Montana Judicial Institute

October 3-5, 2018

WEDNESDAY, OCTOBER 3RD

12:00 pm	Lunch [Russell Smith Federal Courthouse, 201 E. Broadway] ***Introductions, welcome and Ice Breaker*** *by* Katie DeSoto & Mark Kovacich	
1:00 pm	***Opening Lecture*** – Hon. Donald Molloy	**TAB #1**
1:30 pm	***The Rule of Law: History & Structure*** Professor Tom Huff	**TAB #2**
2:30 pm	Break	
2:45 pm	***The Rule of Law: History & Structure (continued)***	
3:45 pm	***Anatomy of a Civil Case*** – Hon. Jeremiah Lynch, Katie DeSoto, Mark Kovacich, Tucker Gannett, Dylan McFarland	**TAB #3**
5:00 pm	Recess	
6:00 pm	Dinner [*DoubleTree Missoula*] ***Speaker*** - Anthony Johnstone, Professor of Law, University of Montana School of Law ***Topic*** - The President and the Constitution	
8:00 pm	Adjourn for the day	

THURSDAY, OCTOBER 4TH

8:00 am	***Welcome, housekeeping and preview of day*** – Katie DeSoto & Mark Kovacich [Russell Smith Federal Courthouse]	
8:15 am	***Anatomy of a Civil Case (continued)***	
9:45 am	Break	
10:00 am	***Anatomy of a Criminal Case*** – Hon. Dana Christensen, Karl Englund, Tim Racicot, Tony Gallagher, Tom Holter, Deputy Shawn Williams	**TAB #4**

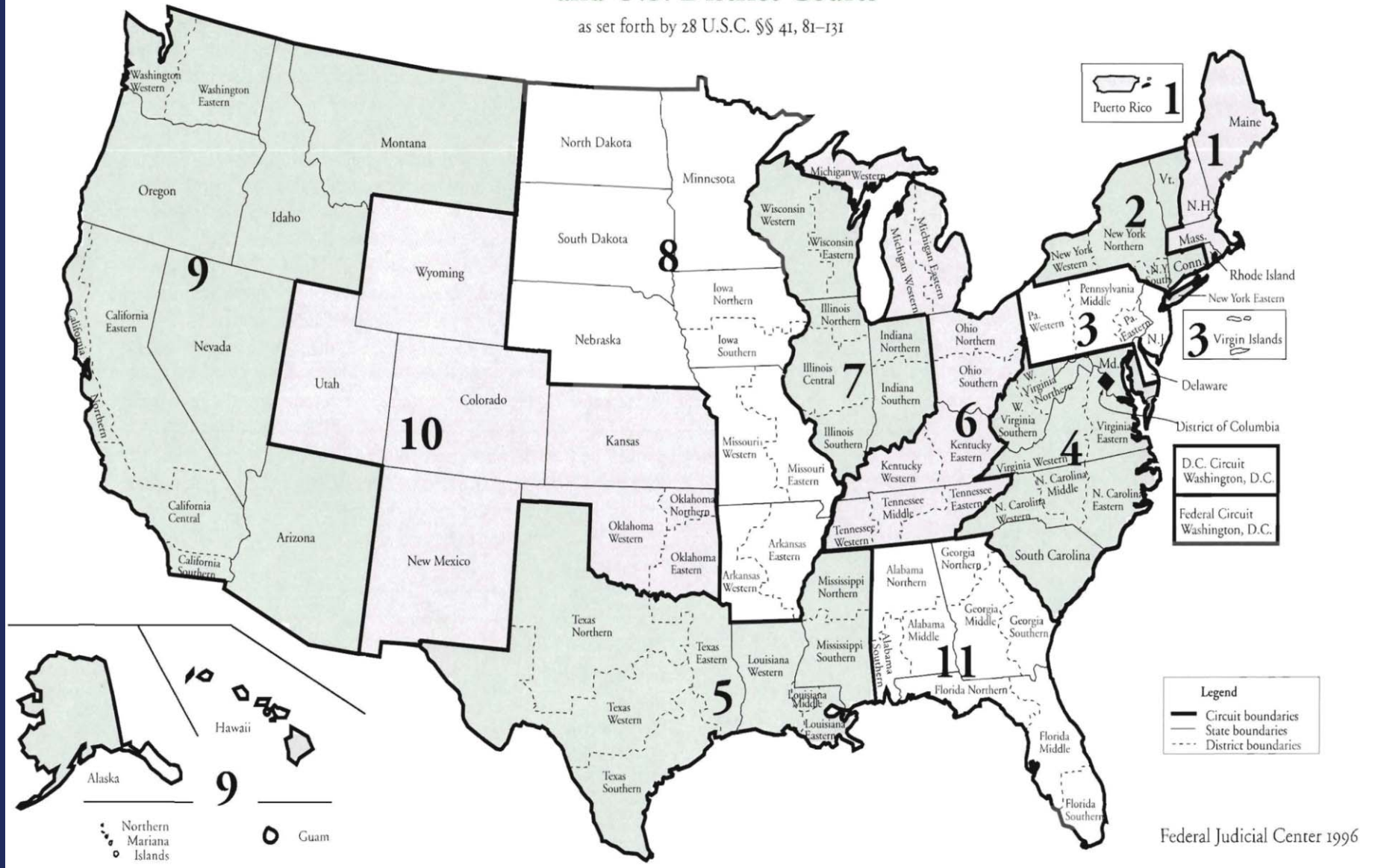
11:00 am	Break	
11:15 pm	***Anatomy of a Criminal Case (continued)***	
12:15 pm	***Lunch***	
1:15 pm	***The Experience of a Federal Criminal Defendant*** – Mark Bachteler	
2:00 pm	***Arraignment & Sentencing Hearings*** Hon. Jeremiah Lynch & Hon. Dana Christensen	**TAB #5**
5:00 pm	Recess	
6:00 pm	Dinner *[Missoula Children's Theater, 200 North Adams Street]* ***Keynote speaker: James R. Murray, Trial Attorney, Blank Rome, Washington, D.C.***	
8:00 pm	Adjourn	

FRIDAY, OCTOBER 5TH

8:00 am	***Welcome, housekeeping and preview of day –*** Katie DeSoto & Mark Kovacich [Russell Smith Federal Courthouse]	
8:15 am	***Tribal Jurisdiction –*** Maylinn Smith	**TAB #6**
	John Harrison	**TAB #7**
10:00 am	Break	
10:15 am	***Questions & Discussion*** - led by Karl Englund	
11:00 am	***Appellate Courts –*** Hon. Brian Morris	**TAB #8**
12:00 pm	***Lunch***	
1:00 pm	Adjourn	
	**RESOURCE MATERIAL AND REFERENCES	**TAB #9**

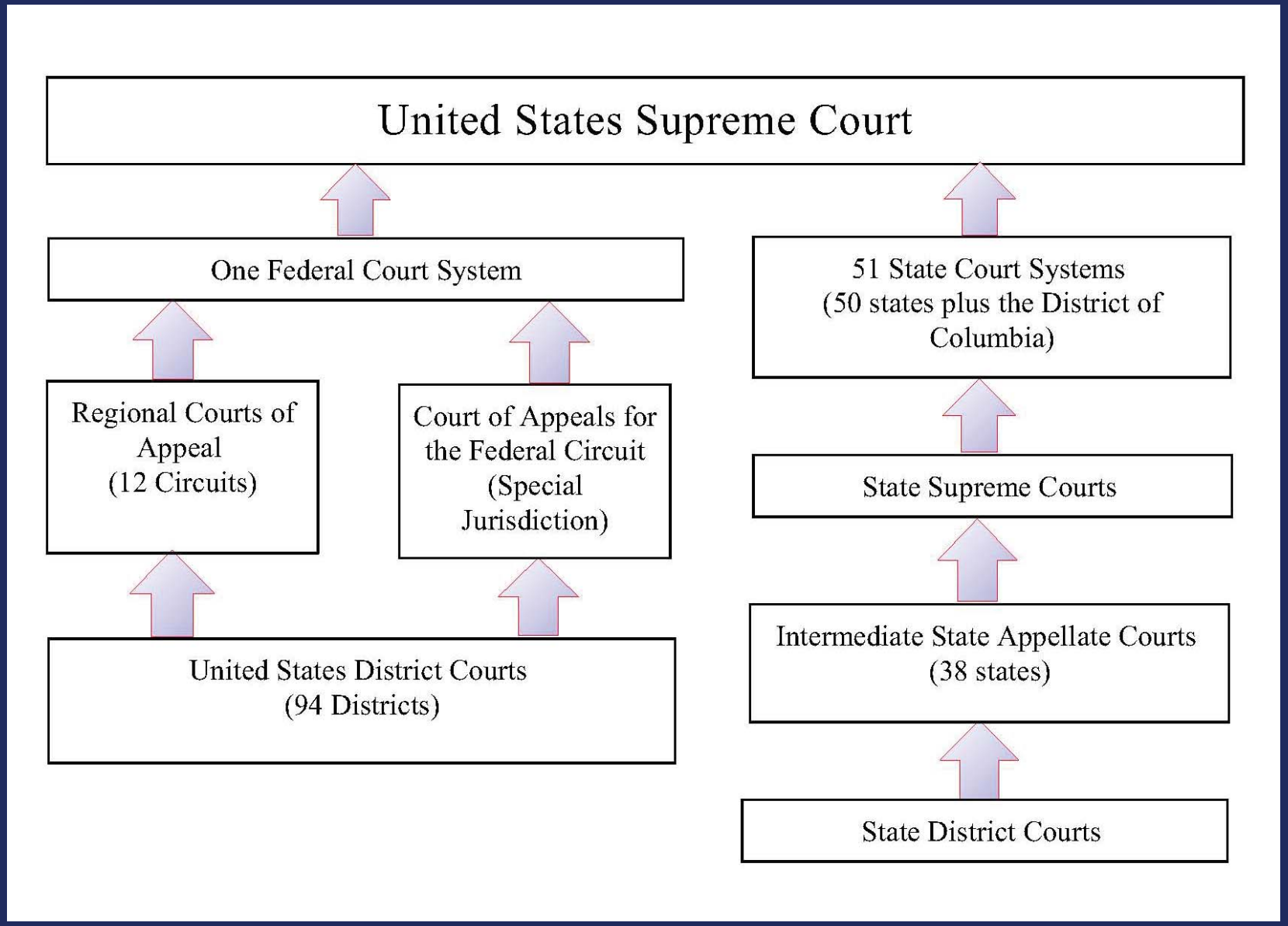
Geographical Boundaries of U.S. Courts of Appeals and U.S. District Courts

as set forth by 28 U.S.C. §§ 41, 81–131



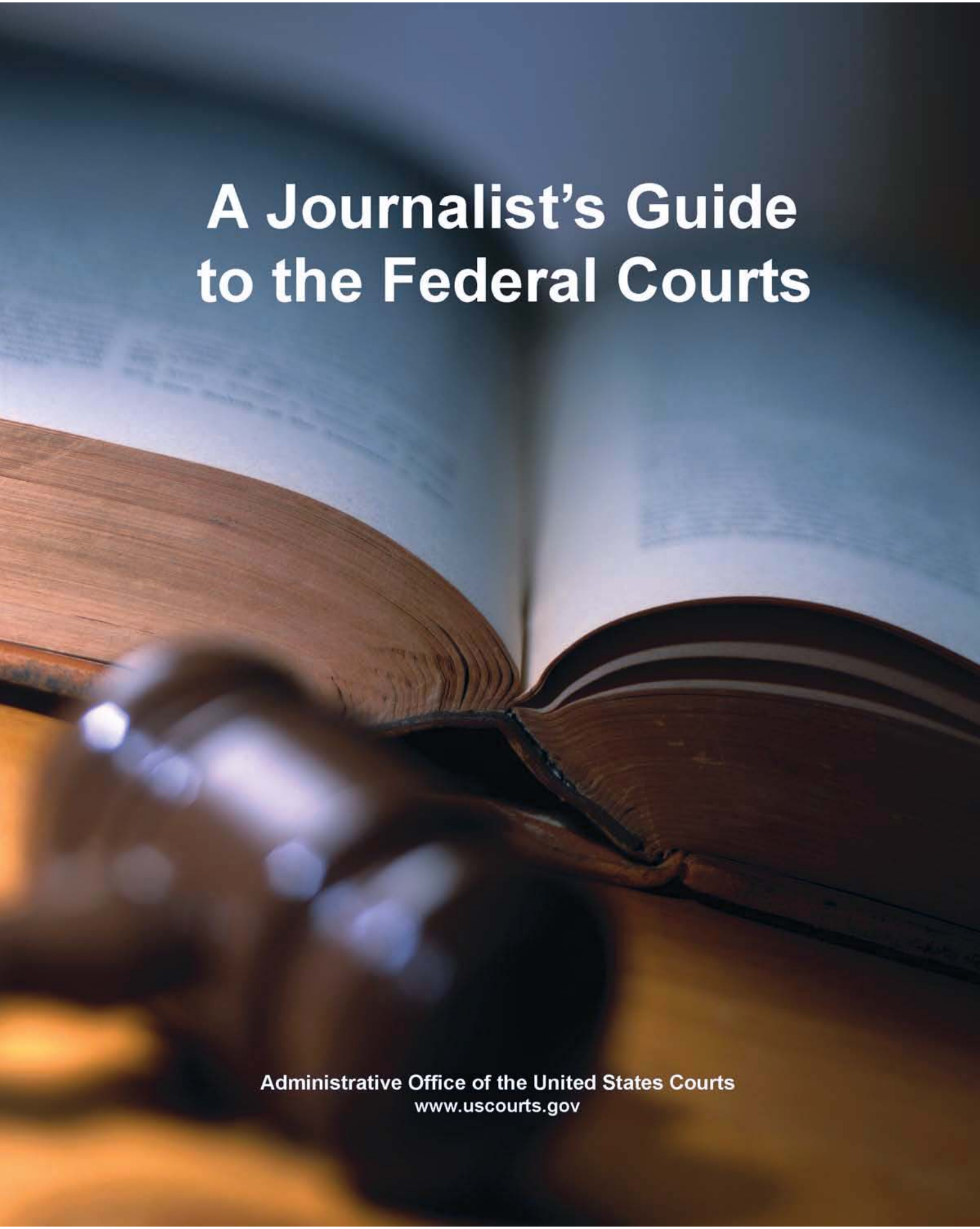
Federal Judicial Center 1996

Federalism


United States Supreme Court
One Federal Court System
Regional Courts of Appeal (12 Circuits)
Court of Appeals for the Federal Circuit (Special Jurisdiction)
United States District Courts (94 Districts)
51 State Court Systems (50 states plus the District of Columbia)
State Supreme Courts
Intermediate State Appellate Courts (38 states)
State District Courts

Federal Courts (Limited Jurisdiction)		State Courts (General Jurisdiction)	
Criminal	Civil	Criminal	Civil
Offenses related to interstate or foreign commerce	Federal Questions	Offenses under the state criminal code	Unlimited Jurisdiction
Offenses in U.S. territories and on Indian reservations	U.S. government is a party	May duplicate federal offenses due to dual sovereignty	State civil matters not handled in federal court:
Offenses against national security or federal property	Disputes between citizens of different states (minimum amount in controversy required)	Everything from minor offenses to murder	Probate Family law Tort law* Contract law* Property law*
	Bankruptcy		*Unless the parties are diverse

A Journalist's Guide to the Federal Courts



Administrative Office of the United States Courts
www.uscourts.gov

A Journalist's Guide to the Federal Courts

Federal judges and the journalists who cover them share much common ground. One clear area of mutual interest is accurate and informed coverage of federal courts. A *Journalist's Guide to the Federal Courts* is intended to assist reporters assigned to court coverage. It is the media who inform and educate the public about the courts, spark discussion and debate about their work, instill public trust and confidence in the institution and its function, and help protect judicial independence. These are worthwhile and important pursuits.

There are justifiable and distinct differences between the three branches of government and the access they grant the news media. Most of the work of federal courts is performed in open court and decisions, and in most cases court filings are available on the Internet. This primer is aimed at helping reporters who cover federal appellate, district, and bankruptcy courts – the cases, the people, and the process.

The *Guide* does not constitute a statement of Judicial Conference policy and is not binding on any federal court. The individual courts of appeals, district courts, and bankruptcy courts may regulate their own media relations, and there also may be some variation in press policies even among different judges on the same court. In addition to this *Guide*, two useful sources are the web site: www.uscourts.gov, and the Office of Public Affairs at the Administrative Office of the U.S. Courts in Washington, D.C., (202-502-2600).

James C. Duff,
Director, Administrative Office of the U.S. Courts

David A. Sellers,
Assistant Director for Public Affairs

Contents

Welcome to Federal Court

This guide assumes you have a basic understanding of the U.S. legal system. If not, you may want to peruse "Understanding the Federal Courts," a publication of the Administrative Office of the U.S. Courts (www.uscourts.gov/understand03/). The Administrative Office, based in Washington, D.C., is the federal Judiciary's central support agency, providing various services to federal courts. It has an Office of Public Affairs, 202-502-2600, which may be able to help you. You may also want to explore other features, including an online version of this *Guide*, on the Judiciary's web site, www.uscourts.gov.

Whether you're reporting about a high-profile case or your new full-time beat is the federal courthouse, you'll find that covering a federal trial court or appellate court is quite unlike reporting on the other two branches of government. Among the most notable differences:

- **Some legal terms are hard to understand.** You don't need a law degree to cover the federal courts, but a big part of your job will be translating legal jargon and procedures for your readers or viewers. This guide should help. When in doubt, check out the guide's glossary or another reference tool.

- **Rules. Rules. Rules.** There are layers upon layers of rules: Rules that govern all federal cases; rules that govern all cases in your local federal court; rules that govern all cases before a particular judge. Understanding the rules – and their exceptions – will greatly inform your coverage.

- **Judges do their own work.** Federal judges work largely alone. Each judge has law clerks, who usually join the court for one year soon after graduation from law school. They assist with legal research and may help draft sections of opinions or orders, but judges make the decisions and take the leading role in explaining them.

Insiders often refer to **district court judges** and **appellate court judges** as Article III judges, because their terms of service are governed by Article III of the U.S. Constitution (http://www.archives.gov/national_archives_experience/charters/constitution_transcript.html). They are nominated by the President

and confirmed by the U.S. Senate. **Bankruptcy judges** are not Article III judges. They are not appointed by the president, but by the courts of appeals. There are no constitutional requirements to serve as a federal judge, but in modern times all judges have been lawyers

Like the Supreme Court justices, federal circuit and district judges serve for life, provided they exhibit good behavior. They can be removed from office only by a trial of impeachment in the U.S. Senate. Their salaries, which are set by Congress, cannot be reduced while they are in office. All appellate court judges receive the same salary, no matter where they serve. The same is true for district court judges.

Each district court judge sits in one of the 94 federal judicial districts. There is at least one judicial district in every state, the District of Columbia and Puerto Rico. The territorial courts in the Virgin Islands, Guam and the Northern Marianna Islands have judges appointed for 10-year terms rather than for life. Each district may have multiple divisions. Each division typically has its own courthouse and judges hearing cases that arise in that particular geographic location. There are formal names of U.S. district courts. For instance: U.S. District Court for the Southern District of New York. “Manhattan federal trial court” is how a reporter might shorten it.

Each district court is located within one of the nation’s 12 regional judicial circuits. The 12 regional courts of appeals serve as intermediate courts in the federal system, and are required to hear any appeal brought at the conclusion of a district court case by a criminal defendant or by the losing party in a civil action. Decisions of the courts of appeals may be reviewed by the U.S. Supreme Court, but the nation’s highest court has total discretion to determine whether it will hear the appeal. It grants full review only to a tiny percentage of the cases that reach it each year.

Senior judges are partially retired Article III judges. There is no requirement that judges take senior status because there is no mandatory retirement age for Article III judges. Judges are eligible to take senior status if they are at least 65 and have at least 15 years on the bench, or any combination of age and years of service thereafter that equals 80. Senior judges continue to draw their former salary, but may handle a reduced caseload. They are required to handle at least one-fourth of the workload of an active judge to qualify for future salary increases. By taking senior status,

even if maintaining a full caseload, a judge creates a vacancy on the court, to be filled by the nomination/confirmation process.

Visiting judges, like senior judges, can help a court stay on top of its caseload. Visiting judges have long provided significant assistance to courts they visit. Article III judges may sit by designation and assignment in any other federal court having a need for their services. They provide temporary assistance not only when a court's own judges must disqualify themselves, but also to help meet the caseload needs arising from vacancies, lack of sufficient judgeships, specific emergencies, and other workload imbalances.

Covering Federal District Court

The best journalists who cover the federal courts distinguish themselves by their knowledge of the intricacies of the system. They find documents other reporters overlook, they understand documents that other reporters misinterpret, and they anticipate what's coming next.

This chapter will walk through each stage of both a criminal and a civil case. But first, it describes the key players in the federal trial courts. It also identifies the types of court information you'll need and the possible sources for that information.

Key Players

Senior judges are a major part of the federal Judiciary. They handle 15-20 percent of district court and appellate court cases.

The district court's **chief judge** position is assigned based on length of service. It is held by the longest-serving active judge from among those judges who are 64 years old or younger, have served for one year or more as a judge, and have not previously served as chief judge. The chief judge serves for a term of seven years or to age 70, whatever comes first, and handles administrative matters related to operation of the clerk's office and the courthouse that do not require the attention of all the judges. He or she generally carries a full caseload in addition to administrative duties. A chief judge does not receive any additional pay.

Magistrate judges are appointed by the U.S. district judges in each judicial district for a term of service of eight years (four years for part-time magistrate judges), which can be renewed. They hear the federal equivalent of misdemeanor cases – minor crimes committed on federal lands. They also handle preliminary matters in criminal cases, and are

usually the first judicial officer a defendant sees following arrest or indictment. In most districts, magistrate judges also handle pretrial motions and hearings in civil cases and felony criminal cases; those cases are eventually turned over to district judges for trial. Magistrate judges may preside over civil trials if the parties consent. The job title is magistrate judge, not magistrate.

Each federal judicial district has a **clerk of court** whose staff, among other duties, accepts papers for filing and moves those papers from the clerk's office to judges' chambers. The clerk's office serves as the court's central nervous system – all matters must flow through it, and the clerk of court serves as custodian of the record in every case. The staff members you will deal with at the front counter of the clerk's office are generally referred to as **docket clerks**. Most districts with multiple divisions also have two or more **division managers**, who supervise clerk's office staff in a given courthouse. Because they function primarily as supervisors and managers, you may rarely see the clerk of court or division manager in a courtroom.

In each judge's courtroom, generally seated in front of the judge's bench, is the **courtroom deputy clerk**. In addition to being the person primarily responsible for maintaining the case files, the courtroom deputy clerk calls cases at the beginning of a hearing, swears in witnesses during trials, and receives exhibits introduced into evidence at trial. The courtroom deputy clerk is a member of the clerk's office staff, not a member of the judge's personal staff, and should not be confused with the judge's **law clerks**, who generally also sit near the judge's bench during hearings. It is a courtroom deputy clerk who generally announces the arrival of the judge in the courtroom, sometimes by saying, "All rise. Oyez, oyez, oyez . . ."

"Oyez" means "hear ye" in the Anglo-Norman language used in the courts of Medieval England.

Court reporters generally sit in front of the judge, facing the attorneys. They are responsible for recording the proceedings, either by using a stenographic machine or an audio recording hood, which looks like a mask, into which they repeat the words spoken during the hearing. They typically are employed by the court, and are paid a salary for recording hearings and trials, and providing copies of transcripts to the judge and the clerk of court. All parties, journalists, and members of the public who want a copy of the transcript must pay the reporter a per-page fee, which is set by the Judicial Conference of the United States. (More on this in a later section of this chapter.)

In courthouses, you will see two kinds of security personnel. Each federal judicial district has a United States Marshal, who is appointed by the President and reports to the attorney general. The marshal oversees the

security of the district court. (http://www.usdoj.gov/marshals) He or she heads an office of **deputy U.S. marshals**, who typically wear business attire when in the courtroom, are responsible for the custody and transportation of prisoners, and the safety of witnesses, jurors, and the judge. There typically are two or more deputy marshals present whenever a criminal defendant who is being detained during the trial is present in the courtroom. Outside the courtroom, the U.S. Marshals Service runs the Witness Security Program, which is more commonly known as the witness protection program, in which witnesses who could face retribution are relocated under new identities after they testify. The U.S.M.S. is also the federal government's lead agency in tracking down fugitives.

> Journalists should never cross from the spectator gallery into the well of the courtroom, which is generally marked by a short rail, without seeking permission from the judge or a court employee.

Court security officers, who dress in blue blazers and gray pants, also work under the direction of the U.S. Marshal. They are responsible for the safety of the public in the courthouse. They staff the metal detectors inside the front doors of most courthouses. Generally at least one court security officer – also known as a CSO – is present at every court hearing.

Each federal judicial district has a U.S. Attorney's Office (http://www.usdoj.gov/usao/offices/index.html), which is the local office of the U.S. Department of Justice. The **U.S. attorney**, who runs the office, is nominated by the President and confirmed by the U.S. Senate for a four-year term. **Assistant U.S. attorneys** ordinarily serve as the government's lawyers in both criminal and civil cases. In criminal cases, they often are joined at the courtroom's counsel table by the lead **law enforcement agent** who investigated the case. Assistant U.S. attorneys are sometimes assisted by counsel from other federal agencies if the case involves an investigation that was begun by those agencies.

Representing defendants in a criminal case is one or more **defense counsel**. Defense counsel almost always sit at the table located the farthest from the jury box. If defendants can afford to, they are required to hire **private counsel**, unless the defendants choose to represent themselves. (Self-representation is known by the Latin term, appearing *pro se.)*

If defendants cannot afford an attorney, one will be appointed for them from one of two sources. **Federal public defenders** are government-paid lawyers who represent financially qualified defendants. **Criminal Justice Act (CJA) or panel attorneys** are lawyers in private practice who make themselves available to be appointed to represent such defendants. CJA attorneys are used in cases in which the federal public defender has a conflict of interest, representing one of several

defendants in the same case. CJA attorneys also are used when public defenders do not have the resources – either staff or time – to handle the case, or if the particular court does not have a defender office. CJA attorneys generally are assigned at random from a list maintained by the clerk's office. In most judicial districts, however, judges can order that a particular attorney be assigned to a case if complexity of the case or the interests of justice require it.

Types and Sources of Court Information

First, a Word About Judges as Sources

When a question about a case arises, a journalist's natural instinct is to call the judge handling the matter. After all, who could provide a more accurate, authoritative answer? This is almost always a bad idea.

Federal judges are bound by the Code of Conduct for United States Judges, which requires that they "avoid public comment on the merits of pending or impending actions" in cases before them or on appeal. You can find the Code online at http://www.uscourts.gov/guide/vol2/ch1.html. Some federal judges will respond, or have a court employee respond, to a journalist's questions about procedural aspects of a case, but some judges refuse to be interviewed by journalists on any topic. (The same rules will apply to those judges' secretaries and law clerks.)

That is not to say you can never speak with a federal judge. Many judges speak at or attend bar association programs and other public events, at which it is perfectly appropriate to introduce yourself. Some also will talk informally to journalists about non case-related matters. If you are new to covering a federal court, it would not hurt to call the judge's chambers and ask if you can drop by simply to say hello.

So Who's Your Go-To Source?

If the judge is off-limits, to whom do you turn? Particularly if the federal courthouse is your full-time beat, you'll need someone when all other sources of information fail. That person probably works in the clerk's office.

A few courts have public information officers (PIOs) who deal with the news media on a daily basis. Most courts, however, do not have such an officer. Absent a PIO, the district executive, clerk of court or division manager should be able to help. They often designate a member of the clerk's staff, or some other court employee, as a contact person for the news media. For routine information about a case – when's the next hearing date, for instance – the docket clerks who staff the clerk's office

front counter may be your best sources. But keep in mind that even these sources have their limits. It's not their job to talk about the substance of a case – such as the meaning of a ruling or how the charges in an indictment can be defended against. They provide access to court documents, schedules, pretrial hearings, and trials. They do not interpret those documents and proceedings.

> For questions about legal substance, start with the lawyers in the case. If they won't talk, call lawyers who have handled similar cases in your courthouse or professors at a local law school.

The Court's Docket

If you are the federal court beat reporter, you will need to keep abreast of all the noteworthy cases on the court's docket. Every district court has a web site (http://www.uscourts.gov/allinks.html), and some include a schedule of trials, motion hearings, pleas, and arraignments. Otherwise, you will need to visit the clerk's office on a daily basis to see the schedule. Many courts keep it in a large day planner on the front desk of the clerk's office.

Each court also keeps a list of all criminal and civil cases filed by date. They are often referred to as "the running lists." The Party/Case Index System on the PACER system provides electronic indices of cases in every federal district court. (See description of PACER in Pleadings, Orders, and Opinions section below.)

If you're only following a single high-profile case, your task is much easier. Early in the case, the judge will issue a scheduling order, setting out the dates motion papers must be filed, pretrial hearings will be held, and the trial will start.

Pleadings, Orders, and Opinions

All federal trial courts have computerized dockets. The docket lists the date and a brief description of all filings by the parties and all actions by the court in a particular case. You can access the dockets free of charge at terminals in the clerk's office.

> "Orders" are descriptions of what the judge has ruled. "Opinions" typically cite previous cases at length to explain the ruling.

In some courts, those dockets also allow you to view the full texts of the pleadings, orders, and opinions. More courts will have this capability soon. By 2005, all federal trial courts nationwide will have installed a new case docketing system, known as the Case

Management/Electronic Case Files system (http://www.uscourts.gov/cmecf/cmecf_about.html). An optional part of the system, which some courts are installing, allows attorneys to file documents electronically from their offices, rather than bringing copies of the pleadings to the courthouse.

The feature also allows the public to view the full text of those pleadings over the Internet through the Public Access to Court Electronic Records (PACER) system (www.pacer.uscourts.gov). PACER already allows you to view the docket of any federal case (but not the full texts of pleadings and opinions) from any computer with Internet access. PACER is current as of the previous day's close of business. It may not help if you need to report about a filing the day it occurs. The charge for looking at and printing out documents in PACER is minimal – eight cents per page of information, with a cap of $2.40 no matter how long a document is. Users of PACER need to register for a password that will allow access to the system.

If there is no electronic access to the full text of pleadings and opinions in your court, your only other option is the paper case file itself. It normally is in the clerk's office, but a few days before the trial begins, it may be sent to the judge's chambers for the duration of the case. You will be out of luck unless you can persuade a court employee to track it down and let you borrow it for a few minutes. Sometimes, attorneys involved in the case will provide you with copies of relevant case documents.

For cases that draw massive amounts of media attention, some courts have found it is more efficient to post the case documents on their web sites, providing free access. A court web site can automatically send reporters e-mails whenever a new document is added to the high-profile case's docket.

Reporters working on daily deadlines should know the difference between filing and docketing a document. Filing occurs when the document is handed over by the lawyer to the clerk's office to be time/date stamped as being received. Docketing occurs when notice of its filing is added to the case docket by a clerk's office staff. In most clerk's offices, a document is considered public information once it has been docketed. (A lag – of a few minutes to more than a day – can exist between filing and docketing.) If time is of the essence, you may want to get documents directly from the lawyers as soon as they are filed, rather than waiting for them to be docketed by staff in the clerk's office. Be aware, however, that in most instances a document will not be considered part of the court's official record until it appears on the docket.

Court Rules

Each district and bankruptcy court has its own set of local rules, which

address procedural matters not uniformly governed by the Federal Rules of Procedure. In some jurisdictions, individual judges also have a set of rules that govern the cases in their courtrooms. Both are generally posted on the court's web site.

The court's local rules, in particular, often contain important information about covering the courthouse. For instance, a growing number of federal courts have banned cell phones, pagers, Palm Pilots, and Blackberry devices from their courthouses.

During the course of a case, you will hear and read references to a variety of other rules. The Federal Rules of Criminal Procedure, Federal Rules Civil Procedure, Federal Rules of Bankruptcy Procedure, and Federal Rules of Evidence set forth the general procedural requirements for litigating cases in federal courts. You also will need to be familiar with some federal laws, which are collected in the United States Code. Provisions of the United States Constitution also may be mentioned.

Federal Rules of Criminal Procedure - http://judiciary.house.gov/media/pdfs/printers/108th/crim2004.pdf

Federal Rules of Civil Procedure - http://judiciary.house.gov/media/pdfs/printers/108th/civil2004.pdf

Federal Rules of Bankruptcy Procedure - http://www.law.cornell.edu/rules/frbp/

Federal Rules of Evidence - http://judiciary.house.gov/media/pdfs/printers/108th/evid2004.pdf

United States Code - http://www.law.cornell.edu/uscode

United States Constitution - http://www.archives.gov/national_archives_experience/charters/constitution.html

Sealing of Documents

Although neither the Freedom of Information Act nor the Privacy Act applies to the Judiciary, information received by the court is publicly available unless sealed by statute, rule, or order of the court.

Statutes provide for sealing documents in specific proceedings, such as juvenile and grand jury proceedings. More generally, a federal rule of civil procedure provides for protective orders during discovery to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Similarly, bankruptcy court records are public and open to examination except that the court may protect commercial

information or protect a person “with respect to scandalous or defamatory matter.”

There are no statutes or federal rules that provide guidance for when a court should or should not seal documents in cases not specifically covered by a statute or a rule. Courts sometimes have sealed documents that contain sensitive material, such as classified information affecting national security.

An entire case may be sealed at the opening of a case, or certain docket entries may be sealed during the course of the proceedings. These cases or documents generally are listed on the docket but with the notation that the information is sealed.

Judges’ Biographical Information

The Federal Judicial Center, which is the federal court’s educational and research agency, lists on its web site brief biographies of all Article III judges since the country was founded (http://www.fjc.gov/newweb/jnetweb.nsf/hisj).

Broadcasting the Trial

Trials and other courtroom proceedings are generally open to the public. No federal trial court, however, permits broadcasting of its proceedings. News organizations may intervene in high-profile cases to make a motion to allow broadcasting the trial. No such motion ever has been granted.

The biggest stumbling block to broadcasting federal trials is Federal Rule of Criminal Procedure 53, which says the court shall not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom. Members of Congress on occasion have introduced bills that would give federal trial judges the discretion to allow broadcasting trials. To date, none has been enacted.

There are two types of exceptions to this prohibition that are worth noting, though neither provides video for public broadcast:

- In the trial of Timothy McVeigh, who was charged with bombing the Oklahoma City Federal Building in 1995, Congress passed a law that required the federal court hearing the case in Denver to set up a closed-circuit viewing location for relatives of the victims in Oklahoma City.

- In cases where a single courtroom will not hold all spectators, some federal courts, at the presiding judge’s

discretion, have piped a closed-circuit video feed of the proceedings into an adjacent room, which can double or triple the number of spectators accommodated.

You will need to check where, if anywhere, in the courthouse you are allowed to have a cell phone, pager, tape recorder, or other electronic device.

A Criminal Case

The Investigation

A defendant may be arrested in the course of allegedly committing a crime. But the criminal cases that attract media attention most often involve a protracted investigation prior to a defendant's arrest. The investigation will generally be conducted by the FBI, but other federal agencies may be involved depending on the nature of the alleged crime (DEA for drug investigations, SEC for securities investigations, etc.).

To obtain a search warrant or arrest warrant, the law enforcement agent and an assistant U.S. attorney will have to make an application to a magistrate judge or district court judge. The applications will be accompanied by an affidavit filed by the lead law enforcement agent, which is meant to provide the judge with evidence of probable cause. Both documents can be valuable for reporters. The application itself – a one-page form – will include information about the defendant, and the affidavit will include an overview of the facts of the case.

To avoid public disclosure of the investigation, search warrant applications generally are sealed, at least until the search is conducted and sometimes until after the arrest is made. While they are sealed, the warrant application will typically show up on the court's docket under a title that gives away nothing about the substance of the case, such as *"In re search warrant application*."

But if a search warrant application is unsealed before an arrest, that provides a valuable lead that an investigation is underway. Courthouse beat reporters should review unsealed warrants on a regular basis. The ways that clerk's offices file search warrant applications vary greatly from office to office; you'll have to ask at your courthouse about the easiest way to routinely review the documents.

Prosecutors use three terms to describe people involved in investigations, and it is critical that you distinguish among them. A "witness" is someone who merely has information useful to the investigation. A "subject" of an investigation is a person whose conduct is within the scope of a criminal probe, although they themselves may not be suspected of breaking the

law. A "target" is someone who is likely to be indicted. A subject of an investigation can become a target.

Indictment

Before the target of an investigation is arrested, prosecutors generally will take the evidence they have gathered to a grand jury. Grand juries are composed of 16 to 23 citizens. Agreement by a bare majority is required to find probable cause exists that a crime was committed.

Grand juries are formally supervised by a district judge, often the chief judge, but for all practical purposes they function day-to-day under the auspices of the U.S. Attorney's Office. Only prosecutors present evidence before a grand jury, and a finding of probable cause – necessary to issue an indictment – is a relatively low standard of proof.

The indictment lists the crimes the defendant allegedly committed and describes the facts the government believes support those allegations. It is a roadmap to what the prosecution intends to prove at trial. Grand jury indictments are returned to the district court – usually to a magistrate judge – in a sealed court hearing. Indictments generally are unsealed after a defendant is arrested.

A criminal case also can begin without an indictment. In these cases, the lead investigator swears out a criminal complaint, called an "information," setting forth the same kinds of allegations and facts that would be contained in an indictment. Absent an indictment, the prosecution must convince a judge that there is probable cause to proceed with the case. These hearings are held in open court after the defendant has been arrested in a felony case. A defendant can agree to waive indictment and proceed with the case based on the criminal complaint, or can demand that the prosecutor seek an indictment.

Defendant Appears in Court

Within hours of the defendant's arrest, he or she will make an **initial appearance** in court. Defendants are typically not represented by counsel at this hearing. They are advised of the charges they face, their rights are explained to them by the judge, and counsel is appointed if defendants cannot afford to hire their own lawyer. Defendants will be remanded to the custody of the U.S. Marshals Service at the conclusion of this hearing unless they are released, in which case conditions of release will be set.

Defendants are provided with the services of a court interpreter in all courtroom appearances when language is a barrier to the effective administration of justice.

If no indictment has been issued, the defendant will next have a **preliminary examination hearing**, at which the government will present its evidence. If the judge finds there is probable cause (or if an indictment has already been returned), there will then be a **detention hearing**, where it will be determined whether the defendant needs to be held in jail until trial. Both sides may present evidence at this hearing, as well as cross-examine the other side's witnesses.

The likelihood the defendant will flee and the danger they pose to the community are the only two factors a judge may consider in a detention hearing.

The decision whether to release the defendant is governed by the Bail Reform Act of 1984 and subsequent amendments to it. The law presumes that defendants should be released on personal recognizance or unsecured personal bond (that is, without putting up any money or other asset as security) unless the judge determines "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."

The judge can put restrictions on defendants – such as requiring a secured bond, forfeiture of a passport, electronic monitoring of defendants' location, requiring they remain in their home, etc. But the judge must choose "the least restrictive . . . condition, or combination of conditions, that . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community."

There are exceptions to the presumption that defendants should be released pending trial. The Act creates a rebuttable presumption that defendants should not be released under the following circumstances:

- The defendant is accused of one of a list of crimes listed in the statute, and was previously convicted of committing one of the specified crimes while free on bail.
- The judge finds there is probable cause the defendant committed a federal drug offense that carries a penalty of 10 years or more in prison.
- The judge finds there is probable cause the defendant used a firearm to commit a felony.

To rebut the presumption and release a defendant, the judge must find that some condition or combination of conditions of release will assure defendants' appearance at trial and safeguard the community.

Pretrial reports are always filed under seal, but they often are discussed at length during the detention hearing.

Prior to the detention hearing, a member of the court's Pretrial Services office will speak to the

defendant and as many family members as possible. The officer will file a report with the judge, prosecutor, and defense counsel that makes a recommendation whether the defendant can be released and, if so, under what conditions. This is a recommendation only, and it is not binding on the judge.

A decision to release or detain a defendant that is made by a magistrate judge may be reviewed by a district judge on the motion of either party. (This is a kind of appeal, though the word "appeal" is not used to describe it.) Detention orders may also be appealed to the court of appeals after a district judge rules on them.

The last of the early hearings in a criminal case is the **arraignment**. The defendant's counsel is asked three questions:

- Does the defendant waive a formal arraignment, at which the indictment would be read in its entirety?
- How does the defendant plead, guilty or not guilty?
- Does the defendant request a trial by jury? (If not, the case will be decided by the judge in what is known as a bench trial.)

If a formal arraignment is waived – as it almost always is – the hearing can be over in five minutes.

At the arraignment, some judges also schedule the trial date and dates for motion hearings. Under the Speedy Trial Act, criminal defendants are entitled to a trial that begins no later than 70 days from the date the indictment or information was filed, or from the date the defendant appears before a judge, whichever is later. The defendant can waive the right to a speedy trial, or the judge can waive the requirements of the Act by finding that the interests of justice require it.

These four hearings can be held at a single time under certain circumstances. In some courts magistrate judges hold all of these hearings; in other courts, some are held by magistrate judges while others are held by District Court judges. In most courts, the District Court judge who will handle the trial is assigned to the case after the initial appearance; check with the clerk's office for that judge's name. Judges are assigned to cases at random, to avoid the possibility that prosecutors might "judge shop" their case to a jurist considered friendly to prosecution arguments.

Pretrial Motions and Hearings

A wide variety of motions may be made prior to trial. Among the most common that are filed by the defense are:

- Motions to relocate the trial through a change of venue,

claiming pretrial publicity will make it impossible to select an impartial jury.
- Motions challenging the admissibility of certain pieces of evidence.
- Motions seeking access to evidence in the possession of the prosecution.

This phase of the case, known as motion practice, occurs primarily on paper. Only if a judge feels that oral argument of the issues or evidence from witnesses would aid in a decision will a hearing be held.

During the pretrial phase, you also may encounter efforts to seal what hearings there are. Most pretrial hearings must be open to the public, but there are a complicated set of exceptions. Media organizations may decide to oppose the sealing of court records.

Plea Bargains and Sentencing

More than 90 percent of federal defendants plead guilty. Some do so during the pretrial phase as part of a plea bargain, in exchange for the prosecutors' dropping some charges or recommending a more lenient sentence.

Two documents are filed with the court at the plea hearing: the plea agreement, which outlines what charges are being pleaded to and which are being dropped; and a statement of facts describing what the defendant admits to doing. Both generally are available only after the hearing has ended.

During the hearing, the judge will conduct what is known as the plea colloquy, in which defendants are informed of the rights they are giving up and the crimes they are admitting. At some point, the judge will ask the defendants to, in their words, describe what they did.

Sentencing is generally scheduled for a month or more after the plea hearing, to allow time for the staff of the court's Probation Office to prepare a presentence investigation report. The probation officer will speak to the defendant, family members, friends, and others as part of the investigation. The report is always filed with the judge, prosecutor, and defense counsel under seal. Starting in 1987, sentencing in federal court was governed by the U.S. Sentencing Guidelines. They are set by the U.S. Sentencing Commission (http://www.ussc.gov), a judicial branch agency created by Congress to make sentencing more determinate and lessen sentencing disparities. In January 2005, the U.S. Supreme Court ruled that the guidelines are merely advisory. Judges are urged to consider the guidelines but now can depart from the guideline ranges, so long as the sentence is reasonable and does not exceed the maximum term set by statute for a particular crime.

The presentence report makes a recommendation as to how the guidelines rate the seriousness of the offense and the defendant's criminal history. Prosecutors and defense counsel will have made a similar estimate when they agreed to the plea bargain. The judge is not required to follow the recommendations of the Probation Office or the parties. During the sentencing hearing, defendants are given a chance to tell the court anything they believe the judge should consider before imposing sentence.

The Trial

Jury Selection

During jury selection, which is also known as voir dire, the lawyers, the judge or both will question prospective jurors about their backgrounds and their ability to be impartial. Prospective jurors may be struck from the panel in two ways. Lawyers may exercise a "challenge for cause," claiming the juror could not be impartial. If the judge agrees, the potential juror is excused. "Peremptory challenges" allow lawyers to remove a juror without stating a reason. Both sides are given a limited number of these peremptory challenges.

Jury selection in death penalty and other complex cases can take several weeks. In some courts, judges handling a high-profile trial will call in 200 or more jurors to fill out an extensive questionnaire, and then call in 20 or more a day to be questioned individually and challenged for cause. On the final day of jury selection in such cases, the qualified pool of jurors is called in, both sides exercise their peremptory challenges, and the jury is seated.

> Federal criminal juries typically have 12 members, plus up to six alternate jurors. To insure everyone pays attention to the testimony, no juror knows which of them are alternates until they are excused after closing arguments.

You should never contact a prospective juror or his or her family or close friends, nor should you speak about the case if you know you are in the presence of a juror while a case is active. This is considered jury tampering – a crime.

In cases in which judges are concerned about the safety of jurors, the jury may be anonymous, identified only by numbers. No one, other than the person in the clerk's office who arranges their payment (jurors are paid $40 per day), will know their names in such a case. A judge may decide that a need exists to sequester a jury – keep all jurors in the court's custody until a trial concludes.

Opening Statements

It is opening *statements* and closing *arguments*. At the beginning of a trial, lawyers are limited to telling the jury what they believe the evidence will show. Only at the end can they marshal those facts to make an argument the defendant did or did not commit the crime.

Prosecutors go first because they bear the burden of proving beyond a reasonable doubt that the defendant committed the crime. Defense counsel are not obligated to make an opening statement or present any evidence, since the defendant is presumed innocent. Defense counsel may choose to make an opening statement at the conclusion of the initial set of prosecution witnesses, known as the prosecution's case-in-chief.

Testimony, Exhibits, and Transcripts

Some individual judges or local rules of court require the prosecution to file a list of potential witnesses prior to trial, along with a list of exhibits that may be entered into evidence. These lists can provide a handy reference for reporters. Check the case file about a week before trial begins.

Prosecution witnesses take the stand first. Each can be cross-examined by the defense. If a witness is cross-examined, the prosecution is permitted a "redirect," asking the witness only questions related to the topics discussed during cross-examination. You are free to speak to witnesses after they are excused by the court, unless the judge indicates the witness is subject to recall to the stand later in the trial. The witness, however, is not obligated to respond to your questions, and often may be advised by counsel not to do so.

> The defendant has the choice whether to testify. No inference of guilt may be drawn by the jurors if the defendant chooses not to testify.

At the end of the prosecution's case-in-chief, the defense likely will make what is known as a Rule 29 motion. Named after Federal Rule of Criminal Procedure 29, the motion asks the judge to acquit the defendant because the prosecution's evidence is insufficient to sustain a conviction. This motion may also be made after the conclusion of testimony by the defense witnesses. These motions are almost always denied because the prosecution's case is rarely that weak. But if the motion is granted, the defendant goes free; the prosecution cannot appeal such a ruling and the defendant cannot be tried again in federal court on the same charges because of the constitutional protection against double jeopardy. If, however, the judge waits to rule on the motion until after the jury reaches a verdict, and that verdict is guilty, prosecutors can then appeal the judge's acquittal.

During testimony, both sides will seek to introduce pieces of evidence. If the judge allows an item to be admitted, it becomes part of the public record of the case and should be available for members of the media to inspect and copy. However, your interest in seeing the item sometimes conflicts with the court's interest in insuring none of the evidence is tampered with. This is another of those issues you'll want to broach with your contact person in the clerk's office. Getting a copy of the exhibit from the party that introduced it is another option you can pursue.

Transcripts of courtroom proceedings are provided to the court and litigants by a court reporter. Many court reporters are trained in what is called real-time court reporting, which makes a daily copy of a transcript available, for a fee.

Closing Arguments

The prosecution goes first, followed by the defense and a rebuttal by the prosecution. Because the prosecution has the burden of proof, it gets the final word.

Jury Instructions, Deliberations, and the Verdict

After the closing arguments, the judge will give the jury its final instructions. Both sides may contest the content of those instructions because they can have an enormous effect on the jury's verdict.

During deliberations, the jurors may have questions about the evidence or the instructions. They will give a note to the Deputy Marshal or some court employee, who will take it to the judge. The judge will then call the lawyers back into court, discuss what the answer to the note should be, call the jurors back into the courtroom, and give them the answer.

> After a mistrial, prosecutors may retry the defendant on the same charges without violating the Constitution's ban on double jeapordy.

Criminal juries must reach a unanimous verdict of guilty or not guilty. The jury may say at some point that it is hopelessly deadlocked. At this point, judges typically give the jury what's known as an Allen charge. Named after a 1896 U.S. Supreme Court case, the Allen charge urges jurors to reconsider their opinions and try again to reach a verdict. If they attempt to do so but still report they are deadlocked, the judge may declare a mistrial.

In most federal courthouses, once a jury has reached a verdict, it is announced as soon as all the lawyers can get to the courtroom. You may have as little as 15 minutes warning.

Once a jury's members have been dismissed by the judge, you are free to speak to them. (The clerk's office may be willing to provide the names and addresses of the jurors, unless the jury is anonymous.) Still, no juror is obligated to speak with you.

In high-profile cases, the crush of media attention can be overwhelming for some jurors. In such cases judges will sometimes have court security personnel escort the jurors out a back door of the courthouse. You may want to suggest to your contact person in the clerk's office that the judge ask any jurors who would be willing to speak to the media to remain in the jury room or convene at a specific location inside or outside the courthouse. That gives journalists the access they want, while providing a controlled environment in which the jurors can feel comfortable.

Death Penalty Cases

Federal judges, following the U.S. Sentencing Guidelines, determine and impose sentences in all cases except death penalty cases. If a defendant facing the death penalty is found guilty, the same jury that convicted him will determine his sentence. It has only two choices: execution or life in prison. A second phase of the trial, referred to as the penalty phase, then takes place. Both sides can present witnesses who will testify about the seriousness of the crime and any mitigating factors, such as the defendant's life experiences and lack of a prior criminal history.

A Civil Case

Most of the procedures that govern a criminal case also apply to civil cases. The major differences are described below.

Filing the Complaint

Civil cases do not involve an allegation by the government that an individual or entity violated the criminal laws of the United States. Civil cases begin when a plaintiff – the party seeking relief – files a complaint. Federal courts are authorized to hear only civil cases that:

- Deal with a question involving the United States Constitution.
- Involve questions of federal law (as opposed to state law).
- Involve the government of the United States of America – including its agencies – as a party, whether as a plaintiff or defendant.
- Involve a dispute among residents of different states with an amount in controversy more than $75,000.

The act of informing individuals or businesses about a complaint filed

against them is called **service of process.**

Generally, a lawsuit must be filed in the jurisdiction where the defendant resides or where the claim arose. In cases based on diversity of citizenship (when the plaintiff and defendant
are residents of different states), the lawsuit may be filed in the jurisdiction where the plaintiff resides.

The complaint states the claim that the plaintiff is making – why he, she, or it is entitled to relief. And it states the kind of relief sought. There are three principal forms of relief:

- **Declaratory judgment:** a decision of the court that determines the rights of parties without ordering anything be done or awarding monetary damages.

- **Injunction:** a court order requiring the defendant to do a specific act or prohibiting a defendant from doing a specific act. If a true emergency exists, a **temporary restraining order** can be issued without even providing notice of the lawsuit to the defendant; a TRO can last no more than 10 days. A **preliminary injunction** is similar to a TRO, except that the defendant must receive notice of the lawsuit before the preliminary injunction is issued. The preliminary injunction (sometimes informally referred to as a temporary injunction) stays in effect until a hearing can be held, or sometimes until after a trial. If the plaintiff is successful at trial, a **permanent injunction** would be issued.

- **Monetary relief:** money damages meant to make the plaintiff “whole” for the wrongdoing of the defendant. The two most common types of monetary relief are compensatory and punitive damages. **Compensatory damages** are intended to compensate the injured party for his or her loss. **Special damages** are a subset of compensatory damages; they represent the direct costs of the wrongdoing, such as hospital bills or wages lost while being treated. **General damages** are also a result of the wrongdoing, but are subjective in amount, such as awards for the plaintiff’s pain and suffering or a payment for his or her mental anguish. Some contracts anticipate a breach of the agreement and stipulate how much will be awarded in the event a party reneges on the deal; these are called **liquidated damages**. There are also cases where a wrong was committed by the defendant, but the plaintiff suffered almost no harm; **nominal damages**, such as an award of $1, are made in such cases. **Punitive damages,** which

generally are available only if authorized by statute, are awarded to punish the defendant and are a warning to others who would consider undertaking similar conduct. **Treble damages** are a variation of punitive damages – triple the amount of the plaintiff's actual losses.

The Defendant's Answer

Under federal rules, defendants generally have 20 days to file an answer after they are served with the complaint; the government of the United States has 60 days. Defendants in cases seeking review of decisions under the Social Security Act have 90 days to answer. Defendants in cases brought under the Freedom of Information Act have 30 days to answer. The complaint and answer should be available for you to see and copy in the clerk's office. In many courts, this information also will be available online.

Motions Against the Complaint

Although most defenses to a complaint must be stated in the answer, a defendant has the option of asserting certain defenses in the form of a motion to dismiss the complaint before filing the answer.

Motions to dismiss the complaint typically make one or more of the following arguments:

- The court lacks the power to decide the subject matter of the case or to compel a defendant to appear.
- Service of process was defective.
- The complaint fails to state a claim that the law will recognize as enforceable.

Pretrial Conferences and Hearings

Once the defendant has filed his or her answer or motion to dismiss the complaint, the judge assigned the case will hold a pretrial conference. The conference typically lasts less than an hour. A schedule for discovery – the exchange of information between opposing parties – is generally set at this conference, and a trial date is sometimes also scheduled at this point.

Most motions filed in civil cases involve disputes about whether a party is entitled to receive certain kinds of information prior to trial. While these motions are a part of the case file, the actual information in dispute is almost never filed with the court. During discovery, the parties may take numerous depositions of people involved in the dispute. In a deposition, the witness is under oath and asked questions by the attorneys for both sides, much as they would be if they were on the witness stand in court.

This testimony sometimes may be introduced during the trial. Journalists do not have a right to attend depositions in civil cases, as they are not conducted in open court or in the presence of a judge.

When either party files a pretrial motion, the judge may choose to hold a hearing. However, if the judge believes the motion papers are sufficiently clear that the issue can be decided without an oral presentation, no hearing will be held.

After discovery, the judge will hold a final pretrial hearing. Usually, the hearing is a conference between the judge and the parties to discuss the issues that will be tried and the evidence that is to be used at trial. The judge also will usually require that a pretrial order be submitted by the parties, in which the trial plans of the parties are set forth in writing. The purpose is to help the judge and the parties understand exactly what issues will be important at the trial, and to work out possible solutions to problems before the trial begins. Parties frequently discuss settling their case during this final pretrial phase, and it is not uncommon for judges to strongly encourage them to resolve the dispute before trial.

Ending the Case Without a Trial

A trial is necessary only when there are disputed issues of fact. After the discovery period has
ended, it may become apparent that the facts in the case are not in dispute, and one or more parties may file a motion for summary judgment. A motion for summary judgment can be filed at any time after the answer is filed.

After the motion for summary judgment and the response have been filed, the judge, generally without conducting a hearing, will decide whether or not to grant the motion. If the judge grants the motion in whole, the case will be over and judgment will be entered in favor of the party who moved for summary judgment. If the judge grants the motion in part, only the issues that are in dispute will be tried, and those issues on which summary judgment was granted will not be. If the judge denies the motion, the case will be set for trial. The parties also may resolve their dispute by settlement, without court intervention. The overwhelming majority of civil cases are settled prior to trial.

The Trial

Both the plaintiff and the defendant have the constitutional right to a jury trial. The jury in a civil case consists of no fewer than six and no more than 12 members, not including alternate jurors. All verdicts must be unanimous, unless the parties agree otherwise – an option not available in criminal cases. The plaintiff's lawyer goes first in opening statements, followed by defense counsel, and the plaintiff's witnesses appear first.

Once the plaintiff's last witness has testified, the defendant may, but is not required to, make a motion for a "directed verdict," which is similar to a Rule 29 motion in a criminal case. This motion claims that the plaintiff has failed to prove one or more of the essential elements of the claim for relief and therefore the defendant is entitled to judgment in his favor as a matter of law.

Unlike criminal juries, which can only find a defendant guilty if the evidence is beyond a reasonable doubt, civil juries find the facts based on the preponderance of the evidence standard – that is, it is more likely than not that factual issues supporting the plaintiff's claims have been proven to be true.

Courtroom Equipment

Advances in courtroom technologies can both streamline litigation and increase juror understanding. For the federal judiciary, the modern courtroom offers four basic features:

– An **evidence presentation system** that enables the judge or lawyers to show jurors and each other case documents and exhibits on a network of monitors. Large courtroom monitors allow the public to follow the proceedings.

– Video-teleconferencing, which, among other things, permits offsite witnesses to offer "live" testimony during trial and accommodates appellate proceedings without all participating judges and lawyers being physically present.

– **Integrated CD-ROM, video and audio capability,** which allows lawyers to present their cases on videotape, audiotape, or through CD-ROM players attached to personal computers.

– **Realtime transcription,** a system that allows a court reporter's transcription to be viewed virtually simultaneously on monitors placed throughout the courtroom for use by the judge, lawyers, and jurors.

Bankruptcy Court

Federal courts have exclusive jurisdiction over bankruptcy cases. The primary purposes of the federal bankruptcy laws are to give an honest debtor, either a person or a business, a "fresh start" in life by relieving the debtor of most debts, and to repay creditors in an orderly manner to the extent that the debtor has property available for payment. That can be done using several different methods, as identified by chapter numbers of the U.S. Bankruptcy Code, Title 11 of the United States Code.

There are 90 U.S. bankruptcy courts, which, by statute, are units of the U.S. district courts. A U.S. bankruptcy judge presides over a bankruptcy case. The judge is appointed to a 14-year term by the judges of the local U.S. Court of Appeals and can be reappointed. Like district courts, bankruptcy courts have their own local rules. Each court's local rules are available at the court's web site, all of which can be accessed at http://www.uscourts.gov. A publication, "Bankruptcy Basics," offers a good explanation of bankruptcy law and bankruptcy court proceedings. It is available online at http://www.uscourts.gov/library/bankbasic.pdf.

Bankruptcy court proceedings are open to the public and the news media unless some extraordinary circumstance exists, such as the judge considering a matter under seal. As in other federal courts, all bankruptcy proceedings are recorded. Bankruptcy judges are authorized to use either contract court reporters (not employees of the court) or electronic sound recording equipment. You may order a transcript of a bankruptcy proceeding through the contract court reporter or through a professional transcription service chosen by the court.

All documents filed in connection with a bankruptcy case generally are considered public documents and can be viewed at the court clerk's office or through the court's PACER system (see www.pacer.psc.uscourts.gov).

Bankruptcy courts generally have their own clerks, but in some judicial districts the clerk's operations of the district and bankruptcy courts are consolidated.

Bankruptcy generally provides two options: liquidation or reorganization. Liquidation means selling off a debtor's assets, if there are any available, to raise cash for creditors. Chapter 7 of the Bankruptcy Code is designed for that purpose. When a Chapter 7 case is filed, a trustee is appointed by the United States Trustee to take over the debtor's property for the benefit of creditors. A debtor who is an individual, however, is allowed to keep a limited amount of "exempt" property specified by law. The great majority of cases filed under Chapter 7, however, are "no assets" cases, in which the debtor has not assets available for distribution to creditors.

Reorganization involves obtaining a bankruptcy judge's approval of a plan for repayment over time of all or a percentage of the debts owed to creditors. Chapters 11 and 13 govern the reorganization of a debtor's financial affairs. Chapter 13 cases involve obtaining a bankruptcy judge's approval of a plan for repayment over time of all or a percentage of the debts owed to creditors. Chapter 11 cases, nearly always filed by corporations or other business entities, involve a plan of reorganization of the debtor's liabilities, which must be voted on by creditors and approved by a bankruptcy judge.

In all cases, no matter what chapter, a "meeting of creditors" must be

held, usually from 20 to 40 days after a bankruptcy petition is filed. The debtor must attend this meeting, at which creditors may ask questions regarding the debtor's financial affairs and the extent of the debtor's holdings. A trustee, not a bankruptcy judge, presides over this hearing.

There are several types of bankruptcy proceedings that may interest journalists. The first is a hearing on **first day orders**, which are sometimes held in Chapter 11 cases. At this hearing, a bankruptcy judge is asked to approve important matters that determine how the debtor will operate while the case is pending. Another hearing in a Chapter 11 case is held for **confirmation of the debtor's plan of reorganization**. During this hearing, the debtor's lawyer attempts to obtain the judge's approval of the plan, and creditors have a chance to present their objections to the plan.

Still another proceeding of interest is an adversary hearing – something of a mini-trial involving a particular issue related to the main bankruptcy case. Adversary proceedings can focus, among other things, on requests for injunctions, environmental issues, and fraud on the part of the debtor.

Appeals of a bankruptcy judge's rulings can be made to the district court, or, in certain circuits, to a bankruptcy appellate panel composed of three bankruptcy judges. Further appeals to the court of appeals and the Supreme Court are then available.

Bankruptcy court records are available online through the PACER system (http://www.pacer.psc.uscourts.gov) or through each court's web site, accessible through http://www.uscourts.gov. The court web sites also contain local rules, practice preferences of individual judges, and other useful information.

Covering Federal Appellate Court

The nation's 94 federal judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies and some original proceedings filed directly with the courts of appeals.

A list of the 12 regional circuits and of the judicial districts they encompass is in the appendix.

The Court of Appeals for the Federal Circuit is based in Washington, D.C., and has nationwide jurisdiction to hear appeals in specialized cases. The court hears appeals from the U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Patent and Trademark Office. It also exclusively hears certain types of cases

appealed from the district courts, primarily those involving patent laws.

The Appeals Process

The losing party in a decision by a federal trial court usually has the right to appeal the final decision to a federal court of appeals. Similarly, a litigant not satisfied with a decision made by a federal administrative agency usually may seek review by a court of appeals. Parties who contest decisions made in certain federal agencies – for example, disputes over Social Security benefits – may be required to seek review first in a district court rather than go directly to an appeals court.

In a civil case, either side may appeal the judgment based on a jury verdict or bench trial. In a criminal case, the defendant may appeal a conviction based on a guilty verdict, but the government may not appeal if a defendant is found not guilty. Either side in a criminal case may appeal a sentence that is imposed after a guilty verdict if it departs from the sentencing guidelines.

If the dissatisfied party in the district court plans an appeal, the first step usually is to file a **notice of appeal** in the district court, which informs the court of appeals and other parties.

A litigant who files an appeal from a district court decision is known as an **appellant.** The term “petitioner” is used for a litigant who files an appeal from an administrative agency or who appeals an original proceeding. The appellant (petitioner) bears the burden of showing that the trial court or administrative agency made a legal error that affected the decision in the case. The court of appeals makes its decision based on the record of the case established by the trial court or agency. The court of appeals does not receive additional evidence or hear witnesses. The court of appeals also may review the factual findings made by the trial court or agency, but typically may overturn a decision on factual grounds only if the findings were “clearly erroneous.”

Three-Judge Panels

Appeals normally are decided by panels of three judges working together. A panel may include a senior circuit or district judge, a district judge from a district court within the particular circuit, or a visiting circuit or district judge from another circuit. In general, judges are assigned to panels randomly. The judges may play no role in determining who will sit on which panel or in the assignment of cases to a particular panel. Indeed, the creation of the panels and the assignment of cases to individual panels are separate functions often performed by different court units.

Additionally, judges do not participate in cases in which their participation would constitute a conflict of interest or create an appearance of impropriety. In such circumstances, the judge should recuse himself or

herself from the case.

The appellant presents legal arguments to the panel in a written brief, seeking to persuade the judges that the trial court committed substantial error, and that the trial court's decision should therefore be reversed. The party who prevailed in the trial court, known as the **appellee** (or **respondent** for administrative agency appeals), argues in a reply brief that the trial court was correct, or that any error made was not significant enough to affect the outcome of the case.

In the majority of circuits, most appeals are decided solely on the basis of briefs submitted to the court. In other circuits, the court more often renders its decision after **oral argument**, which is a structured discussion in which both sides present arguments on the legal principles in the dispute. Each side is given a short time, typically 15 minutes, to present its case, but the judges may interrupt to ask any questions they have. Oral arguments traditionally are open to the public.

Judicial Conference policy leaves it to the individual appellate courts to decide whether electronic and photographic coverage of oral arguments will be allowed. The Second and Ninth Circuits will consider requests for such coverage in civil cases. The Seventh, Eighth and Ninth Circuits make available on the Internet digital recordings of oral arguments.

Some time after the submission of briefs or after oral argument, the court of appeals will issue a decision, usually accompanied by an opinion explaining its rationale. A decision may be reached by a 3-0 or 2-1 vote. A decision will take into account and apply any relevant **precedents,** similar cases already decided by that court, or by the Supreme Court.

This decision will be controlling unless: (1) the judges send the case back to the trial court for additional proceedings (i.e. remand the case); (2) the court determines on its own that the matter should be reheard because of a potential conflict with a prior decision; (3) the parties seek a rehearing before the panel; (4) the parties seek review before the full appeals court (called an *en banc* session); or (5) the parties seek review in the U.S. Supreme Court.

Federal courts of appeals issue tens of thousands of decisions each year, and only a small percentage of them are taken to the Supreme Court, which grants review only to a fraction of the cases it receives. Opinions issued by the courts of appeals and by the Supreme Court are posted on the respective court web sites.

Bankruptcy Appellate Panels

Appeals of decisions made by bankruptcy judges may be filed with the district court, or, in some circuits, with the bankruptcy appellate panel, which is composed of three bankruptcy judges from within the circuit. The

law requires the judicial council of each circuit to establish a bankruptcy appellate panel to hear bankruptcy appeals unless the **judicial council** (see definition in **Key Players** section below) finds that there are insufficient judicial resources in the circuit, or that the establishment of a bankruptcy appellate panel would result in undue delay or increased costs to the parties in bankruptcy cases.

There are two additional requirements that must be satisfied before an appeal in a bankruptcy case can be heard by a bankruptcy appellate panel: the district judges in each district must authorize the referral of appeals from the district court to the bankruptcy appellate panel; and the parties to the appeal must consent to the appeal being heard by the panel. A member of the bankruptcy appellant panel may not hear an appeal originating in the district from which such member is appointed. Whether an appeal is heard by a district judge or a bankruptcy appellate panel, any further appeal of a bankruptcy case must be made to the court of appeals.

A bankruptcy appellate panel has been established in the First, Sixth, Eighth, Ninth, and Tenth Circuits. In the First and Ninth Circuits, the panels may hear appeals from all districts in their circuits. The Sixth Circuit panel hears appeals arising only in the Northern and Southern Districts of Ohio and the Western District of Tennessee. The Eighth Circuit panel hears all appeals except those arising from the Districts of North Dakota and South Dakota. The Tenth Circuit's panel hears all appeals except those originating in the District of Colorado.

Key Players

Federal court of appeals judges are Article III judges appointed for life. Each judge is authorized to maintain a staff that usually includes three law clerks and two secretaries (judicial assistants).

The **chief judge** has an important role in court management. By statute, the chief judge is the judge senior in commission who, at the inception of chief judge service, has served on the court at least one year and is under the age of 65. A chief judge may serve for a maximum of seven years, and may not serve as chief judge beyond the age of 70. As the presiding official of a court of appeals, the chief judge has both legal and functional authority over court administration.

The chief judge has specific statutory responsibilities for the management of the court and its cases, to facilitate the smooth and efficient operation of the court and the timely hearing and disposition of cases. For example, the chief judge has responsibility to ensure the administration of cases by providing a sufficient number of judges to sit on appellate panels. This includes the authority to certify the need for a temporary assignment of a

judge from another circuit to serve on a district court or the court of appeals; to designate or assign a circuit judge with the circuit to hold district court in any district within the circuit; to designate or assign a district judge to sit on the court of appeals; or to designate or assign temporarily a district judge to hold a district court in any district in the circuit. The chief judge has statutory authority to certify that an emergency exists that would permit the formation of a panel not consisting of a majority of judges from the same court of appeals, which normally is required by statute.

The chief judge also has administrative responsibilities relating to the court's operation, including presiding over court meetings and coordinating decision-making activities of the court. This includes the appointment and oversight of a court staff, including the clerk of court and the senior staff attorney. The chief judge's responsibilities include budgetary and administrative authority.

The chief judge also presides over the **circuit judicial council,** which is vested with authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." (28 U.S.C. Section 332(d)(1)). In addition to the chief judge, the council consists of an equal number of appellate and district judges. The Judicial Conference has called on judicial councils to take on more specific responsibilities, such as approving temporary emergency support for chambers within each circuit.

Each circuit has a **circuit executive** who works closely with the chief judge to coordinate a wide range of administrative matters. The circuit executive is appointed by the circuit judicial council. Each court of appeals also is organized into the following court units: clerk's office, staff attorney office, circuit mediation office, and, in some circuits, clerk for the bankruptcy appellate panel.

In some circuits, the circuit executive serves as a liaison between the court and the news media. In other circuits, however, that responsibility may belong to the appeals court's **clerk of court,** whose staff manages the flow of cases through the court, maintains court records, and handles other administrative duties. The clerk of court is responsible for central records keeping, maintaining caseload statistics, and maintaining automation (information technology) systems necessary for the effective operation of the court.

Another member of a court of appeals' management team may be its **senior staff attorney,** who supervises an office of attorneys whose duties range from reviewing all appeals filed by prison inmates without a lawyer's help to drafting proposed opinions on preliminary matters.

Each court of appeals has a circuit mediation program, also referred to as a conference attorney program. Although programs vary from court to

court, the primary goal of the program is to achieve settlement of pending cases prior to submission to a panel of judges for decision.

The circuit librarian is appointed by each court of appeals and is responsible for the administration of the library program and related services within the circuit.

An important inquiry early on in any journalist's dealings with a federal court of appeals is to identify the person(s) within the court authorized to talk to the news media. Most courts of appeals do not have a public information officer, but the circuit executive or clerk of court likely has designated an individual who deals with the news media on a daily basis.

Types and Sources of Court Information

Federal appeals courts comply with the Federal Rules of Appellate Procedure, which can be found online, at http://www.house.gov/judiciary/Appel2002.pdf In addition, each appeals court has its own local rules, which are posted on its web site. A court's rules govern the various deadlines imposed on all parties in a case, and dictate the pace of a case, from initial filing to resolution.

You can visit an appeals court's web site by going to the Judiciary's web site, www.uscourts.gov, and clicking on Court Links. Decisions, opinions, orders, and court calendars may be found on the court's web site.

The clerk's office maintains court records, including briefs filed in appellate cases, as well as court calendars and other information provided to the public.

On occasion, a lone appellate judge will handle an emergency matter. The papers filed in such a case and the order issued by the judge will be on file in the clerk's office, and they also may be posted on the court's web site.

Glossary

Acquittal – A jury verdict that a criminal defendant is not guilty, or the finding of a judge that the evidence is insufficient to support a conviction.

Active Judge – A judge in the full-time service of the court. Compare to **senior judge**.

Administrative Office of the United States Courts (AO) – The federal agency responsible for collecting court statistics, administering the federal courts' budget, and performing many other administrative and programmatic functions, under the direction and supervision of the **Judicial Conference of the United States.**

Admissible – A term used to describe evidence that may be considered by a jury or judge in civil and criminal cases.

Affidavit – A written or printed statement made under oath.

Alternate Juror – A juror selected in the same manner as a regular juror who hears all the evidence but does not help decide the case unless called on to replace a regular juror.

Alternative Dispute Resolution (ADR) – A procedure for settling a dispute outside the courtroom. Most forms of ADR are not binding on the parties, and involve referral of the case to a neutral party such as an arbitrator or mediator.

Amicus Curiae – Latin for "friend of the court." It is advice formally offered to the court in a brief filed by an entity interested in, but not a party to, the case.

Answer – The formal written statement by a defendant in a civil case that responds to a complaint, articulating the grounds for defense.

Appellant – The party who appeals a district court's decision, usually seeking reversal of that decision.

Appellee – The party who opposes an appellant's appeal, and who seeks to persuade the appeals court to affirm the district court's decision.

Arraignment – A proceeding in which a criminal defendant is brought into court, told of the charges in an indictment or information, and asked to plead guilty or not guilty.

Article III Judge – A federal judge who is appointed for life, during "good behavior," under Article III of the Constitution. Article III judges are

nominated by the President and confirmed by the Senate.

Bail – The release, prior to trial, of a person accused of a crime, under specified conditions designed to assure that person's appearance in court when required. Also can refer to the amount of bond money posted as a financial condition of pretrial release.

Bankruptcy Judge – A judicial officer of the United States district court who is the court official with decision-making power over federal bankruptcy cases.

Bench Trial – A trial without a jury, in which the judge serves as the fact-finder.

Brief – A written statement submitted in a trial or appellate proceeding that explains one side's legal and factual arguments.

Burden of Proof – The duty to prove disputed facts. In civil cases, a plaintiff generally has the burden of proving his or her case. In criminal cases, the government has the burden of proving the defendant's guilt. (See **standard of proof**.)

Case File – A complete collection of every document filed in court in a case.

Case Law – The law as established in previous court decisions. A synonym for legal precedent.
Akin to **common law**, which springs from tradition and judicial decisions.

Caseload – The number of cases handled by a judge or a court.

Cause of Action – A legal claim.

Chambers – The offices of a judge and his or her staff.

Class Action – A lawsuit in which one or more members of a large group, or class, of individuals or other entities sue on behalf of the entire class. The district court must find that the claims of the class members contain questions of law or fact in common before the lawsuit can proceed as a class action.

Clerk of Court – The court officer who oversees administrative functions, especially managing the flow of cases through the court. The clerk's office is often called a court's central nervous system.

Complaint – A written statement that begins a civil lawsuit, in which the plaintiff details the claims against the defendant.

Concurrent Sentence – Prison terms for two or more offenses to be served at the same time, rather than one after the other. Example: Two five-year sentences and one three-year sentence, if served concurrently, result in a maximum of five years behind bars.

Consecutive Sentence – Prison terms for two or more offenses to be served one after the other. Example: Two five-year sentences and one three-year sentence, if served consecutively, result in a maximum of 13 years behind bars.

Count – An allegation in an indictment or information, charging a defendant with a crime. An indictment or information may contain allegations that the defendant committed more than one crime. Each allegation is referred to as a count.

Damages – Money that a defendant pays a plaintiff in a civil case if the plaintiff has won. Damages may be compensatory (for loss or injury) or punitive (to punish and deter future misconduct).

Declaratory Judgment – A judge's statement about someone's rights. For example, a plaintiff may seek a declaratory judgment that a particular statute, as written, violates some constitutional right.

De Facto – Latin, meaning "in fact" or "actually." Something that exists in fact but not as a matter of law.

Default Judgment – A judgment awarding a plaintiff the relief sought in the complaint because the defendant has failed to appear in court or otherwise respond to the complaint.

De Jure – Latin, meaning "in law." Something that exists by operation of law.

De Novo – Latin, meaning "anew." A trial de novo is a completely new trial. Appellate review de novo implies no deference to the trial judge's ruling.

Discharge – A release of a debtor from personal liability for certain debts, preventing creditors from taking any action against the debtor or the debtor's property to collect the debts.

Discovery – Procedures used to obtain disclosure of evidence before trial.

Dismissal with Prejudice – Court action that prevents an identical lawsuit from being filed later.

Dismissal without Prejudice – Court action that allows the later filing.

Due Process – In criminal law, the constitutional guarantee that a defendant will receive a fair and impartial trial. In civil law, the legal rights of someone who confronts an adverse action threatening liberty or property.

En Banc – French, meaning "on the bench." All judges of an appellate court sitting together to hear a case, as opposed to the routine disposition by panels of three judges. In the Ninth Circuit, an en banc panel consists of 11 randomly selected judges.

Exclusionary Rule – Doctrine that says evidence obtained in violation of a criminal defendant's constitutional or statutory rights is not admissible at trial.

Exculpatory Evidence – Evidence indicating that a defendant did not commit the crime.

Ex Parte – A proceeding brought before a court by one party only, without notice to or challenge by the other side.

Federal Public Defender Organization – As provided for in the Criminal Justice Act, an organization established within a federal judicial circuit to represent criminal defendants who cannot afford an adequate defense. Each organization is supervised by a federal public defender appointed by the court of appeals for the circuit.

Felony – A serious crime, usually punishable by at least one year in prison.

Habeas Corpus – Latin, meaning "you have the body." A writ of habeas corpus generally is a judicial order forcing law enforcement authorities to produce a prisoner they are holding, and to justify the prisoner's continued confinement. Federal judges receive petitions for a writ of habeas corpus from state prison inmates who say their state prosecutions violated federally protected rights in some way.

Hearsay – Evidence presented by a witness who did not see or hear the incident in question but heard about it from someone else. With some exceptions, hearsay generally is not admissible as evidence at trial.

In Camera – Latin, meaning in a judge's chambers. Often means outside the presence of a jury and the public. In private.

Inculpatory Evidence – Evidence indicating that a defendant did commit the crime.

Injunction – A court order preventing one or more named parties from taking some action. A preliminary injunction often is issued to allow fact-

finding, so a judge can determine whether a permanent injunction is justified.

Interrogatories – A form of discovery consisting of written questions to be answered in writing and under oath.

Judicial Conference of the United States – The policy-making entity for the federal court system. A 27-judge body whose presiding officer is the Chief Justice of the United States.

Jurisdiction – The legal authority of a court to hear and decide a certain type of case. It also is used as a synonym for **venue**, meaning the geographic area over which the court has territorial jurisdiction to decide cases.

Moot – Not subject to a court ruling because the controversy has not actually arisen, or has ended.

Motion in Limine – A pretrial motion requesting the court to prohibit the other side from presenting, or even referring to, evidence on matters said to be so highly prejudicial that no steps taken by the judge can prevent the jury from being unduly influenced.

Per Curiam – Latin, meaning “for the court.” In appellate courts, often refers to an unsigned opinion.

Peremptory Challenge – A district court may grant each side in a civil or criminal trial the right to exclude a certain number of prospective jurors without cause or giving a reason.

Probation – An alternative to prison, it is conditional freedom for an offender.

Pro Se – Representing oneself. Serving as one’s own lawyer.

Pro Tem – Temporary.

Remand – Send back.

Sanction – A penalty or other type of enforcement used to bring about compliance with the law or with rules and regulations.

Senior Judge – A federal judge who, after attaining the requisite age and length of judicial experience, takes senior status, thus creating a vacancy among a court’s active judges. A senior judge retains the judicial office and may cut back his or her workload by as much as 75 percent, but many opt to keep a larger caseload.

Standard of Proof – Degree of proof required. In criminal cases, prosecutors must prove a defendant's guilt "beyond a reasonable doubt." The majority of civil lawsuits require proof "by a preponderance of the evidence" (50 percent plus), but in some the standard is higher and requires "clear and convincing" proof.

Statute of Limitations – The time within which a lawsuit must be filed or a criminal prosecution begun. The deadline can vary, depending on the type of civil case or the crime charged.

Sua Sponte – Latin, meaning "of its own will." Often refers to a court taking an action in a case without being asked to do so by either side.

Subpoena – A command, issued under a court's authority, to a witness to appear and give testimony.

Temporary Restraining Order – Akin to a preliminary injunction, it is a judge's short-term order forbidding certain actions until a full hearing can be conducted. Often referred to as a TRO.

341 Meeting – A meeting of creditors at which the debtor is questioned under oath by creditors, a trustee, examiner, or the United States trustee about his/her financial affairs.

Tort – A civil, not criminal, wrong. A negligent or intentional injury against a person or property, with the exception of breach of contract.

Trustee – The representative of the bankruptcy estate who exercises statutory powers, principally for the benefit of the unsecured creditors, under the general supervision of the court and the direct supervision of the United States trustee or bankruptcy administrator.

Venue – The geographic area in which a court has jurisdiction. A **change of venue** is a change or transfer of a case from one judicial district to another.

Voir Dire – Jury selection process of questioning prospective jurors, to ascertain their qualifications and determine any basis for challenge.

Warrant – Court authorization, most often for law enforcement officers, to conduct a search or make an arrest.

Writ – A written court order directing a person to take, or refrain from taking, a certain act.

