attorney with the Legal Aid Society, she currently teaches the Safe Harbor Clinic. She has taught Criminal Law and Criminal Procedure II for many years, as well as seminars and classes in White Collar Crime and Federal Criminal Law. During the 1980s, she was the Chief of the Criminal Court Bureau of the Brooklyn District Attorney’s Office, as well as their Director of Training. She has also served as a Special Assistant U.S. Attorney in the Civil Division of the Eastern District of New York. She recently taught the Prosecution Clinic at New York University School of Law as an Adjunct Professor and is active in various organizations relating to clinical legal education. Her scholarship interests range from gender issues to portrayals of women lawyers in popular culture.

PATRICIA FERSCH is the founder of the Family Law Center in New York City. Law is her second career. She was previously a retail buyer, merchandise manager and a wholesaler/manufacturer in costume jewelry in the retail trade. She returned to school for her undergraduate degree in 1983 for the purpose of finding a new career that would enable her to help people. Her new career goals were solidified in December 1990 after she saw a 60 Minutes piece called Grandmothers at Law. She interned with the organization in the summer of 1991 and decided to start a similar practice in New York. She volunteered at the Legal Aid Society when she started the Family Law Center as a low-fee legal office serving the working poor in the five boroughs. She is committed to serving individuals who are in need of legal services but are unable to pay conventional attorneys’ fees. Because of the importance of her internship experience, she works with summer interns every year and has recently expanded her practice by hiring one of her former interns as an associate.

BETTY LEVINSON is a Partner at Levinson & Kaplan, and her primary practice areas are litigation and family law. She graduated from Brooklyn Law School in 1973 and was admitted to the Bar of the State of New York in April 1974. After two
years as a criminal defense attorney at the Legal Aid Society in New York County, she began working exclusively in private practice. In addition to teaching and lecturing on gender, family law, lesbian and gay, and domestic violence issues, she has been counsel in a number of novel cases. In 1975, she was counsel for amici in *Bruno v. Codd*, a successful challenge of the mistreatment of battered women by the Family Court, Police Department, and the Probation Department. In 1985, she represented the defendant in *People v. Green*, described in her article, *Using Expert Testimony in the Grand Jury to Avoid a Homicide Indictment for a Battered Women: Practical Considerations for Defense Counsel*, Women’s Rights Reporter (Fall 1986). In 1992, she was co-counsel in *Matter of Evan*, New York’s first lesbian adoption case. She also served as counsel for the plaintiff in *Nussbaum v. Steinberg*, obtaining a ruling which for the first time tolled New York’s one-year statute of limitations for a civil assault action brought by a battered woman.

**JENNIFER L. ROSATO** is Professor of Law at Brooklyn Law School. Her area of interest focuses on ethical and legal issues related to healthcare decisions made on behalf of children. Recent articles on this subject have appeared in the *Journal of Law, Medicine and Ethics*, *Temple Law Review*, and op-ed articles in several newspapers across the country. She also writes in the area of gender and the law and other family law. She frequently lectures on family law issues and is active in a variety of bar committees and organizations devoted to these issues. She served as a Law Clerk to Judge Thomas O’Neill, Jr. of the U.S. District Court of the Eastern Pennsylvania and was an Associate with the firm of Hangleby, Connolly, Epstein, Chicco, Foxman & Ewing. After teaching at Villanova University School of Law, she joined the Brooklyn Law School faculty in 1992.

**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 author of the prize-winning book *Battered Women and Feminist Lawmaking* (Yale University Press 2000) and co-author of the
law school casebook *Battered Women and the Law* (Foundation Press 2001) with Clare Dalton, Professor at Northeastern University Law School. A national expert on gender and law, she has written numerous articles on civil rights, women’s rights and civil procedure, and has lectured around the world on these issues. She has also been a Visiting Professor at Harvard and Columbia Law Schools. In June 2000, she was recognized by the National Organization of Women–NYC with a “Women of Power and Influence” Award. She has been active in legal education reform, serving as a member of Association of American Law Schools (AALS) Executive Committee and on the Board of Governors of the Society of American Law Teachers (SALT). She joined the faculty of Brooklyn Law School in 1983, after clerking for Judge Constance Baker Motley of the United States District Court for the Southern District of New York, serving as a staff attorney with the Center for Constitutional Rights and a staff attorney with the Rutgers Law School–Newark Constitutional Litigation Clinic.

**ANTHONY J. SEBOK** is Professor of Law at Brooklyn Law School, specializing in tort law and tort theory. He has authored articles concerning handgun litigation, punitive damages, and the differences between European and American tort systems, and has lectured widely on American tort law. He has also published *Legal Positivism in American Jurisprudence* (Cambridge University Press 1999) and numerous law review articles on jurisprudence, as well as co-edited the *Philosophy of Law: A Collection of Essays* (Garland Publishing 1994). He was awarded a Berlin Prize Fellowship by the American Academy of Berlin in 1999, enabling him to spend a semester abroad as a Visiting Scholar at Humboldt University, where he began work on a series of articles examining tort theory and punitive damages. He returned to Berlin in 2001 as the DAAD Visiting Professor at the Freie Universitat. Professor Sebok is also a regular columnist at FindLaw. He received his Ph.D. in politics and was Law Clerk to Chief Judge Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania before joining the faculty of Brooklyn Law School in 1992. His current research
interests concern the way in which tort law is used to resolve and remedy social problems.

LISA C. SMITH is Assistant Professor of Clinical Law at Brooklyn Law School and is an expert in the area of domestic violence. She served for many years as Executive Assistant District Attorney for Domestic Violence, Sex Crimes and Child Abuse in the King’s County District Attorney’s Office. She is a member of the New York State Governor’s Advisory Council on Domestic Violence and the Chairperson of the Brooklyn Domestic Violence Fatality Review Team. She has initiated several innovative programs to combat domestic violence that have garnered national attention, lectures frequently on domestic violence issues, and is often quoted in the media on this subject. She has directed the Prosecutors Clinic at Brooklyn Law School for more than a decade and recently broadened the clinic’s scope to include federal misdemeanors in the Eastern District of New York. Before joining the faculty at Brooklyn Law School in 1987, she served in the King’s County District Attorney’s Office in the Narcotics Bureau, the Sex Crimes Bureau and as Deputy Chief of the Criminal Court Bureau.
INTRODUCTION

Good afternoon. My name is Candace Sady and I’m one of the coordinators of this event from Brooklyn Law Students Against Domestic Violence (BLSADV), a feminist student organization here at Brooklyn Law School.\(^1\) We planned this symposium to address the importance of incorporating gender issues, including the issue of domestic violence, into the law school curriculum.

The origin of this idea was a discussion during my Spring 2001 Battered Women and the Law class with Professor Elizabeth Schneider. We were talking about domestic violence through the lenses of sociology and psychology. A member of the class said that law school should teach students to be lawyers, not social workers or psychologists. She proceeded to say that she had come to law school to become the former.

Basically, this comment made me think about the manner in which a person who would not pre-select to learn about the issue of domestic violence might respond when confronted with it in practice. It made me consider how an attorney’s lack of understanding or interest in a client’s needs, experiences or background might affect that attorney’s perceptions, and how that could negatively impact their legal practice.

Too often students graduate from law school without an understanding of how domestic violence impacts the lives and legal claims of their clients—without a clear understanding of the link between theory and practice. This panel, consisting of law professors who teach criminal law, torts, family law and contracts, each paired with a practitioner practicing in that area, will address this omission.

---

\(^1\) Candace Sady is a graduate of Brooklyn Law School, 2002, Oberlin College, 1996, and is currently an Associate in the litigation and dispute resolution department at Proskauer Rose LLP. She would like to thank Professor Elizabeth Schneider for her assistance in organizing the symposium, Jennifer L. Cohen-Vigder for her endless contributions to the event and the Executive Board and all members of Brooklyn Law Students Against Domestic Violence.
I’d like to thank everyone in the audience for attending, and the panelists for taking the time to prepare for this discussion. At this time I’d like to introduce the moderator, Professor Elizabeth Schneider.

DISCUSSION

Professor Elizabeth Schneider

First, I want to say how wonderful it is to have a panel like this that was organized by the students in BLSADV. Thanks to all of you and special thanks to Candace, who took tremendous initiative in putting this program together. This is what you dream about as a teacher, that issues come to the fore in your classes and that students in those classes are so engaged that they take the initiative to educate the legal community more broadly.

Today, we have an impressive group of speakers, both colleagues on the Brooklyn Law School faculty and other law schools, and a great group of practitioners. Our topic is legal education and domestic violence—the need for integration of issues of domestic violence more broadly into the law school curriculum. Our focus is on criminal law, torts, contracts, and family law.

This subject of domestic violence and legal education is very close to my heart. I’ve been working for many years now with a group of law teachers around the country on these issues and with the American Bar Association Commission on Domestic Violence. The ABA Commission has published important reports on legal education and domestic violence and organized a series of conferences around the country on legal education and domestic violence.2 We now have specialized courses—what I

---

call “stand-alone courses”—courses on Battered Women and the Law, that I teach here at Brooklyn Law School, and that I’ve taught at Harvard, Columbia, and Florida State University Law Schools. These specialized courses are taught at many law schools around the country. But there are also law teachers around the country who are integrating issues of domestic violence into their mainstream law school courses. And of course there are also specialized advocacy programs on domestic violence, clinics on domestic violence, and other upper-level courses that integrate these issues.

Almost every course in law school could and should integrate these issues—first-year courses, clinics, specialized courses like health law, family law, or poverty law, international human rights, and employment law. If you look at the casebook on domestic violence that Clare Dalton and I have written, you’ll get a sense of the range of different issues and courses which are affected.

We have a critical responsibility here in the law school to train lawyers. As many of you probably know, there are far too few lawyers to assist battered women on the many issues for which they need representation. Even lawyers who practice in

---

3 For a comprehensive review, see generally A.B.A. COMM. ON DOMESTIC VIOLENCE, TEACH YOUR STUDENTS WELL, supra note 2 (examining efforts by law schools nationwide to incorporate domestic violence into law school curricula).

4 CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW (Foundation Press 2001) [hereinafter DALTON & SCHNEIDER] (examining domestic violence in relation to family law, criminal law, civil protection orders, tort liability, civil rights, employment law, insurance law, immigration and asylum law, and international human rights).

5 See id. at 339-49, 1062-92 (discussing legal representation in domestic violence cases). See also Justice Suarez, Decision of Interest, N.Y. L.J. (Feb. 11, 2003) at 18 (emphasizing that inadequate compensation has produced an insufficient number of panel attorneys resulting in the denial of counsel to family court litigants, and the courts are forced to proceed, on a regular basis, without attorneys in domestic violence, foster care placement and review, child protective and juvenile delinquency proceedings).
DOMESTIC VIOLENCE IN LEGAL EDUCATION

the field of family law do not have knowledge or experience with intimate violence so that they can even recognize when they have a case that involves these issues. Issues involving domestic violence can arise in almost every area of practice. So we have a tremendous obligation to educate ourselves and younger lawyers about issues of domestic violence.

I want to give special thanks both to my colleagues on the faculty of Brooklyn Law School who will be speaking today: Stacy Caplow, Lisa Smith, Tony Sebok, Jennifer Rosato, and to others who are not speaking, who have been terrifically supportive and enthusiastic about this curricular work. And I want to thank other colleagues, such as Chantal Thomas from Fordham Law School and Betty Levinson from Levinson & Kaplan, who are participating in this program.

It is also particularly special to have Kristin Bebelaar with us today. Kristin, now a lawyer in practice with Gulielmetti & Gesmer, who previously worked at South Brooklyn Legal Services, is a Brooklyn alum who worked closely with me as a research and teaching assistant when I was beginning to teach Battered Women and the Law and write these books. I know that as a lawyer she is now making a huge difference in the lives of many battered women. She’s an example to me of the enormous impact that learning about domestic violence as a law student can make to legal practice.

We will now begin the program.

We start with criminal law, with Stacy Caplow, who teaches criminal law here as the professor. Lisa Smith, although she is both professor and practitioner in the Prosecutor’s Clinic here, will be speaking from the practitioner perspective. Then, we will go to torts with Tony Sebok, who teaches torts here, as the professor and with Betty Levinson from the practitioner’s perspective. Then, we will move to contracts with Chantal Thomas talking from the contracts professor’s perspective, and Kristin Bebelaar from the contracts practitioner’s perspective.

---

6 DALTON & SCHNEIDER, supra note 4, at 806-79 (examining domestic violence and the law of torts).

7 The remarks of Professor Chantal Thomas are not reproduced in this publication.
And then finally family law, with Jennifer Rosato who teaches family law here, speaking from the perspective of the professor, and Pat Fersch from the perspective of the practitioner. We’ll then open it up to all of you for questions, comments and discussion.

**Professor Stacy Caplow**

I enter this conversation with a disclaimer: I do not hold myself out to be a model for teaching or incorporating domestic violence into first-year criminal law classes. To say otherwise would be false advertising in front of the many people present today who were students in that class. On the other hand, I make a determined effort to deal with these issues as a distinct part of the curriculum. I probably represent a fairly typical example of the difficulties that arise when people with good intentions try to integrate this subject into a basic first-year course. In addition, having taught criminal law for many years, I also appreciate how the topic of domestic violence has metamorphosed over this time period with this course and how it has seeped into other classes.8

Criminal law seems like an obvious place to begin this discussion. It is the course where issues of domestic or intimate violence recur in so many of the cases read, even without

---

8 Other commentators have made similar observations. See, e.g., Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 Fam. L.Q. 211, 215 (2002) (explaining that domestic violence is no longer considered strictly a criminal law concern). The treatment of domestic abuse in areas like tort law changed dramatically in the past decade. *Id.* In addition, because of feminists and women’s rights advocates, laws were changed and policies and programs developed to address the dilemmas of women often referred to as battered. *Id.* This evolution is also present in practice, outside of the academic realm. See, e.g., M. Mercedes Fort, *A New Tort: Domestic Violence Gets the Status It Deserves In* Jewitt v. Jewitt, 21 S. Ill. U. L.J. 355, 372 (1997) (explaining that a major change in domestic violence laws is the ability of plaintiffs to recover for damages from an abusive relationship under the theory of a new tort of domestic violence/battered women’s syndrome); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 Temp. Pol. & Civ. RTS. L. Rev. 325, 341-43 (1999) (describing the extension of domestic violence protection to same-sex couples).
necessarily being labeled as such. You do not need a casebook that is called “Domestic Violence and the Law” to read about forcible rape, abuse and neglect of children, or to encounter cases involving battered women raising justification defenses, or to study cases involving provocation or extreme emotional disturbance defenses in which male defendants essentially claim “she drove me crazy so I killed her.” These are a few of the innumerable topics in criminal law where sex and violence are linked.

Before I begin my brief remarks, I want to acknowledge someone in the audience who was one of the first people to bring to light the lack of coverage of domestic violence and other gendered topics in the criminal law course particularly. Nancy Erickson, who now works for Legal Services of New York here in Brooklyn, taught family law for many years at Ohio State and at New York Law School, and as a law teacher really was the first person to ask the questions, “What are we teaching about domestic violence?” and “What are we teaching about sex bias in criminal law?” Nancy published two articles in 1990 examining sex bias issues in criminal law courses and did a survey of criminal law professors concerning what they teach about these issues.9

There has always been an obvious relationship between intimate and family violence and criminal law, so it should be inevitable that these topics pervade that course.10 Yet more than ten years ago Nancy looked at the standard criminal law casebooks, and found them seriously lacking in any kind of in-depth coverage of these topics; some were even devoid of any

---


10 See, e.g., Franklin E. Zimring, Legal Perspectives on Family Violence, 75 CAL. L. REV. 521 (1987) (discussing the intersection between privacy law, in both civil and criminal contexts, and family violence).
coverage.\textsuperscript{11} She also reported the paucity of attention paid by faculty to these topics.\textsuperscript{12}

Taking a leaf from her work and thinking that this was a good way to begin my remarks, I re-read her articles and then looked at the most recent editions of six casebooks in my office, one of which I now use,\textsuperscript{13} and two others which are familiar to me.\textsuperscript{14} The remainder were books I had never examined closely before.\textsuperscript{15}

Progress over the past decade has been mixed. These newer editions contain more topics, expand familiar topics, and generally give at least lip service to the notion that domestic and intimate violence issues present complicated questions that deserve a distinct place in the study of criminal law. With the exception of the clearly recognizable issues of battered woman’s syndrome and rape, most texts often include cases involving domestic and intimate violence simply to illustrate broader doctrines without acknowledging the underlying concerns that

\begin{footnotesize}
\begin{itemize}
  \item[11] Erickson, \textit{Final Report, supra} note 9, at 316-17, 327-28 (noting that despite growing interests regarding topics that concern women such as marital violence and property distribution, “traditional casebooks has been evidenced by the failure to include, or by superficial coverage, of [such] topics . . . in the criminal law course”).
  \item[12] \textit{Id.} at 223, 242-43. The study revealed that the topics least likely to be covered in a criminal law class were the common law doctrine of coverture, spousal-conspiracy doctrine, and issues of sexual harassment. \textit{Id.} at 223. Some of the many reasons cited by professors for not teaching these topics were the belief that the doctrines were no longer relevant, lack of casebook coverage, the thought that such topics were more relevant to other courses, and the perceived unimportance of the subject matter compared to others in criminal law. \textit{Id.} at 213, 223-24.
\end{itemize}
\end{footnotesize}
DOMESTIC VIOLENCE IN LEGAL EDUCATION

Several basic topics are included in all of the books, with varying degrees of thoroughness. Some books have expanded their coverage noticeably since their earlier editions. Predictably, in every book there are materials about the battered woman’s syndrome defense that address issues that are far more complicated and treat developments over the past decade with a fair amount of depth. This is not surprising since this particular topic has been one of the leading gendered issues in criminal law—along with rape—for a long time. Equally unsurprising, in

16 Cf. BONNIE, supra note 15, at 792 (citing People v. Casassa, 49 N.Y.2d 668 (1980)). Casassa involved a man who killed the woman with whom he was in love simply because she did not love him in return; it is included in the section discussing when provocation can be used to reduce murder charges to manslaughter. Id. See also KADISH, supra note 15 at 197 (citing Kuniz v. Montana, 995 P.2d 951 (Mont. 2000)). In Kuniz, the defendant stabbed her live-in boyfriend with a knife after he became physically abusive towards her. Id. Kadish includes the case in the section discussing what constitutes culpable conduct and, specifically, whether the defendant had a duty to seek medical assistance for the victim in light of the fact that she caused the situation.

17 Cf. DRESSLER, supra note 13, at 486-506; KAPLAN ET AL., supra note 14, at 581-610, 763-75; BONNIE ET AL., supra note 15, at 360-74; DIX ET AL., supra note 15, at 786-801; SALTZBURG ET AL., supra note 15, at 751-67. Almost all of the books feature the same two cases: State v. Kelly, 478 A.2d 364 (N.J. Sup. Ct. 1984) (noting that whether expert testimony on battered woman’s syndrome is admissible evidence depends on whether it is relevant to the defendant’s claim of self-defense; however, the use of force in self-defense is only justifiable when “the actor reasonably believes that such force is immediately necessary to protect himself against death or serious bodily harm,” therefore, the expert must testify carefully so as not to determine whether the defendant’s fears and actions were reasonable since that is a question only the jury is permitted to answer) and State v. Norman, 378 S.E.2d 8 (N.C. 1989) (disagreeing with the idea that evidence of battered woman’s syndrome is sufficient, without more, to justify killing as perfect self defense, and therefore, the defendant, who was continuously abused by her husband, was not entitled to a charge of perfect self defense since her husband was sleeping when she shot him and there was no justifiable fear of imminent bodily harm). The differences appear in the discussion in the notes following the lead case.

18 Cf. Albert R. Roberts, The Criminal Justice System Can Reduce
every casebook there is an extensive chapter on rape and sexual violence offenses, all of which have expanded demonstrably over the past decade.\textsuperscript{19}

Rape and battered woman syndrome are obvious subjects that could trigger class discussion about the underlying social and psychological issues of domestic violence as well as enforcement policies. Probably most criminal law teachers engage in some form of historical or sociological conversations in their courses. However, there are other less obvious topics which should not be ignored but are often sacrificed in the name of doctrinal analysis. For example, in every book, there are some cases relating to the reasonableness standard in either or both the self-defense and provocation sections in which gender differences arise.\textsuperscript{20} Often the cases in these sections are factually based on violence against women, wives, girlfriends or objects of male fantasy. Some, but certainly not all, of the casebooks have attempted to go beyond the usual questions related to the heat of passion doctrine such as “Are mere words sufficient?” and have added note material about the reasonableness standards based on gender.\textsuperscript{21} Domestic and/or

\textit{Violence Against Women, in Violence Against Women} 163 (James D. Torr ed., Greenhaven Press 1999) (explaining that in the last two decades all fifty states have passed criminal statutes to protect battered women and that prosecution of spousal abuse as well as rape cases has steadily increased); KADISH ET AL., supra note 14, at 313 (noting that few areas of criminal law have attracted as much controversy and attention as rape over the past two decades); STANLEY G. FRENCH ET AL., VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 57 (1998) (discussing that a woman is more likely to be battered than raped and acknowledging long standing debate of battered woman’s syndrome as an imperfect defense) [hereinafter VIOLENCE AGAINST WOMEN].


\textsuperscript{20} Cf. BONNIE ET AL., supra note 15, at 354 (noting that the reasonableness standard is an objective standard, thus, “jurors must decide whether the defendant’s beliefs would be held by a reasonable person in the defendant’s ‘situation.’”).

\textsuperscript{21} Cf. DRESSLER, supra note 13, at 238-63; KAPLAN ET AL., supra note 14, at 385-415 (including several key cases involving violence by man against woman); KADISH ET AL., supra note 14, at 405-25 (highlighting cases
intimate violence is at the heart of the facts of most of these cases, but they are studied to illustrate traditional doctrinal issues, and follow-up notes rarely raise more complicated questions of gender or sex-bias. Other examples of a category of cases that offer opportunities to consider domestic and intimate violence are those dealing with omissions in the criminal act—or actus reus—section, or relating to the standard of negligence in unintentional killings, or causation. In almost all of these cases, the death of a child results in a caregiver or parent being charged with some form of either negligent homicide or assault for either directly harming, or failing to prevent harm to the child. Yet, aside from their very disturbing facts describing violence towards children, these cases are rarely used to spark any discussion beyond straightforward doctrinal analysis.

I did note some new topics in the more recently published texts. A few books acknowledged the so-called “cultural defenses,” which often pose sex-linked issues about how men and women behave under certain circumstances when they import cultural norms and behavior to the United States and then find themselves criminally accountable. Sometimes, but not always, the charges involve what Americans would consider domestic or involving killing by jealous male partner); BONNIE ET AL., supra note 15, at 776-801 (illustrating Model Penal Code approach, citing People v. Casassa, 404 N.E.2d 1310 (N.Y. 1980) (involving a rejected suitor)); DIX ET AL., supra note 14, at 473-94 (including a case where the defendant and victim were “romantically involved”); SALTZBURG ET AL., supra note 14, at 284-304 (including a case involving the killing of a “paramour”).

22 DRESSLER, supra note 13, at 277-80 (citing People v. Williams, 484 P.2d 1167 (Wash. 1971) (convicting parents of manslaughter for failing to obtain medical treatment for their child)), 196-200 (citing Oxendine v. State, 528 A.2d 870 (Del. 1987) (involving brutal child abuse in context of causation-in-fact)); KAPLAN ET AL., supra note 14, at 472-75 (citing State v. Williams, 484 P.2d 1167 (Wash. Ct. App. 1971) (holding parents liable for failing to provide medical attention to baby when a man of reasonable prudence would have done so under similar circumstances)). See also KADISH ET AL., supra note 14, at 431-33.

23 See, e.g., DRESSLER, supra note 13, at 419 n.6, 683-94; KAPLAN ET AL., supra note 14, at 415-26 (noting the relevance of cultural norms on mother’s killing of child), 599 n.11 (noting the various battering and cultural defenses).
family violence or abuse.

There are also limited references to extending the battered spouse defense to include other victims of violence, notably children.\textsuperscript{24} There was only one book that had a separate section on any kind of feminist legal theory.\textsuperscript{25} Every so often, there might be a snippet from something written by some notable and recognizable feminist scholars such as Liz Schneider, Susan Estrich or Nancy Erickson. However, other than those occasional excerpts tucked into the notes in the chapters on rape or the battered spouse defense, there is very little overarching theory at all.

Why are casebooks important? As Nancy realized years ago, they basically structure what is taught in the course.\textsuperscript{26} In her survey, Nancy asked many criminal law teachers why a certain subject was not covered. The most common response was “Because it is not in the textbook.”\textsuperscript{27} Therefore, if something is not in the book, chances are teachers will be restricted by those editorial—and possibly ideological—choices, unless they have the energy and the creativity to supplement the materials.

Casebooks do not just limit the subjects taught; they flag certain perspectives based on which cases are chosen and how those particular cases are edited. By the language used, cases reveal what the judge is thinking about the particular facts of the case. However, to impressionable first-year students, in particular, who tend to accept uncritically the perspective presented in the case, the cases shape the very way in which the issues are internalized. Even the teacher who is willing and

\textsuperscript{24} See, e.g., DRESSLER, supra note 13, at 505-06 n.5 (discussing the use of battered woman syndrome as a defense for the domestic partner who participated in a crime spree because she felt compelled to); KADISH ET AL., supra note 14, at 775 (stating, “[m]any courts that permit the use of battered woman’s syndrome to support a claim of self-defense accept similar evidence in cases involving a battered or abused child who kills the abusive parent”); BONNIE ET AL., supra note 15, at 374 n.4 (discussing the analogy between the battered wife syndrome and the battered child syndrome as defenses for murder).

\textsuperscript{25} SALTZBURG ET AL., supra note 15, at 90-96.

\textsuperscript{26} Erickson & Lamanna, Sex-Bias, supra note 9, at 311.

\textsuperscript{27} Id. at app. A.
DOMESTIC VIOLENCE IN LEGAL EDUCATION

Desirous of incorporating more materials faces the limitations posed by case selection and editing. It is worth observing, however, that case selection particularly in the chapters or sections on rape and the battered woman's syndrome defense were practically identical in all of the books I examined. There are only a finite number of cases that raise the central issues effectively.

We have been asked to talk about our concerns and inhibitions about raising domestic violence topics in a course not expressly dedicated to those issues and that purports to examine the law "objectively." Probably anything I could say about this would be true for any course with the possible exception of Women and the Law. Principally, there is the coverage tension, the challenge all of us face in every course to finish the materials. Because issues concerning domestic violence are so rich and so controversial, emphasis on them may exacerbate the coverage dilemma. Students will want to talk about them in class and no instructor would want to cut off discussion. Having raised provocative questions, it would be unfair to say, "Okay, that was our five minutes on that hot topic." You want to see the conversation develop, yet whenever you dedicate a lot of time to one issue you detract from others. Therefore, these choices present their own controversies given the expectations of the students about the course coverage and approach.

Another characteristic of criminal law that is less true about other courses is that the course is loaded with emotional land mines throughout the semester. You never know when there is somebody in the class for whom a case resonates, who has had a personal experience or similar event in their lives, whether directly as a crime victim, or whether they identify with either the victim or the defendant in some way. These are very touchy issues and can be flashpoints during class discussions. I am sure all of us teaching criminal law or family law have had students come up to us to say, "I'm not participating in this discussion . . . I hope you'll understand." They will describe something that happened to them, or to a relative or friend, that makes them uncomfortable about participating, or perhaps even attending class.
In addition to the land mines, there are also considerable gendered reactions to many criminal law issues. The criminal law course offers myriad opportunities for very exciting and lively, but often uncomfortable, debates about rape and other issues that reveal the differences between the women and men in the class concerning certain values and conduct. These topics create class divisions at the outset, and, for the instructor, it is very hard to steer tactfully and diplomatically through the class’s turbulent discussion. Moreover, it is difficult to remain objective about many of these subjects in front of the room. It is particularly hard to refrain from either discrediting or sanctioning certain deeply held points of view. Ideology and partisanship always create a risk of alienating a portion of the students. Because the semester will outlast any single class or discussion, there may be a big price to pay for taking sides or even appearing biased. This is especially true for a woman professor whom the students undoubtedly assume has a “female” perspective on sex crimes and gender related issues.

In my first-year class, the anxiety students already feel about speaking out is compounded by the nature of the subject matter. Some students are silenced by the sad and violent facts of the cases and their emotional content, while others are emboldened to speak out about their beliefs even though their comments have a tenor that departs from typical classroom atmosphere. Either way, they often speak or fail to speak for reasons largely related to emotions or feelings. This compounds the stress of the class. Not only are students concerned about whether they understand the material, they also worry about how they are reacting to it emotionally, and how their classmates are reacting to them. Moreover, during their first-year adjustment period, they generally struggle with the basic question of whether and to what degree their personal beliefs, past histories and feelings can and should play a role in their legal studies. As they try to learn to “think like a lawyer,” they often overcompensate by being too objective and neutral. In a criminal law class, this suppression of genuine feelings and beliefs contributes to the self-doubt experienced by many first-year students during their first semester.
Whatever divisions result from students’ experiences, their politics, or their beliefs, those differences intensify during discussions like this, and it is very hard to steer a steady course without jeopardizing the good will of some, if not many students, both on that day and in the future. In addition, I am not convinced—and here I speak from my own experience—that all teachers have the same ability to navigate these issues without a shipwreck. I certainly do not hold myself out as an expert on domestic violence, and I know that I cannot teach these topics as skillfully as somebody who knows more than I do. Although I do claim a degree of sensitivity and self-awareness that perhaps not all criminal law teachers possess, I still do not feel confident about my ability to handle these volatile subjects. I have convinced myself that sincerity and tact will save the day. Perhaps that is wishful thinking.28

It is hard to be all things to all people. It is especially hard to be all things to all students. They microscopically examine everything we say, reading meaning into remarks when none is intended, and are quick to find fault. As any of us who have read student course evaluations know, they are full of inconsistencies: either you let them talk too much or you cut them off too soon; you let some students dominate and other people feel put upon or ignored. All of these difficulties are just exacerbated in the context of these provocative topics.

Usually, criminal law is a required course and students cannot

28 For example, on an anonymous evaluation form, one student recently criticized me for being tactless during our discussion of rape because I asked the class to tell me about personal experiences before the whole class and when no one did, assuming that no one had any experiences, I questioned women about how they would react. This comment dramatized for me just how tricky these discussions can be since this description is radically different from what I believe occurred. I actually have a script that I use in the beginning of this section every year which specifically tells the students that they do not have to talk about personal experiences, that they have to treat this subject and others’ viewpoints with respect, and that they have to appreciate that some students may have had personal experiences that inform their opinions. Despite this admonition, this student apparently heard something completely different from what I said, probably because of his or her own expectations and discomfort.
pick their professor. Teaching about domestic violence in this setting, then, poses the problem that the student is participating in something without having chosen it. For some students—of course—this emphasis is perfectly acceptable, but for others it could be objectionable or—if not objectionable—at least they question what this emphasis is costing in the coverage of other topics: “Are we missing something if we spend so much time on this?”

I have a few thoughts about how I might try to improve my own class. One is to try to unlink domestic violence issues from gender identification. If perceived as a woman’s issue, male students—many of whom already feel alienated from the topic or intimidated about speaking out by the strength of many women’s views—will further shut down. Consistent with this, I would prefer a more integrationist approach. In other words, instead of labeling an issue “domestic violence,” identify how the case is really about domestic violence disguised as a more neutral doctrinal voice.

I also think at the same time I would re-link domestic violence to more universal issues that come up in criminal law—link sex and violence more directly to seemingly objective doctrines like reasonableness. Many of the texts provide some tools for achieving this. Link the causes of domestic violence and its emotional roots to issues that we all question in criminal law, at least from time to time, about where and how emotion and passion matter. The many ways in which men and women engage in intimate violence provide vivid and depressing examples of the kind of human behavior that the criminal law addresses. By using domestic violence as an example rather than a focal point, a more successful conversation might ensue.

Also, I think when we examine court decisions we should prod students to consider what is omitted from the text. When, instead of just saying “Miss So-and-So is the mother of a seven-year-old child,” the judge writes, “Miss So-and-So is the mother of an illegitimate seven-year-old child”—a fact that has nothing to do with the case—we should ask what this signals about the resulting outcome. This kind of blatant editorializing within a judicial decision is something that we all think about
DOMESTIC VIOLENCE IN LEGAL EDUCATION

occasionally. Why not think about it even more, bring it up in other topics in relation to all of the cases we read, and to consider how the people and the parties in the cases are being portrayed and the assumptions these portrayals produce?

Another suggestion is to encourage students to create their own stories about what is missing from the facts of a case. For example, there is a one-paragraph case in the Dressler casebook called Martin v. State, in which a man is dragged out of his house by the police and charged with public intoxication. The question is whether he committed a voluntary act. The class can have a nice conversation about voluntariness, and it is a good case for using a conventional Socratic technique. But we read it in the beginning of the semester, so I often ask my students, “What’s going on here? Why were the cops even at the house? Was there something else happening besides this man being drunk and pulled out of the house?” I ask them to write a more detailed statement of facts. Many students come up with a domestic violence story, “He was drunk, and was being abusive to his wife. A neighbor called the police.” Sometimes you can see how domestic violence is the hidden text of many seemingly more neutral stories.

In terms of techniques, if students tell stories, particularly if they experiment with role reversal a little more, they may be able to see how stereotypes determine our thinking. Even more importantly, I think we ought to take a chance on bringing more of the world back into the classroom—something I try to do in many ways including in the context of domestic violence. Read newspaper articles and relate them to cases in the text so that the

---

29 This is not to suggest that all judges are biased or derisive in domestic violence cases, although the potential ought to be noted. Cf. Joan S. Meier, Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice, 21 HOFSTRA L. REV. 1295, 1353 (1993) (stating that “judges in family court frequently express disrespectful attitudes towards the parties and the cases.”). In fact, the situation in the District of Columbia was so severe that an incoming presiding judge of the family division of the local courts suggested that training for the bench include psychological consultation so judges could separate their personal views from their professional duties. Id. at 1353 n.176.

issues introduced by cases in the book feel more contemporary and real. Have guest speakers. Go to court and see what is happening in the real world. Nothing in the classroom will resemble what is going on in family or criminal court and the real stories of the people caught up in these systems. I encourage people to do more of that in their regular classrooms.

All professors are role models in some way. What students learn, how they learn it, and what is emphasized in law school will follow them into the real world, and factor into the choices they make in practice. We have to acknowledge the responsibility of shaping the consciousness of our students. To the extent that we have a commitment to exposing this particular topic—and take care to include it more in our courses—we will leave a legacy.

Professor Lisa Smith

I’m Professor Lisa Smith, and I teach a variety of the criminal clinical programs here at Brooklyn Law School. I’ve been asked to speak as a practitioner, and I just want to say that anything I speak about as a practitioner, the clinical students here at the law school have all worked in exactly the same capacity. So I’m speaking as a practitioner and also as a clinical professor.

The first question is how does domestic violence affect criminal practice? I’m going to speak about that from three perspectives: the prosecution perspective; the defense perspective; and then quickly about the policy and planning perspective.

From the prosecution perspective, the impact is so dramatic that it’s really hard to describe. So I’m just going to tell you a little bit about statistics for one moment to give you a sense of impact.

Some of the changes that have occurred over the last few years, and the reason that we’ve had this tremendous impact change can be attributed to one thing, which is the mandatory arrest law in New York State.31 Most of you are aware of that

31 N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2003). New York’s mandatory arrest law requires, generally, that a police officer perform a mandatory arrest when the officer has reasonable cause to believe that a
DOMESTIC VIOLENCE IN LEGAL EDUCATION  431

fact, but mandatory arrest also applies in domestic violence situations\textsuperscript{32} and this has increased the number of arrests dramatically.\textsuperscript{33} Additionally, and I think probably more importantly, a lot of the work done by people like Professor Schneider and many of you in the audience has brought much attention to domestic violence and increased awareness and the number of arrests.\textsuperscript{34} These are obviously some of the reasons

\begin{itemize}
  \item person has committed a crime against a member of the same family or household, or has an order of protection in effect. \textit{Id}. It also addresses arrest without a warrant by police officer, when and where it is authorized. \textit{Id}.
  \item This practice has been met with varying sentiments. \textit{Compare} Alison B. Veerland, \textit{The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?}, 27 FORDHAM URB. L.J. 1053, 1060-61 (2000) (asserting that the mandatory arrest law has given endangered women a reliable source of assistance because the police no longer ask the woman whether or not she wants to press charges before arresting the alleged abuser), \textit{with} Kevin Walsh, \textit{The Mandatory Arrest Law: Police Reaction}, 16 PACE L. REV. 97, 105-06 (1995) (stating that the mandatory arrest law brings an influx of arrests into the criminal justice system, many of which prosecutors fail to aggressively prosecute, resulting in charges being dropped and, consequently, less incentive for officers to arrest in domestic violence situations).
  \item See DALTON & SCHNEIDER, \textit{supra} note 4 (surveying the first legal casebook on domestic violence and exploring domestic violence’s relationship with family law, criminal law, tort liability, civil rights and international human rights); Elizabeth M. Schneider & Susan B. Jordan, \textit{Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault}, 4 WOMEN’S RTS. L. REP. 149, 153-63 (1978) (advising attorneys representing battered women who have committed homicides after sexual or physical abuse of ways in which to effectively defend the women); Elizabeth M. Schneider, \textit{Equal Rights to Trial for Women: Sex-Bias in the Law of Self-Defense}, 15
432

JOURNAL OF LAW AND POLICY

why we have the mandatory arrest law.35

So to give you a sense of impact, in 1996, and I think these statistics are approximately correct, there were maybe about 5,000 domestic violence prosecutions in Brooklyn and maybe a little less in Manhattan, Bronx, and Queens.36 After that, in 1997, 1998, 1999, you were looking at about 12,000 prosecutions.37 As you can see, there was an incredible change and obviously that change has significantly impacted the criminal justice system in a tremendous way.


36 Statistics provided by Office of the Kings County DA Domestic Violence Bureau.

37 Statistics provided by Office of the Kings County DA Domestic Violence Bureau, available at http://www.brooklynda.org/Domestic%20Violence/DV.htm (last visited Apr. 3, 2003) (reporting nearly 500 felony and 12,000 misdemeanor domestic violence cases prosecuted in 1998 by the Kings County DA Domestic Violence Bureau, and over the past two years, the felony dismissal rate has averaged 4.7 percent).
DOMESTIC VIOLENCE IN LEGAL EDUCATION 433

Years ago, when domestic violence cases came into the system and even though there weren’t that many, in fact, very few, they were routinely disposed of immediately.38 When I say disposed of, I mean dismissed. What you would see in every criminal court across the entire country was this exact scenario.39 They would call the case to the calendar. The defendant would be there and he would come up with his attorney. You would also see the prosecutor there. Somebody would say, “Your Honor, this is a D.V. case.” The next person you would see is the victim—who was always in the audience—approach. The judge

38 During the 1980s, studies reported that 50 to 80 percent of domestic violence cases were dismissed. See Richard R. Peterson et al., New York City Criminal Justice Agency, Comparing the Processing of Domestic Violence Cases to Non-Domestic Violence Cases in New York City Criminal Courts, New York City Criminal Justice Agency Final Report 3 (2001), available at http://www.nycja.org/research/reports/dv01.pdf (last visited Apr. 3, 2003) (listing common reasons for the high dismissal rate, including prosecutors’ perceptions of domestic violence as a private matter and less serious than crimes against strangers, the reluctance of victims to cooperate by pressing charges or testifying against the batterer either before or during prosecution, and the difficulty in establishing strong evidence in domestic violence cases where the abuse often takes place in the home with no witnesses other than the parties to the incident).

39 The prevalence of this scenario has been noted elsewhere, cf. Elizabeth Barravecchia, Expanding the Warrantless Arrest Exception to Dating Relationships, 32 McGeorge L. Rev. 579, 582 (2001) (noting that while many battered women who summon police while under an attack later recant their stories once the officers arrive, those that allow an arrest to occur will often drop the charges soon after); Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 Yale J.L. & Feminism 3, 39 (1999) (stating that victims in domestic violence cases frequently drop their suits); Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 WM & Mary L. Rev. 1505, 1520 (1998) (reasoning that the lack of domestic violence prosecution stems from several factors, including a victim’s refusal to testify against her abuser); Nancy James, Domestic Violence: A History of Arrest Policies and a Survey of Modern Law, 28 Fam. L.Q. 509, 513 (1994) (noting that if a woman does insist that her abuser be arrested, she will frequently telephone the jail the following day and ask that he be released from custody, or, if prosecution has already commenced, she commonly requests that the charges be dropped).
would say usually, “Is the victim in the audience?” She would come up. The judge would say, “Why are you here?” And the victim would respond, “I want to dismiss the charges.” The judge’s response would surprise many of you because you’re very young, and so it is going to sound ridiculous but this is exactly how the scenario would go. The judge would respond by saying, “Has anybody threatened you to force you to drop the charges?” And she would, of course, say “No.” The judge would then say, “Is there any reason other than your own willingness to drop the charges that you’re dropping the charges?” And she would say, “No, it’s my free will.” The judge would then ask, “Has anybody forced you to drop the charges?” She would again say, “No.” The judge would say, “Case dismissed,” and that was the end of it.

So from that scenario you can see that even if there was an

40 Barravecchia, supra note 39, at 582; Epstein, supra note 39, at 39; Hanna, supra note 39, at 1520; James, supra note 39, at 513.

41 Others have noted domestic violence victims’ unwillingness to press charges against their abusers. See, e.g., Gena L. Durham, The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem, 71 S. CAL. L. REV. 641, 651 (1998) (noting that domestic violence victims are often overwhelmed with feelings of guilt relating to the prospect of putting their husbands or boyfriends in jail and are therefore less likely to cooperate with prosecutors); Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1849 (1996) (discussing that prosecutors have begun to implement mandatory victim participation policies in domestic violence cases as a response to the high number of dismissals that occur when a victim is asked whether or not she would like to proceed and that victim non-cooperation, reluctance or outright refusal to proceed are the major reasons for lack of criminal prosecution); Judith S. Kaye & Susan K. Knipps, Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach, 27 W. ST. U. L. REV. 1 (2000) (pointing out that unlike victims of random attacks, battered women often have compelling reasons for dismissing the charges against their attackers including fear, economic dependence, and affection, which makes these cases difficult to prosecute); Julia Weber, Courts Responding to Communities: Domestic Violence Courts Components and Considerations, 2 J. CENT. CHILD. &CTS. 23 (2000) (arguing that a “no-drop” policy of domestic violence prosecution recognizes that the dynamics of domestic violence are such that perpetrators may try to coerce their partners into not cooperating with partners).
arrest, the case was gone by the first court date. So those cases had no impact in criminal justice—and none in prosecution—for many, many years. So from the prosecution standpoint, there has been a sea change because you have this tremendous increase in arrests and, more importantly, you don’t have that dismissal scenario anymore. Therefore, not only are there arrests but also there’s a lot of work put into the cases in a lot of courts.

You now see that in the criminal courts it’s very common to have domestic violence cases represent about fifteen percent of the court’s caseload. So you can see that that has made a

---

42 See Randal B. Fritzler & Leonore M.J. Simon, Creating a Domestic Violence Court: Combat in the Trenches, 37 C T. REV. 28, 29 (2000) (stating that domestic violence cases have had higher dismissal rates and less serious sentences compared to other violent crimes); Donna Wills, Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution, 7 UCLA WOMEN’S L.J. 173, 177 (1997) (noting that the “great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible” and that they frequently recant their charge, minimize the abuse or simply fail to appear in court).

43 See FERNANDEZ-LANIER, supra note 33 (describing the increase in arrest rates resulting from implementation of mandatory arrest laws). See also Press Release, New York State Unified Court System, $1 Million in Federal and State Grants Allow Expansion of Domestic Violence Courts in New York City (June 25, 1998). As of 1997, Brooklyn Supreme Court Domestic Violence Part had a dismissal rate of 3.7 percent, a considerably low rate since domestic violence cases are typically dismissed because the witnesses are reluctant to testify. Id. See also supra note 37-38 and accompanying text (reporting the decline in dismissals of domestic violence cases in the Kings County DA Domestic Violence Bureau).

44 Judge Morgenstern stated that “in the Brooklyn Criminal Court, we arraign over 100,000 cases every year. One out of every five cases is a domestic violence case, . . . . In New York City, in 1997, there were over 250,000 Domestic Incident Reports (DIRs) filed. In 1998, we had almost 300,000 DIRs,” although not all of these resulted in arrest and prosecution. See Symposium, Women, Children, and Domestic Violence: Current Tensions and Emerging Issues, 27 FORDHAM URB. L.J. 565, 684 (2000). At the end of 2002, there were more than 110,000 cases pending citywide in the criminal courts. Of that number, 22,166 were domestic violence prosecutions. Statistics provided by the Office of the Administrative Judge of the Criminal Courts of
significant change for the courts and for everybody. So it's a change in the courts, and additionally, because of that—and all of this sort of follows—there are now quite a few specialized courts. So there are specialty felony domestic violence courts. There are specialized misdemeanor domestic violence courts. So additionally, the court system has moved all of these cases out of the general court calendar and they are now in special parts. So that's also a change. Actually, with the exception of drugs in some jurisdictions, there isn't any other substantive field that has its own court part in the same way that domestic violence does.

the City of New York.

45 See New York State Division of Criminal Justice Services, New York State's Domestic Violence Courts Program Fact Sheet (2000), available at http://criminaljustice.state.ny.us/ofpa/pdffdocs/domviolcourt.pdf (last visited Apr. 3, 2003). The increasing number of domestic violence cases filed prompted the establishment of special courts to adjudicate these issues, and Felony Domestic Violence Courts currently exist in Brooklyn, Bronx, and Queens. Id. The Brooklyn Domestic Violence Court, which opened in June 1996, served as a model for other domestic violence courts in New York state. Id. See also Center for Court Innovation, Brooklyn Domestic Violence Court, available at http://www.courtinnovation.org/demo_04bdvc.html (last visited Apr. 3, 2003).

46 See New York State Division of Criminal Justice Services, New York State's Domestic Violence Courts Program Fact Sheet (2000), available at http://criminaljustice.state.ny.us/ofpa/pdffdocs/domviolcourt.pdf (last visited Apr. 3, 2003). Misdemeanor Domestic Violence Courts were established in Brooklyn, Bronx, Queens and Manhattan; these courts focus attention on the victim, assessing the level of potential danger that an offender may pose since the charges may not reflect the gravity of harm that the victim may be exposed to. Id. See also Betsy Tsai, The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation, 68 Fordham L. Rev. 1285 (2000) (describing the staffing and composition of domestic violence courts with the goal to ensure that the judge and the prosecution teams are promptly aware of any crisis and facilitate a rapid and stringent measure to protect the victims).

47 See, e.g., Office of Court of Drug Treatment, The First Year Report to the Chief Judge (2002), available at http://www.courts.state.ny.us/1styrdc.pdf (last visited Apr. 3, 2003) (documenting the achievements of the Office of Court of Drug Treatment in New York, created to address cycle of addiction and recidivism in drug-related crime). See also Office of National Drug Control Policy, Summary of Drug Court Activity by
DOMESTIC VIOLENCE IN LEGAL EDUCATION

So that’s also a very significant change.

Now, those changes have obviously impacted everything. For instance, in almost every prosecutor’s office there are separate domestic violence bureaus. Therefore, if you’re a student and you’re interested in working in domestic violence—and this again applies to all the students in the clinics—and you want to do domestic violence as a prosecutor, you can volunteer to be in the domestic violence bureau. It’s interesting because for some people that’s the first thing they want to do when they get to a prosecutor’s office. For others, they’d rather stay as far away from that as possible because, of course, they want to do something really interesting like vehicle and traffic law cases. So I always find that dichotomy very odd. But that’s the truth.

I’m here as a practitioner. So I’m going to tell you about practice. You have that in almost every prosecutor’s office across

STATE AND COUNTY, OJP DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT (2002) (providing detailed information about the number of drug courts that have been operating for over two years, have recently been implemented, or are being planned in each state).

the country now. Another thing that’s very interesting to think about—in the way this has changed everything dramatically—is that domestic violence has really inspired the criminal justice system to think about cases in a different way, which simply is something called evidence-based prosecutions.\(^49\) This is something I’m going to address very, very quickly.

Now, you’re all familiar with the fact that many victims in domestic violence prosecutions do not want to press charges. That used to be the really easy way to get rid of your caseload. If somebody gave you ten domestic violence cases and you just wrote on each case, “complaining witness doesn’t wish to prosecute,” it was dismissed. That was the way it was.

That is not the way it is anymore.\(^50\) In the clinic that I teach—

\(^{49}\) One example of the Nassau County District Attorney’s policy of “evidence based prosecution” is a case in 2000 where a defendant was indicted “through the use of audiotapes of 911 calls and police observation testimony,” even though the complainant did not cooperate. See Office of the Nassau District Attorney, Sex Offense and Domestic Violence Bureau, \textit{available at} http://www.nassauda.org/DAWebpage/AnnualReports/sex_offense_and_domestic_violence_bureau.html (last visited Apr. 3, 2003) (stating that the bureau responsible for domestic violence cases “prosecutes to the fullest extent possible even when the complainant refuses to cooperate.”). See also Office of the Queens District Attorney, \textit{available at} http://www.queensda.org/DivisionsandBureaus.html (last visited Apr. 3, 2003) (stating that Assistant District Attorneys “have proceeded to trial on cases without the cooperation or testimony of the victim, where there existed other adequate and admissible evidence to support the charges.”). See \textsc{Richard R. Peterson, New York City Criminal Justice Agency, Cross-Borough Differences in the Processing of Domestic Violence Cases in New York City Criminal Courts} (2002), \textit{available at} http://www.nycja.org/research/reports/boro2r36.pdf (last visited Apr. 3, 2003). In the Bronx, the Assistant District Attorneys (ADAs) primarily prosecuted cases in which the domestic violence victims signed the complaint. \textit{Id.} In Brooklyn, however, ADAs prosecuted virtually all domestic violence cases pursuant to a no-drop policy. \textit{Id.} In the Bronx, only 80 percent of domestic violence arrests resulted in prosecution, while in Brooklyn, 99 percent resulted in prosecution. \textit{Id.} As a result of prosecuting only the cases that the domestic violence victims choose to cooperate, the conviction rate in the Bronx is 64 percent; in Brooklyn, it is only 18 percent. \textit{Id.}

\(^{50}\) See \textsc{Peterson, supra} note 49 (indicating that Brooklyn’s ADAs’ no-drop prosecution policy produced a 99 percent prosecution rate, which was 19
the Prosecutors’ Clinic—where we work primarily on domestic violence cases, we look at each case to see if it’s triable without the victim, as well as with the victim. I’d say that as a theory and as a practice, there are many people who are in favor of it, \(^{51}\) and many who aren’t.\(^{52}\) That would be the subject for an entire

percent higher as compared to the Bronx ADA’s office who primarily only prosecuted cases in which the domestic violence victims signed the complaint). See also Hanna, supra note 41, at 1860-64. “Many [prosecutor’s] offices now have pro-prosecution or ‘no-drop’ policies. . . . Some states have adopted pro-prosecution legislation, and many others have officially endorsed its adoption.” Id. “These policies actively encourage women to proceed through the criminal justice system.” Id.

\(^{51}\) At least four states have adopted legislation encouraging no-drop policies. See FLA. STAT. ch. 741.2901 (2002) (requiring the adoption of “pro-prosecution” policies and permitting the prosecuting attorney to disregard victim reluctance when deciding whether to pursue a case); MINN. STAT. § 611A.0311 (2002) (requiring all county and city attorneys to develop prosecution plans that address methods for gathering evidence other than the victim’s in-court testimony); UTAH CODE ANN. § 77-36-3 (2003) (disallowing judicial dismissal of a domestic violence case at a victim’s request unless there is “reasonable cause” to think that the victim would “benefit”); WIS. STAT. § 968.075 (2002) (directing all district attorneys offices to “develop, adopt and implement written policies” that are not based on the victim’s consent to prosecute a domestic abuse case). Other states have encouraged more aggressive prosecution of domestic violence cases but do not specifically address the impact of victim participation on prosecutorial decisions. See, e.g., CAL. PENAL CODE § 273.8 (2003) (allocating funds for use by district and city attorneys’ offices under the Spousal Abuser Prosecution Program); N.J. STAT. ANN. § 2C:25-18 (2002) (encouraging broad application of remedies in criminal courts for domestic violence cases). See also Hanna, supra note 41, at 1860-64 (advocating aggressive prosecution of domestic violence but proposing that “rather than focus exclusively on whether the victim is willing to testify at trial, prosecutors should develop strategies aimed at gathering evidence that will overcome the presumption of innocence in criminal cases. A proper investigation can reduce the likelihood that the victim will ever have to take the stand.”).

\(^{52}\) For further analysis of varying viewpoints, see Renee L. Rold, All States Should Adopt Spousal Privilege Exception Statutes, 55 J. Mo. B. 249, 249 (1999) (examining the concept of spousal privilege, discussing the various statutes in jurisdictions enacted to enforce compelled victim testimony in spousal domestic violence cases, and suggesting that compulsion statute wrongly takes the decision to testify out of the victim’s hands); Renee
separate panel. But we do that, and that’s changed things dramatically too. Because, if you can imagine, you were previously just dismissing all those cases, and now you’re actually thinking about trying each of them with or without the victim. This doubles and triples the work, and tripled the work for every prosecutor. 53 But it’s very interesting and it obviously gives you a huge amount of experience with evidence, criminal procedure, and trials. In fact—and this is not such a good story since it is an odd story—but a couple of years ago, one of the students from Brooklyn Law School was in the Prosecutors Clinic and he had a domestic violence case where the victim was uncooperative. We tried that case and the defendant was given probation. Oddly enough, and not because we even knew about it, two years later—and that was with one girlfriend—two years later he got re-arrested for beating up his new girlfriend. The case just happened to come to us and I recognized the name of the defendant. And now we are involved in trying to prosecute him for violating his sentence of probation.

I’m just going to quickly say that, from the defense perspective, bringing all of these cases creates much more work on the defense side. But there are a lot of very interesting areas to work on in the defense side of domestic violence. For one thing, mandatory arrest has done something unfortunate—it also causes a lot of cross-complaints where the woman gets arrested at the same time as the man. 54 This is because the cops get to the

Romkens, Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women, 13 Yale J.L. & Feminism 265 (2001) (emphasizing the growing acknowledgment among feminist legal scholars that mandatory arrest and prosecution policies present nd problems that deserve critical attention when developing policies to help protect victims).

53 Cf. Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171, 1188 (2002) (noting that greater arrest incentives, mandatory arrests and increased state record keeping requirements in domestic violence have resulted in a dramatic increase in arrests of both men and women, with increases running as high as 431 percent over one decade in one large California county).

54 “Retaliatory arrests are very difficult because it does not obviously present itself to either the police officer or to the District Attorney’s office at
DOMESTIC VIOLENCE IN LEGAL EDUCATION

scene and they’re not sure who to arrest.\textsuperscript{55} So there’s a lot of defense work of women who are being arrested under mandatory arrest as well as under retaliatory complaints.\textsuperscript{56}

I’m just going to quickly go through some of the problems I wish I had known as a practitioner before entering the practice. There are three things. You have to have a lot of patience and tenacity. You have to be really interested, and you have to that moment that there is a situation where we have got to sort out which one it was.” Symposium, \textit{Women, Children, and Domestic Violence: Current Tensions and Emerging Issues}, supra note 44, at 685. Furthermore, in domestic violence situations, “[w]hen cross-complaints are filed in court, the District Attorney’s hands are tied because both parties want to end the matter in court, albeit for very different reasons. The District Attorneys cannot communicate with either party without their attorneys present and the cases are labeled “ACD” (adjourned in contemplation of dismissal) with limited orders or dismissed outright.” \textit{Id.}

\textsuperscript{55} See \textit{id.} Judge Morgenstern explained that “[w]hen the domestic violence officers would show up at that point, they would now have to make an assessment as to who was the primary initial aggressor in the situation.” \textit{Id.} See also Joan Zorza, \textit{The Criminal Law of Misdemeanor Domestic Violence}, 83 J. CRIM. L. & CRIMINOLOGY 46, 57-60 (1992) (noting that the director of the country’s first batterer’s treatment program testified before the Gender Bias Study of the court system in Massachusetts that virtually every woman referred to the program was a victim wrongly accused by the batterer of being the aggressor).

\textsuperscript{56} A lawyer from Sanctuary for Families, Center for Battered Women’s Legal Services, noted:

[In the early 1990s, it used to be that my primary assistance to my clients was helping them convince the police to arrest the men who had abused them. I find myself now in the position of spending most of my time helping my clients not get arrested on retaliatory charges made by their abuser. I find that the mandatory arrest law is being used as a tool by abusers against women.” Symposium, \textit{Women, Children, and Domestic Violence: Current Tensions and Emerging Issues}, supra note 44, at 686. However, Professor Lisa Smith, Director of Brooklyn Law School’s Criminal Clinical Program, emphasized that the New York City Police Department has done special training in Brooklyn on the primary aggressor law, and there has actually “been a drop in cross-complaints in the courts, so much so that the judges actually independently mentioned to me one day that they had noticed that the cross-complaints were dropping dramatically.” \textit{Id.}
understand that you’re opening a Pandora’s box when you’re working in the field because you have to be willing to think about yourself as a social worker, and as a psychologist.\(^{57}\) You have to understand the cultural problems,\(^ {58}\) language barriers,\(^ {59}\) and other barriers because people come in with a lot of handicaps and disabilities.\(^ {60}\) You have to be willing to be the kind of lawyer who

\(^{57}\) See Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 Tenn. L. Rev. 1019, 1062 (1997) (noting that clinical practice can help prepare lawyers for legal representation of women who have been abused and pointing out that the practice involves a synthesis of elements beyond purely legal rights and remedies, including a client’s vision of herself, her experiences and her needs).

\(^{58}\) Violence against women is not limited by borders, culture, class, education, socio-economic level or immigration status. For women and their children who have immigrated to the United States, the dangers faced in abusive relationships are often more acute; immigrant women not only face pressures of cultural assimilation but also pressures of maintaining cultural traditions, language barriers, economic insecurity and discrimination due to gender, race or ethnicity. See Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand Legal Protections for Battered Immigrant Women a History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol’y & L. 95 (2000).

\(^{59}\) There is a lack of multilingual services provided to domestic violence victims. Battered women may be forced to locate their own interpreters and a victim may be forced to rely on community or family members who may be connected to her batterer. Even if service is obtained, language may interfere with the provision of adequate services; a limited-English speaker may find it difficult to discuss her experiences with a monolingual-English-speaking counselor or to live for a prolonged period in a shelter where only English is spoken. See Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the Asian American Community*, 3 Asian L.J. 151, 165 (1996). See also Berta E. Hernandez-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. Gender Race & Just. 354, 384 (1998). Hernandez-Truyol notes that “[i]mmigrant Latinas who are victims of domestic violence doubly suffer from such lack of services.” She posits that “language difficulties or undocumented status can interfere with obtaining information about services or gaining access to services that is compounded by the additional obstacles of a possible inability to communicate with service providers or fear of deportation for themselves.” Id.

\(^{60}\) See Conference, *Revolutions Within Communities: The Fifth Annual*
doesn’t say, “I’m just doing criminal. I don’t need to know about Medicare benefits, the school system, family court,” etcetera.\textsuperscript{61} Because you’re going to need to know about every single thing that people are going to discuss here. Thank you.


\begin{quote}
disabled women are dependent upon their abusers for everything, and their abusers in most cases are their caregivers . . . . Their abusers or caregivers may restrict their access to transportation. Caregivers may withhold wheelchairs and medications, refuse to assist with personal needs, leave their partners in bed all day and not get them up to go to the bathroom, resist access to friends, those sorts of neglectful type activities. So here is a disabled person who is dependent upon their abuser. If they report the abuse, they lose the person who gets them out of bed every day. They may lose their children as well, because if they go to a shelter, if there is one accessible for them, their children will have to go into foster care or some other place. For all these reasons, on top of their isolation, women with disabilities really do not have a lot of options and are often fearful of reporting the abuse, which is why they stay in dangerous situations significantly longer than non-disabled women. A disabled woman will stay in an abusive situation 8.3 years versus 4.1 years for a non-disabled woman.
\end{quote}

\textit{Id.} Additionally, seven years ago, SafePlace, a Texas-based organization recognized that disabled women were victims of domestic violence at a higher rate than the general population. See Chuck Lindell, \textit{Grants Will Help Abuse Victims Who Are Disabled}, \textit{AUSTIN AMERICAN-STATESMAN}, Mar. 5, 2003, at B1. “Women with disabilities are easier to victimize and harder to help afterward, a devastating combination that Austin-based SafePlace has struggled for seven years to correct . . . SafePlace last year won U.S. Justice Department approval to run a national program helping disabled victims of domestic violence.” \textit{Id.}

\textsuperscript{61} To effectively provide for the needs of a battered client, a lawyer must consider, among other things, child support, child custody, the psychological impact on the client and the client’s safety. \textit{See, e.g.}, Linda G. Mills, \textit{On the Other Side of Silence: Affective Lawyering for Intimate Abuse}, 81 CORNELL L. REV. 1225 (1996) (arguing that traditional legalistic approach to domestic violence is ineffective and insensitive to the complex circumstances that give rise to violence in intimate relationships).
Thank you. I’m very honored to be asked to speak on this issue. It is an issue which actually I see as continuous with a larger question, which has to do with the relationship between tort law, the education we receive in tort law and its application to larger questions of social policy.

I think that one of the lessons in looking at a typical casebook in tort law or looking at a syllabus is that concealed underneath what appears to be a rather technical and formal set of concepts are an incredible array of substantive decisions that are made by courts, both at the level of judges and juries. And these decisions get codified, and concretized in appellate decisions, which are then taught to you in your casebook.

The problem with thinking about domestic violence from the perspective of tort law is, I think, the following. Clearly, the concepts which you want to learn in order to be a skilled torts lawyer—or just a lawyer in general, so that you know what the practice of civil liability looks like—are broad. And in fact, the broadest and most important category really has to do with accident law. Accident law has a number of deep concepts which don’t necessarily hook up directly with what you might think of as the primary area of interest for someone who is concerned about domestic violence issues. But even here there is a bit of a confusion. Because actually many of the concepts that need to be raised in thinking about negligence law hide serious questions about power and the distribution of power in society.

Currently, feminist scholars have written a great deal about critiques of the tort system, mostly from the perspective of looking at the negligence law system. However, within tort law there is also the whole issue of intentional torts. I remember when I began teaching torts, Regina Austin, a critical race scholar at the University of Pennsylvania School of Law, and a critical legal studies scholar, told me that she spends much of her time in her first-year torts class talking about intentional torts.

I was a little surprised by this. But she explained to me that many scholars who are progressive gravitate towards the
intentional torts section of the first-year course. And the reason for that is, of course, that with intentional torts there are an awful lot of opportunities to think about how violence is visited upon people who do not have real access to the criminal justice system, and also how in intentional torts there may be creative ways to at least recognize and perhaps even remedy the exercise of violence.

There is not as much scholarship on intentional torts from a feminist perspective as there ought to be, but there are a handful of wonderful articles. I would point out in particular Clare Dalton’s wonderful piece from 1997, and also a recent piece by Jennifer Wriggins in the *University of Southern California Law Review* called *Domestic Violence Torts*. I’ve learned an awful lot about how to think about intentional torts by reading works like these.

Now, in talking about the things that you might want to learn from your torts course, an advanced torts class or thinking further about torts on your own, and then of course talking to torts practitioners like Betty Levinson, who is here today to speak with us, I want to just point out that there is an incredible array of ways in which the interactions between married and unmarried

---

62 Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319 (1997) (examining the obstacles to intentional torts suits brought by the abused spouses). The article begins with a proposal that the removal of interspousal immunity does not leave spouses free to sue one another in intentional tort claims. *Id.* at 321. Proceeding from the premise that there is a huge difference between simply removing the obvious discrimination against such plaintiffs embodied in the interspousal tort immunity and making the tort system genuinely hospitable to them, it directs possible solutions to practitioners, judges and legislators, involving significant redesign of the tort system. *Id.* at 323.

63 Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001) (offering an approach to civil liability for domestic violence torts through insurance reform because standard liability insurance policies, which generally do not cover domestic violence torts, are one of the reasons for the surprisingly small number of tort suits compared to the frequency with which people are injured by domestic violence). The article proposes procedural changes as a part of the solution for better access to the justice system. *Id.* at 176. It also addresses the relative lack of deterrence and compensation that the tort system and insurance policies provide domestic violence torts. *Id.* at 124.
individuals who have a domestic relationship manifest themselves as torts.

To list just the intentional torts—and I apologize if this is going to sound like a quick look at the table of contents of your bar review course book—there are battery, assault, intentional infliction of emotional distress and false imprisonment. There is also a whole way of categorizing many of these intentional acts as negligence, for reasons which I’ll explain in a moment. That is just in the personal injuries areas. False imprisonment is technically personal injury.

Then in privacy and defamation, you can claim privacy violations within the domestic context just like one can claim privacy violations between strangers. You have to plead it right, but you could. Similarly there are, of course, opportunities for slander and libel, since disputes between individuals involving a great deal of vitriol do actually manifest themselves in false statements made about each other. Finally—and I wonder how much we will have a chance to talk about this today—there is a very interesting area in which some aspects of both divorce law and also relations between unmarried couples present questions about fraud and conversion, because property is involved. And so you have the whole panoply of common law tort brought in the interaction between individuals who have domestic relations with each other.

Now, the bad news is that one reason why many cases don’t seem to present themselves in your torts casebook this way—for example, we could of course think about some cases that could have been, like the famous Tarasoff case, is an example of a boyfriend murdering an ex-girlfriend.64 Or the whole question about subjective versus objective judgment in defense in battery could also be raised in that context.

But I’m not going to sugarcoat this. It doesn’t happen too often. And why it doesn’t happen too often is not just because of

64 Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that when a psychotherapist determines or should determine that his patient presents a serious danger of violence to another person, the psychotherapist has a duty to use reasonable care to protect the intended victim against such danger).
the inherent sexism of the casebook authors, although that might be an explanation. It is also because—and here we’ll have to speak with Ms. Levinson about this—there are certain very simple barriers as to why a large volume of cases do not make it up into the appellate courts, and maybe not even to filings and I’m going to briefly mention them. I think you may want to go into them in greater depth another time.

First of all, the lack of insurance of defendants makes it somewhat tricky for lawyers to take on cases. They may have insurance, but if it is an intentional tort their insurance won’t cover them. New York State, for example, doesn’t allow insurance contracts to be written that cover intentional torts, and this is true for a vast majority of states. So there you have simply a system of judgment-proof defendants. One famous defendant who may or may not be judgment-proof is O.J. Simpson. He was sued and actually lost a tort action against him for wrongful death. I suspect that the plaintiffs will eventually—if they have not already—locate personal assets to recover. But you can imagine that it is a very tricky proposition to structure tort law as a response to violence between domestic partners when insurance is a problem.

Secondly, and this is an interesting way in which one can frame the teaching of a torts class. It happened to me this morning. I realized, as I was teaching a statute of limitations case, that I could teach it from this perspective. But statute of limitations is in fact a tricky problem when you’re talking about intentional torts. The short statute of limitations makes it hard for people to bring claims, especially when they are afraid of retaliation if they’re intending to pursue divorce later on or if they’re intending to try and extricate themselves, given that there may be children in common or property in common. So the short statute of limitations makes suing for intentional torts very, very difficult, which is why you don’t see very many claims. There are also some very interesting cases on the question of continuing torts, as well as on the question of equitable tolling. But the law does not look very good.

Finally, the law of damages itself presents an interesting problem about how to measure and how to award damages.
Naturally, you’d think that this would be a wonderful area where punitive damages would be a great way for torts practitioners to use the skills that they have. But what we can talk about later is why juries are not necessarily sympathetic in the framing of punitive damages in cases including intentional torts against women as they might be in other contexts.

I think that’s where I’m going to end it now, because what I’d like to hear more about is how these problems get played out in a variety of contexts, including the context of divorce, because I think that’s really one of the biggest problems. Thank you.

Betty Levinson

It is a pleasure to be with you. As I begin our discussion about tort and other civil remedies for victims of domestic violence, I want to first connect with Lisa’s reference to criminal court allocutions. As I listened to her comments, I thought back to 1973, my last semester here at Brooklyn. Parenthetically, Nancy Erickson, whose work has been acknowledged by Stacy Caplow, and I were in the same section. I am glad that we are all here together today.

During that semester I was a member of the first class of students permitted to appear in criminal court under the aegis of the Legal Aid Society, as it implemented the new “student practice” rules. We worked down the block on Schermerhorn Street, standing up for real clients in the arraignment part. Each time an assault case came in, the judge demanded to know the whereabouts of the complainant. If the assault was of the domestic variety, he would ask, “Where’s the wife?” or “Where’s the girlfriend?” and the case would invariably be

---

65 See presentation of Professor Lisa Smith, supra pp. 430-44.
66 See presentation of Professor Stacy Caplow, supra pp. 418-30.
67 N.Y. JUD. LAW § 478 (McKinney 2002) (allowing students to practice a limited amount of law and perform all of the essential lawyering functions in the jurisdictions including meeting with clients and witnesses to gather facts, analyzing legal problems and providing legal advice, negotiating matters on behalf of clients with opposing parties and representing clients before courts and administrative tribunals under faculty supervision).
dismissed as a mere “domestic dispute.” 68 If the case involved strangers, the question was, “Where’s the victim?” This was followed with inquiries regarding the severity of the injuries to determine if the offense was a misdemeanor or felony.

In the years since then, awareness about the nature and impact of domestic violence has grown. 69 We have ads in the subway and public service messages in magazines and newspapers. Daytime TV is filled with domestic violence on talk shows, not to mention the soaps. Many people have become more thoughtful about this problem and no longer automatically go into victim-blaming gear. 70 We better understand the shame and fear that make it so difficult for a domestic violence victim to be public about her painful private life. 71 We observe the

68 Other commentators have noted this phenomena. See, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 104–06 (2000) [hereinafter SCHNEIDER, BATTERED WOMEN] (suggesting that the domestic violence victim’s stories are often marginalized in the courtroom).

69 For example, approximately 5 percent of employers have established policies pertaining to domestic violence. See Cycles of Silence: More Employers Today Are Doing Their Part to Help Employees in Abusive Relationships, CINCINNATI POST, June 4, 2002, at 1B (“For years, employers considered domestic violence a private matter, an issue best kept behind closed doors . . . . [Today] about 5 percent have policies that specifically address domestic violence”). In addition, some police departments have procedures for responding to domestic violence calls that allow officers to arrest the offender if someone has been beaten regardless of whether the victim decides to press charges. See presentation of Professor Lisa Smith, supra pp. 430-44 (discussing changes in processing and prosecuting domestic violence cases in New York City).

70 In fact, Battered Women’s Syndrome (BWS) is generally admissible as part of a self-defense claim when a woman is charged with murder. See, e.g., People v. Seeley, 720 N.Y.S.2d 315 (Sup. Ct. 2000) (stating that BWS is not a complete defense but is evidence of the defendant’s state of mind relevant to a legally accepted defense, such as justification, and holding that a woman on trial for the second degree murder of her boyfriend could submit expert testimony related to her condition as a battered woman); People v. Garcia, 1 P.3d 214 (Colo. Ct. App. 1999) (finding evidence of BWS admissible as to the general validity of a self defense claim; such evidence goes toward establishing whether, from the defendant’s viewpoint, she was justified in using deadly force).

71 This difficulty has been noted elsewhere. For example in the process of
powerful draw of the abusive partner, as well as the nature of the emotional harms that inevitably accompany physical injuries. Despite this progress, we are still challenged by the need to truly bring this knowledge home—not just to the trenches where we lawyers work—but beyond, to the policy makers, and ultimately to our legislators, who create the standards for civil behavior and the remedies for their breach. We still have a lot of work to do.

Over the years, virtually every person I have worked with who has been a victim and then a survivor of domestic violence has been clear: the permanent injuries of most domestic violence are not physical, they are emotional.\textsuperscript{72} They are the psychic, long-lasting pains of betrayal by somebody you had every reason and right to trust. Abuse by a trusted person—a domestic partner, a parent, a teacher, a psychotherapist, a clergy person—should not be treated as a garden variety tort, as the current crisis in the Catholic Church prompts us to remember. The power of the intimate abuser over his victim carries with it an imperative of silence. When the nature of the wrong makes such silence foreseeable, laws requiring prompt action remove any possibility of redress. Even sympathetic judges can do no more than point to the legislature for hope of reform, as has been demonstrated in the case law of childhood sexual abuse.\textsuperscript{73}

construction and location of a $3 million women’s shelter in Milwaukee, Wisconsin, the center and its staff expressed hope that “shedding the secrecy of [the building’s] location will increase awareness of domestic violence” and eliminate the privacy of the abuse. Ana Caban, Public Appeal Begins For Shelter, MILWAUKEE JOURNAL SENTINEL, Feb. 5, 2002, at 3B. “Privacy was once closely guarded as a way of preventing more violence against women and children. Becoming public, however, is a way of holding the perpetrator more accountable, . . . and a way of telling the community, [l]et’s all help to solve this problem’ of domestic violence.” Id.

\textsuperscript{72} Cf. Mary Ann Dutton, Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 HOFSTRA L. REV. 1191, 1216-19 (1993) (noting that the psychological impact of domestic violence and abuse reaches beyond depression, anxiety, or nightmares, and that “[p]sychological reactions to violence also include the ways in which battered women have come to think about the violence, themselves, and others as a result of their experiences.”).

\textsuperscript{73} For example, one opinion noted that “[i]t may be that special legislation is necessary to protect the civil rights of the defenseless victims.”
Our procedural and substantive laws on the civil side do not provide a welcome mat to domestic violence victims. Given the fact that the vast majority of domestic assaults are charged as misdemeanors or violations, tort claims pleading significant emotional injuries are legally hobbled when not accompanied by serious physical injuries. In addition, tort attorneys, paid on contingency fee agreements, are generally unwilling to litigate cases without the promise of a substantial recovery, which, at present, goes hand-in-hand only with such physical injuries.

In the absence of state law that would presumptively permit domestic violence victims to obtain meaningful financial compensation for their psychological as well as physical injuries, civil remedies, either in the tort sphere or within the matrimonial law context, however, turn a cold shoulder toward domestic violence victims. In New York, courts have been unfriendly to both married and single women seeking tort remedies for the psychological injuries sustained because of domestic violence. The court of appeals ruled out any cause of action for damages for the intentional infliction of emotional distress between married people, a rule of law that continues to disallow such claims until the present time. The same result applies to


Statutes of limitations present the most obvious example. See, e.g., Wriggins, supra note 63, at 139-40 (noting the relatively short statutes of limitations for intentional torts compared to negligence and strict liability, and how the dynamics of domestic violence can make filing a tort claim near the time the injuries are sustained difficult if not impossible).

See, e.g., Weiker v. Weiker, 290 N.Y.S.2d 732, 734 (1986) (stating that recovery for intentional infliction of emotional distress should not apply to marital disputes); Murphy v. Murphy, 486 N.Y.S.2d 457, 459 (App. Div. 1985) (reducing an award for intentional infliction of emotional distress to an ex-girlfriend because there was no evidence that her injuries were permanent).

See, e.g., Reich v. Reich, 657 N.Y.S.2d 671, 672 (App. Div. 1997) (holding that a claim for the intentional infliction of emotional distress between
unmarried co-habitants.\textsuperscript{78}

Furthermore, in the tort arena, the statute of limitations for assault and other intentional torts is typically very short.\textsuperscript{79} In New York, it is just one year.\textsuperscript{80} It often takes a battered woman numerous attempts to permanently break away from an abusive partner. A domestic violence survivor is likely to be emotionally bound to her abuser even after physical separation.\textsuperscript{81} Thus, the expectation that she should be in a position to sue within one year is unrealistic. Here, I can’t help but observe that the statute of limitations for breach of contract in New York is six years,\textsuperscript{82} which speaks volumes about our legislature’s priorities.

One recently achieved exception to New York’s one-year statute of limitations arises if an adult domestic violence victim

\textsuperscript{78} See Williams v. Lynch, 666 N.Y.S.2d 749, 750 (App. Div. 1997) (holding that plaintiff could not maintain an action for intentional infliction of emotional distress where her “allegation was not atypical in a matrimonial dispute and did not rise to the level of atrocity or outrageousness to sustain such a claim.”); Artache v. Golden, 133 A.D.2d 596 (N.Y. App. Div. 1987) (holding that there was no cause of action for intentional infliction of emotion distress in New York arising out of an oral partnership agreement by the parties who cohabitate and hold themselves out to be husband and wife); Baron v. Jeffer, 469 N.Y.S.2d 815 (App. Div. 1983) (finding that it would be contrary to public policy to recognize recovery for intentional infliction of emotional distress in the context of a “dispute arising out of the differences” occurring between persons who, although not married, have been living together as husband and wife for an extended period of time).

\textsuperscript{79} For example, California, Texas and New Jersey have a two year statute of limitations for intentional torts. CAL. CIV. PROC. § 335.1 (2003); TEX. CIV. PRAC. & REM. § 16.003(a) (2003); N.J. STAT. ANN. § 2A: 14-2 (West 2003).

\textsuperscript{80} N.Y. C.P.L.R. § 215(3) (McKinney 2003).

\textsuperscript{81} See, e.g., Barriers to Leaving a Violent Relationship, National Coalition Against Domestic Violence, at http://www.ncadv.org/problem/barriers.htm (last visited Mar. 4, 2003) (detailing the reasons why women stay in violent relationships as well as why they may feel emotionally bound to their abusers). During non-violent phases, a victim can view her abuser as a “good man” who fulfills her dreams of romantic love. \textit{Id}.

\textsuperscript{82} N.Y. C.P.L.R. § 213(2) (McKinney 2003) (stating that an action upon a contractual obligation or liability, express or implied, must be commenced within six years).
DOMESTIC VIOLENCE IN LEGAL EDUCATION

can show that her injuries—physical, emotional, or economic—were so severe as to render her incapable of functioning in society. The decision in the case, Nussbaum v. Steinberg, on which I served as plaintiff’s attorney and Liz Schneider acted as counsel for amicus curiae, contains language that vividly describes the intensity of a battered victim’s connection to her abuser. I am glad to say that the domestic violence survivor whose efforts to effectuate this precedent, Hedda Nussbaum, is with us today.

In the Nussbaum case, it was the physical element of the tort that provided the basis for damages, as opposed to the emotional injuries. Again, emotional pain and suffering, to be compensable, requires a physical injury. Psychological injuries alone constitute second-class damages, as illustrated in Roy v. Hartogs, where an emotionally ill patient became the sexual prey of her psychiatrist. Although a jury awarded significant

---

84 Id. at 33. See also Court Decisions, First Judicial Department, New York Part [hereinafter, Court Decisions], N.Y. L.J., Mar. 12, 1997, at 26, col. 3 (reproducing the opinion of special referee Liebman that allowed tolling of the statute of limitations for insanity in a domestic violence case where the victim was so overpowered by her abuser that she became unable to independently function in society and protect her legal rights).
85 Court Decisions, supra note 84. Stating that in cases of domestic violence:
the abuser and the victim are generally found to be in a close or intimate relationship. The destructive impact of violence in such an intimate relationship may be so complete that the victim is rendered incapable of independent judgment even to save one’s own life. In various forms, the victim may very well turn to the tormentor for connection and support.

Id.
86 Id. (stating that “[a] factual demonstration on the record of physical, emotional and even economic abuse can serve as an evidentiary basis for demonstrating that one is incapable of pursuing their legal rights” and entitled to an extension of the one-year statute of limitations in New York).
87 381 N.Y.S.2d 587, 588 (App. Div. 1976) (holding that a plaintiff who claimed that her psychiatrist had sexual intercourse with her for thirteen months as part of her therapy could sustain a cause of action for malpractice).
damages, the appellate division drastically reduced the award.88

Remedies for domestic violence occurring within the marriage relationship have been equally unavailing. When we think about the intersection of domestic violence and divorce, we remember our family law courses, and history in which women were the property of husbands and subject to his “chastisement,” provided a wife was beaten by a stick no thicker than his thumb.89 For centuries, the notion of a wife suing her husband for exercising his rights was legally without merit.90 Gradually, over time, legal impediments for women were lifted with the introduction of the Married Women’s Acts91 and the repeal of interspousal immunity in many jurisdictions.

Faced with procedural and substantive impediments to obtaining damages, attorneys have sought alternative theories by which to obtain appropriate compensation for clients, such as negligence and fraud, which was the basis for recovery in *Maharam v. Maharam.*92 The defendant husband in *Maharam* was liable for failing to inform his wife that he had contracted

---

88 *Id.* at 589. The appellate court modified the jury award of $153,697.50 in compensatory and punitive damages, holding that compensatory damages greater than $25,000 were excessive and that the plaintiff could not recover punitive damages. *Id.*


90 See, e.g., Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence,* 23 J. Fam. L. 359, 340-41 (1984) (stating that the “perception of the marital relationship gave husbands the legal right to beat their wives because married women were considered ‘nonpersons,’ they enjoyed virtually no rights—not even the right to be free from physical beatings.”).

91 See, e.g., N.Y. Gen. Oblig. Law § 3-313 (West 2001) (providing a married woman with a right of action for an injury to her person, property or character, or for an injury arising out of the marital relation, as if unmarried).

DOMESTIC VIOLENCE IN LEGAL EDUCATION

herpes. However, it was by the plaintiff’s reliance upon an imperative in the Public Health Law, rather than any law or attitude recognizing the nature of domestic violence, that permitted her to sue for money damages.

Some attorneys have turned to the matrimonial sphere to pursue economic recognition of physical and emotional injuries sustained by domestic violence victims. In New York, the divorce cause of action under which a wife must sue is “cruel and inhuman treatment,” which requires a showing that the defendant has engaged in conduct that “so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to co-habit with the defendant.” However, the level of cruel and inhuman treatment that may be actionable in a short marriage will not suffice in a marriage of long duration, increasing the burden of proof for a domestic violence victim in a longer marriage. To compound this problem, there is a five-year statute of limitations for cruel and inhuman treatment. A wife who remains with—or even separates from—an abusive husband and does not bring an action within five years cannot obtain a divorce on cruelty grounds. Again, the current

93 Maharam v. Maharam, 510 N.Y.S.2d 104 (App. Div. 1986). The appellate court ruled that the husband had an affirmative legal duty to disclose that he had genital herpes to his wife based on a section of the Public Health Law which provided that “any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor.” Id. at 107. See also N.Y. PUB. HEALTH LAW § 2307 (McKinney 2003).

94 Maharam, 510 N.Y.S.2d at 107 (noting that the wife alleged that the husband was grossly negligent in failing to disclose the fact that he had genital herpes, which was the proximate cause of her injury). The court found that “[t]his states a legally cognizable claim inasmuch as the husband’s alleged conduct violates section 2307, a statute enacted for public health and safety, and may therefore be negligent per se.” Id.

95 See N.Y. DOM. REL. LAW § 170(1) (Consol. 2003).

96 See, e.g., Hessen v. Hessen, 353 N.Y.2d 421, 426-27 (1974) (holding that the level of cruel and inhuman treatment that must be established in a divorce proceeding increases with the duration of the marriage).

97 N.Y. DOM. REL. LAW § 210 (Consol. 2003).

98 Id.
statutes ignore the many reasons why an abused wife may not be able to bring an action within the requisite time, thus preventing her from obtaining a judgment of divorce, or, as likely, forcing her to accept undesirable settlement terms. Moreover, the standard settlement agreement contains a general release that waives any right to sue on any cause of action occurring prior to the execution of the agreement.

New York divorce law has never contemplated the explicit granting of financial compensation to an abused spouse. Before 1980, title controlled the distribution of property—most typically to the husband—and alimony was available to a dependent spouse. However, no matter how badly abused the wife was, if she was guilty of marital misconduct, her right to alimony was extinguished.99

In 1980, New York’s Equitable Distribution Law became effective, creating a new genus of marital property. However, the statute is facially blind to fault and in the twenty or more years since its effective date, only a handful of cases have weighted the distribution of property in a fashion that recognizes the impact of egregious behavior by an abusive spouse.100 I believe Kristin will talk about one such recent case, Johnston v. Martin, 101 handled by her office.

The result of our statutory framework is that if a stranger strikes me and does me significant physical and/or emotional injury, I can sue him for my medical expenses, my pain and suffering, as well as punitive damages. If my husband assaults me, however, my principal remedy is divorce, under the “cruel

99 See generally David Kaufman, Note, The New York Equitable Distribution Statute: An Update, 53 BROOK. L. REV. 845 (1987) (explaining that prior to the passage of section 236 of the New York Domestic Relations Law, New York courts were required to award property upon divorce to the spouse that held title to the property, often resulting in the husband being awarded the property).
100 Havell v. Islam, 751 N.Y.S.2d 449, 452 (App. Div. 2002) (citing the trial court’s finding that the husband’s behavior was “so egregious as to ‘shock the conscience’ and relied on its equitable powers to render justice between the parties.”).
101 See presentation of Kristin Bebelaar, infra pp. 460-73.
and inhuman treatment” provisions of the Domestic Relations Law, and I have no right to compensation above and beyond my “equitable share” of the marital estate, and perhaps a claim for spousal maintenance—particularly if I have been so badly injured I am unable to work. If there is no marital estate at the time of the divorce judgment, and if my husband currently has no significant income, I’m out of luck.

While the result in Johnston is correct, it does not grapple with the underlying problem—that is, current remedies do not presumptively entitle an abused spouse to compensation for the physical and emotional injuries suffered during marriage either by way of a larger share of the marital estate or payment in the nature of damages. In addition, the financial circumstances of the family at the time of judgment are those upon which the court

102 See N.Y. Dom. Rel. Law § 170(1) (Consol. 2003). Providing that “[t]he cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.” Id.

103 A court may award maintenance “in such amount as justice requires.” N.Y. Dom. Rel. § 236, Part B, (6)(a) (Consol. 2003). In determining the amount of maintenance to award, courts consider a variety of factors, including the parties’ health and earning capacities and the ability of the party seeking maintenance to become self-supporting. N.Y. Dom. Rel. § 236, Part B, (6)(a)(2)-(4) (Consol. 2003). The statute also allows a maintenance award for “any other factor which the court shall expressly find to be just and proper. N.Y. Dom. Rel. § 236, Part B, (6)(a)(11) (Consol. 2003).

104 See generally Dalton, supra note 62, at 387. The author states:

If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.

Id.
must make its determination, without reference to the abuser spouse’s separate property. This excludes from judicial consideration the possibility that the abuser may have secreted assets and income or that he may vastly improve his financial standing after the entry of judgment. If an award were made without reference to the family’s present economics, a judgment for such damages would function like any money judgment under New York state law, that is, it would be effective for a period of twenty years.105

Another area where domestic violence and tort law may intersect is on issues regarding the liability of a third party. For example, is a police department that is aware of an order of protection but fails to take action to enforce it liable for money damages? In Connecticut, the answer is yes.106 In New York, unless the plaintiff victim can show a “special relationship” to obtain a finding of police negligence, she has no remedy.107 In addition, even if there is an actionable claim, the police department will implead the abuser, thus, substantially reducing its share of damages.

As we make efforts to further modify our laws to provide remedies for victims of domestic violence, we should be mindful of what Candace mentioned about having our antennae sensitized to picking up issues of domestic violence.108 In many spheres, not necessarily those that immediately announce themselves, domestic violence is just beneath the surface. For example, the client who comes for help regarding a real estate dispute with her former lover may not feel comfortable speaking about the

105 See N.Y. C.P.L.R. § 211(a) (McKinney 2003).
106 See, e.g., Thurman v. Torrington, 595 F.Supp. 1521 (D. Conn. 1984) (finding a cognizable cause of action under the Equal Protection Clause where the police afforded more protection to those who were abused by non-relatives but did not devote the same level of attention and care when the abuser was the spouse or relative of the victim).
107 See, e.g., Sorichetti v. New York, 65 N.Y.2d 461 (1985) (holding the police department liable for negligence only when a special relationship exists between the city and the infant because of an order of protection).
intimate details of their abusive relationship. However, the outcome may turn on the fact that there have been allegations of domestic violence. By way of another example, the fact that a client is afraid of her life partner may influence the manner in which a will is drafted.

As practitioners, we need to elicit all facts that will enable us to properly counsel our clients, even in cases where domestic violence may not seem to have any role in the problem the client has presented to us. Unless we can make our clients comfortable enough to trust us with such information, we may be missing a big piece of the picture.

In conclusion, we need to keep focused on all levels of concern. The legislature should be persuaded to bring current tort law into the modern era by making it accessible to victims of domestic violence who would otherwise be foreclosed by short statutes of limitation. Trial and appellate courts should be encouraged to recognize the depth of the psychological injuries suffered by victims of domestic abuse. Furthermore, attorneys should be attuned to the unspoken in order to permit injured clients to feel comfortable enough to describe what is, for most people, unspeakable.

109 See Andrea D. Lyon, Be Careful What You Wish for: An Examination of Arrest and Prosecution Patterns of Domestic Violence in Cases in Two Cities in Michigan, 5 MICH. J. GENDER & L. 253 (1999) (discussing generally that victims of domestic violence are reluctant to report abuse and pursue criminal action for fear of inciting more abuse from their abuser).

110 A victim’s fear of her abuser may intersect with her anxiety about being able to obtain assistance from the judicial system. See Betty Levinson, Handling the Domestic Violence Case 2000, 82 PLI/NY 11, 20 (2000). Therefore, attorneys must be sensitive to their clients’ doubts and fears and may have to adjust settlement or trial strategies in response. Id. at 21. Attorneys must maintain professional competence and the zealous representation of their clients, which requires awareness of all relevant aspects of law that could impact the handling of any particular issue in domestic violence cases. Id. at 23.

111 The difficulties of open communication between abused clients and their legal counsel have also been noted elsewhere. See, e.g., Bruce J. Winick, Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot, 4 PSYCHOL. PUB. POL’Y & L. 901, 907 (1998) (noting that when a client
Kristin Bebelaar

I have to say at the outset that I am honored and frankly, a little nervous to be on this panel. I’ve been practicing law for about six years and it’s hard for me to believe that I’m on a panel with the people who taught me much of what I know. I took Professor Rosato’s Family Law class. I took Professor Schneider’s Women and the Law class and I was a research and teaching assistant in her course on Battered Women and the Law. I took Professor Sebok’s Jurisprudence class. I worked on an amicus brief in a battered woman’s tort case with Ms. Levinson when I was a law student. I have worked on a case opposite Patricia Fersch, who’s going to talk about family law practice, and I have long respected her practice as an attorney. So I’m a little intimidated but I am very honored to be here. I’m glad that Professor Thomas spoke about the issues of mutual assent and duress, because I think those issues are important aspects of contracts law in the context of battering, but I’m not going to have time to talk about them today.

Professor Schneider has written extensively on battering and the law. As her work makes clear, battering is a major social is unwilling to engage in an open discussion, the attorney should observe the client for signs of agitation, anger, and distress and be sensitive to the client’s anxiety level and proceed gently).

112 The remarks of Professor Chantal Thomas are not reproduced here.

problem, as well as a touchstone of feminist theory and activism. Therefore, battering is an excellent subject in which to teach students two things every practicing attorney comes to know. First, it is the rare case that fits precisely into only one area of law, which is why a good lawyer must be familiar with all areas of law. Second, in every case, there is both a “specific picture,” the facts as your client initially presents them to you, and a “big picture,” the story the court will recognize as fitting into a particular area or areas of law. Inevitably, your client’s story is more complex than the set of facts and legal concepts a court wants to hear about. However, as your client’s attorney, you must address both the issues that are significant to your client and the ones that will be significant to the court.

Domestic violence is an excellent vehicle to teach these two concepts because domestic violence comes up in the facts, and thus, has legal effects on cases in virtually every legal category. Additionally, cases involving clients who have experienced violence in a relationship usually involve the kind of complexity that requires lawyers and law students to focus on both the “specific picture” and the “big picture.”

623, 632 (1980).

114 See, e.g., Meier, supra note 29, at 1296 (noting that practicing domestic violence law requires some degree of knowledge in other disciplines, including but not limited to psychology, sociology, public policy, and criminal law).

115 See Schneider, Particularity and Generality, supra note 113, at 567 (acknowledging the difficulty with accurately describing the experiences of battered women and in conveying this understanding to the courts). “Although the battered women’s movement has had to demonstrate distinctive aspects of the problem of battering in order to establish battered women as a legal and social construct, the characterizations of distinctiveness have been incomplete, have not explained fully the complex experiences of battering, and have constrained feminist analysis.” Id.

116 See, e.g., Dorchen A. Leidholdt, Interviewing Battered Women, in Lawyer’s Manual on Domestic Violence: Representing the Victim 115, 127-29 (Ronald E. Cohen & James C. Neely ed., 2d ed. 1998) [hereinafter Lawyer’s Manual] (discussing the various issues victims of domestic violence face in addition to the legal proceeding their lawyer was retained to handle, such as the client’s personal safety concerns, and psychological needs).
I should preface my comments on the specific case I will discuss today by saying that it is perhaps misleading to say that I am a “contracts practitioner.” I am a general civil practitioner. I approach every case, whether it is presented to me as primarily a torts case or a family law case or a discrimination case or a contracts case, holistically, as I think most lawyers do—at least that’s what my professors at Brooklyn Law School taught me. I separate out different legal issues from one another and most cases fall primarily into one category or another, but I also need to understand how the different legal aspects of a particular case affect each other.\footnote{Similar client interviewing and counseling techniques have been explored elsewhere. See, e.g., ROBERT F. COCHRAN, JR., ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 12-16 (1999) (stating that lawyers often control the direction of their client’s case by fitting the situation into areas of law with which they are more comfortable and that lawyers also serve as gatekeepers to the legal system by screening out issues that may not have legal bases).}

The case I will focus on in my comments today is a “contracts” case in the sense that it involves drafting and executing a contract, but the contract has to do with the sale of real property. Therefore, in order to properly draft it, I had to utilize property law principles because it was a contract between people with a history of relationship violence. I also had to utilize what some would characterize as family law principles, as well as criminal law principles, in advising my client and in drafting the contract. Similarly, in this, as in every case, I had to understand how the facts a client brings me fit into various legal categories and rules. To do that, I have to start by really listening to my client.

Working with a client who has been abused involves some skills I think most people don’t learn in law school: the skill of listening.\footnote{See generally SCHNEIDER, BATTERED WOMEN, supra note 69 (discussing the complexities of understanding and evaluating a battered woman’s needs).} Listening not just to the words your client is saying, but to her body language and the words left unsaid.\footnote{Id. See also Meier, supra note 29, at 1334-35 (noting that an attorney}
this is perhaps something that can’t be taught in three years of
law school. I learned it largely by working with people in the
process of freeing themselves from abuse. Coming to understand
that process entailed understanding that while there are elements
of the process that are common, each person’s process is also
different.

Professor Schneider refers to this as the “complexities of
voice.” She points out that practitioners must understand that
battered women have both a different voice as a group and
different voices as individuals. She writes about the importance
of understanding the interplay between what she calls
“particularity and generality.” In other words, there are
experiences and themes that are common to every abused
person’s story, yet each person’s particular life experience will
inform her experience of abuse and how she communicates—or
doesn’t communicate—that experience.

should encourage communication by developing an understanding with his or
her client which would entail knowing the client’s feelings by being able to
identify “nonverbal cues” such as body language).

Professor Schneider argues that lawyers must take into account the particular
experiences of abused women as well as the general violence against women in
society. She defines “particularity” as “describing the complexity of
women’s experiences non-simplistically, accurately, and in greater detail.”
She divides the general problems of violence against women into two
categories: “the way in which woman-abuse must be viewed as linked to
larger societal violence” and the way it is “linked to women’s subordination in
general.”

See Schneider, Particularity and Generality, supra note 113, at 522.

See Schneider, Battered Women, supra note 69, at 59, 71.
Second, as Professor Schneider writes, lawyers need to understand that battered women are often heard, yet not really heard—and for many women, this experience affects the way they tell their story. In other words, within the relationship they are often repeatedly “gaslighted,” or convinced that their experience is not reality, that they are “crazy.” When they try to tell others about the abuse, they are often not listened to or not believed or are asked what they did to deserve or cause the abuse, implying that it must be their fault. They learn to be hesitant about telling their story or not to tell it at all. They often feel a great deal of shame about the abuse, in part because their abusers often convince them it is their fault or that they deserved it.

I think battered women may be more hesitant to discuss the abuse today than they have ever been, because women are expected to be strong and autonomous in ways they weren’t ten or twenty years ago. Today, there are women whose strength and self-sufficiency in their work lives makes it much harder for them to admit to abuse at home. Certainly the average woman I deal with in my practice is in her thirties to fifties, well-educated, usually lives in Manhattan, has a successful career, and on the surface seems independent and self-confident, yet I encounter

124 Schneider, *Particularity and Generality*, supra note 113, at 558. Society typically views battered women as helpless, which puts them at a disadvantage in the legal system. *Id.* In an effort to minimize society’s impact on the judicial system, expert testimony on battering was developed to explain common experiences and their impact. *Id.* at 560. In addition “[t]he goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman’s action. The notion of expert testimony was predicated on an assumption that battered women’s voices would not be understood or were not strong enough to be heard alone in the courtroom.” *Id.* By focusing on both the particular and general aspects of battery, social beliefs of female subordination are more easily recognized, and women are allowed to tell their individual stories within a general context. *Id.* at 567-68.

125 See *Schneider*, *Battered Women*, supra note 69, at 31 (recognizing that because of various societal stereotypes against women who kill, they often faced discrimination and inequality at trials); see also *Meier*, supra note 29, at 1344 (recognizing that society conveys messages to the victim that her experience of domestic violence is trivial, or that her accusations are false, or that she is personally responsible for the abuse).
clients on virtually a daily basis who have been battered or are now being battered.\footnote{126}

I have learned that abused clients will often only hint at the violence or threats of violence they are experiencing, telling only the surface of the underlying reality. They often have a depressed affect, not showing much emotion even when telling me about a traumatic event.\footnote{127} Some women, including the client whose case I will talk about in a moment, even laugh or tell jokes when talking about abusive behavior. Sometimes that is another way to downplay the seriousness of what they have experienced. Sometimes humor is also how they survive it.

I’m going to call my client Jane. I’ve been working with her for about a year. I conducted the initial consultation with a partner in my office, Ellen Gesmer. What Jane came to talk to us about was a scenario that Ms. Levinson just described when she was speaking.\footnote{128} Jane had purchased an apartment with her then boyfriend, whom I will call Bill, and their relationship was coming to an end. The apartment was a New York City condominium that they had purchased for approximately thirty-five thousand dollars. In the real estate market at the time Jane came to us, the apartment was worth approximately two million

\footnote{126 For statistics on and profiles of domestic violence see generally \textit{Domestic Violence Statistics}, at http://www.actabuse.com/dvstats_3.html#3 (last visited Feb. 5, 2002). Midwestern State University conducted a study based on a survey of 6,000 women. More than 50 percent of women who said they had been abused reported family incomes above $35,000. \textit{Id.} Just over 70 percent of the women were Anglo, 10.4 percent were black, and 9.5 percent were Hispanic. \textit{Id.} The women were also asked to provide information on education levels and income of the abusers. That profile showed that more than 18 percent had a bachelor’s degree or higher. \textit{Id.}

\footnote{127 This is also called “constriction.” \textit{See} Meier, \textit{supra} note 29, at 1312-14 (1993). \textit{See also} Linda Kelly, \textit{Domestic Violence Survivors: Surviving the Beatings of 1996}, 11 GEO. IMMIGR. L.J. 303, 318-19 (1997) (stating that a domestic violence victim suffering from Post-Traumatic Stress Disorder (PTSD) may recount stories of horrific violence inflicted upon her without emotion). Moreover, “[w]ithout the proper training to recognize such a trait, a benefits decision-maker may simply conclude that the battered (victim’s) story is false” because they believe that true victims could never suffer such violence without evoking emotion. \textit{Id.} at 319.

\footnote{128 \textit{See} presentation of Betty Levinson, \textit{supra} pp. 448-59.}
dollars. She wanted to know what her rights were with regard to the property, and if it would be possible to sell the apartment and recoup her investment in it even if Bill could not afford to buy her out and did not want to sell.

When Jane initially came to us, she did not present her story as being about, or even involving, domestic violence. She told us that she and Bill owned the loft as joint tenants with rights of survivorship, that they’d been in the relationship for about fifteen years, and that they were never legally married. During their relationship, she had made a major financial investment in the apartment, paying for virtually all of the purchase and renovation costs, maintenance, mortgage, insurance, and real estate taxes, and had in addition loaned Bill money and paid half the rent on his separate work space over the years.

She talked about him having broken a piece of furniture during an argument, and then went on to tell the rest of the story. We had to stop her there, because she talked about it as if that were no big deal. In fact, I think she even laughed about it. We had to ask her a number of questions to get the whole picture.