Appendix A

Federal Judiciary Web Sites

Administrative Office and Federal Judicial Center

- Federal Courts Home Page - http://www.uscourts.gov/index.html
- Federal Judicial Center - http://www.fjc.gov/
- PACER Service Center - http://pacer.psc.uscourts.gov/
- U.S. Party/Case index - http://pacer.uspci.uscourts.gov/

1st Circuit

- Court of Appeals - http://www.ca1.uscourts.gov/
- Maine Bankruptcy Court - http://www.meb.uscourts.gov/
- Maine District Court - http://www.med.uscourts.gov/
- Massachusetts Bankruptcy Court - http://www.mab.uscourts.gov/
- Massachusetts District Court - http://www.mad.uscourts.gov/
- New Hampshire Bankruptcy Court - http://www.nhb.uscourts.gov/
- New Hampshire District Court - http://www.nhd.uscourts.gov/
- Puerto Rico Bankruptcy Court - http://www.prb.uscourts.gov/
- Puerto Rico District Court - http://www.prd.uscourts.gov/
- Puerto Rico Pretrial Services Office - http://www.prpt.uscourts.gov/
- Puerto Rico Probation Office - http://www.prp.uscourts.gov/
- Rhode Island Bankruptcy Court - http://www.rib.uscourts.gov/
- Rhode Island District Court - http://www.rid.uscourts.gov/

2nd Circuit

- Connecticut Bankruptcy Court - http://www.ctb.uscourts.gov/
- Connecticut District Court - http://www.ctd.uscourts.gov/
- Court of Appeals - http://www.ca2.uscourts.gov/
- New York Eastern Bankruptcy Court - http://www.nyeb.uscourts.gov/
- New York Eastern District Court - http://www.nyed.uscourts.gov/
- New York Northern Bankruptcy Court - http://www.nynb.uscourts.gov/
- New York Northern District Court - http://www.nynd.uscourts.gov/
- New York Southern Bankruptcy Court - http://www.nysb.uscourts.gov/

- New York Southern District Court - http://www.nysd.uscourts.gov/
- New York Western Bankruptcy Court - http://www.nywb.uscourts.gov/
- New York Western District Court - http://www.nywd.uscourts.gov/
- Vermont Bankruptcy Court - http://www.vtb.uscourts.gov/
- Vermont District Court - http://www.vtd.uscourts.gov/

3rd Circuit

- Court of Appeals - http://www.ca3.uscourts.gov/
- Delaware Bankruptcy Court - http://www.deb.uscourts.gov/
- Delaware District Court - http://www.ded.uscourts.gov/
- New Jersey Bankruptcy Court - http://www.njb.uscourts.gov/
- New Jersey District Court - http://pacer.njd.uscourts.gov/
- New Jersey Pretrial Services - http://www.njpt.uscourts.gov/
- Pennsylvania Eastern Bankruptcy Court - http://www.paeb.uscourts.gov/
- Pennsylvania Eastern District Court - http://www.paed.uscourts.gov/
- Pennsylvania Middle Bankruptcy Court - http://www.pamb.uscourts.gov/
- Pennsylvania Middle District Court - http://www.pamd.uscourts.gov/
- Pennsylvania Western Bankruptcy Court - http://www.pawb.uscourts.gov/
- Pennsylvania Western District Court - http://www.pawd.uscourts.gov/
- Virgin Islands District Court - http://www.vid.uscourts.gov/

4th Circuit

- Court of Appeals - http://www.ca4.uscourts.gov/
- Maryland Bankruptcy Court - http://www.mdb.uscourts.gov
- Maryland District Court - http://www.mdd.uscourts.gov/
- North Carolina Eastern Bankruptcy Court - http://www.nceb.uscourts.gov/
- North Carolina Eastern District Court - http://www.nced.uscourts.gov/
- North Carolina Middle Bankruptcy Court - http://www.ncmb.uscourts.gov/
- North Carolina Middle District Court - http://www.ncmd.uscourts.gov/
- North Carolina Western Bankruptcy Court -

http://www.ncwb.uscourts.gov/
- North Carolina Western District Court - http://www.ncwd.uscourts.gov/
- South Carolina Bankruptcy Court - http://www.scb.uscourts.gov/
- South Carolina District Court - http://www.scd.uscourts.gov/
- Virginia Eastern Bankruptcy Court - http://www.vaeb.uscourts.gov/
- Virginia Eastern District Court - http://www.vaed.uscourts.gov/
- Virginia Eastern Pretrial Services Office - http://www.vaept.uscourts.gov/
- Virginia Western Bankruptcy Court - http://www.vawb.uscourts.gov/
- Virginia Western District Court - http://www.vawd.uscourts.gov/
- West Virginia Northern Bankruptcy Court - http://www.wvnb.uscourts.gov/
- West Virginia Northern District Court - http://www.wvnd.uscourts.gov/
- West Virginia Southern Bankruptcy Court - http://www.wvsd.uscourts.gov/bankruptcy/index.htm
- West Virginia Southern District Court - http://www.wvsd.uscourts.gov/
- West Virginia Southern Probation Office - http://www.wvsd.uscourts.gov/probation/index.html

5th Circuit

- Court of Appeals - http://www.ca5.uscourts.gov/
- Louisiana Eastern Bankruptcy Court - http://www.laeb.uscourts.gov/
- Louisiana Eastern District Court - http://www.laed.uscourts.gov/
- Louisiana Eastern Pretrial Services Office - http://www.laept.uscourts.gov/
- Louisiana Eastern Probation Office - http://www.laep.uscourts.gov/
- Louisiana Middle Bankruptcy Court - http://www.lamb.uscourts.gov/
- Louisiana Middle District Court - http://www.lamd.uscourts.gov/
- Louisiana Western Bankruptcy Court - http://www.lawb.uscourts.gov/
- Louisiana Western District Court - http://www.lawd.uscourts.gov/
- Mississippi Northern Bankruptcy Court - http://www.msnb.uscourts.gov/
- Mississippi Northern District Court - http://www.msnd.uscourts.gov/

- Mississippi Southern Bankruptcy Court - http://www.mssb.uscourts.gov/
- Mississippi Southern District Court - http://www.mssd.uscourts.gov/
- Texas Eastern Bankruptcy Court - http://www.txeb.uscourts.gov/
- Texas Eastern District Court - http://www.txed.uscourts.gov/
- Texas Eastern Probation Office - http://www.txep.uscourts.gov/
- Texas Northern Bankruptcy Court - http://www.txnb.uscourts.gov/
- Texas Northern District Court - http://www.txnd.uscourts.gov/
- Texas Southern District/Bankruptcy Courts - http://www.txs.uscourts.gov/
- Texas Western Bankruptcy Court - http://www.txwb.uscourts.gov/
- Texas Western District Court - http://www.txwd.uscourts.gov/

6th Circuit

- Court of Appeals - http://www.ca6.uscourts.gov/
- Federal Magistrate Judges Secretaries Association - http://www.fmjsa.org/
- Kentucky Eastern Bankruptcy Court - http://www.kyeb.uscourts.gov/
- Kentucky Eastern District Court - http://www.kyed.uscourts.gov/
- Kentucky Western Bankruptcy Court - http://www.kywb.uscourts.gov/
- Kentucky Western District Court - http://www.kywd.uscourts.gov/
- Kentucky Western Probation Office - http://www.kywp.uscourts.gov/
- Michigan Eastern Bankruptcy Court - http://www.mieb.uscourts.gov/
- Michigan Eastern District - http://www.mied.uscourts.gov/
- Michigan Eastern Probation Office - http://www.mied.uscourts.gov/_probation
- Michigan Western Bankruptcy Court - http://www.miwb.uscourts.gov/
- Michigan Western District Court - http://www.miwd.uscourts.gov/
- Ohio Northern Bankruptcy Court - http://www.ohnb.uscourts.gov/
- Ohio Northern District Court - http://www.ohnd.uscourts.gov/
- Ohio Southern Bankruptcy Court - http://www.ohsb.uscourts.gov/
- Ohio Southern District Court - http://www.ohsd.uscourts.gov/
- Ohio Southern Probation - http://www.ohsp.uscourts.gov/

- Tennessee Eastern Bankruptcy Court - http://www.tneb.uscourts.gov/
- Tennessee Eastern District Court - http://www.tned.uscourts.gov/
- Tennessee Middle Bankruptcy Court - http://www.tnmb.uscourts.gov/
- Tennessee Middle District Court - http://www.tnmd.uscourts.gov/
- Tennessee Middle Probation & Pretrial Services Office - http://www.tnmp.uscourts.gov/
- Tennessee Western Bankruptcy Court - http://www.tnwb.uscourts.gov/
- Tennessee Western District Court - http://www.tnwd.uscourts.gov/
- Tennessee Western Probation Office - http://www.tnwp.uscourts.gov/

7th Circuit

- Court of Appeals - http://www.ca7.uscourts.gov/
- Illinois Central Bankruptcy Court - http://www.ilcb.uscourts.gov/
- Illinois Central District Court - http://www.ilcd.uscourts.gov/
- Illinois Northern Bankruptcy Court - http://www.ilnb.uscourts.gov/
- Illinois Northern District Court - http://www.ilnd.uscourts.gov/
- Illinois Southern Bankruptcy Court - http://www.ilsb.uscourts.gov/
- Illinois Southern District Court - http://www.ilsd.uscourts.gov/
- Illinois Southern Probation Office - http://www.ilsd.uscourts.gov/uspo/default.html
- Indiana Northern Bankruptcy Court - http://www.innb.uscourts.gov/
- Indiana Northern District Court - http://www.innd.uscourts.gov/
- Indiana Northern Probation and Pretrial - http://www.innp.uscourts.gov/
- Indiana Southern Bankruptcy Court - http://www.insb.uscourts.gov/
- Indiana Southern District Court - http://www.insd.uscourts.gov/
- Indiana Southern Probation Office - http://www.insp.uscourts.gov/
- Wisconsin Eastern Bankruptcy Court - http://www.wieb.uscourts.gov/
- Wisconsin Eastern District Court - http://www.wied.uscourts.gov/
- Wisconsin Western Bankruptcy Court -

http://www.wiw.uscourts.gov/bankruptcy/
- Wisconsin Western District Court - http://www.wiwd.uscourts.gov/
- Wisconsin Western Probation Office - http://www.wiw.uscourts.gov

8th Circuit

- Arkansas Eastern District Court - http://www.are.uscourts.gov/
- Arkansas Eastern and Western Bankruptcy Court - http://www.arb.uscourts.gov/
- Arkansas Western District Court - http://www.arwd.uscourts.gov/
- Court of Appeals - http://www.ca8.uscourts.gov/
- Iowa Northern Bankruptcy Court - http://www.ianb.uscourts.gov/
- Iowa Northern District Court - http://www.iand.uscourts.gov/
- Iowa Southern Bankruptcy Court - http://www.iasb.uscourts.gov/courtpages/home/homepage.asp
- Iowa Southern District Court - http://www.iasd.uscourts.gov/
- Minnesota Bankruptcy Court - http://www.mnb.uscourts.gov/
- Minnesota District Court - http://www.mnd.uscourts.gov/
- Missouri Eastern Bankruptcy Court - http://www.moeb.uscourts.gov/
- Missouri Eastern District Court - http://www.moed.uscourts.gov/
- Missouri Eastern Pretrial Services - http://www.moept.uscourts.gov/
- Missouri Eastern Probation Office - http://www.moep.uscourts.gov/
- Missouri Western District and Bankruptcy Courts - http://www.mow.uscourts.gov/
- Nebraska Bankruptcy Court - http://www.neb.uscourts.gov/
- Nebraska District Court - http://www.ned.uscourts.gov/
- North Dakota Bankruptcy Court - http://www.ndb.uscourts.gov/
- North Dakota District Court - http://www.ndd.uscourts.gov/
- South Dakota Bankruptcy Court - http://www.sdb.uscourts.gov/
- South Dakota District Court - http://www.sdd.uscourts.gov/

9th Circuit

- Alaska Bankruptcy Court - http://www.akb.uscourts.gov/
- Alaska District Court - http://www.akd.uscourts.gov/
- Arizona Bankruptcy Court - http://www.azb.uscourts.gov/
- Arizona District Court - http://www.azd.uscourts.gov/
- Bankruptcy Appellate Panel of the Ninth Circuit - http://www.ce9.uscourts.gov/bap

- California Central Bankruptcy Court - http://www.cacb.uscourts.gov/
- California Central District Court - http://www.cacd.uscourts.gov/
- California Eastern Bankruptcy Court - http://www.caeb.uscourts.gov/
- California Eastern District Court - http://www.caed.uscourts.gov/
- California Eastern Probation Office - http://www.caep.uscourts.gov/
- California Northern Bankruptcy Court - http://www.canb.uscourts.gov/
- California Northern District Court - http://www.cand.uscourts.gov/
- California Southern Bankruptcy Court - http://www.casb.uscourts.gov/
- California Southern District Court - http://www.casd.uscourts.gov/
- California Southern Pretrial Services - http://www.caspt.uscourts.gov/
- California Southern Probation Office - http://www.casp.uscourts.gov/
- Court of Appeals - http://www.ca9.uscourts.gov/
- Guam District Court - http://www.gud.uscourts.gov/
- Hawaii Bankruptcy Court - http://www.hib.uscourts.gov/
- Hawaii District Court - http://www.hid.uscourts.gov/
- Idaho Bankruptcy/District Court - http://www.id.uscourts.gov/
- Montana Bankruptcy Court - http://www.mtb.uscourts.gov/
- Montana District Court - http://www.mtd.uscourts.gov/
- Nevada Bankruptcy Court - http://www.nvb.uscourts.gov/
- Nevada District Court - http://www.nvd.uscourts.gov/
- Northern Mariana Islands District Court - http://www.nmid.uscourts.gov/
- Office of the Circuit Executive - http://www.ce9.uscourts.gov/
- Oregon Bankruptcy Court - http://www.orb.uscourts.gov/
- Oregon District Court - http://www.ord.uscourts.gov/
- Washington Eastern Bankruptcy Court - http://www.waeb.uscourts.gov/
- Washington Eastern District Court - http://www.waed.uscourts.gov/
- Washington Western Bankruptcy Court - http://www.wawb.uscourts.gov/
- Washington Western District Court - http://www.wawd.uscourts.gov/

10th Circuit

- Bankruptcy Appellate Panel of the Tenth Circuit - http://www.bap10.uscourts.gov/
- Colorado Bankruptcy Court - http://www.cob.uscourts.gov/bindex.htm
- Colorado District Court - http://www.co.uscourts.gov/dindex.htm
- Colorado Federal Courts All Units - http://www.co.uscourts.gov/
- Court of Appeals - http://www.ck10.uscourts.gov/
- Kansas Bankruptcy Court - http://www.ksb.uscourts.gov/
- Kansas District Court - http://www.ksd.uscourts.gov/
- New Mexico Bankruptcy Court - http://www.nmcourt.fed.us/web/BCDOCS/bcindex.html
- New Mexico District Court - http://www.nmcourt.fed.us/web/DCDOCS/dcindex.html
- New Mexico Pretrial Services - http://www.nmcourt.fed.us/web/PTDOCS/ptindex.html
- New Mexico Probation Office - http://www.nmcourt.fed.us/web/PBDOCS/pbindex2.html
- Oklahoma Eastern Bankruptcy Court - http://www.okeb.uscourts.gov/
- Oklahoma Eastern District Court - http://www.oked.uscourts.gov/
- Oklahoma Northern Bankruptcy Court - http://www.oknb.uscourts.gov/
- Oklahoma Northern District Court - http://www.oknd.uscourts.gov/
- Oklahoma Western Bankruptcy Court - http://www.okwb.uscourts.gov/
- Oklahoma Western District Court - http://www.okwd.uscourts.gov/
- Utah Bankruptcy Court - http://www.utb.uscourts.gov/
- Utah District Court - http://www.utd.uscourts.gov/
- Wyoming Bankruptcy Court - http://www.wyb.uscourts.gov/
- Wyoming District Court - http://www.ck10.uscourts.gov/wyoming/district/index.html

11th Circuit

- Alabama Middle Bankruptcy Court - http://www.almb.uscourts.gov/
- Alabama Middle District Court - http://www.almd.uscourts.gov/
- Alabama Northern Bankruptcy Court - http://www.alnb.uscourts.gov/
- Alabama Northern District Court - http://www.alnd.uscourts.gov/
- Alabama Southern Bankruptcy Court - http://www.alsb.uscourts.gov/

- Alabama Southern District Court - http://www.als.uscourts.gov/
- Court of Appeals - http://www.ca11.uscourts.gov/
- Florida Middle Bankruptcy Court - http://www.flmb.uscourts.gov/
- Florida Middle District Court - http://www.flmd.uscourts.gov/
- Florida Middle Probation Office - http://www.flmp.uscourts.gov/
- Florida Northern Bankruptcy Court - http://www.flnb.uscourts.gov/
- Florida Northern District Court - http://www.flnd.uscourts.gov/
- Florida Northern Probation and Pretrial - http://www.flnp.uscourts.gov/
- Florida Southern Bankruptcy Court - http://www.flsb.uscourts.gov/
- Florida Southern District Court - http://www.flsd.uscourts.gov/
- Georgia Middle Bankruptcy Court - http://www.gamb.uscourts.gov/
- Georgia Middle District Court - http://www.gamd.uscourts.gov/
- Georgia Northern Bankruptcy Court - http://www.ganb.uscourts.gov/
- Georgia Northern District Court - http://www.gand.uscourts.gov/
- Georgia Southern Bankruptcy Court - http://www.gasd.uscourts.gov/usbc/usbc.html

Georgia Southern District Court - http://www.gasd.uscourts.gov/district/usdc.html

DC Circuit

- DC Bankruptcy Court - http://www.dcb.uscourts.gov/
- DC Circuit Court of Appeals - http://www.cadc.uscourts.gov/
- DC District Court - http://www.dcd.uscourts.gov/

Federal Circuit

- U.S. Court of Appeals For the Federal Circuit - http://www.fedcir.gov/

Other

- U.S. Court of International Trade - http://www.cit.uscourts.gov/
- U.S. Supreme Court - http://www.supremecourtus.gov/
- United States Sentencing Commission - http://www.ussc.gov

James C Duff, Director

Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002
(202) 502-2600

The New York Times

The Morning Agenda: The Privatization of the Justice System

By Amie Tsang November 2, 2015

THE PRIVATIZATION OF THE JUSTICE SYSTEM | Tens of millions of United States citizens have **signed away their constitutional right** to a day in court without even knowing it, Jessica Silver-Greenberg and Robert Gebeloff report in DealBook.

Companies have been inserting individual arbitration clauses into consumer and employment contracts, circumventing the courts and **preventing people from bringing class-action lawsuits.**

The clauses can be **just a few words,** like the one in an American Express credit card contract saying that cardholders who have a problem with their account "may elect to resolve any claim by individual arbitration."

The move was engineered over more than a decade by a **Wall Street-led coalition of credit card companies and retailers** who wanted to insulate themselves from costly lawsuits. Their work led to two Supreme Court rulings that enshrined class-action bans in contracts.

Law enforcers say they have **lost a tool for uncovering patterns of corporate abuse.** In a letter to the Consumer Financial Protection Bureau, attorneys general in 16 states warned that "unlawful business practices" could flourish with the proliferation of class-action bans.

And the use of class-action bans is growing. Even lawsuits that would not

have been brought by a class have been forced out of the courts, according to the Times' investigation. **Thousands of businesses,** from obstetrics practices to private schools to big corporations to storefront shops, have used arbitration as an alternate system of justice.

Thousands of **cases brought by single plaintiffs** over claims like medical malpractice and wrongful death are being decided behind closed doors.

Little is known about arbitration because the proceedings are confidential and the government does not require cases to be reported, but **proceedings bear little resemblance to a day in court,** Jessica Silver-Greenberg and Michael Corkery report in DealBook.

Arbitration rules tend to favor businesses and the arbitrators who have replaced judges and juries **commonly consider the companies their clients.**

Some plaintiffs have said their disputes were resolved quickly, but a Times investigation has discovered many cases where proceedings have devolved into **legal free-for-alls** with companies even paying employees to testify in their favor.

The outcomes are decided by a single arbitrator who can determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or **outright disregarded the law.**

Companies can steer cases toward friendly arbitrators, while **arbitrators can cultivate close ties with companies** to attract more business.

When plaintiffs have asked the courts to intervene, they have almost always lost. Saying its hands were tied, one court in California said it could not overturn arbitrators' decisions **even if they caused "substantial injustice."**

In interviews, more than three dozen arbitrators described how they **felt**

beholden to companies. Beneath every decision, they said, was the threat of losing business.

Read more here about how the use of arbitration has crept into every corner of Americans' lives, **affecting people from birth to death.**

LESSONS IN INVESTING FROM VALEANT | Charlie Munger, Berkshire Hathaway's vice chairman, was **already a fierce critic** of Valeant, and his issues with it have only deepened recently, Bloomberg News reports.

Mr. Munger tore into the company over the weekend, saying its **business practices were "deeply immoral"** and "similar to the worst abuses in for-profit education."

This came after William A. Ackman, the billionaire investor, held a **three-hour conference** to defend his hedge fund's 22-million-share investment in the pharmaceutical group.

Mr. Ackman, who said he **essentially expected years of investigations** and probably a fine for Valeant's involvement with Philidor Rx Services, argued that the investment in Valeant still made sense in the long term,

Matthew Goldstein reports in DealBook.

Mr. Ackman and one of his lawyers discussed a federal lawsuit charging Novartis with using specialty pharmacies to illegally increase sales of its products. It reached a deal this week to pay a $390 million penalty to settle the litigation. Mr. Ackman all but suggested he **expected Valeant to face a similar kind of lawsuit** and settlement.

Valeant's case has offered a bounty of **educational moments for investors,**

Gretchen Morgenson writes in the Fair Game column. One big lesson is the peril of relying on earnings forecasts and stock valuations based on fantasy rather than reality.

Valeant is one of a growing number of companies that present **two types of financial results** — those that adhere to generally accepted accounting principles, or GAAP, and those that help executives put a good spin on their operations.

The latter figures, which exclude certain costs and are known as pro forma or non-GAAP numbers, are **a false construct**, as companies can choose which costs they want to leave out.

The difference between real earnings and adjusted numbers is **greater for Valeant** than many of its competitors.

Generally accepted accounting principles require companies to recognize over time the diminishing value of intangible assets they acquire when buying another company — or **amortization**. Valeant excludes these costs, and it is a big number for an acquisitive company.

It's easier to justify paying up for a stock **when you're relying on ersatz results**, Ms. Morgenson notes. Valeant's shares, at their peak of $262, were trading at 98 times 2014 earnings. Set against the fantasy figures, though, the stock carried a multiple of just 31 times. Not a bargain, perhaps, but also not insane.

ON THE AGENDA | AIG and **Visa** will both hold conference calls on their latest quarterly earnings at 8 a.m. The **ISM Report on Business** in October will be released at 10 a.m. **Virginia Rometty**, chief executive at IBM, and **John Stumpf**, the chief executive at Wells Fargo, are on the opening panel at the Fortune Global Forum at 3 p.m.

HSBC PROFIT JUMPS | Gains in its investment bank and lower legal and regulatory costs helped third-quarter profit at HSBC **rise 52 percent,**

Chad Bray reports in DealBook.

For the three months that ended Sept. 30, HSBC reported a **profit of**

$5.23 billion, up from $3.43 billion in the third quarter of 2014.

The British lender said its profit had also been bolstered by gains related to **the value of its debt.**

The positive results came **after cost-cutting plans** announced this year, which involved shedding up to 50,000 jobs, selling businesses and shrinking the global investment banking business.

The bank, which generates more than half of its earnings in Asia, tried to reassure investors about the **quality of its loan portfolio**, given the slowdown in the region.

It also said "a significant amount of work has been carried out" to determine whether it will move its **headquarters from London.**

| *Contact amie.tsang@nytimes.com*

MERGERS & ACQUISITIONS »

Merger and Acquisition Volumes Weaken Despite Mega-Deals | Although several big deals were announced last month, including Anheuser-Busch InBev's $104 billion takeover of SABMiller, the lack of smaller mergers is raising concerns that the foundations of the 2015 deal frenzy is falling away.

THE FINANCIAL TIMES

PMC-Sierra Says Skyworks Offer Still Superior to Microsemi Bid | The bidding war started two weeks ago when Microsemi first offered to buy PMC-Sierra for about $2.2 billion, trumping a $2 billion offer from Skyworks Solutions, an Apple supplier.

REUTERS

INVESTMENT BANKING »

Greek Lenders Told to Raise $15.9 Billion to Cover Bad Loans | The European Central Bank's assessment is an indicator of what it will take to enable Greek lenders to help the country resume healthy economic growth.

NYT »

Commerzbank Chief Declines to Extend Contract | The decision announced on Sunday appears to have come as a surprise to the supervisory board of Commerzbank, Germany's second-largest bank by assets, and leaves it without an apparent successor to Martin Blessing.
THE WALL STREET JOURNAL

Germany's Battered Regional Lenders Return to Risk | After several years of retrenchment, they are venturing back into riskier markets, diving into property markets like Rio de Janeiro and Uzbekistan.
THE WALL STREET JOURNAL

What a Bank's Pay Service Means for Silicon Valley | Silicon Valley enthusiasts are likely underestimating the ability of the big banks to defend their turf, John Carney and Dan Gallagher write in the Heard on the Street column.

THE WALL STREET JOURNAL

HEDGE FUNDS »

Hedge Funds End Run of Wrong-Way Gold Bets | After two months of a lackluster track record in gold, hedge funds finally backed away from bullish bullion bets just before the Federal Reserve drove the biggest weekly price drop in two months.
BLOOMBERG NEWS

I.P.O./OFFERINGS »

Asset Manager Could Raise Up to $2.2 Billion in I.P.O. | Amundi, an asset manager, was created in 2010 by a merger of the asset management operations of two French banks, Crédit Agricole and Société Générale.
NYT »

EMC May Float Software Company in I.P.O. Next Year | EMC and Dell are speeding up plans to take the software company Pivotal public and are now studying the option of an initial public offering in early 2016, ReCode reports, citing sources familiar with the discussions.

RECODE

C.I.C.C. of China Prices I.P.O. at Top of Range | China International Capital Corporation, the country's largest foreign-backed investment bank, priced the deal at 10.28 Hong Kong dollars, or about US$1.33, a share, The Wall Street Journal reports, citing people with knowlege of the deal.
THE WALL STREET JOURNAL

LEGAL/REGULATORY »

E.U. Opens Inquiry into Hutchison's Telefónica Deal | Europe's top antitrust regulator has opened an investigation into Telefonica's $14 billion sale of the British cellphone operator O2, warning that the mobile-telecom merger could lead to higher prices and less choice for British customers.
THE WALL STREET JOURNAL

Owner of The Orange County Register Files for Bankruptcy Protection | Rich Mirman, the chief executive of Freedom Communications and the publisher of the Register, said he was leading a group of investors hoping to buy the company at a court-supervised auction.
NYT »

U.S. and Britain to Hold Joint Financial Cybersecurity Exercise | Their governments will hold a joint exercise to test online security and information sharing arrangements involving global financial institutions, according to Britain's National Computer Emergency Response Team.
BLOOMBERG NEWS

Sign up for the DealBook Newsletter, delivered every morning and afternoon.

The New York Times | http://nyti.ms/1KMvBJg

DealB%k WITH FOUNDER ANDREW ROSS SORKIN

BEWARE THE FINE PRINT | PART I

Arbitration Everywhere, Stacking the Deck of Justice

By JESSICA SILVER-GREENBERG and ROBERT GEBELOFF OCT. 31, 2015

On Page 5 of a credit card contract used by American Express, beneath an explainer on interest rates and late fees, past the details about annual membership, is a clause that most customers probably miss. If cardholders have a problem with their account, American Express explains, the company "may elect to resolve any claim by individual arbitration."

Those nine words are at the center of a far-reaching power play orchestrated by American corporations, an investigation by The New York Times has found.

By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful

business practices.

Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.

Among the class actions thrown out because of the clauses was one brought by Time Warner customers over charges they said mysteriously appeared on their bills and another against a travel booking website accused of conspiring to fix hotel prices. A top executive at Goldman Sachs who sued on behalf of bankers claiming sex discrimination was also blocked, as were African-American employees at Taco Bell restaurants who said they were denied promotions, forced to work the worst shifts and subjected to degrading comments.

Some state judges have called the class-action bans a "get out of jail free" card, because it is nearly impossible for one individual to take on a corporation with vast resources.

Patricia Rowe of Greenville, S.C., learned this firsthand when she initiated a class action against AT&T. Ms. Rowe, who was challenging a $600 fee for canceling her phone service, was among more than 900 AT&T customers in three states who complained about excessive charges, state records show. When the case was thrown out last year, she was forced to give up and pay the $600. Fighting AT&T on her own in arbitration, she said, would have cost far more.

By banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination, court records show.

"This is among the most profound shifts in our legal history," William G. Young, a federal judge in Boston who was appointed by President Ronald Reagan, said in an interview. "Ominously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach."

More than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit card companies and retailers, according to interviews with coalition members and court records. Strategizing from law offices on Park Avenue and in Washington, members of the group came up with a plan to insulate themselves from the costly lawsuits. Their work culminated in two Supreme Court rulings, in 2011 and 2013, that enshrined the use of class-action bans in contracts. The decisions drew little attention outside legal circles, even though they upended decades of jurisprudence put in place to protect consumers and employees.

One of the players behind the scenes, The Times found, was John G. Roberts Jr., who as a private lawyer representing Discover Bank unsuccessfully petitioned the Supreme Court to hear a case involving class-action bans. By the time the Supreme Court handed down its favorable decisions, he was the chief justice.

Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.

The Times investigation was based on thousands of court records and interviews with hundreds of lawyers, corporate executives, judges, arbitrators and plaintiffs in 35 states.

Since no government agency tracks class actions, The Times examined federal cases filed between 2010 and 2014. Of 1,179 class actions that companies sought to push into arbitration, judges ruled in their favor in four out of every five cases.

In 2014 alone, judges upheld class-action bans in 134 out of 162 cases.

Some of the lawsuits involved small banking fees, including one brought by Citibank customers who said they were duped into buying insurance they were never eligible to use. Fees like this, multiplied over millions of customers,

amount to billions of dollars in profits for companies.

The data provides only part of the picture, since it does not capture the people who were dissuaded from filing class actions.

A spokeswoman for American Express said that over the last few years, banking regulators have examined the company's business practices, largely obviating the need for class actions. The regulators "have required significant remediations and large fines to address issues they found, with very little loss in value to the consumer," said the spokeswoman, Marina H. Norville.

Law enforcement officials, though, say they have lost an essential tool for uncovering patterns of corporate abuse. In a letter last year to the Consumer Financial Protection Bureau, attorneys general in 16 states warned that "unlawful business practices" could flourish with the proliferation of class-action bans.

In October, the bureau outlined rules to prevent financial firms from banning class actions. Almost immediately, the U.S. Chamber of Commerce galvanized forces to stop the move.

Andrew J. Pincus, a law partner at Mayer Brown in Washington who has represented companies that use arbitration, said class actions yielded little relief for plaintiffs. "Arbitration provides a way for people to hold companies accountable without spending a lot of money," Mr. Pincus said. "It's a system that can work."

Support for that assertion has been anecdotal, since there is no central database of arbitrations. But by assembling records from arbitration firms across the country, The Times found that between 2010 and 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less.

Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations in those five years, the data shows. Time Warner Cable, which has 15 million customers, faced seven.

One federal judge remarked in an opinion that "only a lunatic or a fanatic sues for $30."

Daniel Dempsey of Tucson admits he might be both. He has spent three years and $35,000 fighting Citibank in arbitration over a $125 late fee on his credit card. Mr. Dempsey, who previously worked in Citi's investment bank, said the erroneous charge ruined his credit score, and he vowed to continue until he was awarded damages.

The odds are not in his favor. Roughly two-thirds of consumers contesting credit card fraud, fees or costly loans received no monetary awards in arbitration, according to The Times's data.

The Supreme Court's rulings amounted to a legal coup for a group of corporate lawyers who figured out how to twin arbitration clauses with class-action bans. The lawyers represented clients that had paid billions of dollars to resolve class actions over the years. The lawsuits, companies said, were driven by plaintiffs' lawyers who stood to make millions of dollars. They said they had no choice but to settle even those cases that were without merit.

"These lawsuits were not about protecting consumers but about plaintiffs' lawyers," said Duncan E. MacDonald, a former general counsel for Citibank who was part of the group. "These were nuclear weapons aimed at companies."

Consumer advocates disagreed. A class action, they argued, allowed people who lost small amounts of money to join together to seek relief. Others exposed wrongdoing, including a case against auto dealers who charged minority customers higher interest rates on car loans.

The consequences of arbitration clauses can be seen far beyond the financial sector. Even lawsuits that would not have been brought by a class have been forced out of the courts, according to the Times investigation. Taking Wall Street's lead, businesses — including obstetrics practices, private schools and funeral homes — have employed arbitration clauses to shield themselves from liability, interviews and arbitration and court records show.

Thousands of cases brought by single plaintiffs over fraud, wrongful death and rape are now being decided behind closed doors. And the rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show.

The sharp shift away from the civil justice system has barely registered with Americans. F. Paul Bland Jr., the executive director of Public Justice, a national consumer advocacy group, attributed this to the tangle of bans placed inside clauses added to contracts that no one reads in the first place.

"Corporations are allowed to strip people of their constitutional right to go to court," Mr. Bland said. "Imagine the reaction if you took away people's Second Amendment right to own a gun."

A POWERFUL COALITION FORMS

At Italian Colors, a small restaurant tucked in an Oakland, Calif., strip mall, crayons and butcher paper adorn the tables, and a giant bottle of wine signed by the regulars sits in the entryway.

The laid-back vibe matches that of the restaurant's owner and chef, Alan Carlson, who prides himself on running an establishment that not only serves great food — one crowd-pleaser is the spaghetti Bolognese — but also doesn't take itself too seriously.

"I've been a ski bum, a line cook at a Greek diner and owned restaurants, and it's all been about having fun," Mr. Carlson said.

Somewhat of a libertarian, Mr. Carlson said he used to associate big lawsuits with "ambulance chasers." But that was before he needed one.

In 2003, he sued American Express on behalf of small businesses over steep processing fees. The fees — 30 percent higher than Visa's or MasterCard's — were hurting profits, but the restaurants could not afford to turn away diners who used American Express corporate cards.

It was a classic antitrust case: A big company was accused of using its monopoly power to charge unfair prices. But as Italian Colors v. American Express wended its way through the courts over the next 10 years, it became something far more momentous.

When the case was filed, the alliance of corporate interests, including credit card companies, national retailers and carmakers, had already been strategizing on how to eliminate class actions.

The effort was led by a lawyer at Ballard Spahr, a Philadelphia firm that represented big banks. The only thing the lawyer, Alan S. Kaplinsky, had in common with Mr. Carlson was a first name. Laser-focused and admirably relentless, Mr. Kaplinsky preferred his polo shirts buttoned up and tucked in.

Among his clients were Alabama money lenders accused of duping customers into taking out credit cards. Settlements were costly; trying the cases in front of sympathetic juries was worse.

Mr. Kaplinsky was searching for solutions when he remembered helping, as a young lawyer, a mutual savings and loan association draft an arbitration clause, he said in an interview. Banks could take it a step further, he thought, by writing class-action bans into the clauses.

"Clients were telling me they were getting killed by frivolous lawsuits and asking me what on earth could be done about it," Mr. Kaplinsky said.

He soon joined forces with lawyers at WilmerHale, a firm that had represented big banks. The group invited corporate legal teams in July 1999 to the law firm's New York offices to strategize about arbitration.

Attendees included representatives from Bank of America, Chase, Citigroup, Discover, Sears, Toyota and General Electric. At a subsequent teleconference, participants dialed in remotely using an easy-to-remember code: a-r-b-i-t-r-a-t-i-o-n.

Details of the meetings, and of more than a dozen others over the next three years, were culled from court records filed in a federal lawsuit in Manhattan and corroborated in interviews with lawyers who attended.

The records and interviews show that lawyers for the companies talked about arbitration clauses as a means to an end. The goal was to kill class actions and send plaintiffs' lawyers to the "employment lines."

Of the companies participating, only American Express and First USA had adopted an arbitration clause banning class actions; months later, Discover Bank added its own. By the time the meetings concluded, many of the companies had followed suit.

To keep track of whether judges upheld or rejected the class-action bans, Mr. Kaplinsky set up a scorecard. In the positive column were courts in Pennsylvania and Georgia, which upheld a clause used by some companies that gave consumers a small window to opt out of arbitration.

On the negative side were courts in California and one in Massachusetts, which struck down a class-action waiver in a Comcast cable contract. The judge found that the ban would shield the company "even in cases where it has violated the law."

Many judges across the country did not object to companies' requiring consumers to use arbitration. But they bridled at preventing those consumers from banding together to bring a case.

State law guaranteed citizens a means to defend their rights, and contracts that tried to take that away were "unconscionable," many judges said. In other words, class-action bans were unfair.

PETITIONING THE HIGHEST COURT

The push by Mr. Kaplinsky's group coincided with the Chamber of Commerce's own campaign against class actions, which they called a scourge on

companies.

In particular, the chamber pointed to an Illinois judge who had ordered Philip Morris to pay more than $10 billion for playing down risks associated with light cigarettes.

At the other end of the spectrum, the chamber also criticized so-called coupon lawsuits that generated big paydays for lawyers and little money for consumers. In one, against a television manufacturer accused of selling sets with fuzzy pictures, plaintiffs each received $25 or $50 coupons while their lawyers collected $22 million.

"It's not like the class-action system is a land of milk and honey," said Matthew Webb, a senior vice president at the Institute for Legal Reform, a chamber affiliate.

Once a state or federal judge certifies plaintiffs as a class, the suits are often unstoppable, the chamber has said — even if no one has been harmed. It has also said that plaintiffs' lawyers have brought cases in jurisdictions that were known to be friendly to class actions.

The chamber scored a victory when Congress passed the Class Action Fairness Act in 2005, which allowed companies to move cases into federal court and out of state courts considered hostile to corporate defendants.

Brian T. Fitzpatrick, a former clerk to Justice Antonin Scalia who teaches law at Vanderbilt University, said criticizing class actions for small awards was misleading. By their very nature, the lawsuits are intended to help large groups of people get back small individual amounts, Mr. Fitzpatrick said.

"Without a class action, if someone loses $500, they will not be able to do anything about it," he said.

Walter Hackett, who worked as a banker until 2007, said the real threat was cases that force companies to abandon lucrative billing practices.

"When banks make mistakes or do bad things, they tend to do them many times and to many people," said Mr. Hackett, who switched sides and became a consumer lawyer.

With state courts still blocking their efforts, Mr. Kaplinsky's group focused on getting a case to the Supreme Court.

Success hinged on the justices' applying the Federal Arbitration Act, a dusty 1925 law that formalized the use of arbitration for disagreements between businesses. Since the mid-1980s, the court had expanded the scope of the law to cover a range of disputes between companies and their employees and customers.

In fact, when Congress passed the act, lawmakers specifically emphasized that it was meant for businesses. Some raised concerns that companies would one day twist the law to impose arbitration on their workers, according to minutes from a congressional hearing.

The Supreme Court had never taken a case that centered on whether the Federal Arbitration Act allowed plaintiffs to form a class action.

A lawsuit in California's courts looked promising. The defendant, Discover Bank, was accused of charging unfair fees. A lower court upheld the bank's class-action ban, but the state's Court of Appeals negated it, accusing Discover of trying to grant itself a "license to push the boundaries of good business practices to their furthest limits."

Discover, one of the companies involved with Mr. Kaplinsky's group, then petitioned the Supreme Court to intervene. Representing the company was John G. Roberts Jr., at the time a prominent corporate defense lawyer.

With much at stake, Mr. Kaplinsky said, he spoke with Mr. Roberts and offered input on the brief Mr. Roberts was drafting to the Supreme Court. "He was a really nice guy," Mr. Kaplinsky said.

In the subsequent petition, Mr. Roberts wrote that the California appeals court had overstepped its bounds in violation of the Federal Arbitration Act. Allowing consumers to bring a case as a class, he wrote, would violate the "core purpose of the Arbitration Act: to enforce arbitration agreements according to their terms."

In essence, companies were using the law to push disputes out of court, and then imposing conditions that made it impossible to pursue those disputes in arbitration.

The Supreme Court declined to take up the case.

A VICTORY FOR CORPORATIONS

Determined, businesses sweetened the terms of arbitration to try to tempt the Supreme Court to wade into the fray, according to interviews. A clause drafted for AT&T, for example, promised to award certain customers who prevailed in arbitration at least $7,500 and to pay them double their legal fees.

In 2010, the Supreme Court agreed to hear a case. In AT&T v. Concepcion, customers said the company had promised them a free phone if they signed up for service, and then charged them $30.22 anyway.

Once again, the ruling involved the California courts and their rejection of a class-action ban as "unconscionable." By then, Mr. Roberts was chief justice.

Lawyers for both sides focused on the power of state courts.

Mr. Pincus, the Mayer Brown partner, represented AT&T and said that the Federal Arbitration Act superseded state law. In his main argument, Mr. Pincus accused state courts of making up special rules to discriminate against arbitration.

Deepak Gupta, who at age 34 was already known as a skilled appellate lawyer, worked for the plaintiffs. Mr. Gupta countered that the state courts

should be free to enforce their own laws.

"We thought we had a fighting chance if we argued the case was about the importance of states' rights," Mr. Gupta said in an interview.

Sitting in the gallery during opening arguments, Mr. Kaplinsky had a different take on the Roberts court, which seemed to favor arbitration. "We were pretty sure we had his vote," Mr. Kaplinsky said.

When the court ruled 5-4 in favor of AT&T, it largely skipped over Mr. Pincus's central argument.

"Requiring the availability of classwide arbitration," Justice Scalia wrote for the majority, "interferes with fundamental attributes of arbitration." The main purpose of the Federal Arbitration Act, he wrote, "is to ensure the enforcement of arbitration agreements according to their terms."

It was essentially the same argument Mr. Roberts had made as a lawyer in the Discover case.

With the Supreme Court marginalizing state law, the only option left for consumer advocates was to use a federal law to fight back.

Enter Mr. Carlson, the owner of Italian Colors, who was still fighting with American Express. After the company won the first round, Mr. Carlson's lawyers appealed, saying the class-action ban prevented merchants from exercising their federal rights to fight a monopoly.

"In a contest between just me — a restaurant in Oakland — and American Express, who do you think wins?" Mr. Carlson said.

Individually, none of the merchants could pay for a case that could cost more than $1 million in expert analysis alone.

The United States Court of Appeals for the Second Circuit, which included Sonia M. Sotomayor, ruled in the plaintiffs' favor in 2009.

American Express appealed again, and the case ultimately went to the Supreme Court. By the time the court heard it, in 2013, Ms. Sotomayor was a justice and recused herself.

The case centered on the Sherman Act, a muscular antitrust law that empowered citizens to take on monopolistic entities. Conservatives and liberals on previous Supreme Courts had consistently found that Americans should be guaranteed a way to exercise that right.

On June 20, 2013, the justices abandoned the precedent and ruled in favor of American Express.

Arbitration clauses could outlaw class actions, the court said, even if a class action was the only realistic way to bring a case. "The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim," Justice Scalia wrote.

Within hours, critics from across the political spectrum registered their disbelief on legal blogs. "No one thinks they got it right," Judge Young of Boston wrote later in a decision.

The most withering criticism came from Justice Elena Kagan, who wrote the dissenting opinion. "The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse," she wrote. She went on to say that her colleagues in the majority were effectively telling those victims, "Too darn bad."

Back in Oakland, Mr. Carlson got the news from his lawyer. The restaurateur said he had no choice but to continue accepting American Express. About a third of his customers use it, including many who run up bigger tabs because the cards are tied to expense accounts.

Mr. Carlson did make one change, though. He added a special bourbon cocktail to the menu. "I call it the Scalia," he said. "It's bitter and tough to swallow."

A CLAUSE FOR ALL OCCASIONS

Signs posted in a theater in Los Angeles and a hamburger joint in East Texas informed guests that, simply by walking in, they had agreed to arbitration. Consumer contracts with Amazon, Netflix, Travelocity, eBay and DirecTV now contain arbitration clauses. Even Ashley Madison, the online site for adulterers, requires that clients agree to them.

It is virtually impossible to rent a car without signing an agreement like Budget's, which reads, "Arbitration, No Class Actions." The same goes for purchasing just about anything online, which makes adding the clauses even easier.

The "birth of a thousand clauses," as one corporate lawyer put it, has caught millions of Americans by surprise.

James Pendergast had no idea he had agreed to arbitration until a class-action suit he filed on behalf of Sprint customers in Miami was thrown out of court. They had sued the company after noticing that their monthly bills contained roaming charges incurred in their homes.

The cost of arbitration was far more than the $20 charges Mr. Pendergast was contesting. And his lawyer, Douglas F. Eaton, advised him that winning would require high-tech experts at a six-figure bill.

If he lost, Mr. Pendergast might even have to pay for Sprint's lawyers. "Why would anyone risk that?" Mr. Eaton said.

The data on consumer arbitration obtained by The Times shows that Sprint, a company with more than 57 million subscribers, faced only six arbitrations between 2010 and 2014.

"Just imagine how many customers Sprint can take money from because of arbitration," Mr. Pendergast said.

Sprint declined to comment.

Few industries more keenly understood the potential of arbitration clauses than financial firms. A particularly bruising set of lawsuits starting in 2009 revealed an accounting device that more than a dozen banks employed on debit card transactions. Customers accused the banks of deducting big payments like monthly rent before taking out smaller charges like those for a pack of gum — even if the customer bought the gum first.

Changing the order of transactions, the lawsuits said, allowed the banks to increase the number of times they could charge overdraft fees, typically $35 a pop. Forced into court, the banks settled the cases for more than $1 billion.

At least seven of the banks in the overdraft cases have since added arbitration clauses, The Times found.

A lot is at stake. Since regulations prompted by the 2008 financial crisis crimped profits from trading and other risky activities, revenue from fees has become crucial to banks' profits.

Together, the three largest banks in the country — JPMorgan Chase, Bank of America and Wells Fargo — made more than $1 billion through overdraft fees in the first three months of 2015, according to the Federal Deposit Insurance Corporation.

In interviews, corporate executives and defense lawyers predicted that consumers would use arbitration once it became more familiar. They added that people could also get relief in small claims court, an option often not covered by arbitration clauses. But much like arbitration, few people go to small claims court, according to court data and interviews with judges.

While many companies also include an opt-out provision on arbitration — typically between 30 and 45 days — few consumers take advantage of it because they do not realize they have signed a clause to begin with, or do not understand its consequences, according to interviews with lawyers and plaintiffs.

Companies noted in interviews that arbitration incentivized them to resolve

many customer disputes informally.

Matthew Kilgore, of Rohnert Park, Calif., had no such luck.

A bread truck driver, Mr. Kilgore had dreamed of being a helicopter pilot ever since his father, who was in the Navy, took him to an air show when he was a child.

At 28, after his first daughter was born, he enrolled at Silver State Helicopters, a for-profit school in Oakland, taking out a $55,950 loan from Key Bank to pay for the program.

Less than halfway into training, Mr. Kilgore got a call from his flight instructor, who said Silver State was bankrupt. In disbelief, he drove to Oakland the next day to find the school's doors padlocked.

Key Bank and Student Loan Xpress, the school's preferred lenders, demanded that students pay back their loans for degrees they never received. About 2,700 students, including Mr. Kilgore, joined in class actions against the two lenders, accusing them of ignoring financial signs that the school was in trouble.

Student Loan Xpress, whose contracts did not have an arbitration clause, agreed to settle and forgave more than $100 million in student loans. Key Bank, whose contracts did, used the clause to get Mr. Kilgore's lawsuit dismissed in 2013.

Key Bank declined to comment on Mr. Kilgore's case, but said the bank had forgiven a portion of many students' loans.

Mr. Kilgore has not been able to pay back his loan, which with interest has swelled to $110,000. With his credit ruined, he and his wife cannot buy a house and he has abandoned his dream of becoming a pilot.

"It's the worst decision I ever made," he said.

BARGAINING POWER FADES

A hunter whose trophies are mounted on the walls of his chambers in Philadelphia's federal courthouse, Judge Berle M. Schiller prefers to use a bow to catch his prey. He has stalked deer through the Pennsylvania woods, tracked caribou in Quebec and pursued fleet-footed impala through South Africa.

Hunting with a rifle is "not a fair fight," said Judge Schiller, 71, who applies the same philosophy to his courtroom. Or at least he did until December 2013, when he had to rule on a lawsuit against the owner of 39 Applebee's restaurants in Pennsylvania.

The class action was brought by a former waiter on behalf of other low-wage employees. The waiter, Charles Walton, said Applebee's made workers sweep floors, stock silverware, scrub booths and empty trash cans, but did not pay them a fair wage for the extra tasks. The Applebee's employees, who relied on tips, often ended up making less than minimum wage. Employment lawyers said these practices were widespread in the restaurant industry.

The Rose Group, which owned the restaurants, defended its practices and urged Judge Schiller to dismiss the lawsuit since Mr. Walton signed an employee contract that included "a mutual promise to resolve claims by binding arbitration."

The request troubled Judge Schiller. "It is just these kinds of cases where it's important to have a jury," he said.

Applebee's franchises, run by different owners, have faced similar class actions in Alabama, Florida, Illinois, Kentucky, Missouri, New York, South Carolina and Rhode Island.

In 2014, Ronnie Del Toro brought a case while working as a waiter in the Bronx. Once again, Applebee's sought to have it thrown out.

In the meantime, Mr. Del Toro said the restaurant's owner and two hulking men, including one who went by "Big Drew," confronted him on the job. They

warned him to "stop being a little bitch" and withdraw his lawsuit, according to an application for a restraining order that Mr. Del Toro filed in a Bronx court.

"I didn't wait to hear anymore," said Mr. Del Toro, who moved to Brooklyn and got the restraining order.

Apple-Metro Inc., which owns the Bronx Applebee's, did not return requests for comment.

Mr. Del Toro now works at P.F. Chang's, another restaurant chain. He had to sign an employment contract with an arbitration clause to get the job.

Class-action bans are also widely included in the employment policies of retailers, including Macy's, Kmart and Sears.

Even some N.F.L. cheerleaders have had to agree to them. When a group of cheerleaders sued the Oakland Raiders over working conditions, they discovered that Roger Goodell, the N.F.L. commissioner, would preside over the arbitration. The Raiders later agreed to use someone else.

The use of class-action bans is spreading far beyond low-wage industries to Silicon Valley and Wall Street, where banks like Goldman Sachs require some executives to sign contracts containing the clauses.

Civil rights experts worry that discriminatory labor practices will go unchecked as class actions disappear.

Cases brought by African-American employees against Nike in 2003 and Walgreens in 2005, for example, led the companies to change their policies. The drug company Novartis paid $175 million to settle a class action brought by female employees over promotions and pay.

Jenny Yang, chairwoman of the Equal Employment Opportunity Commission, said arbitration allowed "root causes" to persist. Part of the problem, Ms. Yang said, is that arbitration keeps any discussion of discriminatory practices hidden from other workers "who might be experiencing

the same thing."

The point was not lost on Judge Schiller in Philadelphia, who has handled many employment cases in his 15 years on the bench. Once an arbitrator himself for disputes between companies, the judge said he had nothing against the forum, as long as both sides wanted to go.

Among thousands of employees at Applebee's franchises, only four took the company to arbitration between 2010 and 2014, according to The Times's review of arbitration data.

When lawyers for Applebee's argued before Judge Schiller to have the lawsuit thrown out, they assured him that Mr. Walton, who brought the suit, could have turned down the job and not agreed to the arbitration clause.

Judge Schiller was not persuaded. "To suggest that he had bargaining power because he could wait tables elsewhere ignores reality," the judge wrote in court papers. The Applebee's workers, the judge wrote, must "chew on a distasteful dilemma" of whether to "give up certain rights or give up the job."

Despite his own objections, Judge Schiller said he was bound by the Supreme Court decisions. In his ruling, he noted the "lamentable" state of legal affairs and dismissed the case.

With no other option, Mr. Walton took his case to arbitration. In April, he lost.

Michael Corkery contributed reporting.

A version of this article appears in print on November 1, 2015, on page A1 of the New York edition with the headline: Arbitration Everywhere, Stacking Deck of Justice .

The New York Times | http://nyti.ms/1KVPvRU

DealB%k WITH FOUNDER ANDREW ROSS SORKIN

BEWARE THE FINE PRINT | PART III

In Religious Arbitration, Scripture Is the Rule of Law

By MICHAEL CORKERY and JESSICA SILVER-GREENBERG NOV. 2, 2015

A few months before he took a toxic mix of drugs and died on a stranger's couch, Nicklaus Ellison wrote a letter to his little sister.

He asked for Jolly Ranchers, Starburst and Silly Bandz bracelets, some of the treats permitted at the substance abuse program he attended in Florida. Then, almost as an aside, Mr. Ellison wrote about how the Christian-run program that was supposed to cure his drug and alcohol problem had instead "de-gayed" him.

"God makes all things new," Mr. Ellison wrote in bright green ink. "The weirdest thing is how do I come out as straight after all this time?"

To his family and friends, Mr. Ellison's professed identity change was just one of many clues that something had gone wrong at the program, Teen Challenge, where he had been sent by a judge as an alternative to jail.

But when his family sued Teen Challenge in 2012 hoping to uncover what had happened, they quickly hit a wall. When he was admitted to the program, at age 20, Mr. Ellison signed a contract that prevented him and his family from taking the Christian group to court.

Instead, his claim had to be resolved through a mediation or arbitration process that would be bound not by state or federal law, but by the Bible. "The Holy Scripture shall be the supreme authority," the rules of the proceedings state.

For generations, religious tribunals have been used in the United States to settle family disputes and spiritual debates. But through arbitration, religion is being used to sort out secular problems like claims of financial fraud and wrongful death.

Customers who buy bamboo floors from Higuera Hardwoods in Washington State must take any dispute before a Christian arbitrator, according to the company's website. Carolina Cabin Rentals, which rents high-end vacation properties in the Blue Ridge Mountains of North Carolina, tells its customers that disputes may be resolved according to biblical principles. The same goes for contestants in a fishing tournament in Hawaii.

Religious arbitration clauses, including the one used by Teen Challenge, have often proved impervious to legal challenges.

Scientology forbids its followers from associating with former members who have been declared "suppressive persons," according to people who have left the church. But this year, a federal judge in Florida upheld a religious arbitration clause requiring Luis Garcia, a declared suppressive, to take his claim that the church had defrauded him of tens of thousands of dollars before a panel of Scientologists, instead of going to court.

Pamela Prescott battled for years to prove that she had been unjustly fired from a private school in Louisiana. The crux of her case — which wound through arbitration, a federal appeals court and state court — was references in her

employment contract to verses from the Bible.

In legal circles, those cases, along with the Ellison suit, are considered seminal examples of how judges have consistently upheld religious arbitrations over secular objections. They also reflect a battle in the United States over religious freedom, a series of skirmishes that include a Kentucky clerk's refusal to issue marriage licenses to same-sex couples and a Muslim woman's being passed over for a job at Abercrombie & Fitch because she wore a head scarf.

More than anything, the cases show the power of arbitration clauses. An investigation by The New York Times found that companies have used the clauses to create an alternate system of justice. Americans are being forced out of court and into arbitration for everything from botched home renovations to medical malpractice.

By adding a religious component, companies are taking the privatization of justice a step further. Proponents of religious arbitration said the process allowed people of faith to work out problems using shared values, achieving not just a settlement but often reconciliation.

Yet some lawyers and plaintiffs said that for some groups, religious arbitration may have less to do with honoring a set of beliefs than with controlling legal outcomes. Some religious organizations stand by the process until they lose, at which point they turn to the secular courts to overturn faith-based judgments, according to interviews and court records.

"Religious arbitration, at its best, ensures that people can resolve their disputes in accordance with deeply held religious beliefs," said Michael A. Helfand, an associate professor at Pepperdine University School of Law and an arbitrator in a rabbinical court in New York. "But both religious communities and courts need to make sure that the protections the law has put in place to make it a fair and unbiased process are actually implemented."

Few courts have intervened, saying the terms of arbitration are detailed in binding contracts signed by both parties. Some judges are also reluctant to risk

infringing the First Amendment rights of religious groups, according to a review of court decisions and interviews with lawyers.

Some plaintiffs counter that it is their First Amendment rights being infringed because they must unwillingly participate in what amounts to religious activity.

"I am being forced to go before a court run by a religion I no longer believe in," said Mr. Garcia, the former Scientologist. "How could that happen?"

LEST YE BE JUDGED

Religion has long been at the center of Pamela Spivey's life. She taught Sunday school, went to Bible-study camps and watched preachers on television.

So when her friends at the Park West Church in Knoxville, Tenn., suggested that she send her son Nick to Teen Challenge, she didn't ask many questions. "When you think Christian, you automatically think good," said Ms. Spivey, who goes by the name Cheri.

It certainly seemed better than the alternative. After breaking his probation sentence for drunken driving and crashing into four parked cars, Mr. Ellison faced a year in jail.

As an alternative, the prosecutor in the case agreed to Mr. Ellison's enrolling in Teen Challenge, a program that teaches participants to overcome addiction by studying the Bible and becoming more "Christ-like."

Teen Challenge was highlighted by President George W. Bush as a successful faith-based program that deserved federal funding. "Government can pass law and it can hand out money," Mr. Bush said in a 2006 speech. "But it cannot love."

Like his mother, Mr. Ellison was a committed Christian, but he was never comfortable in church, his family said. He loved to write songs and poems. He

had long bangs and was rarely without his Pokémon hat. But when he drank, they said, he could become violent and out of control.

Mr. Ellison was also openly gay — something his friends said was not easy in Knoxville public high school, where teachers were allowed to question evolution. "I was scared for him to be so open about it," said his friend Emily Kinser. "But I was also so proud of him."

Friends and family said Mr. Ellison drank and took drugs to escape the pressures of not fitting in. "Society is telling him he's not right," said Ms. Kinser. "He felt unwanted."

The night before he left for Teen Challenge in January 2011, Mr. Ellison was upbeat as he ate pizza with friends and family at his favorite restaurant in Knoxville.

His yearlong program in Pensacola, Fla., consisted of doing manual labor for many hours a day. Local landscaping companies, carwashes and a fish market employed the men, former participants and their families said. Teen Challenge said money from the "work assignments" helped cover some expenses and the men were not entitled to compensation, according to a participant consent form.

"This wasn't treatment, this was free labor," said Angie Helms, whose son Tyler attended Teen Challenge with Mr. Ellison.

Teen Challenge explained that working was a way for the men in the program to overcome their addiction. Work is "one of the central purposes for human existence," according to the consent forms.

Zack Sharp worked in the front office at Teen Challenge when Mr. Ellison attended. He also handed out over-the-counter medication and herbal remedies to the other men in the program. Mr. Sharp, who was 24 and had abused every substance "I could get my hands on," said he broke down and ingested some of the herbal pain medicine one day. He said he had a seizure, fell and dislocated

his shoulder.

Mr. Sharp said he connected with Mr. Ellison partly because they were both gay. Coming from a conservative family in West Virginia, Mr. Sharp said he was accustomed to people trying to "heal" him — through prayer, even exorcisms. At Teen Challenge, Mr. Sharp said, he knew how to play along with attempts to make him straight. But Mr. Ellison seemed more sensitive to the pressures, he said.

In a written report in March 2011, a counselor at Teen Challenge noted that Mr. Ellison had acknowledged having "homosexual relationships" and that he would bring this up in future sessions with Mr. Ellison to "see where he stands."

About two weeks later, the counselor wrote that Mr. Ellison was making progress: "He admits that it's wrong and had agreed to ask the Lord to help him with this issue on a daily basis."

Officials at Teen Challenge, reached by phone and email, declined to comment.

There were other, subtler pressures. Mr. Ellison told his family that someone had taunted him by leaving pantyhose on his bed. He got in trouble for things like not turning off the air-conditioning before going to church and for entering another student's bedroom, his disciplinary records show. For one infraction, he had to copy a passage from the Bible 200 times.

"It's ironic," Mr. Ellison wrote to his family. "The model Christians here are the ones I have the most trouble with. I want Matthew 7 tattooed onto my forehead." He was referring to the biblical passage, "Judge not, lest ye be judged."

Mr. Ellison was months into the program when he was sent home for disciplinary reasons, according to court papers.

Mr. Sharp, who credits Teen Challenge with helping him kick his addiction,

said the program was unfair to those who broke the rules. He recalled at one point watching Mr. Ellison pack his bag and walk out the front gate of the facility. No one was permitted to talk to him as he left.

Ms. Spivey bought him a bus ticket home. Back in Knoxville, Mr. Ellison turned himself in to the authorities, because leaving Teen Challenge was a violation of his court order.

A prosecutor permitted Mr. Ellison to return to the Pensacola program, but he soon got into trouble again. Teen Challenge agreed to move him to another facility in Jacksonville.

About a month later, Ms. Spivey got a call while she was out walking her dog. A manager at Teen Challenge said Mr. Ellison was intoxicated and was being taken to the hospital.

Ms. Spivey said she asked to speak with her son, but was told he did not want to talk to her.

When Ms. Spivey called the hospital, she was told that Mr. Ellison had never been "seen or admitted" there, according to the lawsuit she filed against Teen Challenge.

Mr. Ellison did not have a cellphone and he did not know anyone in Jacksonville, his family said.

"Please pray for my son," Ms. Spivey posted on Facebook that evening. "He is in Jacksonville, Florida, and he is missing."

Somehow, Mr. Ellison ended up at a CVS in downtown Jacksonville, where he met a woman who drove him to her apartment. The two stayed up that night drinking, according to a sheriff's report.

At about 4 p.m., the woman told investigators, she checked on Mr. Ellison, who was sleeping on her couch. He had stopped snoring and his skin was cold. An autopsy revealed cough medicine and methadone in his system.

Ms. Spivey was outside pacing when a Knoxville police cruiser pulled up to her home before dawn on Aug. 21, 2011. She knew right away that her son was dead.

With her children Cameron and Katie, Ms. Spivey made the eight-hour drive to Jacksonville.

"I just wanted to know the truth," she said.

THE PEACEMAKER METHOD

When word got out that some of the early Christians had strayed, the Apostle Paul was concerned. Among their grave offenses: incest, prostitution and suing one another in court.

Christians should not take their problems before "unbelievers," Paul wrote in his letter to the Corinthians. Disputes should be resolved inside the church.

Centuries later, Paul's writings inspired a group of lawyers in Los Angeles to develop the practice of Christian conciliation. The group's work ultimately gave rise to Peacemaker Ministries, a nonprofit that devised a legal process that draws on the Bible.

The peacemaker method is used by private schools, Christian lawyers and others. Clauses requiring Americans to use Christian arbitration instead of civil court now appear in thousands of agreements like the one Mr. Ellison signed with Teen Challenge.

"Our secular court system is darn good," said Bryce Thomas, a Christian conciliator in Hickory, N.C. "But it doesn't get into deep moral issues like sin and reconciliation."

A tall and outgoing lawyer, Mr. Thomas said he was called to leave his private practice and take up Christian conciliation full time. He works out of an office on the bottom floor of his house, where there is a crucifix on the wall near

a bust of Abraham Lincoln. To clear his head, he likes to stroll around a "peace path," a garden of rhododendrons and towering trees behind his house.

"The Lord spoke to me when I was 59 and said, 'I want you to give up your law practice and do peacemaking,'" said Mr. Thomas. "I said, 'Lord, how about when I am 65?' And he said, 'No, Bryce, I need you now.'"

That was in 2006, he said, not long after a federal appeals court upheld one of his rulings, establishing an important precedent for how Christian arbitration can trump secular objections.

The dispute involved Northlake Christian School in Covington, La., and Pamela Prescott, a teacher and principal for about 12 years who said she was fired with little explanation. She blamed her termination on a new school administrator, who she said had undermined her at every turn.

He also made her feel uncomfortable, she said. At one staff meeting, the administrator surprised Ms. Prescott by washing her feet, an apparent reference to Jesus' washing his disciples' feet.

"It was creepy," Ms. Prescott recalled. "I may be a Christian. But I am also a normal person."

The oldest of five girls, Ms. Prescott was raised in New Orleans. Her father is a lawyer, but Ms. Prescott came to believe that suing another Christian was wrong.

Still, her firing had damaged her reputation, she said. The school gave her a few days to leave campus and never fully explained the reason for her termination to students and parents. No other Christian schools would hire her. "It was like I had stolen something," she said.

Ms. Prescott said she had tried to engage the school to resolve the dispute informally, but it didn't work. Feeling she had no other choice, Ms. Prescott filed a federal lawsuit, claiming sexual harassment and discrimination by the school.

When word of her lawsuit got out, parents from the school and former colleagues avoided her at church and at the local Walmart, she said. Her pastor suggested she stop teaching Sunday school.

The school moved to compel Christian mediation and then arbitration, which was eventually held in a rented room at city hall in Mandeville, La. Mr. Thomas oversaw the proceedings, which resembled a civil trial with some exceptions. The arbitration began most days with a prayer. And when a teacher cried on the witness stand, Mr. Thomas allowed the woman and Ms. Prescott to hug.

The school argued that a survey of parents revealed unhappiness with Ms. Prescott's leadership. But only a small number of families had filled out the survey, and Ms. Prescott never saw the results.

Mr. Thomas dismissed Ms. Prescott's claims of harassment and gender discrimination. But he found that the school board had violated its own contract when it failed to provide Ms. Prescott with any feedback before firing her. The contract required the school to follow Matthew 18:15, which implores Christians to confront each other before raising their problems with anyone else.

"If your brother sins against you," the verse states, "go and tell him his fault between you and him alone."

Mr. Thomas awarded Ms. Prescott about $157,000 for lost income and damage to her reputation.

"This woman had no idea her job was in jeopardy," Mr. Thomas said in an interview. "They treated her badly."

In his ruling, he urged the two sides to reconcile in a way "that glorifies God." But Northlake was not ready to move on.

The school had required Ms. Prescott to agree to Christian arbitration as a condition of her hiring. But when Northlake lost, it appealed the arbitration

award in federal court, arguing that Mr. Thomas's ruling was inconsistent with Louisiana law.

The case dragged on for four more years. An appeals court in New Orleans ruled that it had no ground to overturn the Christian arbitrator. Northlake appealed the case all the way to the Supreme Court, which declined to hear it.

The current headmaster of Northlake said he could not comment on the case because it involved a previous administration. He added that the school still used Christian arbitration.

In the end, Ms. Prescott said she felt vindicated, despite having spent all but $8,000 of her settlement on legal costs.

"My faith is still strong," she said. "But I am more careful in dealing with Christians than I used to be. They are just people with no more ability to be good than anyone else."

THE PRICE OF ENLIGHTENMENT

By the time he left Scientology, Luis Garcia had signed off on two dozen arbitration clauses in agreements with the church, requiring him to settle any dispute before a panel of fellow Scientologists.

In just about every aspect of church life, including training and making donations, members must settle any issue internally rather than going to court.

Yet, there has never been an actual arbitration in the six-decade history of Scientology, according to court records and a lawyer for the church.

Mr. Garcia's may be the first.

An entrepreneur and a native of Madrid, Mr. Garcia said Scientology gave him the confidence to open a successful print shop and yogurt store in Orange County, Calif.

Mr. Garcia and his wife, Maria, dedicated years to Scientology, taking dozens of classes to try to reach enlightenment. He estimates that his family spent $2.3 million on courses, fees and donations.

In 2008, Mr. Garcia reached the highest level in Scientology, where he said all of one's past lives are supposed to be easily recalled. "But that didn't happen," he said. "That's when I began to question everything."

Mr. Garcia said he sent an email criticizing the church management to hundreds of Scientologists in November 2010. The church declared the Garcias "suppressives" and excommunicated them, according to a legal brief submitted by his lawyers.

Mr. Garcia said he wanted back the roughly $68,000 he had paid the church for training courses he never took and other expenses, according to his lawsuit. He also demanded that the church return $340,000 he said his family had given for the construction of a "Super Power" building in Clearwater, Fla.

Neither a spokeswoman from Scientology nor a church lawyer commented on the allegations in Mr. Garcia's lawsuit.

Mr. Garcia said he repeatedly felt pressured to give money to keep officials from blocking his path toward enlightenment or writing him up for an ethics violation.

One night in Clearwater, a church official asked Mr. Garcia for $65,000 to pay for a large cross that would sit atop the Super Power headquarters, according to the lawsuit. "She said it would be the Garcias' cross," Mr. Garcia recalled in an interview.

Another former Scientologist, Bert Schippers of Seattle, said he was told the cross would be dedicated in his honor after he agreed to make a donation.

Scientology moved to force Mr. Garcia's case into arbitration. The process seemed like a farce, he said. An arbitration run by a panel of Scientologists, his

lawyers argued, could not possibly be impartial. As a declared suppressive, Mr. Garcia was considered a pariah. Church members who interacted with him risked being harassed, according to court papers filed by his lawyers.

"The hostility of any Scientologists on that panel is not speculation," his lawyers argued. "It is church doctrine."

A church official testified that the panel would be instructed to act fairly. In a statement, a lawyer for the church said that even though Scientology had never conducted an arbitration, the church had a set of procedures it used to resolve disputes with members.

In his decision, Judge James D. Whittemore of Federal District Court in Tampa said the Garcias were bound by the terms of the contract they had signed with the church. While acknowledging that Mr. Garcia may have a "compelling" argument about the potential bias of the process, Judge Whittemore said the First Amendment prevented him from even considering the issue.

"It necessarily would require an analysis and interpretation of Scientology doctrine," wrote Judge Whittemore, who was appointed by President Bill Clinton. "That would constitute a prohibited intrusion into religious doctrine, discipline, faith and ecclesiastical rule, custom or law by the court."

Mr. Garcia said he was still deciding whether to go through with arbitration.

Judge Whittemore's ruling has also been a blow to the network of former Scientologists who have spoken out against the church.

"I do not understand why the courts are going along with it," Mr. Schippers said.

Mr. Garcia's lawyer, Theodore Babbitt, said the ruling might have scuttled many future lawsuits against the church. "Arbitration," Mr. Babbitt said, "is inoculating the Church of Scientology from liability."

THE ELUSIVE TRUTH

In Jacksonville, Ms. Spivey's family tried piecing together her son's final hours, picking up clues wherever they could.

At Teen Challenge, they pressed the staff for the name of the employee who supposedly took Mr. Ellison to the hospital. The treatment facility declined to identify him, the family said.

The local CVS where Mr. Ellison was seen hours before his death allowed the family to review video from its security cameras, which showed Mr. Ellison walking out of the store with a bottle of soda around 1 a.m.

The woman who picked him up near the CVS said he wanted to call home, but her cellphone was out of minutes.

Most of the family's questions remained unanswered. They still did not know whether the pressure Mr. Ellison felt at Teen Challenge about being gay exacerbated his drug abuse. Or how he ended up on his own in a strange city with no money or cellphone.

Ms. Spivey said she was convinced that only a lawsuit could force Teen Challenge to explain what had happened. But the contract that Mr. Ellison signed when he enrolled in the program stated that any dispute had to go to Christian conciliation.

His family said they thought it was hypocritical that Teen Challenge was willing to collect food stamp subsidies to feed participants in the program, but insisted on the separation of church and state when it came to their legal case.

The conciliation would start as a mediation. If mediation fell apart, the case would move to formal arbitration, a process that could include prayer.

Ms. Spivey said even though her faith had deepened since her son's death, she did not want to take part in an arbitration involving religion. "I didn't want to do worksheets on the Bible and then kiss and make up," she said. "I wanted to

find out what happened to Nick."

In an appeal filed in Florida state court, Ms. Spivey's lawyer, Bryan S. Gowdy, focused on the First Amendment's protection of religious freedom — including the right not to exercise it.

Mr. Gowdy quoted James Madison, who wrote that the "religion then of every man must be left to the conviction and conscience of every man."

But the judges in the First District Court of Appeals were satisfied that there was no constitutional conflict.

The appeals court found that the rules of Christian conciliation were not that different from those governing secular arbitration and included only a "scattering of religious elements," which served to "solemnize the process and to promote and advance conciliation as a spiritual goal."

If she still had a problem, the court ruled, Ms. Spivey could let someone else represent Mr. Ellison's estate.

Ms. Spivey decided to go ahead with the mediation, though she said she worried how Christian panelists would view her son because of his homosexuality and drug addiction.

Peacemaker Ministries, which would run the process, said the mediation would incorporate prayer and scripture, according to a motion Ms. Spivey's attorney filed in Florida circuit court. Lawyers for both sides were also told that if they attended, they could not advocate on their clients' behalf. Ms. Spivey had to pay a $5,000 retainer and a $750 fee to Peacemaker Ministries, her lawyer said in court papers.

Dale Pyne, chief executive of Peacemaker Ministries, said he understood Ms. Spivey's reluctance about conciliation since it was her son who had signed the arbitration agreement, not her. But he said the process helped "those in conflict to reconcile their issues and their relationships." He added that "most of

that is highly unlikely in a court process."

Last year, Ms. Spivey decided to settle with Teen Challenge. She said she felt she was neglecting her other two children by obsessing over the case, which had gone on for more than two years. She declined to disclose the settlement amount.

Ms. Spivey said that without a court trial, she was never able to learn what happened to her son, not just on the night he died, but during his stay at Teen Challenge.

His family still does not know why he wrote the letter saying he was no longer gay, or whether he meant it. "I don't actually believe it," his sister Katie said.

Mr. Ellison did not mail the letter. His family found it in his duffel bag at the apartment where he died. It was mixed in with clothes, family pictures and his Bible.

A version of this article appears in print on November 3, 2015, on page A1 of the New York edition with the headline: When Scripture Is the Rule of Law.

The New York Times | http://nyti.ms/1kkstih

DealB%k WITH FOUNDER ANDREW ROSS SORKIN

BEWARE THE FINE PRINT | PART II

In Arbitration, a 'Privatization of the Justice System'

JESSICA SILVER-GREENBERG and MICHAEL CORKERY NOV. 1, 2015

Deborah L. Pierce, an emergency room doctor in Philadelphia, was optimistic when she brought a sex discrimination claim against the medical group that had dismissed her. Respected by colleagues, she said she had a stack of glowing evaluations and evidence that the practice had a pattern of denying women partnerships.

She began to worry, though, once she was blocked from court and forced into private arbitration.

Presiding over the case was not a judge but a corporate lawyer, Vasilios J. Kalogredis, who also handled arbitrations. When Dr. Pierce showed up one day for a hearing, she said she noticed Mr. Kalogredis having a friendly coffee with the head of the medical group she was suing.

During the proceedings, the practice withheld crucial evidence, including

audiotapes it destroyed, according to interviews and documents. Dr. Pierce thought things could not get any worse until a doctor reversed testimony she had given in Dr. Pierce's favor. The reason: Male colleagues had "clarified" her memory.

When Mr. Kalogredis ultimately ruled against Dr. Pierce, his decision contained passages pulled, verbatim, from legal briefs prepared by lawyers for the medical practice, according to documents.

"It took away my faith in a fair and honorable legal system," said Dr. Pierce, who is still paying off $200,000 in legal costs seven years later.

If the case had been heard in civil court, Dr. Pierce would have been able to appeal, raising questions about testimony, destruction of evidence and potential conflicts of interest.

But arbitration, an investigation by The New York Times has found, often bears little resemblance to court.

Over the last 10 years, thousands of businesses across the country — from big corporations to storefront shops — have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.

The change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court.

"This amounts to the whole-scale privatization of the justice system," said Myriam Gilles, a law professor at the Benjamin N. Cardozo School of Law. "Americans are actively being deprived of their rights."

All it took was adding simple arbitration clauses to contracts that most employees and consumers do not even read. Yet at stake are claims of medical

malpractice, sexual harassment, hate crimes, discrimination, theft, fraud, elder abuse and wrongful death, records and interviews show.

The family of a 94-year-old woman at a nursing home in Murrysville, Pa., who died from a head wound that had been left to fester, was ordered to go to arbitration. So was a woman in Jefferson, Ala., who sued Honda over injuries she said she sustained when the brakes on her car failed. When an infant was born in Tampa, Fla., with serious deformities, a lawsuit her parents brought against the obstetrician for negligence was dismissed from court because of an arbitration clause.

Even a cruise ship employee who said she had been drugged, raped and left unconscious in her cabin by two crew members could not take her employer to civil court over negligence and an unsafe workplace.

For companies, the allure of arbitration grew after a 2011 Supreme Court ruling cleared the way for them to use the clauses to quash class-action lawsuits. Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show.

Still, there are thousands of Americans who — either out of necessity or on principle — want their grievances heard and have taken their chances in arbitration.

Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported. The secretive nature of the process makes it difficult to ascertain how fairly the proceedings are conducted.

Some plaintiffs said in interviews that arbitration had helped to resolve their disputes quickly without the bureaucratic headaches of going to court. Some said the arbitrators had acted professionally and without bias.

But The Times, examining records from more than 25,000 arbitrations between 2010 and 2014 and interviewing hundreds of lawyers, arbitrators,

plaintiffs and judges in 35 states, uncovered many troubling cases.

Behind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused of wrongdoing.

Winners and losers are decided by a single arbitrator who is largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.

"What rules of evidence apply?" one arbitration firm asks in the question and answer section of its website. "The short answer is none."

Like the arbitrator in Dr. Pierce's case, some have no experience as a judge but wield far more power. And unlike the outcomes in civil court, arbitrators' rulings are nearly impossible to appeal.

When plaintiffs have asked the courts to intervene, court records show, they have almost always lost. Saying its hands were tied, one court in California said it could not overturn arbitrators' decisions even if they caused "substantial injustice."

Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators. In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.

Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company's lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and

defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)

Other potential conflicts are more explicit. Arbitration records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014.

"Private judging is an oxymoron," Anthony Kline, a California appeals court judge, said in an interview. "This is a business and arbitrators have an economic reason to decide in favor of the repeat players."

With so much latitude, some organizations are requiring their employees and customers to take their disputes to Christian arbitration. There, the proceedings can incorporate prayer, and arbitrators from firms like the Colorado-based Peacemaker Ministries can consider biblical scripture in determining their rulings.

The firms that run the arbitration proceedings say the process allows plaintiffs to have a say in selecting an arbitrator who they think is most likely to render a fair ruling.

The American Arbitration Association and JAMS, the country's two largest arbitration firms, said in interviews that they both strived to ensure a professional process and required their arbitrators to disclose any conflicts of interest before taking a case.

The American Arbitration Association, a nonprofit, said it allowed plaintiffs to reject arbitrators on the ground of potential bias.

JAMS, a for-profit company, said it did the same and put extra protections in place for consumers and employees. "Their core value is neutrality — their business depends on it," Kimberly Taylor, chief operating officer of JAMS, said of its arbitrators.

But in interviews with The Times, more than three dozen arbitrators

described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.

Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. "Why would an arbitrator cater to a person they will never see again?" she said.

Arbitration proved to be devastating to Debbie Brenner of Peoria, Ariz., who believes she did not get a fair shake in her fraud case against a for-profit school chain that nearly left her bankrupt. In a rambling decision against Ms. Brenner that ran to 313 pages, the arbitrator mused on singing lessons, Jell-O and Botox.

"It was a kangaroo court," Ms. Brenner said. "I can't believe this is America."

FROM CRADLE TO GRAVE

An ob-gyn's office in Tampa, Fla., now informs expectant mothers that if problems arise — a botched vaginal delivery, a flawed C-section — the patients cannot take their grievances to court. Neither can the families of loved ones who are buried at Evergreen Cemetery outside Chicago, which also requires disputes to be resolved privately.

From birth to death, the use of arbitration has crept into nearly every corner of Americans' lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house and placing a parent in a nursing home.

The first contact point can arise prenatally, when obstetricians seek to limit liability by requiring patients to sign agreements containing arbitration clauses as a condition of treating them.

Leydiana Santiago of Tampa was devastated when her baby was born in November 2011 with vision and hearing loss and thumbs that needed to be amputated. Ms. Santiago blamed her doctor at Lifetime Obstetrics and

Gynecology for the problems. She said her doctor mistakenly determined that she had miscarried, court records show. As a result, Ms. Santiago resumed taking medication for lupus — medication that can cause birth defects.

Women's Care Florida, which owns Lifetime, declined to comment on the case.

In April 2014, a Florida appeals court upheld a decision to force Ms. Santiago into arbitration. "I obey what appears to be the rule of law without any enthusiasm," wrote one of the judges, Chris Altenbernd, adding that he feared "I have disappointed Thomas Jefferson and John Adams."

Students from high school to graduate school can likewise find themselves caught in the gears. Lee Caplin discovered this when he enrolled his 15-year-old son at Harvard-Westlake, a private school in Los Angeles.

His son said he was bullied and harassed, and received graphic and profane death threats, including some that came from school computers. Among the threats, court records show, were, "I'm going to pound your head with an ice pick" and "I am looking forward to your death."

Harvard-Westlake declined to comment on the case, but said that it "takes allegations of bullying very seriously."

Afraid for his life, the teenager dropped out and the family relocated. When Mr. Caplin sued the school for failing to protect his son, he learned that even civil rights cases can be blocked from court.

The arbitrator ruled in favor of Harvard-Westlake, saying the plaintiff did not sufficiently prove that the school was "negligent."

"It's not a system of justice; it's a rigged system of expediency," Mr. Caplin said.

Many companies give people a window — typically 30 to 45 days — to opt out of arbitration. Few people actually do, either because they do not realize they

have signed a clause, or do not understand its consequences, according to plaintiffs and lawyers.

Cliff Palefsky, a San Francisco lawyer who has worked to develop fairness standards for arbitration, said the system worked only if both sides wanted to participate. "Once it's forced, it is corrupted," he said.

Graduates entering the job market can confront even more challenging terrain. For many people, when the choice is between giving up the right to go to court or the chance to get a job, it is not a choice at all.

That is why a housekeeper in suburban Virginia said she had to sign an employment agreement with an arbitration clause that her employer had printed from the Internet. She said she regretted it later when he sexually harassed her and she had no legal recourse in court.

Circumstances are not any easier on the home front, where residents like Jordan and Bob Fogal of Houston can become stuck with a construction nightmare.

Not long after they moved into their townhouse, more than 100 gallons of water crashed through their dining room ceiling.

The couple won when they took their builder to arbitration, but they ended up with only $26,000, about a fifth of what they needed to make repairs. Unable to come up with the rest of the money and sickened from pervasive mold, the Fogals moved out.

The perils of using a secretive system can be even more acute in old age, as illustrated by numerous cases involving nursing homes.

Daniel Deneen said he was incredulous when he got a fax from a nursing home in McLean, Ill., about a client for whom he was a legal guardian.

The client, a 90-year-old woman with dementia, needed prompt care for bed sores. Unless Mr. Deneen agreed to arbitration, he said, doctors working at

the nursing home would not treat her there.

"It was the most obnoxious, unfair document I have ever been presented with in over 30 years of practicing law," Mr. Deneen said.

Once contracts with arbitration clauses are signed, nursing homes can also use them to force civil cases involving sexual assault and wrongful death out of the courts.

In May 2014, a woman with Alzheimer's was sexually assaulted twice in two days by other residents at the Bella Vista Health Center, a nursing home in Lemon Grove, Calif., according to an investigation by the state's department of public health. The investigation also found that the nursing home "failed to protect" the woman.

A lawyer for Bella Vista, William C. Wilson, said the company disputed the state's findings and that the staff "makes the health and safety of its patients their top priority."

After unsuccessfully fighting to have the arbitration clause in their agreement voided, the woman's family settled with Bella Vista.

Between 2010 and 2014, more than 100 cases against nursing homes for wrongful death, medical malpractice and elder abuse were pushed into arbitration, according to The Times's data.

Roschelle Powers said she found her mother, Roberta, who had diabetes and dementia, vomiting and disoriented one day in May 2013 at a Birmingham, Ala., nursing home. Ms. Powers said she alerted the home, Greenbriar at the Altamont, specifically mentioning pills she had found in her mother's hand, according to a deposition.

A few days later, Roberta Powers's son, Larry, said he called 911 after finding her alone and unresponsive.

A day after the ambulance took his mother to the hospital, she was dead. An

autopsy showed that the 83-year-old Mrs. Powers had more than 20 times the recommended dose of metformin, a diabetes medication, in her blood.

During arbitration, the nursing home acknowledged the blood test results but said they had been the result of renal dysfunction. The arbitrator ruled in favor of Greenbriar. "There was no evidence to support the allegation that Ms. Powers somehow gained access to, and then took, more than her prescribed amount of metformin," Joseph L. Reese Jr., a lawyer for the nursing home, said.

Perry Shuttlesworth, the family's lawyer, said that "it was only because of forced arbitration that the nursing home got away with this." He added that "a jury would not have let this happen. "

Even when plaintiffs prevail in arbitration, patterns of wrongdoing at nursing homes are kept hidden from prospective residents and their families.

Recognizing the issue, 34 United States senators have asked the federal government to deny Medicare and Medicaid funding to nursing homes that employ arbitration clauses. "All too often, only after a resident has suffered an injury or death," the senators wrote in a letter in September, "do families truly understand the impact of the arbitration agreement they have already signed."

Sometimes, even death provides no escape.

Willie K. Hamb was at the funeral for her husband at Evergreen Cemetery outside Chicago when she discovered that his coffin would not be buried in the shady plot she said she had requested.

Instead, the cemetery informed Mrs. Hamb that it would place the coffin in a wall crypt until the more than $56,000 marble mausoleum they said she had agreed to in a contract was complete.

Mrs. Hamb, 72 and retired, said all she could afford for her husband, known to his friends as Pudden, was the simple plot and service she had already paid $12,461 to arrange.

Service Corporation International, one of the nation's largest providers of funeral services and the owner of Evergreen Cemetery, declined to comment.

The dispute will be resolved in a coming arbitration. Mrs. Hamb's lawyer, Michelle Weinberg, said she was not optimistic that her client would prevail, especially since the arbitrator is a bank compliance officer.

A CRASH COURSE

Debbie Brenner enrolled in the surgical technician program at Lamson College near Phoenix in her 40s with high hopes of reinventing herself. She spent hours learning about the tools used in surgical procedures as if mastering the movements of the waltz, each handoff in graceful succession: scalpel, retractor, clamp, sutures.

Whether the instruments featured in lessons were real, or just depictions in photographs, depended on what teachers could round up on any given day. Lamson students became accustomed to empty surgical trays and anatomical mannequins missing their plastic replicas of organs. One enterprising instructor fashioned hearts, livers and kidneys out of felt and string.

Students considered that instructor to be one of Lamson's better faculty members, more than a dozen of them said in interviews. Some teachers routinely disappeared from class, leaving tests conspicuously on the desks to be copied, they said.

Ms. Brenner, a devout Christian, said she prayed that the program's shortcomings would not diminish her job prospects. She said the enrollment officer who persuaded her to sign up for the $24,000-a-year program had promised her she would easily find a job after graduation.

When Ms. Brenner completed the program with high marks in 2009, she said, Lamson failed to find her an internship. She was volunteering at Maricopa County Hospital when, she said, a surgical technician told her that most hospitals refused to hire Lamson students because they were so poorly trained.

According to students, some did not even know how to properly sterilize their hands before surgery.

"It was a joke," Ms. Brenner said. "The school's brochure was all about making our dreams come true, but this was a nightmare."

Soon after, Lamson shut down the program when it was unable to place enough of its students in internships. In March 2011, Ms. Brenner and other students filed a lawsuit against the school and its owner, Delta Career Education Corporation, accusing them of fraud. The case was promptly dismissed because of an arbitration clause in the students' enrollment agreements.

Ms. Brenner, confident she could prevail in arbitration, persuaded her husband to withdraw $12,000 from his retirement account to put toward legal fees.

By the time her case was heard in March 2013, the attorney general of Arizona had sued another Delta school for defrauding students in a criminal justice program. And a federal class-action lawsuit in Michigan had accused a Delta school of defrauding students out of millions of dollars in student loans. The company did not admit wrongdoing, but settled both lawsuits for a total of more than $8 million.

Arbitration would prove to be more advantageous for the company, records and interviews show.

Ms. Brenner's case was conducted in the Phoenix office of Gordon & Rees, one of two big law firms defending Lamson and Delta. The arbitrator, Dennis Negron, was a corporate lawyer and real estate broker who had written papers on how to limit liability because "last on your list of desires is to be sued."

As in most arbitrations, lawyers for both sides chose Mr. Negron from a list provided by an arbitration firm, in this case the American Arbitration Association.

Lawyers for Ms. Brenner and four other students grouped into the same arbitration said they anticipated victory because they believed that the evidence was overwhelmingly in their favor.

Even the school's former head of admissions, Jeff Bing, testified that he had been instructed by his superiors at Delta to increase enrollment at all costs.

Mr. Bing said it was widely known that the admissions staff, whose compensation was tied to the number of students recruited, was "overpromising" on jobs. He testified that the job placement rate for graduates was around 20 percent.

To keep the enrollment numbers up, Mr. Bing said, virtually anyone who applied was accepted. He added in an interview that the only qualification was "a pulse."

Mr. Bing and other former employees recounted in interviews with The Times how profits drove most of the decision-making at Lamson.