What eventually emerged was what I’ve come to recognize as a fairly typical picture of an abusive relationship.\(^\text{129}\) It started with a lot of isolation of her support systems—friends and family—which then progressed to threats, then the breaking of furniture or personal items or throwing and banging objects, then throwing things at her, and finally physical assaults on her such as grabbing her and shoving her against the walls. The threats became more frequent and more intense as time went on. Jane’s partner also drank and it seemed that his drinking was getting worse. Jane knew that during a rageful episode, he was more violent drunk than sober. So, while she was hesitant to tell us this

\(^{129}\) Of course, no two clients or instances of domestic violence are identical. There are, however, elements that are considered common, typical traits. See Women’s Issues and Social Empowerment, Domestic Violence Information Manual: Forms of Domestic Violence, at http://www.wise.infoxchange.net.au/dvim/dvabuse.htm (last visited Feb. 24, 2003) (describing the various types of domestic violence abuse such as psychological, emotional, physical, and sexual abuses all of which undermines the women’s confidence and isolate her from her support systems).
at first, Jane was becoming concerned about her safety, and that was really what had brought her to our office. She wanted to know if she left the apartment, given the increasing danger to her, would she in effect be giving up some or all of her financial investment, or whether there were other options.

We next explored what her feelings were about the whole situation. One of the things that I think can be very difficult in working with people who have been abused and are still in the process of freeing themselves from that abuse is that they often don’t know, themselves, what it is they feel or what it is they want, because they’re so used to not being allowed to say what they feel or want.130

Other speakers today were talking about using patience. I think one of the things that I’ve had to learn to be patient about is that each person has his or her own process. As someone’s attorney, I can’t advise my client and can’t take the next legal step, whether that’s litigation, drafting a letter, or drafting a contract, if I don’t know for sure that my client knows what he or she wants.131 On the one hand, it is difficult to achieve a balance between empowering a client by listening to her and respecting her unique process versus confronting any denial she has and encouraging her to assess her safety realistically.132

When we listened to Jane, what emerged was that her

130 Id. (citing Mary Ann Dutton, Post-Traumatic Stress Disorder Among Battered Women: Analysis of Legal Implications, 12 BEHAV. SCI. & L. 215, 219 (1994) (stating that “victims of domestic violence suffer psychological effects, such as post-traumatic stress disorder or depression,” as well as low self-esteem and nervousness as a result of being abused by a loved one)).

131 Lawyers have a general duty to clarify a client’s wishes before taking further steps during the course of representations. See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2002). A lawyer is required to “promptly consult with and secure the client’s consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.” Id.

132 See generally Meier, supra note 29, at 1345, 1347-49 (describing the difficulty for a lawyer to adequately assess the danger their client may face especially when some victims are unable to assess the danger for themselves as a result of the severe abusive treatment they endured causing them to become psychologically as well as physically dependent upon their abuser).
complex feelings about her experience had a strong effect on her ability to make a decision about what she should do. She wanted to leave, but felt guilty because he had convinced her and/or she had convinced herself that she was responsible for his feelings. She also knew he would be unhappy about her leaving and afraid of what his reaction might be, to what extent she was safe, and what leaving might mean for her rights as to the apartment.

As soon as we realized that there was a continuing physical and emotional danger for Jane in staying in her apartment with her abuser, we had to address her safety first before we even got to the legal issues regarding the apartment. That’s not something that I think most of my professors taught me. It’s certainly not something I learned in my contracts class, although I had a very wonderful contracts professor. Nor was it something I expected to deal with in what was essentially a real estate or contract case.

We had to talk with Jane about a safety plan. For example,

---

133 The psychological response suffered from domestic violence victims exposed to prolonged abuse has been termed “learned helplessness.” See generally Joan M. Schroeder, Using Battered Women Evidence in the Prosecution of a Batterer, 76 IOWA L. REV. 553, 558-59 (1991) (describing learned helplessness as the effect of repeated beatings causing a battered women to become passive and remain in an abusive situation).

134 An abused woman’s safety is very often intertwined with her legal rights. See generally SCHNEIDER, BATTERED WOMEN, supra note 69, at 51-52, (citing Sally E. Merry, Wife Battering and the Ambiguities of Rights, in IDENTITIES, POLICIES, AND RIGHTS 301-02 (Austin Sarat & Thomas R. Kearns, ed., 1995) (stating that abusers are likely to become more violent towards women who leave them and this threat to their safety and the safety of their children are of great concern to victims)).

135 A client’s safety is, of course, of primary concern in situations of domestic violence. See Meier, supra note 114, at 1349 (suggesting that if danger is imminent, the lawyer should suggest to the client to seek shelter or protection). Safe Horizon provides a guide to help abused women make a safety plan. See Safe Horizon, Essential Information for Battered Women: Making a Safety Plan, at http://www.dvsheltertour.org/safety.html (last visited Feb. 5, 2003). The main guidelines and topics are: planning ahead; deciding how you would get out; communicating with someone who can help and deciding where you should go; keeping important documents together in a safe place; memorizing or keeping a list of important telephone numbers; and
I suggested putting all of her important documents in one place so that if she had to leave suddenly she’d be able to get out quickly. I suggested she think of some people she could call on and stay with if she needed to leave suddenly. We talked about what the police response was likely to be if she called the police. We spoke to her about other legal options, such as how to get an order of protection, which for her would be difficult because she was not married or related to her abuser nor did they have a child in common. This meant that she would need to go to criminal court for the order, which, as discussed earlier, can be frightening to a lot of women. It’s a very different experience to get an order of protection in family or supreme court than to go to criminal court, where the abuser will have criminal charges against him or her.

Next, we had to talk about Jane’s options regarding the apartment. One option was to try to go to court and seek partition, which would mean asking the court to direct that the

keeping your children safe. Id.

136 See, e.g., Domestic Violence: Guidelines on Police Response Procedures in Domestic Violence Cases, at http://www.state.nj.us/lps/dcj/agguide/3dvpolrs.pdf (last visited Feb. 5, 2003) (stating that some common police procedures in domestic violence situations include escorting victims to the family part of the superior court, providing the victim with support hotlines, and other lifesaving guidance and assistance).

137 In New York, if the victim is not or has never been legally married to the abuser, and does not have a child in common with her abuser, she must go to criminal court for an order of protection. See Obtaining and Enforcing Valid Orders of Protection in New York State, at http://www.usdoj.gov/usao/nyw/victim_witness/pdf/OOPmanual.pdf (last visited Feb. 5, 2003) (setting forth the procedures for obtaining and enforcing orders of protection).

138 Once a domestic violence proceeding is within the jurisdiction of the New York State Criminal Court, the prosecutor has control over the case, not the victim, and the prosecutor may chose, but is not obligated, to take the victim’s wishes into consideration. Id. at 18. Victims may hesitate to go to criminal court because there is a greater threshold of evidence required for the criminal court than in family court. Id.

139 Id. See also N.Y. C.P.L.R. § 530.11(c) (McKinney 2003) (“The purpose of Criminal Court is to prosecute the perpetrator for violating a law in New York State and can result in a criminal conviction, incarceration, probation and/or a criminal fine.”).
apartment literally be divided in half, so that she could do what she wants with her half and he could do what he wants with his. That, of course, would raise issues of whether it was physically possible to divide the apartment and what that would do to the value of the property. We decided that partition wasn’t a good option for her. We also had to research whether, if she left, would it affect her right to seek partition. Our research indicated that she could leave and it would not affect her rights\textsuperscript{140}—but there was still a concern about what he might do to the apartment if she left, and how that might affect its value. However, in researching partition, I came across one case, \textit{Johnston v. Martin}, which I was surprised to find.\textsuperscript{141} In that case, a couple owned real estate together.\textsuperscript{142} The man had abused the woman for a long time resulting in her leaving the property.\textsuperscript{143} A few weeks after she left, he changed the locks.\textsuperscript{144} The court found that the combination of the abuse with the changed locks constituted ouster, which meant that she had the right to use and occupy the property and since her abuser had deprived her of this right, she could obtain the reasonable value from him for his exclusive use of the residence.\textsuperscript{145} I don’t know if the court would have found ouster if he hadn’t changed the locks, but the opinion makes it clear that the man’s violence toward her was a factor in the court’s determination.\textsuperscript{146}

\textsuperscript{140} \textit{See} Perkins v. Volpe, 146 A.D.2d 617 (N.Y. App. Div. 1989) (holding that the defendant’s exclusive occupancy of a residence did not constitute ouster because, as tenants in common, the defendant had the right to occupy the whole residence).


\textsuperscript{142} \textit{Id.} at 1019-20.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 1021.

\textsuperscript{146} \textit{Id.} at 1019, 1021. The court stated:

[b]ased on the uncontroverted testimony that plaintiff moved out in response to her troubled relationship with defendant and his violence toward her and that defendant thereafter changed the locks on the doors of the big house and informed her of this fact, we are persuaded that defendant effectively denied plaintiff access to the property.
We discussed her offering to buy him out, but she could not afford to do so, so this was not a viable option. We discussed the possibility of his agreeing that he would buy her out. However, every time she had brought either of those options up with him in the past, he would become enraged. That was frightening to her. In addition, there was a concern that he might file for bankruptcy, in which case the apartment would be completely lost to her, as the homestead exemption is so low in New York. So that was not a viable option.

Another option we discussed with Jane was to go to court and ask the court to force a sale. However, the legal standard to obtain this relief is “great prejudice.” While I thought we might be able to argue that it was unsafe for her to remain there, and that he could not afford to buy her out, when I did the research I could find no cases where a court had found that abuse constituted great prejudice.

Finally, we discussed with Jane the option of negotiating with him to agree to sell the apartment to a third party, and then divide the profits in such a way that she could recoup her investment. Ultimately, we advised her and she agreed that she should move out of the apartment as soon as possible and then begin the process of negotiating an agreement to sell and divide the profits, or, if he wouldn’t agree, to take him to court to seek partition or a sale.

147 N.Y. C.P.L.R. § 5206 (McKinney 2003) (exempting a principal homestead up to “ten thousand dollars in above liens and encumbrances . . . from application to the satisfaction of a money judgment”). New York’s homestead exemption will only protect ten thousand dollars of the value of the home above liens and encumbrances. Id. If there is any unencumbered value left in the property after the value of the liens, encumbrances, and the exemption are accounted for, the home will probably be sold to pay off the husband’s unsecured debts.

148 N.Y. REAL PROP. LAW § 901(1) (2003). The statute provides:

[a] person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.
Then over the next several months, a routine began where weeks would go by where I wouldn’t hear from her and I was sort of flummoxed. I didn’t know what to do. The partner who was supervising me encouraged me and validated for me that it’s really my ethical duty to check in with her and make sure she’s okay.\textsuperscript{149} Not only is it a nice thing but it’s really part of my duty as her attorney.

For several months I had to keep checking in with her to see if she was okay and to give her some encouragement. It took her a long time before she went through her process and was really ready to move out and to feel more empowered and more self-confident. Ultimately, Jane was able to get him to agree that they would sell the apartment.

I have been drafting an agreement setting forth when and how they will agree on a sale price, accept an offer, and how they will divide profits and expenses at closing. In doing that, even though my client is much more self-confident than she was when she first came to us, I have to be conscious of the power imbalance that is there and her tendency to either let her fears direct her decisions or to let herself believe that there is no abuse going on.\textsuperscript{150}

In some cases where the parties to a contract have been in a relationship that was abusive, it may be impossible to form and execute a viable contract where the power imbalance is too great.\textsuperscript{151} These situations raise interesting issues regarding

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{150} This general tendency has been noted elsewhere See Bruce J. Winick, Applying the Law Therapeutically in Domestic Violence Cases, 69 UMKC L. Rev. 33, 69 (2000) (stating that “[m]any domestic violence clients will be in denial about their conduct or its wrongfulness, or will tend to rationalize or minimize it. Attorneys need to be aware of how to deal with these psychological defense mechanisms and how to engage in these highly sensitive conversations with the client.").
\end{flushright}

\begin{flushright}
\textsuperscript{151} See also Marcia M. Maddox, Undoing the Unconscionable: Breaking
contract formation, such as whether a battered woman can ever be considered an “incompetent,” whether a true meeting of the minds has occurred, and whether there has been duress. Because of the extent to which Jane had extricated herself from the abuse, these were not issues in this case, although there were times earlier on in our working relationship when I considered them to be potential issues.

As in a divorce agreement, I wanted to take steps to involve as little need for direct communication as possible and resolve many of the foreseeable problems and to minimize the potential for confrontation and conflict. I made the contract self-executing to the extent possible. I made the definitions section of the agreement as complete and clear as I could. I also tried to build in real easily identifiable consequences for Bill in the event that he defaulted on his obligations under the contract. For example, if he failed to move out of the apartment at the agreed upon time and the closing was delayed as a result; he was solely responsible for any associated costs, including legal fees. To some degree, all of these are things I would want to do in any contract, but in this case the stakes were much higher.

**Professor Jennifer Rosato**

I know we are running out of time, but I hope you’ll hang in. There’s still more to say. I try to do whatever I can, in whatever courses I have, to think about many of the social issues that are raised. Domestic violence is just one of them. And I’m not really looking in a course like family law to students like Kristin, who are very, very aware of these issues, who are knowledgeable already when they come to my class, but there are a lot of students in my family law class—I teach about 60 or 70 students each year—who either have experiences that are relevant, but they’re there mostly because it’s a bar course, not because they

---

*Unlawful Separation “Agreements,”* 2 ATLA-CLE 2097 (2001) (addressing marital agreements arising from domestic violence situations and highlighting that evidence of domestic violence indicates that the parties to the contract do not have equal bargaining power and such agreements may be deemed unconscionable).
want to be enlightened. They want to hear, mostly, what are the equitable distribution rules, what are the rules for custody in New York. It seems almost a deviation for me to be doing domestic violence work in the class.\textsuperscript{152}

That brings me to a couple of concerns that I always have to think about when I’m doing an issue like domestic violence in my classroom. The first is what has been called the feminazi problem.\textsuperscript{153} That’s a problem especially if you are a woman professor and you’re raising these issues in your classroom. I think you have to be very careful that it’s not considered part of your agenda that you’re ramming down students’ throats. Therefore, it has to be done very sensitively; it can’t be done everyday. In some sense, you have to be more neutral than you might in other situations, because you can’t let your thoughts about domestic violence seep into the conversation. Because in my mind, the reason why you raise domestic violence issues is not just for the enlightenment and learning, but also for the openness of the discussion that occurs. If you shut it down with your own agenda, that important discussion will not take place.

Therefore, before you start, you have to presume that in your class there are folks who have been victims, folks who have been perpetrators, folks that have worked for DA’s (District Attorney) offices, folks that have worked in the defense context as well. With that in mind, I try to teach domestic violence issues using role-plays. That’s very important to me, to get people out of

\textsuperscript{152} Cf. Naomi Cahn & Joan Meier, \textit{New Approaches to Poverty Law, Teaching and Practice: Domestic Violence and Feminist Jurisprudence: Towards a New Agenda}, 4 B.U. PUB. INT. L.J. 339, 348 (1995) (noting that outside of the clinical context and feminist jurisprudence, few courses other than family law cover domestic violence and even within family law most casebooks devote relatively few pages to the subject).

personalizing their answer with “I think this,” “I feel this.”

Specifically, what I do in family law is to create a fairly extensive role-play in which I give students roles as associates in a law firm who have a client coming to visit them during the next class. As for the role of the client, I do a little bit of casting myself, usually a former student that I know has a sensitivity to these issues, but also who is a very good actress.

One year I found that the portrayal was almost too real. The actress who I had in the role of “Linda,” the victim, actually broke down and cried. The class didn’t really know what to do. There was a collective sense of cognitive dissonance for a moment—“Was this real or was this pretend?” Afterwards, she said to me, “I don’t know what came over me. I just got so into the role that I forgot about what I was supposed to be doing.”

As a professor, you don’t want the role-play to be a bad Lifetime movie, right? On the one hand you want to role-play, you want to put people in a role, you want them to get interested and outside of themselves. On the other hand, you don’t want to make it so fake that it seems like we are just playing games. Until I teach them the black-letter law, that balance is sometimes

The merits of role-playing and other alternative teaching methods have been noted by other commentators. See Carrie Menkel-Meadow, Case Studies in Legal Ethics: Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics, 69 FORDHAM L. REV. 787 (2000). (providing a review of various approaches to case studies, narratives and role-playing as educational tools in the legal classroom). See also Janet Weinstein, Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice, 74 WASH. L. REV. 319 (1999). Weinstein examines interdisciplinary education as a method to train lawyers to be “creative problem solvers” who can better serve the needs of their clients. Id. at 319 Her article reviews a model used at the San Diego Interdisciplinary Training Program in Child Abuse and Neglect and advocates exposing law students to professionals or students from other disciplines within a problem setting. Id. at 354-61. Weinstein posits:

[i]f we understand the developmental levels at which many of our students enter school, we should make efforts to expose them to law practice as early in their education as possible. An increase in role-playing and a requirement of pro bono work beginning in the first year of school would accelerate maturation from both sociocultural and psychological perspectives.

Id. at 362.
hard to achieve. Sometimes I try to do it by bringing in someone from the outside so it’s not just me sitting in a chair with a wig. “Oh, that’s so funny, Professor Rosato. You’re playing the victim today.” I have done that from time to time, when I’ve needed to. But having that stranger in the room changes the tone of the room significantly.

As the role-play begins, I ask the experts in the class—three designated students—to interview the client. Before class, I give the actress background facts to review. I ask her to be forthcoming with the facts, but not too forthcoming. I think it’s interesting that even when I use the same scenario, every class elicits a different set of facts. Because in this particular scenario there is abuse going back five years. It’s not very often that the class, in the limited amount of time they have, really sees that the pattern of abuse comes up often very early in the couple’s relationship.

During the class, we not only get the facts during the interview, but also do some problem solving. We add in a little bit of skill development. The role-play is a realistic one, even though it is applied to a non-stereotypical situation: a young, white, middle-class couple. I developed the hypothetical with a clinical professor. By running the hypothetical past one of my clinical colleagues, I was able to really develop the ideas and make sure that they were going to work out in context. During the role-play, I have the students go back and forth with this actress, our victim/client. She talks about the issues that have come up in her relationship with her abusive husband. I have given the students the applicable laws beforehand so they can ask meaningful questions to reveal the material facts.

The interview usually takes place on one class day. For the next class, we come back and I ask, “What should we do about Ms. Fairless, our client?” What I find most interesting is, first of all, the discussion—like the interview—is different every time I use this hypothetical. It’s amazing how that happens. Second, I find that there are some people who speak who have never spoken in class before and never will speak again. The subject engages them at some level. I try to have an open discussion, so it means that the students who are or have been police officers
tell me what it’s like for a woman to get an order of protection and explain the role of law enforcement. DA interns talk about the prosecutor’s role in the system. In the end, the discussion has a sensitizing effect if you do it right: the students become teachers by showing each other where they have been and there’s a non-judgmental aspect to it. However, I think it’s essential that if you are an opinionated professor and you don’t think you can stay neutral, don’t try this type of exercise in your class.155 Because it is going to fail and it’s going to fail very badly and perhaps negatively affect the entire semester.

Eventually, we do talk about the law. First, we discuss the meaning of stalking in context.156 We have the statute in front of us,157 and we have an interesting debate about whether a husband

---

155 See generally Menkel-Meadow, Telling Stories in School, supra note 154, at 814-16 (describing the practical mechanics of teaching with case studies and role-playing and noting that the professor’s task is to place students in roles and facilitate dialogue); Weinstein, Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice, supra note 154, at 361 (noting that professors “are in the position to model questioning behavior” and that, ideally, a professor’s questions “would truly be information seeking”).

156 See also Susan E. Bernstein, Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?, 15 CARDOZO L. REV. 525, 529-30 (1993) (analyzing case histories representing the typical stalking situation—the jealous lover, the violent husband or the vengeful ex-husband).

157 A number of states have passed stalking legislation that could be used as teaching tools; although specifics invariably differ, Utah’s legislation is illustrative. UTAH CODE ANN. §76-5-106.5 (2002). It provides that:

A person is guilty of stalking who:
(a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:
(i) to fear bodily injury to himself or a member of his immediate family; or
(ii) to suffer emotional distress to himself or a member of his immediate family;
(b) has knowledge or should have knowledge that the specific person:
(i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or
(ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and
(c) whose conduct:
following his wife around in a grocery store everyday for a week constitutes stalking. We deal with the legal aspects but also what is the reality, and how the application of the law works in a particular context.\textsuperscript{158} We also address more broadly whether the use of legal remedies is even appropriate, and whether the use of legal remedies can escalate violence.\textsuperscript{159} I’m sure that, in the real world you say, “Okay, well, the best thing to do is to get that protective order.”\textsuperscript{160} But how is this really going to play out in this relationship? And we have a tendency as lawyers to get right to the legal remedy, but it may be an entirely inappropriate thing to do,\textsuperscript{161} and we talk about that dilemma. We don’t necessarily

(i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or
(ii) causes emotional distress in the specific person or a member of his immediate family.

\textit{Id.}

\textsuperscript{158} \textit{See, e.g.}, H.E.S. v. J.C.S., 815 A.2d 405 (N.J. Super. 2003) (holding that husband’s alleged video surveillance of wife’s bedroom could constitute harassment and stalking as predicate offenses of domestic violence); Milillo v. Milillo, 748 N.Y.S.2d 850 (Fam. Ct. 2002) (mother’s allegations of three physical break-ins by father to her home, in which she lived alone with her children, made out cognizable claim of stalking); People v. Kieronski, 542 N.W.2d 339 (Mich. Ct. App. 1995) (holding that there was sufficient evidence to bind defendant on charge of aggravated stalking of his ex-wife; ex-wife testified that defendant approached her at public places and stated “I’ll get you, bitch!”).

\textsuperscript{159} \textit{See generally} Catharine F. Klein & Leslye E. Orloff, \textit{Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law}, 21 HOFSRA L. REV. 801 (1993) (noting different studies that indicate the failure of restraining orders to adequately protect women from further abuse). The article also surveys civil protection order statutes and state appellate opinions and examines recent developments, trends and innovations. \textit{Id.} at 813.


\textsuperscript{161} It has been noted that many attorneys do not understand domestic violence and its effect on the survivors. \textit{See} Edward S. Snyder, \textit{Remedies for Domestic Violence: A Continuing Challenge}, 12 J. AM. ACAD. MATRIM.
DOMESTIC VIOLENCE IN LEGAL EDUCATION

reach a solution, but we talk about it.

We also consider the lawyer’s role as counselor, as Kristin just raised so beautifully so I don’t really need to say more about it. But what we raise, for example, is what kind of counseling a lawyer should do. As a teacher, I take a fairly passive role in this discussion. I don’t say “in my experience.” Instead, I ask, “What is our role here?” since many students want to send our client to a mental health professional because they think she is being too weak. Some say: “What’s wrong with her? Why can’t she stand up to her husband?” Others are saying, “That’s not our role. Our role is not to be counselors.” Therefore, there’s a back and forth about what the appropriate role of a lawyer is.

Often, we also have a child in the picture. So it’s also important for the class to think about the legal ramifications not

Law. 335, 338 (1994). (observing that rather than attempting to understand the psychological impact on survivors, attorneys generally seek legal remedies.) The survivor’s lack of resolve in prosecuting the batterer with criminal charges of abuse leads most attorneys to seek civil protective orders. See Barry, Protective Order Enforcement, supra note 160, at 345. Although civil protective orders may be a popular remedy, they are not sufficiently enforced to make them as effective as possible. Id. at 348. Protective orders also do little in the way of reforming or punishing batterers because they only remove the batterer from his victim. Id. at 346.

162 See presentation of Kristin Bebelaar, supra pp. 460-73. See also Robert L. Valente, Addressing Domestic Violence: The Role of the Family Law Practitioner, 29 Fam. L.Q. 187, 191-3 (1995) (noting that, to be an effective counselor, attorneys representing battered clients should first acknowledge domestic violence as both a psychological and legal problem and rather than exclusively addressing the legal aspects of a situation).

163 See generally id. at 194 (articulating the legal counseling a lawyer should provide and noting that “family lawyers handling domestic violence cases must ensure that their clients receive appropriate treatment for their emotional and psychological issues by psychotherapists or counselors properly trained to handle domestic violence cases.”).

164 The issue of a lawyer’s role in domestic violence cases and counseling has been explored extensively elsewhere. See, e.g., Phyllis E. Bernard, On Integrating Responses To Domestic Violence: Teaching Ethical, Holistic Client Representation in Family ADR, 47 Loy. L. Rev. 163 (2001) (commenting that a family law attorney addressing divorce or custody has the dual role of identifying whether domestic violence is a factor and an ethical obligation to protect the client from receiving or inflicting additional harm).
only for the partners involved, but also for third parties.\textsuperscript{165} That also shapes what we do.

I also try to bring in some of the non-legal aspects of it. We talk about whether Linda should stay with her mother, who’s a controlling person and tells Linda, “You stay with the man. He’s a good man. He brings home the bacon. He takes care of the child.” So her mom is telling Linda to stay, and that’s not maybe what she wants to do. But what’s the alternative? What’s a battered women’s shelter like?

Some students in the class with experience in domestic violence matters educate the others and I think it’s very important to have that dialogue and look at the legal and non-legal aspects.\textsuperscript{166} The students not only think about what’s going to keep her safe, first and foremost, but also what is going to keep her the happiest in the long run and to pursue legal remedies if and when she needs them.

None of the things I posed as part of the hypothetical, and this also goes to what you were saying about real life dilemmas. What if the client says, “Thank you very much but I don’t think

\textsuperscript{165} Addressing domestic violence in homes where children are present requires consideration of additional legal and parental matters. See, e.g., \textit{In re} Deandre T., 676 N.Y.S.2d 666 (App. Div. 1998) (holding that domestic violence by a child’s father against the mother witnessed by the child was sufficient to constitute neglect because it placed the child in imminent danger of mental impairment); \textit{In re} Bryan L., 565 N.Y.S.2d 969 (Fam. Ct. 1991) (concerning an allegation that a man beat his wife in the presence of their child and that this behavior exposed the child to the risk of emotional and mental impairment); E.R. v. G.S.R., 648 N.Y.S.2d 257 (Fam. Ct. 1996) (mandating the consideration of the impact of domestic violence on the child in a custody and visitation proceeding). \textit{See also} Amy Haddix, \textit{Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights}, 84 Cal. L. Rev. 757, 769 (1996) (noting that trial courts have terminated a father’s parental rights for committing acts of domestic violence against the mother in the child’s presence).

\textsuperscript{166} Other commentators have explored this dichotomy. \textit{See generally} Joyce Klemperer, \textit{Programs for Battered Women—What Works?}, 58 Alb. L. Rev. 1171, 1178-82 (1995) (stating that one non-legal aspect of domestic violence is what to do with victims who are seeking to get away from their abuser).
DOMESTIC VIOLENCE IN LEGAL EDUCATION

I’m going to need your services anymore.” What do you do as a lawyer? In that scenario, is my duty as a lawyer to follow up or to simply hope that nothing happens to her?\footnote{As a general rule, the lawyer’s duty to his or her client is a product of an established lawyer-client relationship and no duty extends to individuals who decline legal representation. \textit{See Model Rules of Prof’l Conduct} (Scope [3]) (2002) (“Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.”). \textit{But see generally} Christine A. Picker, \textit{The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues for Attorneys Who Represent Battered Women with Abused Children}, 12 ST. LOUIS U. PUB. L. REV. 69 (1993) (exploring the potential expansion of a lawyer’s duties in the context of domestic violence).

I think all of these legal, non-legal, and emotional issues are very important issues to raise in law school. I admit that sometimes I do it on the cheap, and I apologize if I do, but I think any well-intentioned attempts are worth it.\footnote{\textit{See, e.g.}, Marjorie A. Silver, \textit{Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship}, 6 CLINICAL L. REV. 259 (1999) (articulating reasons for and ways to cultivate law students’ emotional intelligence in order to better represent clients in emotionally charged cases); Shalleck, supra note 57, at 1022 (asserting that law schools should take an active role in counteracting pervasive stereotyping of battered women to transform the legal community’s understanding and representation of such clients).} That’s what I’ve always thought.

\textit{Patricia Fersch}

I might be able to help with some real life examples. I have a low-fee law office and I represent both men and women. I jotted down some names of some actual cases that I’ve worked on with varying results that I thought would be helpful. I will use their real first names because it just makes it easier for me to somewhat tell their stories.

I will say that my concerns as a practitioner are always, and I think I have them in the right order: safety first, hers and the children’s safety; secondly, support. Again, in the right order—emotional and financial. Strangely, the last concern is the legal
issues. But let me get to some of the stories.

First of all, to answer the last question that the professor posed, “What if the client stops your services?” That is a real problem, but there’s really not a thing, frankly, that I can do about it. So I’ll start with the case of Lillian.

Lillian is very well educated and married to an attorney who at one time worked for the District Attorney’s office in the Domestic Violence Unit in one of the five boroughs. By the time Lillian came to my office she already had a criminal order of protection, evidence of very apparent physical abuse and a child that was about a month or two months old at the time. The issue for her initially was her apartment. She was in the apartment. He was out—he had been ordered out by the criminal court. But she was in his apartment and of course the child was his child. Lillian was unsure about what to do; whether she should go to Albany—her family was from the Albany area—whether she should stay in the county she was in and whether he would fight her in terms of issues of relocation because he was, of course, a lawyer. I won’t get into the relocation issues, but you can certainly address that with your family law professors.

As a result, Lillian was very unsteady. My role initially was to encourage her to make or take some steps, such as seek counseling. Finances weren’t a problem for her because she had a certain amount of cash that she had accumulated prior to the marriage. But it was going to be a problem because he was no longer in the District Attorney’s office. Her husband was now a private practitioner who took all his fees in cash and had not filed taxes for about ten years, which was a wedge to use against him if I got him into court. But the key was to get him into court.

Lillian, however, did not want to go into court. I started the

169 This prioritization has been advocated elsewhere. See, e.g., V. Pualani Enos & Lois H. Kanter, Who’s Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting, 9 CLINICAL L. REV. 83, 93-94 (2002) (defining the client-oriented approach as one that seeks to give primacy to the overall well-being of the client while de-emphasizing the legal concerns).

170 See presentation of Professor Jennifer Rosato, supra pp. 473-81.

171 In fact, many domestic violence victims are hesitant to pursue legal
DOMESTIC VIOLENCE IN LEGAL EDUCATION

action and she dropped the ball. The case was before one of the most respected judges of the New York County Supreme Court, and I made the court aware of my problem with the client. I adjourned the case a couple of times, but unfortunately, Lillian dropped the action and never appeared.

She returned to my office a year later after sending me a Christmas card with the baby’s picture. Lillian wanted to re-start the action. We started it again, and again she stopped it, saying that they were going to work things out. To my knowledge, in the last year, thankfully, she was not physically battered again. But that’s one example.

Another case was that of Robin. She was a vice president for one of the banks, an absolutely beautiful, stunning, intelligent African-American woman, married to an African-American man. They had two boys, eight and ten years old. The husband was, I don’t mean to be crude, but he was really a low-life.

Here there was no physical evidence of the abuse, whereas in the first case I had physical evidence, and that client had an order of protection. In this case there was no physical evidence of abuse, no police record, and no order of protection. Robin had never called the police or sought an order of protection. The violence had escalated, but I had no evidence. However, I absolutely, unequivocally and without a doubt believed my client. There wasn’t a question in my mind. The problem here was her safety and the safety of the two kids, with the abusive husband in the house and no record to get him out.

The judge in this case, while refusing to order the husband action against their abusers for various reasons. See, e.g., Meier, supra note 29, at 1345 (listing various reasons why victims are hesitant to turn to the courts for help such as the fear of retaliation, fear of facing their abusers in the courtroom, or believing that the presence of danger is insufficient to warrant legal action).

The trend in domestic violence physical assault cases is for the suppression of evidence of the abuse. See Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Justice, Full Report of the Prevalence, Incidence and Consequences of Violence Against Women 51 (2000). According to definitive government statistics on violence against women, only 41.5 percent of female victims of physical assault by intimates showed physical injury. Id.
out, held a tight rein on the situation. The judge was concerned that getting him out would put Robin in worse harm. So the judge kept him appearing in court literally every single day until there was a resolution—and some of you may not like the solution. I can’t say that I was really happy about it either but she was safe, the kids were safe and, ultimately, we got the husband out. This case is about three years old and I spoke to Robin recently. She thanked me and so I guess all’s well that ends well. The bottom line was that the judge helped me realize that if we give this guy some money we’d get rid of him. This was exactly what we did—we gave him some money and he went away. He’s been away for three years. He chooses not to see his kids. He doesn’t bother her and she’s happy as can be.

I admit that it was not the legal solution that I originally set out to get, which was, so I can be clear, a divorce, an order of protection ordering him out and for my client to get to keep all the money because he was a bum and made no contribution to the marriage or the kids. It was certainly a solution that has worked for Robin and those kids in terms of their safety. Furthermore, the amount of money in the scheme of things—which was about fifteen or twenty-five thousand dollars—was a rather minimal amount of money in this situation. However, relative to the other families I usually work with, offering such a sum would be impossible for most to bear. But in this case it was possible, and it worked.

It appears that I am out of time. So, I guess the one thing I wanted to say, and I’ll end with this, is that the most difficult thing that I’ve found is many of the people who really are in trouble in terms of domestic violence don’t say it.173 Many victims remain silent. However, I often find people coming into

---

173 There are numerous reasons why battered women would remain silent about their abuse. See, e.g., Barbara J. Hart, Victim Issues, Minnesota Center Against Violence and Abuse, at http://www.mincava.umn.edu/hart/victimi.htm. (last visited Feb. 27, 2003). They may fear retaliation and heightened abuse from their abusers; fear that they will be blamed for the violence perpetrated against them; believe that reporting the abuse would be futile; be without resources to engage in a prolonged legal battle; or may believe that they can best protect themselves and their children by remaining silent. Id.
my office saying, “I’m a victim of domestic violence.” Those people are usually the ones whose marriage is unraveling.\textsuperscript{174} It may not be pretty. What’s going on in their household may not be anything that anyone wants to live through. But it’s a marriage or a relationship unraveling, which is very, very different from domestic violence.\textsuperscript{175}

The other question is that—I don’t know if anybody talked about it, and I’m obviously not going to get time to—when domestic violence is used as a weapon especially with regard to custody and visitation issues.\textsuperscript{176} But I guess we’ll save that for another day. Thanks for your time.

\textbf{Professor Elizabeth Schneider}

Thanks to all of our panelists for these great presentations. There are people in the audience who have done work in the area or are teaching about domestic violence in other law schools that I’d like to recognize.

\textsuperscript{174} See, e.g., William G. Austin, \textit{Partner Violence and Risk Assessment in Child Custody Evaluations}, 39 Fam. Ct. Rev. 483, 491 (2001) (asserting that “clinical [studies] are likely to contain a higher level of psychological disturbance and more entrenched family conflict (e.g., couples involved in marital therapy), where biased reporting might be expected”); Andre Derdeyn \& Elizabeth Scott, \textit{Rethinking Joint Custody}, 45 Ohio St. L.J. 455, 493 (1984) (stating that “spouses in a deteriorating relationship may become intensely competitive in an effort to protect themselves from distress caused by the partner and to blame the spouse for the failing relationship”).


\textsuperscript{176} See id. at 491 (stating that “[a]lthough violence reporting may be more reliable than previously thought, this does not imply that there will not be self-interested distortions of violence reports for the complex child custody case involving domestic violence. When the case cannot be mediated or settled and a [child custody evaluation] is ordered, it is expected that there will be a highly contentious quality to the case, in which information manipulation will be common.”).
We have Vicki Lutz from the Pace Law School Battered Women’s Justice Center, a law school program devoted to student representation of battered women, and Vanessa Merton also from Pace Law School, who teaches in the area of health law as well as other issues that touch on domestic violence. We have Kim Susser, Director of the Domestic Violence Initiative at the New York Legal Assistance Group (NYLAG), who co-teaches a course on domestic violence and the law at St. John’s University Law School. Nancy Erickson, who was already mentioned, has done pioneering work and legal scholarship in this area, first as a law professor at Ohio State and now in private practice here in New York. Minna Kotkin established a Violence Against Women Act Project several years ago in the Federal Litigation Clinic that she directs here at Brooklyn Law School. This was a very innovative and important project—counseling, doing outreach, and educating women about their rights under the civil rights remedy of the Violence Against Women Act, until it was held unconstitutional by the United States Supreme Court in United States v. Morrison. Finally a person is with us today who will be coming into the fold, Deborah Tuerkheimer, now with the Brooklyn DA’s office. Deborah will be joining the faculty at the University of Maine Law School in Fall 2002 and teaching a course there on domestic violence. I would like to acknowledge one other person in the audience, Hedda Nussbaum. In addition to the criminal case here in New York that I’m sure many of you are aware of involving Hedda, she was the plaintiff in Nussbaum v. Steinberg that Betty litigated successfully in Manhattan Supreme Court and the Appellate Division, First Department. Kristin and I wrote an amicus curiae brief in that

---

177 529 U.S. 598 (2000). The Supreme Court found that the Commerce Clause did not grant Congressional authority to regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce” and that VAWA was also unconstitutional under Section 5 of the Fourteenth Amendment. Id. at 617.

178 618 N.Y.S.2d 168 (Sup. Ct. 1994), aff’d, 703 N.Y.S.2d 32 (App. Div. 2000). Hedda Nussbaum, battered companion of Joel Steinberg, who was convicted of killing their illegally adopted 6-year-old daughter, proved that years of his abuse rendered her so incapacitated that the statute of limitations
DOMESTIC VIOLENCE IN LEGAL EDUCATION

Nancy Erickson

Are there any movements in the statute of limitations area? Anything happening there?

Betty Levinson

There are, but they’re limited. Let me start with New York, which I know best. Both the toll for infancy and insanity are in the same section of the CPLR. In either event, the toll of the statute of limitations extends for ten years past the date of the tort for which there would ordinarily be a one-year statute.

on her claims against him for assault and other intentional torts was tolled. Ms. Nussbaum argued that the statute of limitations on her claims should be stopped from expiring by section 208 of New York’s Civil Practice Law and Rules, which extends the time to sue for persons under a disability due to infancy or insanity. A referee agreed that Ms. Nussbaum had proven “an overall inability to function in society,” the standard applied by the New York Court of Appeals to the term insanity in the statute, and thus her civil suit against Mr. Steinberg could go to trial. The Appellate Division, First Department, affirmed the decision. See also Cerisse Anderson, Tolling of Time-Bar Allows Nussbaum to Sue Steinberg, N.Y. L.J., Mar. 11, 1997, at 1.

179 See N.Y. C.P.L.R. § 201 (McKinney 2003). “An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.” Id. See also N.Y. C.P.L.R. § 203 (McKinney 2003). “The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed.” Id.

180 Nussbaum, 703 N.Y.S.2d at 33. The appellate division held:

[the evidence adduced at the hearing and credited by the Special Referee amply demonstrated that, during the 10-year period preceding the commencement of this action, plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year Statute of Limitations for
The toll for insanity does not require proof of insanity as understood in its colloquial use. As indicated in the leading case, *McCarthy v. Volkswagen*, you need to show that the person affected has been rendered incapable of functioning in society. 181 In Hedda Nussbaum’s case, 182 the special referee who tried the summary judgment hearing on the toll explicitly held that an inability to function can arise for economic reasons. This suggests an expansion of the scope of “nonfunctioning” upon which the toll can be based. Thus, if an abuser impedes his victim’s access to their income and assets, and she is financially dependent upon him, and has no funds with which to separate herself and live her own life, let alone the freedom and funds to retain counsel for the purpose of suing him, such can contribute to the “nonfunctioning” justifying a toll. Expanding this definition of “functioning” is definitely helpful.

Theories that have worked in other states either haven’t been tried or haven’t succeeded in New York. In New Jersey, there is good law based on continuing tort theory. 183 In Idaho, a

---

181 *McCarthy v. Volkswagen*, 450 N.Y.S.2d 457 (App. Div. 1982) (interpreting the toll for insanity to apply to “those individuals who are unable to protect their legal rights because of an over-all inability to function in society”).

182 *Nussbaum*, 703 N.Y.S.2d at 33. The appellate division held that “[t]he evidence adduced at the hearing and credited by the Special Referee amply demonstrated that, during the 10-year period preceding the commencement of this action, plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year Statute of Limitations for intentional torts pursuant to CPLR § 208.” *Id.*

183 See Giovine v. Giovine, 284 N.J. Super. 3, 18 (App. Div. 1995) (holding that a plaintiff “shall be entitled to present proof that she has the medically diagnosed condition of battered woman’s syndrome” and is “entitled to sue her husband for damages attributable to his continuous tortuous conduct resulting in her present psychological condition, provided [that] medical, psychiatric, or psychological expert proof to establish[es] that she was caused to have an inability to take any action at all to improve or alter the situation”); *Cusseaux v. Pickett*, 279 N.J. Super. 335, 345 (App. Div. 1994) (“Because the battered-woman’s syndrome is the result of a continuing pattern of abuse and violent behavior that causes continuing damage, it must be treated in the
defendant was estopped from asserting a defense of the statute of limitations when his conduct was shown to be the reason the plaintiff refrained from suing him.\footnote{Figueroa v. Merrick, 919 P.2d 1041, 1045 (Idaho Ct. App. 1996) (holding that the defendant was equitably estopped from asserting the statute of limitations defense because his “statements or conduct induced the plaintiff to refrain from prosecuting [the] action during the statutory limitation period.”).} Estoppel was rejected in New York in \textit{Hoffman v. Hoffman},\footnote{Hoffman v. Hoffman, 556 N.Y.S.2d 608, 609 (App. Div. 1990).} where a young plaintiff sued her father and grandfather for childhood sexual abuse. As Judge Ciparick, who now sits on the New York Court of Appeals, functionally said in the \textit{Hoffman} case, “Legislature, do something.”

\textbf{Professor Elizabeth Schneider}

I would like to underscore something that Tony said.\footnote{See presentation of Professor J. Anthony Sebok, \textit{supra} pp. 444-48.} There is some very good scholarship now, Nancy, on torts and domestic violence. First the Clare Dalton and Jenny Wriggins articles that Tony mentioned.\footnote{Dalton, \textit{supra} note 62, at 324 (exploring the ways in which abuse-related injuries fit or do not fit into traditional tort categories, discussing how same way as a continuing tort”).} We have an entire chapter on

\footnote{See also David E. Poplar, \textit{Tolling the Statute of Limitations for Battered Women After Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse}, 101 DICK. L. REV. 161, 186 (1996) (defining a continuous tort as “one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted … . A continuing tort sufficient to toll the statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation,” and discussing this doctrine in the context of battered woman’s syndrome).}
torts in our casebook, which is in itself pretty amazing. You couldn’t have had anything like that ten years ago.

So I think there’s a lot written. There are obviously the real life problems that Tony and Betty were talking about, but there are many interesting developments particularly on statute of limitations efforts around the country.

**Audience Member**

Speaking about legislative changes, I know there are multiple problems with women in non-traditional relationships. These changes would make terms in the law more gender neutral and broaden the definition of family relationships. I wonder if that has really translated into access to legal remedies for non-traditional victims of domestic violence—men, people in same-sex relationships, unmarried partners in family court arenas. I wonder if anybody could speak to that.

**Kristin Bebelaar**

There’s a lot of movement in Albany on a bill to expand the definition of family to include people who live together and are not married among the current definition. This would expand access to family court to those who are now unable to have that access.

---

Issues of process make it difficult for victims of domestic violence to pursue traditional claims, suggesting some substantive and procedural “fixes” for these difficulties, and addressing the ways in which it is likely that a tort claim by a victim of domestic abuse will be both triggered by, and complicated by, a concurrent, or recently concluded, divorce proceeding); Wriggins, *supra* note 63, at 125 (asserting that as a consequence of the dearth of lawsuits in domestic violence cases, key aims of the tort system such as deterrence and loss-spreading are not achieved, and suggesting a more effective approach to civil liability for domestic violence torts through insurance reforms such as the Domestic Violence Torts Insurance Plan, which challenges the conventional wisdom that intentional torts cannot or should not be insurable).

---

188 *DALTON & SCHNEIDER, supra* note 4, at 806-67.

189 In the 2002-03 term, the State Assembly passed A2235, a bill that expanded the definition of family in the Family Court Act and Criminal
PATRICIA FERSCH

The reality right now is that family court is not a vehicle for same-sex couples who experience domestic violence, unless they have another issue—unless they have a child in common.

BETTY LEVINSON

There are ways around that, depending upon what remedy you’re seeking, as long as you have a cause of action that could go to supreme court. You can always ask for preliminary injunctive relief, which can include an order of protection. In fact, there are cases which I have used and recommended stating that even if you can’t go to family court you can attach a TRO to any claim.

AUDIENCE MEMBER

Have any of you have seen any action around the gender animus legislation in New York City and Westchester that allows a tort action based on domestic violence over a six to seven year period? Of course the problem is that you’ve got to show

Procedure Law to include “members of the same family or household.” This would include “unrelated persons who continually or at regular intervals reside in the same household or have done so in the past.” See State Assemb. A2235, 2003-2004 Reg. Sess. (N.Y. 2003), available at http://assembly.state.ny.us/leg/?bn=02235 (last visited Apr. 3, 2003).

190 NEW YORK CITY, N.Y., ADMIN. CODE tit. 8, §§ 8-901-907 (2000), the “Victims of Gender Motivated Violence Protection Act.” The statutory language closely follows that of the federal Violence Against Women Act and allows victims of gender-motivated violent acts to sue their attackers. See also Julie Goldscheid & Risa Kaufman, Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory, 6 MICH. J. RACE & L. 265, 271 (2001) (examining state laws provide redress for gender-motivated violence). Recently, a plaintiff whose case against her former fiancé for alleged gender-motivated abuse, brought under the federal Violence Against Women Act, was dismissed because the applicable part of the Act was struck down by the Supreme Court while her case was pending but was allowed to be heard upon refilling in state court under New York City’s local
gender animus, but has anybody seen such activity?

Professor Elizabeth Schneider

I don’t know the answer to that. I’ve been wondering about that, myself. After Morrison held the civil rights remedy of the Violence Against Woman Act unconstitutional, New York City passed legislation to create a local remedy.191

Now, the problem is that many cases involving the gender animus requirement under the civil rights remedy of VAWA never got to the merits because of the constitutionality problem. My view always was that once they got past the constitutionality hurdle, there were going to be big problems with the gender animus requirement. My hunch was that rape looks like gender animus to people, but domestic violence does not. That raises questions that go to what Stacy Caplow discussed about unlinking the issues.

That is ironic to me because the whole thrust of my argument in Battered Women and Feminist Lawmaking is to put domestic violence back into a much more affirmative gender equality framework.192 In one of the chapters in that book, written before law. Local Law Applied Retroactively, 8 CITY L. 64 (2002). The court applied the new law retroactively because the law’s intent was to supply a private remedy to the victims of domestic violence and fill a void left by the Supreme Court’s opinion. Id.

191 NEW YORK CITY, N.Y., ADMIN. CODE tit. 8 §§8-901-907 (2000). The statute went into effect December 19, 2000, and was enacted because “in light of the void left by the Supreme Court’s decision, the Council [found] that victims of gender-motivated violence should have a private right of action against their perpetrators under the Administrative Code.” Id. In its Declaration of Legislative Findings and Intent, the City Council further described the gravity of the problems faced by victims of gender-motivated violence within the court system and sought “to resolve the difficulty that victims face in seeking court remedies by providing an officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence.” Id.

192 SCHNEIDER, BATTERED WOMEN, supra note 69, at 5-7.

Feminist legal arguments about gender violence have developed from feminist insights about the way heterosexual intimate violence is part of a larger system of coercive control and subordination; this system
DOMESTIC VIOLENCE IN LEGAL EDUCATION

Morrison was decided, I discuss why I think courts are not going to be very responsive around the gender animus arguments.\textsuperscript{193} Frankly, I think those points are still true, even under the New York City formulation of it, even though it’s a different formulation.

The point is—that judges still have to interpret the meaning. If a batterer beats a woman and says, “I hate women as a class,” then judges more are likely to see gender animus. If he’s just beating her, judges will ask, why does that show gender animus? That’s a particular problem of consciousness and sensitivity—an enormous hurdle. That means that lawyers have to explain the systemic, individual and social dimensions of battering, which is very much the framework of our casebook. This is a tremendous educational challenge for judges, for lawyers, for law students, for law professors—for all of us—to put these pieces together and understand battering within this larger social context.

Thank you all for a very stimulating and informative program.

\textsuperscript{193} Id. at 188-96. (suggesting that the same social attitudes that have emerged and shaped the law in other domestic violence contexts—private, personal or family issues—are likely to prevent intimate violence from being understood or interpreted by judges as an issue of gender).
TILTING THE LEVEL PLAYING FIELD:
PUBLIC ADMINISTRATION MEETS
LEGAL THEORY

Sheila Suess Kennedy*

INTRODUCTION

There is an old story about two businessmen who take a quarrel to the village Rabbi. He listens to the first man tell his side, and says, “Yes, you are right.” The second man then gives his version of the affair, and once again the Rabbi says, “You are right.” At that point, an onlooker protests, “They can’t both be right!” To this the Rabbi responds, “Ah, yes, you also are right.” American public administrators increasingly find themselves in the position of that Rabbi, needing to acknowledge the legitimacy of competing claims on the government that are seemingly both correct and but are mutually exclusive. Wanting to be fair, we are torn between programs intended to ameliorate past injustices and complaints that the programs themselves are unjust.

The idea of equality is a bedrock element of the American legal and political systems; we strive for a meritocracy and affirm the government’s obligation to treat similarly situated citizens equally. The ‘level playing field’ is a favorite metaphor

* Associate Professor, Law and Public Policy, School of Public and Environmental Affairs, Indiana University Purdue University–Indianapolis. Prior to joining the faculty, the author was the Executive Director of the Indiana Civil Liberties Union. She has been Corporation Counsel for the City of Indianapolis, a lawyer in private practice, and a Republican candidate for U.S. Congress. She earned her J.D. from Indiana University–Indianapolis in 1975.
JOURNAL OF LAW AND POLICY

for politicians and public administrators alike. Whether a playing field is truly level, however, is often a contentious issue. This article analyzes the constitutional requirements of equal treatment against claims arising in the context of affirmative action and charitable choice, programs whose proponents claim that the field must “tilt” if genuine equality is to be achieved. But, if government must treat people differently—that is, unequally—to achieve real equality, what are the implications for public policy, public management and the rule of law? Indeed, how are we to define equality so that, to appropriate Justice Stewart’s famous approach to obscenity, I will “know it when I see it”?1

I. JUSTICE, FAIRNESS & DIFFERENCE

The notion of the level playing field has been invoked politically as a necessary condition of democracy, a convenient metaphor for saying that a democracy, defined anywhere along the spectrum, presupposes the absence of a wide disparity in the participatory capabilities of the citizenry.2 Political equality has been deemed present when “the decision rule for determining outcomes at the decisive stage must take into account, and take equally into account, the expressed preferences of each member of the demos as to the outcome.”3 This construct, of course, begs

1 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing the difficulty in defining obscenity).
2 See, e.g., Michael J. Goldberg, Derailing Union Democracy: Why Deregulation Would Be a Mistake, 23 BERKELEY J. EMP. & LAB. L. 137 (2002) (discussing the importance of a level playing field as a basic safeguard of democracy).
3 Robert A. Dahl, Procedural Democracy, in PHILOSOPHY, POLITICS AND SOCIETY 97 (Peter Laslett & James Fishkin eds., 1979) (examining the idea of procedural democracy and the problem of inclusion, and examining various solutions to the problem of inclusion, including his own). Procedural democracy is the idea that certain criteria should govern the decision-making process of any human association. Id. at 101. Such criteria include political equality (decisions must take into account the preferences of each member equally), effective participation (members must have adequate and equal opportunity to express individual preferences) and enlightened understanding (members must have adequate and equal opportunity to discover and evaluate
the question of equal access to membership, among other things.

Philosophers have gone beyond such narrow rules of political participation in describing the role of equality in a just society. Aristotle defined as a fundamental attribute of justice the principle that equals should be treated equally, begging the questions “who are equals?” and “what constitutes equal treatment?” John Rawls proposes that we construct our legal and political system behind a veil of ignorance: if we do not know beforehand what our personal attributes or social station will be, the theory goes, we will be more likely to construct a system that is fair to all, even where it may be unequal. Amartya Sen argues that, no matter how many rights individuals may have, if material conditions are such that those individuals cannot freely choose their ends—if they are so afflicted by disease or constrained by custom or poverty that they are not truly free to choose their own goals—they are neither free nor equal.

Virtually all political philosophies extol equality as an ideal, but as Ian Hacking wryly noted, there is a wide variety of individual preferences. Id. at 101-05. The problem of inclusion relates to the membership of the association, i.e., who has a right to be included in the association and who can properly be excluded. Id. at 109.


We must find some point of view, removed from and not distorted by the particular features and circumstances of the all-encompassing background framework, from which a fair agreement between free and equal persons can be reached. The original position, with the feature I have called ‘the veil of ignorance,’ is this point of view. And the reason why the original position must abstract from and not be affected by the contingencies of the social world is that the conditions for a fair agreement on the principals of political justice between free and equal persons must eliminate the bargaining advantages which inevitably arise within the background institutions of any society as the result of cumulative social, historical and natural tendencies.

Id.

working definitions of the term.\textsuperscript{6} Libertarians want equality of rights, or equality before the law. Egalitarians want equality of results in varying formulations.\textsuperscript{7} Free market advocates want equal access to markets.\textsuperscript{8} Americans speak often of “equality of opportunity” a term often defined as the opportunity to compete on . . . what else? A level playing field. And so we come full circle, having consistently avoided the crucial question, “equality of what?”

Unless we are able to define the “what,” we will be similarly unable to decide what sorts of differences require recognition if genuine equality is to be achieved. Even if we are talking simply about equal rights before the law, using the narrowest possible construction of that term, a fair and equal system must take note of and allow for differences between children and adults, competent and incompetent persons, motorists and pedestrians, and so forth. All but the most doctrinaire egalitarians will allow for differences in need resulting from a variety of factors, including behavior and effort. As Will Kymlicka noted, in other countries it is “increasingly accepted that some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of

\textsuperscript{6} Hacking, supra note 5, at 41-42 (noting the different theories of equality and discussing how Sen’s focus on “equality of what” deviates from the previous focus on “equality for whom”).

\textsuperscript{7} Many years ago I read a wonderful science fiction story, the name of which I have unfortunately long forgotten, describing a society so obsessed with the egalitarian version of equality that persons who could run fast were weighted down with sandbags; those with high I.Q.s required to wear earphones playing distracting music, and so forth. For further discussion of egalitarian theories, see Michael Quinn, Justice and Egalitarianism vi, 41 (1991) (stating that at the core of egalitarian theories of justice is the notion that society should ensure that individuals have the same ability to make reasoned choices, thus allowing for each person to equally consider his or her choices in life). However, Quinn notes that theorists, including Rawls, Dworkin and Nozick, differ in how this ideal should be accomplished and what stands in the way of accomplishing it. Id. See generally John Rawls, A Theory of Justice (1999).

citizenship." These systems recognize that applying the same rules to everyone does not necessarily treat everyone as equal.

Further complicating the issue of difference, and the importance we should assign to it in an effort to define equality, is the significance of labels or framing. In the introduction to *Making All the Difference* Martha Minow tells the story of animal behaviorist Harold Herzog, Jr., who works in a laboratory at the University of Tennessee and must obtain approval for any experiment on the 15,000 or so mice they use each year. Yet the concern over mouse welfare does not extend to those that escape and are subsequently labeled “pests,” nor to field mice that might get into the building. Those mice are routinely captured and destroyed. Similarly, other mice are used as food for other experimental animals, and likewise fall outside the rules governing appropriate treatment. Finally, and ironically, when a pet mouse owned by Herzog’s son died the family gave “Willie” a funeral, complete with a tombstone. The moral of the story, as both Herzog and Minow note, is that our sense of equitable behavior depends heavily upon the labels we assign and the language with which we describe the situation and categories before us. Minow and Herzog conclude that the negative labels humans use to refer to animals dictate the way such animals are treated by humans.
its relevance to issues of equality, need only look to contemporary political disputes over gay rights or reproductive choice. When the gay community demands equality, the Christian Right responds that what they really want is “special rights.” When some women talk about “the right to choose” as an element of religious equality, others respond by equating choice with murder and by labeling pro-choice advocates “baby killers.” Americans believe in equality; we don’t believe in “special rights.” We believe in personal autonomy and respect for different religious beliefs; we don’t condone baby-killing. He who frames the issue wins the debate. Unfortunately, the competition to be the first to label—to be the side that successfully frames the issue—usually generates more heat than light.

II. FOURTEENTH AMENDMENT EQUALITY

In the United States discussions of equality generally, although certainly not always, begin with examining the role of government and the meaning and application of the Equal Protection Clause of the Fourteenth Amendment, passage of which, as Akhil Reed Amar has persuasively argued, profoundly changed the way in which America defines its constitutional principles, including principles of equality.16

The Fourteenth Amendment prohibits states from denying persons within their respective jurisdictions “the equal protection of the laws.”17 The pertinent language reads:

similar way, the labels often assigned to certain groups of people usually bear a direct relation to the moral judgments made about those people. Id.

16 See generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 7 (1998) (introducing his argument that the Fourteenth Amendment has, since its passage, greatly influenced the way in which the Bill of Rights is viewed). To the extent that people think that the Bill of Rights applies directly to state government action, people have come to ignore the Fourteenth Amendment itself. In reality, it underlies everyone’s thinking because the Fourteenth Amendment created the avenue for applying the Bill of Rights to the states in the first instance. Id.

17 U.S. CONST. amend. XIV.
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 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.18

The language is straightforward and congressional debate surrounding passage, as well as subsequent arguments for and against ratification, proceeded on the assumption that the amendment would obligate the states to “incorporate” the Bill of Rights—that is, would impose upon the states the same limitations that the original Bill of Rights imposed upon the federal government.19 Nevertheless, the amendment, and particularly its Equal Protection Clause, were subsequently interpreted by the Supreme Court much more narrowly. The “fundamental rights” protected by the Bill of Rights were applied to the states very slowly, and over a period of many years.20

---

18 Id.
19 See generally AMAR, supra note 16, at 163-74, 197-206 (discussing the politics of ratification and incorporation debate).
20 For example, in 1833 the Supreme Court held that the rights guaranteed in the first eight amendments did not apply to state governments. See Barron v. Baltimore, 32 U.S. 243, 249 (1833) (finding that the Fifth, Sixth and Eighth Amendments to the United States Constitution applied only to the federal government and not to the states). Forty years later, in the now-infamous Slaughter-House Cases, the Court held that those same eight amendments were not “privileges and immunities” of citizenship. See 83 U.S. 36, 81 (1872) (noting, “we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration”). Subsequently, in a series of cases, the Court gradually read the Due Process Clause of the Fourteenth Amendment as “incorporating” fundamental liberties, making those guarantees that could be deemed fundamental binding on the States. For an overview of the evolution of the incorporation doctrine, see generally Twining v. New Jersey, 211 U.S. 78 (1908) (finding the exemption from self-incrimination under the Fifth Amendment to the United States Constitution as not
Even after the Equal Protection Clause was so applied, early notions of equal protection accommodated treatment that was “separate but equal.” Not until *Brown v. Board of Education* in 1954 did the Supreme Court conclude that separate was inherently *unequal*.\(^{21}\)

The equality protected by the Fourteenth Amendment is not the equality proposed by political philosophers. Rather, the amendment is consistent with the founders’ belief that liberty is essentially defined in the *negative*, as freedom from state constraints on individuals’ beliefs and behaviors.\(^{22}\) Equality in

incorporated under the Privileges and Immunities Clause of the Fourteenth Amendment; Palko *v.* Connecticut, 302 U.S. 319 (1937) (holding that Fifth Amendment immunity from double jeopardy is not incorporated under the Fourteenth Amendment); Adamson *v.* California, 332 U.S. 46, 54 (1947) (incorporating protection against compulsory self-incrimination by fear of hurt, torture or exhaustion under the Due Process Clause of the Fourteenth Amendment); Duncan *v.* Louisiana, 391 U.S. 145 (1968) (finding that the Fifth Amendment right to be free from compelled self-incrimination is incorporated under the Fourteenth Amendment); Benton *v.* Maryland, 395 U.S. 784, 794 (1969) (applying the double jeopardy prohibition to the states through the Fourteenth Amendment on the grounds that it represents a “fundamental ideal in constitutional heritage”).

\(^{21}\) 347 U.S. 483, 495 (1954) (holding that the doctrine of “separate but equal” holds no place in the field of public education because “separate educational facilities are inherently unequal”). *See also* Gaston County, N.C. *v.* United States, 395 U.S. 285 (1969) (determining it appropriate to analyze whether a state or county has a history of separate and inferior educational opportunities, as outlined in *Brown v. Board of Education*, when deciding the fairness of a literacy test under the auspice of the Voting Rights Act of 1965 and upholding the lower court’s determination that because such a history was present in Gaston County the literacy test was unfair and barred by the Act).

\(^{22}\) *See, e.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). In *Allgeyer* the Court declared that:

*The liberty mentioned in [the Fourteenth Amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter all contracts which may be proper, necessary and essential to his carrying out to a
that sense is limited to our right to be treated equally by government. Equal protection analysis thus begins with an inquiry as to whether there has been state action, without which there is no violation of the Fourteenth Amendment.\textsuperscript{23}

Once it is determined that state action is present, courts apply an elaborate “tiered” analysis that hinges upon the nature of the classification involved and the precision with which the government action has been focused. As Randall Kelso explained:

\begin{quote}
[t]he first inquiry is what governmental interests support a statute’s constitutionality. Depending upon the standard of review, the governmental interests must be legitimate or permissible; important, substantial, or significant; or compelling or overriding. Of course, the governmental interest may be impermissible or illegitimate, and thus not support the statute under any standard of review.\textsuperscript{24}
\end{quote}

\footnotesize
\textsuperscript{23} This search is not as simple as it may seem. State action jurisprudence is virtually incoherent, with serious consequences beyond the scope of this article. \textit{See generally} Sheila S. Kennedy, \textit{When is Private Public? State Action in the Era of Privatization and Private-Public Partnerships}, 11 GEO. MASON U. CIV. RTS. L.J. 203 (2001) (emphasizing that under the state action doctrine, public invasions of rights are constitutionally prohibited, while the Fourteenth Amendment affords no protection against private conduct).

Subsequent inquiries focus upon the methods employed to advance those governmental ends. Under the rational basis test, if the government’s interest is “legitimate” or “permissible,” the law must be rationally related to its objective. A second tier, commonly known as intermediate scrutiny, requires that where the interest is “important, substantial or significant” there must be a more substantial nexus, or connection, between the means and the end. If a given law targets a suspect class or impinges upon a fundamental interest, the governmental interest must be “compelling” and a direct relationship must be demonstrated in accordance to “strict scrutiny” standards. Where heightened scrutiny is applied, either intermediate or strict, a final level of analysis focuses upon whether the law in question has been narrowly tailored to achieve its ends—such that it avoids imposing a burden greater than necessary to the achievement of the desired ends.

Most challenges to equal protection are decided under the “rational basis” test and it is an unusual law that fails to pass muster under this standard, which is highly deferential to the state. However, certain classifications have been determined

---

25 See generally id.
26 Id. at 227.
27 Id.
28 Id. at 228.
29 Id. at 234.
30 Id. at 230-32. One notable exception is Romer v. Evans, in which the Supreme Court struck down an amendment to the Colorado State Constitution, holding that animus toward a particular group of people—here, homosexuals—could never constitute a legitimate state purpose. 517 U.S. 620, 632 (1996). The Court noted:

[Colorado’s amendment] fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id.
inherently suspect and require closer examination by the courts. Race, national origin and alienage will trigger strict scrutiny, as will laws burdening a fundamental right. The categories requiring strict scrutiny are those where members of the group share an immutable characteristic, have historically suffered pervasive discrimination, and where efforts to vindicate their rights in the political arena are unlikely to succeed. Categories that will be examined under “heightened,” but not strict, scrutiny include, for example, gender and legitimacy.31

As the above, somewhat cursory, overview of equal protection analysis illustrates, the Supreme Court has fashioned a highly technical template to determine whether there has been a violation of the Fourteenth Amendment. There is substantial scholarship suggesting that the Court has not hesitated to manipulate this template to serve political or ideological ends.32 It is certainly the case that equal protection jurisprudence has evolved without the benefit of any overarching, generally accepted theory of equality, negative or positive. It should not come as a surprise, therefore, that equal protection case law is anything but coherent, nor that political constituencies unschooled in the arcane language of legal analysis view much of it as unfair and decidedly unequal. Because the stability of a society depends in large measure upon the extent to which members of that society feel they are treated justly, this popular...
resentment is no small matter. If the rules promulgated by the state are believed by large segments of the citizenry to differ substantially from their internalized notions of fair play and equal treatment, the consequences for legal legitimacy and voluntary compliance can be quite negative.

The disparity between popular understanding of equality and its legal or constitutional definition takes on added urgency as government becomes a more pervasive element of citizens’ everyday experiences. In a society where the operations of the state reach increasingly into areas that were previously entirely private, the ways that state conducts business, uses its power to shape law and provide for the common welfare become critical elements in the formation of that society, and the degree to which that society values or devalues particular notions of equality.33

III. NEUTRALITY AND EQUALITY

It is impossible to understand the political passions aroused by affirmative action, charitable choice, or any other government action that specifically recognizes difference in order to achieve equality, without first understanding the importance Americans attach to governmental neutrality. As I have written elsewhere, the one thing most Americans will agree upon, at least publicly, is that our goal is the establishment of a society in which skin

33 Not only do contemporary laws and regulations address numerous areas of American life that were hitherto unregulated, government programs such as social security and welfare, and government agencies like the Small Business Administration, the United States Civil Rights Commission, the Equal Employment Opportunity Commission, and many others, are part of the landscape of even the average citizen. See, e.g., D.J. Galligan, Administrative Law xi (1992). Galligan posits that:

[the rise of the welfare state and the regulation of social and economic activity have meant a substantial expansion of government in the middle and later years of the twentieth century. New and wide ranging legislative programmes have been developed; a host of new authorities have been created, and the lives of citizens have been much controlled and regulated.

Id.
color, gender and the like are officially irrelevant. Most of us really do want a society where people are judged by their actions, talents and “the content of their characters,” where the same, neutral rules apply to everyone in equal measure.

If one believes that it is profoundly immoral to disadvantage someone on the basis of race, gender, sexual orientation or other aspects of one’s fundamental identity, it seems morally and intellectually inconsistent to award advantage on that same basis. Furthermore, programs that single out particular groups for protection or other special treatment raise the specter of misuse of government power: how do we ensure that such programs are based upon a desire to remedy demonstrable inequalities and not on considerations of political or other advantage? If government can “bend the rules” for one group, what is to keep it from advantaging others who are less deserving? How shall we define desert for such purposes?

Of course, legal discourse discussing neutrality runs into many of the same problems encountered in discussions of equality. If African-Americans have been enslaved, stigmatized and segregated over the past three hundred years, how “neutral” is a system that removes legal barriers but does nothing to remedy the personal and structural effects of those experiences?

Because official neutrality, like equality, is highly valued but rarely defined, it is often argued that applying special rules to certain groups actually furthers more general neutrality. As

34 SHEILA KENNEDY, WHAT’S A NICE REPUBLICAN GIRL LIKE ME DOING AT THE ACLU? 182-91 (1997) (postulating in part that the approach of traditional Republicanism to questions of equality was similar to that of civil libertarians in that both were suspicious of government intrusions).

35 Id.

36 See, e.g., Alan E. Brownstein, Interpreting the Religion Clauses in Terms of Liberty, Equality and Free Speech Values: A Critical Analysis of “Neutrality Theory” and Charitable Choice, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243 (1999). Brownstein criticizes neutrality theory on three bases. Id. at 246-47. First, he argues that neutrality theory is a misnomer because it encourages decisions that favor religious choices. Id. Second, by focusing solely on government interference with religion and liberty, it ignores other constitutional values affected by charitable choice laws. Id. at 247. Third, the theory ignores “the positive role that government should play in promoting
noted by Alan Brownstein, proponents of charitable choice use “neutrality theory” to justify a form of affirmative action for faith-based organizations. Brownstein stated:

The goal of neutrality theory, according to Esbeck, is to ‘maximize [ ] religious liberty.’ That objective is best accomplished by the minimization of the government’s influence over personal choices concerning religious beliefs and practices. The goal is realized when government is neutral as to the religious choices of its citizens. Thus, whether pondering the constitutionality of exemptions from regulatory burdens or as to equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of government action on personal religious choices.

Id. at 249. Brownstein advocates a holistic approach to scrutiny of charitable choice proposals. Id. at 249. First, he acknowledges the basis for some preferential treatment of religious organizations as “constitutionally justified, if not required.” Id. Brownstein further recognizes that other decisions that may disadvantage religious organizations, such as access to state benefits, may be warranted as a result of that preferential treatment. Id. Brownstein notes that, “[i]f regulatory exemptions result in incentives favoring religion, the granting of exemptions creates an imbalance in the constitutional ledger that may help justify other decisions, creating countervailing incentives, that move the system closer to equilibrium.” Id.

Id. at 245 (quoting Carl H. Esbeck, A Constitutional Case for Governmental Cooperation with Faith Based Social Service Providers, 46 EMORY L.J. 1, 27 (1997)) [hereinafter Esbeck, Constitutional Case]. Esbeck, Senior Counsel to the Deputy Attorney General, participated in drafting the charitable choice legislation and advocated before Congress for its passage. See Brownstein, supra note 36, at 234; Carl H. Esbeck, Statement Before the United States House of Representatives Concerning Charitable Choice and Community Solutions Act, 16 J. NOTRE DAME J.L. ETHICS & PUB. POL’Y 567, 568 (2002) [hereinafter Esbeck, Concerning Charitable Choice]. Esbeck argues that government should minimize its impact on religious organizations
Neutrality theory implements this integration by “distinguishing between burdens and benefits.”\textsuperscript{39} Under its operational rules, minimization of government influence is achieved by: “(1) allowing religious providers equal access to [state] benefits, and (2) allowing them \textit{separate relief from regulatory burdens}.”\textsuperscript{40}

In other words, Esbeck defines “neutrality” in this context as special dispensation from rules of otherwise general application— as tilting the level playing field.\textsuperscript{41} As Professor Brownstein notes, however, “granting an exemption from a general law confers substantial material benefits” much as if a particular religious group were excused from payment of an onerous, but generally applicable, tax.\textsuperscript{42} Comparing such an approach to the neutrality theory underpinning free speech principles, Brownstein argues that by providing special regulatory exemptions for proponents of a religious point of view, but not for proponents of other, secular viewpoints, programs like charitable choice may distort the marketplace of ideas and run afoul of the First Amendment.\textsuperscript{43}

when determining eligibility criterion for federal funding of social service programs. \textit{See} Esbeck, \textit{Constitutional Case, supra} at 24.

\textsuperscript{39} Esbeck, \textit{Constitutional Case, supra} note 38, at 24. According to Esbeck, religious organizations should be allowed equal access to benefits, but should be granted separate relief from regulatory burdens. \textit{Id.} He suggests that this “best of both worlds” approach is precisely what the First Amendment was designed to encompass. \textit{Id.} at 27.

\textsuperscript{40} \textit{Id.} at 24 (emphasis added).

\textsuperscript{41} \textit{Id.} at 20–21. \textit{See also} Brownstein, \textit{supra} note 36, at 251 (critiquing Esbeck for ignoring that neutrality of government spending decisions is a sham).

\textsuperscript{42} Brownstein, \textit{supra} note 36, at 261.

\textsuperscript{43} \textit{Id.} at 271. Other commentators have made similar suggestions as to potential First Amendment concerns and infringements raised by charitable choice initiatives and legislation. \textit{See}, e.g., Michelle Dibadj, \textit{The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice}, 26 S. ILL. U. L.J. 529, 556 (2002) (arguing that Faith-Based Initiatives offer protection for religious organizations resulting in preferential treatment over non-religious organizations); Carmen M. Guercicagotia, \textit{Innovation Does Not Cure Constitutional Violation: Charitable Choice and the Establishment Clause}, 8 GEO. J. ON POVERTY L. & POL’Y 447, 472–73 (2001) (stating that charitable choice violates any of the three principles of the Establishment
IV. AFFIRMATIVE ACTION AND CHARITABLE CHOICE

Disputes over the nature of fundamental fairness and genuine equality have figured prominently in political debate and litigation over affirmative action programs. One element of that debate centers upon the appropriate level of analysis; that is, to what extent should courts take note of the history of black Americans as a group, and to what extent should judicial remedies address discrimination against discrete, identifiable individuals?44 The American legal system is uncomfortable with the claims of so-called “identity politics.” Unlike the legal systems in countries described by Kymlicka, ours has historically focused on individual rights and responsibilities, and Americans are profoundly uncomfortable when individual merit and behavior are not the primary focus of legal analysis.45 For example, it has been noted that:

[i]he official American vision of equality has been one of

Clause, secular purpose, coercion and endorsement, and is therefore unconstitutional).

44 See generally Sandra Levitsky, Reasonably Accommodating Race: Lessons From the ADA For Targeted Affirmative Action, 18 LAW & INEQ. 85, 111 (2000) (citing various views on affirmative action). Levitsky notes evidence that most Americans “do not approve of remedies to persistent inequality that grant rewards on the basis of group membership rather than individual merit” and that “[a] successful affirmative action measure will necessarily have to contain then, an individual based remedy.” Id.

45 See generally KYMLICKA, supra note 9, at 57 (attributing a negative attitude toward international protection of national minorities to the League of Nation’s minority protection scheme, which facilitated the Nazi aggression in Czechoslovakia and Poland). Kymlicka notes that providing that separation of church and state as a resolution to the growing conflict between Catholics and Protestants in European countries in the sixteenth century resulted in an entrenchment of individual freedom of religion and oppression of religious minorities. Id. at 3. Additionally, he notes the uniqueness of Canadian federalism for its accommodation of both individual and “group-specific community rights.” Id. at 26-27. He also asserts that the instability of the former Soviet Union arising from disputes over boundaries, local autonomy, language, and naturalization could have been resolved by restoring the rights of minority groups, rather than relying solely on general human rights principles. Id. at 5.
a society in which group identity is legally irrelevant, where individual conduct is the only proper concern of government, and individual merit the only determinant of reward in the workplace. In such a system, individuals are rewarded or punished based upon their behavior and performance. Race, religion, sex, and similar markers of group affiliation are unrelated to one’s legal or employment status, despite how meaningful those affiliations may be to the individual. The civil rights movement spoke so powerfully to the nation’s conscience because the treatment of minorities was blatantly inconsistent with our stated commitment to equality and fundamental fairness.46

Both the original 1964 Civil Rights Act and subsequent affirmative action programs begin by recognizing that injustices done to black Americans as a group have harmed individual members of that group in ways courts can neither quantify nor fully identify, and that individualized remedies are inadequate.47 If institutionalized racism has distorted the operation of economic and educational systems and diminished access and opportunities available to most African-Americans, the simple cessation of discrimination, without more, would leave many without the means to fully enter into American life.48 To achieve genuine equality and overcome the burdens of past discrimination, affirmative action programs were based upon the belief that achievement of ultimate equality required government to “tilt”

48 Id.
the playing field.\textsuperscript{49}

The extent of the tilt—the degree to which racial identity should be a factor in employment or education decisions—has been the subject of considerable litigation.\textsuperscript{50} Judicial opinions have been closely divided. Indeed, as Ashutosh Bhagwat noted, three of the most significant affirmative action cases, \textit{Regents of the University of California v. Bakke},\textsuperscript{51} \textit{Fullilove v. Klutznick}\textsuperscript{52}

\textsuperscript{49} Academics, practitioners and politicians have offered multiple and various arguments in favor of affirmative action programs. For a description and assessment of the principal traditional arguments in support of affirmative action, see generally Jack Greenberg, \textit{Affirmative Action in Higher Education: Confronting the Condition and Theory}, 43 B.C. L. REV. 521, 548, 556-67 (2002) (explaining that affirmative action initiatives are necessary for such reasons as that otherwise all but a few black students would attend non-selective colleges, the black-white gap in social conditions would increase, the economic status of black people would decrease and there would be socially disruptive reactions within black communities such as increases in crime).

\textsuperscript{50} It should be noted here that a similar analysis could be made with respect to gender, although the application of affirmative action to gender-based initiatives has been less contentious. For a discussion of this phenomena, see generally Daniel P. Tokaji & Mark D. Rosenbaum, \textit{Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans}, 10 STAN. L. & POL’Y REV. 129, 136-38 (1999) (explaining that state laws banning sex-conscious affirmative action directly conflict with the core constitutional principle of equal protection and showing how a proper determination may be made regarding what, if any, sex-conscious affirmative action initiatives are necessary and appropriate).

\textsuperscript{51} 438 U.S. 265, 315 (1978) (striking down the University of California’s affirmative action policies as requiring illegal racial quotas even though race \textit{may} be used as a factor in admissions decisions). The university’s affirmative action policy included a separate admissions committee for economically and/or educationally disadvantaged applicants and applicants who were of a racial minority. \textit{Id}. Such candidates were exempted from the general rule that applicants with a grade point average of less than 2.5 were summarily rejected admission. \textit{Id}.

\textsuperscript{52} 448 U.S. 448, 490 (1980) (upholding the “minority business enterprise” provision of the Public Works Employment Act of 1977 because Congress had determined that extensive discrimination occurred within the construction industry and Congress was entitled to judicial deference). The provision required at least ten percent of federal funds granted for public work projects be used to procure services from business owned predominately by racial minorities. \textit{Id}.
and Wygand v. Jackson Board of Education,\textsuperscript{53} were decided by pluralities; the Supreme Court could not even muster a majority opinion.\textsuperscript{54}

In Adarand Constructors v. Pena, the Rhenquist Court held that all race-conscious programs, state or federal, discriminatory or benign, are subject to strict scrutiny, thus clarifying an area of doctrinal uncertainty about when strict scrutiny was required.\textsuperscript{55} As Bhagwat observes, however:

\textsuperscript{53} 476 U.S. 267, 296 (1986) (holding a public teachers’ collective bargaining agreement invalid on the ground that there must be convincing evidence of prior discrimination before a public employer can use limited racial classifications to remedy that discrimination). The bargaining agreement protected minority teachers during layoffs and resulted in layoffs of white teachers who had more seniority than some retained black teachers. Id.

\textsuperscript{54} See Ashutosh Bhagwat, Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads, 4 U. PA. J. CONST. L. 260, 262 (2002) (noting that the lack of a majority opinion in cases addressing the constitutionality of benign race-conscious governmental actions produced confusion regarding the circumstances under which governments were permitted to engage in race-conscious decision making and the applicable standard of constitutional review in to such cases). It should be noted here, however, that after declining to revisit the issue of affirmative action in the context of education for twenty-four years, the Supreme Court granted certiorari for Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), cert. granted, 123 S. Ct. 617, 154 L. Ed. 2d 514 (2002). The Sixth Circuit reversed the district court’s decision in favor of an unsuccessful law school applicant that the University of Michigan’s admissions procedure violated the Equal Protection Clause by giving preference to minority applicants. Id. at 735. The Sixth Circuit found that the school had a compelling interest in achieving a diverse student body, and giving minority students a plus in the admissions process for the purposes of fostering diversity does not violate the Equal Protection Clause. Id. at 739, 747. The Supreme Court granted certiorari; the Court’s decision was pending at the time of publication.

\textsuperscript{55} 515 U.S. 200 (1995). In Adarand, a white subcontractor who was not awarded a portion of a federal highway project brought an action challenging the constitutionality of a federal program designed to provide highway contracts to disadvantaged business enterprises. Id. at 210. The subcontractor claimed that a benign racial classification, such as the one at issue, violated the Due Process Clause of the Fifth Amendment. Id. The Tenth Circuit affirmed summary judgment in favor of the government, but the Supreme Court remanded the case, finding that racial classifications should be examined under strict scrutiny. Id. at 227.
an examination of recent decisions by the federal courts of appeals reveals widespread disagreement and confusion regarding the constitutionality of race-conscious official action. Despite facial unanimity regarding the applicable standard of review, courts differ widely in how they implement the strict scrutiny standard. In particular, there is an explicit and widening division among the courts of appeals regarding the kinds of governmental objectives that are sufficiently ‘compelling’ to justify race-based actions that disfavor the majority race, a division the Supreme Court has studiously avoided resolving.56

In *Hopwood v. Texas*, the Court of Appeals for the Fifth Circuit determined that diversity of the student body at a state university’s law school was not sufficiently compelling to justify an admissions policy that gave preferential treatment to African-American and Hispanic applicants.57 The court held that, absent a history of discrimination by the school that would justify remedial measures, the program could not survive equal protection scrutiny.58

56 Bhagwat, *supra* note 54, at 263.

57 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, a class of non-minority applicants rejected by a state university law school challenged the law school’s affirmative action admissions program as a violation of the Equal Protection Clause of the Fourteenth Amendment. The school utilized a Texas Index (TI) number, a combination of undergraduate grade point average and Law School Aptitude Test score, as a basis for admission. *Id.* at 935. In addition, the school considered factors such as the strength of a student’s undergraduate education, the difficulty of his or her major, significant trends in the student’s grades and the qualities each applicant might bring to the law school class. *Id.* Applicants with a TI number that exceeded a certain threshold were presumptively admitted, while those below were denied. *Id.* at 935-36. The plaintiffs challenged the admission process, contending that the practice of having lower TI thresholds for black and Mexican applicants violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 938. The Fifth Circuit, finding for the plaintiff class, noted that “[t]he law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.” *Id.* at 934.

58 *Id.* at 952. Specifically, the court noted that benign racial classifications
Similarly, the Circuit Court for the District of Columbia struck down Federal Communications Committee regulations intended to foster diversity in programming, declining to find any compelling government interest in promoting broadcast diversity. On the other hand, the Seventh Circuit upheld preferential hiring of black officers to staff a boot camp in which the young offenders were predominantly African-American, accepting the state’s argument that the presence of black staff members was essential to the program’s success and thus a compelling state interest. Additionally, the Ninth Circuit upheld must be strictly scrutinized, meaning that “the racial classification must serve a compelling state interest and be narrowly tailored to meet that goal.” Id. at 941. The school’s admission program did not serve a compelling state interest of remedying past discrimination because although Texas state actors had discriminated against minorities in the past, there was no evidence that the law school was an offending actor. Id. at 948-49. The court noted that “[b]ecause a state does not have a compelling state interest in remedying the present effects of past societal discrimination, however, we must examine the district court’s legal determination that the relevant governmental entity is the system of education within the state as a whole.” Id. at 949.

59 See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 355 (D.C. Cir. 1998). The Church challenged a FCC order finding that the Church failed to follow the equal employment opportunity guidelines for hiring minorities at the church’s radio station. Id. at 346. Though other positions in the Church did not require Lutheran training, the radio positions did, thus considerably narrowing the pool of minority applicants. Id. The Church challenged the FCC’s race-based employment program as a violation of equal protection provided by the Fifth Amendment. Id. at 345. The Court found that the FCC did not define “diverse programming” and did not establish how race brings diversity in programming and therefore, the interest it intended to safeguard was too abstract and did not meet the equal protection’s compelling standard. Id. at 354-55.

60 See Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996). Three white correctional officers who were denied a lieutenant position over a less qualified black applicant challenged the hiring as a violation of equal protection. Id. at 917. The boot camp, comprised of seventy percent black youths but only six percent black correction officers, was designed to rehabilitate young criminals as an alternative to prison, and the program’s success depended on the inmates taking brutal orders from drill sergeants. Id. Using a strict scrutiny standard, the court found that expert evidence supported the state’s argument that the correctional program would not succeed unless there were blacks in positions of authority to get the black inmates to respond
an admissions process for an elementary-level university laboratory school that made race and ethnicity a part of the admissions decision, agreeing with the university that research goals required a representative student body. Thus, the interest in safeguarding those goals was sufficiently compelling for purposes of equal protection analysis.

There are numerous additional cases in which federal circuit and district courts have had to determine whether a given interest was sufficiently “compelling” to meet the constitutional standard under the facts of the case. Such determinations are necessarily
to the drills, therefore, the hiring of the black applicant was a compelling interest. Id. at 920. This decision did not intend that the employees mirror the composition of the inmates, just that there is some representation. Id.

Hunter ex rel. Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999). The University Elementary School (UES) is a research laboratory that determines the needs of California’s change in population through its own experiences with a diverse student body. Id. at 1062. To achieve useful results, UES employed a specific admissions process aimed at producing a student population that reflected the population of urban public schools, including consideration of factors such as race/ethnicity, gender and family income. Id. The parents of a student applicant who was not admitted to the school based on the race/ethnicity criteria challenged the constitutionality of the admissions process under the Equal Protection Clause of the Fourteenth Amendment, triggering the strict scrutiny standard requiring that the Regents show that race/ethnicity was a narrowly tailored means to serve a compelling state interest. Id. at 1063. The circuit court affirmed the district court’s holding that “the defendants’ interest in operating a research-oriented elementary school is compelling.” Id. at 1064. The court also found that the use of race/ethnicity in the admissions process was “narrowly tailored to achieve the necessary laboratory environment.” Id. at 1067.

Specifically, the court noted that the California’s benefit from the school’s development of effective techniques for use in urban public schools was a compelling interest and the use of race/ethnicity in the school’s admissions process was narrowly tailored to developing those techniques. Id. The court stated that “California has a compelling interest in providing effective education to its diverse, multi-ethnic, public school population. . . . [The admissions process] produce[s] research results which can be used to improve the education of California’s ethnically diverse urban public school population.” Id.

A catalogue of such cases and in-depth analysis of the jurisprudence surrounding “compelling interest” is beyond the scope of this article. For
ad hoc, and the resulting body of equal protection jurisprudence demonstrates—if demonstration were needed—the inherent difficulty of using technical legal formulae as a proxy for equality.64

Affirmative action programs geared to racial and gender disparities are not the only administrative or legislative efforts intended to correct prior discrimination. In 1996, Section 104 of the Personal Responsibility and Work Opportunity Act, popularly dubbed charitable choice, addressed a perceived government bias against contracting with religious social service providers.65

thorough review and thoughtful commentary, see Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 CALIF. L. REV. 297, 300 (1997). Bhagwat notes that in Adarand Constructors v. Pena the Supreme Court held that any discrimination predicated upon race, including that adopted under affirmative action, is to be analyzed under strict scrutiny and therefore obligates the government to present a compelling justification underlying such practice. Id. He also acknowledges that in Hopwood v. Texas the Court ruled that a law school admissions policy favoring minority applicants for admission was unconstitutional under the Equal Protection Clause because promoting student diversification “could never qualify as a ‘compelling’ government interest.” Id. See also Stephen E. Gottlieb, Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication, 68 B.U. L. REV. 917, 919 (1988) (discussing that the notion of “compelling interest lacks a strong textual foundation in the Constitution,” which never explicitly mandates or defines the term; rather “some governmental interests can be justified on the basis of penumbras surrounding Constitutional rights” while others may be rationalized as “among the purposes for which particular governmental powers were authorized.”).  

64 See Bhagwat, supra note 63, at 308-09 (noting that “[l]egislatures, not courts, have the best institutional ability to identify and assess the efficacy of means. When courts do second-guess legislative choices of this nature, they tend to be either proceeding ad hoc or disguising their true concerns.”); Gottlieb, supra note 63, at 937. Gottlieb notes that “the Court’s treatment of governmental interests has become largely intuitive, a kind of ‘know it as I see it’ approach. . . In turn, this kind of ad hoc approach is suspect as inconsistent, unprincipled, and lacking the impartiality we require from the Court.” Id.

65 42 U.S.C. § 604a(a)(1)(A)-(B). This section provides “[a] State may administer and provide services . . . through contracts with charitable, religious, or private organizations; and provide beneficiaries of assistance under the programs . . . with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.” Id.
Proponents of greater involvement in the complex network of governmental social support by grass roots religious providers argued that Section 104 was necessary to “level the playing field,” although religious providers like Catholic Charities, Lutheran Social Services, Jewish Family & Children’s Services and the Salvation Army had long histories of partnering with government.66 Supporters of the legislation argued that confusion over the application of First Amendment’s Establishment Clause doctrine caused government officials to disfavor religious bidders in some cases and impose burdensome requirements on those with whom they did business in other cases.67 Advocates of greater “faith-based” participation in welfare programs encouraged states to reach out to such organizations and encourage their participation.68 Some states, like Massachusetts, took the position that their playing field was already level and did


67 See, e.g., John J. Diulio Jr., The New Civil Rights Struggle, WALL ST. J., June 20, 2002, at A16. Diulio, a professor at University of Pennsylvania, Senior Fellow at the Manhattan Institute and former director of the White House Office of Faith-Based and Community Initiatives, noted that “[o]pponents of President Bush’s Faith-Based Initiative [have] rushed to claim that government funding of faith-based organizations providing social welfare services violates the establishment clause of the First Amendment.” Id. He further argued, “in their purported fidelity to Constitutional values, they have overlooked the implication of an equally important amendment, the 14th.” Id. See also Lewis D. Solomon & Matthew J. Vlissides, Jr., Faith-Based Charities and the Quest to Solve America’s Social Ills: A Legal and Policy Analysis, 10 CORNELL J.L. & PUB. POL’Y 265, 267 (2001) (stating that some faith-based advocates believe there should be legislation to level the playing field between religious and secular charitable organizations because as the law stands now religious programs are not treated equally).

little to specifically implement charitable choice. Others, like Indiana, instituted extensive, and relatively expensive, programs designed to acquaint small religious providers with opportunities for government collaborations. These efforts to include faith-based organizations (FBOs) have raised many of the same questions as traditional affirmative action programs.

Perhaps the thorniest of these issues involves application of bid qualifications: shall the same criteria be applied to FBOs as are applied to secular providers? In an article published in Commentary, Leslie Lenkowsky argued for “elimination of arbitrary rules that allow, for example, the use of professional therapy but not pastoral counseling.” As with affirmative action, equal treatment is in the eye of the beholder: if the state insists that a responsive bidder employ licensed social workers or credentialed drug therapists, does that requirement discriminate against FBOs whose programs use pastors rather than social workers or trained counselors? On the other hand, if the state relaxes certification requirements for FBOs, does this amount to an unconstitutional preference for religious providers? What is the difference between “equal treatment” and “special rights”?

---


71 Leslie Lenkowsky, Funding the Faithful: Why Bush is Right, 111 Commentary 19, 23 (2001) (rebuiting the various arguments that have been advanced in opposition to President Bush’s plans for government support of faith-based organizations and offering solutions to alleviate some of the concerns raised).

72 In testimony before Senate Committee on the Judiciary, John L. Avery of the National Association of Alcoholism and Drug Abuse Counselors (NAADAC) focused upon precisely this issue, saying that “NAADAC’s concern is not with who provides care, but rather by what clinical standards that care is provided.” Faith Based Solutions: What are the Legal Issues?: Hearing on S.304 Before the Senate Committee on the Judiciary, 107th Cong. (2001) (statement of John L. Avery, Director of Government Relations,
Similarly, provisions of Section 104 that allow FBOs to discriminate on the basis of religion in employment have been widely attacked, by secular and religious organizations alike, as special accommodation unwarranted by public policy. Defenders of the provisions respond that a failure to recognize and accommodate the religious nature of FBOs would amount to a special burden on faith and would be discriminatory.

Lost in the arguments about fair play and equal treatment are cautionary notes sounded by social science researchers who warn that competition between groups is more polarizing than competition between individuals:

[t]aking more for one’s group seems to be more legitimate than taking more for oneself, even though one benefits in both cases. Implicit in the act of allocating to one’s group

---

73 Both secular and non-secular groups oppose charitable choice because of fear of discrimination in hiring and provision of services. For example, The Interfaith Alliance has taken a position against charitable choice legislation, in part because of the potential for “discrimination toward members of minority faiths and ethnic traditions who are in need of assistance” and “the potential for employment discrimination against non-believers or members of religions differing from that of the provider.” Position of the Interfaith Alliance on Charitable Choice Legislation, The Interfaith Alliance, available at www.interfaithalliance.org/Initiatives/ccpos.html (last visited Feb. 4, 2003). The American Civil Liberties Union has also issued statements against faith-based initiatives. See Latest Government Funding of Controversial Religious Programs One More Reason Not to Pass Faith-Based Plan Without Protections, American Civil Liberties Union, Oct. 9, 2002, (noting that “[t]he Bush Administration seems determined to ignore Congress and continues to argue that faith-based organizations should have the right to discriminate in hiring against people based on their religion in publicly funded programs.”), available at www.aclu.org/news/NewsPrint.cfm?ID=10854&c=37.

is the justification that other people will benefit: there exists the possibility that taking more for one’s group may reflect the individual’s genuine concern with the welfare of fellow group members and not just greedy behavior. . . . The problem arises when one’s opponent in the negotiation is also representing his/her group.75

Whatever one’s position on the merits of particular affirmative action programs or versions of charitable choice, the controversy each has aroused is indisputable.76 No matter what rules the courts ultimately impose, some will feel betrayed—and unequal. Further restrict or eliminate affirmative action, and those who have borne the brunt of America’s racist history will say that they do not have equal access to the playing field. Confirm those same programs and others will complain that special efforts to redress past injuries that benefit an entire group are too broad and inherently unequal. Tell religious organizations that they must meet the same standards as secular service providers, and they will argue that such a position fails to take into account their essential nature and is discriminatory. Make special rules for such organizations and their secular competitors will protest that the playing field has been unfairly tilted. Where you stand, as the saying goes, depends upon where you sit.

V. IMPLICATIONS FOR PUBLIC ADMINISTRATION

What are the implications for government legitimacy and the

75 Kristina A. Diekmann, Ann E. Tenbrunsel & Max H. Bazerman, *Fairness, Justification, and Dispute Resolution*, in *WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE 21ST CENTURY* 196 (Sandra E. Gleason ed., 1997) (arguing that although fairness constrains decision-making and negotiation, a person will nevertheless maximize his or her personal outcome if it can be justified and that the presence of a group may make the self-serving motivation less obvious, allowing for even more self-interested behavior).

76 Regardless of one’s personal opinion on the relative strengths or ills of affirmative action and charitable choice initiatives, the one assertion upon which all groups can agree is that all groups do not agree. See generally *supra* notes 43, 49, 72, 73 (setting forth various argument both for and against the programs).
rule of law if significant constituencies experience government programs as biased or unfair? A few come to mind. First, democratic deliberation becomes problematic. We have already seen how proponents and opponents of affirmative action and charitable choice “talk past each other.” In a very real sense, they are inhabitants of different realities. But democracies require common ground to function, and some agreement on the nature of equality would seem to be a precondition for finding that common ground. Second, compromise becomes difficult, if not impossible. If different people see different realities, how can we formulate policies that all will consider to be fair and equal? Third, social stability is jeopardized. If government is to be seen as legitimate, it must live up to its own principles. In America, equality is a—perhaps the—foundational precept. When a significant segment of our society believes that it is being marginalized, devalued or treated in a discriminatory manner, or that others are being unfairly privileged, there is a real potential for social upheaval.

What, if anything, can public administrators—those on the front lines—do to foster public perceptions of fair play by the state? While it falls to policymakers to fashion laws that attempt to bridge very different perceptions of equal treatment, administrators are not without tools of their own. At a minimum, those charged with administering the laws must take care to do so in as evenhanded a fashion as possible. Where rules prescribe different treatment for members of different groups, administrators must clarify that they are acting pursuant to the law, and not on the basis of personal bias. Whenever possible, they should explain the purpose of laws that may be perceived as favoring some groups over others.

These actions, of course, are all aspects of the professionalism that we expect from public administrators. But 

77 See generally Anthony M. Bertelli & Laurence E. Lynn, Jr., A Precept of Managerial Responsibility: Securing Collective Justice In Institutional Reform Litigation, 29 FORDHAM URB. L.J. 317 (2001). The authors note that “[professionalism] allows a cadre of professionals—public administrators of human service agencies—to interpret the laws that govern them, and to work towards collective justice—providing adequate services to most beneficiaries at
administrators can and should do more: they should give policymakers the benefit of their street level experiences. If programs are not working, no matter how well intentioned, they need to be modified. If misconceptions are rampant, those must be addressed through public education. Most importantly, public administrators need to remind citizens and policymakers alike of the importance of maintaining the principle of government neutrality toward those who are similarly situated. It is one thing to engage in outreach to identify those who may be wary of working with government or build to help potential bidders meet a legitimate professional standard. It is quite another to relax the standard. The first path adds substance to public resources, the second sows distrust and discord.

CONCLUSION

Eventually, if America manages to eradicate the vestiges of slavery and segregation, the nation may no longer need affirmative action. Even ardent proponents of charitable choice have suggested that replacing direct contracts with vouchers allowing program recipients to choose their own social service provider might ease both the First Amendment and fairness issues, although such policies raise substantial concerns about the marketization of public goods. But the need to define the nature of equality and equal treatment, to sketch the landscape of truly level playing field and provide clear guideposts for the public officials who must administer government programs, will remain—a daunting but absolutely essential task of liberal democracy.

__________________________
the expense of the constitutional rights of a few.” Id. at 332.
PACKAGED AND SOLD: SUBJECTING ELDER LAW PRACTICE TO CONSUMER PROTECTION LAWS

Donna S. Harkness*

[D]uring our Revolutionary War, certain shares of Bank of England stock stood in the name of Washington, who was in arms against the English government, yet all through that war, the dividends were regularly paid to the commander of the army of rebellious Americans. Washington was a rebel in arms against England, but the Bank of England was a commercial institution and here as always the honesty instituted by trade is far superior to any other conception of honest conduct.

— John Maxcy Zane

The marketplace idyll illustrated by the Bank of England’s noble adherence to commercial obligations to General Washington provides a stark contrast with the realities of contemporary consumer practice. It has been observed that “consumer law is central to almost every problem that sends older Americans in search of legal assistance.” Indeed, “the

* The author is a certified elder law attorney and Assistant Clinical Professor of Law at the University of Memphis, Cecil C. Humphreys School of Law.


2 Deanne Loonin, Consumer Law and the Elderly: Using State Unfair and Deceptive Practices Statutes to Protect and Preserve the Financial Independence of Seniors, BIFOCAL, Fall 1999, at 1 (providing an introduction to the wide range of federal and state consumer protection acts). Although consumer law per se is not one of the thirteen categories identified by the National Elder Law Foundation as comprising elder law practice, consumer law is a substantial component of several of those categories. See Board
Certification of the National Elder Law Foundation, Program for the Certification of Elder Law Attorneys, available at http://www.nelf.org/randregs.htm (last modified Aug. 1995) [hereinafter PROGRAM]. The thirteen categories are: 1) health and personal care planning; 2) pre-mortem legal planning; 3) fiduciary representation; 4) legal capacity counseling; 5) public benefits advice; 6) advice on insurance matters; 7) resident rights advocacy; 8) housing counseling; 9) employment and retirement advice; 10) income, estate and gift tax advice; 11) counseling about tort claims in nursing homes; 12) counseling with regard to age and/or disability discrimination; and 13) litigation and administrative advocacy, defined as “including financial or consumer fraud.” Id. “Consumer fraud” is enumerated in the description of “litigation and administrative advocacy,” and is an essential part of insurance counseling, housing counseling and pre-mortem legal planning, including self-dealing and misuse of powers of attorney claims. Id. See also William J. Brennan, Jr., Predatory Mortgage Lending Practices Directed Against the Elderly, BIFOCAL, Spring 1998, at 1 (citing evidence that seniors are targeted by predatory lenders because they have less access to legitimate lending sources); Julia C. Calvo, Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly, BIFOCAL, Winter 2002, at 1 (explaining that power of attorney documents, although inexpensive and easily executed, provide possibility for abuse); Lawrence A. Frolik, Insurance Fraud on the Elderly, 37 TRIAL 48 (2001) (highlighting fraudulent practices of insurance companies and agents when marketing to the elderly); Donna S. Harkness, Predatory Lending Prevention Project: Prescribing A Cure For The Home Equity Loss Ailing The Elderly, 10 B.U. PUB. INT. L.J. 1 (2000); Hans A. Lapping, License To Steal: Implied Gift-Giving Authority and Powers of Attorney, 4 ELDER L.J. 143 (1996) (suggesting that statutes that include the authority to make gifts in general powers of attorney create a potential for fraud and abuse after a principal becomes incapacitated); Sue Seeley, Assisted Living: Federal and State Options for Affordability, Quality of Care, and Consumer Protection, BIFOCAL, Fall 2001, at 11 (arguing that seniors living in private assisted living have difficulty enforcing their rights because the industry is scarcely regulated and companies are reluctant to supply tenants with written contracts). Consumer law is also a component of the estate and gift tax advice category, where aggressive marketing of living trusts and investment and estate planning schemes continues to be a problem. See Lori A. Stiegel et al., Scams in the Marketing and Sale of Living Trusts: A New Fraud for the 1990s, 26 CLEARINGHOUSE REV. 609 (1992) (stating that living trust salespeople, sometimes traveling door-to-door, aggressively advertise their product as a means to avoid probate and guardianship and frequently use misleading or incorrect information to persuade the elderly to pay excessive amounts for preparation of trust documentation that may prove ineffective).
market often operates at its very worst where older consumers are concerned.\textsuperscript{3} Unfair and deceptive practices imposed upon elderly clients by the professionals to whom they turn for legal advice and assistance are perhaps the most reprehensible examples.\textsuperscript{4} The nature and extent of this problem in relationships between lawyers and elderly clients merits specific examination.\textsuperscript{5}

Consider, for example, the following scenario. A Louisiana lawyer representing an elderly man\textsuperscript{6} with a known history of


\textsuperscript{4} \textit{See FTC v. Canada Prepaid Legal Services, Inc. et al., CV00-2080Z (W. D. Wash. filed 12/11/2000). One recent example involves a telemarketing scam originating in Canada. Allegations in the complaint filed by the Federal Trade Commission (FTC) against Canada Prepaid Legal Services, Inc. and others posing as investment counselors indicate that elderly U.S. consumers were contacted and promised “substantial monthly payments” and continuing eligibility for entry in monthly drawings for additional cash prizes in return for purchase of “purported United Kingdom Premium Savings Bonds.” \textit{Id.} The “bonds” were not cheap; consumers were bilked out of as much as $5,000 for their “one-time” investment. None of the named defendants were authorized to sell premium savings bonds, and because of the “lottery feature” of the bonds, their sale in the United States is illegal. \textit{Id.} The case was settled in December 2002; Canada Prepaid agreed to repay the victims one million U.S. dollars out and to abide by a permanent injunction against any further such sales to any U.S. citizen. \textit{See} Press Release, Federal Trade Commission, Canadian Telemarketers Targeting Elderly Settle FTC Charges (Dec. 5, 2002), \textit{available at} http://www.ftc.gov/opa/2002/12/nagg.htm. Canada Prepaid was also charged with placing unauthorized charges on consumers’ credit cards. \textit{See also B.C. Telemarketers Agree To Pay $1 Million To Settle U.S. Charges}, \textit{GUELPH MERCURY}, Dec. 6, 2002, at A12 (reporting allegations that telemarketers operating under the names Canada Prepaid Legal Services and BSI Premium Bonds, had sold consumers fake lottery tickets by falsely promising elderly consumers that they would qualify for cash prizes).

\textsuperscript{5} For purposes of this article, “elderly” clients are those age 60 and older, in conformance with the definition of “older individual” used under the Older Americans Act for purposes of establishing eligibility for legal and other social services contemplated by the Act. 42 U.S.C. \textsection3002(35) (Supp. 2002).

\textsuperscript{6} A word of clarification seems in order here, lest it appear that the
psychiatric illness negotiated a settlement of the client’s case pursuant to a general durable power of attorney granted by the client.\(^7\) The lawyer misrepresented the amount received, overstating it by about $6,000, and charged the client a ten

author is suggesting that elder law practitioners are prone to fraudulent or exploitative conduct. The National Elder Law Foundation, created by the Board of Directors of the National Academy of Elder Law Attorneys in 1993, has established demanding criteria for certification in the practice of elder law. See \textit{National Academy of Elder Law Attorneys, Criteria for NAEA Membership}, available at https://www.naela.org/applications/Membership/GetType.cfm (last visited April 26, 2003). An attorney must demonstrate “substantial involvement/experience” in elder law. An extensive application form must be completed in which the attorney lists sixty elder law matters that he or she has handled within the past three years, classifying each listed case among thirteen separate categories comprising the substantive area of “elder law.” In addition, the attorney must describe the type of service provided, outcome, etc., along with a list of five attorney references, three of whom must have engaged in eight hundred hours per year of elder law practice. \textit{Id}. Forty-five hours of continuing legal education (CLE) in the area of elder law must be documented within the three year period as well. Finally, the candidate must pass an examination covering all thirteen areas; certification lasts five years. See \textit{Program}, \textit{supra} note 2, at 5-8. It is difficult to imagine that someone who has worked to obtain certification would jeopardize it by engaging in any improper behavior, let alone the sort of overreaching and fraud generally described in consumer protection cases. In fact, elder law practitioners in are least likely to take advantage of their clients—the opposite is more likely true, with the attorneys giving very generously of their time and expertise for little or no recompense. See Andrea Sachs, \textit{Legal Advice and Care: It’s Not a Lawyer Joke. A Growing Corps of Attorneys Practice a Kinder, Gentler Type of Law for Seniors}, \textit{Time}, Oct. 30, 2000 (noting that “lawyers, as a profession, are not renowned for their kindness . . . but a growing cadre of elder-law practitioners is destroying some of the stereotyping”). By directing the article to elder law practice, I do not mean to “preach to the choir.” Rather, I intent to alert those who are least culpable that they may be in danger of adverse affects from the conduct of those attorneys who are not primarily engaged in elder law practice, but engage in the practice of defrauding those among their elderly clientele.

\(^7\) \textit{See In re} Frank P. Letellier, II, 742 So. 2d. 544 (La. 1999) (holding that an attorney was properly disbarred for violating several of the guidelines for evaluating disciplinary matters concerning commingling and conversion of client funds and noting that the attorney took advantage of an obviously vulnerable victim).
percent flat fee based on the overstated figure. The lawyer then placed the settlement proceeds in his law firm’s bank account. Over the next four years, he used the proceeds to fund loans for a self-established corporation owned by his bookkeeper and billed the client $10,800 for managing the client’s funds.

This arrangement came to a halt when the New Orleans Director of Health filed a complaint with the Louisiana Office of Disciplinary Counsel. The client’s deplorable living conditions were the catalyst for the complaint—he was seen “wandering his neighborhood, begging for food and rummaging through trash cans . . . human excrement [was found] in every room [of his home], [with] non-working sewerage, and multiple fire code violations.”

The good news is that a complaint was filed with the Office of Disciplinary Counsel for the State of Louisiana; the attorney was disbarred for commingling and conversion of client funds with his office account and failure to cooperate with the Office of Disciplinary Counsel’s investigation. The matter was appealed to the Louisiana Supreme Court, which upheld disbarment and was particularly concerned that the attorney “took advantage of an obviously vulnerable victim.” The court described the client’s vulnerable condition, stating “we view [the client’s] age, history of psychological problems, slovenly demeanor and living conditions, and the news video footage of his home to be consistent with reports that [he] was unable to care either for

---

8 Id. at 544.
9 Id. at 545 (noting that the attorney “failed to segregate the funds from his own, failed to invest the funds in an interest-bearing account, made unauthorized expenditures and disbursements to the detriment of [the client], failed to furnish a proper accounting regarding the funds, and used [the client’s] funds without his permission to make loans.”).
10 Id.
11 Id.
12 In re Frank P. Letellier, II, 742 So. 2d. 544, 545 (La. 1999).
13 Id.
14 Id. at 546–47.
15 Id. at 548.
himself or his financial affairs."\textsuperscript{16} Disbarment was warranted, as was full restitution with interest.\textsuperscript{17}

The bad news is that the Office of Disciplinary Counsel dismissed the initial complaint; it was reinstated due to the persistence of the City Health Director.\textsuperscript{18} The disciplinary board initially rejected the hearing committee’s recommendation of disbarment and contemplated a mere two year suspension before opting for harsher penalty.\textsuperscript{19} Moreover, in virtually every state, including Louisiana, disbarment is not a permanent ban from the practice of law—this lawyer could qualify for reinstatement.\textsuperscript{20}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{In re} Frank P. Letellier, II, 742 So. 2d. 544, 548 (La. 1999) (revoking the attorney’s license to practice law and ordering that he “make full restitution with legal interest [and that] all costs and expenses of these proceedings are assessed [to the attorney]”).

\textsuperscript{18} \textit{Id.} at 545 n.1 (noting that the City Health director appealed the initial dismissal).

\textsuperscript{19} \textit{Id.} at 547 (“The disciplinary board issued a report stating that it concurred with the majority of the findings of the hearing committee. However, the disciplinary board recommended that Respondent be suspended for a period of two years.”).

\textsuperscript{20} \textit{See, e.g.,} ALASKA R. BAR RULE 29(b)(5) (1998) (prohibiting reinstatement until the expiration of at least five years from the effective date of the disbarment); ARIZ. REV. STAT. ANN. S. CT. RULE 71(e) (2000) (prohibiting the application for reinstatement before 90 days prior to the fifth anniversary of the disbarment and prohibiting reinstatement until after the fifth anniversary of the disbarment); ARK. R. USDCT. DISC. ENF. RULE 7.C (1998) (prohibiting reinstatement for five years following the disbarment); CAL. ST. BAR P. RULE 662(c) (2002) (giving the State Bar Court discretion to impose a five year period, a ten year period, or a permanent prohibition against the filing of a reinstatement petition); COLO. STAT. LWYR. DISC. RULE 251.29; COLO. R. USDCT. D.C. COLO. L. CIV. R. 83.5.N (2002) (making attorney ineligible for reinstatement until the sixth anniversary of disbarment or suspension, readmission or reinstatement is neither automatic nor a matter of right); CONN. R. USDCT. L. CIV. R. 3(i)(2) (2002) (prohibiting reinstatement judgment for at least five years); DEL. LAWYERS R. DIC. PROC. RULE 22(c) (2002) (prohibiting the application for reinstatement for at least five years after the disbarment); D.C. R. BAR RULE 11 § 16(c) (2002) (requiring the attorney to wait for at least five years from the disbarment to apply for reinstatement); FLA. STAT. BAR RULE 3-4.3.74 (requiring an attorney to wait three to four
In this scenario the court did not consider whether the Louisiana Unfair Trade Practices and Consumer Protection Law would have appropriately applied to redress the harm done because the issue was not raised. This article suggests that such years from date of disbarment to apply for reinstatement; GA. R. USDCTND. CIV. LR. 83.1.F(8) (prohibiting an attorney from petitioning for reinstatement for three years after disbarment or two years after an adverse decision upon a previous petition for reinstatement); IL. STAT. S. CT. RULE 767(a) (prohibiting an attorney from petitioning for reinstatement for five years after disbarment); IND. R. USDCTND DISC. ENF. RULE VII(b) (prohibiting reinstatement for at least five years from disbarment); KAN. R. DISC. RULE 219(e) (prohibiting reinstatement for five years after disbarment); KY. ST. S. CT. RULE 3.020.5 (requiring a waiting period of five years from disbarment before filing for reinstatement); LA. ST. S. CT. DISC. RULE 19 § 24.A (prohibiting reinstatement of a lawyer for five years after the effective date of disbarment). See also ALA. R DISC P. RULES 8(a), 28 (2000); HAW. S. CT. Rule 2.17 (2001); IDR. BAR COMM RULE 506; IN ST ADMIS AND DISC RULE 23(4); ME R. BAR 7.3(j); MD. R. CTS J & ATTY S RULE 16-781; M I. R. DISC P MCR 9.123; MN. ST LWYRS PROF RESP RULE 18; MO. R. BAR RULE 5.28; MISS. ST. BAR DISC. R.12; MT. R. DISC. R. 20; NE. R. DISC. R. 10; NV. ST. S. CT. MISCON. R.116; N.H. R. S. CT. R. 37; N.M. R DISC. R. 17-214; N.Y. CT. R. § 603.14; N.C. BAR CH. 1, SUBCH. B., § .0125; N.D. R LWYR. DISC. R. 4.5; OKLA. ST. DISC. P. R. 11.1; PA. ST. DISC. R. 218; RI. R. S. CT. ART. III DISC. R. 16; S.C. CODE ANN. § 413(33) (Law Co-op. 2002); S.D. CODIFIED LAWS § 16-19-83 (Michie 2002); TENN. JUD. R. 9 (West 2002); TEX. GOV'T CODE ANN. § 11.02 (Vernon 2002); TEX. GOV'T CODE ANN. § 11.05 (Vernon 2002); UTAH JUD. ADMIN. R. 25 (Michie 2002); VT. ADMIN. ORDER NO. 9, R. 22 (2002); 6 VA. ADMIN. CODE § 4(13) (West 2003); WASH E.L.C. R. 9.1 (West 2003); W. VA. CT. R. 3.33 (West 2002); WIS. CT. R. GEN. L.R. 83.10 (West 2002); WYO. CT. R. XXII (Michie 2002). Eight states either do not allow for reinstatement at all following disbarment (as opposed to suspension) or provide an option for permanent disbarment in cases where the wrongdoing is of sufficient magnitude to warrant such a harsh penalty. CA ST. BAR P. Rule 662; FL ST. BAR Rule 3-5(f) & (g); GA. R BAR Rule 4-220; IN ST. ADMIS AND DISC Rule 23(3)(a); IA. Rule 35.13; MA R. S. CT Rule 4.01 §18(3); N.J. R. GEN APPLICATION 1:20-10(1)(g); OH. ST. GOV'T BAR Rule 5; OR R BAR B Rule 8.1. See also Jennifer M. Kraus, Attorney Discipline Systems: Improving Public Perception and Increasing Efficiency, 84 MARQ. L. REV. 273 (2000) (examining attorney self-regulation and strategies designed to address public criticism and distrust of present systems).

21 See LA. REV. STAT. ANN. §§ 51-1401 (West 2002) (declaring unlawful
consideration is both enlightening and merited in the context of elder law. Part I reviews the development of state consumer protection statutes addressing fraudulent consumer practices. Part II explores the rationale for applying consumer protection concepts to the practice of law. Part III examines the legal and philosophical barriers to such application. Part IV determines whether these concerns can be reconciled by applying consumer laws exclusively to elder law practice, where clients are often vulnerable or disabled. This article concludes that employing consumer protection statutes to regulate lawyers serving elderly clients and practicing elder law would enhance trust between the elderly and their legal counsel. Such reform would also provide greater protection and opportunities for redress than existing mechanisms of attorney discipline and malpractice lawsuits.

I. DEVELOPMENT OF STATE CONSUMER PROTECTION STATUTES

Consumer protection is a relatively recent concept and represents a significant shift from the laissez-faire philosophy pervading English common law, expressed by the doctrine *caveat emptor*. This “buyer beware” approach was first eroded in food and drug law. The need to regulate food preparation and distribution arose at the beginning of the twentieth century in the wake of scandals in the meat packing industry. Widespread methods of competition and unfair or deceptive acts in the conduct of any trade or commerce). There is reason to believe that the Louisiana courts might have been receptive to such a claim. See Reed v. Allison & Perrone, 376 So. 2d 1067, 1068-69 (La. Ct. App. 1979) (holding that attorneys could be held liable under the state’s consumer protection act for unfair and deceptive advertising in certain circumstances).

22 See William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 726-27 (1972) (noting that before the turn of the twentieth century sellers were forced to be fair to buyers not because of regulatory scheme, but because their business reputations in small communities depended on fair practice and honest dealing).

23 *Id.* at 728 (identifying two waves of consumer protection regulation in the first half of the twentieth century). According to Lovett, the first wave of consumer protection laws responded to scandals identified by authors such as
marketing of useless, and potentially harmful, substances as miracle cure-alls manifested the need for federal oversight of the manufacture, production and sale of products designed “for use in the diagnosis, cure, mitigation, treatment or prevention of disease.” Congress passed the first pure food and drug legislation in 1906. Congress also enacted the Federal Trade Commission Act (FTCA) in 1914, but the Act was limited to unfair methods of competition and did not address unfair and deceptive practices regarding consumers.

Federal legislation did not reflect concern for unfair trade practices affecting individual consumers until Congress amended the FTCA in 1938. This amendment declared “unfair or deceptive acts or practices” unlawful and eliminated the requirement that acts result in injury to competition to constitute a violation. The FTCA did not provide a private cause of

Upton Sinclair in *The Jungle.* The second wave was during the 1930s, which was marked by additional legislation broadening consumer protection at the federal level. *Id.*


25 See Federal Food & Drug Acts, ch. 3915, 34 Stat. 768 (1906) (“[P]reventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.”).


28 Id.; see also Hetrick, supra note 27, at 329 (noting that the expansion of the consumer protection law is a result of the “impersonal nature of the marketplace,” and a general dissatisfaction with the established remedies available for abuses by large scale businesses).
action, however, and the Federal Trade Commission (FTC) was neither staffed nor funded sufficiently to enforce the Act at a local level. The FTC recommended that states enact legislation regulating unfair and deceptive practices to address this gap. By the mid-1980s all states had passed consumer legislation, often called “little FTC Acts,” acknowledging the federal legislation as a catalyst. Many of these state statutes prohibit unfair and

29 See Hetrick, supra note 27 at 329-30 (noting that “the FTC enforcement effort was not sufficient to provide manpower to police unfair practices in local areas”); Lovett, supra note 22, at 729 (noting that the federal FTCA did not provide for private enforcement).


deceptive acts or practices affecting trade or commerce involving some transaction for personal, family or other consumer use.  

Unlike the federal statute, however, all states except Iowa either explicitly codified a private cause of action or have
construed their statutes to do so. In many states, prevailing consumers can recover attorneys’ fees, minimum statutory damages regardless of actual loss and punitive or treble damages. Several state consumer laws provide private remedies and/or enhanced damages where elderly consumers are

33 Id. at 538-39 (documenting that Iowa courts have declined to extend a cause of action unless the conduct rises to the level of a criminal offense, but may allow a party to raise consumer protection issues defensively). See also supra note 31 (citing to state statutes); CAL. BUS. & PROF. CODE §§ 17200-17581 (West 2003); HAW. REV. STAT. ANN. §§ 480-1 to 480-24 (Michie 2002); KAN. STAT. ANN. §§ 50-623 to 50-640 (2002); ME. REV. STAT. ANN. tit. 10, §§ 1211-1216 (West 2002); MICH. COMP. LAWS ANN. § 445.922 (West 2002); MINN. STAT. ANN. §§ 325F.67 to 325F.70 (West 2002); OHIO REV. CODE ANN. §§ 4165.01 to 4165.04 (West 2003); PA. STAT. ANN. tit. 73, § 201-9.3 (West 2002); UTAH CODE ANN. §§ 13-2-9 to 13-5-1, 13-11-1 to 13-11-23 (2003); VT. STAT. ANN. tit. 9, §§ 2464 to 2480g (2003); WASH. REV. CODE ANN. §§ 19.86.090-19.86.920 (West 2003); WIS. STAT. ANN. §§ 100.18, 100.20-100.264 (West 2002).

34 See COLO. REV. STAT. § 6-1-113(2)(1)(4) (1999) (adding bad faith as a precondition to treble damages and awarding costs and attorney fees to the attorney general or a district attorney in all actions where the attorney general or the district attorney successfully enforces this article); DEL. CODE ANN. tit. 6, § 2533(b) (2002) (attorney fees awarded only in “exceptional cases”); MASS. GEN. LAWS. ANN. ch. 93A, § 9(3) (West 2002) (giving the defendant a right to make a reasonable settlement offer and limiting attorneys’ fees awards to those incurred prior to the offer if the consumer rejects a reasonable offer and prevails at trial); N.C. GEN. STAT. § 75 E-5 (2002) (attorneys fees awarded only if conduct is willful and there is an unwarranted refusal to settle); OHIO REV. CODE ANN. § 1345.11 (2002) (attorney fees authorized only if the seller knowingly violates the statute); OR. REV. STAT. § 18.540 (2002) (punitive damage awards first pay the consumer’s attorney); TEX. BUS. & COM. CODE ANN. § 17.50 (2002) (amended in 1995 to provide for recovery of treble the consumer’s economic damages only if the defendant acted knowingly, and treble the consumer’s economic damages and mental anguish damages only if the defendant acted intentionally). See also Peres v. Anderson, 98 B.R. 189 (E.D. Pa. 1989) (statutory damages awarded despite no actual damages); Jones v. General Motors Corp., 953 P.2d 1104 (N.M. App. 1998) (statutory damages allowed even if no actual damage shown). But see Shurtleff v. Northwest Pools, Inc., 815 P.2d 461 (Idaho Ct. App. 1991) (no statutory damages where no actual damages).
involved. For example, in California an elderly or disabled person who suffers damage or injury has a cause of action to recover actual damages, statutory damages, restitution, punitive damages, and reasonable attorneys’ fees. This recognition of the elderly as a uniquely vulnerable population in need of extraordinary protection arguably represents legislative effort to bring elder law practice within the purview of consumer protection regulation.

On the other hand, core concepts defining the scope and application of state consumer protection statutes vary. For example, the requirement that acts affect “trade or commerce” is generally broad, but render the laws inapplicable in instances of isolated transactions, such as the sale of a home or car by a nonmerchant. Whether the practice of law falls within the purview of such statutes may be addressed by judicial

35 See CAL. CIV. CODE § 1780(b) (West 1998 & Supp. 2002); CAL BUS. & PROF. CODE § 17206.1 (West 1997 & Supp. 2002). California led the way by enacting a minimum damages provision for elderly and handicapped consumers, allowing up to $5,000 in statutory damages in cases where it is determined that the consumer “has suffered substantial physical, emotional or economic damage,” and the perpetrator either knew or should have known that the victim was elderly or disabled or that the perpetrator’s conduct resulted in loss of an elderly or disabled victim’s home, retirement or primary source of income or that the conduct was such that age, poor health or disability would make a person more vulnerable to damage. Id. Other states have since followed California’s lead. See ARK. CODE ANN. §4-88-202 (2001); FLA. STAT. ANN. §501.2077 (West 1997 & Supp. 2002); GA. CODE ANN. §10-1-854 (2000 & Supp. 2001); IND. CODE ANN. §24-5-0.5-4 (1996 & Supp. 2001); IOWA CODE ANN. §714.16A (1993 & Supp. 2000); NEV. REV. STAT. §§ 598.0975, 599B.290 (1999); TENN. CODE ANN. §47-18-125; WIS. STAT. ANN. §§ 100.264, 134.95 (West 1997 & Supp. 2001).

36 See infra Part II (arguing that consumer protection laws, as opposed to traditional disciplinary boards, should regulate lawyer client relationships, especially when the client is elderly), Part IV (noting that due to the vulnerability of elderly clients, it is both constitutional and sensible to apply consumer protection laws to attorney client relations).

37 See SHELDON, supra note 32, at 32 (noting that state consumer protection laws, modeled after the FTCA, prohibit unfair and deceptive trade practices but generally do not cover isolated real estate sale by non-merchant).
interpretation of terms such as “trade or commerce,” “services” or “consumer.” 39 Only Maryland and Ohio expressly exclude attorney conduct from consumer protection regulation. 40

II. APPLYING CONSUMER PROTECTION CONCEPTS TO THE PRACTICE OF LAW

Prior to the consumer protection movement, consumers had very limited means to redress their grievances. 41 State consumer protection laws responded to consumer dissatisfaction with markets that required negotiating with unfamiliar, impersonal sellers for goods of an increasingly sophisticated technological nature. 42

These same factors pertain to the lawyer-client relationship. Most individuals rarely consult lawyers; many do so only when faced with stressful situations such as accidents, divorce or criminal prosecution. 43 These consumers are unfamiliar with

39 Id. at 29-35.
40 See MD. CODE ANN., COM. LAW, § 13-104(1) (2000 & Supp. 2001); OH. REV. CODE ANN. § 1345.01(A) (West 1993 & Supp. 2001). Maryland’s statute states “[t]his title does not apply to: (1) The professional services of a . . . lawyer.” MD CODE ANN., COM. LAW, § 13-104(1) (2000 & Supp. 2001). Arguably, this statute could be interpreted to exempt only the actual “practice of law” and not entrepreneurial activities like advertising and billing. Id. Ohio’s exemption is more broadly worded, stating that “[c]onsumer transaction” does not include transactions between . . . attorneys . . . and their clients” and could include a wide variety of an attorney’s conduct such as advertising and other client services, as well as the practice of law. OH. REV. CODE ANN. §1345.01(A). See also Hetrick, supra note 27, at 330.
41 See Lovett, supra note 22, at 728 (setting forth the classic example of the meat packing industry at the beginning of the twentieth century, where lack of quality control meant that consumers were unable to detect adulterated products prior to purchase and had no adequate redress after purchase).
42 Hetrick, supra note 27, at 329-30 (“Two essential factors contributing to the modern growth of consumer protection legislation and litigation are the increasingly impersonal nature of the marketplace and consumer dissatisfaction with the traditional commercial law remedies for mistreatment by large-scale business organizations.”).
43 See Steven K. Berenson, Is It Time For Lawyer Profiles?, 70 FORDHAM
lawyers and do not how to rationally select an attorney. This problem is exacerbated by age, which is often accompanied by isolation, physical debilities and mental vulnerability.

L. REV. 645, 648-49 (2001) (concluding based on the results of a Martindale-Hubbell survey, that those who seek out legal services are not able to determine the quality of services they receive and noting that people who seek legal services are intimidated, confused or unable to adequately compare information); Roy C. Cramton, Delivery of Legal Services to Ordinary Americans, 44 CASE W. RES. L. REV. 531, 542 (1994) (finding that most people who need to seek legal services do because of lack of knowledge and information about their legal needs and how to find the right lawyer, as well as a lack of funds and trust in lawyers and legal proceedings).

Linda Morton, Finding A Suitable Lawyer: Why Consumers Can’t Always Get What They Want and What the Legal Profession Should Do About It, 25 U.C. DAVIS L. REV. 283, 284 (1992) (noting that lack of experience and knowledge in finding a lawyer makes the process difficult, from the question of where to find a lawyer to knowing which one is competent, trustworthy and can handle the issue at hand).

See Nina Keilin, Client Outreach 101: Solicitation of Elderly Clients By Seminar Under the Model Rules of Professional Conduct, 62 FORDHAM L. REV. 1547, 1551-54 (1994) (discussing that because the elderly can be more vulnerable to high-pressure sales tactics, elder law attorneys should take special care in soliciting older clients and suggesting changes to the model professional ethics code that would help guide elder law attorneys in the proper ways to find clients). Keilin, of Legal Services of the Elderly in New York City, observes that increased use of “low-cost educational seminars” conducted by lawyers and aimed primarily at the elderly may result in the exploitation and abuse that such seminars should be designed to prevent. Id. at 1546-47. According to Keilin, low-cost or even free “seminars” are offered by attorneys “to tap into the expanding base of elderly clients.” Id. at 1547. Unfortunately, if seniors “really are more susceptible to persuasive salesmanship, the use of seminars . . . is potentially misleading or coercive.” Id. at 1548. She further notes that many of the tactics employed by those engaged in consumer scams are evident at such seminars, with “the force of the attorney’s personality . . . sexual attractiveness or personal charisma” being more important than any real need the client may have for the service offered. Id. at 1554. As an extreme example of this vulnerability, she cites the following excerpt from Bennett v. Bailey, 597 S.W.2d 532 (Tex. 1980):

In this astonishing case, the plaintiff, a widow of undisclosed age, purchased more than $29,000 worth of dance lessons from flattering young male instructors. Upon her refusal to ‘upgrade’ to a $49,000 contract or to add a $9,000 contract, the ‘affections’ of these
In addition, the law may seem extremely complex, arcane, and untrustworthy to the average lay person. Clients generally instructors were withdrawn; one instructor stepped on plaintiff’s toe, disabling her for eleven weeks. Surprisingly, she returned to the studio to resume her lessons. The same instructor twirled plaintiff in the air, and she sustained two broken ribs. Plaintiff received treble damages.

Id. at 1552 n.27. That this practice remains a part of the sales techniques used by unscrupulous dance studios is demonstrated by the experience of two seniors in Spring Hill, Florida, who bought over $100,000 worth of dance lessons in the late 1990s due to a strategy of gift-giving and flattery on the part of instructors termed the “Love Technique.” See Jamie Malernee, Hernando County Dance Studio Settles Lawsuits, ST. PETERSBURG TIMES, Nov. 24, 2000, available at 2000 WL 26337524 (reporting that a 68-year old woman settled her lawsuit with Dance Tonight in which she alleged the instructors wooed clients into dance lesson contracts but expressing disappointment that the studio did not have to admit wrongdoing even though they previously settled similar suits). See also Stiegel et al., supra note 2, at 609 (noting that, in addition to being lonely, seniors are often “unfamiliar with or fearful about probate and guardianship”). Flattery and expressions of concern are often combined with high pressure sales tactics designed to exacerbate these fears in marketing living trusts to the elderly. Id. at 612.

46 See Alan Reifman, et al., Real Jurors’ Understanding of the Law in Real Cases, 16 LAW & HUM. BEHAV. 539, 539 (1992). The impact of this on jury trials has been discussed in a number of articles, suggesting that despite a rise in the percentage of the population that is college educated, the complexity of legal issues has generated a situation where studies indicate that “jurors understand fewer than half of the instructions they receive at trial.” Id. at 539. See also Joe S Cecil et al., Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials, 40 AM. U. L. REV. 727, 751 (1991) (examining the difficulties jurors face in understanding different types of civil trials); Steven I. Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 NW. U. L. REV. 190, 191 (1990) (arguing that the structure of the jury system may lead to unjust results because jurors who do not understand complex legal principles are forced to use their own interpretations of legal standards and law); Graham C. Lilly, The Decline of the American Jury, 72 U. COLO. L. REV. 53, 70-72 (2001). Although this may be attributable in part to deliberate jury selection procedures designed to retain only those who are “comparatively less informed, less skilled, or less educated than the pool of potential jurors,” the fact remains that the same people who cannot follow a judge’s instructions in the jury box may be unable to follow what their attorney tells them. See Lilly, supra, at 65. These findings reiterate the
do not understand what their lawyer does and cannot assess the quality of performance until it is too late. Professor Michael Asimow noted in a provocative article that the trend toward a “business” or “commercial” perspective among those who practice law has engendered public perception of law firms as the virtual “embodiment of evil.” To the lay person, the bar associations and disciplinary boards intended to police attorneys may seem composed of lawyers that want to protect members of their own profession. This undermines the public’s faith in complaint procedures, continuing legal education requirements and bar disciplinary systems. Additionally, the few available legal remedies require a victimized client to bear the burden of proof to establish technical elements, often necessitating expert

extreme disadvantage that an elderly person would have in assessing his or her lawyer’s performance.

Michael Asimow, Embodiment of Evil: Law Firms in the Movies, 48 U.C.L.A. L. Rev. 1339 (2001) (positing that the unfavorable portrayal of large law firms in films, as supported by general anti-business sentiment, is essentially an accurate representation of the current culture of large firms).

See, e.g., Dennis Chapman, Court Backs Changes in Lawyer Discipline System, Milwaukeee J. & Sentinel, Jan. 22, 2000, available at 2000 WL 3841113 (discussing the Wisconsin Supreme Court’s decision to increase the percentage of non-lawyers on bar disciplinary board to insure “greater public involvement” and “dispel the notion that the disciplinary process is too lawyer-friendly”).

See, e.g., David Armstrong, Disbarred Massachusetts Lawyers Skirt Discipline System Despite Sanctions, Many Are Reinstated, Some Offend Again, Boston Globe, Sept. 17, 2000, available at 2000 WL 3343172 (discussing several instances where reinstated lawyers again defrauded clients, including the case of attorney Thomas J. Moriarty, who misappropriated client funds belonging to elderly patients in a Veteran’s medical center); Patrik Jonsson, Would the Learned Counsel Please Stop Screaming?, Christian Sci. Monitor, July 17, 2001, available at 2001 WL 3736676 (reporting on the negative impact that attorney incivility has had on the public’s perception of lawyers); Bruce Schultz, Louisiana’s Lawyer Discipline System Gets Tougher, Baton Rouge Advocate, Nov. 19, 2000, available at 2000 WL 4506587 (reporting on the new Louisiana lawyer disciplinary system which includes members of the non-lawyer public on its Disciplinary Board). Statistics also suggest that ninety percent of all complaints filed are dismissed, and that only five percent actually result in discipline. See Kraus, supra note 20, at 285-86.
testimony.\textsuperscript{50}

In contrast, because consumer protection statutes are remedial in nature they can be liberally construed to promote fair dealing and effectuate the underlying consumer oriented public policy.\textsuperscript{51}

\textsuperscript{50} See generally Ray Ryden Anderson & Walter W. Steele, Jr., \textit{Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle}, 47 SMU L. REV. 235 (1994) (citing the general requirement of expert testimony when accusing an attorney of malpractice). Professors Anderson and Steele delineate three potential causes of action that a client may assert—breach of fiduciary duty, breach of contract and the tort of malpractice. \textit{Id} at 235. There is much confusion in the courts with respect to differentiation among the three causes of action, with varying results for the unfortunate clients involved. \textit{Id.} at 236-37. To prevail in an action for malpractice, the client has the burden to show breach by the attorney of the duty owed to the client and that the breach was the proximate cause of the injury or loss suffered by the client. 7 AM. JUR. 2d \textit{Attorneys at Law} § 212 (1997 & Supp. 2001). It has been held that the client must “not only establish that he or she would have succeeded in the underlying action and that any judgment would be collectible, but must also show that his or her former attorney was negligent and that plaintiff would have succeeded in the first action but for the attorney’s malpractice.” \textit{Id.}

\textsuperscript{51} See, e.g., Hall v. Walter, 969 P.2d 224, 230-35 ( Colo. 1998) (noting that in prior cases the court had given the state’s consumer protection statute “a liberal construction” and holding that the statute gave standing to nonconsumer landowners who sustained actual damages as a result of a real estate developer’s misrepresentations to buyers); Price v. Long Realty, Inc., 502 N.W.2d 337, 342-43 (Mich. Ct. App. 1993) (holding that because Michigan’s consumer protection act is a “remedial statute designed to prohibit unfair practices in trade or commerce it must be liberally construed to achieve its intended goals,” thus the law applied to the conduct of a “licensed real estate broker” where the conduct involved—namely, perpetration of a fraud—was not authorized under the broker’s license); Blatterfein v. Larken Assocs., 732 A.2d 555, 559-64 (N.J. Super. Ct. App. Div. 1999) (finding that the purpose of New Jersey’s consumer protection statute was to “eliminate sharp practices and dealings” and that the statute was “to be liberally construed in favor of consumers” so that an architect was held liable under the consumer protection statute for misrepresentations concerning the quality of building materials used in new homes he had designed); Elder v. Fischer, 717 N.E.2d 730, 734-37 (Ohio App. 1998) (finding that the purpose of Ohio’s consumer protection act is to “protect consumers from ‘unscrupulous suppliers’ in a manner not afforded under the common law” and holding that a residential nursing care facility’s billing practices constituted a “consumer transaction”); Iadananza v. Mather, 820 F. Supp. 1371,1377-81 (D. Utah 1993) (“[I]t is the
Thus, a client consumer could potentially recover for “immoral, unethical, oppressive or unscrupulous” activities that do not rise to the level of a tort or malpractice claim.\textsuperscript{52}

The attorney disciplinary procedures currently in place may be inadequate to deter unfair and deceptive practices or compensate victimized clients for their losses. Disciplinary boards are generally authorized to impose sanctions these as censure, suspension and disbarment.\textsuperscript{53} The basic purpose of these
court’s duty [under Utah law] to accord effect to a statutory provision requiring the statute to be construed liberally with a view to achieving statute’s object” and finding that residential real property was included under the Utah consumer protection act’s definition of “consumer transaction”).

\textsuperscript{52} See FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5, (1972) (delineating the FTC’s factors for determining whether a practice that is neither deceptive nor a violation of antitrust law is nevertheless unfair). Courts often look to FTC regulations and advisory opinions as a source of authority to determine whether a practice is unfair or deceptive for purposes of a consumer protection statute. In a recent case construing the concept for purposes of the Connecticut Trade Practices Act (CUTPA), the Connecticut court stated:

It is well settled that in determining whether a practice violates CUTPA [Connecticut courts] have adopted the criteria set out in the ‘cigarette rule’ by the federal trade commission for determining when a practice is unfair: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.


\textsuperscript{53} \textit{7 AM. JUR. 2D Attorneys at Law} § 30 (2002) (noting that disciplinary measures can only be used against an attorney for good cause shown in a
sanctions is to correct future attorney behavior and, when necessary, “remove from the profession a person whose misconduct has proved such person unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney.”

Disciplinary proceedings protect the public interest; they do not rectify harm done to individuals victimized by an attorney’s conduct. Admittedly, the majority of bar disciplinary codes contain express provisions that allow conditioning an attorney’s reinstatement upon payment of restitution. Even if

judicial proceeding).

See, e.g., N.H. R. PROF. COND. CMTEE. § 2.10 (2002). In New Hampshire, although restitution is not an affirmative requirement in the state attorney disciplinary scheme, the rules provide that restitution is not enough to “justify abatement of an investigation into the conduct of an attorney or the deferral or termination of proceedings” under the disciplinary rules, demonstrating that the regulation has goals beyond restitution. Id. (explaining that whether the complainant settles, receives restitution, or simply does not prosecute a charge, none of those factors alone cause an investigation into the conduct of an attorney to be deferred or terminated under the professional conduct rules of New Hampshire).

Virtually every jurisdiction has incorporated restitution as a possible condition of reinstatement, either through explicit provisions in the jurisdiction’s bar disciplinary rules, establishment of a client reimbursement fund (to which the lawyer must submit repayment) or case law. See ALA. R. DISC. 8(i); COLO. C.P.R. 251.29; D.C. BAR R. 11; FLA. BAR R. 3-7.10(f)(3)(F); IDAHO BAR R. 506(h); ILL. SUP. CT. R. 767(e); MD. CT. R. 16-760(b)(4); MO. ATT’Y R. 5; MASS. SUP. CT. R. 4:01 (4)(c), (d); MISS. R. DISC. 12.7; MO. BAR R. 5.28(b)(2); MONT. DISC. R. 7(6); NEV. SUP. CT. R. 116(6); N.J. R. GEN. APPLICATION 1:20-21(f)(11); N.M. R. DISC. 17-203(c); N.Y. CT. R. 603.14 (m); N.Y. CT. R. 691,11(d); N.C. BAR R. ch. 1 subch. B § .0125(a)(3)(M); N.D. R. DISC. 4.5(b)(2); OHIO BAR R. 5(10)(e)(1); PA. R. DISC. 531; R.I. SUP. CT. R. DISC. art. III 3(d); TENN. SUP. CT. R. 9 § 19.7; TEX. R. DISC. 11:02(d); UTAH R. DISC. 2.9(a); W. VA. R. DISC. 3.15; WIS. SUP. CT. C.P.R. 22.10; WYO. R. DISC. 4(e)(12). The following states provide a client reimbursement fund. See DEL. SUP. CT. R. 66; HAW. SUP. CT. R. 10.19; IDAHO BAR R. 601; IOWA CT. R. 39.3(4)(c); KAN. R. DISC. 227; KAN. L.F.C.P.R. 16; KY. SUP. CT. R. 3.820(3)(c); ME. LAW. FUND CLIENT PROT. R. 3(b); MICH. R. DISC. 9.123(b)(9); OKLA. R. DISC. 11.1(b); N.C. BAR R. ch. 1 subch. B. § .0125(a)(3)(L); VA. SUP. CT R. pt. 6 § 4 para. 11.1(b); WASH. A.P.R. 15. In addition, case law in a number of
repayment of funds to an injured client is ordered, however, such requirements are generally limited to funds wrongfully converted by the lawyer. In fact, some courts have found ordering client restitution beyond the province of a disciplinary proceeding. Consumer protection actions provide greater recompense, allowing recovery of all damages incurred and treble or punitive damages where appropriate.

Although the number of disciplinary proceedings has not grown remarkably in the past decade, public perception of lawyers is increasingly negative and reports of lawyers taking advantage of elderly clients remain especially troubling. This jurisdictions has upheld restitution as a condition of reinstatement. See In re Feeley 814 P.2d. 777, 780 (Ariz. 1991) (ordering restitution); In re Caputi, 676 N.E. 2d. 1058, 1062 (Ind. 1997) (providing for reinstatement following suspension and satisfaction of costs); In re Caver, 733 So.2d. 1208, 1212 (La. 1999) (ordering full restitution); In re Disciplinary Action Against Hendrickson, 462 N.W.2d. 594, 594 (Minn. 1990) (conditioning reinstatement on restitution of funds); In re Disciplinary Proceedings Against O’Keefe, 613 N.W.2d. 890, 893 (Wis. 2000) (ordering restitution).

See supra note 56 (setting forth state statutes providing for restitution).

See In re Scott, 979 P.2d 572, 574 (Colo. 1999) (disbarring attorney but refusing to order restitution where it “is neither appropriate nor possible” to assess the portion of client’s damages resulting from the attorney’s neglect); In re Ackerman, 330 N.E.2d 322, 324 (Ind. 1975) (suspending attorney for violating his oath as an attorney, but refusing restitution because, among other reasons, money damages “cannot constitutionally be determined in a disciplinary proceeding, in that to do so would deny the attorney the right to trial by jury”); In re Disciplinary Proceedings Against Harman, 403 N.W.2d 459, 460 (Wis. 1987) (reprimanding attorney publicly for unprofessional conduct but refusing restitution where monetary amounts had not been ascertained and would be disputed absent the attorney’s agreement). See also Patricia Jean Lamkin, Annotation, Power of Court to Order Restitution in Disciplinary Proceeding Against Attorney, 75 A.L.R.3d 302 (1977) (setting forth the parameters of a court’s power to order restitution).

See Sheldon, supra note 32, at 623-27 (describing the remedies available under consumer protection laws).

The author undertook an informal telephone survey of state bar disciplinary authorities in all 50 states in the summer of 2002. This survey yielded responses from 40 states regarding recent changes in the volume of complaints received. Ten states reported static numbers: Arizona, Delaware,
Florida, Massachusetts, Nebraska, Ohio, Pennsylvania, South Dakota, Texas, and Utah. Eleven states reported increasing numbers: Alabama, Colorado (dramatic increase in 1999, probably due to institution of more user friendly intake system), New Jersey, Virginia (increased over the last five years, but decreased a bit last year, so may be leveling off), Washington (although total number of complaints increased, number of complaints as a percentage of the number of attorneys hovered around 15% for the last decade, the 2000 year jumped slightly to 18%, but this was not deemed indicative of any significant trend), Connecticut (increasing over last five years but leveling off), Michigan (increasing slightly), Missouri, Montana (increasing as of 2000, but down somewhat in 2001), South Carolina (possibly due to change of rules and structure mid-1990s), Wisconsin (possibly due to institution of a more “user” friendly intake system). Seven states reported decreasing numbers: North Dakota (slight decrease recently but fluctuates from year to year), Georgia (probably due to better screening by new Client Assistance Program; no clear trend), Maine (decreasing to static), Maryland, New York (attributed in part to greater efficiency on the part of disciplinary agencies), Rhode Island (decreasing since 1993, possibly due to better screening of complaints), Tennessee (possibly due to implementation of a new consumer assistance program). Five states reported ambiguous trends: Minnesota (variable with possible significant increase in 2001), Mississippi (slight increase this year, but numbers had been down for past few years), North Carolina (with some higher than average years in the late 1990s, but a significant drop in 2000, possibly indicating a leveling off), Oregon (variable from year to year, with slight downward trend within past several years), Wyoming (variable from year to year with no clear trend, this year appearing to be an all time low, for example, with last year relatively high). Two states responded that their numbers were not available: California (disciplinary system overhauled dramatically in 1999 with backlog of 2,200 cases; comparison statistics not available) and Vermont (have instituted totally new program of bar discipline, so no comparable statistics available). See also Asimow, supra note 47, at 1341-42 (arguing the public’s perception of the legal profession is largely shaped by the profession’s depiction in popular culture and that current films have depicted the legal profession in a negative light; highlighting the shift from a professional model to a business model, billing improprieties, hardball litigation tactics and ethical improprieties). See also David Armstrong, Disharred Mass. Lawyers Skirt Discipline System Despite Sanctions, Many are Reinstated; Some Offend Again, BOSTON GLOBE, Sept. 17, 2000, at A1, available at 2000 WL 3343172 (noting the propensity of many of the offenders to victimize those who are elderly); Lou Kilzer & Sue Lindsay, The Probate Pit Busted System, Broken Lives, ROCKY MTN NEWS, Apr. 7, 2001, at 21A, available at 2001 WL 7369135 (discussing examples of overreaching
ELDER LAW PRACTICE & CONSUMER PROTECTION 547

problem is not new. A case from 1972, Columbus Bar Association v. Ramey, is an instructive paradigm. 61

Ramey, a licensed practitioner in Ohio, represented an elderly woman with a history of institutionalization for psychiatric problems.62 An ailing colleague, the client’s recently deceased attorney, referred her to him. The colleague was responsible for securing the client’s release from a mental hospital approximately and she retained him to help with her finances, despite having moved to Arkansas after her release.63 The client trusted her former attorney and Ramey benefited from this—at least initially. After her former attorney’s death, the client traveled to Ohio and executed an irrevocable trust at Ramey’s suggestion.64 She named Ramey trustee and remainder beneficiary by reference to a simultaneously executed will, leaving everything to Ramey.65 Ramey drafted both documents and advised the client that she could revoke both the trust and the will whenever she liked.66 Language in the trust suggested, however, that Ramey’s appointment as remainder beneficiary vested immediately and may survive revocation of the will.67 In his account of the

and excessive attorneys’ fees in the probate court system in cases involving elderly, incompetent clients); Mary Mitchell, Man Losing Home Needs Our Humanity, Not Pity, CHI. SUN-TIMES, Aug. 31, 2001, at 14, available at 2001 WL 7245374 (expressing outrage at aggressive collection of attorney’s fees by 82 year old man’s former attorney, resulting in loss of the client’s home); Legislature Needs to Act, S. FLA. SUN-SENTINEL, Dec. 21, 2000, at 26A, available at 2000 WL 28997028 (discussing ambulance chasing and the deleterious effects on the elderly of fraudulent practices in connection with personal injury cases).

61 290 N.E.2d 831 (Ohio 1972) (holding that attorney’s conduct in assuming the role of trustee and beneficiary of trust and failing to fully disclose the potential legal significance of the instruments prepared constituted conduct contrary to standards prescribed by legal ethics canons).

62 Id. at 832.

63 Id.

64 Id. at 833.

65 Id.

66 Id.

67 Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 833 (Ohio 1972). The trust stated, “[u]pon the death of the grantor, the balance remaining in the
interview before the Ohio Board of Commissioners on Grievances and Discipline, Ramey admitted that the client was “trembling” when she told him she was apprehensive about possible recommitment to a mental hospital. He acknowledged “spend[ing] several hours that afternoon trying to quiet her nerves.”

The client returned to Arkansas and consulted a local attorney regarding what had transpired in Ohio. She was “living in a state of near-poverty” and needed money to relocate. The Arkansas attorney contacted Ramey, advised him of the client’s need, and requested an accounting and immediate delivery of the trust funds. In response, Ramey called the client, who refused to speak with him and referred him to the Arkansas attorney. No accounting was rendered and the trust funds were not delivered, whereupon the Arkansas lawyer filed for declaratory judgment in federal district court. This resulted in nullification of both the trust and the will. Ramey filed the requested accounting as part of his answer, which apparently revealed no mismanagement of the client’s funds. Although counts of fraud and undue influence were raised, the court issued no specific finding as to these allegations. The Columbus Bar Association initiated disciplinary proceedings against Ramey and he received a public reprimand for “creation of a conflict of interest and a failure to fully disclose the potential legal significance” of the documents he

trust, after caring for pets and covering other expenses, was to . . . pass to the legatee named in the will executed simultaneously with this agreement.” Id.

68 Id. at 833.
69 Id.
70 Id. at 835.
71 Id.
72 Id.
73 Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 835 (Ohio 1972).
74 Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 835 (Ohio 1972).
75 Id. at 834 (indicating that Ramey entered an appearance in the case by mail and filed the requested accounting).
76 Id. at 834 (“No specific finding was made as to the allegations of fraud and undue influence.”).
ELDER LAW PRACTICE & CONSUMER PROTECTION 549

prepared. Ultimately, the client recovered only the money placed in the trust, with no compensation for the lost use of her funds or for the money expended to initiate the lawsuit. In addition, Ramey was paid for drafting the objectionable documents and continued to receive a fee until the trust was nullified.

Given that both documents were nullified, it is difficult to discern any benefit that the client received from the services Ramey rendered. Although the situation seems to constitute malpractice under Ohio law, the damages recoverable in a malpractice suit would be limited to those proximately caused by Ramey’s breach. After repayment of the trust funds, this might be limited to reimbursement of the fees charged by the Arkansas lawyer and interest on the funds held in the trust. Because both the trust and will were effective, malpractice in this case would focus on Ramey’s statement that the documents were revocable.

77 Id. at 837.
78 Id.
79 Id. 836.
80 For an example of Ohio case law examining a cause of action for malpractice, see, e.g., Krahn v. Kinney, 538 N.E.2d 1058, 1060 (Ohio 1989). The elements to establish a cause of action for malpractice in Ohio are as follows: 1) existence of an attorney/client relationship giving rise to a duty; 2) breach of that duty; and 3) damages proximately caused by the breach. Id. Construing the element of proximate cause, Ohio requires only that the plaintiff show a “causal connection” between the alleged malpractice and the resulting injury to the plaintiff and not that the injury would not have been sustained “but for” the attorney’s action. Id. See also Vahlia v. Hall, 674 N.E.2d 1164 (Ohio 1997) (stating that a standard of proof requiring a plaintiff to prove that, “but for” the defendant’s negligence, the plaintiff would have prevailed in the underlying action effectively immunizes most negligent attorneys from liability); Robinson v. Calig & Handleman, 694 N.E.2d 557 (Ohio App. 1997) (reversing a trial court’s holding that “but for” was the appropriate test for determining proximate cause in a legal malpractice action because the judgment was rendered before Vahlia v. Hall).
81 See Harrell v. Crystal, 611 N.E.2d 908, 916 (Ohio Ct. App. 1992) (holding that the “[t]he only thing recoverable are the damages that resulted from negligent advice”).
82 Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 833 (Ohio 1972).
Although the court did not address potential malpractice, the court found no actual mismanagement of the trust, implying that Ramey was entitled to payment for his professional services. Accordingly, any damages for malpractice would have been limited to the client’s inability to effectively revoke the documents without resorting to litigation. Furthermore, it appears that the one year statute of limitations would have barred any such cause of action.

On the other hand, if consumer protection laws applied to the practice of law, suit for rescission for unfair and deceptive practices would provide recovery of all fees paid and damages suffered, plus a potential award of treble damages if willful and knowing fraud were proven. This result more closely approximates justice and is more likely to discourage such conduct than the mere slap on the wrist issued in Ramey. In addition, the statute of limitations under Ohio law does not expire until two years after the event that constitutes the violation.

In contrast to the static volume of disciplinary complaints, the

---

83 Id. at 836-37.
84 Ohio Rev. Code Ann. § 2305.11(A) (Anderson1953). The client executed both trust and the will on June 21, 1969. See Ramey, 290 N.E.2d at 833. The client had copies of the trust document and the will in her possession as of August 19, 1969 and consulted an independent Arkansas attorney on September 4, 1969. Id. at 834. As of September 4, 1969, she knew or should have known that malpractice was committed. Id. at 834. The facts indicate that the client would not allow the Arkansas attorney to contact Ramey due to her fear that he would have her re-committed to a mental institution. Id. The Arkansas attorney was not able to make a formal demand until October 30, 1970, which was almost two months after the statute of limitations expired. Id.
85 See Ohio Rev. Code Ann. §§1345.01-1345.13, 4165.01 to 4165.04 (West 2003).
86 Columbus Bar Ass’n v. Ramey, 290 N.E.2d 831, 836 (Ohio 1972).
87 Ohio Rev. Code Ann. § 1345.10 (West 2001). Recent case law suggests that Ohio courts would interpret any other possible applicable statute of limitations that might arise within the context of a consumer protection case in a manner favorable to the consumer plaintiff. See Cattano v. High Touch Homes, Inc., 2002 WL 1290411 (Ohio App. 2002) (upholding a breach of contract claim and finding that the plaintiff had met the contract’s statute of limitations clause where a homeowner’s estate sued a modular home seller).
number of attorney malpractice suits has increased dramatically over the past decade.\textsuperscript{88} When the elderly are concerned, however, malpractice litigation often falls short of adequate relief.\textsuperscript{89} Plaintiffs in malpractice actions must prove that an attorney’s negligent or wrongful conduct proximately caused their loss.\textsuperscript{90} Even in states where proof of causation need not meet the “but for” standard the threshold requirements of a duty of professional care and breach of that duty must be proven, which may

\textsuperscript{88} See Anderson & Steele, \textit{supra} note 50, at 235 (“The ever increasing number of lawsuits against lawyers over the past decade has resulted in increased thinking about the law of attorney malpractice and has resulted in dramatic changes and developments in the practice of law and in attitudes about law practice.”); Jennifer Bjorhus, \textit{Wronged Legal Clients Are Finding That Suits Work Both Ways}, \textit{Seattle Times}, Dec. 19, 1995 at A1, \textit{available at} 1995 WL 11228373 (documenting an increasing number of malpractice suits in Seattle and a twenty percent increase in legal malpractice cases in Oregon overall); Alice Lipowicz, \textit{Firms Suit Up To Try Attorney Malpractice: Rebel Lawyers Build Hot New Specialty; Firms Pay Big For Mishandling Cases}, \textit{Crain’s N.Y. Bus.}, Nov. 3, 1997, at 14, \textit{available at} 1997 WL 8254953 (noting multi-million dollar malpractice judgments or settlements against several elite law firms in the 1990s); Edward McDonough, \textit{Lawsuits Against Lawyers Becoming More Common}, \textit{Salt Lake Trib.}, Feb. 4, 1996, at AA3 (describing the new trend toward holding transactional attorneys representing securities issuers liable for third party damages to stock purchasers); Stephen A. Moses, \textit{Long-term Care Due Diligence For Professional Financial Advisors}, 14 J. Fin. Plan. 158, 161 (2001), \textit{available at} 2001 WL 12215378 (warning that attorneys unfamiliar with the nuances of long term care insurance for elderly clients risk negligence claims).

\textsuperscript{89} See Lawrence W. Kessler, \textit{The Unchanging Face of Legal Malpractice: How the ‘Captured’ Regulators of the Bar Protect Attorneys}, 86 MARQ. L. REV. 457, 459 (2000) (claiming the lack of any significant legal malpractice tort reform is due to the conflicting interests of the very lawyers and legal academics responsible for creating legal practice standards).

\textsuperscript{90} See Algiers Anderson, \textit{supra} note 30, at 510 (noting that “[l]iability under any ‘malpractice’ theory must be premised on the following: the existence of a duty, which was breached by the lawyer and that breach was the proximate cause of the plaintiff’s (client’s) damage”); Anderson & Steele, \textit{supra} note 50, at 253 (noting that “[t]o prevail in an action against an attorney for the tort of malpractice, a client must allege and prove . . . that but for the attorney’s misconduct the client would not have suffered damage”).
necessitate expert testimony.91 These hurdles are substantial and could preclude recovery.92

Under most consumer protection acts, the plaintiff need only show that the defendant engaged in some act that is “unfair” and/or “deceptive” to the consumer, without requiring that the defendant acted with intent to defraud.93 In addition, although punitive damages may be available in particularly outrageous malpractice cases, this generally requires proof of intentional wrong doing or “conscious indifference” and some courts require evidence of “ill will, malice or intent to cause injury” to support such an award.94 In contrast, many state consumer protection statutes provide enhanced damages provisions in a broader panoply of situations.95 Statutes of limitations may also be problematic, particularly if it is not clear whether the suit sounds

91 See Barry Brown & Scott Hyman, Case-within-a-Case: Trap for the Unwary, 3 LEGAL MALPRACTICE REP. 1, 2 (1992) (“The client [in an attorney malpractice lawsuit] must also prove the attorney failed to exercise ordinary skill and knowledge. Finally, the client must affirmatively establish the fact of actual damage, the extent of the damage, and that such damages are not remote, speculative, or uncertain.”).

92 See generally id. (discussing the difficulty of maintaining a successful malpractice action and noting that in order to prevail a plaintiff must address the legal and factual merits of the underlying as well as the present litigation).

93 See Hetrick, supra note 27, at 331-32 (noting that malpractice actions against attorneys may include an “unfair trade practices” cause of action); Sheldon, supra note 32, at 120-22 (“The [FTC] definition of deception does not require intent; a practice is deceptive even if there is no intent to deceive”). Furthermore, “unless a state statute specifically provides otherwise, intent is not necessary under state UDAP statutes.” Id.

94 Annotation, Allowance of Punitive Damages in Action Against Attorneys for Malpractice, 13 A.L.R. 4TH 95, 96 (1982) (noting that “courts have held that punitive damages were dependent upon evidence of an intentional wrong or a conscious indifference on the part of the attorney”).

95 Id. at 34 (Supp. 1998); see also Debra D. Burke, The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?, 15 CAMPBELL L. REV. 223, 236-38 (1993) (stating that the North Carolina consumer protection law has been construed to apply “to a variety of activities which affect commerce”).
ELDER LAW PRACTICE & CONSUMER PROTECTION 553

in contract or tort. The liberal interpretation of consumer protection laws is also generally absent from determinations of attorney malpractice.

III. BARRIERS TO APPLYING CONSUMER PROTECTION STATUTES TO THE PRACTICE OF LAW

There are three potential barriers to applying consumer protections to legal services: state constitutional separation of powers, statutory construction and policy considerations relating to the professional stature of attorneys. These, however, should not preclude consumer regulation of attorneys by state legislatures. A willing legislature can remove the barriers raised by statutory construction. Ultimately, applying consumer protection concepts to the practice of law hinges on assurances that professional autonomy and respect for the legal profession will not be compromised.

A. Separation of Powers

Critics argue that applying state consumer protection legislation to attorneys implicates the constitutional separation of powers. This critique, however, fails to consider the disparate

---

96 Anderson & Steele, supra note 50, at 259-61 (observing that statutes of limitation for contract actions generally do not begin to run until breach has occurred and then afford a longer period than statutes of limitation for tort actions). Anderson and Steele characterize attorney malfeasance as a breach of contract as opposed to malpractice, which may be advantageous from a statute of limitations point of view. Id. at 259.

97 See Hetrick, supra note 27, at 333-34. The California Supreme Court has declared that it has the plenary and inherent power to control the admission, discipline and disbarment of attorneys. Santa Clara County Counsel Attorneys Ass’n v. Woodside, 869 P.2d 1142 (Cal. 1994) (resolving a direct confrontation between the courts and the State Bar Act by ruling that despite the Act, the courts rather than the Legislature, had the power to determine whether disqualified attorneys would be readmitted). Separation of powers doctrine arises as an inference from the structure of the federal government created by the Constitution and the value placed by the framers on
purposes of the judiciary’s disciplinary function and the consumer protection legislation’s redress function, which allows each to regulate attorney conduct without conflicting with the jurisdiction of the other.

The argument is grounded in the separation of powers among the three branches of government: executive, legislative and judicial. This balance prohibits any of the branches from usurping powers or functions assigned to the other branches. Historically, courts regulate attorney conduct. Because lawyer discipline is a function of the judicial branch, it is arguably unconstitutional for the legislative branch to pass laws regarding attorney conduct.

To date, only two states’ supreme courts have addressed this issue. Both upheld applying state consumer protection laws to attorneys under their respective state constitutions. In a case the division of power among branches. Jason Lynch, Federalism, Separation of Powers, and the Role of State Attorneys General In Multistate Litigation, 101 COLUM. L. REV. 1998, 2025 (2001).

98 Id.; U.S. CONST. Art. I, § 1 (stating that all legislative powers shall be vested in a Congress); U.S. CONST. Art. II, § 1 cl. 1 (stating that the executive power shall be vested in a President); U.S. CONST. Art. III, § 1 (stating that the judicial power shall be vested in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”).

99 Mary M. Devlin, The Development of Lawyer Disciplinary Procedures in the United States, 7 GEO. J. LEGAL ETHICS 911, 912 (1994) (describing three eras of lawyer discipline in the United States). Devlin writes, “[f]rom at least the time of . . .1275, attorneys have been subject to the summary jurisdiction of the courts in which they practice for their professional conduct.” Id. Over the centuries, attorney discipline has evolved to the point of creation of formal disciplinary boards or agencies, fully staffed with disciplinary counsel and having their own hearing officers to conduct and adjudicate initial disciplinary investigations and proceedings. Id. at 933. But in the final analysis, such agencies remain under the direction of and are subject to the judicial branch of government. Id.

100 These states are Washington and Connecticut. See Hetrick, supra note 27, at 333-34.
ELDER LAW PRACTICE & CONSUMER PROTECTION 555

from Washington, *Short v. Demopolis*, the defendant’s attorneys sued for nonpayment of fees.\(^{102}\) The defendant denied liability and asserted affirmative defenses and counterclaims, including a violation of the state consumer protection act.\(^{103}\) He also alleged misrepresentation of the identity of the attorneys who actually provided the legal services.\(^{104}\) The attorneys asserted that application of the state consumer protection act to the practice of


A Delaware appellate court recently suggested in dicta in an unpublished opinion that applying the Delaware Consumer Fraud Act to the practice of law might be unconstitutional. See *Jamgochian v. Prousalis*, 2000 WL 1610750, *4-6* (Del. Super. Aug. 31, 2000) (holding that Delaware’s Consumer Fraud Act did not apply to the practice of law based on statutory rather than constitutional grounds). The court rested its decision on statutory construction, but did discuss Delaware Constitution’s delegation of powers concerning attorney regulation to the Delaware Supreme Court, the breadth of the court’s regulatory activity, and the state’s “Lawyer’s Fund for Client Protection” as a mechanism for assuring that clients victimized by an attorney’s fraudulent conduct receive adequate compensation. *Id.* at *4-5.

\(^{102}\) *Short*, 691 P.2d at 165.

\(^{103}\) *Id.* The defendant alleged:

10 causes of action: (1) unfair and deceptive practices in violation of the Consumer Protection Act, RCW 19.86; (2) breach of contract; (3) violation of Code of Professional Responsibility DR 2-106 (excessive fees); (4) violation of CPR DR 6-101 (incompetence); (5) negligence and malpractice; (6) fiduciary duty violations; (7) misrepresentation; (8) violation of CPR DR 2-110 (threat to withdraw) causing mental distress; (9) reformation of contract; and (10) attorney fees assessment.

\(^{104}\) *Id.* at 164-65.
law violated the separation of powers in the state constitution.\textsuperscript{105}

Considering this argument, the Washington Supreme Court first quoted the state constitution, which reads, “[t]he judicial power of the state shall be vested in a supreme court.”\textsuperscript{106} The court then noted that, although the judicial branch was vested with “exclusive, inherent power to admit, enroll, discipline, and disbar attorneys,” the constitution did not limit the legislative power to enact laws that may affect and apply to attorneys provided it did not “purport to take away the court’s power to admit, suspend, or disbar.”\textsuperscript{107} Applying the state consumer protection law to an attorney’s conduct did not interfere with the state court’s “power to regulate the practice of law” because the remedies provided by the statute did not affect the court’s distinct disciplinary power.\textsuperscript{108} The court found that “entrepreneurial aspects of the practice of law” fell within the ambit of the Washington Consumer Protection Act’s definition of “trade or commerce” and did not violate the separation of powers.\textsuperscript{109}

In \textit{Heslin v. Connecticut Law Clinic of Trantolo and Trantolo}, the Supreme Court of Connecticut addressed the Connecticut Commissioner of Consumer Protection’s attempt to obtain information from attorneys under investigation for possible violation of the state’s consumer protection laws.\textsuperscript{110} The defendant law firm was investigated for alleged “unfair or deceptive use of the terms ‘clinic’ and ‘law clinic,’” based on false statements concerning fees and a referral scheme that resulted in clients paying more than the advertised fee.\textsuperscript{111} The

\textsuperscript{105} \textit{Id.} at 165. Specifically, the plaintiffs claimed “to regulate the legal profession through the CPA was an unconstitutional infringement on the power of the judiciary to regulate the practice of law.” \textit{Id.}


\textsuperscript{107} \textit{Short}, 691 P.2d at 169.

\textsuperscript{108} \textit{Id.} at 170.

\textsuperscript{109} \textit{Id.} at 170-71. The court specifically declined to decide “whether the CPA applies to every aspect of the practice of law in this state.” \textit{Id.}

\textsuperscript{110} 461 A.2d 938 (Conn. 1983).

\textsuperscript{111} \textit{Id.} at 939.
defendant refused compliance with the Commissioner’s investigative demand, claiming that such regulation was a violation of the separation of powers contained in the Connecticut Constitution.112

The *Heslin* court first noted that, in Connecticut, the constitutionality of legislative action is presumed and any challenge must establish invalidity “beyond reasonable doubt.”113 The mere fact that legislative action “affects” the judicial branch is insufficient for invalidation so long as the power exercised is within the proper sphere of powers assigned to the legislature.114 Incidental overlap is not problematic—a statute is not unconstitutional unless the legislature usurped a power “which lies exclusively under the control of the courts” or constitutes “significant interference” with the judicial function.115 The defendants claimed that the conduct governed by the Connecticut Uniform Trade Practices Act (CUTPA) fell under the judiciary’s

112 *Id.* at 943; *see also* CONN. CONST. art. II (“the powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”); CONN. CONST. am. art. XVIII (2003). Connecticut’s Constitution states:

> Article second of the constitution is amended to read as follows: The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

*Id.*

113 *See Heslin*, 461 A.2d at 939; *see also* State v. Angel C., 715 A.2d 652, 659 (Conn. 1998) (“legislative enactments carry with them a strong presumption of constitutionality, and that a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt”) (citations omitted).

114 *Heslin*, 461 A.2d at 939.

115 *Id.*
authority and was also exclusively vested "within judicial control." The court disagreed, finding that the CUTPA was a "statute of general applicability," so that the incidental congruence of the statute’s provisions with some specific disciplinary rules relating to the conduct of attorneys did not rise to the level of unconstitutional encroachment.

To elucidate this conclusion, the court observed that the attorney disciplinary system and the consumer protection law serve different purposes. Attorneys have a virtually symbiotic relationship with the courts, functioning as "officers" and "commissioners" thereof, and are properly subjected to discipline and regulation by the judiciary. For the Heslin court, the policy behind the disciplinary system concerns the fitness to practice in the ambit of the judicial arena, with no focus on the competing rights or interests of private parties. The court went so far as to say that "the judiciary’s disciplinary machinery contains no mechanism for recompensing those who are victims of attorney misconduct."

The Heslin court noted that the consumer protection law neither conflicts with nor eliminates any ethical or professional requirement to which attorneys are subject under the disciplinary code. According to the court, the remedies provided by consumer protection statutes are separate and distinct because they provide money damages, injunctive and equitable relief as opposed to disbarment, suspension and censure. The court found that both attorney discipline codes and consumer protection

116 Id. at 944 (noting that the trial court had agreed with this view); see generally CONN. GEN. STAT. §§42-110a–42-110q (2003).
118 Id. at 945-46.
119 Id. at 946.
120 Id. at 945.
121 Id.
122 Id.
statutes can be constitutionally applied to the practice of law.\textsuperscript{124}

In the two decades since \textit{Heslin}, a number of state disciplinary schemes have included some sort of restitution as a condition for reinstatement or provided some sort of fund to compensate clients injured by attorney malfeasance.\textsuperscript{125} Such
provisions, although laudatory, fall short of the full recovery and public consumer functions served by the compensatory and treble damages provisions of most consumer protection laws. Restitution, for example, cannot be independently enforced by the client and is contingent upon a suspended or disbarred attorney’s desire to be reinstated. 126 Client reimbursement is also limited to the amount of compensation. 127 Although the rules of professional conduct are concerned with the attorney-client relationship, the private interests of clients are not the raison d’etre. As the Heslin court stated, “the code’s emphasis is consistently ethical and regulatory,” and the rules do not really address the “pragmatic concerns of the public.” 128 Pragmatic concerns are the lynchpin and focus of consumer protection law: “the prevention of injury to the consumer of legal services and redress to those injured by attorney misconduct.” 129

---

126 Id. Restitution is a condition for applying for reinstatement to a state’s respective disciplinary board—a suspended attorney must file a petition with the respective board for an order if the attorney wishes to be reinstated to practice law. Id.

127 See, e.g., DEL. S.C.R. 66 (Oct. 2002) (“The purpose of the trust fund shall be to establish . . . the collective responsibility of the profession in respect to losses caused to the public by defalcations of members of the Bar, acting either as attorneys or as fiduciaries . . . and the trustees “receive, hold, manage and distribute . . . the funds raised” at their discretion). The Lawyer’s Fund for Client Protection established by the Delaware Supreme Court Rule 66 provides that payment of client claims out of the fund is purely discretionary and that no one has “any right in the trust fund as beneficiary or otherwise.” Id. The regulations governing administration of the fund further provide that the trustees may decide to pay only a portion of a claim in their discretion and that payment on any one claim may not exceed ten percent of the fund balance existing at the time. See, REG. IV.3, Claims Against the Fund, Regulations of the Trustees of the Lawyer’s Fund for Client Protection of the Bar of Delaware, available at http://courts.state.de.us/lfcp/rules/regs.pdf (last visited Feb. 24, 2003).


129 Id.
B. Statutory Construction

In addition to potential constitutional challenges, applying consumer protection laws to the legal profession may present problems of statutory construction. For example, courts have struggled with the proper application of the terms “consumer,” “consumer transaction” and “trade and commerce.” Additionally, at least four states’ consumer protection statutes include specific exemptions for attorneys as members of “learned professions” while other courts in other states may choose to

130 Courts are split concerning inclusion of persons receiving attorney services within the definition of “consumer.” See, e.g., Sears Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10 (1st Cir. 1997) (applying Massachusetts law to find a violation of Massachusetts’ consumer protection statute when attorneys billed clients in a manner that was in breach of their contract); Banks v. D.C. Dept. of Consumer Regulatory Affairs, 634 A.2d 433 (D.C. App. 1993) (applying consumer protection procedures act to nonlawyers who claimed to practice law by finding that their performance of legal services was trade practice); Rousseau v. Eshleman, 519 A.2d 243 (N.H. 1986), recon. denied, 529 A.2d 862 (N.H. 1987) (prohibiting application of the trade or commerce standard to attorney); Vort v. Hollander, 607 A.2d 1339 (N.J. Super. Ct. App. Div. 1992), cert. denied, 617 A.2d 1221 (N.J. 1992) (holding that attorney’s malpractice did not fall within the meaning of the consumer fraud act); Roach v. Mead, 722 P.2d 1229 (Or. 1986) (denying recovery under provisions of Unlawful Trade Practices Act for legal services rendered by attorney’s partner). See also SHELDON, supra note 32, at 14-16 (enumerating and categorizing transactions as for or not for consumer purposes); Michelle J. Evans, Annotation, Who is a “Consumer” Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts, 63 A.L.R. 5th 1, 83-90 (1998) (distinguishing consumer protection cases that did and those that did not grant consumer status to the parties).

131 Maryland and Ohio have specific attorney exemptions. See supra note 40 (citing to statutes and quoting statutory language). North Carolina and Texas have “learned professional” exemptions. N.C. GEN. STAT. ANN § 75-1.1(b) (1999 & Supp. 2000) (defining “commerce” as not including professional services rendered by a member of a learned profession); TEX. BUS. & COM. CODE ANN. §17.49(c) (West 1987 & Supp. 2002) (exempting application of the statute to the rendering of professional services). The Texas exemption applies to the attorney’s “professional skill” defined as “providing of advice, judgment or opinion.” The statute expressly allows consumers to proceed under the Texas Consumer Protection Act in cases involving
infer such an exemption. These difficulties, however, do not necessarily prohibit attorney regulation under consumer protection laws.

The Supreme Court of New Hampshire interpreted its consumer protection law to exempt the legal profession. It found that New Hampshire’s consumer protection act, although “comprehensive,” did not exempt any “[t]rade or commerce otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of this state or of the United States.” The court noted that this would exempt doctors, electricians and plumbers from application of the consumer protection law as they are under the jurisdiction of regulatory boards. The court also found that the state judiciary’s “professional conduct committee” constituted a “regulatory board acting under statutory authority” of the state, thus exempting the practice of law from coverage by the statute.

misrepresentation of material fact, unconscionable acts, breach of warranty, etc. See TEX. BUS. & COM. CODE ANN. § 17.49(c) & (c)(1)–(4) (West 1987 & Supp. 2002).

In states without specific exemptions, courts may also limit application of consumer protection statutes and imply an exemption for those in the “learned professions,” which historically included medicine, theology and the law. See, e.g., Jamgochian v. Prousalis, 2000 WL 1610750 (Del. Super. 2000); Vort v. Hollander, 607 A.2d 1339 (N.J. Super. Ct. App. Div. 1992), cert denied 617 A.2d 1221 (N.J. 1992). See also Burke, supra note 95, at 224. Learned professions are those “characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place.” Id. at 242-43.


Rousseau, 519 A.2d. at 245.

Id. Recent case law upheld the Rousseau majority’s reading of the exemption. See Colonial Imports Corp v. Volvo Cars of North America, 2001 WL 274808 (D. N.H. 2001) (following Rousseau and applying the principle to the commercial relationship of motor vehicle dealers to distributors or manufacturers); Averill v. Cox, 761 A.2d 1083 (N.H. 2000) (holding that the practice of law falls within the scope of the exemption in the state’s consumer protection statute).
A well-reasoned dissent objected to the majority’s characterization of the professional conduct committee as a “regulatory board,” pointing out that the statutory language contemplated boards created pursuant to legislative authority, while the professional conduct committee was created pursuant to the judiciary’s “inherent” constitutional power to govern the conduct of attorneys and the practice of law.\textsuperscript{136} The dissent argued that the judiciary, as a “separate, independent branch of government” is not “acting under statutory authority of this state.”\textsuperscript{137} Thus, the dissent concluded, the exemption should not extend to the practice of law as a matter of clear statutory construction.\textsuperscript{138} Although the dissent’s narrow reading did not prevail, it represents a viable alternative that courts could employ.

C. Policy Considerations

Critics have argued that because the legal profession requires practitioners to exercise discretion and adhere to codes of ethics, it is a learned profession and therefore properly set apart from

\textsuperscript{136} Rousseau, 519 A.2d at 246-47.
\textsuperscript{137} Id.
\textsuperscript{138} Id. See, also, Gilmore v. Bradgate Associates, Inc., 604 A.2d 555, 557 (N.H. 1992) (using principles of statutory construction to find that “neither the legislature nor the Rousseau court could have intended to exclude from the protection of the act the large number of industries which are subject to regulation in this State simply because the legislature has provided for regulation of that industry within a statutory framework”). Gilmore, which suggested that Rousseau might be overruled, was overruled. See Averill v. Cox, 761 A.2d 1083, 1087 (N.H. 2000). The Averill court noted:

the Gilmore court limited the reach of the statutory exemption to actions that are expressly permitted by a regulatory board or office . . . This reasoning produces a troubling result because it is difficult to envision any commercial transaction which is prohibited by the Consumer Protection Act but expressly permitted by a statutorily authorized regulatory body.

Id.
other types of businesses subject to consumer protection laws.  

Upon thorough analysis, however, it is clear that the application of consumer protections to legal services does not threaten the legal profession’s status as a learned profession.

Professor Debra Burke has noted that, historically, the law was included among the “learned professions.” By definition, a learned profession contemplates exceptional education as a criteria for practice, the repositing of confidence and trust between practitioners and their clientele, adherence to ethical standards far superior to those expected of tradesmen or merchants, and services rendered which require the exercise of professional judgment and tailored to the individual goals and circumstances of each client. In the case of the profession of law, there is an additional societal responsibility to promote justice as an officer of the court, even when this runs counter to the desires of a particular client. In these ways, the legal profession meets the definition of a learned profession.

---


140 Burke, supra note 95, at 242.

141 See generally ANTHONY T. KRONMAN, THE LOST LAWYER 353-75 (1993) (comparing a lawyer to a classical statesman); ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) (noting that certain professions, including the legal profession, are learned arts in pursuit of public service); Louis L. Hill, Solicitation By Lawyers: Piercing the First Amendment Veil, 42 ME. L. REV. 369, 376-80 (1990) (tracing the development of the law as a learned profession from the medieval period to colonial America).

142 CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 17-19, 688-89 (1986) (noting that lawyers have a duty, for example, of “candor” in representations made to a court and to counsel clients in nonlitigation contexts to behave in a just fashion); William F. Harvey, MDP Versus the Legal Profession, 44 RES GESTAE 24, 29-31 (2000) (urging caution in regarding “learned professions” as beyond regulation in light of recent trends toward
profession is qualitatively different from such service occupations as plumbing, real estate or home repair contracting.

1. The Reputation of the Profession

Some argue that subjecting the practice of law to consumer law standards implies that legal services are analogous to mass produced commodities that can be bought and sold without individual assessment and evaluation. This implication undermines professional autonomy and fosters the idea that many lay people may already have—that the practice of law can be reduced to filling in blanks on standardized forms and can be marketed to the public with minimal instructions. The issue is whether such a devaluation of the practice of law ineluctably results from subjecting the profession to application of consumer protection laws. Although form books may be popular, thoughtful people realize that they are no substitute for an attorney’s advice, just as they would not substitute a book on home remedies for a doctor’s examination. If anything, applying multidisciplinary practice). This caution is especially compelling in light of recent events concerning unethical, and even illegal, activity at accounting firms.

143 See William E. Hornsby, Jr., Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing, 36 U. RICH. L. REV. 49 (2002) (arguing that the regulation of lawyer advertising demeans a valuable tool for client development to the point of calling into question its morality); Bob Rouder, Mediating The Professional Paradox: An Application of the Aggregate Idiot Phenomenon, 80 TEX. L. REV. 671, 682-83 (2002) (characterizing professional regulation as penalizing individuals who are nothing worse than imperfect human beings). But see Mylene Brooks, Lawyer Advertising: Is There Really a Problem?, 22 LOY. L.A. ENT. L.J. 1, 29 (1994) (arguing that more consumer regulation than what is typical for commercial services is unnecessary as legal services are already a commodity).

consumer law protections to the practice of law could serve to educate the public on the importance of a high level of competence and professionalism associated with legal practice.

2. Professional Discretion

It could also be argued that subjecting the legal profession to scrutiny beyond an expectation of a minimal level of competence would chill professional judgment. This concern, however, is misplaced. Such claims misapprehend the focus of current state consumer protection laws, which are principally directed at “unfair and deceptive practices.” Additionally, the burden of proof is high and a client would be required to demonstrate that his or her attorney engaged in such behavior either negligently or knowingly.

Some courts have articulated a dichotomy between the “entrepreneurial” aspects of the practice of law, to which consumer protection law may be applied, and “professional”


146 See Sheldon, supra note 32, at 1. Sheldon notes that state statutes regarding unfair or deceptive acts and practices (UDAPs) often echo the concepts of deception and unfairness set forth in the FTCA, but, unlike the federal statute, state laws provide consumers with a private right of action. Id. State provisions, therefore, accomplish the same goals of punishing and deterring merchant misconduct as envisioned by the federal act, but achieve those goals through private litigation, which may make state UDAPs especially attractive tools for consumer protection. Id. He also points out that these statutes are remedial in nature, allowing consumers to challenge new practices and ensure that the law keeps up with the ever-changing marketplace and novel forms of consumer abuse. Id. at 91.

aspects of practice, which are beyond application. In so doing, the courts seek to clearly demarcate between those facets of legal practice that are commercial in nature and those that are not. For example, the courts have classified such activities as billing and advertising as entrepreneurial, whereas decisions requiring a legal education are not, inasmuch as they implicate the “competence and strategy of the lawyer.”

Although billing and advertising are areas where consumer protection is necessary, the greatest harm to clients arises from misrepresentations and exploitative practices connected with the actual provision of legal services. The example provided in

---

148 See Gadson v. Newman, 807 F. Supp. 1412, 1415-18 (C.D. Ill. 1992) (denying defendant hospital and psychiatrist motion to dismiss Illinois Consumer Fraud Act and conspiracy to commit consumer fraud counts). In Gadson, the court determined that the underlying rationale for this distinction is that the practice of law is already highly regulated by professional organizations. Id. at 1417. However, the court suggested other tasks that may also be part of an attorney’s legal practice, such as setting a fee schedule, are more closely tied to the business aspect of the profession. Id. These aspects of a legal practice are subject to statutory regulation as they would be in other commercial enterprises. Id. See also Reed v. Allison & Perrone, 376 So. 2d 1067, 1068-69 (La. Ct. App. 1979) (finding that attorneys could be held liable under the state’s consumer protection act for unfair and deceptive advertising in certain circumstances); Matthews v. Berryman, 637 P.2d 822 (Mont. 1981).

149 See, e.g., Kessler v. Loftus, 994 F. Supp. 240 (D. Vt. 1997) (excluding as opinion and professional judgment attorney’s assertion that a mortgage would be adequate security for plaintiff’s property settlement opinion and finding Vermont’s Consumer Fraud Act inapplicable); Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 717 A.2d 724 (Conn. 1998) (holding that professional negligence was not covered by the state’s Unfair Trade Practices Act); Short v. Demopolis, 691 P.2d 163, 168 (Wash. 1984) (finding state consumer protection law applicable to the entrepreneurial aspects of defendant’s law practice, such as determination of, billing and collection of legal fees, but upholding dismissal of claims related to attorney’s competence and strategic decisions). See also Eriks v. Denver, 824 P.2d 1207, 1214 (Wash. 1992) (citing Short and finding the concealment of concurrent representation of clients was entrepreneurial in nature, subject to the consumer protection act).
Columbus Bar Association v. Ramey is illustrative. In that case, the attorney’s wrongdoing involved misuse of professional judgment that created a conflict between his client and himself, and a potential economic windfall at his client’s expense. Restricting coverage of consumer protection laws to the entrepreneurial aspects of law would allow such an attorney to escape liability for blatantly wrongful conduct.

The most compelling argument against applying consumer protection concepts to the practice of law is the possibility that such application could impose strict liability on the lawyer for any marketing, selling, distribution or provision of legal services. Because liability can attach under many state consumer protection statutes without proof that the defendant knowingly or intentionally engaged in unfair or deceptive conduct, concerns have been raised that attorneys risk strict liability if consumer protection laws are applied to legal practice. The fear is that, under consumer protection law, an attorney could be liable for unintentional error in the exercise of professional judgment. However, given that the legal profession already adheres to higher ethical and professional standards,

150 290 N.E.2d 831 (Ohio 1972).
151 Id. at 836-37.
152 Gatlin, supra note 139, at 409-12 (noting that strict liability, as opposed to a fault standard, gives attorneys less leeway in exercising their professional judgment when pursing legal strategies because attorneys are forced to become guarantors of their opinions and decisions and can be accountable for careful, well reasoned, albeit incorrect decisions). See also Rousseau v. Eshleman, 519 A.2d 243, 249-50 (N.H. 1986) (Johnson, J., dissenting) (“Attorneys never have been required to insure the correctness of their opinions, and any policy of strict liability would make it virtually impossible for the attorney to function in the traditional role of legal counselor.”). Justice Johnson articulated in his dissent that any of an attorney’s activities which constitute the “actual practice of law,” requiring the professional judgment of an attorney based upon his or her legal knowledge and skill, should be exempt from the consumer protection act. Id. at 250.
153 SHELDON, supra note 32, at 120-24; see also Gatlin, supra note 139, at 412.
154 See Gatlin, supra note 139, at 412 (noting that “even a carefully executed opinion has the potential to deceive if incorrect.”).
standards than imposed by the marketplace, applying consumer protection law would not necessarily undermine the practice of an attorney that abides by those lofty standards.155

Examining consumer protection case law demonstrates that defendants have attempted to claim lack of knowledge or intent in order to shield against accountability for misrepresentations made without knowledge of truth or falsity.156 These defendants’ suggestion that carelessness equates with a lack of culpability is rejected by the courts in instances of unfairness and deception to the consumer.157

155 The most important duties recognized by attorney ethical codes are those obligations owed to clients. Allen Blumenthal, Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession, 3 KAN. J.L. & PUB. POL’Y 6 (1994) (arguing that this emphasis on the client is at the expense of an emphasis on important duties to the court, adversaries and third parties).

156 See, e.g., Bond Leather Co. v. Q.T. Shoe Mfg. Co., 764 F.2d 928, 929 (1st Cir. 1985) (involving liability for misrepresentations by defendant shoe company to the effect that it was “going public” with its stock, thereby inducing plaintiff creditor to release the guarantor for defendant’s debts); In re Andrews, 78 B.R. 78, 83 (Bankr. E.D. Pa. 1987) (holding that the imposition of excess late fees by a mortgage company not authorized by contract was unfair and deceptive notwithstanding the lack of actual fraud or willful misrepresentation); Falcon Associates, Inc. v. Cox, 699 N.E.2d 203 (Ill. App. Ct. 1998) (involving misrepresentation by builder of amount of insulation provided in homes and the quality of the home built as compared to the display model), app. den., 707 N.E.2d 1239 (Ill. 1999); Gennari v. Weichert Co. Realtors, 691 A.2d 350, 365 (N.J. 1997) (holding real estate brokerage firm liable for affirmative misrepresentation of its agent concerning quality of workmanship performed by builders of defective new homes, even in the absence of actual knowledge of the falsity); Williams v. Trail Dust Steak House, Inc., 727 S.W.2d 812 (Tex. Ct. App. 1987) (holding that a sale of a defective motor home may be deemed unconscionable under Texas consumer protection law if consumer could show that he was “taken advantage of to a grossly unfair degree” whether or not defendant acted with intent, knowledge or conscious indifference); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531 (Wash. 1986) (holding that title insurance company’s failure to advise borrowers of tax consequences when preparing deed is not unfair or deceptive).

157 See supra note 156 (setting forth case law wherein defendants attempted to avoid liability by claiming lack of knowledge or intent).
A case decided by the North Carolina Court of Appeals, *Torrance v. AS & L Motors*, is illustrative.158 The plaintiff, a purchaser of a used automobile, inquired whether the car had ever been involved in an accident; the salesperson responded that it “had never been involved in an auto accident.”159 The plaintiff relied on this affirmative assertion and purchased the car for $13,000.160 Three weeks later, she found specks of paint on the windshield that suggested the car was wrecked and repainted.161 The plaintiff took the car to a mechanic, who, upon inspecting the vehicle, determined that the car had “been substantially damaged on its right side and that it would cost approximately $2,500 to satisfactorily repair.”162 The seller maintained that although the salesperson’s statement was untrue, it should not be characterized as unfair and deceptive because the salesperson believed the statement was true.163 The court rightly found that the salesperson’s subjective belief as to the truth or falsity was not the issue.164 The salesperson misled the buyer by representing that he knew the car had not been in an accident when he did not have this knowledge, and was liable for committing an unfair and deceptive act.165 The salesperson in this case could have avoided liability by telling the buyer, honestly, that he did not know the car’s history. This truthful response would have empowered the buyer and avoided liability.166

---

158 459 S.E.2d 67 (N.C. App. 1995), *review denied*, 461 S.E.2d 768 (N.C. 1995) (admitting into evidence a vendor’s statements that would be ordinarily be barred under the parol evidence rule to support a deceptive practice claim but reversing an award of attorney’s fees because the statement was not willful, frivolous or malicious).


160 *Id.*

161 *Id.*

162 *Id.* at 68-69.

163 *Id.* at 69-70.

164 *Id.* at 70.


166 *Id.* (noting that the buyer could have chosen whether to have the car inspected before purchasing, since the car was being sold “as is,” or assumed the risk and purchased without obtaining any further information). Although
Menuskin v. Williams, involving negligent misrepresentation by a real estate title company, demonstrates the same principle in a legal context.\footnote{167} In Menuskin, a title company’s attorney drafted a warranty deed stating that land was free and clear of any encumbrance when, in fact, a developer had an outstanding construction lien on the property.\footnote{168} In his defense, the attorney claimed that he had relied on assertions of the seller that the title was clear, and that he was not instructed to perform a title search.\footnote{169} The plaintiffs relied on the representation of clear title and bought the property.\footnote{170} The lien holder contacted the plaintiffs a year later, after the developer declared bankruptcy, and advised them that the property would be foreclosed upon unless the purchasers made arrangements to “repurchase” their homes.\footnote{171} As in Torrance, the defendant manifested belief in a statement without knowing whether or not it was true.\footnote{172} Despite lack of knowledge and intent, the conduct was deemed actionable by the court under Tennessee’s consumer protection law because the attorney’s misrepresentations constituted an unfair and deceptive practice resulting in harm to the purchasers.\footnote{173} Again, the attorney could have easily avoided liability by disclosing that he did not know whether the title was clear because no title

the court found that the seller violated the state’s consumer protection act, it acknowledged the salesman’s “good faith” and reversed the lower court’s award of attorney’s fees to the plaintiff because nothing in the record suggested that the defendant “willfully engaged in a deceptive act or practice.” \textit{Id.}

\footnote{167} 145 F.3d 755 (6th Cir. 1998) (holding title company and attorney liable for negligent misrepresentation of existing encumbrances on property purchased by the plaintiffs).

\footnote{168} Menuskin v. Williams, 145 F.3d 755, 761 (6th Cir. 1998).

\footnote{169} \textit{Id.}

\footnote{170} \textit{Id.}

\footnote{171} \textit{Id.}

\footnote{172} \textit{See Torrance, 459 S.E.2d 67, 69-70 (N.C. App. 1995).}

\footnote{173} \textit{Menuskin, 145 F.3d at 767-68, citing TENN. CODE ANN. §§ 47-18-101. The court did note that treble damages would have been inappropriate under the facts alleged, as there was no allegation of willful or knowing violation of the state consumer protection act. \textit{Id.}
search was performed. In this way, the plaintiffs would not have had the false impression that a title search was performed.\textsuperscript{174}

Thus, although attorneys are not “insurers of the correctness of their opinions,”\textsuperscript{175} an attorney can easily avoid allegations of deception by disclosing to the client that the law is unsettled and an attorney’s opinion is simply that—an opinion, and not a guarantee. In any event, an attorney providing an opinion regarding an unsettled area without such a disclosure arguably falls below the standards of due care. An attorney knows or should know that a client will rely on an opinion to their potential detriment, a risk that is increased if the area of law is in flux.\textsuperscript{176}

This is not to suggest that there is no room for sympathy for an attorney, particularly one that is young, inexperienced or eager to predict optimistic outcomes. The bottom line, however, is that some conduct falls below the standards of independent professional judgment attorneys are expected to exercise. If harm results, particularly to clients who are elderly and vulnerable, attorneys should be accountable for paying the cost. Of course, no one is immune from an occasional lapse. No ethical attorney, however, should engage in the sort of nefarious practices described in this article, or conduct approaching an “unfair and deceptive” act. Conscientious attorneys need not fear incurring liability due to application of the standards of consumer protection law.\textsuperscript{177} Thus, such protection would penalize only

\textsuperscript{174} Menuskin v. Williams, 145 F.3d 755, 763 (6th Cir. 1998) (stating that “[b]y including the National Title logo on the documents delivered to the appellants, [the defendants] may have given the appellants the false impression that they had performed a title search.”). In the author’s experience, disclaimer or disclosure statements are now routinely displayed on deeds in Tennessee where no title work has been performed, apparently as an outgrowth of the holding in this case.

\textsuperscript{175} Gatlin, \textit{supra} note 139, at 412 (“Strict liability applied to the practice of law under DTPAs overturns the judicially established axiom that attorneys are not insurers of the correctness of their opinions.”).

\textsuperscript{176} See \textsc{Model Rules of Prof’l Conduct} R 2.1 cmt. n.1 (2002). (requiring that a lawyer provide an honest assessment of a situation regardless of how unpalatable it may be to the client).

\textsuperscript{177} See \textit{supra} note 60 (listing results of survey of state bar disciplinary
ELDER LAW PRACTICE & CONSUMER PROTECTION 573

those whose standards of practice fall grossly below the norm—those who cannot, in good faith, characterize their conduct as within the realm of permissible professional discretion.\(^{178}\)

authorities by state as to the volume of complaints compared to several years prior with no definite trend identified). The cases involving attorneys and legal practice are especially instructive. In *Thomas J. Sibley, P.C v. National Union Fire Ins. Co. of Pittsburgh, Pa.*., the law firm’s malpractice carrier attempted to avoid defending the firm in a lawsuit filed by an injured third party raising a consumer protection claim. 921 F. Supp. 1526, 1528 (E.D. Tex. 1996). The malpractice policy excluded coverage for any claim “arising out of any dishonest, fraudulent or malicious act, error or omission” of the insured. *Id.* at 1530. The court found that under the Louisiana Unfair Trade Practices Act, the plaintiff would not have to establish dishonesty, fraud or malice on the part of the firm to prevail, so the policy exclusion would not apply. *Id.* at 1532. However, the court did note that in order to show that the firm engaged in unfair trade practices, the plaintiff would have to show the firm had committed acts that “offend public policy, are immoral, unethical, oppressive and unscrupulous.” *Id.* at 1531.

Similarly, in *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.* a title insurance company acting as escrow agent failed to advise borrowers of tax consequences when, as a condition of receiving a loan, the insurance company transferred property from the borrower’s business to the borrower personally. 719 P.2d 531 (Wash. 1986). Because there was no duty on the part of the title company to provide such advice, the court found that the failure to provide any advice at all was not unfair and deceptive, particularly since there was no way the transfer tax could have been avoided if the borrowers wanted to obtain the loan. *Id.* at 535-36. On the other hand, had the escrow agent made an affirmative representation that the transaction contained no tax consequences, it is possible the result might have been different. *Id.* at 539-40.

\(^{178}\) See *Cripe v. Leiter*, 703 N.E.2d 100, 108 (Ill. 1998) (Harrison, J., dissenting). As Judge Harrison stated in dissent:

> [h]olding attorneys to the same standards of honesty and fair dealing that apply to other business people will inevitably affect the practice of law. In my view, the results can only be positive . . . . The conduct alleged in this case, if proven, would not be permissible under the rules of our court. Although the attorneys involved might ultimately be subject to discipline, that is no reason to deny plaintiff her right to bring a statutory damage action against them. If what the attorneys did constituted a crime, we would surely not say that they are exempt from prosecution merely because they are subject to disbarment by us. The same principle applies here.
IV. APPLICATION TO ELDERS ONLY

The foregoing discussion illustrates that including legal services within the ambit of activities governed by consumer protection law presents no inherent constitutional problem, nor would such inclusion threaten the legal profession’s status as a learned profession.179 Nonetheless, this article does not advocate expanding consumer protection statutes to encompass the entirety of legal practice.180 Rather, this article focuses on the efficacy of applying consumer protection legislation to legal practices affecting the elderly. Indeed, several state consumer protection statutes already contain special provisions protecting the elderly.181 Analysis of states’ consumer protection statutes reveals that, although barriers exist, willful courts or legislatures can remove them. Exemptions provided to the legal profession are largely definitional in nature or derived from construction of existing statutory language. Therefore, if it is desirable to include attorney services under consumer protection statutes where elderly clients are likely to be impacted, state statutes can be amended.

The fact is, elders remain vulnerable.182 Many of the elderly

Id.

179 See supra Part III.A (addressing separation of powers concerns), III.C (addressing the argument that special treatment is needed in order to protect professional judgment).

180 The author does suggest, however, that doing so would not be inconsistent with the ethics of the legal profession.

181 See supra note 35 (noting that California, Arkansas, Florida, Georgia, Indiana, Iowa, Nevada, Tennessee, and Wisconsin have all enacted statutes that allow private remedies and/or increased damages where elderly customers are injured by unfair or deceptive commercial practices).

182 Consumer studies indicate that elders often have less knowledge about the products or services they are offered and are more trusting of those who offer them. See James Depriest, Protecting the Vulnerable Elder Consumer, 35 AR. LAWYER 18, 19 (2000). Elders are also primary targets for financial schemes because “approximately seventy five percent of all funds deposited in financial institutions are controlled by persons age sixty five and older.” Carolyn L. Dessin, Financial Abuse of the Elderly, 36 IDAHO L. REV. 203, 205 (2000). Examples of elderly vulnerability abounds. For example, “[a]
are isolated, living alone without anyone they can trust to discuss decisions concerning financial and legal matters. Many also suffer from physical ailments making it difficult to concentrate on complex legal and financial matters. Approximately two million Americans aged 65 and above have Alzheimer’s disease, which greatly affects cognitive abilities.

women in Kentucky pays $3,400 for improvement to her house that were never made; she then pays an additional $1,260 to a nonexistent company on a “lien” for the cost of materials for the improvements.” Starnes, supra note 3, at 201-02. “[a] man suffering from bladder cancer refuses to see a doctor because health store clerks told him that a combination of herbal remedies would prevent the cancer from living in his body.” Id. at 202. An elderly couple becomes ill and must move closer to their son and as a result loses $8,000 spent for prepaid funerals and burial plots when the funeral chain refuses to transfer the plans to a funeral home in their new location. See Final Arrangement, CONSUMER REPORTS, May 2001 at 28.

183 Lori A. Stiegel, Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies, BIFOCAL, Summer 2002, at 1 (citing to a dependent relationship, frailty or impairment, and social isolation as the factors most common to financial exploitation of the elderly).

184 THOMAS P. GALLANIS, ET AL., ELDER LAW 3-4 (2000) (stating that “as more people live to the oldest ages, there may also be more who face chronic, limiting illnesses or conditions, such as arthritis, diabetes, osteoporosis, and senile dementia. These conditions result in people becoming dependent on others for help in performing the activities of daily living.”). See also A Profile of Older Americans: 2002: Health, Health Care and Disability, ADMINISTRATION ON AGING, available at http://www.aoa.gov/aoa/stats/profile/12.html (last visited May 1, 2003).

According to the Administration on Aging:

In 2000, 27% of older persons assessed their health as fair or poor. Limitations on activities because of chronic conditions increase with age. In 1997, more than half of the older population (54.5%) reported having at least one disability of some type. 6.9 million (21.6%) reported difficulties with instrumental activities of daily living (IADLs). IADLs include preparing meals, shopping, managing money, using the telephone, doing housework, and taking medication.

185 See Jack Schwartz, Alzheimer’s Disease and The Role of State Law, BIFOCAL, Winter 2001, at 1. It is expected that this number will increase four-fold by the year 2050, meaning that one of every 45 elderly people will suffer
debilitation make it unlikely that a professional’s advice, no matter how suspect, will be questioned or scrutinized. The elderly should be able to rely on the honesty and integrity of their attorneys, and anyone willfully and knowingly taking advantage of that trust should be liable to the fullest extent possible.

The elderly are also more likely to be on fixed incomes. This makes them, as a group, less likely to afford to initiate malpractice lawsuits, which are less attractive to contingency basis practitioners due to the high standards of proof than suits under the consumer protection law. Protecting elderly from at least a mild form of the impairment. Id. at 1. See also Facts: About Alzheimer’s Disease, ALZHEIMER’S ASSOCIATION, available at http://www.alz.org/AboutAD/WhatisAD.htm. The Alzheimer’s Association stated:

The disease is the leading cause of dementia, a condition that involves gradual memory loss, decline in the ability to perform routine tasks, disorientation, difficulty in learning, loss of language skills, impairment of judgment and personality changes. As the disease progresses, people with Alzheimer’s become unable to care for themselves.

Id.

186 John Morrison, What Montana Lawyers Can Do to Protect Seniors from Increase in Financial Scams, 28 MONT. LAW. 5 (2003) (“as people grow older, the aging process can impair certain cognitive abilities that may impede them from effectively collecting critical information, asking relevant questions and evaluating information”); Starnes, supra note 3, at 204 (arguing that elderly victims’ embarrassment about being defrauded, fear of appearing senile, or inability to care for themselves decrease the likelihood that they will report any incidence of fraud).

187 See JOAN M. KRAUSKOPF, ET AL., ELDERLAW: ADVOCACY FOR THE AGING §§ 1.20-1.22 (1993, Supp. 2000). Krauskopf notes that “[o]lder economic units traditionally have had approximately half the income of younger counterparts...The difference was due primarily to the fact that retirement benefits and investment income for older families fail to balance out the loss of earnings upon retirement.” Id. at 15. Social security is the major source of income for 90 percent of older people. See A Profile of Older Americans: 2002: Highlights, Administration on Aging, available at http://www.aoa.gov/aoa/stats/profile/highlights.html (last visited May 1, 2003).

188 See supra notes 50-52 and accompanying text (setting forth the
consumers of legal services further the public purpose of consumer protection statutes by facilitating recovery of relatively small claims that may be devastating to the victims. Pursuit of minor claims may otherwise be economically unfeasible in the absence of the treble damages and decreased the burden of proof afforded by these laws.

Given this state of affairs, applying consumer protection standards of honesty in fact, fairness, and elimination of deceptive conduct to all aspects of legal practice when representing elderly clients should not pose any threat to attorneys already bound to the higher standards of a “learned profession.”

CONCLUSION

In 1993, then Associate Professor Debra D. Burke issued a challenge to all members of the “learned professions” to “lobby for inclusion” under the umbrella of consumer protection statutes, rather than continuing to scramble for cover under a plethora of restrictive and self-serving exemptions. Although

contrast ing standards of proof and available damages).

189 See Keilin, supra note 45, at 1552-53. For example, elderly clients may be charged excessive legal fees upfront for drafting documents such as wills, trusts and powers of attorney, and then unjustified fees for largely illusory “monitoring” or “advisory” services, or may be victimized by misappropriation of funds pursuant to such documents, either by the attorney alone, or by the attorney in concert with the attorney in fact. Many times the individual amounts involved may total less than $1,000 but are multiplied over many clients and are devastating to the individuals involved because their incomes are fixed by retirement. Id.

190 Burke, supra note 95, at 261. Dr. Burke is now Professor in the Department of Marketing and Business Law, Western Carolina University. Dr. Burke criticizes the North Carolina Deceptive Trade Practices Act for exempting professional services rendered by a member of a learned profession from its prohibition on unfair or deceptive acts or practices in or affecting commerce. Id. at 224. She suggests that learned professionals—individuals practicing theology, medicine, and law—should call for inclusion of their professions in the Act’s prohibition because it would promote the public interest of eradicating unfair and deceptive acts in all professions,
she recommended caution and argued for limitation on the application of “automatic” treble damages to avoid any chilling or hampering effect on the exercise of professional judgment.\textsuperscript{191} she rightly perceived that eradication of unfair and deceptive actions among members of the bar is crucial to restore public trust.\textsuperscript{192} Perhaps it should come as no surprise that there has been no groundswell of response from the organized bar to follow Burke’s clarion call. This article optimistically proposes that attorneys who specialize in elder law will lead the way by advocating for specific inclusion under consumer protection laws of any legal practice involving or impacting those who are vulnerable due to advanced age, whether or not also disabled, incapacitated, isolated, or on a fixed income. By so doing, they will raise the standard of practice and the public’s trust for all reputable members of our learned profession.