As administrators were pressured to increase enrollment, instructors were drilled on the importance of student retention — which factored into federal aid disbursements.

Penny Philippi and Karen Saliski, two former teachers, said they were directed not to flunk anyone, including a student who skipped classes to "chase U.F.O.s."

Delta declined to comment.

During the arbitration proceedings, even a witness for the defense expressed concerns about Lamson. Kelly Harris, who headed the school's surgical technician program, defended the quality of education offered at Lamson but said the school enrolled too many students.

Ms. Harris, in an interview with The Times, said she warned school executives that the practice would dilute the quality of training, flood the job

market and make the Lamson degree worthless. They scoffed, she said.

"It broke my heart to see these kids treated as dollar signs," Ms. Harris said.

She was one of only two people who testified for the defense. Lawyers for Lamson and Delta denied that enrollment officers guaranteed jobs, adding that they were hard to come by during the recession.

In the end, Mr. Negron ruled in favor of Lamson and Delta.

Mr. Negron found that the defense had presented the "two most credible witnesses" and praised for-profit education, according to his decision, a copy of which was obtained by The Times. Mr. Negron did not return repeated calls and emails seeking comment.

"There is little doubt that for-profit technical or specialty schools, like the college, serve an invaluable service to the public," he wrote in his decision.

Mr. Negron found that the college did not make job promises during the enrollment process but may have engaged in "puffery, which each of the adult students should have known and recognized as puffery." Chiding Ms. Brenner for not being a savvier shopper, he said she had approached her decision to enroll in a "most cavalier manner" as if "buying a Snickers at the local market."

His opinion was not shared by arbitrators who ruled in favor of students in two nearly identical cases against Lamson, documents obtained by The Times show.

If the cases had played out in court, legal experts said, Ms. Brenner could have referred to those decisions to appeal Mr. Negron's.

As it stands, Ms. Brenner lost far more than the case.

Mr. Negron decided that she and the other students should pay the defense's $354,210.77 legal bill because of the "hardship" the students had inflicted on Lamson and Delta.

"I felt like I had been sucker-punched," Ms. Brenner said.

REPEAT BUSINESS

Fearful of losing business, some arbitrators pass around the story of Stefan M. Mason as a cautionary tale. They say Mr. Mason ruled in favor of an employee in an age discrimination suit, awarding him $1.7 million, and was never hired to hear another employment case.

While Mr. Mason's experience was rare, more than 30 arbitrators said in interviews that the pressure to rule for the companies that give them business was real.

Companies can even specify in contracts with their customers and employees that all cases will be handled exclusively by one arbitration firm. Big law firms also bring repeat business to individual arbitrators, according to documents and interviews with arbitrators. Jackson Lewis, for example, had 40 cases with the same arbitrator in San Francisco over a five-year period.

The JAMS arbitrator in an employment case brought by Leonard Acevedo of Pomona, Calif., against the short-term lender CashCall simultaneously had 28 other cases involving the company, according to documents disclosed by JAMS during the proceedings.

"This whole experience burst my bubble," said Mr. Acevedo, a 57-year-old veteran, who lost his case in October 2014. His lawyer, James Cordes, offered a more critical take. "It clearly appears that the arbitrator was working for the company," Mr. Cordes said. "And he disregarded evidence to hand a good result to his client."

JAMS denied that its arbitrator had been influenced by CashCall.

Linda S. Klibanow, an employment arbitrator in Pasadena, Calif., acknowledged the potential for conflicts of interest but said she thought most arbitrators, many of whom are retired judges, could remain fair.

"I think that most arbitrators put themselves in the place of a jury as the fact finder and try to render a fair decision," Ms. Klibanow said.

Elizabeth Bartholet, an arbitrator in Boston who has handled more than 100 cases, agreed that many arbitrators had good intentions, but she said that the system made it challenging to remain unbiased. Ms. Bartholet recalled that after a company complained that she had scheduled an extra hearing for a plaintiff, the arbitration firm she was working with canceled it behind her back.

A year later, she said, she was at an industry conference when she overheard two people talking about how an arbitrator in Boston had almost cost that firm a big client. "It was a conference on ethics, if you can believe it," said Ms. Bartholet, a law professor at Harvard.

Deborah Pierce, the doctor in Philadelphia, said she did not expect to confront in arbitration the very problem she was suing her employer over: an uneven playing field.

Dr. Pierce decided to go to arbitration after learning that another female doctor had been denied a partnership by her employer, Abington Emergency Physician Associates, under similar circumstances. She also had the backing of the Equal Employment Opportunity Commission, which found that there was probable cause that Dr. Pierce had been discriminated against.

The practice is now under different management.

Dr. Pierce needed to prove the partners' states of mind when they dismissed her, or debunk whatever reason the company gave for letting her go. Both required access to the practice's records and witnesses.

Once in arbitration, she and her lawyers said, the arbitrator gave them a weekend to review hundreds of records the defense originally withheld.

Vasilios J. Kalogredis, the arbitrator, said he could not comment on details of the proceedings because they were confidential, though he emphasized that

"everything was handled properly."

For Dr. Pierce, the most astounding moment came when her lawyers asked Mr. Kalogredis to impose sanctions on the defense for breaking the rules of discovery and destroying evidence. He fined the defense $1,000 after investigating the matter, then billed Dr. Pierce $2,000 for the time it took him to look into it.

"I kept thinking, 'I'm not a lawyer, but this can't be right,' " said Dr. Pierce, who had to take out a second mortgage to cover her legal expenses, which included a $58,000 bill from Mr. Kalogredis.

After the ruling, Dr. Pierce's lawyers wrote to Mr. Kalogredis's arbitration firm questioning his qualifications. The firm, American Health Lawyers Association, responded that it was not its responsibility to verify the "abilities or competence" of its arbitrators.

Robert Gebeloff contributed reporting.

A version of this article appears in print on November 2, 2015, on page A1 of the New York edition with the headline: A 'Privatization of the Justice System'.

The New York Times | http://nyti.ms/1KVPvRU

DealB%k WITH FOUNDER ANDREW ROSS SORKIN

BEWARE THE FINE PRINT | PART III

In Religious Arbitration, Scripture Is the Rule of Law

By MICHAEL CORKERY and JESSICA SILVER-GREENBERG NOV. 2, 2015

A few months before he took a toxic mix of drugs and died on a stranger's couch, Nicklaus Ellison wrote a letter to his little sister.

He asked for Jolly Ranchers, Starburst and Silly Bandz bracelets, some of the treats permitted at the substance abuse program he attended in Florida. Then, almost as an aside, Mr. Ellison wrote about how the Christian-run program that was supposed to cure his drug and alcohol problem had instead "de-gayed" him.

"God makes all things new," Mr. Ellison wrote in bright green ink. "The weirdest thing is how do I come out as straight after all this time?"

To his family and friends, Mr. Ellison's professed identity change was just one of many clues that something had gone wrong at the program, Teen Challenge, where he had been sent by a judge as an alternative to jail.

But when his family sued Teen Challenge in 2012 hoping to uncover what had happened, they quickly hit a wall. When he was admitted to the program, at age 20, Mr. Ellison signed a contract that prevented him and his family from taking the Christian group to court.

Instead, his claim had to be resolved through a mediation or arbitration process that would be bound not by state or federal law, but by the Bible. "The Holy Scripture shall be the supreme authority," the rules of the proceedings state.

For generations, religious tribunals have been used in the United States to settle family disputes and spiritual debates. But through arbitration, religion is being used to sort out secular problems like claims of financial fraud and wrongful death.

Customers who buy bamboo floors from Higuera Hardwoods in Washington State must take any dispute before a Christian arbitrator, according to the company's website. Carolina Cabin Rentals, which rents high-end vacation properties in the Blue Ridge Mountains of North Carolina, tells its customers that disputes may be resolved according to biblical principles. The same goes for contestants in a fishing tournament in Hawaii.

Religious arbitration clauses, including the one used by Teen Challenge, have often proved impervious to legal challenges.

Scientology forbids its followers from associating with former members who have been declared "suppressive persons," according to people who have left the church. But this year, a federal judge in Florida upheld a religious arbitration clause requiring Luis Garcia, a declared suppressive, to take his claim that the church had defrauded him of tens of thousands of dollars before a panel of Scientologists, instead of going to court.

Pamela Prescott battled for years to prove that she had been unjustly fired from a private school in Louisiana. The crux of her case — which wound through arbitration, a federal appeals court and state court — was references in her

employment contract to verses from the Bible.

In legal circles, those cases, along with the Ellison suit, are considered seminal examples of how judges have consistently upheld religious arbitrations over secular objections. They also reflect a battle in the United States over religious freedom, a series of skirmishes that include a Kentucky clerk's refusal to issue marriage licenses to same-sex couples and a Muslim woman's being passed over for a job at Abercrombie & Fitch because she wore a head scarf.

More than anything, the cases show the power of arbitration clauses. An investigation by The New York Times found that companies have used the clauses to create an alternate system of justice. Americans are being forced out of court and into arbitration for everything from botched home renovations to medical malpractice.

By adding a religious component, companies are taking the privatization of justice a step further. Proponents of religious arbitration said the process allowed people of faith to work out problems using shared values, achieving not just a settlement but often reconciliation.

Yet some lawyers and plaintiffs said that for some groups, religious arbitration may have less to do with honoring a set of beliefs than with controlling legal outcomes. Some religious organizations stand by the process until they lose, at which point they turn to the secular courts to overturn faith-based judgments, according to interviews and court records.

"Religious arbitration, at its best, ensures that people can resolve their disputes in accordance with deeply held religious beliefs," said Michael A. Helfand, an associate professor at Pepperdine University School of Law and an arbitrator in a rabbinical court in New York. "But both religious communities and courts need to make sure that the protections the law has put in place to make it a fair and unbiased process are actually implemented."

Few courts have intervened, saying the terms of arbitration are detailed in binding contracts signed by both parties. Some judges are also reluctant to risk

infringing the First Amendment rights of religious groups, according to a review of court decisions and interviews with lawyers.

Some plaintiffs counter that it is their First Amendment rights being infringed because they must unwillingly participate in what amounts to religious activity.

"I am being forced to go before a court run by a religion I no longer believe in," said Mr. Garcia, the former Scientologist. "How could that happen?"

LEST YE BE JUDGED

Religion has long been at the center of Pamela Spivey's life. She taught Sunday school, went to Bible-study camps and watched preachers on television.

So when her friends at the Park West Church in Knoxville, Tenn., suggested that she send her son Nick to Teen Challenge, she didn't ask many questions. "When you think Christian, you automatically think good," said Ms. Spivey, who goes by the name Cheri.

It certainly seemed better than the alternative. After breaking his probation sentence for drunken driving and crashing into four parked cars, Mr. Ellison faced a year in jail.

As an alternative, the prosecutor in the case agreed to Mr. Ellison's enrolling in Teen Challenge, a program that teaches participants to overcome addiction by studying the Bible and becoming more "Christ-like."

Teen Challenge was highlighted by President George W. Bush as a successful faith-based program that deserved federal funding. "Government can pass law and it can hand out money," Mr. Bush said in a 2006 speech. "But it cannot love."

Like his mother, Mr. Ellison was a committed Christian, but he was never comfortable in church, his family said. He loved to write songs and poems. He

had long bangs and was rarely without his Pokémon hat. But when he drank, they said, he could become violent and out of control.

Mr. Ellison was also openly gay — something his friends said was not easy in Knoxville public high school, where teachers were allowed to question evolution. "I was scared for him to be so open about it," said his friend Emily Kinser. "But I was also so proud of him."

Friends and family said Mr. Ellison drank and took drugs to escape the pressures of not fitting in. "Society is telling him he's not right," said Ms. Kinser. "He felt unwanted."

The night before he left for Teen Challenge in January 2011, Mr. Ellison was upbeat as he ate pizza with friends and family at his favorite restaurant in Knoxville.

His yearlong program in Pensacola, Fla., consisted of doing manual labor for many hours a day. Local landscaping companies, carwashes and a fish market employed the men, former participants and their families said. Teen Challenge said money from the "work assignments" helped cover some expenses and the men were not entitled to compensation, according to a participant consent form.

"This wasn't treatment, this was free labor," said Angie Helms, whose son Tyler attended Teen Challenge with Mr. Ellison.

Teen Challenge explained that working was a way for the men in the program to overcome their addiction. Work is "one of the central purposes for human existence," according to the consent forms.

Zack Sharp worked in the front office at Teen Challenge when Mr. Ellison attended. He also handed out over-the-counter medication and herbal remedies to the other men in the program. Mr. Sharp, who was 24 and had abused every substance "I could get my hands on," said he broke down and ingested some of the herbal pain medicine one day. He said he had a seizure, fell and dislocated

his shoulder.

Mr. Sharp said he connected with Mr. Ellison partly because they were both gay. Coming from a conservative family in West Virginia, Mr. Sharp said he was accustomed to people trying to "heal" him — through prayer, even exorcisms. At Teen Challenge, Mr. Sharp said, he knew how to play along with attempts to make him straight. But Mr. Ellison seemed more sensitive to the pressures, he said.

In a written report in March 2011, a counselor at Teen Challenge noted that Mr. Ellison had acknowledged having "homosexual relationships" and that he would bring this up in future sessions with Mr. Ellison to "see where he stands."

About two weeks later, the counselor wrote that Mr. Ellison was making progress: "He admits that it's wrong and had agreed to ask the Lord to help him with this issue on a daily basis."

Officials at Teen Challenge, reached by phone and email, declined to comment.

There were other, subtler pressures. Mr. Ellison told his family that someone had taunted him by leaving pantyhose on his bed. He got in trouble for things like not turning off the air-conditioning before going to church and for entering another student's bedroom, his disciplinary records show. For one infraction, he had to copy a passage from the Bible 200 times.

"It's ironic," Mr. Ellison wrote to his family. "The model Christians here are the ones I have the most trouble with. I want Matthew 7 tattooed onto my forehead." He was referring to the biblical passage, "Judge not, lest ye be judged."

Mr. Ellison was months into the program when he was sent home for disciplinary reasons, according to court papers.

Mr. Sharp, who credits Teen Challenge with helping him kick his addiction,

said the program was unfair to those who broke the rules. He recalled at one point watching Mr. Ellison pack his bag and walk out the front gate of the facility. No one was permitted to talk to him as he left.

Ms. Spivey bought him a bus ticket home. Back in Knoxville, Mr. Ellison turned himself in to the authorities, because leaving Teen Challenge was a violation of his court order.

A prosecutor permitted Mr. Ellison to return to the Pensacola program, but he soon got into trouble again. Teen Challenge agreed to move him to another facility in Jacksonville.

About a month later, Ms. Spivey got a call while she was out walking her dog. A manager at Teen Challenge said Mr. Ellison was intoxicated and was being taken to the hospital.

Ms. Spivey said she asked to speak with her son, but was told he did not want to talk to her.

When Ms. Spivey called the hospital, she was told that Mr. Ellison had never been "seen or admitted" there, according to the lawsuit she filed against Teen Challenge.

Mr. Ellison did not have a cellphone and he did not know anyone in Jacksonville, his family said.

"Please pray for my son," Ms. Spivey posted on Facebook that evening. "He is in Jacksonville, Florida, and he is missing."

Somehow, Mr. Ellison ended up at a CVS in downtown Jacksonville, where he met a woman who drove him to her apartment. The two stayed up that night drinking, according to a sheriff's report.

At about 4 p.m., the woman told investigators, she checked on Mr. Ellison, who was sleeping on her couch. He had stopped snoring and his skin was cold. An autopsy revealed cough medicine and methadone in his system.

Ms. Spivey was outside pacing when a Knoxville police cruiser pulled up to her home before dawn on Aug. 21, 2011. She knew right away that her son was dead.

With her children Cameron and Katie, Ms. Spivey made the eight-hour drive to Jacksonville.

"I just wanted to know the truth," she said.

THE PEACEMAKER METHOD

When word got out that some of the early Christians had strayed, the Apostle Paul was concerned. Among their grave offenses: incest, prostitution and suing one another in court.

Christians should not take their problems before "unbelievers," Paul wrote in his letter to the Corinthians. Disputes should be resolved inside the church.

Centuries later, Paul's writings inspired a group of lawyers in Los Angeles to develop the practice of Christian conciliation. The group's work ultimately gave rise to Peacemaker Ministries, a nonprofit that devised a legal process that draws on the Bible.

The peacemaker method is used by private schools, Christian lawyers and others. Clauses requiring Americans to use Christian arbitration instead of civil court now appear in thousands of agreements like the one Mr. Ellison signed with Teen Challenge.

"Our secular court system is darn good," said Bryce Thomas, a Christian conciliator in Hickory, N.C. "But it doesn't get into deep moral issues like sin and reconciliation."

A tall and outgoing lawyer, Mr. Thomas said he was called to leave his private practice and take up Christian conciliation full time. He works out of an office on the bottom floor of his house, where there is a crucifix on the wall near

a bust of Abraham Lincoln. To clear his head, he likes to stroll around a "peace path," a garden of rhododendrons and towering trees behind his house.

"The Lord spoke to me when I was 59 and said, 'I want you to give up your law practice and do peacemaking,'" said Mr. Thomas. "I said, 'Lord, how about when I am 65?' And he said, 'No, Bryce, I need you now.'"

That was in 2006, he said, not long after a federal appeals court upheld one of his rulings, establishing an important precedent for how Christian arbitration can trump secular objections.

The dispute involved Northlake Christian School in Covington, La., and Pamela Prescott, a teacher and principal for about 12 years who said she was fired with little explanation. She blamed her termination on a new school administrator, who she said had undermined her at every turn.

He also made her feel uncomfortable, she said. At one staff meeting, the administrator surprised Ms. Prescott by washing her feet, an apparent reference to Jesus' washing his disciples' feet.

"It was creepy," Ms. Prescott recalled. "I may be a Christian. But I am also a normal person."

The oldest of five girls, Ms. Prescott was raised in New Orleans. Her father is a lawyer, but Ms. Prescott came to believe that suing another Christian was wrong.

Still, her firing had damaged her reputation, she said. The school gave her a few days to leave campus and never fully explained the reason for her termination to students and parents. No other Christian schools would hire her. "It was like I had stolen something," she said.

Ms. Prescott said she had tried to engage the school to resolve the dispute informally, but it didn't work. Feeling she had no other choice, Ms. Prescott filed a federal lawsuit, claiming sexual harassment and discrimination by the school.

When word of her lawsuit got out, parents from the school and former colleagues avoided her at church and at the local Walmart, she said. Her pastor suggested she stop teaching Sunday school.

The school moved to compel Christian mediation and then arbitration, which was eventually held in a rented room at city hall in Mandeville, La. Mr. Thomas oversaw the proceedings, which resembled a civil trial with some exceptions. The arbitration began most days with a prayer. And when a teacher cried on the witness stand, Mr. Thomas allowed the woman and Ms. Prescott to hug.

The school argued that a survey of parents revealed unhappiness with Ms. Prescott's leadership. But only a small number of families had filled out the survey, and Ms. Prescott never saw the results.

Mr. Thomas dismissed Ms. Prescott's claims of harassment and gender discrimination. But he found that the school board had violated its own contract when it failed to provide Ms. Prescott with any feedback before firing her. The contract required the school to follow Matthew 18:15, which implores Christians to confront each other before raising their problems with anyone else.

"If your brother sins against you," the verse states, "go and tell him his fault between you and him alone."

Mr. Thomas awarded Ms. Prescott about $157,000 for lost income and damage to her reputation.

"This woman had no idea her job was in jeopardy," Mr. Thomas said in an interview. "They treated her badly."

In his ruling, he urged the two sides to reconcile in a way "that glorifies God." But Northlake was not ready to move on.

The school had required Ms. Prescott to agree to Christian arbitration as a condition of her hiring. But when Northlake lost, it appealed the arbitration

award in federal court, arguing that Mr. Thomas's ruling was inconsistent with Louisiana law.

The case dragged on for four more years. An appeals court in New Orleans ruled that it had no ground to overturn the Christian arbitrator. Northlake appealed the case all the way to the Supreme Court, which declined to hear it.

The current headmaster of Northlake said he could not comment on the case because it involved a previous administration. He added that the school still used Christian arbitration.

In the end, Ms. Prescott said she felt vindicated, despite having spent all but $8,000 of her settlement on legal costs.

"My faith is still strong," she said. "But I am more careful in dealing with Christians than I used to be. They are just people with no more ability to be good than anyone else."

THE PRICE OF ENLIGHTENMENT

By the time he left Scientology, Luis Garcia had signed off on two dozen arbitration clauses in agreements with the church, requiring him to settle any dispute before a panel of fellow Scientologists.

In just about every aspect of church life, including training and making donations, members must settle any issue internally rather than going to court.

Yet, there has never been an actual arbitration in the six-decade history of Scientology, according to court records and a lawyer for the church.

Mr. Garcia's may be the first.

An entrepreneur and a native of Madrid, Mr. Garcia said Scientology gave him the confidence to open a successful print shop and yogurt store in Orange County, Calif.

Mr. Garcia and his wife, Maria, dedicated years to Scientology, taking dozens of classes to try to reach enlightenment. He estimates that his family spent $2.3 million on courses, fees and donations.

In 2008, Mr. Garcia reached the highest level in Scientology, where he said all of one's past lives are supposed to be easily recalled. "But that didn't happen," he said. "That's when I began to question everything."

Mr. Garcia said he sent an email criticizing the church management to hundreds of Scientologists in November 2010. The church declared the Garcias "suppressives" and excommunicated them, according to a legal brief submitted by his lawyers.

Mr. Garcia said he wanted back the roughly $68,000 he had paid the church for training courses he never took and other expenses, according to his lawsuit. He also demanded that the church return $340,000 he said his family had given for the construction of a "Super Power" building in Clearwater, Fla.

Neither a spokeswoman from Scientology nor a church lawyer commented on the allegations in Mr. Garcia's lawsuit.

Mr. Garcia said he repeatedly felt pressured to give money to keep officials from blocking his path toward enlightenment or writing him up for an ethics violation.

One night in Clearwater, a church official asked Mr. Garcia for $65,000 to pay for a large cross that would sit atop the Super Power headquarters, according to the lawsuit. "She said it would be the Garcias' cross," Mr. Garcia recalled in an interview.

Another former Scientologist, Bert Schippers of Seattle, said he was told the cross would be dedicated in his honor after he agreed to make a donation.

Scientology moved to force Mr. Garcia's case into arbitration. The process seemed like a farce, he said. An arbitration run by a panel of Scientologists, his

lawyers argued, could not possibly be impartial. As a declared suppressive, Mr. Garcia was considered a pariah. Church members who interacted with him risked being harassed, according to court papers filed by his lawyers.

"The hostility of any Scientologists on that panel is not speculation," his lawyers argued. "It is church doctrine."

A church official testified that the panel would be instructed to act fairly. In a statement, a lawyer for the church said that even though Scientology had never conducted an arbitration, the church had a set of procedures it used to resolve disputes with members.

In his decision, Judge James D. Whittemore of Federal District Court in Tampa said the Garcias were bound by the terms of the contract they had signed with the church. While acknowledging that Mr. Garcia may have a "compelling" argument about the potential bias of the process, Judge Whittemore said the First Amendment prevented him from even considering the issue.

"It necessarily would require an analysis and interpretation of Scientology doctrine," wrote Judge Whittemore, who was appointed by President Bill Clinton. "That would constitute a prohibited intrusion into religious doctrine, discipline, faith and ecclesiastical rule, custom or law by the court."

Mr. Garcia said he was still deciding whether to go through with arbitration.

Judge Whittemore's ruling has also been a blow to the network of former Scientologists who have spoken out against the church.

"I do not understand why the courts are going along with it," Mr. Schippers said.

Mr. Garcia's lawyer, Theodore Babbitt, said the ruling might have scuttled many future lawsuits against the church. "Arbitration," Mr. Babbitt said, "is inoculating the Church of Scientology from liability."

THE ELUSIVE TRUTH

In Jacksonville, Ms. Spivey's family tried piecing together her son's final hours, picking up clues wherever they could.

At Teen Challenge, they pressed the staff for the name of the employee who supposedly took Mr. Ellison to the hospital. The treatment facility declined to identify him, the family said.

The local CVS where Mr. Ellison was seen hours before his death allowed the family to review video from its security cameras, which showed Mr. Ellison walking out of the store with a bottle of soda around 1 a.m.

The woman who picked him up near the CVS said he wanted to call home, but her cellphone was out of minutes.

Most of the family's questions remained unanswered. They still did not know whether the pressure Mr. Ellison felt at Teen Challenge about being gay exacerbated his drug abuse. Or how he ended up on his own in a strange city with no money or cellphone.

Ms. Spivey said she was convinced that only a lawsuit could force Teen Challenge to explain what had happened. But the contract that Mr. Ellison signed when he enrolled in the program stated that any dispute had to go to Christian conciliation.

His family said they thought it was hypocritical that Teen Challenge was willing to collect food stamp subsidies to feed participants in the program, but insisted on the separation of church and state when it came to their legal case.

The conciliation would start as a mediation. If mediation fell apart, the case would move to formal arbitration, a process that could include prayer.

Ms. Spivey said even though her faith had deepened since her son's death, she did not want to take part in an arbitration involving religion. "I didn't want to do worksheets on the Bible and then kiss and make up," she said. "I wanted to

find out what happened to Nick."

In an appeal filed in Florida state court, Ms. Spivey's lawyer, Bryan S. Gowdy, focused on the First Amendment's protection of religious freedom — including the right not to exercise it.

Mr. Gowdy quoted James Madison, who wrote that the "religion then of every man must be left to the conviction and conscience of every man."

But the judges in the First District Court of Appeals were satisfied that there was no constitutional conflict.

The appeals court found that the rules of Christian conciliation were not that different from those governing secular arbitration and included only a "scattering of religious elements," which served to "solemnize the process and to promote and advance conciliation as a spiritual goal."

If she still had a problem, the court ruled, Ms. Spivey could let someone else represent Mr. Ellison's estate.

Ms. Spivey decided to go ahead with the mediation, though she said she worried how Christian panelists would view her son because of his homosexuality and drug addiction.

Peacemaker Ministries, which would run the process, said the mediation would incorporate prayer and scripture, according to a motion Ms. Spivey's attorney filed in Florida circuit court. Lawyers for both sides were also told that if they attended, they could not advocate on their clients' behalf. Ms. Spivey had to pay a $5,000 retainer and a $750 fee to Peacemaker Ministries, her lawyer said in court papers.

Dale Pyne, chief executive of Peacemaker Ministries, said he understood Ms. Spivey's reluctance about conciliation since it was her son who had signed the arbitration agreement, not her. But he said the process helped "those in conflict to reconcile their issues and their relationships." He added that "most of

that is highly unlikely in a court process."

Last year, Ms. Spivey decided to settle with Teen Challenge. She said she felt she was neglecting her other two children by obsessing over the case, which had gone on for more than two years. She declined to disclose the settlement amount.

Ms. Spivey said that without a court trial, she was never able to learn what happened to her son, not just on the night he died, but during his stay at Teen Challenge.

His family still does not know why he wrote the letter saying he was no longer gay, or whether he meant it. "I don't actually believe it," his sister Katie said.

Mr. Ellison did not mail the letter. His family found it in his duffel bag at the apartment where he died. It was mixed in with clothes, family pictures and his Bible.

A version of this article appears in print on November 3, 2015, on page A1 of the New York edition with the headline: When Scripture Is the Rule of Law.

The Rule of Law
One of the Crown Jewels of Modern, Constitutional Democracies

I. What is the "Rule of Law?"

A. The distinction between political decisions and legal decisions [tab B]

B. The core values: fairness, consistency, and respect (See specifics on Solum' Legal Theory Lexicon [tab C])

C. The facets of a complex institution

1. Types of law and theories of interpretation (jurisprudence)

2. Variety of legal actors: judges, attorneys, legislators, court staff, legal scholars, police, etc. (most importantly, their competence and professionalism)

II. Philosophy and History of the Rule of Law

A. In Europe before the Reformation

B. After the Reformation – Religious Pluralism

1. The Wars of Religion

2. Life as "nasty, brutish, and short"

C. The 17th century philosophers "to the rescue." How to deal with religious pluralism and perpetual war?

1. Thomas Hobbes – a state without moral foundations a treaty – very unpopular (in the 17th century) and probably unworkable.

2. John Locke – the *non-sectarian* state – who do we trust and who don't we trust? The Protestant idea of rights and the role of the rule of law in the face of religious pluralism. [See Locke in tab B, again]

D. The 18th century Enlightenment

1. Increasing trust in human reason and the rise of modern science

2. Trust in the natural "moral sense" of persons – how the *secular* state becomes possible

   a. Liberty of conscience essential to moral life and authentic religious belief. Religious belief helpful but not essential to civic responsibility.

   b. The rule of law as objectively and morally sound

E. The 19th century – two serious problems arise:

1. Rise of the social sciences – is "moral sense" theory correct? Are we socially constructed? The rise of a new and complex pluralism in the social sciences.

   Our response: American Pragmatism (in early 20th century)

2. Rise of powerful social institutions – industrial capitalism and bourgeois culture

Three responses:

Marx and the "socialist" (i.e. government) takeover of threatening institutions

The New Deal and the pragmatic and progressive regulation of capitalism against its dangers (still controversial) [tab I]

Protecting the rights associated with liberty of conscience [tabs H, M]

F. The 20th century: How, then, is the rule of law possible for us? Problem of objectivity:

1. The American approach to the rule of law.

   a. Interpretation, as a practice, that upholds the rule of law

      i. Concede the open texture of legal language – but appeal to our political ideals and history in the exercise of interpretive judgment. The idea of an overlapping consensus

      ii. Concede the social construction of the interpreters of law – self conscious and courageous judges and lawyers doing their best in their exercise of practical judgment to preserve the rule of law ideal

   b. The American conception of the rule of law in action – respect for the dignity and autonomy of persons (the decent treatment of persons) as essential to the rule of law.

i. Making the *procedures* of law work – instrumental and intrinsic values.

ii. Maintaining broad community respect and support for the rule of law – decent and respectful court staff, attorneys, and other legal professionals.

BREAK

III. The facets of the rule of law **in practice**. How the professionalism of lawyers, judges, and other legal professionals make the rule of law a reality. Examples:

A. The Problems of Interpretation (jurisprudence):

The Office of Legal Counsel's Torture Memos [tabs D, E, F]

Howick – Interpreting a Simple Statute [tab G]

Cohen v. California – Interpreting the Constitution [tab H]

Penn. Coal Co. v. Mahon – "Can a regulation be a taking?" [tab I]

Bradwell, Reed, Frontiero, Craig, Michael M. etc. – Understanding gender discrimination [tabs J, K, L]

Griswold v. Connecticut – A Hard Case [tab M]

B. The Importance of Practical Judgment and Honorable Intentions:

The U.S. Attorney Prosecuting the Heart Butte Postmistress. Shannon op-ed and Justice Jackson on the Federal Prosecutor [tabs N, O]

David Iglasias – Resisting Political Pressure [tab P]

Donald Trump – Using Political Pressure [tab Q]

Donald Trump – The Muslim Ban [tab Q]

Scott Pruitt – Reversing Environmental Rules, the Role of Public Reason [tab Q]

Judge Molloy – Fashioning a Remedy in the Grace case [tab R]

C. Treatment of Everyone with Dignity:

The Story of Mrs G [tab S]

The Rule of Law

Freedom of men under government is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it, a liberty to follow my own will in all things that the rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.

John Locke, The Second Treatise of Government

* * * * *

The most abstract and fundamental point of legal practice is to guide and constrain the power of government . . . . Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.

The law of the community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort.

Ronald Dworkin, Law's Empire

Legal Theory Lexicon

"All the concepts that fit."

Legal Theory Lexicon 017: The Rule of Law

Introduction

This installment of the *Legal Theory Lexicon* provides a very short introduction to the idea of "the rule of law," aimed as usual at law students (especially first year law students) with an interest in legal theory.

What is the Rule of Law?

The ideal of the rule of law can be traced back at least as far as Aristotle and is deeply embedded in the public political cultures of most modern democratic societies. For example, the Universal Declaration of Human Rights of 1948 declared that "it is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law." Although the ideal of the rule of law has been criticized on the ground that it is an ideological construct that masks power relationships, even some readical critics acknowledge that observance of the ideal could curb abuses of the powerless by the powerful.

What is the ideal of the rule of law? An initial observation is that there are several different conceptions of the meaning of the rule of law. Indeed, the rule of law may not be a single concept at all; rather, it may be more accurate to understand the ideal of the rule of law as a set of ideals connected more by family resemblance than a unifying conceptual structure.

Dicey's Influential Formulation

Historically, the most influential account of the rule of law was offered by A.V. Dicey. His formulation incorporated three ideas:

(1) the supremacy of regular law as opposed to arbitrary power;
(2) equality before the law of all persons and classes, including government officials; and,
(3) the incorporation of constitutional law as a binding part of the ordinary law of the land.

Rawls on the Rule of Law

A contemporary elaboration of the ideal of the rule of law is provided by John Rawls. He defines the rule of law as "the regular, impartial, and in this sense fair" administration of "public rules." In schematic form and with some alterations, Rawls offered the following conception of the rule of law:

1. The Requirement that Compliance Be Possible. The legal system should reflect the precept that ought implies can.
    a. The actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid.
    b. Those who enact the laws and issue legal orders should do so in good faith, in the sense that they believe "a" with respect to the laws and orders they promulgate.
    c. A legal system should recognize impossibility of performance as a defense, or at least a mitigating circumstance.
2. The Requirement of Regularity. The legal system should reflect the precept that similar cases should be treated similarly.
    a. Judges must justify the distinctions they make between persons by reference to the relevant legal rules and principles.
    b. The requirement of consistency should hold for the interpretation of all rules.
3. The Requirement of Publicity. The legal system should reflect the precept that the laws should be public.
    a. The laws should be known and expressly promulgated.
    b. The meaning of the laws should be clearly defined.
4. The Requirement of Generality. Statutes and other legal rules should be general in statement and should not be aimed at particular individuals.

5. The Requirement of Due Process. The legal system should provide fair and orderly procedures for the determination of cases.

a. A legal system ought to make provision for orderly and public trials and hearings.

b. A legal system ought to contain rules of evidence that guarantee rational procedures of inquiry.

c. A legal system ought to provide a process reasonably designed to ascertain the truth.

d. Judges should be independent and impartial, and no person should judge her own case.

Absent from Rawls's formulation is the notion that the rule of law requires that the government and government officials be subject to the law. Thus, a sixth aspect of the rule of law might be added to Rawls' formulation as follows:

6. The Requirement of Government under Law. Actions by government and government officials should be subject to general and public rules.

a. Government officials should not be above the law.

b. The legality of government action should be subject to test by independent courts of law.

More can be said about the content of the ideal of the rule of law, but this brief exposition provides sufficient clarity for for this brief introduction.

The Values Served by the Rule of Law

What values are served by the rule of law? Why is the rule of law important? Those are big questions, but we can at least give some quick and dirty answers. One reason that the rule of law is important has to do with predictability and certainty. When the rule of law is respected, citizens and firms will be able to plan their conduct in conformity with the law. Of course, one can dig deeper and ask why that predictability and certainty are important. Lot's of answers can be given to that question as well. One set of answers is purely instrumental. When the law is predictable and certain it can do a better job of guiding conduct. Another set of answers would look to function of law in protecting rights or enhancing individual autonomy. The predictability and certainty of the law creates a sphere of autonomy within which individuals can act without fear of government interference.

Another way to look at the value of the rule of law is to focus on what the world would be like if there were systematic and serious departures from the requirements of the rule of law. What if the laws were secret? What if officials were immune from the law and could act as they pleased? What the system of procedure were almost completely arbitrary, so that the results of legal proceedings were random or reflected the whims and prejudices of judges? What if some classes of people were above the law? Or if other classes were "below the law" and denied the laws protections? These rhetorical questions are intended to draw out a "parade of horribles" in your imagination. In other words, the rule of law serves as a bulwark against tyranny, chaos, and injustice.

The Rule of Law and Bad Law

One final question: "Is the rule of law a good thing, *even if* the laws are bad, unjust, or in the extreme case evil?" This question is too tough to take on in a systematic way, but here is one helpful thought. In a reasonably just society, one might believe that the rule of law is a good thing, even if some of the laws are bad. Certainty and predictability provide very great goods, which would be undermined if each judge or official picked and chose among the laws, enforcing the ones that the judge thought were good and nullifying the ones the judge thought were bad. But in a thoroughly evil society, the rule of law will be extremely problematic. Even an evil society may benefit from regularity in the enforcement of ordinary laws, but when it comes to horrendously evil laws, anarchy or revolution is likely to be preferable to the rule of law.

Conclusion

Sooner or later most law students run into a reference to "the rule of law," but in my experience, this idea is rarely explained when its introduced. This entry in the legal theory lexicon is designed to give you a fairly solid foundation with respect to the content of the rule of law and to get you thinking about what functions the rule of law serves.

Related Lexicon Entries

- Legal Theory Lexicon 023: Procedural Justice

Bibliography

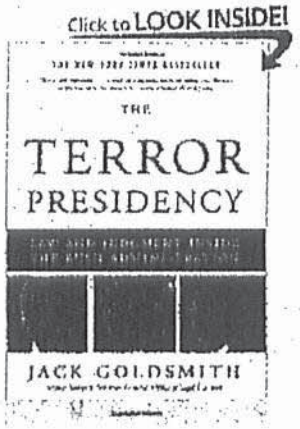
- Albert Dicey, The Law of the Constitution 194 (London: MacMillan, 9th ed., 1950)
- Richard H. Fallon, Jr., *The Rule of Law" as a Concept in Constitutional Discourse*, 97 Columbia Law Review 1-56 (1997)
- Joseph Raz, *The Rule of Law and its Virtue*, 93 LQR 195-202 ((1997) & reprinted in The Authority of Law: Essays on Law and Morality (Oxford, Clarendon Press, 1979)
- Judith N. Shklar (1987), "Political Theory and the Rule of Law", in Hutchinson and Monahan (eds.) The Rule of Law: Ideal or Ideology (Toronto: Carswell, 1987), p. 1.
- Lawrence B. Solum, *Equity and the Rule of Law*, Nomos XXXVI: The Rule of Law 120 (1994)
- Tamanaha, Brian. On the Rule of Law: History, Politics, Theory (Cambridge University Press, 2004).
- Jeremy Waldron (2002), Is the Rule of Law an Essentially Contested Concept (in Florida)?, Law & Philosophy, vol. 21/2, 2002.

(Last revised on October 29, 2017.)

January 04, 2004 in Concepts and Constructs, Rawls | Permalink

Comments

The comments to this entry are closed.



Share your own customer images

Search inside this book

Tell the Publisher!
I'd like to read this book on Kindle

Don't have a Kindle? Get your Kindle here, or download a **FREE** Kindle Reading App.

The Terror Presidency: Law and Judgment Inside the Bush Administration [Paperback]

Jack Goldsmith (Author)

(35 customer reviews) | (4)

Price: $16.95 & eligible for **FREE Super Saver Shipping** on orders over $25. Details

In Stock.
Ships from and sold by **Amazon.com**. Gift-wrap available.

Want it delivered Tuesday, April 17? Order it in the next 7 hours and 48 minutes, and choose **One-Day Shipping** at checkout. Details

26 new from $10.20 37 used from $3.73

Formats	Amazon Price	New from	Used from
Hardcover	$15.82	$4.45	$0.01
Paperback	$16.95	$10.20	$3.73

Quantity: 1

Buy New

or
Sign in to turn on 1-Click ordering.
or

Amazon Prime Free Trial required. Sign up when you check out. Learn More

Buy Used
Used - Very Good See details
$7.46 & eligible for FREE Super Saver Shipping on orders over $25. Details
Fulfilled by Amazon

or
Sign in to turn on 1-Click ordering.

More Buying Choices
63 used & new from $3.73
Have one to sell?
Share

Description

...tion Date: **April 13, 2009**

A central player's account of the clash between the rule of law and the necessity of defending America.

Jack Goldsmith's duty as head of the Office of Legal Counsel was to advise President Bush on what he could and could not do . . . legally. Immediately after taking the job in October 2003, Goldsmith began to see that the work of his predecessors, whose opinions were the legal framework governing the conduct of the military and intelligence agencies in the war on terror, were deeply flawed.

Goldsmith is a conservative lawyer who understands the imperative of averting another 9/11. But his

Show More

Frequently Bought Together

Customers buy this book with The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals by Jane Mayer Paperback $11.64

Price For Both: $28.59

Show availability and shipping details

Customers Who Bought This Item Also Bought

Power and Constraint: The Accountable Presidency... Jack Goldsmith (2)

Angler: The Cheney Vice Presidency › Barton Gellman (70)

The Dark Side: The Inside Story of How the War on ... › Jane Mayer (159)

The Wrong War: Grit, Strategy, and the Way Out... Bing West (59)

COMPLETE COVERAGE

A Guide to the Memos on Torture

THE REACH OF WAR

GO TO COMPLETE COVERAGE

By THE NEW YORK TIMES

Most E-Mailed

1. Well: Attention Disorders Can Take a Toll on Marriage
2. Prone to Error: Earliest Steps to Find Cancer
3. Adventures In Very Recent Evolution
4. Many States Adopt National Standards for Their Schools
5. Recipes for Health: Spicy Quinoa, Cucumber and Tomato Salad

Go to Complete List

The New York Times, Newsweek, The Washington Post and The Wall Street Journal have disclosed memorandums that show a pattern in which Bush administration lawyers set about devising arguments to avoid constraints against mistreatment and torture of detainees. Administration officials responded by releasing hundreds of pages of previously classified documents related to the development of a policy on detainees.

Additional documents were released in December and January by the American Civil Liberties Union, which filed a civil lawsuit seeking to discover the extent of abuse of prisoners by the military. Those papers are posted at aclu.org.

2002

NUARY A series of memorandums from the Justice Department, many of them written by **...n C. Yoo**, a University of California law professor who was serving in the department, provided arguments to keep United States officials from being charged with war crimes for the way prisoners were detained and interrogated. The memorandums, principally one written on Jan. 9, provided legal arguments to support administration officials' assertions that the Geneva Conventions did not apply to detainees from the war in Afghanistan.

RELATED SITES
• Yoo's Memo on Avoiding Geneva Conventions (PDF document)

JAN. 25 **Alberto R. Gonzales**, the White House counsel, in a memorandum to **President Bush**, said that the Justice Department's advice in the Jan. 9 memorandum was sound and that Mr. Bush should declare the Taliban and Al Qaeda outside the coverage of the Geneva Conventions. That would keep American officials from being exposed to the federal War Crimes Act, a 1996 law that carries the death penalty.

RELATED SITES
• Gonzales's Memo to Bush (PDF document)

JAN. 26 In a memorandum to the White House, Secretary of State **Colin L. Powell** said the advantages of applying the Geneva Conventions far outweighed their rejection. He said that declaring the conventions inapplicable would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops." He also said it would "undermine public support among critical allies."

RELATED SITES
...owell's Memo to White House (PDF document)

...B. 2 A memorandum from **William H. Taft IV**, the State Department's legal adviser, to Mr. Gonzales warned that the broad rejection of the Geneva Conventions posed several problems. "A decision that the conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the

conventions in the event they are captured." An attachment to this memorandum, written by a State Department lawyer, showed that most of the administration's senior lawyers agreed that the Geneva Conventions were inapplicable. The attachment noted that C.I.A. lawyers asked for an explicit understanding that the administration's public pledge to abide by the spirit of the conventions did not apply to its operatives.

RELATED
• Taft's Memo on Rejection of Geneva Conventions (PDF document)

FEB. 7 In a directive that set new rules for handling prisoners captured in Afghanistan, **President Bush** broadly cited the need for "new thinking in the law of war." He ordered that all people detained as part of the fight against terrorism should be treated humanely even if the United States considered them not to be protected by the Geneva Conventions, the White House said. Document released by White House.

RELATED SITES
• Bush's Directive on Treatment of Detainees (PDF document)

AUGUST A memorandum from **Jay S. Bybee**, with the Office of Legal Counsel in the Justice Department, provided a rationale for using torture to extract information from Qaeda operatives. It provided complex definitions of torture that seemed devised to allow interrogators to evade being charged with that offense.

RELATED SITES
• Justice Dept. Memo on Torture (PDF document)
• Letter by Author of Memo on Torture to White House Counsel

Dec. 2 Memo from Defense Department detailing the policy for interrogation techniques to be used for people seized in Afghanistan. Document released by White House.

RELATED SITES
• Defense Dept. Memo on Afghanistan Detainees (PDF document)

2003

MARCH A memorandum prepared by a Defense Department legal task force drew on the January and August memorandums to declare that **President Bush** was not bound by either an international treaty prohibiting torture or by a federal anti-torture law because he had the authority as commander in chief to approve any technique needed to protect the nation's security. The memorandum also said that executive branch officials, including those in the military, could be immune from domestic and international prohibitions against torture for a variety of reasons, including a belief by interrogators that they were acting on orders from superiors "except where the conduct goes so far as to be patently unlawful."

APRIL A memorandum from Secretary of Defense **Donald H. Rumsfeld** to **Gen. James T. Hill** outlined 24 permitted interrogation techniques, 4 of which were considered stressful enough to require Mr. Rumsfeld's explicit approval. Defense Department officials say it did not refer to the legal analysis of the month before.

RELATED SITES

• Rumsfeld's Memo on Interrogation Techniques (PDF document)

DEC. 24 A letter to the International Committee of the Red Cross over the signature of **Brig. Gen. Janis Karpinski** was prepared by military lawyers. The letter, a response to the Red Cross's concern about conditions at Abu Ghraib, contended that isolating some inmates at the prison for interrogation because of their significant intelligence value was a "military necessity," and said prisoners held as security risks could legally be treated differently from prisoners of war or ordinary criminals.

Other Memorandums

Some have been described in reports in The Times and elsewhere, but their exact contents have not been disclosed. These

Torture, an international treaty and the Anti-Torture Act, a federal law. This memorandum provided what has been described as a script in which officials were advised that they could avoid responsibility if they were able to plausibly contend that the prisoner was in the custody of another government and that the United States officials were just getting the information from the other country's interrogation. The memorandum advised that for this to work, the United States officials must be able to contend that the prisoner was always in the other country's custody and had not been transferred there. International law prohibits the "rendition" of prisoners to countries if the possibility of mistreatment can be anticipated.

Neil A. Lewis contributed to this report. Online Document Sources: Findlaw.com and National Security Archive, George Washington University (gwu.edu)

TOP WORLD ARTICLES

- Jerusalem Journal: Jews and Muslims Share Holy Season in Jerusalem
- To Smother Rebels, Arson Campaign in Chechnya
- Holiday Bombings Kill 27 in Baghdad
- Doubt Arises in Account of an Attack in China

Go to World

TOP NYTIMES.COM ARTICLES

- Iraq's Premier Is Asked to Quit as Shiites Split
- Labor Shortage in China May Lead to Trade Shift
- New York City Losing Blacks, Census Shows
- In Death of Bronx Charter School, a Wider Problem

Go to NYTimes.com Home

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

August 1, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President

Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party. The legislative history simply reveals that Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.

In Part II, we examine the text, ratification history, and negotiating history of the Torture Convention. We conclude that the treaty's text prohibits only the most extreme

acts by reserving criminal penalties solely for torture and declining to require such penalties for "cruel, inhuman, or degrading treatment or punishment." This confirms our view that the criminal statute penalizes only the most egregious conduct. Executive branch interpretations and representations to the Senate at the time of ratification further confirm that the treaty was intended to reach only the most extreme conduct.

In Part III, we analyze the jurisprudence of the Torture Victims Protection Act, 28 U.S.C. § 1350 note (2000), which provides civil remedies for torture victims, to predict the standards that courts might follow in determining what actions reach the threshold of torture in the criminal context. We conclude from these cases that courts are likely to take a totality-of-the-circumstances approach, and will look to an entire course of conduct, to determine whether certain acts will violate Section 2340A. Moreover, these cases demonstrate that most often torture involves cruel and extreme physical pain. In Part IV, we examine international decisions regarding the use of sensory deprivation techniques. These cases make clear that while many of these techniques may amount to cruel, inhuman or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture. From these decisions, we conclude that there is a wide range of such techniques that will not rise to the level of torture.

In Part V, we discuss whether Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war. In Part VI, we discuss defenses to an allegation that an interrogation method might violate the statute. We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.

I. 18 U.S.C. §§ 2340–2340A

Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."[1] Section 2340 defines the act of torture as an:

---

[1] If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. *See* 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. *See* 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. *See* Omnibus Crime Bill, Pub. L. No.103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001)

> act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering."). You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering. As such, we have not addressed the elements of "outside the United States," "color of law," and "custody or control."[2] At your request, we would be happy to address these elements in a separate memorandum.

A. "Specifically Intended"

To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent. *See* 18 U.S.C. § 2340(1). In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act. *See United States v. Carter*, 530 U.S. 255, 269 (2000); Black's Law Dictionary at 814 (7th ed. 1999) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with"). For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. *Ibid.* (internal quotation marks and citation omitted)

Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or

---

(discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

[2] We note, however, that 18 U.S.C. § 2340(3) supplies a definition of the term "United States." It defines it as "all areas under the jurisdiction of the United States including any of the places described in" 18 U.S.C. §§ 5 and 7, and in 49 U.S.C. § 46501(2). Section 5 provides that United States "includes all places and waters, continental or insular, subject to the jurisdiction of the United States." By including the definition set out in Section 7, the term "United States" as used in Section 2340(3) includes the "special maritime and territorial jurisdiction of the United States." Moreover, the incorporation by reference to Section 46501(2) extends the definition of the "United States" to "special aircraft jurisdiction of the United States."

suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. *See id.* at 269; Black's Law Dictionary 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

Carter, 530 U.S. at 268 (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.5, at 315 (1986)).

As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. As the Supreme Court explained in the context of murder, "the . . . common law of homicide distinguishes . . . between a person who knows that another person will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life[.]" *United States v. Bailey*, 444 U.S. 394, 405 (1980). "Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of their unintended but foreseen consequences.'" *Vacco v. Quill*, 521 U.S. 793, 802–03 (1997). Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. *See, e.g., United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.1953). Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. *See, e.g., South Atl. Lmtd. Ptrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. *See Cheek v. United States*, 498 U.S. 192, 202 (1991); *United States v. Mancuso*, 42 F.3d 836, 837 (4th Cir. 1994). For example, in the context of mail fraud, if an individual honestly believes that the material transmitted is truthful, he has not acted with the required intent to deceive or mislead. *See, e.g., United States v. Sayakhom*, 186

F.3d 928, 939–40 (9th Cir. 1999). A good faith belief need not be a reasonable one. *See Cheek*, 498 U.S. at 202.

Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of proving to the jury that he actually held that belief. As the Supreme Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury . . . will find that the Government has carried its burden of proving" intent. *Id.* at 203–04. As we explained above, a jury will be permitted to infer that the defendant held the requisite specific intent. As a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief.

B. "Severe Pain or Suffering"

The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause "severe physical or mental pain or suffering." In examining the meaning of a statute, its text must be the starting point. *See INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotations and citations omitted). Section 2340 makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the text provides that pain or suffering must be "severe." The statute does not, however, define the term "severe." "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The dictionary defines "severe" as "[u]nsparing in exaction, punishment, or censure" or "[I]nflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture." Webster's New International Dictionary 2295 (2d ed. 1935); *see* American Heritage Dictionary of the English Language 1653 (3d ed. 1992) ("extremely violent or grievous: *severe* pain") (emphasis in original); IX The Oxford English Dictionary 572 (1978) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "of circumstances . . .: hard to sustain or endure"). Thus, the adjective "severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.

Congress's use of the phrase "severe pain" elsewhere in the United States Code can shed more light on its meaning. *See, e.g., West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) ("[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."). Significantly, the phrase "severe pain" appears in statutes defining an emergency medical condition for the purpose of providing health benefits. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C § 1395w-22 (2000); *id.* § 1395x (2000); *id.* §

1395dd (2000); *id.* § 1396b (2000); *id.* § 1396u-2 (2000). These statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." *Id.* § 1395w-22(d)(3)(B) (emphasis added). Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain. They treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that "severe pain," as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture.[3]

C. "Severe mental pain or suffering"

Section 2340 gives further guidance as to the meaning of "severe mental pain or suffering," as distinguished from severe physical pain and suffering. The statute defines "severe mental pain or suffering" as:

> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or

[3] One might argue that because the statute uses "or" rather than "and" in the phrase "pain or suffering" that "severe physical suffering" is a concept distinct from "severe physical pain." We believe the better view of the statutory text is, however, that they are not distinct concepts. The statute does not define "severe mental pain" and "severe mental suffering" separately. Instead, it gives the phrase "severe mental pain or suffering" a single definition. Because "pain or suffering" is single concept for the purposes of "severe mental pain or suffering," it should likewise be read as a single concept for the purposes of severe physical pain or suffering. Moreover, dictionariesdefine the words "pain" and "suffering" in terms of each other. *Compare, e.g.*, Webster's Third New International Dictionary 2284 (1993) (defining suffering as "the endurance of . . . pain" or "a pain endured"); Webster's Third New International Dictionary 2284 (1986) (same); XVII The Oxford English Dictionary 125 (2d ed. 1989) (defining suffering as "the bearing or undergoing of pain"); *with, e.g.*,Random House Webster's Unabridged Dictionary 1394 (2d ed. 1999) (defining "pain" as "physical suffering"); The American Heritage Dictionary of the English Language 942 (College ed. 1976) (defining pain as "suffering or distress"). Further, even if we were to read the infliction of severe physical suffering as distinct from severe physical pain, it is difficult to conceive of such suffering that would not involve severe physical pain. Accordingly, we conclude that "pain or suffering" is a single concept within the definition of Section 2340.

Both Briefs
AND Opinion, ATTACHED.

ANTHONY R. GALLAGHER
Federal Defender
Federal Defenders of Montana
P.O. Box 3547
Great Falls, Montana 59403
(406) 727-5328
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

Butte Division

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD KEITH HOWICK, Defendant.	Crim. Case No. 99-11-BU-DWM **POINT BRIEF:** **"BRINGS INTO"** **AND** **MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT III**

Edward Keith Howick, by his attorneys, the Federal Defenders of Montana and Anthony R. Gallagher, Federal Defender, pursuant to the Court's request and in accord with Rule 29 of the Federal Rules of Criminal Procedure hereby moves this Honorable Court to enter a judgment of acquittal as to Count III of the indictment. The focus of this motion/point brief is the phrase "brings into" in the indictment and statute.

Count III of the indictment reads:

> That beginning sometime before and continuing until on or about October 5, 1999 at Bozeman, within the State and District of Montana and other locations, the defendant EDWARD KEITH HOWICK did with the intent to defraud, bring into the United States falsely made and counterfeited obligations of the United States, to wit: five five hundred dollar 1935 series gold certificates,

Defenders of Montana
ox 3547
Falls, MT 59403
(406) 727-5328

five one hundred dollar 1935 series gold certificates, one one thousand dollar 1935 series silver certificate, one five hundred dollar 1935 series silver certificate, one one hundred dollar 1935 series silver certificate, six five dollar 1935 series silver certificates, fifty five one dollar 1935 series silver certificates, all in violation of 18 U.S.C. § 472.

The Government (as readily admitted at the close of proceedings on April 14, 2000) failed to present any evidence that Mr. Howick actually brought counterfeit obligations into the United States. Judgment of Acquittal as to Count III must be entered.

Introduction

Mr. Howick begins the analysis of "brings into" with the understanding that ambiguities concerning a statute must be resolved in favor of lenity. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 1439 (1980); Simpson v. United States, 435 U.S. 6, 14-15, 98 S.Ct. 909, 913-14 (1978); Prince v. United States, 352 U.S. 322, 329, 77 S.Ct. 403, 407; Bell v. United States, 349 U.S. 81, 83-84, 75 S.Ct. 620, 622-63 (1955).

1. Plain Meaning

The statute at issue, entitled Uttering Counterfeit Obligations or Securities, provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent ***brings into the United States*** or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than fifteen years, or both.

18 U.S.C. § 472 (emphasis added). Statutory construction expanding criminal liability beyond the express terms of a statute is disfavored, absent strong indications of legislative purpose. See Crandon v. United States, 494 U.S. 152, 160, 110 S.Ct. 997, 1002 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by

Federal Defenders of Montana
P.O. Box 3567
Great Falls, MT 59403
(406) 727-5328

the text"). Stretching the definition of "brings into" to incorporate "to cause," counsel, abet or aid, flies in the face of the plain language of the section. See, e.g., United States v. Dadanian, 818 F.2d 1443, 1448 (9th Cir. 1987) (discussing principles of statutory construction for criminal statutes; plain meaning of statute controls absent clear legislative intent to the contrary), modified on other grounds, 856 F.2d 1391 (9th Cir. 1988).

2. **Active Verbs in the Statute**

The phrase "brings into the United States" is immediately followed by "or keeps in possession or conceals . . ." These active verbs clearly show that the Congress intended that only performance of bringing in, keeping in possession or concealing are proscribed. Nothing in the statute (or judicial interpretations discovered by counsel) suggests otherwise.

3. **No Hidden or Implied Congressional Intent**

The power to define federal criminal offenses and to prescribe their punishments rests wholly with Congress. Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436 (1980); see also Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679-80 (1983); Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225 (1977). In Mr. Howick's case, the phrase "bring into the United States falsely made and counterfeited obligations of the United States," establishes the Congressional intent. Nothing in the statute implies a Congressional plan to include any other activity (such as causing another to bring currency into the United States) is to be read into the "bring into" language.

4. **Dictionary Definition**

The simple connotation of the words used in the statute implies that 18 U.S.C. § 472 only proscribes the act of physically bringing counterfeit obligations into the United States. BLACK'S LAW DICTIONARY provides the following guidance:

J. Defenders of Montana
Box 3547
Great Falls, MT 59403
(406) 727-5328

Bring into.

To import; to introduce.

Bring.

To convey to the place where the speaker is or is to be; to bear from a more distant to a nearer place; to make to come, procure, produce, draw to; to convey, carry or conduct, move. To cause to be, act, or move in a special way. The doing of something effectual. The bringing of someone to account, or the accomplishment of some definite purpose.

5. The Charging Decision

As the United States argued during the *in camera* hearing on Defendant's Motion for Judgment of Acquittal at the end of the prosecution's case, the Government could have presented a charge encompassing the provisions of 18 U.S.C. § 2 to the Grand Jury, but chose not to do so. Having voluntarily limited the charge to the language of Count III as drafted and the statute as written, the prosecution cannot now rely on another statute, uncharged and not considered by the Grand Jury, to embrace behavior of one who "aids, abets, counsels, commands, induces or procures" the commission of an offense, nor does the charging document include the actions of one who "causes an act to be done." 18 U.S.C. §§ 2(a) and (b).

Though an indictment may be narrowed, so that the trial jury deliberates on lesser offenses than the Grand Jury charged, it may not be broadened. Any "broadening [of] the possible bases for conviction from that which appeared in the indictment" is fatal. United States v. Miller, 471 U.S. 130, 138, 105 S.Ct. 1811, 1816 (1985).

WHEREFORE, because, as the Government conceded at the conclusion of the proceedings on April 14, 2000, there is no evidence that Mr. Howick actually brought counterfeit obligations of the United States into the country, a verdict of "Not Guilty" must be entered as to Count III.

Federal Defenders of Montana
P.O. Box 3547
Great Falls, MT 59403
(406) 727-5328

Respectfully submitted, April 21, 2000.

ANTHONY R. GALLAGHER
Federal Defender
P.O. Box 3547
Great Falls, MT 59403
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2000, a copy of the foregoing Point Brief: "Bring In," was caused to be delivered to:

Chambers of the
Honorable Donald W. Molloy
United States District Judge
201 East Broadway
Missoula, MT 59802
(by mail and fax)

Edward Keith Howick
211 Flathead Avenue North
Bozeman, MT 59715

Kris A. McLean
Assistant United States Attorney
P.O. Box 8329
Missoula, MT 59807
(by mail and fax)

FEDERAL DEFENDERS OF MONTANA

ral Defenders of Montana
.. Box 3547
Great Falls, MT 59403
(406) 727-5328

KRIS A. MCLEAN
Assistant U.S. Attorney
P.O. Box 8329
Missoula, Montana 59807
406-542-8851

ATTORNEY FOR THE UNITED STATES

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD KEITH HOWICK, Defendant.	CR 99-11-BU-DWM BRIEF IN RESPONSE TO COURT'S ORDER REGARDING STATUTORY LANGUAGE OF 18 U.S.C. § 472

INTRODUCTION

COMES NOW the United States of America, by and through it's attorney of record, Assistant U.S. Attorney Kris McLean, and files this brief in compliance with this Court's Order of Friday, April 14, 2000. This Court ordered supplemental briefing following a question from the jury regarding the United States' burden in proving that the Defendant was guilty of "bringing into the United States" counterfeit obligations. Based on the following, the Court should adopt a broad interpretation of the statutory language. However, even under a narrow

interpretation, the verdict should stand because the charge of aiding and abetting is impliedly read into all counts.

DISCUSSION

I. THE COURT SHOULD ADOPT A BROAD INTERPRETATION OF THE STATUTORY LANGUAGE IN QUESTION.

A broad construction of the statutory language in question will fulfill Congress' intent of providing that bringing counterfeit obligations into the United States constitutes a violation of 18 U.S.C. § 472. A narrow interpretation would render the language meaningless and exclude conduct clearly intended to be within the scope of 18 U.S.C. § 472.

Section 472 reads as follows:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeit, or altered obligation or other security of the United States, shall be fined under the this title or imprisoned not more than fifteen years, or both.

18 U.S.C. § 472. The plain wording of the statute disjunctively sets out various ways to violate the statute. In considering this exact statute, the Eighth Circuit stated: "[i]t had long been settled that where a crime is denounced disjunctively in the statute . . . , proof of any one of the allegations will sustain a conviction." Rimmerman v. United States, 374 F.2d 251, 253-54 (8th Cir. 1967) (held that where defendant was charged conjunctively with "possessing and concealing" counterfeit bills, proof of either allegations would sustain a conviction). The conclusion that any one of the disjunctive crimes forms the basis of a violation of the statute is supported by the case law. See e.g., United States v. Matos-Rodriguez, 188 F.3d 1300, 1301 (11th Cir. 1999) (defendant charged and convicted separately of one count passing and one count

possession); United States v. Taftsiou, 144 F.3d 287, 289 (3rd Cir. 1998) (defendant charged and convicted separately of one count passing and one count possessing and concealing); United States v. Wethington, 141 F.3d 284, 285 (6th Cir. 1998) (defendant charged and convicted separately of one count passing and one count possession); United States v. Caro, 637 F.2d 869, 870 (2nd Cir. 1981) (defendant charged and convicted separately for one count bringing into the United States and one count possession).

Since each separately listed act constitutes a violation of the statute, one in possession of counterfeit obligations, bringing the obligations into the United States, commits two separate offenses, as was the case in United States v. Caro, 637 F.2d at 870. In Caro, the defendant was caught at John F. Kennedy International Airport with counterfeit Federal Reserve Notes hidden in his suitcase. Id. The defendant was charged and convicted on one count of bringing counterfeit obligations into the United States and one count of possessing the same notes. Id. He received concurrent sentences on each count of two years imprisonment. Id. Therefore, as shown in Caro, Congress intended that "brings into the United States" and "possession" denounce separate acts, each of which violates 18 U.S.C. § 472.

A narrow construction of "brings into the United States," requiring the defendant be in possession of the obligations, would render the separate act of bringing counterfeit obligations across U.S. borders meaningless as "possession" has already be denounced as an independent crime. In essence, the narrow interpretation of the provision would merge the two acts into one act where mere possess violates the statute whether the defendant is caught crossing the border or within the United States. Such a construction would subvert Congress' intention of making bringing counterfeit obligation into the United States a separate crime.

While recognizing the rule of construction that requires strict construction of penal statutes:

> No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope - - nor does any rule require that the act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of congress.

United States v. Raynor, 302 U.S. 540, 552, 58 S.Ct. 353, 359 (1937). Clearly, by denouncing possession and bringing into the United States as separate crimes, Congress intended that all means of bringing counterfeit obligations into the United States constitute a violation of the statute beyond mere possession. A fair reading of the language, giving the words their plain meaning, would include bringing counterfeit obligations into the United States by common carriers such as Federal Express. Any other construction would exclude conduct intended to be within the scope of the statute.

Therefore, the Court should adopt a broad interpretation of the statutory language "brings into the United States," which would into any conduct causing the obligations to cross U.S. borders such as common carriers. Adopting this construction will uphold Congress' intention of denouncing such conduct as an separate crime, independent of mere possession.

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee in the Office of the United States Attorney and is a person of such age and discretion as to be competent to serve papers.

That on 4/24/00 she served a copy of the attached **BRIEF IN RESPONSE TO COURT'S ORDER REGARDING STATUTORY LANGUAGE OF 18 U.S.C. § 472** by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Missoula, Montana.

Addressee(s):

Anthony R. Gallagher
Federal Defenders Office
P.O. Box 3547
Great Falls, MT 59403

Kimberlee A. Taylor, Paralegal Assistant

094 TO Tom Kreff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD KEITH HOWICK, Defendant.	)	CR 99-11-BU-DWM ORDER

One aspect of Howick's Rule 29 motion was precipitated by a jury question. During deliberations the jury asked what the phrase "bringing into" meant. They wanted to know if it required physical possession and control, or if it meant that one causes an object to be brought into the United States. Counsel for Howick asked that no further instruction on the meaning of the term be given, so I told the jury to read the instructions already given to them and apply their common sense. They did. In so doing Howick was convicted of Count III of the superseding indictment.

After the jury was discharged I asked counsel to brief the issue. I am convinced after consideration of the question that the statute should not be so narrowly read as to require a "physical" bringing in of the counterfeit or fictitious items. Consequently, for the reasons set forth below I deny Howick's Rule 29 motion with respect to Count III.

Count III and "Bringing In"

Count III charged that Howick "did with intent to defraud bring in to the United States" the counterfeit silver certificates that agents found in the Federal Express package, in violation of 18 U.S.C. § 472. As stated above, the jury questioned whether the element "bringing into the United States" required the Government to show that Howick physically transported the certificates into the country.

The Government concedes that there is no evidence that Howick personally transported the certificates across the borders of the United States.

The statute reads as follows:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than fifteen years, or both.

18 U.S.C. § 472.

From my review there seems to be only one other case where a defendant was convicted on a charge of "bringing in." I am unable to find a case defining the meaning of the phrase "brings into the United States."

To resolve the issue, it is necessary to start with the language of the statute. See United States v. Ron Pair Enterprise, Inc., 489 U.S. 235, 241 (1989). The words "bring in" in the statute must be given their "ordinary or natural" meaning.

The Government argues that requiring it to show that Howick physically brought the certificates into the United States frustrates Congress' intent to criminalize the act of bringing counterfeit currency into the United States. This circular argument sheds no light on Congress' intent. The case cited, United States v. Caro, 637 F.2d 869 (2d Cir. 1981), does not discuss what the Government is required to show. Moreover, in Caro, the defendant had stuffed counterfeit currency into the lining of his suitcase. He physically transported the currency. Although he was convicted of both bringing into the United States and of possessing, there is no information as to whether he moved to dismiss the indictment for multiplicity or to vacate one of the convictions.

The Government also argues that aiding and abetting is always included in an indictment. See 18 U.S.C. § 2; United States v. Kazni, 576 F.2d 238, 242 n.8 (9th Cir. 1978) (quoting Wood v. United States, 405 F.2d 423, 425 (9th Cir. 1968)). However, the Government did not prosecute the case on that theory and did not request an instruction on it. Thus, this response does not answer the question.

Howick assumes that the statute is ambiguous and argues that any analysis of the phrase "brings into" must be resolved in favor of lenity. See Whalen v. United States, 445 U.S. 684, 694 (1980). While it is true that the rule of lenity prohibits expansion of criminal liability beyond the express terms of a statute, the problem here is what the express terms of the statute mean.

Howick's argument is helpful only as it relates to the government's suggestion that aiding and abetting, 18 U.S.C. § 2, can be read into the indictment or the statute in question. It can't.

Howick argues that "connotation" gives meaning to the words of the statute and that connotation then implies only the proscription of physically bringing counterfeit obligations into the United States. However, it is context and not connotation that must be considered in ferreting out the meaning of the statute.

In context with "keeps in possession or conceals," the phrase "bringing into" emphasizes a physical component. Congress might have mentioned constructive bringing in or causing something to be brought in, but it did not do so. The cases interpreting the phrase "keeps in possession" do not suggest theories of constructive possession. Moreover, the law in question was promulgated in 1909, before Congress could have imagined the kind of virtually instantaneous communication and express delivery that make it seem obvious to us, in the twenty-first century, that one can actively participate in "bringing in" without leaving one's home.

Drawing an analogy to the Supreme Court's analysis in Bailey v. United States, 516 U.S. 137, 144-45 (1995) (analyzing the word "use" as it appears in 18 U.S.C. § 924(c)), a standard dictionary of the English language provides help in construing the statute:

> **bring in** *vt* **1:** to produce by way of profit or return <each sale *brought in* about five dollars> **2** *obs*: to gain an introduction (as to a club) or a place of favor

> for 3: to enable (a man on base) to reach home plate (as by a hit) <his two-bagger *brought in* three men and tied the score> 4: to introduce (as a bill in a legislature or a point into a discussion) <members appointed to prepare and *bring in* the bill — T.E. May> 5: to report or to lay before a court or other legal body <the jury *brought in* a verdict> <*bring in* a writ of habeas corpus> 6a: to cause to produce or be productive (as an oil well) b: to win tricks with the long cards of (a suit) in whist or bridge 7a: EARN <he *brings in* a good salary each week> b: to finish with (as a score) <the golfer *brought in* a 268 for 72 holes of play>

Webster's Third New International Dictionary Unabridged 27 (1986). Because the bill defining the offense was enacted in 1909, it is probably reasonable to consider even the obsolete definition, number 2.

These definitions illustrate a dimension of sponsorship that is excluded by a construction of the phrase that is strictly physical. The first definition of "bring" supports this broader interpretation:

> 1a: to convey, lead, carry, or cause to come along from one place to another, the direction of movement being toward the place from which the action is being regarded <*brought* home a pretty young wife> <*brought* two ponderous law books to the trial> b: to cause to be, move, or act in a special way, as (1): ATTRACT <the trial *brought* a crowd to the courtroom> <the turmoil in the street *brought* householders to their windows> (2): PERSUADE, INDUCE <an argument that *brought* many men to his way of thinking> <he may be *brought* to forgive> <we hope to — a speaker before you at the next meeting> (3): FORCE, COMPEL <was *brought* sharply to consider his relations to the political state — V.L. Parrington>; *esp*: to force to go, be, or appear . . . (4): to handle, act upon, or treat so that the object is in a particular state or condition or acts in a particular way . . . .

Id.

Though Congress' meaning would have been clearer if it had said "bring into or cause to be brought in to," or qualified the

phrase by requiring the object be "physically" brought into the United States, the dictionary definitions show that causing is typically part of the concept of the word while physical possession is generally not. The various definitions imply action and not possession.

A consideration in construing the statute besides the bare meaning of the word is its placement and purpose in the statutory scheme. "'[T]he meaning of statutory language, plain or not, depends on context.'" Brown v Gardner, 513 U.S. 115, 118 (1994) (citing King v St. Vincent's Hospital, 502 U.S. 215, 221 (1991)). Looking past the phrase "brings into," § 472 must be read with the assumption that Congress intended each of its terms to have meaning. Here, there are three operative acts that pertain to false instruments. Criminal liability can be imposed for "bring[ing] into", for "keep[ing] in possession," or "conceal[ing]" false securities or obligations of the United States. Nothing suggests that these terms are intended by Congress to be redundant. Presumably the Congress used the three distinct phrases because it intended each to have a particular, nonsuperfluous meaning. Implying a physical component as a necessary element of the first proscription would cause contextual confusion in the meaning of possession which does not necessarily have a physical component. A person can have actual or constructive possession and sole as well as joint possession. See United States v. Terry, 911 F.2d 272, 280 (9th Cir. 1990). A narrow reading of the statute renders certain language

superfluous. Physically bringing in would also require physical possession. By reading the statute giving it the plain meaning of "bring," each separate act has meaning that does not render other parts of the statute superfluous.

Most importantly, the jury initiated the question of the meaning of "bring in," and all twelve of them must have agreed that the common-sense definition extended to causing something to be brought in.

For these reasons, I conclude that "bring in" includes causing something to be brought in. The evidence was sufficient to support a finding that Howick requested shipment of the silver certificates found by agents in the Federal Express package and delivered to Howick on October 5, 1999. Consequently, Howick's Rule 29 motion must be denied as to Count III.

Accordingly, IT IS HEREBY ORDERED that Howick's Rule 29 motion with respect to Count III of the Indictment (Dkt # 68) is DENIED.

DATED this 5th day of May, 2000.

DONALD W. MOLLOY
UNITED STATES DISTRICT JUDGE

Supreme Court of the United States
Paul Robert COHEN, Appellant,
v.
State of CALIFORNIA.
No. 299.

Argued Feb. 22, 1971.
Decided June 7, 1971.

The defendant was convicted before the Superior Court of Los Angeles County of the offense of disturbing the peace and he appealed. The Court of Appeal, Second District, 1 Cal.App.3d 94, 81 Cal.Rptr. 503, affirmed the conviction, and the defendant appealed. The Supreme Court, Mr. Justice Harlan, held, inter alia, that conviction of defendant who walked through courthouse corridor wearing jacket bearing the words 'Fuck the Draft' in a place where women and children were present of breach of the peace under California statute prohibiting disturbance of the peace by offensive conduct could not be justified either upon theory that the quoted words were inherently likely to cause violent reaction or upon more general assertion that the states, acting as guardians of public morality, may properly remove such offensive word from the public vocabulary since the state may not, consistently with the First and Fourteenth Amendments, make the simple public display involved of the single four-letter expletive a criminal offense.

Reversed.

Mr. Justice Blackmun, dissented and filed an opinion in which Mr. Chief Justice Burger, and Mr. Justice Black joined and in which Mr. Justice White joined in part.

West Headnotes

[1] Federal Courts 170B ⇦ 505

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk505 k. Validity of State Constitution or Statutes. Most Cited Cases
(Formerly 106k394(10))
Where throughout the proceedings in state courts the defendant consistently claimed that, as construed to apply to facts of the case, California breach of the peace statute infringed his rights to freedom of expression guaranteed by First and Fourteenth Amendments, and that contention had been rejected by highest California state court in which review could be had, defendant properly invoked Supreme Court's jurisdiction by his appeal. West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14; 28 U.S.C.A. § 1257(2).

[2] Constitutional Law 92 ⇦ 2036

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(R) Armed Services
92k2036 k. Selective Service and the Draft. Most Cited Cases
(Formerly 92k90.1(2), 92k90)

Disorderly Conduct 129 ⇦ 112

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
(Formerly 62k1(6) Breach of the Peace, 92k90.1(2), 92k90)
Where defendant, who walked through courthouse corridor wearing jacket bearing the words "Fuck the Draft" in a place where women and children were present, was convicted of disturbing the peace under California statute prohibiting disturbing the peace by offensive conduct, the only "conduct" which the state sought to punish was the fact of

communication; thus conviction rested solely upon "speech", not upon any separately identifiable conduct which allegedly was intended by defendant to be perceived by others as expressive of particular views but which, on its face, did not necessarily convey any message and hence arguably could be regulated without effectively repressing defendant's ability to express himself. West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14.

[3] Constitutional Law 92 ⇐ 2036

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(R) Armed Services
92k2036 k. Selective Service and the Draft. Most Cited Cases
(Formerly 92k90.1(2), 92k90)

Constitutional Law 92 ⇐ 4509(8)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(8) k. Disorderly Conduct and Breach of the Peace. Most Cited Cases
(Formerly 92k274.1(3), 92k274)

Where defendant walked through courthouse corridor wearing jacket bearing the words "Fuck the Draft" in place where women and children were present, California lacked power to punish defendant for underlying content of message the inscription conveyed; at least so long as there was no showing of an intent to incite disobedience to or disruption of the draft, defendant could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14.

[4] Constitutional Law 92 ⇐ 1498

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1498 k. Absolute Nature of Right. Most Cited Cases
(Formerly 92k90(3), 92k90)

Constitutional Law 92 ⇐ 4034

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4034 k. Speech, Press, Assembly, and Petition. Most Cited Cases
(Formerly 92k274.1(1), 92k274)

The First and Fourteenth Amendments do not give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. U.S.C.A.Const. Amends. 1, 14.

[5] Disorderly Conduct 129 ⇐ 101

129 Disorderly Conduct
129k101 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)

Disorderly Conduct 129 ⇐ 107

129 Disorderly Conduct
129k107 k. Location or Proximity; Public Place. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)

Disorderly Conduct 129 ⇐ 112

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)
Breach of the peace conviction of defendant who walked through courthouse corridor wearing jacket bearing the words "Fuck the Draft" in place where women and children were present could not be supported on ground that California statute prohibiting the disturbing of the peace by offensive conduct sought to preserve an appropriate decorous atmosphere in courthouse where defendant was arrested, in absence of language in statute that would have put defendant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places; the phrase "offensive conduct" could not be said sufficiently to inform the ordinary person that distinctions between certain locations were thereby created. West's Ann.Cal.Pen.Code, § 415.

[6] Obscenity 281 ⇦ 2.1

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.1 k. In General. Most Cited Cases
(Formerly 281k2)
Whatever else may be necessary to give rise to the states' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. U.S.C.A.Const. Amends. 1, 14.

[7] Disorderly Conduct 129 ⇦ 112

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)
Breach of the peace conviction of defendant who walked through courthouse corridor wearing jacket bearing the words "Fuck the Draft" in place where women and children were present could not be justified on theory of state'spower to prohibit obscene expression, since it could not plausibly be maintained that the vulgar illusion to the selective service system would conjure up such psychic stimulation in anyone likely to be confronted with defendant's crudely defaced jacket. West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14.

[8] Disorderly Conduct 129 ⇦ 112

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)
Breach of the peace conviction of defendant who walked through courthouse corridor wearing jacket bearing the words "Fuck the Draft" in place where women and children were present could not be justified on theory that states may ban simple use, without demonstration of additional justifying circumstances, of so-called "fighting words" which are inherently likely to provoke violent reaction, where no individual actually or likely to be present could reasonably have regarded the words on the jacket as a direct personal insult, and there was no showing that anyone who saw defendant was in fact violently aroused or that defendant intended such a result. West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14.

[9] Constitutional Law 92 ⇦ 1559

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1559 k. Offensive, Vulgar, Abusive, or Insulting Speech. Most Cited Cases
(Formerly 92k90(1), 92k90)
The mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. U.S.C.A.Const. Amends. 1, 14.

[10] Constitutional Law 92 ⇦ 1502

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1502 k. Receipt of Information or Ideas; Listeners' Rights. Most Cited Cases
(Formerly 92k90(3), 92k90)
The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner; any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. U.S.C.A.Const. Amends. 1, 14.

[11] Disorderly Conduct 129 ⇦ 106

129 Disorderly Conduct
129k106 k. Requisites of Annoyance or Disturbance in General. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)

Disorderly Conduct 129 ⇦ 112

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
(Formerly 62k1(5), 62k1(6), 62k1 Breach of the Peace)
If defendant's "speech" consisting of the words "Fuck the Draft" on jacket which defendant wore in courthouse corridor was otherwise entitled to constitutional protection, fact that some unwilling "listeners" might have been briefly exposed to it could not serve to justify conviction of breach of the peace, where there was no evidence that persons powerless to avoid defendant's conduct did in fact object to it, and where portion of statute upon which defendant's conviction rested evinced no concern, either on its face or as construed by California courts, with special plight of captive auditor, but, instead, indiscriminately swept within its prohibitions all "offensive conduct" that disturbed "any neighborhood or person." West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14.

[12] Constitutional Law 92 ⇦ 1801

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement; Criminal Conduct
92k1801 k. Incitement or Encouragement of Crime or Lawless Action. Most Cited Cases
(Formerly 92k90(1), 92k90)
An undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. U.S.C.A.Const. Amends. 1, 14.

[13] Constitutional Law 92 ⇦ 1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90(3), 92k90)
Most situations where the state has a justifiable interest in regulating speech will fall within one or more of various established exceptions to usual rule that governmental bodies may not prescribe the form or content of individual expression. U.S.C.A.Const. Amends. 1, 14.

[14] Constitutional Law 92 ⇦ 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General

92XVIII(A)1 In General
92k1490 k. In General. Most Cited Cases
(Formerly 92k90(1), 92k90)
The constitutional right of free expression is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. U.S.C.A.Const. Amends. 1, 14.

[15] Constitutional Law 92 ⇐ 1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90(1), 92k90)
Supreme Court cannot sanction the view that the Constitution, while solicitous of the cognitive content of the individual speech, has little or no regard for that motive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. U.S.C.A.Const. Amends. 1, 14.

[16] Constitutional Law 92 ⇐ 1561

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1561 k. Profanity or Swearing. Most Cited Cases
(Formerly 92k90.1(2), 92k90)

Constitutional Law 92 ⇐ 2036

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(R) Armed Services
92k2036 k. Selective Service and the Draft. Most Cited Cases
(Formerly 92k90.1(2), 92k90)

Constitutional Law 92 ⇐ 4509(8)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(8) k. Disorderly Conduct and Breach of the Peace. Most Cited Cases
(Formerly 92k274.1(3), 92k274)

Disorderly Conduct 129 ⇐ 112

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
(Formerly 62k1(6), 62k1(5), 62k1 Breach of the Peace)
The conviction of defendant who walked through courthouse corridor wearing jacket bearing the words "Fuck the Draft" in a place where women and children were present of breach of the peace under California statute prohibiting disturbance of the peace by offensive conduct could not be justified either upon theory that the quoted words were inherently likely to cause violent reaction or upon more general assertion that the states, acting as guardians of public morality, may properly remove such offensive word from the public vocabulary since the state may not, consistently with the First and Fourteenth Amendments, make the simple pub-

lic display involved of the single four-letter expletive a criminal offense. West's Ann.Cal.Pen.Code, § 415; U.S.C.A.Const. Amends. 1, 14.

**1783 Syllabus[FN*]

FN* NOTE: The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*15 Appellant was convicted of violating that part of Cal. Penal Code s 415 which prohibits 'maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person * * * by * * * offensive conduct,' for wearing a jacket bearing the words 'Fuck the Draft' in a corridor of the Los Angeles Courthouse. The Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,' and affirmed the conviction. Held: Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 1787-1789.

1 Cal.App.3d 94, 81 Cal.Rptr. 503, reversed.

Melville B. Nimmer, Los Angeles, Cal., for appellant.

Michael T. Sauer, Los Angeles, Cal., for appellee.

Mr. Justice HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

*16 Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code s 415 which prohibits 'maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person * * * by * * * offensive conduct * * *.'[FN1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

FN1. The statute provides in full:

'Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager of for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court.'

'On April 26, 1968, the defendant was observed in the Los Angeles County**1784 Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

'The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct *17 in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.' 1 Cal.App.3d 94, 97-98, 81 Cal.Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,' and that the State had proved this element because, on the facts of this case, '(i)t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket.' 1 Cal.App.3d, at 99-100, 81 Cal.Rptr., at 506. The California Supreme Court declined review by a divided vote.[FN2] We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U.S. 904, 90 S.Ct. 2211, 26 L.Ed.2d 558. We now reverse.

FN2. The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in In re Bushman, 1 Cal.3d 767, 83 Cal.Rptr. 375, 463 P.2d 727 (1970), it is 'not at all certain that the California Court of Appeal's construction of s 415 is now the authoritative California construction.' Post, at 1789 (BLACKMUN, J., dissenting). In the course of the Bushman opinion, Chief Justice Traynor stated:

'(One may) * * * be guilty of disturbing the peace through 'offensive' conduct (within the meaning of s 415) if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (People v. Cohen (1969) 1 Cal.App.3d 94, 101, 81 Cal.Rptr. 503.)' 1 Cal.3d, at 773, 463 P.2d, at 730.

We perceive no difference of substance between the Bushman construction and that of the Court of Appeal, particularly in light of the Bushman court's approving citation of Cohen.

[1] The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently*18 claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U.S.C. s 1257(2); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921).

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

[2][3] The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. **1785United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Further, the State certainly lacks power to punish Cohen for the

underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

*19 [4] Appellant's conviction, then, rests squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

[5] In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See Edwards v. South Carolina, 372 U.S. 229, 236-237, 83 S.Ct. 680, 683-684, 9 L.Ed.2d 697, and n. 11 (1963). Cf. Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[FN3]

FN3. It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folder over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18-19.

[6][7] In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of *20 instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone' likely to be confronted with Cohen's crudely defaced jacket.