\textsuperscript{191} Unlike the law of many other states, treble damages are triggered under the North Carolina statute whenever there is a violation of the statute. N.C. GEN. STAT. § 75-16 (2002).

\textsuperscript{192} Burke, \textit{supra} note 95, at 260-62. Dr. Burke argues that the act’s exemption for learned professionals makes an “archaic” and “ambiguous” distinction” because it unjustly focuses on who acted deceptively instead of what constitutes unfair or deceptive conduct under the act. \textit{Id.} at 261-62. Moreover, Dr. Burke states that by exempting learned professionals, the Act indemnifies the individuals who are in the best positions to abuse their power. \textit{Id.} at 260-61.
THE PARTY’S OVER: ESTABLISHING NONPARTISAN MUNICIPAL ELECTIONS IN NEW YORK CITY

Karen I. Chang*

INTRODUCTION

Over the course of the last century, cities across the United States have increasingly been adopting nonpartisan local election systems.¹ Today, a majority of the nation’s cities utilize nonpartisan elections,² and sixty of the seventy-five largest U.S. cities have elected their mayors in nonpartisan elections.³ New York City is considering joining the majority by changing to a

* Brooklyn Law School Class of 2004; B.A., Wellesley College, 2000. The author would like to thank her parents, Morgan and Eileen, her sister Gloria, Steve Wu and Hae Jin Shim for their love, support and encouragement. She would also like to thank the editors of the Journal of Law and Policy for their invaluable comments and guidance.

nonpartisan process for local elective offices. In July 2002, New York City’s Mayor Michael Bloomberg appointed a thirteen-member commission—including civic, community and business leaders—to review the election format change. On September 3, 2002, the Commission decided to defer proposing the nonpartisan issue as a 2002 ballot referendum.

New Yorkers, political officials and policy analysts have voiced various and divergent opinions as to whether such a change to the local election system will benefit New York City. The argument against nonpartisan elections typically focuses on the concern that nonpartisan elections would reduce voter turnout—primarily among minorities and those of lower socioeconomic backgrounds—by discouraging one of the primary “institutional mechanisms through which individuals organize their political decision making.” In contrast, advocates believe that in New York, where one political party heavily dominates, “the outcome of the elections is often effectively decided in the primary,” in which only a narrow subsection of eligible voters participate. They believe nonpartisan elections would open the decision-making process to the entire population and stimulate competition, which would compel candidates to address at the outset issues facing the broad constituency.

---

4 City in Transition, supra note 2, at 68. Local elective offices include those for mayor, public advocate, council member, borough president and comptroller. See id.
5 Id. at 4.
7 See City in Transition, supra note 2, at 11-13 (summarizing the scope of the commission’s charter revision review, including the public hearings held, expert testimony heard and public comments solicited).
8 Hawley, supra note 1, at 64. See also, infra Part III (describing the potential harm to voters of lower socioeconomic background as a primary argument against use of a nonpartisan election system).
9 City in Transition, supra note 2, at 84-85.
10 Preliminary Options, supra note 2, at 26 (reviewing arguments in
Structurally, nonpartisan elections eliminate the preferential position given to political parties in local elections; they do not, however, prohibit their participation in electoral campaigning.11 Beyond the influence of a candidate’s party affiliation, other mechanisms that inform the local electorate enhance and influence the mental framework voters construct in making voting decisions.12 Part I of this note describes the historical background of nonpartisan elections in the United States, including the originating principles for nonpartisan elections and the structural changes implemented under a nonpartisan election format. Part II describes statutory and case law support for the election format change, highlighting underlying policy goals. Part III describes the current arguments for maintaining New York City’s current election format and the concerns regarding possible detrimental effects nonpartisan elections would have on the city’s electorate. Part IV argues that nonpartisan elections would reinvigorate New York City’s local electorate because the role of political parties in local elections is fundamentally different than those at the state or national level. Moreover, a nonpartisan system would significantly increase competition in New York City’s local elections and break down the conclusive role political parties play in the city’s effectively single-party system. Part V suggests supplemental actions and legislation that should be taken if and when voters decide to give nonpartisan favor of nonpartisan elections, including that they would “force candidates to address issues facing the population as a whole, rather than the narrow group of insiders who tend to vote in partisan primaries”); Joseph Mercurio, Nonpartisan Elections: Can Bloomberg Extend His Success to Another Campaign Promise?, Nat’l. Pol. Serv., Inc., at http://www.nationalpolitical.com/column126.htm (June 21, 2002) [hereinafter Mercurio, Bloomberg’s Campaign Promise] (discussing the benefits of a competitive election).


12 See HAWLEY, supra note 1, at 53 (explaining that the mass media is a primary source of political information, particularly when political parties are inactive). Other informative mechanisms include the media and the government-produced Voter Guide. See infra Part V.C.3.d (discussing the various sources of electoral information available to voters in New York).
elections a chance.

I. BACKGROUND AND STRUCTURE OF NONPARTISAN ELECTIONS

The history of the national and local trends toward nonpartisan municipal elections, as well as the variety of possible nonpartisan electoral structures, provide the background necessary to understand the policy and legal concerns at issue today. The current rationales for implementing nonpartisan elections are similar to the original motives in some respects while dissimilar in others, due to development within differing historical contexts. Understanding the different structures should inform New York City’s legislative drafters in the structure the city chooses to implement, should it decide to establish nonpartisan elections.

A. Historical Background

As the nation’s election systems formalized and increased in complexity at the turn of the twentieth century, state and local governments gained greater independence and flexibility to modify their election laws, which in turn stimulated the parallel development of nonpartisan and partisan election systems.13

1. The National History of Nonpartisan and Partisan Elections

Both partisan and nonpartisan local election systems grew out of the initial shift from voice voting to a paper ballot system in the late nineteenth century.14 The first paper ballot forms in the United States, distributed in Kentucky in 1888, tracked Australian and British ballots by not including party designation.15 A variety of nonpartisan primary election systems

13 See Lee, supra note 11, at 31 (discussing the link between municipal home rule and the freedom of local politics from national parties); infra Part II.A (explaining the purpose and structure of municipal home rule laws).

14 Lee, supra note 11, at 20.

15 Id. (describing Kentucky’s new statutory requirement that paper ballots be printed and distributed at the state’s expense).
developed in different cities, similar to the diverse systems that exist today. While nonpartisan election systems were under development, election reformers advocated two other related measures: (1) separating city elections from state and national elections, either by varying the date or by scheduling them for odd-numbered years; and (2) creating a “short ballot,” which entailed changing many administrative positions from elective to appointive positions. Alternating election years facilitated the implementation of nonpartisan elections, which required different ballot structures, but also reflected the general belief that municipal issues were reasonably separate from national partisanship. The short ballot was considered an essential feature in conjunction with nonpartisan elections.

Cities like Boston, Massachusetts, and Berkeley, California, began revising their election laws to implement nonpartisan elections in the first decade of the twentieth century. At the same time, there was movement to apply the nonpartisan ballot to judicial elections. California and Arizona were the first to adopt

---

16 Id. at 21-22. The nonpartisan election structures that developed included a runoff of the top two primary candidates, no runoff if a candidate received a majority primary vote, or no primary and a simple plurality win. Id; see also Part I.B (listing current nonpartisan election structures used in cities across the United States).

17 LEE, supra note 11, at 22. Some nonpartisan advocates have stressed that nonpartisan elections necessitate the short ballot. Id. at 32 (noting the position held by leading nonpartisan supporter Richard Childs, Executive Committee Chairman of the National Municipal League in the 1950s).

18 Id. at 22; ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE, 1870-1900 283 (1974). A similar problem has been discussed recently with regard to the ability of voting machines to handle nonpartisan and partisan election formats simultaneously. See CITY IN TRANSITION, supra note 2, at 95-96. The Charter Revision Committee’s staff members, however, have stated that available federal and state funding sources will provide sufficient resources to procure new machines capable of implementing this change. Id. at 98.

19 LEE, supra note 11, at 22.

20 Id. at 22-23 (describing the earliest movement to nonpartisan systems, and noting that “[o]ther California cities quickly followed suit”).

21 LEE, supra note 11, at 23 n.11 (indicating that in 1950, seventeen states held nonpartisan judicial elections).
this system, and other states soon followed.\textsuperscript{22}

In 1888, the same year that Kentucky implemented a nonpartisan ballot, Massachusetts adopted a ballot that included party designation.\textsuperscript{23} Massachusetts’s decision to use a partisan ballot sought to resolve the problem voters experienced in elections that utilized laundry list ballots—ballots including a dozen or more offices with no identifiable party affiliation or endorsement.\textsuperscript{24} Adding party affiliation to the ballot created the need to legally define “political party” and to recognize party nominations of candidates at the primary level.\textsuperscript{25} State, district and local governmental regulation followed the development of formalized party activity, and nominating conventions became their regulatory focus.\textsuperscript{26} Nominating convention laws made way for state-wide direct primary laws, in which party candidates are elected by the general party membership.\textsuperscript{27}

Nonpartisan elections became a major municipal reform issue during the Progressive Era, a movement at the turn of the twentieth century that sought to combat the corruption within city governments controlled by political party bosses.\textsuperscript{28} The municipal reform movement was premised on the lack of trust in political

\textsuperscript{22} Id. at 23.

\textsuperscript{23} Id. at 21.


\textsuperscript{25} LEE, supra note 11, at 21. A political party was defined as “an organization casting a certain percentage of the aggregate vote.” Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} See Nancy Northup, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 COLUM. L. REV. 1677 (1987) (reviewing the origins of the widespread establishment of nonpartisan elections). See also HAWLEY, supra note 1, at 8 (offering analysis of the “elitist origins of nonpartisanship in city politics”). Besides “elite” reformers, the progressives also included journalists and civic and religious leaders angered by increasing urban poverty and poor living and working conditions. Id. at 9. As Hawley explains, the motives that drove activists were often contradictory. Id.
NONPARTISAN MUNICIPAL ELECTIONS IN NYC 585

parties and politicians and the belief that “[c]ity government is largely a matter of ‘good business practice’ . . . or . . . ‘municipal housekeeping,’” in which the issues of a city council are only minimally political in nature. 29 Thus, the municipal progressive movement emphasized efficiency and economy as its leading objectives. 30

Since the Progressive Era, most cities have established nonpartisan municipal elections. 31 As of 1991, approximately three-fourths of all municipalities in the United States utilized nonpartisan elections. 32 Although the massive municipal corruption that fueled the nonpartisan movement during the Progressive Era is no longer an articulated premise for switching to a nonpartisan election format, 33 advocacy for nonpartisan

---

29 LEE, supra note 11, at 28.
30 HAWLEY, supra note 1, at 9. Some went as far as analogizing the city to a corporation. Id. at 10 (quoting Andrew D. White, a leading reformer and the President of Cornell University in 1890). At the same time, White and other reformers also shared the elitist notion that a partisan system was dangerous in that it would theoretically allow the city to be controlled by the urban poor and new immigrants. Id.
31 See id. at 14 (describing the increase in the number of cities establishing nonpartisan municipal elections between the 1930s and 1960s); CITY IN TRANSITION, supra note 2, at 82 (describing the current use of nonpartisan elections by “an overwhelming majority of cities across the nation”).
33 For example, Chicago, Ill., was among five of the ten largest cities that were notoriously corrupt at the end of the nineteenth century. GRIFFITH, supra note 18, at 10 (describing the extent of corruption across the country and noting that political parties were usually involved in the municipal corruption). When Chicago established nonpartisan elections for citywide public offices for the 1999 elections, however, its primary impetus was not to rectify corrupt government practices but to improve cost-efficiency in light of the hybrid election systems used between aldermen and citywide officeholders and the reality that the primary became the more important election due to the dominance of Democratic voters. See Scott Fornek, The Party’s Over: Mayoral Primaries Get the Ax, CHI. SUN-TIMES, July 8, 1995, at 1 (discussing the elimination of party primaries in Chicago’s mayoral elections).
Moreover, because of the party’s historical dominance over Chicago’s local elections, a majority of Chicago Republicans had chosen to vote in Democratic
elections continues under a broader set of rationales. Some continue to support the nonpartisan format on the historical view of local governance as more operational than political. 34 Others, however, view the political party hierarchy as having too much control over the outcome of elections, causing candidates to be more accountable to the party institution than to the public. 35 Supporters of nonpartisan elections consider the nonpartisan structure as returning candidate accountability to the people and their community issues. 36

2. The History of Nonpartisan Elections in New York City

New York City was a paradigm of the corruption that fueled the Progressive movement. In the 1860s and 1870s, New York City was under the control of the “Tweed Ring,” the political machine that exercised political dominance through combined acts of charity and patronage. 37 Under the control of Party “Boss” William Marcy Tweed, the city was, among other things,
defrauded of millions of dollars. \(^{38}\) The efforts of reformers and
the New York Times in exposing the Tweed Ring corruption
finally brought an end to their control in 1871. \(^{39}\) Yet, unlike
cities whose corruption led to implementation of nonpartisan
elections, the corruption in New York City at that did not result
in a change in its electoral system.

In the early 1960s, a task force was appointed to review New
York City government. \(^{40}\) The task force examined nonpartisan
mayoral elections in large cities of comparable size. \(^{41}\) They
decided not to implement them in New York, however, because
they found that in other large cities, voters were still well aware
of the party backings of candidates, and if the premise for
changing to nonpartisan elections was to remove the party from
the election process, nonpartisan elections would fail to do so. \(^{42}\)

In 1986, New York City voters approved special nonpartisan
elections through a referendum, which amended certain
provisions of the City Charter, including the method of filling
vacancies for City Council or Borough President. \(^{43}\) Under the
post-referendum provisions, special election candidates are
nominated by independent petitions rather than by party
committee, and party affiliation may not be included on the
ballot. \(^{44}\) In 1991, the New York City Board of Elections refused
to comply with the new charter provisions, claiming that the
provisions contradicted New York State Election Law, which
allows party labels, and arguing that city rules must yield to state

---

\(^{38}\) See id.
\(^{39}\) See id. at 69, 74.
\(^{40}\) See Edward Costikyan, Editorial, The Case Against Bloomberg’s
Charter Revisions on the Mayor’s First Major Misstep—A Plan That Calls For
a ‘Well-Deserved Death,’ N.Y. SUN, July 29, 2002, at 6. Costikyan was
appointed by former governor Nelson Rockefeller to head this task force. Id.
\(^{41}\) See id.
\(^{42}\) See id.
\(^{43}\) See Dick Zander, Minority Challenge to Charter Change, NEWSDAY,
Nov. 28, 1988, at 20.
\(^{44}\) See Cerisse Anderson, Party Designation Barred in Special Council
Thomas J. Manton, Chairman of the Democratic Executive Committee of Queens County, intervened and contended that the nonpartisan provisions violated his party’s First Amendment right to free speech. The Supreme Court of New York upheld the charter revisions, and the Appellate Division affirmed, finding no contradiction between the state law and the charter revision and no First Amendment violation.

New York’s Municipal Home Rule Law provides for appointment of a charter revision commission in New York City through, among other methods, mayoral action. The Commission is charged with reviewing the City Charter and proposing a new charter or revising the existing one. Former Mayor Rudolph Giuliani began researching the possibility of implementing nonpartisan elections for all municipal offices in 1998. The New York City Charter Revision Commission has since annually examined the possible benefits and disadvantages of such a procedural change. The 1998, 1999 and 2001 Commissions examined the possibility of establishing nonpartisan
NONPARTISAN MUNICIPAL ELECTIONS IN NYC  589

elections. Although concluding that nonpartisan elections would be beneficial to New York City, the Commissions deferred the issue for further studies. Giuliani’s 2001 Commission believed that one reason for the lack of spirited, substantive policy debate about the city’s future, even as the 2001 primary election approached, was that the city’s partisan election system “tend[ed] to foster uniformity, rather than diversity of ideas.” They pointed out that this homogeneous perspective was perpetuated by the overwhelming dominance of the Democratic Party among the New York City electorate. The Commission’s findings were not considered full and fair because the members were widely seen as Giuliani’s personal political tools, chosen to advocate Giuliani’s position in support of nonpartisan elections rather than conduct an independent evaluation of the policy benefits and burdens of such a change.

In 2002, Mayor Bloomberg, perhaps recognizing the lack of credibility given to the Giuliani commissions, appointed diverse, independent members. The thirteen members began examining

52 PRELIMINARY OPTIONS, supra note 2, at 14-18 (summarizing the 1998, 1999 and 2001 commissions’ findings and actions).
53 CITY’S PROGRESS, supra note 50, at 104.
54 Id. at 105.
55 Id. More than sixty-five percent of all registered voters are members of the Democratic Party. See New York State Bd. of Elections, Voter Enrollment for November 2002, at http://www.elections.state.ny.us/enrollment/enroll.htm (last visited Apr. 2, 2003). About eighty percent of voters who are registered with a party are registered Democrats. Id.
57 Muzzio, Bloomberg Jumps Gun, supra note 56. See also Editorial, Charter Reform, Slowly, N.Y. DAILY NEWS, Aug. 31, 2002, at 22 (“Bloomberg’s panel . . . has proved to be as independent as he said it would be”); Michael Cooper, Mayor Calls Charter Panel’s Rejection of His Plan Proof of Its Independence, N.Y. TIMES, Sept. 4, 2002, at B7 (noting that the commission’s decision to defer proposing a ballot referendum, which he
nonpartisan elections but again deferred making a decision. In doing so, the Commission considered input from local community leaders and members of the general public, as well as information from a staff with expertise in city government and the charter revision process. The Commission’s decision largely reflected concerns voiced by the public—that the review process required further public comment and review and that the hearings were held during August, when many people are on vacation.

3. Mayor Bloomberg’s Premises for Establishing Nonpartisan Elections

Nonpartisan elections were among the leading proposals promoted by Mayor Bloomberg at the outset of his mayoral campaign. Bloomberg stated that he did not believe the role political parties play is as central to local governance as it is to national governance. He described the current partisan elections as allowing “a very small group of people [to] determine who gets elected” because a proportionately small number of voters actually participate in the primary. He expressed hope that nonpartisan elections would increase the competitiveness of the city’s local elections and believed the nonpartisan system would

disagreed with, showed their independence); Dan Janison, Mayor’s Charter Panel a Varied Crew, NEWSDAY, July 13, 2002, at A11 (describing the varied backgrounds of the 2002 Charter Revision Commission members, which include members who have had ideological and political conflicts with Mayor Bloomberg).

58 Hearing (Sept. 3, 2002), supra note 6 (statement of Robert Maguire, Chair of the 2002 Charter Revision Commission).

59 CITY IN TRANSITION, supra note 2, at 11-13 (discussing the review procedures used by the 2002 Charter Revision Commission).

60 Id. at 12.

61 Adam Nagourney, Bloomberg Says Elections Should Be Nonpartisan, N.Y. TIMES, June 8, 2001, at B4. Bloomberg is a quintessential nonpartisan advocate, as a Democrat-turned-Republican, whose election received the support of the Independent Party. See id.

62 Id.

63 Muzzio, Charter Revision, supra note 24 (quoting Mayor Bloomberg).

64 Id. (noting a suggestion made by a Bloomberg advisor).
increase opportunities for candidates to run for an elected position without submitting to the party hierarchy. Bloomberg also speculated that by taking parties out of their current position of power more people would participate in the political process.

B. The Structure of Nonpartisan Elections: What It Is and What It Isn’t

One of the primary misconceptions about nonpartisan elections is that they absolutely restrict political parties from playing any role in the campaign and election process. Understanding the various ways in which nonpartisan elections are, or are not, structured illuminates the purposes underlying the current nonpartisan movement.

1. Existing Nonpartisan Election Structures

In cities with nonpartisan elections, candidates are placed on the general election ballot either by nominating petition or by advancing from a nonpartisan primary. In nonpartisan cities that

---

65 Adam Nagourney, Bloomberg Says Elections Should Be Nonpartisan, N.Y. TIMES, June 8, 2001, at B4 (quoting Bloomberg, who stated, “You’ve got to get rid of the partisan politics and party bosses who really limit the public’s choice”).

66 Muzzio, Charter Revision, supra note 24 (quoting Bloomberg’s advisor).


68 Northup, supra note 28, at 1683. Independent nominations are used to reduce the number of candidates eligible to be placed on the primary ballot or on the general election ballot when primaries are not used. See, e.g., ALBUQUERQUE CITY CHARTER art. 2 § 3 (1971) (requiring a candidate to submit a petition with a specified number of signatures to be placed on the ballot), available at http://www.amlegal.com/albuquerque_nm/; L.A. CTY CHARTER § 422 (2000) (using nominating petitions “to qualify a candidate for
do not hold primaries, the candidate who wins the most votes wins the election. In cities that utilize primaries, all candidates run in a nonpartisan primary in which all qualified voters are eligible to participate. In some cities, a runoff election is held only if no candidate receives a majority of votes. In such cases, the primary usually becomes the deciding election. Several cities, on the other hand, always advance two candidates to the general election, regardless of whether any candidate receives a majority.

Independent petitions are used to nominate candidates either to the general ballot or to the primary ballot. The petitions require candidates to obtain a threshold number of signatures before their name can be placed on the ballot. Party affiliation placement on the primary nominating ballot), available at http://www2.lacity.org.

69 See CITY IN TRANSITION, supra note 2, at E12 to E15. Those cities include Memphis, Tenn.; Fort Worth, Tex.; Portland, Ore.; Albuquerque, N.M.; Virginia Beach, Va.; Colorado Springs, Colo. and Santa Ana, Cal. Id.

70 PRELIMINARY OPTIONS, supra note 2, at 68. See also CITY IN TRANSITION, supra note 2, at 104 (proposing a draft of a city charter amendment to provide for nonpartisan elections and requiring that “[e]very qualified voter shall be entitled to vote at such nonpartisan primary election”).

71 See CITY IN TRANSITION, supra note 2, at E12 to E15. Those cities include Los Angeles, Cal.; Chicago, Ill.; Houston, Tex.; Phoenix, Ariz.; San Diego, Cal.; Dallas, Tex.; San Antonio, Tex.; Detroit, Mich.; San Jose, Cal.; Jacksonville, Fla.; Columbus, Ohio; Austin, Tex.; Milwaukee, Wis.; Nashville-Davidson, Tenn.; El Paso, Tex.; Denver, Colo.; Oklahoma City, Okla.; New Orleans, La.; Las Vegas, Nev.; Long Beach, Cal.; Fresno, Cal.; Atlanta, Ga; Sacramento, Cal.; Oakland, Cal.; Mesa, Ariz.; and Honolulu, Haw. Id.

72 Id. Those cities include Boston, Mass.; Seattle, Wash.; Cleveland, Ohio (only if the top two candidates each received over one percent of the vote); Kansas City, Kan.; Omaha, Neb.; Miami, Fla.; Minneapolis, Minn. and Wichita, Kan. Id.

73 See Northup, supra note 28, at 1683.

74 See, e.g., L.A. CITY CHARTER § 422 (2000) (requiring any candidate for mayor, city attorney, controller and member of the city council to collect signatures of 500 registered voters to be placed on the primary nominating ballot), available at http://www2.lacity.org; 65 ILL. COMP. STAT. ANN. § 20/21-28 (West 2003) (requiring candidates for city alderman in Chicago to collect signatures aggregating "not less than 2% of the total number of votes
2. New York City’s Proposed Nonpartisan Election Structure

In the nonpartisan election structure considered by the 2002 Charter Revision Commission, candidates’ party affiliations, if any, are not denoted on the ballot. The charter revision draft
provided for a primary election and specified that the two candidates receiving the most votes would always advance to a runoff election in November.77

The proposed election format for New York City would not prohibit political parties from endorsing, supporting or opposing candidates.78 Unlike nonpartisan elections, which attempt to statutorily eliminate party activism, the nonpartisan structure proposed by the city would modify only the formal roles parties currently play in the various stages of the election process, including the implementation of the closed party primary and placement of party labels on the ballot.79 In effect, the political

77 CITY IN TRANSITION, supra note 2, 104 (providing section sixty-eight of the “Draft Nonpartisan Elections Chapter”). This structure is similar to that in place in Boston and Seattle. See id. at E12 to E15 (briefly describing the election systems in Boston and Seattle).

78 The proposed nonpartisan election system does not establish “absolute” nonpartisan elections, which the Ninth Circuit held unconstitutional. See Geary v. Renne, 911 F.2d 280 (9th Cir. 1990). In Geary, an official prohibition of party endorsements, approved by referendum, was held to unconstitutionally violate the First Amendment right of political parties to free expression, as well as the right of party members to receive an unrestricted flow of political information. See id. at n.4 (citing the provisions of the California Elections Code banning party primaries and party labels). California’s nonpartisan statutes removed the statutory role of political parties by banning the use of party primaries and party labels on the ballot, but they did not prohibit political party endorsements. Id. at 282. Nevertheless, due to the ambiguous legal status of party endorsements in electoral campaigns, political parties did not endorse candidates in the majority of California counties. Id. Similarly, the Supreme Court has held that election laws prohibiting political parties from making primary endorsements violated the First Amendment freedom of speech and association and failed to serve any compelling interest. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 229 (1989).

Unlike in California, New York’s proposed system would merely remove party labels from election ballots and allow all qualified voters to vote in the primary; it would not prohibit political parties from endorsing candidates during the campaign process. See CITY IN TRANSITION, supra note 2, at 102-04 (providing, inter alia, “Draft Nonpartisan Elections Chapter” sections sixty-five and sixty-nine, which establish a nonpartisan primary and prohibit any partisan designations from being placed on the ballot).

79 See CITY IN TRANSITION, supra note 2, at 68 (describing the statutory
party would be reduced to the same legal status in the political arena as all other groups in the local community, whether social, religious, economic or geographical.80

II. NEW YORK STATE AND LOCAL AUTHORITY FOR NONPARTISAN ELECTIONS

The legal authority for states and municipalities to conduct nonpartisan elections includes state, local and federal statutes and regulations, as well as judicial determinations interpreting the statutes. These authorities define the extent and limit the scope of state and local power in establishing their election formats.

A. State and Local Statutory Authority for Nonpartisan Elections

Nonpartisan elections have existed in New York State since the early twentieth century under New York State’s Home Rule Law, which implicitly authorizes cities to adopt nonpartisan elections by charter amendment.81 Section 10 of New York State’s Municipal Home Rule Law authorizes cities to adopt local laws related to “the powers, duties, qualifications, number, [and] mode of selection . . . of its officers . . . .”82 The purpose of

80 LEE, supra note 11, at 97.
82 § 10 (emphasis added). This Home Rule Law directly derives from Article IX, section 2(c) of the New York State Constitution, N.Y. CONST. art. IX, § 2 (2000) (providing that local governments have the power to “adopt and amend local laws [regarding the] . . . mode of selection . . . of its officers . . .”). Local election structures may differ from those codified in New York’s state election laws, which provide that “[w]here a specific provision of law exists in any other law which is inconsistent with the provisions of this chapter, such provision shall apply unless a provision of this chapter specifies that such provision of this chapter shall apply notwithstanding any other provision of law.” N.Y. ELEC. LAW § 1-102 (McKinney 2003); see
home rule is “to prevent centralization of power in the state, and to continue, preserve, and expand local self-government.”83

The cities of Sherrill and Watertown instituted nonpartisan primary systems in 1916 and 1920, respectively.84 Under their original nonpartisan election procedures, the two candidates receiving the most votes in the nonpartisan primary advanced to the general election, regardless of party affiliation.85 Party labels remained on the ballot, but the law effectively allowed two candidates from the same party to compete in the general election.86

B. The Federal Voting Rights Act

The United States Department of Justice (DOJ) examines whether changes in voting procedures, including a change to nonpartisan elections, will result in “a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .”87 Such denial or abridgment is found:

[I]f, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of

---


84 See CITY IN TRANSITION, supra note 2, at 78.

85 Id. at 79.

86 Id. Sherrill’s current city charter, however, removes the party label from all ballots for local elective offices. SHERRILL CITY CHARTER, tit. XIV § 206 (Sept. 2001) (requiring that “[a]ll ballots [including primary, regular and special election ballots] used in all elections held under authority of this act shall . . . be without party mark or designation”), available at http://www.sherrillny.org.

citizens protected by [42 USC 1973(a)] . . . in that *its members have less opportunity* than other members of the electorate to participate in the political process and *to elect representatives of their choice*.\(^88\)

Under the Federal Voting Rights Act, New York City must obtain preclearance from the DOJ before officially amending its election laws.\(^89\) The 2002 Charter Revision Commission hired an expert in voting rights, Dr. Allan Lichtman, to examine whether any such violations would arise if New York City were to implement nonpartisan elections.\(^90\) Dr. Lichtman analyzed New

\(^88\) § 1973(b) (emphasis added).

\(^89\) *See* § 1973(c) (codifying section 5 of the Federal Voting Rights Act); 28 C.F.R. § 51 app. (2003) (listing the jurisdictions covered under the preclearance section of the Voting Rights Act, including Bronx, Kings and New York Counties). The DOJ reviews any voting procedure changes made in cities subject to preclearance to ensure they do not discriminate on account of race or color. *See* app. to 28 C.F.R. § 51.1(a) (2003). If the procedural change will be decided by referendum, jurisdictions may seek prospective review. *See* 28 C.F.R. § 51.22 (2003):

> With respect to a change for which approval by referendum . . . is required, the [U.S.] Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

*Id.* According to Gerry Hebert, former chief of the Voting Rights Section of the DOJ, among the 152 requests for preclearance, in which review was limited to their change to nonpartisan elections, all were approved. *Charter Revisions to Establish a Nonpartisan Local Election System: Hearing on Proposed New York City Charter Chapter 3 Before the New York City Charter Revision Commission (Aug. 23, 2002)* [hereinafter *Hearing (Aug. 23, 2002)*] (statement of Gerry Hebert). Hebert explained that the only time the DOJ denied preclearance was for a change in school board elections in Georgetown County, South Carolina in 1994, where the new rule prohibited party endorsement during the campaign. *Id.*; *CITY IN TRANSITION, supra* note 2, at C-31.

\(^90\) *CITY IN TRANSITION, supra* note 2, at 81. Dr. Lichtman was hired by the 1998, 1999 and 2002 commissions to perform statistical analyses. *Id.* Dr. Lichtman has served as an expert witness for many minority civil rights organizations, including the NAACP, the Puerto Rican Legal Defense and Education Fund and the Mexican Legal Defense and Education Fund. *Charter Revisions to Establish a Nonpartisan Local Election System: Hearing on
York City’s voting patterns from the 1989, 1993 and 1997 general elections, examining whether nonpartisan elections would violate the Voting Rights Act by reducing minority turnout or harming minorities’ ability to elect their candidate of choice and concluded that the nonpartisan format would not violate the Act. He also examined voting patterns in other cities using partisan and nonpartisan systems for comparison.

1. Minority Turnout

To evaluate whether minority voter turnout was harmed more by nonpartisan elections disproportionately, Dr. Lichtman examined voter turnout patterns in New York City’s nonpartisan special elections between 1992 and 1998. The statistics showed that changes in minority and white turnout depended on whether the election district had a larger minority or white population. Moreover, minority turnout increased when there was a competitive minority candidate on the ballot. His results showed no particular detriment to minority voter turnout in New York City’s special elections in comparison to white voter turnout.


91 CITY IN TRANSITION, supra note 2, at 81. See 28 C.F.R. § 51.58(b)(2) (2003) (stating that the Attorney General, in reviewing changes in electoral systems, will consider as a factor “the extent to which minorities have been denied an equal opportunity to influence elections and the decisionmaking of elected officials in the jurisdiction”).

92 CITY IN TRANSITION, supra note 2, at 90 (describing the extent of Dr. Lichtman’s study, which included an examination of the partisan and nonpartisan electoral systems of the nation’s 100 largest cities and their effect on minority voting power).

93 Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman).

94 Id.

95 Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman). See infra Part II.B.3 (explaining the correlation between minority candidate competitiveness and increased minority turnout).

96 Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman explaining that minority voter turnout patterns in New York City’s special
NONPARTISAN MUNICIPAL ELECTIONS IN NYC  599

Similar to these findings, the special elections held in other major cities—including Washington, D.C., Memphis, Tennessee and Chicago, Illinois—showed no divergent pattern of minority turnout compared to white turnout, based on whether the system was nonpartisan or partisan.97 The primary factor affecting minority voter turnout in those cities was the competitiveness of the election, not the partisan or nonpartisan nature of the election system.98

2. Minorities’ Ability to Elect Their Candidates of Choice

Dr. Lichtman also analyzed the success of minority candidates under nonpartisan election systems as a gauge to determine whether the election format change would diminish opportunities for minorities to elect their candidate(s) of choice.99 Minority candidate success gives a fair approximation of the electoral success of minority voters because of their tendency to vote for candidates of their race.100

In his examination of election results in the fifty largest cities, Dr. Lichtman found not only that party identification was unnecessary for minority candidates to be elected, but also that a positive correlation exists between nonpartisan systems and the election of black and Hispanic mayors.101 Of those fifty cities, elections from 1992 to 1998 varied based on whether the district was a majority-minority district, not based on the use of a nonpartisan election system. In fact, he found that the same voter turnout patterns existed in white voter turnout during those elections, i.e., that white voter turnout decreased in majority-minority districts. Id.

97 Id.
98 Id.
99 CITY IN TRANSITION, supra note 2, at E-2; see 28 C.F.R. § 51.58(b)(2) (2003).
100 CITY IN TRANSITION, supra note 2, at E-2. Dr. Lichtman’s analysis of minority voter turnout in New York City special elections between 1992 and 1998 also indicates this tendency. See Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman).
101 CITY IN TRANSITION, supra note 2, at 82. Dr. Susan Welch, a professor of political science at Pennslyvania State University, was also retained by the commission to examine Dr. Lichtman’s analysis, and she
forty-one utilized nonpartisan elections and nine administered partisan elections. Of the forty-one cities holding nonpartisan elections, thirty-four percent have elected minority mayors, compared with twenty-two percent in the cities using partisan elections. Moreover, cities that do not have majority-minority populations have also elected minority mayors under nonpartisan systems.

Dr. Lichtman also examined minority vote cohesiveness to see whether partisan systems, which are generally unifying structures, would help New York City’s minorities elect candidates of their race. He found that although the three major minority groups in the city—black, Hispanic and Asian—each have greater membership in the Democratic Party than the Republican Party, whites constitute a substantial plurality in the Democratic Party. Moreover, the different minority groups in the city do not tend to unite behind a single candidate and thus agreed with his conclusion. Id. at 92. On the other hand, she also expressed concerns that voters would lose the benefits commonly associated with partisan election systems. See, e.g., infra Part III (discussing the benefits that political parties bring to elections).

102 PRELIMINARY OPTIONS, supra note 2, at D-1.
103 Id.
104 Charter Revisions to Establish a Nonpartisan Local Election System: Hearing on Proposed New York City Charter Chapter 3 Before the New York City Charter Revision Commission (Aug. 22, 2002) [hereinafter Hearing (Aug. 22, 2002)] (statement of Don Borut). For example, Houston and Dallas both currently have African American mayors, but their minority populations do not comprise a majority of their populations. Id.
105 See Kenneth Sherrill, The Dangers of Non-Partisan Elections to Democracy, 2 SOC. POL’Y 15, 17 (1998) (explaining that parties “provide for collective behavior [and] collective responsibility” based on rational expectations that “if a party . . . nominates a candidate, citizens have a reasonable expectation that . . . the candidate shares the party’s general perspective”).
106 CITY IN TRANSITION, supra note 2, at C-15.
107 Id. at C-14. Within the Democratic Party, non-Hispanic whites constitute forty-four percent, blacks thirty percent, Hispanics twenty percent, Asians three percent and others three percent. Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman citing statistics from 2001 exit polls in New York City).
dominate neither the Democratic primary nor the final election results.\textsuperscript{108} The statistics regarding minority voting in cities administering nonpartisan elections, together with broader analyses of voting patterns in New York City, indicate that nonpartisan elections will not violate the Voting Rights Act and may in fact enhance minority voting power.

\textit{C. State and Local Judicial Authority for Nonpartisan Elections}

Courts have upheld local nonpartisan election systems in New York.\textsuperscript{109} In \textit{Bareham v. City of Rochester}, the New York Court of Appeals reviewed various local legislative amendments passed by Rochester’s City Council.\textsuperscript{110} Among other things, the court examined the council’s revisions to local provisions that abolished the party primary and prohibited placing party labels on the ballot.\textsuperscript{111} Finding the provisions statutorily and constitutionally valid,\textsuperscript{112} the court resolved a question regarding the validity of local election laws that are inconsistent with the state election law.\textsuperscript{113} The court found that municipalities were

\textsuperscript{108} \textit{City in Transition, supra} note 2, at C-14.

\textsuperscript{109} See \textit{infra} notes 110-22 (summarizing judicial authority for nonpartisan elections in New York).

\textsuperscript{110} \textit{Bareham v. City of Rochester, 158 N.E. 51 (1927)}.

\textsuperscript{111} \textit{Id. at 148}.

\textsuperscript{112} \textit{Id. at 145 (“The local law springs from the Home Rule statute and that statute descends from the [State] Constitution.”)}.

\textsuperscript{113} \textit{Id.} Article 2, section 10 of the State Constitution required all municipal officers whose election was not provided for within the Constitution to be elected by the electors of such cities. \textit{Id.}; \textit{N.Y. Const.} art. IX, § 2 (2000). The State electors’ method utilized party primaries to elect such officers, in contradiction to Rochester’s new local election laws, which abolished the party primary and removed the party label from the ballot. \textit{Bareham}, 158 N.E. at 54. The court determined that the state and local laws were not fatally inconsistent, but that the state’s Municipal Home Rule Law creates a specific method for cities to supercede the general state election law with regard to its method of electing local officers. \textit{Id.}; \textit{NY Mun. Home Rule Law} §11 (1924), \textit{cited in Bareham}, 158 N.E. 51 at 53. Moreover, the Municipal Home Rule Law from which the local election laws were derived descended from the State Constitution, making both the Municipal Home Rule
empowered to modify their local election laws in so far as the laws affect the election of local officials.\textsuperscript{114} 

\textit{Bareham} states that “[t]he term ‘mode of selection’ expresses an intent to allow a city to determine not only that it shall cause its officers either to be elected or appointed but connotes also that a municipality may define the precise method by which either an election or appointment shall be effected.”\textsuperscript{115} The court thus held that cities in New York possess the authority to establish nonpartisan elections.\textsuperscript{116} The decision emphasized that Section 10 of New York’s Municipal Home Law Rule left the decision of local election format to the city.\textsuperscript{117} Moreover, the state election law granted local municipalities legislative deference in structuring election procedures.\textsuperscript{118}

New York City’s authority to adopt nonpartisan elections was upheld in \textit{City of New York v. New York City Board of Elections}.\textsuperscript{119} There, the New York County Supreme Court upheld New York City Charter Section 25(b)(7), which removed party labels from nonpartisan special election ballots for City Council

\begin{itemize}
  \item \textbf{Law and the local election laws valid under state law. \textit{Id.}} The court stated that as long as the city’s laws do not overstep their bounds (e.g., by attempting to regulate other cities’ election methods) such city laws will be upheld. \textit{Id.} at 55.
  \item \textsuperscript{114} \textit{Bareham}, 158 N.E. at 54.
  \item \textsuperscript{115} \textit{Id.} at 146. \textit{See supra} Part II.A (discussing New York’s Municipal Home Rule Law).
  \item \textsuperscript{116} \textit{Id.} at 144. The court stated that the revised provisions of the City Charter that provide for nonpartisan local elections “do not conflict with the [State] Constitution and that no fatal inconsistency exists between them and the Election Law.” \textit{Id.} The holding in \textit{Bareham} struck down the Rochester law, however, due to the legislature’s failure to cite the election law provisions being superceded, as required by municipal statute. \textit{Id.} at 149.
  \item \textsuperscript{117} \textit{Id.} at 144.
  \item \textsuperscript{119} \textit{New York City Bd. of Elections}, No. 41450/91. The court’s holding granted the city’s motion to preliminarily enjoin the Board of Elections from violating charter section 25(b)(7) by either giving reference to a City Council candidate’s party affiliation or giving recognition to the Democratic Party’s certificate of nomination on behalf of a candidate. \textit{Id.}
and Borough President and changed the candidate nomination process.\textsuperscript{120} The case arose when the Board of Elections encountered a conflict between New York State Election Law Section 6-114, which provides that “[p]arty nominations for an office to be filled at a special election shall be made in the manner prescribed by the rules of the party,”\textsuperscript{121} and the voter-approved City Charter Section 25(b)(7), which established a nonpartisan nominating process by providing for “nomination by [independent] petitions rather than nomination by party committee whenever nominations cannot be made by primary election.”\textsuperscript{122}

The 1988 Charter Revision Commission’s objective in changing special elections to a nonpartisan format was to “create a more open and democratic process for filling City Council vacancies so that Council members can be selected directly by the people they represent and potential candidates can have equal access to the ballot.”\textsuperscript{123} The new nominating process intended to replace one that gave political party leaders an overly powerful role in nominating candidates in special elections.\textsuperscript{124} To fulfill this objective of enhancing access to the ballot, the Commission emphasized implementing independent nominating petitions more

\textsuperscript{120} New York City Bd. of Elections, No. 41450/91. See also Cerisse Anderson, Party Designation Barred in Special Council Election, N.Y. L.J., Apr. 4, 1991, at 1.

\textsuperscript{121} New York City Board of Elections, No. 41450/91 at 3; N.Y. ELEC. LAW § 6-114 (McKinney 2003).

\textsuperscript{122} New York City Bd. of Elections, No. 41450/91 at 7 (quoting the 1988 report of the New York City Charter Revision Commission) (citation omitted). See also Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws, 89 GEO. L.J. 2181 (2001). In recognizing that primary ballot access laws could undermine voters’ opportunity to cast a meaningful vote, Persily examined how the party primary structure, essentially determined by the two major political parties, could serve as a barrier to access to the general election ballot. Id.

\textsuperscript{123} Pl.’s Reply Mem. of Law at 4, New York City Bd. of Elections, No. 41450/91.

\textsuperscript{124} Pl.’s Mem. of Law in Supp. of Mot. for Prelim. Inj. at 18-19, New York City Board of Elections, No. 41450/91.
than creating nonpartisan elections per se.\textsuperscript{125} The court concluded that there was no conflict between the charter and the election law because the State Constitution conferred upon municipalities the power to establish their own local election law provisions.\textsuperscript{126} Thus, Section 25(b)(7) was upheld notwithstanding New York State Election Law Section 6-114, which allows parties to place their candidates’ party labels on the ballot.\textsuperscript{127}

III. ARGUMENTS AGAINST NONPARTISAN ELECTIONS

Opponents of nonpartisan elections point to purported successes of the current partisan system for local elections and highlight concerns that a nonpartisan format might be detrimental to the city.\textsuperscript{128} Partisan advocates claim that parties provide a cohesive ideology, ensure accountability, inform voters, fund candidates and increase minority electoral influence.\textsuperscript{129} They express concern that a nonpartisan system would not only lead to a loss of these benefits, but also depress voter turnout, increase dependence on less informative voter cues and lead to an unfair Republican advantage.\textsuperscript{130}

Supporters of the current partisan election system argue that political parties should maintain their role in local elections because of their critical function in connecting people to the political system.\textsuperscript{131} Political parties, unlike narrowly-focused,
single-issue organizations, play an important role in “assembling ideological coalitions” and uniting voters across a spectrum of issues based on a common policy perspective. To that extent, political parties are useful signals of candidates’ policy differences. Furthermore, party affiliation promotes accountability of the candidate to a party’s policy orientation, both as a candidate and as an elected official.

Political parties also assist voters and candidates by providing funding and distributing candidate information. A party’s multi-issue, policy-oriented structure makes it an efficient mechanism to disseminate a candidate’s viewpoint on a broad

---

132 See Charter Revisions to Establish a Nonpartisan Local Election System: Hearing on Proposed New York City Charter Chapter 3 Before the New York City Charter Revision Commission (Aug. 13, 2002) [hereinafter Hearing (Aug. 13, 2002)] (statement of David Yassky, City Council member representing the 33rd District in Brooklyn, that “[p]arties can be organizers of ideology and constructors of agenda to which people adhere”). See also Press Release, Denny Farrell, supra note 67 (discussing the role political parties play in financially supporting candidates and in offering citizens a way to participate in public service).

133 See Amy Bridges, Editorial, In Elections, Parties Matter, N.Y. TIMES, Aug. 30, 2002, at A18 (discussing the benefits that political parties bring to elections). But see infra note 178 and accompanying text (noting the divergence of broad national political ideology from localized needs).

134 See CITY IN TRANSITION, supra note 2, at 70 (stating a nonpartisan opponent view that parties “force candidates to make commitments that result in political accountability”); Sherrill, supra note 105, at 17 (noting that the collective behavior and responsibility facilitated by political parties promotes candidate accountability). But see infra Part IV.C.1 (discussing how the context of New York’s current partisan system eliminates public official accountability).

135 CITY IN TRANSITION, supra note 2, at 92 (summarizing Dr. Susan Welch’s support for political parties and the benefits they bring to the political system); Bridges, supra note 133 (noting the role parties play in distributing information); Charter Revisions to Establish a Nonpartisan Local Election System: Hearing on Proposed New York City Charter Chapter 3 Before the New York City Charter Revision Commission, (Aug. 21, 2002) [hereinafter Hearing (Aug. 21, 2002)] (statement of Professor Clayton Gillette, Professor of Law, New York University School of Law, noting various benefits provided by parties).
range of issues, and information about a candidate’s position can only be effectively disseminated to voters if they obtain adequate funding. Partisan advocates argue that, under the partisan structure, parties support candidates by playing a significant role in funding their campaigns. Political parties’ financial support also helps candidates efficiently convey their platform through various media. In addition to funding candidates, political parties also “help recruit, train, and support candidates.”

Adherents of the current partisan process also cite the successes that minorities have made within the party structure,

---

136 See Sherrill, supra note 105, at 17 (describing the historical role of political parties as a “structured alliance” between a candidate and his supporters, who support his or her policy issues); Bridges, supra note 133 (noting that political parties “are the only devices thus far invented which generate power on behalf of the many).

137 Sherrill, supra note 105, at 18 (explaining that “candidates running without the advantage of . . . party identification will have to raise and spend much more money to achieve desired levels of name recognition”); CITY IN TRANSITION, supra note 2, at C-20 (acknowledging partisan advocates’ contention that nonpartisan elections will make it difficult for non-wealthy candidates to obtain sufficient campaign funds); David Seifman, Betsy: Nonparty Votes Help Rich, N.Y. POST, Aug. 1, 2002, at 22 (noting Public Advocate Betsy Gotbaum’s view that Bloomberg’s implementation of nonpartisan elections will “only help wealthy candidates like himself”).

138 See Sherrill, supra note 105, at 19 (arguing that without partisan elections, candidates will spend too much of their time in fundraising); Hearing (Aug. 21, 2002), supra note 135 (statement of Keith Wright, New York State assemblyman, 70th District). But see infra Part IV.C.3.c (discussing the New York City Campaign Finance Board’s unique efforts to financially support candidates and reduce wealth advantages in elections).

139 Hearing (Aug. 13, 2002), supra note 132 (statement of Margaret Groarke, assistant professor of government, Manhattan College, discussing various ways that political parties contribute to electoral campaigns). But see infra Part IV.C.3.d (discussing the variety of electoral informational sources available to New York City voters).

140 Hearing (Aug. 13, 2002), supra note 132 (statement of Margaret Groarke). But see infra notes 202-205 (discussing how the current system creates incentives for elected officials to be more responsive to their party’s national goals than to their constituents’ local interests).
particularly in becoming a solid voice in the Democratic Party.\textsuperscript{141} Within the Democratic Party, blacks constitute thirty percent, Hispanics constitute twenty percent and Asians constitute three percent.\textsuperscript{142} In contrast, in the Republican Party blacks constitute six percent, Hispanics constitute four percent and Asians constitute twenty-nine percent.\textsuperscript{143} Opponents of nonpartisan elections fear that removing party labels from the ballot will amount to a setback to minorities in the development of their political clout.\textsuperscript{144}

Opponents of nonpartisan elections also fear that such a system would be detrimental to campaigns and the overall election process. They contend that the reduced role of the party and the subsequent loss of information typically distributed by political parties will make it more difficult for the average citizen

\begin{footnotesize}
\textsuperscript{141} See, e.g., Hearing (Aug. 13, 2002), \textit{supra} note 132 (statement of Yvette Clark, City Council Member, 40th District in Brooklyn, that “[m]any of our communities are just coming of age with respect to the exercising of their voting rights”); \textit{Hearing (Aug. 21, 2002), supra} note 135 (statement of William (Bill) Perkins, City Council Member, 9th District in Manhattan, asserting that “[e]liminating the Democratic Party’s official role could have serious effects for Latino and African American voters who are a growing force within the party”). \textit{See also supra} note 90 (delineating the percentage of minorities enrolled in the Democratic Party in New York City, based on 2001 exit polls).

\textsuperscript{142} \textit{Hearing (Aug. 15, 2002), supra} note 90 (statement of Dr. Lichtman).

\textsuperscript{143} \textit{Id.} The increase in minority participation was largely a result of passage and enforcement of the Voting Rights Act. \textit{Id.} (stating that “urban politics have largely been transformed over the past several [decades], in part by the Voting Rights Act”).

\textsuperscript{144} \textit{Hearing (Aug. 13, 2002), supra} note 132 (statement of Yvette Clark, City Council Member, 40th District in Brooklyn, expressing her belief that the “proposal flies in the face of those of us at the grass roots of our communities who have labored to register extremely disenfranchised communities to become active participants in the political process and now stand to face the rolling back of many of those gains”); \textit{Hearing (Aug. 13, 2002), supra} note 132 (statement of Oliver Koppel, City Council Member, 11th District in the Bronx, that “it will disadvantage minority voters to shift from a system that has allowed one minority to get elected and last year a minority representative to come very close to becoming the Democratic candidate for Mayor”). \textit{But see infra} Part IV.C.3.b (discussing how the nonpartisan system will benefit minority voters).
\end{footnotesize}
to evaluate competing candidates.\textsuperscript{145} If political parties no longer retain their preferred status in local elections, their involvement may diminish, denying people informational benefits.\textsuperscript{146} The feared result is that the reduction in substantive information contributed by parties to campaigns will depress voter turnout.\textsuperscript{147}

Additionally, some people fear that nonpartisan elections would leave non-ideological factors like incumbency and name recognition as the primary cues for voter choice.\textsuperscript{148} Nonpartisan opponents contend that nonpartisan elections are less centered on ideology, and instead turn the electoral process into a "personality contest."\textsuperscript{149}

Lastly, a key underlying concern is that nonpartisan elections will give Republicans an unfair advantage.\textsuperscript{150} The phenomenon

\textsuperscript{145} Sherrill, supra note 105, at 20 (stating that removing the party label will deprive voters “of the historical perspective needed to project the nature of an administration”); \textit{Hearing (Aug. 13, 2002), supra} note 132 (statement of Dorothy Siegel, a community activist from Brooklyn, that “without party affiliation voters will have no idea who they’re voting for or what candidates stand for”).

\textsuperscript{146} See \textit{Hawley, supra} note 1, at 64 (stating that removing the party label from the ballot will discourage party involvement, consequently “placing greater demands on [voters’] ideology; cognitive capacity; experience; and nonparty sources of political communication and mobilization”). \textit{But see} notes 276-280 and accompanying text (discussing why political parties need not and, in fact, should not reduce their informal role in the political process).

\textsuperscript{147} See \textit{City in Transition, supra} note 2, at 87 (noting that “[c]onflicting studies were cited concerning whether nonpartisan elections would increase voter turnout or minority participation”). \textit{But see} supra Part I, notes 93-98 and accompanying text (discussing voter turnout). \textit{But see} IV.C.3.a (discussing the inapplicability of lower voter turnout concerns).

\textsuperscript{148} Schaffner et al., supra note 32, at 4 (describing alternative voter cues used when political parties are removed from the ballot); Margaret Groarke, Written Testimony Before The New York City Charter Revision Commission, Brooklyn (Aug. 13, 2002) (on file with author) (citing incumbency, name familiarity, ethnicity and gender as alternative voter cues).

\textsuperscript{149} See \textit{Hearing (Aug. 21, 2002), supra} note 135 (statement of Virginia Fields, Borough President of Manhattan, that “by cloaking all candidates under a non-partisan blur, major ideological differences that exist between the parties are no longer apparent and the process becomes the personality contest”).

\textsuperscript{150} \textit{Hawley, supra} note 1, at 77-99 (summarizing studies confirming the
was found in several studies conducted in the 1960s and 1970s examining voting patterns in nonpartisan elections and was found to exist based on the disproportionate likelihood for Republican candidates to win, compared with the proportional number of Republican Party registrants in the respective regions. The rationale offered to explain this phenomenon is that Democrats, who are often members of lower socioeconomic classes, depend more on parties for information than Republicans.

The concerns raised are legitimate and should be taken into account in deciding whether to implement nonpartisan elections

Republican advantage in nonpartisan elections in California between the 1950s and 1960s. The Republican advantage is also described as a wealth advantage. See Edward L. Lascher, Jr., The Case of the Missing Democrats: Reexamining the “Republican Advantage” in Nonpartisan Elections, 44 W. Pol. Q. 656, 657 (1991) (hypothesizing that Republicans’ likelihood of having greater financial means with which to increase name recognition and improve candidate image is a possible explanation for the Republican advantage). But see infra Part IV.C.3.e (discussing the inapplicability of the Republican advantage to New York City).

See Lascher, supra note 150, at 663 (discussing Lascher’s study, which surveyed California county supervisors elected by nonpartisan elections, where county supervisor positions are functionally comparable to city council offices). The Republican advantage was found at all but very high levels of Democratic voter registration. Id.; Hawley, supra note 1, at 33 (discussing the implications of a study showing a partisan bias in nonpartisan elections for city council and mayoral positions in eighty-eight cities in California between 1957 and 1966). Interestingly, arguments raising concerns of a “Republican advantage” were missing from hearing testimonies, but were prevalent in daily newspaper editorials. See, e.g., Michael Cooper, For City Charter Commission, First a Goal, Then the Members, N.Y Times, Mar. 27, 2003, at D3 (suggesting that nonpartisan elections could benefit Mayor Bloomberg as a Republican in a city that is five-to-one Democratic); David Seifman, Bloomy Charter Vote Chills Pataki, N.Y. Post, July 27, 2002, at 2 (warning of a potential Republican advantage if New York implemented nonpartisan elections). Concerns of a wealth advantage were more commonly raised by public officials. See, e.g., Hearing (Aug. 13, 2002), supra note 132 (statement of Betsy Gotbaum, New York City Public Advocate, that “nonpartisan elections certainly favor wealthy candidates”).

See Hawley, supra note 1, at 63. But see infra Part IV.C.3.e (discussing why the Republican advantage would not apply in light of New York’s particular demographics and circumstances).
in any city. Such an evaluation, however, will be unique in every municipality, based on city-specific “problems, needs and resources” that may confirm or diminish the relevance of the various contentions.153

IV. REINVIGORATING NEW YORK CITY’S LOCAL ELECTIONS

Understanding the distinct rationale for nonpartisan elections at the local level requires examining the rationale of political party involvement in national and state electoral campaigns. Political parties play distinctly different roles at local levels and therefore warrant independent consideration. Nonpartisan elections do not dismiss ideology, public policy and political parties as irrelevant.154 To the contrary, studies have shown that political party organizations remained active in nonpartisan local elections in large cities.155 Moreover, nonpartisan elections bring competitiveness to local elections, empower all registered voters

153 See LEE, supra note 11, at 184. Lee explains that examination of these community-specific characteristics should be undertaken with the goal of answering the following questions:

[Which system will do most to enhance the twin factors of competition and consensus essential to the democratic process?] Which system will best promote freedom and equality of access to public office and political activity by all groups in the community? Which system will best encourage the presentation of alternative viewpoints on key issues facing the community and relate these views to candidate choice? And finally, which system will best lead to the recruitment and election of those men and women of ability and integrity without whom the community will fail to reach its potential as a vital force in the life of its citizens?

Id.

154 See Joseph Mercurio, Editorial, Non-Partisan Elections: Mayor’s First Misstep?, National Political Services, Inc., at http://www.nationalpolitical.com/column133.htm (August 2, 2002) [hereinafter Mercurio, Mayor’s Misstep?] (stating that, contrary to views that nonpartisan elections are intended to remove party activity in elections, “adopting non-partisan elections is not a plot to eliminate political parties”).

155 See LEE, supra note 11, at 149 (stating that “[r]espondents from the larger cities more often reported that political party organizations were active in city elections”).
to determine the outcome of the election and create incentives for candidates to put local concerns at the forefront of their campaign platform and during their term of office. Of course, each municipality must make its own determination as to the value of a nonpartisan system by examining local factors such as the size and diversity of population, financial resources available to candidates, the vigor and variety of local news and informational sources and the competitiveness of the local party system.156 The particular characteristics of New York City, however, indicate that the time has come for the city to switch to nonpartisan elections.157

A. The Roles of Political Parties

Although political parties are not mentioned in the Constitution, the growth and survival of the two-party system throughout American history and the unique statutory roles of parties in the electoral process have made them the primary structure for collective action.158 Political parties facilitate three major electoral functions: participation, representation and competition.159 Because of their large constituencies, political

156 See Id. at 29-30.
157 See infra Part IV.C for a full discussion on the characteristics of New York City that support the establishment of nonpartisan elections; see also, Lenora Fulani, Editorial, The Right Time, NEWSDAY, July 30, 2002, at A28 (arguing that “when Democratic Party Professionals argue that more time is needed to study the issue, they mean that more time is needed to recapture control of the black vote, one-third of which escaped its grasp last year”); Michael Kramer, Editorial, Mike’s Voting Reform on the Money, N.Y. DAILY News, Aug. 7, 2002, at 14 (stating that Mayor Bloomberg’s proposal for nonpartisan elections is “long overdue”).
158 See LEE, supra note 11, at 113 (arguing that “[e]ffective local government depends on organized political action by organized groups. Party organization may not be the best, but it is better than no organization”); see also Persily, supra note 122, at 2188 (describing the different functions that political parties play, which largely exist by virtue of their roles as “state actor-private association hybrids”); supra Part I.A.1 (describing the historical need to define political parties statutorily, in order to give them official roles in state and local elections).
159 See Persily, supra note 122, at 2188 (outlining the various functions of
parties can organize individuals to take collective action at a “massive scale.” They also have the unique opportunity to enhance participation through party primaries, which provide voters the opportunity to select candidates that they believe will best represent the party and execute the goals of the party’s platform. Partisan election systems, in which political parties are granted preferred organizational status, are also beneficial as formalized mechanisms for generating competition, one of the vital forces behind a thriving democracy. One political sociologist explained the coexistence of competition and cohesion, stating that “[a] stable democratic system requires sources of cleavage so that there will be struggle over ruling positions, challenges to parties in power, and shifts of parties in office; but without consensus—a system allowing a peaceful ‘play’ of power—there can be no democracy.” Parties not in

party primaries).

See id.; Sherill, supra note 136, at 16 (noting that political parties facilitate collective behavior).

Persily, supra note 122, at 2189.

Id. at 2189; see also Hearing (Aug. 13, 2002), supra note 132 (statement of Margaret Groarke, an assistant professor of government at Manhattan College, that party candidates will “carry out their program if elected”).


LEE, supra note 11, at 157 (quoting political sociologist Seymour Martin Lipset) (citation omitted). Interestingly, partisan advocates often emphasize the importance of parties in creating cohesion but fail to mention its critical counterpart role of generating competition when advocating for partisan elections in an uncompetitive city. See Sherrill, supra note 105, at 18
power can fuel “political innovation” and seek “to implement relatively major changes in efforts to attract large segments of the electorate to its support.” In a partisan election system, parties create competition by establishing frequent and consistent channels to air and oppose viewpoints.

Nevertheless, “[t]hat meaningful competition and opposition are more plentiful under a partisan system has not yet been established, . . . and any such generalization must be seriously qualified by the existence of many cities in which one party has a preponderant majority and cannot be effectively challenged.” As even one political scientist opposed to nonpartisan elections recognized, partisan election systems are “less likely to be responsive to needs for social change” in the absence of inter-party competition.

Today’s national political party committees establish annual party platforms to articulate their broad policy directions. Even as they attempt to create a cohesive objective, however, one of the most difficult problems for parties at the national level is “building and maintaining electoral coalitions,” due to the need to unite communities with very different social, economic and political concerns. “Uniting diverse and sometimes latently antagonistic population subgroups into a single and successful voting coalition has required subordinating inter-group tensions

(noting, in his article opposing nonpartisan elections in New York City, that parties encourage cohesiveness in politics).

165 HAWLEY, supra note 1, at 164.
166 LEE, supra note 11, at 161. See Persily, supra note 122, at 2190 (explaining that “regulation of the [party] primary can determine the probability for turnover in government, the number of candidates actively pursuing voter support, and the chance that challenges to incumbents will arise at some point of the electoral process”).
167 LEE, supra note 11, at 161.
168 HAWLEY, supra note 1, at 164.
to party objectives.” 171 In fact, holding a broadly cohesive platform together often “exclude[s] any sustained concern by parties for policy articulation.” 172

B. The Nonpartisan Format is Useful and Legitimate at the Local Level

The reality of the looser national and state units contrasts starkly with the ability of candidates to articulate specific community commitments at the local level. Local candidates, by virtue of the geographically “local” nature of the community and its more unified interests, can engage directly with the community, listen to their constituency and articulate their responsive commitments, rather than relying on party affiliation as a primary vehicle to espouse political ideology. 173 This distinct opportunity, compared with those running for state or national offices, undermines the argument that political party preferential status is a prerequisite to informed participation. 174

Some argue that local governance is distinct from federal governance inasmuch as it tends to be more managerial and provision-oriented than party politics-oriented. 175 Cities deal with

171 Id.
172 Id. Political parties’ priority to amass the support of large numbers of constituents consequently forces them to “couch their platform planks in vague generalities.” JEWELL CASS PHILLIPS, MUNICIPAL GOVERNMENT AND ADMINISTRATION IN AMERICA 216 (1960).
173 See Hearing (Aug. 21, 2002), supra note 135 (statement of Michelle Bouchard, a former city council candidate for the third district in Manhattan, stating her view that partisan politics at the local level creates dividing lines and ideological war, and because important issues are not partisan, they should not be “claimed by either party”); Hearing (Aug. 15, 2002), supra note 90 (statement of Orlando Mayor Glenda Hood expressing her belief, based on her mayoral experience, that more important than party politics is the importance of responsiveness of local officials to neighborhood residents’ concerns).
174 See supra Part III (citing arguments by partisan proponents of the importance of political party activity in distributing candidate information and encouraging voter participation).
175 Hearing (Aug. 21, 2002), supra note 135 (statement of Professor Clayton Gillette, a law professor with New York University School of Law).
resource redistribution at a much more local and regional scope, compared with higher federal offices. The problems local officials address include low-income housing, urban redevelopment, local crime, social welfare services, environmental control and land use planning. Although the state and national governments deal with similar problems on a larger scale, the policy objectives that a national party seeks to achieve, by virtue of the broader jurisdiction they seek to encompass, often diverge from the specific needs to which a local official must respond.

Studies have shown that, as the population of a city increases, the likelihood of a local government official running for state and federal government offices increases. Larger population also enhances the likelihood of a party attempting to “groom” local leaders for higher office, and in doing so, would implicate the higher state or national policy agenda, rather than the interests of a particular district. The danger of compromised local

See also Hearing (Aug. 15, 2002), supra note 90 (statement of Orlando Mayor Glenda Hood explaining that in her experience as Mayor of Orlando, the issues she has encountered are only minimally related to partisan politics).

Hearing (Aug. 21, 2002), supra note 135 (statement of Professor Clayton Gillette).

See Hawley, supra note 1, at 182.

Hearing (Aug. 21, 2002), supra note 135 (statement of Professor Clayton Gillette contrasting local and national “economic and political environment” and the significant differences in objectives sought in resource distribution and development of the respective local versus national economy).

See Lee, supra note 11, at 107 tbl.38 (California “Cities Reporting Local Officials Having Run for State or National Office”).

See id. at 106 (discussing the results of a survey of party chairmen throughout the state of California, asking the chairmen, “Have you or your predecessor in the past four years looked to the ranks of city, county, or school officeholders to seek candidates for state or national office?”). The survey results indicated that “42 per cent of the chairmen in counties under 50,000 and 62 per cent of those from the larger counties replied they had often or sometimes looked to the local ranks.” Id. See Hearing (Aug. 21, 2002), supra note 135 (statement of Professor Clayton Gillette explaining the possibility that when political parties select candidates with the intention of promoting them to state or national offices, the candidate’s agenda, by virtue of his obedience to the party’s agenda, may not be aligned with those of
commitment is evident when juxtaposing the dichotomous agendas of local governance and national policy objectives with the desire of the national party to begin preparing local officials for higher offices.\textsuperscript{181}

Despite the differences in local versus state and national campaigning and governance, voters should take candidates’ policy preferences seriously when assessing a municipal candidate. Studies have shown correlations between a municipal candidate’s party affiliation and their actions once elected.\textsuperscript{182} The correlation is found primarily when examining an elected official’s willingness to use governmental power actively to solve problems—Democrats are generally more willing to use governmental power while Republicans generally seek more limited government involvement.\textsuperscript{183} The belief that candidates affiliated with a certain party publicly uphold certain policy attitudes, indeed, underlies the fundamental importance of partisanship.\textsuperscript{184} The claim that there is “no Republican or Democratic way to pave a street” fails to acknowledge that policy attitudes are found in the details of the project.\textsuperscript{185}

Nonpartisan elections are not geared towards hiding candidate policy leanings, but seek to make local elections more accessible and competitive, as seen in the rationales that underlie New York City’s nonpartisan special elections. Moreover, officials, once elected, remain aware of the party affiliations and policy perspectives of fellow elected officials and are thus able to form

\textsuperscript{181} See id.

\textsuperscript{182} Hawley, supra note 1, at 118-19.

\textsuperscript{183} See id.

\textsuperscript{184} Sherrill, supra note 105, at 17 (stating that people rationally “associate political parties with competing philosophies of government”).

\textsuperscript{185} Hawley, supra note 1, at 111; Josh Shipper, The Party’s Not Over, Gotham Gazette, Aug. 15, 2001 (stating that the premise for nonpartisan systems is based on the idea that “[y]ou don’t need to be Republican or Democrat to pave a road”), available at http://www.gothamgazette.com/searchlight2001/archives/arch.feature.html. In reality, there are important policy issues not found in the technical details of paving the street, but in deciding which streets in which neighborhood to pave, or which streets to give maintenance priority. Hawley, supra.
alliances when the need arises.  

C. Nonpartisan Elections Will Reinvigorate the Vote in New York City

The partisan electoral system in New York City has failed to inspire competition and accountability, and allows election of public officials by the few rather than by the many. Nonpartisan elections would reinvigorate the campaign process by opening primary access to voters and candidates, bringing back the meaningfulness of voting in a competitive general election, promoting a broader examination of candidate merits and perhaps encouraging a more informed vote.

1. New York’s Current Local Election System Harms All Its Voters

With Democrats comprising more than sixty-five percent of all registered voters in the city, and about eighty percent of all registered party members, New York City is effectively a single-party system. In New York City, 4,237,103 people are currently registered to vote. Of that number, 2,819,414 are enrolled as Democrats. Yet, only 785,365 Democrats, less than one-third of all Democrats, voted in the 2001 mayoral primary, with even lower numbers voting for their city council members. Among minority voters, these numbers are

186 Hearing, supra note 90 (statement of Orlando Mayor Glenda Hood).
187 New York State Board of Elections, Enrollment Statistics in November 2002, http://www.elections.state.ny.us/enrollment/enroll.htm (last visited Mar. 31, 2003) [hereinafter Enrollment Statistics]. See Mercurio, Bloomberg’s Campaign Promise, supra note 10 (citing similar party enrollment statistics in New York City in 2001). See also Persily, supra note 122, at 2224 (noting that political parties have a legitimate interest in creating restrictive primary ballot access laws to produce a candidate with enough party support to be competitive in the general election).
188 Enrollment Statistics, supra note 187.
189 Id.
proportionally lower.\(^1\)

At the same time, over 880,000 voters, approximately twenty percent of the electorate, are affiliated with neither the Republican nor Democratic Party.\(^2\) These numbers indicate that the current primary system allows the narrow population of party primary voters to determine the candidates that participate in the runoff election.\(^3\) In almost all municipal offices, the Democratic Party primary winner claimed victory in a virtually uncontested general election.\(^4\) Thus, with the race practically concluded

---

\(^1\) See Mercurio, *Bloomberg’s Campaign Promise*, supra note 10.

\(^2\) Enrollment Statistics, supra note 187.

\(^3\) *Hearing* (Aug. 15, 2002), supra note 90 (statement of Louisa Chan, a member of the community school board in district 24 that the city’s primary system gives a small group of special interest groups control of the entire election). See *CITY IN TRANSITION*, supra note 2, at 88 (summarizing comments by nonpartisan supporters that candidates will be forced to address issues facing the entire population and not merely those issues voiced by the “narrow group of insiders who tend to vote in partisan primaries”).

\(^4\) Board of Elections in the City of New York, Election Results, http://vote.nyc.ny.us/pdf/results/2001/generalElection/ (Nov. 28, 2001). For example, in the election for Public Advocate, the Democratic candidate won with 845,924 votes, with the closest runner-up receiving only 56,647 votes, a difference of 789,277 votes. Id. Similarly, the Democratic candidate won the seat for Comptroller with 768,700 votes, the runner-up receiving 705,357 votes less. Id. In the eighth council district in the Bronx, the Democratic candidate won in the general election with 16,678 votes, while the runner-up candidate only received 2,342 votes. Board of Elections in the City of New York, Election Results, http://vote.nyc.ny.us/pdf/results/2001/generalElection (Nov. 28, 2001). In the twenty-second council district in Queens, the Democratic candidate won with 11,354 votes, while the runner-up received only 6,133 votes. Id. The mayoral election is arguably an exception, as evidenced by the election of two Republican mayors during the last decade. *See Hearing* (Aug. 21, 2002), supra note 135 (statement of former New York City Mayor Koch); *Hearing* (Aug. 20, 2002), supra note 163 (statement of Professor Richard Flanagan that “only six or perhaps seven Council seats, and I’m being generous here, and the Mayor’s office are competitive in the general
during the primary in favor of the dominant party and the candidate selected by this narrow subgroup of dominant party primary voters, unaffiliated voters and members of other parties are effectively disenfranchised.195

The ills of our current system afflict all voters, Democrats included. Supporters of the partisan system encourage voters to use a candidate’s party affiliation as a proxy for evaluating a candidate’s policy positions.196 Political scientists particularly emphasize that voting purely based on party affiliation is a rational decision made by voters.197 The typical rebuttal is that insisting on party labels on the ballot sends a message that voters cannot vote intelligently without the party cue.198 But, as the

Supreme Court stated:

To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant’s argument depends upon the belief that voters can be “misled” by party labels. But “[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.”

Party labels are not an inherently wrong way to inform voters of a candidate’s party affiliation. But, the lack of competition within a single party system combined with the statutory preference given to a candidate’s party affiliation create a disincentive for candidates to address the concerns of their constituency, since the victory will be won as long as they have the appropriate party label on the ballot and have made it past the primary. The possibility for patronage and corruption also increases when a single party dominates and has no viable

---

United States Congress).

199 Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 220 (1986). In Tashjian, the State Republican Party Committee brought a federal action challenging the constitutionality of Connecticut’s closed primary law, which restricted party primary voting such that only party members could vote in the party primary. Id. at 211. The Court found that the law impermissibly interfered with the political party’s First Amendment right to define its associational boundaries. Id. at 225.

200 See Anthony Champagne, Political Parties and Judicial Elections, 34 Loy. L.A. L. Rev. 1411, 1413 (2001). In his symposium presentation examining the role of political parties in judicial elections, Champagne, while recognizing that party labels provide “a clue” into the attitudes and values of judges, also noted that a highly qualified judicial candidate could also be harmed by bearing the wrong party label. Id. Champagne highlighted, as an example, the judicial elections in Houston, Tex., where Republican straight ticket voting led to the defeat of nineteen Democratic judges in Harris County and cited a comment from a law school dean that “if Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance.” Id.
competition in the general election.  

Moreover, the noncompetitive system creates an incentive for victorious candidates to remain more loyal to the party that secured the victory than to their constituency, especially when a potential future in politics at higher state or national offices may rest in the hands of the party hierarchy. Officials whose loyalties lie primarily with the party hierarchy will be less responsive to the public in situations where unified local needs and preferences diverge from state and national policy objectives.

The importance of garnering the party hierarchy’s support also presents an obstacle for candidates who may have good ideas to improve their community but whose views and interests may not conform to the party line. The harm of the party label derives less from its presence on the ballot on election day than from the perpetuation of a process controlled by party hierarchy entrenched in the partisan local election structure.

The party-controlled process may have deeper implications upon the minority community, most of which are Democrats. The Democratic Party includes many of the most zealous nonpartisan election opponents, who often argue that minorities will be harmed under a nonpartisan system and benefit under the

---

201 See Northup, supra note 28, at 1681.
202 See CITY IN TRANSITION, supra note 2, at 84. See also Hearing (Aug. 13, 2002), supra note 132 (statement of Rabbi Lieb Blantz of Brooklyn).
203 See supra Part IV.A regarding the importance of competitive elections in ensuring responsive government.
204 See Hearing (Aug. 21, 2002), supra note 135 (statement of Michelle Bouchard, former candidate for city council from Manhattan). See also Shipper, supra note 185 (describing how a team of a dozen lawyers working for the Queens County Democratic Organization worked to disqualify one-third of the city council candidates in one Queens County district for technical errors in their ballot petition signatures).
205 See Persily, supra note 122 (examining the problem of the party-controlled process, in the context of party-constructed primary ballot access laws). Persily particularly highlighted how primary ballot access laws have been used to guarantee “that only the party establishment’s favored nominee could get on the ballot.” See id. at 2206.
206 See infra notes 207-211 and accompanying text.
current partisan system. At the local level, city council elections are determined by racial demographics, not by partisanship. Harry Kresky, co-chair of the Rules Committee of the Independence Party of New York, argued that structural racism within political parties exists not in the city council races, but in the city statewide races. By examining the failure of various minority candidates to win the Democratic ticket, Kresky posited that the Democratic Party, rather than empowering blacks and Latinos, “ensures their status as the most loyal constituencies whose votes are vitally needed to elect white Democrats to citywide, statewide and national office.” He suggested that minorities would be more empowered if they acted as a nonpartisan swing vote, ensuring the election of the best candidate, regardless of race or party.

The current partisan election process deprives voters of a meaningful vote in the election by restricting access where the final decision is effectively determined, weakens public official accountability and creates an election system that allows the party hierarchy to exert too much control. Only when New York

207 Supra Part III (stating partisan proponents’ belief that the partisan system benefits minority voters).


209 Id. See also Charter Revisions to Establish a Nonpartisan Local Election System: Hearing on Proposed New York City Charter Chapter 3 Before the New York City Charter Revision Commission (Aug. 6, 2002) [hereinafter Hearing (Aug. 6, 2002)] (statements of Harry Kresky, Charter Revision Commissioner, and Dr. Lichtman, a professor of history with American University, discussing the hypothesis that due to the effect of demographics in determining many majority-minority district city council races, the change to nonpartisan elections would have a marginal effect on the results of those races).

210 Kresky, supra note 208 (noting the lack of success of minority Democratic candidates in citywide elections, and pointing out the racist tactics used by Democratic mayoral candidate Mark Green in his 2001 primary campaign against Hispanic Democratic candidate Herman Badillo).

211 Id.

212 See supra notes 193-211 and accompanying text (describing how the current restrictive system deincentivizes official accountability while
City returns the decision-making power to the broader population of registered voters will it achieve a genuinely representative democracy and responsive government.

2. Nonpartisan Elections Will Increase Electoral Access and Competition

Responsive governments exist when voters determine the results in contested elections. In contrast to the accepted, expected role of political parties in engendering electoral competition, the single party system divests parties of any incentive to use their preferred status to create the competition necessary to safeguard voters’ choices. New York’s municipal elections are anything but competitive, and this creates accountability problems. The majority of winners in the city’s local elections face no significant competition in the general elections, and the critical decisions that determine the election results are made by a narrow subset of majority party members, cued by the party hierarchy. Often, less than five percent of effectively increasing party influence).

See Mercurio, Time Has Come, supra note 163 (stating that “when voters have a say in the outcome of elections and there are genuinely contested elections, the government is more responsive and less corrupt”); see also William Grady, In a GOP County, 2nd Party Would Be Nice; Poll Shows Democrat Competition Favored, CHI. TRIB., Aug. 31, 1997, at 1 (noting that even a local official supported by the dominant party in a one party city favored competitive elections). “The thing that keeps us all honest philosophically is when you know there’s somebody out there who wants to take you out. That’s the inherent beauty of the democratic system.” Id.

See supra Part IV.A (discussing the roles of political parties in electoral campaigns).

City in Transition, supra note 2, at E-7 (summarizing Cooper Union Professor Fred Siegal’s reasons for making all of the city’s elections nonpartisan). Professor Siegal noted that “[t]he present system is a political monopoly which eliminates competition and accountability.” Id. See supra note 194 (delineating statistics from New York City 2001 elections showing large voting differentials between winning candidates and runners-up).

For example, while Public Advocate Betsy Gotbaum won the 2001 general election by a difference of 789,277 votes, her competition was much narrower in the primary. See Board of Elections in the City of New York,
Democratic Party members—those who voted in the primary for the eventual winner—make the determination because partisan elections encourage straight ticket voting.217 Some voters may choose not to participate in elections in which their candidate of choice has virtually no chance of winning.218 Others are proscribed from meaningful participation due to restrictive ballot access laws such as the party primary.219 In the case of New York City’s electoral system, these conditions perpetuate the retention of control in the hands of the few.220 Nonpartisan elections would open up access at both the candidate selection and voting phases of the electoral process and put the election into the broader


217 See Mercurio, Bloomberg’s Campaign Promise, supra note 10 (arguing that under our current partisan system, “a tiny portion of [eligible voters] . . . chose the winner”); Elizabeth Garrett, The Law and Economics of “Informed Voter” Ballot Notations, 85 VA. L. REV. 1533, 1536 (1999) (observing that “parties have worked to convince states to adopt the party-column ballot, which encourages straight ticket voting”).

218 See, e.g., supra Part II.B.1 (noting statistics that show that white voters do not participate in the election of district city council members in majority-minority districts and vice versa).

219 See Persily, supra note 119, at 2189 (stating how party primaries “exist as a major avenue for political participation [in a] system [that] provides few opportunities for the average citizen to play a role in the workings of the democracy”).

220 See Mercurio, Bloomberg’s Campaign Promise, supra note 10 (discussing how few voters actually participate in the primary, the effective election).
public’s control.

a. Broader Public Access in Candidate Selection

Increasing public control over the results of the election is fundamental to a direct democracy. Nonpartisan elections allow all voters to cast a ballot at the primary stage. Just as the Voting Rights Act was enacted to give racial minorities greater access to the electoral decision-making process, nonpartisan elections give all voters, regardless of party affiliation, equal access to candidate selection.

When access to the primary is widened, the voices and votes of nonmajority party members and nonparty voters become a factor in nonpartisan elections. In elections with genuine...
competition, all voters, whether members of the majority party or not, can have a stake in the elections. In noncompetitive partisan elections, however, this segment of the voting population is virtually excluded. The merits assessed in 1988, when voters approved special nonpartisan elections, should be considered, and voters in New York City, including minorities, should recognize that change would enhance their ability to make their vote count.

The new system would give potential candidates equal access to the ballot, just as they already do in the city’s nonpartisan special elections. The same problems that the nonpartisan format change intended to resolve in 1988 are at issue—candidate access to the ballot and voter access to the candidate selection process. In single party jurisdictions where the primary is the “dispositive election,” primary ballot access rules can be the sole determinant of whether voters will have a chance to choose among candidates or whether the rule-makers, i.e., the parties, being Democratic Party loyalists, as has historically been the case).

225 Mercurio, *Bloomberg’s Campaign Promise*, supra note 10 (explaining how one-third of all voters, which are not part of the dominant party, have no real opportunity to vote meaningfully). See *Enrollment Statistics*, supra note 187 (showing that, as of November, 2001, 1,417,689 of the 4,237,103 registered voters, about one-third, are not members of the Democratic Party in New York City).

226 See, e.g., Fornek, supra note 33 (describing the minority Republican Party’s mayoral primary as “little more than a political ‘Gong Show’ because of the virtual impossibility of a Republican candidate winning in the general election).

227 See *infra* notes 228-230 and accompanying text (describing the relationship between the purposes of establishing nonpartisan special elections and those of establishing general nonpartisan municipal elections).


229 See *Preliminary Options*, supra note 2, at 26 (discussing the potential to increase opportunities for candidates whose views “may not fit with the party machines”).
NONPARTISAN MUNICIPAL ELECTIONS IN NYC 627

will make that choice for them.230 Open access to the primary may be the most beneficial change because whereas support for nonpartisan elections based on “provisional versus political” distinctions,231 or expectations that nonpartisan elections eliminate party influence,232 cannot be guaranteed, increasing ballot access is an objective that is guaranteed, because allowing all voters to participate in the primary is a structural change that widens voter access at a crucial electoral juncture.233

b. Broader Candidate Access to the Ballot

Removing political parties’ favored status in the election structure increases opportunities for candidates whose views may not be synchronized with the party line, but whose ideas may be equally, if not more, beneficial to the community.234 If New York implements nonpartisan elections, local representatives would have greater freedom to serve the specific needs within their community, particularly on issues where a conflict of interest

230 Persily, supra note 122, at 2190 (discussing the potential negative effects of constraining restrictive ballot access laws).

231 See Hearing (Aug. 15, 2002), supra note 90 (statement of Orlando Mayor Glenda Hood supporting the idea of local governance as more provision-oriented than politics-oriented). Mayor Hood, however, also stated that the policy preferences and party affiliations of elected officials are still recognized informally and have been useful in forming alliances when the need arises. Id.

232 Costikyan, supra note 40 (explaining that a Task Force charged with reviewing New York City government decided not to implement nonpartisan elections because their examination of such elections in other large cities showed that they did not eliminate the party from the election process).

233 The 2002 Draft Charter aptly provides that all qualified voters are qualified to vote in the primary. See CITY IN TRANSITION, supra note 2, at 102 (providing section sixty-five of the “Draft Nonpartisan Elections Chapter”).

234 PRELIMINARY OPTIONS, supra note 2, at 26 n.24 (stating that “nonpartisan systems give qualified candidates of the minority party or independents a better chance to succeed . . . [and] permit voters to analyze local issues independently on their merits and to focus on the intelligence and experience of the candidates themselves rather than on their political affiliations”).
exists with broader state or national party objectives. By facilitating broader candidate access to the ballot at the municipal election level, nonpartisan elections also encourage their localized commitment.

3. New York City Demographics Facilitate Nonpartisan Elections

Additional factors specific to New York City both allay concerns of those wary of nonpartisan elections and support such a change. Specifically, the political and social conditions in the city will allow nonpartisan elections to offer fair minority representation, adequate candidate funding and sufficient candidate information without fear of a Republican advantage.

a. Lower Voter Turnout: A Misplaced Fear

Some studies suggest that nonpartisan elections reduce voter turnout. This projected consequence has raised repeated concerns that weigh against changing to nonpartisan elections. These concerns, however, do not consider the particular local variables contributing to differential turnout. Although these

235 See supra note 180 (discussing the risk of compromised commitments by candidates).
236 See supra Part IV.C.1 (describing how the current partisan system creates incentive for candidates to remain loyal to the party hierarchy above their constituency, which can create conflicts of interest when the state and national party objectives diverge from localized interests).
237 See, e.g., LEE, supra note 11, at 136-38 (generally finding lower voter turnout from elections in six cities in California in 1955, compared with turnout at the 1954 general election); Schaffner et al., supra note 32, at 8 (finding lower voter turnout in the mayoral elections in Urbana in 1985 and Champaign in 1987 than in the turnout in each city for the 1986 Illinois general election for the U.S. House of Representatives).
239 See Hearing (Aug. 20, 2002), supra note 163 (statement of Professor Frank Barry, a researcher with New York University Taub Urban Research Center and a former staff member with New York City’s Campaign Finance
concerns may be legitimate, they are largely inapplicable in New York.

First, low voter turnout is evident in municipal elections across the country, regardless of whether the system is partisan or nonpartisan.\textsuperscript{240} Low turnout, moreover, occurs in local elections that are not held simultaneously with the election of officials to state and national offices, in which higher profile campaigns tend to draw a larger voter turnout.\textsuperscript{241}

Second, conclusions from studies done in the mid-twentieth century may not be applicable today in light of changing urban conditions in the last few decades, particularly driven by the enactment of the 1965 Voting Rights Act.\textsuperscript{242} Moreover, findings in other studies have differed, and variances existed even within studies, which attenuate the applicability and validity of the sweeping conclusion that nonpartisan elections reduce voter turnout.\textsuperscript{243}

Third, reduced voter turnout is unlikely to occur in New York because of variables unique to the city, including population and competitiveness of the elections.\textsuperscript{244} Studies have shown that larger cities tend to exhibit more political activity.\textsuperscript{245}
Similarly, in light of the role of political parties as a major generator of electoral competition, political parties are more closely tied to competitive elections and less competitive elections might justify the use of nonpartisan elections.\(^{246}\)

New York City is the largest city in the nation, with a population of more than eight million, in contrast to the much smaller cities that showed lower voter turnout.\(^ {247}\) The majority of cities examined in those studies also had competitive elections,\(^ {248}\) while many of New York City’s elections are largely noncompetitive.\(^ {249}\) In light of the city’s characteristics and the limited applicability of findings from studies showing that nonpartisan elections reduce voter turnout, low voter turnout should not be an obstacle to considering nonpartisan elections as a viable means of reinvigorating the city’s municipal elections.

\(^{246}\) See Hearing (Aug. 20, 2002), supra note 163 (statement of Professor Frank Barry), explaining that whereas two-party systems exist largely to create competition, in single party systems, the “competition gets pushed into the primary system,” effectively excluding approximately one-third of all voters from the decisive election, who are not majority party members.). Nonpartisan systems would bring the excluded one-third back into the decision-making process. See id.

\(^{247}\) POPULATION DIV., DEP’T OF CITY PLANNING, POPULATION BY MUTUALLY EXCLUSIVE RACE & HISPANIC ORIGIN, NEW YORK CITY & BOROUGHS, 1999 AND 2000 (indicating that the total population in the city is 8,008,278), http://www.nyc.gov/html/dcp/html/census/popdiv.html (last visited Apr. 20, 2003); LEE, supra note 11, at 189-94 (noting that the populations of the six cities studied varied from 15,000 to 133,000).

\(^{248}\) See, e.g., LEE, supra note 11, at 61.

\(^{249}\) Hearing (Aug. 20, 2002), supra note 163 (statement of Professor Frank Barry). A competitive election is distinguishable from a noncompetitive one in its ability “to present contests to the voters in which the winners are not predetermined.” Persily, supra note 122, at 2190. New York elections are not competitive in that the winners typically win in a landslide victory at the general election, while the results are much closer in the primary election. See id.; Mercurio, Time Has Come, supra note 163.
Nonpartisan Municipal Elections in NYC

b. Minority Voters Would Benefit

Nonpartisan elections strengthen the ability of minorities to elect candidates. In the fifty largest cities in the country, more minority mayors have been elected through nonpartisan than partisan elections. Moreover, New York City minority voting patterns in nonpartisan special elections have shown no consistent decrease in minority voter turnout compared to white turnout. Competitive minority candidates, however, tend to increase minority voter turnout.

Nonpartisan elections would increase participation by minority voters because voters that join the ranks of parties other than the Democratic Party or choose not to join a political party would be able to vote in a nonpartisan primary. Moreover, all minority voters stand to benefit. Blacks and Hispanics constitute twenty-three percent and twenty-five percent of the voting age population, respectively. With such a high percentage of the voting population, their votes are significant enough for any candidate to seek their support.

---

250 See supra Part II.B (discussing minorities’ ability to elect candidates of their choice within nonpartisan systems).

251 See Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman); supra notes 101-104 and accompanying text (discussing the success of minority candidates in nonpartisan elections compared with partisan elections).

252 See Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman, reviewing the results of his statistical research of nonpartisan special election voter turnout between 1992 and 1998).

253 Id.; see supra Part II.B.2 (discussing the inclusion of minority turnout concerns in the Department of Justice’s review process under Section 5 of the Voting Rights Act); supra Part II.B.3 (discussing the correlation between minority candidates and minority turnout).

254 See Hearing (Aug. 13, 2002), supra note 132 (statement of Genevieve Torres, a political activist from Brooklyn) (stating that “if you look in the black and Latino community, a majority of youth is deciding that they’d like to opt out of deciding on a party or they’d rather vote as independents”).

255 See Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman).

256 See Kresky, supra note 208 (noting that minority voters’ support is essential to any local electoral victory).
c. Candidates Would Receive Adequate Funding

New York City provides financial assistance to candidates for municipal office through an innovative campaign finance program.\footnote{See The New York City Campaign Finance Board, For Candidates, at http://www.cfb.nyc.ny.us/for_candidates/index.htm (last visited Apr. 24, 2003) (generally describing the types of financial assistance given to candidates).} In 2001, the program provided forty-one million dollars to candidates, far more than any funding provided by parties.\footnote{Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman citing statistics compiled by the Campaign Finance Board).} The city’s purposes for implementing the program included “[making] candidates and elected officials more responsive to citizens, rather than special interests; . . . [helping] credible candidates who may not have access to ‘big money’ to run competitive campaigns; [and leveling] the political playing field by enabling all serious candidates, whether challengers or incumbents, to compete on more equal footing.”\footnote{The New York City Campaign Finance Board, The Program and the Law, at http://www.cfb.nyc.ny.us/program_law/index.htm (last visited Apr. 24, 2003).} The city’s public financing system is the most generous and comprehensive reform program among American cities.\footnote{Hearing (Aug. 20, 2002), supra note 163 (statement of Frank Barry). See also New York City Campaign Finance Board, Message from the [Campaign Finance Program] Chairman, at http://www.cfb.nyc.ny.us/about/chairman_statement.htm (last visited Apr. 24, 2003) (describing the purposes of the Program, and noting that its comprehensiveness makes it the “vanguard of the [campaign finance] reform movement”).} Indeed, the policy goals of nonpartisan elections—encouraging competition, access and political responsiveness—closely resemble those that motivated passage of the city’s campaign finance reform and are equally legitimate.\footnote{Supra Part I.A.3 (highlighting Mayor Bloomberg’s premises for establishing nonpartisan elections).}
d. New York Has a Wealth of Political Information

Sufficient sources of information are available in New York City to fill in the gaps in the event that parties decided to reduce their informational role in elections. New York City has an undeniably active, “aggressive” and opinionated press. In addition, the Campaign Finance Board is required to inform voters about municipal candidates via the Voter Guide.

Historically, newspapers have been an important part of the election and political process. Today, press activity remains a significant variable in the election results of large cities.

---


263 NEW YORK CITY CHARTER tit. 52 § 10 (2002); N.Y.C. R. & REGS. tit. 52, § 10-02 (2002) (listing information that statutorily must be included in the Voter Guide).

264 HAWLEY, supra note 1, at 53 (nothing that “[t]he primary sources of political information regarding local elections, especially where parties are inactive, are community organizations and the mass media”); LEE, supra note 11, at 78 (listing local newspapers as one of the important influences in election politics).

265 LEE, supra note 11, at 78 (explaining that local newspapers are valued more highly for their candidate endorsements in cities with larger
According to studies of municipal judicial elections, in ninety-five percent of the cities with populations above 50,000 in which the press was active, “supported candidates were reported as winning ‘many times’ or ‘always.’” Therefore, New York City’s diverse, active press is a significant alternative to partisanship for informing the vote.

The city’s Campaign Finance Board also provides the Voter Guide, required by the City Charter. The guide provides biographical information about each local candidate, including the name, political party enrollment, previous and current public offices held, current occupation, prior employment and positions, experience in public service, educational background and major organizational affiliations. It also includes “concise statements on the candidate’s principles, platform or views, for each candidate in the election who has submitted, in a timely manner, a candidate Voter Guide statement . . . .” This program is unique to New York City and ensures that the city’s electorate will not be uninformed in the event that political parties diminish their activity. In addition to the Voter Guide, the Campaign Finance Board funds candidates to further the candidate’s own efforts to produce and distribute information.

**e. Republican Advantage? Not Here.**

There would be no Republican advantage in New York City populations. See also Champagne, supra note 200, at 1421 (describing how the mass media can even be critical to the success of a judicial election). Judicial elections are comparable to many of the local elections such as city council elections because both are considered low-visibility races. See id. at 1412; see also text accompanying note 240 (discussing the issue of low voter turnout in municipal elections, which generally corresponds to the low-visibility nature of an election).

266 LEE, supra note 11, at 148.
267 NEW YORK CITY CHARTER tit. 52 § 10 (2002).
268 Id. at § 10(b)(1).
269 Id. at § 10(b)(2).
270 See NEW YORK CITY CHARTER tit. 52 § 10 (2002).
271 See supra Part IV.C.3.c (discussing the Campaign Finance Board’s efforts in assisting candidates financially).
because the conditions that create such an advantage are absent. Belief in the universal existence of a Republican advantage in nonpartisan elections is based on the misunderstanding that nonpartisan elections eliminate political party involvement.\(^{272}\)

Studies in the 1960s as well as a more recent study showed a Republican advantage in nonpartisan elections.\(^{273}\) Those findings are repeated in media even today without proper consideration of the funding resources uniquely available in New York City, which were established specifically to reduce the influence of wealth in elections.\(^{274}\) This concern continues to be espoused in anti-Republican circles, though occasionally the arguments are dressed in sheep’s clothing.\(^{275}\)

Among the bases for fearing a Republican advantage is the concern that nonpartisan elections end party involvement and issue awareness.\(^ {276}\) Common arguments regarding the Republican advantage combine the three additional concerns, i.e., candidate

\(^{272}\) See supra Part I.B (explaining that structurally, nonpartisan elections still allow political parties to carry on most of their campaign activities).

\(^{273}\) See, e.g., Hawley, supra note 1, at 33 (discussing the results and implications of his study, which showed the partisan bias of nonpartisanship in city council and mayoral positions in eighty-eight cities in California between 1957-1966); Lascher, supra note 150 (discussing his study published in 1991, which surveyed California county supervisors elected by nonpartisan elections; county supervisor positions are functionally comparable to city council offices).

\(^{274}\) See, e.g., Muzzio, Bloomberg Jumps Gun, supra note 56 (“Nonpartisan systems, especially in large cities, seem to engender a Republican bias.”); see also supra Part IV.C.3.c (discussing why wealth, a proxy argument for the Republican advantage, is inapplicable).

\(^{275}\) See, e.g., Hawley, supra note 1, at 33; Press Release, Denny Farrell, supra note 67 (emphasizing the benefits that political parties bring to elections, rather than stating any belief that Republicans may benefit from the change).

\(^{276}\) This presumption can be inferred from the numerous comments that have been made by partisan advocates who emphasize the benefits that political parties bring to the electoral process in general as if parties will not choose to provide them under a nonpartisan system. See, e.g., City in Transition, supra note 2, at 92; Amy Bridges, Editorial, In Elections, Parties Matter, N.Y. Times, Aug. 30, 2002, at A18; Press Release, Denny Farrell, supra note 67.
wealth, reduced voter turnout and reduced candidate information. These are not problems in New York City. Recent evidence from large, highly political cities like Chicago indicates that parties continue to play an active role in local nonpartisan elections. If parties remain committed to the results in local elections, they must also remain dedicated to informing the voters on their local issue positions in spite of the loss of the spoils system inherent in “formalized politics.”

In fact, there is a strong possibility that a nonpartisan primary would result in New Yorkers choosing two Democratic candidates to face off in a general election. As of November 2002, the Republican Party had only 536,000 New Yorkers, whereas the Democratic Party had 2.8 million. With such lopsided numbers, candidates that face off in the current general

277 See supra Parts IV.C.3.a-d (describing these concerns but also explaining why conditions in New York City would not create significant turnout, funding or informational problems if nonpartisan elections were established).

278 See Lascher, supra note 150 (contending that Republicans’ greater financial means with which to increase name recognition and improve candidate image may explain why Republican candidates have done better in nonpartisan elections relative to their share of registered Republican Party voters, as he found in his study of elections of California municipal officials);

279 See Rick Pearson, Daley Triumphs in Landslide, CHI. TRIB., Feb. 24, 1999, at 1 (noting that in Chicago’s first nonpartisan municipal election, “[Mayor] Daley . . . used his powerful political organization” to win the election).

280 See Northup, supra note 28, at 1680 (describing the political party as an institution not only of policies, but of patronage and personnel as well); see also Hearing (Aug. 13, 2002), supra note 132 (statement of City Council member David Yassky acknowledging that “parties can . . . serve a non-helpful role as patronage organizations”).

281 For example, in Los Angeles’s 2001 nonpartisan mayoral primary, two Democrats faced off in the runoff election. L.A. Mayoral Race Heads to Runoff, CHI. SUN-TIMES, April 12, 2001, at 24. In cities where one party is dominant, competition like that in two-party contests is possible if there is lively debate over controversial local issues, thus providing more of the checks and balances that party contests normally offer. PHILLIPS, supra note 172, at 207.

282 Enrollment Statistics, supra note 187.
NONPARTISAN MUNICIPAL ELECTIONS IN NYC  

election system, which advances only one candidate from each party, hardly represents the majority of New Yorkers’ views. Nonpartisan elections have greater potential to more accurately represent the public’s policy perspectives, create a more competitive election and keep candidates accountable.

V. DRAFTING THE NONPARTISAN ELECTION LAW: STRUCTURAL CONSIDERATIONS

If and when the Charter Revision Commission decides to propose establishing nonpartisan elections, they will have the flexibility to structure the nonpartisan election law in a way that best suits the New York City context. In drafting the charter sections, the Commission may determine the scope of the nonpartisan laws, whether to use a primary and the number of voter signatures required to be placed on a ballot.283

A. The Commission’s 2002 Draft Proposal: The Contents

The commission included a draft charter chapter establishing nonpartisan elections for local elective offices in the September 3, 2002 report.284 As set forth in this draft, candidates would be nominated by nonpartisan designating petitions, with a specified number of registered voters’ signatures required for placement on the primary ballot.285 The signature requirements for candidates using the nonpartisan designating petition derive from State Election Law § 6-142, which governs independent nominating

283 See infra Parts V.A-B and accompanying text (summarizing the various nonpartisan election laws utilized in Chicago, Ill.; Houston, Tex.; Los Angeles, Cal.; and Seattle, Wash.).
284 See CITY IN TRANSITION, supra note 2, at 98.
285 CITY IN TRANSITION, supra note 2, at 99 (setting forth section sixty-one of the “Draft Nonpartisan Elections Chapter”). “Nonpartisan designating petitions are analogous to independent nominating petitions.” Id. at 109 (discussing section sixty-one of the “Draft Nonpartisan Elections Chapter”). New York State Election Law currently determines the number of signatures that must be collected on an independent nominating petition to be placed on the ballot. N.Y. ELEC. LAW § 6-142 (McKinney 2003).
petitions and which requires a higher number of signatures than does a partisan designating petition. The offices that would utilize the nonpartisan election system would include mayor, comptroller, public advocate, city council member and borough president. Every qualified voter would be entitled to vote in the nonpartisan primary election. The candidates receiving the largest and second largest number of votes would advance to a general runoff election. No party labels or symbols would be

286 N.Y. ELEC. LAW § 6-142. When using an independent nominating petition to qualify to be placed on a ballot, the state election law requires 7,500 signatures for any citywide public office and 4,000 signatures for any county or borough office, the same numbers needed when using a partisan designating petition. Compare N.Y. ELEC. LAW § 6-142 and N.Y. ELEC. LAW § 6-136 (McKinney 2003). For any city council district office, however, two thousand seven hundred signatures are needed when using a nonpartisan designating petition compared with only nine hundred signatures needed when using a partisan designating petition. Id.

287 CITY IN TRANSITION, supra note 2, at 99 (providing section sixty-one of the “Draft Nonpartisan Elections Chapter”).

288 Id.

289 Id. at 103 (setting forth section sixty-six of the “Draft Nonpartisan Elections Chapter,” which requires that “[t]he board of elections shall certify the names of the persons who received the largest and next largest number of votes for mayor, comptroller, public advocate, member of the city council, and borough president, respectively”). Rather than hold a runoff election with only the top two candidates, as provided in the draft charter chapter, Dr. Lichtman suggests that by having the top three candidates who obtain over twenty-five percent of the vote move into the runoff, minorities would enhance their opportunity to be effective in the primary and general election. PRELIMINARY OPTIONS, supra note 2, at A-4. He contends that the significant size and strength of minority groups might make a three-way split beneficial because it would allow a candidate to be elected with a plurality of votes. Id. He argues that because studies of minority electoral patterns in New York City show that minorities do not consistently vote cohesively, minorities are generally not able to control the party vote despite their strong affiliation with the Democratic Party. See Hearing (Aug. 15, 2002), supra note 90 (statement of Dr. Lichtman). Ensuring an “equal opportunity to participate meaningfully in the political process in the jurisdiction,” 28 C.F.R. § 51.58(b)(1) (2003), and “influence elections and the decisionmaking of elected officials in the jurisdiction,” 28 C.F.R. § 51.58(b)(2) (2003), are of primary concern in rewriting the election rules. A runoff election with two candidates, however, will ensure that these opportunities are safeguarded, while additionally
allowed on the ballot or voting machine at the primary or general election.290

B. Reflections on the Commission’s 2002 Draft Proposal

In considering how the City Charter should be revised, the policy goals of nonpartisan elections should be evident in the construction of the revisions. First, cities may designate the scope of nonpartisan elections by applying an election system to all, or only selected, municipal offices.291 Although the charter could be revised to apply only to those offices that repeatedly suffer from lack of competition, structural consistency and efficiency would be furthered by applying a nonpartisan system to all municipal elections.292 New York City voting patterns indicate that there is virtually no competition at the general producing a winner that has received majority support from the electorate. Blacks and Hispanics constitute a substantial proportion of the voting population—twenty-three percent and twenty-five percent, respectively. CITY IN TRANSITION, supra note 2, at C-14. These proportions are significant enough for candidates to rationally desire to secure their support, even if the minority groups do not vote cohesively.