[8] This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' **1786 Cantwell v. Connecticut, 310 U.S. 296, 309, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the

State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951); Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

*21 [9][10] Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), we have at the same time consistently stressed that 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' Id., at 738, 90 S.Ct., at 1491. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

[11] In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in *22 being free from unwanted expression in the confines of one's own home. Cf. Keefe, supra. Given the subtlety and complexity of the factors involved, if Cohen's 'speech' was otherwise entitled to constitutional protection, we do not think the fact that some unwilling 'listeners' in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person.' Cf. Edwards v. South Carolina, supra. FN4

FN4. In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing 'the peace or quiet * * * by loud or unusual noise' and using 'vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner.' See n. 1, supra. This secondquoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the 'offensive conduct' portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, *23 may properly remove this offensive word from the public vocabulary.

[12] The rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966); Cox v. Louisiana, 379 U.S. 536, 550-551, 85 S.Ct. 453, 462-463, 13 L.Ed.2d 471 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[FN5] We *24 think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

FN5. The amicus urges, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappropriate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes 'offensive conduct' and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

[13][14] At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society

**1788 as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See Whitney v. California, 274 U.S. 357, 375-377, 47 S.Ct. 641, 648-649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and *25 even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '(w)holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

[15] Additionally, we cannot overlook the fact, because it *26 is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '(o)ne of the prerogatives of American citizenship is the right to criticize public men and measures-and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.' Baumgartner v. United States, 322 U.S. 665, 673-674, 64 S.Ct. 1240, 1245, 88 L.Ed. 1525 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little **1789 social benefit that might result from running the risk of opening the door to such grave results.

[16] It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Reversed.

*27 Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE and Mr. Justice BLACK join.
I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 690, 93 L.Ed. 834 (1949). The California Court of Appeal appears so to have described it, 1 Cal.App.3d 94, 100, 81 Cal.Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seem misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of s 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal.App.3d, at 104, 81 Cal.Rptr., at 503. A month later, on January 27, 1970, the State Supreme Court in another case construed s 415, evidently for the first time. In re Bushman, 1 Cal.3d 767, 83 Cal.Rptr. 375, 463 P.2d 727. Chief Justice Traynor, who was among the dissenters to his court's refusal to take Cohen's case, wrote the majority opinion. He held that s 415 'is not unconstitutionally vague and overbroad' and further said:

'(T)hat part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

28 ' * * (It) does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence * * *.' 1 Cal.3d, at 773-774, 83 Cal.Rptr., at 379, 463 P.2d, at 731.

Cohen was cited in Bushman, 1 Cal.3d, at 773, 83 Cal.Rptr., at 378, 463 P.2d, at 730, but I am not convinced that its description there and Cohen itself are completely consistent with the 'clear and present danger' standard enunciated in Bushman. Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in Bushman.

Mr. Justice WHITE concurs in Paragraph 2 of Mr. Justice BLACKMUN'S dissenting opinion.
U.S.Cal. 1971.
Cohen v. California
403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284

END OF DOCUMENT

Supreme Court of the United States.
PENNSYLVANIA COAL CO.
v.
MAHON et al.
No. 549.

Argued Nov. 14, 1922.
Decided Dec. 11, 1922.

In Error to the Supreme Court of the State of Pennsylvania.

Suit by H. J. Mahon and another against the Pennsylvania Coal Company. A judgment for defendant was reversed by the Supreme Court of Pennsylvania (274 Pa. 489, 118 Atl. 491), and decree directed for plaintiffs, and defendant brings error. Reversed.

West Headnotes

Mines and Minerals 260 ⇦ 92.3(1)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.3 Validity of Statutes
260k92.3(1) k. In General. Most Cited Cases
(Formerly 260k92.3)
The destruction of valuable property and contract rights by Act Pa. May 27, 1921, P.L. 1198, 52 P.S.Pa. § 661 et seq., forbidding the mining of anthracite coal in such way as to cause the subsidence of any dwelling house, etc., is not justified as a protection of personal safety, as this could be provided for by notice.

Mines and Minerals 260 ⇦ 92.3(1)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.3 Validity of Statutes
260k92.3(1) k. In General. Most Cited Cases
(Formerly 260k92.3)
The destruction of property and contract rights by Act Pa. May 27, 1921, P.L. 1198, 52 P.S.Pa. § 661 et seq., forbidding the mining of anthracite coal so as to cause the subsidence of certain buildings and places, cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.

Mines and Minerals 260 ⇦ 92.3(1)

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.3 Validity of Statutes
260k92.3(1) k. In General. Most Cited Cases
(Formerly 260k92.3)
The destruction of valuable property and contract rights by Act Pa. May 27, 1921, P.L. 1198, 52 P.S.Pa. § 661 et seq., forbidding the mining of anthracite coal so as to cause the subsidence of any dwelling house, and other structures and places, is not valid as applied to mining causing the sinking of a single dwelling house owned by one whose deed reserved the right to remove the coal, and who thereby waived all claim for damages therefrom.

Nuisance 279 ⇦ 71

279 Nuisance
279II Public Nuisances
279II(B) Rights and Remedies of Private Persons
279k71 k. Nature and Grounds of Liability to Individuals. Most Cited Cases
A source of damage to a single private house is not a public nuisance, even if similar damage is inflicted on others in different places; the damage not being common or public.

Constitutional Law 92 ⇐ 2674

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2674 k. Eminent Domain. Most Cited Cases
(Formerly 92k118)

Constitutional Law 92 ⇐ 4076

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4075 Eminent Domain
92k4076 k. In General. Most Cited Cases
(Formerly 92k280)

Eminent Domain 148 ⇐ 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Eminent Domain 148 ⇐ 2.5

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.5 k. Contracts in General; Creditors' Rights. Most Cited Cases
(Formerly 148k2(1))
While some values incident to property are enjoyed under an implied limitation, and the government may to some extent diminish such values without compensation, the implied limitation is subject to limits, in view of the contract and due process clauses.

Eminent Domain 148 ⇐ 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
In determining the limits within which values incident to property may be diminished under the police power without compensation, the extent of the diminution is a fact for consideration.

Eminent Domain 148 ⇐ 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
While property may be regulated to a certain extent, if regulation goes too far, it constitutes a taking.

Eminent Domain 148 ⇐ 67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
In determining whether there has been such a diminution in values incident to property under the police power as to require an exercise of eminent domain and the payment of compensation, the greatest weight is given to the judgment of the Legislature, but it always is open to interested parties to contend that the Legislature has gone beyond its jurisdictional power.

Eminent Domain 148 ⇐ 318

148 Eminent Domain
148V Title or Rights Acquired
148k318 k. Extent of Right to Use of Property. Most Cited Cases
The rights of the public in a street purchased or laid

out by eminent domain are those that it has paid for, and if its representatives have acquired only surface rights, without the right of support, the right of support cannot be supplied later without compensation, in view of U.S.C.A. Const. Amends. 5, 14.

**159 *394 Messrs. John W. Davis, of New York City, and H. S. Drinker, Jr., of Philadelphia, Pa., for plaintiff in error.

*404 Mr. W. L. Pace, of Pittston, Pa., for defendants in error.

Mr. Geo. Ross Hull, of Harrisburg, Pa., for State of Pennsylvania, as amicus curiae.

*412 Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921 (P. L. 1198), commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs, A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other *413 things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95,

103, 90 Am. Dec. 181. The extent of *414 the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land-a very valuable estate-and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should **160 be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, 100 Atl. 820, L. R. A. 1917E, 672. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This *415 we think that we are warranted in assuming that the statute does.

It is true that in Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713, it was held competent for the legislature to require a pillar of coal to the left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go-and if they go beyond the general rule, *416 whether they do not stand as much upon tradition as upon principle. Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980. In general it is not plain that a man's misfor-

tunes or necessities will justify his shifting the damages to his neighbor's shoulders. Spade v. Lynn & Boston Ry. Co., 172 Mass. 488, 489, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree-and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They were to the verge of the law but fell far short of the present act. Block & Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595, March 20, 1922.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

Mr. Justice BRANDEIS dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent 'as to cause the * * * *417 subsidence of * * * any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.' Act Pa. May 27, 1921, § 1 (P. L. 1198). Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten **161 the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatended is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious-as it may because of further change in local or social conditions-the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private *418 persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53

L. Ed. 923. Compare Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Walls v. Midland Carbon Co., 254 U. S. 300, 41 Sup. Ct. 118, 65 L. Ed. 276. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargine cases settled that. Mugler v. Kansas, 123 U. S. 623, 668, 669, 8 Sup. Ct. 273, 31 L. Ed. 205; Powell v. Pennsylvania, 127 U. S. 678, 682, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. See also Hadacheck v. Los Angeles, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; Pierce Oil Corporation v. City of Hope, 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power. Compare Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; Missouri Pacific Railway Co. v. Omaha, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157. If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to *419 like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the state's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. See Powell v. Pennsylvania, 127 U. S. 678, 681, 684, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Murphy v. California, 225 U. S. 623, 629, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153. But even if the particular **162 facts are to govern, the statute should, in my opinion be upheld in this case. For the defendant has failed to adduce any evidence from which *420 it appears that to restrict its mining operations was an unreasonable exercise of the police power. Compare Reinman v. Little Rock, 237 U. S. 171, 177, 180, 35 Sup. Ct. 511, 59 L. Ed. 900; Pierce Oil Corporation v. City of Hope, 248 U. S. 498, 500, 39 Sup. Ct. 172, 63 L. Ed. 381. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to

such an extent as to cause a subsidence. It was, doubtless, for this reason that the Legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house, that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs, and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. Welch v. Swasey, 214 U. S. 91, 106, 29 Sup. Ct. 567, 53 L. Ed. 923; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 30 Sup. Ct. 301, 54 L. Ed. 515; Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 Sup. Ct. 281, 58 L. Ed. 539. May we say that notice would afford adequate protection of the public safety where the Legislature and the highest court of the state, with greater knowledge of local conditions, have declared, in effect, that it would not? If the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Atlantic Coast Line R. R. Co. v. North Carolina, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599. The rule that the state's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary (Chicago, Burlington & Quincy R. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948); *421 and, likewise, to supersede, by an Employers' Liability Act, the provision of a charter exempting a railroad from liability for death of employees, since the civil liability was deemed a matter of public concern, and not a mere private right. Texas & New Orleans R. R. Co. v. Miller, 221 U. S. 408, 31 Sup. Ct. 534, 55 L. Ed. 789. Compare Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 23, 38 Sup. Ct. 35, 62 L. Ed. 124. Nor can existing contracts between private individuals preclude exercise of the police power. 'One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the state by making a contract about them.' Hudson Water Co. v. McCarter, 209 U. S. 349, 357, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 438, 23 Sup. Ct. 531, 47 L. Ed. 887; Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

*422 (c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Law, section 1.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be 'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity **163 of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects (Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369); or upon adjoining owners, as by party wall provisions (Jackman v. Rosenbaum Co., 260 U. S. 22, 43 Sup. Ct. 9, 67 L. Ed. 107, decided October 23, 1922). But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381; his brickyard, in 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas, 1917B, 927; his livery stable, in 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900; his billiard hall, in 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; his oleomargarine factory, in 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; his brewery, in 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

U.S. 1922
Pennsylvania Coal Co. v. Mahon
260 U.S. 393, 43 S.Ct. 158, 28 A.L.R. 1321, 67 L.Ed. 322

END OF DOCUMENT

P

Supreme Court of the United States
BRADWELL
v.
THE STATE.
December Term, 1872

**1 IN error to the Supreme Court of the State of Illinois.

Mrs. Myra Bradwell, residing in the State of Illinois, made application to the judges of the Supreme Court of that State for a license to practice law. She accompanied her petition with the usual certificate from an inferior court of her good character, and that on due examination she had been found to possess the requisite qualifications. Pending this application she also filed an affidavit, to the effect 'that she was born in the State of Vermont; that she was (had been) a citizen of that State; that she is now a citizen of the United States, and has been for many years past a resident of the city of Chicago, in the State ofIllinois.' And with this affidavit she also filed a paper asserting that, under the foregoing facts, she was entitled to the license prayed for by virtue of the second section of the fourth article of the Constitution of the United States, and of the fourteenth article of amendment of that instrument. *131

The statute of Illinois on the subject of admissions to the bar, enacts that no person shall be permitted to practice as an attorney or counsellor-at-law, or to commence, conduct, or defend any action, suit, or plaint, in which he is not a party concerned, in any court of record within the State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counsellor-at-law, and shall authorize him to appear in all the courts of record within the State, and there to practice as an attorney and counsellor-at-law, according to the laws and customs thereof.

On Mrs. Bradwell's application first coming before the court, the license was refused, and it was stated as a sufficient reason that under the decisions of the Supreme Court of Illinois, the applicant-'as a married woman would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client.' After the announcement of this decision, Mrs. Bradwell, admitting that she was a married woman-though she expressed her belief that such fact did not appear in the record-filed a printed argument in which her right to admission, notwithstanding that fact, was earnestly and ably maintained. The court thereupon gave an opinion in writing. Extracts are here given:

'Our statute provides that no person shall be permitted to practice as an attorney or counsellor at law without having previously obtained a license for that purpose from two of the justices of the Supreme Court. By the second section of the act, it is provided that no person shall be entitled to receive a license until he shall have obtained a certificate from the court of some county of his good moral character, and this is the only express limitation upon the exercise of the power thus intrusted to this court. In all other respects it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, and must be held subject to at least two limitations. One is, that the *132 court should establish such terms of admission as will promote the proper administration of justice; the second, that it should not admit any persons or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute.

**2 'The substance of the last limitation is simply that this important trust reposed in us should be ex-

ercised in conformity with the designs of the power creating it.

'Whether, in the existing social relations between men and women, it would promote the proper administration of justice, and the general well-being of society, to permit women to engage in the trial of cases at the bar, is a question opening a wide field of discussion, upon which it is not necessary for us to enter. It is sufficient to say that, in our opinion, the other implied limitation upon our power, to which we have above referred, must operate to prevent our admitting women to the office of attorney at law. If we were to admit them, we should be exercising the authority conferred upon us in a manner which, we are fully satisfied, was never contemplated by the legislature.

'It is to be remembered that at the time this statute was enacted we had, by express provision, adopted the common law of England, and, with three exceptions, the statutes of that country passed prior to the fourth year of James the First, so far as they were applicable to our condition.

'It is to be also remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of bishops, or be elected to a seat in the House of Commons.

'It is to be further remembered, that when our act was passed, that school of reform which claims for women participation in the making and administering of the laws had not then arisen, or, if here and there a writer had advanced such theories, they were regarded rather as abstract speculations than as an actual basis for action.

'That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.

'In view of these facts, we are certainly warranted in saying *133 that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.'

The court having thus denied the application, Mrs. Brad-well brought the case here as within the twenty-fifth section of the Judiciary Act, or the recent act of February 5th, 1867, amendatory thereto; the exact language of which may be seen in the Appendix.

West Headnotes

Attorney and Client 45 ⇦ 4

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k4 k. Capacity and Qualifications. Most Cited Cases
A refusal by the courts of a state to admit a woman to practice law does not violate any provision of the constitution of the United States, or of its amendments.

Constitutional Law 92 ⇦ 2927

92 Constitutional Law
92XXIV Privileges or Immunities; Emoluments
92XXIV(B) Privileges and Immunities of Citizens of the United States (Fourteenth Amendment)
92XXIV(B)2 Particular Issues and Applications
92k2927 k. Attorneys. Most Cited Cases
(Formerly 92k206(4))
The right to practice law is not a privilege or immunity of a citizen of the United States, within the meaning of the fourteenth amendment. U.S.C.A.Const. Amend. 14.

Mr. Matthew Hale Carpenter, for the plaintiff in error:

**3 The question does not involve the right of a female to vote. It presents a narrow matter:

Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment,[FN1] the privilege of earning a livelihood by practicing at the bar of a judicial court?

1. The Supreme Court of Illinois having refused to grant to a woman a license to practice law in the courts of that State, on the ground that females are not eligible under the laws of that State; *Held*, that such a decision violates no provision of the Federal Constitution.

2. The second section of the fourth article is inapplicable, because the plaintiff was a citizen of the State of whose action she complains, and that section only guarantees privileges and immunities to citizens of other States, in that State.

3. Nor is the right to practice law in the State courts a privilege or immunity of a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the Constitution of the United States.

4. The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe.

FN1 See the Amendment, *supra*, pp. 43, 44.

The original Constitution said:

'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'

Under this provision each State could determine for itself what the privileges and immunities of its citizens should be. A citizen emigrating from one State to another carried with him, not the privileges and immunities he enjoyed in his native State, but was entitled, in the State of his adoption, to such privileges and immunities as were enjoyed by the class of citizens to which he belonged by the laws of such adopted State.

But the fourteenth amendment executes itself in every State of the Union. Whatever are the privileges and immunities of a citizen in the State of New York, such citizen, emigrating, carries them with him into any other State of the Union. It utters the will of the United States in every State, and silences every State constitution, usage, or law which conflicts with it. If to be admitted to the bar, on attaining the age and learning required by law, be one of the *134 privileges of a white citizen in the State of New York, it is equally the privilege of a colored citizen in that State; and if in that State, then in any State. If no State may 'make or enforce any law' to abridge the privileges of a citizen, it must follow that the privileges of all citizens are the same.

Does admission to the bar belong to that class of privileges which a State may not abridge, or that class of political rights as to which a State may discriminate between its citizens?

**4 It is evident that there are certain 'privileges and immunities' which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them. I concede that the right to vote is not one of those privileges. And the question recurs whether admission to the bar, the proper qualification being possessed, is one of the privileges which a State may not deny.

In *Cummings* v. *Missouri*,[FN2] this court say:

FN2 4 Wallace, 321.

'The theory upon which our political institutions rest is, that all men have certain inalienable rights-that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness *all avocations, all honors, all positions, are alike open*

to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.'

In *Ex parte Garland*,[FN3] this court say:

FN3 Ib. 378.

'The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, *upon *135 evidence of their possessing sufficient legal learning and fair private character*. . . . The order of admission is the judgment of the court, that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, *and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been offered*.'[FN4]

FN4 Ex parte Heyfron, 7 Howard's Mississippi, 127; Fletcher *v.* Dainger-field, 20 California, 430.

It is now settled by numerous cases,[FN5] that the courts in admitting attorneys to, and in expelling them from, the bar, act judicially, and that such proceedings are subject to review on writ of error or appeal, as the case may be.

FN5 Ex parte Cooper, 22 New York, 67; Strother *v.* Missouri, 1 Missouri, 605; Ex parte Secomb, 19 Howard, 9; Ex parte Garland, 4 Wallace, 378.

5 From these cases the conclusion is irresistible, that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, they cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a State legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. This would be the exclusion of all colored citizens, without regard to age, character, or learning. Yet no sound mind can draw a distinction between such an act and a custom, usage, or law of a State, which denies this privilege to all female citizens, without regard to age, character, or learning. If the legislature may, under pretence of fixing qualifications, declare that no ***136 female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that 'no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen.' And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.

Now, Mrs. Bradwell is a citizen of the United States, and of the State of Illinois, residing therein; she has been judicially ascertained to be of full age, and to possess the requisite character and learning.

Still admission to the bar was denied her, not upon the ground that she was not a citizen; not for want of age or qualifications; not because the profession

of the law is not one of those avocations which are open to every American citizen as matter of right, upon complying with the reasonable regulations prescribed by the legislature; but first upon the ground that inconvenience would result from permitting her to enjoy her legal rights in this, to wit, that her clients might have difficulty in enforcing the contracts they might make with her, as their attorney, because of her being a married woman; and, finally, on the ground of her sex, merely.

Now, the argument *ab inconvenienti*, which might have been urged with whatever force belongs to it, against *adopting* the fourteenth amendment in the full scope of its language, is futile to resist its full and proper operation, now that it has been adopted. But that objection is really without force; for Mrs. Bradwell, admitted to the bar, becomes an officer of the court, subject to its summary jurisdiction. Any malpractice or unprofessional conduct towards her client would be punishable by fine, imprisonment, or expulsion from the bar, or by all three. Her clients would, therefore, not be compelled to resort to actions at law against her. The objection arising from her coverture was in fact *137 abandoned, in its more full consideration of the case, by the court itself; and the refusal put upon the fact that the statute of Illinois, interpreted by the light of early days, could not have contemplated the admission of any woman, though unmarried, to the bar. But whatever the statute of Illinois meant, I maintain that the fourteenth amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters, and our daughters. The inequalities of sex will undoubtedly have their influence, and be considered by every client desiring to employ counsel.

**6 There may be cases in which a client's rights can only be rescued by an exercise of the rough qualities possessed by men. There are many causes in which the silver voice of woman would accomplish more than the severity and sternness of man could achieve. Of a bar composed of men and women of equal integrity and learning, women might be more or less frequently retained, as the taste or judgment of clients might dictate. But the broad shield of the Constitution is over them all, and protects each in that measure of success which his or her individual merits may secure.
No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State.

The court having overruled these claims of right founded on the clauses of the Federal Constitution before referred *138 to, those propositions may be considered as properly before this court.

As regards the provision of the Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont.

While she remained in Vermont that circumstance made her a citizen of that State. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the State of Illinois.

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

We do not here mean to say that there may not be a temporary residence in one State, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the definition of citizenship of a State as defined by the first section of the fourteenth amendment.

In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them, and he proceeds to argue that admission to the bar of a State of a person who possesses the requisite learning and character is one of those which a State may not deny.

**7 *139 In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the *Slaughter-House Cases*[FN6] renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

FN6 *Supra*, p. 36.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY:

I concur in the judgment of the court in this case, by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read.

*140 The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect, but had simply provided that no person should be admitted to practice as attorney or counsellor without having previously obtained a license for that purpose from two justices of the Supreme Court, and that no person should receive a li-

cense without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

**8 The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

*141 It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society *142 must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the

nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

**9 For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

Mr. Justice SWAYNE and Mr. Justice FIELD concurred in the foregoing opinion of Mr. Justice BRADLEY.

The CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions.

U.S.,1872

Bradwell v. People of State of Illinois

83 U.S. 130, 1872 WL 15396 (U.S.Ill.), 21 L.Ed. 442, 16 Wall. 130

END OF DOCUMENT

Supreme Court of the United States
Sharron A. FRONTIERO and Joseph Frontiero, Appellants,
v.
Elliot L. RICHARDSON, Secretary of Defense, et al.
No. 71-1694.

Argued Jan. 17, 1973.
Decided May 14, 1973.

Suit was brought by a married woman air force officer and her husband against the Secretary of Defense seeking declaratory and injunctive relief against enforcement of federal statutes governing quarters' allowance and medical benefits for members of the uniformed services. The Three-Judge United States District Court for the Middle District of Alabama, 341 F.Supp. 201, denied relief, and plaintiffs appealed. Mr. Justice Brennan announced the judgment of the Supreme Court and delivered an opinion, in which Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall joined, holding that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny, and that statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support, violate due process clause of the Fifth Amendment insofar as they require a female member to prove dependency of her husband.

Reversed.

Mr. Justice Stewart filed a statement concurring in the judgment.

Mr. Justice Powell concurred in the judgment and filed an opinion in which the Chief Justice and Mr. Justice Blackmun joined.

Mr. Justice Rehnquist filed a dissenting statement.

West Headnotes

[1] Constitutional Law 92 ⇐ 2970

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2970 k. In General. Most Cited Cases
(Formerly 92k208(3))
Classifications based upon sex, like classifications based upon race, alienage or national origin, are inherently suspect and must be subjected to strict judicial scrutiny. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

[2] Constitutional Law 92 ⇐ 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))
Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

[3] Constitutional Law 92 ⇐ 2970

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2970 k. In General. Most Cited Cases
(Formerly 92k208(1))

With respect to strict judicial scrutiny of a legislative classification, "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

[4] Constitutional Law 92 ⇐ 2974

92 Constitutional Law
92XXV Class Legislation; Discrimination and Classification in General
92k2974 k. Sex or Gender; Sexual Orientation. Most Cited Cases
(Formerly 92k208(3))

Any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands dissimilar treatment for men and women who are similarly situated and therefore involves the very kind of arbitrary legislative choice forbidden by the Constitution. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

[5] Armed Services 34 ⇐ 5(6)

34 Armed Services
34I In General
34k5 Persons in the Armed Services, and Militia Called Into Service of the United States
34k5(6) k. Pay and Allowances. Most Cited Cases
(Formerly 34k13.3(5))

Constitutional Law 92 ⇐ 4244

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)10 War and National Security
92k4241 Armed Services
92k4244 k. Pay and Benefits. Most Cited Cases
(Formerly 92k278.4(5), 92k318(2))

Statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support violate due process clause of the Fifth Amendment insofar as they require a female member to prove dependency of her husband. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A.Const. Amend. 5; 10 U.S.C.A. §§ 1072, 1076; 37 U.S.C.A. §§ 401, 403.

****1765 *677** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

A married woman Air Force officer (hereafter appellant) sought increased benefits for her husband as a 'dependent' under 37 U.S.C. ss 401, 403, and 10 U.S.C. ss 1072, 1076. Those statutes provide, solely for administrative convenience, ****1766** that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support. When her application was denied for failure to satisfy the statutory dependency standard, appellant and her husband brought this suit in District Court, contending that the statutes deprived servicewomen of due process. From that Court's adverse ruling, they took a direct appeal. Held: The judgment is reversed. Pp. 1768-1772, 1772-1773, 341 F.Supp. 201, reversed.

***678** Joseph J. Levin, Jr., Montgomery, Ala., for appellants.

Ruth B. Ginsburg, New York City, for American Civil Liberties Union, amicus curiae, by special leave of Court.

Samuel Huntington, Washington, D.C., for appellees.

Mr. Justice BRENNAN announced the judgment of the Court in an opinion in which Mr. Justice DOUGLAS, Mr. Justice WHITE, and Mr. Justice MARSHALL join.

The question before us concerns the right of a female member of the uniformed services[FN1] to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U.S.C. ss 401, 403, and 10 U.S.C. ss 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support. 37 U.S.C. s 401(1); 10 U.S.C. s 1072(2)(A). A servicewoman, on the other hand, may not claim her husband as a 'dependent' under these programs unless he is in fact dependent upon her for over one-half of his support. *679 37 U.S.C. s 401; 10 U.S.C. s 1072(2)(C).[FN2] Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge issenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. 341 F.Supp. 201 (1972). We noted probable jurisdiction. 409 U.S. 840, 93 S.Ct. 64, 34 L.Ed.2d 78 (1972). We reverse.

FN1. The 'uniformed services' include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U.S.C. s 101(3); 10 U.S.C. s 1072(1).

FN2. Title 37 U.S.C. s 401 provides in pertinent part:

'In this chapter, 'dependent,' with respect to a member of a uniformed service, means-

'(1) his spouse;

'However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support . . .'

10 U.S.C. s 1072(2) provides in pertinent part:

"Dependent,' with respect to a member . . . of a uniformed service, means-

'(A) the wife;

'(C) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . .'

I

In an effort to attract career personnel through reenlistment, Congress established, in 37 U.S.C. s 401 et seq., and 10 U.S.C. s 1071 et seq., a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry.[FN3] Thus, under 37 U.S.C. s 403, **1767 a member of the uniformed services with dependents is entitled to an *680 increased 'basic allowence for quarters' and, under 10 U.S.C. s 1076, a member's dependents are provided comprehensive medical and dental care.

FN3. See 102 Cong.Rec. 3849-3850 (Cong. Kilday), 8043 (Sen. Saltonstall); 95 Cong.Rec. 7662 (Cong. Kilday), 7664 (Cong. Short), 7666 (Cong. Havenner), 7667 (Cong. Bates), 7671 (Cong. Price). See also 10 U.S.C. s 1071.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her 'dependent.' Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support.[FN4] Appellants then commenced this suit, contendingthat, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[FN5] In essence, appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction*681 against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

FN4. Appellant Joseph Frontiero is a full-time student at Huntingdon College in Montgomery, Alabama. According to the agreed stipulation of facts, his living expenses, including his share of the household expenses, total approximately $354 per month. Since he receives $205 per month in veterans' benefits, it is clear that he is not dependent upon appellant Sharron Frontiero for more than one-half of his support.

FN5. '(W)hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964); see Shapiro v. Thompson, 394 U.S. 618, 641-642, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600 (1969); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members,[FN6] a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the 'breadwinner' in the family-and the wife typically the 'dependent' partner-'it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption**1768 of dependency to such members.' 341 F.Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District *682 Court speculated that such differential treatment might conceivably lead to a 'considerable saving of administrative expense and manpower.' Ibid.

FN6. The housing provisions, set forth in 37 U.S.C. s 401 et seq., were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H.R.Rep. No. 779, 81st Cong., 1st Sess.; S.Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in substance the dependency definitions of s 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by s 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision

was itself derived from unspecified earlier enactments. See S.Rep. No. 917, 78th Cong., 2d Sess., 4.

The medical benefits legislation, 10 U.S.C. s 1071 et seq., was enacted as the Dependents' Medical Care Act of 1956. As such, it was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H.R.Rep. No. 1805, 84th Cong., 2d Sess.; S.Rep. No. 1878, 84th Cong., 2d Sess.

II

[1] At the outset, appellants contend that classifications based upon sex, like classifications based upon race,[FN7] alienage,[FN8] and national origin,[FN9] are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971):

FN7. See Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-192, 85 S.Ct. 283, 287-288, 13 L.Ed.2d 222 (1964); Bolling v. Sharpe, supra, 347 U.S., at 499, 74 S.Ct., at 694.

FN8. See Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

FN9. See Oyama v. California, 332 U.S. 633, 644-646, 68 S.Ct. 269, 274-275, 92 L.Ed. 249 (1948); Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

In Reed, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Appellant, the mother of the deceased, and appellee, the father, filed competing petitions for appointment as administrator of their son's estate. Since the parties, as parents of the deceased, were members of the same entitlement class the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment.

[2] The Court noted that the Idaho statute 'provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject*683 to scrutiny under the Equal Protection Clause.' 404 U.S., at 75, 92 S.Ct. at 253. Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest. See Jefferson v. Hackney, 406 U.S. 535, 546, 92 S.Ct. 1724, 1731, 32 L.Ed.2d 285 (1972); Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372, 4 L.Ed.2d 1435 (1960); McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961); Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since 'men (are) as a rule more conversant with business affairs than . . . women.'[FN10] Indeed, ap-

pellee maintained that 'it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are.' FN11 **1769 And the Idaho Supreme Court, in upholding the constitutionality of this statute, suggested that the Idaho Legislature might reasonably have 'concluded that in general men are better qualified to act as an administrator than are women.' FN12

FN10. Brief for Appellee in No. 70-4, O.T. 1971, Reed v. Reed, p. 12.

FN11. Id., at 12-13.

FN12. Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provide 'dissimilar treatment for men and women who are . . . similarly situated.' *684404 U.S., at 77, 92 S.Ct., at 254. The Court therefore held that, even though the State's interest in achieving administrative efficiency 'is not without some legitimacy,' '(t)o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the (Constitution) . . ..' Id., at 76, 92 S.Ct. at 254. This departure from 'traditional' rational-basis analysis with respect to sex-based classifications is clearly justified.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. FN13 Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:

FN13. Indeed, the position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decisionmaking councils. See M. Gruberg, Women in American Politics 4 (1968). See also 2 A. de Tocqueville, Democracy in America (Reeves trans. 1948).

'Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and *685 independent career from that of her husband. . . .

'. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.' Bradwell v. State of Illinois, 16 Wall. 130, 141, 21 L.Ed.2d 442 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Myrdal,

An American Dilemma 1073 (20th Anniversary ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right-which is itself 'preservative of other **1770 basic civil and political rights'[FN14]-until adoption of the Nineteenth Amendment half a century later.

FN14. Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964); see Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972); Kramer v. Union Free School District, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969); Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886).

It is true, of course, that the position of women in America has improved markedly in recent decades.[FN15] *686 Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic,[FN16] women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.[FN17] See generally K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Act of 1964, 84 Harv.L.Rev. 1109 (1971).

FN15. See generally The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A. Montagu, Man's Most Dangerous Myth (4th ed. 1964); The President's Commission on the Status of Women, American Women (1963).

FN16. See, e.g., Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv.L.Rev. 1499, 1507 (1971).

FN17. It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. See Joint Reply Brief of Appellants and American Civil Liberties Union (Amicus Curiae) 9.

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ..' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S.Ct. 1400, 1407, 31 L.Ed.2d 768 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.[FN18] As a result, statutory distinctions *687 between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

FN18. See, e.g., Developments in the Law-Equal Protection, 82 Harv.L.Rev. 1065, 1173-1174 (1969).

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress ex-

pressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of 'race, color, religion, sex, or national origin.'[FN19] Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act 'shall discriminate . . . between employees on the basis of sex.'[FN20] And s 1 of the **1771 Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that '(e)quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.'[FN21] Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal *688 branch of Government is not without significance to the question presently under consideration. Cf. Oregon v. Mitchell, 400 U.S. 112, 240, 248-249, 91 S.Ct. 260, 322, 327, 27 L.Ed.2d 272 (1970) (opinion of Brennan, White, and Marshall, JJ.); Katzenbach v. Morgan, 384 U.S. 641, 648-649, 86 S.Ct. 1717, 1722, 16 L.Ed.2d 828 (1966).

FN19. 42 U.S.C. s 2000e-2(a), (b), (c) (emphasis added). See generally, Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo.Wash.L.Rev. 824 (1972); Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 8j Harv.L.Rev. 1109 (1971).

FN20. 29 U.S.C. s 206(d) (emphasis added). See generally Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U.Cin.L.Rev. 615 (1970).

FN21. H.R.J.Res. No. 208, 92d Cong., 2d Sess. (1972). In conformity with these principles, Congress in recent years has amended various statutory schemes similar to those presently under consideration so as to eliminate the differential treatment of men and women. See 5 U.S.C. s 2108, as amended, 85 Stat. 644; 5 U.S.C. s 7152, as amended, 85 Stat. 644; 5 U.S.C. s 8341, as amended, 84 Stat. 1961; 38 U.S.C. s 102(b), as amended, 86 Stat. 1092.

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

III

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U.S.C. ss 401, 403, and 10 U.S.C. ss 2072, 2076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command 'dissimilar treatment for men and women who are . . . similarly situated.' Reed v. Reed, 404 U.S., at 77, 92 S.Ct., at 254.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere 'administrative convenience.' In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands *689 rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier

simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.[FN22]

FN22. It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. See Gruenwald v. Gardner, 390 F.2d 591 (CA2), cert. denied, 393 U.S. 982, 89 S.Ct. 456, 21 L.Ed.2d 445 (1968); cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). On the contrary, these statutes seize upon a group-women-who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages. Cf. Gaston County v. United States, 395 U.S. 285, 296-297, 89 S.Ct. 1720, 1725-1726, 23 L.Ed.2d 309 (1969).

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in **1772 fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.[FN23] And in light of the fact that the *690 dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits rather than through the more costly hearing process,[FN24] the Government's explanation of the statutory scheme is, to say the least, questionable.

FN23. In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full time 12 months per year. See U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W.B.Pub. No. 72-191, Mar. 1972). Moreover, 41.5% of all married women are employed. See U.S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971, p. 4 (Summary Special Labor Force Report, Aug. 1972). It is also noteworthy that, while the median income of a male member of the armed forces is approximately $3,686, see The Report of the President's Commission on an All-Volunteer Armed Force 51, 181 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See Statistical Abstract of the United States Table No. 535 (1972), Source: U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 80. Applying the statutory definition of 'dependency' to these statistics, it appears that in the 'median' family, the wife of a male member must have personal expenses of approximately $4,474, or about 75% of the total family income, in order to qualify as a 'dependent.'

FN24. Tr. of Oral Arg. 27-28.

[3][4][5] In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.' Stanley v. Illinois, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551 (1972). And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality. See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Carrington v.

Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, Solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the (Constitution) . . ..' Reed v. Reed, 404 U.S., at 77, 76, 92 S.Ct., at 254. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative ***691** convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband. FN25

FN25. As noted earlier, the basic purpose of these statutes was to provide fringe benefits to members of the uniformed services in order to establish a compensation pattern which would attract career personnel through re-enlistment. See n. 3, supra, and accompanying text. Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (CA10 1972). See also 1 U.S.C. s 1.

Reversed.

Mr. Justice STEWART concurs in the judgment, agreeing that the statutes before****1773** us work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.

Mr. Justice REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, Frontiero v. Laird, 341 F.Supp. 201

.Mr. Justice POWELL, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice BRENNAN, which would hold that all classifications based upon sex, 'like classifications based upon race, alienage, and national origin,' are 'inherently suspect and must therefore be subjected to close judicial scrutiny.' Ante, at 1768. It is unnecessary for the Court in this case to ***692** characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of Reed and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democractic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues

which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

U.S.Ala. 1973.
Frontiero v. Richardson
411 U.S. 677, 93 S.Ct. 1764, 9 Fair Empl.Prac.Cas. (BNA) 1253, 5 Empl. Prac. Dec. P 8609, 36 L.Ed.2d 583

END OF DOCUMENT

CRAIG ET AL.
v.
BOREN, GOVERNOR OF OKLAHOMA, ET AL.

No. 75-628.

Supreme Court of United States.

Argued October 5, 1976.
Decided December 20, 1976.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

191 *191 *Frederick P. Gilbert* argued the cause and filed briefs for appellants.

James H. Gray, Assistant Attorney General of Oklahoma, argued the cause for appellees. With him on the brief was *Larry Derryberry,* Attorney General.[*]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

192 The interaction of two sections of an Oklahoma statute, Okla. Stat., Tit. 37, §§ 241 and 245 (1958 and Supp. 1976),[1] *192 prohibits the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

This action was brought in the District Court for the Western District of Oklahoma on December 20, 1972, by appellant **Craig**, a male then between 18 and 21 years of age, and by appellant Whitener, a licensed vendor of 3.2% beer. The complaint sought declaratory and injunctive relief against enforcement of the gender-based differential on the ground that it constituted invidious discrimination against males 18-20 years of age. A three-judge court convened under 28 U. S. C. § 2281 sustained the constitutionality of the statutory differential and dismissed the action. 399 F. Supp. 1304 (1975). We noted probable jurisdiction of appellants' appeal, 423 U. S. 1047 (1976). We reverse.

I

We first address a preliminary question of standing. Appellant **Craig** attained the age of 21 after we noted probable jurisdiction. Therefore, since only declaratory and injunctive relief against enforcement of the gender-based differential is sought, the controversy has been rendered moot as to **Craig**. See, *e. g., DeFunis* v. *Odegaard,* 416 U. S. 312 (1974).[2] The question thus arises whether appellant Whitener, the licensed vendor of 3.2% beer, who has a live controversy against enforcement of the statute, may rely upon the equal protection objections of males 18-20 years of age to establish
193 her claim of *193 unconstitutionality of the age-sex differential. We conclude that she may.

Initially, it should be noted that, despite having had the opportunity to do so,[3] appellees never raised before the District Court any objection to Whitener's reliance upon the claimed unequal treatment of 18-20-year-old males as the premise of her equal protection challenge to Oklahoma's 3.2% beer law. See 399 F. Supp., at 1306 n. 1. Indeed, at oral argument Oklahoma acknowledged that appellees always "presumed" that the vendor, subject to sanctions and loss of license for violation of the statute, was a proper party in interest to object to the enforcement of the sex-based regulatory provision. Tr. of Oral Arg. 41. While such a concession certainly would not be controlling upon the reach of this Court's constitutional authority to exercise jurisdiction under Art. III, see, *e. g., Sierra Club* v. *Morton,* 405 U. S. 727, 732 n. 3 (1972); cf. *Data Processing Service* v. *Camp,* 397 U. S. 150, 151 (1970), our decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary "rule of self-restraint" designed to minimize

unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative. See, *e. g.*, *Barrows* v. *Jackson*, 346 U. S. 249, 255, 257 (1953); see also *Singleton* v. *Wulff*, 428 U. S. 106, 123-124 (1976) (POWELL, J., dissenting). These prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here, where the lower court already has entertained the relevant constitutional challenge and the parties have sought—or at least have never resisted—an authoritative constitutional determination. In such circumstance
194 a decision by us to forgo *194 consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and "cogently," *Holden* v. *Hardy*, 169 U. S. 366, 397 (1898), the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose. Our Brother BLACKMUN's comment is pertinent: "[I]t may be that a class could be assembled, whose fluid membership always included some [males] with live claims. But if the assertion of the right is to be `representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by" the present *jus tertii* champion. *Singleton* v. *Wulff*, *supra*, at 117-118.

In any event, we conclude that appellant Whitener has established independently her claim to assert *jus tertii* standing. The operation of §§ 241 and 245 plainly has inflicted "injury in fact" upon appellant sufficient to guarantee her "concrete adverseness," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), and to satisfy the constitutionally based standing requirements imposed by Art. III. The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, "sanctions and perhaps loss of license." Tr. of Oral Arg. 41. This Court repeatedly has recognized that such injuries establish the threshold requirements of a "case or controversy" mandated by Art. III. See, *e. g.*, *Singleton* v. *Wulff*, *supra*, at 113 (doctors who receive payments for their abortion services are "classically adverse" to
195 government as payer); *Sullivan* v. *Little Hunting* *195 *Park*, 396 U. S. 229, 237 (1969); *Barrows* v. *Jackson*, *supra*, at 255-256.

As a vendor with standing to challenge the lawfulness of §§ 241 and 245, appellant Whitener is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should her constitutional challenge fail and the statutes remain in force. *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965); see Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974). Otherwise, the threatened imposition of governmental sanctions might deter appellant Whitener and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that "enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights." *Warth* v. *Seldin*, 422 U. S. 490, 510 (1975). Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Sullivan* v. *Little Hunting Park*, *supra*; *Barrows* v. *Jackson*, *supra*.[4]

196 *196 Indeed, the *jus tertii* question raised here is answered by our disposition of a like argument in *Eisenstadt* v. *Baird*, *supra*. There, as here, a state statute imposed legal duties and disabilities upon the claimant, who was convicted of distributing a package of contraceptive foam to a third party.[5] Since the statute was directed at Baird and penalized his conduct, the Court did not hesitate—again as here—to conclude that the "case or controversy" requirement of Art. III was satisfied. 405 U. S., at 443. In considering Baird's constitutional objections, the Court fully recognized his standing to defend the privacy interests of third parties. Deemed crucial to the decision to permit *jus tertii* standing was the recognition of "the impact of the litigation on the third-party interests." *Id.*, at 445. Just as the defeat of Baird's suit and the "[e]nforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives," *id.*, at 446, so too the failure of Whitener to prevail in this suit and the continued enforcement of §§ 241 and 245 will "materially impair the ability of" males 18-20 years of age to purchase 3.2% beer despite their classification by an overt gender-based
197 criterion. Similarly, just as the Massachusetts law in *Eisenstadt* "prohibit[ed], *197 not use, but distribution," 405 U. S., 446, and consequently the least awkward challenger was one in Baird's position who was subject to that proscription, the law challenged here explicitly regulates the sale rather than use of 3.2% beer, thus leaving a vendor as the obvious claimant.

We therefore hold that Whitener has standing to raise relevant equal protection challenges to Oklahoma's gender-based law. We now consider those arguments.

II

A

Before 1972, Oklahoma defined the commencement of civil majority at age 18 for females and age 21 for males. Okla. Stat., Tit. 15, § 13 (1972 and Supp. 1976). In contrast, females were held criminally responsible as adults at age 18 and males at age 16. Okla. Stat., Tit. 10, § 1101 (a) (Supp. 1976). After the Court of Appeals for the Tenth Circuit held in 1972, on the authority of *Reed* v. *Reed*, 404 U. S. 71 (1971), that the age distinction was unconstitutional for purposes of establishing criminal responsibility as adults, *Lamb* v. *Brown*, 456 F. 2d 18, the Oklahoma Legislature fixed age 18 as applicable to both males and females. Okla. Stat., Tit. 10, § 1101 (a) (Supp. 1976). In 1972, 18 also was established as the age of majority for males and females in civil matters, Okla. Stat., Tit. 15, § 13 (1972 and Supp. 1976), except that §§ 241 and 245 of the 3.2% beer statute were simultaneously codified to create an exception to the gender-free rule.

Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." 404 U. S., at 75. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental
198 objectives and must be substantially related to achievement of those objectives. Thus, in *Reed*, the objectives *198 of "reducing the workload on probate courts," *id.*, at 76, and "avoiding intrafamily controversy," *id.*, at 77, were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. See, *e. g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972); *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973); cf. *Schlesinger* v. *Ballard*, 419 U. S. 498, 506-507 (1975). And only two Terms ago, *Stanton* v. *Stanton*, 421 U. S. 7 (1975), expressly stating that *Reed* v. *Reed* was "controlling," 421 U. S., at 13, held that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds. 421 U. S., at 14-15.[6]

Reed v. *Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations, *Schlesinger* v. *Ballard*, *supra*, at 508, concerning the financial position of servicewomen, *Frontiero* v. *Richardson*, *supra*, at 689 n. 23, and working women, *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643 (1975), could not justify use of a gender line
199 in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated *199 misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. *Stanton* v. *Stanton*, *supra*; *Taylor* v. *Louisiana*, 419 U. S. 522, 535 n. 17 (1975). In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact. See, *e. g.*, *Stanley* v. *Illinois*, *supra*, at 658; cf. *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 650 (1974).

In this case, too, "*Reed*, we feel, is controlling . . .," *Stanton* v. *Stanton*, *supra*, at 13. We turn then to the question whether, under *Reed*, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

B

The District Court recognized that *Reed* v. *Reed* was controlling. In applying the teachings of that case, the court found the

requisite important governmental objective in the traffic-safety goal proffered by the Oklahoma Attorney General. It then concluded that the statistics introduced by the appellees established that the gender-based distinction was substantially related to achievement of that goal.

C

We accept for purposes of discussion the District Court's identification of the objective underlying §§ 241 and 245 as the
200 enhancement of traffic safety.[7] Clearly, the protection *200 of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18-20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for
201 that same age period.[8] Similarly, youths aged 17-21 were found to be overrepresented among those killed *201 or injured in traffic accidents, with males again numerically exceeding females in this regard.[9] Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts.[10] Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for "driving under the influence."[11] Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma's experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol. Conceding that "the case is not free from doubt," 399 F. Supp., at 1314, the District Court nonetheless concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification." *Id.*, at 1307.

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protec question presented here. The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender
202 line as a classifying device. Certainly if maleness *202 is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit."[12] Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.[13]

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection
203 analysis. Setting aside the obvious methodological problems,[14] the surveys do not adequately justify the salient *203 features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol lever, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating." Okla. Stat., Tit. 37, § 163.1 (1958); see *State ex rel. Springer v. Bliss*, 199 Okla. 198, 185 P. 2d 220 (1947). Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differential as involved here.[15] Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer—albeit apparently not of the diluted 3.2% variety—reached results that hardly can be viewed as impressive in justifying either a gender or age classification.[16]

204 *204 There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative

philosophy that underlies the Equal Protection Clause.[17] Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under *Reed*, Oklahoma's 3.2% beer statute invidiously discriminates against males 18-20 years of age.

D

Appellees argue, however, that §§ 241 and 245 enforce state policies concerning the sale and distribution of alcohol and by force of the Twenty-first Amendment should therefore be held to withstand the equal protection challenge. The District Court's response to this contention is unclear. The court assumed that the Twenty-first Amendment "strengthened" the State's police powers with respect to alcohol regulation, 399 F. Supp., at 1307, but then said that "the standards of review that [the Equal Protection Clause] mandates are not relaxed." *Id.*, at 1308. Our view is, and we hold, that the Twenty-first
205 Amendment does not save the *205 invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment.

The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the *License Cases*, 5 How. 504, 579 (1847), the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause. Later in the century, however, *Leisy* v. *Hardin*, 135 U. S. 100 (1890), undercut the theoretical underpinnings of the *License Cases*. This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson[18] and Webb-Kenyon Acts.[19] See, *e. g.*, *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917) (upholding Webb-Kenyon Act); *In re Rahrer*, 140 U. S. 545 (1891) (upholding Wilson Act). With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and state police power temporarily subsided.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of § 2 of the Twenty-first
206 Amendment[20] closely follows the Webb-Kenyon and Wilson *206 Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, *e. g.*, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330 (1964); *Carter* v. *Virginia*, 321 U. S. 131, 139-140 (1944) (Frankfurter, J., concurring); *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398 (1939). Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, *supra*, at 332; cf. *Department of Revenue* v. *James Beam Distilling Co.*, 377 U. S. 341 (1964); *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938).

Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." P. Brest, Processes of Constitutional Decision-making, Cases and Materials, 258 (1975). Any departures from this historical view have been limited and sporadic. Two States successfully relied upon the Twenty-first Amendment to respond to challenges of major liquor importers to state authority to regulate the importation and manufacture of alcoholic beverages on Commerce Clause and Fourteenth Amendment grounds. See *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board* v. *Young's Market Co.*,
207 *207 299 U. S. 59, 64 (1936). In fact, however, the arguments in both cases centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear, *Hostetter* v. *Idlewild*

Bon Voyage Liquor Corp., supra, at 330, and n. 9, and touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment, see, *e. g.*, *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 47-48, 50-51 (1966) (rejecting Fourteenth Amendment objections to state liquor laws on the strength of *Ferguson* v. *Skrupa*, 372 U. S. 726, 729-730 (1963) and *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955)).[21] Cases involving individual rights protected by the Due Process Clause have been treated in sharp contrast. For example, when an individual objected to the mandatory "posting" of her name in retail liquor establishments and her characterization as an "excessive drink[er]," the Twenty-first Amendment was held not to qualify the scope of her due process rights. *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971).

It is true that *California* v. *LaRue*, 409 U. S. 109, 115 (1972), relied upon the Twenty-first Amendment to "strengthen" the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performance "partake more of gross sexuality than of communication," *id.*, at 118. Nevertheless, the Court has never recognized sufficient "strength" in the Amendment to defeat an otherwise established claim of invidious discrimination in
208 violation of the Equal Protection Clause. *208 Rather, *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 178-179 (1972), establishes that state liquor regulatory schemes cannot work invidious discriminations that violate the Equal Protection Clause.

Following this approach, both federal and state courts uniformly have declared the unconstitutionality of gender lines that restrain the activities of customers of state-regulated liquor establishments irrespective of the operation of the Twenty-first Amendment. See, *e. g.*, *White* v. *Fleming*, 522 F. 2d 730 (CA7 1975); *Women's Liberation Union of R. I.* v. *Israel*, 512 F. 2d 106 (CA1 1975); *Daugherty* v. *Daley*, 370 F. Supp. 338 (ND Ill. 1974) (three-judge court); *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (SDNY 1970); *Commonwealth Alcoholic Beverage Control Bd.* v. *Burke*, 481 S. W. 2d 52 (Ky. 1972); cf. *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P. 2d 529 (1971); *Paterson Tavern & G. O. A.* v. *Hawthorne*, 57 N. J. 180, 270 A. 2d 628 (1970). Even when state officials have posited sociological or empirical justifications for these gender-based differentiations, the courts have struck down discriminations aimed at an entire class under the guise of alcohol regulation. In fact, social science studies that have uncovered quantifiable difference in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious.[22] In sum, the principles
209 embodied in the Equal *209 Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.

210 *210 We conclude that the gender-based differential contained in Okla. Stat., Tit. 37, § 245 (1976 Supp.) constitutes a denial of the equal protection of the laws to males aged 18-20[23] and reverse the judgment of the District Court.[24]

It is so ordered.

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court as I am in general agreement with it. I do have reservations as to some of the discussion concerning the appropriate standard for equal protection analysis and the relevance of the statistical evidence. Accordingly, I add this concurring statement.

With respect to the equal protection standard, I agree that *Reed* v. *Reed*, 404 U. S. 71 (1971), is the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court's language may imply. *Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present.[*]

211 *211 I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a "'fair and substantial relation'" to this objective. *Id.*, at 76,

quoting Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920).

It seems to me that the statistics offered by appellees and relied upon by the District Court do tend generally to support the view that young men drive more, possibly are inclined to drink more, and—for various reasons—are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

MR. JUSTICE STEVENS, concurring.

212 There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the *212 courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

In this case, the classification is not as obnoxious as some the Court has condemned,[1] nor as inoffensive as some the Court has accepted. It is objectionable because it is based on an accident of birth,[2] because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket,[3] and because, to the extent it
213 reflects any physical difference between males and *213 females, it is actually perverse.[4] The question then is whether the traffic safety justification put forward by the State is sufficient to make an otherwise offensive classification acceptable.

The classification is not totally irrational. For the evidence does indicate that there are more males than females in this age bracket who drive and also more who drink. Nevertheless, there are several reasons why I regard the justification as unacceptable. It is difficult to believe that the statute was actually intended to cope with the problem of traffic safety,[5] since it has only a minimal effect on access to a not very intoxicating beverage and does not prohibit its consumption.[6]
214 Moreover, the empirical data submitted by *214 the State accentuate the unfairness of treating all 18-20-year-old males as inferior to their female counterparts. The legislation imposes a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcholic beverages.[7] It is unlikely that this law will have a significant deterrent effect either on that 2% or on the law-abiding 98%. But even assuming some such slight benefit, it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.

MR. JUSTICE BLACKMUN, concurring in part.

I join the Court's opinion except Part II-D thereof. I agree, however, that the Twenty-first Amendment does not save the challenged Oklahoma statute.

MR. JUSTICE STEWART, concurring in the judgment.

I agree that the appellant Whitener has standing to assert the equal protection claims of males between 18 and 21 years old. Eisenstadt v. Baird, 405 U. S. 438, 443-446; Griswold v. Connecticut, 381 U. S. 479, 481; Barrows v. Jackson, 346 U. S. 249, 255-260; Buchanan v. Warley, 245 U. S. 60, 72-73; see Note, Standing To Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 431-436 (1974). I also concur in the Court's judgment on the merits of the constitutional issue before us.

5 *215 Every State has broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders. E. g., California v. LaRue, 409 U. S. 109; Joseph E. Seagram & Sons v. Hostetter, 384 U. S. 35;

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330; *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401; *State Board* v. *Young's Market Co.*, 299 U. S. 59. But "[t]his is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor . . . ." *Califor* v. *LaRue*, *supra*, at 120 n. (concurring opinion).

The disparity created by these Oklahoma statutes amounts to total irrationality. For the statistics upon which the State now relies, whatever their other shortcomings, wholly fail to prove or even suggest that 3.2% beer is somehow more deleterious when it comes into the hands of a male aged 18-20 than of a female of like age. The disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination. See *Reed* v. *Reed*, 404 U. S. 71.

MR. CHIEF JUSTICE BURGER, dissenting.

I am in general agreement with MR. JUSTICE REHNQUIST'S dissent, but even at the risk of compounding the obvious confusion created by those voting to reverse the District Court, I will add a few words.

At the outset I cannot agree that appellant Whitener has standing arising from her status as a saloonkeeper to assert the constitutional rights of her customers. In this Court "a litigant may only assert his own constitutional rights or immunities." *United States* v. *Raines*, 362 U. S. 17, 22 (1960). There are a few, but strictly limited exceptions to that rule; despite the most creative efforts, this case fits within none of them.

216 *216 This is not *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969), or *Barrows* v. *Jackson*, 346 U. S. 249 (1953), for there is here no barrier whatever to Oklahoma males 18-20 years of age asserting, in an appropriate forum, any constitutional rights they may claim to purchase 3.2% beer. **Craig's** successful litigation of this very issue was prevented only by the advent of his 21st birthday. There is thus no danger of interminable dilution of those rights if appellant Whitener is not permitted to litigate them here. Cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 445-446 (1972).

Nor is this controlled by *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). It borders on the ludicrous to draw a parallel between a vendor of beer and the intimate professional physician-patient relationship which undergirded relaxation of standing rules in that case.

Even in *Eisenstadt*, the Court carefully limited its recognition of third-party standing to cases in which the relationship between the claimant and the relevant third party "was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself." 405 U. S., at 445. This is plainly not the case here. See also *McGowan* v. *Maryland*, 366 U. S. 420, 429-430 (1961); *Brown* v. *United States*, 411 U. S. 223, 230 (1973).

In sum, permitting a vendor to assert the constitutional rights of vendees whenever those rights are arguably infringed introduces a new concept of constitutional standing to which I cannot subscribe.

On the merits, we have only recently recognized that our duty is not "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 33 (1973). Thus, even interests of such importance in our society as public education and housing do not qualify as "fundamental rights" for equal
217 protection purposes because they have no *217 textually independent constitutional status. See *id.*, at 29-39 (education); *Lindsey* v. *Normet*, 405 U. S. 56 (1972) (housing). Though today's decision does not go so far as to make gender-based classifications "suspect," it makes gender a disfavored classification. Without an independent constitutional basis supporting the right asserted or disfavoring the classification adopted, I can justify no substantive constitutional protection other than the normal *McGowan* v. *Maryland*, *supra*, at 425-426, protection afforded by the Equal Protection Clause.

The means employed by the Oklahoma Legislature to achieve the objectives sought may not be agreeable to some judges, but since eight Members of the Court think the means not irrational, I see no basis for striking down the statute violative of the Constitution simply because we find it unwise, unneeded, or possibly even a bit foolish.

With MR. JUSTICE REHNQUIST, I would affirm the judgment of the District Court.

MR. JUSTICE REHNQUIST, dissenting.

The Court's disposition of this case is objectionable on two grounds. First is its conclusion that *men* challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court's enunciation of this standard, without citation to any source, as being that "classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." *Ante,* at 197 (emphasis added). The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in Frontiero v. Richardson, 411 U. S. 677 (1973), from their view that sex is a "suspect" classification for purposes of equal protection
218 analysis. I think the Oklahoma statute challenged here need pass only the "rational basis" equal *218 protection analysis expounded in cases such as McGowan v. Maryland, 366 U. S. 420 (1961), and Williamson v. Lee Optical Co., 348 U. S. 483 (1955), and I believe that it is constitutional under that analysis.

I

In Frontiero v. Richardson, supra, the opinion for the plurality sets forth the reasons of four Justices for concluding that sex should be regarded as a suspect classification for purposes of equal protection analysis. These reasons center on our Nation's "long and unfortunate history of sex discrimination," 411 U. S., at 684, which has been reflected in a whole range of restrictions on the legal rights of women, not the least of which have concerned the ownership of property and participation in the electoral process. Noting that the pervasive and persistent nature of the discrimination experienced by women is in part the result of their ready identifiability, the plurality rested its invocation of strict scrutiny largely upon the fact that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Id.,* at 686-687. See Stanton v. Stanton, 421 U. S. 7, 14-15 (1975).

Subsequent to *Frontiero,* the Court has declined to hold that sex is a suspect class, Stanton v. Stanton, supra, at 13, and no such holding is imported by the Court's resolution of this case. However, the Court's application here of an elevated or "intermediate" level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard. Jefferson v. Hackney, 406 U. S. 535, 546-547 (1972); Richardson v.
219 Belcher, 404 U. S. 78, 81-84 (1971); Dandridge v. Williams, 397 U. S. 471, 484-485 (1970); *219 McGowan v. Maryland, supra, at 425-426; Flemming v. Nestor, 363 U. S. 603, 611 (1960); Williamson v. Lee Optical Co., supra, at 488-489.

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in *Frontiero* to support its invocation of strict scrutiny. There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.

The Court does not discuss the nature of the right involved, and there is no reason to believe that it sees the purchase of 3.2% beer as implicating any important interest, let alone one that is "fundamental" in the constitutional sense of invoking strict scrutiny. Indeed, the Court's accurate observation that the statute affects the selling but not the drinking of 3.2% beer, *ante,* at 204, further emphasizes the limited effect that it has on even those persons in the age group involved. There is, in sum, nothing about the statutory classification involved here to suggest that it affects an interest, or works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection.

It is true that a number of our opinions contain broadly phrased dicta implying that the same test should be applied to all classifications based on sex, whether affecting females or males. *E. g.,* Frontiero v. Richardson, supra, at 688; Reed v. Reed, 404 U. S. 71, 76 (1971). However, before today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution.[1] There being no such interest *220 here, and there being no plausible argument that this is a discrimination against females,[2] the Court's reliance on our previous sex-discrimination cases is ill-founded. It treats

gender classification as a talisman which—without regard to the rights involved or the persons affected—calls into effect a heavier burden of judicial review.

The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we
221 have had enough difficulty with the two standards of review which our cases have recognized—the *221 norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

I would have thought that if this Court were to leave anything to decision by the popularly elected branches of the Government, where no constitutional claim other than that of equal protection is invoked, it would be the decision as to what governmental objectives to be achieved by law are "important," and which are not. As for the second part of the Court's new test, the Judicial Branch is probably in no worse position than the Legislative or Executive Branches to determine if there is *any* rational relationship between a classification and the purpose which it might be thought to serve. But the introduction of the adverb "substantially" requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them. And even if we manage to avoid both confusion and the mirroring of our own preferences in the development of this new doctrine, the thousands of judges in other courts who must interpret the Equal Protection Clause may not be so fortunate.

II

The applicable rational-basis test is one which

> "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens
> 222 differently than *222 others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S., at 425-426 (citations omitted).

Our decisions indicate that application of the Equal Protection Clause in a context not justifying an elevated level of scrutiny does not demand "mathematical nicety" or the elimination of all inequality. Those cases recognize that the practical problems of government may require rough accommodations of interests, and hold that such accommodations should be respected unless no reasonable basis can be found to support them. *Dandridge* v. *Williams*, 397 U. S., at 485. Whether the same ends might have been better or more precisely served by a different approach is no part of the judicial inquiry under the traditional minimum rationality approach. *Richardson* v. *Belcher*, 404 U. S., at 84.

The Court "accept[s] for purposes of discussion" the District Court's finding that the purpose of the provisions in question was traffic safety, and proceeds to examine the statistical evidence in the record in order to decide if "the gender-based distinction *closely* serves to achieve that objective." *Ante*, at 199, 200 (emphasis added). (Whether there is a difference between laws which "closely serv[e]" objectives and those which are only "substantially related" to their achievement, *ante*, at 197, we are not told.) I believe that a more traditional type of scrutiny is appropriate in this case, and I think that the Court would have done well here to heed its own warning that "[i]t is unrealistic to expect . . . members of the judiciary
223 to be well versed in the rigors of experimental or statistical technique." *Ante*, at 204. One *223 need not immerse oneself ... the fine points of statistical analysis, however, in order to see the weaknesses in the Court's attempted denigration of the evidence at hand.

One survey of arrest statistics assembled in 1973 indicated that males in the 18-20 age group were arrested for "driving under the influence" almost 18 times as often as their female counterparts, and for "drunkenness" in a ratio of almost 10 to 1.[3] Accepting, as the Court does, appellants' comparison of the total figures with 1973 Oklahoma census data, this survey indicates a 2% arrest rate among males in the age group, as compared to a .18% rate among females.

Other surveys indicated (1) that over the five-year period from 1967 to 1972, nationwide arrests among those under 18 for drunken driving increased 138%, and that 93% of all persons arrested for drunken driving were male;[4] (2) that youths in the 17-21 age group were overrepresented among those killed or injured in Oklahoma traffic accidents, that male casualties substantially exceeded female, and that deaths in this age group continued to rise while overall traffic deaths declined;[5] (3) that over three-fourths of the drivers under 20 in the Oklahoma City area are males, and that each of them, on average, drives half again as many miles per year as their female counterparts;[6] (4) that four-fifths of male drivers
224 *224 under 20 in the Oklahoma City area state a drink preference for beer, while about three-fifths of female drivers of that age state the same preference;[7] and (5) that the percentage of male drivers under 20 admitting to drinking within two hours of driving was half again larger than the percentage for females, and that the percentage of male drivers of that age group with a blood alcohol content greater than .01% was almost half again larger than for female drivers.[8]

The Court's criticism of the statistics relied on by the District Court conveys the impression that a legislature in enacting a new law is to be subjected to the judicial equivalent of a doctoral examination in statistics. Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies, and are entitled to draw factual conclusions on the basis of the determination of probable cause which an arrest by a police officer normally represents. In this situation, they could reasonably infer that the incidence of drunk driving is a good deal higher than the incidence of arrest.

And while, as the Court observes, relying on a report to a Presidential Commission which it cites in a footnote, such statistics may be distorted as a result of stereotyping, the legislature is not required to prove before a court that its statistics are perfect. In any event, if stereotypes are as pervasive as the Court suggests, they may in turn influence the conduct of the men and women in question, and cause the young men to conform to the wild and reckless image which is their stereotype.

The Court also complains of insufficient integration of the various surveys on several counts—that the injury and death figures are in no way directly correlated with intoxication, *ante,* at 201 n. 9; that the national figures for drunk driving
225 contain no breakdown for the 18-21-year-old group, *225 *ante,* at 201 n. 11; and that the arrest records for intoxication are not tied to the consumption of 3.2% beer, *ante,* at 201-202, nn. 11 and 12. But the State of Oklahoma—and certainly this Court for purposes of equal protection review—can surely take notice of the fact that drunkenness is a significant cause of traffic casualties, and that youthful offenders have participated in the increase of the drunk-driving problem. On this latter point, the survey data indicating increased driving casualties among 18-21-year-old, while overall casualties dropped, are not irrelevant.

Nor is it unreasonable to conclude from the expressed preference for beer by four-fifths of the age-group males that that beverage was a predominant source of their intoxication-related arrests. Taking that as the predicate, the State could reasonably bar those males from any purchases of alcoholic beer, including that of the 3.2% variety. This Court lacks the expertise or the data to evaluate the intoxicating properties of that beverage, and in that posture our only appropriate course is to defer to the reasonable inference supporting the statute—that taken in sufficient quantity this beer has the same effect as any alcoholic beverage.

Quite apart from these alleged methodological deficiencies in the statistical evidence, the Court appears to hold that that evidence, on its face, fails to support the distinction drawn in the statute. The Court notes that only 2% of males (as against .18% of females) in the age group were arrested for drunk driving, and that this very low figure establishes "an unduly tenuous 'fit' between maleness and drunk driving in the 18-20-year-old group. On this point the Court misconceives the nature of the equal protection inquiry.

The rationality of a statutory classification for equal protection purposes does not depend upon the statistical "fit" between

226 the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence *226 of the trait within the included class than in the excluded class to justify different treatment. Therefore the present equal protection challenge to this gender-based discrimination poses only the question whether the incidence of drunk driving among young men is sufficiently greater than among young women to justify differential treatment. Notwithstanding the Court's critique of the statistical evidence, that evidence suggests clear differences between the drinking and driving habits of young men and women. Those differences are grounds enough for the State reasonably to conclude that young males pose by far the greater drunk-driving hazard, both in terms of sheer numbers and in terms of hazard on a per-driver basis. The gender-based difference in treatment in this case is therefore not irrational.

The Court's argument that a 2% correlation between maleness and drunk driving is constitutionally insufficient therefore does not pose an equal protection issue concerning discrimination between males and females. The clearest demonstration of this is the fact that the precise argument made by the Court would be equally applicable to a flat bar on such purchases by *anyone,* male or female, in the 18-20 age group; in fact it would apply a *fortiori* in that case given the even more "tenuous `fit'" between drunk-driving arrests and femaleness. The statistics indicate that about 1% of the age group population as a whole is arrested. What the Court's argument is relevant to is not equal protection, but due process —whether there are enough persons in the category who drive while drunk to justify a bar against purchases by all members of the group.

Cast in those terms, the argument carries little weight, in light of our decisions indicating that such questions call for a balance of the State's interest against the harm resulting from any overinclusiveness or underinclusiveness. *Vlandis* v.
227 *Kline,* 412 U. S. 441, 448-452 (1973). The personal interest harmed *227 here is very minor—the present legislation implicates only the right to purchase 3.2% beer, certainly a far cry from the important personal interests which have on occasion supported this Court's invalidation of statutes on similar reasoning. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, 640 (1974); *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972). And the state interest involved is significant—the prevention of injury and death on the highways.

This is not a case where the classification can only be justified on grounds of administrative convenience. *Vlandis* v. *Kline, supra,* at 451; *Stanley* v. *Illinois, supra,* at 656. There being no apparent way to single out persons likely to drink and drive, it seems plain that the legislature was faced here with the not atypical legislative problem of legislating in terms of broad categories with regard to the purchase and consumption of alcohol. I trust, especially in light of the Twenty-first Amendment, that there would be no due process violation if no one in this age group were allowed to purchase 3.2% beer. Since males drink and drive at a higher rate than the age group as a whole, I fail to see how a statutory bar with regard only to them can create any due process problem.

The Oklahoma Legislature could have believed that 18-20-year-old males drive substantially more, and tend more often to be intoxicated than their female counterparts; that they prefer beer and admit to drinking and driving at a higher rate than females; and that they suffer traffic injuries out of proportion to the part they make up of the population. Under the appropriate rational-basis test for equal protection, it is neither irrational nor arbitrary to bar them from making purchases of 3.2% beer, which purchases might in many cases be made by a young man who immediately returns to his vehicle with the beverage in his possession. The record does not give any good indication of the true proportion of males in the age
228 group who drink and drive (except *228 that it is no doubt greater than the 2% who are arrested), but whatever it may be I cannot see that the mere purchase right involved could conceivably raise a due process question. There being no violation of either equal protection or due process, the statute should accordingly be upheld.

[*] *Ruth Bader Ginsburg* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

[1] Sections 241 and 245 provide in pertinent part:

§ 241. "It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) cent of alcohol measured by weight.

§ 245. "A `minor,' for the purposes of Section . . . 241 . . . is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years."

[2] Appellants did not seek class certification of Craig as representative of other similarly situated males 18-20 years of age. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393, 401 (1975).

[3] The District Court's opinion confirms that Whitener from the outset has based her constitutional challenge on gender-discrimination grounds, 399 F. Supp., at 1306, and "[n]o challenge is made to [her] standing and requisite interest in the controversy . . . ." *Id.*, at 1306 n. 1.

[4] The standing question presented here is not answered by the principle stated in *United States* v. *Raines*, 362 U. S. 17, 21 (1960), that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." In *Raines*, the Court refused to permit certain public officials of Georgia to defend against application of the Civil Rights Act to their official conduct on the ground that the statute also might be construed to encompass the "purely private actions" of others. The *Raines* rule remains germane in such a setting, where the interests of the litigant and the rights of the proposed third parties are in no way mutually interdependent. Thus, a successful suit against Raines did not threaten to impair or diminish the independent private rights of others, and consequently, consideration of those third-party rights properly was deferred until another day.

Of course, the *Raines* principle has also been relaxed where legal action against the claimant threatens to "chill" the First Amendment rights of third parties. See, *e. g.*, *Lewis* v. *New Orleans*, 415 U. S. 130 (1974).

[5] The fact that Baird chose to disobey the legal duty imposed upon him by the Massachusetts anticontraception statute, resulting in his criminal conviction, 405 U. S., at 440, does not distinguish the standing inquiry from that pertaining to the anticipatory attack in this case. In both *Eisenstadt* and here, the challenged statutes compel *jus tertii* claimants either to cease their proscribed activities or to suffer appropriate sanctions. The existence of Art. III "injury in fact" and the structure of the claimant's relationship to the third parties are not altered by the litigative posture of the suit. And, certainly, no suggestion will be heard that Whitener's anticipatory challenge offends the normal requirements governing such actions. See generally *Steffel* v. *Thompson*, 415 U. S. 452 (1974); *Samuels* v. *Mackell*, 401 U. S. 66 (1971); *Younger* v. *Harris*, 401 U. S. 37 (1971).

[6] *Kahn* v. *Shevin*, 416 U. S. 351 (1974) and *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), upholding the use of gender-based classifications, rested upon the Court's perception of the laudatory purposes of those laws as remedying disadvantageous conditions suffered by women in economic and military life. See 416 U. S., at 353-354; 419 U. S., at 508. Needless to say, in this case Oklahoma does not suggest that the age-sex differential was enacted to ensure the availability of 3.2% beer for women as compensation for previous deprivations.

[7] That this was the true purpose is not at all self-evident. The purpose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments. The District Court acknowledged the nonexistence of materials necessary "to reveal what the actual purpose of the legislature was," but concluded that "we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally." 399 F. Supp., at 1311 n. 6. Similarly, the attorney for Oklahoma, while proposing traffic safety as a legitimate rationale for the 3.2% beer law, candidly acknowledged at oral argument that he is unable to assert that traffic safety is "indeed the reason" for the gender line contained in § 245. Tr. of Oral Arg. 27. For this appeal we find adequate the appellee's representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization.

[8] The disparities in 18-20-year-old male-female arrests were substantial for both categories of offenses: 427 versus 24 for driving under the influence of alcohol, and 966 versus 102 for drunkenness. Even if we assume that a legislature may rely on such arrest data in some situations, these figures do not offer support for a differential age line, for the disproportionate arrests of males persisted at older ages; indeed, in the case of arrests for drunkenness, the figures for all ages indicated "even more male involvement in such arrests at later ages." 399 F. Supp., at 1309. See also n. 14, *infra*.

[9] This survey drew no correlation between the accident figures for any age group and levels of intoxication found in those killed or injured.

[10] For an analysis of the results of this exhibit, see n. 16, *infra*.

[11] The FBI made no attempt to relate these arrest figures either to beer drinking or to an 18-21 age differential, but rather found that male arrests for all ages exceeded 90% of the total.

[12] Obviously, arrest statistics do not embrace all individuals who drink and drive. But for purposes of analysis, this "underinclusiveness" must be discounted somewhat by the shortcomings inherent in this statistical sample, see n. 14, *infra*. In any event, we decide this case in

light of the evidence offered by Oklahoma and know of no way of extrapolating these arrest statistics to take into account the driving and drinking population at large, including those who avoided arrest.

[13] For example, we can conjecture that in *Reed*, Idaho's apparent premise that women lacked experience in formal business matte (particularly compared to men) would have proved to be accurate in substantially more than 2% of all cases. And in both *Frontiero* ar *Wiesenfeld*, we expressly found appellees' empirical defense of mandatory dependency tests for men but not women to be unsatisfacto even though we recognized that husbands are still far less likely to be dependent on their wives than vice versa. See, *e. g.*, 411 U. S., at 688-690.

[14] The very social stereotypes that find reflection in age-differential laws, see *Stanton* v. *Stanton*, 421 U. S., 7, 14-15 (1975), are likely substantially to distort the accuracy of these comparative statistics. Hence "reckless" young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home. See, *e. g.*, W. Reckless & B. Kay, The Female Offender 4, 7, 13, 16-17 (Report to Presidential Commission on Law Enforcement and Administration of Justice, 1967). Moreover, the Oklahoma surveys, gathered under a regime where the age-differential law in question has been in effect, are lacking in controls necessary for appraisal of the actual effectiveness of the male 3.2% beer prohibition. In this regard, the disproportionately high arrest statistics for young males—and, indeed, the growing alcohol-related arrest figures for all ages and sexes—simply may be taken to document the relative futility of controlling driving behavior by the 3.2% beer statute and like legislation, although we obviously have no means of estimating how many individuals, if any, actually were prevented from drinking by these laws.

[15] See, *e. g.*, nn. 9 and 11, *supra*. See also n. 16, *infra*.

[16] The random roadside survey of drivers conducted in Oklahoma City during August 1972 found that 78% of drivers under 20 were male. Turning to an evaluation of their drinking habits and factoring out nondrinkers, 84% of the males versus 77% of the females expressed a preference for beer. Further 16.5% of the men and 11.4% of the women had consumed some alcoholic beverage within two hours of the interview. Finally, a blood alcohol concentration greater than .01% was discovered in 14.6% of the males compared to 11.5% of the females. "The 1973 figures, although they contain some variations, reflect essentially the same pattern." 399 F. Supp., at 1309. Plainly these statistical disparities between the sexes are not substantial. Moreover, when the 18-20 age boundaries are lifted and all drivers analyzed, the 1972 roadside survey indicates that male drinking rose slightly whereas female exposure to alcohol remained relatively constant. Again, in 1973, the survey established that "compared to all drivers interviewed, . . . the under-20 age group gener showed a lower involvement with alcohol in terms of having drunk within the past two hours or having a significant BAC (blood alcoh content)." *Ibid.* In sum, this survey provides little support for a gender line among teenagers and actually runs counter to the imposition drinking restrictions based upon age.

[17] See, *e. g.*, n. 22, *infra*.

[18] The Wilson Act, enacted in 1890, reads in pertinent part: "All . . . intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory . . . ." 27 U. S. C. § 121.

[19] The Webb-Kenyon Act of 1913 prohibits "[t]he shipment or transportation. . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . . ." 27 U. S. C. § 122.

[20] "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[21] The dictum contained in *State Board* v. *Young's Market Co.*, 299 U. S. 59, 64 (1936), that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth," is inapplicable to this case. The Twenty-first Amendment does not recognize, even indirectly, classifications based upon gender. And, as the accompanying text demonstrates, that statement has not been relied upon in recent cases that have considered Fourteenth Amendment challenges to state liquor regulation.

[22] Thus, if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that State could freely favor Jews and Italian Catholics at the expense of all other Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking. See, *e. g.*, Haberman & Sheinberg, Implicative Drinking Reported in a Household Survey; A Corroborative Note on Subgroup Differences, 28 Q. J. Studies on Alcohol 538 (1967); Wechsler, Thum, Demone, & Dwinnell, Social Characteristics and Blood Alcohol Level, 33 Q. J. Studies on Alcoh 132, 141-142 (1972); Wechsler, Demone, Thum, & Kasey, Religious-Ethnic Difference in Alcohol Consumption, 11 J. Health & Soc. Behavior 21, 28 (1970); Schmidt & Popham, Impressions of Jewish Alcoholics, 37 J. Studies on Alcohol 931 (1976). Similarly, if a State were allowed simply to depend upon demographic characteristics of adolescents in identifying problem drinkers, statistics might support

the conclusion that only black teenagers should be permitted to drink, followed by Asian-Americans and Spanish-Americans. "Whites and American Indians have the lowest proportions of abstainers and the highest proportions of moderate/heavy and heavy drinkers." Summary of Final Report of a National Study of Adolescent Drinking Behavior, Attitudes and Correlates 147-148 (Center for the Study of Social Behavior, Research Triangle Inst., Apr. 1975) (percentage of moderate/ heavy and heavy adolescent drinkers by race: black 15.2%; Asian-American 18.3%; Spanish-American 22.7%; white 25.3%; American Indian 28.1%).

In the past, some States have acted upon their notions of the drinking propensities of entire groups in fashioning their alcohol policies. The most typical recipient of this treatment has been the American Indian; indeed, several States established criminal sanctions for the sale of alcohol to an Indian or "half or quarter breed Indian." See, *e. g.*, Fla. Stat. Ann. § 569.07 (1962 and 1976 Supp.) (repealed in 1972); Iowa Code Ann. § 732.5 (1950 and 1976 Supp.) (repealed in 1967); Minn. Stat. Ann. § 340.82 (1957) (repealed in 1969); Neb. Rev. Stat. 53-181 (1944) (repealed in 1955); Utah Code Ann. § 76-34-1 (1953 and 1975 Supp.) (repealed in 1955). Other statutes and constitutional provisions proscribed the introduction of alcoholic beverages onto Indian reservations. See, *e. g.*, Act of June 10, 1910, § 2, 36 Stat. 558; Ariz. Const., Art. XX, § 3; N. M. Const., Art. XXI, § 8; Okla. Const., Art. 1, § 7. While Indian-oriented provisions were the most common, state alcohol beverage prohibitions also have been directed at other groups, notably German, Italian, and Catholic immigrants. See, *e. g.*, J. Higham, Strangers in the Land 25, 267-268, 295 (1975). The repeal of most of these laws signals society's perception of the unfairness and questionable constitutionality of singling out groups to bear the brunt of alcohol regulation.

[23] Insofar as *Goesaert* v. *Cleary*, 335 U. S. 464 (1948), may be inconsistent, that decision is disapproved. Undoubtedly reflecting the view that *Goesaert's* equal protection analysis no longer obtains, the District Court made no reference to that decision in upholding Oklahoma's statute. Similarly, the opinions of the federal and state courts cited earlier in the text invalidating gender lines with respect to alcohol regulation uniformly disparaged the contemporary vitality of *Goesaert*.

[24] As noted in *Stanton* v. *Stanton*, 421 U. S., at 17-18, the Oklahoma Legislature is free to redefine any cutoff age for the purchase and sale of 3.2% beer that it may choose, provided that the redefinition operates in a gender-neutral fashion.

[*] As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. For thoughtful discussions of equal protection analysis, see, *e. g.*, Gunther, The Supreme Court, 1971 Term —Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945 (1975).

[1] Men as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups.

[2] "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .,' *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175." *Frontiero* v. *Richardson*, 411 U. S. 677, 686.

[3] Apparently Oklahoma is the only State to permit this narrow discrimination to survive the elimination of the disparity between the age of majority for males and females.

[4] Because males are generally heavier than females, they have a greater capacity to consume alcohol without impairing their driving ability than do females.

[5] There is no legislative history to indicate that this was the purpose, and several features of the statutory scheme indicate the contrary. The statute exempts license holders who dispense 3.2% beer to their own children, and a related statute makes it unlawful for 18-year-old men (but not women) to work in establishments in which 3.2% beer accounts for over 25% of gross sales. Okla. Stat., Tit. 37, §§ 241, 243, 245 (1953 and Supp. 1976).

There is, of course, no way of knowing what actually motivated this discrimination, but I would not be surprised if it represented nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket. If so, the following comment is relevant:

"[A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate

and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination— to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, 427 U. S. 495, 520-521 (STEVENS, J., dissenting).

[6] It forbids the sale of 3.2% beer to 18-20-year-old men without forbidding possession, or preventing them from obtaining it from oth sources, such as friends who are either older or female. Thus, the statute only slightly impedes access to 3.2% beer.

[7] The only direct evidence submitted by the State concerning use of beer by young drivers indicates that there is no substantial difference between the sexes. In a random roadside survey of drivers, 16.5% of the male drivers under 20 had consumed alcohol within two hours of the interview as opposed to 11.4% of the women. Over three-fourths of the nonabstainers in both groups expressed a preference for beer. And 14.6% of the men, as opposed to 11.5% of the women, had blood alcohol concentrations over .01%. See *ante*, at 203 n. 16.

[1] In *Stanley* v. *Illinois*, 405 U. S. 645 (1972), the Court struck down a statute allowing separation of illegitimate children from a surviving father but not a surviving mother, without any showing of parental unfitness. The Court stated that "the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"

In *Kahn* v. *Shevin*, 416 U. S. 351 (1974), the Court upheld Florida's $500 property tax exemption for widows only. The opinion of the Court appears to apply a rational-basis test, *id.*, at 355, and is so understood by the dissenters. *Id.*, at 357 (BRENNAN, J., joined by MARSHALL, J., dissenting).

In *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), the Court invalidated § 202 (g) of the Social Security Act, which allowed benefits to mothers but not fathers of minor children, who survive the wage earner. This statute was treated, in the opinion of the Court, as a discrimination against female wage earners, on the ground that it minimizes the financial security which their work efforts provide for their families. 420 U. S., at 645.

[2] I am not unaware of the argument from time to time advanced, that all discriminations between the sexes ultimately redound to the detriment of females, because they tend to reinforce "old notions" restricting the roles and opportunities of women. As a general proposition applying equally to all sex categorizations, I believe that this argument was implicitly found to carry little weight in our decisions upholding gender-based differences. See *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Kahn* v. *Shevin*, *supra*. Seeing no assertion that it has special applicability to the situation at hand, I believe it can be dismissed as an insubstantial consideration.

[3] Extract from: Oklahoma Bureau of Investigation, Arrest Statistics for September, October, November, and December 1973. Defendants' Exhibit 1, Jurisdictional Statement A22. Extract from: Oklahoma City Police Department, Arrest Statistics for 1973. Defendants' Exhibit 2, Jurisdictional Statement A23. See *ante*, at 200 n. 8.

[4] Extract from: Federal Bureau of Investigation, Crime in the United States, 1972. Defendants' Exhibit 6, App. 182-184.

[5] Extract from: Oklahoma Department of Public Safety, Summary of Statewide Collisions for 1972, 1973. Defendants' Exhibits 4 and 5, Jurisdictional Statement A30-A31.

[6] Extract from: Oklahoma Management and Engineering Consulting, Inc., Report to Alcohol Safety Action Program (1973). Defendants' Exhibit 3, Table 1, Jurisdictional Statement A25.

[7] *Id.*, at A27 (Table 3), A29 (Table 5).

[8] *Id.*, at A25 (Table 1). See *ante*, at 203 n. 16.

H

Supreme Court of the United States
MICHAEL M., Petitioner,
v.
SUPERIOR COURT OF SONOMA COUNTY
(California, Real Party in Interest).
No. 79-1344.

Argued Nov. 4, 1980.
Decided March 23, 1981.

Defendant, a 17 1/2 -year-old male, who had been charged with violating California's "statutory rape" law, petitioned for a writ of certiorari to review a judgment of the California Supreme Court, 25 Cal.3d 608, 159 Cal.Rptr. 340, 601 P.2d 572, upholding the constitutionality of the law. The Supreme Court, Justice Rehnquist, held that the California "statutory rape" law, which defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years," did not unlawfully discriminate on the basis of gender because men alone could be held criminally liable thereunder.

Affirmed.

Justice Stewart filed a concurring opinion.

Justice Blackmun filed an opinion concurring in the judgment.

Justice Brennan filed a dissenting opinion in which Justice White and Justice Marshall joined.

Justice Stevens filed a dissenting opinion.

West Headnotes

[1] Constitutional Law 92 ⇦ 3380

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3380 k. In General. Most Cited Cases
(Formerly 92k224(1))

Legislature may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean ability or social status of affected class, but, because equal protection clause does not demand that statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same, statutes are valid where gender classification is not invidious, but rather realistically reflects fact that sexes are not similarly situated in certain circumstances. (Per Justice Rehnquist, with three Justices concurring and one Justice concurring in the judgment.) U.S.C.A.Const. Amend. 14.

[2] Constitutional Law 92 ⇦ 3380

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3380 k. In General. Most Cited Cases
(Formerly 92k224(1))

Legislature may provide for special problems of women without offending equal protection clause. (Per Justice Rehnquist, with three Justices concurring and one Justice concurring in the judgment.) U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 ⇦ 3417

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3416 Criminal Law
92k3417 k. In General. Most Cited Cases
(Formerly 92k224(5))

Rape 321 ⇦ 2

321 Rape
321I Offenses and Responsibility Therefor
321k2 k. Statutory Provisions. Most Cited Cases

California "statutory rape" law, which defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years," did not unlawfully discriminate on basis of gender because men alone could be held criminally liable thereunder; statute was not unconstitutional as applied to defendant who, like the girl involved, was under 18 at the time of sexual intercourse. West's Ann.Cal.Pen.Code; § 261.5; U.S.C.A.Const. Amend. 14.

****1201 Syllabus*** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

*464 Petitioner, then a 17 1/2 -year-old male, was charged with violating California's "statutory rape" law, which defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that the statute unlawfully discriminated on the basis of gender since men alone where criminally liable thereunder. The trial court and the California Court of Appeal denied relief, and on review the California Supreme Court upheld the statute.

Held: The judgment is affirmed. Pp. 1204-1208; 1211-1213.

25 Cal.3d 608, 159 Cal.Rptr. 340, 601 P.2d 572, affirmed.

Justice REHNQUIST, joined by Chief Justice BURGER, Justice STEWART, and Justice POWELL, concluded that the statute does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 1204-1208.

(a) Gender-based classifications are not "inherently suspect" so as to be subject to so-called "strict scrutiny," but will be upheld if they bear a "fair and substantial relationship" to legitimate state ends. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225. Because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or **1202 require "things which are different in fact ... to be treated in law as though they were the same," *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 1499, 16 L.Ed.2d 577, a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. Pp. 1204-1205.

(b) One of the purposes of the California statute in which the State has a strong interest is the prevention of illegitimate teenage pregnancies. The statute protects women from sexual intercourse and pregnancy at an age when the physical, emotional, and psychological consequences are particularly severe. Because virtually all of the significant harmful and identifiable consequences of teenage pregnancy fall on the female, a legislature acts well within it authority when it *465 elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. Pp. 1205-1206.

(c) There is no merit in petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male. The relevant inquiry is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. In any event, a gender-neutral statute would frustrate the State's interest in effective enforcement since a female would be less likely to report violations of

the statute if she herself would be subject to prosecution. The Equal Protection Clause does not require a legislature to enact a statute so broad that it may well be incapable of enforcement. Pp. 1206-1207.

(d) Nor is the statute impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, incapable of becoming pregnant. Aside from the fact that the statute could be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, the Constitution does not require the California Legislature to limit the scope of the statute to older teenagers and exclude young girls. P. 1207.

(e) And the statute is not unconstitutional as applied to petitioner who, like the girl involved, was under 18 at the time of sexual intercourse, on the asserted ground that the statute presumes in such circumstances that the male is the culpable aggressor. The statute does not rest on such an assumption, but instead is an attempt to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented. P. 1207.

BLACKMUN, J., concluded that the California statutory rape law is a sufficiently reasoned and constitutional effort to control at its inception the problem of teenage pregnancies, and that the California Supreme Court's judgment should be affirmed on the basis of the applicable test for gender-based classifications as set forth in *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225, and *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397. Pp. 1210-1213.

REHNQUIST, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined.

STEWART, J., filed a concurring opinion *post*, p. 1208.

BLACKMUN, J., filed an opinion concurring in the judgment *post*, p. 1211.

BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined *post*, p. 1213.

STEVENS, J., filed a dissenting opinion *post*, p. 1218.

*466 Gregory F. Jilka, Rohnert Park, Cal., for petitioner.

Sandy R. Kriegler, Los Angeles, Cal., for respondent.

**1203 Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice STEWART, and Justice POWELL joined.

The question presented in this case is whether California's "statutory rape" law, § 261.5 of the Cal.Penal Code Ann. (West Supp.1981), violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17 1/2 -year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence, adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16 1/2 -year-old female, and her sister as they waited at a bus stop. Petitioner and Sharon, *467 who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to

trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that § 261.5 unlawfully discriminated on the basis of gender. The trial court and the California Court of Appeal denied petitioner's request for relief and petitioner sought review in the Supreme Court of California.

The Supreme Court held that "section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section." 25 Cal.3d 608, 611, 159 Cal.Rptr. 340, 342, 601 P.2d 572, 574. The court then subjected the classification to "strict scrutiny," stating that it must be justified by a compelling state interest. It found that the classification was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant." *Ibid.* Canvassing "the tragic human costs of illegitimate teenage pregnancies," including the large number of teenage abortions, the increased medical risk associated with teenage pregnancies, and the social consequences of teenage childbearing, the court concluded that the State has a compelling interest in preventing such pregnancies. Because males alone can "physiologically cause the result which the law properly seeks to avoid," the court further held that the gender classification was readily justified as a means of identifying offender and victim. For the reasons stated below, we affirm the judgment of the California Supreme Court.[FN1]

FN1. The lower federal courts and state courts have almost uniformly concluded that statutory rape laws are constitutional. See, *e. g., Rundlett v. Oliver*, 607 F.2d 495 (CA1 1979); *Hall v. McKenzie*, 537 F.2d 1232 (CA4 1976); *Hall v. State*, 365 So.2d 1249, 1252-1253 (Ala.App.1978), cert. denied, 365 So.2d 1253 (Ala.1979); *State v. Gray*, 122 Ariz. 445, 446-447, 595 P.2d 990, 991-992 (1979); *People v. Mackey*, 46 Cal.App.3d 755, 760-761, 120 Cal.Rptr. 157, 160, cert. denied, 423 U.S. 951, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975); *People v. Salinas*, 191 Colo. 171, 551 P.2d 703 (1976); *State v. Brothers*, 384 A.2d 402 (Del.Super.1978); *In re W.E.P.*, 318 A.2d 286, 289-290 (D.C.1974); *Barnes v. State*, 244 Ga. 302, 303-304, 260 S.E.2d 40, 41-42 (1979); *State v. Drake*, 219 N.W.2d 492, 495-496 (Iowa 1974); *State v. Bell*, 377 So.2d 303 (La.1979); *State v. Rundlett*, 391 A.2d 815 (Me.1978); *Green v. State*, 270 So.2d 695 (Miss.1972); *In re J.D.G.*, 498 S.W.2d 786, 792-793 (Mo.1973); *State v. Meloon*, 116 N.H. 669, 366 A.2d 1176 (1976); *State v. Thompson*, 162 N.J.Super. 302, 392 A.2d 678 (1978); *People v. Whidden*, 51 N.Y.2d 457, 434 N.Y.S.2d 937, 415 N.E.2d 927 (1980); *State v. Wilson*, 296 N.C. 298, 311-313, 250 S.E.2d 621, 629-630 (1979); *Olson v. State*, 588 P.2d 1018 (Nev.1979); *State v. Elmore*, 24 Or.App. 651, 546 P.2d 1117 (1976); *State v. Ware*, 418 A.2d 1 (R.I.1980); *Roe v. State*, 584 S.W.2d 257, 259 (Tenn.Cr.App.1979); *Ex parte Groves*, 571 S.W.2d 888, 892-893 (Tex.Cr.App.1978); *Moore v. McKenzie*, 236 S.E.2d 342, 342-343 (W.Va.1977); *Flores v. State*, 69 Wis.2d 509, 510-511, 230 N.W.2d 637, 638 (1975). Contra, *Navedo v. Preisser*, 630 F.2d 636 (CA8 1980); *United States v. Hicks*, 625 F.2d 216 (CA9 1980); *Meloon v. Helgemoe*, 564 F.2d 602 (CA1 1977) (limited in *Rundlett v. Oliver, supra*), cert. denied, 436 U.S. 950, 98 S.Ct. 2858, 56 L.Ed.2d 793 (1978).

***468 **1204** As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications. The issues posed by such challenges range from issues of standing, see *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), to the appropriate standard of judicial review for the substantive classification. Unlike the California Supreme Court, we

have not held that gender-based classifications are "inherently suspect" and thus we do not apply so-called "strict scrutiny" to those classifications. See *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). Our cases have held, however, that the traditional minimum rationality test takes on a somewhat "sharper focus" when gender-based classifications are challenged. See *Craig v. Boren*, 429 U.S. 190, 210 n. *, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (POWELL, J., concurring). In *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), for example, the Court stated that a gender-based classification will be upheld if it *469 bears a "fair and substantial relationship" to legitimate state ends; while in *Craig v. Boren, supra*, 429 U.S. at 197, 97 S.Ct. at 457, the Court restated the test to require the classification to bear a "substantial relationship" to "important governmental objectives."

[1][2] Underlying these decisions is the principle that a legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham v. Hughes*, 441 U.S. 347, 354, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) (plurality opinion of STEWART, J.). But because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require " 'things which are different in fact ... to be treated in law as though they were the same,' " *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 1499, 16 L.Ed.2d 577 (1966), quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940), this 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. *Parham v. Hughes, supra; Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). As the Court has stated, a legislature may "provide for the special problems of women." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653, 95 S.Ct. 1225, 1236, 43 L.Ed.2d 514 (1975).

[3] Applying those principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct.[FN2] Precisely why the legislature desired that result is of course somewhat less clear. This Court has long recognized that "[i]nquiries into congressional motives or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383-384, 88 S.Ct. 1673, 1682-1683, 20 L.Ed.2d 672 (1968); *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), and the *470 search for the "actual" or "primary" purpose of a statute is likely to be elusive. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *McGinnis v. Royster*, 410 U.S. 263, 276-277, 93 S.Ct. 1055, 1062-1063, 35 L.Ed.2d 282 (1973). Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical**1205 injury or from the loss of "chastity," and still others about promoting various religious and moral attitudes towards premarital sex.

> FN2. The statute was enacted as part of California's first penal code in 1850, 1850 Cal.Stats., ch. 99, § 47, p. 234, and recodified and amended in 1970.

The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. *Reitman v. Mulkey*, 387 U.S. 369, 373-374, 87 S.Ct. 1627, 1629-1630, 18 L.Ed.2d 830 (1967). And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, if it "could not

have been a goal of the legislation," *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 648, n. 16, 95 S.Ct. at 1233, this is not such a case.

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but also that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades,[FN3] have significant social, medical, and economic consequences for both the mother and her child, and the State.[FN4] *471 Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion.[FN5] And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.[FN6]

FN3. In 1976 approximately one million 15-to-19-year-olds became pregnant, one-tenth of all women in that age group. Two-thirds of the pregnancies were illegitimate. Illegitimacy rates for teenagers (births per 1,000 unmarried females ages 14 to 19) increased 75% for 14-to-17-year-olds between 1961 and 1974 and 33% for 18-to-19-year-olds. Alan Guttmacher Institute, 11 Million Teenagers 10, 13 (1976); C. Chilman, Adolescent Sexuality In a Changing American Society 195 (NIH Pub. No. 80-1426, 1980).

FN4. The risk of maternal death is 60% higher for a teenager under the age of 15 than for a women in her early twenties. The risk is 13% higher for 15-to-19-year-olds. The statistics further show that most teenage mothers drop out of school and face a bleak economic future. See, *e. g.*, 11 Million Teenagers, *supra*, at 23, 25; Bennett & Bardon, The Effects of a School Program On Teenager Mothers and Their Children, 47 Am.J. Orthopsychiatry 671 (1977); Phipps-Yonas, Teenage Pregnancy and Motherhood, 50 Am.J. Orthopsychiatry 403, 414 (1980).

FN5. This is because teenagers are disproportionately likely to seek abortions. Center for Disease Control, Abortion Surveillance 1976, pp. 22-24 (1978). In 1978, for example, teenagers in California had approximately 54,000 abortions and 53,800 live births. California Center for Health Statistics, Reproductive Health Status of California Teenage Women 1, 23 (Mar. 1980).

FN6. The policy and intent of the California Legislature evinced in other legislation buttresses our view that the prevention of teenage pregnancy is a purpose of the statute. The preamble to the Pregnancy Freedom of Choice Act, for example, states: "The legislature finds that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California." Cal.Welf. & Inst.Code Ann. § 16145 (West 1980).

Subsequent to the decision below, the California Legislature considered and rejected proposals to render § 261.5 gender neutral, thereby ratifying the judgment of the California Supreme Court. That is enough to answer petitioner's contention that the statute was the " 'accidental by-product of a traditional way of thinking about females.' " *Califano v. Webster*, 430 U.S. 313, 320, 97 S.Ct. 1192, 1196, 51 L.Ed.2d 360 (1977) (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223, 97 S.Ct. 1021, 1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment)). Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is "current" and what is "outmoded" in the perception of women.

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. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity. The statute at issue here *472 protects women from sexual intercourse at an age when those consequences are particularly severe.[FN7]

FN7. Although petitioner concedes that the State has a "compelling" interest in preventing teenage pregnancy, he contends that the "true" purpose of § 261.5 is to protect the virtue and chastity of young women. As such, the statute is unjustifiable because it rests on archaic stereotypes. What we have said above is enough to dispose of that contention. The question for us-and the only question under the Federal Constitution-is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted. Even if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner's argument must fail because "[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968). In *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), for example, the Court rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. Similarly, in *Washington v. Davis*, 426 U.S. 229, 243, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976), the Court distinguished *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), on the grounds that the purposes of the ordinance there were not open to impeachment by evidence that the legislature was actually motivated by an impermissible purpose. See also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270, n. 21, 97 S.Ct. 555, 566, 50 L.Ed.2d 450 (1977); *Mobile v. Bolden*, 446 U.S. 55, 91, 100 S.Ct. 1490, 1508, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment).

**1206 The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female.[FN8] We hold that such a statute is *473 sufficiently related to the State's objectives to pass constitutional muster.

FN8. We do not understand petitioner to question a State's authority to make sexual intercourse among teenagers a criminal act, at least on a gender-neutral basis. In *Carey v. Population Services International*, 431 U.S. 678, 694, n. 17, 97 S.Ct. 2010, 2021, 52 L.Ed.2d 675 (1977) (plurality opinion of BRENNAN, J.), four Members of the Court assumed for the purposes of that case that a State may regulate the sexual behavior of minors, while four other Members of the Court more emphatically stated that such regulation would be permissible. *Id.*, at 702, 703, 97 S.Ct., at 2025, 2026 (WHITE, J., concurring in part and concurring in result); *Id.*, at 705-707, 709, 97 S.Ct., at 2026-2028, 2029 (POWELL, J., concurring in part and concurring in judgment); *Id.*, at 713, 97 S.Ct., at 2030-2031 (STEVENS, J., concurring in part and concurring in judgment); *id.*, at 718, 97 S.Ct., at 2033 (REHNQUIST, J., dissenting). The Court has long recognized that a State has even broader authority to protect the physical, mental, and moral well-being of its youth, than of its adults. See, *e. g.*,

> *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 72-74, 96 S.Ct. 2831, 2842-2843, 49 L.Ed.2d 788 (1976); *Ginsberg v. New York*, 390 U.S. 629, 639-640, 88 S.Ct. 1274, 1280-1281, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 (1944).

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.

We are unable to accept petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be *broadened* so as to hold the female as criminally liable as the male. It is argued that this statute is not *necessary* to deter teenage pregnancy because a gender-neutral statute, where both male and female would be subject to prosecution, would serve that goal equally well. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. *Kahn v. Shevin*, 416 U.S., at 356 n. 10, 94 S.Ct., at 1737-1738.

In any event, we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. The State persuasively contends that a gender-**1207 neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report *474 violations of the statute if she herself would be subject to criminal prosecution.[FN9] In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.[FN10]

> FN9. Petitioner contends that a gender-neutral statue would not hinder prosecutions because the prosecutor could take into account the relative burdens on females and males and generally only prosecute males. But to concede this is to concede all. If the prosecutor, in exercising discretion, will virtually always prosecute just the man and not the woman, we do not see why it is impermissible for the legislature to enact a statute to the same effect.

> FN10. The question whether a statute is *substantially* related to its asserted goals is at best an opaque one. It can be plausibly argued that a gender-neutral statute would produce fewer prosecutions than the statute at issue here. See STEWART, J., concurring, *post*, at 1210, n. 13. Justice BRENNAN's dissent argues on the other hand, that
>
> > "even assuming that a gender-neutral statute would be more difficult to enforce, ... [c]ommon sense ... suggests that a gender-neutral statutory rape law is potentially a greater deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators." *Post*, at 1216-1217 (emphasis deleted).
>
> Where such differing speculations as to the effect of a statute are plausible, we think it appropriate to defer to the decision of the California Supreme Court, "armed as it was with the knowledge of the facts and circumstances concerning

the passage and potential impact of [the statute], and familiar with the milieu in which that provision would operate." *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S.Ct. 1627, 1633, 18 L.Ed.2d 830 (1967).

It should be noted that two of the three cases relied upon by Justice BRENNAN's dissent are readily distinguishable from the instant one. See *post*, at 1215, n. 3. In both *Navedo v. Preisser*, 630 F.2d 636 (CA8 1980), and *Meloon v. Helgemoe*, 564 F.2d 602 (CA1 1977), cert. denied, 436 U.S. 950, 98 S.Ct. 2858, 56 L.Ed.2d 793 (1978), the respective governments asserted that the purpose of the statute was to protect young women from physical injury. Both courts rejected the justification on the grounds that there had been no showing that young females are more likely than males to suffer physical injury from sexual intercourse. They further held, contrary to our decision, that pregnancy prevention was not a "plausible" purpose of the legislation. Thus neither court reached the issue presented here, whether the statute is substantially related to the prevention of teenage pregnancy. Significantly, *Meloon* has been severely limited by *Rundlett v. Oliver*, 607 F.2d 495 (CA1 1979), where the court upheld a statutory rape law on the ground that the State had shown that sexual intercourse physically injures young women more than males. Here, of course, even Justice BRENNAN's dissent does not dispute that young women suffer disproportionately the deleterious consequences of illegitimate pregnancy.

*475 We similarly reject petitioner's argument that § 261.5 is impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant. Quite apart from the fact that the statute could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, see *Rundlett v. Oliver*, 607 F.2d 495 (CA1 1979), it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls.

There remains only petitioner's contention that the statute is unconstitutional as it is applied to him because he, like Sharon, was under 18 at the time of sexual intercourse. Petitioner argues that the statute is flawed because it presumes that as between two persons under 18, the male is the culpable aggressor. We find petitioner's contentions unpersuasive. Contrary to his assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented.

In upholding the California statute we also recognize that this is not a case where **1208 a statute is being challenged on the grounds that it "invidiously discriminates" against females. *476 To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made "solely for ... administrative convenience," as in *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973) (emphasis omitted), or rests on "the baggage of sexual stereotypes" as in *Orr v. Orr*, 440 U.S., at 283, 99 S.Ct., at 1114. As we have held, the statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on

the male.

Accordingly, the judgment of the California Supreme Court is

Affirmed.

Justice STEWART, concurring.

Section 261.5, on its face, classifies on the basis of sex. A male who engages in sexual intercourse with an underage female who is not his wife violates the statute; a female who engages in sexual intercourse with an underage male who is not her husband does not.[FN1] The petitioner contends that this state law, which punishes only males for the conduct in question, violates his Fourteenth Amendment right to the equal protection of the law. The Court today correctly rejects that contention.

FN1. But see n. 5 and accompanying text, *infra.*

A

At the outset, it should be noted that the statutory discrimination, when viewed as part of the wider scheme of California law, is not as clearcut as might at first appear. Females are not freed from criminal liability in California for engaging in sexual activity that may be harmful. It is unlawful, for example, for any person, of either sex, to molest, annoy, or contribute to the delinquency of anyone under 18 years of *477 age.[FN2] All persons are prohibited from committing "any lewd or lascivious act," including consensual intercourse, with a child under 14.[FN3] And members of both sexes may be convicted for engaging in deviant sexual acts with anyone under 18.[FN4] Finally, females may be brought within the proscription of § 261.5 itself, since a female may be charged with aiding and abetting its violation.[FN5]

FN2. See Cal.Penal Code Ann. §§ 272, 647a (West Supp.1981).

FN3. Cal.Penal Code Ann. § 288 (West Supp.1981). See *People v. Dontanville*, 10 Cal.App.3d 783, 796, 89 Cal.Rptr. 172, 180 (2d Dist.).

FN4. See Cal.Penal Code Ann. §§ 286(b)(1), 288a(b)(1) (West Supp.1981).

FN5. See Cal.Penal Code Ann. § 31 (West 1970); *People v. Haywood*, 131 Cal.App.2d 259, 280 P.2d 180 (2d Dist.); *People v. Lewis*, 113 Cal.App.2d 468, 248 P.2d 461 (1st Dist.). According to statistics maintained by the California Department of Justice Bureau of Criminal Statistics, approximately 14% of the juveniles arrested for participation in acts made unlawful by § 261.5 between 1975 and 1979 were females. Moreover, an underage female who is as culpable as her male partner, or more culpable, may be prosecuted as a juvenile delinquent. Cal.Welf. & Inst.Code Ann. § 602 (West Supp.1981); *In re Gladys R.*, 1 Cal.3d 855, 867-869, 464 P.2d 127, 136-138, 83 Cal.Rptr. 671, 680-682.

Section 261.5 is thus but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity. To be sure, § 261.5 creates an additional measure of punishment for males who engage in sexual intercourse with females between the ages of 14 and 17.[FN6] The question then is whether the Constitution prohibits a state legislature from imposing this *additional* sanction on a gender-specific basis.

FN6. Males and females are equally prohibited by § 288 from sexual intercourse with minors under 14. Compare Cal.Penal Code Ann. § 288 (West Supp.1981) with Cal.Penal Code Ann. §§ 18, 264 (West Supp.1981).

B

The Constitution is violated when government,

state or federal, invidiously classifies **1209 similarly situated people on the basis of the immutable characteristics with which they were *478 born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. See *Fullilove v. Klutznick*, 448 U.S. 448, 522, 100 S.Ct. 2758, 2798, 65 L.Ed.2d 902 (dissenting opinion); *McLaughlin v. Florida*, 379 U.S. 184, 198, 85 S.Ct. 283, 13 L.Ed.2d 222 (concurring opinion); *Brown v. Board of Ed.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Plessy v. Ferguson*, 163 U.S. 537, 552, 16 S.Ct. 1138, 1144, 41 L.Ed. 256 (dissenting opinion). By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.

As was recognized in *Parham v. Hughes*, 441 U.S. 347, 354, "a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Gender-based classifications may not be based upon administrative convenience, or upon archaic assumptions about the proper roles of the sexes. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397; *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583; *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225. But we have recognized that in certain narrow circumstances men and women are *not* similarly situated; in these circumstances a gender classification based on clear differences between the sexes in not invidious, and a legislative classification realistically based upon those differences is not unconstitutional. See *Parham v. Hughes, supra; Califano v. Webster*, 430 U.S. 313, 316-317, 97 S.Ct. 1192, 1194-1195, 51 L.Ed.2d 360; *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610; cf. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 59, 93 S.Ct. 1278, 1310, 36 L.Ed.2d 16 (concurring opinion). "[G]ender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated." *Caban v. Mohammed*, 441 U.S. 380, 398, 99 S.Ct. 1760, 1771, 60 L.Ed.2d 297 (dissenting opinion).

*479 Applying these principles to the classification enacted by the California Legislature, it is readily apparent that § 261.5 does not violate the Equal Protection Clause. Young women and men are not similarly situated with respect to the problems and risk associated with intercourse and pregnancy, and the statute is realistically related to the legitimate state purpose of reducing those problems and risks.

C

As the California Supreme Court's catalog shows, the pregnant unmarried female confronts problems more numerous and more severe than any faced by her male partner.[FN7] She alone endures the medical risks of pregnancy or abortion.[FN8] She suffers**1210 disproportionately the social, educational, and emotional consequences of pregnancy.[FN9] Recognizing this disproportion,*480 California has attempted to protect teenage females by prohibiting males from participating in the act necessary for conception.[FN10]

FN7. The court noted that from 1971 through 1976, 83.6% of the 4,860 children born to girls under 15 in California were illegitimate, as were 51% of those born to girls 15 to 17. The court also observed that while accounting for only 21% of California pregnancies in 1976, teenagers accounted for 34.7% of legal abortions. See *ante*, at 1205, n. 3.

FN8. There is also empirical evidence that sexual abuse of young females is a more

serious problem than sexual abuse of young males. For example, a review of five studies found that 88% of sexually abused minors were female. Jaffe, Dynneson, & ten Bensel, Sexual Abuse of Children, 129 Am.J. of Diseases of Children 689, 690 (1975). Another study, involving admissions to a hospital emergency room over a 3-year period, reported that 86 of 100 children examined for sexual abuse were girls. Orr & Prietto, Emergency Management of Sexually Abused Children, 133 Am.J. of Diseased Children 630 (1979). See also *State v. Craig*, 169 Mont. 150, 156-157, 545 P.2d 649, 653; Sarafino, An Estimate of Nationwide Incidence of Sexual Offenses Against Children, 58 Child Welfare, 127, 131 (1979).

FN9. Most teenage mothers do not finish high school and are disadvantaged economically thereafter. See Moore, Teenage Childbirth and Welfare Dependency, 10 Family Planning Perspectives 233-235 (1978). The suicide rate for teenage mothers is seven times greater than that for teenage girls without children. F. Nye, School-Age Parenthood (Wash.State U.Ext.Bull. No. 667) 8 (1976). And 60% of adolescent mothers aged 15 to 17 are on welfare within two to five years of the birth of their children. Teenage Pregnancy, Everybody's Problem 3-4 (DHEW Publication (HSA) No. 77-5619).

FN10. Despite the increased availability of contraceptives and sex education, the pregnancy rates for young women are increasing. See Alan Guttmacher Institute, 11 Million Teenagers 12 (1976). See generally C. Chilman, Adolescent Sexuality in a Changing American Society (NIH Pub.No.80-1426, 1980).

The petitioner contends that the statute is overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible. The petitioner does not allege, however, that he used a contraceptive, or that pregnancy could not have resulted from the conduct with which he was charged. But even assuming the petitioner's standing to raise the claim of overbreadth, it is clear that a statute recognizing the defenses he suggests would encounter difficult if not impossible problems of proof.

The fact that males and females are not similarly situated with respect to the risks of sexual intercourse applies with the same force to males under 18 as it does to older males. The risk of pregnancy is a significant deterrent for unwed young females that is not shared by unmarried males, regardless of their age. Experienced observation confirms the commonsense notion that adolescent males disregard the possibility of pregnancy far more than do adolescent females.[FN11] And to the extent that § 261.5 may punish males for intercourse with prepubescent females, that punishment is justifiable because of the substantial physical risks for prepubescent females that are not shared by their male counterparts.[FN12]

FN11. See, *e. g.*, Phipps-Yonas, Teenage Pregnancy and Motherhood, 50 Am.J. Orthopsychiatry 403, 412 (1980). See also *State v. Rundlett*, 391 A.2d 815, 819, n. 13, 822 (Me.); *Rundlett v. Oliver*, 607 F.2d 495, 502 (CA1).

FN12. See *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40; see generally Orr & Prietto, *supra*; Jaffee, Dynneson, & ten Bensel, *supra*; Chilman, *supra*.

*481 D

The petitioner argues that the California Legislature could have drafted the statute differently, so that its

purpose would be accomplished more precisely. "But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the ... [l]egislature are within constitutional limitations." *Kahn v. Shevin*, 416 U.S. 351, 356, n. 10, 94 S.Ct. 1734, 1738, 40 L.Ed.2d 189. That other States may have decided to attack the same problems more broadly, with gender-neutral statutes, does not mean that every State is constitutionally compelled to do so. FN13

FN13. The fact is that a gender-neutral statute would not necessarily lead to a closer fit with the aim of reducing the problems associated with teenage pregnancy. If both parties were equally liable to prosecution, a female would be far less likely to complain; the very complaint would be self-incriminating. Accordingly, it is possible that a gender-neutral statute would result in fewer prosecutions than the one before us.

In any event, a state legislature is free to address itself to what it believes to be the most serious aspect of a broader problem. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-487, 90 S.Ct. 1153, 1162-1163, 25 L.Ed.2d 491; see also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563.

E

In short, the Equal Protection Clause does not mean that the physiological differences**1211 between men and women must be disregarded. While those differences must never be permitted to become a pretext for invidious discrimination, no such discrimination is presented by this case. The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.

Justice BLACKMUN, concurring in the judgment.

[3] It is gratifying that the plurality recognizes that "[a]t the risk of stating the obvious, teenage pregnancies ... have increased dramatically over the last two decades" and "have significant social, medical, and economic consequences for both *482 the mother and her child, and the State." *Ante*, at 1205 (footnotes omitted). There have been times when I have wondered whether the Court was capable of this perception, particularly when it has struggled with the different but not unrelated problems that attend abortion issues. See, for example, the opinions (and the dissenting opinions) in *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977); *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Poelker v. Doe*, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); and today's opinion in *H. L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388.

Some might conclude that the two uses of the criminal sanction-here flatly to forbid intercourse in order to forestall teenage pregnancies, and in *Matheson* to prohibit a physician's abortion procedure except upon notice to the parents of the pregnant minor-are vastly different proscriptions. But the basic social and privacy problems are much the same. Both Utah's statute in *Matheson* and California's statute in this case are legislatively created tools intended to achieve similar ends and addressed to the same societal concerns: the control and direction of young people's sexual activities. The plurality opinion impliedly concedes as much when it notes that "approximately half of all teenage pregnancies end in abortion," and that "those children who are born" are "likely candidates to become wards of the State." *Ante*, at 1205, and n.6.

I, however, cannot vote to strike down the California statutory rape law, for I think it is a sufficiently reasoned and constitutional effort to control the

problem at its inception. For me, there is an important difference between this state action and a State's adamant and rigid refusal to face, or even to recognize, the "significant ... consequences"-to the woman-of a forced or unwanted conception. I have found it difficult to rule constitutional, for example, state efforts to block, at that later point, a woman's attempt to deal with the enormity of the problem confronting her, just as I have rejected state efforts to prevent women from rationally taking*483 steps to prevent that problem from arising. See, *e. g.*, *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). See also *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). In contrast, I am persuaded that, although a minor has substantial privacy rights in intimate affairs connected with procreation, California's efforts to prevent teenage pregnancy are to be viewed differently from Utah's efforts to inhibit a woman from dealing with pregnancy once it has become an inevitability.

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), was an opinion which, in large part, I joined, *id.*, at 214, 97 S.Ct., at 466. The plurality opinion in the present case points out, *ante*, at 1204, the Court's respective phrasings of the applicable test in *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971), and in *Craig v. Boren*, 429 U.S., at 197, 97 S.Ct., at 457. I vote to affirm the judgment of the Supreme Court of California and to uphold the State's gender-based classification on that test and as exemplified by those two cases and by **1212*Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); and *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

I note, also, that § 261.5 of the California Penal Code is just one of several California statutes intended to protect the juvenile. Justice STEWART, in his concurring opinion, appropriately observes that § 261.5 is "but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity." *Ante*, at 1208.

I think, too, that it is only fair, with respect to this particular petitioner, to point out that his partner, Sharon, appears not to have been an unwilling participant in at least the initial stages of the intimacies that took place the night of June 3, 1978.[FN*] Petitioner's**1213 and Sharon's nonacquaintance *484 with each other before the incident; their drinking; their withdrawal from the others of the group; their foreplay, in which she willingly participated and seems to have encouragedsS *485 and the closeness of their ages (a difference of only one year and 18 days) are factors that should make this case an unattractive one to prosecute at all, and especially to pros ecute*486 as a felony, rather than as a misdemeanor chargeable under § 261.5. But the State has chosen to prosecute in that *487 manner, and the facts, I reluctantly conclude, may fit the crime.

FN* Sharon at the preliminary hearing testified as follows:

"Q. [by the Deputy District Attorney]. On June the 4th, at approximately midnight-midnight of June the 3rd, were you in Rohnert Park?

"A. [by Sharon]. Yes.

"Q. Is that in Sonoma County?

"A. Yes.

"Q. Did anything unusual happen to you that night in Rohnert Park?

"A. Yes.

"Q. Would you briefly describe what happened that night? Did you see the defendant that night in Rohnert Park?

"A. Yes.

"Q. Where did you first meet him?

"A. At a bus stop.

"Q. Was anyone with you?

"A. My sister.

"Q. Was anyone with the defendant?

"A. Yes.

"Q. How many people were with the defendant?

"A. Two.

"Q. Now, after you met the defendant, what happened?

"A. We walked down to the railroad tracks.

"Q. What happened at the railroad tracks?

"A. We were drinking at the railroad tracks and we walked over to this bush and he started kissing me and stuff, and I was kissing him back, too, at first. Then, I was telling him to stop-

"Q. Yes.

"A. -and i was teLling him to slow down and stop. he said, 'okay, okay.' But then he just kept doing it. He just kept doing it and then my sister and two other guys came over to where we were and my sister said-told me to get up and come home. And then I didn't-

"Q. Yes.

"A. -and then my sister and-

"Q. All right.

"A. -David, one of the boys that were there, started walking home and we stayed there and then later-

"Q. All right.

"A. -Bruce left Michael, you know.

"The Court: Michael being the defendant?

"The Witness: Yeah. We was lying there and we were kissing each other, and then he asked me if I wanted to walk him over to the park; so we walked over to the park and we sat down on a bench and then he started kissing me again and we were laying on the bench. And he told me to take my pants off.

"I said, 'No,' and I was trying to get up and he hit me back down on the bench and then I just said to myself, 'Forget it,' and I let him do what he wanted to do and he took my pants off and he was telling me to put my legs around him and stuff-

"Q. Did you have sexual intercourse with the defendant?

"A. Yeah.

"Q. He did put his penis into your vagina?

"A. Yes.

"Q. You said that he hit you?

"Q. Yeah.

"Q. How did he hit you?

"A. He slugged me in the face.

"Q. With what did he slug you?

"A. His fist.

"Q. Where abouts in the face?

"A. On my chin.

"Q. As a result of that, did you have any bruises or any kind of an injury?

"A. Yeah.

"Q. What happened?

"A. I had bruises.

"The Court: Did he hit you one time or did he hit you more than once?

"The Witness: He hit me about two or three times.

"Q. Now, during the course of that evening, did the defendant ask you your age?

"A. Yeah.

"Q. And what did you tell him?

"A. Sixteen.

"Q. Did you tell him you were sixteen?

"A. Yes.

"Q. Now, you said you had been drinking, is that correct?

"A. Yes.

"Q. Would you describe your condition as a result of the drinking?

"A. I was a little drunk." App. 20-23.

CROSS-EXAMINATION

"Q. Did you go off with Mr. *M.* away from the others?

"A. Yeah.

"Q. Why did you do that?

"A. I don't know. I guess I wanted to.

"Q. Did you have any need to go to the bathroom when you were there.

"A. Yes.

"Q. And what did you do?

"A. Me and my sister walked down the railroad tracks to some bushes and went to the bathroom.

"Q. Now, you and Mr. *M.*, as I understand it, went off into the bushes, is that correct?

"A. Yes.

"Q. Okay. And what did you do when you and Mr. *M.* were there in the bushes?

"A. We were kissing and hugging.

"Q. Were you sitting up?

"A. We were laying down.

"Q. You were lying down. This was in the bushes?

"A. Yes.

"Q. How far away from the rest of them were you?

"A. They were just bushes right next to the railroad tracks. We just walked off into the bushes; not very far.

"Q. So your sister and the other two boys came over to where you were, you and Michael were, is that right?

"A. Yeah.

"Q. What did they say to you, if you remember?

"A. My sister didn't say anything. She said, 'Come on, Sharon, let's go home.'

"Q. She asked you to go home with her?

"A. (Affirmative nod.)

"Q. Did you go home with her?

"A. No.

"Q. You wanted to stay with Mr. *M.*?

"A. I don't know.

"Q. Was this before or after he hit you?

"A. Before.

"Q. What happened in the five minutes that Bruce stayed there with you and Michael?

"A. I don't remember.

"Q. You don't remember at all?

"A. (Negative head shake.)

"Q. Did you have occasion at that time to kiss Bruce?

"A. Yeah.

"Q. You did? You were kissing Bruce at that time?

"A. (Affirmative nod.)

"Q. Was Bruce kissing you?

"A. Yes.

"Q. And were you standing up at this time?

"A. No, we were sitting down.

"Q. Okay. So at this point in time you had left Mr. *M.* and you were hugging and kissing with Bruce, is that right?

"A. Yeah.

"Q. And you were sitting up.

"A. Yes.

"Q. Was your sister still there then?

"A. No. Yeah, she was at first.

"Q. What was she doing?

"A. She was standing up with Michael and David.

"Q. Yes. Was she doing anything with Michael and David?

"A. No, I don't think so.

"Q. Whose idea was it for you and Bruce to kiss? Did you initiate that?

"A. Yes.

"Q. What happened after Bruce left?

"A. Michael asked me if I wanted to go walk to the park.

"Q. And what did you say?

"A. I said, 'Yes.'

"Q. And then what happened?

"A. We walked to the park.

"Q. How long did it take you to get to the park?

"A. About ten or fifteen minutes.

"Q. And did you walk there?

"A. Yes.

"Q. Did Mr. *M.* ever mention his name?

"A. Yes." *Id.*, at 27-32.

*488 Justice BRENNAN, with whom Justices WHITE and MARSHALL join, dissenting.

I

It is disturbing to find the Court so splintered on a case that presents such a straightforward issue: Whether the admittedly gender-based classification in Cal.Penal Code Ann. § 261.5 (West Supp.1981) **1214 bears a sufficient relationship to the State's asserted goal of preventing teenage pregnancies to survive the "mid-level" constitutional scrutiny mandated by *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).[FN1] Applying the analytical framework provided by our precedents, I am convinced that there is only one proper resolution of this issue: the classification must be declared unconstitutional. I fear that the plurality opinion and Justices STEWART and BLACKMUN reach the opposite result by placing too much emphasis on the desirability of achieving the State's asserted statutory goal-prevention of teenage pregnancy-and not enough emphasis on the fundamental question of whether the sex-based discrimination *489 in the California statute is *substantially* related to the achievement of that goal.[FN2]

FN1: The California Supreme Court acknowledged, and indeed the parties do not dispute, that Cal.Penal Code Ann. § 261.5 (West Supp.1981) discriminates on the basis of sex. *Ante*, at 1203. Because petitioner is male, he faces criminal felony charges and a possible prison term while his female partner remains immune from prosecution. The gender of the participants, not their relative responsibility, determines which of them is subject to criminal sanctions under § 261.5.

As the California Supreme Court stated in *People v. Hernandez*, 61 Cal.2d 529, 531, 39 Cal.Rptr. 361, 362, 393 P.2d 673, 674 (1964) (footnote omitted):

"[E]ven in circumstances where a girl's actual comprehension contradicts the law's presumption [that a minor female is too innocent and naive to understand the implications and nature of her act], the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him."

FN2. None of the three opinions upholding the California statute fairly applies the equal protection analysis this Court has so carefully developed since *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). The plurality opinion, for example, focusing on the obvious and uncontested fact that only females can become pregnant, suggests that the statutory gender discrimination, rather than being invidious, actually ensures equality of treatment. Since only females are subject to a risk of pregnancy, the plurality opinion concludes that "[a] criminal sanction imposed solely on males ... serves to roughly 'equalize' the deterrents on the sexes." *Ante*, at 1206. Justice STEWART adopts a similar approach. Recognizing that "females can become pregnant as the result of sexual intercourse; males cannot," Justice STEWART concludes that "[y]oung women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy," and therefore § 261.5 "is *realistically* related to the legitimate state purpose of reducing those problems and risks" (emphasis added). *Ante*, at 1209. Justice BLACKMUN, conceding that some limits must be placed on a State's power to regulate "the control and direction of young people's sexual activities," also finds the statute constitutional. *Ante*, at 1211. He distinguishes the State's power in the abortion context, where the pregnancy has already occurred, from its

power in the present context, where the "problem [is] at its inception." He then concludes, without explanation, that "the California statutory rape law ... is a sufficiently reasoned and constitutional effort to control the problem at its inception." *Ibid.*

> All three of these approaches have a common failing. They overlook the fact that the State has not met is burden of proving that the gender discrimination in § 261.5 is *substantially* related to the achievement of the State's asserted statutory goal. My Brethren seem not to recognize that California has the burden of proving that a gender-neutral statutory rape law would be less effective than § 261.5 in deterring sexual activity leading to teenage pregnancy. Because they fail to analyze the issue in these terms, I believe they reach an unsupportable result.

II

After some uncertainty as to the proper framework for analyzing equal protection challenges to statutes containing gender-based classifications, see *ante*, at 1204, this Court settled upon the proposition that a statute containing a gender-based classification cannot withstand constitutional challenge unless ***490** the classification is substantially related to the achievement of an important governmental objective. *Kirchberg v. Feenstra*, 450 U.S. 455, 459, 101 S.Ct. 1195, 1198, 67 L.Ed.2d 428; *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980); *Califano v. Westcott*, 443 U.S. 76, 85, 99 S.Ct. 2655, 2661, 61 L.Ed.2d 382 (1979); *Caban v. Mohammed*, 441 U.S. 380, 388, 99 S.Ct. 1760, 1766, 60 L.Ed.2d 297 (1979); ****1215***Orr v. Orr*, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-211, 97 S.Ct. 1021, 1028-1029, 51 L.Ed.2d 270 (1977); *Califano v. Webster*, 430 U.S. 313, 316-317, 97 S.Ct. 1192, 1194-1195, 51 L.Ed.2d 360 (1977); *Craig v. Boren, supra*, at 197, 97 S.Ct., at 457. This analysis applies whether the classification discriminates against males or against females. *Caban v. Mohammed, supra*, at 394, 99 S.Ct., at 1769; *Orr v. Orr, supra*, at 278-279, 99 S.Ct., at 1111; *Craig v. Boren, supra*, at 204, 97 S.Ct., at 460. The burden is on the government to prove both the importance of its asserted objective and the substantial relationship between the classification and that objective. See *Kirchberg v. Feenstra*, 450 U.S., at 461, 101 S.Ct., at 1199; *Wengler v. Druggists Mutual Ins. Co., supra*, at 151-152, 100 S.Ct., at 1546; *Caban v. Mohammed, supra*, at 393, 99 S.Ct., at 1768; *Craig v. Boren, supra*, at 204, 97 S.Ct., at 460. And the State cannot meet that burden without showing that a gender-neutral statute would be a less effective means of achieving that goal. *Wengler v. Druggists Mutual Ins. Co., supra*, at 151-152, 100 S.Ct., at 1546-1547; *Orr v. Orr, supra*, at 281, 283, 99 S.Ct., at 1112, 1113.[FN3]

> FN3. Gender-based statutory rape laws were struck down in *Navedo v. Preisser*, 630 F.2d 636 (CA8 1980), *United States v. Hicks*, 625 F.2d 216 (CA9 1980), and *Meloon v. Helgemoe*, 564 F.2d 602 (CA1 1977), cert. denied, 436 U.S. 950, 98 S.Ct. 2858, 56 L.Ed.2d 793 (1978), precisely because the government failed to meet this burden of proof.

The State of California vigorously asserts that the "important governmental objective" to be served by § 261.5 is the prevention of teenage pregnancy. It claims that its statute furthers this goal by deterring sexual activity by males-the class of persons it considers more responsible for causing those pregnancies.[FN4] But even assuming that prevention of teenage ***491** pregnancy is an important governmental objective and that it is in fact an objective of § 261.5, see *infra*, at 1217-1218, California still has the burden of proving that there are fewer teenage pregnancies under its gender-based statutory rape law than there would be if the law were gender neutral. To meet this burden, the State must show

that because its statutory rape law punishes only males, and not females, it more effectively deters minor females from having sexual intercourse.[FN5]

FN4. In a remarkable display of sexual stereotyping, the California Supreme Court stated:

"The Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." 25 Cal.3d 608, 612, 159 Cal.Rptr. 340, 343, 601 P.2d 572, 575 (1979) (emphasis in original).

FN5. Petitioner has not questioned the State's constitutional power to achieve its asserted objective by criminalizing consensual sexual activity. However, I note that our cases would not foreclose such a privacy challenge.

The State is attempting to reduce the incidence of teenage pregnancy by imposing criminal sanctions on those who engage in consensual sexual activity with minor females. We have stressed, however, that

"[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972) (footnote omitted).

Minors, too, enjoy a right of privacy in connection with decisions affecting procreation. *Carey v. Population Services International*, 431 U.S. 678, 693, 97 S.Ct. 2010, 2020, 52 L.Ed.2d 675 . Thus, despite the suggestion of the plurality to the contrary, *ante*, at 1206, n. 8, it is not settled that a State may rely on a pregnancy-prevention justification to make consensual sexual intercourse among minors a criminal act.

The plurality assumes that a gender-neutral statute would be less effective than § 261.5 in deterring sexual activity because a gender-neutral statute would create significant enforcement problems. The plurality thus accepts the State's assertion that

"a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. ***492** In an area already fraught with prosecutorial ****1216** difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement." *Ante*, at 1206-1207 (footnotes omitted).

However, a State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under *Craig v. Boren*. Rather, the State must produce evidence that will persuade the court that its assertion is true. See *Craig v. Boren*, 429 U.S., at 200-204, 97 S.Ct., at 458-460.

The State has not produced such evidence in this case. Moreover, there are at least two serious flaws in the State's assertion that law enforcement problems created by a gender-neutral statutory rape law would make such a statute less effective than a gender-based statute in deterring sexual activity.

First, the experience of other jurisdictions, and California itself, belies the plurality's conclusion that a gender-neutral statutory rape law "may well be incapable of enforcement." There are now at least 37 States that have enacted gender-neutral statutory rape laws. Although most of these laws protect young persons (of either sex) from the sexual exploitation of older individuals, the laws of Ari-

zona, Florida, and Illinois permit prosecution of both minor females and minor males for engaging in mutual sexual conduct. FN6 California has introduced no evidence that those States have been handi capped*493 by the enforcement problems the plurality finds so persuasive. FN7 Surely, if those States could provide such evidence, we might expect that California would have introduced it.

FN6. See Ariz.Rev.Stat.Ann. § 13-1405 (1978); Fla.Stat. § 794.05 (1979); Ill.Rev.Stat., ch. 38, ¶ 11-5 (1979). In addition, eight other States permit both parties to be prosecuted when one of the participants to a consensual act of sexual intercourse is under the age of 16. See Kan.Stat.Ann. § 21-3503 (1974); Mass.Gen.Laws Ann., ch. 265, § 23 (West Supp.1981); Mich.Comp.Laws § 750.13 (1970); Mont.Code Ann. §§ 45-5-501 to 45-5-503 (1979); N.H.Rev.Stat. § 632-A:3 (Supp.1979); Tenn.Code Ann. § 39-3705(4) (Supp.1979); Utah Code Ann. § 76-5-401 (Supp.1979); Vt.Stat.Ann., Tit. 13, § 3252(3) (Supp.1980).

FN7. There is a logical reason for this. In contrast to laws governing forcible rape, statutory rape laws apply to consensual sexual activity. Force is not an element of the crime. Since a woman who consents to an act of sexual intercourse is unlikely to report her partner to the police-whether or not she is subject to criminal sanctions-enforcement would not be undermined if the statute were to be made gender neutral. See n. 8, *infra*.

In addition, the California Legislature in recent years has revised other sections of the Penal Code to make them gender-neutral. For example, Cal.Penal Code Ann. §§ 286(b)(1) and 288a(b)(1) (West Supp.1981), prohibiting sodomy and oral copulation with a "person who is under 18 years of age," could cause two minor homosexuals to be subjected to criminal sanctions for engaging in mutually consensual conduct. Again, the State has introduced no evidence to explain why a gender-neutral statutory rape law would be any more difficult to enforce than those statutes.

The second flaw in the State's assertion is that even assuming that a gender-neutral statute would be more difficult to enforce, the State has still not shown that those enforcement problems would make such a statute less effective than a gender-based statute in deterring minor females from engaging in sexual intercourse. FN8 Common sense, however, suggests *494 that a gender-neutral statutory rape law is potentially a ***1217 greater* deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators. Even if fewer persons were prosecuted under the gender-neutral law, as the State suggests, it would still be true that twice as many persons would be *subject* to arrest. The State's failure to prove that a gender-neutral law would be a less effective deterrent than a gender-based law, like the State's failure to prove that a gender-neutral law would be difficult to enforce, should have led this Court to invalidate § 261.5.

FN8. As it is, § 261.5 seems to be an ineffective deterrent of sexual activity. Cf. *Carey v. Population Services International, supra*, at 695, 97 S.Ct., at 2021 (substantial reason to doubt that limiting access to contraceptives will substantially discourage early sexual behavior). According to statistics provided by the State, an average of only 61 juvenile males and 352 adult males were arrested for statutory rape each year between 1975 and 1978. Brief for Respondent 19. During each of those years there were approximately one million Californian girls between the ages of 13-17. Cal. Dept. of Finance, Population Projections for California Counties, 1975-2020, with Age/Sex Detail to 2000,

Series E-150 (1977). Although the record in this case does not indicate the incidence of sexual intercourse involving those girls during that period, the California State Department of Health estimates that there were almost 50,000 pregnancies among 13-to-17-year-old girls during 1976. Cal. Dept. of Health, Birth and Abortion Records, and Physician Survey of Office Abortions (1976). I think it is fair to speculate from this evidence that a comparison of the number of arrests for statutory rape in California with the number of acts of sexual intercourse involving minor females in that State would likely demonstrate to a male contemplating sexual activity with a minor female that his chances of being arrested are reassuringly low. I seriously question, therefore, whether § 261.5 as enforced has a substantial deterrent effect. See *Craig v. Boren*, 429 U.S., at 214, 97 S.Ct., at 465 (STEVENS, J., concurring).

III

Until very recently, no California court or commentator had suggested that the purpose of California's statutory rape law was to protect young women from the risk of pregnancy. Indeed, the historical development of § 261.5 demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse.[FN9] Because*495 their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection.[FN10] In contrast, young men were **1218 assumed to *496 be capable of making such decisions for themselves; the law therefore did not offer them any special protection.

FN9. California's statutory rape law had its origins in the Statutes of Westminster enacted during the reign of Edward I at the close of the 13th century (3 Edw. 1, ch. 13 (1275); 13 Edw. 1, ch. 34 (1285)). The age of consent at that time was 12 years, reduced to 10 years in 1576 (18 Eliz. 1, ch. 7, § 4). This statute was part of the common law brought to the United States. Thus, when the first California penal statute was enacted, it contained a provision (1850 Cal.Stats., ch. 99, § 47, p. 234) that proscribed sexual intercourse with females under the age of 10. In 1889, the California statute was amended to make the age of consent 14 (1889 Cal.Stats., ch. 191, § 1, p. 223). In 1897, the age was advanced to 16 (1897 Cal.Stats., ch. 139, § 1, p. 201). In 1913 it was fixed at 18, where it now remains (1913 Cal.Stats., ch. 122, § 1, p. 212).

Because females generally have not reached puberty by the age of 10, it is inconceivable that a statute designed to prevent pregnancy would be directed at acts of sexual intercourse with females under that age.

The only legislative history available, the draftsmen's notes to the Penal Code of 1872, supports the view that the purpose of California's statutory rape law was to protect those who were too young to give consent. The draftsmen explained that the "[statutory rape] provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape." Code Commissioners' note, subd. 1, following Cal.Penal Code, p. 111 (1st ed. 1872). There was no mention whatever of pregnancy prevention. See also Note, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 74-76 (1952).

FN10. Past decisions of the California courts confirm that the law was designed to protect the State's young females from their own uninformed decisionmaking. In *People v. Verdegreen*, 106 Cal. 211, 214-215, 39 P. 607, 608-609 (1895), for example, the California Supreme Court stated:

"The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the virtue of young and unsophisticated girls.... It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature."

As recently as 1964, the California Supreme Court decided *People v. Hernandez*, 61 Cal.2d, at 531, 39 Cal.Rptr., at 362, 393 P.2d, at 674, in which it stated that the under-age female

"is presumed too innocent and naive to understand the implications and nature of her act.... The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition."

It was only in deciding *Michael M.* that the California Supreme Court decided for the first time in the 130-year history of the statute, that pregnancy prevention had become one of the purposes of the statute.

It is perhaps because the gender classification in California's statutory rape law was initially designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies, that the State has been unable to demonstrate a substantial relationship between the classification and its newly asserted goal. Cf. *Califano v. Goldfarb*, 430 U.S., at 223, 97 S.Ct., at 1035. (STEVENS, J., concurring in judgment). But whatever the reason, the State has not shown that Cal.Penal Code § 261.5 is any more effective than a gender-neutral law would be in determining minor females from engaging in sexual intercourse. It has therefore not met its burden of proving that the statutory classification is substantially related to the achievement of its asserted goal.

I would hold that § 261.5 violates the Equal Protection Clause of the Fourteenth Amendment, and I would reverse the judgment of the California Supreme Court.

Justice STEVENS, dissenting.

Local custom and belief-rather than statutory laws of venerable but doubtful ancestry-will determine the volume of sexual activity among unmarried teenagers.[FN1] The empirical*497 evidence cited by the plurality demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.[FN2] Nevertheless, as a matter of constitutional power, unlike my Brother BRENNAN see *ante*, at 1215 n. 5, I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse. The societal interests in reducing the incidence of venereal disease and teenage pregnancy are sufficient, in my judgment, to justify a prohibition of conduct that increases the risk of those harms.[FN3]

FN1. "Common sense indicates that many young people will engage in sexual activity

regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not." *Carey v. Population Services International,* 431 U.S. 678, 714, 97 S.Ct. 2010, 2031, 52 L.Ed.2d 675 (STEVENS, J., concurring in part and in judgment).

FN2. If a million teenagers became pregnant in 1976, see *ante*, at 1205, n. 3, there must be countless violations of the California statute. The statistics cited by Justice BRENNAN also indicate, as he correctly observes, that the statute "seems to be an ineffective deterrent of sexual activity." See *ante*, at 1216-1217, n. 8.

FN3. See *Carey v. Population Services International, supra*, at 713, 97 S.Ct., at 2030 (STEVENS, J., concurring in part and in judgment).

My conclusion that a nondiscriminatory prohibition would be constitutional does not help me answer the question whether a prohibition applicable to only half of the joint participants in the risk-creating conduct is also valid. It cannot be true that the validity of a total ban is an adequate justification for a selective prohibition; otherwise, the constitutional objection to discriminatory rules would be meaningless. The question in this case is whether the difference between males and females justifies this statutory discrimination based entirely on sex.[FN4]

FN4. Equal protection analysis is often said to involve different "levels of scrutiny." It may be more accurate to say that the burden of sustaining an equal protection challenge is much heavier in some cases than in others. Racial classifications, which are subjected to "strict scrutiny," are presumptively invalid because there is seldom, if ever, any legitimate reason for treating citizens differently because of their race. On the other hand, most economic classifications are presumptively valid because they are a necessary component of most regulatory programs. In cases involving discrimination between men and women, the natural differences between the sexes are sometimes relevant and sometimes wholly irrelevant. If those differences are obviously irrelevant, the discrimination should be treated as presumptively unlawful in the same way that racial classifications are presumptively unlawful. Cf. *Califano v. Goldfarb*, 430 U.S. 199, 223, 97 S.Ct. 1021, 1035, 51 L.Ed.2d 270 (STEVENS, J., concurring in judgment). But if, as in this case, there is an apparent connection between the discrimination and the fact that only women can become pregnant, it may be appropriate to presume that the classification is lawful. This presumption, however, may be overcome by a demonstration that the apparent justification for the discrimination is illusory or wholly inadequate. Thus, instead of applying a "mid-level" form of scrutiny in all sex discrimination cases, perhaps the burden is heavier in some than in others. Nevertheless, as I have previously suggested, the ultimate standard in these, as in all other equal protection cases, is essentially the same. See *Craig v. Boren,* 429 U.S. 190, 211-212, 97 S.Ct. 451, 464-465, 50 L.Ed.2d 397 (STEVENS, J., concurring). Professor Cox recently noted that however the level of scrutiny is described, in the final analysis, "the Court is always deciding whether in its judgment the harm done to the disadvantaged class by the legislative classification is disproportionate to the public purposes the measure is likely to achieve." Cox, Book Review, 94

Harv.L.Rev. 700, 706 (1981).

*498 **1219 The fact that the Court did not immediately acknowledge that the capacity to become pregnant is what primarily differentiates the female from the male [FN5] does not impeach the validity of the plurality's newly found wisdom. I think the plurality is quite correct in making the assumption that the joint act that this law seeks to prohibit creates a greater risk of harm for the female than for the male. But the plurality surely cannot believe that the risk of pregnancy confronted by the female-any more than the risk of venereal disease confronted by males as well as females-has provided an effective deterrent to voluntary female participation in the risk-creating conduct. Yet the plurality's decision seems to rest on the assumption that the California Legislature acted on the basis of that rather fanciful notion.

FN5. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 162, 97 S.Ct. 401, 421, 50 L.Ed.2d 343 (STEVENS, J., dissenting).

*499 In my judgment, the fact that a class of persons is especially vulnerable to a risk that a statute is designed to avoid is a reason for making the statute applicable to that class. The argument that a special need for protection provides a rational explanation for an exemption is one I simply do not comprehend.[FN6]

FN6. A hypothetical racial classification will illustrate my point. Assume that skin pigmentation provides some measure of protection against cancer caused by exposure to certain chemicals in the atmosphere and, therefore, that white employees confront a greater risk than black employees in certain industrial settings. Would it be rational to require black employees to wear protective clothing but to exempt whites from that requirement? It seems to me that the greater risk of harm to white workers would be a reason for including them in the requirement-not for granting them an exemption.

In this case, the fact that a female confronts a greater risk of harm than a male is a reason for applying the prohibition to her-not a reason for granting her a license to use her own judgment on whether or not to assume the risk. Surely, if we examine the problem from the point of view of society's interest in preventing the risk-creating conduct from occurring at all, it is irrational to exempt 50% of the potential violators. See dissent of Justice BRENNAN, *ante*, at 1216-1217. And, if we view the government's interest as that of a *parens patriae* seeking to protect its subjects from harming themselves, its discrimination is actually perverse. Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter? That is the effect of this statutory classification.

If pregnancy or some other special harm is suffered by one of the two participants in **1220 the prohibited act, that special harm no doubt would constitute a legitimate mitigating factor in deciding what, if any, punishment might be appropriate in a given case. But from the standpoint of fashioning a general preventive rule-or, indeed, in determining appropriate punishment when neither party in fact has suffered any special*500 harm-I regard a total exemption for the members of the more endangered class as utterly irrational.

In my opinion, the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other. The risk-creating conduct that this statute is designed to prevent requires the participation of two persons-one male and one female.[FN7] In many situations it is probably true that one is the aggressor and the other is either an unwilling, or at least a less willing, participant in the joint act. If a statute authorized punishment of only one participant and required the prosecutor to prove that that participant had been the aggressor, I assume that the discrimin-

ation would be valid. Although the question is less clear, I also assume, for the purpose of deciding this case, that it would be permissible to punish only the male participant, if one element of the offense were proof that he had been the aggressor, or at least in some respects the more responsible participant in the joint act. The statute at issue in this case, however, requires no such proof. The question raised by this statute is whether the State, consistently with the Federal Constitution, may always punish the male and never the female when they are equally responsible or when the female is the more responsible of the two.

> FN7. In light of this indisputable biological fact, I find somewhat puzzling the California Supreme Court's conclusion, quoted by the plurality, *ante*, at 1203, that males "are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." 25 Cal.3d 608, 612, 159 Cal.Rptr. 340, 343, 601 P.2d 572, 575 (1979) (emphasis in original). Presumably, the California Supreme Court was referring to the equally indisputable biological fact that only females may become pregnant. However, if pregnancy results from sexual intercourse between two willing participants-and the California statute is directed at such conduct-I would find it difficult to conclude that the pregnancy was "caused" solely by the male participant.

It would seem to me that an impartial lawmaker could give only one answer to that question. The fact that the California Legislature has decided to apply its prohibition only to *501 the male may reflect a legislative judgment that in the typical case the male is actually the more guilty party. Any such judgment must, in turn, assume that the decision to engage in the risk-creating conduct is always-or at least typically-a male decision. If that assumption is valid, the statutory classification should also be valid. But what is the support for the assumption? It is not contained in the record of this case or in any legislative history or scholarly study that has been called to our attention. I think it is supported to some extent by traditional attitudes toward male-female relationships. But the possibility that such a habitual attitude may reflect nothing more than an irrational prejudice makes it an insufficient justification for discriminatory treatment that is otherwise blatantly unfair. For, as I read this statute, it requires that one, and only one, of two equally guilty wrongdoers be stigmatized by a criminal conviction.

I cannot accept the State's argument that the constitutionality of the discriminatory rule can be saved by an assumption that prosecutors will commonly invoke this statute only in cases that actually involve a forcible rape, but one that cannot be established by proof beyond a reasonable doubt. FN8 **1221 That assumption implies that a State has a legitimate interest in convicting a defendant on evidence that is constitutionally insufficient. Of course, the State may create a lesser-included offense that would authorize punishment of the more guilty party, but surely the interest in obtaining convictions on inadequate*502 proof cannot justify a statute that punishes one who is equally or less guilty than his partner. FN9

> FN8. According to the State of California:
>
> "The statute is commonly employed in situations involving force, prostitution, pornography or coercion due to status relationships, and the state's interest in these situations is apparent." Brief for Respondent 3. See also *id.*, at 23-25. The State's interest in these situations is indeed apparent and certainly sufficient to justify statutory prohibition of forcible rape, prostitution, pornography, and nonforcible, but nonetheless coerced, sexual intercourse. However, it is not at all apparent to me how this state interest can justify a statute not specifically directed to any of these offenses.

FN9. Both Justice REHNQUIST and Justice BLACKMUN apparently attach significance to the testimony at the preliminary hearing indicating that the petitioner struck his partner. See opinion of REHNQUIST, J., *ante*, at 1203; opinion of BLACKMUN, J., *ante*, at 1212-1213, n. In light of the fact that the petitioner would be equally guilty of the crime charged in the complaint whether or not that testimony is true, it obviously has no bearing on the legal question presented by this case. The question is not whether "the facts ... fit the crime," opinion of BLACKMUN, J., *ante*, at 1213 that is a question to be answered at trial-but rather, whether the statute defining the crime fits the constitutional requirement that justice be administered in an evenhanded fashion.

Nor do I find at all persuasive the suggestion that this discrimination is adequately justified by the desire to encourage females to inform against their male partners. Even if the concept of a wholesale informant's exemption were an acceptable enforcement device, what is the justification for defining the exempt class entirely by reference to sex rather than by reference to a more neutral criterion such as relative innocence? Indeed, if the exempt class is to be composed entirely of members of one sex, what is there to support the view that the statutory purpose will be better served by granting the informing license to females rather than to males? If a discarded male partner informs on a promiscuous female, a timely threat of prosecution might well prevent the precise harm the statute is intended to minimize.

Finally, even if my logic is faulty and there actually is some speculative basis for treating equally guilty males and females differently, I still believe that any such speculative justification would be outweighed by the paramount interest in evenhanded enforcement of the law. A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.

I respectfully dissent.

U.S.Cal.,1981.
Michael M. v. Superior Court of Sonoma County
450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437

END OF DOCUMENT

Supreme Court of the United States
Estelle T. GRISWOLD et al. Appellants,
v.
STATE OF CONNECTICUT.
No. 496.

Argued March 29, 1965.
Decided June 7, 1965.

Defendants were convicted of violating the Connecticut birth control law. The Circuit Court in the Sixth Circuit, Connecticut, rendered judgments, and the defendants appealed. The Appellate Division of the Circuit Court affirmed, and defendants appealed. The Connecticut Supreme Court of Errors, 151 Conn. 544, 200 A.2d 479, affirmed, and the defendants appealed. The Supreme Court, Mr. Justice Douglas, held that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy.

Reversed.

Mr. Justice Black and Mr. Justice Stewart dissented.

West Headnotes

[1] Constitutional Law 92 ⇦ 696

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k696 k. Abortion and Birth Control. Most Cited Cases
(Formerly 92k42.1(3), 92k42)
Planned Parenthood League's executive director and medical director who had been convicted as accessories for giving information, instruction, and medical advice to married persons as to means of preventing conception had standing to question constitutionally of Connecticut law forbidding use of contraceptives. C.G.S.A. §§ 53-32, 54-196; U.S.C.A.Const. art. 3, § 1 et seq.

[2] Constitutional Law 92 ⇦ 2486

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2486 k. In General. Most Cited Cases
(Formerly 92k70.3(4), 92k70(3))
The Supreme Court does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

[3] Constitutional Law 92 ⇦ 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In General. Most Cited Cases
(Formerly 92k90(1), 92k90)
The state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. U.S.C.A.Const. Amend. 1.

[4] Constitutional Law 92 ⇦ 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In General. Most Cited Cases
(Formerly 92k90(2), 92k90)

Constitutional Law 92 ⇦ 2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(2), 92k90)
The right of freedom of speech and press includes not only right to utter or to print, but right to distribute, right to receive, right to read and freedom of inquiry, freedom of thought, and freedom to teach. U.S.C.A.Const. Amend. 1.

[5] Constitutional Law 92 ⇦ 1210

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 k. In General. Most Cited Cases
(Formerly 92k82(7), 92k82)
The First Amendment has a penumbra where privacy is protected from governmental intrusion. U.S.C.A.Const. Amend. 1.

[6] Constitutional Law 92 ⇦ 1430

92 Constitutional Law
92XIV Right of Assembly
92k1430 k. In General. Most Cited Cases
(Formerly 92k91)
The right of assembly extends to all irrespective of their race or ideology. U.S.C.A.Const. Amend. 1.

[7] Constitutional Law 92 ⇦ 1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91)
The right of "association," like the right of "belief," is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means; association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making express guarantees fully meaningful. U.S.C.A.Const. Amend. 1.

[8] Constitutional Law 92 ⇦ 1210

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 k. In General. Most Cited Cases
(Formerly 92k82(7), 92k82)
Specific guarantees in the Bill of Rights have penumbras; one of these penumbras is privacy. U.S.C.A.Const. Amends. 1, 3, 4, 5, 9, 14.

[9] Constitutional Law 92 ⇦ 1140

92 Constitutional Law
92IX Overbreadth in General
92k1140 k. In General. Most Cited Cases
(Formerly 92k82(4), 92k82)
A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade area of protected freedom.

[10] Abortion and Birth Control 4 ⇦ 140

4 Abortion and Birth Control
4k132 Contraceptives and Birth Control
4k140 k. Crimes and Prosecutions. Most Cited Cases
(Formerly 4k1.30, 4k1)

Constitutional Law 92 ⇦ 4452

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)22 Privacy and Sexual Matters
92k4451 Abortion, Contraception, and Birth Control
92k4452 k. In General. Most Cited Cases

(Formerly 92k274(5), 4k1.30, 4k1, 92k274, 92k274(2))

Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy. C.G.S.A. § 53-32; U.S.C.A.Const. Amends. 1, 3, 4, 5, 9, 14.

**1679 *479 Thomas I. Emerson, New Haven, Conn., for appellants.

Joseph B. Clark, New Haven, Conn., for appellee.

*480 Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven-a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are ss 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

'Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.'

Section 54-196 provides:

'Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.'

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A.2d 479. We noted probable jurisdiction. 379 U.S. 926, 85 S.Ct. 328, 13 L.Ed.2d 339.

*481 [1] We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts **1680 are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime.

This case is more akin to Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, where an employee was permitted to assert the rights of his employer; to Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; NAACP v. State of Alabama, 357 U.S. 449, 78

S.Ct. 1163, 2 L.Ed.2d 1488; NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

[2] Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments ***482** suggest that Lochner v. State of New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, should be our guide. But we decline that invitation as we did in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703; Olsen v. State of Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; Lincoln Federal Labor Union v. Northwestern Co., 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

[3][4] The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice-whether public or private or parochial-is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By Pierce v. Society of Sisters, supra, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. State of Nebraska, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Martin v. City of Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313) and freedom of inquiry, freedom of thought, and freedom to teach (see Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 220, 97 L.Ed. 216)-indeed the freedom of the entire university community. Sweezy v. State of New Hampshire, 354 U.S. 234, 249-250, 261-263, 77 S.Ct. 1203, 1211, 1217-1218, 1 L.Ed.2d 1311; ****1681** Barenblatt v. United States, 360 U.S. 109, 112, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115; Baggett v. Bullitt, 377 U.S. 360, 369, 84 S.Ct. 1316, 1321, 12 L.Ed.2d 377. Without ***483** those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases.

[5] In NAACP v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, we protected the 'freedom to associate and privacy in one's associations,' noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid 'as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.' Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. NAACP v. Button, 371 U.S. 415, 430-431, 83 S.Ct. 328, 336-337. In Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's 'association with that Party' was not shown to be 'anything more than a political faith in a political party' (id., at 244, 77 S.Ct. at 759) and was not action of a kind proving bad moral character. Id., at 245-246, 77 S.Ct. at

759-760.

[6][7] Those cases involved more than the 'right of assembly'-a right that extends to all irrespective of their race or idealogy. De Jonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278. The right of 'association,' like the right of belief (West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

*484 [8] The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'[FN*] **1682 We recently referred*485 in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See Beaney, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960).

FN* The Court said in full about this right of privacy:

'The principles laid down in this opinion (by Lord Camden in Entick v. Carrington, 19 How.St.Tr. 1029) affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,-it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.' 116 U.S., at 630, 6 S.Ct., at 532.

We have had many controversies over these penumbral rights of 'privacy and repose.' See, e.g.,

Breard v. City of Alexandria, 341 U.S. 622, 626, 644, 71 S.Ct. 920, 923, 933, 95 L.Ed. 1233; Public Utilities Comm. v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; Lanza v. State of New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384; Frank v. State of Maryland, 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877; Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

[9][10] The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The *486 very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

Mr. Justice GOLDBERG, whom THE CHIEF JUSTICE and Mr. Justice BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments (see my concurring opinion in **1683 Pointer v. Texas, 380 U.S. 400, 410, 85 S.Ct. 1065, 1071, 13 L.Ed.2d 923, and the dissenting opinion of Mr. Justice Brennan in Cohen v. Hurley, 366 U.S. 117, 154, 81 S.Ct. 954, 974, 6 L.Ed.2d 156), I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution[FN1] is supported both by numerous *487 decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, ante, at 1681. I add these words to emphasize the relevance of that Amendment to the Court's holding.

FN1. My Brother STEWART dissents on the ground that he 'can find no * * * general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.' Post, at 1706. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98

L.Ed. 884; Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992; Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204; Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; NAACP v. Alabama, 360 U.S. 240, 79 S.Ct. 1001, 3 L.Ed.2d 1205; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625. To the contrary, this Court, for example, in Bolling v. Sharpe, supra, while recognizing that the Fifth Amendment does not contain the 'explicit safeguard' of an equal protection clause, id., 347 U.S. at 499, 74 S.Ct. at 694, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in Schware v. Board of Bar Examiners, supra, the Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674. In Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138, the Court said:

'For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.' (Emphasis added.)

*488 And, in Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, the Court, referring to the Fourteenth Amendment, stated:

'While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also (for example,) the right * * * to marry, establish a home and bring up children * * *.'

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal **1684 rights.[FN2] The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

FN2. See, e.g., Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; Gitlow v. New York, supra; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782; Robinson v. State of California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Pointer v. Texas, supra; Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.

The Ninth Amendment reads, 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights[FN3] could

not be sufficiently broad to cover all essential *489 rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. FN4

FN3. Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that 'no language is so copious as to supply words and phrases for every complex idea.' The Federalist, No. 37 (Cooke ed. 1961), at 236.

FN4. Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961), at 578-579. He also argued,

'I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.' Id., at 579. The Ninth Amendment and the Tenth Amendment, which provides, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,' were apparently also designed in part to meet the above-quoted argument of Hamilton.

In presenting the proposed Amendment, Madison said:

'It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the *490 last clause of the fourth resolution (the Ninth Amendment).' I Annals of Congress 439 (Gales and Seaton ed. 1834).

**1685 Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:

'In regard to * * * (a) suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis * * *. But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.' II Story, Commentaries on the Constitution of the United States 626-627 (5th ed. 1891).

He further stated, referring to the Ninth Amendment:

'This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the wellknown maxim, that an affirmation in particular cases implies a negation in all others; and, e converso, that a negation in particular cases implies an

affirmation in all others.' Id., at 651.

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.[FN5]

FN5. The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

While this Court has had little occasion to interpret the Ninth Amendment,[FN6] '(i)t cannot be presumed that any *491 clause in the constitution is intended to be without effect.' Marbury v. Madison, 1 Cranch 137, 174, 2 L.Ed. 60. In interpreting the Constitution, 'real effect should be given to all the words it uses.' Myers v. United States, 272 U.S. 52, 151, 47 S.Ct. 21, 37, 71 L.Ed. 160. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because**1686 it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that *492 '(t)he enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.' (Emphasis added.)

FN6. This Amendment has been referred to as 'The Forgotten Ninth Amendment,' in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are There 'Certain Rights * * * Retained by the People'? 37 N.Y.U.L.Rev. 787 (1962), and Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind.L.J. 309 (1936). As far as I am aware, until today this Court has referred to the Ninth Amendment only in United Public Workers v. Mitchell, 330 U.S. 75, 94-95, 67 S.Ct. 556, 566-567, 91 L.Ed. 754; Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143-144, 59 S.Ct. 366, 372, 83 L.Ed. 543; and Ashwander v. TVA, 297 U.S. 288, 330-331; 56 S.Ct. 466, 475, 80 L.Ed. 688. See also Calder v. Bull, 3 Dall. 386, 388, 1 L.Ed. 648; Loan Ass'n v. City of Topeka, 20 Wall. 655, 662-663, 22 L.Ed. 455.

In United Public Workers v. Mitchell, supra, 330 U.S. at 94-95, 67 S.Ct. at 567, the Court stated: 'We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments (is) involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment.'

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow 'broaden(s) the powers of this Court.' Post, at 1701. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother Black in his dissent in Adamson v. People of State of California, 332 U.S. 46, 68, 67 S.Ct. 1672, 1683, 91 L.Ed. 1903, that the entire Bill of Rights is incorporated in the Fourteenth Amend-

ment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693; Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659; Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900; NAACP v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792; New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority*493 of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment-and indeed the entire Bill of Rights-originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth And Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. United Public Workers v. Mitchell, 330 U.S. 75, 94-95, 67 S.Ct. 556, 566, 567, 91 L.Ed. 754.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) * * * as to be ranked as fundamental.' Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice **1687 which lie at the base of all our civil and political institutions' * * *.' Powell v. State of Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158. 'Liberty' also 'gains content from the emanations of * * * specific (constitutional) guarantees' and 'from experience with the requirements of a free society.' *494Poe v. Ullman, 367 U.S. 497, 517, 81 S.Ct. 1752, 1763, 6 L.Ed.2d 989 (dissenting opinion of Mr. Justice Douglas).[FN7]

FN7. In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in Pointer v. Texas, supra, 380 U.S. at 413-414, 85 S.Ct. at 1073, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against

> both federal and state governments. In Pointer I said that the contrary view would require 'this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States.' Id., at 413, 85 S.Ct. at 1073.

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.' Id., at 521, 81 S.Ct. at 1765. Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

'The protection guaranteed by the (Fourth and Fifth) amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.'

*495 The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy-that of the marital relation and the marital home. This Court recognized in Meyer v. Nebraska, supra, that the right 'to marry, establish a home and bring up children' was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S., at 399, 43 S.Ct. at 626. In Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act 'unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.' 268 U.S., at 534-535, 45 S.Ct. at 573. As this Court said in Prince v. Massachusetts, 321 U.S. 158, at 166, 64 S.Ct. 438, at 442, 88 L.Ed. 645, the Meyer and Pierce decisions 'have respected the private realm of family life which the state cannot enter.'

I agree with Mr. Justice Harlan's statement in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 551-552, 81 S.Ct. 1752, 1781: 'Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted **1688 Constitutional right. * * * Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.'

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution*496 explicitly forbids the State from disrupting the traditional relation of the family-a relation as old and as fundamental as our entire civilization-surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned

in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as 'an uncommonly silly law,' post, at 1705, would nevertheless let it stand on the ground that it is not for the courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Post, at 1705. Elsewhere, I have stated that '(w)hile I quite agree with Mr. Justice Brandeis that * * * 'a * * * State may * * * serve as a laboratory; and try novel social and economic experiments,' New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens * * *.'[FN8] The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

> FN8. Pointer v. Texas, supra, 380 U.S. at 413, 85 S.Ct. at 1073. See also the discussion of my Brother Douglas, Poe v. Ullman, supra, 367 U.S. at 517-518, 81 S.Ct. at 1763 (dissenting opinion).

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born *497 to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be 'silly,' no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be **1689 abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480. The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' McLaughlin v. State of Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222. See Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any 'subordinating (state) interest which is compelling' or that it is 'necessary *498 * * * to the accomplishment of a permissible state policy.' The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern-the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-

control devices for the prevention of disease, as distinguished from the prevention of conception, see Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See Aptheker v. Secretary of State, 378 U.S. 500, 514, 84 S.Ct. 1659, 1667; NAACP v. State of Alabama, 377 U.S. 288, 307-308, 84 S.Ct. 1302, 1313, 1314, 12 L.Ed.2d 325; McLaughlin v. State of Florida, supra, 379 U.S. at 196, 85 S.Ct. at 290. Here, as elsewhere, '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn.Gen.Stat. ss 53-218, 53-219 et seq. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.' NAACP v. State of Alabama, supra, 377 U.S. at 307, 84 S.Ct. at 1314. See McLaughlin v. State of Florida, supra, 379 U.S. at 196, 85 S.Ct. at 290.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation*499 of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in Poe v. Ullman, supra, 367 U.S. at 553, 81 S.Ct. at 1782.

'Adultery, homosexuality and the like are sexual intimacies which the State forbids * * * but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality * * * or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.'

**1690 In sum, I believe that the right of privacy in the marital relation is fundamental and basic-a personal right 'retained by the people' within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

Mr. Justice HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

*500 In other words, what I find implicit in the Court's opinion is that the 'incorporation' doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the 'incorporation' approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. See, e.g., my concurring opinions in Pointer v. State of Texas, 380 U.S. 400, 408, 85 S.Ct. 1065, 1070, 13 L.Ed.2d 923, and Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106, and my dissenting opinion in Poe v. Ullman, 367 U.S. 497, 522, at pp. 539-545, 81 S.Ct. 1752, 1774, 1778.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amend-

ment because the enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their 'incorporation' approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan.L.Rev. 5 (1949)), but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to 'interpretation' of specific constitutional *501 provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the 'vague contours of the Due Process Clause.' Rochin v. People of State of California, 342 U.S. 165, 170, 72 S.Ct. 205, 208, 96 L.Ed. 183.

While I could not more heartily agree that judicial 'self restraint' is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. 'Specific' provisions of the Constitution, no less than 'due process,' lend themselves as readily to 'personal' interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed 'tune with the times' (post, p. 1702). Need one go further than to recall last Term's reapportionment cases, **1691 Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, where a majority of the Court 'interpreted' 'by the People' (Art. I, s 2) and 'equal protection' (Amdt. 14) to command 'one person, one vote,' an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? See my dissenting opinions in those cases, 376 U.S., at 20, 84 S.Ct. at 536; 377 U.S., at 589, 84 S.Ct. at 1395.

Judicial self-restraint will not, I suggest, be brought about in the 'due process' area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See Adamson v. People of State of California, 332 U.S. 46, 59, 67 S.Ct. 1672, 91 L.Ed. 1903 (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition *502 will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.[FN*]

FN* Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights. Post, p. 1696, n. 4.

Mr. Justice WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judg-

ment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children,' Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed.2d 1042 and 'the liberty * * * to direct the upbringing and education of children,' Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, and that these are among 'the basic civil rights of man.' Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. These decisions affirm that there is a 'realm of family life which the state cannot enter' without substantial justification. Prince v. Com. of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645. Surely the right invoked in this case, to be free of regulation of the intimacies of *503 the marriage relationship, 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (opinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with **1692 this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, Trubek v. Ullman, 147 Conn. 633, 165 A.2d 158, health, or indeed even of life itself. Buxton v. Ullman, 147 Conn. 48, 156 A.2d 508. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. State v. Nelson, 126 Conn. 412, 11 A.2d 856; State v. Griswold, 151 Conn. 544, 200 A.2d 479. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; McLaughlin v. Florida, 379 U.S. 184, 192, 85 S.Ct. 283, 288.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demands the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under *504 the cases of this Court, require 'strict scrutiny,' Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, and 'must be viewed in the light of less drastic means for achieving the same basic purpose.' Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417. See also McLaughlin v. State of Florida, 379 U.S. 184, 85 S.Ct. 283. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271.[FN*]

FN* Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against un-

duly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623; Jacobson v. Com. of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752; Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659; Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271.

The traditional due process test was well articulated, and applied, in Schware v. Board of Bar Examiners, supra, a case which placed no reliance on the specific guarantees of the Bill of Rights.

'A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623. Cf. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216. And see Ex parte Secombe, 19 How. 9, 13, 15 L.Ed. 565. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; Cummings v. State of Missouri, 4 Wall. 277, 319-320, 18 L.Ed. 356. Cf. Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.' 353 U.S., at 238-239, 77 S.Ct. at 756. Cf. Martin v. Walton, 368 U.S. 25, 26, 82 S.Ct. 1, 2, 7 L.Ed.2d 5 (Douglas, J., dissenting).

**1693 *505 As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530, 79 S.Ct. 437, 442, 3 L.Ed.2d 480; Martin v. Walton, 368 U.S. 25, 28, 82 S.Ct. 1, 3, 7 L.Ed.2d 5 (Douglas, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. See Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct. 752, 756. Connecticut does not bar the im-

portation or possession of contraceptive devices; they are not considered contraband material under state law, State v. Certain Contraceptive Materials, 126 Conn. 428, 11 A.2d 863, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has *506 been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064. Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This 'undeviating policy * * * throughout all the long years * * * bespeaks more than prosecutorial paralysis.' Poe v. Ullman, 367 U.S. 497, 502, 81 S.Ct. 1752, 1755. Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration. Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there **1694 will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been *507 demonstrated and whose intrinsic validity is not very evident. At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Mr. Justice BLACK, with whom Mr. Justice STEWART joins, dissenting.

I agree with my Brother STEWART'S dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe-except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time

why their expressions of views would not be *508 protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89; NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405. But speech is one thing; conduct and physical activities are quite another. See, e.g., Cox v. State of Louisiana, 379 U.S. 536, 554-555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471; Cox v. State of Louisiana, 379 U.S. 559, 563-564, 85 S.Ct. 476, 480, 13 L.Ed.2d 487; id., 575-584 (concurring opinion); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; cf. Reynolds v. United States, 98 U.S. 145, 163-164, 25 L.Ed. 244. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on the conduct-just as in ordinary life some speech accompanies most kinds of conduct-we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment **1695 so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth *509 Amendment's guarantee against 'unreasonable searches and seizures.' But I think it belittles that Amendment to talk about it as though it protects nothing but 'privacy.' To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term 'right of privacy' as a comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.' 'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293, 84 S.Ct. 710, 733, 11 L.Ed.2d 686 (concurring opinion); cases collected in City of El Paso v. Simmons, 379 U.S. 497, 517, n. 1, 85 S.Ct. 577, 588, 13 L.Ed.2d 446 (dissenting opinion); Black, The Bill of Rights, 35 N.Y.U.L.Rev. 865. For these reasons I get nowhere in this case by talk about a constitutional 'right or privacy' as an emanation from *510 one or more constitutional

provisions.[FN1] I like **1696 my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

FN1. The phrase 'right to privacy' appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv.L.Rev. 193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. See generally 41 Am.Jur. 926-927. Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that 'A right of privacy in matters purely private is * * * derived from natural law' and that 'The conclusion reached by us seems to be * * * thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law * * *.' Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 218, 50 S.E. 68, 70, 80, 69 L.R.A. 101. Observing that 'the right of privacy * * * presses for recognition here,' today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy.'