290 CITY IN TRANSITION, supra note 2, at 104 (providing section sixty-nine of the “Draft Nonpartisan Elections Chapter”).


292 A hybrid partisan-nonpartisan local election system was used in Chicago prior to 1995, in which a nonpartisan system was used to elect aldermen, while a partisan system was used to elect its citywide offices, including mayor, city clerk and treasurer. Fornek, supra note 33. The state legislature voted to change the citywide office elections to the nonpartisan format for structural efficiency purposes. Id. The costs of running a single system are lower than that for the hybrid system. Id.
election for city council, comptroller, public advocate, and borough president. Even if a nonpartisan format would not necessarily enhance the competitiveness of the mayoral race, utilizing the nonpartisan system for all offices would provide a more efficient administrative approach.

Of the forty-one largest cities administering nonpartisan elections, the majority only require a general runoff election if no candidate receives a majority of votes in the primary. Contingent runoff elections were created in response to the inefficiencies of holding two elections that produced the same result, which is particularly common in cities where voters are heavily registered with one party. The 2002 Draft Charter does not provide for this contingency, but the commission should

---

293 Mercurio, Bloomberg’s Campaign Promise, supra note 10. See supra note 216 (describing voting statistics for the 2001 primary and general election, showing major disparities in votes between the winners and the runners-up in municipal general elections).

294 See supra note 292 (discussing Chicago’s streamlined nonpartisan system). The mayoral office has seen more competition, as evidenced by the Republican Party affiliation of the current and last mayor in the Democratic Party-dominated city. See supra note 194 (citing voting statistics for the 2001 mayoral election and comparing them to those in other citywide and councilmanic offices). See also Hearing (Aug. 21, 2002), supra note 135 (statement of former New York City Mayor Koch noting that the current structure offers sufficient checks and balances, reflected in the city’s voting pattern, which has “been to elect a Republican every 30 years when the Democrats have really screwed it up bad”). But see Shipper, supra note 185 (quoting former Mayor Giuliani, who disagreed with the belief that the mayoral race was competitive, stating that he was “only the third Republican mayor in 100 years”).

295 See CITY IN TRANSITION, supra note 2, at E12-E15. See supra note 71 (listing those cities that do not hold a general election if a candidate has received a majority of votes in the primary).

296 See Fornek, supra note 33 (explaining that the primary reason for establishing this contingent general election format was “to simplify elections and save taxpayers money”); see also Hardy, supra note 33 (observing that in Democratic Party-dominated Chicago, “Republicans haven’t won a Chicago mayoral race since 1927”).

297 See CITY IN TRANSITION, supra note 2, at 102 (setting forth section sixty-five of the “Draft Nonpartisan Elections Chapter,” which establishes a nonpartisan primary); id. at 104 (setting forth section sixty-eight of the “Draft
consider its potential benefits. Contingent runoff elections could provide financial benefits to the city. Moreover, since the nonpartisan primary would be open to all qualified voters, the runoff would not be essential to ensure equal voting access.

The signature requirement for independent nominating petitions also implicates ballot access issues. The experience with nonpartisan elections in Chicago revealed that an onerously high signature requirement threatened to render their mayoral election uncontested. Candidate ballot access problems harm not only potential candidates, but also voters, who may not have the opportunity to vote for candidates of their choosing. This attenuates the representative nature of the democracy.

298 See Fornek, supra note 33 (quoting a spokesman for the Chicago Board of Elections who stated that “[t]he city could save $2 million to $2.5 million if no runoffs were required for the citywide offices”). More likely than not, however, the larger number of candidates typically on a primary ballot, the division of votes among those candidates, and the numerous offices being filled at each election will inevitably require a runoff for at least one office. Id. (noting that “those savings would disappear if even one race required a runoff”).

299 See City in Transition, supra note 2, at 102-03 (setting forth section sixty-five of the “Draft Nonpartisan Elections Chapter,” which states that “[e]very qualified voter shall be entitled to vote at such nonpartisan primary election”).

300 Steve Neal, Editorial, Change Unfair Petition Rules: Candidates for City Offices Need 25,000 Signatures to Run, CHI. SUN-TIMES, July 29, 2002 (describing the problems candidates faced with access to the ballot due to the high signature requirement for Chicago’s citywide elective offices). The nonpartisan legislation failed to specify the number of signatures needed for a candidate to gain access to the ballot. Id. The Chicago Board of Elections thus imposed a legacy rule upon all citywide offices, which required all candidates to collect 25,000 signatures, a rule previously imposed only on candidates running as an independent or new party candidate. Id. In contrast, only 5,000 signatures are required to run for statewide offices. Id.

301 See Persily, supra note 122, at 2188-89 (explaining that “ballot access laws . . . hinder . . . political participation by restricting the voter’s opportunity to cast a ballot for the candidate of their choice”).

302 Id. at 2189 (noting that the distinctive trait of democratic participation in elections from Communist systems is “the existence of some meaningful
In a typical partisan contest, the signature requirements are significantly higher for candidates not endorsed by a party, which has raised concerns that “the primary becomes little more than a state-sponsored endorsement of the candidate of the party leadership.” The differential signature requirement does not appear to be an issue under a nonpartisan system because all candidates would have to collect the same number of signatures, regardless of party endorsements. Implementing the higher signature requirement for all candidates, however, could potentially recreate the partisan system bias in the nonpartisan structure if only those candidates supported by the dominant political party are able to attain the signature threshold. Therefore, the Commission should consider the broader ballot access concern that derives from an overly high signature requirement in general and counterbalance the need for a signature requirement that is high enough to avoid the use of laundry list ballots.

CONCLUSION

The problematic reality of New York City’s current local election system becomes evident when the invalid assumptions and their supposed negative effects on voter turnout, minority power and the Republican advantage are laid aside. As a system overwhelmingly dominated by one party across a majority of local elective offices, the current system fails to create the competition necessary to keep candidates and officials locally range of choices for which a voter can express a preference”).

303 Persily, supra note 122, at 2201. For example, New York State’s current election law requires three times as many signatures for city council candidates who lack party backing. N.Y. ELEC. LAW § 6-142 (McKinney 2003).

304 See CITY IN TRANSITION, supra note 2, at 99-100 (setting forth section sixty-one of the “Draft Nonpartisan Elections Chapter,” which provides for uniform petition signature requirements).

305 See id.

306 See supra Part I.A.1 (discussing the problems of laundry list ballots, and the movement to implement short ballots, particularly in nonpartisan elections).
accountable and does not open the election process to all voters in the primary, where the vote really matters. The city’s partisan system restricts access to candidates that could bring positive change. Nonpartisan elections would pave the way to return the electoral decision to all of New York City’s voters and ensure a responsive government.
Dying to Sleep: Using Federal Legislation and Tort Law to Cure the Effects of Fatigue in Medical Residency Programs

Andrew W. Gefell*

Sawyer: Dr. Nossett, I’m going to start with you. You’ve not only seen it all, you say you’ve done it. And in fact, you once fell asleep yourself while delivering a baby?

Nossett: That’s correct.¹

Introduction

The exhausting work schedules of resident physicians in the United States create an array of grave safety problems for medical residents and the public at large. In addition to residents’ personal and emotional difficulties and the compromised quality of health care, the incidence of motor vehicle accidents that occur after residents leave work is alarming.²

* Brooklyn Law School Class of 2004; B.A., Brandeis University, 1997. The author would like to thank his parents, Paul and Peg Gefell, Johnita, Johanna, Nora and Mary Jo for their unconditional support and encouragement.

¹ Interview by Diane Sawyer with Dr. Angela Nossett, Chief Resident, Harbor UCLA Medical Center (ABC television broadcast, June 18, 2002).

² See Lisa M. Bellini et al., Variation of Mood and Empathy During Internship, 287 JAMA 3143 (2002) (finding that “enthusiasm at the beginning of the internship gave way to depression, anger and fatigue”). In addition, a recent study found that the rate of accidents involving anesthesia residents was more than twice the national average. See R.T. Gear et al., Incidence of Automobile Accidents Involving Anesthesia Residents After On-Call Duty
To combat this crisis and other problems related to resident work hours, New York created the Bell Regulations, which limit the number of hours residents may be scheduled. In addition, on November 6, 2001, Congressman John Conyers of Michigan introduced the Patient and Physician Safety and Protection Act of 2001 (PPSPA) as an amendment to Title XVII of the Social Security Act. The bill, still far from gaining sufficient support to
be passed into law, is based in large part on the New York regulations.\footnote{See 10 N.Y. COMP. CODES R. & REGS, tit. 10, § 405.4(b)(6)(ii) (2002).} Both state regulations and federal legislative action support the view that employers need to better control the scheduling of their employees to prevent foreseeable risks to others.\footnote{See Gene P. Bowen, Wherein Lies the Duty? Determining Employer Liability for the Actions of Fatigued Employees Commuting From Work, 42 WAYNE L. REV. 2091, 2092 (1996) (stating that the “notion behind such legislation appears to be recognition of an employer’s duty to monitor the work schedules of its employees to avoid creating a safety hazard to others”).} If New York serves as a guide, however, regulations may not be sufficient. The New York regulations have proven to have limited effectiveness, as hospitals routinely violate work depression and pregnancy complications.” \textit{Id.}

\textit{The PPSPA is consistent with the recognition that industries affecting public safety warrant federal regulation. For example, transportation industries are subjected to strict federal limits on the number of hours airplane pilots, truck drivers, train conductors and seamen are permitted to work. 14 C.F.R. § 121.471 (2003) (limiting flight times for all flight crewmembers); 49 C.F.R. § 395.3 (2003) (setting maximum driving times for motor vehicle carriers); 49 C.F.R. §§ 228.21 (2003) (imposing civil penalties for violating hours of service regulations for railroad employees), 49 C.F.R. § 228.23 (2003) (imposing criminal penalties for falsifying reports or records of hours of service for railroad employees); 46 U.S.C. § 8104 (2003) (setting work hour regulations for seamen). In 1999, the European Union agreed to limit the length of the work week for residents to forty-eight hours. Paul R. McGinn, Europe Will Limit Resident Hours, MED. STUDENT JAMA (Sept. 20, 1999), available at http://www.amaassn.org/scipubs/msjama/articles/vol_282/no_13/europe.htm; David Villar Patton et al., Legal Considerations of Sleep Deprivation Among Resident Physicians, 34 J. HEALTH L. 377 (2001). The authors found that in Israel, a system of longer residency programs with fewer hours during the residency “substantially enables Israel’s doctors to permit room for their own human needs, and in turn, provide compassionate and humane care as a matter of habit.” \textit{Id.} at 386, citing Jesse Lachter, Looking at the Training of House Staff, 319 NEW ENG. J. MED. 718, 719 (1988). Additionally, they report that New Zealand residents may work up to only sixteen hours consecutively, with a weekly maximum limited to seventy-two hours. \textit{Id.} Emergency room residents may work no more than ten consecutive hours, with up to fifty hours per week. \textit{Id.} Finally, Denmark, Norway and Sweden residents work thirty-seven to forty-five hours per week; in the Netherlands they are limited to forty-eight hours per week. \textit{Id.} at 387.}
hour standards.  

In addition to formal regulations, the deterrent effect of the tort system might also be utilized to “encourage” hospitals to adjust residents’ training and employment. Specifically, in the realm of third-party liability, a person struck by a sleep-deprived resident that has fallen asleep at the wheel on the way home from work may be able to sue the hospital on a theory of negligence. Although this specific claim has never been successfully tried, analogous case law and public policy suggest such a claim is legally sound and could, if triumphant, improve resident training methods and working conditions in the United States. But, ultimately, the question remains whether that is the best alternative.

Part I of this note reviews the ever-expanding landscape of scientific evidence on fatigue and its effect on human capabilities, patient care and the lives of residents. Part II introduces the elements of the New York statute, evaluates its effectiveness and briefly examines the proposed federal legislation. Part III explores whether utilizing the deterrent force of the tort system is a wise alternative or supplement to regulatory attempts to change residency working conditions. While acknowledging that the majority of courts reject imposing third-party liability on the employer, this section focuses on three analogous cases that support liability under certain circumstances. Furthermore, Part III utilizes workers’ compensation cases in a similar fashion. Part IV synthesizes direct negligence and workers’ compensation case law and argues that, within these cases, principles emerge that support a finding of negligence in the resident-employee context.

---


8 See Boston Medical Center, et al., 330 N.L.R.B. 152 (1999) (holding that medical residents are employees within the meaning of Section 2(3) of the National Labor Relations Act, notwithstanding that they also possess aspects of students).
REFORMING MEDICAL RESIDENCY PROGRAMS

Part V recognizes that third-party tort liability offers compelling benefits, but concludes that enforced public regulation of resident work hours proposes far less frightening costs and maintains the benefits of well-rested physicians.

I. FATIGUE: WHAT IT IS AND WHAT IT DOES

Two commonly cited consequences of medical resident fatigue are reduced quality of patient care and a negative impact on the health of residents.9 In addition, motor vehicle crashes, particularly after on-duty shifts, have also garnered attention in discussion of residents’ work hours.10 To understand the reasons, it is important to first understand the nature of fatigue.

Human beings have a biological need to sleep, and sleep deprivation causes the brain to signal to the body the need to sleep.11 Sleepiness is a specific term “relating to reduced alertness as a result of increased pressure to fall asleep.”12 Whether lacking sleep for twenty-four consecutive hours (“sleep loss”), or receiving inadequate sleep over a period of time

---

9 Included in Congress’ findings in support of this bill were that residents work “an excessive number [ ] of hours” that is “inherently dangerous for patients and the lives of [ ] physicians,” that “sleep deprivation of the magnitude seen in residency training programs leads to cognitive impairment” and that scientific research demonstrates that the “excessive hours worked by resident-physicians lead to higher rates of medical error, motor vehicle accidents, depression and pregnancy complications.” H.R. 3236, supra note 4, at § 2.


11 See Lyznicki et al., supra note 10, at 1908. “The sleep process involves a demand or obligatory component related to an individual’s prior amounts of rest and work, and a circadian component related to 2 intervals of increased sleepiness and lowered performance are experienced during each 24-hour period.” Id.

12 Id. at 1909. “Sleepiness is a normal manifestation of the biological need for sleep, just as hunger signals the need to eat and thirst to drink.” Id.
(“chronic partial sleep restriction”), the harmful impact on cognitive performance is similar.\textsuperscript{13} Fatigue is a feeling of physical and mental weariness resulting from exhaustion.\textsuperscript{14} A lack of adequate sleep, therefore, inevitably causes fatigue.

The implications are frightening in light of the highly complex duties of resident physicians, as the necessary skills of job performance inevitably suffer. Studies prove that motor skills such as the manual dexterity of surgical residents are vulnerable to the effects of fatigue.\textsuperscript{15} One study of emergency residents demonstrated “reductions in the comprehensiveness of history and physical examination documentation” and a decline in completion time for clinical task and accuracy tests.\textsuperscript{16} Beyond the psychomotor skills required for the job, the long hours of

\begin{flushleft}
\textsuperscript{13} Sigrid Veasey et al., \textit{Sleep Loss and Fatigue in Residency Training}, 288 JAMA 1116 (2002). The authors report that “performance testing of vigilance (responsiveness to simple repeated tasks) and serial mathematical calculations were equally affected by 24 hours of total sleep loss and 1 week of sleep restriction to 5 hours per night.” Id. at 1116-17. The studies discussed revealed that “cognitive performance [ ] of healthy young adults who were sleep deprived . . . [are] below the mean.” Id. at 1117. Furthermore, verbal processing and complex problem solving abilities were impaired, as evidenced by the finding that, “[l]earning for both complex cognitive and procedural tasks can decrease by up to 50\% when sleep loss occurs. . . .” Id. In a study observing the training experience of junior and senior residents, “[p]erformances on simulated electrocardiogram, short term recall of a list of things to do, and reaction times all deteriorated after being on call; these postcall performance deficits were similar for junior and senior residents, suggesting a lack of adaptation over time to the sleep-deprived state.” Id. The authors also pointed out, however, that these types of studies must be controlled for factors that affect sleepiness such as the intake of caffeine and other stimulants, warm ambient temperature, reduced body temperature and recent food intake. Id.

\textsuperscript{14} See \textsc{American Heritage Dictionary} 665 (3d ed. 1992). \textit{See also} Lyznicki et al., \textit{supra} note 10, at 1909 (defining fatigue as “a more complex phenomenon that may be defined as the decreased capability of doing physical or mental work, or the subjective state in which one can no longer perform a task effectively”).

\textsuperscript{15} Veasey et al., \textit{supra} note 13, at 1117.

\textsuperscript{16} Id.
\end{flushleft}
reforming medical residency programs 651

residency training have also been found to cause depression, anxiety and anger.\textsuperscript{17} Finally, and perhaps most significantly, as the long hours of residency training compound the effects of fatigue, residents consistently lose vigor and empathetic concern for patients.\textsuperscript{18}

The increased incidence of motor vehicle crashes after work, especially after on-call shifts, additionally manifest from fatigue in resident physicians.\textsuperscript{19} One study compared sleep deprivation

\textsuperscript{17} See, e.g., Bellini et al., \textit{supra} note 2, at 3143.

\textsuperscript{18} \textit{Id.}; \textit{see also} Amer Ardati, \textit{Don't Overwork Physicians, Imperil Public}, \textit{Detroit News}, Feb. 13, 2002 (quoting a resident physician in a Columbia Presbyterian case study as stating, “if you’re on two nights in a row, you want to do as little as possible. You give bad care.”); Bellini et al., \textit{supra} note 2, at 3146 (commenting that “results . . . at the end of [the one year] internship demonstrated a significant increase in personal distress coupled with a decrease in empathetic concern”); Public Citizen, \textit{ACGME’s Proposed Limits on Resident Physician Work Hours are Inadequate, Coalition Says} (Feb. 11, 2002), available at http://www.citizen.org/pressroom/release.cfm?ID=1021 (quoting Dr. Ruth Potee, national president of CIR/SEIU and a third-year family practice resident at Boston Medical Center, who said, “The consequences of working excessive hours is serious, both to our patients and to ourselves. Auto accidents, complications of pregnancy, depression—all disproportionately impact resident physicians. . . ”).

\textsuperscript{19} See Veasey, \textit{supra} note 13 at 1122 (finding that “the greatest documented danger of sleep loss for medical residents is the risk of motor vehicle crashes”); Carol Ann Campbell, \textit{Hospital Residents Plead for More Rest–Two Lawmakers Hear the Tales of Fatigue}, \textit{Star-Ledger} (Newark, N.J.), May 8, 2002, at 39 (quoting a resident at University of Medicine and Dentistry of New Jersey, who mentioned “[o]ne of our residents fell asleep in the parking lot and didn’t wake up until the morning.”); Sanjay Gupta, \textit{Is Your Doctor Too Drowsy?}, \textit{Time}, Mar. 11, 2002 at 17 (quoting a surgeon stating that “[p]ractically every surgical resident I know has fallen asleep at the wheel driving home from work . . . I know of three who have hit parked cars. Another hit a ‘Jersey barrier’ on the New Jersey Turnpike, going 65 m.p.h.”); Ivan Oransky, \textit{Post-call Fatigue Poses Risk for Residents}, \textit{Med. Student JAMA}, May 24, 1999, available at http://www.ama-assn.org/scipubs/msjama/ articles/vol_281/no_21/post.htm (stating that “[e]very resident I know has either fallen asleep behind the wheel driving home after call or knows someone involved in a post-call crash”). See also AAA F OUND. FOR TRAFFIC SAFETY, \textit{WHY DO PEOPLE HAVE DROWSY DRIVING CRASHES? INPUT FROM DRIVERS WHO JUST DID} (1999). Especially
among on-call housestaff and faculty members, including its effect on driving.\textsuperscript{20} Forty-four percent of housestaff had fallen asleep at the wheel when stopped at a red light, versus twelve percent of the faculty.\textsuperscript{21} Twenty-three percent of housestaff fell asleep at the wheel \textit{while driving}, versus eight percent for the faculty.\textsuperscript{22} Overall, a total of forty-nine percent of housestaff had fallen asleep at the wheel, with ninety percent of these incidents occurring after an on-call shift.\textsuperscript{23} Similarly, the accident rate of anesthesiology residents surveyed in another study was more than twice the national average.\textsuperscript{24} The solution seems simple. Because fatigue is a state of sleep deprivation, “[t]he most effective countermeasure . . . is sleep.”\textsuperscript{25} Limitations placed on resident work hours provide the opportunity to catch up on sleep, presumably leading to less fatigue and, therefore, improved patient care and resident health and safety.

relevant to the residency discussion are the conclusions that work and sleep schedules are associated with car crashes, drivers in “sleep-crashes” are more likely to involve an atypical schedule, and that “working the night shift increases the odds of a sleep related (versus non-sleep-related) crash by nearly 6 times.” \textit{Id.} at 50.

\textsuperscript{20} Marcus & Loughlin, \textit{supra} note 10. The study utilized an anonymous questionnaire mailed to pediatric residents and full-time faculty. \textit{Id.} at 763. The questionnaire included general questions about being on call, participating in other types of nocturnal work, falling asleep while driving, traffic citations and motor vehicle accidents. \textit{Id.} All incidents relating to falling asleep at the wheel occurred after on-call shifts. \textit{Id.} The authors provided that “the study has the limitations of a retrospective questionnaire study . . . and it is possible that [housestaff] provided biased responses.” \textit{Id.}

\textsuperscript{21} \textit{Id.} at 764.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} Gear et al., \textit{supra} note 2. “Thirty-six-item questionnaires were mailed to anesthesia residents in training at the Hospital of the University of Pennsylvania . . . ask[ing] subjects to report on their own traffic accidents, near accidents, or traffic violations occurring during their residency which they attributed to post-call fatigue.” \textit{Id.}

\textsuperscript{25} Veasey et al., \textit{supra} note 13, at 1122.
II. THE PUBLIC REGULATION PATH

Convinced that the hazardous effects of sleep loss and fatigue for medical residents is a serious problem for patients and residents, New York decided to regulate the work hours of residents in its teaching hospitals. However, states throughout the country have been slow to follow. Nonetheless, the problem calls for attention, as evidenced by the current proposal to nationalize the substance of the New York regulations in the form of federal legislation.

A. New York State’s Bell Regulations

The New York State Bell Regulations were largely motivated by the Libby Zion case in which sleep loss and fatigue were blamed for the alleged negligence of a resident physician. A grand jury investigation attributed fault to the residency training system, as opposed to doctors or the hospital. The regulations

---

26 See supra, note 3 (providing a brief history of the New York Regulations).

27 Id. (noting that only New Jersey and Puerto Rico have proposed such regulations).

28 See supra, note 4 (discussing the PPSPA).

29 See generally Dan Collins, A Father’s Grief, A Father’s Fight, L.A. TIMES, Feb. 1, 1995, at E1. In 1984, Libby Zion was brought to New York hospital after suffering from a high fever and earache. Id. She was given a dosage of Demerol despite her use of an anti-depressant drug, Nardil. Id. A mixture of the two drugs can be fatal, and Libby died within five hours. Id. Her father filed a lawsuit against the hospital. Id. The claim included a charge that the exhausted resident who prescribed the Demerol was negligent in failing to realize that the combination of the two drugs can prove fatal. Id.

are designed to protect resident health and patient care through scheduling and resident work hour limits.

First, the Bell Regulations provide that “the scheduled work week shall not exceed an average of eighty hours per week over a four week period.” While the cumulative hours of a given work week may exceed eighty, the four week average must meet the criteria. The regulations are flexible, therefore, in that they reasonably account for patient care needs that require a rigorous work week, while maintaining a four week average to allow adequate rest.

Second, “trainees shall not be scheduled to work for more than twenty-four consecutive hours.” This section addresses the detrimental effects that result from sleeplessness but also recognizes the hospital’s need to provide round-the-clock patient care services to the public. Although twenty-four consecutive hours without sleep is arguably dangerous, the regulations at least set a clearly defined limit.

Third, the regulations provide that on-call duty shall not be included in the twenty-four and eighty hour limits, so long as “such duty is scheduled for each trainee no more often than every third night . . . [and] a continuous assignment that includes night shift on-call duty [must be] followed by a non-working period of no less than sixteen hours.” On-call duty can demand extraordinarily long hours of work without sleep. The

---

34 10 N.Y. COMP. CODES R. & REGS., tit. 10, § 405.4(b)(6)(ii)(b) (2002). See also Patton et al., supra note 5, at 380 (reporting that “researchers have even compared the effects of sleep deprivation to the effects of alcohol intoxication”).
36 See, e.g., David Abel, Bill Eyes Guidelines on Work Hours for Medical Residents, BOSTON GLOBE, Nov. 10, 2001, at B1 (stating that a former resident of Baltimore’s Johns Hopkins Hospital abandoned her surgical training after falling asleep during a 60-hour shift without rest); Gupta, supra
regulations mandate that hospitals at least spread out on-call shifts so residents can consistently obtain a reasonable amount of rest while completing their regular weekly schedules.

These seemingly realistic regulations account for hospitals’ staffing needs while limiting the inherent sleep deprivation problems of residency training methods. New York hospitals, however, continue to schedule residents beyond the prescribed limits.\(^{37}\) Although the Bell Regulations focus on reducing fatigue, enforcement of the prescribed limits has twice proven the regulations somewhat ineffective, both in 1998 and 2002.\(^{38}\)

\(^{37}\) See Health Department Cites 54 Teaching Hospitals, supra note 7. These 2002 violations came four years after a first wave of sweeping inspection by the Department of Health. New York State Department of Health, NYS Hospitals Fined for Violating Resident Work Hours (June 18, 1998) [hereinafter NYS Hospitals Fined], available at http://www.health.state.ny.us/nysdoh/commish/98/workhrs.htm. The department issued a report based on a survey of twelve teaching hospitals “showing widespread abuse of resident work hour limits, particularly among surgical residents in New York City.” Id. The report specifically found that all first year residents in the cardiovascular surgical program worked 110-130 hours per week. Id. Ten of eighteen surgical residents worked in excess of eighty-five hours per week. Id. Finally, residents were found to have worked until 8 p.m. after a thirty-six hour shift only to return to work at 6 a.m. the next day. Id.

\(^{38}\) See id. (reporting the 1998 violations); Health Department Cites 54 Teaching Hospitals, supra note 7 (reporting the 2002 violations). The Department of Health contracted with IPRO, an independent not-for-profit corporation, to monitor resident working hours in New York State. IPRO, New York State Resident Work Hour Regulations (n.d.). As of May 2003, however, the annual report had not been published so it is difficult to assess whether IPRO has been more successful. Furthermore, the Accreditation Council for Graduate Medical Education (“ACGME”), the body in control of determining accreditation of teaching hospitals, announced its own enforceable guidelines applicable to residency programs beginning July 3, 2003. Accreditation Council for Graduate Medical Education, Resident Duty Hours Language (Feb. 13, 2003), [hereinafter Resident Duty Hours Language] available at http://www.acgme.org/DutyHours/dutyHoursLang_final.asp. Also mirroring in large part the New York State Bell Regulations, these guidelines seek to self-regulate the teaching hospitals with the enforcement
B. The Patient and Physician Safety and Protection Act of 2001

The PPSPA essentially mirrors the Bell Regulations in regard to specific regulation of residents’ work hours and schedules.\(^{39}\) Supported by findings drawn from scientific evidence asserting that the effects of fatigue manifest in compromised patient care and endangered resident health, the legislation appropriately recognizes that resident work hours need to be reduced.

For example, unlike the state regulations, however, the federal legislation contains unique enforcement mechanisms. The Act conditions receipt of federal funds on compliance with the work hour limits.\(^{40}\) Furthermore, the Act provides an incentive to mechanism of more frequent review of programs. Id. For example, during routine accreditation surveys in 1999, the ACGME issued citations for work hour violations to 11.7% of programs surveyed. Jay Greene, More Residencies Cited for Work Violations, AMNEWS, Mar. 6, 2000, available at http://www.ama-assn.org/sci-pubs/amnews/pick_00/prl20306.htm. ACGME officials stated that citations had been increasing over the past few years. Id. Nevertheless, “[t]o date, the ACGME has not withdrawn accreditation of any program solely for overworking residents.” Id. Therefore, while setting limits for the number of hours residents are allowed to work in accredited hospitals recognizes the problem, lack of enforcement will have trouble solving it. In comparison, the New York State Department of Health attempts, as an external regulator, to implement a rational work environment for residency training programs. If the shortcomings demonstrated in the 1998 and 2002 reports are any indication of the problem of enforcement, truly internal enforcement by the ACGME is limited as well if enforcement has no teeth. But see Jaya Agrawal, Resident Education and Safety, 66 Am. Fam. Physician 1569 (2002) (reporting that the Yale surgical residency program is at risk of losing accreditation unless changes are made with respect to the number of hours residents work).

\(^{39}\) See generally H.R. 3236, supra note 2. Similarities include the eighty-hour work week, twenty-four consecutive hour limit and required time off between shifts. Compare 10 N.Y. Comp Codes R & Regs., tit. 10, § 405.4(b)(6)(ii) with H.R. 3236, § 3 (j)(1)(A).

\(^{40}\) H.R. 3236, supra note 2, at § 3 (j)(1)(A). This distinction is found in an enforcement mechanism: “ . . . [A]s a condition of participation under this title each hospital shall establish the following limits on working hours.” Id. Thus far, assigning standards to the guarantee of federal funds as a
hospitals that successfully conform to the new standards within five years.41

Like the Bell Regulations, which generated public attention by highlighting the conditions of residency programs, federal legislation could spark national awareness of the issues concerning residents—especially because it is likely that everyone, at some point in their lives, will rely on a resident physician in a time of need.42 The national community responding to the concerns of fatigue, coupled with the past success of tailoring federal funds to government standards and the financial incentive offered for compliance, indicates that the PPSPA takes what New York has attempted to achieve a step further.

While violations of the New York regulations are well documented, not all hospitals, or departments or specialties within hospitals, fail to comply.43 Therefore, even though certain conditioning device has proven successful. Dori Page Antonetti, A Dose of Their Own Medicine: Why the Federal Government Must Ensure Healthy Working Conditions for Medical Residents and How Reform Should be Accomplished, 51 CATH. UNIV. L. REV. 875, 913 (2002). The Balanced Budget Act of 1997 imposed residency program guidelines for federal funding on teaching hospitals in order to better serve public health. Id. By attaching conditions to federal grants, thus providing a powerful incentive for hospitals to follow such guidelines, the legislation proved successful in that all of the goals of the initiative were met. Id.

41 H.R. 3236, supra note 2, at § 4 (providing funds).

42 In fact, according to the results of the 2002 Sleep in America poll, conducted by the National Sleep Foundation, the respondents indicated, on average, the maximum amount of time a doctor should work is 9.8 hours per day. NATIONAL SLEEP FOUNDATION, 2002 “SLEEP IN AMERICA” POLL (2002). Eighty-six percent also stated that if they knew their doctor was working for twenty-four consecutive hours, they would feel anxious about their safety, and seventy percent would ask for another doctor. Id at 26. Similar results reflected concern involving drowsy airplane pilots, and workplace overtime generally. Id. at 27-28; see also, Antonetti, supra note 40, at 909 (observing that “[n]ewspapers, documentaries, and popular television programs have shed light on the problem of excessive work hours during residency . . . expos[ing] a system previously hidden from the public eye, and . . . spark[ing] criticism and outrage”).

43 See, e.g., Anne Barnard & Liz Kowalczyk, Medical Resident Workload
hospitals may not maintain a perfect record, they have made strides in reducing residents’ workloads.\textsuperscript{44} Still, public regulation as a solution to problems resulting from the excessive work schedules of resident physicians is far from perfect, as demonstrated by the ability of hospitals to function while absorbing the costs of fines.\textsuperscript{45} The PPPSA appropriates amounts to cover the “incremental costs incurred in order to comply with the requirements imposed by [the] Act.”\textsuperscript{46} Therefore, federal regulation that invests in the system it seeks to regulate is a step in the right direction.

\textit{Curbed, Big Impact Seen on Hub Hospitals}, \textit{BOSTON GLOBE}, June 13, 2002, at A1. Brigham and Women’s Hospital has cut back the hours in their surgery program to eighty to eighty-five hours. \textit{Id.} Dr. Michael Zinner, Chief of Surgery, planned to require doctors to sacrifice research time to help cover shifts, hire more physicians’ assistants and provide additional training to nurses. \textit{Id.} Brigham and Women’s and Yale-New Haven Medical Center estimated that changing their surgery programs could cost $1 million a year. \textit{Id.; see also} Jay Greene, \textit{Residencies Successful in Curbing Work-Hour Violations}, \textit{AMNews} (July 30, 2001), available at http://ama-assn.org/sci-pubs/amnews/pick_01/prsc0730.htm.

\textsuperscript{44} The regulations force hospitals to reduce resident physicians’ workloads and assume financial burdens. For example, Jackson Memorial Hospital in Miami has dealt with the eighty hour week for more than six years, since residents unionized and bargained for change. See Lamas, \textit{supra} note 30. While residents are not barred from working beyond the eighty hours, the hospital did hire “physician extenders,” laboratory technicians, nurse practitioners and physician assistants. \textit{Id.} This additional personnel may help to “fill the gaps,” but it is noteworthy that the annual overtime budget ran out after four months. \textit{Id.; see also} Jackie Jadrank, \textit{Residents Defend Schedule}, \textit{ALBUQUERQUE JOURNAL}, July 8, 2002, at C1. Steve McKernan, CEO of the University of New Mexico Hospital, in responding to cutting resident work hours, “It’s going to be more expensive. We’ve routinely been adding advance-practice nurses.” \textit{Id.} However, hiring more advance-practice nurses comes at almost twice the cost. \textit{Id. But see Agrawal, supra} note 38.

\textsuperscript{45} See Health Department Cites 54 Teaching Hospitals, \textit{supra} note 7; NYS Hospitals Fined, \textit{supra} note 37.

\textsuperscript{46} H.R. 3236, \textit{supra} note 2, at § 4. Compare Antonetti, \textit{supra} note 40 (stating that in authorizing financial assistance, “the federal government may provide teaching programs with total funds up to $1 trillion in 2003, $800 million in 2005, $400 million in 2006, and $200 million in 2007”).
III. TORT LIABILITY FOR HOSPITALS AS AN ALTERNATIVE DETERRENT

Regardless of good intentions, the enforcement problems in New York require creative thinking to accomplish the task of reducing resident work hours in the name of improved health care and healthier residents. When a fatigued resident commits a medical error that causes injury, a negligence claim arises and an explanation of why the negligence occurred is inconsequential. Therefore, while fatigue may increase the number of medical errors, the issue may be moot in the context of medical malpractice. When a resident falls asleep at the wheel after an exhausting shift, however, analogous case law illustrates that actual fatigue and its cause become a central theme in litigation.

A. Robertson v. LeMaster

In Robertson v. LeMaster, the Supreme Court of West Virginia found a railroad company liable for damages from an accident caused by an employee who fell asleep driving home from work.47 After laboring for more than twenty-six hours at a train derailment site, the employee, LeMaster, finally insisted that he was too tired to continue working.48 The employer suggested that if he would not work, he should go home.49 Another railroad employee drove LeMaster to his car—LeMaster fell asleep with a lit cigarette in his hand during the ride.50 On his way home he fell asleep at the wheel, resulting in an accident with Robertson.51

In his claim against the railroad, Robertson argued that the company “knew or should have known that its employee

49 Id.
50 Id.
51 Id.
constituted a menace to the health and safety of the public.”52 The railroad contended it had no duty, as a matter of law, to control an employee acting outside the scope of employment.53 In the alternative, it argued that any negligence on its part was not the proximate cause of the injuries sustained, and the employee’s negligence was an independent intervening cause that cut the string of causation.54

On the issue of duty, the Robertson court recognized that under traditional principles of tort law, an employer has no duty to control employees outside the scope of employment.55 Nevertheless, the court asserted that the issue was not whether the employee was to be controlled, but, rather, “whether the [railroad’s] conduct prior to the accident created a foreseeable risk of harm.”56 According to the Restatement (Second) of Torts, an affirmative act may give rise to a duty to use reasonable care if such an act creates an unreasonable risk of harm to another.57 Here, requiring an employee to work unreasonably long hours, driving him to his vehicle and sending him on the highway in an exhausted condition satisfied the requirement for such an act.58 In addition, the court considered “the likelihood of injury, the magnitude of the burden in guarding against it, and the consequences of placing that burden on the defendant.”59 The court held that a reasonable jury could find that the employee, after working excessive hours, was in such an exhausted condition that driving caused a foreseeable and unreasonable risk of harm to motorists.60 In the view of the Supreme Court of West Virginia, the duty analysis is primarily driven by foreseeability.

52 Id.
53 Id.
55 Id. at 567.
56 Id.
57 RESTATEMENT (SECOND) OF TORTS § 321 (1965), cited in Robertson, 301 S.E.2d at 567.
58 Robertson, 301 S.E.2d at 568-69.
59 Id. at 568.
60 Robertson v. LeMaster, 301 S.E. 2d 563, 570 (W. Va. 1983).
The court also rejected the railroad’s argument that the employee-driver’s negligence constituted an intervening cause that broke the chain of causation as a matter of law.\textsuperscript{61} Robertson argued that LeMaster’s negligent driving was caused by fatigue directly attributable to the employer’s negligence in imposing unreasonable work hours.\textsuperscript{62} The plaintiff argued that the employer’s negligence “reduced the capability of its employee to think and act as a reasonable person.”\textsuperscript{63} Further, the plaintiff argued that if the intervening cause can be reasonably anticipated, liability may be imposed on the defendant because “the risk created by the defendant may include the intervention of the foreseeable negligence of others.”\textsuperscript{64}

Foreseeability of harm, as with duty, played a critical role in the court’s analysis of causation, and the plaintiff won the day.\textsuperscript{65} The employee arguably broke the chain of causation through his own negligence—that is, by deciding to drive while fatigued. Despite this fact, the court found it reasonable to attribute this seemingly independent decision to the negligence of the employer in requiring an unreasonable work schedule.\textsuperscript{66} Since the alleged negligence of the employee did not “constitute a new effective cause and operate independently,” such an intervening cause could not “relieve a person charged with negligence in connection with an injury.”\textsuperscript{67} Moreover, since the intervening cause could be anticipated after such unreasonable hours, the court held that the jury could conclude “LeMaster’s negligent conduct was a direct result of the mental fatigue and physical

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} Id.\textsuperscript{.}
\item \textsuperscript{62} Id.\textsuperscript{.}
\item \textsuperscript{63} Id.\textsuperscript{.}
\item \textsuperscript{64} Id. (quoting W. Prosser, The Law of Torts (4th ed. 1971)).
\item \textsuperscript{65} Robertson v. LeMaster, 301 S.E. 2d 563, 570 (W. Va. 1983). (stating that if “[t]he Defendant railway’s negligence reduced the capability of its employee to think and act as a reasonable person . . . LeMaster’s conduct would not constitute an intervening cause so as to relieve the railway company of liability”).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id. at 569 (quoting, Lester v. Rose, 130 S.E.2d 80 (1963)).
\end{itemize}
\end{footnotesize}
exhaustion attributable to the [employer’s] negligence." 68 Therefore, the employer’s creation of a poor judgment maker, the employee, outweighed any negligence on the part of LeMaster himself. 69

In the context of overworked medical residents, a hospital is likely to argue that the resident knew of his or her fatigue and weakened ability to drive safely, yet made the decision to drive home. 70 At that moment, the employee becomes a causal actor and, arguably, the cause of the accident. 71 Applying Robertson’s reasoning, however, by scheduling unreasonable hours and causing sleep deprivation, the hospital creates an environment in which the ability of a resident to make sound judgments is significantly damaged. 72 As such, although the resident makes a

68 Robertson, 301 S.E.2d at 570.
69 The court reversed and remanded with instructions that reasonable persons may draw different conclusions from the evidence and facts of the record regarding responsibility for plaintiff’s injuries. Id. Presumably, after the directed verdict of the lower court in favor of the employer was reversed, thus opening the door to potential liability, the case settled. Id. Therefore, although the court did not expressly hold that the railroad was negligent in working its employees for an excessive number of hours, its willingness to give a theory of negligence with third-party liability to the jury revealed that it considered the cause of action legally sound. Indeed, the court opined that “if the intervening cause is one which is to be reasonably anticipated, the defendant may be liable, for ‘[t]he risk created by the defendant may include the intervention of the foreseeable negligence of others.”’ Id. (quoting W. PROSSER, THE LAW OF TORTS (4th ed.) (1971)). Thus, in the employer-employee context, it appears that the employer may commit acts sufficient to create legal causation. Id. Resident physicians become exhausted and fall asleep at the wheel often because of excessive work hours. See Lyznicki et al., supra note 10. Therefore, assigning long hours as a condition of employment would seemingly swallow any negligence on the part of the resident-driver.

70 See Robertson, 301 S.E. 2d at 569. In Robertson, the court articulated the employer’s defense that it was not the proximate cause of the car accident occurring during the commute from work. Id. “The thrust of the [employer’s] argument . . . is that the negligence of [the employee] constituted an independent intervening cause of the accident that broke the chain of causation.” Id.

71 Robertson v. LeMaster, 301 S.E. 2d 563, 569 (W. Va. 1983).
72 See Patton et al., supra note 5, at 380 (observing “[s]ome researchers
conscious, albeit distorted, decision to drive home despite feeling exhausted, a strong causal relationship exists between the creation of sleep deprivation through excessive scheduling and falling asleep at the wheel.73

B. Faverty v. McDonald’s

An appellate court in Oregon similarly analyzed third-party liability of an employer for injuries resulting from an automobile accident involving an employee who had worked long hours.74 In Faverty v. McDonald’s, the employee, a high-school student, worked at one of McDonald’s fast food restaurants.75 He worked his usual shift, 3:30 p.m. to 7 p.m.76 He also worked a cleanup shift from midnight until 5 a.m. and continued to work yet another shift from 5 a.m. until 8:21 a.m., at which point he asked to leave because he felt sleepy.77 Shortly after being allowed to leave, the employee began his trip home and either became drowsy or fell asleep at the wheel and caused the accident.78 The plaintiff, Faverty, was injured and the employee died in the accident.79 The plaintiff settled his claims against the employee’s representatives and pursued a claim against McDonald’s, alleging that McDonald’s was negligent in scheduling its employee too many hours without allowing adequate time for rest.80

As in Robertson, the employer’s initial argument focused on the absence of duty.81 Specifically, McDonald’s argued it could have even compared the effects of sleep deprivation to the effects of alcohol intoxication”).

73 Robertson, 301 S.E. 2d at 569.
74 Faverty v. McDonald’s, 892 P.2d 703 (Or. Ct. App. 1995).
75 Id. at 705.
76 Id.
77 Id.
78 Id.
79 Id.
80 Faverty v. McDonald’s, 892 P.2d 703, 705 (Or. Ct. App. 1995).
81 Id. at 706; Robertson v. LeMaster, 301 S.E. 2d 563, 565 (W. Va.
not be held liable as a matter of law because it had no duty to prevent an employee from working as many hours as the employee in this case did. The court disagreed. Rather than analyzing whether the employee could or should be controlled, the court agreed with the plaintiff that liability depends on whether the employer created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. The court held that, even absent a special relationship, a defendant “is subject to a general duty to avoid conduct that unreasonably creates a foreseeable risk of harm to a plaintiff.” Therefore, the court concluded that McDonald’s created a duty because it should have foreseen that an employee working three shifts in a twenty-four hour period posed a risk of harm for motorists when that exhausted employee drove home from work.

McDonald’s next argued that, even if subject to this general duty, there was no evidence that it knew or should have known that the employee was so fatigued that it could have foreseen the possibility of an accident. The court rejected these arguments.

---

82 Faverty, 892 P.2d at 706 (noting that the employer relied on Sections 315 and 317 of the Restatement (Second) of Torts). Section 315 of the Restatement provides that “there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct.” Restatement (Second) of Torts § 315 (1965). Section 317 provides an exception to Section 315’s general rule of nonliability for failing to control the conduct of third persons by placing the master under a duty to exercise reasonable care if the servant is either on the master’s premises or is using the master’s chattel at the time of injury. Id. at § 317. Since the accident that caused the injuries did not occur on the employer’s premises, and the employee was not at that time using the employer’s chattel, the exception provided by Section 317 did not apply. Faverty, 892 P.2d at 708. Therefore, the employer argued that the general rule of nonliability for the conduct of third persons should apply. Id.

83 Id. at 706.
84 Id. at 708.
85 Faverty v. McDonald’s, 892 P.2d 703, 708 (Or. Ct. App. 1995).
86 Id. at 710.
87 Id. at 709.
REFORMING MEDICAL RESIDENCY PROGRAMS

Based on the facts, McDonald’s controlled all of the work assignments, the court concluded it knew how often its employees were working. McDonald’s had a policy against working high school students after midnight and, when necessary, it did so only once a week. A similar company policy prohibited employees from working two shifts in one day. The court found that McDonald’s knew of two recent accidents involving employees leaving work late and falling asleep at the wheel. There was also evidence that the employee was visibly fatigued, and the managers on staff that evening observed the employee throughout his shift. Given these facts, the court determined that a reasonable jury could conclude that the employer knew or should have known that working its employee so many hours would negatively affect his ability to drive, and the employer should have foreseen the risk of a car accident after its employee worked three shifts in less than twenty-four hours.

Finally, McDonald’s argued that since the employee “volunteered” for the cleanup project, it could not be negligent as a matter of law. The court was not persuaded. The court found

88 Id.
89 Id.
90 Id.

91 Faverty v. McDonald’s, 892 P.2d 703, 709 (Or. Ct. App. 1995). The court observed, “According to at least one of [the employer’s] managers, those policies were adopted and enforced out of concern that employees not become overly tired on the job.” Id. Therefore, the employer’s violation of a self-imposed policy factored in to the court’s analysis in siding with the plaintiff.
92 Id.
93 Id. at 710.
94 Id. The existence of self-imposed shift limits indicated that the employer knew of the risk involved with overworking high school employees. Id. at 709 (stating that “according to at least one of [the employer’s] managers, those policies were adopted and enforced out of concern that employees not become overly tired on the job”).
95 Id. at 710.
96 Id.
that the employer affirmatively asked the employee to work, controlled all work assignments and penalized employees for not working as assigned.\footnote{Faverty v. McDonald’s, 892 P.2d 703, 710 (Or. Ct. App. 1995).} Acknowledging the vulnerable position of employees hesitant to fill shifts and complete special duties, such as cleanup projects, the court noted that even if the employee volunteered the managers knew that assigning this shift to this employee would violate company policies.\footnote{Id. (stating that plaintiff did not “out of the blue, volunteer to take three shifts in one 24-hour period. Defendant affirmatively asked him to work those hours.”).} In addition, the court seized upon the fact that the managers were aware of the employee’s condition and compared the managers to “a bartender who serve[s] to a visibly intoxicated person who then cause[s] an automobile accident that harmed another” after that customer “volunteers” to pay for the drink.\footnote{Id. Dram Shop Acts provide an illustrative example. See, e.g., Michael L. Young, Note, Reinventing the “Legislative Intent, or Rather the Legislative Mandate” on Dram Shop Liability in Missouri: A Look at Kilmer v. Mun, 45 ST. LOUIS. U. L. J. 625 (2001). At common law, tavern owners “were not liable for injuries suffered by the patron or a third party because the proximate cause of the injuries was the patron’s consumption of alcoholic beverages, and that patron’s negligent driving or other behavior, not the tavern or restaurant owner’s sale of the beverages.” Id. at 629. Although the Prohibition Era’s Dram Shop Act was repealed at the end of Prohibition in 1934, it remained a criminal offense to serve alcoholic beverages to minors or “habitual drunkards and the apparently intoxicated.” Id. at 632. By the 1980s, however, in response to the terrible problems involved with drunk driving, Missouri, and many other jurisdictions abrogated the traditional proximate cause rule. Id. By 1983, the Missouri Court of Appeals found that “plaintiffs [including third parties] could bring a civil action against tavern owners by expanding the duty of care dram shop owners owe to the public when selling alcoholic beverages to their customers.” Id. at 635. This was justified on the grounds that since an intoxicated person is more likely to cause harm than a sober person, “tavern owners [have] a duty of care to stop serving alcoholic beverages to intoxicated persons.” Id. In 1985, however, Missouri became the only state to pass legislation that requires criminal conviction of a tavern owner before civil liability can be imposed. Id. at 639. Today, only a few states have no dram shop liability at all. Id. The Missouri courts have responded to passage of this law with judicially activist interpretation in creating broad areas of liability.}
REFORMING MEDICAL RESIDENCY PROGRAMS

Faverty illustrates the fact-sensitive nature of negligence cases. The court looked at the circumstances of the case to determine that a reasonable jury could find the employer negligent.\(^{100}\) It is important to note that the fact that the employer in Faverty worked the employee beyond its own rules was crucial to the court’s decision.\(^{101}\) Without such a policy and blatant violation, the court may not have reached the same result.\(^{102}\)

As significant as Faverty may be, the case provides little guidance as to what actually constitutes a reasonable work schedule. In concluding that liability was reasonable, the Faverty court found a duty arising out of the foreseeable risks of harm and consequences of employers’ actions towards their employees.\(^{103}\) Therefore, working an employee an unreasonable number of hours and thus creating a foreseeable risk of falling asleep at the wheel and causing an accident also creates a duty to prevent such harm.\(^{104}\) The Faverty court’s failure to provide any working guidelines however, renders the opinion open to the criticism that its decision was value-driven or merely an extraordinary case with abysmal decisionmaking on the part of the employer, thus supplying little precedential value.\(^{105}\)

---

See generally id.

\(^{100}\) Faverty, 892 P.2d at 710.

\(^{101}\) Id.

\(^{102}\) Id. at 709-10. Similarly, the existence of a federal regulation does not necessarily give rise to negligence per se. Parker v. R & L Carriers, Inc., 560 S.E.2d 114 (Ga. Ct. App. 2002). In Parker, the employee, a truck driver, violated the Federal Motor Carrier Safety Regulations by driving beyond the number of hours permitted. Id. The court found that irrelevant to the employee’s running a red light. Id. at 115. “The proximate cause of the accident was the failure to yield the right of way, not the failure to follow federal regulations. [The employee’s] inattention or fatigue may have explained his failure to yield the right of way . . . but whether his fatigue violated a federal regulation is irrelevant.” Id.

\(^{103}\) Faverty v. McDonald’s, 892 P.2d 703, 710 (Or. Ct. App. 1995).

\(^{104}\) Id.

create “a genuine issue of material fact concerning whether there was ‘a foreseeable risk of harm which the employer had a duty to guard against’”); Hershman v. New Line Prods., Inc., No. B145028, 2001 WL 1470360 at *3 (Cal. App. 2 Dist., Nov. 20, 2001) (stating that “a 19-hour shift and 70 hours in the preceding five days was not enough of a factual basis upon which to impose liability”). The majority of courts are hesitant to impose third-party liability on employers for the tortious acts of employees during the commute. See, e.g., McNeil v. Nabors Drilling USA, Inc., 36 S.W.2d 248 (Tex. App. 2001). In McNeil, the court refused to impose liability on the grounds of an absence of a legally recognized duty to third parties. Id. at 251. The employee received less than fifteen hours of sleep over the course of four days at the employer’s drilling rig site. Id. at 249. On the fourth day, the employee decided to drive home to rest, instead of utilizing the on-site sleeping quarters provided by the employer. Id. The employee neither complained to supervisors about his lack of sleep, nor discussed his plan to rest at home. Id. During the drive, after making stops at a store, car wash and another drilling rig, he fell asleep at the wheel and crashed into the plaintiff, injuring her. Id. The court began its analysis by determining whether an “employer assumes a duty over its employee’s off-duty conduct when the employer is aware of the employee’s incapacity and affirmatively attempts to control the employee.” Id. at 250. Lacking sufficient knowledge of the employee’s state of fatigue, the duty question was dismissed. Id. at 251. Furthermore, the court stated that employers are not legally required to “monitor their employees before allowing them to leave work”, and employers implementing safety policies “to prevent employee incapacity do not assume a duty to third parties.” Id.; see also D’Amico v. Christie, 518 N.E.2d 896 (N.Y. 1987). In comparing Otis Engineering v. Clark, infra pp. 21-24, the court noted that it had not come across sufficient facts in which the employer “virtually placed its employee behind the wheel.” Id. at 902. Since the employer could not have reasonably controlled the employee’s conduct, “plaintiffs [ ] failed to demonstrate any legal duty in the existing law of this State that [the employer] can be said to have breached.” Id.; Depew v. Crocodile Enterprises, Inc., 73 Cal. Rptr.2d 673 (Cal. Ct. App. 1998). The employee worked 17.5 hours, then another six hours after he had sixteen hours during which he did not have to work. Id. at 678. During the drive home, the employee caused an automobile accident with the plaintiff. Id. The court concluded “there was an insufficient causal nexus between [the employee’s] employment and [plaintiff’s] death.” Id.

However, the fact-sensitive nature of negligence cases permits liability to be imposed under certain circumstances. See Faverty v. McDonald’s, 892 P.2d 703 (Or. Ct. App. 1995); Otis Engineering v. Clark, 668 S.W.2d 307 (Tex. App. 1983); Robertson v. LeMaster, 301 S.E.2d 563 (W. Va. 1983). Therefore, a plaintiff is well-advised to assert the existence of egregious work
Nonetheless, even if the line to draw for an excessive work schedule is usually difficult, if not impossible, Faverty demonstrates that egregious circumstances can give rise to third-party liability.

In discussing this duty issue, the difficulty seems to arise at the inability to determine the nature of such duty. Id. at 2103. On the one hand, a finding of negligence could be grounded upon nonfeasance—“failure to prevent the employee from leaving in an incapacitated state”—or, in the alternative, misfeasance—“allowing, if not requiring, the employee to work long hours and then setting the visibly exhausted employee on the road to drive home.” Id. The Robertson and Faverty courts relied upon the latter. Id. at 2104. The nonfeasance path severely limits third-party liability by requiring the employer to stop the employee from driving home. Moreover, it “ignores the possibility that the employer has voluntarily entered an affirmative course of action affecting the interests of one of its employees and has thereby assumed a duty to act with reasonable care.” Id. at 2105. On the other hand, the concept of misfeasance recognizes the causal relationship between the affirmative act of imposing a grueling work schedule and the hazard of driving an automobile in an exhausted state. “The Robertson court seemed to suggest that the duty arose sometime during the excessive work period, while the Faverty court seemed to suggest that the duty arose as early as the point of scheduling.” Id. at 2109. In synthesizing Faverty, Bower suggests that the court should have been more explicit: “The employee’s schedule was excessive, he became visibly incapacitated, he asked to go home, and he was released—end of analysis.” Id. at 2110. Without such precise instruction, applying these principles to the hospital-resident scenario raises similar problems. On the one hand, hospitals have for years administered residency programs that are grueling, in which residents become incapacitated and leave work to drive home after a long shift. See Marcus & Loughlin, supra note 10. Therefore, if the case is one of negligent scheduling, the hospital is negligent on a weekly, if not daily, basis. On the other hand, if the scheduling is not excessive on its face, and liability depends on the existence of an employer’s affirmative act that creates a foreseeable danger to others, the release of the visibly incapacitated employee constitutes negligence. In that case, employer liability has a stronger case because the employer not only caused the incapacitation but also failed to guard against it. This is in line with the theory of misfeasance.
C. Otis Engineering Corp. v. Clark

In Otis Engineering Corp. v. Clark, an appellate court in Texas adopted the Robertson reasoning and held that an employer has a duty to prevent employees under its control from causing a foreseeable risk of harm to others.\textsuperscript{106} In Otis, an employee with a history of drinking on the job was visibly intoxicated at work.\textsuperscript{107} After he returned from his dinner break, his supervisor suggested that he go home and escorted him to his car.\textsuperscript{108} The supervisor asked if he could make it home and the employee replied that he could.\textsuperscript{109} Thirty minutes later, the employee caused an accident that killed two women.\textsuperscript{110} The employee’s blood alcohol level was so high that an expert opined that “100% of persons with that much alcohol in their systems exhibit signs of intoxication observable to the average person.”\textsuperscript{111} The supervisors were aware of his intoxication and that he was in no condition to drive.\textsuperscript{112} Furthermore, the employer maintained a nurses’ station for ill or disabled employees.\textsuperscript{113} Nonetheless, the supervisor chose to send the employee out on the highway.\textsuperscript{114}

\textsuperscript{106} 668 S.W.2d 307, 311 (Tex. App. 1983).
\textsuperscript{107} Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. App. 1983).
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. Larry and Clifford Clark brought a wrongful death action against the Otis Engineering Corporation after the Clarks’ wives were killed in the automobile accident involving one of Otis’ employees. Id.
\textsuperscript{111} Id. at 308.
\textsuperscript{112} Id.
\textsuperscript{113} Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 308-09 (Tex. App. 1983).
\textsuperscript{114} Id. at 308. Clark contended that the affirmative act of the employer of sending home an employee known to be intoxicated imposed a duty on the employer to act in a nonnegligent manner. Id. at 309. Not only were there alternatives, but the affirmative act also subjected other motorists to the dangers of an accident on the highway. Id. at 311. The court noted the availability of an on-site nurses’ station, and the options of calling a taxi or the police, and contacting the family for transportation. Id. Otis asserted that an
REFORMING MEDICAL RESIDENCY PROGRAMS 671

Echoing Robertson, the court recognized that an employer is ordinarily liable only for the off-duty torts of employees committed either on the employer’s premises or with the employer’s chattels.115 The court opined, however, that all persons have a general duty not to engage in any affirmative act that may worsen a situation.116 “[P]ersuaded by the logic” of Robertson and other decisions that focus the duty inquiry on foreseeability,117 the court articulated a standard of duty:

[w]hen, because of an employee’s incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.118

Accordingly, the court remanded for the jury to decide whether Otis acted as a reasonable and prudent employer in light of the surrounding facts and circumstances.119

A vigorous dissent in Otis expressed concern that placing a duty on the employer for injuries involving off-duty employees reaches too far.120 Noting the affirmative conduct of the employer in Robertson, the dissenting judge found no such affirmative act on the part of Otis and viewed the issue as a matter of

employer owes no duty to Clark and motorists in general. Id. at 309.

115 Id. at 311.
116 Id.
117 Id.
118 Id. at 311.
119 Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. App. 1983). After the employer initially won on summary judgment, the court of appeals reversed and remanded. Id. at 307. The employer took an appeal to the Texas Supreme Court. Id. The supreme court affirmed the holding of the court of appeals, which recognized the availability of alternative measures at the employer’s discretion, including a nurse station or a possible phone call to the employee’s wife. Id. The court also noted the obviously foreseeable consequences of sending its visibly intoxicated employee on the road to drive home. Id.
120 Id. (McGee, J., dissenting) (stating that “the majority has placed an impractical and unreasonable duty upon all employers”).
nonfeasance because the employer failed to prevent the employee from driving home.\textsuperscript{121} Hence, the dissent forewarned “[i]f this rationale is followed, any omission will be regarded as an affirmative act,” thus opening the door to infinite liability.\textsuperscript{122} This “slippery slope” argument foresees an overly expansive scheme of liability and erosion of individual responsibility for one’s actions.\textsuperscript{123}

While the dissent presented valid concerns, the argument hinged on the fact that in \textit{Otis} the employee, as opposed to the employer, created the perilous situation.\textsuperscript{124} In other words, the employee became intoxicated independent of any actions by the employer.\textsuperscript{125} Therefore, according to the dissent, liability should not be placed on an employer when they played no part in contributing to the employee’s debilitating condition.\textsuperscript{126} This reasoning is obviously inapplicable, however, when the employer is the cause of the condition.

\textbf{D. The Workers’ Compensation Parallel}

Workers’ compensation cases also provide helpful analysis of the question of third-party liability.\textsuperscript{127} The issue for workers’

\begin{itemize}
\item \textsuperscript{121} \textit{Id}. at 315. In \textit{Robertson}, the employee’s exhaustion was caused by the affirmative act of the employer in requiring the employee to work a grueling number of hours; here, such an affirmative act was not present. \textit{Id}. Since the employer in \textit{Otis} played no role in generating the employee’s incapacity, that is, drunkenness, \textit{Robertson} was distinguishable. \textit{Id}. “It is an unfair type of circuitous reasoning to say that [the employer] engaged in an ‘affirmative act’ when it ‘affirmatively’ failed to fire [the employee], or restrain him,” after becoming aware of his intoxication. \textit{Id}.
\item \textsuperscript{122} \textit{Id}. The dissent concluded that, “[i]n an attempt to do justice in this one case, the majority has placed an impractical and unreasonable duty upon all employers.” \textit{Id}. at 318.
\item \textsuperscript{123} \textit{Id}. at 319.
\item \textsuperscript{124} \textit{Otis Engineering Corp. v. Clark}, 668 S.W.2d 307, 308 (Tex. App. 1983).
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} \textit{Id}. at 312.
\item \textsuperscript{127} For example, in \textit{Van Devander v. Heller Electric Co.}, the Circuit
Court of the District of Columbia rejected the employer’s argument that a compensation award should not be extended to injuries sustained while the employee was proceeding to or from work. 405 F.2d 1108, 1110 (D.C. Cir. 1968). The “Coming and Going” rule excludes injuries suffered during the commute to and from work from workers’ compensation because that activity is considered outside the scope of employment. Id. However, the rule addresses only ordinary and routine hazards that are incident to travel. Id. The court distinguished the “Coming and Going” rule from “unusual hazards arising out of foreseeable and abnormal consequences of requiring an employee to remain at work for 26 hours.” Id. In essence, because falling asleep at the wheel was a direct result of working long hours, the accidental injury arose out of and in the course of employment. Id. Therefore, the court found a causal nexus between the employer’s excessive demands of employment and the employee’s injury that resulted from employment-induced exhaustion. Id. Accordingly, the employee was compensated because his “fatigue was a consequence of 26 hours of uninterrupted employment without rest and this was the proximate cause of his falling asleep while driving home.” Id. Since Van Devander, formal exceptions to the rule have evolved. Specifically, the Supreme Court of Missouri held that the “special hazard” exception provides for recovery for injuries outside the scope of employment, if “there is a peculiar or abnormal exposure to a peril, whose risk is incident to or inseparable from the scene of employment.” Snowbarger v. Tri-County Electrical Cooperative, 793 S.W.2d 348 (Mo. 1990). In Snowbarger, the employee worked eighty-six out of the 100.5 hours preceding the accident, which the court found constituted exposure to an abnormal peril. Id. at 350. Because the employee fell asleep at the wheel on the way home from work, the court found that his physical exhaustion was attributable to the employer’s working conditions. Id. The court stated that Snowbarger “encountered an abnormal exposure to an employment related peril because he worked eighty-six out of the 100.5 hours preceding his fatal accident; his physical exhaustion engendered an unusual risk of an automobile accident . . . [t]he condition was incident to his employment.” Id. Therefore, the fact “that the accident happened after he had driven approximately twenty-two miles . . . [did] not change its cause: the unusually long overtime hours he had worked.” Id. Finally, Deland v. Hutchings Psychiatric Ctr. affirmed the decision of the New York State Workers’ Compensation Board that falling asleep at the wheel was connected to the extreme demands of employment. 203 A.D.2d 776 (N.Y. App. Div. 1994). The employee had worked twenty-eight out of forty hours. Id. at 777. The court found that driving home after such an exhausting schedule was a reasonably anticipated hazard. Id. It further found that the long hours created the exhaustion which caused the accident. Id. Therefore, the Deland court reasoned that the excessive number of hours worked in less than
compensation law is whether an injury arises out of and in the course of employment.\footnote{128}{See Van Devander, 405 F.2d at 1110; Snowbarger, 793 S.W.2d at 349; Deland, 203 A.D.2d at 777.} An employee’s commute is generally considered outside the scope of employment since the “hazards [employees] encounter in such journeys are not incident to the employer’s business.”\footnote{129}{Van Devander, 405 F.2d at 1110.} However, the exception to the rule is premised on recognizing the causal link between hazardous or dangerous employment conditions and an automobile accident that occurs during the trip home from work.\footnote{130}{Id.} As such, courts have found that an employee’s car accident on the way home from work is directly caused by employment fatigue and sufficiently connected to employment to permit recovery.\footnote{131}{See, e.g., Van Devander, 405 F.2d at 1110; Snowbarger, 793 S.W.2d at 350; Deland, 203 A.D.2d at 778.} The exception requires a finding that the employment conditions were such that the risk of an accident of this kind was foreseeable.\footnote{132}{See generally supra note 129 (setting forth case law illustrating this exception).} If so, an injury occurring outside of or away from work is brought back under the umbrella of workers’ compensation coverage because the risk of such injury never left the workplace.\footnote{133}{Snowbarger v. Tri-County Electrical Cooperative, 793 S.W.2d 348, 350 (Mo. 1990) (stating that “[a] condition may also exist where there is a peculiar or abnormal exposure to a peril, whose risk is incident to or inseparable from the scene of employment . . . [the employee’s] physical exhaustion engendered an unusual risk of an automobile accident”).}

When assessing the validity of a claim against a hospital by a third-party injured by an exhausted employee leaving work, the narrow “special hazard” exception of workers’ compensation law provides an analogous causal nexus between a hospital employer that overworks residents to the point of extreme fatigue and an accident caused by a resident who fell asleep at the wheel. This doctrine, customized for injuries sustained on a commute for the purpose of workers’ compensation coverage, provides a two day period caused the accident. \textit{Id.}

theoretical basis of causation when exhausted residents cause accidents after leaving work.

E. Putting it All Together

Case law indicates that a tiered analysis of duty and causation, issues that seem to inevitably merge with one another in intensely fact-driven cases, determines a finding of negligence. Nonetheless, foreseeability of harm, or at least foreseeability of a risk of harm, is a standard principle that both issues share. "Duty is measured by the scope of the risk which negligent conduct foreseeably entails." On the other hand, these cases all involved egregious circumstances, not the least of which was an affirmative act on the part of the employer that played a direct causal role in the harm suffered. The Otis dissent instructively argued that because the employer did not commit an affirmative act, it should not be held responsible for harm that resulted. By relying on this distinguishable fact, however, the dissent actually left itself open to placing liability

134 See supra Part III.A-D (discussing third-party liability).
135 Id.
137 See generally supra Part III.A-D (setting forth case law examining third-party liability). Consider also that Texas courts have not extended the Otis holding to find employer liability. See Nat’l Convenience Stores Inc. v. Matherne, 987 S.W.2d 145, 151 (Tex. App. 1999) (finding that without “evidence of actual or constructive knowledge [that the employee] was incapacitated by fatigue . . . [the employer] could not have breached any duty to prevent [the employee] from driving”); Moore v. Times Herald Printing Co., 762 S.W.2d 933, 935 (Tex. App. 1998) (finding no evidence that the employer had knowledge of the employee’s incapacity and did not act affirmatively sufficient to control the employee’s actions); J & C Drilling Co. v. Salaiz, 866 S.W.2d 632, 639 (Tex. App. 1993) (concluding that the employer did not take any affirmative action to place the employee on the road in a fatigued state; in fact, the employer provided a trailer for rest at the work site).
on a hospital that does create the dangerous situation—namely, working a resident to the point of exhaustion. The Otis dissent’s reasoning leads to the conclusion that, when an employer creates fatigue which causes an accident, liability should or could be imposed.

IV. ANALYSIS AND APPLICABILITY OF CASE LAW TO MEDICAL RESIDENTS

An affirmative act of requiring an employee to work an excessive number of hours may open the door to employer liability. To establish a prima facie case of negligence, the defendant must have breached a duty owed to the plaintiff. Although no hospital has been found liable for injuries sustained by a motorist involved in an accident with a fatigued resident who fell asleep at the wheel, the aforementioned case law provides encouraging signs that a claim could succeed in the context of medical residency programs.

A. A Hospital’s Duty to Schedule Residents with Reasonable Care

A common thread in cases discussing an employer’s liability to third parties is that if a risk or hazard arising out of employment is reasonably foreseeable, a duty is triggered on the part of the employer to prevent such a risk. As a general

---

139 Id. at 318.
140 Id.
141 See supra Part III (setting forth cases involving employer liability for third parties).
142 See, e.g., Robertson v. LeMaster, 301 S.E.2d 563, 566 (W. Va. 1983). The court stated, “[i]n order to establish a prima facie case of negligence . . . it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.” Id. (citing Parsley v. General Motors Acceptance Corp., 280 S.E.2d 703 (W. Va. 1981)).
143 See, e.g., Robertson, 301 S.E.2d at 568. The Robertson court was
proposition, if an employer affirmatively requires its employee to work to the point of excessive fatigue, it becomes reasonably foreseeable that the employee may fall asleep at the wheel after work and cause an accident. 144 Similarly, a hospital arguably creates a duty to act with reasonable care when scheduling residents beyond set limits because of the foreseeability that an exhausted resident will cause an accident driving home from work.145

Literature and studies by the medical community highlighting the inherently dangerous nature of resident physician training and employment methods as they pertain to operating an automobile also put the hospitals on notice of this problem. 146 This information, if not produced by doctors and researchers actually working at or with the hospital, 147 is at least available to employer-hospitals. Hospitals regularly schedule residents for an excessive number of hours, despite medical evidence that confronted with the question of whether the existence of a duty is the product of foreseeability. Id. After examining the evidence, the court determined that “the [employer] could have reasonably foreseen that its exhausted employee . . . would pose an immediate risk of harm to other motorists.” Id. See also Faverty v. McDonald’s, 892 P.2d 703, 708 (Or. Ct. App. 1995). (stating that a defendant is “subject to the general duty to avoid conduct that unreasonably creates a foreseeable risk of harm to a plaintiff”).

144 See supra Part III (discussing analogous case law).
145 See, e.g., Gear et al., supra note 2, at 2 (questioning anesthesiology residents and finding a greater accident rate amongst residents than the national average); Lyznicki et al., supra note 10 (assessing driver sleepiness and highway crashes and reviewing recent recommendations to limit hours-of-service regulations for commercial motor vehicle drivers); Marcus & Laughlin, supra note 10 at 766 (concluding that “an increased incidence of falling asleep at the wheel when driving home [after an on-call shift] probably result[s] in increased traffic citations and motor vehicle accidents”).
146 See Gear et al., supra note 2; Lyznicki et al., supra note 10; Marcus & Laughlin, supra note 10.
147 See Amended Complaint for Plaintiff, Brewster v. Hong, No. 98 L 008806 (Ill. Ct. Cl. 2002). The second count of the plaintiff’s complaint points out, “Defendant [Hospital] operated its own Sleep Disorder and Research Center” and generally argues that hospitals should be aware of the problems associated with fatigue and motor vehicle accidents. Id.
“residents are 6.7 times more likely to have a motor vehicle accident due to falling asleep at the wheel during their residency than before their residency.” Therefore, these scheduling practices constitute an affirmative act triggering a duty to prevent the risk of motor vehicle accidents.

In light of the hospital’s knowledge of resident fatigue and its detrimental effect on driving a vehicle, in conjunction with ever-expanding medical evidence, it is foreseeable that residents will fall asleep at the wheel and pose a danger to the general public. Not only is it foreseeable because overworked and fatigued employees are at risk of falling asleep at the wheel and causing accidents, but residents are especially prone to accidents as a result of their difficult and irregular schedules that produce irregular sleeping patterns. Since the hospital creates the hazardous condition, they arguably owe a duty to those who are at risk when a resident leaves the hospital after, for instance, a thirty-six hour on-call shift.

B. Culture of Resistance

There is pressure placed on residents to endure long hours and stick by their patients, even if assigned to them towards the end of a shift, based upon the prevailing notion that long work hours breed good doctors. This culture is, for several reasons,

148 See Public Citizens Health Research Group et al., supra note 2, at 5.
149 See, e.g., Lyznicki et al., supra note 10.
150 See Veasey et al., supra note 13 (recognizing the impact of irregular sleeping patterns experienced by medical residents).
151 Analogous case law is illustrative, see, e.g., Robertson v. LeMaster, 301 S.E. 2d 563, 570 (W. Va. 1983); Faverty v. McDonald’s, 892 P.2d 703, 710 (Or. Ct. App. 1995).
152 See Marcus & Loughlin, supra note 10, at 766. “Stated reasons include maintaining continuity in patient care, instilling a sense of responsibility in residents, and increasing the learning opportunities for residents.” Id. See also Sarah Avery, Residents May Get Shorter Shift, NEWS & OBSERVER (Raleigh, N.C.), June 22, 2002, at A1. According to Dr. John Weinerth, Director of Graduate Medical Education at Duke University, “[i]f you are only on for eight hours, is that enough time to follow a patient’s
REFORMING MEDICAL RESIDENCY PROGRAMS

resistant to work hour reform for resident physicians. Residents, akin to the position of an apprentice, are dependent on their supervisors for positive evaluations. Fatigue is perceived

illness through to some sort of conclusion? Some illnesses are quick; some take a long time.” Id. This supports the school of thought that properly trained doctors need to get the “hands-on experience of tending to patients through the progression of an illness or injury.” Id. See also Sean McLinden, Editorial, Education, Not Ego, is Behind Medical Residents’ Long Hours, PITTSBURGH POST-GAZETTE, June 29, 2002, at A10.

Learning, through observation, how a disease progresses is essential to acquiring the skills necessary to accurately detect and manage that disease in unsupervised settings. The "index of suspicion," the most valuable tool available to the physician, is most sharply honed through the process of caring for patients.

Id.

153 See Sandra G. Boodman, Waking up to the Problem of Fatigue Among Medical Interns, L.A. TIMES, Apr. 16, 2001 at S1. Residency work hours and the training in general has not changed since its inception 100 years ago. Id. Doctors maintain that the grueling schedules are necessary to train future doctors, citing the need “to subordinate needs for sleep and food to the unpredictable and often consuming demands of patient care.” Id. Surgeons insist that long hours are conducive to quality patient care because they “benefit patients by fostering a ‘community of care’ that forges a bond between doctors and patients.” Id. One Harvard-trained surgeon stated, “[s]urgeons are built differently. [Becoming impervious to exhaustion is] a part of the selection process in surgery.” Id. He was also quoted as dismissing complaints about fatigue as “whining.” Id.; see also David Abel, Bill Eyes Guidelines on Work Hours for Medical Residents, BOSTON GLOBE, Nov. 10, 2001 at B1. Many hospital administrators and doctors feel that the current scheduling practices of residency training programs are designed to force young doctors to make decisions under pressure. Id. Faverty briefly touched on this type of environment that exists in the fast-food setting by rejecting the employer’s assertion that the employee “volunteered” for the overnight clean-up shift. Faverty v. McDonald’s, 892 P.2d 703, 710 (Or. Ct. App. 1995). The court found that the employee did not merely volunteer for the shifts, but rather, that the employer affirmatively asked him to work the shifts. Id. The court rejected this “spin on the evidence” and recognized that the employer controlled such duties and penalized employees for failing to fulfill them. Id.

154 Boodman, supra note 153. “Residents are a captive population afraid to complain—or to admit they are exhausted—because their careers depend on
as a weakness in medicine and residency training programs.155

An Illinois case involving an allegation of negligence on the part of the hospital for a car accident caused by a fatigued resident provides a good example.156 According to the complaint, the resident in question remained at the hospital from her thirty-third to thirty-seventh hours solely because she felt she “had to stay longer than just [her] usual sign-out time.”157 Narrowly classifying such actions as voluntary, thus constituting a separate causal source, ignores the prevalent feeling amongst residents that hospitals expect them to remain almost indefinitely at the hospital to care adequately for their patients.158 While the hospital in the Illinois case will likely argue that the resident voluntarily remained at the hospital, the unreasonably high expectations hospitals place on residents commonly create fatigue-related motor vehicle crashes.159 Still, a court may disagree with

the goodwill of their supervisors, particularly their residency directors.” Id. A resident’s future hinges on the recommendation received from his or her senior physician. Id.

155 Id. See also Marc Siegel, Editorial, Commentary Training Rxzzzzz Medical Residents Need Good Supervision, Not More Sleep, L.A. TIMES, July 1, 2002, at B11. According to Mr. Siegel, Assistant Professor of Medicine at New York University:

[the age-old caste system for residency training is based on role modeling and continuity of patient care, where fledgling interns learn responsibility by doing rounds with their supervising residents and following through with their patients. It is incorrect to assume that sleep deprivation alone is what can lead to untoward patient outcomes. The greater risk lies with poorly motivated residents who lack adequate guidance.

Id.

156 See Brewster, supra note 147.

157 Id. (emphasis added).

158 See, e.g., Boodman, supra note 153. See also Carl T. Hall, Doctors See Loopholes in the Limits on Workweek, S. F. CHRON., June 16, 2002, at A4 (quoting a third-year resident at San Francisco General as saying, “[y]ou don’t talk about it[,] If you complain, you would be perceived as not being tough enough, or of being lazy, or not motivated to learn and do more and be enthusiastic. It would be seen as having a bad attitude.”).

159 See supra Part I (discussing fatigue and residency training programs).
REFORMING MEDICAL RESIDENCY PROGRAMS

Faverty's acknowledgment that employees feel pressure from management to complete shifts. Moreover, expectations felt by residents may be difficult to document and prove in court.

On the other hand, residents are also aware of their fatigued conditions. Indeed, the individual resident likely knows better than any supervisor just how tired she feels and has the option of resting at the hospital or calling a taxi service or family member for transportation. Nonetheless, an independent decision to drive home, if it is to be classified as such, does not change the fact that hospitals schedule grueling hours. While a fatigued resident is at least partly responsible for his or her decision to drive, the hospital, as an employer, is responsible for placing the resident in a position to make such a decision, let alone exercise good judgment in a sleep-deprived condition. In the future, in recognition of these circumstances, courts may be willing to view the hospital and resident as joint tortfeasors and assign responsibility to both parties.

---

160 Faverty v. McDonald’s, 892 P.2d 703, 710 (Or. App. 1995) (stating that the employee “did not, out of the blue volunteer to take three shifts . . . [d]efendant affirmatively asked him to work those hours”).

161 As a practical matter, whether a resident will arrange for transportation every time he or she feels nervous about fatigue is debatable. It is certainly possible that residents will ignore their exhausted bodies and drive home simply because they have been in the hospital for thirty-six hours and understandably want to get home.

162 See, e.g., Public Citizens Health Research Group et al., supra note 2; see also Brewster, supra note 147. Still, an employer would seemingly have to know more than that the general nature of residency training is exhausting. Rather, a plaintiff would need to show that the employer knew of a specific employee’s fatigue when they left work. While an industry awareness of fatigue supports the conclusion that change, perhaps through legislation, is necessary to alleviate the problem, imposing liability on employers for employees who are fatigued in general likely pushes the concept of third-party liability past its breaking point.

163 Robertson v. LeMaster, 301 S.E. 2d 563, 570 (W. Va. 1983) (holding that if the intervening cause, here, the fatigued resident, “is one to be reasonably anticipated, the defendant may be liable, for ‘[t]he risk created by the defendant may include the intervention of the foreseeable negligence of others’ (quoting W. PROSSER, THE LAW OF TORTS (4th ed.) (1971)).
C. Third-Party Liability and Residency Training Programs

Imposing third-party liability upon hospital employers would produce some favorable results, but also has dangerous implications. On the one hand, tort liability can deter harmful conduct—here, the excessive scheduling of resident physicians that causes fatigue. On the other hand, imposing broad liability on health care institutions can upset their ability to provide vital services.

1. Arguments in Favor of Imposing Tort Liability on Hospitals

Tort liability is appropriate if it positively addresses and deters harmful conduct. In the medical residency context, the pertinent issue is whether finding a hospital liable to a motorist struck by a resident during the trip home from work can solve the fatigue-related problems of residency training.

The fundamental philosophical premise of compensation supports such liability. If hospitals are immune from liability, innocent motorists struck by fatigued residents are left to absorb the cost of their injuries. Given the cost of medical education, residents are an unlikely source for large damage awards.

164 See, e.g., Jennifer H. Arlen, Compensation Systems and Efficient Deterrence, 52 Md. L. Rev. 1093, 1096 (1993) (asserting that, in a strict liability context, “[p]otential injurers forced to pay the full social costs of the risks that they create face efficient incentives to reduce risk by caretaking and decreasing activity frequency to the efficient levels”).

165 Indeed, the Robertson court briefly discussed the history and aims of tort law before assessing the facts at hand. Robertson, 301 S.E.2d at 610. Desiring to promote the principle that victims of tortious conduct should be compensated for their losses, Robertson recognized that contemporary courts have abandoned the pro-defendant bias of the industrial revolution and furthered “the modern trend to expand the concept of duty in tort cases.” Id.

166 For example, the average pay for residents at the University of New Mexico Hospital is $35,000 to $36,000. See Jackie Jadnak, Around the Clock Work, Albuquerque J., Sept. 22, 2002, at A1. In another example illustrating the financial condition of residents during their training period, a heart surgeon explained that after ten years of training, he accumulated
Imposing liability on hospitals would compensate victims for the harm suffered.

Furthermore, policy considerations suggest that imposing liability on hospitals for the tortious acts of residents during their commute is a wise choice. The basic formula in deciding whether any act is negligent was initially laid down by Judge Learned Hand in *United States v. Carroll Towing Co.*\textsuperscript{167} Articulating what is essentially an equation of cost effectiveness, reflecting the overall goal of American tort law, Hand stated that if the burden of precaution in guarding against the risk of injury outweighs the probability of harm together with the severity of the injury, it simply is not negligent to allow the possibility of injury to occur.\textsuperscript{168} Here, the likelihood of injury is high, as documented by medical studies.\textsuperscript{169} The gravity of harm resulting from all automobile accidents is obviously severe. Therefore, the question is whether it is more cost effective for hospitals to allow these inevitable accidents, or whether the tort regime should impose liability on hospitals to deter them from their current employment and resident training methods. Since a substantial portion of these accidents are preventable and result in serious injury and loss of

\textsuperscript{167} 159 F.2d 169 (2d. Cir. 1947). A docked barge in New York harbor broke away from its pier at a time when the employee responsible for the vessel was inexcusably absent. \textit{Id.} at 173-74. The barge set off a chain reaction of damage to other vessels and property in the harbor, thus implicating a potentially wide range of liability for the owner of the barge. \textit{Id.} at 170-71. The court formulated the cost-benefit analysis to account for the unpredictable and inevitable nature of accidents, such as the “occasions when every vessel will break from moorings.” \textit{Id.} at 173.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} See, \textit{e.g.}, Gear et al., \textit{supra} note 2 (finding that anesthesiology residents experience automobile accidents at a rate twice the national average); Marcus & Loughlin, \textit{supra} note 10 (finding that “residents frequently fall asleep at the wheel when driving post-call”); Veasey et al., \textit{supra} note 13 (stating that “the greatest documented danger of sleep loss for medical residents is the risk of motor vehicle crashes”).
life, the burden of precaution for the hospitals—adjusting their scheduling for resident physician—is a worthy change. On the other hand, the cost of such an adjustment, not to mention an unpredictable third-party liability damage award, must also be considered.\(^ {170}\)

2. Arguments Against Imposing Tort Liability on Hospitals

Imposing third-party liability on employers in general, and hospitals in particular, also has negative implications.\(^ {171}\) First, there is the risk of expanding liability to employers in general to an undesirable degree. Second, there is a risk of reduced quality of care due to hospitals’ attempts to avoid liability. Finally, hospitals subject to unpredictable tort judgments could disrupt necessary community services.

The potential for unlimited liability represents a glaring concern for imposing liability on the employer for injuries occurring outside the place of employment.\(^ {172}\) Under those circumstances, the world becomes an employer’s plaintiff once the nature or demands of a job become laborious to the degree of

\(^{170}\) See supra notes 42-43 (setting forth the financial implications hospitals face when adjusting to work hour limits).

\(^{171}\) Hospitals, unlike the general employer population, provide a vital service to their communities. As such, health care institutions regularly receive different treatment in the eyes of the law. For example, Congress amended the National Labor Relations Act with Health Care Amendments in 1974, implementing additional safeguards to prevent strikes and picketing that could disturb patient care services. 28 U.S.C. § 158 (2003). The amendments mandate that a labor organization shall provide a health care institution not less than a ten day notice before engaging in any strike, and any employee who engages in a strike within the notice period shall lose his status as an employee. Id.

\(^{172}\) See, e.g., Harrington v. Brooks Drugs, Inc., 808 A.2d 532 (N.H. 2002). Arising out of the workers’ compensation context, the court rejected plaintiff’s argument that the commute after an overnight shift posed as a hazard, thus constituting an exception to the “going and coming” rule. Id. at 536. The court was unprepared to “impose upon employers of overnight or late shift employees liability greater than that borne by employers whose employees work a more traditional nine-to-five schedule.” Id.
posing a foreseeable risk of harm to others. Establishing an appropriate point at which to draw such a line is difficult, if for no other reason than that labor, whether repairing a derailed train or providing patient care services, is exhausting or at least taxing.\footnote{See \textit{American Heritage Dictionary} 1004 (3d ed. 1992) (defining labor as “physical or mental exertion, especially when difficult or exhausting; work”).} Even in light of increasing volumes of medical and scientific data pointing to exhausted resident physicians, it is a precarious proposition to impose third-party liability on an employer in any context, especially where the tortious act occurs after and outside of employment.\footnote{Even the aforementioned cases that did approve of third-party liability support this notion by virtue of their strict holdings and need for egregious circumstances that give rise to employer knowledge of incapacity and affirmative action. \textit{See supra} Part III (examining analogous case law permitting third-party liability).} 

In the health care context, third-party liability could lead to a reduction in health care services. Hospitals provide a necessary, vital service to the public at large, including emergency care.\footnote{Recognizing the emergency nature of hospital services and their necessity to the community, the PPSPA provides that the work hour limitations and requirements of the Act “shall not apply to a hospital during a state of emergency.” H.R. 3236, \textit{supra} note 4, at § 3 (j)(1)(C).} Imposing third-party liability could cause a reduction in quality of care by forcing a hospital to choose between providing comprehensive patient care services around the clock and sending residents home to ensure reasonable working hours.\footnote{Even if a tort claim could successfully change residency programs to the extent that they reduce work hours, less work hours for residents presents financial challenges for the hospital as well. \textit{See supra} notes 42-43 (discussing the economic impact of limited work hours).}

Public regulation seemingly strikes the best balance between the needs of a hospital with those of the residents. Tying funding to compliance, as in the proposed federal regulation, can more effectively deter hospitals from inappropriate scheduling than the penalty-driven New York regulations.\footnote{See \textit{supra} Part II (examining the New York regulations and proposed}
lawsuits against hospitals could lead to increased medical costs, shrunken patient care services or even bankruptcy of a health care institution.178

CONCLUSION

The training of resident physicians in the United States creates serious problems for patient care and the health of residents. Public regulation, though limited in some respects, demonstrates society’s desire to tackle this acknowledged problem. Enforcement is a critical component for any type of regulation. In this light, the PPSPA will likely operate more effectively than the penalty driven Bell Regulations because its enforcement mechanisms, conditioning federal funding and providing financial incentives to conform, and provision of additional payments from the federal government have more teeth than the Bell Regulations.

In the alternative, the deterrent affect of tort law is a more powerful method to affect change, at the cost of potential financial burdens. That potential is compounded in light of the unpredictable nature of tort liability on hospitals and employers generally. Furthermore, case law illustrates the difficulty in deciding what constitutes unreasonable scheduling or work hours, an issue the Bell Regulations and PPSPA settle by implementing work hour limits.179

Therefore, the PPSPA is a viable method to reduce work hours for residency training because such a change will save human life and promote medical and economic efficiency in the form of healthy, proficient doctors. If it cannot, an unfortunate motorist-turned-plaintiff may someday change the way medical residents are trained.

federal legislation).

178 Even public regulation presents serious financial concerns for the health care industry. See supra, note 43-44 (setting forth examples of hospitals adjusting to work hour limits).

179 See generally H.R. 3236, supra note 4.
EVOLUTION, CHILD ABUSE AND THE CONSTITUTION

Christopher Marlborough*

INTRODUCTION

The presence of a non-genetic parent in a child’s home is the largest single risk factor for severe child maltreatment yet discovered.1 Professor Owen Jones has used the example of stepparent infanticide to explain how evolutionary analysis in law can serve society’s goals when prevailing theories have failed.2

* Brooklyn Law School Class of 2003; B.A., State University of New York at Purchase, 1991. I would like to thank Professors Jennifer Rosato and Bailey Kuklin for their input and guidance in writing this note and my lovely wife Jennifer for her infinite patience.


2 Owen Jones, Evolutionary Analysis in Law: An Introduction and Application to Child Abuse, 75 N.C. L. REV. 1117 (1997) [hereinafter Jones, Child Abuse]. Professor Jones suggests a four-stage process to determine when evolutionary principles can be helpful to inform legal policy. Id. at 1158. First, “[t]he Identification Stage frames the subject to analyze it. It clarifies one’s legal goal with respect to a law-relevant of human behavior and assesses the likelihood that evolutionary analysis can aid in the pursuit of that goal.” Id. at 1157-58. Second, “[t]he Information Stage uncovers and organizes new information on the multiple causes of the defined behavior. It describes how one can explore evolutionary theories, examine the evidence bearing on their falsifiable predictions, and assess the fit between the theory and the available evidence.” Id. at 1158. Third, “[t]he Integration Stage describes how to expose true conflicts between evolutionary and prevailing theories and how to integrate the best parts of each into a comprehensive understanding of the behavior, generate new legal strategies for pursuing pre-articulated legal goals, improve the cost-benefit analyses that often drive various legal policies,
Specifically, Jones has made a compelling case for the consideration of evolutionary theories in legal policies relating to child abuse and has brought some startling facts to the attention of the legal community.\footnote{Id.} Children living with one genetic parent and one non-genetic parent are up to one hundred times more likely to suffer fatal abuse than those living with two genetic parents.\footnote{See Daly & Wilson, Cinderella, supra note 1, at 28.} While one might think this enormous disparity would inspire lawmakers to address the problem head on, thus far they have not. The implementation of laws targeting non-genetic parents presents unique moral and ethical conflicts to legislators who largely rely on the social science community for scientific information.\footnote{Owen D. Jones, On the Nature of Norms: Biology, Morality and the Disruption of Order, 98 Mich. L. Rev. 2072, 2072 (2000). Jones notes that lawmakers have traditionally looked to philosophy for moral guidance and to sociology for information on norms. Id. “To the extent that legal thinkers have in fact begun to move beyond philosophy and sociology for more information, they have turned primarily to economics, psychology and game theory.” Id. at 2073. Nevertheless, “[a]s consumers and appliers of knowledge from other disciplines, legal thinkers should play—indeed should feel obligated to play—far more active role in furthering interdisciplinary integration of subjects relevant to law.” Id. at 2073. Jones points out that behavioral biology has at least as much to offer to the study of norms as these other disciplines and that by ignoring contributions from this field of inquiry, legal thinkers risk errors that are both intellectually embarrassing and harmful. Id.} Research that has lead to the discovery of differential abuse rates among non-biological parents, however, did not arise from the traditional social sciences, but from the field of evolutionary psychology.\footnote{Daly & Wilson, Cinderella, supra note 1, at 21. Evolutionary psychology is the scientific study of the effects of the human biological evolutionary history on modern day human behavior. See Stephen Pinker, How the Mind Works 23 (1997) [hereinafter Pinker, Mind Works]. It is an interdisciplinary science, which gathers evidence from numerous other disciplines, including biology, paleontology, ethology, anthropology, sociology, economics, cognitive psychology and linguistics in order to make predictions about human behavior. See Edward O. Wilson, Consilience:
EVOLUTION AND CHILD ABUSE

science and academic communities have gone beyond a healthy skepticism and have displayed unprecedented hostility to evolutionary explanations for human behavior.\textsuperscript{7} Much of this criticism is unwarranted and comes from people who should know better, based on their training and expertise.\textsuperscript{8} As

\textbf{THE UNITY OF KNOWLEDGE} 10 (1997) [hereinafter \textit{WILSON, CONSILENCE}]. Therefore, a common understanding of the world among the various disciplines is critical to the success of evolutionary psychology. \textit{Id.} A more general term, “sociobiology” is the study of the evolutionary history of animal behavior, including humans. \textit{Id.} at 150.

\textsuperscript{7} \textit{See}, e.g., \textit{PINKER, MIND WORKS}, \textit{supra} note 6, at 45. “The biologist E.O. Wilson was doused with a pitcher of water at a scientific convention and students yelled for his dismissal over bullhorns and put up posters urging people to bring noisemakers to his lectures.” \textit{Id.}

\textsuperscript{8} \textit{STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE} 108-09 (2002) [hereinafter \textit{PINKER, BLANK SLATE}]. Scholars have suggested a variety of reasons evolutionary psychology has had difficulty gaining acceptance in the social science community. \textit{Id.} First, evolutionary psychology is often inappropriately compared with the social Darwinist and the eugenics movements. \textit{Id.} at 109. For a comprehensive discussion of the history of social Darwinism, see \textit{DANIEL J. KEVLES, IN THE NAME OF EUGENICS} (1985). Social Darwinism referred to class stratification within society, postulating that people are socially disadvantaged because of their genetic inferiority, which had left them unable to compete with those in the upper classes. \textit{See} \textit{STEPHEN JAY GOULD, THE MISMEASURE OF MAN} 396 (2d ed. 1996). The eugenics movements went one step further and attempted to improve the human race by giving the “more suitable races” an upper hand in the survival of the fittest. \textit{See} \textit{KEVLES, supra}, at ix. At one time, evolutionary explanations for human behavior were widely accepted among the intellectual community in this country, with results that are repugnant by today’s standards. \textit{See} \textit{PINKER, MIND WORKS}, \textit{supra} note 6, at 47. The eugenics agenda has been used to assert the supremacy of the Aryan race and to support the mandatory sterilization of convicts and the disabled. \textit{Id.}

Second, critics of evolutionary psychology suggest that biological considerations of human behavior will lead to inappropriate ethical and moral conclusions, such as biological determinism and conflicts with the concept of free will. \textit{See generally} \textit{DANIEL C. DENNETT, FREEDOM EVOLVES} (2003) (arguing that biological determinism and free will are compatible); \textit{see also}, \textit{PINKER, BLANK SLATE}, \textit{supra}, at 174 -79 (arguing that free will is unnecessary to preserve personal responsibility for our actions ). One such moral conclusion was a key flaw in social Darwinist thought. \textit{DANIEL C. DENNETT, DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF
Social Darwinists were misguided by what has been termed the “the naturalist fallacy,” confusing the reality of “what is” from the moral and ethical judgments of what “ought to be.” Pinker, Blank Slate, supra, at 150. Some have asserted that evolutionary psychology presents a similar moral threat. Id. Even Susan Blaffer Hrdy, a leading sociobiologist and the originator of the sexual selection hypothesis of infanticide discussed in this note, has questioned whether sociobiology should be taught at the high school or even undergraduate level. Pinker, Mind Works, supra note 6, at 47. Hrdy suggests, “[U]nless a student already has a moral framework in place, we could be creating social monsters by teaching this.” Id. at 45. In fact, if evolutionary psychologists promoted biological determinism in its strictest form, there would be no impetus for them to seek change in social policy at all. Social policy would be irrelevant to the issue of stepparents biologically determined to abuse the stepchildren. See Pinker, Blank Slate, supra, at 177. The nature versus nurture dichotomy is not the “winner take all” battle of the century as it is often portrayed. Henry Plotkin, Darwin Machines and the Nature of Knowledge 164 (1993). Nevertheless, there is legitimate debate over the relative influence of each. See Pinker, Blank Slate, supra, at vii-x, 35. The answers to this inquiry come from culture’s most accurate method for finding the truth, science. Wilson, Consilience, supra note 6, at 45. Evolutionary psychologists argue that biology is just as important as culture; while biology imposes constraints on behavior, all behavior results from the interaction of biology and culture. Steven Pinker, Language is a Human Instinct, in The Third Culture: Beyond the Scientific Revolution 223, 234 (John Brockman ed. 1995) (tracing the idea of the mind as a blank slate to the 1920s, when it arose as a politically motivated reaction to the social Darwinist and eugenics movements). Pinker contends that this idea was strongly supported by now discredited theories in anthropology and psychology. Id. Anthropologists claimed that nothing could be said about the human species because cultures vary without limit, while psychology contributed the idea of the mind as a “general all-purpose learning mechanism.” Id.

Third, the jargon in the field often leads to gross generalizations and misunderstandings. See Pinker, Blank Slate, supra, at 114. Popular science writers often rely heavily on analogy and metaphor to make their points. Id. Thus, the field does not lend itself well to sound bites or short descriptions which can be taken out of context or too literally. Id.; see also Matt Ridley, The Genome 226 (1999) (explaining how even the common terminology used in genetics to describe the inheritability of disease as “a gene for sickle cell anemia” or “a gene for diabetes,” is used loosely in media reports, leading to even greater confusion for an underinformed public); George C. Williams, The Pony Fish’s Glow and Other Clues to Plan and Purpose in
evolutionary psychology has entered the legal arena, new opportunities develop to allow critics to knowingly mislead the public at large. Law Professor Steven Goldberg, a critic of evolutionary analysis in law, has suggested the need for close scrutiny of these proposals based on principles of fairness to stepparents and constitutional limitations of the use of statistical

NATURE 43 (1997) (providing another example of confusing terminology). The reader may well believe that grandparents share “one-quarter of their genes” with their grandchildren and one-half of their genes with their parents and siblings. This is a common generalization. In fact, humans share 98.6% of their genes with chimpanzees. WILLIAMS, supra, at 43. The 1.4% difference is what separates humans from our closest living relatives. Id. More accurately, humans share 99.9% of their genes with one another. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 576 (3d ed. 1996). The phrase “one-quarter of their genes” is a colloquialism standing for the assertion that a grandparent has on average a 25% (of the 1.4% difference) greater similarity in their genetic composition than a person chosen at random from the human population. WILLIAMS, supra, at 43.

N. Steven Goldberg, Statistics Law and Justice, 39 JURIMETRICS J. 255, 255 (1999). This note takes no exception to Professor Goldberg’s suggestion that fairness to disaffected parties should be considered, as should be the case with any legislation that is under consideration.

For the purposes of this note and for the research and scientific theories discussed herein, the term “stepparent” is used broadly to describe a non-biological mate of a biological parent living in the home with a child. Martin Daly & Margo Wilson, An Assessment of Some Proposed Exceptions to the Phenomenon of Nepotistic Discrimination Against Stepchildren, 38 ANN. ZOOL. FENNICI 287, 290 (2001) [hereinafter Daly & Wilson, Nepotistic Discrimination]. This includes formal stepparent relationships and live-in boyfriends. Id. The definition excludes all “murders perpetrated by mothers’ boyfriends who were not co-residing with their victims.” Id. The definition also excludes adoptive parents. See DALY & WILSON, CINDERELLA, supra note 1, at 45. Daly and Wilson explain that the evolutionary influences predicting greater incidence of abuse in non-biological families may operate differently in adoptive relationships than in other parent-substitute relationships. Id. The attendant evolutionary pressures “have been prevalent features of the human [ancestral environment] for as long as men and women have formed parentally investing couples,” but adoptive relationships are “a modern novelty.” Id. at 45-46. The adoptive relationships differ from stepparents in that, “adoptive parents are eager to adopt, are screened for suitability, and have the option of changing their minds (an option that they exercise surprisingly often).” Id. at 45. Although the term “stepparents” is not
In response, this note addresses the constitutional concerns to a few of the proposed remedies, examining the differential treatment of stepparents and its application to the Equal Protection Clause. Part I of this note presents the facts indicating the greater incidence of child abuse by non-genetic parents compared to that of genetic parents and provides the evolutionary theories that predict and explain that difference. Part II presents three proposals from evolutionary scholars that legislators might consider to address the crisis of stepparent child abuse and infanticide. Finally, with emphasis on the Supreme Court cases discussed in Goldberg’s article, Part III analyzes the equal protection issues raised by these proposed changes. This note concludes that although the issue of fairness to stepparents warrants substantial debate, there are no significant constitutional obstacles to any of the proposals put forth by evolutionary psychologists and their supporters.

I. THE CASE AGAINST STEPFAMILIES

Unquestionably, stepparents have been much maligned throughout literary history, the story of Cinderella being the most obvious example. Folklorists have catalogued stories of entirely accurate, it is consistent with the literature in this area. When a legal distinction is made between non-biological mates living in the home, persons standing in loco parentis to the child and legal stepparents, it will be noted in the text.

10 See Goldberg, supra note 9, at 255-56 (arguing that the statistics of differential abuse say nothing about any individual’s situation and offering several examples of how the Supreme Court has rejected such statistical evidence).