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN[FN2] and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of *511 speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing-merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

FN2. Brother Harlan's views are spelled out at greater length in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 539-555, 81 S.Ct. 1752, 1774, 1783, 6 L.Ed.2d 989.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it consider to be arbitrary, capricious, unreasonable, or oppressive, or this Court's belief that a particular state law under scrutiny has no 'rational or justifying' purpose, or is offensive to a 'sense of fairness and justice.'[FN3] If these formulas based on 'natural justice,' or others which mean the same thing,[FN4]

are to prevail, they require**1697 judges to determine *512 what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any *513 of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.'[FN5] Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination-a power which was specifically**1698 denied to federal courts by the convention that framed the Constitution.[FN6]

FN3. Indeed, Brother WHITE appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare acts unconstitutional with 'restraint.' He now says that, instead of being presumed constitutional, see Adkins v. Children's Hospital, 261 U.S. 525, 544, 43 S.Ct. 394, 396, 67 L.Ed. 785, the statute here 'bears a substantial burden of justification when attacked under the Fourteenth Amendment.'

FN4. A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which 'shocks the conscience,' Rochin v. People of California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183, sufficiently to 'shock itself into the protective arms of the Constitution,' Irvine v. People of State of California, 347 U.S. 128, 138, 74 S.Ct. 381, 386, 98 L.Ed. 561 (concurring opinion). It has been urged that States may not run counter to the 'decencies of civilized conduct,' Rochin, supra, 342 U.S. at 173, 72 S.Ct. at 210, or 'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, or to 'those canons of decency and fairness which express the notions of justice of English-speaking peoples,' Malinski v. People of State of New York, 324 U.S. 401, 417, 65 S.Ct. 781, 789, 89 L.Ed. 1029 (concurring opinion), or to 'the community's sense of fair play and decency,' Rochin, supra, 342 U.S. at 173, 72 S.Ct. at 210. It has been said that we must decide whether a state law is 'fair, reasonable and appropriate,' or is rather 'an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into * * * con-

tracts,' Lochner v. State of New York, 198 U.S. 45, 56, 25 S.Ct. 539, 543, 49 L.Ed. 937. States, under this philosophy, cannot act in conflict with 'deeply rooted feelings of the community,' Haley v. State of Ohio, 332 U.S. 596, 604, 68 S.Ct. 302, 306, 92 L.Ed. 224 (separate opinion), or with 'fundamental notions of fairness and justice,' id., 607, 68 S.Ct. 307. See also, e.g. Wolf v. People of State of Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 ('rights * * * basic to our free society'); Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 ('fundamental principles of liberty and justice'); Adkins v. Children's Hospital, 261 U.S. 525, 561, 43 S.Ct. 394, 402, 67 L.Ed. 785 ('arbitrary restraint of * * * liberties'); Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 ('denial of fundamental fairness, shocking to the universal sense of justice'); Poe v. Ullman, 367 U.S. 497, 539, 81 S.Ct. 1752, (dissenting opinion) ('intolerable and unjustfiable'). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can 'not tolerate.' Linkletter v. Walker, 381 U.S. 618, at 631, 85 S.Ct. 1731, at 1739.

FN5. See Hand, The Bill of Rights (1958) 70: '(J)udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.' See also Rochin v. People of California, 342 U.S. 165, 174, 72 S.Ct. 205, 210 (concurring opinion). But see Linkletter v. Walker, supra, n. 4, 381 U.S. 631, 85 S.Ct., at 1739.

FN6. This Court held in Marbury v. Madison, 1 Cranch 137, that this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution. See also Fletcher v. Peck, 6 Cranch 87, 3 L.Ed. 162. But the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

'* * * and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by (original wording illegible) of the members of each branch.' 1 The Records of the Federal Convention of 1787 (Farrand ed.1911) 21.

In support of a plan of this kind James Wilson of Pennsylvania argued that:

'* * * It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional

rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.' 2 id., at 73.

Nathaniel Gorham of Massachusetts 'did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.' Ibid.

Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision:

'* * * He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It (the proposal) was making the Expositors of the Laws, the Legislators which ought never to be done.' Id., at 75.

And at another point:

'Mr. Gerry doubts whether the Judiciary ought to form a part of it (the proposed council of revision), as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality * * *. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures.' 1 Id., at 97-98.

Madison supported the proposal on the ground that 'a Check (on the legislature) is necessary.' Id., at 108. John Dickinson of Delaware opposed it on the ground that 'the Judges must interpret the Laws they ought not to be legislators.' Ibid. The proposal for a council of revision was defeated.

The following proposal was also advanced:

'To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers-1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union * * *.' 2 id., at 342. This proposal too was rejected.

*514 Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result hereas would that of a number of others which they do not bother to name, e.g., *515 Lochner v. State of New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937; Coppage v. State of Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441; Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813, and Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785. The two they do cite and quote from, Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, were both decided in opinions **1699 by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in Lochner v. New York, supra, one of the cases on which he relied in Meyer, along with such other long-discredited decisions as, e.g., Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336, and Adkins v. Children's Hospital, supra. Meyer held unconstitutional, as an 'arbitrary' and unreasonable interference with the right of a teacher to carry on

his occupation and of parents to hire him, a *516 state law forbidding the teaching of modern foreign languages to young children in the schools.[FN7] And in Pierce, relying principally on Meyer, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an 'arbitrary, unreasonable, and unlawful interference' which threatened 'destruction of their business and property.' 268 U.S., at 536, 45 S.Ct. at 574. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth,[FN8] I merely point out that the reasoning stated in Meyer and Pierce was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, and Schneider v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms.[FN9] See *517Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 7-8, 84 S.Ct. 1113, 1117, 12 L.Ed.2d 89.[FN10] Brothers WHITE and GOLDBERG**1700 now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify and law restricting 'liberty' as my Brethren define 'liberty.' This would mean at the *518 very least, I suppose, that every state cri minal statute-since it must inevitably curtail 'liberty' to some extent-would be suspect, and would have to be justified to this Court.[FN11]

FN7. In Meyer, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right 'to marry, establish a home and bring up children,' Mr. Justice McReynolds asserted also that the Due Process Clause prevented States from interfering with 'the right of the individual to contract.' 262 U.S., at 399, 43 S.Ct., at 626.

FN8. Compare Poe v. Ullman, 367 U.S., at 543-544, 81 S.Ct. at 1776, 1777, 6 L.Ed.2d 989 (Harlan, J., dissenting).

FN9. The Court has also said that in view of the Fourteenth Amendment's major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See McLaughlin v. State of Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222.

FN10. None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. Prince v. Com. of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, upheld a state law forbidding minors from selling publications on the streets. Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, held simply that a State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, 353

U.S., at 246-247, 77 S.Ct. at 760, to support such a finding. Compare Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654, in which the Court relied in part on Schware. See also Konigsberg v. State Bar, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810. And Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Compare Chambers v. State of Florida, 309 U.S. 227, 240-241, 60 S.Ct. 472, 478-479, 84 L.Ed. 716. With one exception, the other modern cases relied on by my Brethren were decided either solely under the Equal Protection Clause of the Fourteenth Amendment or under the First Amendment, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the First Amendment. As for Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 I am compelled to say that if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

FN11. Compare Adkins v. Children's Hospital, 261 U.S. 525, 568, 43 S.Ct. 394, 405 (Holmes, J., dissenting):

'The earlier decisions upon the same words (the Due Process Clause) in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.'

My Brother GOLDBERG has adopted the recent discovery[FN12] that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks *519 violates 'fundamental principles of liberty and justice,' or is contrary to the 'traditions and (collective) conscience of our people.' He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider 'their personal and private notions.' One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll.[FN13] And **1701 the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the '(collective) conscience of our people.' Moreover, one would certainly have to look far beyond the language of the Ninth Amendment[FN14] to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that 'by enumerating particular exceptions to the grant of power' to the Federal Government, 'those rights which were not singled out, were intended to be as-

signed into the hands of the General Government (the United States), and were consequently *520 insecure.' FN15 That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the '(collective) conscience of our people' is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

FN12. See Patterson, The Forgotten Ninth Amendment (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified 'natural and inalienable rights.' P. 4. The Introduction by Roscoe Pound states that 'there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival.' P. iii.

In Redlich, Are There 'Certain Rights * * * Retained by the People'?, 37 N.Y.U.L.Rev. 787, Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states:

'But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional-but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise.' Id., at 798.

FN13. Of course one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother Goldberg would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes 'fundamental' rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.

FN14. U.S.Const. Amend. IX, provides:

'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

FN15. 1 Annals of Congress 439. See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891): 'This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a neg-

> ation in all others; and, e converso, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies.' Id., at 651 (footnote omitted).

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision *521 of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to **1702 a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.[FN16]

> FN16. Justice Holmes in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in Baldwin v. State of Missouri, 281 U.S. 586, 50 S.Ct. 436, 439, 74 L.Ed. 1056, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said:
>
> 'I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly and limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still was ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.' 281 U.S., at 595. See 2 Holmes-Pollock Lettes (Howe ed. 1941) 267-268.

*522 I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat oldfashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for

striking down this state law. The Due Process Clause with an 'arbitrary and capricious' or 'shocking to the conscience' formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., Lochner v. State of New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703; Olsen v. State of Nebraska ex rel. Western Reference & Bond Assn., 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, and many other *523 opinions.[FN17] See also **1703Lochner v. New York, 198 U.S. 45, 74, 25 S.Ct. 539, 551 (Holmes, J., dissenting).

FN17. E.g., in Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469, this Court held that 'Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.'

Compare Gardner v. Com. of Massachusetts, 305 U.S. 559, 59 S.Ct. 90, 83 L.Ed. 353, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.

In Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93, this Court two years ago said in an opinion joined by all the Justices but one[FN18] that

FN18. Brother HARLAN, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see e.g., Poe v. Ullman, 367 U.S. 497, 539-555, 81 S.Ct. 1752, 1774, 1783 (dissenting opinion), did not join the Court's opinion in Ferguson v. Skrupa.

'The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases-that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely-has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'

And only six weeks ago, without even bothering to hear argument, this Court overruled Tyson & Brother v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, which had held state laws regulating ticket brokers to be a denial of due process of law.[FN19] *524Gold v. DiCarlo, 380 U.S. 520, 85 S.Ct. 1332. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the Lochner, Coppage, Adkins, Burns line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.[FN20]

FN19. Justice Holmes, dissenting in Tyson, said:

'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvi-

ous meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.' 273 U.S., at 446, 47 S.Ct. at 433.

FN20. Compare Nicchia v. People of State of New York, 254 U.S. 228, 231, 41 S.Ct. 103, 104, 65 L.Ed. 235, upholding a New York dog-licensing statute on the ground that it did not 'deprive dog owners of liberty without due process of law.' And as I said concurring in Rochin v. People of State of California, 342 U.S. 165, 175, 72 S.Ct. 205, 211, 96 L.Ed. 183, 'I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards' urged by my concurring Brethren today.

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

'(I)t has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will **1704 never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the *525 general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.' Calder v. Bull, 3 Dall. 386, 399, 1 L.Ed. 648 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in Adamson v. People of State of California, 332 U.S. 46, 90--92, 67 S.Ct. 1672, 1696, 91 L.Ed. 1903 (dissenting opinion):

'Since Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, was decided, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless *526 area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 599, 601, n. 4, 62 S.Ct. 736, 749, 750, 86 L.Ed. 1037.'[FN21] (Footnotes omitted.)

FN21. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and similar cases applying specific Bill of Rights provisions to the States do not in my view stand for the proposition that this Court

can rely on its own concept of 'ordered liberty' or 'shocking the conscience' or natural law to decide what laws it will permit state legislatures to enact. Gideon in applying to state prosecutions the Sixth Amendment's guarantee of right to counsel followed Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, which had held that specific provisions of the Bill of Rights, rather than the Bill of Rights as a whole, would be selectively applied to the States. While expressing my own belief (not shared by MR. JUSTICE STEWART) that all the provisions of the Bill of Rights were made applicable to the States by the Fourteenth Amendment, in my dissent in Adamson v. People of State of California, 332 U.S. 46, 89, 67 S.Ct. 1672, 1695, 91 L.Ed. 1903, I said: 'If the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process.'

Gideon and similar cases merely followed the Palko rule, which in Adamson I agreed to follow if necessary to make Bill of Rights safeguards applicable to the States. See also Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

The late Judge Learned Hand, after emphasizing his view that judges should not **1705 use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their 'personal preferences,'[FN22] made the statement, with which I fully agree, that:

FN22. Hand, The Bill of Rights (1958) 70. See note 5, supra. See generally id., at 35-45.

'For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I *527 knew how to choose them, which I assuredly do not.'[FN23]

FN23. Id., at 73. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, see id., at 35-45, he also expressed the view that this Court in a number of cases had gone too far in holding legislation to be in violation of specific guarantees of the Bill of Rights. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about construing the specific guarantees of the Bill of Rights.

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

Mr. Justice STEWART, whom Mr. Justice BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. *528 But the Court does not say

which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the 'guide' in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining 'the wisdom, need, and propriety' of state laws. Compare Lochner v. State of New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, with Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93. My Brothers HARLAN and WHITE to the contrary, '(w)e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' Ferguson v. Skrupa, supra, 372 U.S. at 730, 83 S.Ct. at 1031.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States.[FN1] It has *529 not even been argued **1706 that this is a law 'respecting an establishment of religion, or prohibiting the free exercise thereof.'[FN2] And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of 'the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'[FN3] No soldier has been quartered in any house.[FN4] There has been no search, and no seizure.[FN5] Nobody has been compelled to be a witness against himself.[FN6]

FN1. The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitations upon the powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the Fourteenth Amendment as limitations upon state action, and some members of the Court have held the view that the adoption of the Fourteenth Amendment made every provision of the first eight amendments fully applicable against the States. See Adamson v. People of State of California, 332 U.S. 46, 68, 67 S.Ct. 1672, 1684 (dissenting opinion of Mr. Justice Black).

FN2. U.S.Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, e.g., the Ten Commandments. The Bible, Exodus 20:2-17 (King James).

FN3. U.S.Constitution, Amendment I. If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

FN4. U.S.Constitution, Amendment III.

FN5. U.S.Constitution, Amendment IV.

FN6. U.S.Constitution, Amendment V.

The Court also quotes the Ninth Amendment, and my Brother GOLDBERG's concurring opinion relies heavily upon it. But to say that the Ninth

Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' United States v. Darby, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that *530 the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.[FN7]

FN7. Cases like Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, and Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480, relied upon in the concurring opinions today. dealt with true First Amendment rights of association and are wholly inapposite here. See also, e.g., NAACP v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697. Our decision in McLaughlin v. State of Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, is equally far afield. That case held invalid under the Equal Protection Clause a state criminal law which discriminated against Negroes.

The Court does not say how far the new constitutional right of privacy announced today extends. See, e.g., Mueller, Legal Regulation of Sexual Conduct, at 127; Ploscowe, Sex and the Law, at 189. I suppose, however, that even after today a State can constitutionally still punish at least some offenses which are not committed in public.

**1707 At the oral argument in this case we were told that the Connecticut law does not 'conform to current community standards.' But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases 'agreeably to the Constitution and laws of the United States.' It is the essence of judicial *531 duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.[FN8]

FN8. See Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506. The Connecticut House of Representatives recently passed a bill (House Bill No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7.

U.S.Conn., 1965.
Griswold v. Connecticut
381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510

END OF DOCUMENT

The Federal Prosecutor

BY ROBERT H. JACKSON*

"The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway."

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of federal district attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized department of justice. It is an unusual and rare instance in which the local district attorney should be superseded in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict,

*This address by the Attorney General of the United States was delivered at the Second Annual Conference of United States Attorneys held in the Department of Justice Building, Washington, on April 1, 1940.

and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called "the shadow cast by one's daily life." Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.

The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics.

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the department of justice were to make even a pretence of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

In times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called "subversive activities." They are dangerous to civil liberty because the prosecutor has no definte standards to determine what constitutes a "subversive activity," such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as "subversive" the activities of any of those who would bring about

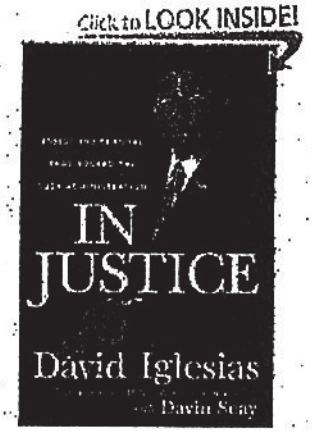
a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat" were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.

In the enforcement of laws that protect our national integrity and existence, we should prosecute any and every *act* of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are concerned only with the prosecution of acts which the congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely. The same variation of attitudes towards other law-enforcement problems exists. The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.



Share your own customer images

Search inside this book

Tell the Publisher!
I'd like to read this book on Kindle

Don't have a Kindle? Get your Kindle here, or download a FREE Kindle Reading App.

In Justice: Inside the Scandal That Rocked the Bush Administration [Hardcover]

David Iglesias (Author), Davin Seay (Contributor)

(18 customer reviews) | (0)

List Price: ~~$25.95~~

Price: $19.72 & eligible for **FREE Super Saver Shipping** on orders over $25. Details

You Save: $6.23 (24%)

Special Offers Available

In Stock.

Ships from and sold by **Amazon.com**. Gift-wrap available.

Only 1 left in stock--order soon (more on the way).

Want it delivered Tuesday, April 17? Order it in the next 3 hours and 49 minutes, and choose **One-Day Shipping** at checkout. Details

43 new from $0.01 70 used from $0.01 4 collectible from $2.00

FREE Two-Day Shipping for students on millions of items. Learn more

Formats	Amazon Price	New from	Used from
Hardcover	$19.72	$0.01	$0.01

Quantity: 1

Buy New

or

Sign in to turn on 1-Click ordering.

or

Add to Cart with

Amazon Prime Free Trial required. Sign up when you check out. Learn More

Buy Used

Used - Acceptable See details

$3.64 & eligible for FREE Super Saver Shipping on orders over $25. Details

Fulfilled by Amazon

or

Sign in to turn on 1-Click ordering.

More Buying Choices

117 used & new from $0.01

Have one to sell?

Share

Description

Publication Date: **May 27, 2008** | ISBN-10: **0470261978** | ISBN-13: **978-0470261972** | Edition: **1**

The Bush administration's drive to politicize the Justice Department reached a new low with the wrongful firing of seven U.S. Attorneys in late 2006. Their action has ignited public outrage on a scale that far surpassed the reaction to any of the Bush administration's other political debacles. David Iglesias was one of those federal prosecutors, and now he tells his story.

Iglesias has long served in the Navy as part of the JAG corps. One of his earliest cases, about an assaulted Marine in Guantanamo Bay, became the basis for the movie A Few Good Men. When Bush chose him to become the U.S. Attorney for New Mexico, it was a dream come true. He was a core member of Karl Rove's idealized Republican Party of the future -- handsome, Hispanic, evangelical, and a military veteran. The dream came to an abrupt end when Senator Pete Domenici improperly called Iglesias, wanting him to indict

Show More

Special Offers and Product Promotions

- Buy $50 in qualifying physical textbooks, get $2 in Amazon MP3 Credit. Here's how (restrictions apply)

Frequently Bought Together

Customers buy this book with Making Our Democracy Work: A Judge's View (Vintage) by Stephen Breyer Paperback $10.88

Price For Both: $30.60

Show availability and shipping details

Customers Who Bought This Item Also Bought

Page 1 of 3


Making Our Democracy Work:


Constitutional Law for a


Classics of Political and


Mandragola


Bhagavad Gita: A New

C

Georgia Law Review
Spring, 2010

10th Annual Legal Ethics and Professionalism Symposium

Drawing the Ethical Line: Controversial Cases, Zealous Advocacy, and the Public Good

Symposium Remarks

*939 A PROSECUTOR'S NON-NEGOTIABLES: INTEGRITY AND INDEPENDENCE [FNa1]

David C. Iglesias [FNa2]

I have a soft spot in my heart for Georgia because my older sister Marina was born in this lovely state, and my mother actually received two years of her education up at the Toccoa Falls Institute, way back in the 1940s. . . . In a very strange quirk of history, eight years ago to the day, I raised my right hand and I took an oath of office in a brand new federal courthouse that would eventually become . . . the Pete V. Domenici Courthouse, named after our senior senator who retired after thirty-six years of service and who, as the story goes, I will tell you more about.

I didn't really fully realize the substance of what I was swearing to until years later when it became abundantly clear that the oath that I took was to the Constitution. It wasn't to my party, it wasn't to my senator, it wasn't to a specific ideology, but it was to the rule of law-something that I've been privileged to speak [about] to foreign nationals in many countries over these past few years. But it was a wonderful day. It was a wonderful five-plus years as New Mexico's chief federal law enforcement official. The ending was not so nice. But I will talk a little bit about that too, because some good things have actually resulted from that bad set of circumstances. . . .

I went from having one of the proudest days of my life, being sworn in as the United States Attorney to-five-and-a-half short years later-swearing to take an oath [again] in front of the United States Senate and United States House, joined with some of my colleagues, who were there to tell the American people what had happened.

The mission of the Justice Department is pretty straightforward. It's to "seek just punishment for those guilty of unlawful behavior, *940 and ensure fair and impartial administration of justice for all Americans." [FN1] Now in that very brief sentence you have the word[s] "just," "fair," and "impartial". . . . It's a good mission. It's something that every U.S. Attorney and Assistant U.S. Attorney takes very seriously when they get sworn in, and I was privileged to swear in twenty-seven Assistant U.S. Attorneys during my tenure as U.S. Attorney.

One of my heroes in recent American history is Robert H. Jackson, who was an associate justice of the U.S. Supreme Court. He was also a Nuremberg prosecutor, where he prosecuted alleged Nazis for war crimes. [Something that] Jackson said, I actually put in my book, [FN2] and has been quoted in numerous other places

because I think it really captures well the obligations of a prosecutor. . . . [I]n 1940, speaking to U.S. Attorneys in Washington, D.C., Justice Jackson (he was then the Attorney General) . . . said that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motive, he is one of the worst." [FN3] And I believe the sad saga of the U.S. Attorney firing[s] represents some of those base motives.

The Supreme Court [has] also weighed in on what the responsibilities of the United States Attorney [are]. In Berger v. United States, [FN4] a 1935 case, the Court wrote, "[The United States Attorney's] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor-indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." [FN5] So again, the focus is on justice-on ethical prosecutions.

*941 Most recently, there's this really interesting organization-with a very unfortunate acronym for a name-called NAFUSA. . . . It stands for the National Association of Former United States Attorneys. They met in Seattle, Washington last week and their keynote speaker was former Deputy Attorney General William Ruckelshaus, who-as you recall from your American history-was the Deputy [Attorney General] during Watergate and resigned, along with Elliot Richardson, when they both refused to fire the Special Prosecutor, Archibald Cox. [FN6] And here's what Mr. Ruckelshaus said just recently to the former U.S. Attorneys: "You owe a duty of loyalty to the President that transcends most other duties, save the paramount one owed to the American people . . . ." [FN7] I couldn't agree more.

So, I got sworn in on a beautiful New Mexico fall day. There was not a cloud in the sky; it was about seventy-five degrees. I had to pinch myself, thinking: How could somebody who was born in Latin America, who has a father who grew up in Latin America, ascend to this important position? I mean, it was the American dream come true. So, for the next few years, I just couldn't believe that I was actually the U.S. Attorney.

I did my due diligence immediately before my nomination, and I talked to every former U.S. Attorney in New Mexico going back to the Nixon Administration. And what they told me-both Democrats and Republicans-was remarkably similar, and that was this: "You will be independent. You will have your own fiefdom. The politicians will leave you alone. This will be the most important job you'll probably ever have." So I took those comments to heart. [Over] the next five years, my office was evaluated twice. Every three years, every U.S. Attorney's Office gets evaluated. I got very positive evaluations from this team. The judges were happy; the Assistant U.S. Attorneys were happy; the agency heads were also happy. We were able to prosecute historic political corruption cases, and I later *942 found out through some media reports that I had the fourth most productive office in the country, which surprised me because New Mexico is not a large state-but we do a lot of border prosecutions because of our shared border with the Republic of Mexico.

Then, on December 7, 2006 [(Pearl Harbor Day)], a bright line was drawn in my career. It was a day [on which] I well remembered being a Naval officer (and a part-time Naval officer at that); [I felt] it was a sneak attack on my career . . . [when] I got a phone call from the Executive Office of U.S. Attorneys. . . . The Director called me and said, "It's time for you to move on. We want to go [in] a different direction." And I asked him, "Well, what was the problem?," because I knew what my office evaluations were. I had heard rumors, but you always hear rumors. There is always somebody angry at you. As my good friend Bud Cummins says in Little Rock, "If you do your job well as U.S. Attorney, you probably won't be welcome at the country club." (Bud has a way of capturing things like that.) And [the Director said], . . . "I really don't know, Dave. All I know is it

came from on high." So I thought, "That really sounds political to me." I also knew enough about the Office to know that U.S. Attorneys rarely get fired absent misconduct.

I later found out that . . . six other U.S. Attorneys got the same phone call I did on Pearl Harbor Day. And we eventually . . . compared notes. It didn't happen right away. I was called by the media about two weeks later, because they were hearing these rumblings, these rumors. And I gave it up. I'm not very good at lying. (I guess that comes from being a minister's kid. I've tried, and I'm not very good at it.) So I said, "Yeah, I've been asked to resign." So I was the first to admit it, and then Bud Cummins in Little Rock followed suit shortly thereafter. Then in late December, I get this very cryptic e-mail from John McKay, who was the U.S. Attorney in Seattle, Washington. And he said he was leaving, but he didn't say what he was doing. . . . [I]t's traditional, when you leave the office, [to] send a message out to your colleagues [and] indicate where you are going-[maybe] you're going to be a judge, or a professor, or some other important job. John didn't say where he was going, so something just told me that John got the same phone call I did, because he was known to be a real independent thinker, and he had some great ideas. So I fired off an e-mail, and I said, *943 "Did you get the same phone call I did, John?" And John called me and said, "Yes, and I hear there are ten more," which blew my mind, because I knew that something like that had never happened midterm. So I said, "Who are they?" John gave me the names. I started calling people, and he was right for a lot of the people. And I noticed some very troublesome similarities in a lot of the districts that were targeted. A lot had allegations of voter fraud that did not result in prosecutions. Some had public corruption cases that were being investigated or had just been prosecuted. In my case, the chief complainants were party operatives who viewed the voter fraud issue as the ultimate wedge issue, and that is [apparent] in an e-mail that has been produced. It's funny-I don't think any U.S. Attorney that takes his or her job seriously views any specific crime as a wedge issue. We view it as a crime that needs to be punished if it's provable.

So, we quickly started to talk. You know, back in the old days, you only communicated through letters; but now, with e-mail and free Skype video conferencing, it's really easy to stay in contact. So, we all started to compare notes with each other-the six of us-and we realized [that it was appropriate] to quote the astronauts in the Apollo 13 movie, "Houston, we have a problem." [FN8] That problem was [that] it appeared that we were targeted for exercising independent thought as U.S. Attorneys.

We agreed to remain silent until there was further evidence of political wrongdoing or unless the thorny issue of performance came up. Because in . . . small state[s] like New Mexico and Arkansas and other places, your reputation is really all you have. If you're tarred and feathered with the allegation that you were an inefficient U.S. Attorney or a bad U.S. Attorney, that's going to limit your job opportunities.

So, we kind of kept our peace. This photo is taken from the Washington Post. [FN9] I won't read you all the comments, but . . . the comments for virtually all of us were very positive. [For] Dan Bogden, it said his overall evaluation was very positive. Charlton *944 was well-respected, Cummins was very competent and highly regarded, and it goes on and on. (I'm happy to tell you that . . . Dan Bogden has been re-sworn as the U.S. Attorney for Nevada. . . .)

One of the strangest firings happened early on, in early 2006. Todd [Graves] was a U.S. Attorney from Kansas City. He investigated allegations of voter fraud, could not find any cases he could prosecute, and-despite pressure from voter fraud groups-said, "I'm not going to prosecute anything." Then his brother, who's a member of Congress, crossed swords with Kit Bond (the senator . . . from Missouri); and based on that and the lack of finding prosecutable cases, Todd was called in January of 2006 and asked to move on. Todd fortunately was in

the process of transitioning to the private sector so it didn't affect him as much, but Todd was actually called to testify in front of Congress after the six of us did because, as a result of the production . . . that the Justice Department did to the House and Senate, they found that Todd was really an early victim of a political hit. . . .

So, my life changed clearly on Pearl Harbor Day, but the stage had been set months earlier. And in October of 2006, [around] . . . midyear elections, I got a phone call from . . . Senator Pete Domenici, who had helped sponsor me to get my appointment. When I ran for Attorney General in 1998, [FN10] he helped me a lot-he lent me one of his staffers [and] did some fund-raisers for me. But when he called me in October, it wasn't a good phone call, because he called me two weeks after Heather Wilson, who was my Congresswoman from Albuquerque, had called. I was in Washington, D.C. attending some Justice Department meetings, [and] I [got] a phone call from Heather Wilson, and she wanted to know about sealed indictments. . . . I didn't give her what she wanted, because she had heard that I was waiting to unseal until after the election. She was hearing that I was intentionally not filing indictments until after the election. She was locked in a very, very tight race against her opponent, who was then the sitting state Attorney General [and] who had not filed any corruption cases. The issue had come up in the elections that her opponent had not filed any, and the U.S. *945 Attorney's Office had filed all these corruption cases. So, I knew what she wanted, and I knew I couldn't play footsie with her. . . .

I need to take you back to the summer of 2001, when John Ashcroft, then the sitting Attorney General, and his Deputy [Attorney General], Larry Thompson, . . . said "You can't play politics, Dave. It's good that you ran three years ago, [FN11] but if you're a U.S. Attorney, you can't play politics." If any of you have ever heard Mr. Ashcroft speak, he has a very gravelly voice, and he's like that uncle that you were kind of afraid of when you were a kid. [He has] a lot of gravitas; he's a very serious guy. So I really paid attention, and I found out that that was the same comment he made to all incoming U.S. Attorneys-that you don't play politics.

So, I didn't give Heather Wilson what she wanted, and I'm convinced she picked up the phone and talked to our senior senator, Pete Domenici, [and] said, "I talked to Iglesias, and he didn't give me what I wanted." So I was at home, [and] I [got] a phone call [from Pete]. . . . He wanted to know if I was going to file those public corruption indictments he'd been reading about before November.

Well, what happens in November? [The] first Tuesday is when the election is. And I stammered and stuttered, and . . . I just told him I didn't think so, which is more than I should have said (I'll give that up right now). And he said, "I'm very sorry to hear that," and he hung up on me. And if any of you [have] ever been kicked in the solar plexus, that's how I felt. I knew something very bad had happened. I tried to go on with my duties, but essentially I had some choices then, because I knew they were both talking about the corruption cases that were widely reported. They wanted me to hurry those in time for Heather Wilson, who was the protege of Pete Domenici-to use those [cases] in a political sense-and I [knew] I couldn't do that, for the very simple reason [that] the cases weren't ready. I don't remember the California wine company that used to have that ad that said, "We will sell no wine before its time," [FN12] [but] that's true for a criminal case too. You can't indict a case until it's ready, and those cases weren't ready. So, I just put faith in the *946 system that I would be protected from political interference, and I went back to business as usual.

So, I didn't give confidential information out despite pressure from my friend, the member of Congress, and my sponsor, the senator. There was no voter fraud case filed. I had set up one of only two voter fraud task forces in this country. I investigated over 100 allegations of voter fraud, [and] narrowed it down to one that maybe had some merit. I talked to Main Justice, to the guru there of election fraud, and . . . we didn't have a good feeling that we could prove the case. Local FBI agent[s] didn't disagree, so I didn't file anything. I later found out

through the mass of information that was released from Main Justice to the House and Senate that the local party operatives were extremely angry at me that I didn't file voter fraud cases, especially right before the election. Looking back, I'm glad I did not do that.

So, we are at this point in early 2007, [where] my fellow fired colleagues and I [were] in frequent contact, and then the trip wire was hit by the former Deputy [Attorney General], Paul McNulty, who testified under oath that we had performance-based reasons [for being fired]. [FN13] Paul knew better, or should have known better, because he had access to our evaluations and should have known that all but one [of us] had very positive evaluations. John McKay got the highest civilian award that the Navy gives for some innovative programs he came up with, and it was all I could do to keep McKay from reaching through the telephone and [start] screaming. He was real upset, I was real upset, and within a few weeks of that we were called [to testify].

I had my last press conference, [where I showed] that the numbers of prosecutions had increased under my watch [and that] the conviction rate was higher than the national average-that performance was not the reason. And the senator sent one of his press officers to take notes, so my press officer spotted her and told me, so there was . . . [a] dueling press officer [situation] . . . . It was well-covered. I had already talked to the Washington Post and *947 McClatchy Group and told them that I had been contacted by two members [of Congress], but I wasn't willing to name them unless I was ordered to. Well, within forty-eight hours of my last press conference, on my last day on the job, my secretary [drove] to our house (I was the former U.S. Attorney at this point) and [handed] me a subpoena from the House of Representatives. So we then testified [in] the Senate in the morning, and the House in the afternoon. I ran into a journalist that I respect, Michael Isikoff from Newsweek, who covers a lot of the Justice Department beat, and I said, "Mike, is this very common for Congress-both Houses-to hear evidence on the same case on the same day?," and he goes, "No, this almost never happens." So, that told me it was very important to get to the bottom of this.

[M]y wife [was] sitting right behind me, and she said that the hair on the back of her neck stood up when we all stood to take our oath; [when] we were all sworn in, she felt like history was being made. I'm afraid to tell you [that] my feelings were a lot more pedestrian. (I didn't want to faint, you know. It was very intimidating to have rows of photographers and C-SPAN there, not to mention looking up at the members of Congress.) But we told them what had happened, in no uncertain terms, and I am so fortunate that I had other colleagues [who] were willing to testify. I'm not sure I would have had the courage to have done this by myself, because it would have been my word against lots of very powerful people.

But the fallout began rather quickly, when Kyle Sampson . . . resigned. Kyle was the aggregator of information. . . . Gonzales actually lasted quite some time ([he] didn't step down for another year and a half) but his legacy was tarnished as a result of not protecting us from what had happened. Also, there was an ethics investigation launched in the House and Senate. The House did not find any wrongdoing. The Senate issued a punishment . . . to Senator Pete Domenici-[the] only time he ever [got] anything like that. [FN14] I filed an Office of Special Counsel complaint. And then *948 Representative Conyers picked up the baton and has been investigating and just released his report, which I will get into.

The Justice Department has its own Inspector General and Office of Professional Responsibility. They issued almost a 400-page report last fall that has some pretty strong language. [FN15] And then, very interestingly, there was a civil lawsuit filed [by] the House of Representatives against former White House officials over this issue [FN16]: Can a[n] administration official cite executive privilege in refusing to obey a congressional subpoena? Now, that is like angels dancing on the head of a pin. The answer, according to Judge Bates,

who is a Bush appointee, is: No, the [White] House cannot. [FN17] That case was appealed, and I just heard from House counsel this last week that the appeal from the Justice Department has been dropped, so I think the matter has been resolved.

We had some more resignations in short order in the months after our testimony. Paul McNulty, who hit the trip wire, resigned. Monica Goodling, . . . [for whom] famously there is an e-mail out there that says, "We have another Monica problem" (I'm not going to go there, folks) . . . had the dubious distinction of being the first high-ranking Justice Department official ever to take the Fifth Amendment, and wanted a grant of immunity. So when she did testify, it was under a grant of immunity. And of course Karl Rove['s] name is featured very prominently in a lot of the documents that were produced to the House and Senate. I just saw him on FOX . . . [implying] that part of why he was upset with me is I failed to prosecute clear cases of voter fraud. [FN18] . . .

*949 There's a certain irony about this picture, [FN19] because this photo was taken by the Associated Press in January of 2006, about the time Todd Graves got his phone call telling him it was time for him to move on. We're in the Roosevelt Room in the West Wing talking about the PATRIOT Act, which in another twist of history was actually used to put in indefinite interim U.S. Attorneys, [FN20] which skirts the confirmation process and which I spoke out against and other members of the Bar have also. Little did we know that several of us . . . [would be] asked to move on within a year of this photo being taken.

So, we had the Senate Letter of Admonition. Senator Domenici retired, citing an incurable brain disorder. Heather Wilson ran to take his place and lost in the Republican primary. So, those two folks are no longer in office. But . . . I have seen the law of unintended consequences, which happens in these things-things I would have never foreseen, such as writing a book. I have always wanted to write a book but never thought I had anything important to say. Well, be careful what you pray for, because sometimes you get it. So I wrote a book and was on the Daily Show with Jon Stewart, also with Larry King, [and] Meet the Press with John McKay. . . .

I went from having real doubt if we really believed in the rule of law in this country to believing that we really do mean what we say, because I saw the media really express a lot of interest in what had happened to us and want [ ] to cover it. . . . For a lot of nonlawyers, what's executive privilege? Why is that important? Why should a prosecutor be independent? You know, the average person has never set foot in a federal courthouse. . . . We do a lot of prosecutions, but compared with our state and local partners, we just do a fraction. *950 And most Americans will never set foot in a federal courthouse, so they don't really know what's at stake-they don't know the enormous powers that U.S. Attorneys have. I believe that U.S. Attorneys are the only appointees that can take away your life, your liberty, and your property, and do it completely legally. There may be some others that are out there, but not to the extent that U.S. Attorneys [can]. It's a tremendously serious job, and politics have to stay out of it, and we need to get men and women who take their oath to the Constitution very seriously, like we all did.

So, the OIG-OPR Report came out. [FN21] The House Committee Report was . . . dropped just two months ago. It said that there was petty patronage, political horse trading, [and that] the most egregious case of political abuse in the U.S. Attorney corps was my case. [FN22] Mr. Conyers said that when Mr. Iglesias said his firing was a political fragging, he was right. If any of you know what the word frag means, it's a very ugly word. It's used in a combat situation when a senior officer gets killed intentionally by his own troops. It's very ugly. I sent that in an e-mail to a friend of mine, not realizing it was going to get released to a blog, which got picked up by everybody. But, the OIG OPR Report had similar strong language, claiming that our firings were disingenuous, after-the-fact rationalizations; that [the] process was fundamentally flawed; and recommended a further criminal

investigation. [FN23] I think this may be the first time in Justice Department history that there's a criminal probe involving the termination of U.S. attorneys. That probe, I know, is still ongoing. It's on the shoulders of Nora Dannehy, who's the acting U.S. Attorney in Connecticut. I've talked to her former boss, and he's had some very, very good things to say about Nora-as being very diligent, being very thorough, being very professional. So whatever she arrives at, I'm good with, [because] the one thing I don't want folks to say about me is that I second-guessed a U.S. *951 Attorney in the way that I was second-guessed. She has full access to the facts that I don't have, and if she wants to go forward with an indictment, that's fine; if she doesn't, that's also fine, because I understand what burden is on her, . . .

I think this really goes at the heart of what sets America apart. Like many of you, I've had the privilege of traveling officially overseas. I've been to places like the Congo [and] like Laos, where the rule of law is not practiced. Half of my ancestry is from Latin America, [which] has significant human rights issues and rule-of-law issues. There are lots of countries where the president can pick up the phone and cause a prosecution to go away or to go forward, and that's not what we stand for in this country. . . . The rule of law is not just a happy phrase that the pundits use on network television; it actually has meaning, and U.S. Attorneys find that out very quickly. And law professors get to inculcate that in their students at a very early age.. . . .

I'd just like to close this by quoting an Air Force fighter pilot. You know I'm a Navy man, and I don't normally quote Air Force people, but this guy was a real maverick and a real independent thinker. He raised the roof over lots of programs and got in the face of lots of his superiors, and he just had the best ideas and the best execution. What Boyd said (this was [in] a book that Paul Charlton, my fired colleague from Arizona, gave me) : . . was, "[When] your boss asks you for loyalty, give him integrity. When he asks you for integrity, give him loyalty." [FN24] In other words, integrity is always on the top of your mind as a public servant.

[FNa1]. Mr. Iglesias gave these remarks at the 10th Annual Legal Ethics and Professionalism Symposium, entitled "Drawing the Ethical Line: Controversial Cases, Zealous Advocacy, and the Public Good." The symposium was held at the University of Georgia School of Law on October 16, 2009. All footnotes and citations were added by the Georgia Law Review.

[FNa2]. J.D., University of New Mexico School of Law; B.A., Wheaton College. Mr. Iglesias served as the United States Attorney for the District of New Mexico from 2001 to 2007.

[FN1]. U.S. Dep't of Justice, About D.O.J., http:// www.justice.gov/02organizations/about.html (last visited Feb. 7, 2010).

[FN2]. David Iglesias, In Justice: Inside the Scandal that Rocked the Bush Administration 228 (2008).

[FN3]. Robert H. Jackson, The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 31 J. Crim. L. & Criminology 3, 3 (1940).

[FN4]. 295 U.S. 78 (1935).

[FN5]. Id. at 88.

[FN6]. David S. Broder, Resigning in the Name of Principle, N.Y. Times, Oct. 24, 1973, at A16 ("[Richardson] resigned, rather than execute the President's order to fire Special Watergate Prosecutor Archibald Cox, and the Deputy Attorney General, William D. Ruckelshaus, whose independence of judgment and integrity match

Richardson's own, followed suit.").

[FN7]. William D. Ruckelshaus, Remembering Watergate, Address Before the National Association of Former U.S. Attorneys (Oct. 3, 2009), at 23, available at http://www.nafusa.org/pdf/ruckelshausspeech10032009.pdf.

[FN8]. Apollo 13 (Universal Pictures 1995).

[FN9]. See Dan Eggen, 6 of 7 U.S. Attorneys Had Positive Job Evaluations, Wash. Post, Feb. 18, 2007, at A11. Photographs are omitted from this written version of Mr. Iglesias's remarks.

[FN10]. Mr. Iglesias ran for the office of New Mexico Attorney General in 1998.

[FN11]. See supra note 10.

[FN12]. See Joseph McBride, What Ever Happened to Orson Welles?: A Portrait of an Independent Career 8-9 (2006) (discussing Orson Welles's commercials for Paul Masson wine using this advertising line).

[FN13]. Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 35 (2007) (statement of Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice) ("All of the changes that we made were performance related.").

[FN14]. See generally Public Letter of Qualified Admonition from U.S. Senate Select Comm. on Ethics to the Honorable Pete V. Domenici, U.S. Senate (Apr. 24, 2008), available at http://ethics.senate.gov/downloads/pdffiles/domenici% 20letter.pdf.

[FN15]. See generally Office of Inspector Gen. & Office of Prof'l Responsibility, U.S. Dep't of Justice, An Investigation into the Removal of Nine U.S. Attorneys in 2006 (2008), available at http://www.justice.gov/opr/us-att-firings-rpt092308.pdf.

[FN16]. See generally Comm. on the Judiciary v. Miers, 542 F.3d 909 (D.C. Cir. 2008).

[FN17]. See Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 106-07 (D.D.C. 2008) (holding White House official "not entitled to absolute immunity from compelled congressional process").

[FN18]. See The O'Reilly Factor (FOX News television broadcast Aug. 11, 2009), available at http://www.foxnews.com/story/0,2933,539163,00.html. When Mr. O'Reilly asked Mr. Rove about his involvement in Mr. Iglesias's firing, Mr. Rove responded: "I passed on to the White House council's [sic] office to pass on to the Justice Department complaints about the performance of the U.S. Attorney in New Mexico, that he failed to go after ACORN in clear cases of voter[r] fraud . . . ." Id.

[FN19]. Photograph omitted.

[FN20]. See USA PATRIOT and Reauthorization Act of 2005, Pub. L. No. 109-177, Title V, § 502, 120 Stat. 192, 246 (2006) (amended 2007) ("A person appointed as United States Attorney under this section may serve until the qualification of a United States Attorney for such district appointed by the President under section 541 of this title"). The statute was changed in 2007 to provide that such appointments should last no more than 120 days. See Preserving United States Attorney Independence Act of 2007, Pub. L. No. 109-177, § 1, 121 Stat. 224, 224 (2007) (providing that a United States Attorney appointed by the Attorney General may serve until the earli-

er of "the qualification of a United States attorney for such district appointed by the President under section 541 of this title" or "the expiration of 120 days after appointment by the Attorney General under this section").

[FN21]. See supra note 15 and accompanying text.

[FN22]. John Conyers, Jr., Resolution Recommending that the House of Representatives Find Harriet Miers and Joshua Bolten, Chief of Staff, White House, in Contempt of Congress for Refusal to Comply with Subpoenas Duly Issued by the Committee on the Judiciary, H.R. Rep. No. 110-423, at 3-7 (2007) (summarizing "substantial evidence" that David Iglesias's firing "may have been a political act").

[FN23]. See id. at 15 (citing need for more information to "assess the degree of any illegality, and the appropriate defendants on any such charges").

[FN24]. Robert Coram, Boyd: The Fighter Pilot Who Changed the Art of War (2002).
44 Ga. L. Rev. 939

END OF DOCUMENT

Great Falls Tribune

Estimated printed pages: 2

March 31, 2005
Section: Montana
Page: 1M

Judge says former postmaster's crime not that big of a deal

Kathleen Schultz
Staff
Great Falls Tribune

By KATHLEEN A. SCHULTZ Tribune Staff Writer

She couldn't, and didn't, deny it - longtime Heart Butte postmaster Athena Mosxona did throw away advertising fliers, which did amount to the willful destruction of mail.

But the 61-year-old, indicted in November and forced to take an early retirement, was all but exonerated Wednesday when U.S. District Judge Sam Haddon sentenced her to a mere 10 days of unsupervised probation - after chastising the "overzealous" prosecution for making a federal case of the matter.

The Valier woman, who had worked for the Heart Butte post office since 1979, the last 19 years as postmaster, admitted throwing away advertising circulars. But she threw them away after putting one copy in each of the 250-plus mailboxes.

Her decision to toss the excess circulars, rather than stuff multiple copies into each box until they were all used up, violated a post office regulation.

The regulation, in essence, says that if an employee isn't sure what to do in a given situation, and a supervisor isn't available, he or she must protect the mail at all costs.

"I'm really sorry," a tearful Mosxona told Haddon. "I did not know I was creating a criminal act, and if I had to do it all over again, I'd stuff every single box with every one of those things."

The violation led to her indictment on one count of felony destruction of mail, which carries up to five years in prison, a $250,000 fine and three years of probation.

Plea bargaining brought the charge down to the misdemeanor level, which still could have meant up to six months in federal prison, a $5,000 fine and a year's probation.

Assistant U.S. Attorney Joe Thaggard supported defense attorney Ed Sheehy's request for, at most, a year of unsupervised probation and no fine.

But a stern Haddon took issue with the postal regulation upon which the charge was based. "I find the absence of a clear directive from her employer to be of significance," the judge said.

Pointing out that the entire episode may have been motivated by a fellow employee who had a beef with Mosxona, and citing numerous letters of support from her customers, Haddon accepted her guilty plea but sentenced her to only 10 days probation. She also had to pay a $10 court fee.

The whole case could have, and should have, been handled in another venue, Haddon said, calling Mosxona's federal prosecution an "overzealous use of the power of the court to affect the lives of our citizens."

U.S. Attorney Bill Mercer stood by his office's decision to prosecute Mosxona.

"The postal service probably employs more people in the state of Montana than any other entity," Mercer said. "It's my view that, in order to ensure that you don't have postal employees throwing away mail, stealing stamp stocks, and so on and so forth - the only way we're going to deter criminal behavior is to let people know we're going to prosecute."

Missoulian
4/22/2007

Evaluating prosecutors, including Mercer, on 'production' perverts system

By CRAIG SHANNON

If you ever find yourself sitting in some federal prison somewhere, you might ask yourself whether the U.S. attorney's salary depended on it.

In the March 30 Missoulian, under the headline "Mercer assures Tester he's willing to testify," U.S. Sens. Jon Tester and Max Baucus urged Bill Mercer to choose between one of the two jobs he is now holding, citing concerns over whether Mercer is spreading himself too thin. Mercer is currently both the Montana U.S. attorney and acting associate attorney general in Washington, D.C., making him No. 3 in the U.S. Department of Justice.

Tester asked Mercer, "Are we short-changing folks?"

Heck no, Mercer replies, citing a rise in both conviction rates and sentence length: "I'm very pleased to report that production in terms of the number of cases charged that result in sentences has continued to go up. Mercer added that "sentence length" also shows the productivity in Montana is "extraordinary."

A more careful look at these statements raises questions about the motivation behind our criminal justice system and the resulting inherent bias. Is our justice system motivated by a search for truth or to further one's political aspiration or to protect one's salary?

Mercer's salary necessarily depends on job performance. According to Mercer, his job performance is measured by his ability to convict more Montana citizens this year than last along with making certain that he persuades some well-meaning federal judge to put those convicted citizens in some hole that is deeper and darker this year than last.

Sometimes a law is just on its face and unjust in its application, as in the prosecution of Dr. Martin Luther King, Jr. for "parading without a permit," an otherwise just prosecution but for an unjust reason – to maintain segregation and to deny citizens the First Amendment right of peaceful assembly and protest. If the reason for the arrest is unjust, then the arrest is unjust. This is similar to the traffic cop who is instructed to not return to the station house until he has written tickets for at least 100 moving violations. The traffic cop's salary depends on increased prosecutions; a right law prosecuted for the wrong reason leads to injustice.

If you were one of those unlucky citizens crushed beneath the Justice Department's wheel, ending up in a cage, how would you feel if you later learned that the prosecutor needs you there in order to keep his job? Such an inherent bias cannot be the basis of a fair and just system. Such a system is not freedom, not even close.

The short little Missoulian article March 30 creates more questions than it answers. To what extent is Mercer, and possibly other U.S. attorneys throughout this free nation, encouraged to measure job performance in this way? Is there some explicit or implicit quota expected of them? What other ways are used to measure job performance? Does this measuring stick create a hidden bias on the part of the U.S. Attorney's Office to seek increased conviction rates and longer prison sentences for the wrong reasons?

How can such a hidden bias truly serve justice? Are prosecutions motivated by a search for justice or by a search for the boss' blessings?

Craig Shannon is a criminal defense attorney in Missoula.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA,	)	CR 05-07-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
W. R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO,	)	
	)	
Defendants.	)	

I. Introduction

Pending before the Court are a motion to strike the testimony of government witness Robert Locke and a motion to dismiss the Superseding Indictment due to

prosecutorial misconduct. Locke's testimony has been suspended for one month as the parties and the Court have endeavored to reach an appropriate remedy for the dual problem posed by Locke's untrustworthy testimony and the government's late disclosure of evidence in violation of the Jencks Act, 18 U.S.C. § 3500, and in contravention of the Defendants' constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). The facts surrounding the government's discovery failures are well known to the parties and will not be recited in detail here. It suffices to say that the government failed in its duty to disclose witness statements and other evidence bearing on the witness' credibility in a timely manner. The government suggested at oral argument that it referred to its "mistake, violation, error, misstep or regret" 39 times in its brief in response to the motions to dismiss. Hrg. Tr. at 112-13, Apr. 27, 2009.

These matters have been argued extensively. The Defendants urge the Court to impose the most drastic remedy of dismissal of the Superseding Indictment, arguing that the government's conduct, in this specific instance and in the entirety of the case, has distorted the fact-finding process of the trial beyond repair. Although they at one point stated that they do not wish to see Locke return to the stand under any circumstances, the Defendants have since, with one exception, advised the Court that if the remedy of dismissal is not implemented they would

welcome the opportunity to continue to cross-examine Locke on the narrow issue of his relationship with the prosecution. This would include inquiry into the true number of meetings between Locke and any member of the prosecution team, the extent of Locke's animus toward Grace and Defendant Bettacchi, Locke's interactions with prosecution team members, and the details of Locke's evolution from non-target to unindicted co-conspirator to, ostensibly, unrepresented witness under threat of future prosecution.

Defendant Bettacchi differs from his co-defendants on the question of Locke's return to the witness stand. He argues that the effects of Locke's troublesome testimony are visited disproportionally upon him, and there is merit to his position. If the Superseding Indictment is not dismissed, Defendant Bettacchi has asked that Locke not be permitted to testify further.

In essence, the prosecution's argument is that the virtue of its case sanctifies the means chosen to achieve conviction. This argument cannot prevail in a legal system that is designed to ensure fairness in the proceeding when each side follows the rules. Our confidence in the fairness of our system is rooted in the belief that our process is sound. Useful falsehoods are particularly dangerous in a criminal case, where the cost of wrongful conviction cannot be measured in the impact on the accused alone. Such tainted proof inevitably undermines the process, casting a

dark shadow not only on the concept of fairness, but also on the purpose of the exercise of the coercive power of the state over the individual. No man should go free nor lose his liberty on the strength of false, misleading or incomplete proof.

In one sense the pending motions present distinct legal issues: the reliability of Locke's testimony on one hand, and the government's discovery and constitutional violations on the other. As the arguments on these issues have demonstrated, however, they are intertwined to the point that the discussion of one will eventually require consideration of both. While the motions are discussed separately below, they are addressed collectively in the implementation of the remedy.

II. Robert Locke

Much of Robert Locke's testimony in this case is incredible. He gave an incomplete account of his many meetings with the prosecution, likely creating a misimpression in the minds of the jury that the government did not attempt to correct. He testified to his ignorance as to the identity of Grace's lead corporate counsel, when his own records reveal that he knows exactly who Grace's top lawyer is, and had met with him personally. In response to carefully crafted questioning from government counsel, Locke gave an account of the purposes and motivations behind his "options" memo (Gov. Ex. 239) that was so selective as to

border on prevarication. Locke's account of his rejection of the government's grant of immunity (Def. Ex. 16076) was similarly incomplete, and the government did nothing to correct the record. Finally, Locke's recollection of Defendant Bettacchi's dismissive invocation of "caveat emptor" in response to Locke's reservations over the sale of the screening plant property is highly suspicious; the record does not permit us to know for certain whether Locke presented a convenient remembrance, a crafty embellishment, or an outright lie.

Other behavior and testimony from Locke casts doubt on his credibility. Throughout his testimony, he gave non-responsive answers in which he volunteered information that was prejudicial to the Defendants. He admitted that he had been following the trial proceedings in news accounts and through other media because the trial was important to him. Documents offered by the Defendants, as well as documents produced in response to the Rule 17(c) subpoena issued to Locke, suggest that he has more than once sought to leverage his status as cooperating witness with plaintiffs' attorneys and with the United States in this case to achieve a favorable outcome in his civil suit against Defendants Grace and Bettacchi. He destroyed, on the eve of trial, his personal calendars from recent years, including those that might have revealed meetings relative to his civil suit. He took records and documents from W.R. Grace headquarters that he was not

authorized to keep and has sought to parlay them into leverage by cooperating with plaintiffs' counsel in civil cases.

III. The Government's Discovery and Brady Violations

The government has committed clear and admitted violations of Fed. R. Crim. P. 16, 18 U.S.C. § 3500, and Brady and Giglio. While the prosecution initially resisted any such characterization of its non-disclosure as a violation of any obligation, counsel for the government now concede their error and profess to take full responsibility for it. Locke's e-mail exchanges with Special Agent Marsden, his immunity negotiations with the government, and Marsden's notes as to those negotiations and other matters show Locke's animus toward the Defendants and the extent of his relationship with the prosecution. They are evidence of the bias of the prosecution's star witness, which is clearly a fertile area for cross-examination. The documents should have been disclosed, and the government's failure to timely disclose denied the Defendants the opportunity to conduct thorough and more effective cross-examination.

Since first coming clean with Locke's e-mails but denying their constitutional import, the government has ratcheted up its contrition in increments, apparently hoping to pinpoint the minimum degree of repentance necessary to satisfy the Court. The explanation offered for the non-disclosure is that the

government's discovery obligation is simply too vast to expect complete compliance – as AUSA Cavan put it, the prosecution has "a thousand balls in air." Hrg. Tr. at 244, Apr. 17, 2009. AUSA Racicot stated, "[W]e just dropped the ball. It wasn't that we were trying to hide it." Hrg. Tr. at 124, Apr. 27, 2009. Implicit in this line of argument is the complaint that the Court has overburdened the government by issuing excessively broad discovery orders.

The size of the case, and the resulting disclosure obligation, is a condition of the government's choosing. The constitution and the law do not yield when the government casts a wide net in the charging decision. The government resists the Defendants' effort to tie the most recent discovery violation to the government's earlier transgressions in this area, but the Court is not entirely willing to view the most recent episode in isolation. The government's own argument blaming the scope of its disclosure duties conjures up the failures of the past. The history of this case suggests that the failure to disclose documents related to Locke is merely the latest manifestation of a systemic problem, i.e., that the Department of Justice charged a case larger than the one it prepared to prosecute.

The record reveals that Special Agent Marsden had a completely flawed understanding of the government's disclosure obligations under Brady and Giglio. He filed an affidavit saying that he asked AUSA McLean whether the Locke notes

and e-mails should be produced, and McLean answered in the negative. AUSA Cassidy's affidavit said Special Agent Marsden's misconceptions as to the government's constitutional responsibilities did not come from Cassidy, who instructed case agents properly. Cassidy also stated that Special Agent Marsden had left him with the impression that Locke's communication with Marsden consisted mainly of press articles. AUSA McLean stated that he failed to review Marsden's e-mails because Marsden told McLean the emails were "just press clippings." McLean also states that Marsden's testimony regarding Brady and Giglio was not based on McLean's instruction to Marsden.

The attempt by the United States to rationalize its failure to disclose suggests that the prosecution is not up to the task of meeting its discovery obligations in the case it charged. The government's own attorneys argue that the demands of this sprawling case are so daunting that the Court must permit the occasional non-malicious violation of the Defendants' constitutional rights. In the words of AUSA Cavan, "there is no such thing as a perfect case." Hrg. Tr. at 244, Apr. 17, 2009. The record shows that the government's case agent had an improper understanding of the law. To the extent that the prosecutors have filed affidavits saying they are not responsible for implanting Marsden with that improper understanding, it is of no consequence. It makes no difference whether the agent came to his

misunderstanding through faulty instruction or lack of sufficient instruction; either way, the prosecutors are responsible. Marsden's misunderstanding led him to ignore the importance of Locke's emails, which in turn led prosecutors to fail to review them, resulting in prejudice to the Defendants.

These themes of poor planning and incompetence are common threads throughout the government's spotty compliance with its disclosure obligations dating back to the beginning of the case. However, incompetence is not bad faith. Poor planning is not malice. A systemic flaw is not always flagrant conduct. And the damage, while serious, is not irreparable. The behavior of the prosecution is troubling and at times frustrating, but the record does not support a finding of prosecutorial misconduct.[1] What is clear from the record is that the government's conduct creates a climate in which the Defendants' constitutional rights are at risk, and the Court's role of ensuring the fair administration of justice is complicated.

---

[1]The Court and the parties have given extensive consideration to the Ninth Circuit opinion in United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008), in which the court of appeals upheld the district court's dismissal of the indictment after declaring a mistrial due to Brady and Giglio violations. Based on the record in this case, Chapman puts this Court well within its discretion to declare a mistrial and dismiss the Superseding Indictment. There are, however, two critical distinctions between this case and the facts in Chapman. The witnesses at issue in Chapman had left the stand, and could not practically be recalled. Id. at 1079-80. Here the government revealed its breach during the cross-examination of Locke and he remains under subpoena. Unlike the situation in Chapman, continued cross-examination of the relevant witness is a viable remedy.

A more important distinction is the fact that the district court in Chapman found that the government had acted "flagrantly, willfully, and in bad faith." Id. at 1080 n.2. The Court has not made a similar finding in this case. The extreme remedy in Chapman is not warranted here.

IV. Remedy

The parties have put before the Court a range of remedial options. The most drastic is to dismiss the Superseding Indictment, either with or without prejudice. As discussed above, dismissal on the basis of prosecutorial misconduct is not warranted here.

The next option is for the Court to declare a mistrial. The Defendants have shown no interest in a mistrial, as it would allow the government the opportunity to start anew and, in essence, benefit from its failure to fulfill its disclosure obligations by receiving the proverbial second bite at the apple. The Defendants have represented that but for the matters at issue here, they do not wish to forfeit their position except due to dismissal of the charges. It is the Court's understanding that the government also opposes the remedy of a mistrial.

The third possibility is to strike Locke's testimony in its entirety as a remedy for the government's Jencks Act and Brady/Giglio violations. This option has some appeal in light of the prejudice occasioned by the government's non-disclosure and the unreliable nature of Locke's testimony. In the end, however, striking Locke's testimony in its entirety goes too far.

The unavoidable conclusion from listening to Locke's testimony is that he is untrustworthy, and his testimony is very likely fabricated in important respects.

This is a judgment reached through the application of common sense; the witness is simply not credible. But while there is ample evidence of his untrustworthiness, and a strong circumstantial case for perjury, there is no irrefutable objective proof that he has perjured himself. In my view the circumstantial evidence is sufficient, but absent an unmistakable case for perjury, it is not the Court's view on credibility that matters. The issue of Locke's trustworthiness is ultimately for the jury to decide. Intrusion into the jury's consideration of the factual record should occur only as minimally necessary to correct a failure of the process to ensure fairness.

The minimally intrusive solution here is to allow Locke's testimony to stand, subject to the following conditions intended to cure the prejudice to the Defendants resulting from the government's failure to disclose. First, the Defendants may continue cross-examination of Locke on the narrow issues of his relationship and meetings with the government, his animus toward the Defendants, and his status in relation to immunity. Continued cross-examination within these confines will allow the Defendants to utilize the recently disclosed information to conduct a fully informed albeit belated cross-examination to complete the factual record before the jury.

Continued cross-examination is not favored by all Defendants. Defendant Bettacchi, having been uniquely prejudiced by Locke's testimony and the

government's conduct, would understandably prefer that Locke not return to the stand. This conflict among the Defendants appears on the surface to foreclose the remedy of continued cross-examination, but it is not so. There is a cure that both solves the conflict and recognizes that the government's withholding of evidence showing the true extent of Locke's bias and partnership with the prosecution has had heightened consequences for Defendant Bettacchi. Counsel for Defendant Bettacchi was denied an opportunity to fully cross-examine on the number of meetings between Locke and the government, resulting in a less compelling presentation. Had he been fully informed of the genesis of Locke's recollection, Bettacchi's counsel also would likely not have potentially compromised himself as he did by drawing legitimate inferences of recent fabrication relating to Locke's "caveat emptor" testimony. Bettacchi's counsel may well have opened differently had he been fully aware of Locke's attitude toward his client.

The substance of Locke's testimony is especially prejudicial to Bettacchi, as he is the subject of Locke's dubious recollections of discussions on the sale of the former screening plant. Moreover, Locke's e-mails exchanges with Special Agent Marsden make clear that Bettacchi held special status among the targets of Locke's vengeance. The evidence of bias against Bettacchi is far deeper than that against any other Defendant, the significance of which is twofold: first, Bettacchi has

suffered greater prejudice from non-disclosure; and second, Locke's already questionable testimony is even more suspect on matters concerning Bettacchi personally. It is difficult to believe that the Justice Department would sponsor such a biased witness as the linchpin of its conspiracy case. For all of these reasons, the continued cross-examination of Locke will be accompanied by an instruction to the jury that it may not rely upon the testimony of Robert Locke in deciding Defendant Bettacchi's guilt or innocence on any charge.

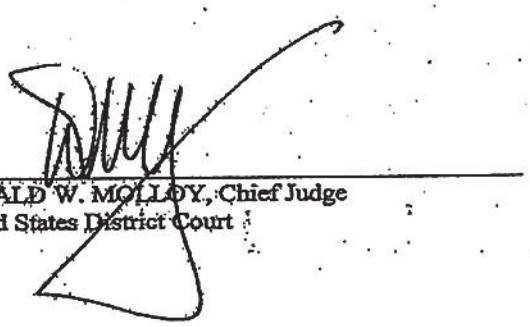
The jury will be further instructed that the government has failed to fully disclose information to the defense as required by the rules and the Constitution, and that Locke is back on the stand so examination can continue after the Defendants have received the information they are entitled to. The jury will be instructed that the striking of Locke's testimony as to Bettacchi should not be read as an endorsement of Locke's testimony as to other Defendants; to the contrary, the jury should view Locke's entire testimony with skepticism.

As part of the remedy, the United States will not be permitted to conduct a redirect examination. The process, when adhered to by all parties, is designed to ensure fairness. When a party fails to fulfill its responsibilities under the process for any reason, it falls to the Court to restore the fairness that the constitution and basic notions of justice require. Here that is achieved by prohibiting re-direct

examination. Locke's testimony will remain in the record, but it will not be bolstered on re-direct examination.

Based on the foregoing, IT IS HEREBY ORDERED that the motion to strike the testimony of Robert Locke (Doc. No. 1021), and the motions to dismiss the Superseding Indictment due to prosecutorial misconduct (Doc. Nos. 1113 and 1117) are GRANTED in part and DENIED in part as set forth above.

Dated this 28th day of April, 2009.



DONALD W. MOLLOY, Chief Judge
United States District Court

BUFFALO LAW REVIEW

Volume 38 Winter 1990 Number 1

Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.

LUCIE E. WHITE*

* Assistant Professor, University of California at Los Angeles School of Law.

Among the colleagues and friends who have supported this project with their time, imagination, and moral intuition are Rick Abel, Alison Anderson, Peter Arenella, David Binder, Kinberle Crenshaw, William Forbath, Carole Goldberg-Ambrose, Isabelle Gunning, Joel Handler, Amy Hirsh, Ken Karst, Duncan Kennedy, Jerry Lopez, Christine Littleton, Carrie Menkel-Meadow, Martha Minow, John Nockleby, Judith Resnik, Florence Roisman, William Simon, and Steven Yeazell. My research was supported by grants from the Academic Senate of the University of California at Los Angeles. Prior versions of this essay were presented at the Feminism and Legal Theory conference of the University of Wisconsin Law School in 1988, and in Professor Steven Yeazell's seminars on Theories of Process at the UCLA Law School in 1988 and 1989. Students who assisted in the project include Jane Wheeler, Lisa Laifman, and Sara Ricks.

> The profound political intervention of feminism has been . . . to redefine the very nature of what is deemed political. . . . The literary ramifications of this shift involve the discovery of the rhetorical survival skills of the formerly unvoiced. Lies, secrets, silences, and deflections of all sorts are routes taken by voices or messages not granted full legitimacy in order not to be altogether lost.[1]

In 1970 the Supreme Court decided *Goldberg v. Kelly*.[2] The case, which held that welfare recipients are entitled to an oral hearing prior to having their benefits reduced or terminated, opened up a far-reaching conversation among legal scholars over the meaning of procedural justice. All voices in this conversation endorse a normative floor that would guarantee all persons the same formal opportunities to be heard in adjudicatory proceedings, regardless of such factors as race, gender, or class identity. Beyond this minimal normative consensus, however, two groups of scholars have very different visions of what procedural justice would entail. One group, seeing procedure as an *instrument* of just government, seeks devices that will most efficiently generate legitimate outcomes in a complex society.[3] Other scholars, however, by taking the perspective of society's marginalized groups, give voice to a very different—I will call it

1. B. Johnson, *Is Writerliness Conservative?*, in A WORLD OF DIFFERENCE 25, 31 (1987).

2. 397 U.S. 254 (1970). *Goldberg* was litigated as part of a broad initiative to increase the power and expand the benefits of welfare recipients. *See* R. COVER, O. FISS & J. RESNIK, PROCEDURE 133 (1988). For more extensive discussion of the National Welfare Rights Organization's political strategy, *see* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED AND HOW THEY FAIL 264-361 (1977); L. BAILIS, BREAD OR JUSTICE: GRASSROOTS ORGANIZING IN THE WELFARE RIGHTS MOVEMENT (1974) and sources cited therein.

3. This position was endorsed by the Supreme Court in Matthews v. Eldridge, 424 U.S. 319 (1976)(directing courts to balance accuracy, administrative costs, and other factors to determine the minimal procedures constitutionally required before the state can infringe a liberty or property interest). Jerry Mashaw has criticized the logic of the *Matthews* decision in *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Matthews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Yet it is Mashaw who has most fully articulated a vision of process as an instrument of just government in a bureaucratic state. *See* J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). *See also* his pre-*Matthews* article, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

a "humanist"—vision. According to this vision, "procedural justice" is a normative *horizon* rather than a technical problem. This horizon challenges us to realize the promise of formal procedural equality in the real world. But this horizon may beckon us even farther than equality of access to current adjudicatory rituals. It may invite us to create new legal and political institutions that will frame "stronger," more meaningful opportunities for participation[4] than we can imagine within a bureaucratic state.[5] *Goldberg* can be read to pre-figure this humanist vision of procedural justice. The Court's decision to mandate prior oral hearings for welfare recipients suggests "the Nation's basic commitment" to both substantive equality and institutional innovation in participation opportunities, in order to "foster the dignity and well-being of *all* persons within its borders."[6]

I begin this essay by assuming that the meaningful participation by all citizens in the governmental decisions that affect their lives—that is, the humanist vision—reflects a normatively compelling and widely shared intuition about procedural justice in our political culture.[7] The

---

4. *See* B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984).

5. Prominent among the legal scholars engaged in articulating this vision of process are Martha Minow and Frank Michelman. *See, e.g.*, Minow, *Interpreting Rights: an Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Minow, *The Supreme Court 1987 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Michelman, *The Supreme Court 1986 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS, DUE PROCESS 126 (J. Pennock & J. Chapman eds. 1977); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153.

6. Goldberg v. Kelly, *supra* note 2, at 264-65 (emphasis added). It is ironic that the *Goldberg* opinion itself fits best within the instrumentalist conversation about procedural values. Justice Brennan endorses oral pre-termination hearings for welfare recipients primarily because he assumes that such hearings will ensure accurate and politically legitimate decisions. Scholars from all political perspectives have raised questions about whether welfare hearings have in fact fulfilled those instrumental objectives, or otherwise increased the power of the poor. *See, e.g.*, Scott, *The Reality of Procedural Due Process — A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972) (empirical study of the implementation of fair hearings in Virginia welfare offices); Mashaw, *The Management Side of Due Process*, *supra* note 3 (questioning the efficiency of individualized welfare hearings in every context); Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983)(statistics show that hearing opportunities are rarely used by unrepresented clients). *See also* Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982); Rosenblatt, *Legal Entitlements and Welfare Benefits*, in THE POLITICS OF LAW (D. Kairys ed. 1982); J. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986); Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) (all raising questions about how effective procedural reforms have been in expanding the substantive entitlements or political power of the poor).

7. Studies by social scientist Tom Tyler suggest that one of the major factors that determine the degree of fairness that a litigant *perceives* in a procedure is her opportunity for participation. *See*

essay explores a disjuncture between this vision and the conditions in our society in which procedural rituals are actually played out. Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups. Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms. These conditions—the web of subterranean speech norms and coerced-speech practices that accompany race, gender, and class domination[8]—undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them. Furthermore, bureaucratic institutions disable *all* citizens—especially those from subordinated social groups—from meaningful participation in their own political lives.

. . .

This disjuncture between the norm of at least *equal*—if not also *meaningful*—participation opportunities for all citizens and a deeply stratified social reality reveals itself when subordinated speakers attempt to use the procedures that the system affords them. The essay tells the story of such an attempt—a story of enforced silence, rhetorical survival, and chance, as a poor woman engages in an administrative hearing at a welfare office. I tell the story more as a meditation than an argument—a

---

Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV.103 (1988). *See also*, Tyler, *The Role of Perceived Injustice in Defendant's Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984); J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975). *See also* O'Neil, *Of Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161, 187 n. 129 ("[t]he hearing . . . serves a psychological need in the administration of benefit programs that may be even more basic to a civilized system of administration than the function of ascertaining the truth.").

8. In this essay I use "gender, race, and class" not to denote physical traits of individuals, but rather to refer to schema of shared meaning that construct and support social hierarchy by reifying and ranking human differences. Thus, the very *concepts* of gender, race, and class are inextricably bound up with norms that construct and sustain subordination. Albert Memmi describes the process of race classification as follows:

> Racism is the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression. . . . Broadly speaking, the process is one of *gradual dehumanization*. The racist ascribes to his victim a series of surprising traits, calling him incomprehensible, impenetrable, mysterious, strange, disturbing, etc. Slowly he makes of his victim a sort of animal, a thing or simply a symbol.

A. MEMMI, DOMINATED MAN 191-95 (1968). Catharine MacKinnon explains the concept of gender: "Gender is also a question of power, specifically of male supremacy and female subordination. . . . [D]ifferences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who was who." C. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 40 (1987).

Some women or minority speakers may not experience these feelings at all: through social advantage and force of personality, they have learned to speak with force and authority. As more women and minorities enter elite social positions, the ranks of such exceptional individuals will increase. They will be more readily accepted by legal audiences as "social males." But for many speakers who are stigmatized by gender, race, or caste—those unwilling or unable to assume the role of a social male—the lived experience of inequality undermines the formal guarantee of an equal opportunity to participate in the rituals of the law. Mrs. G. is one of this majority. Through her story we can trace how the complex realities of social inequality undermine the law's formal promise of procedural justice.

A. *The Story*[78]

Mrs. G. is thirty-five years old, Black, and on her own. She has five girls, ranging in age from four to fourteen. She has never told me anything about their fathers; all I know is that she isn't getting formal child support payments from anyone. She lives on an AFDC[79] grant of just over three hundred dollars a month and a small monthly allotment of Food Stamps. She probably gets a little extra money from occasional jobs as a field hand or a maid, but she doesn't share this information with me and I don't ask. She has a very coveted unit of public housing, so she doesn't have to pay rent. She is taking an adult basic education class at the local community action center, which is in the same building as my own office. I often notice her in the classroom as I pass by.

The first thing that struck me about Mrs. G., when she finally came to my office for help one day, was the way she talked. She brought her two

---

Courtroom: Some Participants are More Equal than Others, 69 JUDICATURE 339 (1986). In addition to these studies, there is an empirical literature which examines how gender shapes the way that male listeners respond to women speakers, both in general and in the courtroom. On the general question, *see, e.g.*, Rasmussen & Moely, *Impression Formation as a Function of Sex Role Appropriateness of Linguistic Behavior*, 14 SEX ROLES 149 (1986); D. Halpern, *The Influence of Sex Role Stereotyping on Prose Recall*, 12 SEX ROLES 363 (1985). On the specific context of the courtroom, *see supra* text and notes 68-70. *See also* D. BINDER & P. BERGMAN, THE ASSESSMENT OF CREDIBILITY 17 (1977)(suggesting that jurors' presuppositions about the speaker might affect their credibility assessments). It is not merely ordinary witnesses whose credibility suffers because of audience stereotypes. Expert witnesses, female lawyers, and even female jurors are also victims of the process. *See* Hodgson & Pryor, *Sex Discrimination in the Courtroom: Attorney Gender and Credibility*, 71 WOMEN'S LAW J. 7 (1985); Sherman, *Women as Expert Witnesses: Trial and Tribulations*, 19 TRIAL 46 (Aug. 1983); McHugh, Sexism Hurts Lawyer Credibility, 131 Chicago Daily L. Bulletin 1 (Dec. 6 1985); Cohen & Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts*, 9 SOC. BEHAVIOR & PERSONALITY 81 (1981); Weisbrod, *supra* note 37, at 59.

78. This story is based upon my work as a legal aid lawyer in North Carolina from 1982 to 1986. Certain details have been changed to avoid compromising client confidentiality.

79. Aid to Families with Dependent Children, 42 U.S.C. §§ 601, 615 (1982).

oldest daughters with her. She would get very excited when she spoke, breathing hard and waving her hands and straining, like she was searching for the right words to say what was on her mind. Her daughters would circle her, like two young mothers themselves, keeping the air calm as her hands swept through it. I haven't talked with them much, but they strike me as quite self-possessed for their years.

At the time I met Mrs. G., I was a legal aid lawyer working in a small community in south central North Carolina. I had grown up in the state, but had been away for ten years, and felt like an outsider when I started working there. I worked out of two small rooms in the back of the local community action center. The building was run-down, but it was a store front directly across from the Civil War Memorial on the courthouse lawn, so it was easy for poor people to find.

There were two of us in the office, myself and a local woman who had spent a few years in Los Angeles, working as a secretary and feeling free, before coming back to the town to care for her aging parents. Her family had lived in the town for generations. Not too long ago they, and most of the other Black families I worked with, had been the property of our adversaries — the local landowners, businessmen, bureaucrats, and lawyers. Everyone seemed to have a strong sense of family, and of history, in the town.

In the late 1960s, the town had erupted into violence when a local youth who had read some Karl Marx and Malcolm X led some five thousand people down the local highway in an effort to integrate the county swimming pool. He had been charged with kidnapping as a result of the incident and had fled to Cuba, China, and ultimately Detroit. My colleague would talk to me about him in secretive tones. Her father was one of those who sheltered him from justice on the evening of his escape. I think she expected that one day he would come back to take up the project that was abandoned when he fled.

Since World War II, the town had been a real backwater for Black people. People told me that it was a place that was there to be gotten out of, if you could figure out how. Only gradually, in the 1980s, were a few African American families moving back into the area, to take up skilled jobs in chemicals and electronics. But the lives of most Blacks in the county in the early 1980's could be summed up by its two claims to fame. It was the county where the state's arch-conservative senior Senator had grown up. Locals claimed that the Senator's father, the chief of police at one time, was known for the boots he wore and the success he had at keeping Black people in their place. It was also the county where Steven Spielberg filmed *The Color Purple*. By the time Spielberg discovered the county, the dust from the 1960s had long since settled, and the town where I worked had the look of a sleepy Jim Crow village that time had quite entirely passed by.

Mrs. G. and two daughters first appeared at our office one Friday morning at about ten, without an appointment. I was booked for the whole day; the chairs in the tiny waiting room were already filled. But I called her in between two scheduled clients. Mrs. G. looked frightened. She showed me a letter from the welfare office that said she had received an "overpay-

ment" of AFDC benefits. Though she couldn't read very well, she knew that the word "overpayment" meant fraud. Reagan's newly appointed United States attorney, with the enthusiastic backing of Senator Jesse Helms, had just announced plans to prosecute "welfare cheats" to the full extent of the law. Following this lead, a grand jury had indicted several local women on federal charges of welfare fraud. Therefore, Mrs. G. had some reason to believe that "fraud" carried the threat of jail.

The "letter" was actually a standardized notice that I had seen many times before. Whenever the welfare department's computer showed that a client had received an overpayment, it would kick out this form, which stated the amount at issue and advised the client to pay it back. The notice did not say why the agency had concluded that a payment error had been made. Nor did it inform the client that she might contest the county's determination. Rather, the notice assigned the client a time to meet with the county's fraud investigator to sign a repayment contract and warned that if the client chose not to show up at this meeting further action would be taken. Mrs. G.'s meeting with the fraud investigator was set for the following Monday.

At the time, I was negotiating with the county over the routine at these meetings and the wording on the overpayment form. Therefore, I knew what Mrs. G. could expect at the meeting. The fraud worker would scold her and then ask her to sign a statement conceding the overpayment, consenting to a 10 percent reduction of her AFDC benefits until the full amount was paid back, and advising that the government could still press criminal charges against her.

I explained to Mrs. G. that she did not have to go to the meeting on Monday, or to sign any forms. She seemed relieved and asked if I could help her get the overpayment straightened out. I signed her on as a client and, aware of the other people waiting to see me, sped through my canned explanation of how I could help her. Then I called the fraud investigator, canceled Monday's meeting, and told him I was representing her. Thinking that the emergency had been dealt with, I scheduled an appointment for Mrs. G. for the following Tuesday and told her not to sign anything or talk to anyone at the welfare office until I saw her again.

The following Tuesday Mrs. G. arrived at my office looking upset. She said she had gone to her fraud appointment because she had been "afraid not to." She had signed a paper admitting she owed the county about six hundred dollars, and agreeing to have her benefits reduced by thirty dollars a month for the year and a half it would take to repay the amount. She remembered I had told her not to sign anything; she looked like she was waiting for me to yell at her or tell her to leave. I suddenly saw a woman caught between two bullies, both of us ordering her what to do.

I hadn't spent enough time with Mrs. G. the previous Friday. For me, it had been one more emergency—a quick fix, an appointment, out the door. It suddenly seemed pointless to process so many clients, in such haste, without any time to listen, to challenge, to think together. But what to do, with so many people waiting at the door? I mused on these thoughts for a

moment, but what I finally said was simpler. I was furious. Why had she gone to the fraud appointment and signed the repayment contract? Why hadn't she done as *we* had agreed? Now it would be so much harder to contest the county's claim: we would have to attack *both* the repayment contract *and* the underlying overpayment claim. Why hadn't she listened to me?

Mrs. G. just looked at me in silence. She finally stammered that she knew she had been "wrong" to go to the meeting when I had told her not to and she was "sorry."

After we both calmed down I mumbled my own apology and turned to the business at hand. She told me that a few months before she had received a cash settlement for injuries she and her oldest daughter had suffered in a minor car accident. After medical bills had been paid and her lawyer had taken his fees, her award came to $592. Before Mrs. G. cashed the insurance check, she took it to her AFDC worker to report it and ask if it was all right for her to spend it. The system had trained her to tell her worker about every change in her life. With a few exceptions, any "income" she reported would be subtracted, dollar for dollar, from her AFDC stipend.

The worker was not sure how to classify the insurance award. After talking to a supervisor, however, she told Mrs. G. that the check would not affect her AFDC budget and she could spend it however she wanted.

Mrs. G. cashed her check that same afternoon and took her five girls on what she described to me as a "shopping trip." They bought Kotex, which they were always running short on at the end of the month. They also bought shoes, dresses for school, and some frozen food. Then she made two payments on her furniture bill. After a couple of wonderful days, the money was gone.

Two months passed. Mrs. G. received and spent two AFDC checks. Then she got the overpayment notice, asking her to repay to the county an amount equal to her insurance award.

When she got to this point, I could see Mrs. G. getting upset again. She had told her worker everything, but nobody had explained to her what she was supposed to do. She hadn't meant to do anything wrong. I said I thought the welfare office had done something wrong in this case, not Mrs. G. I thought we could get the mess straightened out, but we'd need more information. I asked if she could put together a list of all the things she had bought with the insurance money. If she still had any of the receipts, she should bring them to me. I would look at her case file at the welfare office and see her again in a couple of days.

The file had a note from the caseworker confirming that Mrs. G. had reported the insurance payment when she received it. The note also showed that the worker did not include the amount in calculating her stipend. The "overpayment" got flagged two months later when a supervisor, doing a random "quality control" check on her file, discovered the worker's note. Under AFDC law, the insurance award was considered a "lump sum pay-

ment."[80] Aware that the law regarding such payments had recently changed, the supervisor decided to check out the case with the state quality control office.

He learned that the insurance award did count as income for AFDC purposes under the state's regulations;[81] indeed, the county should have cut Mrs. G. off of welfare entirely for almost two months on the theory that her family could live for that time off of the insurance award. The lump sum rule was a Reagan Administration innovation designed to teach poor people the virtues of saving money and planning for the future.[82] Nothing in the new provision required that clients be warned in advance about the rule change, however.[83] Only in limited circumstances was a state free to waive the rule.[84] Without a waiver, Mrs. G. would have to pay back $592 to the welfare office. If the county didn't try to collect the sum from Mrs. G., it would be sanctioned for an administrative error.[85]

---

80. *See* 42 U.S.C. § 602(a)(17)(Supp. III 1982 ed.) and 45 C.F.R. 233.20(a)(3)(ii)(F)(1988). The implementing regulation states that "[w]hen the AFDC assistance unit's income . . . exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including . . . personal injury . . . awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills resulting from accidents or injury . . .), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size."

81. In contrast to other federal statutes, such as the Internal Revenue Code, which exclude insurance settlements for personal injury from income, *see, e.g.*, I.R.C. § 104 (1982), the AFDC statute has been interpreted to authorize states to include personal injury awards in the income definition to which the lump sum rule applies. The federal regulations implementing the lump sum rule went farther than the statutory authorization, by affirmatively *requiring* the states to classify all non-recurring lump sum payments, including insurance awards, as income. *See supra* note 80. The statute's inclusion of personal injury awards in its definition of "income" was unsuccessfully challenged by poverty advocates in Lukhard v. Reed, 481 U.S. 368 (1987)(AFDC statute permits states to define personal injury awards as "income" for AFDC purposes, even though common usage and other federal statutory schemes do not do so).