11 Family law issues such as child abuse are dealt with largely on the state level. See Simms v. Simms, 175 U.S. 162 (1899). For the purposes of this note, the proposals will be presented in the context of New York law and scrutinized under the federal Constitution. When necessary, scientific terms will be italicized and defined in the text or in footnotes.

12 See DALY & WILSON, CINDERELLA, supra note 1, at 1-5. The Grimm brothers alone have chronicled several European folk tales of wicked stepparents including Cinderella, Hansel and Gretel, Snow White and The
“wicked stepparents” across cultures in Europe, Asia and other parts of the world. Psychological studies reveal that people tend to view steprelations pessimistically. Social scientists have often regarded the results of these studies as stemming from myths and stereotypes that create negative relationships between stepparents and stepchildren. More likely, a stepparent mythology has been created by the social scientists themselves. The social science myth, as it turns out, is that steprelations are not significantly different from biological relationships. As one researcher has noted, “[I]n attempting to counteract stepfamily ‘myths,’ [social scientists] have created a counter-factual mythology of their own in which social relationships can be reordered by fiat and the

---

13 Id. at 5. Negative characterizations of steprelations can even be found in botanical literature. Id. A Japanese spiny broad-leaved plant bears the botanical name *Mamako-no-shiri-nugui*. Id. Translation: The stepchild’s bottom-wiper. Id. Daly and Wilson argue that “[t]he cross-cultural ubiquity of Cinderella stories is revealing . . . for they would not persist where their themes had no resonance.” Id.

14 David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 63-64 (1992) (“Empirical investigations have consistently found that stepparent-stepchild relationships are perceived by many to be inferior to parent-child relationships.”).


16 DALY & WILSON, CINDERELLA, supra note 1, at 58. Critics of the social sciences have argued that leading sociologists, anthropologists and political scientists satisfy themselves with “folk psychology” in favor of empirically tested evidence from biology and scientific psychology. See WILSON, CONSILIENCE, supra note 6, at 183. Ironically, in the case of steprelations, sociologists argue against “folk psychology” when those alleged “myths” concur with the results of empirical evidence.

17 See Fine & Fine, supra note 14, at 63-64. After noting the negative perception of stepparent relationships, the authors maintain that “actual differences in quality have been found to be small and some stepparents and stepchildren have reported that, over time, they have been able to establish relationships that were mutually supportive and endearing.” Id. (emphasis added). It would be interesting to know whether more than “some” genetic parents would qualify their feelings for their children so explicitly.
statistical facts about differential violence can be dismissed. As study after study continues to provide more evidence on the subject, the facts become increasingly difficult to ignore.

A. The Facts

Child maltreatment in the United States is a national emergency. In 2000 alone, 879,000 children were abused or neglected. Although child fatalities are relatively rare in comparison to abuse cases, they have increased over the last ten years. The federal government reported 1,200 substantiated cases of fatal child abuse or neglect in 2000. Some government officials believe this number to be too low, suggesting at least 2,000 and as many as 5,000 child fatalities per year. The fact that children living with stepparents are disproportionately the victims of severe and fatal abuse is not included in the report. Meanwhile, evidence continues to mount that residing with a non-biological parent greatly increases a child’s risk of being

18 DALY & WILSON, CINDERELLA, supra note 1, at 58.
19 Id.; see infra notes 28-42 and accompanying text (documenting the increased risk of abuse to stepchildren).
20 PANEL ON RESEARCH ON CHILD ABUSE AND NEGLECT, NAT’L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 42 (1993).
23 CHILD MALTREATMENT 2000, supra note 21, at 53. “Substantiated’ is a conclusion that the allegation of maltreatment or risk of maltreatment was supported by state law or state policy.” Id. at 9.
24 See FACT SHEET, supra note 22.
25 CHILD MALTREATMENT 2000, supra note 21; see also DALY & WILSON, CINDERELLA, supra note 1, at 39 (describing the general lack of recognition of children living in stepparent homes as being at high risk for abuse).
abused.26

In the United States, a study by the American Humane Association of 87,789 children identified as maltreated revealed that twenty-five percent of severe abuse cases resided with one genetic parent and one non-biological parent, and forty-three percent of children killed by abuse lived with substitute parents.27 These statistics are even more disturbing when we consider that the mean age of the victims was 3.6 years old and only a small percentage of children at such a young age live in stepparent families.28 Based on conservative population estimates, the increased risk of infanticide for children under four in stepparent families was one hundred times greater than children living with two genetic parents.29 These studies are consistent with those conducted in other western countries.30

26 See infra notes 28-42 and accompanying text (documenting the increased risk of abuse to stepchildren).

27 MARTIN DALY & MARGO WILSON, HOMICIDE 88 (1988) [hereinafter DALY & WILSON, HOMICIDE]. The researchers used data from infanticide and substantiated allegations of severe abuse. Id. They recognize the potential for detection bias in child abuse. Id. That is to say, if stepparents are already more suspect, they may also be more likely to get caught or be falsely accused of abuse. Id. They contend any possible allegations of abuse against stepparents based on “myths and stereotypes” of the reporters (consistent with social scientists’ claims) will be minimized by the substantiated homicide of an infant. DALY & WILSON, CINDERELLA, supra note 1, at 31.

28 See Daly & Wilson, Nepotistic Discrimination, supra note 9, at 289. The proportion of children who reside with a stepparent at birth is near zero and increases steadily with age. Id.

29 DALY & WILSON, HOMICIDE, supra note 27, at 88. “Census bureaus of the United States and Canada [id] not distinguish natural parents from substitutes.” Id. The researchers reported that they relied on conservative estimates based on other surveys and that the true proportion of stepchild murder is likely to be even higher. Id. at 88-89. The 1990 U.S. Census provides some information on stepparent families. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 64 tbl.77 (1996). According to the Census Bureau, “[c]ategories showing natural born, step and adoptive children are necessary to reflect increasingly complex family structures created as a result of remarriage, disruption or cohabitation.” Id.

30 DALY & WILSON, CINDERELLA, supra note 1, at 32-36. In addition, recent research indicates that this is a global phenomenon, indicating that it is
A 1984 study of Canadian families found that the increased risk of child abuse was forty times greater for preschoolers when the child lived with one biological parent and one non-biological parent (the increased risk was only ten times greater for teenage victims). 31 The risk of fatal child abuse was seventy times greater. 32 Another Canadian study, based on the Canadian National Homicide Archive with data as recent as 1994, found that stepfathers were sixty times more likely to kill their children than were biological parents. 33

A 1973 study in England reveals that British men acting in loco parentis were 150 times more likely to commit infanticide and were responsible for fifty-two percent of the infant deaths studied. 34 The average age of the victim was only fifteen months. 35 Although the statistics vary considerably, a clear trend emerges. Children living with one biological parent and a non-genetic parent are at a substantially higher risk of abuse and

less likely to be culturally dependent. Id. “Researchers have reported that children incurred excess risk of various sorts of mistreatment and/or mortality at the hands of stepparents among Ache hunter-gatherers [of Paraguay], and in Australia, Columbia, Finland, Korea, Malaysia and Trinidad.” Id. Hunter-gatherer societies like the Ache “provide the best model to which the human animal evolved and to which our psyches are adapted.” Id. at 36. Life is challenging for the Ache, especially if you are a stepchild. Id. Nineteen percent of Ache children raised by two genetic parents die by age fifteen. Id. For Ache children raised by a mother and a stepfather, forty-three percent die before their fifteenth birthday. Id.

31 Id. at 30.
32 Id. at 32. Though this result is significantly lower than the American study, this sample also included single mothers, another high risk group, which was not included in the American study. Id.
33 Id. at 210; Martin Daly & Margo Wilson, Some Differential Attributes of Lethal Assaults on Small Children by Stepfathers Versus Genetic Fathers, 15 ETHOLOGY AND SOCIOBIOLOGY 207, 209 (1994). “Stepfathers” in this study are defined as non-biological parents married to the child’s biological mother and common law fathers. Id. Common law fathers are defined as “a substitute father in loco parentis by virtue of his de facto or common law relationship with the victim’s mother.” Id.
34 D A L Y & W I L S O N, HOMICIDE, supra note 27, at 90.
35 Id.
infanticide than children living with two genetic parents.36

Not only does stepparent abuse differ from parental abuse in frequency, studies indicate that there are significant differences in the circumstances under which the abuse occurs.37 Fatal abuse at the hands of stepparents is most likely to occur when the child is very young,38 is less likely to be the result of a psychiatric condition in the abuser,39 and is likely to result from different forms of assault.40 These data suggest that, aside from the greater likelihood of violence against their stepchildren, non-biological parents may have different motivations or factors influencing their acts of violence.41

If stepchild abuse is both quantitatively and qualitatively different from child abuse committed by biological parents, what could possibly account for these differences? Society’s aversion to child abuse and infanticide and the enormous disparity in abuse rates suggest a particularly compelling need for a fearless search for answers to this problem. Unfortunately, traditional cultural-based theories of the social sciences have been unable to adequately explain the wide discrepancy in the incidence of abuse between these groups.42

36 Daly & Wilson, Cinderella, supra note 1, at 26-36.
37 Id. at 34-35.
38 Id. at 91. The increased risk for fatal abuse by a non-biological parent is greatest when the child is under two years old and diminishes over time. Id.
39 Daly & Wilson, Cinderella, supra note 1, at 34-35.
40 Daly & Wilson, Homicide, supra note 27, at 90. While biological parents and stepparents in the Canadian Study were equally likely to kill their children using a firearm, stepparents in Canada were 120 times more likely to beat their children to death. Id. In England and Canada, eighty percent of homicidal stepparents were found to have battered, kicked or bludgeoned their victims to death, while the majority of homicidal genetic parents used less assaultive means. Id. at 34. In addition, while nineteen percent of men who killed their own children also killed themselves in the same violent act, only 1.5% of murdering stepparents took their own life. Daly & Wilson, Cinderella, supra note 1, at 34 (noting the twelve-fold difference).
41 Daly & Wilson, Cinderella, supra note 1, at 35.
42 See Jones, Child Abuse, supra note 2, at 1167-70 (noting that the prevailing social science theories of child abuse all focus on the present, fail to account for the biological relationship and have been unsuccessful in
B. The Theories

By recognizing the importance of biology in human behavior, evolutionary psychologists predicted greater incidence of abuse among non-biological parents before the statistical data was even available. The following section provides a brief evolutionary primer and explains the specific theories posited to account for stepparent abuse.

... attempting to stem the rising tide of the child abuse problem in the last twenty years. In fact, prior to the researchers’ evolutionary approach to child abuse, no studies existed comparing the incidence of abuse between genetic and non-genetic parents. DALY & WILSON, CINDERELLA, supra note 1, at 20. It took an evolutionary perspective of the problem to even think to ask the right question. Id.

43 DALY & WILSON, CINDERELLA, supra note 1, at 20.
44 See Jones, Child Abuse, supra note 2, at 1129-57 (providing a more thorough evolutionary primer and explaining the concepts discussed in this section).
“Evolutionary theory” is a general metatheory that explains the fact of biological evolution as stemming from natural selection and sexual selection. Under the larger umbrella theory of evolution by natural selection, other midlevel theories such as kin selection explain a wide variety of phenomenon in various domains of functioning. There are two more specific evolutionary theories that predict greater incidence of infanticide and abuse of stepchildren at the hands of their stepparents: Discriminative Parental Solicitude Theory (DPST) and Reproductive Access Theory (RAT). DPST is based on Darwin’s theory of natural selection and kin selection, while RAT is based on the notion of sexual selection.

1. Natural Selection, Kin Selection and Discriminative Parental Solicitude

A brief explanation of natural selection and kin selection is necessary for a proper understanding of the mechanics of DPST.

a. Natural Selection

Natural selection is the primary force that drives biological evolution. It is “the process through which certain types of organisms are more reproductively successful than other types, thereby disproportionately passing along those traits that led to their success.” Natural selection requires the interaction of three factors: variation, heredity and differential reproduction. Individuals differ in their behavioral and physical traits.

---

45 See Jones, Child Abuse, supra note 2, at 1171.
46 Id.
47 Id. at 1175.
48 DALY & WILSON, CINDERELLA, supra note 1, at 11-14.
50 See DENNETT, DARWIN’S DANGEROUS IDEA, supra note 8, at 43.
51 MORTON JENKINS, 101 KEY IDEAS IN EVOLUTION 71 (2000).
52 Id.
53 Id.
are inherited from ancestors and modified by genetic mutation and sexual recombination.\textsuperscript{54} Due to these differences, some individuals may have a reproductive advantage over others and produce more viable offspring.\textsuperscript{55} As a result of greater reproductive success, individuals surviving into future generations will tend to be better equipped than their ancestors to deal with the challenges of the environment of their ancestors.\textsuperscript{56} Over successive generations the advantages inevitably produced through natural selection are called “evolutionary adaptations.”\textsuperscript{57}

\textit{b. Kin Selection}

“If evolution consists of a competition among individuals for survival and reproduction, it makes little sense to help others.”\textsuperscript{58} While cooperative behavior is common when both parties stand to gain from the interaction,\textsuperscript{59} altruistic behavior is relatively rare in the biological world.\textsuperscript{60} The fact that altruistic behavior exists at all in the natural world presented a paradox for evolutionary

\begin{footnotes}
\item[54] Id.
\item[55] Id.
\item[56] Id. For most organisms throughout history, the ancestral environment was substantially similar to the present environment, so any advantage gained based on the ancestral environment would also be advantageous in the organism’s present environment. Daly & Wilson, Cinderella, supra note 1, at 40-43. As a result of human cultural evolution, however, adaptations in our ancestral environment can sometimes be maladaptive in the present environment. Id. (discussing the legal considerations stemming from these “maladaptive adaptations”) See Owen Jones, The Evolution of Irrationality, 41 Jurimetrics J. 289 (2001). [hereinafter Jones, Irrationality]; Owen Jones, Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology, 95 Nw. U. L. Rev. 1141 (2001).
\item[57] Dennett, Darwin’s Dangerous Idea, supra note 8, at 43.
\item[59] See Jones, Child Abuse, supra note 2, at 1149. See also Robert Wright, Nonzero 253 (2000) (noting the importance of cooperative interaction between organisms since the earliest life forms appeared on earth).
\item[60] See Dennett, Darwin’s Dangerous Idea, supra note 8, at 478. In all mammalian species studied so far, the rate of intra-species killing is several thousand times greater than the highest homicide rate in any American city. Id.
\end{footnotes}
theorists. Kin selection provided the solution, harmonizing altruistic behavior with natural selection when that behavior benefits genetically related individuals. While altruistic behavior may not benefit the altruistic individual, it is a good way to make more copies of an altruistic individual’s genes. Kin selection is “the evolutionary process that maximizes one’s ability to treat others [preferentially] according to their genetic similarity to oneself.” Altruistic behavior among kin is the result of an unconscious cost-benefit analysis considering both the risk to the actor and the mathematical degree of relatedness to the party to whom the benefit is being offered. An organism whose genes predispose it to act in the interest of those most genetically similar will benefit when the cost of that act is outweighed by its

---

61 ZIMMER, supra note 58, at 249.
62 See DENNETT, DARWIN’S DANGEROUS IDEA, supra note 8, at 478. Social species that help one another most often share a high degree of genetic relatedness. Id. Examples of kin selection at work include the fact that individuals in closely related groups of animals within a species are much more likely than groups that are not closely related to provide alarm calls to their group drawing attention to themselves from predators. Id. Without producing any offspring, an organism can increase its genetic success, merely by supporting and protecting its close relatives. Id. at 479. Female drone bees who share three-fourths (as opposed to one-half in most other animals) of their genes with siblings, forego reproduction altogether, in support of their unusually closely related queen. See ZIMMER, supra note 58, at 248-49.

Reciprocal altruism explains the much less common occurrence of altruistic behavior toward non-related individuals. See DENNETT, DARWIN’S DANGEROUS IDEA, supra note 8, at 479. The most frequently cited example occurs in vampire bats who will occasionally share their bloody bounty with their unsuccessful cavemates after a night of hunting. Id. Reciprocal altruism, however, also requires self-interest in that the benefit conferred is based on the expectation of a future benefit from the recipient. Id. Reciprocal altruism requires advanced cognitive abilities to keep score of who owes a favor to whom. Id. This explains its rarity in the animal kingdom and its more common occurrence among humans. Id. Dennett describes reciprocal altruism as “the first steps toward human promise keeping.” Id.
63 ZIMMER supra note 58, at 249.
64 WILLIAMS, supra note 8, at 42-43.
65 See DENNETT, DARWIN’S DANGEROUS IDEA, supra note 8, at 478.
DPST is based on the concept of kin selection and relates more directly to the issue of infanticide.67 Other than identical twins, no one is more closely related to an individual than his own genetic children.68 According to the theory, “[p]arental care makes a clear direct contribution to parental fitness.”69 Parents will invest in offspring most capable of turning that investment into reproductive success for the parent.70 Investing in unrelated children, without a reciprocal payoff for the caregiver, decreases fitness when the cost is considered in terms of foregone opportunities to reproduce.71 Application of the theory rephrases the question of increased danger to stepchildren. Instead of asking “why do stepparents abuse their stepchildren?” theorists inquire, “why are parents less inclined to abuse their children

66 WILLIAMS, supra note 8, at 44. For this reason, many scientists prefer the term “inclusive fitness,” as opposed to reproductive success, because the former includes the concept of kin selection. See ZIMMER, supra note 58, at 249.

67 Jones, Child Abuse, supra note 2, at 1177.

68 DAVID BURNE, GET A GRIP ON EVOLUTION 137 (1999). Individuals share fifty percent of their genes with their parents, their full siblings and their own genetic children. Id. See supra note 8 (acknowledging the technical inaccuracy of this statistic).

69 DALY & WILSON, HOMICIDE, supra note 27, at 42.

70 Id. The theory is broader than just step-relations. Id. at 44. DPST considers three classes of factors that may contribute to reduced parental investment in a child. Id. The first class includes the likelihood that the parent lacks a genetic relationship to the child (including not only step-relations, but also uncertain paternity). Id. “The second class encompasses indications that the offspring itself may be of dubious quality, and hence a poor prospect to contribute to parental fitness, even if nurtured properly.” Id. The third class includes indications that circumstances are not favorable for child rearing and takes into account such factors as scarce resources, lack of social support, alternative avenues of parental investment, such as older siblings, and whether there are likely to be future opportunities to reproduce. Id.

71 Id.
EVOLUTION AND CHILD ABUSE

than unrelated stepparents?" The theory predicts that “where parental feeling is weak, the risk of parental mistreatment is exacerbated.” Proponents of the theory argue that the interaction of biological and environmental factors will make a child more or less likely to suffer abuse.

Ultimately, the primary factor creating strong parental feelings is the genetic relationship. Considering the general evolutionary principles discussed thus far, several reasons for preferential treatment to biological children emerge. Genetic success is only enhanced when it benefits children who survive to reproductive age. Organisms can adopt different reproductive strategies, such as providing few resources to many offspring with hopes that at least a few survive or, as humans tend to do, investing an enormous amount of resources in only a few children, thereby greatly increasing each child’s chances of survival. The killing of one’s own offspring will often defeat those reproductive strategies.

Considered from the perspective of kin selection, generously providing for one’s own offspring, who share fifty percent of each parent’s genes, will often be in

72 See Jones, Child Abuse, supra note 2, at 1177. “[N]ot caring for infants is the default evolved predisposition . . . .” Id.; see also Daly & Wilson, Nepotistic Discrimination, supra note 9, at 294. The authors emphasize that infanticide committed by stepparents is not itself an adaptive behavior but merely “[a] predictable by-product of the fact that costly parental care can be parasitized and that parental solicitude has therefore evolved to be individualized and preferentially directed to one’s own children.” Id.


74 Daly & Wilson, Homicide, supra note 27, at 44.

75 Daly & Wilson, Cinderella, supra note 1, at 37.

76 Daly & Wilson, Homicide, supra note 27, at 44.

77 See Jones, Child Abuse, supra note 2, at 1195 (noting the common practice of infanticide of the disabled in other cultures).


79 Id. There may be some instances when the killing of one’s own offspring will be beneficial to the reproductive success of the organism. See supra note 71.
the best interest of that parent when a cost benefit-analysis is applied; whereas providing for a biological stranger generally will not be in one’s genetic interest.\textsuperscript{80}

In many ways, predictions of DPST are consistent with empirical social science findings.\textsuperscript{81} Even with a biological relationship, parents discriminate among their own children based on a number of factors.\textsuperscript{82} In some instances, a biological parent may “choose”\textsuperscript{83} to sacrifice a present child’s best interest in favor of retaining her ability to have more children in the future.\textsuperscript{84} A younger parent, with more reproductive years remaining, would receive a greater benefit from this choice.\textsuperscript{85} Conversely, an older parent may find that her opportunities to bear more children are foreclosed by age, therefore making it more beneficial to invest in presently living offspring.\textsuperscript{86} DPST predicts higher incidence of infanticide and abuse in general among young mothers compared to older mothers.\textsuperscript{87} It is well established that children born to young mothers are at greater risk of maltreatment.\textsuperscript{88} A parent

\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} See \textit{Diamond, supra} note 78, at 24.
\textsuperscript{83} The term “choose” does not mean to imply a conscious choice on the part of a parent, but rather unconscious considerations in a cost-benefit analysis. \textit{Id.} at 16-17. “Many of the so-called choices are actually programmed into an animal’s anatomy and physiology.” \textit{Id.} at 17.
\textsuperscript{84} See \textit{Daly \\& Wilson, Homicide, supra} note 27, at 52.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} See \textit{Child Maltreatment 2000, supra} note 21, at 52 tbl.4-3. In 2000, female parents were perpetrators of child maltreatment in 65.1\% of cases compared with 37.3\% for male parents. \textit{Id.} Of female perpetrators, 41.9\% were less than thirty years of age. \textit{Id.} at 47.

Though the fact that children born to young mothers are at higher risk of abuse is consistent with social science findings, the theories social scientists use to explain this phenomenon do not include evolutionary considerations. See Jones, \textit{Child Abuse, supra} note 2, at 1168. “The conspicuous absence from the prevailing theories of any mention of human evolution, or evolved behavioral predispositions of any kind, reflects a passive and unexamined assumption that, absent genetic defects, human behavior is not significantly influenced by the cumulated effects of natural selection on our species.” \textit{Id.}
may consider the likelihood of the child surviving to reproductive age. A parent may also consider alternative recipients of the parent’s investment of resources and preserve parental resources to present children most likely to benefit from them. These other factors are more likely to play the strongest roles when resources are scarce and there is not enough to go around among biological children. Prevailing theories and social science findings recognize that children born into poverty are at a greater risk of physical abuse and infanticide. DPST is consistent with present empirical findings and explains more phenomenon than prevailing theories.

2. Sexual Selection and Reproductive Access Theory

The second theory predicting greater incidence of infanticide among stepparents is Reproductive Access Theory, which is based on the Darwinian concept of sexual selection.

---

89 See Daly & Wilson, Homicide, supra note 27, at 52. As a child gets older, her chances of living to reproductive age increase, and the prospective burden she places on her parents decreases. Id.
90 Diamond, supra note 78, at 23.
91 See Daly & Wilson, Homicide, supra note 27, at 43-53.
92 See Fact Sheet, supra note 22. See also Jones, Child Abuse, supra note 2, at 1164. The Social-Cultural Model emphasizes the contributions of social pressure including economic hardship. Id.
93 See Jones, Child Abuse, supra note 2, at 1223. To the extent that the evolutionary theory has more predictive power than social science theories, it should receive greater consideration. Id. It should be reiterated that evolutionary analysis recognizes the importance of cultural explanations, and an integrated world view that includes both biological and cultural influences can, when the two are not directly conflicting, provide the most accurate understanding of many behavioral phenomena. Id. “The point of integration is to construct a unified, coherent, interwoven, historically accurate, and generally superior theory of behavior that impedes or furthers social access to the specified goal.” Id. at 1223-24.
a. Sexual Selection

Unlike natural selection, sexual selection “depends not on a struggle for existence, but on a struggle between the males for possession of the females; the result is not death to the unsuccessful competitor, but few or no offspring.” 95 In most species who invest a significant amount of resources in raising their young, females have a disproportionately large investment in creating children. 96 Among internally fertilizing species, the males of that species can adopt a reproductive strategy of low parental investment and attempt to sire a large number of offspring, whereas childbearing puts practical limitations on the same strategy for women. 97 Males compete both directly and

95 Id. The classic example is that of the peacock and the peahen. Id. at 137. See also ZIMMER, supra note 58, at 236-38. The male peacock is known for its elaborate tail display with more than 150 brightly colored “eyes,” while the female peahen looks drab in comparison. Id. The peacocks compete for the attention of the peahens by displaying their tail, the theory being that the bright plumage and decorative pattern provide key markers of genetic health. Id. The peahens are very selective and will reject a peacock with less than 130 “eyes” on his tail. Id. at 238. The peahens, through their preference for larger tails with lots of eyes, provide the selection pressure necessary for males to develop more and more ornate displays. Id. This occurs in spite of the fact that the peacock may be more conspicuous to predators and less able to fend off attacks due to his cumbersome tail feathers. Id. at 235. The individual peacock’s survival does him little good in the “survival of the fittest” unless he can successfully reproduce. Id.

The sex-specific definition is outdated, as instances of sexual selection have since been noted in both males and females. See ZIMMER, supra note 58, at 238. For example, among pipefish, it is the females who are brightly colored and compete for the attention of males. Id. In this species, it is the male pipefish who carry the eggs in a pouch and provide the majority of the parental investment, while the females can have several males carry their eggs simultaneously. Id. Jared Diamond provides a more complete description of this phenomenon, known as “sex-role reversal polyandry,” and the limited circumstances in which it is likely to occur. See DIAMOND, supra note 78, at 26-29.

96 Id. at 238.

97 Id. at 234. The most fecund woman in recorded history bore a “mere” sixty-nine children, while Moroccan Emperor Ismael the Bloodthirsty was the most fruitful male, siring approximately fourteen hundred children. DIAMOND,
indirectly for reproductive access to females, who are in a position to be more selective because they sacrifice more in bearing children. The most frequently cited examples of sexual selection at work include characteristics related to direct male-male combat, such as large antlers or sexual dimorphism and characteristics related to male sexual display, such as a peacock’s tail. RAT is an even less direct form of male to male competition and brings sexual selection to a grisly extreme.

b. Reproductive Access Theory

RAT is based on the concept of sexual selection. The theory predicts that, under some circumstances, males will be more likely to kill young unweaned infants in order to make a female more reproductively available to sire his children. Species most likely to be influenced by selection pressure leading to infanticide of unrelated infants include those in which females experience reduced fertility while weaning an infant. This phenomenon is known as “lactational amenorrhea” and is well documented in a variety of mammals, including humans. When a mother stops nursing, her fertility immediately increases, making her available to bear the children of another male. As a result, a male who murders the unweaned infants of his new mate

\[\text{supra note 78, at 36-37.}\]

\[98\text{ See ZIMMER, supra note 58, at 235-39.}\]

\[99\text{ See DARWIN, supra note 94, at 136-37.}\]

\[100\text{ See ZIMMER, supra note 58, at 248. While male to male competition for mates can be a rather bloody business, as evidenced by an elephant seal’s fight to the death to “protect” his harem, both combatants are willing participants. MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE 133 (1993). Infanticide, however, results in the slaughter of helpless innocents.}\]

\[101\text{ See HRDY, supra note 49, at 246.}\]

\[102\text{ Id. at 277.}\]

\[103\text{ Id.}\]


\[105\text{ See Kramer & Kauma, supra note 104.}\]
will have a reproductive advantage over those who do not by accelerating his mate’s ability to bear his children (provided there are no other repercussions to the act). This phenomenon is seen widely in the animal kingdom, including in some of human’s closest living primate relatives, most notably chimpanzees and gorillas. While DPST applies to both men and women, if RAT is applicable to humans, then children living with stepfathers are at an even greater risk than those living with stepmothers. It should be noted that application of RAT to humans is far more controversial than DPST, even among evolutionary psychology scholars. The theory is mentioned here, however, to point out

106 See  

107 Id. at 244-47; see also Jones, Child Abuse, supra note 2, at 1190.

108 See Jones, Child Abuse, supra note 2, at 1159. Although DPST applies to men and women, it may not apply equally. DIAMOND, supra note 78, at 37. “[A]nimals have programmed instincts that lead them to provide (or not to provide) parental care, and this instinctive ‘choice’ of behavior can differ between sexes of the same species.” Id. Men may still be more predisposed to abuse or infanticide because the cost-benefit analysis will be different for men and women. See Jones, Child Abuse, supra note 2, at 1159.

For the implications of RAT, see HRDY, supra note 49, at 277. The rarity of very young children living with a stepmother has limited research in this regard. See DALY & WILSON, CINDERELLA, supra note 1, at 37. Daly & Wilson assert that sexually selected infanticide is not a human adaptation. Id. First, infanticide is rare in the human population relative to those animals where sexually selected infanticide is common. Id. Second, “[s]tepfighters are much more likely to inflict non-lethal abuse than to kill, and such abuse is
that evolutionary psychology does present the potential for sex-based classifications which becomes relevant in Part III of this note.

II. LEGISLATIVE PROPOSALS

While an evolutionary perspective has been useful in directing research in the area of child abuse and has led to extraordinary discoveries such as those discussed in Part I, the potential legal remedies to the child abuse crisis offered by Professor Jones and likeminded contemporaries have been relatively modest. This section discusses three of those proposals.110

First, improved data collection methods might be implemented in order to get a better understanding of the exact scope of the problem. Second, consideration of the presence of a stepparent in the risk assessment phase of child abuse investigations may help child welfare investigators focus their attention on cases that are most likely to result in substantiated instances of abuse. Third, in the event of the unexplained death of an infant in a stepparent family, requiring child fatality review

obviously not a ‘well designed’ means to hasten the production of one’s own children, nor even reduce the costs of stepparental investment.” Id. Third, “humans live [and evolved] in a complex social environment, which involves maintaining one’s reputation and the possibility of retribution.” Id. at 38. Considering these factors, “the average benefits conferred for killing stepchildren would [n]ever have outweighed the average costs enough” to provide the selection pressure necessary for “specifically infanticidal inclinations.” Id. Jones points out that the [reproductive access] theory would be expected to have greater vitality in a species in which the average tenure of a male to a female is short, as it is in lions and langurs, than when the average tenure is longer, as it is in humans. Jones, Child Abuse, supra note 2, at 1213-14. “Moreover, the widely documented and substantial differences among the social organization of primate species suggests further caution and recommends that the more general DPST may better explain observable, human stepfather infanticide.” Id. at 1214.

110 These proposals are put forward for consideration, not to advocate for their appropriateness, but for their potential effectiveness in combating the problem of child abuse. Other than discussing potential constitutional barriers, weighing the benefits of these proposals against their harm to stepparents is beyond the scope of this note.
team investigations may cause more cases of infanticide to be discovered.

A. Improved Data Collection

The most modest proposal to be examined is the suggestion that increased study and improved data collection can increase our understanding of the scope of the problem.111 Currently, most state and federal agencies do not distinguish between stepfamilies, adoptive families and families with two genetic parents.112 Researchers and legal scholars, including Jones, have proposed mandating state agencies to collect data in ways that differentiate between genetic and non-genetic parents.113

Although child abuse investigations are conducted exclusively on the state level, Congress has recognized that child abuse is a national problem and has addressed the issue by establishing the National Clearinghouse on Child Abuse and Neglect Information.114 The National Clearinghouse collects child abuse data from the states for purposes of a national study of the issue, makes recommendations to the states on productive areas for legislation and acts as a distribution center for information on child abuse for state and local governments as well as researchers.115 At present the National Clearinghouse does not

111 See DALY & WILSON, CINDERELLA, supra note 1, at 52-53.
112 Jones, Child Abuse, supra note 2, at 1229. Even though evolutionary psychologists have proposed this remedy for more than a decade, “most studies and reporting procedures that today capture information regarding a perpetrator’s relationship to an abused child continue to collapse ‘stepparents’ into the definition of ‘parents.’” Id. at 1230.
113 Id. at 1235.

The Secretary shall, in consultation with other Federal agencies and recognized experts in the field, carry out a continuing interdisciplinary program of research that is designed to provide information needed to better protect children from abuse or neglect and to improve the well-being of abused or neglected children, with at least a portion of such research being field initiated.

Id.

115 See CHILD MALTREATMENT 2000, supra note 21, at 1-3.
EVOLUTION AND CHILD ABUSE

report or maintain statistics distinguishing stepparents from biological parents. Improved data collection can lead to a more precise understanding of the problem and might be welcomed even by critics eager to disprove what they believe to be a myth. In the absence of administrative initiative in this area, the following provision (hereinafter Proposed Data Collection Statute), which would amend the statutory scheme creating the National Clearinghouse, could at least partially remedy the problem:

The National Clearinghouse on Child Abuse and Neglect Information shall include in its data the living arrangement of the victim and the biological relationship of the victim to the perpetrator.

---

116 *See id.* at 52 tbl.4-3. Currently the National Clearinghouse provides data on family relationships with the following categories in gathering data on abuse: parents (distinguished by sex), other relatives, foster parents, residential facility staff, child day care, non-caretakers and unknown. *Id.* The categories do not distinguish stepparents or adoptive parents from genetic parents. *Id.* at 47. Furthermore, according to the previous edition of the same report, “[s]tates define child maltreatment as the abuse or neglect of their parents or by ‘other caretakers’ responsible for their children’s care.” ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1999 33 (2000) [hereinafter CHILD MALTREATMENT 1999], available at http://www.acf.hhs.gov/programs/cb/publications/cm99/cm99.pdf. But, “[s]tates differ in definitions of who count as caretakers.” *Id.*

117 *See Claxton-Oldfield, supra note 15, at 54; see also Daly & Wilson, Cinderella, supra note 1, at 52-53* (alleging that the absence of accurate federal data on stepparent abuse and the prevalence of stepparents—as defined broadly in this note to include live-in boyfriends and legal stepparents—required them to use conservative estimates based on less reliable sources thereby providing ideological critics with an excuse to ignore their work).


119 Jones has offered a similar suggestion. *See Jones, Child Abuse, supra note 2, at 1235.*

Currently, the U.S. Census uses the following categories to define a child’s family relationship: adopted children; children in traditional nuclear families; cohabitating parent-child families; “blended,” or stepparent, families; and children in extended family households. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN (2001). This might make a good starting point, with further classification provided for
B. Risk Assessment

Researchers and legal scholars have suggested considering familial status as a factor in the risk assessment phase of child abuse investigations. Many child abuse investigators are overworked and lack sufficient resources to thoroughly investigate every claim. Efforts to increase the likelihood of finding substantiated cases of abuse, when they are present, would allow these beleaguered investigators protect children more efficiently.

New York is a prime candidate for this proposal. New York City, for example, has seen a dramatic decline in substantiated cases of abuse, from forty-one percent in 1990 to twenty percent in 1996. "Absent other evidence, the . . . decline in . . . [substantiated] cases would be good news. However, these trends were accompanied by a sharp cut in [Child Protective Service] staff, and this cut likely had an effect on the quality of the investigations." During the same period, the average child protective worker caseload soared from twelve to twenty-four.

cohabitating parents that are biologically related to the child and those that are not.

Jones, Child Abuse, supra note 2, at 1237 (noting the need for child protective agencies to weigh the risk of stigmatizing stepfamilies against the potential benefits of stepchild abuse prevention programs); Colin Tudge, Relative Danger, NAT. HIST., Sept. 1997, at 28-31 (interviewing Martin Daly, who calls for child protective agencies to recognize children in stepparent families as being at high risk for child abuse); see also Pinker, Blank Slate, supra note 8, at 165.

Jones, Child Abuse, supra, note 2, at 1237 (noting this common criticism of the child protection system).

Id. at 1238. “Evolutionary analysis suggests that, if the agency were to ascribe more weight to the presence of a stepparent, say by modifying its standard operating procedures to preferentially investigate reports of child abuse in homes with substitute parents, children would be better protected.”

Id.


Id.

Id. at 25.
Staff reductions and budget cuts have created incentives for workers to err on the side of failing to report a finding of abuse in borderline cases rather than refer the case for preventive services or foster care. In New York, 67.4 percent of investigated cases led to a finding that the allegation of maltreatment was unsubstantiated in the year 2000, while the national average for same period was 58.4 percent. The proposed New York statute, to be titled “Consanguinity as a Factor in Child Abuse Investigations” (hereinafter Proposed Risk Assessment Statute) reads as follows:

The Legislature recognizes that a child living in the home with a non-biological parent is at a high risk of child abuse. When conducting a risk assessment of potential victims of child abuse, investigators shall consider this risk in prioritizing cases for review. These cases should be given priority in the speed with which they are addressed.

C. Child Fatality Review Teams

This section proposes requiring child fatality review teams to investigate the presence of infanticide when the death of an infant occurs in a stepparent family. More diligent investigations into mysterious child deaths in stepparent families can result in the detection of more substantiated cases of infanticide, which in turn provides greater protection for other children who may be living in the home of an abuser.

126 Id. The Child Welfare League of America (CWLA) reports that the benchmark for CPS worker caseloads is twelve. Id. According to the Citizens Budget Commission report, New York CPS workers are maintaining double their recommended capacity of cases. Id.

127 See CHILD MALTREATMENT 2000, supra note 21, at 17 tbl.2-5.

128 At present, “decisions made by child protection agencies are not affected by the fact a child resides in a stepfamily.” Jones, Child Abuse, supra note 2, at 1237 n.363. Jones has suggested that such a proposal, informed by the underlying evolutionary principles discussed herein, may provide greater protection to children, admittedly at the potential to cost of stigmatizing stepparents. Id. at 1237-38.
Sudden Infant Death Syndrome (SIDS) “is the sudden death of an infant under one year of age that remains unexplained after thorough case investigation, including performance of a complete autopsy, examination of the death scene and a review of the clinical history.”129 Because instances of fatal abuse are often difficult to detect when the manner of death is shaken baby syndrome or soft suffocation,130 which can often be detected only through an autopsy, the National Clearinghouse recommends that all states implement mandatory autopsy statutes and child fatality death review teams to distinguish true SIDS cases from fatal abuse.131 The National Clearinghouse estimates that five percent of reported cases of SIDS are in fact undetected instances of fatal child abuse, and that the best means of distinguishing infanticide from SIDS cases is through mandatory autopsy and child fatality review teams.132 “By the end of 1999, seventeen states had

---

129 Comm. on Child Abuse and Neglect, Am. Acad. of Pediatrics, Distinguishing Sudden Infant Death Syndrome From Child Abuse Fatalities, in 107(2) PEDIATRICS 437 (2001) [hereinafter Distinguishing SIDS]. Further confounding the detection of abuse cases, is the fact that SIDS is correlated with several of the same high risk factors as child abuse, including young maternal age, siblings who have died under similar circumstances, lack of prenatal care and low birth weight. Id. In addition, “[t]he SIDS rate is 2 to 3 times higher among African American and some American Indian populations.” Id. African American and American Indian children are also significantly more likely to suffer from maltreatment. CHILD MALTREATMENT 1999, supra note 116, at 28 tbl.2-10.

130 See Distinguishing SIDS, supra note 129, at 437. Shaken baby syndrome is the medical term used to describe the violent shaking and resulting injuries sustained from shaking. Id.

131 See FACT SHEET, supra note 22. Child fatality review teams “are comprised of prosecutors, coroners and medical examiners, law enforcement personnel, CPS workers, public health care providers and others.” Id. “The teams review cases of child death and facilitate appropriate follow-up,” which may include support services for surviving family members and provide information necessary for prosecution of perpetrators. Id. They can also be instrumental in providing information and recommendations to local community support systems and CPS workers. Id. “Well designed, properly organized child fatality review teams appear to offer the greatest hope for defining the underlying nature and scope of fatalities due to child abuse and neglect and for offering solutions.” Id.

132 Id. Five percent may be a conservative estimate. Task Force on Infant
passed mandatory autopsy statutes and thirty-two states had passed statutes mandating child death fatality review teams in the event of an unexplained death of a child under two years old.\textsuperscript{133}

In 2002, New York passed a law mandating autopsies in cases of unexplained deaths of all children under one year of age.\textsuperscript{134} Nevertheless, the state allows for child fatality review

\begin{quote}
Sleep and Sudden Infant Death Syndrome, Am. Acad. of Pediatrics, Changing Concepts of Sudden Infant Death Syndrome: Implications for Infant Sleeping Environment and Sleep Position, 105(3) \textit{PEDIATRICS} 650 (2000). Some researchers believe that as many as ten percent of reported SIDS cases are, in fact, instances of infanticidal abuse. \textit{Id.}
\end{quote}

\textsuperscript{133} See \textsc{Admin. for Children and Families, U.S. Dep’t of Health and Human Servs.}, \textsc{Child Abuse and Neglect State Statutes Elements} 1-2 (1999) [hereinafter State Statutes], available at http://www.calib.com/nccanch/pubs/stats00/cdrtaut.pdf. For example, the Illinois mandatory autopsy statute reads as follows:

Where an infant under two years of age has died suddenly and unexpectedly and the circumstances surrounding the death are unexplained, an autopsy shall be performed by a physician licensed to practice medicine in all of its branches who has special training in pathology. When an autopsy is conducted under this Section, the parents or guardian of the child shall receive a preliminary report of the autopsy within five days of the infant’s death.


The Virginia child fatality review teams statute reads in pertinent part:

There is hereby created the State Child Fatality Review Team . . . [,] which shall develop and implement procedures to ensure that child deaths occurring in Virginia are analyzed in a systematic way. The team shall review (i) violent and unnatural deaths, (ii) sudden child deaths occurring within the first eighteen months of life, and (iii) those fatalities for which the cause or manner of death was not determined with reasonable medical certainty.


\textsuperscript{134} \textsc{N.Y. Pub. Health Law} § 4210(2) (McKinney 2002).

The commissioner shall adopt regulations to establish standard autopsy protocols for any person under the age of one year who dies under circumstances in which death is not anticipated by medical history or the cause is unknown . . . In developing and implementing such regulations and protocols, the commissioner shall consult with health professionals, families and other persons participating in the implementation of the sudden infant death syndrome program.
teams to investigate the unexplained death of an infant only when a complaint has been lodged with the Central Registry on Child Abuse or when the child is in foster care at the time of her death. Thus, many child murders will likely remain undetected.

The National Clearinghouse believes that the five percent chance of finding a substantiated case of abuse is enough to warrant a complete investigation of all unexplained infant deaths. While this is the preferred solution, child fatality review teams can be resource-intensive, expensive and invasive of family privacy. At some point, the potential of discovering substantiated cases of fatal child abuse makes the investment cost-effective both economically and personally. Since very young infants living with one genetic parent and a stepparent in the United States are up to one hundred times more likely to suffer fatal child abuse, New York should consider passing a statute requiring child fatality review teams in cases where the child is living with a biological parent and a non-biological adult in a parental role. This would significantly increase the state’s return

---

135 N.Y. SOC. SERV. LAW § 422-b (McKinney 1999).

A fatality review team may be established at a local or regional level, with the approval of the office of children and family services, for the purpose of investigating the death of any child whose care and custody or custody and guardianship has been transferred to an authorized agency, or in the case of a report made to the central register involving the death of a child.

136 See The City of New York Human Res. Admin., New York City Child Fatality Review Panel, Annual Report for 1991 4 (1992). In 1991, there were 102 child fatalities in New York City alone, and less than half were investigated by the child fatality review team. Id. More than half of the cases that were reviewed were substantiated as cases of infanticide. Id.

137 See Fact Sheet, supra note 22.

138 See Jones, Child Abuse, supra note 2, at 1236-37. While Jones does not discuss this proposal specifically, he does clarify how evolutionary analysis can help improve cost-benefit analysis. Id. “Although evolutionary analysis generally says little about which goals society should favor, it can (as here) highlight previously unconsidered costs of legal and social policies.” Id.
EVOLUTION AND CHILD ABUSE

on its investment. The proposed statute (hereinafter Proposed Child Fatality Review Team Statute), which would amend the current provision outlining the use of fatality review teams, reads as follows:

In the event of an unexplained death of an infant under one year old, where the infant resides with a biological parent and a non-biological adult, a child fatality review team will investigate the possibility of fatal child abuse. This investigation will be conducted regardless of the presence or absence of a complaint filed with the central register.

III. EQUAL PROTECTION ANALYSIS

A critic of evolutionary psychology, Professor Steven Goldberg, has said that “[t]he evolutionary evidence burdening [a stepparent] is a statement about stepparents generally. It is not a statement about him individually.” Commentators on both sides of the debate on the use of evolutionary thought in legal decision making have recognized that “[i]f evolutionary analysis ever has a direct impact on American law, it will be through statistical generalizations about human behavior rather than explanations of why a specific individual acted in a certain way.” While this contention is undisputed, Goldberg goes on to unfairly stack the deck. Goldberg cites a number of examples implying that the

---

139 § 422-b.
140 This proposal has not been made before, probably because the preferred solution is to authorize a child fatality review team to review all unexplained deaths. See supra text accompanying note 137. The New York legislature, however, has shown its willingness to split hairs, distinguishing between children in foster care and those in intact families. See § 422-b. Whether the legislature’s concern is financial or based on parental rights to privacy, the one hundred fold increased risk might be enough to shift the balance toward protecting children in this cost-benefit analysis.
141 Goldberg, supra note 9, at 257.
142 Id. at 255.
143 Id.
use of statistical evidence is disfavored by the Supreme Court.\textsuperscript{144} Goldberg offers these cases “not for their doctrinal significance, but to provide a general sense of the problems statistics, including evolutionary-based evidence, must overcome.”\textsuperscript{145} It is, however, precisely because of their doctrinal significance that the statistical evidence presented in those cases was rejected.\textsuperscript{146} In fact, there are no significant constitutional barriers to any of the proposed statutes.

\textit{A. Fundamental Liberty Interest and Family Privacy}

First, a court will consider whether a fundamental liberty interest is implicated.\textsuperscript{147} If the proposed statutes substantially


\textsuperscript{145} Goldberg, \textit{supra} note 9, at 257.

\textsuperscript{146} \textit{See Id.} The author uses cases involving discrimination based on race and sex to make the point that distinctions between various groups are disfavored by the courts. \textit{Id.} “Two disparate Supreme Court cases in which statistical arguments fare poorly, illustrate the hurdles evolutionary based evidence will face in the future.” \textit{Id.} at 258. Elsewhere in his article, Goldberg concedes no court is likely to question most decisions based on statistical evidence, however his rhetorical use of clearly distinguishable cases is puzzling. \textit{Id.} at 257.

\textsuperscript{147} U.S. Const. amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment states that no state shall “deprive any person of life, liberty, or property without due process of law.” \textit{Id.} In a due process analysis, one must first define what liberty interest is affected before determining whether the interference is substantial. \textit{See Skinner v. Oklahoma}, 316 U.S. 535, 536 (1942). When due process claims arise in the context of an equal protection challenge, the intrusion need not rise to a level that would preclude all people from exercising the right. \textit{Id.} at 540. Therefore, actions that would be constitutional if applied to all citizens may be unconstitutional when arbitrarily applied to one group over another. \textit{Id.} Ironically, the consideration of due process issues in equal protection analysis was first applied in a eugenics case. \textit{See generally id.} In \textit{Skinner}, the Court held that a forced sterilization law was unconstitutional, not because the practice of mandatory sterilization of convicted felons without a hearing was a per se violation of due
interfere with a fundamental liberty interest, the courts would subject the statutes to strict scrutiny. Under strict scrutiny, a law would be struck down unless it is narrowly tailored to further a compelling state interest. Here the interests of both the biological parent and the stepparent must be considered. It is likely that a court would not recognize the existence of a fundamental liberty interest for stepparents, as has been recognized for biological and adoptive parents. Even if an interest similar to that of biological parents was recognized, however, it is unlikely that the modest proposals presented here would warrant strict scrutiny.

1. Parents

A biological and adoptive parent each has a protected liberty interest in the “companionship, care, custody and management of his or her children.”\textsuperscript{148} Any substantial interference with a biological parent’s fundamental liberty interest is subject to strict scrutiny.\textsuperscript{149} Even if stepparents have no familial rights, the fundamental liberty interest of biological parents may be infringed by substantial, unwarranted intrusions into family privacy. The biological parent is at least equally affected by an investigation into an allegation of abuse.\textsuperscript{150} Child abuse investigations do not, at least initially, focus on an individual process, but because the arbitrary distinction between white collar and blue collar crimes violated equal protection when examined under a more intensive scrutiny. \textit{Id.} at 540. Higher scrutiny was warranted because the liberty interest of procreative freedom was at stake. \textit{Id.} Ultimately, the plaintiff was allowed a hearing before being involuntarily sterilized. \textit{Id.}

\textsuperscript{148} Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that absent a finding of unfitness, an unwed father has a right to custody of his children without a hearing upon the death of the child’s mother); \textit{see also} Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). The “Constitution protects the sanctity of the family because the institution of the family is so deeply rooted in this Nation’s history and traditions.” \textit{Id.}

\textsuperscript{149} Moore, 431 U.S. at 499.

\textsuperscript{150} \textit{See} Daly \& Wilson, Cinderella, \textit{supra} note 1, at 34. DPST appears to suggest that biological parents would be even more disaffected, because a child abuse investigation potentially interrupts their closer relationship. \textit{Id.} Ultimately, the biological parent has more to lose. \textit{Id.}
suspect, but on the specific facts of the case. Therefore, the biological parent who chooses to remarry or cohabit with a new mate would have standing to make an equal protection claim against arbitrary state invasion in the care, custody and management of his or her child if that interference were substantial.

2. Stepparents

Most likely, courts would find that stepparents do not have the same fundamental liberty interest as a biological parent in the care, custody and management of their children. To establish the liberty interest, the step-relationship must satisfy the Supreme Court’s definition of “family.” The Court has only loosely defined the parameters of what constitutes a family and has not specifically determined whether stepparents are included. In fact, the First Circuit declined to extend the previously recognized parental liberty interest in “companionship of . . . children” to a stepparent absent Supreme Court precedent.

151 *See* Jones, *Child Abuse*, *supra* note 2, at 1238. Criticism from the social science community of the findings presented in this note has centered less on the objective findings that stepparent families present greater potential for abuse than the fact that stepparents are the perpetrators of that abuse. *Daly & Wilson, Cinderella, supra* note 1, at 51-52. Critics argue that child abuse investigations data available at the time is unreliable because it does not indicate the perpetrator was a stepparent even when it does indicate that the victim came from a stepparent family. *Id.* In either event, more intensive investigations into stepparent families as opposed to traditional families would still result in more substantiated cases of abuse, regardless of who is found to be the perpetrator.

152 *See* Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986) (declining to extend parental rights to a stepparent, absent Supreme Court precedent).

153 *Id.* at 504-06.

154 *Compare* Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (holding that a household composed of a grandparent and grandchild satisfies the requirements of zoning ordinances requiring family status), *with* Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (holding that foster parents do not possess the parental liberty interest of biological parents).

155 *Ortiz*, 807 F.2d at 6. “Some Supreme Court cases acknowledging the
First, because a stepparent’s familial rights remain an open question, it may be helpful to examine what is and is not a family for constitutional purposes. Several decisions defining what triggers the rights of family have stressed the biological nature of the relationship. The Court has noted, “The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.” Grandparents and extended biological relations receive some constitutional protection in the absence of a competing biological parent’s interest. Foster parents have personal liberty interest of parents in the ‘companionship, care, custody, and management of his or her children,’ suggest that this right may extend only to natural parents.” Our conclusion is simply that, in light of the limited nature of the Supreme Court precedent in this area, it would be inappropriate to extend recognition of an individual’s liberty interest in his or her family or parental relationship to the facts of this case.”

See Moore, 431 U.S. at 505-06. “[T]he choice of relatives in this degree of kinship to live together may not lightly be denied by the state.” The usual understanding of families implies biological relationships and most decisions treating the relationship between parent and child have stressed this element.” Michael H. v. Gerald D., 491 U.S. 110 (1989). Michael H. provides an exception to the Court’s preference for biology and demonstrated commitment in establishing parental rights. Michael H., a genetic father who had established a parental relationship with the child was denied an order of filiation when the child in question was born to a woman married to another man. Id. The Court determined that there is no fundamental right available to an unwed father in such a case, noting the absence of such a right at common law. Id. at 125-26.

Lehr v. Robertson, 463 U.S. 248, 262 (1983) (holding that a biological father who takes an active role in his child’s life is entitled to constitutional interest in the care, custody and management of his children, but absent that demonstrated commitment, no such liberty interest is recognized).

See Moore, 431 U.S. at 504-06. In Moore, the Court held that a zoning ordinance could not arbitrarily define the standards of what constitutes a family and consequently prohibit a grandmother from living with her grandchildren. Id. at 499-502. For the first time, the Court extended the definition “family” beyond the traditional, nuclear family. Id. In doing so, however, the Court repeatedly emphasized the significance of the biological relationship. Id. at 503-04. “The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and
been specifically denied parental privileges when the competing interest of a biological parent is present. Stepparent relations arguably fall somewhere in between biological grandparents and foster parents. While no biological relationship exists between a stepparent and stepchild, there may be more potential for permanency in a stepparent relationship than in a foster care situation, where the relationship results from a contractual relationship with the state.

children... is equally deserving of constitutional recognition,” when compared to biological parents. See also Quilloin v. Walcott, 434 U.S. 246 (1978) (making no attempt to consider the rights of the adoptive stepparent, while holding that the natural father had no right to veto a stepparent adoption, since he had not taken an active role in the child’s life prior to the adoption proceeding). But see Troxel v. Granville, 530 U.S. 57 (2001) (striking down an Oregon statute that afforded special rights to grandparents in visitation of children against the biological parents’ wishes).

In general, when there are competing interests, a biological parent’s liberty interest trumps those of a grandparent. The cases defining what constitutes a family often make for a difficult comparison to the proposed statutes because, like the visitation statute in Troxel, the party seeking substantive rights may be in conflict with a biological parent. See Org. of Foster Families for Equality and Reform, 431 U.S. at 846.

Org. of Foster Families for Equality and Reform, 431 U.S. at 845-46 (denying a foster parent the same protections that parents and grandparents receive when removing a child from the foster home in order to return the child to the natural parent). One “consideration related to this [decision] is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable.” Id. at 846. “Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.” Id.

See text accompanying note 159.

See Org. of Foster Families for Equality and Reform, 431 U.S. at 845. There is an “important distinction” between the foster family and the natural family... Unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.
In addition, the court has noted that a fundamental liberty interest may derive from rights or obligations granted under state law. Nevertheless, no state, including New York, has a particularly expansive view of stepparent rights from which an interest in the care, custody and management of one’s stepchildren would likely emerge.

Finally, in determining stepparent rights, a court might

---

162 See id. at 844 n.51 (citing New York State law for the proposition that “adoption is the legal equivalent of biological parenthood”); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 664 (1966) (holding that there is not necessarily a constitutional right to vote in state elections but that, nevertheless, “once the franchise is granted to the electorate [by the state], lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”).

163 MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 6 (1994) (“The legal system has failed to recognize, on any consistent basis, that the relationship between stepchild and stepparent entails any enforceable rights and duties.”); N.Y. DOM. REL. LAW §§ 70-71 (McKinney 2003) (allowing court-ordered visitation to biological parents and siblings); N.Y. SOC. SERV. LAW § 101 (McKinney 2003) (limiting a stepparent’s obligation of support to a stepchild to situations where the child would otherwise require public assistance and that even an adoptive stepparent has no obligation of support if living separate and apart from his/her spouse and stepchild); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 2001) (noting that, unlike many other states, a “biological stranger” lacks standing to request visitation in New York); Hertz v. Hertz, 717 N.Y.S.2d 497, 498 (App. Div. 2000) (following Troxel v. Granville, 530 U.S. 57 (2001), and holding N.Y. DOM. REL. LAW § 72, New York’s grandparent visitation statute, unconstitutional). The same limited view applies in the law regarding inheritance. See In re Peer’s Estate, 245 N.Y.S. 298 (Sur. Ct. 1930), aff’d, 249 N.Y.S. 900 (App. Div. 1930) (holding that stepchildren inherit only if decedent leaves no next of kin.). The statute upon which Peer’s Estate was based, however, has since been repealed, removing any potential for an unadopted stepchild to inherit through intestacy. See MAHONEY, supra, at 57 n.14. New York is not one of the four states that recognize a stepchild’s right to recover in wrongful death suits. Id. at 103. New York recognizes worker’s compensation survivor benefits for stepchildren, but not stepparents. Id. at 116 n.8. New York does, however, recognize some limited rights for stepparents. N.Y. DOM. REL. LAW § 110 (McKinney 2003) (recognizing stepparent adoption as all other states do); Rosenberg v. Silver, 762 F.2d 255 (2d Cir. 1985) (holding that a stepfather is entitled to parental tort immunity if he can establish in loco parentis relationship to his stepchild).
choose to consider a stepparent’s efforts to be a substantial part of the child’s life, the amount of time spent in the home and the permanency of the relationship. This “psychological parent” argument has failed twice before the Court, although both cases involved competing interests between biological parents and more remotely related or unrelated caretakers. “[T]he importance of

164 See Drummond v. Fulton County Dep’t of Children’s Servs., 547 F.2d 835 (5th Cir. 1977). The court recognized the liberty interest of a pair of foster parents in the adoption of their foster child based on psychological parent theory. Id. The court noted the close relationship the foster parents had developed with the child over the five years the child had been living with them. Id. at 857. Under procedural due process, the foster parents were allowed a hearing before they could be denied an opportunity to adopt. Id. This case was decided shortly before the Supreme Court spoke on the issue and relied in part on the circuit court opinion in Org. of Foster Families for Equality and Reform case to the same effect. See Org. of Foster Families for Equal. & Reform v. Dumphson, D.C., 418 F. Supp. 277 (S.D.N.Y. 1976), rev’d, 431 U.S. 816 (1977).

165 See Org. of Foster Families for Equality and Reform, 431 U.S. at 847 n.54. The Court noted that both litigants discussed the validity of the “psychological parent” theory in their briefs. Id. Without determining the theory’s validity, the Court rejected its relevance in determining the legal relationship of a foster parent to a foster child. Id. at 845 n.52. The Court recognized the “undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families.” Id.; See also Troxel, 530 U.S. at 91 (Kennedy, J., dissenting). “Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.” Id. at 98. While this argument was not accepted by the majority, Troxel involved conflicting interests between grandparents asserting their rights to visitation and biological parents, whose interests clearly trump those of grandparents. Id.

The Court’s rulings in a line of paternity cases may also be instructive on this point. Compare Caban v. Mohammed, 441 U.S. 380 (1979) (finding that by coming forward to participate in the rearing of his child, a putative father’s continued interest in the custody of his children warrants protection), with Quilloin v. Walcott, 434 U.S. 246 (1978), and Lehr v. Robertson, 463 U.S. 248 (1983) (declining to find the same right in a putative father who did not make attempts to involve himself in the child’s life before attempts were made to terminate his parental rights). When a non-custodial biological father attempts to assert paternity rights, courts require not only a biological
the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘[promoting] a way of life’ through the instruction of children.”166 This argument may be more viable when a stepparent’s claim is not in conflict with the biological parent’s wishes.167

The distinction between different kinds of “stepparents” as broadly defined in this note becomes increasingly important if contributions to the child’s well-being are considered. A stepparent who has legally adopted his stepchild would be in the best position to invoke the liberty interest because adoptive parents are treated as biological parents under the law.168 In relationship, but also parental contributions to the quality of the child’s life. “In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.” Lehr, 434 U.S. at 260. In these cases, however, a biological relationship was present or presumed.

166 Lehr, 463 U.S. at 261 (quoting Caban, 441 U.S. at 261).
167 See Org. of Foster Families for Equality and Reform, 431 U.S. at 846.

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that individuals may acquire such an interest in the face of another’s constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right . . .

Id. at 845 n.51. “Adoption . . . is recognized as the legal equivalent of biological parenthood.” Id.; N.Y. DOM. REL. LAW § 110 (McKinney 2003) (defining “adoption” as “the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of [a] parent in respect of such other person”). A person may adopt the child of his spouse without terminating the parental rights of his spouse. Id. “Approximately one-half of all adoptions are by relatives, defined to include stepparents.” MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 161 n.1 (1994). “Through such an adoption, the stepfamily is transformed from [an] uncertain legal entity . . . into a legal family.” Id. at 161.
contrast, one who is simply married to the child’s mother might be less likely to receive constitutional recognition as family.\textsuperscript{169} A live-in boyfriend would be unlikely to have a right in the “care, custody and management” of his girlfriend’s children.

3. Substantial Interference

Even if stepparents were granted all of the rights of a biological parent, the level of interference with a stepparent’s fundamental liberty interest in the care, custody and management of his or her stepchildren must be substantial in order for strict scrutiny to apply. While the collection of anonymous data does not interfere with individual family privacy, the Proposed Risk Assessment and Proposed Child Fatality Review Team statutes warrant further examination.\textsuperscript{170}

Any interference in family privacy caused by the Proposed Risk Assessment Statute is \textit{de minimis}.\textsuperscript{171} In the context of child abuse investigations, this liberty interest is most often invoked when the termination of parental rights are at stake.\textsuperscript{172}

\textsuperscript{169} See Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986) (declining to extend constitutional liberty interest to a stepparent). \textit{But see} Gribble v. Gribble 583 P.2d 64 (Utah 1978). In \textit{Gribble}, the Supreme Court of Utah determined that a stepparent requesting court-ordered visitation was entitled to a hearing as to whether he stood “in loco parentis” to a child against the wishes of the biological parent. \textit{Id.} at 66. If found to be in loco parentis, the plaintiff would be entitled to all of the rights and obligations of a parent and child, even without a formal adoption. \textit{Id.} As a case of non-parental visitation rights, it appears that this decision is no longer good law under \textit{Troxel v. Granville}, 530 U.S. 57 (2001), which declared that when competing interests between biological parents and others are at stake, the parental rights supercede those of a biological stranger or even a grandparent. \textit{See generally} Gribble, 583 P.2d 64. Absent a competing parental interest, however, the argument may still have some vitality.

\textsuperscript{170} Data collection would involve no personally identifiable information and would compile merely demographic data, therefore no individual liberties are infringed.

\textsuperscript{171} See Moore v. Sims, 442 U.S. 415 (1979) (refusing to scrutinize a state’s decision to take temporary custody of children whose parents were suspected of child abuse).

\textsuperscript{172} See Santosky v. Kramer, 455 U.S. 755 (1982) (holding that the Due
proposed statute would serve to prioritize an inevitable investigation or, at most, trigger a more thorough investigation.\textsuperscript{173} This is, however, a long way from the termination or suspension of parental custody, which requires a showing of clear and convincing evidence of parental guilt.\textsuperscript{174}

The analysis of the Proposed Child Fatality Review Team Statute is much the same as in the Proposed Risk Assessment Statute, but strict scrutiny is even less applicable in the context of fatality review teams. First, since most cases reviewed by child fatality review teams involve very young children, a truly committed stepparent may not be able to accrue enough time in the child’s life to prove that commitment to a court and be treated as a parent.\textsuperscript{175} Second, there is no fundamental liberty interest at stake, even for a biological parent,\textsuperscript{176} as the death of the child terminates the interest in protecting the care, custody and management of that child.\textsuperscript{177} The Fifth Circuit specifically

Process Clause requires a clear and convincing evidentiary standard in order to terminate parental rights, but also noting the profound significance of the state’s interference into a family’s privacy when it seeks to terminate those rights). “When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.” \textit{Id.} at 759.

\textsuperscript{173} See \textit{Sims}, 442 U.S. 415.
\textsuperscript{174} \textit{Santosky}, 455 U.S. at 769.
\textsuperscript{175} See \textit{CHILD MALTREATMENT 2000}, \textit{supra} note 21, at 53 tbl.5-1. In 2000, more than seventy percent of all fatality victims of child maltreatment were under three years old. \textit{Id.}

While the paternity cases require a biological father’s “attempt” to become a substantial part of a child’s life, the psychological parent theory is concerned with the actual bond that has developed between the child and the substitute. \textit{See} Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978). “In light of the fact that the record does not disclose . . . the extent to which their foster parents have become their psychological parents during the last three years, we are hard pressed to determine who would be most harmed by the denial of custody.” \textit{Id.}

\textsuperscript{176} See \textit{Arnaud} v. Odom, 870 F.2d 304 (5th Cir. 1989). The court noted that recognizing a constitutionally protected interest in a deceased infant’s remains would be more than an extension or interpretation of any preexisting right, but a new liberty interest altogether. \textit{Id.} at 311.

\textsuperscript{177} \textit{Id.; see also In re Stephanie WW}, 623 N.Y.S.2d 404 (3d Dep’t 1995)
declined to recognize “a liberty interest in the next of kin to be free from state-occasioned mutilation of the body of a deceased relative.” 178

B. Protected Classes

Strict or intermediate scrutiny may also be applied when a law discriminates against suspect classes, including race, alienage, national origin and sex. The proposed statutes do not discriminate against any of these classes in a manner that would trigger heightened scrutiny.

(holding that although a neglect action could not be brought on behalf of a dead child, the child’s death could be used to substantiate a neglect action brought on behalf of her surviving sister).

178 Arnaud, 870 F.2d at 305. Arnaud involved both a SIDS death and a resulting autopsy required by a mandatory autopsy statute. Id. The plaintiff parent was not challenging the constitutionality of the mandatory autopsy itself, but whether the coroner’s performance of “gruesome experiments” on the infant’s corpse (that clearly exceeded his authority) in preparation for expert testimony in an unrelated case, violated a substantive due process right of the plaintiff. Id. The court rejected the argument that the child’s parents had a liberty interest in their deceased child’s remains, but found that the parents had a “quasi-property” right in their child’s corpse, allowing them the potential to recover in tort. Id. at 309.
EVOLUTION AND CHILD ABUSE

1. Strict Scrutiny and Racial Discrimination

Professor Goldberg cites the case of Palmore v. Sidoti as analogous to the issues of child abuse prevention presented in this note. Palmore, however, involved a suspect classification based on race and was subject to strict scrutiny. When a court

179 See Att’y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986). “It is well established that where a law classifies by race, alienage or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.” Id.

These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.


180 See Goldberg, supra note 9, at 256; Palmore v. Sidoti, 466 U.S. 429 (1984). Jones points out that a supporter of evolutionary biology in law might favor targeting stepparents for child abuse prevention and education programs. By way of analogy, it was plausible to argue, as a Florida court did in 1982, that an interracial couple should not be granted custody of a white child because racial prejudice would make life difficult for the child. But the United States Supreme Court concluded that the law should not tolerate such prejudice. Id.

181 Palmore, 466 U.S. 429. In Palmore, the Supreme Court applied strict scrutiny and overruled a judge’s custody determination in favor of the child’s father based solely on the fact that the child’s white mother was cohabitating with a black man. Id. The court rejected the argument that the racial distinction was appropriate because the child would be subject to increased risk of suffering from racial prejudice. Id. at 431. The reasoning of the trial court was that there are social consequences for children in an interracial family and that the child would be subject to discrimination by society. Id. The Supreme Court recognized the potential that the child may suffer from these pressures, but determined under strict scrutiny that the justification was insufficient to warrant such a profound intrusion. Id. “The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.” Id. at 434. “The Constitution cannot control
applies strict scrutiny, it almost invariably strikes down the law.\textsuperscript{182} Undoubtedly, if strict scrutiny were applied to the proposed statutes in this note they would be deemed unconstitutional.\textsuperscript{183} Race, alienage and national origin classifications, however, are not implicated by the proposed statutes, and stepparents are not a suspect class; therefore, strict scrutiny would not be triggered.\textsuperscript{184}

\begin{quote}
\textit{such prejudices, but neither can it tolerate them.} \textit{Id.} at 433.
\end{quote}

\textsuperscript{182} Gerald Gunther, \textit{Foreward: A Search for Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 \textit{Harv. L. Rev.} 1, 8 (1972) (coining the oft-repeated phrase that strict scrutiny is “strict in theory and fatal in fact”). \textit{But see} Adarand Constructors Inc. v. Pena, 515 U.S. 200, 237 (1995) (“dispell[ing] the notion that strict scrutiny is strict in theory, but fatal in fact”); \textit{see also} Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny and upholding the internment of Japanese-Americans during World War II because the action was narrowly tailored to the Government’s purported compelling interest in national security).

\textsuperscript{183} \textit{See Palmore}, 466 U.S. at 432. A law that is overinclusive or underinclusive will not be upheld when this standard is applied. \textit{Id.} A law is overinclusive to the extent it affects more people than necessary to serve the government’s interest. \textit{See Craig v. Boren}, 423 U.S. 1047 (1976) (holding that a different drinking age for men and women is overinclusive because it disaffects drinkers who don’t drive). A law is underinclusive to the extent that it does not reach every person necessary to serve the governmental purpose. \textit{Id.} (holding that the same law is underinclusive because it does not address all drunk drivers including older drunk drivers and female drunk drivers). The proposed statutes in this note are overinclusive to the extent that they would target stepparent families where there is no abuse and underinclusive to the extent that they would not target every instance of child abuse.

\textsuperscript{184} \textit{See} Oliver R. Goodenough, \textit{Biology, Behavior and Criminal Law: Seeking a Responsible Approach to an Inevitable Interchange}, 22 \textit{Vt. L. Rev.} 263, 282-84 (1997). It is unlikely that proposals for race-based distinctions will come from the field of evolutionary psychology at all. First, evolutionary psychology looks at the human species as a whole and not at the differences between individuals or groups within the species (except for sex-based differences). Jones, \textit{Child Abuse}, supra note 2, at 1120. In addition, the scientific consensus indicates that race is largely a social construct. Goodenough, \textit{supra}, at 283. The physical differences between the races are primarily specific adaptations to local climate, disease and diet. \textit{Id.}; Nina Jablonski & George Chaplin, \textit{Skin Deep}, Sci. Am., Oct. 2002, 75, 75-81 (explaining the mechanics of skin color evolution). Theorists believe that dark skin evolved in sunnier parts of the globe either as a natural sunscreen to
EVOLUTION AND CHILD ABUSE 731

2. Quasi-Suspect Class and Sex Discrimination

Additionally, Goldberg cites Craig v. Boren as an example of prevent skin cancer or to prevent the breakdown of vitamin B folate, which is important for reproductive processes. Id. Lighter skin evolved in areas with little sunlight in order to absorb more ultraviolet radiation and maximize vitamin D production. Id. at 79.

Goodenough points out that science and the law have independently reached the same conclusion: distinctions based on racial classifications are inherently suspect. Goodenough, supra, at 284. “[S]cientific explanations’ stigmatizing persons according to their race or ethnicity are much more likely to reflect racial prejudice than legitimate scientific activity.” Id.

Craig, 429 U.S. 190. An intermediate level of scrutiny is applied to cases involving legal distinctions based on sex. Id. For discrimination based on sex, a law must be sufficiently related to an important government interest in order to withstand intermediate scrutiny. Id. The court’s rationale for this rule is that laws discriminating on the basis of sex are “inherently suspect” because sex “frequently bears no relation to ability to contribute to society,” and legal distinctions based on sex often “reflect outdated notions of the relative capabilities of men and women.” City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985) (quoting Frontiero v. Richardson, 411 U.S. 677 (1973)). The Court recognizes that men and women do have some biological differences that might be relevant to law and, therefore, the test is not as stringent as strict scrutiny. Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (upholding a statutory rape law that criminalized sex with females but not males under the age of 18). Much like evolutionary theories have noted with regard to sexual selection, the Court recognized that the burdens of teen pregnancy fall disproportionately on females. Id. at 471.

“We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Id. The Court “has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” Id. at 465. See also Trimble v. Gordon, 430 U.S. 762 (1977) (striking down an Illinois law that allowed illegitimate children to inherit in intestacy only from their mothers but not from their unwed fathers even if they could prove paternity). “The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers’ estates than that required . . . under their mothers’ estates.” Id. at 770. “Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.” Tuan Anh Nguyen v. I.N.S., 553 U.S. 53, 63.
the failure of statistical evidence under constitutional scrutiny. In *Craig*, however, the discrimination was based on the quasi-suspect class of gender and subjected to intermediate scrutiny. Statistical evidence has a poor track record under intermediate scrutiny. While sex based classifications can potentially arise

(2001). *Lehr*, 463 U.S. at 267-68 (upholding a New York statutory scheme that gave mothers of children born out of wedlock notice of an adoption hearing, but only extended that right to fathers who mailed a postcard to a putative fathers registry).

See *Craig*, 429 U.S. 190; Goldberg, supra note 9, at 258. In *Craig*, the Court examined an Oklahoma statute that established a drinking age of eighteen for women and twenty-one for men (for beer with low alcohol content). *Id.* at 190. Oklahoma based its legislative decision on the state’s interest in traffic safety and statistical evidence that men were more likely to be arrested for drunk driving. *Id.* at 200, 222. In a 7-2 decision, the Court struck down the statute, finding that the law invidiously discriminated against men and violated the male plaintiff’s guarantee of equal protection. *Id.* “Even where this statistical evidence is accepted as accurate, it offers only a weak answer to the equal protection questions presented here.” *Id.* at 201. The Court emphasized both the overinclusive nature of the prohibition, referring to the fact that a significant number of men are not arrested for drunk driving, and underinclusiveness, because the statute applied only to males between eighteen and twenty-one, even though the drunk driving statistics considered by the Court included men of all ages. *Id.* While the majority applied intermediate scrutiny, both dissenting opinions applied the rational basis test. *Id.* at 217, 220-21. In dissent, Justice Rehnquist argued that the statute in question was not based on prejudice but emphasized the fact that men are much more likely to be arrested for drunk driving. *Id.* at 222 (Rehnquist, J., dissenting). This suggests that the level of scrutiny was critical to the majority’s decision.

See *Craig*, 429 U.S. at 199.

See generally *id.* at 208-09 (“The principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups.”); see also *Tuan Anh Nguyen*, 533 U.S. 53 (2001) (“[O]verbroad sex-based generalizations are impermissible even though they enjoy empirical support.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

Obviously, the notion that men are more likely to be the primary supporters of their spouses is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families’ support.
from the field of evolutionary psychology, that is not the case here. The proposed statutes do not facially discriminate on the basis of sex. Stepparents are not a quasi-suspect class and are unlikely to be deemed so in the future. One could argue that

\[ \text{Id. at 646.} \]

As evidenced by the discussion regarding sexual selection and reproductive access theory in Part I of this note, evolutionary theories sometimes distinguish between men and women based on the different environmental pressures present for each sex. Some notable differences include sexual dimorphism, hormonal differences, the relative size of certain brain structures and behavioral differences. See Goodenough, supra note 184, at 285-86. Nonetheless, the dangers of reinforcing stereotypes to the detriment of both men and women are real and significant. Id. at 285. Goodenough posits that the law strikes a reasonable compromise. Id. at 287. “We should cautiously explore the scope of the enduring gender differences, while taking care to avoid denigration and artificial constraints on both men and women.” Id.

\[ \text{Id.} \]

See Proposed Data Collection Statute, supra text accompanying note 119; Proposed Risk Assessment Statute, supra text accompanying note 128; Proposed Child Fatality Review Team Statute, supra text accompanying note 140.

\[ \text{Id. at 446.} \]

In Cleburne, the Court reversed the Fifth Circuit’s determination that mental retardation was a quasi-suspect classification and that plaintiff’s equal protection claim warranted intermediate scrutiny. Id. at 438. See also Maher v. Roe, 432 U.S. 464, 470 (1977) (holding that indigent women’s claim contesting a state policy that refused to publicly fund abortions was not entitled to heightened scrutiny of the policy); Romer v. Evans, 517 U.S. 620, 635 (1996) (denying suspect class status to homosexuals). For a brief period of time, the Ninth Circuit held that homosexuals were a suspect class in a case involving the military’s discrimination against homosexuals. Watkins v. U.S.
the proposed statute results in sex discrimination, since the overwhelming majority of stepparents residing with young stepchildren are male. In cases of disparate impact, however, Army, 847 F.2d. 1329 (1989) That decision was quickly vacated by the full circuit. Watkins v. U.S. Army, 875 F.2d 699, 731 (1989), cert. denied, 498 U.S. 957 (1990).

The Supreme Court has looked at a number of factors in determining whether a group should receive protected status, including a history of purposeful discrimination, immutability of the trait in question, and whether that class is a “discrete and insular minority” unable to rally its own political support. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (discussing the history of discrimination and immutability requirements in establishing sex to be a suspect classification); U.S. v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”Id. Stepparents are not prime candidates for the protections of heightened scrutiny. First, stepparents have not had the kind of purposeful discrimination relevant for consideration. But see DALY & WILSON, CINDERELLA, supra note 1, at 1-8, 21-25 (noting historical prejudice and distrust of stepparents). Despite the fact that stepparents may be viewed suspiciously by some, they have not been subject to the same institutional discrimination as women, racial minorities, or even other groups that have been denied suspect class status, such as the mentally retarded. See Plyler v. Doe, 457 U.S. 202, 220 (1982) (denying suspect class status to undocumented aliens and finding that undocumented alien status is not an immutable characteristic because it is the product of conscious action). Id. Unlike race and gender, stepparents can change their status at any time by leaving a relationship or adopting a child (when the biological father has waived or lost his parental rights). Third, stepparents are not a discrete and insular minority. In fact, many states have shown special consideration to custodial stepparents in relation to both visitation and adoption rights. See, e.g., Troxel v. Granville, 530 U.S. 57, 64 (2001) (striking down a Washington state statute that afforded special rights to grandparents in their visitation of children against the biological parents’ wishes). In New York, before 1995, stepparents were the only individuals who could adopt a child without terminating the other (opposite sex) parent’s parental rights. See N.Y. DOM. REL. LAW § 110 (McKinney 2003). The New York Court of Appeals has since afforded the same rights to non-marital couples. In re Jacob, 660 N.E.2d 397 (N.Y. 1995).

the court will rarely inquire beyond a rational basis test. If a statute is neutral on its face, a court will inquire further only when a clear pattern emerges that can only be explained as

indicates that ninety-two percent of children living with stepparents reside with a biological mother and a male stepparent. _Id._ Here a stepparent is defined in the traditional sense of an unrelated person married to the child’s parent. _Id._ Considering that the mandatory autopsy statute would affect only children under two years old, the percentage of stepfathers in households with children of nursing age may be much higher than households with older children. _See_ Daly & Wilson, _Nepotistic Discrimination_, _supra_ note 9, at 289. While the anonymous data collection does not discriminate based on sex at all, implementation of the Proposed Child Fatality Review Team Statute and (to a lesser extent) the Proposed Risk Assessment Statute may disproportionately affect males more than females.

193 _See_ McClesky v. Kemp, 481 U.S. 279 (1987). In _McClesky_, the plaintiff argued that his death sentence violated the Equal Protection Clause because the death sentence is more often imposed on black defendants convicted of killing white victims than on white defendants convicted of killing black victims. _Id._ The Court refused to apply strict scrutiny and held that “a defendant alleging an equal protection violation has the burden of proving purposeful discrimination” in his particular case. _Id._ at 291-92. Goldberg presents _McClesky_ as an example of yet another failure of statistical evidence. Goldberg, _supra_ note 9, at 258. The case is a better example of how disparate impact of a protected class is insufficient to trigger heightened scrutiny and how the Court will defer to the legislature in most cases when heightened scrutiny is inapplicable. _See_ _McClesky_, 481 U.S. 279.

For the rare instances where higher scrutiny is involved, _compare_ Washington v. Davis, 426 U.S. 229 (1976) (refusing to apply strict scrutiny to determine if a police exam was racially discriminatory because more blacks than whites passed), _with_ Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down a law requiring laundry permits for wooden laundries when all but one white applicant was granted a permit and all 200 Chinese applicants were denied), _and_ Gomillion v. Lightfoot, 364 U.S. 339, at 340 (1960) (striking down a racial gerrymandering scheme that changed the boundaries of a city “from a square to an uncouth twenty-eight sided figure” that excluded 395 of the 400 black citizens from the city without excluding a single white person). The latter two examples are instances of de facto discrimination and represent “the rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation.” _McClesky_, 481 U.S. at 294. In these cases, statistical proof must present a “stark” pattern in order to overcome the standard rule of deference to legislative decisions. _Id._ at 293.
discriminatory intent against the protected class. Stepparents would not be distinguished by the fact that they may be male but because of the increased risk of abuse that their presence presents to their infant stepchildren.

3. Rational Basis Scrutiny and Everything Else

One broad group of cases that are conspicuously absent from Goldberg’s analysis are the vast majority of opinions construing legislative decisions based on statistical evidence that do not substantially interfere with a fundamental liberty interest or disaffect a suspect class. In such cases, courts will apply a “rational basis test” and generally uphold a law in deference to the legislature. Under this test, a law will be upheld if it bears a rational relationship to a legitimate government interest,

---

194 See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding administrative decision refusing a zoning reclassification request that had a racially discriminatory impact and holding that a racially motivated purpose must also be behind the law).

195 See DALY & WILSON, HOMICIDE, supra note 27, at 88. In fact, some of the strongest advocates for better recognition of this fact come from fathers’ rights organizations. See Fathers for Life, Child Abuse and Neglect Data at the National Clearinghouse, Health Canada, at http://fatherless.net/Sodhi/cancan1.htm (last visited Mar. 12, 2003). Fathers for Life contends that the National Clearinghouse on Family Violence (in Canada) presents distorted and inaccurate information to promote their political agenda, ignoring the greater risk of children in stepparent families. Id. By combining statistics for biological male parents and substitute male parents, the National Clearinghouse reports a greater overall percentage of abuse perpetrated by male parents. Id. See also, Dads Against the Divorce Industry, The Human Carnage of Fatherlessness, at http://www.dadi.org/carnage.htm. (last visited Mar. 12, 2003).

196 See Goldberg, supra note 9. Although these cases would more accurately represent “the constitutional hurdles . . . statistical evidence must overcome,” those hurdles are easily surmounted. Id at 258-59.

197 Id. “[L]egislatures are presumed to have acted within their constitutional power, despite the fact that in practice the law results in some inequality.” McGowan v. Maryland, 366 U.S. 420 (1961) (upholding the constitutionality of Maryland’s Sunday Blue Laws under rational basis scrutiny).
provided it is not motivated solely by invidious discrimination or a bare desire to harm a politically unpopular group. 198 When the rational basis test is applied, most legislation, including legislation based on statistical evidence, is upheld. 199 The rational basis test applies to all of the proposed statutes.

198 See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (rejecting heightened scrutiny for the mentally retarded, but striking down a zoning ordinance under rational basis scrutiny that was motivated by a bare desire to harm); see also Romer, 517 U.S. 620 (1996) (rejecting heightened scrutiny for homosexuals as a class, but striking down a statewide voter referendum prohibiting protections for homosexuals from discrimination under rational basis scrutiny).

199 See Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). In Williamson, the Court upheld a state law preventing opticians from fitting old lenses into new frames without a prescription from an ophthalmologist or optometrist. Id. In deference to the legislature, the Court noted that the “law may exact a needless wasteful requirement in many cases, but it is for the legislature not the courts to balance the advantages and disadvantages of the . . . requirement.” Id. at 487. See also New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). Beazer provides a prime example of the successful use of statistical evidence under rational basis review. Id. In Beazer, the Supreme Court ruled that the Transit Authority (TA) employment policy of refusing to hire methadone users was constitutional under rational basis scrutiny. Id. The court noted that the recidivism rate for methadone users in treatment was high and that the law was overinclusive to the extent that it refused consideration for employment to “the strong majority” of methadone users who would neither return to illicit drug use nor pose a threat to job safety. Id. at 576. “The ‘no drugs’ policy now enforced by the TA is supported by the legitimate inference that as long as a treatment program . . . continues, a degree of uncertainty persists.” Id. at 591. “No matter how unwise it may be for [the] TA to refuse employment to individual [applicants] simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere with that policy decision.” Id. at 594.

Goldberg appears to acknowledge the Beazer decision, though not by name. See Goldberg, supra note 9, at 257. Specifically, he notes, “When we consider educational attainment in awarding a job or a history of drug abuse in denying one, we are in part relying on a statistical prediction about who is more likely to be a successful worker. Yet no court is likely to set aside our decision.” Id. While this case did not warrant a citation as a case exemplifying “the hurdles statistics, including evolutionary-based evidence, must overcome,” cases involving race and sex discrimination received a more thorough analysis. Id. at 258-59.
738  JOURNAL OF LAW AND POLICY

a. Proposed Data Collection Statute Under the Rational Basis Test

Challenges to data collection are invariably scrutinized under the rational basis test even when the protected classes of race and sex are involved.  Courts consistently recognize the government’s broad discretionary powers to conduct research.  The National Clearinghouse already collects data on the sex of perpetrators and victims of child abuse, and the statute would do nothing to alter this practice.  By collecting more accurate

200 See Caulfield v. Bd. of Educ. New York, 583 F.2d 605 (2d Cir. 1978). For example, the U.S. Census Bureau has been collecting racial data since its inception in 1790 and it has withstood numerous constitutional challenges under rational basis scrutiny. See, e.g., Morales v. Daley, 116 F. Supp. 2d 801 (S.D. Tex. 2000). In Morales, the plaintiff argued that the U.S. Census questions pertaining to race were discriminatory on their face and that the tracking of racial statistics was a violation of equal protection under strict scrutiny. Id. In addition to the recognition of racial classification as a per se violation of equal protection, the plaintiffs claimed that census data was inappropriately used to identify Japanese-Americans for internment. Id. at 811. The Morales court granted the government’s motion for summary judgment and noted that the potential for misuse of otherwise legally obtainable information does create an equal protection violation. Id. at 814. “Plaintiff’s position is based on a misunderstanding of the distinction between collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and government use of suspect classifications without a compelling interest.” Id.; see also Wisconsin v. New York, 517 U.S. 1 (1996) (rejecting the state’s argument that a decision of the Secretary of Commerce to apply one statistical method in enumerating the census in favor of another should be reviewed applying strict scrutiny because the decision had a disproportionate impact on racial minorities).

201 See supra note 199 (discussing applicable case law).

202 See CHILD MALTREATMENT 2000, supra note 21, at 25, 47. Although the report contains a fair amount of data on the demographics of perpetrators of child abuse that mirrors the demographics of the victims (age, economic status, etc.), data on the race of the perpetrator of child maltreatment is not included. Id. This may have resulted from a policy choice by the government. Another such choice may be reflected in the latest publication of Child Maltreatment, which obfuscates the racial data of victims by not comparing the incidence of maltreatment with the racial demographics of the general population. Compare CHILD MALTREATMENT 2000, supra note 21, at 26, with
information, the data collection statute does not disaffect individual stepparents. In fact, if the preliminary studies mentioned throughout this note are inaccurate, more extensive data on the subject could serve to vindicate stepparents. The statute merely allows the National Clearinghouse to gather anonymous data and assess the scope of the problem of stepparent abuse. The government has a legitimate interest in ensuring that the National Clearinghouse carries out its legislative mandate of preventing harm to minors. Since the statistical evidence indicates that the presence of stepparents presents a high risk, the statute is rationally related to that goal and would pass rational basis scrutiny.

b. Proposed Risk Assessment Statute Under the Rational Basis Test

The government has a compelling interest in protecting the safety of children. The Supreme Court has recognized that child abuse investigations are “in aid of and closely related to criminal statutes,” and law enforcement is a state interest.

CHILD MALTREATMENT 1999, supra note 116, at 14 (providing a per capita abuse rate for victims by race).

203 42 U.S.C. § 5105 (2002) (requiring the National Clearinghouse to carry out “an interdisciplinary program of research that is designed to provide information needed to better protect children from abuse or neglect”); see also Morales, 116 F. Supp. 2d. at 814 (noting that Congress has delegated to the Census Bureau the authority to decide what is needed and to ask the appropriate questions).


205 Moore v. Sims, 442 U.S. 415 (1979) (abstaining from hearing a case of an ongoing child abuse investigation at the state level). Although the focus of the Moore case is federalism, the Court’s language clearly shows deference to the state’s plenary power over individual interests absent unusual circumstances. Id. at 415. The state not only investigated a family suspected of child abuse, but took temporary custody of the children during the investigation. Id. The Court suggested that not “every attachment issued to protect a child, creates great, immediate and irreparable harm.” Id. at 417.
Although such a law may be both overinclusive (to the extent that it would disaffect some non-abusing stepparents) and underinclusive (to the extent that it would not target all abusers), this is not a significant factor under rational basis scrutiny. In addition, the proposal does not require a finding of abuse in stepparent families but merely contributes one more factor to an exhaustive list of factors relevant to child risks. Additionally, because “clear and convincing evidence” is constitutionally required to terminate the parental relationship, it is unlikely that this one factor would tip the scales in favor of a finding of abuse where none exists. This is especially true if caseworkers are more likely to err on the side of caution and report borderline cases as unsubstantiated.

c. Proposed Child Fatality Review Team Statute Under the Rational Basis Test

The Proposed Child Fatality Review Team Statute also bears a rational relation to the legitimate state interest in crime prevention and detection. Although highly overinclusive and underinclusive, the statute is rationally related to the state’s interest if it can reasonably be perceived to have the potential to uncover undetected instances of abuse or prevent future abuse.

206 Beazer, 440 U.S. at 592. “Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this ‘perfection is by no means required.’” Id. at 592 n.39, quoting Vance v. Bradley, 440 U.S. 93, 108 (1979), quoting Phillips Chemical Co. v. Dumas School Dist., 361 U.S. 376, 385 (1960).


208 See CITIZENS BUDGET COMM’N, supra note 123, at 25. The Commission noted that “the staff reductions led to less timely initiation of investigations, and the staff cuts and other budget cuts created incentives for workers to err on the side of failing to ‘found’ a report rather than refer the case for preventive services or foster care.” Id.

209 Michigan v. Long, 463 U.S. 1032, 1047 (1983) (noting that the state’s legitimate interest in crime prevention and detection is one factor in determining the reasonableness of a police search).
EVOLUTION AND CHILD ABUSE

4. Other Proposals

The preceding examples represent only three of the proposed legislative changes that might be considered when applying an evolutionary perspective to the current social problem of child abuse and stepparents. Professor Jones and other commentators have suggested a number of other proposals for receptive legislatures to consider in addressing the increased risk of abuse to children living with stepparents.\(^\text{210}\) Jones has not necessarily advocated any of these proposals but offers them as examples of the role evolutionary analysis can play in legal decision making.\(^\text{211}\) These proposals present considerations that can be divided into several categories.

First, like the Proposed Data Collection Statute, several proposals would escape serious constitutional scrutiny altogether due to the legislature’s broad discretionary spending and fact-finding powers. One such proposal is to increase funding for education of mandatory reporters and counseling to families at risk.\(^\text{212}\) Second, some proposals are more similar to the Proposed Risk Assessment and Proposed Child Fatality Review Team statutes, which directly disaffect stepparents. Those proposals would be subject to a similar equal protection analysis. These proposals include creating a separate legal standard for a stepparent’s right to discipline their children, creating deterrents

\(^\text{210}\) See Jones, Child Abuse, supra note 2; Robin Fretwell Wilson, Children at Risk: The Sexual Exploitation of Female Children After Divorce, 86 CORNELL L. REV. 251 (2001) (assessing the risk of child sexual abuse at the hands of both biological parents and stepparents after divorce and suggesting legal interventions to mitigate the problem).

\(^\text{211}\) See Jones, Child Abuse, supra note 2, at 1233-35.

\(^\text{212}\) Id. See also N.Y. SOC. SERV. LAW § 418 (McKinney 2003). The statute defines “mandatory reporters” as:

Any person or official required to report cases of suspected child abuse or maltreatment, including workers of the local child protective service, as well as an employee of or official of a state agency responsible for the investigation of a report of abuse or maltreatment of a child in residential care.

Id.
through harsher punishment for non-related child abusers\textsuperscript{213} or providing a preference for biological parents in child custody determination.\textsuperscript{214} Third, consideration of biological influence on behavior can invigorate preexisting debate with a new perspective. Here, the constitutional implications are minor because the policy considerations would not rest solely on statistical evidence. For example, the subject of kinship care has been hotly debated.\textsuperscript{215} Kinship care, an alternative to traditional foster care, creates a preference for relatives of the parent.\textsuperscript{216} The debate is not currently centered around the best interest of the child but questions the wisdom of paying grandparents, uncles and aunts to care for their own relatives.\textsuperscript{217} As dangers to children living in a home absent biological relatives are more clearly defined, however, the best interest of the child may take a prominent role in the debate. Other proposals, such as making divorce more difficult when children are present in the family, is another example of a debate that could benefit from this discussion.\textsuperscript{218} Arguably, this could avoid the increased risk of

\textsuperscript{213} See Jones, Child Abuse, supra note 2, at 1235.

\textsuperscript{214} See Jones, Irrationality, supra note 56, at 311. Jones has suggested that behaviors that are biologically based may be more resistant to traditional methods of deterrence, such as imprisonment. \textit{Id.}

\textsuperscript{215} Gabrielle A. Paupeck, Note, When Grandma Becomes Mom: The Liberty Interests of Kinship Foster Care, 70 FORDHAM L. REV. 527 (2001) (arguing that kinship foster parents should have the same constitutional liberty interest in their wards as traditional nuclear family parents).

\textsuperscript{216} \textit{Id.} at 529.

\textsuperscript{217} \textit{Id.} at 535.

\textsuperscript{218} See, \textit{e.g.}, ARK. CODE ANN. § 9-11-808 (Michie 2001). Arkansas is one of three states, along with Arizona and Louisiana, that allow marrying couples to opt into a covenant marriage. Nicole Licata, Note, \textit{Should Premarital Counseling Be Mandatory as a Prerequisite to Obtaining a Marriage License?}, 40 FAM. CT. REV. 518, 525 (2001). “The covenant marriage enables couples to bind themselves to a stricter marital agreement than the traditional agreement.” Kimberly Miller, Survey of Legislation 2001 General Assembly: Title 9: Family Law, 24 U. ARK. LITTLE ROCK L. REV. 483, 484 (2002). For dissolution of a covenant marriage in Arkansas, [T]he parties must prove one of the more egregious grounds for traditional divorces or live separate and apart for two years. If, however, the couple has a minor child of the marriage, then they
abuse to children after divorce altogether. Finally, Jones notes that some of these suggestions are admittedly absurd in our society but are nonetheless thought provoking.\textsuperscript{219} For example, one suggestion encourages single parents to marry their in-laws.\textsuperscript{220} Like kinship care, a child whose mother marries her brother-in-law retains at least some biological connection to her

must first obtain a judgment of judicial separation and live apart continuously for two years and six months from the date of the judgment before seeking divorce. Id. at 484. Cf. Wilson, supra note 210, at 319 (noting that educating parents to the risks of sexual abuse to children after divorce may, for better or for worse, discourage divorce).

[A]ny effort to raise awareness about the sexual vulnerability of girls following divorce will empower currently married parents to consider their options when making the decision whether to divorce. Arguably, society should not keep families in “blissful ignorance” simply because they may not react appropriately to information about this risk. Id.

219 See Jones, Child Abuse, supra note 2, at 1235.

220 Id. As absurd as this suggestion may seem, several cultures have included marital preferences for relatives. See DALY & WILSON, HOMICIDE, supra note 27, at 85. Under the levirate custom of Talmudic law, when a man dies, his brother is given a right of marriage to the decedent’s wife. See, e.g., Deuteronomy 25:5 (King James).

If bretheren dwell together, and one of them die, and have no child, the wife of the dead shall not marry, without unto a stranger: her husband’s brother shall go in unto her, and take her to him to wife, and perform the duty of an husband’s brother unto her. Id.

This rule, however, would not protect stepchildren to childless widows. But see Robert D. Cooter & Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts, 46 AM. J. COMP. L. 509, 540 (1998) (recognizing the levirate custom in some Native American cultures without a requirement that the widow be childless). Some Native American cultures also encourage sororal polygyny, the polygamous marriage of a man and two sisters. Id. at 539-40. In one of the few recorded polyandrous societies, women of the Tre-ba culture of Tibet often marry two brothers. DIAMOND, supra note 78, at 36. While the author cites the culture’s land tenure system of the Tre-ba as the reason for this practice, some evolutionary safeguards against stepparent abuse are nonetheless present to children in Tre-ba families because their nonparental caretakers are closely related. Id.
caretakers in a reconstituted family.

CONCLUSION

The evidence that abuse in stepparent families is quantitatively different from abuse in biological families is overwhelming. Evolutionary analysis offers no automatic policy implications, and proponents are quick to point out the tradeoff between “minimizing child abuse while stigmatizing stepparents on the one hand, and being maximally fair to stepparents while tolerating an increase in child abuse on the other.”221 Professor Jones and other scholars have offered a number of proposals to address the problem, but, more importantly, they have brought the issue to public attention.222 Professor Goldberg correctly posits that these proposals would be based solely on statistical evidence but incorrectly implies that these distinctions may be subject to constitutional infirmities. All of the proposed remedies would be subject to rational basis review under equal protection, and they would easily pass constitutional muster. By raising the specter of constitutional defects, Goldberg stymies the legitimate attempts to move forward with a dialogue on the propriety of these proposals.

221 See Pinker, Blank Slate, supra note 8, at 165.

222 Id. “If we did not know that people are predisposed to lose patience with stepchildren faster than with biological children, we would implicitly choose one end of this tradeoff—ignoring stepparenting as a risk factor altogether, and tolerating the extra cases of child abuse—without even realizing it.” Id.; see also Jones, Child Abuse, supra note 2, at 1238.
REVERSING REFORM: THE HANDSCHU SETTLEMENT IN POST-SEPTEMBER 11 NEW YORK CITY

Jerrold L. Steigman*

Tappin’ my phone, they never leave me alone
I’m even lethal when I’m unarmed
‘Cause I’m louder than a bomb

—Public Enemy

INTRODUCTION

Since September 11, 2001, messages from the government and mainstream press have been full of reminders that the world has changed. Mass hysteria has affected markets, government and society. The United States government rushed through legislation aimed at deterring further terrorist attacks and protecting the country, and rounded up suspects based on ethnicity. The words “September 11” became synonymous with somber reflection and demanded an etiquette that instantly developed. A satirical newspaper wondered if irony was dead.

* Brooklyn Law School Class of 2004; B.S., B.A., Binghamton University, 1996.
1 Public Enemy, Louder Than a Bomb, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK (DefJam Recordings 1988).
2 David Cole, National Security State, THE NATION, Dec. 17, 2001, at 4 (“It is already a cliche that the attacks of September 11 ‘changed everything.’”).
Reference to September 11 by government officials became proof enough that the relationship between people and government must change, the only question remaining being, by how much? Questioning the prudence or necessity of policies proposing to radically alter the powers of government was dismissed as unpatriotic or helpful to terrorists. People’s fears were commodified and manipulated. Against this backdrop, the rules governing police investigations of political activists in New York City came under attack.

The consent decree in Handschu v. Special Services Division, which included what is referred to as the Handschu Settlement and which was agreed to in 1985 by New York City residents and the New York City Police Department (NYPD), governs police investigations of groups or individuals that engage in various forms of political activity. In September 2002, the NYPD and the City of New York—defendants in the Handschu case—sought and obtained modification of the consent decree.

This note focuses on the mechanics of the Handschu Settlement and the arguments for and against modification. Part I summarizes the law regarding modification of consent decrees. Part II reviews the consent decree entered into in Handschu.

---


6 Handschu, 605 F. Supp. 1384. See Paul Chevigny, Politics and Law in the Control of Local Surveillance, 69 CORNELL L. REV. 735 (1984) (discussing the settlement agreement, which at that time still was not finalized or entered as an order in the court). Professor Chevigny was lead counsel for the plaintiffs in the Handschu case, and his discussion reviewed public and judicial reactions to local police surveillance in cities and states around the country. Id. at 738-39. See also Eric Lardiere, Comment, The Justiciability and Constitutionality of Political Intelligence Gathering, 30 U.C.L.A. L.
background of the decree, relevant terms of the decree and subsequent litigation. Part II also describes the modifications sought by the defendants as well as the court’s decision to modify the decree. Part III analyzes the defendants’ motion and the district court decision, illustrating possible results of modification by considering the outcome of a similar case. Part III discusses whether the defendants’ assertion that the threat of terrorism required modification of the decree is supportable. The note concludes by arguing that contrary to the assessment that terrorism required modification, circumstances have not changed with respect to the facts or the law in a way that warrants modification. The city we currently live in might be different than before September 11 because of the supposed newly discovered realization that the city is vulnerable to attack. The NYPD legitimately wants to prevent possible future terrorist attacks. But one thing is certain: before the Handschu plaintiffs obtained the consent decree with the NYPD, the NYPD abused constitutional rights when it conducted investigations based on individuals’ protected speech and political affiliations. The police targeted critics of the government and social justice activists because of what they thought. The decree helped to curb that abuse, at least creating a deterrent to abuse and a mechanism for people to learn of and put a halt to unfair and unfounded

---

8 Alliance to End Repression v. City of Chicago, 237 F.3d 799 (7th Cir. 2001) (modifying a similar consent decree for reasons that are posited by the NYC defendants in Handschu). See infra Part III.C.
9 See infra Part III (arguing that modification is not warranted because the NYPD gives no persuasive argument for reinstating unchecked monitoring of political actors).
10 The words “vulnerable to attack” are used with caution. For an explication of recent trends in speech about war, citizenship and enemies, see Leti Volpp, Critical Race Studies: The Citizen and the Terrorist, 49 U.C.L.A. L. REV. 1575, 1586-90 (2002) (commenting that recent political developments have tended to return racist and marginalizing thinking to common usage).
investigations. Nothing about terrorism or September 11 changed the necessity for oversight of police action in this regard. It is certainly a stressful time in our history. New York City residents should be skeptical of government enthusiasm for eliminating oversight in these stressful times. Indeed, the current state of affairs may actually increase the need for oversight. Without the decree in place, a known risk is created—the risk that police abuses will occur and go unrelieved in the absence of oversight.