82. The provision was added to the AFDC statute by § 2304 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), 95 STAT. 845, *as amended*, 42 U.S.C. § 602(a)(17)(Supp. III 1982). *See* S. REP. No. 35, 97th Cong., 1st Sess. 436, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 702; Bell v. Massinga, 721 F.2d 131 (4th Cir. 1983).

83. *See* Gardebring v. Jenkins, 485 U.S. 415 (1988)(Federal AFDC regulations do not require that each recipient be given advance notification of the lump sum provision before the provision can be enforced).

84. *See* 45 C.F.R. § 233.20(a)(3)(ii)(F)("A State may shorten the period of ineligibility when . . . the lump sum income or a portion thereof becomes unavailable to the family for a reason beyond the control of the family . . ."). In its explanation of this regulation, the Department of Health and Human Services stated that "a State may shorten the period of ineligibility where it finds a life-threatening circumstance exists, and the non-recurring income causing the period of ineligibility has been or will be expended in connection with the life-threatening circumstance." *See* 47 Fed. Reg. 5654 (Feb. 5, 1982).

85. The federal government monitors the state welfare agencies which administer the AFDC program for erroneous overpayments, but not erroneous underpayments. If a state's "error rate" is deemed too great, the federal government sanctions the state by reducing its AFDC funding. *See* Casey & Mannix, *Quality Control in Public Assistance: Victimizing the Poor through One-sided Accountability*, 22 CLEARINGHOUSE REV. 1381 (1989). This policy was reviewed and critiqued in a

I met again with Mrs. G. the following Friday. When I told her what I had pieced together from her file, she insisted that she had asked her worker's permission before spending the insurance money. Then she seemed to get flustered and repeated what had become a familiar refrain. She didn't want to make any trouble. She hadn't meant to do anything wrong. I told her that it looked to me like it was the welfare office—and not her—who had done something wrong. I said I would try to get the county to drop the matter, but I thought we might have to go to a hearing, finally, to win.

Mrs. G. had been in court a few times to get child support and to defend against evictions, but she had never been to a welfare hearing. She knew that it was not a good idea to get involved in hearings, however, and she understood why. Fair hearings were a hassle and an embarrassment to the county. A hearing meant pulling an eligibility worker and several managers out of work for a few hours, which—given the chronic under-staffing of the welfare office—was more than a minor inconvenience. It also meant exposing the county's administrative problems to state-level scrutiny.

Front-line eligibility workers were especially averse to hearings because the county's easiest way to defend against its own blunders was to point to the worker as the source of the problem. As a result, the workers did all they could to persuade clients that they would lose, in the end, if they insisted on hearings. The prophesy was self-fulfilling, given the subtle and diffuse retaliation that would often follow for the occasional client who disregarded this advice.

I could tell that Mrs. G. felt pressure from me to ask for a hearing, but she also seemed angry at the welfare office for asking her to pay for their mistake. I said that it was her decision, and not mine, whether to ask for the hearing, and reassured her that I would do my best to settle the matter, no matter what she decided. I also told her she could drop the hearing request at any time, for any reason, before or even after the event. When she nervously agreed to file the hearing request, I didn't second-guess her decision.

My negotiations failed. The county took the position that the worker should have suspended Mrs. G.'s AFDC as soon as the client had reported the insurance payment. This mistake was "regrettable," but it didn't shift the blame for the overpayment. Mrs. G.—and not the county—had received more welfare money than she was entitled to. End of discussion. I then appealed to state officials. They asked if the county would concede that the worker told Mrs. G. she was free to spend her insurance award as she pleased. When county officials refused, and the details of this conversation did not show up in the client's case file, the state declined to intervene. Mrs. G. then had to drop the matter or gear up for a hearing. After a lot of hesitation, she decided to go forward.

---

study commissioned by Congress and performed by the National Academy of Sciences in 1988. *See* Panel on Quality Control of Family Assistance Programs, Committee on National Statistics, Commission on Behavioral and Social Sciences and Education, FROM QUALITY CONTROL TO QUALITY IMPROVEMENT IN AFDC AND MEDICAID (F. Kramer ed. 1988).

Mrs. G. brought all five of her girls to my office to prepare for the hearing. Our first task was to decide on a strategy for the argument. I told her that I saw two stories we could tell. The first was the story she had told me. It was the "estoppel"[86] story, the story of the wrong advice she got from her worker about spending the insurance check. The second story was one that I had come up with from reading the law. The state had laid the groundwork for this story when it opted for the "life necessities" waiver permitted by federal regulations.[87] If a client could show that she[88] had spent the sum to avert a crisis situation, then it would be considered "unavailable" as income, and her AFDC benefits would not be suspended. I didn't like this second story very much, and I wasn't sure that Mrs. G. would want to go along with it. How could I ask her to distinguish "life necessities" from mere luxuries, when she was keeping five children alive on three hundred dollars a month, and when she had been given no voice in the calculus that had determined her "needs."

Yet I felt that the necessities story might work at the hearing, while "estoppel" would unite the county and state against us. According to legal aid's welfare specialist in the state capital, state officials didn't like the lump sum rule. It made more paper work for the counties. And, by knocking families off the federally financed AFDC program, the rule increased the pressure on state and county-funded relief programs. But the only way the state could get around the rule without being subject to federal sanctions was through the necessities exception. Behind the scenes, state officials were saying to our welfare specialist that they intended to interpret the exception broadly. In addition to this inside information that state officials would prefer the necessities tale, I knew from experience that they would feel comfortable with the role that story gave to Mrs. G. It would place her on her knees, asking for pity as she described how hard she was struggling to make

86. In public benefit cases, the courts have generally held that the doctrine of estoppel cannot be used against the government when a government agent's misinformation results in a claimant's loss of benefits. *See* Schweiker v. Hansen, 450 U. S. 785 (1981). The *Hansen* opinion states in dicta that estoppel may be justified in some circumstances, but the court did not specify what those circumstances might be. *Id.* at 788. Lower court cases have allowed estoppel against the government when an official gives a claimant erroneous factual information which the claimant was not in a position to identify and avoid, and when compensating the claimant will neither undermine important federal interests or deplete the public fisc. *See, e.g.*, Scime v. Secretary of H.H.S., 647 F. Supp. 89, 93 (W.D.N.Y. 1986), *rev'd*, 822 F.2d 7; McDonald v. Schweiker, 537 F. Supp. 47, 50 (N.D.Ind. 1981).

87. *See supra* note 84. The state implemented the exception for "life threatening circumstances" through D.S.S. Administrative Letter No. IPA-8-84 (DSS-3430)("Lump Sum Payments")(March, 82). The regulation illustrates "Life-threatening situations" by a list of six specific events, such as "serious health hazard to a member of the assistance unit, such as but not limited to a situation where the recipient's house is uninhabitable and the recipient must use the lump sum for essential repairs or necessary utilities." The seventh item on the list authorizes the "county director or his designee" to determine other life-threatening situations on a case by case basis. *See id.* § C-1-g.

88. I use "she" because virtually all of my clients who received AFDC benefits were single mothers. Although single fathers with custody of their children are technically eligible to receive AFDC, they account for an insubstantial percentage of the recipient pool: in my four years of welfare advocacy, I did not encounter any single fathers on AFDC.

ends meet.[89]

The estoppel story would be entirely different. In it, Mrs. G. would be pointing a finger, turning the county itself into the object of scrutiny. She would accuse welfare officials of wrong, and claim that they had caused her injury. She would demand that the county bend its own rules, absorb the overpayment out of its own funds, and run the risk of sanction from the state for its error.

As I thought about the choices, I felt myself in a bind. The estoppel story would feel good in the telling, but at the likely cost of losing the hearing, and provoking the county's ire. The hearing officer—though charged to be neutral—would surely identify with the county in this challenge to the government's power to evade the costs of its own mistakes. The necessities story would force Mrs. G. to grovel, but it would give both county and state what they wanted to hear—another "yes sir" welfare recipient.

This bind was familiar to me as a poverty lawyer. I felt it most strongly in disability hearings, when I would counsel clients to describe themselves as totally helpless in order to convince the court that they met the statutory definition of disability.[90] But I had faced it in AFDC work as well, when I taught women to present themselves as abandoned, depleted of resources, and encumbered by children to qualify for relief.[91] I taught them to say yes to the degrading terms of "income security," as it was called — invasions of sexual privacy, disruptions of kin-ties, the forced choice of one sibling's welfare over another's.[92] Lawyers had tried to challenge these

---

89. The costs of this posture have been eloquently described by Patricia Williams in *Alchemical Notes*, *supra* note 24, at 419-20 (1987):

> I got through law school, quietly driven by the false idol of the white-man-within-me, and I absorbed a whole lot of the knowledge and the values which had enslaved me and my foremothers. . . . I learned to undo images of power with images of powerlessness; to clothe the victims of excessive power in utter, bereft naivete; to cast them as defenseless supplicants raising — *pleading*— defenses of duress, undue influence and fraud. I learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice.

90. To be eligible for disability payments under the Social Security Act, one must be unable to engage in substantial gainful activity because of a medically determinable physical or mental impairment that is expected to result in death or to continue for at least 12 months. *See* 42 U.S.C. 423(d)(1982).

91. Under current law, in order to receive AFDC benefits, a family must meet the categorical requirement of "deprivation" — the absence of two able-bodied parents in the home — as well as a means test. *See* 42 U.S.C. 606(a)(1982). This requirement has been widely criticized for its exclusion of two-earner families living in poverty, and for the consequent pressure it places upon poor couples to live apart in order to receive benefits. *See, e.g.*, R. SIDEL, WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA (1986); Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1988).

92. To receive AFDC, women — with narrowly drawn exemptions for cause — must cooperate with the state in prosecuting paternity and child support actions, and in assigning child support payments to the state to repay AFDC benefits. *See* 42 U.S.C. 602(a)(26)(B)(1982). In Roe v. Norton, 422 U.S. 391 (1975), the Supreme Court found these conditions to be constitutional. *See* Sugarman, *Roe v. Norton: Coerced Maternal Cooperation*, in IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 365 (R. Mnookin ed. 1985). In addition, a mother must apply

conditions, but for the most part the courts had confirmed that the system could take such license with its women. After all, poor women were free to say no to welfare if they weren't pleased with its terms.[93]

As I contemplated my role as an advocate, I felt again the familiar sense that I had been taken. Here I was, asking Mrs. G. to trust me, talking with her about our conspiring together to beat the system and strategizing together to change it. Here I was, thinking that what I was doing was educative and empowering or at least supportive of those agendas, when all my efforts worked, in the end, only to teach her to submit to the system in all of the complex ways that it demanded.

In the moment it took for these old thoughts to flit through my mind, Mrs. G. and her children sat patiently in front of me, fidgeting, waiting for me to speak. My focus returned to them and the immediate crisis they faced if their AFDC benefits were cut. What story should we tell at the hearing, I wondered out loud. How should we decide? Mechanically at first, I began to describe to her our "options."

When I explained the necessities story, Mrs. G. said she might get confused trying to remember what all she had bought with the money. Why did they need to know those things anyway? I could tell she was getting angry. I wondered if two months of benefits—six hundred dollars—was worth it. Maybe paying it back made more sense. I reminded her that we didn't have to tell this story at the hearing, and in fact, we didn't have to go to the hearing at all. Although I was trying to choose my words carefully, I felt myself saying too much. Why had I even raised the question of which story to tell? It was a tactical decision—not the kind of issue that clients were supposed to decide.[94] Why hadn't I just told her to answer the questions that I chose to ask?

Mrs. G. asked me what to do. I said I wanted to see the welfare office admit their mistake, but I was concerned that if we tried to make them, we would lose. Mrs. G. said she still felt like she'd been treated unfairly but—in the next breath—"I didn't mean to do anything wrong." Why couldn't

---

for AFDC benefits for all of her children living in the household, even those who have an independent source of income such as child support or Social Security benefits. That income is then deemed available to the other children, and justifies a cut in the family's AFDC grant. *See* 42 U.S.C. 602(a)(38)(Supp. III 1982). This provision was found constitutional in Bowen v. Gilliard, 483 U.S. 587 (1987). *See* Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1987-88). For a history of oppressive conditions of AFDC participation on the state level, *see* W. Bell, AID TO DEPENDENT CHILDREN (1965).

93. *See* Bowen v. Gilliard, 483 U.S. at 608. The majority responded to the record of harms caused by the sibling-deeming requirement by stating that "[t]he law does not require any custodial parent to apply for AFDC benefits." The dissent responded that "[t]he court has thus assumed that participation in a benefit program reflects a decision by the recipient that he or she is better off by meeting whatever conditions are attached to participation than not receiving benefits." *Id.*

94. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2 Comment (1983)("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . . ."). Whether this provision intends for lawyers unilaterally to select the basic legal theories they will advance in a case is, however, a subject of debate.

we tell both stories? With this simple question, I lost all pretense of strategic subtlety or control. I said sure.

I asked for the list she had promised to make of all the things she bought with the insurance money. Kotex, I thought, would speak for itself, but why, I asked, had she needed to get the girls new shoes? She explained that the girls' old shoes were pretty much torn up, so bad that the other kids would make fun of them at school. Could she bring in the old shoes? She said she could.

We rehearsed her testimony, first about her conversation with her worker regarding the insurance award and then about the Kotex and the shoes. Maybe the hearing wouldn't be too bad for Mrs. G., especially if I could help her see it all as strategy, rather than the kind of talking she could do with people she could trust. She had to distance herself at the hearing. She shouldn't expect them to go away from it understanding why she was angry, or what she needed, or what her life was like. The hearing was their territory. The most she could hope for was to take it over for a moment, leading them to act out her agenda. Conspiracy was the theme she must keep repeating as she dutifully played her role.

We spent the next half hour rehearsing the hearing. By the end, she seemed reasonably comfortable with her part. Then we practiced the cross-examination, the ugly questions that—even though everyone conceded to be irrelevant—still always seemed to get asked . . . questions about her children, their fathers, how long she had been on welfare, why she wasn't working instead. This was the part of these sessions that I disliked the most. We practiced me objecting and her staying quiet and trying to stay composed. By the end of our meeting, the whole thing was holding together, more or less.

The hearing itself was in a small conference room at the welfare office. Mrs. G. arrived with her two oldest daughters and five boxes of shoes. When we got there the state hearing officer and the county AFDC director were already seated at the hearing table in lively conversation. The AFDC director was a youngish man with sandy hair and a beard. He didn't seem like a bureaucrat until he started talking. I knew most of the hearing officers who came to the county, but this one, a pale, greying man who slouched in his chair, was new to me. I started feeling uneasy as I rehearsed how I would plead this troubling case to a stranger.

We took our seats across the table from the AFDC director. The hearing officer set up a portable tape recorder and got out his bible. Mrs. G.'s AFDC worker, an African American woman about her age, entered through a side door and took a seat next to her boss. The hearing officer turned on the recorder, read his obligatory opening remarks, and asked all the witnesses to rise and repeat before god that they intended to tell the truth. Mrs. G. and her worker complied.

The officer then turned the matter over to me. I gave a brief account of the background events and then began to question Mrs. G. First I asked her about the insurance proceeds. She explained how she had received an insurance check of about six hundred dollars following a car accident in which

she and her oldest daughter had been slightly injured. She said that the insurance company had already paid the medical bills and the lawyer; the last six hundred dollars was for her and her daughter to spend however they wanted. I asked her if she had shown the check to her AFDC worker before she cashed it. She stammered. I repeated the question. She said she may have taken the check to the welfare office before she cashed it, but she couldn't remember for sure. She didn't know if she had gotten a chance to talk to anyone about it. Her worker was always real busy.

Armed with the worker's own sketchy notation of the conversation in the case file, I began to cross-examine my client, coaxing her memory about the event we had discussed so many times before. I asked if she remembered her worker telling her anything about how she could spend the money. Mrs. G. seemed to be getting more uncomfortable. It was quite a predicament for her, after all. If she "remembered" what her worker had told her, would her story expose mismanagement in the welfare office, or merely scapegoat another Black woman, who was not too much better off than herself?

When she repeated that she couldn't remember, I decided to leave the estoppel story for the moment. Maybe I could think of a way to return to it later. I moved on to the life necessitates issue. I asked Mrs. G. to recount, as best she could, exactly how she had spent the insurance money. She showed me the receipts she had kept for the furniture payments and I put them into evidence. She explained that she was buying a couple of big mattresses for the kids and a new kitchen table. She said she had also bought some food—some frozen meat and several boxes of Kotex for all the girls. The others in the room shifted uneasily in their chairs. Then she said she had also bought her daughters some clothes and some shoes. She had the cash register receipt for the purchase.

Choosing my words carefully, I asked why she had needed to buy the new shoes. She looked at me for a moment with an expression that I couldn't read. Then she stated, quite emphatically, that they were Sunday shoes that she had bought with the money. The girls already had everyday shoes to wear to school, but she had wanted them to have nice shoes for church too. She said no more than two or three sentences, but her voice sounded different—stronger, more composed—than I had known from her before. When she finished speaking the room was silent, except for the incessant hum of the tape machine on the table and the fluorescent lights overhead. In that moment, I felt the boundaries of our "conspiracy" shift. Suddenly I was on the outside, with the folks on the other side of the table, the welfare director and the hearing officer. The only person I could not locate in this new alignment was Mrs. G.'s welfare worker.

I didn't ask Mrs. G. to pull out the children's old shoes, as we'd rehearsed. Nor did I make my "life necessities" argument. My lawyer's language couldn't add anything to what she had said. They would have to figure out for themselves why buying Sunday shoes for her children—and saying it—was indeed a "life necessity" for this woman. After the hearing, Mrs. G. seemed elated. She asked me how she had done at the hearing and I

told her that I thought she was great. I warned her, though, that we could never be sure, in this game, who was winning, or even what side anyone was on.

We lost the hearing and immediately petitioned for review by the chief hearing officer. I wasn't sure of the theory we'd argue, but I wanted to keep the case open until I figured out what we could do.

Three days after the appeal was filed, the county welfare director called me unexpectedly, to tell me that the county had decided to withdraw its overpayment claim against Mrs. G. He explained that on a careful review of its own records, the county had decided that it wouldn't be "fair" to make Mrs. G. pay the money back. I said I was relieved to hear that they had decided, finally, to come to a sensible result in the case. I was sorry they hadn't done so earlier. I then said something about how confusing the lump sum rule was and how Mrs. G.'s worker had checked with her supervisor before telling Mrs. G. it was all right to spend the insurance money. I said I was sure that the screw up was not anyone's fault. He mumbled a bureaucratic pleasantry and we hung up.

When I told Mrs. G. that she had won, she said she had just wanted to "do the right thing," and that she hoped they understood that she'd never meant to do anything wrong. I repeated that they were the ones who had made the mistake. Though I wasn't sure exactly what was going on inside the welfare office, at least this crisis was over.

B. *The Terrain*

Mrs. G. had a hearing in which all of the rituals of due process were scrupulously observed. Yet she did not find her voice welcomed at that hearing. A complex pattern of social, economic, and cultural forces underwrote the procedural formalities, repressing and devaluing her voice. Out of that web of forces, I will identify three dominant themes, all of them linked, sometimes subtly, to Mrs. G.'s social identity as poor, Black, and female. The first theme is *intimidation*. Mrs. G. did not feel that she could risk speaking her mind freely to welfare officials. She lived in a community in which the social hierarchy had a caste-like rigidity. As a poor Black woman, her position at the bottom accorded her virtually no social or political power. She depended on welfare to survive and did not expect this situation to change in the future. She was simply not situated to take action that might displease her superiors. The second theme is *humiliation*. Even if Mrs. G. could find the courage to speak out at the hearing, her words were not likely to be heard as legitimate, because of the language she had learned to speak as a poor woman of color, and because of the kind of person that racist and gendered imagery portrayed her to be. The final theme is *objectification*. Because Mrs. G. had little voice in the political process that set the substantive terms of her welfare

The New York Times

Trump Blasts Sessions for Charging G.O.P. Members Before Midterms

By Katie Rogers and Katie Benner

Sept. 3, 2018

WASHINGTON — President Trump on Monday attacked Jeff Sessions, his attorney general, over the Justice Department's decision to bring criminal charges against two Republican congressmen ahead of the midterm elections, linking the department's actions with his party's political fate.

In a pair of tweets sent midafternoon, Mr. Trump suggested that the Justice Department should not have brought charges against two "very popular" Republican lawmakers running for re-election so close to November because it could jeopardize the party's control of the House.

"Two long running, Obama era, investigations of two very popular Republican Congressmen were brought to a well publicized charge, just ahead of the Mid-Terms, by the Jeff Sessions Justice Department," Mr. Trump wrote on Twitter. "Two easy wins now in doubt because there is not enough time. Good job Jeff."

In another tweet, he suggested that Mr. Sessions, a former senator who was one of Mr. Trump's only vocal defenders early in his campaign, had fallen into favor with Democrats after the charges were delivered.

Donald J. Trump
@realDonaldTrump

Two long running, Obama era, investigations of two very popular Republican Congressmen were brought to a well publicized charge, just ahead of the Mid-Terms, by the Jeff Sessions Justice Department. Two easy wins now in doubt because there is not enough time. Good job Jeff.....

12:25 PM - Sep 3, 2018

79K 63K people are talking about this

Donald J. Trump
@realDonaldTrump

> ....The Democrats, none of whom voted for Jeff Sessions, must love him now. Same thing with Lyin' James Comey. The Dems all hated him, wanted him out, thought he was disgusting - UNTIL I FIRED HIM! Immediately he became a wonderful man, a saint like figure in fact. Really sick!
> 12:39 PM - Sep 3, 2018
>
> 99.9K 47.5K people are talking about this

The president was most likely referring to two recent cases: Last month, Duncan Hunter, Republican of California, was **indicted by a federal grand jury** on charges that he and his wife, Margaret, used more than $250,000 in campaign funds to pay for personal expenses. Chris Collins, a Republican of New York and an ardent supporter of Mr. Trump's, was **indicted on charges of insider trading.**

Both lawmakers have pleaded not guilty to the charges.

Mr. Trump has frequently berated Mr. Sessions and publicly questioned his judgment since the attorney general's decision in March 2017 to **recuse himself from the special counsel's investigation** into the Trump campaign's ties with Russia.

Until Monday, Mr. Trump had not so overtly tied the Justice Department's responsibility for pursuing charges against alleged criminals with Republicans' election prospects.

Last week, it even appeared that Mr. Trump would stop publicly toying with the idea of removing Mr. Sessions until after the midterm elections.

"I just would love to have him do a great job," Mr. Trump said in an interview with Bloomberg News in the Oval Office last week. "I do question what Jeff is doing."

By calling it the "Jeff Sessions Justice Department," Mr. Trump put even more distance between himself and the country's top law enforcement organization, which is investigating members of his inner circle and his business dealings.

Those inquiries are being conducted by the United States attorney's office in the Southern District of New York and by Robert S. Mueller III, the special counsel appointed to investigate Russian election interference and any ties to the Trump campaign.

Mr. Trump's tweets — sent from the White House on a searingly hot day that kept him from departing for his nearby Virginia golf course — criticized indictments that fall well within the Justice Department's window for bringing charges during an election cycle.

His comments triggered a swift rebuke from former prosecutors and members of his own party.

"The United States is not some banana republic with a two-tiered system of justice — one for the majority and one for the minority party," Senator Ben Sasse, Republican of Nebraska and a member of the Judiciary Committee, said in a statement. "These two men have been charged with crimes because of evidence, not because of who the president was when the investigations began."

The investigations into Mr. Trump's inner circle have resulted in a string of guilty pleas and convictions that include two members of the Trump campaign and Mr. Trump's personal lawyer, Michael D. Cohen. Allen Weisselberg, the chief financial officer of the Trump Organization, and David Pecker, the publisher of the National Enquirer and Mr. Trump's longtime friend, have also cooperated to some degree with federal investigators.

Mr. Trump has used Twitter to cast the investigations into his conduct and that of his associates as witch hunts propagated by career government employees.

"The president is trying to delegitimize the criminal justice system in this country because people close to him are at risk," said Joyce Vance, a former federal prosecutor.

The Justice Department declined to comment. After Mr. Trump attacked the department, its methods and the outcome of its cases last month, in the wake of prosecutors' securing a guilty plea from Mr. Cohen and a guilty verdict for the president's former campaign manager, Mr. Sessions issued a rare rebuke.

"While I am attorney general, the actions of the Department of Justice will not be improperly influenced by political considerations," Mr. Sessions said in his statement. "No nation has a more talented, more dedicated group of law enforcement investigators and prosecutors than the United States."

Only one of the two indicted congressmen will drop out from his bid for re-election this fall. Mr. Hunter **cannot take his name off the ballot** in California, and maintains a strong chance of re-election against a first-time Democratic opponent. In the 47-page indictment, Mr. Hunter and his wife are accused of hiding personal expenses as gifts for "wounded warriors" and using the money to pay for lavish expenditures, including vacations and a plane ticket for a pet rabbit.

Mr. Collins, who pleaded not guilty in early August, announced days later that **he would suspend his campaign** for re-election in New York. The indictment **immediately weakened** the chances of Mr. Collins's seat remaining Republican, although the Cook Political Report, a nonpartisan political handicapper, maintains that the seat is a "likely" Republican victory.

Federal prosecutors say Mr. Collins used his seat on the board of an Australian-based drug company to privately tip off his son and other investors — before the information was made public — that the company's only product had failed a do-or-die scientific trial. Because his son and others dumped their stocks before the public announcement, they avoided losing hundreds of thousands of dollars.

Mr. Collins **received the message that tipped him off** while he was attending the 2017 congressional picnic at the White House, according to the scene described in court papers.

It was clear that elections were on the president's mind on Monday. After tweeting about Mr. Sessions, Mr. Trump attacked John Kerry, the former senator and Democratic presidential candidate, for suggesting that he might run again for president in 2020.

"I should only be so lucky - although the field that is currently assembling looks really good - FOR ME!" Mr. Trump wrote.

Emily Cochrane contributed reporting.

A version of this article appears in print on Sept. 3, 2018, on Page A11 of the New York edition with the headline: Trump Berates Sessions for Charging 2 G.O.P. Congressmen Running for Re-election

READ 454 COMMENTS

The New York Times

'There's No Reason to Apologize' for Muslim Ban Remarks, Trump Says

By Adam Liptak

April 30, 2018

WASHINGTON — President Trump said on Monday that he would not apologize for campaign statements calling for a "Muslim ban," appearing to undercut an assertion at **a Supreme Court argument last week** from Solicitor General Noel J. Francisco. In defending Mr. Trump's efforts to restrict travel from several predominantly Muslim countries, Mr. Francisco said that the president had already disavowed the statements.

Mr. Francisco's own assertion contained a mistake, a Justice Department spokeswoman said on Monday. "The president has made crystal clear on Sept. 25 that he had no intention of imposing the Muslim ban," Mr. Francisco said during the argument. But he got the date wrong by eight months, and critics said the statement he referred to was less than crystal clear.

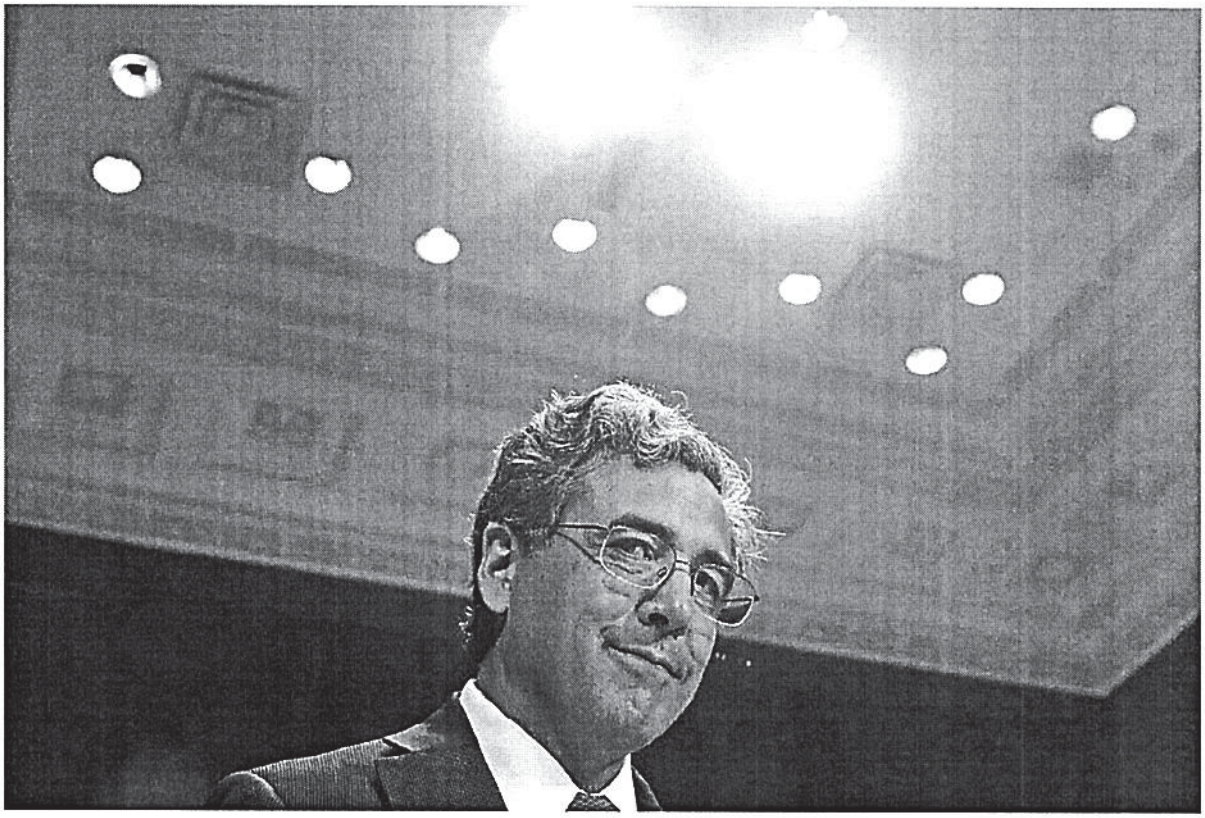
Mr. Trump's comment and the Justice Department's clarification arose from an exchange at Wednesday's argument.

Chief Justice John G. Roberts Jr. asked whether Mr. Trump could immunize his order from constitutional challenge by disavowing his campaign statements.

A lawyer for the challengers, Neal K. Katyal, said yes, but he added that Mr. Trump and his advisers had never repudiated the campaign statements. "Instead they embraced them," he said.

On Monday, Mr. Trump appeared to do so again. Told by a reporter that "the lawyers for the opponents said that if you would simply apologize for some of your rhetoric during the campaign, the whole case would go away," Mr. Trump was skeptical and unrepentant.

"I don't think it would, No. 1," he said. "And there's no reason to apologize. Our immigration laws in this country are a total disaster. They're laughed at all over the world — they're laughed at for their stupidity, and we have to have strong immigration laws. So I think if I apologize, it wouldn't make 10 cents' worth of difference to them. There's nothing to apologize for."



Solicitor General Noel J. Francisco said last week that Mr. Trump had disavowed his campaign statements calling for a Muslim ban. Mark Wilson/Getty Images

At the argument, Mr. Francisco's reference to a Sept. 25 statement from Mr. Trump confused many observers. That was the day after Mr. Trump issued his latest travel ban, and such a statement would have shed timely light on what he had intended it to accomplish. But Mr. Francisco misspoke. He had meant to refer to an interview Mr. Trump gave on Jan. 25, 2017, not long before he issued his original travel ban, the first of three.

"It's not the Muslim ban," Mr. Trump said in the interview. "But it's countries that have tremendous terror."

Critics of the administration said the interview was not the "crystal clear" statement Mr. Francisco had described.

Leah Litman, a law professor at the University of California, Irvine, wrote on Take Care, a legal blog, that the interview included no disavowal of or apology for Mr. Trump's campaign pledge to impose a "Muslim ban."

Follow Adam Liptak on Twitter: @adamliptak.

A version of this article appears in print on April 30, 2018, on Page A15 of the New York edition with the headline: President Says He Won't Apologize For His Remarks Over 'Muslim Ban'

The New York Times

In His Haste to Roll Back Rules, Scott Pruitt, E.P.A. Chief, Risks His Agenda

By Coral Davenport and Lisa Friedman

April 7, 2018

WASHINGTON — As ethical questions threaten the Environmental Protection Agency administrator, Scott Pruitt, President Trump has defended him with a persuasive conservative argument: Mr. Pruitt is doing a great job at what he was hired to do, roll back regulations.

But legal experts and White House officials say that in Mr. Pruitt's haste to undo government rules and in his eagerness to hold high-profile political events promoting his agenda, he has often been less than rigorous in following important procedures, leading to poorly crafted legal efforts that risk being struck down in court.

The result, they say, is that the rollbacks, intended to fulfill one of the president's central campaign pledges, may ultimately be undercut or reversed.

"In their rush to get things done, they're failing to dot their i's and cross their t's. And they're starting to stumble over a lot of trip wires," said Richard Lazarus, a professor of environmental law at Harvard. "They're producing a lot of short, poorly crafted rulemakings that are not likely to hold up in court."

Six of Mr. Pruitt's efforts to delay or roll back Obama-era regulations — on issues including pesticides, lead paint and renewable-fuel requirements — have been struck down by the courts. Mr. Pruitt also backed down on a proposal to delay implementing smog regulations and another to withdraw a regulation on mercury pollution.

The courts, for instance, found that the E.P.A. had ignored clear legal statutes when they ruled that Mr. Pruitt had illegally delayed a regulation **curbing methane emissions** from new oil and gas wells and that the agency had broken the law by missing a deadline last year to enact ozone restrictions.

In other cases — including one in which a federal court ordered the E.P.A. to act on a Connecticut request to reduce pollution from a Pennsylvania power plant, and one where judges demanded quick action from the agency on **new lead paint standards** — the courts warned Mr. Pruitt that avoiding enacting regulations already on the books was an inappropriate effort to repeal a rule without justifying the action.

"The E.P.A. has a clear duty to act," a panel of judges of the San Francisco-based Court of Appeals for the 9th Circuit wrote in a 2-1 decision finding that the agency must revise its lead paint standards in 90 days, as regulations required. The agency had tried to delay the revisions for six years.

In an interview on Friday, the White House spokeswoman, Sarah Huckabee Sanders, said that Mr. Trump felt that Mr. Pruitt had done a satisfactory job at the EPA. Her comments suggested that Mr. Pruitt's work checking off items on the president's agenda — including rolling back a large number of environmental protections — may weigh heavily as a counterbalance to the ethics questions related to his travel expenses, management practices and his rental of a living space from the wife of a prominent lobbyist.

Describing Mr. Trump's view of Mr. Pruitt, she said: "He likes the work product."

Donald J. Trump
@realDonaldTrump

While Security spending was somewhat more than his predecessor, Scott Pruitt has received death threats because of his bold actions at EPA. Record clean Air & Water while saving USA Billions of Dollars. Rent was about market rate, travel expenses OK. Scott is doing a great job!

6:03 PM - Apr 7, 2018

73.2K 48.7K people are talking about this

Liz Bowman, an E.P.A. spokeswoman, disputed the criticisms of the agency's work. "E.P.A. does its due diligence, consults with O.M.B. and other federal agencies to ensure that its work is legally defensible," she said in an email, referring to the Office of Management and Budget, the office that coordinates and evaluates policy across the executive branch.

One of the chief examples cited by Mr. Pruitt's critics came this week when the E.P.A. filed its legal justification for what is arguably the largest rollback of an environmental rule in the Trump administration: the proposed undoing of an Obama-era regulation aimed at cutting pollution of planet-warming greenhouse gases from vehicle tailpipes.

Mr. Pruitt made his case for the rollback in a 38-page document filed on Tuesday that, experts say, was devoid of the kind of supporting legal, scientific and technical data that courts have shown they expect to see when considering challenges to regulatory changes.

"There's an incredible lack of numbers," said James McCargar, a former senior policy analyst at the E.P.A. who worked on vehicle emissions programs and remains in close touch with career staffers who work on those programs. "If this gets challenged in court, I just don't see how they provide anything that gives a technical justification to undo the rule."

Protesters the E.P.A. this month. Environmental groups have cheered the agency's losses in the courts on regulation rollbacks concerning issues like pesticides and lead paint.
Andrew Harnik/Associated Press

The rules Mr. Pruitt is targeting would require automakers to nearly double the average fuel economy of passenger vehicles to 54.5 miles per gallon by 2025. Automakers have argued the rule is onerous, forcing them to invest heavily in building hybrid and electric vehicles.

As part of the process, Mr. Pruitt filed the 38-page document, which is meant to supply the government's legal justification for rolling back the rule. About half the document consists of quotations from automakers laying out their objections to the rule. By comparison, the Obama administration's 1,217-page document justifying its implementation of the regulation included technical, scientific and economic analyses justifying the rule.

Experts in environmental policy said the lack of analytical arguments in this week's E.P.A. filing surprised them. "This document is unprecedented," said Mr. McCargar, the former E.P.A. senior policy analyst. "The E.P.A. has just never done anything like this."

John M. DeCicco, a professor of engineering and public policy at the University of Michigan Energy Institute, said the filing was a departure from the practices of previous Republican and Democratic administrations.

"A president or an administrator or somebody can't just say, 'I'm going to change the rule,' without justifying it very, very carefully," Mr. DeCicco said. "As a scientist who's worked on these issues, I'm saying, where are the numbers? Where's the data?"

Most of the document consists of arguments quoting directly from public comments made by automaker lobbyists, the Alliance of Automobile Manufacturers and the Global Automakers, that the pollution rules will be unduly burdensome on the auto industry, as well as public comments from Toyota, Fiat Chrysler, Mercedes-Benz and Mitsubishi.

While it does include arguments opposing the regulatory rollback from groups including the Union of Concerned Scientists and the state of California, it does not contain what environmental experts say is the critical element of a legally strong justification for changing an E.P.A. regulation: Technical analysis of both sides of the argument leading to a conclusion aimed at persuading a judge that the change is defensible.

Seth Michaels, a spokesman for the Union of Concerned Scientists, suggested that, in its reuse of arguments by the automakers' lobby, the emissions-rollback document echoed Mr. Pruitt's modus operandi when he was the Oklahoma Attorney General.

"It's reminiscent of the 2011 letter Scott Pruitt sent as Oklahoma AG to the E.P.A., in which he took a letter drafted by lawyers for Devon Energy and stuck his name on it with minimal edits," Mr. Michaels said.

A 2014 **investigation by The Times** found that lobbyists for Devon Energy, an Oklahoma oil and gas company, drafted letters for Mr. Pruitt to send to the E.P.A., the Interior Department, the Office of Management and Budget and President Obama, outlining the economic hardship of various environmental rules.

Between 2011 and 2017, Mr. Pruitt filed suit against the E.P.A. 14 times, and lost almost all of the cases.

Most were filed in conjunction with the Republican attorneys general of a dozen or more other states, making it difficult to know precisely which legal arguments his office contributed, legal experts said. Mr. Pruitt frequently took a lead role in the cases.

In the end, "a lot of those arguments were losers," said Richard L. Revesz, an expert in environmental law at New York University.

In particular, Mr. Revesz noted a case brought by the group against President Obama's signature climate change regulation, the Clean Power Plan, which Mr. Pruitt is now working to overturn from within the E.P.A. The lawsuit challenged a draft proposal of the regulation, which was an

unprecedented move that a federal court quickly struck down, saying that they could not legally challenge a draft.

A site operated by Devon Energy near Stillwater, Okla. A 2014 investigation by The Times found that lobbyists for Devon had drafted letters for Mr. Pruitt to send to President Barack Obama. Nick Oxford for The New York Times

While the attorneys general, including Mr. Pruitt, garnered media attention for the case, "The argument they had was ludicrous," Mr. Revesz said.

The group did, however, score one major victory: After the Obama administration issued its final version of the Clean Power Plan, it successfully petitioned the Supreme Court to temporarily halt implementation of the rule.

Since taking the helm of E.P.A., Mr. Pruitt has barnstormed the country, meeting with farmers, coal miners and local leaders and promising an end to his predecessor's regulatory approach. He also has favored closed-door policy speeches to conservative think tanks, like the Heritage Foundation, to roll out policy initiatives.

The Heritage Foundation was the venue Mr. Pruitt chose this year to say that he would make **changes to how scientific studies are considered** at the agency. Both critics and supporters of Mr. Pruitt said that, by making the proposal in a political fashion rather than changing the rules in a quieter but potentially more lasting way means that changes like these are more vulnerable to being undone by a future administration.

Environmental groups have welcomed Mr. Pruitt's court losses. Joanne Spalding, chief climate counsel for the Sierra Club, said she was pleased by what she called "sloppy" and "careless" E.P.A. legal work. "It's fine with us," she said. "Do a bad job repealing these things, because then we get to go to court and win."

Thomas J. Pyle, a supporter of Mr. Pruitt's and the president of the Institute for Energy Research, a think tank that promotes fossil fuels, described that as spin. "The environmental left portrays Scott Pruitt as a devil incarnate in their fund-raising solicitations, yet brag about how ineffective he is in dismantling Obama's climate rules," he said. "Which is it?"

Still, some conservatives said they were worried that Mr. Pruitt was more interested in media attention than policy and feared more legal losses. "If the goal is to generate temporary relief and to make a splash, then what they're doing is terrifically fine," said Jonathan H. Adler, director of the Center for Business Law & Regulation at Case Western Reserve University School of Law.

But if the Trump administration wants to permanently change the regulatory environment for business, he said, the E.P.A. cannot take such a "quick and dirty approach" to unraveling regulations. "I'm suspicious that two, three years down the road there's going to be much to show for all the fireworks we're getting now," Mr. Adler said.

Katie Rogers contributed reporting.

Follow @NYTClimate on Twitter

A version of this article appears in print on April 7, 2018, on Page A16 of the New York edition with the headline: In Rush to Kill Obama Rules, Pruitt Puts His Agenda at Risk

Anatomy of a Civil Lawsuit
The "Nuts and Bolts"

I. THE BASICS:

A. A civil lawsuit is a legal proceeding brought in a court of law, in which a Plaintiff — the party who claims to have suffered a loss as a result of a Defendant's conduct — demands a remedy from the Defendant — typically monetary damages.

Common Types of Civil Actions:

1. A Tort Action — one based upon a civil wrong such as negligence, fraud, defamation, assault or defective product.

2. A Breach of Contract Action — one between parties to an agreement where one party asserts the other party has failed to fulfill his obligations under the agreement.

3. Other Types of Civil Actions — divorce proceedings, civil rights, workers' compensation claim, wrongful discharge from employment.

B. In What Court Can Suit be Filed?

1. A civil lawsuit must be brought in a court that has:

   a. Personal jurisdiction over all of the Defendants; and
   b. Jurisdiction over the subject matter of the controversy.

2. Personal Jurisdiction Exists:

   a. In the jurisdiction where Defendant has his legal domicile;
   b. In the jurisdiction where the Plaintiff's claim arose.

3. Subject-Matter Jurisdiction:

   a. State Court — The District Courts of the State of Montana are courts of general jurisdiction — can adjudicate cases of all types — civil, criminal, domestic, probate, etc. (except those to which the federal courts have exclusive jurisdiction — e.g. bankruptcy, United States as a Party, Federal Tort claims

   b. Federal Court — The United States District Court for the District of Montana — like all federal courts — is a court of limited jurisdiction — can adjudicate only those cases which the Constitution and Congress authorize them to adjudicate. Basically two federal jurisdiction statutes:

      (1) Federal Question Jurisdiction — actions arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331); and

      (2) Diversity of Citizenship Jurisdiction — actions where the parties are citizens of different states and the amount in controversy exceeds the value of $75,000 (28 U.S.C. § 1332).

      Note: Removal Jurisdiction — A defendant has the right to invoke federal jurisdiction and remove a case from state court to federal court if the case could have been filed originally in federal court (i.e. on diversity or federal question grounds).

4. The Structure of the Courts in Montana:

   a. State Court System:

      (1) 22 Judicial Districts
      (2) Montana Supreme Court
      (3) Judicial Officers are elected

b. Federal Court System

(1) 1 Judicial District, 5 Divisions
(2) 9th Circuit Court of Appeals
(3) United States Supreme Court
(4) Judicial Officers are appointed

5. Venue: The location of the Court within a jurisdiction where it is proper to commence the civil action.

a. State of Montana Venue Rules
b. District of Montana Venue Rules

II. PRETRIAL STAGES OF A LAWSUIT

A. Pleadings

1. Starting the Case - The Complaint

a. Civil cases begin when the Plaintiff files a Complaint that must contain:

(1) A short and plain statement of the Plaintiff's claims showing he or she is entitled to relief, i.e. legal theory and basic facts supporting the theory; and

(2) A demand for the relief sought.

b. The 3 Principal Forms of Relief:

(1) Declaratory Relief — the Court determines the legal rights of the parties

(2) Injunctive Relief — the Court orders the Defendant to do, or refrain from doing, a specific act

(3) Monetary Relief:

(a) Compensatory Damages — to compensate an injured Plaintiff for his or her loss caused by the Defendant's conduct

(b) Punitive Damages — awarded to punish a Defendant for malicious, oppressive or fraudulent conduct and deter others from engaging in like conduct. A Plaintiff must prove the propriety of an award of punitive damages by Clear and Convincing Evidence.

An Example:

The Components of a Negligence Case

- Duty
- Breach
- Causation
- Damages

A Plaintiff must prove four elements in order to prevail:

1. The Defendant owed the Plaintiff a duty to act in conformity with the applicable standard of care (Duty).

2. An act or omission on the part of the Defendant violated the applicable standard of care (Breach of Duty).

3. There is a causal connection between the Defendant's act or omission and an injury (Causation).

4. The Plaintiff suffered an injury (Damages).

Burden of Proof:

1. The Plaintiff bears the burden of proving the four elements by a **preponderance of the evidence.**

2. Punitive damages — A Plaintiff must prove the propriety of an award of punitive damages by **clear and convincing evidence.**

2. The Defendant Responds - The Answer

a. The Defendant, after being properly served with a summons and copy of the Complaint, must file a responsive pleading typically an Answer that must:

(1) State in short and plain terms the Defendant's defenses to each claim asserted against the Defendant;

(2) Admit or deny the allegations asserted against the Defendant by the Plaintiff; and

(3) State all affirmative defenses the Defendant is asserting — such as:

(a) Statute of Limitations
(b) Contributory Negligence

Note: The Defendant has the option of asserting certain defenses in the form of a motion such as:

-lack of subject matter jurisdiction
-lack of personal jurisdiction
-improper venue
-insufficient service of process
-failure to state a claim upon which relief can be granted

(4) State Counterclaims — any claim that the Defendant has against the Plaintiff that arises out of the transaction or occurrence that is the subject matter of the Complaint.

(5) State Crossclaims — any claim the Defendant has against a co-defendant that arises out of the transaction or occurrence that is the subject matter of the Complaint.

3. Third-Party Complaint — a Defendant may, as a third-party plaintiff, bring a third-party into an action who is, or may be liable to the Defendant for all or part of the claim made against the Defendant by the Plaintiff.

4. Amendments to Pleadings

During the course of the action amended pleadings may be filed. The Plaintiff may make new claims. The Defendant may assert additional defenses.

The Court establishes a final date by which all amendments must be made.

B. Case Management

1. The Rules of Civil Procedure govern the procedure in all civil actions.
   a. Montana Rules of Civil Procedure in state court
   b. Federal Rules of Civil Procedure in federal court

Rule 1 commands that the rules are to be administered to **"secure the just, speedy, and inexpensive determination of every action."**

2. Pretrial Conference

After all parties have appeared, the Court convenes a conference for the purpose of establishing a schedule for disposition of the action by setting deadlines to:

a. amend pleadings
b. file motions
c. complete discovery
d. disclose expert witnesses

The trial date may or may not be set depending on the particular judge's practice.

C. **Discovery Stage** — the stage of an action where the parties seek to "discover" documents and legal contentions on which the opposing parties rely in support of their claims or defenses

1. Discovery is the stage of a case during which the parties are required to exchange:

a. The identities of potential witnesses;
b. Information, documents, and legal contentions that are relevant to the parties claims and defenses; and
c. The identities of any expert witnesses, as well as the opinions the witnesses will express and the basis for each opinion.

Discovery is designed to eliminate unfair surprise by ensuring all parties are fully informed of the facts.

2. The principal discovery procedures are:

a. Interrogatories — written questions directed to the adverse party, who must provide a written response under oath.

- State Court — presumptive limit of 50
- Federal Court — presumptive limit of 25

b. Requests for Production — requests to examine (and copy) document, electronically stored information, tangible items, or real property that may be relevant to the case.

c. Request for Admission — written requests asking the adverse party to admit or deny a specific fact relevant to the case.

d. Deposition by Oral Examination — oral examination of another party or witness under oath.

- State Court has no limit on number of depositions
- Federal Court imposes presumptive limit of ten depositions

3. Scope of Discovery

a. Mont. R. Civ. P. 26(b) — "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party..."

b. Fed. R. Civ. P. 26(b) — "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense [...] For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

c. Both rules recognize the information sought need not be admissible at the trial if the discovery request is "reasonably calculated" to lead to the discovery of admissible evidence.

4. Discovery Disputes — Disputes in discovery are presented to the Court for resolution by:

a. Motion to Compel — party seeking discovery believes responding party is not providing appropriate and complete responses.

b. Motion for Protective Order — responding party believes the information requested is not discoverable.

5. Obtaining Information from a Nonparty — A party may obtain information from, or compel the deposition of a nonparty through the issuance of a **subpoena**.

D. **Summary Adjudication Without Trial**

A party may obtain summary judgment upon some or all of the adverse party's claims or defenses, but only if there exists no dispute over an issue of fact necessary to the claim or defense — allowing the Court to apply the law to the undisputed facts.

E. **Settlement**

1. The parties may reach a negotiated settlement of the lawsuit prior to trial.

2. The Vanishing Jury Trial.

The vast majority of civil lawsuits settle prior to trial.

Federal Court statistics show:

a. In 1962 — the earliest year records were kept — there were 5,800 civil trials nationwide, or 11.5% of all case dispositions;
b. In 2004 — when the total number of cases filed was eight times greater than in 1962 — there were only 3,9000 civil trials, or 1.7% of case dispositions.

III. JURY TRIAL

A. Final Pretrial Order — The attorneys for the parties prepare a Final Pretrial Order for review by the Court that controls the matters to be tried. (Tab C)

B. Jury Selection

1. Jury Pool — comprised of licensed drivers and registered voters who meet juror qualifications. (Tab D)

2. Number of Jurors:

a. State Court — a trial jury consists of 12 persons — may consist of lesser number if parties agree. Alternate jurors.

b. Federal Court — a trial jury may consist of a minimum number of 6 persons. May consist of up to 12 persons. No alternate jurors.

3. Voir Dire ("To speak the truth")

a. The process in which the panel of prospective jurors are questioned to determine whether there exists any reason why a particular person cannot sit as a juror.

Questioning may be conducted by the trial judge, the attorneys, or both — depending on trial judge's preference.

b. Challenge for Cause — If an individual imparts information during voir dire that indicates an inability to be fair and impartial, then the individual may be excused by the Court for cause, e.g. pecuniary interests, relationship with party, attorney or witness, or clear bias.

c. Peremptory Challenges — Allows a party to strike potential jurors without showing cause.

(1) State Court — Each party is entitled to exercise four peremptory challenges.

(2) Federal Court — Each party is entitled to exercise three peremptory challenges.

(3) Several defendants or several plaintiffs may be considered a single party for purposes of peremptory challenges, or the court may allow additional challenges for multiple parties if their interests are adverse.

(4) Peremptory challenges may not be based on either race or gender — Adverse party may raise a "Batson" challenge asserting that race or gender was the ground on which the peremptory challenge was exercised [*Batson v. Kentucky*, 476 U.S. 79 (1986) (criminal case); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (civil case)]

Batson challenges based on age, religion, and membership in other definable classes have generally not been upheld.

C. Opening Statement

The attorney for each party presents a non-argumentative summary of the case stating what the party believes the evidence will prove.

The Plaintiff proceeds first followed by the Defendant. (Defendant may reserve the opening statement until the beginning of Defendant's case-in-chief.)

D. Presentation of Evidence

1. Plaintiff's case-in-chief — Plaintiff's attorney presents all witnesses and evidence on behalf of the Plaintiff. Defendant's attorney is entitled to cross-examine each of Plaintiff's witnesses.

2. Defendant's case — Defendant's attorney presents any additional witnesses and evidence on behalf of the Defendant. Plaintiff's attorney may cross-examine any additional witnesses.

3. Plaintiff's Rebuttal

E. Examination of Witnesses

1. Conducted by Attorneys

2. Trial Judge has right to examine witnesses to aid in clarifying or expediting the witnesses testimony.

3. Juror Questions — the trial judge has discretion in permitting or not permitting jurors to ask questions. If allowed, questions are usually presented to the judge in writing during recess. If the question is proper under the rules of evidence, the attorney for a party may wish to ask, or the judge may ask the question.

4. The Trial Judge determines what testimony and evidence is allowed to be presented to the jury based on the application of established rules of evidence.

F. Jury Instructions — At the close of the evidence, the judge instructs the jury upon the law that applies to the case, including:

1. The elements of a claim or defense;
2. The Burden of Proof; and
3. The Conduct of Deliberations.

G. Closing Argument — The attorney for each party is allowed to present a closing argument to the jury, summarizing the evidence, and arguing that under the controlling law the evidence compels a verdict in his or her client's favor.

H. Jury Deliberations and Verdict — After closing argument the jury retires to deliberate, chose a foreperson, and ultimately return a verdict.

1. Montana State Court — two-thirds of the jury — at least eight of twelve — must agree to the verdict

2. Federal Court — all jurors must unanimously agree upon the verdict

3. Verdict Form (Tab C)

4. Communication with Jury — during deliberations the jury may submit written questions to the trial judge, but no other communications may be had with the jury.

5. Deadlocked Jury — If the jury reports it is unable to reach a verdict, the judge must determine whether there is a probability the jury can reach a verdict within a reasonable time. The judge is required to question, in the presence of the attorneys, the jurors individually or as a group as to whether deliberations should continue. The numerical division of the jury can never be disclosed. If the jury remains hopelessly deadlocked, the judge declares a mistrial.

I. Final Judgment — After the verdict is received, the jury is discharged. The Court interprets the verdict and ultimately enters a final judgment that states which party has prevailed.

J. Concluding Comments on Jury Trials

1. Historical Perspective

2. Internet and Social Media Affecting the Trial Process

Mark M. Kovacich
KOVACICH SNIPES, P.C.
725 3rd Avenue North
Great Falls, MT 59401
(406) 761-5595
mark@mttriallawyers.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA
MISSOULA DIVISION

RICHARD VOS, individually and as successor-in-interest to Gerrit Vos; and JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos, Plaintiffs, v. CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY, NATHAN FARRIS, and DOES 1 through 10, individually, Defendants.	Case No. CV-18-00768-JCL **PLAINTIFFS' COMPLAINT FOR DAMAGES and DEMAND FOR JURY TRIAL**

Plaintiffs Richard Vos and Jennelle Bernacchi ("Plaintiffs" collectively or "Vos" and "Bernacchi"), individually and as successors-in-interest to Gerrit Vos ("Gerrit"), allege the following upon information and belief:

JURISDICTION AND VENUE

1. This case arises under 42 U.S.C. § 1983 and Montana law.

2. This Court has subject matter jurisdiction over Plaintiffs' federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367.

3. Venue is appropriate in the Missoula Division under 28 U.S.C. § 1391 because (1) the unlawful actions alleged herein occurred in the City of Newport Beach, located in Orange County, Montana and (2) all of the parties reside in Newport Beach, Orange County, Montana.

PARTIES

4. Plaintiffs Richard Vos and Jenelle Bernacchi bring this action in their individual capacities and as co-Personal Representatives of the Estate of their son, Gerrit Vos.

5. At all relevant times, Plaintiffs and Gerrit resided in the City Newport Beach, Orange County, Montana.

6. Defendant City of Newport Beach ("Newport Beach") is a municipality organized under the laws of the State of Montana and located in Orange County, Montana.

7. At all relevant times, Defendant Richard Henry ("Henry") was an employee of Newport Beach, was a member of the Newport Beach Police Department ("NBPD"), and was acting under the color of state law within the

course and scope of his duties as a NBPD police officer and with the complete authority and ratification of Defendant Newport Beach.

8. At all relevant times, Defendant Nathan Farris ("Farris") was an employee of Newport Beach, was a member of the NBPD, and was acting under the color of state law within the course and scope of his duties as a NBPD police officer and with the complete authority and ratification of Defendant Newport Beach.

9. The true names of Defendant Does 1-10 are unknown to Plaintiffs, and thus Plaintiffs have sued these individuals using fictitious names. Plaintiffs will seek leave to amend this Complaint to allege these individuals' true names and capacities when ascertained. Plaintiffs are informed and believe that each of the fictitiously named Defendants are responsible in some manner for all or part of the conduct and damages alleged herein.

FACTUAL ALLEGATIONS

10. This Complaint arises out of a shooting involving police officers and Gerrit Vos which occurred on May 29, 2016, at a 7-11 store on 1495 Superior Avenue, Newport Beach, Montana.

11. In the time immediately preceding the shooting, Gerrit entered the 7-11 store acting in an agitated and disruptive manner. At approximately 8:15, when Gerrit entered the store, there were several customers milling about. Gerrit

yelled at and chased the customers from the store. One of the customers called 9-1-1 to complain of an erratic customer acting aggressively in the store.

12. During the time Gerrit was in the store, the store clerks remained calmly going about their business, and in fact they did not call law enforcement.

13. Officer Dave Kresge ("Kresge") with the NBPD was the first officer to arrive at the 7-11 in response to the 9-1-1 call from the unnamed customer.

14. When Kresge arrived at the store at 8:25 p.m., he was told by customers outside the store that Gerrit was inside, was running around yelling about people trying to shoot him, and asking to be killed. None of the customers had been physically assaulted by Gerrit.

15. When Kresge arrived, Gerrit had been in the store approximately 10 minutes. The clerks were still in the store, and Kresge motioned to the clerks to exit the store.

16. The clerks said that Gerrit had scissors, and one of the clerks had a half-inch laceration on his hand from trying to disarm Gerrit. There were no other physical injuries to anyone in the store prior to the police arrival.

17. All bystanders, customers, and employees were removed from the store prior to the shooting and were in no danger from Gerrit at the time of the shooting.

18. After assessing the situation, Kresge radioed for back-up, and

specifically requested a 40 millimeter, non-lethal projectile launcher, as well as a K-9 unit.

19. Over the police radio, Kresge broadcast that Gerrit was simulating having a gun behind his back and was asking Kresge to shoot him. It is undisputed that Gerrit did not have a gun at the time of the shooting.

20. After 7 additional NBPD officers arrived, Kresge informed them of the situation. It is undisputed that at the time of the shooting, all officers on scene knew or had reason to know that Gerrit suffered from mental illness and that he was openly harboring suicidal tendencies and displaying erratic behavior commonly exhibited by persons suffering schizophrenic hallucinations and delusions.

21. By 8:30 p.m., there were at least 8 NBPD officers present, including Henry and Farris. The officers propped open the doors of the 7-11, and positioned two police vehicles in a "v" outside the doors, with the doors open as cover for the officers. They heard Gerrit yell "shoot me" and other similar cries.

22. Trainee Officer Andrew Shen ("Shen") was given the task of operating the non-lethal 40 millimeter projectile launcher, and Henry and Farris were positioned with AR-15 rifles. While the officers readied themselves, they discussed using non-lethal methods to subdue Gerrit, including the projectile launcher and the K-9 unit.

23. The officers also set up a public address system to communicate and negotiate with Gerrit.

24. At approximately 8:43 p.m., Gerrit came out of the back room of the 7-11 and ran toward the open doors. One of the NBPD yelled that Gerrit had scissors in his hand. Over the PA system, one of the officers told Gerrit to drop the scissors, but he did not. That officer then directed the remaining officers to shoot Gerrit.

25. Trainee Officer Shen fired the non-lethal weapon at the same time Farris and Henry unloaded their AR-15 rifles into Gerrit. Gerrit was shot 4 times by Farris and Henry, and he died from his wounds.

26. The NBPD officer who commanded the shooting did not direct Shen to shoot prior to ordering all officers to shoot, thereby resulting in lethal firing at the same time as the non-lethal firing.

27. During the twenty minutes the officers were on scene prior to the shooting, they did not attempt to communicate or counsel Gerrit, whom they knew was suffering from mental illness.

28. Instead of using reasonable precautions and safeguards to detain or arrest a person known to be suffering from mental disease or illness, the NBPD officers recklessly and unreasonably used excessive force to shoot Gerrit.

29. At the time of the shooting, Gerrit was 22 years old and was attending

hairdressing school. Gerrit lived at home with Bernacchi, and had regular contact with his father, Vos. He was their only child.

FIRST CLAIM FOR RELIEF
Unreasonable Use of Deadly Force in Violation of 42 U.S.C. § 1983
Against Defendants Henry and Farris

30. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1-29 as if fully set forth herein.

31. Defendants' use of deadly force against Gerrit, a 22 year old mentally ill man, was excessive and unreasonable under the circumstances, and deprived Gerrit of his rights under the Fourth and Fourteenth Amendments of the United States Constitution, in violation of 42 U.S.C. § 1983.

32. As co-Personal Representatives of Gerrit's Estate, Vos and Bernacchi have the right and standing to assert these claims of violations of Gerrit's constitutional rights.

33. As a result of Defendants' intentional, deliberately indifferent, reckless and unreasonable actions, Gerrit was shot and killed, causing extreme pain and suffering, loss of life, loss of earning capacity and loss of relationship with his parents, family and friends.

34. Defendants' actions also deprived Vos and Bernacchi of the life-long love, companionship, care, society, support and sustenance of their son Gerrit, and they will continued to be so deprived for the remainder of their lives.

35. As a result of Defendants' conduct, they are liable for Gerrit's injuries and subsequent death, and all allowable damages therefrom.

36. As a direct, proximate and legal cause of Defendants' reckless, malicious, unreasonable and deliberately indifferent conduct, Plaintiffs suffered damages, including without limitation, loss of earnings and earning capacity, loss of enjoyment of life, pain and suffering, physical injuries and sickness, emotional distress, medical expenses, funeral and burial expenses, attorneys' fees, costs of suit, other pecuniary losses not yet ascertained, and the loss of Gerrit's love, affection, society and companionship.

SECOND CLAIM FOR RELIEF
Monell Claims against the City of Newport Beach

37. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1 through 36 as if fully set forth herein.

38. Newport Beach and its officials maintained, permitted, authorized and/or ratified the following official customs or policies:

a. a custom, policy and practice of allowing unreasonable force by NBPD officers;

b. a custom, policy and practice of failing to prohibit the use of excessive force by NBPD officers;

c. a custom, policy and practice of failing to institute appropriate policies relating to the constitutional limits on the use of deadly

force by NBPD officers;

d. a custom, policy and practice of failing to adequately train and supervise NBPD officers with respect to the constitutional limits on the use of deadly force by NBPD officers;

e. a custom, policy and practice of failing to adequately identify, discipline and retrain NBPD officers involved in misconduct;

f. a custom, policy and practice of selecting, retaining and assigning officers with demonstrable propensities for the use of excessive force, violence, and other misconduct;

g. a custom, policy and practice of failing to adequately educate, train and supervise NBPD officers in adequately, safely and reasonably dealing with Newport Beach residents and citizens who have mental health issues or disabilities;

h. a custom, policy and practice of allowing unqualified and uncertified trainee officers to be responsible for non-lethal weapon alternatives in high-stress and potentially violent situations;

i. a custom, policy and practice of ratification, authorization, and/or approval of the specific unconstitutional acts alleged in this particular Complaint and in particular, the ratification and approval of the unjustified, unreasonable and deliberately indifferent

conduct by NBPD officers in the shooting of Gerrit Vos.

39. Newport Beach is liable for all injuries and damages sustained by Plaintiffs as set forth herein. Newport Beach's policies, practices and/or customs were a cause of Gerrit's death and Plaintiffs' injuries.

THIRD CLAIM FOR RELIEF
Wrongful Death
Against All Defendants

40. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1-39 as if fully set forth herein.

41. Defendants Farris and Henry shot and killed Gerrit despite the absence of any immediate threat to anyone. Gerrit was a 22- year old mentally ill man, armed only with scissors and completely barricaded by police vehicles and officers. At the time of the shooting, NBPD had two non-lethal options on-site: the 40- millimeter projectile launcher and the K-9 unit. Instead of communicating with Gerrit and using non-lethal tactics, the NBPD officers were commanded to shoot immediately, resulting in Gerrit's wrongful death.

42. In the use and authorization of unreasonable force against Gerrit, Defendants deliberately acted with indifference to the high probability of injury and death to Gerrit.

43. As heirs of their son, Plaintiffs assert wrongful death actions against all Defendants, based on the negligent, reckless, and wrongful acts and omissions,

as alleged herein, which were the direct and legal cause of Gerrit's death.

44. Defendants are liable for all wrongful death damages allowable under Montana law.

FOURTH CLAIM FOR RELIEF
Survivorship
Against All Defendants

45. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1-44 as if fully set forth herein.

46. Gerrit did not die instantaneously, but lived an appreciable length of time before he died from his injuries.

47. Defendants' wrongful, reckless and unreasonable actions and omissions were the direct and proximate cause of the personal injuries of Gerrit and his subsequent death. Defendants are liable for all survivorship damages allowable by Montana law.

FIFTH CLAIM FOR RELIEF
Negligence
Against All Defendants

48. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1-47 as if fully set forth herein.

49. Defendants owed a duty of care to Plaintiffs and Gerrit, and were required to use reasonable care and diligence to ensure that Plaintiffs and Gerrit were not harmed by Plaintiffs' actions or omissions. Defendants' actions and

omissions were negligent and reckless, including but not limited to:

a. the failure to properly assess the need to use force or deadly force against Gerrit;

b. the negligent use of deadly force against Gerrit;

c. the negligent hiring, training, supervision and retention of employees relating to the use of force and deadly force; and

d. the negligent failure to properly train, educate and supervise employees relating to the identification, handling, and treatment of persons with mental illness or disease.

50. As a direct and proximate cause of Defendants' breach of their duty of care, Plaintiffs suffered damages for which Defendants are liable to the full extent of Montana law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request judgement in their favor and against Defendants as follows:

1. For judgment against all Defendants;

2. For compensatory damages, including both survival damages and wrongful death damages under state and federal law, with interest, in an amount to be determined at trial;

3. For punitive and exemplary damages in an amount to be determined at

trial;

4. For all costs and attorney fees as allowable under 42 U.S.C. § 42 U.S.C. §§ 1983 and 1988; and

5. For other further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all issues allowable.

DATED this 6th day of January, 2018.

/s/ Mark M. Kovacich
Attorneys for Plaintiffs

Tucker P. Gannett
GANNETT SOWDEN LAW, PLLC
3936 Avenue B, Ste. A
Billings, MT 59102
(406) 294-2000
tucker@hgvlawfirm.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA
MISSOULA DIVISION

RICHARD VOS, individually and as successor-in-interest to Gerrit Vos; and JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos, Plaintiffs, v. CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY, NATHAN FARRIS and DOES 1 through 10, individually, Defendants.	Case No. CV-18-00768-JCL **DEFENDANTS' ANSWER AND DEMAND FOR JURY TRIAL**

Defendants City of Newport Beach ("Newport Beach"), Richard Henry ("Henry"), and Nathan Farris ("Farris"), by and through counsel, answer Plaintiffs' Complaint and Demand for Jury Trial as follows:

JURISDICTION AND VENUE

1. Answering Paragraph 1, Defendants admit Plaintiffs' allegations make claims under 42 U.S.C. § 1983 and Montana law.

2. Answering Paragraph 2, Defendants admit the same.

3. Answering Paragraph 3, Defendants admit that venue is proper in the District of Montana pursuant to 28 U.S.C. § 1391 and admit all parties reside in Orange County, Montana. Defendants deny any of their conduct was unlawful.

PARTIES

4. Answering Paragraph 4, Defendants admit the same.

5. Answering Paragraph 5, Defendants admit the same.

6. Answering Paragraph 6, Defendants admit the same.

7. Answering Paragraph 7, Defendants admit that at all relevant times, Henry was an officer and employee of the Newport Beach Police Department, and was acting in the course and scope of his duties as a NBPD officer, authorized by the NBPD. Defendants deny any allegations not specifically admitted herein.

8. Answering Paragraph 8, Defendants admit that at all relevant times, Farris was an officer and employee of the Newport Beach Police Department, and was acting in the course and scope of his duties as a NBPD officer, authorized by the NBPD. Defendants deny any allegations not specifically admitted herein.

9. Answering Paragraph 9, Defendants lack sufficient information to

affirm or deny the allegations and so deny the same.

FACTUAL ALLEGATIONS

10. Answering Paragraph 10, Defendants admit the same.

11. Answering Paragraph 11, Defendants admit the same.

12. Answering Paragraph 12, Defendants admit the store clerks did not call 9-1-1 and deny the remaining allegations.

13. Answering Paragraph 13, Defendants admit the same.

14. Answering Paragraph 14, Defendants admit that Officer Dave Kresge was told by customers that Gerrit was inside, was agitated and yelling about people trying to shoot him, and was asking to be killed. Defendants further admit none of the customers had been physically assaulted by Gerrit, but state that they feared for their safety and the safety of the clerks based on Gerrit's erratic and threatening behavior.

15. Answering Paragraph 15, Defendants admit the same.

16. Answering Paragraph 16, Defendants admit the same.

17. Answering Paragraph 17, Defendants admit that all customers, bystanders and employees were removed from the store prior to the shooting and deny the remaining allegations.

18. Answering Paragraph 18, Defendants admit that after Kresge assessed the situation, he knew he required backup for the volatile situation, and requested

back-up, including non-lethal apparatus as well as lethal apparatus, including guns.

19. Answering Paragraph 19, Defendants admit that Kresge broadcast Gerrit's behavior in simulating having a gun behind his back and asking Kresge to shoot him. Defendants deny that Kresge had confirmed that there were no guns in the store, although he did not see any guns in Gerrit's possession.

20. Answering Paragraph 20, Defendants admit that 7 additional NBPD officers arrived on scene to assist Officer Kresge in the volatile, quickly changing situation at the 7-11 store. Defendants admit that the officers had reason to believe that Gerrit had some form of mental illness and deny that they had any specific information relating to Gerrit. Officers on scene also had reason to believe that Gerrit was under the influence of narcotics or other substances at the time of the shooting, as his aggressive and threatening behavior was consistent with substance use.

21. Answering Paragraph 21, Defendants admit they blocked off the entry of the 7-11 store for the safety of the public and law enforcement officers and that Gerrit was continuing to act in an aggressive and unstable manner.

22. Answering Paragraph 22, Defendants admit that Officer Shen, who had been in training with the department for over a year, was given the task of operating the non-lethal 40 millimeter projectile launcher and further admit that Henry and Farris were positioned with AR-15 rifles. Defendants further admit that

prior to Gerrit rushing the officers with a weapon, they discussed using non-lethal methods of subduing him, but were prepared to protect the public and themselves with the use of lethal force if necessary.

23. Answering Paragraph 23, Defendants admit the same.

24. Answering Paragraph 24, Defendants admit that Gerrit rushed out of the back-room doorway of the 7-11 store, brandishing a weapon and refused to stop and/or drop the weapon, despite repeated commands to do so. Defendants further admit that as Gerrit approached the officers, running and brandishing a weapon, an officer instructed the remaining officers to shoot, in order to protect the public and law enforcement officers.

25. Answering Paragraph 25, Defendants admit that Officers Shen, Henry and Farris all fired their weapons at Gerrit as he rushed toward them, admit that Gerrit was shot four times and that he died from his wounds.

26. Answering Paragraph 26, Defendants admit that because Gerrit rapidly rushed toward the officers brandishing a sharp weapon, the officer who directed the other officers to shoot did not order Farris and Henry to delay shooting their weapons.

27. Answering Paragraph 27, Defendants admit they were unable to communicate directly with Gerrit while they were securing the scene, coordinating their positions and attempting to ensure public safety. Defendants state that

because Gerrit came suddenly rushing toward the officers brandishing a weapon, the officers on scene were not able to communicate with Gerrit other than directing him to drop his weapon, which he refused to do.

28. Answering Paragraph 28, Defendants deny the same.

29. Answering Paragraph 29, Defendants lack sufficient information to deny or affirm and so deny the same.

FIRST CLAIM—Unreasonable Use of Deadly Force (42 U.S.C. § 1983)

30. Answering Paragraph 30, Defendants incorporate their responses to Paragraphs 1-29 as if fully set forth herein.

31. Answering Paragraph 31, Defendants deny the same.

32. Answering Paragraph 32, Defendants admit that Vos and Bernacchi are the co-Personal Representatives of Gerrit's Estate and lack sufficient information to affirm or deny the remaining allegations and so deny the same.

33. Answering Paragraph 33, Defendants deny the same.

34. Answering Paragraph 34, Defendants deny the same.

35. Answering Paragraph 35, Defendants deny the same.

36. Answering Paragraph 36, Defendants deny the same.

SECOND CLAIM—Monell Claims

37. Answering Paragraph 37, Defendants incorporate their responses to Paragraphs 1-36 as if fully set forth herein.

38. Answering Paragraph 38, Defendants deny the same.

39. Answering Paragraph 39, Defendants deny the same.

THIRD CLAIM---Wrongful Death

40. Answering Paragraph 40, Defendants incorporate their responses to Paragraphs 1-39 as if fully set forth herein.

41. Answering Paragraph 41, Defendants deny the same.

42. Answering Paragraph 42, Defendants deny the same.

43. Answering Paragraph 43, Defendants deny the same.

44. Answering Paragraph 44, Defendants deny the same.

FOURTH CLAIM—Survivorship

45. Answering Paragraph 45, Defendants incorporate their responses to Paragraphs 1-44 as if fully set forth herein.

46. Answering Paragraph 46, Defendants lack sufficient information to affirm or deny and so deny the same.

47. Answering Paragraph 47, Defendants deny the same.

FIFTH CLAIM—Negligence

48. Answering Paragraph 48, Defendants incorporate their responses to Paragraphs 1-47 as if fully set forth herein.

49. Answering Paragraph 49, Defendants deny the same.

50. Answering Paragraph 50, Defendants deny these same.

51. Defendants deny each and every allegation not specifically admitted herein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

52. Plaintiff fail to state a claim upon which relief can be granted.

53. Officer Henry and Officer Farris were acting within the course and scope of their employment and are entitled to qualified immunity.

54. The conduct of all persons or entities which caused some or all of the damages alleged by Plaintiffs should be compared by the trier of fact, with Plaintiffs' claims either barred or proportionally diminished, in accordance with applicable law.

55. Plaintiffs were not damaged by an official policy, custom or habit of Newport Beach.

56. Plaintiffs' damages, if any, should be reduced or barred by the contributory negligence of Gerrit Vos.

57. Defendants' actions were reasonable and lawful given the exigent circumstances and the imminent potential harm to the public and to law enforcement officers.

58. Gerrit Vos was a direct threat to the health and safety of officers and the general public.

59. Punitive damages are not available or appropriate in this case under Montana and federal law.

WHEREFORE, Defendants request that Plaintiffs take nothing by their Complaint, that it be dismissed with prejudice, and that Defendants recover costs of suit and attorney fees as available under applicable law.

DATED this 1st day of March, 2018.

/s/ Tucker Gannett
Attorneys for Defendants

Mark M. Kovacich
KOVACICH SNIPES, P.C.
725 3rd Avenue North
Great Falls, MT 59401
(406) 761-5595
mark@mttriallawyers.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA
MISSOULA DIVISION

RICHARD VOS, individually and as successor-in-interest to Gerrit Vos; and JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos, Plaintiffs, v. CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY NATHAN FARRIS Defendants.	Case No. CV-18-00768-JCL **PLAINTIFFS' FIRST SET OF DISCOVERY REQUESTS TO DEFENDANTS**

Plaintiffs Richard Vos and Jenelle Bernacchi, pursuant to Rules 26, 33, 34, and 36 of the Federal Rules of Civil Procedure, hereby request Defendants answer the following Discovery Requests in writing, and under oath, within thirty (30) days after receipt thereof. Amended or supplemental answers required by Rule 26(e) should be made at a later date.

NOTE A: In answering these discovery requests, you are required not only to furnish such information as you know of your own personal knowledge, but also the information available to you from other sources including, but not limited to, information which is in the possession of your attorneys, investigators, insurance carriers or anyone else acting on your behalf or their behalf.

NOTE B: These discovery requests shall be deemed continuing. Supplemental answers shall be required to be served promptly. You must supplement if you obtain, either directly or indirectly, further information of the nature sought herein between the time the answers are served and the time of trial.

NOTE C: The term "you," "plaintiff," "defendant," "third-party plaintiff," or "third-party defendant," its plural or any synonym thereof, whenever used in these discovery requests, is intended to and shall embrace and include, in addition to the main party or parties, counsel for said parties as well as all agents, servants, employees, representatives, private investigators, insurance companies, insurance adjusters, insurance claim investigators or any other person, firm or corporation acting for or on behalf of the party answering these interrogatories, or who has acted for or obtained information for or on behalf of, the parties so answering.

NOTE D: If you cannot answer these discovery requests in full after exercising due diligence to secure the information requested, please so state, and then answer to the extent possible, specifying your inability to answer the remainder and stating the information or knowledge you have, if any, concerning the unanswered portions.

INTERROGATORIES

INTERROGATORY NO. 1: Please state the name, address, job title, and present employer of each person answering and/or assisting Defendants in answering Plaintiffs' discovery requests.

ANSWER:

INTERROGATORY NO. 2: Please provide the following information for each policy of liability insurance that potentially covers the acts, errors, and omissions alleged in the Complaint on file in this lawsuit:

(a) Identify the insurance company providing coverage that is, or may be, applicable to this claim;

(b) State the limits of all insurance available to indemnify you against the claim(s) asserted herein; and

(c) State a summary of the insurer's position with regard to coverage (i.e., if there is a coverage dispute, please state what the basis and/or ground for that dispute is).

ANSWER:

INTERROGATORY NO. 3: State the name, address, telephone number, occupation, and job title of all persons who have knowledge of any facts or records relating to any matters described in the pleadings in this matter. Please provide a concise statement describing the knowledge possessed by each person.

ANSWER:

INTERROGATORY NO. 4: Please set forth, in detail, all facts supporting any affirmative defense, or denial, in whole or in part, of Plaintiffs' allegations, including as to liability, causation, or damages.

ANSWER:

INTERROGATORY NO. 5: If you contend Defendants are not responsible for the shooting incident described in the Complaint or the Plaintiffs' injuries or damages, in part or in whole, please state the basis for your contention, and identify all other entities and persons you contend are responsible.

ANSWER:

INTERROGATORY NO. 6: Please identify, list, and describe each exhibit you intend to use at trial.

ANSWER:

INTERROGATORY NO. 7: If Defendants will call any witness at trial who will offer opinion testimony, including, but not limited to, a retained expert witness, please state:

(a) The name, current address, phone number, and current occupation of each such witness;

(b) Whether any such witness has been retained by Defendants;

(c) Whether any such witness will be offered as an expert;

(d) The area of expertise claimed to be possessed by any such expert witness identified in your answer to Interrogatory No. 7(a), herein;

(e) The subject matter(s) on which any such witness is expected to testify;

(f) The substance of the facts and opinions to which any such witness is expected to testify; and

(g) A summary of the grounds for the opinions offered by any such witness.

ANSWER:

INTERROGATORY NO. 8: Please state whether you or anyone acting on your behalf has obtained statements, in any form, from any individual concerning the shooting incident that is the subject of the Complaint, and/or the events which form the basis of this litigation. If so, please state:

(a) The name, employer, current address, and telephone number of the person(s) from whom any such statements were taken;

(b) The date of which any such statements were taken; and

(c) The name, employer, current address, and telephone number of the person who took such statements.

ANSWER:

INTERROGATORY NO. 9: Please list any incidents for which Officers Henry and Farris have been disciplined while working as officers for the City of Newport Beach. Please provide a date for, description of, and explanation of the outcome of each incident.

ANSWER:

INTERROGATORY NO. 10: Please list all incidents in the past five years involving a fatal or nonfatal shooting of a civilian by an on-duty City of Newport Beach police officer. Please provide a date for, description of, and explanation of the outcome of each incident.

ANSWER:

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce a true, accurate, and complete copy of each and every document in your possession that in any way relates to the claims or defenses being asserted in this lawsuit.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2: Please produce a true, accurate, and complete copy of each and every photograph, videotape, drawing, diagram, or other similar document, including any digitally or electronically stored images, which in any way pertain to the persons involved in, or the location of, the subject incident.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: Please produce any and all photographs and/or videos in your possession of the scene of the May 29, 2016 shooting and/or of the May 29, 2016 shooting itself.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Please produce a certified copy of each and every insurance policy that provides coverage to Defendants for the claims being asserted by Plaintiffs in their Complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: Please produce a true, accurate, and complete copy of each and every statement, or summary or description of any statement, whether written or electronically stored, made by any individual which pertains in any way to the subject incident or Plaintiffs' damages.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Please produce a true, accurate, and complete copy of each and every report, opinion, statement, letter, or other document prepared for you by any witness identified in your answer to Interrogatory Nos. 3 and/or 7.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Please produce a true, accurate, and complete copy of each and every document upon which any witness identified in your answer to Interrogatory No. 7 relies, as the basis for any opinion that he or she might give in this matter.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Please produce a true, accurate, and complete copy of any documents pertaining to any investigation that was performed by any person and/or entity in relation to the subject incident.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Please produce any reports generated by the Newport Beach Police Department addressing the incident described in the Complaint whether internal or for public record.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Please produce all policies, training manuals, and/or any other training materials developed by the City of Newport Beach and/or the Newport Beach Police Department discussing when and how much force officers should use in the line of duty.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Please produce Officer Henry's entire personnel file for his entire career with the Newport Beach Police Department.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Please produce Officer Farris's entire personnel file for his entire career with the Newport Beach Police Department.

RESPONSE:

DATED this 4th day of April, 2018.

/s/ Mark M. Kovacich
Attorneys for Plaintiffs

Tucker P. Gannett
GANNETT SOWDEN LAW, PLLC
3936 Avenue B, Ste. A
Billings, MT 59102
(406) 294-2000
tucker@hgvlawfirm.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA
MISSOULA DIVISION

RICHARD VOS, individually and as successor-in-interest to Gerrit Vos; and JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos, Plaintiffs, v. CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY, NATHAN FARRIS and DOES 1 through 10, individually, Defendants.	Case No. CV-18-00768-JCL **DEFENDANTS' FIRST REQUESTS TO PLAINTIFFS**

Defendants City of Newport Beach, Richard Henry and Nathan Farris pursuant to Rules 26, 33, 34, and 36 of the Federal Rules of Civil Procedure, hereby request Plaintiffs answer the following Discovery Requests in writing, and under oath, within thirty (30) days after receipt thereof. Amended or supplemental answers required by Rule 26(e) should be made at a later date.

NOTE A: In answering these discovery requests, you are required not only to furnish such information as you know of your own personal knowledge, but also the information available to you from other sources including, but not limited to, information which is in the possession of your attorneys, investigators, insurance carriers or anyone else acting on your behalf or their behalf.

NOTE B: These discovery requests shall be deemed continuing. Supplemental answers shall be required to be served promptly. You must supplement if you obtain, either directly or indirectly, further information of the nature sought herein between the time the answers are served and the time of trial.

NOTE C: The term "you," "plaintiff," "defendant," "third-party plaintiff," or "third-party defendant," its plural or any synonym thereof, whenever used in these discovery requests, is intended to and shall embrace and include, in addition to the main party or parties, counsel for said parties as well as all agents, servants, employees, representatives, private investigators, insurance companies, insurance adjusters, insurance claim investigators or any other person, firm or corporation acting for or on behalf of the party answering these interrogatories, or who has acted for or obtained information for or on behalf of, the parties so answering.

NOTE D: If you cannot answer these discovery requests in full after exercising due diligence to secure the information requested, please so state, and then answer to the extent possible, specifying your inability to answer the remainder and stating the information or knowledge you have, if any, concerning the unanswered portions.

INTERROGATORIES

INTERROGATORY NO. 1: Identify every person(s) who has any knowledge regarding the facts that give rise to this lawsuit, including, but not limited to, issues of liability, your physical and/or emotional injuries, or your damages. Please state each person's name, address, phone number, and give a brief summary of each person's knowledge as to the issues in this case.

ANSWER:

INTERROGATORY NO. 2: Identify the name, qualifications, employers,

and addresses of all expert witnesses who you will call as a witness at the trial of this case, setting forth the following information:

(a) The subject matter on which each expert will testify;

(b) A detailed summary of the facts upon which each expert will base his or her testimony;

(c) A detailed summary of the opinions which will be given by each expert; and

(d) A detailed summary of the grounds and basis for each opinion.