I. CONSENT DECREES: PURPOSE, POLICY, ENFORCEMENT AND MODIFICATION

Consent decrees, or consent orders, are settlement agreements between litigants and have the same force as court orders. When a court approves a decree, it “places its imprimatur upon a solemn compact between the parties,” committing “the full power of the judiciary to implement effectively the obligations undertaken in the decree.” Commentators note that consent decrees are not a radical concept; rather, they are a creative way to use the courts to obtain justice not forthcoming elsewhere.

---


12 Id. at 726.

13 See Theodore Eisenberg & Stephen C. Yeazall, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that institutional reform litigation is not as radical a concept as other critics have noted and that the biggest changes that such litigation brings are new entitlements); see also Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983) (pointing out that federal judges are in a very difficult position when presiding over decrees, given their lack of expertise and inability to be effective managers, but not concluding that structural injunctions should not be pursued); Margo Schlanger, *The Courts: Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) (arguing that concentration on the federal judge when considering institutional reform litigation impoverishes the debate on reform, as many other factors put
A. Reform Litigation and Consent Decrees

The earliest cases that created the foundation for reform litigation were school desegregation cases, but later cases have included a wide range of public entities. Parties have used consent decrees to enforce the constitutional and statutory rights and freedoms of citizens facing all types of government actions and intrusions. Consent decrees are most controversial when the pressure on any area of social movement).

See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977) (establishing that courts, in order to facilitate the desegregation process, demand in their orders more stringent requirements than might have been available had the case been fully litigated and not ended in a settlement); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) (requiring a unitary school system under a district court-approved desegregation plan and reiterating approval of broad federal equitable power where local authority defaults on its obligations).

See, e.g., Spallone v. United States, 493 U.S. 265 (1990) (discussing aspects of contempt actions brought to enforce consent order in Yonkers, a community particularly reluctant to obey the strictures of the twenty-year-old agreement between citizens and the local government that required an end to discriminatory public housing administration); United States v. Paradise, 480 U.S. 149 (1987) (ordering one-for-one black state trooper hiring regime on Alabama Department of Public Safety due to its years of recalcitrance in the hiring or promotion of blacks); United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002) (upholding agreement between the federal government and Los Angeles to discontinue practice of depriving individuals of constitutional rights “through the use of excessive force, false arrests and improper searches and seizures”); Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001) (upholding an agreement between bus riders and city authority to end discriminatory practice in providing bus services); Glover v. Johnson, 138 F.3d 229 (6th Cir. 1998) (issuing an order to establish satisfactory educational programs and allow inmates access to courts); Juan F. v. Weicker, 37 F.3d 874 (2d Cir. 1994) (upholding an agreement between neglected or abandoned children and the State of Connecticut to fix the constitutionally-violative administration of child welfare); French v. Owens, 777 F.2d 1250 (7th Cir. 1985) (upholding an injunction against intolerable prison conditions in Indiana facilities); United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970) (same).

See, e.g., Holland v. N.J. Dep’t of Corr., 246 F.3d 267 (3d Cir. 2001) (prohibiting by consent decree race and gender discrimination and harassment of employees of New Jersey Department of Corrections); Watson v. Ray, 192
plaintiffs are citizens (or the federal government) and the defendant a state or municipal agency. Such decrees raise issues of appropriate remedies and how those remedies should be

F.3d 1153 (8th Cir. 1999) (requiring by consent decree between Iowa State Penitentiary inmates and state officials, certain minimum prison conditions); Alexander v. Britt, 89 F.3d 194 (4th Cir. 1996) (requiring by consent decree between North Carolina citizen program applicants and the state’s administrators of welfare and Medicaid programs, that the administrators process claims with certain timeliness); Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985) (establishing ability of parties to enforce consent decrees through contempt actions and requiring the U.S. Department of Health and Human Services to provide certain benefits to aliens); Chairs v. Burgess, 25 F. Supp.2d 1333 (N.D. Ala. 1998) (establishing a consent decree between Alabama jail inmates and corrections officials prohibiting overcrowding in jails and requiring timely transfers of inmates to prisons); United States v. City of Philadelphia, 499 F. Supp. 1196 (E.D. Pa. 1980) (restraining by consent decree gender discrimination in Philadelphia Police Department); Doe v. Dinkins, 192 A.D.2d 270 (1st Dep’t 1993) (establishing the so-called “Callahan consent decree” requiring New York City to provide shelter for any qualified homeless man).

17 Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 STAN. L. REV. 661 (1978) (concluding that the separation of powers doctrine ought to inform a court’s exercise of equitable powers in institutional reform litigation). Professor Nagel recognized, on the other hand, that the Supreme Court stated the opposite in Elrod v. Burns, 427 U.S. 347 (1976), and the “extreme pressures that can exist for using the federal courts as substitutes [for legislative and executive action].” Id. at 664. He was concerned that fundamental democratic values were going to be sacrificed “in order to vindicate particular constitutional rights,” id. at 664, and thus courts ought to defer to judgments of state executive and legislative actors. Id. at 719. See also Alan Effron, Note, Federalism and Federal Consent Decrees Against State Governmental Entities, 88 COLUM. L. REV. 1796 (1988) (arguing that the federal courts’ powers over state administrative agencies raise significant federalism concerns); Tamia Perry, Note, In the Interest of Justice: The Impact of Court-Ordered Reform on the City of New York, 42 N.Y.L. SCH. L. REV. 1239 (1991) (considering the impact on the autonomy of New York City government actors from the imposition of federal orders).

18 See Colin S. Diver, Special Project-The Remedial Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784 (1978) (detailing the problems facing the creation of remedies and discussing how to represent the interests of the parties).
constructed and applied when the plaintiffs represent a class.\textsuperscript{19}

Consent decrees are entered into in the pursuit of institutional reform.\textsuperscript{20} They are sometimes necessary to force government agencies to achieve their mandates within constitutional bounds.\textsuperscript{21} Plaintiffs generally seek declaratory relief that a particular practice violates their rights in some way. They also seek injunctive relief, which, if obtained, serves to order the agency to do or stop doing something.\textsuperscript{22} Consent decrees are attractive to defendants because defendants can contribute to the expedited outcome of the case.\textsuperscript{23} Consent decrees are attractive to plaintiffs because rights are vindicated and the federal courts oversee implementation in the event that agencies refuse to abide by the law.\textsuperscript{24} Consent decrees are also attractive to plaintiffs because they provide relief that may not be available through litigation.

Of course, consent decrees are not a panacea. Parties are sometimes reluctant to abide by the terms of a decree.\textsuperscript{25} Moreover, as judicial instruments, the decrees are susceptible to

\textsuperscript{19} See Maimon Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 198 DUKE L.J. 887 (1984) (questioning how the agreements reached in Title VII consent decrees can be fair to all people involved when such cases include people who are not parties).

\textsuperscript{20} See, e.g., Diver, supra note 18, at 809-12 (discussing the remedial process when the settlements have been negotiated as in most consent orders).

\textsuperscript{21} Horowitz, supra note 13, at 1266-67 (recognizing courts as actors in reform).

\textsuperscript{22} See generally Anderson, supra note 11 (discussing in detail all elements that should be present in a workable consent decree and reviewing case studies of three consent decrees); Horowitz, supra note 13, at 1266-67 (discussing the structural injunctions imposed on the courts through reform litigation).

\textsuperscript{23} Anderson, supra note 11, at 726.

\textsuperscript{24} Id.

\textsuperscript{25} See, e.g., Karla Grossenbacher, Note, Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist, 80 GEO. L.J. 2227 (1992) (discussing Spallone v. United States and arguing that given the ability to pursue options to enforce the decrees, federal judges ought to act forcibly to ensure that the relief is actually forthcoming); Eric A. Rosand, Note, Consent Decrees in Welfare Litigation: The Obstacles to Compliance, 28 COLUM. J.L. & SOC. PROBS. 83 (1994) (discussing the necessity of parties to continuously sue to enforce the consent decrees they have obtained).
The fact that a settlement has not been litigated extensively is not necessarily evidence that the settlement performed its task. Lack of litigation could also be due to factors impeding the capacity of either party to get to court, or it could mean that the parties addressed all the subsequent issues of implementation outside the courtroom.

B. Judicial Intervention and Modification of Consent Decrees

The Federal Rules of Civil Procedure authorize courts to modify consent decrees. Specifically, Rule 60(b)(5) provides that on motion the court can relieve a party from a final judgment or order if “it is no longer equitable that the judgment should have prospective application.” Courts can also provide relief for “any other reason justifying relief from the operation of the judgment.” Historically, the Supreme Court recognized that

---

26 See, e.g., Julie K. Rademaker, Note, Alliance to End Repression v. City of Chicago: Judicial Abandonment of Consent Decree Principles, 80 NW. U.L. REV. 1675 (1986) (arguing that the interpretation of the consent order in that case ignored fundamental aspects of the original agreement).

27 See Anderson, supra note 11, at 727 (noting that lack of litigation could result from the court prodding the parties along without resort to formal judicial measures).

28 Id. at 728 (noting alternatively that the absence of written opinions might be the consequence of a defendant evading enforcement or the plaintiffs losing interest).

29 Id. (recognizing that “[e]ach decree involves its own unique circumstances and a reader should not judge the success of a decree merely by whether it generates court opinions”); see also Horowitz, supra note 13, at 1302 (noting that courts prefer that parties handle subsequent issues without judicial oversight).

30 See Fed. R. Civ. P. 60 (allowing for modification of court orders by motion for relief from a judgment or order pursuant to the Federal Rules of Civil Procedure).


even where the order is by consent, a “court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned into, through changing circumstances, an instrument of wrong.” The Court also cautioned that “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead” a court to modify the agreement. According to the Court, a new statute altering the rights of the parties is one circumstance that can require the modification of a consent decree. At least one lower court noted that Rule 60(b) assumes the propriety of the order and refers instead to “some change in conditions that makes continued enforcement inequitable.”

The leading case governing modification of consent decrees in institutional reform litigation is Rufo v. Inmates of Suffolk County Jail. In Rufo, the Supreme Court ruled that courts

---

33 United States v. Swift & Co., 286 U.S. 106, 114-15 (1932) (holding that a prospective decree is always subject to adaptation as necessary). In Swift, modification was not allowed because the evidence showed that the defendant corporation would return to its abuse of power as a meat packing monopoly. Id. at 117. Meat packing corporations sought to modify the consent decree to allow them to sell groceries as well as meat, but cited no changes that warranted modification. Id. at 116.

34 Id. at 119.

35 Sys. Fed’n No. 91, Ry. Employees’ Dep’t, AFL-CIO v. Wright, 364 U.S. 642, 651-652 (1961) (citing Swift for the proposition that courts have the power to modify consent decrees). Employees and corporation had agreed on a specific price to not establish a union shop. Id. at 644. The statute governing employment of railroad workers was amended, allowing for unions. Id. The petitioners moved for modification of the consent decree but the district court denied the motion and the Sixth Circuit affirmed. Id. at 646. The Supreme Court reversed, recognizing that the parties could not require enforcement of rights that the statute no longer offered. Id. at 652.

36 Schildhaus v. Moe, 335 F.2d 529, 530 (2d Cir. 1964) (holding that plaintiff tax objector was entitled to maintenance of order as issued where facts had not changed). The court in Schildhaus observed that Rule 60(b) was not intended to be a substitute for an appeal from an erroneous judgment. Id. at 531.

37 502 U.S. 367 (1992) (establishing the test for modification of consent
should no longer hold the proponent of modification to the stringent grievous wrong standard when determining whether modification is warranted. The consent decree in *Rufo* arose out of a complaint by inmates in the Suffolk County Jail in Boston, Massachusetts. The plaintiffs alleged, and the district court found, unconstitutional conditions in the jail.

Seventeen years after the original decree, the defendants sought modification. The request was denied by the district court, and the First Circuit upheld the denial. The Supreme Court then reversed the decision and lowered the modification threshold, holding that the “party seeking modification of a consent decree must establish that a significant change in the facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.”

---

38 See *Rufo*, 502 U.S. at 393.
40 *Id.* at 686 (holding that the pretrial detainment facility at issue “unnecessarily and unreasonably infringes upon [the inmates’] most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy”).
42 *Id.* at 566.
43 See *Inmates of Suffolk County Jail v. Kearney*, 915 F.2d 1557 (1st Cir. 1990).
Further, the modification must neither create nor perpetuate a constitutional violation\textsuperscript{45} and should not seek the constitutional floor.\textsuperscript{46} The \textit{Rufo} Court prescribed consideration of whether the primary purpose of the consent decree had been achieved.\textsuperscript{47} The Court did not, however, hold that satisfaction of the primary purpose is a necessary precursor to modification.\textsuperscript{48}

The flexible test outlined in \textit{Rufo} did not shift the burden; defendants still must prove that facts and law have changed to warrant modification.\textsuperscript{49} Plaintiffs do not, after \textit{Rufo}, have the burden of showing that those circumstances have not changed.\textsuperscript{50} The Court noted that a change in the law as a result of decisions clarifying the law can only constitute “a change in the circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law.”\textsuperscript{51} Lamentably, the Court’s opinion provides very little guidance to determine whether and how the law has changed.\textsuperscript{52}

\begin{flushright}
\hspace{1in}
\end{flushright}

\textsuperscript{45} \textit{Id.} at 391 (noting that petitioners, to prevail on this prong, would have to show that double-celling of pretrial detainees at the Suffolk County Jail was constitutional).

\textsuperscript{46} \textit{Id.} The Court noted that because the district court had determined that conditions at the jail were unconstitutional, and that because the parties had settled on particular relief, a modification that removed all the protections above what had been determined as constitutional was prohibited. \textit{Id.}

\textsuperscript{47} \textit{Id.} at 382. \textit{But see} Levine, \textit{supra} note 37, at 1268-69 (arguing that the determination of the primary purpose, unless such a primary purpose is explicitly laid out by the parties, is very difficult and leaves the door open for appellate review).

\textsuperscript{48} \textit{Rufo}, 502 U.S. at 382.

\textsuperscript{49} Levine, \textit{supra} note 37, at 1269-70.

\textsuperscript{50} \textit{Id.} Had that occurred, only defendants would have the benefit of the flexible test. \textit{Id.}

\textsuperscript{51} \textit{Rufo v. Inmates of Suffolk County Jail}, 502 U.S. 367, 390 (1992) (recognizing that the sheriff would have to establish that the parties mistakenly believed that single-celling of pretrial detainees was mandated by the Constitution to warrant modification).

\textsuperscript{52} Levine, \textit{supra} note 37, at 1273-75 (noting that a determination of whether the law has changed for purposes of modification could depend on whether the defendants had committed to abiding by their constitutional obligations or committed to abiding by an injunction not required by the Constitution).
II. THE HANDSCHU SETTLEMENT

The events leading up to the Handschu Settlement consisted of abusive police practices sufficiently shocking to compel plaintiffs to sue. The plaintiffs extracted some major concessions from the NYPD in the shape of promises by the police to conduct their activities within certain parameters and created a mechanism for individuals to determine whether their rights had been violated. The limited subsequent litigation of the settlement suggests its effectiveness at establishing oversight and promoting deterrence. Defendants moved to modify the settlement in September 2002 to remove its principal protections, and the district court granted the modification request.

A. Arriving at Handschu

In the 1960s the NYPD stepped up surveillance and other investigatory efforts to include “more undercover and other surveillance of ‘groups that because of their conduct or rhetoric may pose a threat to life, property, or governmental administration’; of ‘malcontents’; and ‘of groups or individuals whose purpose is the disruption of governmental activities for the peace and harmony of the community.’” Police officials

53 See infra Part II.A (discussing background of the decree).
54 See infra Part II.A (describing terms of the settlement).
55 See infra Part II.B (discussing subsequent litigation). That is, when police acted outside the settlement, the plaintiffs went to court and obtained judgments that their rights had been violated, even though they could not get the court to hold the defendants in contempt.
57 Aff. of New York City Police Commissioner Patrick V. Murphy [hereinafter Murphy Aff.], quoted in Handschu v. Special Servs. Div., 605 F. Supp. 1384, 1396 (S.D.N.Y. 1985). See also Chevigny, supra note 6, at 735-
conceded that their activities included intelligence gathering “not limited to investigations of crime, but related to any activity likely to result in ‘a serious police problem.’”\footnote{Murphy Aff., supra note 57, quoted in Handschu, 605 F. Supp. at 1396 (acknowledging police investigations of radicals and protesters included use of “infiltration and informers, and telephone wiretapping, electronic eavesdropping, surreptitious recording of conversations, covert photography of individuals attending demonstrations, and recording speeches at demonstrations”). The police also would issue false press credentials to its officers and would “routinely furnish information about individuals signing petitions or attending meetings” to the state bar. Id. The case does not define a “serious police problem.” Id. A reasonable place to look for a definition might be where the police focused their resources. See, e.g., People v. Collier, 376 N.Y.S.2d. 954, 955 (Sup. Ct. 1975) (discussing investigation of a Lower East Side community activist). Vietnam War protesters were targets, Murphy Aff., supra note 57, quoted in Handschu, 605 F. Supp. at 1396, as were Black Panthers, Handschu, 605 F. Supp. at 1397.} For example, a two-year investigation of one citizen, which yielded a single, unregistered and subsequently suppressed handgun, comprised, according to the court, countless unconscionable violations of the individual’s rights and a terrific waste of city resources.\footnote{See People v. Collier, 376 N.Y.S.2d. at 958-59 (detailing the circumstances of a particular wide-ranging investigation, while laying out the activities of an undercover New York City Police detective over two years). The court described how the detective was assigned to spy on the defendant and followed this model citizen to a steady procession of school board meetings, local hospital meetings, anti-drug campaign work and other general community activism. Id. at 961-63. Part of the detective’s disguise included holding himself out to be unemployed; the defendant actually tried to get the detective work at various times, including letting him babysit for spending cash. Id. at 967. The detective produced hundreds of memos on the defendant and submitted them to his superiors in the Bureau of Special Services. Id. at 959. The trial court condemned this outrageous investigation at great length. Id. at 979-88.}

A class of plaintiffs composed of various political groups

36 (noting that political surveillance, which had existed as early as 1904 with the NYPD’s “Italian Squad,” became more active in the 1960s). One reason for the increased activity was that the police had more work to deal with an increase in “demands for reform and radical change.” \textit{Id.} at 736. Another was public interest in knowing who and what were causing social upheaval of the times. \textit{Id.} Federal funding was made available to local law enforcement to assist in surveillance efforts. \textit{Id.}
filed a lawsuit in the District Court for the Southern District of New York against the mayor and police commissioner of the City of New York and other police officials. The complaint charged that the infiltration and maintenance of information about the plaintiff class violated plaintiffs’ First Amendment and other constitutional rights. Plaintiffs further alleged that the Intelligence Division of the NYPD engaged in summary punishment to deter plaintiffs from lawful association and political activity and that the activities of the NYPD had a chilling effect on the exercise of the plaintiffs’ constitutional rights of speech, assembly and association.

The plaintiff class and the NYPD agreed to a settlement, which resulted in a consent decree, whereby the police would conduct investigations of political actors only within certain

---

60 Handschu v. Special Servs. Div., 349 F. Supp. 766 (S.D.N.Y. 1972) (establishing plaintiff class of various political groups on behalf of themselves and all residents of New York City that were or may in the future may become targets of political surveillance by the NYPD).

61 See Handschu, 349 F. Supp. at 766 (denying defendants’ motion to dismiss). This action was brought by Professor Chevigny and others. Id. at 766. Plaintiffs alleged that seven specific categories of practices and conduct of the Security and Investigation Section were unconstitutional. Id. The categories were: use of informers, infiltration, interrogation, overt surveillance, summary punishment, intelligence gathering and electronic surveillance. Id. at 768. The plaintiffs sought declaratory and injunctive relief. Id. at 767. One of the original plaintiffs was Shaba Om, a member of the “Panther 21.” Handschu, 605 F. Supp. at 1384. The police had infiltrated the Black Panthers and charged them with a plot to blow up department stores and police stations, but the jury acquitted the Black Panthers on all counts after determining police agents had “manipulated the defendants with ideas and encouragement and then greatly exaggerated their misdeeds to police superiors.” See Chisun Lee, The NYPD Wants to Watch You: Nation’s Largest Law Enforcement Agency Vies for Total Spying Power, VILLAGE VOICE, Dec. 18-24, 2002, at 33 (discussing the background of Handschu).

62 Handschu, 349 F. Supp. at 768.

63 Id. Police agents at public gatherings, for example, could create an “atmosphere of fear and intimidation.” Chevigny, supra note 6, at 737. This fear and intimidation would be compounded by the knowledge that the police were collecting names and building dossiers. Id.
limits. The settlement established an ‘Authority’ (the Authority) to oversee the activities of the Public Security Section (PSS) of the Intelligence Division. The majority decisions of the Authority were binding on the PSS. The NYPD could not engage in any investigation of political activity, which the settlement defined as “the exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions.” The settlement authorized the PSS to commence an investigation only after the NYPD established “specific information” that “a person or group engaged in political activity is engaged in, about to engage in, or threatened to engage in conduct which constitutes a


65 Handschu, 605 F. Supp. at 1417-24 (“Handschu Settlement”), § III. Further references to the settlement will be to section number in annexed pages 1417-24 to the district court opinion. The three members of the Authority were the First Deputy Commissioner of the Police Department, the Deputy Commissioner for Legal Affairs, and a civilian member appointed by the mayor for a term revocable at will. Id. § III. The Public Security Section (PSS) was the then current incarnation of the Special Services Division, named in the original complaint. Handschu, 349 F. Supp. at 767. These names, ‘PSS,’ ‘Intelligence Division,’ and ‘NYPD,’ as well as ‘police,’ are used interchangeably.

66 Handschu, 349 F. Supp. at 767. The membership of the Authority has been criticized because the input of the civilian member can be nullified, as majority decisions are binding. Handschu, 605 F. Supp. at 1410 (agreeing that the civilian member cannot be automatically assumed to be a “booby”). See also David Berry, Note, The First Amendment and Law Enforcement Infiltration of Political Groups, 56 S. CAL. L. REV. 207, 232 (1982) (arguing, inter alia, that settlements, including the Handschu Settlement, are inadequate to protect constitutional rights and citing the lack of independent oversight as one factor exemplary of the inadequacy). But see Chevigny, supra note 6, at 765-66 (maintaining that the civilian member is a good and necessary part of the Authority, defending the composition of the Authority with the observation that settlements are the products of negotiations, and conceding that it would be best, obviously, to have an independent review board with the ability to conduct inquiries).

67 Handschu Settlement, supra note 65, § II.A.

68 Id. § IV.C.
Prior to any criminal investigative efforts, the PSS had to submit to the Authority an “Investigation Statement” specifying the factual predicate. Approved investigations could be conducted for thirty days, with possible extensions. If the commanding officer of the Intelligence Division desired to use undercover personnel in an investigation, the officer had to first apply for approval showing good cause for the investigation and that the use of undercover personnel was essential.

Information obtained during investigations of individuals, groups or organizations could be collected or maintained only in conformity with the settlement. Information “from publicly available sources” could not be maintained with the PSS. Officers were only allowed to collect certain, general information about a planned non-criminal event “in order to preserve the peace, deploy manpower for control of crowds and protect the right[s] of individuals to freedom of speech and assembly.” Specifically, the PSS could not retain information that an individual had signed a particular petition, that an individual’s name appeared on a particular mailing list, that an individual financially supported a particular political group or the group’s aims, or that an individual had published anything that could be said to expound a particular political view. Information collected pursuant to the settlement guidelines “[could] be distributed only to law enforcement agencies or government...
agencies conducting security clearance procedures” and could not be disseminated “unless the requesting agency agree[d] in writing to conform strictly with the provisions” of the settlement. The settlement prohibited developing a file on an individual or group based solely on that individual’s or group’s “political, religious, sexual or economic preference.”

Additionally, the settlement created a mechanism for citizens who believed they were the subjects of surveillance to obtain confirmation of the surveillance from the Authority via an inquiry. If the target of an investigation confirmed that surveillance was conducted, the target could request that the Authority inquire of the PSS to determine whether the investigation was conducted in accordance with the settlement. If the Authority determined that the investigation violated the settlement, the Authority would then determine the disposition of the gathered material and submit a report to the police commissioner, who was required to initiate appropriate disciplinary measures. The activities of the PSS were reviewed annually by the commanding officer of the Intelligence Division and submitted to the Authority. The report included an accounting of the past year’s investigations, which had to be turned over to the police commissioner and submitted to the mayor.

The Second Circuit upheld the settlement in the face of strong
objections. Those who objected were concerned that settling would inhibit public awareness of police abuse and that the NYPD would not be held accountable for past wrongs visited upon New York City residents. That is, past illegal activities of the NYPD would not be adjudicated, and the settlement incorporated no admissions of wrongdoing by the NYPD. Objectors also feared that the settlement would prevent New Yorkers from benefiting from constitutional principles that might arise after the settlement had been approved. The objectors were concerned that if the law changed in the future to incorporate, for example, stronger First Amendment protections, the settlement would stifle the change’s application to the plaintiff class of New York residents.

The district court noted that the desire to have the defendants admit their wrongs was understandable but was inconsistent with the nature of settlements. To allay the objectors’ fears, the court acknowledged the settlement’s flexibility, writing that “if future cases declare constitutionally guaranteed rights and privileges which do not presently exist, the Guidelines are automatically amended pro tanto.” Discussing the wording of the Handschu

85 Handschu v. Special Servs. Div., 787 F.2d 828, 831 (2d Cir. 1986). The objectors complained that they did not have notice of the settlement, but the court considered the uproar among the groups as evidence that the due process requirements of notice were met. Handschu, 787 F.2d at 832-33. The objectors also did not consider the settlement agreement fair and reasonable, but the court thought otherwise, concluding that the plaintiffs had obtained “very respectable” concessions from the NYPD. Id. at 834; see also Handschu, 605 F. Supp. 1397-99.

86 Handschu, 605 F. Supp. at 1398 (noting objectors’ concerns); Chevigny, supra note 6, at 761-65 (addressing objectors concerns).

87 Handschu, 605 F. Supp. at 1399.

88 Id. at 1405.

89 Id.

90 Id. The court recognized the objectors’ “passionate desire . . . that whatever illegalities the NYPD perpetrated in earlier years be exposed to the light of day by a full plenary record. It is easy enough to understand that desire in human terms. But it is absolutely inconsistent with the salutary purpose of class action settlements.” Id.

91 Id. at 1406 (internal citations removed). “Pro tanto” means that the
Settlement, Judge Haight remarked:

If, as defendants’ counsel profess, the NYPD has abandoned any prior abuses and now views constitutional principles with pure and undistilled enthusiasm, no words of restraint are necessary; the millenium [sic] is at hand. If, as objectors apparently believe, the NYPD is mendacious, untrustworthy, and unalterably committed to continuing constitutional violations, no words are sufficient to avoid future controversy. I think it likely the real world lies somewhere between these two poles.\(^9^2\)

\(\text{B. Litigation of the Settlement}\)

Subsequent litigation of the Handschu Settlement revealed that the real world did indeed lie somewhere between the poles. From 1989 to 1990, the plaintiffs litigated the settlement three times, using the mechanisms of the settlement to invoke their rights.\(^9^3\) Defendants sought to modify the settlement in September 2002 and render the mechanisms much less useful.\(^9^4\) Modification was granted, and plaintiffs apparently are not planning an appeal.\(^9^5\)

settlement would have incorporated whatever constitutional protections might have arisen. See BLACK’S LAW DICTIONARY 1222 (6th ed. 1990).  
\(^9^2\) Handschu, 605 F. Supp. at 1409-10. The court was discussing the wording of the settlement with respect to how much of a showing the police would need to make in order to get approval to use informers on an investigation. \textit{Id.}


\(^9^4\) Defs.’ Mem. of Law, \textit{supra} note 5, at 5.

JOURNAL OF LAW AND POLICY

1. Invoking Handschu

In 1989 the plaintiffs made two separate motions to hold the defendants in contempt; the court refused both.96 In the first, plaintiffs alleged that police surveillance of black activists and a radio station violated the settlement.97 The court found that monitoring the station violated the settlement but did not hold defendants in contempt, noting that some ambiguities were inevitable when guidelines such as those in Handschu are put in place.98 In the second, the plaintiffs alleged that the defendants had purposefully destroyed records plaintiffs wished to discover.99 The court did not consider the destruction of records “deliberate sabotage” and appointed a document retrieval expert.100 The expert’s job was to facilitate retrieval of the documents that the defendants claimed were not produced due to administrative difficulties.101

The Handschu Settlement was also litigated in 1990,102 when plaintiffs sought to access notes created by an investigation conducted by undercover police agents.103 The agents had attended meetings of the New York City Civil Rights Coalition (the Coalition), a citizen group “formed . . . to explore the problem of racial bigotry in New York City.”104 The Authority


97 Handschu, 737 F. Supp. at 1291. The activists were the “New York 8” who were charged but acquitted of conspiracy to free two prisoners. Id. at 1304. The police were listening to and taping WLIB to be alerted to “announcements of demonstrations and meetings of interest . . . [and] commentaries by community leaders relating to police activities . . . and comments of members of the New York 8.” Id. at 1295.

98 Id. at 1308.


100 Id.

101 Id.

102 Handschu v. Special Servs. Div., 131 F.R.D. 50 (S.D.N.Y. 1990) (granting a motion by the New York City Civil Rights Coalition to compel discovery on its claim that the defendants were violating the settlement by spying on the Coalition’s activity).

103 Id. at 51.

104 Id. This group was formed after the Howard Beach incident. Id.; see
had previously supplied the Coalition with limited information indicating the investigation had taken place and that some information was obtained in violation of the settlement. Judge Haight ordered discovery, stressing that this type of discovery order exemplified the type authorized by the settlement.

2. Unsettling Handschu

In September 2002, the defendants requested modification of the decree to “eliminate the restrictions on the investigation of political activity.” Defendants’ contended that the settlement was no longer equitable in light of changes in “factual circumstances.” They cited a string of attacks on United States military and civilian targets for the proposition that the NYPD “had no conception of the challenge it would face in protecting the City and its people from international terrorism” when it

also PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 58 (1991). In 1986, three black men were beaten by a group of white teenagers in the predominantly white community of Howard Beach in Queens. Id. One of the victims fled the group and, in attempting to escape across a highway, was hit by a car and killed. Id. What ensued in the public and press was an ugly, racist display founded on an implicit notion that the presence of the men in that neighborhood itself was threatening to the community and the beatings thus warranted. Id. at 58-59. For a full account of the incident and aftermath, see generally id. at 58-61.

105 Handschu, 131 F.R.D. at 51.
106 Id. at 52.
107 Defs.’ Mem. of Law, supra note 5, at 5. The NYPD, following its September 2002 modification motion, asked the district court to review sealed testimony of Intelligence Commissioner David Cohen. Tom Perrotta, Police Ask Court to View Secret Papers: City Seeks Modification of Surveillance Rule, N.Y.L.J., Nov. 6, 2002, at 1. This testimony was supplemental to that contained in the motion and apparently based upon confidential information the public release of which would have compromised an ongoing investigation. Id. The police filed additional papers that denied that the modifications sought constituted a post-September 11 power grab. Tom Perrotta, Police Defend Bid to Relax Spying Rules, N.Y.L.J., Nov. 27, 2002, at 1. The police further alleged that the safety of New Yorkers would be jeopardized by continued adherence to the settlement agreement. Id.

108 Id.
agreed to the settlement in 1985. Defendants also stated that a “terrorist infiltration of America” had occurred, that the “present terrorist threat requires the concerted compilation and exchange of data,” and that the settlement precluded the NYPD from these functions.

109 Id. at 12. Specifically, the defendants cited:

The bombing of military bases in Saudi Arabia; the killing of nineteen U.S. airmen in the 1996 Khobar Towers bombing; the October 2000 attack on the battleship Cole in Yemen; the assault on United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania in August 1998; the World Trade Center bombing of 1993; and the September 11th destruction of the World Trade Center and accompanying attacks on the Pentagon.

110 Id. at 13. It should be noted here that the terms “terrorist” or “terrorism” ought to be cautiously invoked because they are ambiguous. See, e.g., United States v. Graham, 275 F.3d 490, 524-44 (6th Cir. 2001) (Cohn, J., dissenting) (analyzing, in detail, the legislative history of one of the federal definitions of terrorism and the difficulties agreeing on what constitutes terrorism); United States v. Goba, 220 F. Supp. 2d 182, 188 (W.D.N.Y. 2002) (analyzing the definition of terrorism from 8 U.S.C. § 1182 (2002), 18 U.S.C. § 2339(B) (2002) and 22 U.S.C. § 2656(f) (2002)). See also 22 U.S.C. § 2656f(d) (defining terrorism for the U.S. Department of Defense as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience”). The definitions are ambiguous because sometimes what objectively appears to be terrorism is not so designated; conversely, the term can be used very broadly. Compare William Blum, American Empire for Dummies: A Talk Given in Boulder Colorado, ZNET, at http://www.zmag.org/content (Oct. 21, 2002) (discussing American intervention in other nation’s affairs that would fit this definition, among them the squashing of “dissident movements” throughout Latin America in the 1950s through the 1980s, the 1989 invasion of Panama, intervention in Nicaraguan elections, the bombings of Iraq and Yugoslavia, and the support for Cuban terrorist Orlando Bosch), with Mitchell Plitnik, Terror and History, ZNET, at http://www.zmag.org/Znet.html (Nov. 6, 2002) (demonstrating the use of the word terror to describe the Washington D.C. sniper). An everyday definition is preferable; for the purposes of analysis this note defines “terrorism” as a violent act in support of or for the purpose of furthering particular political goals.

111 Defs.’ Mem. of Law, supra note 5, at 17.
According to the defendants, the settlement was too restrictive. Their motion requested a reduction in the role of the Authority so that its sole function would be to review records to determine whether constitutional violations had occurred. Specifically, the defendants claimed the “criminal activity requirement” prohibited defendants from investigating the legal preparatory activities of terrorist operatives. Defendants argued that “in the case of terrorism, to wait for an indication of crime before investigating is to wait far too long.” This inability to investigate lawful activities restricted the “development of intelligence and the sharing of that intelligence.”

In response, plaintiffs did not deny that circumstances had changed in New York City. Instead, they posited in their brief and at oral argument that the settlement would not interfere with terrorism investigations. They also contended that the terrorism of September 11 did not involve protected political activity.

Judge Haight analyzed the request for modification under the

---

112 Id. at 14.
114 Defs.’ Mem. of Law, supra note 5, at 5.
116 Defs.’ Mem. of Law, supra note 5, at 14.
117 Handschu, 2003 U.S. Dist. LEXIS 2134, *28; see also Lee, supra note 61, at 32 (reporting that plaintiffs “acknowledge[d] that September 11 was uniquely tragic but deny that it created a reason to grant police free access to lawful people’s private information”).
118 Handschu, 2003 U.S. Dist. LEXIS 2134, at *29-30 (quoting plaintiffs’ brief that “[t]he Handschu Guidelines do not restrict the investigation and prevention of terrorism. They have no bearing on police action except when an investigation focuses on a group or person engaged in political activity”).
119 Id. at *30 (quoting plaintiffs’ brief that “[t]he Guidelines would not have interfered with the investigation of the September 11th hijackers because they were involved in no protected political activity, in New York or anywhere else.”).
test articulated by the Supreme Court in *Rufo*. He first considered whether defendants made a threshold showing of a change in facts or law requiring revision. He noted:

There is no disputing Deputy Commissioner Cohen’s assertion that since the formulation of the *Handschu* Guidelines in 1985, ‘the world has undergone remarkable changes, . . . not only in terms of new threats we face but also in the ways we communicate and the technology we now use, and are used by those who seek to harm us.’

Judge Haight stated that “these fundamental changes in the threats to public security are perfectly apparent to every individual with any awareness of what is happening in the world.” Thus the court determined that changed circumstances warranted modification.

Judge Haight disposed of the plaintiffs’ argument by noting that he could not “accept its implicit assumption: that terrorists would never in furtherance of their unlawful purposes participate in ‘lawful political, religious, educational or social activities.’” He supported this by pointing to the defendants’ assertion that one of the individuals convicted in the 1993 World Trade Center bombing was an imam and concluded that “the *Handschu* Guidelines may impose restrictions upon the NYPD’s ability to investigate terrorism.” Judge Haight noted that the plaintiffs did not offer evidence to rebut the defendants’ contentions. He therefore found no basis to doubt the contentions that, in general,

---

121 *Id.*
122 *Id.* at *27.
123 *Id.* at *28.
124 *Id.* at *40.
125 *Id.* at *33. In other words, terrorists would never participate in activities that the settlement was supposed to protect. *Id.*
128 *Id.*
the criminal activity requirement and the limits on collection and retention of information restricted police ability to investigate terrorism.\textsuperscript{129}

Judge Haight next considered whether the requested modification was suitably tailored to the changed circumstances.\textsuperscript{130} He determined that the modified \textit{Handschu} guidelines suggested by the defendants did not create or perpetuate a constitutional violation because it maintained the police policy of conforming to “constitutionally guaranteed rights and privileges.”\textsuperscript{131}

Judge Haight also noted that it was within his discretion to determine how closely modification could approach the constitutional floor.\textsuperscript{132} He balanced the “cost or risk to the public” of not modifying the settlement “to allow the NYPD to combat terrorism” against the cost to the “values protected by the First Amendment.”\textsuperscript{133} According to Judge Haight, the modifications came very close to the constitutional floor but were “justified by the unprecedented current public dangers of terrorism.”\textsuperscript{134} He agreed with the defendants that maintaining the Authority, even with its newly limited role, kept the modification sufficiently above the constitutional floor to satisfy \textit{Rufo}.

The NYPD’s promise to incorporate the substance of the FBI Guidelines into the police patrol guide bolstered this conclusion.\textsuperscript{136} Thus, Judge Haight found that modification was

\begin{footnotes}
\item[129] \textit{Id.} at *37-38.
\item[130] \textit{Id.} at *40.
\item[131] \textit{Id.} at *41-42.
\item[132] \textit{Id.} at *45.
\item[133] \textit{Id.} at *45-47 (quoting Alliance to End Repression v. City of Chicago and the United States Department of Justice, 742 F.2d 1007, 1016 (7th Cir. 1984) (en banc)).
\item[134] \textit{Handschu}, 2003 U.S. Dist. LEXIS 2134, at *47.
\item[135] \textit{Id.} at *51.
\end{footnotes}
required and suitably tailored to the change in circumstances.\textsuperscript{137}

In doing so, the court noted a third \textit{Rufo} command: to “give significant weight to the views of the local government officials who must implement any modifications” because those officials “have primary responsibility for elucidating, assessing, and solving the problems of institutional reform.”\textsuperscript{138} Judge Haight assigned significant weight to the opinions of NYPD officials.\textsuperscript{139} He then quoted Judge Posner’s invocation of the specter of terrorism in \textit{Alliance to End Repression v. City of Chicago},\textsuperscript{140} writing:

\begin{quote}
[M]indful of the crucial importance of preserving both individual freedoms and public safety, and balancing the legitimate demands of those two goals to the best of my ability, I conclude that the NYPD is entitled to a conditional order of the Court approving the proposed modifications to the consent decree and to the \textit{Handschu} Guidelines.\textsuperscript{141}
\end{quote}

Ultimately, he conditioned the modifications on the NYPD’s prompt submission to him of the text of the substance of the FBI Guidelines.\textsuperscript{142}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{137}] \textit{Handschu}, 2003 U.S. Dist. LEXIS 2134, at *51.
\item[\textsuperscript{138}] \textit{Id.} at *60 (quoting \textit{Rufo v. Inmates of Suffolk County Jail}, 502 U.S. 367, 392 n.14 and 391 (1992)).
\item[\textsuperscript{139}] \textit{Id.} at *60.
\item[\textsuperscript{140}] \textit{Id.} (citing \textit{Alliance to End Repression v. City of Chicago}, 237 F.3d 799, 802 (2d Cir. 2001), which modified, due to changed circumstances, a consent decree arising from Chicago police investigations of political groups); see also infra Part III.B.
\item[\textsuperscript{141}] \textit{Handschu}, 2003 U.S. Dist. LEXIS 2134, at *62-63.
\item[\textsuperscript{142}] \textit{Id.} at *63-64; see also FBI Guidelines, \textit{supra} note 136. It should be noted here that an additional, perhaps more chilling, development is on the horizon: federal legislation rumored to be originating with the Department of Justice that could terminate the \textit{Handschu} Settlement even if plaintiffs appeal. See Charles Lewis & Adam Mayle, \textit{Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act}, \textsc{The Center for Public Integrity}, at http://www.publicintegrity.org/daaweb/list.asp?L1=10&L2=0&L3=0&L4=0&L5=0 (Feb. 7, 2003) (providing an electronic copy of the Domestic Security Enhancement Act of 2003 (Confidential Draft Jan 9, 2003)). In the Act’s “Section by Section Analysis,” the \textit{Handschu} Settlement is mentioned by
\end{itemize}
\end{footnotesize}
HANDSCHU POST-SEPTEMBER 11

III. HANDSCHU REMAINS VITAL

Accepting that Handschu’s protection of an individual’s First and Fourth Amendment rights hinders the NYPD’s ability to fight terrorism requires accepting the following difficult proposition, which should be rejected: the political views of dissenters raise suspicion of terrorism. It was predictable that the police would invoke the stressfulness of the current climate to modify the decree and use modification as a cover for an interest in suppressing dissent. But, contrary to the defendants’ name:

During the 1970s and 1980s, some law enforcement agencies—e.g., the New York City Police Department—entered consent decrees that limit such agencies from gathering information about organizations and individuals that may be engaged in terrorist activities and other criminal wrongdoing. See, e.g., Handschu . . . . As a result, they lack the ability to use the full range of investigative techniques that are lawful under the Constitution, and that are available to the FBI. (For example, the Attorney General’s investigative guidelines authorize agents, subject to certain restrictions, to attend public places and events “on the same terms and conditions as members of the public generally.”) The consent decrees also handicap officers in their efforts to share information with other law enforcement agencies, including federal law enforcement agencies such as the FBI. These problems threaten to frustrate the operations of the federal-state-local Joint Terrorism Task Forces, and could prevent effective cooperation at all levels of government in antiterrorism efforts. . . . This proposal would discontinue most consent decrees that could impede terrorism investigations conducted by federal, state or local law enforcement agencies. It would immediately terminate most decrees that were enacted before September 11, 2001 (including New York City’s). All surviving decrees would have to be necessary to correct a current and ongoing violation of a Federal right, extend no further than necessary to correct the violation of the Federal right, and be narrowly drawn and the least intrusive means to correct the violation.


143 See infra Part III.A.2 (discussing link between political activity and terrorism).

144 See infra Part III.A.2 (discussing government use of stressful times to
arguments and the court’s determination, changes in circumstances since September 11 with respect to the consent decree are not sufficient to require modification. Ultimately, the modifications impermissibly seek the constitutional floor, risk constitutional violations and are not tailored to any changed circumstances.

A. Analysis and Arguments in Context

In times of relative societal calm, courts should seek to protect fundamental constitutional rights, such as those protected by the First Amendment, that come under harsh attack in “pathological” times. Vigorous protection of these rights in times of calm provides greater stability for the future. This is particularly necessary because in stressful times the courts will be constrained in their ability to monitor concentrations of executive power. To be sure, it is difficult to pin down exactly when suppress dissents.

\[145\] See infra Part III.A.2 (arguing that modifying decree cannot be shown to assist with preventing terrorism).

\[146\] See infra Part III.A.2 (arguing that defendants’ arguments cannot justify modifications).

\[147\] See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456, 459-62 (1985) (arguing that the doctrine surrounding certain core constitutional rights, and specifically the First Amendment, ought to be formulated with an eye toward pathological time periods). Professor Blasi defines pathology as a “social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is [an increased] likelihood that people who hold unorthodox views will be punished for what they say or believe.” *Id.* at 450. This note employs Blasi’s formulation for analytical purposes.

\[148\] *Id.* at 512. This is because the strength of constitutional ideals is most severely tested in pathological times, and if those ideals had solid grounding in other times they would be more robust when tested. *Id.* at 456.

\[149\] *Id.* at 507; *see also* Korematsu v. United States, 323 U.S. 214, 218 (1944) (upholding as constitutional a military wartime decision to round up and detain people of Japanese descent); Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) (reviewing WILLIAM H. REHNQUIST, *All the Laws But One: Civil Liberties in Wartime* (1998) and
pathological times are upon us. The years leading up to World War I, the years of World War II and the McCarthy era are generally considered exemplary pathological times. The year following September 11, 2001, could also be included. Since September 11, vulnerable constitutional rights have been under attack and society has not tolerated dissent. Intolerance of commenting on Chief Justice Rehnquist’s belief that it is not of concern that in times of national security crisis, civil liberties suffer; Anthony Lewis, *Marbury v. Madison v. Ashcroft*, N.Y. Times, Feb. 24, 2003, at A17 (recognizing that the Supreme Court “disappointed us” when it refused to interfere with the internment of Japanese Americans, and that judges cannot “close their eyes to violations of our rights” during a possibly endless war on terrorism). There is something of an inverse relationship between executive power and civil liberties: civil liberties contract as executive power expands, and vice versa.

*See* Blasi, *supra* note 147, at 466.

*See*, e.g., United States v. United States Dist. Court, 407 U.S. 297, 329 (Douglas, J, concurring). Referring to “the flood of cases before us this term . . . we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era.” *Id.*

*Blasi, supra* note 147, at 464 (citing examples of events that precipitate a pathological period outside of the most natural example of a nation going to war). Among those are “a sudden disturbance of a comfortable way of life” or “[v]ivid reminders of a group’s or nation’s vulnerability.” *Id.*; see also *Bush Speaks of Security To Group of U.S. Attorneys*, N.Y. Times, Nov. 30, 2001, at B7. “But we’re at war. The enemy has declared war on us. They . . . seek to destroy our country and our way of life.” *Id.* (quoting President George W. Bush).

*See*, e.g., *Hearing on Anti-Terrorism Policy Before the Senate Jud. Comm.*, 106th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft, who said, “[T]o those who scare peace-loving people with phantoms of lost liberty . . . your tactics only aid terrorists.”), *quoted in* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (arguing that it is the liberty of non-citizens, not the liberty of citizens, that Americans have been historically, and are now even more willing, to give up); David Glenn, *The War on Campus: Will Academic Freedom Survive?*, THE NATION, Dec. 3, 2001 (discussing pressures put on professors at the University of New Mexico and UNC-Chapel Hill, a library assistant at UCLA, and condemnation of teach-ins at CUNY, all for academic commentary about the U.S. response to September 11); Bill Pennington, *Player’s Protest Over the Flag Divides Fans*, N.Y. Times, Feb. 26, 2003, at D1 (reporting that a college basketball player’s act
dissent is a distinctive feature of pathological periods.\textsuperscript{154}

Discussing the pathology of these times requires recognizing that periods of heightened national security do not become so without some influence from the government.\textsuperscript{155} In other words, compliant mass media that parrots the official story provided by government sources contribute to national hysteria.\textsuperscript{156} This of facing away from the flag during the national anthem made her a controversial figure); Bill Berkowitz, \textit{Academic Bashing}, at ZNET, http://www.zmag.org/znet.html (Nov. 6, 2002) (discussing the new study of university faculty by the American Council of Trustees and Alumni (ACTA) and recognizing effort to label university professors as anti-American where they question governmental policy). ACTA was founded by Lynn Cheney and Senator Joseph Lieberman in 1995. \textit{Id.} The report condemns university faculty as being the “weak link” in America’s response to terrorism. \textit{Id.} Such a report seeks to stifle dissenting voices on campus and everywhere by listing those that seriously consider government policy. \textit{Id.}

\textsuperscript{154} Blasi, \textit{supra} note 147, at 457 (noting that “[t]he aggressive impulse to be intolerant of others resides within all of us”). “It is a powerful instinct. . . . When the constraints imposed by [socialized norms about the value of free speech] lose their effectiveness . . . the power of the instinct toward intolerance usually generates a highly charged collective mentality.” \textit{Id.} The constraints on this aggressive intolerance are removed in stressful times, and “the problem is compounded by the fact that the suppression of dissent [manifests itself] in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community.” \textit{Id.} at 457-58; \textit{see also} United States v. Sinclair, 321 F. Supp. 1074, 1079 (E.D. Mich. 1971) (recognizing the influence of the stressfulness of the Vietnam era on the public). “In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand [the views of political opponents of the government].” \textit{Id.}

\textsuperscript{155} Interview by Znet with Robert McChesney & John Nichols, ZNET, Nov. 6, 2002 (discussing their recent book explaining the struggle between free and independent press which serves the people on the one hand and concentrated corporate media subservient to power on the other), http://www.zmag.org/znet.html. For a detailed analysis of powerful interests shaping information, \textit{see generally} \textsc{Edward S. Herman \\& Noam Chomsky, Manufacturing Consent} (1988) (establishing a model for understanding how information contrary to the needs of powerful institutions is suppressed and controlled in a democracy and applying that model to news stories of the 1970s and 1980s).

\textsuperscript{156} \textit{See Herman \\& Chomsky, supra} note 155, at 18-23 (recognizing elite
deference benefits those in power when the media ignore and suppress stories that conflict with governmental interests.\textsuperscript{157} History predicts that government actors will invoke the stressfulness of a climate to justify abuses or extraordinary exercises of power.\textsuperscript{158} Indeed, in their request to modify the

influence on mass media). This contention, that media is subservient to the interests of power, allows for some contrary evidence. Thus, articles occasionally appear in mainstream publications the content of which may seem to undermine views routinely espoused in those publications. \textit{Id.} This theory may explain how the majority of news coverage of the war on terrorism examines both the U.S. vulnerability to terrorism and a high-ranking U.S. military official’s contrary opinion. \textit{See}, \textit{e.g.}, Eric Schmitt & Philip Shenon, \textit{General Sees Scant Evidence of Close Threat in U.S.}, \textit{N.Y. TIMES}, Dec. 13, 2002, at A26 (noting that the head of the military’s Northern Command, four star General Ralph E. Eberhart, who oversees domestic counterterrorism efforts, does not consider threat of terrorism to be “significant”).

\textit{Id.} at 23. It is beyond the scope of this note to conduct an empirical analysis of news stories that dealt with the September 11 events with respect to their content and omissions. For readers interested in news ignored by mainstream media, \textit{see}, \textit{e.g.}, \textit{Censored 2003: Top 25 Censored Stories of 2001-2002}, \url{http://www.projectcensored.org/stories/2003/default.htm} (Mar. 23, 2003) (listing top stories not reported or underreported, including U.S. efforts that could be considered terrorism).

\textit{See}, \textit{e.g.}, Korematsu \textit{v.} United States, 323 U.S. 214, 218 (1944) (recognizing the threat of invasion by Japan during World War II to justify internment of Japanese-Americans). The Court noted:

\begin{quote}
All citizens . . . feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.
\end{quote}

\textit{Id.} at 219-20. During World War I, the post office took away the use of the mail for publications that printed antiwar articles. \textit{See} \textit{Howard Zinn, A People’s History of the United States} 360 (1994). The Department of Justice raided dozens of union meeting halls and seized documents later used
Handschu Settlement defendants’ posited that times are different now than in the past. Their actions demonstrate a predictable attempt to take advantage of this pathological period.

1. District Court Modification

In his decision to modify Handschu, Judge Haight focused on the undisputed assertion in defendants’ papers that the conspiracy to bomb the World Trade Center in 1993 was coordinated by an imam. The court concluded that the defendants had met their burden of showing that the settlement may impose restrictions on the police because the plaintiffs could not show that terrorists would never participate in lawful political or religious activities or organizations. It is impossible, however, to contend that terrorists never participate in lawful activities. The court in trials for conspiracy to “hinder the draft [and] encourage desertion.” Id. at 363-64. And the New York Times quoted a former Secretary of War as saying: “We must have no criticism now.” Id. at 359. Thus, from U.S. Solicitor General Theodore Olson:

When you have a long period of time when you’re not engaged in a war, people tend to forget, or put in the backs of their minds, the necessity for certain types of government action used when we are in danger, when we are facing eyeball to eyeball a serious threat.

Charles Lane, Parallel Legal Unit to Handle ‘Enemy Combatants,’ DAILY GAZETTE (Schenectady), Dec. 1, 2002, at A13 (quoting the Solicitor General in reference to the war on terror).

See Defs.’ Mem. of Law, supra note 5, at 12 (“When the Handschu Guidelines were agreed to in 1985, the NYPD had no conception of the challenge it would face in protecting the City and its people from international terrorism”).

See Arundhati Roy, Come September, Speech at the Lensic Performance Arts Center, Santa Fe, New Mexico, ZNET (Sept. 29, 2002) (condemning the use of September 11 grief for political purpose as a “terrible, violent thing for a State to do its people”), at http://www.zmag.org/content/showarticle.cfm?itemID=2404&sectionID=15; see also supra note 158 (noting examples of government abuse during stressful times).


correctly used the example of the notable imam as proof that lawful political or religious activity has been used as a cover for preparation of terrorist attacks. But reliance on this notion raises the important question of what one should do with such knowledge. Judge Haight’s argument allows for a dangerous assumption and illegitimate next step: that political activity itself becomes suspect in terrorism investigations simply because there is crossover, at times, between lawful political or religious activity and terrorist preparation. The real import of the decision is that because protected political activity once crossed paths with terrorist planning, political activity now can be deemed a specific indication that criminal activity will or is threatening to occur. Political activity thus can be said to raise criminal suspicion.

163 Id. But see Andy Newman & Daryl Khan, Brooklyn Mosque Becomes Terror Icon, but Federal Case is Unclear, N.Y. TIMES, Mar. 9, 2003, at 29 (noting that certain infamy has surrounded a Brooklyn mosque with accused links to raising money for terrorism).

164 Handschu, 2003 U.S. Dist. LEXIS 2134, at *34-35 (requiring that plaintiffs show that terrorists “have never engaged in . . . or will never in the future [engage in political activity]”). The court reasoned that the breadth of the plaintiff class necessitated the finding of a possible relationship between political activities undertaken by the members of the plaintiff class and those undertaken by terrorists. Id. at *34. Thus, the court determined that the settlement’s restrictions on investigation of political activity may inadvertently restrict the NYPD’s investigations of terrorism. Id. at *35. This note contends that by focusing on the relationship between political activity and terrorist activity without factoring in criminal activity whatsoever, the Handschu Settlement modification creates a single-factor test for determining the existence of suspected terrorist activity: political activity.

165 See, e.g., Mari J. Matsuda, Foreward: McCarthyism, the Internment and the Contradictions of Power, 19 B.C. THIRD WORLD L.J. 9, 17-18 (1998) (recognizing, in a discussion of how Japanese-Americans were vilified during World War II, that “[a]s with the threat of terrorism today, as with the mysterious Communists that McCarthyism searched for, the lack of evidence against the accused Japanese Americans became an additional solipsistic reason to violate their rights: there was no other way to fight such a hidden threat”).
2. Defendants’ Arguments

Defendants sought and obtained removal of the “criminal activity requirement.”166 Removing the requirement that investigations are based on suspected criminal activity eliminates the underlying reason for the settlement.167 After modification, the Authority no longer approves investigations based on whether it considers officers to have sufficient basis to determine that there is a crime to investigate.168 Thus, the only role for the Authority is to investigate violations of the constitution.169 This is an evisceration of the decree.170

The NYPD should not be permitted to avoid the requirement that their investigations be based on specific information of criminal activity. It is reasonable to require that virtually all police investigations start with information that criminal activity is afoot. In the absence of criminal activity, it follows to ask what other factors are to be used as a basis for investigations. Neither Judge Haight nor the NYPD specified the factors on which the police would rely to begin investigations in the absence of criminal activity.171 The defendants referred to “lawful

167 See Anderson, supra note 11, at 729 (noting that the success of a consent decree is contingent upon “preserving the spirit” of consent that attended its creation); Chevigny, supra note 6, at 737 (noting that the relief sought in complaints of police surveillance was control of such surveillance in non-criminal contexts).
168 See Defs.’ Mem. of Law, supra note 5, at 20 (“Under [the] modification, the Authority . . . retain[s] a role in monitoring compliance with the core policy of the decree: that police investigations ‘conform to constitutionally guaranteed rights and privileges’”).
169 Id. at 20-21.
170 See, e.g., Flynn & Fries, supra note 5, at A18 (reporting plaintiffs’ counsel as saying police were trying to undo the settlement).
preparatory activities” of potential targets that may indicate conduct pinpointing terrorists: “They may own homes, live in communities with families, belong to religious or social organizations and attend educational institutions.”\(^{172}\) If the NYPD considers these activities suspicious, then a government “dragnet” has been realized,\(^ {173}\) and the NYPD apparently now assumes that otherwise lawful actors are suspicious potential terrorists.\(^ {174}\) This suspicion, however, must arise from something.\(^ {175}\) Regrettably, in the current climate it is reasonable to fear that merely espousing opinions unpopular to those in power may create suspicion.\(^ {176}\)

\[ \text{a. The Change in Contemporary Circumstances Does Not}
\text{Satisfy the Rufo Analysis} \]

Defendants’ argument that “circumstances have changed” is similar to those previously offered by the government to defend

\(^{172}\) See Cohen Decl., supra note 115, at 9.


\(^{174}\) Cohen Decl., supra note 115, at 9.

\(^{175}\) See ARTHUR KINOY, RIGHTS ON TRIAL 21-25 (1994). Silence on the factors police use to determine suspicion when they are not required to show specific information of criminal activity or the threat of criminal activity recalls the government’s “trust the integrity of the executive” argument. Id. (discussing the government’s oral argument in United States v. United States Dist. Court, 407 U.S. 297).

\(^{176}\) For examples of conduct that the NYPD has deemed suspicious in the past, see Handschu v. Special Services Division, 131 F.R.D. 51 (S.D.N.Y. 1989) (discussing investigation of civil rights group); People v. Collier, 376 N.Y.S.2d 954, 961-63 (Sup. Ct. 1975) (discussing investigation of community activist); Murphy Aff., supra note 57 (discussing the police activities that led to the adoption of the settlement); supra notes 57-58 (same). For examples of what the Chicago police and the U.S. government consider suspicious, see Frank Main, Police to Videotape Protesters, CHICAGO SUN-TIMES, Nov. 7, 2002, at 6 (discussing Chicago police surveillance of social justice activists); Dave Lindorff, Grounded, SALON (Nov. 15, 2002) (discussing the federal government’s list of people it does not want to fly, which includes peace activists), at http://archive.salon.com/news/feature/2002/11/15/no_fly.html.
suspect executive action. For example, in United States v. United States District Court the government argued that times were dangerous and thus necessitated government actions to defend itself. The case involved individuals attempting to review government wiretaps of their conversations to determine whether their indictments were based on illegally obtained evidence. The government posited that electronic monitoring of the defendants’ conversations without a warrant was lawful.

177 See United States v. United States Dist. Court, 407 U.S. 297 (1972) (forcing discovery of the source of information the U.S. government was using to charge defendants with conspiracy to, inter alia, illegally sabotage an Ann Arbor Central Intelligence Agency office). In United States v. United States District Court, the government had proffered the constitutionally unsound argument that the President of the United States, acting through the Attorney General, possessed inherent executive powers to authorize wiretaps of domestic groups without first obtaining a warrant. Id. at 299-300; infra Part II.B.2 (discussing defendants arguments). See also David Edwards, Unique Threats, Profitable Responses, MEDIA LENS (2002) (demonstrating that there was a “unique” threat posed by the Soviet Union in the 1950s, by international terrorism in the 1980s, and by Iraq today), republished in ZNET, http://www.zmag.org/znet.html (Nov. 6, 2002).

178 407 U.S. at 311-13 (noting that the government was concerned with “threats and acts of sabotage”). See also KINOY, supra note 175, at 21-25 (describing the arguments raised by the U.S. in the papers and to the Supreme Court). As reason for supporting a domestic security exemption to the warrant requirement, the government cited historical laws that reflected fear of domestic violence and rebellion as well as the Presidential oath of office and told the Court that it had to rely on the “integrity of the Executive branch.” Id. at 22, 24. The Handschu defendants’ argument was the same: times are dangerous, which creates the necessity of unfettered police conduct. See supra Part II.B (discussing defendant’s requested modifications).


180 Id. Recognizing that the Supreme Court had not ruled on the validity of the government’s position that the government should be able to determine unilaterally whether a given situation concerned national security, the district court noted that “[w]e are a country of laws and not of men,” id., and warned:

An idea which seems to permeate much of the [g]overnment’s argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion.
Justice Powell noted:

History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. [Constitutional] protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.”

The argument that times are dangerous should fail now for the same reasons it failed then. Domestic security concerns were invoked in the 1970s in the same manner that terrorism is today. But citing the specter of terrorism, as with domestic security, inadequately supports the government’s drastic plea to

---

There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in . . . citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions.

*Id.* at 1079.

---

181 United States v. United States Dist. Court, 407 U.S. at 314. For example, in the years preceding and during World War I, nine hundred people went to prison under the Espionage Act. See *Zinn, supra* note 158, at 356-59.

182 United States v. United States Dist. Court, 407 U.S. at 318-19 (recognizing that the government cannot simply invoke national security to justify exercising power to, in effect, suspend the constitution whenever it deems appropriate). The Court also rejected the government’s argument that the issues were too complex for the judiciary to handle. *Id.* at 320.

183 Compare *id.* at 320 (“Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize surveillances to oversee political dissent.”), *with Handschu v. Special Servs. Div.*, No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003) (acknowledging defendants’ argument that the restrictions are inconsistent with the public interest because of the threat of terrorism).
eviscerate the *Handschu* Settlement. Indeed, “the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of . . . [Fourth Amendment] prohibition[s].”

It can be argued that dedicating resources to preventing terrorist attacks is a necessary police action after September 11, especially in New York. Some commentators have advocated government use of military force where local law enforcement is overmatched. The media bombarded the public in the past year with suggestions that the intelligence community did not perform its function to prevent the terrorist attacks of 2001. But neither

---

185 *Id.* at 327 (Douglas, J., concurring). Justice Douglas recognized that “such excesses as the use of general warrants and the writs of assistance . . . led to the ratification of the Fourth Amendment.” *Id.*
186 William K. Rashbaum, *Kelly Seeking Federal Money for City Police*, N.Y. TIMES, Nov. 11, 2002, at B1 (reporting that police asked the federal government for funds to allay the cost of the NYPD’s counterterrorism efforts). The NYPD has approximately one thousand officers devoted to working on terrorism. *Id.*
187 David A. Klinger & Dave Grossman, *Responses to the September 11 Attacks: Who should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 HARV. J.L. & PUB. POL’Y 815, 823 (2002) (arguing that since local law enforcement is overmatched in dealing with terrorist threats, perhaps some consideration should be given to lifting the two hundred year ban on U.S. military involvement in local law enforcement). Klinger & Grossman describe an updated and fanciful version of the LAPD shootout with the Symbionese Liberation Army (SLA), with a much better armed and trained Al Qaeda in the SLA’s former role. *Id.* at 824-25. But see Schmitt & Shenon, *supra* note 156 (discussing the comments of an officer who does not consider the threats against the U.S. to be significant). General Eberhart recognized that “[o]ur basic freedoms must be protected” and that the country had “to make sure that we’re not out there doing . . . some of the things we did in the ‘50s with McCarthyism . . . [. ] a very sad chapter in our history.” *Id.*
188 See, e.g., Jan C. Ting, *Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145, 1148 (2002) (commenting that the USA PATRIOT Act itself was promulgated because of intelligence failures); Allison Mitchell & Todd S. Purdum, *A Nation Challenged: The Congress; Lawmakers Seek Inquiry Into Intelligence Failures*, N.Y. TIMES, Oct. 22, 2001, at A1; David E. Sanger,
a perceived need to allocate resources nor the discussion of intelligence failures justify removing the safeguards of the Handschu Settlement. Handschu was concerned with government intrusion on lawful political activity, not legitimate investigations by local law enforcement of activities that can be shown to be criminal.189 Considering the settlement provisions, it is difficult to understand how this seemingly innocuous framework could be considered to hinder police work.190 In fact, plaintiffs’ counsel recently described the agreement as not particularly stringent in terms of what the police are required to show to conduct an investigation.191

Defendants cannot establish the necessary connection between lawful political activity and terrorism.192 This is because any

---

189 Handschu v. Special Servs. Div., 605 F. Supp. 1384, 1420 (S.D.N.Y. 1985) (establishing settlement guidelines for the purpose of regulating investigations of political activity). Political activity is the “exercise of a right or expression or association for the purpose of maintaining or changing governmental policies or social conditions.” Id.

190 See supra Part II.A (discussing settlement provisions).

191 See Perrotta, Police Ask Court to View Secret Papers, supra note 107 (quoting plaintiffs’ counsel as describing the original agreement as a relatively “low hurdle” because a showing of specific information is a lower threshold than reasonable suspicion); Chevigny, supra note 6, at 765 n.200 (recognizing differing views on whether specific information is any different from reasonable suspicion). See also Terry v. Ohio, 392 U.S. 1, 21 (1968) (defining reasonable suspicion as requiring an officer to “be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” an intrusion).

logical connection between the city’s interest in preventing future attacks and spying on domestic political groups is tenuous as best.\textsuperscript{193} Lawful political activity usually has nothing to do with planning or designing terrorist acts.\textsuperscript{194} One example from the FBI Guidelines illustrates a situation where lawful activities might lead to terrorism suspicion: an urban organization’s attempt to purchase vast amounts of fertilizer or other combustible agents.\textsuperscript{195} According to the guidelines, this presumptively raises suspicion to investigate a particular group.\textsuperscript{196} The political or religious nature of this hypothetical group cannot raise suspicion.\textsuperscript{197}

\textsuperscript{193} Press Release, American Civil Liberties Union, How “Patriot Act 2” Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free (Mar. 20, 2003) (establishing the falsity of the claim that it is necessary to undermine civil liberties in order to effectuate safety), available at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12161&c=206.

\textsuperscript{194} See Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003) (explaining that acts of peaceful civil disobedience are not terrorism). The government’s reply to this contention would most likely be that some lawful political activity may develop into planning terrorist acts. The response must be that if this is so, only strict oversight can ensure a minimum of abuse in investigations. Moreover, assuming its resources are scarce, the government has an interest in focusing its investigations where it is most confident they will yield results. See Press Release, American Civil Liberties Union, How “Patriot Act 2” Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free, supra note 193 (recognizing that scarce resources should drive investigations to focus on actual potential threats).

\textsuperscript{195} FBI Guidelines, supra note 136, at 2 (noting that where groups attempt to acquire toxic chemicals, without apparent reason, an investigation may be justified).

\textsuperscript{196} Id.

\textsuperscript{197} See Cole, supra note 153, at 1003 (noting that using political or religious affiliations to determine guilt bypasses the procedures that are in
Rather, the attempted purchase is specific information of criminal or threatened activity.\textsuperscript{198} If the mere political nature of a group raises suspicion, the predictable result is simply that dissenters—those with unpopular ideas—will be viewed as suspicious.\textsuperscript{199}

Blurring the lines between lawful political activity and terrorism constitutes an implicit government effort to link actual terrorists on the one hand and political dissenters on the other.\textsuperscript{200} Over the past year, government officials have sought to establish this link,\textsuperscript{201} but the link, to the extent that it can be established, serves only to justify the government’s desire to reinstate surveillance of activists and dissenters. Political dissent, however, should be a protected activity any time “our way of life” is threatened.\textsuperscript{202} Although political groups unpopular with

\textsuperscript{198} FBI Guidelines, supra note 136, at 2.

\textsuperscript{199} See Cole, supra note 153, at 994-95 (recognizing that early targets of government harassment were alien union members that were critical of capitalism). Cole warns that “[o]nce again, we are treating people as suspicious not for their conduct, but based on their racial, ethnic, or political identity.” Id. at 1003.

\textsuperscript{200} For example, the federal government has a list of people, including peace activists and civil libertarians, who are subjected to scrutiny and harassment when they attempt to fly. See Lindorff, supra note 176 (discussing a alleged government no-fly list). The list was acknowledged by the U.S. Transportation Security Administration and has resulted in the airport harassment of a Milwaukee nun heading to a peace conference. Id. This link has also been implicitly established by other commentators. See Klinger & Grossman, supra note 188, at 824-25 (analogizing the SLA shootout, which involved radical government activists, to a hypothetical shootout with Al Qaeda).

\textsuperscript{201} D.T. Max, \textit{The Making of the Speech}, \textit{N.Y. Times}, Oct. 7, 2001, at 32 (quoting President Bush as saying, “You’re either with us, or with the terrorists.”).

\textsuperscript{202} See Bush Speaks of Security, supra note 152. See also Press Release, American Civil Liberties Union, ACLU Appalled by Ashcroft Statement on Dissent; Calls Free Speech “Main Engine of Justice” (Dec. 10, 2001) (statement of Laura W. Murphy, director of the ACLU’s national office in Washington, D.C., that a lesson from the history of dissent is “that free and robust debate is one of the main engines of social and political justice. . . . [D]ebate only strengthens our government [by providing legitimacy to its
those in power are not necessarily terrorists, given the opportunity and the cover of legitimacy, government officials will naturally focus their attention on dissenters.\(^{203}\) But neither local law enforcement nor societal needs will be met by silencing dissent, and suppressing these voices will make New York inhospitable to the lawful activity of groups concerned about government action.\(^{204}\)

The *Handschu* Settlement was a natural target for exploitation in a stressful time.\(^{205}\) The police argued that the present situation is grave and that removing procedural safeguards from their investigations was a necessary precaution.\(^{206}\) Without more, however, this argument is unavailing. Justice Douglas noted more than thirty years ago that “[w]hen the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court’s long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients.”\(^{207}\)

Moreover, a variety of situations can be deemed to create a  

---


\(^{204}\) This observation is supported by the events that prompted the *Handschu* Settlement in the first place. See *supra* Part II (describing background events to the settlement). The terms of the settlement reveal that residents’ interests are better served by limiting law enforcement capacity to muffle dissent. See *supra* Part II.A (describing terms of the settlement). See also Leonard Levitt, *No Connection to Intelligence*, NEWSDAY, Sept. 30, 2002 at A12 (reporting the motion’s lack of evidence that abrogating the *Handschu* Settlement would in any way assist the NYPD in fighting terrorism); Flynn & Fries, *supra* note 5 (reporting that police contend modification of *Handschu* warranted by change in circumstances).


handschu post-september 11

heightened sense of national security. And, the United States is constantly conducting military operations against various countries and enemies. Thus, an argument that points to a time of war or grave danger becomes all-inclusive. Judge Haight relied almost entirely on the notion that changes to the world are “perfectly apparent” in his decision to modify the Handschu Settlement. The NYPD is justifiably concerned about the safety of New Yorkers. Nevertheless, the safety of New Yorkers can be protected without removing the restrictions on police activity obtained by the Handschu litigants. Safety of residents and citizenry depends as much on the free and open exchange of ideas as it does on physical protection. Removing procedural


209 Grossman, supra note 208.


211 NYPD Mission Statement, available at http://www.nyc.gov/html/nypd/html/mission.html (last visited Mar. 8, 2003). “The Mission of the New York City Police Department is to enhance the quality of life in our City by working in partnership with the community and in accordance with constitutional rights to enforce the laws, preserve the peace, reduce fear, and provide for a safe environment.” Id.

212 See, e.g., Chalmers Johnson, Blowback: The Costs and Consequences of American Empire (2000) (arguing that American foreign policy activities that hurt people worldwide make terrorist attacks predictable and that some changes in foreign policy would likely result in reducing the threat of terrorism); see also supra Part II.A (discussing the terms of the settlement).

213 See, e.g., United States v. Goba, 220 F. Supp. 2d 182, 184 (W.D.N.Y. 2002) (recognizing at the outset of proceedings against an alleged terrorist group in Buffalo, New York, that constitutional protections and concepts of American democracy provide “sufficient strength and protection to
safeguards in government surveillance techniques cannot be proven to lead to an increase in security.\textsuperscript{214}

\textit{b. Seeking the Constitutional Floor}

Defendants’ modification maintained the existence of the Authority.\textsuperscript{215} Arguably, the Authority was maintained solely for the purpose of not violating the \textit{Rufo} requirement that any modification not seek the constitutional floor.\textsuperscript{216} But its mere existence does not necessarily keep the defendants above the constitutional floor.\textsuperscript{217} Indeed, a strong argument exists that the \textit{Handschu} defendants, beyond just seeking the constitutional


\textsuperscript{216} \textit{See supra} Part I (discussing the requirements of consent decree modification).

\textsuperscript{217} \textit{See supra} Part I (discussing the requirements of consent decree modification). It further allows them to suggest that they are not perpetuating a constitutional violation. \textit{See supra} Part I (discussing the requirements of consent decree modification).
floor, actually risked creating or perpetuating a constitutional violation.\textsuperscript{218}

Citing \textit{Laird v. Tatum},\textsuperscript{219} which agreed with the government that the United States Army’s program of domestic surveillance was not, in itself, a harm that could be redressed, the \textit{Handscheu} defendants claimed that the existence of a domestic surveillance program alone is not redressable harm.\textsuperscript{220} This proposition, however, was qualified by the Supreme Court’s decision in \textit{Meese v. Keene},\textsuperscript{221} which held that government harm to a plaintiff’s reputation is cognizable.\textsuperscript{222} Consequently, courts are willing to review the constitutionality of government surveillance that harms an individual’s reputation or opportunity for employment.\textsuperscript{223} Thus, \textit{Handscheu} cannot be minimized by

\textsuperscript{218} 502 U.S. 367, 391 (1992). Staying above the constitutional floor means respecting the rights guaranteed by the First and Fourth Amendments but not providing any additional safeguards not mandated by the Constitution. \textit{See supra} notes 120-37 (discussing the district court analysis of whether modification impermissibly sought the constitutional floor). If, without the oversight of the settlement, the NYPD returns to its past practices of investigating dissenters and minorities without suspicion of crime, the police run the risk of First and Fourth Amendment violations.

\textsuperscript{219} Laird v. Tatum, 408 U.S. 1 (1972) (holding that the claim was barred as not justiciable and that military surveillance of the civilian population ought to be reviewed by the legislature).

\textsuperscript{220} Defs.’ Mem. of Law, \textit{supra} note 5, at 18.

\textsuperscript{221} 481 U.S. 465, 472 (1987) (holding that government harm to a plaintiffs reputation is cognizable). A California State Senator wanted to exhibit Canadian films. \textit{Id.} at 467. The films had been labeled “political propaganda” pursuant to the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-21 (1966), and the state senator contended that he was deterred from showing the films because it would have had a negative impact on his reputation. \textit{Id.} at 473. The Court held that the state senator had standing because he had demonstrated that a government action—labeling the films propaganda—could have caused him a direct injury, distinct and palpable. \textit{Id.} The Court ultimately held that the statute did not actually violate the state senator’s First Amendment rights. \textit{Id.} at 484.

\textsuperscript{222} \textit{Id.} at 472.

\textsuperscript{223} \textit{See, e.g., id.; Riggs v. City of Albuquerque, 916 F.2d 582, 585-86 (10th Cir. 1990) (holding that the plaintiff class of lawyers, political activists and political organizations had standing to sue police for unconstitutional
Moreover, the defendants disingenuously disregarded the benefits that accrued to them when they claimed that no cognizable harm was established in *Handschu*. The litigants agreed to the consent order thereby avoiding long, drawn out litigation and, arguably, unflattering exposure of police misconduct. Furthermore, in addition to the harm caused by the chilling effect on the exercise of their constitutional rights, the *Handschu* plaintiffs also had argued that police use of informers, among other techniques, would have constituted harm. The absence of a conclusive judicial finding of harm does not prove a total absence of harm; settlement was simply an effective and expeditious means to end the litigation.

**c. Compilation/Exchange of Data and Information Sharing**

The NYPD also complained that prohibiting collection of publicly available information “compel[led] the NYPD to

surveillance and maintenance of files since plaintiffs alleged that they were actual targets of the surveillance and the conduct of the police caused harm to their reputations).

224 *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770 (S.D.N.Y. 1972) (recognizing that because the plaintiffs alleged a specific instance where the police conduct curtailed their exercise of First Amendment rights, the case was brought “beyond the pale” of *Laird v. Tatum*).

225 See *Defs.’ Mem. of Law, supra* note 5, at 18. The defendants cite *Laird v. Tatum* for the proposition that “the Constitution does not constrain government from collecting, retaining, and sharing information regarding lawful activity.” *Id.*

226 Anderson, *supra* note 11, at 726 (explaining that “[s]ettlement through consent decrees holds numerous advantages over protracted litigation. Settlement avoids the time, expense and risk of trial”). See also *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1398 (S.D.N.Y. 1985) (recognizing that settling the litigation provided defendants the opportunity to reduce the publicity surrounding their actions that allegedly harmed plaintiffs).

227 See *Handschu*, 349 F. Supp. at 768 (itemizing categories of harm from police action).

228 See *supra* Part I.A (discussing the use of consent decrees in reform litigation).
virtually close its eyes to that which everyone but police officers can see, record, and reflect upon.”

According to the defendants, the police must sit on their hands at public events while “[t]errorists take advantage of this lopsided state of affairs and safely use political events to advance their terrorist purposes.” Yet, defendants did not and presumably could not explain how “terrorist operatives” would use public events to further an illegal purpose. Moreover, the Handschu Settlement neither required the NYPD to ignore public information, as defendants stated, nor barred police attendance at public events.

Defendants also argued that the restriction on sharing information with other agencies made it impossible for the NYPD to participate in the international effort to fight terrorism. They claimed that the settlement affected a necessary partnership of local, state and federal law enforcement. If, however, another law enforcement agency requests information on a particular individual or group, the Handschu Settlement does nothing to prevent police from providing it. On the contrary, the plain

---

229 Defs.’ Mem. of Law, supra note 5, at 14 (referring to the Handschu Settlement, supra note 65, § VI.A).
231 See Cohen Decl., supra note 115, at 7-8. Deputy Commissioner Cohen does note that a confiscated terrorism manual teaches would-be terrorists to “attend public meetings to learn about major decisions and topics being discussed . . . to follow news[,] to keep track of tourist activity and arrival times of foreign tourist groups . . . and to note advertisements about new and used car lots which may be used in assassination, kidnapping, and overthrowing the government.” Id.
232 Handschu Settlement, supra note 65, § VI.A (prohibiting maintenance of public information with the intelligence unit of the NYPD). The settlement does not require ignoring information from publicly available sources. Id.
233 Handschu Settlement, supra note 65, § IV.B (allowing for police inquiry into a planned public event).
234 See Cohen Decl., supra note 115, at 17-22 (noting that there are practical difficulties of forcing other agencies to comply with Handschu and asserting that the police have to be empowered to work with other agencies).
235 Defs.’ Mem. of Law, supra note 5, at 16-17.
236 Handschu Settlement, supra note 65, § VII.A (requiring the other law
language of the settlement allows the sharing of information. It is also interesting to note that, until recently, the partnership the defendants appear to crave seemed to be moving in the opposite direction. For example, congressional legislation authorizes the federal government to sue local law enforcement for patterns and practices resulting in civil rights violations. The Department of Justice could include a pattern or practice of illegal and intrusive police surveillance and infiltration as a cognizable claim.

enforcement entity or government agency to adhere to provisions on maintenance of information).

237 See Lloyd C. Anderson, The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U. ILL. L. REV. 579, 632 (concluding that interpretation of contested language of consent orders ought to be accomplished by looking to the “grievance the decree was designed to cure”). This argument does not attempt to ascertain what is meant by “law enforcement agencies or government agencies conducting security clearance procedures” in section VII.A of the settlement and will assume the statement can be fairly read that other government and law enforcement agencies can legitimately obtain information collected by the NYPD pursuant to the settlement.


It shall be unlawful conduct for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

Id. For detailed discussions of the potential use of § 14,141 to curb unlawful police activities, see Debra Livingston, Police Reform and the Department of Justice: An Essay on Accountability, 2 BUFF. CRIM. L. R. 815 (1999) (discussing the possibility of consent decrees in the cities of Pittsburgh, Pa., and Steubenville, Ohio, to enjoin police abuses); Marshall Miller, Police Brutality, 17 YALE L. & POL’Y REV. 149 (1998) (studying the legislative intent of the statute, how it can be used and what the Department of Justice would have to show to establish the pattern or practice and anticipating how the courts will react to suits based on alleged violations). But see Schlanger, supra note 13, at 2022 (pointing out that, given its history in prison reform litigation, the Department of Justice is hardly to be trusted to act as “trailblazer” for reform suits).

239 Meese v. Keene, 481 U.S. 465, 472 (1987) (recognizing that harm to a plaintiff’s reputation is an action of government that causes direct injury,
Unfortunately, current Department of Justice sentiments may limit this possibility.  

Defendants correctly noted that the USA PATRIOT Act urges government agencies to share information. But, the sections of the USA PATRIOT Act cited by defendants largely encourage only further sharing of information gathered and shared under federal law in place before Handschu was settled. Thus, the distinct and palpable, and is thus cognizable). Therefore, if police surveillance and infiltration causes a direct injury and a pattern and practice can be established, the Department of Justice could succeed in a suit against a local police department. See also Riggs v. City of Albuquerque, 916 F.2d 582, 585-86 (10th Cir. 1990) (holding that plaintiff class of lawyers, political activists, and political organizations had standing to sue police for unconstitutional surveillance and maintenance of files since plaintiffs alleged that they were actual targets of the surveillance and the conduct of the police caused harm to their reputations); United States v. City of Philadelphia, 482 F. Supp. 1248 (E.D. Pa. 1979) (dismissing for lack of standing a suit brought by federal government to enjoin the allegedly unconstitutional activities of the Philadelphia Police Department). The government’s standing problem in City of Philadelphia seems to have been cured by 42 U.S.C. § 14,141. See Livingston, supra note 241, at 815 (recognizing that 42 U.S.C. § 14,141 authorizes Department of Justice to sue police departments).

240 See, e.g., Hearing on Anti-Terrorism Policy Before the Senate Jud. Comm., 106th Cong. (2001) (testimony of Attorney General John Ashcroft, stating, inter alia, that the Department of Justice was going to shift its focus from enforcing the nation’s laws to becoming an anti-terrorism outfit). See also Miller, supra note 238, at 178 (noting that because individuals do not have standing to sue under § 14,141, it will be incumbent on the Department of Justice to bring suit).


242Defs.’ Mem. of Law, supra note 5, at 17 (citing USA PATRIOT Act sections 701, 314). Section 701 amended a portion of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3796h (2003), by adding the words “terrorist conspiracies and activities” to a statute that authorized grant and contract making by the federal government with state and local law enforcement to share information related to crime. USA PATRIOT Act § 701. Section 314 encourages further cooperation among financial institutions, law
USA PATRIOT Act may not comprise a necessary change in law under *Rufo*.\(^{243}\) Because the law has not changed from the time of the settlement, the NYPD cannot successfully argue that the USA PATRIOT Act provisions permit modification.\(^{244}\)

enforcement and others, revising the 1970 and 1982 enacted 31 U.S.C. § 5311 (2003), which required sharing of information by financial institutions, law enforcement and regulatory agencies to facilitate criminal investigations. § 5311. The argument that the USA PATRIOT Act’s express extension of the application of information sharing laws to terrorism investigations has only a slight practical effect on activities of law enforcement entities is a narrow one. Because of the ambiguities surrounding the definition of “terrorism,” it is difficult to see what more these new provisions do besides increase the possibility of abusive police practices. This note does not comment on the reach of the USA PATRIOT Act’s other provisions or on the cumulative radical effect of the Act in conjunction with other recent positions adopted by the government. For an examination of the cumulative effect, see Chisun Lee, *Bracing for Bush’s War at Home*, VILLAGE VOICE, Mar. 26-Apr. 1, 2003, at 56 (looking at recent government activity including the USA PATRIOT Act, the proposed Domestic Security Enhancement Act, and treatment of prisoners in the war on terror, that, taken together, paint a terrifying picture of the future of American liberty and democracy).

\(^{243}\) Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 390 (1992) (acknowledging that a change in the law may require modification); see also Sys. Fed’n No. 91, Ry. Employees’ Dep’t, AFL-CIO v. Wright, 364 U.S. 642, 649 (1961) (recognizing a change in the law when congressional legislation was passed, authorizing union shops before such union shops were prohibited).

\(^{244}\) Rufo, 502 U.S. at 390. It is true, as defendants noted, that the other entities must agree to the same restrictions in their management of the information. See Defs.’ Mem. of Law, *supra* note 5, at 16-17. But this should not be problematic for governmental agencies which routinely manage vast amounts of information. But see Ann Davis, *FBI’s Post-Sept. 11 ‘Watch List’ Mutates, Acquires Life of Its Own*, WALL ST. J., Nov. 9, 2002, at A1 (discussing the FBI list of people considered to be threats to the U.S. that was disseminated to the corporate world after September 11 and now is “lost”). The loss of the information and the subsequent problems are certainly regrettable. It could be argued, however, that a governmental inability to effectively share information due to bureaucratic inefficiency or fights over turf are a final safeguard against intrusions by government into our lives.
B. Potential Deleterious Results of Modifying Handschu

Recent modification of a similar 1982 Chicago consent decree aptly illustrates the potential effects of modifying *Handschu*. The settlement arising from *Alliance to End Repression v. City of Chicago* was recently modified. As in *Handschu*, the Chicago

---

245 Alliance to End Repression v. City of Chicago, 561 F. Supp. 537 (N.D. Ill. 1982). The plaintiffs from *Alliance* were a class of Chicago residents that:

engaged in lawful, political, religious, educational or social activities and who, as a result of these activities, have been . . . subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination.

*Alliance*, 561 F. Supp. at 540. The defendants conducting the activities regulated by the Chicago Settlement were the Chicago Police, the FBI, CIA and the Department of Defense. *Id.* The Chicago Settlement created restrictions on investigations of political actors, including prohibition on investigations that were solely based on protected First and Fourth Amendment activities. *Id.* at 560. The settlement also required periodic audits by independent public accounting firms. *Id.* at 568-69.

246 237 F.3d 799, 802 (7th Cir. 2001) (deciding that the with the Red Squads gone there was support to modify the settlement). This decision, from January 2001, reflected the Chicago police’s belief that the era of harassment of political actors, which stretched from the 1920s to the 1970s, had come to an end. *Id.* at 801. The court noted that the “core” of the decree, which forbade “investigations intended to interfere with or deter the exercise of the freedom of expression that the First Amendment protects, and requires . . . periodic audits,” remained, but “periphery” restrictions would be lifted. *Id.* at 800. What Judge Posner considered the periphery of the decree, however, included the requirement of reasonable suspicion of possible criminal activity. *Id.* The *Handschu* Settlement and the Chicago Settlement have some minor differences. See *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003) (recognizing a difference for the purpose of a modification seeking the constitutional floor, that the Chicago Settlement requires periodic independent audits); see also Chevigny, *supra* note 6, at 760-63. Judge Posner’s assertion that “advocacy of violence” does not raise a reasonable suspicion does not reflect the reality of the Chicago Settlement. *Alliance*, 561 F. Supp. at 563, 565 (establishing settlement and reasonable suspicion as showing Chicago police and the FBI have to make).
police argued that circumstances had changed to allow the modification of the settlement. In his decision granting modification, Judge Posner cited no actual changes that would warrant the modification, and argued simply:

Today the concern, prudent and not paranoid, is with ideologically motivated terrorism. The City does not want to resurrect the Red Squad. It wants to be able to keep tabs on incipient terrorist groups. New groups of political extremists, believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. Until the group goes beyond the advocacy of violence and begins preparatory actions that might create reasonable suspicion of imminent criminal activity, the hands of police are tied. And if the police have been forbidden to investigate until then, if the investigation cannot begin until the group is well on its way toward the commission of terrorist acts, the investigation may come too late to prevent the acts or to identify the perpetrators.

The Chicago police, perhaps in addition to the work fighting terrorism, recently initiated a new project. Under their renewed

The police under that settlement were rightly allowed to begin an investigation if they became aware of credible advocacy of violence. Id.

Compare Alliance, 237 F.3d at 802 (noting a difference between circumstances surrounding the police harassment of political dissenters and current police action to deal with terrorism), with Handschu, 2003 U.S. Dist. LEXIS 2134, at *27-28 (accepting defendants’ argument that the world was different after September 11).

Alliance, 237 F.3d at 802. See also H.C. 5100/94, Public Committee Against Torture v. State of Israel, reprinted in Sanford H. Kadish and Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials 827 (7th ed. 2001) (disposing, by the Supreme Court of the State of Israel, of an argument made by the Israeli government that the world is dangerous and that the “ticking time bomb” requires torture).

See Main, supra note 176, at 6 (reporting that “anti-globalization” protesters in Chicago for a business conference would be taped, their photos saved to prepare for future protests, and their meetings infiltrated by police).
license to investigate lawful political activity, the Chicago police have targeted peace and social justice demonstrators. This indicates how the proposed modifications of the Handschu Settlement will likely be used in New York City.

---

250 Id.; see also Paul Street, Empire Abroad, Repression at Home: Notes From Chicago, ZNET, http://www.zmag.org/znet.html (Nov. 8, 2002) (criticizing as hypocritical comments by the CEO of Boeing Corporation, a leading manufacturer of weapons, expressing his concern about the possibility of violence at protests of the business conference).

251 At least one commentator has noted that police forces across the nation began re-instituting long-condemned practices prior to September 11. Abby Scher, The Crackdown on Dissent, THE NATION, Feb. 5, 2001, at 23 (discussing police targeting of activists and demonstrators throughout 2000, including at the major political party conventions in Philadelphia and Los Angeles). The police rounded up hundreds of activists in “preemptive” arrests in Philadelphia, although charges against them were dismissed when police could offer no reason for the arrests. Id. Scher noted overt police surveillance of the type restricted by Handschu as well as “police raids of demonstrators’ gathering spaces . . . [,] false stories to the press . . . [,] rounding up demonstrators on trumped-up charges . . . [,] list making . . . [,] political profiling . . . [,] unconstitutional bail amounts . . . [and] brutal treatment.” Id.

On the other hand, the use of police “debriefings” after the arrests of protesters and demonstrators has supposedly been curtailed. See William K. Rashbaum, Police Stop Collecting Data on Protesters’ Politics, N.Y. TIMES, Apr. 10, 2003, at D1 (noting the practice, which had begun in February with the use of the “Demonstration Debriefing Form,” information from which had been loaded into a database, would end and the database destroyed). Civil liberties lawyers noted that calling these un-counseled interrogations “debriefings” did not remove them from the ambit of constitutional protections. Id. The police would not comment on the debriefing’s constitutionality but denied the separate contention that asking protesters what school they were from, what prior protests they had attended and their involvement in any organizations, violated either Handschu or the modified Handschu Settlement. Id. In response to this questioning, the Handschu plaintiffs moved (too late for consideration in this note) to incorporate the FBI Guidelines into the decree itself. See Tom Perrotta, Attorneys Seek to Codify Rule Against Police Questioning of Political Beliefs, N.Y.L.J., Apr. 18, 2003, at 1 (noting plaintiffs’ motion seeking to make the FBI Guidelines part of the decree was a response to the demonstrated “aim” of the NYPD’s modification motion: to harass dissenters). The modification order required that the NYPD include the FBI Guidelines in the patrol guide, but this created no enforceable rights. See Handschu v. Special Servs. Div., 2003 U.S. Dist. LEXIS 3643, at
CONCLUSION

New York City residents and the NYPD share a profound interest in deterring terrorist attacks on the city. Residents and citizens, however, also have an interest in protecting individual liberties in the face of government action and ensuring that government agents do not violate constitutional rights in the exercise of their authority. The current climate has heightened the interests of both parties. To understand why the police wanted to remove the Handschu safeguards, and the connection between Handschu and the current climate, the lessons of history must also be considered. Those lessons demonstrate that consolidation of government power and intimidation of dissenters is predictable in times of societal stress. When government
agencies argue that the nation’s vulnerability to terrorism requires the removal of restrictions on police, such arguments must be met with skepticism.\(^{256}\) The NYPD did not, and cannot, show that harassing dissenters reduces the threat of terrorism.\(^ {257}\) The worthy goal of preventing terrorist attacks is not furthered by removing safeguards to civil liberties. There was good sense in requiring the NYPD to establish criminal activities of political actors and obtain approval prior to investigating those political actors.\(^ {258}\) The Handschu Settlement provided some assurance that the war on terrorism would not become a pretext for the NYPD to return to its past transgressions or further other illegitimate government ends. The settlement existed to ensure that police investigations do not trample on the rights of New Yorkers.

\(^{256}\) See supra notes 231-37 and accompanying text (discussing actions taken by Chicago police after similar restrictions were lifted on that city’s police force).

\(^{257}\) See supra Part III (discussing defendant’s arguments for modifications and the court’s reason for granting modification).

\(^{258}\) See supra Part II.A (discussing abusive government behaviors that provided the backdrop to the settlement).
TAXING THE VICTIMS: COMPENSATORY DAMAGE AWARDS AND ATTORNEYS’ FEES IN SEXUAL HARASSMENT LAWSUITS

Marisa J. Mead*

INTRODUCTION

The prospect of recovering damages in sexual harassment lawsuits should be encouraging to potential claimants.1 Prior to 1996, the federal income tax code furthered this goal by allowing victims winning or settling lawsuits based on non-physical personal injuries to exclude compensatory damage awards from

---

*Brooklyn Law School Class of 2004; B.A., University of Delaware, 2001. The author wishes to thank her parents and sister for their constant love and support. A special thanks to Scott M. Steel for always believing in me.

their gross income.\(^2\) In 1996, however, Congress added a provision to the Small Business Job Protection Act\(^3\) making all punitive and compensatory damages awarded for non-physical injuries taxable income.\(^4\) Therefore, federal income tax may significantly reduce or completely dissolve damages awarded to non-physical injury victims.\(^5\) In extreme cases, these plaintiffs may owe the government more money than they were originally awarded to compensate for their injuries.\(^6\)

Nevertheless, plaintiffs who receive compensatory damages on account of physical personal injuries are not taxed on their damage awards.\(^7\) Section 104(a) of the United States tax code provides that victims receiving damages for non-physical injuries,

\(^2\) See Kristin Loiacono, *Where There’s a Will, There’s a Way and Means*, TRIAL, Sept. 1, 2000, at 11 (reporting on the tax treatment of damage awards received for physical and non-physical injuries). Section 61(a) of the Internal Revenue Code defines gross income as “all income from whatever source derived.” 26 U.S.C. § 61(a) (2003). Section 104(a) of the Internal Revenue Code provided an exception to this for income derived from personal injury damage awards received in settlements or lawsuits. 26 U.S.C. § 104(a)(2) (1995). Prior to 1996, § 104(a) did not distinguish between types of personal injuries but, rather, excluded damages from any type of personal injury or sickness. *Id.*


\(^6\) *See* Adam Liptak, *Tax Bill Exceeds Award to Officer in Sex Bias Suit*, N.Y. TIMES, Aug. 11, 2002, at A18 (discussing the case of Cynthia C. Spina, who won her sex discrimination case but was required to pay taxes in excess of her damage award); *infra* Part III.B (illustrating the specifics of Ms. Spina’s case). The tax consequences vary among plaintiffs, depending on a number of factors such as the plaintiff’s gross income before the damage award, the amount the plaintiff may be claiming as income tax deductions and the amount of damages awarded to the plaintiff in the lawsuit. *See infra* Parts II.D and III.B (discussing the different factors that determine the tax consequences for different plaintiffs).

\(^7\) § 104(a)(2). This is because the Internal Revenue Code still allows victims of physical personal injuries to exclude their damage awards from the calculation of gross income. *Id.*; *see also* Loiacono, *supra* note 2 (noting that victims of personal physical injuries are treated preferentially, as opposed to victims of non-physical injuries by the tax code). § 104(a)(2).
TAXING SEXUAL HARASSMENT

including sexual harassment, must always pay income tax on their awards while claimants recovering compensatory damages for physical injuries are not required to do so. Because § 104(a) creates expensive tax consequences for plaintiffs receiving damage awards in non-physical injury cases, many sexual harassment victims are being deterred from commencing lawsuits against their employers.

This note argues that the unreasonable distinction between damages flowing from physical personal injuries and those from non-physical personal injuries is not simply a monetary burden—it also hinders the progress the United States has made in recognizing sexual harassment as a serious problem. Part I of this note provides background information about the development of sexual harassment law and how sexual harassment became a compensable injury as a form of employment discrimination. Part II explains the history and current status of the taxation of damage awards in the United States pursuant to 26 U.S.C. § 104(a). Part III examines the economical, social and legal consequences of § 104(a)’s system of “taxing the victims.”

§ 104(a)(2). All damages relating to physical injuries, except for punitive damages, are exempt from income taxation, while all damages relating to non-physical injuries, both compensatory and punitive, are not exempt from taxation. Id.; see Marcia Coyle, Bill to Remove Tax on Awards May See Action, 228 N.Y. L.J. 33 (2002) (arguing that the tax treatment of physical and non-physical injuries is a distinction without reason).

Loiacono, supra note 2. See also Laura Sager & Stephen Cohen, Discrimination Against Damages for Unlawful Discrimination: The Supreme Court, Congress, and the Income Tax, 35 HARV. J. ON LEGIS. 447 (1998) (criticizing the distinction between lost wages in physical injury cases and back pay awarded in employment discrimination cases).

See Liptak, supra note 6 (reporting that there is less of an incentive to commence a lawsuit based on employment discrimination because of the tax burdens created by § 104(a)). Section 104(a) applies to all non-physical injuries and, thus, to all forms of employment discrimination. § 104(a)(2). This note focuses on sexual harassment claims to provide a specific example of the effect current tax policy has on a particular area of anti-discrimination law.

See infra Part I.A (discussing the development of the law in recognizing sexual harassment as a compensable injury).
Specifically, the tax code deters victims of sexual harassment from reporting their claims, insinuates that their injuries are not “real” and creates a contradictory legal policy. Finally, Part IV discusses conceivable future improvements to the tax code that would correct the negative effects of this tax policy.

I. BACKGROUND OF SEXUAL HARASSMENT LAW

The significance of taxing non-physical injury damage awards in sexual harassment lawsuits is best appreciated by understanding the foundations of sexual harassment law. Today, through the provisions of Title VII of the Civil Rights Act, the law “recognizes that unwanted, demeaning, or threatening sexual conduct can limit women’s opportunities, ambitions, and rewards in workplaces and schools.” The legislature, however, did not always provide victims of sexual harassment adequate remedies. In fact, it was not until the Civil Rights Act was amended in 1991 that sexual harassment plaintiffs were entitled to the full range of damages available today in all employment discrimination

12 See Karen B. Brown, Not Color or Gender Neutral: New Tax Treatment of Employment Discrimination Damages, 7 S. Cal. Rev. L. & Women’s Stud. 223, 256-58 (1998) (arguing that § 104(a) was enacted partly because of Congress’s intention to discount the importance of job bias injuries); Sager & Cohen, supra note 9, at 502 (arguing that heightened sympathy for victims of physical injuries does not justify a tax exclusion favoring physical injury victims over non-physical injury victims); Mark J. Wolff, Sex, Race, and Age: Double Discrimination in Torts and Taxes, 78 Wash. U.L.Q. 1341, 1485 (2000) (stating that employment discrimination victims suffer substantial injuries and are entitled to the § 104(a) tax exclusion just as much as victims of physical injuries).


14 Id.

15 Gwendolyn Mink, Hostile Environment: The Political Betrayal of Sexually Harassed Women 3 (2000) (arguing that although there is currently a statutory basis for relief for sexual harassment victims, those victims are still socially and politically demeaned).

16 Id. at 24. See infra Part I.A (discussing the development of sexual harassment law and available remedies).
TAXING SEXUAL HARASSMENT

A. Development of Sexual Harassment Law

By prohibiting sex discrimination in employment, Title VII of the Civil Rights Act of 1964 was the first statute to provide relief to women who experienced sexual harassment. Title VII states that it is an “unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” The text of Title VII does not specifically mention “sexual harassment,” and victims first had to persuade courts that sexual harassment constituted discrimination on the basis of sex. Initially, courts were not receptive. In 1974, the first claim of

---

18 42 U.S.C. § 2000e (2003); see also MINK, supra note 15, at 24. Prior to the 1964 Act, victims of sex discrimination, and therefore sexual harassment, had no federal statutory recourse. Id.
19 42 U.S.C. § 2000e. The 1964 Act only prohibited racial discrimination in employment when it was first introduced to Congress. 110 Cong. Rec. H2577-84 (1964). The prohibition of sex discrimination in employment was added during the congressional debates on the bill. Id. In fact, it is believed that members of Congress opposed to the passage of the Civil Rights Act actually included the prohibition on sex discrimination in employment to help defeat the passage of the bill. Stephanie Schaeffer, Sexual Harassment Damages and Remedies, 73 Am. Jur. Trials § 6 (1999).
20 MINK, supra note 15, at 24; Schaeffer, supra note 19, at § 6. Plaintiffs asked the courts to recognize that sexual harassment was an “unlawful employment practice . . . because of . . . sex,” as prohibited by Title VII. 42 U.S.C. § 2000e (2003).
sex discrimination based on sexual harassment was dismissed.\textsuperscript{22} The court explained that the woman had been discriminated against not because she was a woman, but because of her refusal to engage in a sexual affair with her supervisor.\textsuperscript{23} The following year, another court denied two women relief under Title VII, finding it was “ludicrous” to hold that the activity involved constituted sex discrimination in employment.\textsuperscript{24} The court reasoned that the alleged sexual advances made by the supervisor were merely attributed to his “personal urge,” without any relation to a discriminatory policy of the employer.\textsuperscript{25} Therefore, the court found that his actions could not constitute sex discrimination in employment.\textsuperscript{26}

It was not until 1976, in \textit{Williams v. Saxbe}, that a court ruled

\textsuperscript{22} \textit{Barnes}, 13 Fair Empl. Prac. Cas. (BNA) at 123.

\textsuperscript{23} \textit{Id.} Paulette Barnes alleged that her supervisor at the Environmental Protection Agency had asked her to begin an affair and told her that doing so would improve her employment position. \textit{Id.} She declined, and was eventually fired. \textit{Id.} The court found against her, maintaining that this was a “personal controversy underpinned by the subtleties of an inharmonious personal relationship.” \textit{Id.}

\textsuperscript{24} \textit{Corne} v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975). In \textit{Corne}, two plaintiffs, Jane Corne and Geneva DeVane, alleged that they had been repeatedly subjected to verbal and physical advances from their supervisor, Leon Price. \textit{Id.} They also stated that because they did not want to cooperate with Mr. Price, they resigned from their positions as clerical workers. \textit{Id.} Therefore, they argued that they had been subjected to a sex discriminatory condition of employment. \textit{Id.} See \textit{Mink}, supra note 15, at 25 (discussing \textit{Corne}).

\textsuperscript{25} \textit{Corne}, 390 F. Supp. at 162. The court stated:

Mr. Price’s conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge. Certainly no employer policy is here involved; rather than the company being benefited in any way by the conduct of Price, it is obvious that it can only be damaged by the very nature of the acts complained of. Nothing in the complaint alleges nor can it be construed that the conduct complained of was company directed policy which deprived women of employment opportunities.

\textit{Id.} at 163.

\textsuperscript{26} \textit{Id.}
TAXING SEXUAL HARASSMENT

in favor of a sexual harassment plaintiff. The claimant, Diane Williams, alleged that she was humiliated and fired after rejecting sexual advances from her supervisor. The District Court for the District of Columbia ruled that she had demonstrated discrimination based on her sex pursuant to Title VII. The defendant argued that sex discrimination was not demonstrated because there had been no gender stereotyping but, rather, the plaintiff was fired for refusing to accept her supervisor’s sexual advances. The court stated that this argument was “an erroneous analysis of the concept of sex discrimination as found in Title VII . . . .” To the contrary, the court found that Congress intended broad construction of Title VII to include a discrimination claim based on a “rule, regulation, practice or policy . . . applied on the basis of gender,” even if it did not arise out of an employer’s “well-recognized sex stereotype.” After Williams, courts commonly accepted Title VII sexual harassment claims, making Title VII the main basis of relief for

28 Id. at 655. Ms. Williams alleged that after she refused the sexual advance of her supervisor, Mr. Brinson, he continued to harass and humiliate her by, among other things, giving her unwarranted reprimands for her job performance. Id. at 655-56. After investigating her allegations, the EEOC informed Ms. Williams that a “finding of no discrimination was proposed.” Id. at 656. At an administrative hearing, the complaints examiner found no discrimination on the basis of sex because “the evidence did not establish ‘any causal relationship’ between her rejection of Mr. Brinson and his subsequent treatment of her and her ultimate termination.” Id. Ms. Williams then sued in the District Court for the District of Columbia to recover damages under Title VII. Id. at 655.
29 Id. at 657-58.
30 Id. at 657.
31 Id. at 658.
32 Id.
victims of sexual harassment.34

In 1980, the United States Equal Employment Opportunity Commission (EEOC), a federal agency created pursuant to § 705 of Title VII, published guidelines for employers to demonstrate preventive measures employers should take to eliminate sexual harassment in the workplace.35 In addition, the EEOC guidelines


In addition, most states now have anti-discrimination statutes that entitle women to sue for sexual harassment as a form of sex discrimination. See Debra S. Katz & Alan R. Kabat, Sexual Harassment in the Workplace, SH039 A.L.I.-A.B.A. 1111 (2002) (giving an overview of current sexual harassment law). Alabama is the only state that does not have a race or sex discrimination law. Id. at 1235. See, e.g., California Fair Employment and Housing Act, CAL. GOV’T CODE §§ 12900-96 (2003); New York Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (2001); see Katz & Kabat, supra at 1235 (providing a complete list of all state anti-discrimination law citations).

included definitions of sexual harassment to help victims recognize and pursue their claims. The EEOC guidelines define sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

The EEOC is authorized to enforce federal anti-

---


37 29 C.F.R. § 1604.11 (2003). Employers are held liable for acts of sexual harassment committed by their employees. § 1604.11(d). The EEOC guidelines state, “With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” Id. In addition, an employee may hold an employer liable for harassment caused by a non-employee if the employer (or its agents or supervisory employees) knew or “should have known of the conduct and fail[ed] to take immediate and appropriate corrective action.” § 1604.11(e). These policies provide an incentive for employers to implement programs encouraging sexual harassment prevention. FRIEDMAN & STRICKLER, supra note 35, at 409.
discrimination laws by receiving complaints from employees who believe they have suffered employment discrimination. Before suing in federal court for a violation of employment discrimination laws, potential plaintiffs must first file a complaint with the EEOC. If the EEOC finds reasonable cause to believe that the discrimination has occurred, it attempts to reach a resolution between the individual filing the charge and the responding employer. The EEOC may also file lawsuits in federal court on behalf of employees who believe they have been discriminated against or allow the charging party to file an action in court without further EEOC involvement.

The Supreme Court decided its first sexual harassment case, *Meritor Savings Bank v. Vinson*, in accordance with the EEOC guidelines. The Court explicitly acknowledged the EEOC definition of sexual harassment, ruling that employers can be liable for two types of harassment: quid pro quo harassment and harassment that creates a hostile work environment. Quid pro

---


40 EEOC Enforcement Activities, *supra* note 36. All charges the EEOC receives are classified into three categories: “Category A” includes charges that are given priority in investigation efforts and settlement efforts “due to the early recognition that discrimination has likely occurred; “Category B” includes charges that require further investigation to determine whether discrimination has occurred; “Category C” includes charges that are unsupported or non-jurisdictional and are closed immediately. *Id.*

41 *Id.* In 1972, the federal government authorized the EEOC to file lawsuits on behalf of workers. KAREN J. MASCHKE, *LITIGATION, COURTS, AND WOMEN WORKERS* 3 (1989) (providing the history of sex discrimination in employment and the judicial response to such claims). Parties may voluntarily participate in the EEOC’s alternative dispute resolution program, where a neutral mediator assists in confidentially resolving discrimination issues between parties. EEOC Enforcement Activities, *supra* note 36. The EEOC may also file lawsuits on behalf of employees in “egregious” discrimination cases or file amicus curiae briefs to support EEOC positions. *Id.*

42 477 U.S. 57 (1986); see Schaeffer, *supra* note 19, at § 7 (discussing the impact of *Meritor* on the law of sexual harassment).

43 Schaeffer, *supra* note 19, at § 14. If liability is proven, the same types
TAXING SEXUAL HARASSMENT

Quo harassment occurs when an employment benefit has been conditioned, implicitly or explicitly, on an employee’s compliance with an unwelcome sexual activity. On the other hand, hostile environment sexual harassment involves unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature in the workplace. According to Meritor, hostile work environment sexual harassment is actionable when it is “sufficiently severe or pervasive ‘to alter
the conditions of [the victim’s] employment and create an abusive working environment.’”

B. Damages Under Sexual Harassment Law

Under the Civil Rights Act of 1964, only back pay, injunctions and other forms of equitable relief were available to prevailing sexual harassment plaintiffs under Title VII. The Civil Rights Act of 1991 (the 1991 Act) changed this result—presently, a plaintiff can be awarded many types of damages: reinstatement, back pay, front pay, compensatory and punitive damages, attorneys’ fees and costs and pre-judgment interest. The 1991 Act defines compensatory damages as including “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.” The 1991 Act’s expansion of available

46 Meritor, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). This severity requirement was satisfied in Meritor. Id. Vinson described a situation where her supervisor made repeated requests for sexual favors while at work, fondled her in front of other employees, followed her into the women’s restroom and exposed himself to her and raped her on several occasions. Id. at 60.


48 42 U.S.C. § 1981(a) (2003). See Buckman, supra note 47, at § 2; Schaeffer, supra note 19, at §§ 16-17. Pre-judgment interest is normally awarded on back pay and compensatory damages and accrues from the date the plaintiff was terminated until the date the plaintiff receives a judgment in a lawsuit for sexual harassment. Schaeffer, supra note 19, at § 26. An award of pre-judgment interest ensures that the plaintiff is fully compensated for her economic losses. Id. The 1991 Act states that “[a] complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b) (2003).

49 § 1981a(b)(3). Compensable pecuniary losses may include, but are not limited to, back pay and front pay. Litigating the Sexual Harassment Case, supra note 45, at 24. Back pay compensates plaintiffs for the wages
TAXING SEXUAL HARASSMENT

813

damages evidenced congressional recognition that victims of sex discrimination deserve compensation for all of their resultant harms. 50

According to the 1991 Act, employers may be liable for compensatory and punitive damages up to $300,000 per plaintiff, depending upon the size of the employer’s work force. 51

they would have earned had they not been discriminated against, while front-pay awards for future lost earnings. EEOC v. Joe’s Stone Crab, Inc., 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998). Basically, front pay compensates the victim for wages she loses while she is looking for employment comparable to the employment she would hold but for the discrimination. Id. Therefore, front pay is usually only awarded when it would be impracticable for the court to require the reinstatement or re-hiring of the victim. Id. at 1378-80. In addition, plaintiffs may also seek compensatory damages for other pecuniary losses such as moving expenses, job search expenses, medical expenses, physical therapy and other expenses reasonably incurred as a result of the discriminatory conduct. Litigating the Sexual Harassment Case, supra note 45, at 447.

50 See, e.g., Williams v. Pharmacia Ophthalmics, Inc., 926 F. Supp. 791, 794 (N.D. Ind. 1996), aff’d, 137 F.3d 944 (7th Cir. 1998) (ruling that a sex discrimination plaintiff’s award of $1,250,000 in compensatory and punitive damages be reduced only as far as the statutory maximum of $300,000 because “compensation is the primary purpose of the new remedies provided by the 1991 Act”); see infra Part III.C and note 221 (describing the types of harms caused by sexual harassment). The plaintiff, Evelyn Williams, won her lawsuit based on the allegations that she had not been considered for a promotion and was later terminated because of her sex. Williams, 926 F. Supp. at 794. The court of appeals, struck down her punitive damage award but upheld her compensatory damage award. Id.

51 42 U.S.C. § 1981(b)(3) (2003). Under the 1991 law, damages are capped according to the number of employees working for the employer found liable for the harassment: an employer with between 15 and 100 employees can be liable for no more than $50,000; for an employer with 101 to 200 employees, damages are capped at $100,000; for an employer with 201 to 500 employees, the cap is $200,000; for an employer with more than 500 employees, the cap is $300,000. Id. Because the cap applies to the amount of damages each plaintiff may recover from an employer, however, an employer might have to pay $300,000 to each plaintiff suing that employer for the same sexual harassment claim. 42 U.S.C. § 1981(a) (stating “damages awarded under this section, shall not exceed, for each complaining party . . . $300,000”). On the other hand, just because a single plaintiff brings several different sex discrimination claims does not mean the plaintiff may recover
Therefore, when a jury awards more than $300,000 to a sexual harassment plaintiff, the judge must reduce the award to what she deems an appropriate amount pursuant to the damage cap provision.\textsuperscript{52} After compensatory and punitive damage awards are granted, the court may also award attorneys’ fees and costs to compensate a successful plaintiff for the expense of bringing the action.\textsuperscript{53} There are two general reasons why attorneys’ fees are

\$300,000 in damages for each one of her claims. Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), \textit{cert. denied} 119 S. Ct. 64, L. Ed. 2d 50 (U.S. 1998) (holding that sex discrimination and retaliation plaintiff could not recover the statutory maximum on each of her asserted claims but, rather, could only recover the statutory maximum once to compensate for all her claims combined). When plaintiffs request punitive or compensatory damages the court is not to inform the jury of the statutory caps put on damage awards. 42 U.S.C. § 1981a(c) (2003). This requirement enables the jury to make its own determination of appropriate damages based on the facts of the case without any influence from the monetary limits of the statute. See \textit{Buckman}, \textit{supra} note 47, at § 5 (discussing the expansion of available damages under Title VII and the statutory cap on those damages).

\textsuperscript{52} 42 U.S.C. § 1981(b)(3) (2003). When a jury award is excessive, the trial judge has discretion on how far to reduce the award below the damage cap. Schaeffer, \textit{supra} note 19, at § 31. Therefore, courts differ on whether to reduce excessive awards to the statutory maximum or below the statutory maximum. \textit{See}, \textit{e.g.}, Luciano v. Olsten Corp., 110 F.3d 210 (2d Cir. 1997) (upholding the trial judge’s reduction of an award to no lower than the statutory maximum of \$300,000, where the plaintiff was awarded more than \$5 million in punitive and compensatory damages). \textit{But see} Hennessy v. Penril Datacomm Networks, 69 F.2d 1344 (7th Cir. 1995) (holding that when the jury awards punitive damages in excess of the statutory cap, under certain circumstances, the award may be reduced to an amount below the statutory maximum).

\textsuperscript{53} 42 U.S.C. § 2000e-5(k) (2003). \textit{See also} Schaeffer, \textit{supra} note 19, at § 35; \textit{Conte}, \textit{supra} note 35, at §6.55. Title VII states that “the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.” § 2000e-5(k). The use of “the Commission” refers to the Equal Employment Opportunity Commission. \textit{See supra} text accompanying notes 35-41 (describing the purposes of the EEOC). If the plaintiff loses her lawsuit and the employer prevails, the prevailing employer may only recover attorneys’ fees if the court finds that the “plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought
recoverable pursuant to Title VII. First, compensation for litigation expenses is the last step in restoring the plaintiff to the position she would have been in if the harassment had not taken place.\textsuperscript{54} Second, there would be less of an incentive to file sexual harassment lawsuits if plaintiffs had to bear the costs of hiring attorneys and pursuing their claims.\textsuperscript{55} Courts have broadly construed the provision of Title VII allowing recovery of attorneys’ fees to fully compensate victims for their injuries and encourage victims to vindicate their civil rights.\textsuperscript{56}

II. TAXATION OF DAMAGE AWARDS

Historically, the United States tax code excluded personal injury damage awards from income taxation.\textsuperscript{57} Through the Small Business Job Protection Act, however, Congress significantly narrowed this exclusion.\textsuperscript{58} Just five years after expanding damages available under the Civil Rights Act of 1991, Congress amended the tax code to limit the exclusion to damages received on account of physical personal injuries.\textsuperscript{59} In addition, the
A personal injury taxation

The taxation of damages has undergone many changes since the federal income taxation program was first adopted in 1913. As early as 1918, damage recoveries for personal injuries were excluded from the calculation of gross income, regardless of the type of injury. Two major theories developed on why Congress excluded all personal injury damage recoveries. The first notion is that damage awards for personal injuries are not “income” per se; therefore, they should not be taxed as “income.” This theory derives from the historically accepted common law definition of “income.” For taxation purposes, income is “a gain that adds to the capital already owned by the person.” If damage awards compensate individuals for losses caused by personal injuries, they cannot constitute “gains” in capital.
TAXING SEXUAL HARASSMENT

because they are actually “returns” of capital. If recoveries for personal injuries are merely returns of capital, they are outside the tax code’s definition of taxable “income.” A second possible explanation for the exclusion is that Congress made a humanitarian policy decision benefiting tort victims by refusing to tax their damage awards. Congress might have been suggesting that victims of personal injuries deserve compensation without an additional tax burden.

To determine which damage awards should be excludable from income taxation, courts first had to clarify what constituted “personal injuries” within the meaning of the original exclusion provision. During the 1920s, both the Bureau of Internal Revenue and the Board of Tax Appeals ruled that alienation of affection and defamation constituted personal injuries, excluding damage awards from taxation. The Board of Tax Appeals stated that the damages “[made] the plaintiff whole as before the injury” and did not constitute a gain in income. Therefore, the

---

67 Hubbard, supra note 57, at 739. For example, in O’Gilvie v. United States, the Court stated that the exclusion of personal injury damages from taxation has been based on the decision not to tax damages that are making up for a loss to the victim. 519 U.S. 79, 80 (1996). See also Comm’r v. Glenshaw Glass Co. 348 U.S. 426, 432 n.8 (1955). “The long history of departmental rulings holding personal injury recoveries nontaxable [is based] on the theory that they roughly correspond to a return of capital . . . .” Id.

68 Hubbard, supra note 57, at 739. See also Stratton’s Independence, 231 U.S. at 415 (stating the historically accepted definition of “income” to be a “gain”).

69 Hubbard, supra note 57, at 738-39.

70 Id. at 739.

71 Revenue Act of 1918, Pub. L. No. 65-254 § 213(b)(6), 20 Stat. 1057, 1066 (1919); see supra note 62 (providing the language of the tax code’s original exclusion of personal injuries from gross income).


73 Hawkins, 6 B.T.A. at 1025.
damages were excluded from taxation. Consistent with this principle, during the 1950s several Internal Revenue rulings held that the personal injury tax exclusion applied to compensation payments for inhumane treatment by enemy governments to former prisoners of war. In 1960, the Treasury ruled that damages paid pursuant to a lawsuit or settlement based on “tort or tort-type rights,” as opposed to contract rights, would be excludable from income taxation.

The passage of the federal civil rights acts required courts to apply the personal injury tax exclusion to damages awarded in the newly created employment discrimination causes of action. The tax court first addressed the taxation of damages awarded in employment discrimination cases in 1975 in Hodge v.

---

74 Id.
75 See Rev. Rul. 58-370, 1958-2 C.B. 14 (1958) (ruling that payments made by Austria to victims of Nazi persecution were excludable); Rev. Rul. 56-462 1956-2 C.B. 20 (1956) (ruling that payments to prisoners of war in the Korean War were excludable); Rev. Rul. 56-518, 1956-2 C.B. 25 (1956) (ruling that payments to victims of Nazi persecution were excludable); Rev. Rul. 55-132, 1955-1 C.B. 213 (1955) (ruling that payments to prisoners of war in World War II for violation of the Geneva Convention were excludable); Sager & Cohen, supra note 9, at 454, n.48 (indicating IRS rulings affirming the position that damages received from personal injuries were not taxable).
76 Treas. Reg. § 1.104-1(c) (1960); see Sager & Cohen, supra note 9, at 454.
77 F. Philip Manns, Jr., Restoring Tortiously Damaged Human Capital Tax-Free Under Internal Revenue Code Section 104(a)(2)’s New Physical Injury Requirement, 46 BUFF. L. REV. 347, 356-57 (1998). This is because, for the first time, tax courts were required to determine whether injuries caused by employment discrimination should be taxable income. Id. Courts differed on whether it was appropriate to look toward the nature of the injuries caused by violations of the Civil Rights Act or the nature of the damages provided to successful plaintiffs in determining the taxability of damage awards. Id. See Hodge v. Comm’r, 64 T.C. 616, 619 (1975) (requiring taxation of a back-pay award granted in a racial discrimination case because of the nature of the damage award). But see Roemer v. Comm’r, 716 F.2d 692, 697 (9th Cir. 1983) (ruling that a damage award from a defamation action was excludable because of the nature of the claim).
TAXING SEXUAL HARASSMENT

The court concluded that back pay awarded in a Title VII employment case was taxable income because it was not based on a personal injury. The court further reasoned that since wages are ordinarily taxable income, an award for lost wages should be taxable as well.

Most circuit courts disagreed with the tax court’s approach in Hodge. During the 1980s, the Sixth and Ninth circuits changed the direction of the interpretation of the personal injury exclusion. These courts looked toward the nature of the claim rather than the nature of the damages awarded to determine whether the damages should be subject to income taxation.

78 Hodge, 64 T.C. 616. The plaintiff, a former truck driver, alleged that he had been denied a job transfer from “city driver” to “line driver” because of his race. Id. at 617. He was awarded the difference between his salary in his current job and the job to which he had been denied a promotion. Id. He and his wife then attempted to exclude half of the damages awarded on the basis that he was being compensated for a personal injury. Id. at 618. The court ruled that the back-pay award was taxable income. Id. at 619.

79 Id. The court did not rule on the taxability of a compensatory damage award because the 1991 Act had not yet been passed, so compensatory damages were not recoverable for Title VII claims. 42 U.S.C. § 2000e-5g (2003); 42 U.S.C. § 1981a (2003).

80 Hodge, 64 T.C. at 619. Therefore, it was the nature of the award that determined its taxability. Manns, supra note 77, at 359.

81 Manns, supra note 77, at 359. See Rickel v. Comm’r, 900 F.2d 655, 661-64 (3d Cir. 1990) (reversing the tax court’s determination that the nature of damages rather than the nature of the claim should be determinative of the taxability of damages); Threlkeld v. Comm’r, 848 F.2d 81, 84 (6th Cir. 1988) (ruling that damages in a malicious prosecution and injury to reputation case were excludable because of the nature of the claims); Roemer, 716 F.2d at 697. But see Thompson v. Comm’r, 866 F.2d 709, 712 (4th Cir. 1989) (ruling consistent with Hodge that the claim for back pay was not excludable because it was essentially a contractual claim for unpaid wages, and therefore was not a tort-type award). On the other hand, the Thompson court ruled that liquidated damages were excludable from taxation because they had been awarded for a tort-type injury. Id.

82 Threlkeld, 848 F.2d 81; Roemer, 716 F.2d 692; see also Manns, supra note 77, at 359.

83 Manns, supra note 77, at 359. Although these cases did not deal with sexual harassment claims, they decided the tax treatment of damages received in connection with other non-physical injuries and therefore are influential in
First, in *Roemer v. Commissioner* the Ninth Circuit ruled that an award for defamation should be excludable because of the nature of the tort of defamation.\(^84\) The court determined that a defamation claim was a personal injury within the purview of §104(a)(2)’s exclusion.\(^85\) Ruling the damages excludable, the court stated that “the relevant distinction that should be made is between personal and non personal injuries, not between physical and nonphysical injuries.”\(^86\)

In 1986, the Sixth Circuit made a similar decision in *Threlkeld v. Commissioner*.\(^87\) The plaintiff sought to exclude his recovery for an injury to his reputation caused by a malicious prosecution.\(^88\) The Sixth Circuit adopted the tax court’s holding that any compensatory damages “received on account of any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law” were excludable from income tax.\(^89\) The court further explained that to determine whether an injury was personal, “we must look to the origin and character of the claim . . . and not to the consequences that result from the injury.”\(^90\) Therefore, the nature of the actual injury, not the nature of the damages received from the lawsuit, was the dispositive factor in determining the tax treatment of the damages deciding the tax treatment of damages received from sexual harassment lawsuits. See *Threlkeld*, 848 F.2d at 84 (“We must look to the nature of the underlying injury to determine excludability under [S]ection 104(a)(2).”); *Roemer*, 716 F.2d at 697 (“We must look to the nature of the tort . . . to determine whether the award should have been reported as gross income.”).

\(^84\) *Roemer*, 716 F.2d at 694 (ruling that Roemer, who won a lawsuit for defamation created by a false credit report, was entitled to exclude his damage awards from his gross income for tax purposes).

\(^85\) *Id.* at 697-98.

\(^86\) *Id.* at 697.

\(^87\) *Threlkeld v. Comm’r*, 848 F.2d 81, 84 (6th Cir. 1988) (holding that damages won by Threlkeld in a malicious prosecution suit resulting from his endurance of a series of false lawsuits were excludable from taxation).

\(^88\) *Id.* at 81-82.


\(^90\) *Threlkeld*, 87 T.C. at 1299. This analysis is termed the “nature of the claim” test. Manns, *supra* note 77, at 359-60.
TAXING SEXUAL HARASSMENT

awarded.91 The plaintiff’s recovery was excludable from income tax because the nature of the injury was “personal.”92 The court stated, “A personal injury has long been understood to include non-physical as well as physical injuries. Therefore, ‘personal’ must be defined more broadly than ‘bodily’ injury.”93 In addition, both the Roemer and Threlkeld courts held that lost earnings received on account of both physical and non-physical injuries were excludable from taxation.94 These rulings were made despite the fact that wages are ordinarily taxable as income.95

B. The History of the Taxation of Employment Discrimination Recoveries

During the years following Threlkeld, however, courts struggled to apply the nature of the claim test to different types of damage awards won in employment discrimination cases.96 In 1992, the Supreme Court in United States v. Burke held that a back-pay award for a Title VII sex discrimination claim was

91 Threlkeld, 848 F.2d at 84; Douglas A. Kahn, Taxation of Damages After Schleier—Where Are We and Where Do We Go From Here?, 15 QUINNIPIAC L. REV. 305, 308-09 (1995) (examining past court rulings about the taxation of personal injury damage awards).
92 Threlkeld, 87 T.C. at 1299.
93 Id. at 1305. The types of non-physical injuries denied tax exclusion by § 104(a)(2) include employment discrimination, slander, libel, defamation and wrongful death. Loiacono, supra note 2; see also Philip Buchan, New Hope on NonPhysical Injury Taxes, TRIAL, Jan. 1998, at 11.
94 Threlkeld, 87 T.C. at 1300; Roemer v. Comm’r, 716 F.2d 692, 697 (9th Cir. 1983).
95 Hodge v. Comm’r, 64 T.C. 616, 619 (1975); see Threlkeld, 848 F.2d at 81 (ruling that lost wages award is excludable); Roemer, 716 F.2d at 693 (ruling award for lost earnings to be excludable).
96 Downey v. Comm’r, 97 T.C. 150, 161 (1991), rev’d, 33 F.3d 836 (7th Cir. 1994) (ruling that damages received for age discrimination in employment were excludable from gross income); Comm’r v. Burke, 929 F.2d 1119 (6th Cir. 1991), rev’d, 504 U.S. 229 (1992) (ruling that a damage award for sex discrimination was excludable from gross income). The tax court in Downey stated, “Some confusion has arisen . . . when the focus has shifted from the source and character of the injury . . . to its consequences.” Downey, 97 T.C. at 161.
taxable.\textsuperscript{97} The Court found the equitable remedies available for Title VII claims distinguishable from the typical compensatory damages available for the tort-type personal injuries aimed at in the § 104(a) tax exclusion.\textsuperscript{98} Using its own version of the nature of the claim approach, the Court held that a claim could not be considered tort-like unless it provided remedies similar to traditional tort claims.\textsuperscript{99} For instance, the Court compared the damages available under Title VII, which only provided back pay, with Title VIII of the Civil Rights Act of 1968, which provided for both compensatory and punitive damages.\textsuperscript{100} The

\textsuperscript{97} 504 U.S. 229 (1992). This case was based on the pre-1991 amendment Civil Rights Act pursuant to which compensatory damages were not recoverable. 42 U.S.C. § 2000e-5(g) (2003); \textit{Burke}, 504 U.S. at 231; \textit{see} Brent B. Nicholson, \textit{Recent Developments Concerning the Taxation of Damages Under Section 104(A)(2) of the Internal Revenue Code}, 61 ALB. L. REV. 215, 218 (1997) (exploring the taxability of personal injury damage awards and the Supreme Court’s decision in \textit{Burke}). The original plaintiff in \textit{Burke} was Judy A. Hutcheson, who brought a Title VII claim in the Eastern District of Tennessee. \textit{Burke}, 504 U.S. at 231. Other employees, including Therese A. Burke, joined, alleging that their employer had discriminated against them by denying salary increases on the basis of their sex. \textit{Id}. They reached a settlement agreement with the employer and later petitioned the district court for a determination that the settlement payments were excludable from their gross income. \textit{Id}. at 232. The district court ruled that the settlement payments were not excludable, and the Sixth Circuit reversed. \textit{Id}. at 232.

\textsuperscript{98} \textit{Burke}, 504 U.S. at 237-38. Compensatory damages are typically granted for pain, suffering, emotional distress, or injury to reputation. Nicholson, \textit{supra} note 97, at 218. The court looked back to the 1960 treasury regulation which stated that any case arising under a tort or tort-type right would be considered a personal injury and any damages flowing from such injury would be excludable. \textit{Burke}, 504 U.S. at 234; Treas. Reg. § 1.104-1(c) (1960); \textit{see supra} text accompanying note 76. This type of analysis is termed the “tort-type” or “tort-like” analysis. \textit{See} Manns, \textit{supra} note 77, at 361.

\textsuperscript{99} \textit{Burke}, 504 U.S. at 237; Manns, \textit{supra} note 77, at 360; \textit{see} cases cited \textit{supra} note 83 (discussing the nature of the claim approach).

\textsuperscript{100} \textit{Burke}, 504 U.S. at 240. At the time of the plaintiff’s claim, Title VII allowed courts to award “such affirmative relief as may be appropriate,” including back pay and reinstatement, as well as “any other equitable relief.” 42 U.S.C. § 2000e-5(g) (2003); Buckman, \textit{supra} note 47, at § 2. Title VIII, however, allowed plaintiffs to recover “actual damages” and “injunctive or other equitable relief.” 42 U.S.C. § 3612(g)(3) (1995). In addition, Title VIII
TAXING SEXUAL HARASSMENT

Court suggested that were compensatory damages recoverable under Title VII, a compensatory damage award would be excludable because the injury would be within the same category as tort-type injuries.\textsuperscript{101}

After the 1991 Act expanded the types of damages recoverable for discrimination suits, the Internal Revenue Service (IRS) ruled that those damages were based on personal injuries.\textsuperscript{102} Therefore, “compensatory damages, including back pay, received in satisfaction of a claim of disparate treatment gender discrimination under Title VII . . . are excludable from gross income as damages for personal injury under Section 104(a) of the Code.”\textsuperscript{103} The ruling also held that this applied even if the compensatory damages were comprised only of back pay.\textsuperscript{104}

In \textit{Commissioner v. Schleier}, however, the Supreme Court ruled that the back pay and liquidated damages received in settlement of an Age Discrimination in Employment Act (ADEA) claim were not excludable from taxation.\textsuperscript{105} The Supreme Court provides that the court may assess a “civil penalty” against the respondent. \textit{Id.}

\textsuperscript{101} \textit{Burke}, 504 U.S. at 237. The court stated:

Notwithstanding a common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies, Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them—wages that, if paid in the ordinary course, would have been fully taxable. Thus, we cannot say that a statute such as Title VII, whose sole remedial focus is the award of back wages, redresses a tort-like personal injury within the meaning of § 104(a)(2) and the applicable regulations.

\textit{Id.} at 241.


\textsuperscript{103} Rev. Rul. 93-88, 1993-2 CB 61. The ruling also applied to disparate treatment racial discrimination under Title VII as well as amounts received under the Americans with Disabilities Act. \textit{Id.}

\textsuperscript{104} \textit{Id.} The ruling was short-lived, however, as it was suspended. Rev. Rul. 95-45, 1995-1 C.B. 53 (1995). \textit{See infra} text accompanying notes 117-19 (discussing the IRS’s position after Rev. Rul. 93-88 was suspended).

\textsuperscript{105} 515 U.S. 323, 327 (1995) (holding that a member of an age
granted certiorari to resolve the appellate court conflict about the tax exclusion of damages. At the time Schleier was decided, the ADEA provided only punitive damages and back pay as remedies. Therefore, the Court followed Burke’s “tort-type” reasoning to decide the available remedies were not sufficient to render the recovery excludable from income tax under § 104(a). The Court found that the victim in Schleier suffered several different injuries when he was fired in contravention of the ADEA. Although emotional distress was a personal injury,
TAXING SEXUAL HARASSMENT

he was not compensated for it through his lawsuit.\textsuperscript{110} He was compensated for the loss of his job through back pay, but this was an economic injury and not a personal injury.\textsuperscript{111} Therefore, it did not satisfy the tort-type Burke test, and could not be excluded from income tax.\textsuperscript{112}

Even though the Court found that ADEA damages were not consistent with tort-type rights to satisfy Burke, the Court further stated that the Burke test was not the final analysis.\textsuperscript{113} Instead, the Court articulated a two-part test to determine whether the tax exclusion applied.\textsuperscript{114} The Court stated that the exclusion applied only when the damages “(i) [were] received through prosecution or settlement of an action based upon tort or tort-type rights . . . and (ii) [were] received on account of personal injuries or sickness.”\textsuperscript{115} Therefore, because the plaintiff’s settlement award was not based on a personal injury, he could not exclude the award from his gross income.\textsuperscript{116}

Following Schleier, on December 30, 1996, the IRS issued another ruling on the subject.\textsuperscript{117} The ruling stated that in employment discrimination cases, lost wages must be included in the calculation of gross income, but emotional distress awards could be excluded.\textsuperscript{118} This ruling superseded the ruling issued prior to Schleier, and conformed the IRS’s position to the Supreme Court’s holding in Schleier.\textsuperscript{119}

economic loss from having his job taken away. \textit{Id.} at 330-31.

\textsuperscript{110} Kahn, \textit{supra} note 91, at 329. The plaintiff had won a set of “liquidated damages,” but the Court considered those to be punitive damages, and therefore not received on account of a personal injury. \textit{Schleier}, 515 U.S. at 323. Thus, they could not be excluded. Kahn, \textit{supra} note 91, at 329.

\textsuperscript{111} Kahn, \textit{supra} note 91, at 329-30.

\textsuperscript{112} \textit{Schleier}, 515 U.S. at 334.

\textsuperscript{113} \textit{Id.} at 333-34; Jennings, \textit{supra} note 106, at 883.

\textsuperscript{114} \textit{Schleier}, 515 U.S. at 333-34.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} at 337.


\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} See \textit{supra} note 104 (citing the suspension of the ruling in effect prior to \textit{Schleier}); \textit{supra} text accompanying notes 102-04 (explaining the IRS
In the same month, the Supreme Court held that punitive damages for physical injuries were not excludable under § 104(a). Although the case involved punitive damages awarded for a physical injury, the opinion included an important discussion of the policy supporting § 104(a)’s historical tax exclusion of certain damage awards. The Court questioned § 104(a)’s exclusion of lost wages from taxation, stating that exclusion for that type of damages goes “beyond what one might expect a purely tax-policy related ‘human capital’ rationale to justify.” The Court observed that exclusion of lost wages entitled the victim to a windfall because she would not have to pay taxes on wages that she would ordinarily have paid if not for the personal injury. The Court was suggesting that just as punitive damages, which serve to punish wrongdoing, did not restore “human capital,” neither did an award for lost wages; therefore, neither should be excludable from gross income.

C. Taxation of Compensatory Damage Awards After the Small Business Job Protection Act of 1996

In 1996, through a provision in the Small Business Job ruling in effect prior to the Supreme Court decision in Schleier).

120 O’Gilvie v. U.S., 519 U.S. 79 (1996) (holding that the surviving spouse of a tort victim was required to pay taxes on punitive damages won in the victim’s suit for personal injuries). This case was decided after § 104(a) was amended in 1996, but the decision was based on the pre-amendment statute. Id. In 1995, the relevant section of the tax code provided that “gross income does not include . . . the amount of any damages received . . . on account of personal injuries or sickness.” 26 U.S.C. § 104 (1995). The plaintiffs in the case were the husband and children of a woman who died of toxic shock syndrome in 1983. O’Gilvie, 519 U.S. at 81. The plaintiffs sued the manufacturer of the product that had caused her death and were awarded $1,525,000 in actual damages and $10 million in punitive damages. Id. The plaintiffs paid income tax on the punitive damages but argued that they should be refunded. Id.

121 O’Gilvie, 519 U.S. at 82-90.
122 Id. at 86.
123 Id.
124 Id.
TAXING SEXUAL HARASSMENT

Protection Act (SBJPA),\textsuperscript{125} Congress created a bright line rule to determine which damage awards would be taxable in the future.\textsuperscript{126} Although the SBJPA was best known for its increase of the minimum wage and tax cuts to small businesses,\textsuperscript{127} it also contained a provision amending § 104(a) to state that only non-punitive damages paid on account of physical injuries or physical sickness may be excluded from gross income.\textsuperscript{128}

The amended statute also explicitly states that, with one

\textsuperscript{126} 26 U.S.C. § 104(a)(2) (2003). The SBJPA was codified throughout several provisions of the Internal Revenue Code, but the damage award amendment is specifically codified in 26 U.S.C. § 104(a)(2). \textit{Id.}
\textsuperscript{127} Pub. L. No. 104-188. The Conference report on the Act stated its purposes were to:
\begin{quote}
[P]rovide tax relief for small businesses, to protect jobs, to create opportunities, to increase the take home pay of workers, to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles, and to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate and to prevent job loss by providing flexibility to employers in complying with minimum wage and overtime requirements under that Act.
\end{quote}
\textit{H.R. REP. NO. 104-737 (1996).}
\begin{quote}
(a) In General. Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical to medical, etc. expenses) for any prior taxable year, gross income does not include—
\end{quote}
\begin{quote}
\begin{itemize}
\item (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.
\end{itemize}
\end{quote}
\begin{quote}
For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness.
\end{quote}
notable exception, emotional distress is not within the definition of physical injuries or sickness. This means that a lawsuit based on emotional distress alone will not trigger the § 104(a)(2) exclusion for damage awards. On the other hand, if a claim for emotional distress is attached to a physical personal injury, compensatory damages received for emotional distress can be excluded from the individual’s gross income. To clarify, if an individual receives a compensatory damage award or settlement stemming from a physical personal injury, the entire award would be excludable from taxation. In contrast, if an

129 The portion of a compensatory damage awards allotted to the reimbursement of medical expenses relating to emotional distress stemming from any personal injury (physical or non-physical) may be excluded from gross income. § 104(a); A. Van Lanckton & Joseph A. Brear, Jr., Federal Tax Treatment of Personal Injury Damages, 44 PRACTICAL LAWYER No. 3, 59, at 60 (1998).

130 26 U.S.C. § 104; see supra note 128 (providing the exact language of the statute’s emotional distress reference). Compensatory damages received on account of wrongful death actions or loss of consortium claims are excludable from gross income pursuant to § 104(a)(2). Internal Revenue Service, Lawsuit Awards and Settlements, DIGITAL DAILY, at http://www.irs.gov/businesses/page/0,,id=7050,00.html [hereinafter Lawsuit Awards and Settlements] (last visited April 18, 2003). The House Committee Report for the 1996 amendment states:

If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive) that flow therefrom are treated as payments received on account of physical injury or physical sickness whether or not the recipient of the damages is the injured party. For example, damages (other than punitive) received by an individual on account of a claim for loss of consortium due to the physical injury or physical sickness of such individual’s spouse are excludable from gross income.


132 See Patrick E. Hobbs, The Personal Injury Exclusion: Congress Gets Physical But Leaves the Exclusion Emotionally Distressed, 76 NEB. L. REV. 51, 87 (1997) (explaining the different interpretations of the emotional distress provision in § 104(a)(2)); see also Coyle, supra note 8 (stating, “If a plaintiff received damages for pain and suffering attendant to a physical injury, the plaintiff could still deduct those damages from gross income.”).

133 § 104(a)(2); Robert Margolis, Personal Injuries—Physical and
individual were to recover compensatory damages stemming from a non-physical personal injury, the entire award would be taxable.\textsuperscript{134}

According to the 1996 House Ways and Means Committee Report on the SBIPA, one reason for the amendment was to end confusion about the tax treatment of damages in non-physical injury cases, in light of decisions such as \textit{Schleier}.\textsuperscript{135} Although the full reasoning for Congress’s distinction between physical and non-physical injuries remains speculative, the origin of the amendment is easily traceable to the federal government’s continuing search for revenue.\textsuperscript{136} To increase federal funds, 

\textit{NonPhysical}, 1 MERTENS LAW OF Fed. income tax’n § 7.91 (2002). This exclusion applies to a lost wages award a plaintiff recovers in a physical injury lawsuit. § 104(a)(2). Any punitive damages, however, would not be excludable for any type of injury pursuant to § 104(a)(2). See \textit{id}. This could theoretically cause a problem in a situation where a plaintiff in a physical injury case is awarded a lump sum settlement including both punitive and compensatory damages. Lanckton & Brear, \textit{supra} note 129, at 63. If the award comes from a trial by jury, the jury will state which part of the award was attributed to the compensatory damages as opposed to punitive damages. \textit{Id}. If the award comes from a settlement, however, the person who prepares the tax payer’s tax return must determine which portion of the award is attributable to punitive damages or compensatory damages. \textit{Id}. There is a good faith requirement for this, and the preparer must look at all the evidence as well as the initial complaint requesting certain amounts for damages. \textit{Id}. This also sends a message to potential plaintiffs in physical injury lawsuits to consider the tax consequences of their categorization of damages when they prepare their initial complaints. \textit{Id}.

\textsuperscript{134} § 104(a)(2); see Lanckton & Brear, \textit{supra} note 129, at 60 (giving an example of tax consequences to plaintiff who wins damages for a non-physical injury).


The Supreme Court recently held that damages received based on a claim under the Age Discrimination in Employment Act could not be excluded from income . . . . The House bill provides that the exclusion from gross income only applies to damages received on account of a personal physical injury or physical sickness.


\textsuperscript{136} Marcia Coyle, \textit{U.S. Tax on Damages Under Fire: Bill to Repeal ‘96 Levy Has Backing of Both Business, Plaintiff Bar}, 21 Nat. L.J. 50, Aug. 9, 1999, at A1. When Congress gave tax breaks to small businesses, it needed to
Congress made all punitive damage awards as well as all damages received on account of non-physical personal injuries taxable income.137

D. Taxation of Attorneys’ Fees

A separate but related issue to the taxation of compensatory damage awards is the taxation of contingent attorneys’ fees and costs. Contingent attorneys’ fees often make up a significant portion of the monetary damages successful plaintiffs in sex discrimination cases receive in their judgments or settlements.138

It is settled that, similar to compensatory damage awards, attorneys’ fees and costs awarded to plaintiffs in cases based on physical injuries are excluded from income tax.139 On the other hand, confusion remains about how attorneys’ fees and costs awarded for claims of non-physical injuries should be taxed.140 The Fifth, Sixth, and Eleventh circuits have held contingency fees excludable from gross income for federal income tax

recover the resultant loss in federal income. Id.

137 26 U.S.C. § 104(a) (2003); see also Coyle, supra note 136. This rule has not been changed since § 104(a) was amended in 1996. The changes in the amendment apply to awards received after August 20, 1996, unless received under a “binding written agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995. Lawsuit Awards and Settlements, supra note 130. The estimated revenue return from the date of this amendment through the year 2000 was $230 million. Coyle, supra note 136.

138 Paul M. Jones, NonPhysical Personal Injury Settlements and Judgments: Amending the Internal Revenue Code to Exclude Attorney Fees, 35 IND. L. REV. 245 (2001). The court may award a prevailing party a “reasonable attorney’s fee as part of costs” in cases under Title VII. 42 U.S.C. § 1988(b) (2003); supra note 53.

139 § 104(a); Jones, supra note 138, at 246 (citing Priv. Ltr. Rul. 99-52-080 (Sept. 30, 1999), which held that damages awarded in a physical injury case were excludable from gross income).

140 Jones, supra note 138, at 246 (commenting on the “crucial shift” taking place “with respect to the income tax treatment of attorney fees awarded in non-physical personal injury settlements and judgments”).
purposes. On the other hand, the First, Ninth, and Federal circuits have held that contingent attorneys’ fees must be included in gross income and then may be declared as a miscellaneous itemized deduction.

The Seventh Circuit, in *Kenseth v. Commissioner*, tried to resolve the dispute between a divided tax court’s decision. The court ruled that a portion of the plaintiff’s settlement award used to pay a contingent attorney’s fee had to be included in his calculation of gross income. The court held that when a taxpayer pays a lawyer pursuant to a contingency fee agreement, the taxpayer receives the benefit of the funds because the court allows the taxpayer to recover the full amount of the fee through the lawsuit. Since the taxpayer benefits from the use of the fee, the award must be included in the calculation of gross income,

---

141 *Id.* at 247. These courts have explained that because state law in these jurisdictions gives attorneys ownership rights in the income received in the settlements or judgment awards, the plaintiff may exclude that portion of the award from his or her own gross income. *Id.* at 247. *See* Clarks v. United States, 202 F.3d 854 (6th Cir. 2000) (applying the holding in *Cotnam* and declining to follow the assignment of income approach); Davis v. Comm’r, 210 F.3d 1346 (11th Cir. 2000) (allowing plaintiff to exclude portion of damage award paid to plaintiff’s attorneys); *Cotnam* v. Comm’r, 263 F.2d 119 (5th Cir. 1959) (allowing exclusion of the award from gross income because of Alabama law granting attorneys rights to the fees).

142 *See* Fredrickson v. Comm’r, 166 F.3d 342 (9th Cir. 1998) (requiring attorneys’ fees awarded to be included in plaintiff’s calculation of his gross income); Alexander v. Comm’r, 72 F.3d 938 (1st Cir. 1995) (requiring plaintiff to declare fees as deduction on income tax return); Baylin v. United States, 43 F.3d 1451 (Fed. Cir. 1995) (ruling that a portion of plaintiff’s award paid to attorneys should be included in taxpayer’s gross income); Jones, *supra* note 138, at 247. These courts take the “assignment of income” approach, reasoning that since plaintiffs “earn” the income from attorneys’ fees awards, they cannot assign that income and avoid paying taxes on it. Jones, *supra* note 138, at 249.

143 114 T.C. 399 (2000), *aff’d*, 259 F.3d 881 (7th Cir. 2001) (holding that contingent attorney’s fee awarded in settlement was not excludable from plaintiff’s gross income).

144 *Id.*

145 *Id.* at 413. The court was using the “assignment of income” approach, as described *infra* note 158.
even though the attorney actually receives that portion of the award.\textsuperscript{146} The court stated, however, that the plaintiff would be allowed to declare his legal fees as a miscellaneous itemized deduction.\textsuperscript{147}

Unfortunately, the ability to declare an attorneys’ fee award as a miscellaneous itemized deduction can create further negative tax consequences for some plaintiffs.\textsuperscript{148} The limitations already placed by the tax code on miscellaneous itemized deductions can create situations where plaintiffs are taxed on their entire awards, including the portions paid to their attorneys.\textsuperscript{149} Usually, the most severe limitation on miscellaneous itemized deductions is the “alternative minimum tax.”\textsuperscript{150} This rule entirely disallows

\textsuperscript{146} Kristina Maynard, \textit{The Fruit Does Not Fall Far from the Tree: The Unresolved Tax Treatment of Contingent Attorney’s Fees}, 33 \textit{LOY. U. CHI. L.J.} 991, 1016 (2002) (arguing that courts should require plaintiffs to include attorneys’ fees awards in their gross income).

\textsuperscript{147} \textit{Kenseth}, 114 T.C. at 413.

\textsuperscript{148} Jones, \textit{supra} note 138, at 256.

\textsuperscript{149} \textit{Id.} One limitation put on miscellaneous itemized deductions is that miscellaneous itemized deductions are only deductible to the extent that the aggregate amount of those deductions exceeds two percent of adjusted gross income (AGI). 26 U.S.C. § 67(a) (2003); Maynard, \textit{supra} note 146, at 1010. If the deductions do not amount to more than two percent of a person’s AGI, they cannot be deducted at all. Aaron C. Charrier, \textit{Taxing Contingency Fees: Examining the Alternative Minimum Tax and Common Law Tax Principles}, 50 \textit{DRAKE L. REV.} 315, 325 (2002) (examining the circuit split on the tax treatment of contingent attorneys’ fees and arguing that the current tax doctrine contradicts the purpose of contingency fee agreements). For example, assume that an individual wins $300,000 in a sex discrimination lawsuit in addition to a $150,000 attorneys’ fees award. Her AGI will be $300,000. See 26 U.S.C. § 62 (2003) (providing a list of items that must be deducted from an individual’s gross income to arrive at the amount of AGI); Maynard, \textit{supra} note 146, at 1010 n.120 (illustrating calculation of AGI). If she tries to deduct the $150,000 fee award, 26 U.S.C. § 67(a) requires that she only be allowed to deduct the amount of the attorneys’ fee award that exceeds two percent of her AGI ($300,000). 26 U.S.C. § 67(a). Two percent of her AGI is $6,000. Therefore, she would still be required to pay tax on $6,000 of her award. See Jones, \textit{supra} note 138, at 255 (providing a hypothetical illustration of the two percent requirement for miscellaneous itemized deductions).

\textsuperscript{150} 26 U.S.C. §§ 55-58 (2003). Maynard, \textit{supra} note 146, at 1011 (“Even more onerous than the limitations on deductions for legal fees for regular tax
miscellaneous itemized deductions by people with significant miscellaneous itemized deductions. The amount intended for deduction is added back into the income tax base, and taxes are then paid on the deduction. Moreover, the attorneys’ fees will be subject to double taxation—the plaintiff’s attorney will also pay his or her own income tax on the attorneys’ fee award, despite the fact that the plaintiff is already paying taxes on the award.

An example of the negative effects of the double taxation of attorneys’ fees is illustrated by the case of an Iowa citizen named Don Lyons. Mr. Lyons won a sex discrimination lawsuit and

purposes is the treatment of such expenses under the Alternative Minimum Tax.”). The alternative minimum tax is in place to prevent taxpayers with “substantial economic income” from avoiding “significant tax liability by using exclusions, deductions, and credits.” Charrier, supra note 149, at 331 (quoting the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986, 432 (1986)).

The alternative minimum tax rule is triggered when an individual’s tentative minimum tax exceeds the amount the individual would normally pay in taxes on his AGI. 26 U.S.C. § 51(a)(1)-(2) (2003); Charrier, supra note 149, at 326. Tentative minimum tax is found by calculating the individual’s alternative minimum taxable income, which is usually the individual’s gross income before making any itemized deductions. Id. at 326. If the amount of tax an individual would pay on the alternative minimum taxable income exceeds the amount she would pay on her AGI with the deduction, the individual will owe the alternative minimum tax. Id. at 326. The alternative minimum tax is the difference between the amount the individual owes in taxes on her AGI and the amount the individual would owe on her alternative minimum taxable income. Id. at 326-27. Thus, in effect, the alternative minimum tax provision requires individuals to pay taxes on both their regular income and the income listed as a miscellaneous itemized deduction. Id.

Jones, supra note 138, at 255; see also Charrier, supra note 149, at 326-28 (providing an illustration of how the alternative minimum tax works).

See Jones, supra note 138, at 256 (arguing that the double taxation of attorneys’ fees should be abolished).

received $15,000 in damages.\textsuperscript{155} After being taxed on this award, Mr. Lyons was left with $9,533.\textsuperscript{156} In a letter to Congress requesting statutory revision to eliminate the tax consequences to Mr. Lyons, his attorney, Victoria L. Herring, stated that she would be requesting a fee reimbursement in the amount of $150,000.\textsuperscript{157} Ms. Herring illustrated that if this request was granted by the court, Mr. Lyons would be required to pay $67,791 in taxes on the entire award.\textsuperscript{158} In Mr. Lyons’s jurisdiction, plaintiffs are required to pay tax on attorneys’ fee awards.\textsuperscript{159} Therefore, after applying his net damage award, $9,533, to the tax payments he was required to make on his attorneys’ fees, he would still owe the government $58,236 altogether.\textsuperscript{160} This was more than two-thirds his normal annual salary and was required despite the fact that his attorney would also be paying income tax on the award of attorneys’ fees.\textsuperscript{161} Even though he would be able to deduct the fee award as a miscellaneous itemized deduction, the triggering of the alternative minimum tax would require him to pay tax on the award anyway.\textsuperscript{162}

According to his letter, Mr. Lyons would be required to pay $5,467 in taxes on his adjusted gross income (AGI).\textsuperscript{163} Mr.

\textsuperscript{155} \textit{Id.} at S7163. Don Lyons sued under Title VII alleging that he was retaliated against by his employer because he had “helped” his coworker in filing a sex discrimination complaint against the employer. \textit{Id.}

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.} at S7164. Mr. Lyons’ attorney stated in her letter to Congress that her fee request was based on her “hourly rate of $180.00 an hour (a rate much less than that of lawyers in other cities, and probably less than the two defense lawyers from Chicago who tried the case).” \textit{Id.} She further stated, “The fees and expenses amount may seem high, but is the result of a fair amount of contentiousness and the need to take depositions in Kansas and Arizona.” \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} Ms. Herring stated, “Not only will I pay taxes on this figure (gladly so), but my client will also and without the ability to deduct the sum due to the pernicious effect of the alternative minimum tax!” \textit{Id.}

\textsuperscript{163} \textit{Id.} His AGI would be equal to his gross income less any itemized
TAXING SEXUAL HARASSMENT

Lyons’s alternative minimum taxable income (AMTI) would be his regular taxable income, subject to the provisions of sections 56 and 58 of the Internal Revenue Code.164 Section 56(b)(1)(A)(i) prohibits miscellaneous itemized deductions.165 Therefore, Mr. Lyon’s AMTI would be $165,000 because it would include his attorney’s fee award (which he would list as a miscellaneous itemized deduction) and his other income ($15,000 in damages from his lawsuit).166 Assuming Mr. Lyons’s tentative minimum tax would exceed the tax owed on his AGI ($15,000), the alternative minimum tax rule would require that Mr. Lyons’s entire AMTI be taxed as if it had not been reported as a deduction at all.167 Instead, he would owe the difference between his tentative minimum tax and his regular tax on his regular taxable income, in addition to his regular tax.168 Therefore, he would essentially have to pay taxes on his AGI of $15,000 in addition to taxes owed on his deduction of $150,000.169 In effect, he would be taxed as if he had made no deduction whatsoever.170

deductions he makes. 26 U.S.C. § 62 (2003). For example, if Mr. Lyons had not earned any other income besides his damages and attorneys’ fee award, his AGI would be $15,000 ($165,000 gross income less than $150,000 attorneys’ fee deduction equals $15,000). Id. Mr. Lyons’s actual gross income for that year is unavailable.

166 See supra note 164.
167 See Charrier, supra note 149, at 326-27 (providing a hypothetical illustration of how the alternative minimum tax provision works); Jones, supra note 138, at 254-56 (illustrating how to calculate tentative minimum tax rates).
168 26 U.S.C. § 55(a)(1)-(2) (2003); Charrier, supra note 149, at 327. Mr. Lyons would owe the difference between his tentative minimum tax and the $5,647 that he would owe in regular tax. Id.; see text accompanying note 164.
169 Charrier, supra note 149, at 327.
170 Id.
III. EFFECTS OF SECTION 104(A)(2) ON VICTIMS OF SEXUAL HARASSMENT

Section 104(a) adds to the negative effects that victims of sexual harassment already endure, such as the emotional harms and social stigmas associated with sexual harassment. Section 104(a) creates economic disincentives for coming forth with sexual harassment lawsuits because it requires successful plaintiffs to pay taxes on their compensation. In addition, the taxation of damages based on non-physical injuries insinuates that sexual harassment is not a serious injury because damages based on physical injuries are excludable from income tax.

A. Social Stigma and Emotional Harms of Sexual Harassment

In the interests of justice and equality for men and women, Congress recognized the need to compensate victims for the suffering associated with sexual harassment. Unfortunately, although this type of discrimination is a compensable injury, many women still have trouble coming forward with allegations against their employers when they have been sexually harassed. One major explanation is that sexual harassment involves

171 See infra Part III.A (discussing the implications § 104(a) has on victims of sexual harassment); see generally MINK, supra note 15 (discussing the harms and stigmas created by sexual harassment).
172 26 U.S.C. § 104(a)(2) (2003); see infra Part III.B (discussing the financial consequences imposed by the tax code upon successful plaintiffs in employment discrimination cases).
173 See supra note 12; infra Part III.C (discussing the social and political consequences of § 104(a)); see also infra note 221 (discussing various injuries caused by sexual harassment).
175 MINK, supra note 15, at 7.
discussing personal, private subjects. In addition, bringing a complaint of sexual harassment often requires the victim to endure personal attacks on her character as well as suggestions that she may have provoked the harassment, exaggerated it or even lied about it. For exposing their harassers, women can be stigmatized, blacklisted on the job market or ostracized by colleagues and friends.

The highly publicized cases of Paula Jones, who sued former President Bill Clinton on allegations of sexual harassment, and

176 Id. at 7.
177 Id. at 27. See, e.g., CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW 349 (2002) (describing the first sexual harassment class action, initiated by Lois Jenson and her fellow female mine workers, who had endured years of hostile environment sexual harassment). In the case of Lois Jenson, opposing attorneys pointed to the fact that she had been raped and had not reported the crime at the time of the incident. Id. at 348-49. They argued that since she did not report it, she must have been lying about the rape as well as her sexual harassment claim. Id. at 349. Furthermore, despite an agreement between the parties to keep her rape testimony private, the judge deciding the case included details about the rape in his opinion, which then became public information. Id. at 349. Other potential members of the class action lawsuit refused to join because they did not want to have to answer painful questions about their families. Id. at 286.
178 MINK, supra note 15, at 101. A woman who complains of sexual harassment in the workplace runs the risk of being “branded a troublemaker—or worse, a feminist.” MINK, supra note 15, at 81; see also BINGHAM & GANSLER, supra note 177, at 105 (describing the personal attacks Lois Jenson endured after filing a sexual harassment complaint with her employer). Lois Jenson started working for Eveleth Mines during the late 1970s. BINGHAM & GANSLER, supra note 177, at 3. After enduring years of pervasive sexual harassment, she came forward and filed a grievance with the mine worker’s union. Id. at 100. After word of her complaint spread around the mine, she found all four of her car tires slashed. Id. at 111. When she filed a complaint with the state attorney general, her coworkers immediately shunned her. Id. at 126. “People stood together in groups giving her dirty looks, people avoided her.” Id. at 126.
Anita Hill, who publicly accused Justice Clarence Thomas of sexual harassment, are poignant examples of the obstacles women face when alleging sexual harassment. Both Anita Hill and Paula Jones endured severe criticism and even public outrage for coming forth with allegations against their male supervisors. In particular, the public seemed to find it important that Paula Jones had waited a number of years before speaking publicly about her alleged harassment. The delay was

Her lawsuit alleged that former Governor of Arkansas and United States President William Jefferson Clinton sexually harassed her while she was employed with the State of Arkansas. Text of Paula Jones’ Complaint, All Politics, Jan. 13, 1997, available at http://www.cnn.com/ALLPOLITICS/1997/01/13/jones.supremecourt/suit.shtml. Ms. Jones alleged that he had made unwelcome sexual advances toward her and that she had felt her employment would be threatened if she were to report the incident. Id. She further alleged that she was later terminated because she had rejected the sexual advances made by Mr. Clinton. Id.


Graves, supra note 180 (reporting that even after her testimony had ended, Ms. Hill faced media stakeouts at her home); Paula Jones’ Day In Court Draws Nearer, All Politics, Jan. 8, 1997, available at http://www.cnn.com/ALLPOLITICS/1997/01/08/jones.morton/index.shtml (reporting that “everybody in America knows who [Paula Jones] is,” but recognizing the public’s “dismissive attitude” towards her).

The vicious personal attacks weathered by Anita Hill and Paula Jones are no different from those endured by many women who bring sexual harassment claims, although the attacks against Hill and Jones were far louder and more visible than most.” Id. After testifying at Justice Thomas’s appointment hearings, Anita Hill faced “death threats, strangers condemning her to hell, hostile stares” and was accused of “flat-out perjury.” Graves, supra, note 180. “The GOP had tried to portray Hill as a spurned woman who had fantasized a sexual relationship with Thomas.” Id. Paula Jones was portrayed as a “trailer park bimbo” in the public eye. Paula Jones’ Day in Court Draws Nearer, supra note 181.

Paula Jones was characterized as a
used against her as a way for society to judge the credibility of her claim.\textsuperscript{184} One possible reason she did not immediately come forward, though, is that she, like most victims of sexual harassment, first tried to cope with the harassment privately instead.\textsuperscript{185}

The fact that so many women over the years have had very little choice but to quietly endure the effects of sexual harassment is one reason the right to sue under Title VII exists—it legitimizes women’s experiences and encourages them to report incidences of sexual harassment.\textsuperscript{186} The Supreme Court has stated that the “gold digger” for attempting to pursue her claim once Mr. Clinton had become president. \textit{Id.} at 2. Mrs. Clinton stated on the \textit{Today Show}, on January 27, 1998, that Ms. Jones’ claim against the president was part of a right-wing conspiracy against him. \textit{Id.} at 117; \textit{Hillary Clinton: ‘This is a Battle,’} All Politics, Jan. 27, 1998, available at http://www.cnn.com/ALLPOLITICS/1998/01/27/hillary.today.

\textsuperscript{184} MINK, supra note 15, at 4-5. The public questioned Ms. Jones’s motives for coming forward with allegations of sexual harassment. \textit{Id.} at 5. Some stated that Hill was more credible than Jones because Hill had been forced to come forward while Jones did so voluntarily. Anna Quindlen, \textit{A Tale of Two Women}, N.Y. TIMES, May 11, 1994, at A1.

\textsuperscript{185} MINK, supra note 15, at 81; see supra notes 184-86 (discussing the various disincentives for coming forth with sexual harassment lawsuits). Women are particularly susceptible to struggling privately with sexual discrimination in “hostile work environments,” where the complaint process is long and tedious. MINK, supra note 15, at 81. Lois Jenson, before commencing the first class action sexual harassment lawsuit in America, stated in her diary:

\begin{quote}
It amazes me that through the years women have kept so silent, but think it should not amaze me, for I have done the same. Since it is against the law. In fact this is not an isolated case but merely that we do not go public. One thought comes to mind. How many violent crimes have emanated from women trying to handle harassment themselves? After all, companies have no set policy until it becomes a necessity and that means that a woman has tried everything she could first and then went to the company . . . .
\end{quote}

BINGHAM & GANSLER, supra note 177, at 105.

\textsuperscript{186} BINGHAM & GANSLER, supra note 177, at 101. In referring to Title VII, in \textit{Mardell v. Harleysville Life Ins. Co.}, the third circuit stated:

Throughout this nation’s history, persons have far too often been judged not by their individual merit, but by the fortuity of their race,
The purpose of the Civil Rights Act was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.”¹⁸⁷ With so many personal, social and political consequences of speaking out about harassment, Title VII recognizes that there should be incentives to persuade women to expose incidences of harassment and encourage people to take steps to eliminate sexual harassment.¹⁸⁸ The federal taxation scheme should be used to support this notion, not contradict it.

The color of their skin, the sex or year of their birth, the nation of their origin, or the religion of their conscientious choosing. Congress has responded to these pernicious misconceptions and ignoble hatreds with humanitarian laws formulated to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed, but principally to deter future violations . . . . A plaintiff in an employment discrimination case accordingly acts not only to vindicate his or her personal interests in being made whole, but also as a ‘private attorney general’ to enforce the paramount public interests in eradicating invidious discrimination.

31 F.3d 1221, 1234 (3d Cir. 1994), vacated by 514 U.S. 1034, 115 S. Ct. 1397, 131 L. Ed. 2d 286 (1995), reinstated by 65 F.3d 1974 (3d Cir. 1995) (ruling in favor of the plaintiff, who alleged sex and age discrimination in employment). Mardell was placed on probation and eventually discharged from her position as a manager for the Harleysville Life Insurance Company. Id. at 1222-23. She alleged that she was discharged on the basis of her sex and age, and that she had specifically been told that she “couldn’t be a good old boy” and that the insurance agents would think of her as a “wife.” Id. at 1223. The employer tried to counter these arguments by revealing evidence that Ms. Mardell had made false representations on her employment application and resume, and that, therefore, the employer could not be found liable for the employment discrimination. Id. at 1223. The court found for Ms. Mardell, stating that this type of “after-acquired evidence” did not absolve the employer from liability. Id. at 1237.

¹⁸⁸ One way the government has done this is to create the EEOC. See supra Part I (discussing the purposes of the EEOC).
B. Section 104(a) as an Economic Disincentive to Commencing Sexual Harassment Lawsuits

Section 104(a) creates yet another disincentive for victims of sexual harassment to speak out because it taxes any compensatory damages they might receive through lawsuits. A recent example is the case of Cynthia C. Spina, who was awarded $3 million by a jury in her sex discrimination and harassment suit against her employer, the Forest Preserve District of Cook County. After winning $950,000 in attorneys’ fees, in addition to $3 million in punitive and compensatory damages, she still owed an additional $99,000 to the IRS. Therefore, after winning her lawsuit for one of the most egregious violations of Title VII ever seen, she owed more to the IRS than she was actually awarded.

The tax consequences for Ms. Spina were so burdensome that she asked the court to consider the taxation of her award when deciding by how much her jury verdict award should be reduced. In denying her argument, the magistrate judge stated that he was aware of the tax consequences and was not unsympathetic, but “Congress, not this Court, must correct any

---

189 See supra Part II (explaining the tax treatment of compensatory damages).
190 Spina v. Forest Pres. Dist. of Cook County, 207 F. Supp. 2d 764 (2002). Ms. Spina won her sexual discrimination, harassment and retaliation claims against her employer. Id. at 767. She alleged that she had been berated, belittled and isolated by her male colleagues because of her sex. Id. at 767. She complained to her supervisors about her treatment, but the harassment only escalated. Id. at 767. Finally, she filed a complaint with the EEOC and filed suit shortly thereafter. Id. at 768.
191 Liptak, supra note 6. There are no reports on Ms. Spina’s exact tax returns. See infra notes 196-200.
192 Liptak, supra note 6. The magistrate judge presiding over Ms. Spina’s case stated that he did not know of another case in which a plaintiff had “endured such continuous harassment at the hands of so many different officers and superiors for such an extended period of time.” Spina, 207 F. Supp. 2d at 774.
193 Spina, 207 F. Supp. 2d at 777.
shortcomings in the tax code’s application.” Although Ms. Spina sought an equitable exception in her circumstances, the court declined “[p]laintiff’s invitation to venture down a slippery slope and wage into this legal morass under a guise of equitable relief.”

There are several reasons why Ms. Spina’s award of approximately $4 million ended up costing her almost $100,000 more than what she received. First, the judge was required to reduce Ms. Spina’s jury award from $3 million to $300,000. The double taxation of attorneys’ fees and costs also caused negative tax consequences for Ms. Spina. When Ms. Spina was awarded approximately one million dollars in attorneys’ fees in addition to her compensatory and punitive damages, she had to pay income tax on the fees. Although she was in a jurisdiction where she could deduct the portion of the award allotted to the payment of attorneys’ fees, the large deduction triggered the alternative minimum tax and required her to pay tax on almost her entire award anyway.

194 Id. (quoting Hukkanen Campbell v. Comm’r, 274 F.3d 1312, 1314 (10th Cir. 2001)).
195 Id.
197 Id. at 776. The judge did this in compliance with the cap put on compensatory damages in the Civil Rights Act of 1991. 42 U.S.C. § 1981(b)(3) (2003). See supra note 51 (discussing the damage cap provision of the Civil Rights Act of 1991); see also Buckman, supra note 47, at § 5.
198 Coyle, supra note 8. In certain districts, taxpayers are required to pay taxes on the attorneys’ fees and costs they receive when their lawsuits are based on non-physical injuries. See supra note 142 (listing districts that require taxation of attorneys’ fees). Illinois, the state in which Ms. Spina brought her lawsuit, requires that plaintiffs pay tax on their awards according to the “assignment of income” approach. Liptak, supra note 6; see supra note 142 (explaining the “assignment of income” approach).
199 Coyle, supra note 8; Liptak, supra note 6.
In addition, negative tax consequences can also arise when plaintiffs win lump sum back-pay awards in employment discrimination cases. The IRS requires the taxation of back-pay awards in the year received, even though the awards usually reflect several years’ of lost pay. As a result, those who win lump sum back-pay awards are often placed into higher income tax brackets (with higher assigned tax rates) than they would have been had they received their wages on a regular basis. Meanwhile, if back pay or lost wages are awarded in a physical injury case, they are not taxed at all. Thus, the tax code entitles

is because AMTI is equal to her AGI in addition to all miscellaneous itemized deductions. See supra text accompanying notes 164-65 (explaining alternative minimum taxable income). Her regular AGI would be equal to $300,000 because she would be listing the $950,000 attorneys’ fee award as a deduction. The tentative minimum tax would then be established using her AMTI. Jones, supra note 138, at 255. She would be required to pay the difference between her tentative minimum tax and the regular tax she would owe on her regular AGI ($300,000). Id. Altogether, by operation of these rules in her particular situation, she owed approximately $99,000 in taxes. Liptak, supra note 6.

201 26 U.S.C. §§ 3121, 3402 (2003). Spina’s case does not mention whether Ms. Spina was awarded back pay. Spina, 207 F. Supp. 2d at 776. The court attributed $200,000 of her award to emotional distress while $100,000 was to compensate her for damage to her reputation. Id. at 776.

202 26 U.S.C. § 104(a). The Internal Revenue Code does not include any provision allowing a lump sum award for back pay to be taxed over a number of years. 146 CONG. REC. S1760-03, S1763 (July 18, 2000). Instead, it is taxed as a lump sum in the year that it was awarded by a jury or in a settlement. Id.; Successful Plaintiff Gets Extra Money to Cover Extra Tax, Says P.A. Court, 6 ANDREWS SEX. HARASSMENT LIT. REP. No. 8, at 12 (Oct. 2000) (discussing the case of O’Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443 (E.D. Penn. 2000), where the court awarded the plaintiff money to cover the negative tax consequences of receiving a lump sum back-pay award).

203 146 CONG. REC. S1760-03, S1763 (July 18, 2000).

204 Id. The Supreme Court in O’Gilvie pointed out that an exclusion for lost wages actually entitles victims to a windfall in that they would ordinarily be required to pay income tax on those wages had they earned them through employment. O’Gilvie, 519 U.S. at 86. After the 1996 amendment to § 104(a), however, only victims of physical injuries are entitled to this preferential treatment. 26 U.S.C. § 104(a)(2) (2003).
victims of physical injuries to another inequitable tax benefit.  

All of this leads to the conclusion that when potential plaintiffs approach a lawyer about initiating sexual harassment litigation, they face another consideration—the possibility that, if they win, they may be in a worse financial position than when they started. Women who decide to bring sexual harassment claims already have to consider the risk of job loss, injury to their reputations and the economic consequences of losing their lawsuits. Now, they also must take into account the fact that, even if they establish liability, they may have to pay the IRS

---

205 See 26 U.S.C. § 104(a)(2); see also Sager & Cohen, supra note 9, at 448-49 (criticizing the distinction made between the exclusion of back pay in physical injury cases and the taxation of back pay in non-physical injury cases). Sager and Cohen argue that in all personal injury cases, damages for lost earnings should be taxable and damages received for pain and suffering should be excludable because damages should be taxed only if they compensate the taxpayer for money that would have been taxable if received under usual circumstances. Id. at 449-50.

206 Liptak, supra note 6 (reporting that attorneys must now instruct clients on the potential effects of § 104(a) on their damage recoveries). As a general rule, in cases based on federal statutes, evidence and arguments about the tax consequences of verdict amounts may be introduced to the jury. See Kenneth G. Zaleski, Jury Instructions as to Tax Consequences, 5 MERTENS LAW OF FED. INCOME TAX’N § 24A:12 (2002). State laws vary on this issue, though. Id. The majority rule is that juries may not be told of the tax status of personal injury awards in state actions. Id. This principle was articulated in the leading case on the subject, Norfolk & Western Ry. Co. v. Liepelt, where the Supreme Court ruled that it was error not to instruct the jury as to the tax-free status of damages awarded in a Federal Employers’ Liability Act (FELA) wrongful death action. 444 U.S. 490 (1980); Federal Employers’ Liability Act, 45 U.S.C. § 51 (2003). In Norfolk, the plaintiff suffered fatal injuries during his employment as a fireman. Norfolk, 444 U.S. at 491. His estate sued under FELA and was awarded $750,000 of non-taxable damages by a jury. Id. The appellate court ruled that it was not error for the court to have not instructed the jury that the plaintiffs would not be required to pay tax on the award. Id. The Supreme Court reversed. Id. at 498. Nevertheless, the Supreme Court’s ruling has often been limited to actions arising under FELA and, unfortunately for victims like Ms. Spina, is not always followed in cases arising under federal laws. See Zaleski, supra note 206.

207 See supra Part III.A (discussing the harms of sexual harassment).
more than they recover in damages. Women are much less likely to take their chances suing employers for harassment if they think they may have to exhaust their financial resources litigating with no reward in the end. Instead, they are left to endure the personal effects of sexual harassment quietly, while those guilty of harassment escape any consequences.

The financial disincentives created by § 104(a)(2) may decrease the number of Title VII sexual harassment claims prosecuted by victims. Because meritorious lawsuits are burdened by § 104(a), this provision undermines the Title VII goals of enabling and encouraging victims to bring sex discrimination claims. If victims no longer have a reason to pursue lawsuits against those guilty of harassment, there will be no consequences in place for employers who violate Title VII and

---


209 Liptak, supra note 6 (citing Cynthia Spina’s lawyer, Monica McFadden, who said that the “tax laws will result in fewer civil rights cases”). Ms. McFadden went on to state, “It has an enormously chilling effect. I have to advise a person coming to me that it is entirely possible not only that any award they achieve will go to the Internal Revenue Service but that they will owe the Internal Revenue Service money.” Id. “It’s had a chilling effect on employment discrimination cases and dire consequences for some people. If people can’t afford to win, why would they go to the trouble of even pursuing the case, no matter how important or meritorious.” Coyle, supra note 8 (quoting Carlton Carl of the Association of Trial Lawyers of America (ATLA)).

210 Mink, supra note 15, at 3.

211 See supra note 209 (quoting an attorney on the resultant loss of lawsuits caused by the taxation of non-physical injury damage awards).

the EEOC guidelines.  

Additionally, § 104(a)(2) discourages settlements because settlement payments are susceptible to the same tax treatment as trial awards. Furthermore, settlements often pose a financial problem for employers, just as they pose a problem for plaintiffs. Now that lawyers advise victims about the tax consequences of settlement awards, victims often seek increased monetary damages to compensate for the negative financial burdens they face regarding income taxes. Employers are discovering that they have to pay more than the plaintiffs would have sought if § 104(a)(2) did not make the award taxable. Businesses are further economically burdened by this because Title VII provides that only employers may be liable for sexual harassment, even when an individual employee committed


America is a better country because we as a people have moved forward toward the goal of eradicating discrimination. Nowhere is that more important than in the workplace. Of almost any sector of American life, the progress toward equality has been greatest in the workplace precisely because of strong federal equal employment opportunity laws.

Id. By discouraging victims from utilizing the laws and guidelines put in place by the federal government, Congress is contradicting the very purposes for which those laws were enacted—to protect from evils of sex discrimination that occur in the workplace. 146 CONG. REC. S1760-03, S1763 (July 18, 2000); see Wolff, supra note 13, at 1409 (examining the taxation of non physical injuries against the backdrop of the progress of the civil rights movement in the United States).

214 26 U.S.C. § 104(a)(2) (2003) (stating, “gross income does not include . . . the amount of any damages . . . (whether by suit or agreement) . . . on account of personal physical injuries or physical sickness”); Coyle, supra note 136.

215 Coyle, supra note 136 (explaining that businesses are paying plaintiffs for the negative tax burdens of their settlement awards).

216 See supra note 209 (quoting a lawyer advising client of tax burdens).

217 Coyle, supra note 136.

218 Id. (quoting attorneys David Chashdan and Frederick M. Gittes, who stated that businesses have been paying more to individuals to cover tax consequences).
TAXING SEXUAL HARASSMENT

the harassment. 219 Therefore, although the SBJPA was designed to give tax breaks to small businesses, it may in fact create an additional tax burden for businesses attempting to settle employment discrimination cases. 220

C. Section 104(a)(2) Denies the Reality of the Harms Caused by Sexual Harassment

Victims of sexual harassment suffer a number of harms. 221 As a result, the scope of harm for which recovery is permitted in sexual harassment cases is very broad. 222 A victim may recover for more than just emotional distress—she may also sue for damages to reputation and career, loss of pride or self-respect, loss of enjoyment in life or career, impact on family or close friends and loss of community or social standing. 223 The availability of damages in sexual harassment cases “demonstrates congressional recognition that discriminatory employment practices inflict injuries beyond mere loss of paycheck or

221 See LITIGATING THE SEXUAL HARASSMENT CASE, supra note 45, at 447. Victims of sexual harassment may suffer from “stress, uncontrolled anger, alienation, helplessness, fright, tension, nervousness, distress, irritability, depression, persistent sadness, guilt, lability, anergia, hyperenergia, mood swings, impulsivity, emotional flooding, anxiety, fear or loss of control, escape fantasies, compulsive thoughts, rage episodes, obsessional fears, crying spells, vulnerability, diminished self confidence, and decreased self esteem and concentration.” Wolff, supra note 12, at 1457. Victims may also experience psychiatric disorders such as depression or post traumatic stress. Id. at 1458. In addition, these harms may lead to physical conditions, such as heart disease, ulcers, headaches, insomnia, stomach problems, weight loss, eating disorders and other chronic illnesses. Id. Sexual harassment may also strain the victim’s relationships with friends and family. Id.
222 LITIGATING THE SEXUAL HARASSMENT CASE, supra note 45, at 447.
223 Id. at 447; H.R. REP. NO. 102-40, pt. 1, at 15 (1991). “Victims of intentional discrimination often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems.” Id.
In light of the myriad harms caused by employment discrimination and sexual harassment, it is difficult to understand why Congress distinguished between those harms and others caused by physical injuries. It appears that the government is using the policy of disparate tax treatment of physical and non-physical injury damage awards to insinuate that sex discrimination is not as legitimate or serious an injury as a physical assault. "A victim of discrimination suffers a dehumanizing injury as real as, and often far more severe and lasting harm than, a blow to the jaw." Yet, the federal tax code contradicts this statement by discriminating against those who are already victims of sex discrimination and taxing them differently.
TAXING SEXUAL HARASSMENT

than victims of other damaging actions.\footnote{228}{26 U.S.C. § 104(a)(2) (2003). The exception allowing medical expenses for emotional distress to be excluded from income tax does not overcome the insinuation that non-physical injuries are less personally harmful than physical injuries. See Wolff, supra note 12, at 1480 Instead, it supports that perception because it suggests that unless a victim seeks medical help for his or her injuries, those injuries will not be regarded as “real.” Id.}

Most importantly, the policy of § 104(a)(2) is not justifiable in light of the progress this country has made since the Civil Rights Act was first enacted in 1964.\footnote{229}{See Wolff, supra note 12, at 1480 (concluding that victims of non-physical injuries endure harms as severe as physical injuries and should therefore receive the same tax treatment as victims of physical injuries); see also Sager & Cohen, supra note 9 (stating that “the national commitment to end unlawful discrimination is undermined when damages for the non-physical injury of discrimination are taxed more heavily than damages for physical harm”).}

After years of hard work and rallying against sex discrimination, victims of sexual harassment and other forms of discrimination won the right to go to court, prove that they have been victimized and receive relief.\footnote{230}{42 U.S.C. § 2000e (2003); 42 U.S.C. § 1981a (2003); see supra Part I.A (showing authority for victims to sue for sexual harassment in court); see also Wolff, supra note 12, at 1484 (arguing that the progress of civil rights in the U.S. led to a backlash causing the double discrimination of non-physical injury victims).}

Yet, by taxing the victims of sexual harassment, the federal government invalidates the reality of those victims’ injuries.\footnote{231}{26 U.S.C. § 104(a)(2).}

In addition, § 104(a)(2) penalizes women for falling victim to sexual harassment in the first place.\footnote{232}{146 CONG. REC. S1760-03, S1763 (July 18, 2000). “The result of the [Small Business Protection Act of 1996] was to discriminate against people in civil rights cases.” Id.}

If the government seeks to use the tax code as a social tool, making policy decisions about the treatment of different societal injuries, it should conform its tax provisions to the political goal of eliminating discrimination in society.\footnote{233}{See Wolff, supra note 12, at 1486 n.1 (providing the history of Congress using the Internal Revenue Code to make social policy decisions);
harassment claims, the tax code re-victimizes the victims of sexual harassment. Rather than compensating them for their injuries at the expense of those liable for the harassment, § 104(a)(2) adds to the misfortune victims of sexual harassment suffer.234

IV. CONGRESSIONAL INVOLVEMENT AND A SUGGESTION FOR THE FUTURE

The negative consequences created by taxing sexual harassment damage awards must be remedied in the legislature.235 Several solutions have been proposed, including one that Congress is currently considering.236 This note suggests that the solution best suited to address the negative tax treatment of employment discrimination cases involves taxing defendants rather than victims.

A. Civil Rights Tax Relief Act

A simple solution to the troubles of § 104(a) is for Congress to reverse its 1996 amendment and eliminate the disparate tax treatment of non-physical and physical injury damage awards.237 Congress is currently considering the Civil Rights Tax Relief Act (CRTRA),238 which proposes to amend the tax code so that damage awards for unlawful discrimination would not be considered part of an individual’s gross income for tax


234 146 CONG. REC. S1760-03, S1763 (July 18, 2000). “The result of this taxation is that the attorneys and government make out better than the victims who had their rights violated.” Id. See supra note 221 (describing harms caused by sexual harassment).

235 146 CONG. REC. S7160-03, (July 18, 2000).

236 Civil Rights Tax Relief Act, H.R. 840, 107th Cong. (2001). The Civil Rights Tax Relief Act was first introduced in 1998. Coyle, supra note 136. The bill is supported by the House Way and Means Committee. Id.


238 H.R. 840.
Therefore, damages received on account of sexual harassment would receive the same treatment as physical injury damage awards. In addition, although the amendment would not allow exclusion of punitive damages or back-pay awards, it would allow income averaging of back-pay awards so they would no longer be taxed in lump sums. Pursuant to the amendment,

239 Id. The proposal would amend the tax code to state:
(a) In General.
   (1) Exclusion. Gross income does not include amounts received by a claimant (whether by suit or agreement and whether as lump sums or periodic payments) on account of a claim of unlawful discrimination.
   (2) Amounts covered. For purposes of paragraph (1), the term ‘amounts’ does not include—
      (A) backpay or frontpay (as defined in section 1302(b)), or
      (B) punitive damages.

Id. Many are advocating for the equal tax treatment of physical injury and employment discrimination damage awards. See Brown, supra note 12, at 223 (arguing for the exclusion of damages for job bias recoveries); Coyle, supra note 8; Mary L. Heen, An Alternative Approach to the Taxation of Employment Discrimination Recoveries: Income from Human Capital, Realization, and NonRecognition, 72 N.C. L. REV. 549 (1994) (arguing that based on the human capital approach, damage awards for employment discrimination cases as well as physical injuries should be excludable from income tax); Loiacono, supra note 2.

240 Supra note 239 (providing text of the proposed amendment).

241 H.R. 840; see also 146 CONG. REC. S1760-03, S1763 (July 18, 2000). The tax code would be amended to read:

General Rule. If employment discrimination backpay or frontpay is received by a taxpayer during a taxable year, the tax imposed by this chapter for such taxable year shall not exceed the sum of—

(1) the tax which would be so imposed if—
   (A) no amount of such backpay or frontpay were included in gross income for such year, and
   (B) no deduction were allowed for such year for expenses (otherwise allowable as a deduction to the taxpayer for such year) in connection with making or prosecuting any claim of unlawful employment discrimination by or on behalf of the taxpayer, plus
(2) the product of—
back-pay awards would be taxed at the same rate as if the individual were still employed.\textsuperscript{242} Finally, the bill attempts to address the double taxation of attorneys’ fees by eliminating the requirement that victims pay taxes on attorneys’ fees recovered in successful lawsuits.\textsuperscript{243}

The CRTRA is a good solution—it would ensure that the tax treatment of damage awards in sexual harassment cases coincides with the policy goals of Title VII’s ban on sex discrimination.\textsuperscript{244}

\begin{itemize}
  \item (A) the number of years in the backpay period and frontpay period, and
  \item (B) the amount by which the tax determined under paragraph (1) would increase if the amount on which such tax is determined were increased by the average annual net backpay and frontpay amount.
\end{itemize}

H.R. 840.

\textsuperscript{242} Civil Rights Tax Relief Act, H.R. 840, 107th Cong. (2001); 146 Cong. Rec. S1760-03, S1763 (July 18, 2000). “The act provides for income averaging of back-pay awards, making it possible for the award to be taxed over the same number of years it was meant to compensate.” \textit{Id.}

\textsuperscript{243} H.R. 840. See 146 Cong. Rec. S7160-03, S1763 (July 18, 2000) (stating that “this legislation ends the double taxation on attorney’s fees that are awarded to a victim in a discrimination case”). In addition, on August 5, 2002, the mayor of Washington D.C. signed the nation’s first Civil Rights Tax Fairness Act, which mirrors the bill currently pending in Congress. \textit{NELA Applauds District’s Adoption of Nation’s First Civil Rights Tax Fairness Act; Asks Congress to Follow}, U.S. NEWswire, Aug. 2, 2002, \textit{available at} 2002 WL 22070164. Specifically, the new law amends the District of Columbia Official Code to exclude from gross income amounts received on account of unlawful discrimination and adds a new section to the tax code to allow the income averaging of back-pay and front-pay awards received from employment discrimination cases. \textit{Id.} Although the local legislation does not address the problem on a national level, it does offer hope of increasing support for the passage of federal legislation. \textit{Id; see} National Employment Lawyers Association, \textit{HR 840/S 917, The Civil Rights Tax Relief Act: Tax Equity for Targets of Discrimination}, \textit{at} http://www.nela.org/news/hr840/endorse.htm (last visited March 20, 2003) (providing a list of the current endorsing organizations of the Civil Rights Tax Relief Act, including such organizations as the American Civil Liberties Union, the U.S. Chamber of Commerce, ABA Labor and Employment Section, and the American Small Business Alliance).

\textsuperscript{244} H.R. 840. \textit{See generally} Wolff, \textit{supra} note 12, at 1343 (arguing that
The equal tax treatment of physical injury and employment discrimination damage awards would remove the suggestion that the harms created by sexual harassment are less important than the harms of physical injuries. Unlike an amendment that would tax all damage awards flowing from all injuries, the CRTRA ensures that victims are not re-victimized by the IRS.

Nevertheless, there are several problems with the CRTRA. First, in passing the bill, the federal government will lose the revenue that it gained through the taxation of all non-physical injury damage awards since the 1996 amendment. More importantly, though, the CRTRA misses an important opportunity to increase the negative consequences to employers the equal treatment of physical and non-physical injuries would be more in line with the recognition that non-physical injuries can be as harmful to victims as physical injuries).

See supra Part III.C (arguing that the tax distinction between physical and non-physical injuries insinuates that victims of non-physical injuries, such as sexual harassment, do not suffer real injuries).

See Mark W. Cochran, Should Personal Injury Damage Awards Be Taxed?, 38 CASE W. RES. L. REV. 43, 51-52 (1987) (arguing that a tax exclusion for personal injury damage awards is inconsistent with the fundamentals of the tax code); Lawrence A. Frolick, Personal Injury Compensation as a Tax Preference, 37 ME. L. REV. 1, 39-40 (1985) (asserting that the exclusion from gross income for personal injury awards should be eliminated in order to increase tax revenue).

See supra note 137 (stating that the government has already received millions in revenue from the creation of the § 104(a)(2) amendment). Some have advocated for an amendment that would make all damage awards, for both physical and non-physical injuries, excludable. See, e.g., H.R. 2802, 105th Cong. (1997); see Buchan, supra note 93, at 11 (discussing the bill as a means to restore the tax exclusion for non-physical injuries). Although this type of solution would ensure against any unreasonable distinctions made between different types of physical and non-physical injuries, this solution would result in a substantial loss in revenue. In this way, the Civil Rights Tax Relief Act has been viewed by some as the “middle road” because rather than providing for the equal treatment of all physical and non-physical injuries, the Civil Rights Tax Relief Act would provide for the equal treatment of physical injury and employment discrimination damages. See Buchan, supra note 93, at 11 (describing the bill suggested by Rep. Gerald Solomon, who proposed that the damage exclusion be applied to employment discrimination awards, but not all non-physical injury damage awards).
found liable for sexual harassment.\textsuperscript{248} This is especially true because many tortfeasors are already allowed to declare payments to plaintiffs in employment discrimination cases as income tax deductions.\textsuperscript{249} Therefore, although the CRTRA would entitle discrimination victims to equal tax treatment, Congress would still be allowing employers to deduct employment discrimination damage payments for income tax purposes.\textsuperscript{250}

\section*{B. A Solution for the Future: Taxing the Defendants, Not the Victims}

A better solution would be one that uses the tax code as a social policy tool to support the goals of Title VII and the EEOC guidelines to eliminate employment discrimination, while still providing the revenue that the taxation of non-physical injury damage awards currently provide through § 104(a).\textsuperscript{251} A statutory requirement that defendant employers compensate plaintiffs for the negative tax consequences they suffer when they are awarded compensatory damage awards or attorneys’ fees would satisfy both the victims and the government.\textsuperscript{252} This solution would keep § 104(a) as it stands, requiring the taxation of damage awards in employment discrimination cases.\textsuperscript{253} Instead of changing § 104(a), Congress should adopt a law stating that employers found liable for harassment are required to pay successful plaintiffs for

\begin{flushright}
\textsuperscript{248} 42 U.S.C. § 1981(a) (2003); see infra Part I.B (discussing the types of liability employers are exposed to for sexual harassment).
\textsuperscript{249} See Wolff, supra note 12, at 1486 (arguing that the income tax deduction allowed for payments made by the tortfeasor should be eliminated in order to eliminate the inequalities of § 104(a)(2) while still providing financial revenue for the government).
\textsuperscript{250} Id. See Wolff, supra note 12, at 1486 (calling for the elimination of the business expense allowance for payments to victims of employment discrimination).
\textsuperscript{251} See supra note 137 (stating the estimated revenue from this tax provision).
\textsuperscript{252} 26 U.S.C. § 104(a) (2003); See supra note 137 (stating the government’s revenue return on § 104(a)); supra Part III.B (discussing negative financial effects of § 104(a) on successful plaintiffs).
\textsuperscript{253} 26 U.S.C. § 104(a)(2).
\end{flushright}
TAXING SEXUAL HARASSMENT

the negative tax consequences posed by § 104(a)(2).\textsuperscript{254} Imposing such a requirement would use § 104(a) to burden parties responsible for perpetuating harassment rather than victims who are already harmed.\textsuperscript{255}

Some courts have attempted to implement this solution by requiring defendant’s to pay plaintiffs for the negative tax consequences of damage awards.\textsuperscript{256} For instance, the Eastern District of Pennsylvania attempted to do so in a recent age discrimination case.\textsuperscript{257} In \textit{O’Neill v. Sears, Roebuck & Co.}, the

\begin{flushright}
\textsuperscript{254} \textit{See infra} Part III.B (discussing negative tax consequences of § 104(a)); \textit{see also} Wolff, \textit{supra} note 12, at 1486 (advocating the equal treatment of physical and non-physical injuries). Wolff advocates eliminating the taxation of non-physical injuries as well as eliminating the business expense allowance for payments to victims of employment discrimination. \textit{Id.} This note’s proposal differs because it would keep § 104(a) the way it is—it would maintain the distinction between physical and non-physical injury damages. However, this note suggests adding a federal law that requires that the tax consequences posed to employment discrimination plaintiffs by § 104(a)(2) be paid by the employers found liable. Employers should have to reimburse the plaintiffs the negative consequences without declaring the tax payments as business expenses.

\textsuperscript{255} \textit{See} Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234-35 (3d Cir. 1994) (stating that one purpose of anti-discrimination laws is to increase the burdens on employers held liable for the discrimination, so as to deter employment discrimination).

\textsuperscript{256} \textit{O’Neill v. Sears, Roebuck & Co.}, 108 F. Supp. 2d 443 (E.D. Pa. 2000) (awarding plaintiff additional damages for tax consequences of lump sum back-pay award); Blaney v. Int’l Ass’n of Machinists and Aerospace Workers, 55 P.3d 1208 (Wash. Ct. App. 2002) (awarding plaintiff supplemental award to compensate for negative tax consequences caused by attorneys’ fee and back-pay award in sex discrimination case). \textit{See also} EEOC v. Joe’s Stone Crab Inc., 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998) (ruling that a district court may award an additional damage award for negative tax consequences posed by a lump sum back-pay award, but declining to do so in that particular case because there was insufficient evidence to make appropriate tax calculations).

\textsuperscript{257} \textit{O’Neill}, 108 F. Supp. 2d at 446. The plaintiff had sued his former employer for the premature termination of his job, alleging that he had been terminated in willful contravention of the ADEA. \textit{Id.} at 443. The plaintiff was awarded both back pay and front pay in a lump sum, rather than over a period of years, equal to what the plaintiff would have worked if he had not been
district court found the plaintiff entitled to receive money to cover the negative tax burdens in relation to his back pay and front pay because had he kept his employment, he would have received his salary over a number of years.\textsuperscript{258} The court reasoned that an award for the negative tax consequences, endured as a result of bringing an employment discrimination suit, was necessary to meet the goal of making the plaintiff “whole.”\textsuperscript{259} Therefore, the court awarded him the difference between his tax liability for the back-pay and front-pay awards received in the lawsuit and the amount he would have owed in taxes had he received the money as wages.\textsuperscript{260}

A Washington court of appeals has also recently taken the initiative to allow a plaintiff to receive a supplemental damage award for negative tax consequences.\textsuperscript{261} The plaintiff, Ms. Blaney, was awarded $638,764 in damages and $235,625.38 in attorneys’ fees for winning her sex discrimination case based on a Washington state anti-discrimination statute.\textsuperscript{262} At trial, Ms. 

---

\textsuperscript{258} Id. at 444. The plaintiff requested that the court add an award for the negative tax consequences posed by these awards. Id. at 446. 

\textsuperscript{259} Id.; Susan Kalinka, O’Neil v. Sears, Roebuck and Co: Award of Damages for Increased Tax Liability, 79 TAXES 45, Jan 1. 2001, available at 2001 WL8812786. The court also thought it was particularly important to award the plaintiff recovery for the negative tax consequences of his lump sum front-pay award because his front-pay award had already been reduced to present value. O’Neill, 108 F. Supp. 2d at 447. Therefore, the presumption was that he would invest the money and receive a return equal to his lost wages; however, the negative tax consequences of his award would leave him with less money to invest. Id. at 447. 

\textsuperscript{260} Id. at 449. Mr. O’Neill’s tax liability after the lawsuit was $67,164.96. Id. at 448. This was $38,780.05 more than what he would have owed had he been paid wages. Id. Therefore, the court awarded him $38,780.05 in addition to his back-pay and front-pay award of $237,332. Id. The court did not consider the negative tax consequences posed by the compensatory and liquidated damages the plaintiff had been awarded, in the amount of $281,736. Id. at 448. It only compensated the plaintiff for the consequences posed by the lump sum wages award. Id. 


\textsuperscript{262} Id. at 1210; Washington Law Against Discrimination, WASH. REV.
TAXING SEXUAL HARASSMENT

Blaney presented the testimony of a certified public accountant who stated that she would owe $244,753 in taxes as a result of her damage awards. To determine whether Ms. Blaney was entitled to compensation for the negative tax consequences, the court of appeals interpreted the anti-discrimination statute’s provision allowing the award of “actual damages.” The court construed “actual damages” to include a supplemental payment to “offset the adverse federal tax consequences to her from the . . . lump sum payment of the judgments on the damages award and attorney fees against it.” Therefore, the court remanded the case to determine the amount Ms. Blaney should be awarded for the negative tax consequences.

Similarly, parties negotiating settlement agreements have also tried to implement this type of solution by agreeing that the employers make increased settlement payments to cover the negative tax consequences posed to the victims. During many recent sexual harassment settlement discussions, employers have discovered that they have to pay extra money to compensate plaintiffs for the taxes that will have to be paid on the settlement payments. Employers who normally want to settle cases are instead finding that they are in a better position if they go to trial where plaintiffs cannot request compensation for negative tax consequences. If there were a statutory requirement that employers compensate plaintiffs for negative tax consequences

CODE 49.60.030(2) (2003).

263 Blaney, 55 P.3d at 1210.

264 WASH. REV. CODE 49.60.030(2); see Blaney, 55 P.3d at 1215 (quoting the Washington statute).

265 Blaney, 55 P. 3d at 1214. The court further stated that its ruling made practical sense because forcing plaintiffs to pay the taxes would “threaten to thwart meritorious suits because a highly successful plaintiff runs the risk of having the entire benefit of a judgment eliminated plus incurring a substantial tax liability to the Internal Revenue Service.” Id. at 1217.

266 Id. at 1218. The court stated that on remand, the burden would be on Ms. Blaney to demonstrate the negative tax consequences. Id.

267 Coyle, supra note 136.

268 Id.

269 See id.
both in court and through out of court settlements, however, employers would no longer be able to use trial to avoid the tax payments.\textsuperscript{270} This would decrease the burden on the courts by allowing more cases to settle.\textsuperscript{271}

This type of solution is particularly productive because victims of sexual harassment would no longer bear the financial burden of being successful in court.\textsuperscript{272} Compensating successful plaintiffs for negative tax consequences caused by § 104(a) will reduce the disincentives in place for victims of harassment to bring lawsuits to vindicate their civil rights.\textsuperscript{273} Women would no longer face the uncertainty of the tax consequences of their lawsuits. Instead, they would know that if they win, their employers would reimburse them for whatever taxes they may have to pay on their monetary damages.\textsuperscript{274}

Moreover, this solution is unique in that it creates an added incentive for employers to take measures to prevent sexual harassment in their workplaces.\textsuperscript{275} Requiring employers to pay

\textsuperscript{270} Coyle, \textit{supra} note 136. “Because of the tax bite, businesses have to pay more or individuals have to take less to get settlements, or there are no settlements. A lot of cases are on the docket longer, and there are more trials.” \textit{Id.} (quoting lawyer Frederick M. Gittes, partner at Spater, Gittes, Schulte & Kolman, of Columbus Ohio).

\textsuperscript{271} \textit{Id.} Advocates of the Civil Rights Tax Relief Act also state that its passage would reduce the burden on courts. Coyle, \textit{supra} note 8. “If the IRS takes less in taxes from civil rights plaintiffs’ settlements, it will be easier for both civil rights plaintiffs and defendant businesses to reach just settlements without the need for protracted trials requiring significant investment of resources.” \textit{Id.} (quoting Rep. Deborah Pryce, who supported the Civil Rights Tax Relief Act).


\textsuperscript{273} \textit{Id.}; Blaney v. Int’l Ass’n of Machinists and Aerospace Workers, 55 P.3d 1208, 1217 (Wash. Ct. App. 2002) (stating that forcing plaintiffs to pay the negative tax consequences will “thwart” meritorious claims from coming forward); \textit{see supra} Part III (discussing the disincentives to bringing lawsuits for sexual harassment).

\textsuperscript{274} § 104(a); \textit{see supra} Part II.C, D (discussing the taxation of damage and attorneys’ fee awards in non-physical injury cases).

\textsuperscript{275} 29 C.F.R. § 1604.11(f) (2003).

Prevention is the best tool for the elimination of sexual harassment.

An employer should take all steps necessary to prevent sexual
plaintiffs for negative tax burdens will increase financial consequences on employers, which in turn will encourage employers to avoid liability by implementing preventative programs and taking strong positions against sexual harassment.\textsuperscript{276} Therefore, this solution furthers the goal of Title VII to eliminate discrimination in society.\textsuperscript{277} In addition, by maintaining the taxation of employment discrimination damage and settlement awards, the government will still receive the revenue it gained by implementing § 104(a)(2) in the first place.\textsuperscript{278} Only this time, the government will receive its tax revenue from the blameworthy parties, not the victims.\textsuperscript{279}

**CONCLUSION**

The federal government has a legitimate and important goal of eliminating the evils of sexual harassment and sex discrimination from society. Through the Civil Rights Acts of 1964 and 1991, Congress attempted to discourage sexual harassment and compensate victims for the considerable harms they may suffer by allowing them to sue for relief under Title VII from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

\textit{Id.}  

\textsuperscript{276} \textit{Id.} “Congress prescribed a strong medicine, the anti-employment discrimination laws, to cure the social malady of invidious discrimination. Deterrence is accomplished by placing an economic price on discriminatory acts, and stigmatizing the wrongdoer’s acts before the entire community.” Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234-35 (3d Cir. 1994).  

\textsuperscript{277} \textit{See supra} Part I.A (discussing the function of Title VII and the EEOC in eliminating sex discrimination in employment).  

\textsuperscript{278} 42 U.S.C. § 2000e (2003); 42 U.S.C. § 1981a (2003); \textit{see supra} note 137 (describing the taxation of non-physical injuries as a means of raising revenue).  

\textsuperscript{279} \textit{See supra} Part III (discussing the negative effects imposed by taxing the victims of sexual harassment).
VII.280 Only five years after providing victims of harassment with a variety of compensatory damages to recover in lawsuits, Congress contradicted itself by taxing employment discrimination victims through § 104(a)(2).281 It is already socially undesirable to bring allegations against those guilty of sexual harassment, and now the government has made it financially undesirable by requiring attorneys’ fees and compensatory damage awards based on non-physical injuries to be subject to income taxation.282 In doing so, victims are subject to double discrimination and are told that their injuries are not “real.” Until Congress passes a law requiring those liable for sexual harassment to pay plaintiffs for tax consequences created by § 104(a)(2), the government will be using the tax code to perpetuate the damaging practice of sex discrimination and sexual harassment throughout society.

282 See supra text accompanying note 208-09 (discussing the undesirability of bringing lawsuits under Title VII for sexual harassment due to the negative financial consequences posed by Section 104(a)(2)).