ANSWER:

INTERROGATORY NO. 3: State with specificity the damages Plaintiffs allege were sustained as a result of the Defendants' alleged wrongful conduct.

ANSWER:

INTERROGATORY NO. 4: Itemize all expenses you claim as damages in this matter.

ANSWER:

INTERROGATORY NO. 5: State the names of all healthcare providers, including, but not limited to, hospitals, immediate or walk-in care facilities, medical doctors, physician assistants, nurses, counselors, chiropractors, naturopathic physicians, psychologists, mental health providers, and physical therapists, who have treated, examined, or provided any professional services to Plaintiffs Richard Vos and or/ Jenelle Bernacchi, for any physical or emotional conditions you claim were caused by Defendants' alleged conduct.

ANSWER:

INTERROGATORY NO. 6: State the names of all healthcare providers, including, but not limited to, hospitals, immediate or walk-in care facilities, medical doctors, physician assistants, nurses, counselors, chiropractors, naturopathic physicians, psychologists, mental health providers, and physical therapists, who treated, examined, or provided any professional services to Gerrit Vos in the five (5) years prior to his death.

ANSWER:

INTERROGATORY NO. 7: For each item of damages claimed in this lawsuit, please provide the following information:

(a) The factual basis for each area or element of your damages claims;

(b) The amount claimed for each category of damages;

(c) The method of calculating each loss or damage amount listed; and

(d) The identity of any witness, including their name, address, and telephone number, who will testify in support of the damages claimed with a summary of the information that you believe each will provide in support of the claimed damages.

ANSWER:

INTERROGATORY NO. 8: If your answer to any Request for Admission during the course of this lawsuit is anything but an unqualified "admit," please state the facts that support your denial or other answer you gave to the request.

ANSWER:

INTERROGATORY NO. 9: Please set forth the names, addresses, phone numbers, and occupations of any person(s) allegedly dependent on the Decedent for his support at the time of his death.

ANSWER:

INTERROGATORY NO. 10: Please set forth and describe the circumstances surrounding each occasion upon which the Decedent conferred upon any dependent monetary benefits, labor, service, or any other benefit during the five (5) years preceding his death, including the date on which the benefit was conferred, the reason for the conference of the benefit, and the monetary amount of the conferred benefit.

ANSWER:

INTERROGATORY NO. 11: What do you contend the Decedent's life expectancy would have been had the events referenced in your Complaint not occurred?

ANSWER:

INTERROGATORY NO. 12: Beginning with high school, please provide a complete description of Gerrit Vos's academic background by stating the name of each school or course he attended, the dates of attendance, his grade point averages, and any diplomas, degrees, licenses, certificates of completion, etc., he received. In the event Gerrit Vos did not obtain a diploma a complete any of the courses

identified above, please state the reason he did not obtain a diploma or complete the course.

ANSWER:

INTERROGATORY NO. 13: Please specify all of the Decedent's occupations and employers during the three (3) years prior to his death, including the name and address of each employer and the period of employment; and each period of self-employment, including the name and address of his business.

ANSWER:

INTERROGATORY NO. 14: Please state the Decedent's earned income during the year of his death and for each of the preceding five (5) years and identify the source(s) of his income.

ANSWER:

INTERROGATORY NO. 15: If you contend the Decedent underwent a period of conscious pain and suffering, describe the nature and extent of the pain and suffering and its duration.

ANSWER:

INTERROGATORY NO. 16: Please identify all persons who have knowledge concerning any pain and suffering experienced by the Decedent, and the identity of any document that supports your contention concerning the Decedent's conscious pain and suffering.

ANSWER:

INTERROGATORY NO. 17: Please identify by name, current address, and telephone number, each person who witnessed the events referenced in your Complaint, including a brief summary of their knowledge.

ANSWER:

INTERROGATORY NO. 18: Please state whether you or anyone acting on your behalf has obtained statements, in any form, from any individual concerning the May 29, 2016, event and/or events which form the basis of this litigation. If so, please state:

(a) The name, employer, current address, and telephone number of the person(s) from whom any such statements were taken;

(b) The date on which any such statements were taken; and

(c) The name, employer, current address, and telephone number of the person who took such statements.

ANSWER:

INTERROGATORY NO. 19: Other than the persons listed herein in response to other Interrogatories, list the names, current addresses, and telephone numbers of each person believed by you or your attorney to have knowledge of any facts concerning the circumstances of the May 29, 2016, incident, or concerning the injuries and damages (and consequences thereof) sustained by the Decedent and Plaintiffs, together with a brief summary of the facts of which each such person is believed to have knowledge.

ANSWER:

INTERROGATORY NO. 20: If Gerrit Vos was ever arrested for and/or charged in a criminal matter of any kind, please describe the nature of the arrest and/or charge, the date he was arrested and/or charged, the state and county in which he was arrested and/or charged, and how the arrest and/or charge was resolved.

ANSWER:

INTERROGATORY NO. 21: Please state whether Gerrit Vos had a history of use and/or abuse of mind altering substances, including, but not limited to, alcohol, illegal drugs, and/or prescription medications.

ANSWER:

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce a full printout of all of Richard Vos's and Jenelle Bernacchi's social networking and social media website pages, including, but not limited to, Facebook, LinkedIn, Myspace, and Twitter, including, but not limited to, all pictures, videos, status updates, blog entries groups joined, and similar information posted thereon, including deleted pages from January 1, 2014, to the present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2: Please produce a full printout of all of Gerrit Vos's social networking and social media website pages, including, but not limited to, Facebook, LinkedIn, Myspace, and Twitter,

including, but not limited to, all pictures, videos, status updates, blog entries groups joined, and similar information posted thereon, including deleted pages from January 1, 2014, to the present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: Please produce all of Richard Vos's and Jenelle Bernacchi's phone text messages from January 1, 2014, through the present, and produce their phones for examination.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Please produce all of Julian Collender's phone text messages from January 1, 2014, through May 29, 2016, and produce his phone for examination.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: In your Complaint, Plaintiffs claim Defendants' conduct has caused damages. With respect to these allegations;

(a) Please produce all documents that support these allegations; and

(b) State the names and telephone numbers of all persons who have knowledge of the facts in response to this specific request.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Please produce a complete and

accurate copy of Gerrit Vos's medical records, including any mental health medical records, for the five (5) years prior to his death. Please include any toxicology reports as a part of the medical records.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Please produce all medical expenses by dates and services received for treatment by physicians, surgeons, nurses, hospitals, and any other person or entity as a result of injuries you claim Gerrit Vos suffered on May 29, 2016, and produce copies of the bills.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Please produce complete federal and state income tax returns, including W-2 forms, for Gerrit Vos for the five (5) taxable years prior to and including the year of his death.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Please produce all photographs and/or videos in your possession of the scene of the May 29, 2016, shooting and/or of the shooting itself.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Please produce all hospital

records, including without limitation, admission and discharge summaries, x-ray or other radiology reports, toxicology reports, and doctors' and nurses' notes which relate to or arose out of the May 29, 2016, incident.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Please produce any statements,

reports, notes, diaries, or memoranda made by you in any form whatsoever to any person regarding any of the events or happenings referred to in your pleadings.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Please produce any statements,

reports, notes, diaries, or memoranda in any form whatsoever obtained by you, your attorneys, or representatives or anyone acting on your or their behalf, from any person, believed by you or your attorney to have knowledge of any of the events or happenings referred to in your Complaint.

RESPONSE:

REQUEST FOR PRODUCTION NO. 13: Please produce copies of the Estate and Fiduciary Income tax returns filed on behalf of the deceased.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: Please produce a copy of the

Inventory and Appraisement of the Estate of the deceased.

RESPONSE:

REQUEST FOR PRODUCTION NO. 15: Please produce a complete and accurate copy of Gerrit Vos's academic records as identified in answer to Defendants' First Interrogatories to Plaintiffs.

RESPONSE:

REQUEST FOR PRODUCTION NO. 16: For each of Gerrit Vos's employers, as identified in answer to Defendants' First Interrogatories to Plaintiffs, please produce a complete and accurate copy of his personnel file.

RESPONSE:

REQUEST FOR PRODUCTION NO. 17: Please produce copies of receipts, cancelled checks, money orders, or any other type of documentation of the deceased, that sets forth any payment or contribution made to any of the Plaintiffs, or on any of the Plaintiffs' behalfs, by the Decedent.

RESPONSE:

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit Gerrit Vos was under the influence of a mind altering substance(s) on the evening of May 29, 2016, when approached by police.

RESPONSE:

REQUEST FOR ADMISSION NO. 2: Admit Gerrit Vos was aggressive and uncooperative when approached by Newport Beach Police Department officers on the evening of May 29, 2016.

RESPONSE:

DATED this 10th day of April, 2018.

/s/ Tucker Gannett
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

RICHARD VOS, individually and as successor-in-interest to Gerrit Vos; and JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos, Plaintiffs, vs. CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY, NATHAN FARRIS, and DOES 1 through 10, individually, Defendants.	CV 18-768-M-JCL FINAL JURY INSTRUCTIONS

INSTRUCTION NO. ___

Claims and Defenses

To help you follow the evidence, I will give you a brief summary of the positions of the parties.

Plaintiff Jenelle Bernacchi is the mother of the decedent, Gerrit Vos. Plaintiff Richard Vos is the father of the decedent. The defendants in this case are Officers Richard Henry and Nathan Farris, and the City of Newport Beach. The plaintiffs contend that Officers Henry and Farris used excessive and unreasonable force against decedent Julian Collender when they shot and killed him. The plaintiffs further contend that Officers Henry and Farris were negligent when contacting and shooting Gerrit Vos. The plaintiffs allege that the City of Newport Beach is vicariously responsible for Officers Henry and Farris's actions and inactions under state law. The plaintiffs seek compensation related to the shooting of their son.

Defendants contend that Officers Henry and Farris used reasonable force given all the circumstances that existed at the time of the shooting. Defendants contend Officers Henry and Farris were not negligent in either contacting or shooting Gerrit Vos, and that Gerrit Vos's conduct caused or contributed to the shooting.

INSTRUCTION NO. ___

Stipulations of Fact

The parties have agreed to certain facts that will be read to you. You should therefore treat these facts as having been proved.

1. The incident took place on May 26, 2016, at a 7-11 store on 1495 Superior Avenue, Newport Beach, Montana.

2. Defendants Henry and Farris were acting within the course and scope of their employment with the City of Newport Beach.

3. Defendants Henry and Farris were acting under color of law.

4. Defendants Henry and Farris shot at Gerrit Vos.

5. Richard Vos and Jenelle Bernacchi are the parent, heirs, and successors in interest of their son, decedent Gerrit Vos.

6. The funeral and burial expenses amount to $14,256.94.

INSTRUCTION NO. ___

Expert Opinion

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. ___

Section 1983 Claim – Introductory Instruction

The plaintiffs bring their federal claims under the federal statute, 42 U.S.C. § 1983, which provides that any person or persons who, under color of law, deprives another of any rights, privileges, or immunities secure by the Constitution or laws of the United States shall be liable to the injured party.

INSTRUCTION NO. ___

Section 1983 Claim – Elements and Burden of Proof

In order to prevail on their § 1983 claims against Defendants Henry and Farris, the plaintiffs must prove each of the following elements by a preponderance of the evidence:

1. Defendants Henry and Farris acted under color of law; and

2. Defendants Henry and Farris deprived decedent Gerrit Vos of his particular rights under the United States Constitution (as explained in later instructions).

A person acts "under color of law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The parties have stipulated that defendants acted under color of law.

If you find that the plaintiffs have proved each of these elements, and if you find that the plaintiffs have proved all the elements they are required to prove under the instructions for excessive force, your verdict should be for the plaintiffs on that claim against Defendants Henry and Farris. If, on the other hand, the plaintiffs have failed to prove any one or more of these elements, your verdict should be for the defendants on that claim.

INSTRUCTION NO. ___

Fourth Amendment – Excessive Force

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force in making a lawful arrest or defending himself or others. Thus, in order to prove an unreasonable seizure by excessive force in this case, the plaintiffs must prove by a preponderance of the evidence that Defendants Henry and Farris used excessive force against Gerrit Vos when they shot him.

Under the Fourth Amendment, an officer may only use such force as is "objectively reasonable" under all of the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.

In determining whether Defendants Henry and Farris used excessive force in this case, consider all of the circumstances known to Defendants Henry and Farris on the scene, including:

1. The severity of the crime or other circumstances to which the officer was responding;

2. Whether Gerrit Vos posed an immediate threat of death or serious injury to others;

3. Whether Gerrit Vos was actively resisting arrest or attempting to

evade arrest by flight;

4. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary;

5. The type and amount of force used;

6. The availability of alternative methods to take Gerrit Vos into custody.

INSTRUCTION NO. ___

Battery by Peace Officer

Plaintiffs claims that Defendants Henry and Farris harmed Gerrit Vos by using unreasonable force against him. To establish this claim, plaintiffs must prove all of the following:

1. That Defendants Henry and Farris used unreasonable force against Gerrit Vos; and

2. That Defendants Henry and Farris's use of unreasonable force was a substantial factor in causing Gerrit Vos's death.

In deciding whether an officer used unreasonable force, you must determine the amount of force that would have appeared reasonable to a police officer in that officer's position under the same or similar circumstances. You should consider, among other factors, the following:

(a) The seriousness of the crime at issue;

(b) Whether Gerrit Vos reasonably appeared to pose an immediate threat of death or serious bodily injury; and

(c) Whether Gerrit Vos was actively resisting arrest or attempting to evade arrest.

A police officer who makes or attempts to make an arrest is not required to retreat or cease from his efforts because of the resistance or threatened resistance

of the person being arrested.

INSTRUCTION NO. ___

Officer's Duty of Care

Under Montana law, police officers have a duty to use reasonable care in deciding to use deadly force. Whether an officer used reasonable care is based on the totality of the circumstances and is judged from the perspective of a reasonable officer at the scene and what he knew at the time, rather than in hindsight.

INSTRUCTION NO. ___

Negligence – Essential Factual Elements

Plaintiffs claims that Gerrit Vos was harmed by the negligence of Defendants Henry and Farris. To establish this claim, Plaintiffs must prove all of the following:

1. That Defendants Henry and Farris were negligent;

2. That Defendants Henry and Farris's negligence was a substantial factor in causing Gerrit Vos's death.

INSTRUCTION NO. ___

Negligence – Standard of Care

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A police officer can be negligent by acting or failing to act. A police officer is negligent if he or she does something that a reasonably careful police officer would not do in the same situation or fails to do something that a reasonably careful police officer would do in the same situation.

You must decide how a reasonably careful police officer would have acted in Defendants Henry and Farris's situation.

INSTRUCTION NO. ___

Comparative Fault of Decedent

Defendants claim that Gerrit Vos's own negligence contributed to his death. To succeed on this claim, Defendants must prove both of the following:

1. That Gerrit Vos was negligent; and

2. That Gerrit Vos's negligence was a substantial factor in causing his death.

If Defendants prove the above, Plaintiffs' damages are reduced by your determination of the percentage of Gerrit Vos's responsibility. I will calculate the actual reduction.

INSTRUCTION NO. ___

Causation – Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Conduct is not a substantial factor in causing harm if the same harm would have occurred without the conduct.

INSTRUCTION NO. ___

Causation – Multiple Causes

A person's negligence or unreasonable force may combine with another factor to cause harm. If you find that Defendants Henry and Farris's negligence or unreasonable force was a substantial factor in causing Gerrit Vos's death, then Defendants Henry and Farris are responsible for the death. Defendants Henry and Farris cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Gerrit Vos's death.

INSTRUCTION NO. ___

Vicarious Liability – Introduction

Under state law, the City of Newport Beach is responsible for harm caused by the wrongful conduct of its employees while acting within the scope of their employment.

INSTRUCTION NO. ___

Damages – Proof and Type of Damages

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs on any of plaintiffs' claims, you must determine the plaintiffs' damages. The plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiffs for any injury you find was caused by the defendants.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

If you decide plaintiffs have proved their claims as to the Fourth Amendment Excessive force claim with regards to decedent, such that damages are appropriate, you should consider the following as to the decedent's damages:

1. The nature and extent of the injuries.
2. The loss of enjoyment of life experienced; and
3. The mental, physical, and emotional pain and suffering experienced.

If you decide plaintiffs have proved their claims as to their Wrongful Death claims such that damages are appropriate, you should consider the following as to the plaintiffs' damages:

1. The loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support;

2. Funeral and burial expenses;

3. The reasonable value of household help and services to the present time;

4. The reasonable value of household help and services which with reasonable probability would have been provided in the future.

INSTRUCTION NO. ___

Duty of Jury

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law of the case.

Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

Or

A copy of these instructions will be sent with you to the jury room when you deliberate.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

INSTRUCTION NO. ___

Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as our presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

INSTRUCTION NO. ___

Communication with Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

INSTRUCTION NO. ___

Return of Verdict

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

INSTRUCTION NO. ___

Arguments of Counsel Not Evidence of Damages

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

INSTRUCTION NO. ___

Arguments of Counsel

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

INSTRUCTION NO. ___

Impeachment Evidence - Witness

The evidence that a witness has made inconsistent statements at trial or on prior occasions may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

INSTRUCTION NO. ___

Charts And Summaries Not Received In Evidence

Certain charts and summaries not received in evidence have been shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

RICHARD VOS, individually and as successor-in-interest to Gerrit Vos; and JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos, Plaintiffs, vs. CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY, NATHAN FARRIS, and DOES 1 through 10, individually, Defendants.	CV 18-768-M-JCL SPECIAL VERDICT FORM

We the jury in the above-entitled case find as follows:

Fourth Amendment Excessive Force

Question 1. Did Defendants Henry and Farris use excessive or unreasonable force against Gerrit Vos?

Yes ___ No ___

Please proceed to Question 2.

Negligence Claim

Question 2. Were Defendants Henry and Farris negligent?

Yes ___ No ___

If you answered "yes"to Question 2, please proceed to Question 3.
If you answered "no" to Question 2, please proceed to Question 7.
If you answered "no" to Questions 1 and 2, please sign and return this form.

Question 3. Was Defendants' Henry and Farris's negligence a cause of Gerrit Vos's death?

Yes ___ No ___

If you answered "yes" to Question 3, please proceed to Question 4.
If you answered "no" to Question 3, please proceed to Question 7.

Question 4. Was Gerrit Vos negligent?

Yes ___ No ___

If you answered "yes" to Question 4, proceed to Question 5. If you answered "no" to question 4, proceed to Question 7.

Question 5. Was Gerrit Vos's negligence a cause of his death?

Yes ___ No ___

If you answered "yes" to question 5, proceed to Question 6. If you answered "no" to Question 5, proceed to Question 7.

Question 6. What percentage of responsibility for Gerrit Vos to you assign to the negligent conduct, if any, of the following?

Defendants Henry and Farris	___%
Gerrit Vos	___%
Total	100%

<u>Damages</u>

If you answered "yes" to Question 1, please answer the following question:

Question 7. What are Gerrit Vos's damages for his pain and suffering and loss of enjoyment of life?

$_____

If you answered "yes" to either Question 1 or Question 3, please answer the following question:

Question 8. What are Plaintiffs' damages?

Plaintiff Richard Vos's damages:

The loss of Gerrit Vos's love, companionship, comfort, care, assistance, protection, affection, and moral support from May 29, 2016, to the present:

$_____

The loss of Gerrit Voss's love, companionship, comfort, care, assistance, protection, affection, and moral support from today forward:

$_____

Plaintiff Jenelle Bernacchi's damages:

The loss of Gerrit Vos's love, companionship, comfort, care, assistance, protection, affection, and moral support from May 29, 2016, to the present:

$_____

The loss of Gerrit Voss's love, companionship, comfort, care, assistance, protection, affection, and moral support from today forward:

$_____

Please sign and return this verdict form.

Signed: _____
Jury Foreperson

Dated: _____

United States District Court

DISTRICT OF MONTANA
MISSOULA DIVISION
RUSSELL SMITH COURTHOUSE
201 EAST BROADWAY
MISSOULA, MT 59802

Important Directions for Marking Answers & Signing This Form

Use A No. 2 Pencil

USE NO. 2 PENCIL ONLY

- Do not use ink or ballpoint
- Fill out form on hard surface
- Make heavy black marks that fill in the circle completely
- Erase any changes completely
- Make no stray marks
- Do not write in margins nor in official use only areas

Right ●
Wrong ⊗

FOR OFFICIAL USE

Jurors Please Do Not Write In This Space

Q ○
X ○
E ○
D ○

100598405

TO: If your name and permanent address are not correct, please make corrections here.

Participant #

Provide Your Phone Number(s)				County You Now Live In
Home		Work (Incl. extension)		
Area Code	Number	Area Code	Number & Ext.	

JUROR QUALIFICATION QUESTIONNAIRE

Please Read Letter On Other Side Before Completing

If another person fills out the form, please indicate that person's name, address and reason why in the "Remarks" section.

Fill In Completely Your Response To Each Question.

	Yes	No
1. Are you a citizen of the United States?	○	○
2. Are you 18 years of age or older? Date of Birth: Month ____ Day ____ Give your age ____ Year ____	○	○
3. Has your primary residence for the past year been in this state?	○	○
If "No", show under Remarks on reverse the county of other counties or states of primary residence during the past year and show dates. — in the same county?	○	○
. Do you read, write, speak and understand the English language?	○	○

If your answer to No. 5 or 6 is "Yes" please see notes to Questions 5 and 6 on reverse side.

	Yes	No
5. Are any charges now pending against you for a violation of state or federal law punishable by imprisonment for more than one year?	○	○
6. Have you ever been convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison?	○	○
7. (If "Yes"), Were your civil rights restored? (If "Yes", explain on the reverse side)	○	○
8. Do you have any physical or mental disability that would interfere with or prevent you from serving as a juror? (If "Yes", please see notes to Question 8 on reverse side).	○	○

9. EXEMPTIONS

Are you employed on a full time basis as a:

	Yes	No
Public official of the United States, state, or local government who is elected to public office or directly appointed by one elected to office	○	○
Member of any governmental police or regular fire dept. (not including volunteer or non-governmental departments)	○	○
Member in active service of the armed forces of the United States.	○	○

10. RACE/ETHNICITY

a. To assist in ensuring that all people are represented on juries, please fill in completely one or more circles which describe you. (See note on reverse side.) Nothing disclosed will affect your selection for jury service.

○ Black/African American ○ Asian ○ American Indian/Alaska Native
○ White ○ Native Hawaiian/Pacific Islander
○ Other (specify) ____
e you Hispanic or Latino? Yes ○ No ○

11. SEX

Male ○
Female ○

12. OCCUPATION (See reverse side)

Are you now employed? Yes ○ No ○

Are you a salaried employee of the U.S. gov't? Yes ○ No ○

Your Usual Occupation, Trade, Or Business

Your Employer's Name

Business Or Employer's Address

13. EDUCATION

Show the extent of your education above grade school

	Yes	No
High school/ GED equivalent	○	○
Trade/Vocational school	○	○
Above high school	○	○

14. Grounds For Requesting Excuse
(see Notes to Question 14 on other side).

This section describes certain categories of persons who may be excused from service as a juror. If you are a person in one of these categories listed below and you wish to be excused, fill in completely the circle for the number of your category listed below here: →

Or, if you wish to serve, do not show anything here. Persons showing a category of excuse which requires more information must give it on the other side under "Remarks".

1 ○	2 ○
3 ○	4 ○
5 ○	6 ○
7 ○	8 ○
9 ○	10 ○

(1) PERSONS OVER 75 YEARS OF AGE
(2) PERSONS WITH ACTIVE CARE AND CUSTODY OF A MINOR, OR AN AGED PERSON, WHOSE HEALTH AND/OR SAFETY WOULD BE JEOPARDIZED BY THEIR ABSENCE
(3) PERSONS SERVING A PUBLIC AGENCY, WITHOUT COMPENSATION, AS VOLUNTEER FIREFIGHTERS OR MEMBERS OF A RESCUE SQUAD OR AMBULANCE CREW
(4) PERSONS WHO HAVE SERVED AS A GRAND OR PETIT JUROR IN A FEDERAL COURT IN THE DISTRICT OF MONTANA WITHIN THE LAST TWO YEARS

FOR OFFICIAL USE

MARITAL STATUS: ○ Single ○ Married ○ Widowed ○ Separated or Divorced

I declare under penalty of perjury that all answers are true to the best of my knowledge and belief.

SIGN HERE ▶ _____ Date _____

If your address changes after you have returned the questionnaire, please notify the court promptly by letter or post card, addressing it to **"Attention: Jury Administrator."**

United States District Court

Dear Prospective Juror:

Your name has been drawn by random selection, and you are being considered for jury service in the United States District Court. Trial by jury is a keystone of our system of justice. Jury service is, therefore, both an opportunity and an obligation of every American. Jurors will receive mileage and, unless they are federal government employees, an attendance fee for each day of service.

In order for us to obtain some information about you from which we can objectively determine whether you are qualified to serve pursuant to federal law, please complete the questionnaire on the reverse side of this form. You **must** answer every question, with a number 2 pencil, sign, date and **return the form in the enclosed postage-free envelope within ten days.**

If you are unable to fill out this form, someone else may do it for you provided that person indicates in the "Remarks" sec why it was necessary for him or her to do so instead of you.

If you do not return this questionnaire form, fully complete within ten days you are liable to be summoned to report at you expense for completion of the questionnaire at this office.

Do not attach anything to this form. Please write your comments on the "Remarks" section. **Do not ask to be excused by telephone.**

If your address changes after you have returned this questionnaire, please notify us promptly by letter or post card, addressing it to **"Attention: Jury Administrator".**

Clerk, United States District Court

Remarks

Use the space below to complete any answers to the questionnaire which require more information or more space. Show the number(s) of questions to which you are further responding.

NOTES REGARDING THE QUALIFICATION FORM

Question 3 - RESIDENCE. If you answered "No", that your primary residence was not in the same state or county for the past year, name the other states and counties of primary residence, and give dates.

Question 5 and 6 - CRIMINAL RECORD. If your answer to either question 5 or 6 is "Yes", please show under "Remarks": (a) date of the offense, (b) date of the conviction (or date of pending charge), (c) nature of the offense, (d) the sentence imposed (if a conviction), and (e) the name of the court. One is disqualified from jury service only for criminal offenses punishable by imprisonment for more than one year, but it is the maximum penalty, and not the actual sentence, which controls.

NOTE - Answer Question 7 only if your answer to Question 6 is "Yes."

Question 8 - YOUR HEALTH. If you claim a mental or ph disability, please explain and/or enclose proof of it in a sep document. Do not attach anything to the form.

NOTE - Do not ask the court to call your doctor. Any doctor statement you obtain regarding your physical condition must be sent to the court by you rather than by the doctor.

Qualified individuals with disabilities have the same opportunity and obligation to serve as jurors as individuals without disabilities. If you have a disability that would affect, but not prevent, your serving as a juror, please advise and explain under "Remarks" or by enclosing a separate unattached letter.

Question 10 - RACE/ETHNICITY. Federal law requires you as a prospective juror to indicate your race. This answer is required solely to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service. By answering this question you help the federal court check and observe the juror selection process so that discrimination cannot occur. In this way, the federal court can fulfill the policy of the United States, which is to provide jurors who are randomly selected from a fair cross section of the community.

Question 12 - OCCUPATION. Federal law requires that you answer the questions about your occupation so that the Federal Courts may determine promptly whether you fall within an excuse or exemption category (See Questions 9 and 14).

Question 14 - GROUNDS FOR EXCUSE. If one of the categories listed in Question 14 applies to you and you wish to be excused for that reason, fill in completely the circle for your category at Question 14. Please make sure you also give, under "Remarks", such information as may be requested within the excuse category. You may still be qualified to serve if the court determines upon review that you appear to be eligible for service. Other persons may be excused only by showing jury service would cause them undue hardship or extreme inconvenience.

Box Number 16 - YOUR SIGNATURE. Be sure you signed the form. If another person had to fill ou questionnaire for you, that person must indicate his or her address and reason why under "Remarks".

UNITED STATES DISTRICT COURT

SUMMONS FOR JURY SERVICE

PLEASE READ FURTHER INSTRUCTIONS IN THE INFORMATION INCLUDED WITH THIS SUMMONS.

TO:

PLEASE BRING THIS UPPER SECTION WITH YOU WHEN YOU REPORT FOR JURY DUTY

DETACH AT PERFORATION FOR JUROR BADGE

JUROR

UNITED STATES DISTRICT COURT

THE COURT SUMMONS YOU TO APPEAR FOR JURY DUTY BEGINNING ON THE DATE, TIME AND PLACE SHOWN BELOW.

LOCATION:

DATE:

TIME:

JUROR NUMBER:

PHONE TO CALL:

Privacy act Statement: Your social security number is requested on a voluntary basis under authority of sections 6041, 6103 and 6109 of the Internal Revenue Code, for two purposes. First, if you earn more than $600 in compensation as a juror, the court must inform the Internal Revenue Service using your social security number, and it is helpful to get your number now. Second, in tax cases involving the United States, a party may ask the Secretary of the Treasury whether prospective jurors have or have not been the subject of any audit or other tax investigation by the Internal Revenue Service, and the Secretary is limited to giving a yes or no response. Providing your social security number makes it much easier to answer that question accurately and quickly. Failure to provide your social security number will not disqualify you from serving as a juror, but it may delay and disrupt the jury selection process.

JURY INFORMATION FORM DETACH LOWER HALF, RETURN BY MAIL WITHIN 5 DAYS

*IF YOU HAVE NO HOME PHONE GIVE PHONE NO. OF SOMEONE WHO CAN REACH YOU.

1. LAST NAME FIRST MIDDLE INITIAL

MAIL ADDRESS: STREET P.O. BOX

CITY STATE ZIP

2. PHONE: HOME (OR OTHER*) WORK (Include EXTENSION)

3. HOW LONG HAVE YOU LIVED IN THIS COUNTY ___ YRS. ___ MOS. THIS STATE ___ YRS. ___ MOS.

4. COUNTY

5. PLACE OF BIRTH

6. ○ SINGLE ○ MARRIED ○ WIDOWED ○ SEPARATED OR DIVORCED

7. NO. OF CHILDREN

8. SOCIAL SECURITY NUMBER**

9. AGE

10. ARE YOU EMPLOYED? ○ YES ○ NO

11. YOUR OCCUPATION OR BUSINESS

12. YOUR FIRM OR EMPLOYER'S NAME

13. BUSINESS ADDRESS OR EMPLOYER'S ADDRESS STREET CITY STATE

14. IF RETIRED, YOUR OCCUPATION BEFORE RETIREMENT

15. SPOUSE'S OCCUPATION (IF SPOUSE RETIRED, OCCUPATION BEFORE RETIREMENT)

16. ANY CHARGES NOW PENDING AGAINST YOU FOR A STATE OR FEDERAL CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR? ○ YES ○ NO

17. HAVE YOU BEEN CONVICTED OF A STATE OR FEDERAL CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR? ○ YES ○ NO

18. IF "YES" WERE YOUR CIVIL RIGHTS RESTORED

IF "YES", INSERT PROOF THAT YOUR CIVIL RIGHTS WERE RESTORED. ○ YES ○ NO

19. DO YOU HAVE ANY PHYSICAL OR MENTAL INFIRMITY WHICH WOULD IMPAIR YOUR CAPACITY TO SERVE AS A JUROR? ○ YES ○ NO

IF ANSWER IS "YES" AND YOU SEEK AN INFIRMITY EXCUSE PLEASE INSERT A LETTER OR A DOCTOR'S STATEMENT.

20. ARE YOU A SALARIED EMPLOYEE OF U.S. GOVERNMENT? ○ YES ○ NO

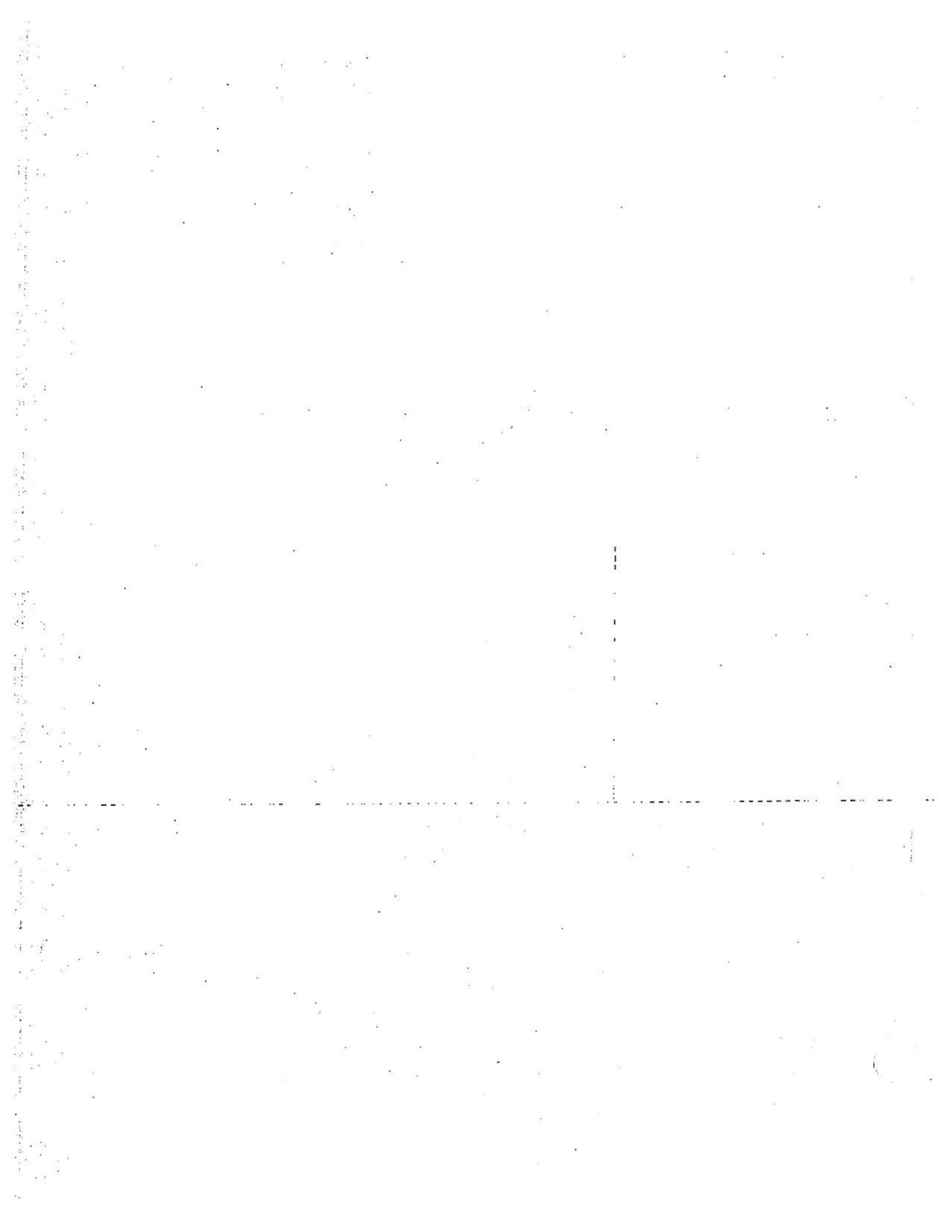
21. ESTIMATED NO. OF MILES ONE WAY FROM YOUR HOME TO COURTHOUSE TO WHICH YOU ARE SUMMONED. ___

I declare under penalty of perjury that all answers are true to the best of my knowledge and belief.

SIGN HERE ►

SCANTRON OpScan/NSIGHT™ EM-290731-1-185

GS99



PETIT JUROR INSTRUCTIONS
(Respond within five days of receipt)

United States District Court
District of Montana
Missoula Division
Jury Information: 1-855-405-2136

PLEASE READ BOTH SIDES OF THESE INSTRUCTIONS CAREFULLY

You have been selected for a one-month term of jury service in the United States District Court in Missoula, Montana. Jury service is the duty of all U.S. citizens and, thus, is not optional. The attached jury summons is a court order to appear, and it is strongly recommended that you immediately alert anyone who may be personally or professionally impacted by your service. Due to the large number of summoned jurors, please read **BOTH sides** of this information sheet before contacting the court with questions.

WHAT DO I NEED TO DO NOW?

Complete the questionnaire at the bottom of the enclosed summons and return by mail, OR respond online, within five days of your receipt of this mailing. If your address has changed, please report your current address when responding to the summons.

To respond online:
Step 1: Visit the website www.mtd.uscourts.gov/jurorinfo.html.
Step 2: Click the "eJuror Login" link on the right side of the screen.
Step 3: Enter the nine-digit participant number located next to your name and address on the summons.
Step 4: Follow the screen prompts and answer each question.

HOW WILL I KNOW WHEN I MUST REPORT FOR JURY SERVICE?

ou must call the Automated Juror Information System (AJIS) weekly for specific reporting instructions. During your one-month term of service, you must dial the toll-free line **1-855-405-2136** every Friday on the dates listed below. You have been provided with a unique nine-digit identification number, called a participant number, which is printed to the right of your name on the summons. You must enter this participant number to access the AJIS system.

Dates to call in for reporting instructions (1-855-405-2136):

- Friday, August 29, 2014, after 12:00 noon (for potential service during the week of Sept. 1st, 2014)
- Friday, September 5, 2014, after 12:00 noon (for potential service during the week of Sept. 8th, 2014)
- Friday, September 12, 2014, after 12:00 noon (for potential service during the week of Sept. 15th, 2014)
- Friday, September 19, 2014, after 12:00 noon (for potential service during the week of Sept. 22nd, 2014)
- Friday, September 26, 2014, after 12:00 noon (for potential service during the week of Sept. 29th, 2014)

It is critical that you call in as instructed to receive the most current reporting information. If you receive a busy signal, or the phone rings for an extended period, that simply means all lines are occupied; should that occur, please hang up and call again in a few minutes. **There is no voice mail option and reporting information is only provided through the AJIS system.**

EMERGENCY NOTIFICATIONS: In the event of a late change in the court schedule, AJIS will place a call to you. Therefore, it is important when filling out the summons that you provide the court with a primary telephone number where you may be contacted with no auto attendant feature, call blocking or ID restrictions of any kind. If you do not receive a cancellation alert because of such restrictions, and you report unnecessarily, you will not be compensated.

E-MAIL: The court also has the ability to send you information via e-mail. Please provide an e-mail address that you check regularly when you respond to the summons. It is recommended that you check your spam and junk mail folders for e-mails from the federal court (domain name uscourts.gov) during your one-month term of service and classify any such correspondence as "safe." **Even if you provide an e-mail address, you must s' call in every Friday as instructed above.**

REQUESTS FOR DEFERRAL OR EXCUSE: You may request a partial deferral from service for a particular date or range of dates for vacations, illnesses, or doctor's appointments. You may request a full excuse from service for extreme hardship. Work related excuses, self-employment or otherwise, do not constitute extreme hardship. Lack of auto transportation is not grounds for an excuse, except in areas where bus transportation does not exist. Requests for deferral or excuse must be made **in writing** to the District of Montana Jury Administrator (who resides in Billings) by either mail, e-mail, or fax:

Mail:	**E-mail:**	**Fax:**
U.S. District Court - Jury Administrator 2601 2nd Ave N, Ste 1200 Billings, MT 59105	missoula_jury@mtd.uscourts.gov	406-247-7008

WHAT DO I NEED TO KNOW IF I AM INSTRUCTED TO REPORT FOR SERVICE?

LOCATION: Russell E. Smith Courthouse, 201 East Broadway, Missoula, Montana.

COURTHOUSE SECURITY: Please allow extra time when reporting; you will be passing through Court Security, similar to that of airport security. Please have photo identification available to gain admittance into the building. Electronic devices such as cell phones and computers are not allowed in the Federal Courthouse. You will be passing through a metal detector, so please try to limit your possession of metal objects such as pocket knives, key chains, belts, jewelry, etc.

PARKING: Parking is provided at the ***Park Place Structure*** located at 201 E. Front Street (on the corner of East Front Street and North Pattee Street two blocks south of the courthouse). Please place the enclosed parking Notice face up on the dashboard of your vehicle in the parking garage and review the back of the Notice for additional information on parking at Park Place. You may chose to park at a parking meter on the street; however, the Court is not able to validate or reimburse this expense or any parking violations which may accrue at a meter during your time in Court. Parking is NOT ALLOWED in the private lot adjacent to the Russell Smith Courthouse; cars parked in this lot will be towed by the property owner.

BE PREPARED TO STAY OVERNIGHT, IF YOU CHOOSE: Jury selection will take place on the day you report and the trial typically will begin immediately after jury selection. If you live 50 miles or more one way from the courthouse, you may choose to stay overnight (and be reimbursed at the government's expense) until your jury service is complete, including the night before your day to report. Most trials last between two and five days, but some will last longer.

PAY: You will be paid a daily attendance fee of $40, including travel days. You will also be reimbursed for mileage at the prevailing federal rate. (You must be pre-approved for travel by any means other than private vehicle.) If you travel 50 miles or more and stay in a hotel, you will be paid $[Enter the seasonal per diem (full)] per night. You must provide your original receipt for overnight lodging. If you have an overnight stay without utilizing a hotel, you will be paid $[Enter the seasonal MI&E] per night. Please allow 4-6 weeks for payment.

MORE INFORMATION: Visit our website at **www.mtd.uscourts.gov/jurorinfo.html** or call **406-247-7003** for more information.

RESPONSE TO THIS SUMMONS IS MANDATORY: If you fail to follow these instructions, you may b served by a U.S. Marshal with an order to appear in court at your own expense to show cause why you should not be held in contempt of court for your failure to comply. Failure to obey the directives of the court may also result in fine, imprisonment, or both, as dictated by law.

Jury service is an important aspect of citizenship, and we thank you for your time and attention.

UNITED STATES FEDERAL COURT – GREAT FALLS DIVISION

NOTICE TO APPEAR

PLEASE REPORT for a GRAND JURY session to begin at the place and time shown below:

DATE: Wednesday, October 1, 2014
TIME: 9:00 A.M.
PLACE: MISSOURI RIVER COURTHOUSE, 125 Central Ave West, Great Falls, MT
Federal Court Security will direct you to the Grand Jury Room.
PHONE: (406) 454-7819

An official Notice to Appear is mailed for each Grand Jury session. If you are unable to attend, please contact Athena, Jury Clerk at (406) 454-7819.

PAY:

- **Attendance:** $40.00 per day for attendance, including travel days. The attendance fee is taxable income; you should keep a record of this. Mileage and subsistence, however, are not taxable.
- **Travel:** $0.56 per mile (round trip) **Cost reimbursement for travel by any other means than private vehicle must be pre-approved.**
- **Hotel/Motel:** $129.00 per night for hotel/motel expense for those who live 50 miles away or further. You must provide your original hotel receipt for overnight lodging. **Remember to request the Federal rate when you book your hotel.**
- **Timing:** Please allow 4-6 weeks before you receive payment. *(In the event you are called to serve during a lapse in appropriation (i.e., a government shutdown), payment of juror fees and reimbursement of expenses may be delayed.)*

PARKING:

- On-site parking is available. Jurors should park in the main lot adjacent to the courthouse.

Please check-in each day you attend Grand Jury to guarantee payment.

Thank you,

Athena Cobb, Jury Clerk

QUESTIONS?
Call 454-7819, 8:00am-5:00pm

PLEASE FILL OUT AND RETURN THE FOLLOWING WITHIN SEVEN (7) DAYS TO CLERK OF DISTRICT COURT, 200 WEST BROADWAY, MISSOULA, MONTANA 59802 PHONE 258-4780 FAX 258-4899

QUESTIONNAIRE AS TO QUALIFICATION FOR JURY SERVICE

(PLEASE PRINT OR TYPE)

1. Name _____
2. Address _____ City _____ Zip Code _____
3. Please state the round trip mileage from your home to the courthouse _____
4. Telephone: Home _____ Work _____ Cellular _____ Email _____
5. How long have you resided there? _____ Number of years in Montana? _____
6. Married [ ] Single [ ] Age _____ Sex Male [ ] Female [ ]
7. Do you have children? Yes [ ] No [ ] Ages _____ Sex _____
8. What education have you had? _____
9. Are you employed at present? Yes [ ] No [ ] Occupation _____
10. Employer's name _____ Employer's Address _____
11. a. If you are married, name of spouse. _____
    b. If married, occupation of spouse. _____
    c. If retired, or not working, give last occupation. _____
    d. If married, give spouse's employer. _____
    e. Do you own or are you buying your own home? _____
12. Have you ever served as a juror? Yes [ ] No [ ] If so, in what court? _____
13. Have you or any member of your immediate family ever been injured in an accident? Yes [ ] No [ ]
    If so, what type? _____
14. Are you or any member of your immediate family involved in law enforcement in any official capacity? Yes [ ] No [ ]
    If so, briefly explain. _____
15. Have you or any member of your immediate family ever been a plaintiff or defendant in a lawsuit? Yes [ ] No [ ]
    What type of lawsuit? _____
16. Are you or your spouse related to an attorney? Yes [ ] No [ ] If so, his/her name and address. _____
17. Are you or your spouse presently being represented by an attorney? Yes [ ] No [ ] If so, his/her name and address. _____
18. Do you have any disability which you feel would make it difficult to serve on a jury? Yes [ ] No [ ] If so, briefly explain the disability and the accommodations we need to provide to enable you to serve on a jury. _____
19. In order to be eligible to serve as a trial juror, you must be 18 years of age or older, a resident for at least 30 days of the state and of the city, town or county in which you are called for jury duty, a citizen of the United States and not convicted of malfeasance in office or any felony or other high crime, the sentence of which has not yet expired or the fine not yet paid.
20. Do you feel you should be excused from serving as a juror because of undue hardship or because you do not meet the eligibility requirements for jury service? Yes [ ] No [ ] If you answered "yes", please complete the affidavit on the reverse side of the questionnaire, have your signature notarized and return to the address above.

I certify that the foregoing statements are true to the best of my knowledge and belief.

SIGNATURE _____ DATE _____

JUDGE WILLIAM G. YOUNG

In Celebration of the American Jury Trial

Thursday, October 02, 2014; 2:00 p.m. – 5:00 p.m.
MCLE Conference Center, Boston, MA; Seminar No. 2150069P01

> We hold these truths to be self evident: That all persons are created equal; That they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among us, deriving their just powers from the consent of the governed.[1]

Now that's about as close to an American creed as you can get,[2] and this afternoon we're going to celebrate and we're going to discuss in the most candid and direct way possible one aspect of the government that we created 227 years ago, the American jury. We didn't start it, but it is in our country that it has come to full flower.

Ninety percent of the jury trials on the planet take place in the United States of America.[3] No country uses juries, the direct democracy of the people, more than we do; it is part of our DNA as Americans.[4]

So in the few minutes as we get rolling here, I want to call to your attention some aspects of the American jury, and then, with our experts here, we will talk about how it actually practically works.

First, I want you to consider that jurors are constitutional officers.[5] Make no mistake, they are constitutional officers, the equal of any judge or any other constitutional officer. Now the Judicial Article III of our Constitution, our Federal Constitution, is drawn in large measure from the Massachusetts Constitution.

But I'll focus on the Federal Constitution. It's very symmetrical. It has only six types of constitutional office; each branch gets two. The legislative branch that makes the

laws has senators and representatives.[6] The executive branch that enforces the law, we have a very strong executive branch, and there's really only one constitutional officer at the top; it is the President of the United States. And given the frailties of the human condition, we have a Vice President of the United States.[7]

So now we're up to four. Everybody else in the executive branch - the cabinet have to be confirmed by the Senate and the like, the generals and admirals, and the boards and commissions, they're not constitutional officers.

The judicial branch of government starts out like this: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time, ordain and establish." [8] That is, the trial courts, the district courts. There's a couple of sentences after that that deal with the justices and judges under Article III.[9] They are constitutional officers, the fifth type of constitutional officer.

And then – and it's very important to understand this – then, in the organization of the three branches of government, you don't need the Bill of Rights for this, in Article III, after those couple of sentences about judges, it says this: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[10] Get that. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And, of course, people wouldn't buy it, they wouldn't go for the Constitution, until it had the Bill of Rights.

Now the Sixth Amendment to the Bill of Rights, which we talk about and we know that that guarantees the right of counsel and the right of confrontation and other rights, that doesn't give the right to jury in criminal cases. You don't need that; that's in the organization of the government.[11]

The Seventh Amendment, and I'm glib here but I'm accurate, in essence says this: You know these cases we're trying to juries now - 1787 – and that we tried in our colonial era to juries, we'll always try them to juries as long as the Republic stands.[12]

And so we have the American jury, what Jefferson called the greatest anchor ever devised by humankind for holding a government to the principles of its Constitution.[13]

Now if they're constitutional officers, they have constitutional rights. We tend not to think of these rights appertaining to the jurors themselves because, given our adversary system, they tend to be played out in the Courts when one of the litigants, a defendant in a criminal case most frequently, is insisting on those rights as though they were his rights. They're part of his rights, but they are the rights of the people themselves to sit as jurors, and there are at least four of them. And to understand how important is this endeavor that we are herein jointly engaged, you've got to comprehend at least these four rights:

First, every citizen has an equal right to access to the jury box. It's akin to one man, one vote. [14] And the jury plans of the various district courts and indeed the state court – and I want to pause here and point out that the jury plan of the Commonwealth of Massachusetts is the best in the nation, except for Alaska. Alaska is better only because, given their oil reserves, they declare a general dividend every year and in order to get your check, you are on the jury rolls. Massachusetts is next. The feds in Massachusetts, we take our jurors from the same pool as the state.

Nationwide, every citizen – because what we're talking about is direct democracy, the people themselves ruling directly – they have an equal statistical right to serve on the nation's jurors.

Second, they have the right – they have the right, the jurors, to be free from discrimination, racial, gender, ethnic discrimination, when being chosen for jury service, when being embodied with that constitutional role. You can see that well if you look at the Supreme Court case, *Batson v. Kentucky,*[15] which says if there is an improper challenge and the judge disallows the challenge, the remedy is to seat the challenged juror. That's because it's her right to be seated, her right to sit as a juror in judgment. She cannot be denied that right on basis of race, gender, or ethnic heritage.

Third, the jury has the absolute right accurately to be instructed as to the law. And you say, "Say what?" You know that if a judge gives improper instructions, the judge should be reversed. But if you think of that consequence as a right of the jurors themselves accurately to be instructed in the law, you will see why this is vitally important.

That right of the jury accurately to be instructed in the law is the basis for the phenomenal judicial independence of the judges of the United States. Not so much the judicial independence of the constitutional court, the Supreme Court of the United States. But get this - We are the only country in the history of the world to vest in an individual trial judge, not elected, appointed for life, the power to set aside a statute passed by the majority of both houses of Congress, and signed into law by the President.[16]

Naturally, that trial judge may be appealed to a higher court, but as a society we accept that each individual trial judge has that constitutional power in reserve. And because she has that power, that makes the Constitution alive and as close as your courthouse.

Imagine that you have all the rights that you have now, every one of the rights

you have now, but they can only be vindicated by the Supreme Court of the United States. Go to Washington, seek certiorari. That's not America. And if you ask yourself why as a society we tolerate the individual unelected judicial officer having that enormous power in reserve, and you look to history, there's only one reason. Because that judge has to instruct the jury what the law actually is, and the system simply won't work if everything has to be referred to the top appellate court. We can't keep the jurors waiting. They have the right to adjudicate, the right to decide the case.

And therefore, if we are to have a jury system, we must vest in our trial judges the power to declare the law. Now, of course, we're all sworn. If a higher court has declared it, we follow that. And where they haven't, that is the power in the trial judge. And we trial judges, we ought to remember that. The only reason we have that constitutional power - the only reason - is because there is a jury of citizens in the box.[17]

Then the fourth right. Jurors have the right, the constitutional right, to adjudicate those jury cases once they because ripe for a trial. That was borne in on me last year, 2013, when in fact the government shut down for 15 days. And we were all put to the test of who are "essential" employees. And it began to dawn on us we might in fact run out of money - and the only reason we stayed open is we had money from fees, so we could go maybe about two weeks, period. At the end we were running out of money.

And we came to realize that even if we didn't have any money, we were going to keep going. We were going to keep summoning those jurors. We'd have to tell them they weren't going to be paid, we couldn't guarantee their pay. But if the Congress by not appropriating the money could stop jury trials, then Congress could extinguish that right. So it is the right of the jury to adjudicate. It is not an answer to say, "Well, no, no. We're

not stopping them; we're just delaying them for a time." Unconstitutional.

Unconstitutional because you go back to the first right, that everyone has an equal right to sit on the jury. And once you've got a case ripe for a jury trial – it must go to that jury.

This has a number of very interesting ramifications when you come to realize jurors themselves have a constitutional right to come into Court and adjudicate cases. Judge Ponser in our court he's our judge who sits in Springfield, takes senior status, to which he is certainly entitled and he's a magnificent judge and he richly deserves it, and so we no longer have a judge out there. Now we do, Judge Mastroianni, but for a year and a half, two years, we didn't have a judge out there.

So one way to skin that cat is to say, "Okay, all you Springfield lawyers and litigants come to Boston; Springfield is 90 mile away." Unconstitutional. What about the people who live in the four western counties of Massachusetts? They have a right equal to citizens who live in the eastern part of Massachusetts to sit on the nation's juries.

In jury cases we must – it is constitutionally mandated - that we go out there and draw the juries from the vicinage, to give them that right. So we're talking about very serious constitutional rights. We're talking about the right of people to do things that no judge is empowered to do.

I want to end up by saying this. The American jury has emerged unchanged, or with as little changes as any aspect of our government, over 227 years. What we celebrate, what we talk about this afternoon is so fundamental that if John Adams walked into the Suffolk Superior Court, his mind might be blown by smartphones and everything else, but once he got into that courtroom – our colleague, John Adams, trial lawyer of

Massachusetts - he'd know exactly what was going on.

So why is that? Why do we have this right, this most robust expression of direct democracy? There is only one reason. The people want it. Nobody else wants it except the people directly. Large aggregations of economic power don't want the jury.[18] All studies confirm that – this isn't a class thing – all studies confirm that with all the imperfections of our system, a jury trial is the fairest mechanism to resolve disputes.

So all the economic powers, they don't want it. The executive – this is a nonpartisan statement, I don't care who's President – the executive doesn't want juries; they never have. Look at the recent proposed EPA regulations.[19] Look at the position they take with respect to the Federal Arbitration Act. Look at the wretched fiasco that we call Guantanamo. The Executive doesn't want juries.[20]

The legislature will do what the people want. You don't see any great leaders in the legislature, the Congress, state or federal, – other than on Law Day – beating the drum for juries.[21]

And sadly, the judiciary is lukewarm. The judges aren't so sure about the juries; some of us like them, some of us aren't so sure.[22]

It's the people that want them and the people want them for two reasons, and I'll be done. They want juries. Never has there been an election, state or federal, where a jury right has been curbed, never. We've curbed jury rights, but not through direct elections. The people want juries for one simple reason. They work. They are the best method.

Jefferson was right, they are the best method of evening out economic disparity. They are the fairest method we know. They are the fairest method that any civilization has ever come upon. They work. And I'm going to suggest to you there's two reasons

why they work and one of those reasons will occupy us this afternoon.

The first reason they work is the people who are sitting right down here [indicating the experienced trial lawyer panellists] and really all of you, because here in the United States we have a strong independent bar. We have attorneys who know how to go to court and try these cases. That's why they work.

And the second reason is this. I've had the privilege of serving as a judge for some time now. Now I'm going into my 37th year. I've been a judge longer than some of you have been alive. So if this sounds a priori, I'm not going to retreat from it because I believe it passionately. I believe that Americans have a certain innate decency. Coupled with that, they have an overwhelming sense of duty. Properly charged by a judge who knows what she's doing, there's no runaway juries, there's no sympathy; there is the fair and impartial adjudication of facts.

And how do I know?

We all know the story I'm going to tell you. Go back over a year now, a year and a half. I was in the office April 15th, 2013. It's not a federal holiday; it's Patriot's Day in Massachusetts. And so I went to work. We didn't have juries that day. And like you, I watched the video tapes of the bombing and I watched them over and over again. And amidst the cries and the chaos, I watched people ripping down the barriers between the runners and the crowds to get to the people who were bleeding out. That was after the second bomb went off and everybody knew that it was an actual attack, not some sort of accident. I watched people running into the smoke toward the cries.

And in Newtown, Connecticut, it took five minutes for the shooter to murder his victims. Not one teacher ran out of that building or dove out the windows. They put their

bodies in front their students they had come to teach. On 9/11, everybody who was in the World Trade Center that could get out, got out. And hundreds of firefighters ran in because it was their duty.

Now on the 16th of April last year, and on many other occasions because I'm the jury liaison in our court, I went down to greet the jurors and I looked out at them and there they were - firefighters, teachers, average Americans. And I'm here to tell you that they have the capacity to govern. Every single jury trial in which you participate is both a test and a celebration of a free people governing themselves.

And just because this jury right is subscribed in the words of our Constitution, don't think it is yours by right. It is yours by inheritance. As President Reagan said of freedom[23], so here:

> The jury trial is a fragile thing, never more than one generation away from extinction. It must be fought for and defended in every generation, for it comes but once to a people.

---

[1] Declaration of Independence (adopted July 2, 1776). In the original, the word "men" appears in place of "persons" and "us."

[2] Joseph J. Ellis, American Sphinx: The Character of Thomas Jefferson (1996) ("These are the core articles of faith in the American Creed.").

[3] Fred Graham, American Juries, in Anatomy of a Jury Trial, 14 eJournal USA 7-4 (Bureau of Int'l Info. Programs U.S. Dept. State 2009).

[4] See William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67 (2006). See also Powers v. Ohio, 499 U.S. 400, 406-07 (1991) (citing Alexis de Tocqueville, 1 Democracy in America 334-337 (Schocken 1st ed. 1961)).

> Juries were once the primary government regulators in America. Throughout the eighteenth century and well into the nineteenth, at a time when legislation was rare and the executive branch weak, juries not only adjudicated legal disputes but, through court cases, enforced taxes, determined welfare rolls, mandated highway repairs, and generally oversaw public business. In the early days of the Republic, the decisions of juries were also viewed as determining the law of the land, hence defining the legal standards for proper conduct. With the growth of the other branches of government — and the judiciary's assertion in the nineteenth century of control over law fixing — the jury lost its role as the chief regulator of societal conduct. Yet, the regulatory function of juries never entirely ended. The jury's determination of reasonableness in negligence cases provides an example of its continuing participation in the establishment of the parameters of proper social conduct.

Stephan Landsman, Juries as Regulators of Last Resort , 55 Wm & Mary L. Rev. 1061, 1061 (2014) (footnotes omitted).

> The American jury trial [today], viewed from inside, provides the jury the wherewithal to exercise political judgment wisely. There is every reason to believe that juries do exercise this judgment, and do so in a way that is respectful of the values of concern for the individual litigant and for the stability of the legal order.

Robert P. Burns, The Jury as a Political Institution: An Internal Perspective, 55 Wm & Mary L. Rev. 805, 835 (2014). See Erin York Cornell & Valerie P. Hans, Representation Through Participation: A Multilevel Analysis of Jury Deliberations 45 Law & Soc'y Rev. 667 (2011).

[5] This analysis depends heavily on Akhil Reed Amar, America's Constitution: A Biography 236 (2005). See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96 (1998); Robert P. Burns, The Dignity, Rights, and Responsibilities of the Jury: On the Structure of Normative Argument, 43 Ariz. St. L. J. 1147 (2011).

[6] U.S. Const. Art. I, sec. 1.

[7] U.S. Const. Art II, sec. 1.

[8] U.S. Const. Art III, sec. 1.

[9] Ibid.

[10] U.S. Const. Art III, see 2., par. 3.

[11] U.S. Const., Sixth Amend.

[12] U.S. Const., Seventh Amend.

[13] Letter from Thomas Jefferson to Thomas Paine (1789), in 7 The Writings of Thomas Jefferson 404, 408 (Lipscomb & Bergh eds. 1903) ("I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.").

[14] Duren v. Missouri, 439 U.S. 357, 364 (1979). Nat'l Ctr. for State Courts, Jury Manger's Toolbox: A Primer on Fair Cross Section Jurisprudence 1-2 (2010) available at http://www.jurytoolbox.org/more/Primer%20 on%c20Fair%c20Cross%20Sections.pdf. Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761 (2011). See R. Darcy & Brett M. Stingley, Statistical Criticism of Jury Selection Methods in the Western District of Oklahoma, 30 Buff P. Int. L. J. S (2011-2012)

[15] 476 U.S. 79, 97-101 , (1986). Snyder v. Louisiana, 552 U.S. 472, 485-86 (2008): But see Rivera v. Illinois 556 U.S. 148, 160 (2008) (criticizing "good faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of [Batson]"); United States v. Bowles, 751 F. 3d 35, 38 (2014) (criticizing "district court's sua sponte initiation of a Batson enquiry" after a single minority strike). See Jeffrey Bellin & Junichi P. Semitsu, Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075 (2011). Jeanette E. Walston, Do Non-Discriminatory Preremptory Strikes Really Exist, or is a Juror's Right to Sit on a Jury Denied When the Court Allows the Use of Preremptory Strikes? 17 Tex. Wesleyan L. Rev. 371 (2011); William H. Burgess & Douglas G. Smith, The Proper Remedy for the Lack of Batson Findings: the Fall-out from Snyder v. Louisiana, 101 J. Crim. L. & Criminology 1 (2011); Leah M. Provost, Excavating From the Inside: Race, Gender, and Preremptory Challenges, 45 Val. U. L. Rev. 307 (2010)

[16] The William, 28 F. Cas. 614 (D. Mass. 1808) (No. 16, 700) (Davis, J.).

> *The William* was a brigantine that had allegedly violated Jefferson's Embargo Act. The government sought her forfeiture in 1808. Appearing for the government with the U.S. Attorney was a young Salem lawyer, Joseph Story. (Three years later, Joseph Story was named to the Supreme Court. Next to Chief Justice Marshall, he is regarded as the leading constitutional jurist of the early Republic.) In Massachusetts, public feeling against the Embargo Act ran high since it suppressed international maritime commerce and caused many vessels to rot alongside their wharves.

The case was tried before Judge John Davis, a Federalist appointed by President Adams, and a jury. Counsel for *The William* challenged the constitutionality of the Embargo Act. Popular opinion in Massachusetts strongly favored a declaration of unconstitutionality as it would set free the local maritime commerce. At the same time, the national policy, supported by a heavily Jeffersonian Congress, was embodied in the Embargo Act. Moreover, at that period of our constitutional development, Congress sometimes impeached judges with whose views it differed.

Judge Davis came to grips with the constitutionality of the Embargo Act on the eve of the trial. Without citation to Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) (Marshall, C.J.), (The records of the decision contain such a citation but some commentators believe it was added later, once the dust had settled, to bolster the Court's ruling.) Judge Davis held that, as a U.S. District Judge, he had the initial authority to pass on the constitutionality of an Act of Congress and, if unconstitutional, to declare it null and void. This was heady doctrine, indeed. Imagine – a single U.S. District Judge setting aside the will of the entire Congress of the United States because that single judge considered the congressional act unconstitutional. This was unprecedented.

Such an approach, of course was sure to find favor throughout maritime New England. But Judge Davis went on to adopt a much narrower view of judicial authority than Chief Justice Marshall and the Supreme Court had espoused in Marbury v. Madison. In Judge Davis's view, a court could hold an Act of Congress unconstitutional, but as the Embargo Act did not run afoul of any express provision of the Constitution, it was constitutional and Judge Davis so held.

While this ruling upholding the national policy would no doubt find favor in the Jeffersonian Congress, it would outrage seafaring New Englanders, so Judge Davis promptly put the case to trial before a local jury. Just as promptly, after a jury argument that essentially called for jury nullification, that jury found for the owners of *The William*. At first blush, therefore, everyone won. The government succeeded in upholding the Embargo Act and the shipowners got back their brigantine.

In the years that followed, however, the importance of one aspect of Judge Davis's decision in *The William* grew apace. Other judges and commentators focused on Judge Davis's assertion that a single U.S. District Judge could address the constitutionality of an Act of Congress. Gradually, it came to be accepted that issues of constitutionality could appropriately be addressed at the trial level and this aspect of the decision "probably affected the history of the nation to a greater degree than any judicial opinion ever rendered in this Commonwealth." Charles Warren, The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary, 8 Mass. L.Q. (No. 2) 1, 20 (1922). Professor Charles Warren is also author of the multivolume history, The Supreme Court in United States History (1926). Today this doctrine is constitutional bedrock, even though the judge who first asserted it never applied it. William G. Young, "Of Iron Men in Wooden Ships Who Went to Sea, With Sails," Legal Chowder: Lawyering and Judging in Massachusetts (MCLE, 2002) 186-87. The title quote is from Prof. Arthur Sutherland, The Ship Blaireux.

[17] In recent years, many judges appear to have forgotten that the true source of their power to render legal interpretations stems from the jury—their co-equal constitutional officers. As a jury foreman told a judge in 1830, "The jury want to know whether what ar you told us, when we first went out, was raly the law, or whether was jist your notion." Jeffrey Abramson, We the Jury: the Jury System and the Ideal of Democracy, 15 (2000). "Juries are central to the constitutional structure of America." Jury instructions are a "constitutional teaching moment." Andrew Guthrie Ferguson, Instructions as Constitutional Education, 84 U. Colo. L. Rev. 233, 233 (2013). It is the *judiciary* which has failed to place the jury trial at the very center of its operations where it belongs:

> [T]hose judges who thought that, by and large, we could do without juries and we would still have the same moral authority, and our written opinions, our constitutional interpretations would still occupy the center stage of political discourse. Well, we are rather stunned that the President thought that, with respect to those people that he designated as enemies of

the state, by and large, he could do without courts.
William G. Young, Speech to the Florida Bar Association at the Annual Convention, June 28, 2007, *available at* www.bostonbar.org/pub/speeches/young_june07.pdf.

[18] For decades, our civil juries have been incessantly disparaged by business and insurance interests. These interests know what they are doing. Recent analysis has led one commentator to conclude that "a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests." Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility 226 (2000). See Gene Schaerr & Jed Brinton, Business and Jury Trials: The Framer's Vision Versus Modern Reality, 71 Ohio St. L.J. 5055 (2011). What is most disturbing about this trend is that it has occurred without the courts offering any defense for the institution upon which their moral authority ultimately depends. *See* Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 141. *But see* United States v. Luisi, 568 F. Supp. 2d 106, 110–11 (D. Mass. 2007) (defending the jury as the cornerstone of the legal system's legitimacy); Ciulla v. Rigny, 89 F. Supp. 2d 97, 100–03 (D. Mass. 2000) (offering a defense of juries). Indeed, federal courts today seem barely concerned with jury trials. *See* Edmund V. Ludwig, *The Changing Role of the Trial Judge*, 85 Judicature 216, 217 (2002) ("Trials, to an increasing extent, have become a luxury . . . when cases are handled as a package or a group instead of one at a time, it is hard, if not impossible, for the lawyers or the judges to maintain time-honored concepts of due process and the adversary system."). Judge Ludwig was at the time a member of the Court Administration and Case Management Committee of the Judicial Conference of the United States. *See* Comm. on Court Admin. & Case Mgmt., Judicial Conference of the U.S., Civil Litigation Management Manual, at iii (2001), *available at* http://www.fjc.gov/public/home.nsf (follow "Publications & videos" hyperlink; then follow "Browse by Subject" hyperlink; then follow "Case Management—Civil" hyperlink). The federal judiciary has been willing "to accept a diminished, less representative, and thus sharply less effective civil jury." *Rigny*, 89 F. Supp. 2d at 102 n.6 (citing Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 Ala. L. Rev. 133, 127–52 (1997)); *see also* Am. Coll. of Trial Lawyers, Report on the Importance of Twelve-Member Civil Jury in the Federal Courts 34 (2002) ("The real question . . . is whether there are any legitimate reasons for departing from [twelve member juries]."); *Developments in the Law: The Civil Jury*, 110 Harv. L. Rev. 408, 1466–89 (1997).

[19] See Craig H. Allen, Proving Natural Resource Damage Under OPA 90, Out With The Rebuttable Presumption in With APA Style Judicial Review, 85 Tul. L. Rev. 1039 (2011).

[20] In fairness, Attorney General Holder has been tireless in seeking to try terror crimes before juries. Sadly, the Obama administration has not backed him with the full force of the Presidency. Matt Apuzzo, A Holder Legacy: Shifting Terror Cases to the Civilian Courts, and Winning N.Y. Times, Oct. 21, 2014 at A 17.

[21] Bipartisan majorities in Congress have severely restricted access to the jury. *See, e.g.*, Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 832 (1974); Private Securities Litigation Reform Act, 48 Stat. 899 (1934); Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998); Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1997).

Whenever Congress extinguishes a right which, heretofore, has been vindicated in the courts through citizen juries, there is a cost. It is not a monetary cost, but rather a cost paid in rarer coin – the treasure of democracy itself. William G. Young, *An Open Letter to U.S. District Court Judges*, Fed. Lawyer, July 2003, at 30, 32. For further discussion of the critical role of the jury in our democratic society, see *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1005–06 (D. Mass. 1989); *The Civil Jury*, *supra* note 25, at 1433. *See generally* Christopher J. Peters, *Adjudication as Representation*, 97 Colum. L. Rev. 312 (1997) (discussing how the processes of our court system vindicate and strengthen democracy by involving litigants with standing in the explication and application of our laws).

In fairness, Senator Sheldon Whitehouse of Rhode Island is a thoughtful and long standing proponent of America's jury system. Senator Sheldon Whitehouse, Restoring the Civil Jury's Role in the Structure of Our Government, 55 Wm. & Mary L. Rev. 1241 (2014).

[22] There is today a deep divide in the federal district court judiciary over the role of the jury. I conceive of trial as the primary means provided by our constitution and laws for the fair and impartial resolution of legal disputes and that all litigants come to court seeking a prompt trial or the credible threat of a trial. See D. Brock Hornby, The Business of the U.S. District Courts, 10 Green Bag 2d 453, 461-62 (2007). This is called the trial model of district court business. This is, however, the minority view.

Today, it is the administrative model of the business of the district courts that holds sway. See Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L.J. 745, 747 (2010). The administrative model seeks the speedy, inexpensive (to the courts), and cost-efficient resolution of every case. Trials, being costly and inefficient, are disfavored. See generally Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924 (2000).

Both models require hands-on judicial management, of course, but their goals are significantly different. Under the trial model, the judge makes management decisions with an eye toward how the case is going to be tried. Settlement and mediation are constantly encouraged but the judicial function is seen as steering the case toward a prompt and fair trial. The choice to opt-out is left to the litigants. Under the administrative model, the primary goal is case resolution. Trial is an option, but usually a last resort.

These are not theoretical differences in management style. They are actual, palpably different approaches that lead to different institutional competencies and outcomes. The issue is **not** judicial management. Everyone agrees judicial management is necessary and beneficial. The issue, rather, is – as one astute commentator has so ably observed – how should district court judges be spending their time? Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 Duke L.J. 669, 689-697 (2010).

I have long argued that the federal judiciary's single minded emphasis on efficiency tends to marginalize the American Jury, supplant other, more important values, and that more comprehensive measures of district court activity are needed today. See United States v. Massachusetts, 781 F. Supp 2d 1, 23-25 (D. Mass. 2011) (citing Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L.J. 745, 747 (2010)); see also Leonard Post, Federal Tort Trials Continue a Downward Spiral, Nat'l L.J., Aug. 22, 2005; Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?, 55 S.M.U. L. Rev. 1405, 1405–06 (2002)). It is for this reason that I have, for the past four years, published a ranking of America's most productive federal district courts. See William G. Young & Jordan M. Singer, Bench Presence: Toward a More Complete Model of Federal District Court Productivity, 118 Penn St. L. Rev. 55 (2013); Jordan M. Singer & William G. Young , Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012, 118 Penn. St. L. Rev. 243 (2013); William G. Young, Mustering Holmes "Regiments," 48 New England L. Rev. 450, 465-475 (2014) (collecting five years of productivity statistics). I am not alone in these concerns. See Joseph F. Anderson, Jr., Where Have You Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial, 4 Fed. Cts. L. Rev. 99, 105 (2010); Victor E. Schwartz & Leah Lorber, A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 Am. J. Trial Advoc. 247, 249 (2000). As Joan A. Lukey, former president of the American College of Trial Lawyers aptly remarks, "If you're going to be in the courtroom... you should be there regularly, not once a year, lawyers who are not comfortable in the courtroom and don't have trial experience are more likely to settle. That has an impact on the bench as fewer trials mean less opportunities for judges to become experienced trial

jurists. All of that becomes cyclical and you end up with fewer trials." Mass. Lawyers Weekly, October 9, 2014 at 2.

> The irony here is that the new palaces of steel and glass [courthouses] arrive at the point where the courts actually empty out in favor of the devolution of adjucative function to the bureaucratic back offices. The courtrooms have the transparency of the void, while the offices thrum and vibrate to the energies of privatized Justice -- the antidemocracy of multiple forms of Alternative Dispute Resolution where only the protagonists engage while the public is shut out. In a parallel development, increasing concerns with security engender both barriers to participation in standard courts and special courts, such as in Guantanamo, that denigrate completely the notion of public participation and with it the safeguards to justice that such participation developed to ensure. Such courts are the particularly sharp edge of less visible but cognate domestic processes, both criminal and civil, which close off avenues to public participation (for example, commercial contracts that include terms requiring that disputes be resolved by private arbitration). Only in certain enlightened spaces is there sign of the successful blending of image and process, marked by the recognition of the violence of judgment, but also, in balance, the price paid in suffering for the possibility of this democratic form of violence to have been achieved and thus a constant reminder of the possibilities of injustice . . . . The danger is that such rare examples of iconography for democratic adjudication" become lost in the welter of self-congratulatory edifices to transparency that provide a front operation to the back-housing of adjudication - as administration.

Eugene McNamee, Review of Judith Resnik & Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms, 25 Law & Literature 131, 137 (2013).

There has been virtual abandonment by the federal judiciary of any sense that its fact-finding processes are exceptional, or due any special deference. This is similar to what Marc Galanter calls the "jaundiced view"—that there has been a decline in faith in adjudication by the courts and their key constituencies—a "turn from law, a turn away from the definitive establishment of public accountability in adjudication" and that there exists a "very real fear of trials." He argues that lawyers, judges, and corporate users, misled by the media, believe that America is amidst a "litigation explosion" and that trials are expensive and risky because juries are pro-plaintiff, "arbitrary, sentimental and 'out of control.'" *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1266–68, 1272–73 (2005). Federal district court judges used to spend their time on the bench learning from lawyers in an adversarial atmosphere, and overseeing fact-finding by juries or engaging in it themselves. This was their job and they were proud of it. Today, judges learn more reflectively, reading and conferring with law clerks in chambers. Their primary challenge is the proper application of the law to the facts—facts that are either taken for granted, or sifted out of briefs and affidavits, and, in the mode of the European civil justice systems, scrutinized by judges and clerks behind closed doors. For an apt criticism of this approach, see Sabin Willett, *Clericalism and the Guantanamo Litigation*, 1 Northeastern U. L.J. 51, 52 (2009). *See generally* Dennis Jacobs, *The Secret Life of Judges*, 75 Fordham L. Rev. 2855 (2007). While judges do talk to lawyers in formal hearings, these hearings can be short, and usually serve to test and confirm a judge's understanding rather than develop it. *See, e.g.*, Eugene R. Fidell, *Hearings on Motions: A Modest Proposal*, Nat'l L.J., Dec. 22, 2008, at 23 (bemoaning the rarity of hearings on dispositive motions in the D.C. district court: "[e]ven in this digital era, there is still a participatory and symbolic aspect to the administration of justice that remains key to its legitimacy. That interest is not served when business is transacted without human contact."). The major reasons for the decline in the preeminence of factfinding are not structural but cultural. On the civil side, they result from a marked shift in emphasis from the trial of actual disputes to mere litigation

management, resulting in an overuse of summary judgment and a concomitant settlement culture. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 984 (2003). *See, e.g.*, *In re* One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named "Flash II", 517 F. Supp. 2d 546, 548, 552 (D. Mass. 2007), *aff'd* United States v. One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named "Flash II", 546 F.3d 26 (1st Cir. 2008). On the criminal side, the sentencing guidelines ushered into judicial opinions a degree of sophistry heretofore unknown to the federal judiciary. For seventeen years, an entire generation of federal judges spoke of sentencing based on "facts" determined by a "preponderance of the evidence," when what they had before them was manifestly *not* evidence, but rather "faux facts" that had neither been tested by cross examination nor presented to a jury. United States v. Green, 346 F. Supp. 2d 259, 280–81 (D. Mass. 2004), *vacated in part*, United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005), *vacated*, United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006).

Yet as judicial face time with jurors, lawyers, and litigants becomes increasingly rare, and as the federal courtrooms throughout the land go dark with disuse, the moral force of what is decreed is increasingly marginalized. Soon, society may begin to wonder why we have the lower federal courts at all.

Perhaps the Supreme Court is already wondering. The disinterest of the institutional judiciary in the American jury may explain the surprising disdain shown by the Supreme Court for the trial process in the federal district courts. See e.g. Bell Atlantic Co. v. Twombly, 560 U.S. 544, 559-560 (2007). Andrew Siegel, The Court against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence. 84 Tex. L. Rev. 1097 (2006) (demonstrating the disdain shown by the Supreme Court for the lower courts.); David Cole, The Anti-Court Court, New York Review of Books, Aug. 14, 2014.

It need not be this way. "[T]he jury is worth fighting for." Jennifer Walker Elrod, Is the Jury Still Out?: A Case for the Continued Viability of the American Jury, 44 Tex. Tech. L. Rev. 303, 303 (2012).

> Judge D. Brock Hornby recently and provocatively pondered how a reality television show might depict a federal trial court judge today. He envisioned that the judge would be in an office in business attire, spending most of her time pounding away on a keyboard. His vision suggested a person tethered to the computer and all but cut off from the parties and their lawyers — a virtual judge, practically invisible. He was not describing a ratings hit or a show that critics would praise.
>
> That may describe the days of some federal trial judges, but it does not describe their fate. It is not the immutable destiny of judges that they must vanish from sight and sound. It is certainly not the case that in order to assume the role of active case manager a judge must retreat into his or her chambers never to be seen again. Properly understood, active case management creates opportunities for judges to reconnect with the litigating public. Throughout the pretrial process, judges can conduct "live" proceedings in which they do not vanish but instead reappear. And as an added bonus, we think judges who manage their cases well will have yet another opportunity to reappear: at the trials they can sometimes foster by avoiding the crippling costs that drive parties who would like to go to trial to settle instead. That's a reality we'd like to see.

Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849, 874-75 (2013) (citing D. Brock Hornby, The Business of the U.S. District Courts, 10 Green Bag 2d 453, 463 (2010)). See D. Nev. Short Tr. Rules, available at http://www.nvd.uscourts.gov/Files/USDC%20Short%20Trial%20Ru les.pdf; Stephen D. Susman & Thomas M. Melsheimer, Trial by Agreement: How Trial Lawyers Hold the Key to Improving

Jury Trials in Civil Cases, 32 Rev. Litig. 431 (2013); Bert I. Huang, Trial By Preview, 113 Colum. L. Rev. 1323 (2013).

[23] Ronald Reagan, Inaugural Address as Governor of California, January 5, 1967.

ANATOMY OF A CRIMINAL CASE
Montana Judicial Institute, October 3-5, 2018

On October 15, 2015, Francis Jackson, a 45 year old woman, and single mother of two teenage children, was involved in a serious automobile accident on Highway 93 north of Arlee, Montana. As a result of the accident, Francis fractured two vertebra in her lower spine, requiring a 6-hour surgical procedure at Community Medical Center in Missoula. Following surgery, Francis was transferred to the rehabilitation unit at Community Medical Center, where she was a patient for 6 additional weeks. Because of damage to her lumbar spine, Francis experienced problems with walking and balance, and extreme low back and lower extremity pain, requiring opiate pain medication.

Upon admission to the rehabilitation unit, her opiate pain medication initially involved the application of a fentanyl patch, which provided slow release, long term pain relief. After two weeks, the fentanyl patch was discontinued and she was placed on a high dosage of oxycontin, which she continued to use until her release at the end of November, 2015. At the time of her release, her treating physician provided her with a prescription for 10 mg. hydrocodone (Lortab), also an opiate medication, with instructions to take this medication as needed, but no more than 4 times per day.

The initial Lortab prescription was for 50 pills, with 6 renewals without doctor consultation. Although Francis's pain diminished over the course of the two months following her release, she continued to take the Lortab, increasing the number of pills per day from 4 to 6-8 pills. By April, 2016, Francis was taking up to 10 Lortab pills per day. On two occasions she returned to her primary physician who re-filled her Lortab prescription. In early June, 2016, her primary physician discontinued her use of Lortab, reasoning that she no longer needed it for pain management, and was abusing the medication. At this point in time, Francis, who had a previous history of alcohol abuse, was clearly addicted to Lortab.

Notwithstanding her difficulties, Francis was able to return to her previous employment as a legal assistant in a criminal defense firm in Missoula in the spring of 2016. One of the firm's clients was a convicted felon named John "Scooter" Davis, a well known, violent drug dealer in the Missoula area. Davis had previously served a mandatory 5-year federal prison sentence for heroin

dealing, and was on supervised release. It is believed, but never proven, that Scooter had murdered a fellow drug dealer over a dispute involving guns and money in California When her physician discontinued her prescription for Lortab, in an act of desperation, Francis reached out to Scooter Davis one day when he was in the law office, and asked him if he could provide her with black market opiate pain medication, which he agreed to do. Because of her escalating drug addiction, Francis's life began to unravel. Her two teenage children moved to their father's home, she was fired from the law office due to absenteeism, and because she was unemployed, she failed to make the mortgage payments on her home, which resulted in the filing of a foreclosure action by the bank. Desperate to make ends meet, and to support her out of control opiate drug habit, she agreed to deal small quantities of heroin for Scooter Davis in early, 2017. By this time, Francis had become a regular user of heroin, which was readily available from Scooter and cheaper than the pills.

In February, 2017, the local sheriff's department learned that Scooter Davis was back in the drug distribution business, and that he was using a number of local drug users to distribute heroin in the Missoula area. Francis was identified as one of the distributors. The sheriff's department conducted two separate controlled purchases involving Francis in February and March, 2017. On February 15, 2017, a confidential informant (CI #1) purchased two grams of heroin from Francis, and on March 1, 2017, a second confidential informant (CI #2) purchased 3 grams of heroin from her. Based on additional information provided to the sheriff's department, officers obtained a search warrant for the home of Scooter Davis in East Missoula. At the time of the search, approximately 3 pounds of heroin was seized, along with 5 semi-automatic firearms, ammunition, miscellaneous drug distribution equipment and paraphernalia, including a digital scale, small baggies and used and new syringes, and $27,400 in cash. Francis and Scooter were at the house at the time of the search. Scooter was arrested at that time and placed in custody, and Francis was arrested one week later, and released following her initial appearance.

Based on the quantity of drugs found at Scooter's home, his previous federal conviction, and seizure of 5 firearms and a large amount of cash, the drug task force became involved in the investigation, which includes federal ATF and DEA agents. Francis was voluntarily interviewed, and she provided significant information regarding the drug dealing activities of Scooter Davis. She described

him as a "major" heroin dealer in the Missoula area, whose source of supply was believed to be an individual in Phoenix, Arizona with direct ties to the Mexican cartel. Francis admitted that she was a lower level dealer of these drugs in the Missoula area, and that she was involved with Scooter because she was addicted to heroin and she was able to obtain a constant supply by dealing for him.

A federal prosecution was commenced, and the grand jury issued an indictment against both Scooter Davis and Francis. Francis was charged with:

Count I - Conspiracy to Distribute Heroin.

Count II - Distribution of Heroin.

Francis was appointed a Federal Defender, and initially pled not guilty to all of the charges in the Indictment.

Because of her cooperation, Francis was offered a plea agreement by the U.S. Attorney's Office which would require her to plead guilty to Count II only [which carries a penalty of up to 20 years in prison and at least three years of supervised release], in exchange for dismissal of Count I. The U.S. Attorney also conditioned the plea agreement on her continued cooperation, which would include testifying as a government witness at the time of the jury trial of Scooter Davis. Francis fears that her cooperation will place her life in jeopardy. Notwithstanding this risk, Francis has accepted the plea agreement and pled guilty to Count II in a hearing before the United States Magistrate Judge, and is scheduled to be sentenced on October 4, 2018. It is anticipated that the government will file a motion with the court requesting a reduced sentence for Francis due to her cooperation.

The United States Probation Office has conducted an interview of Francis in the presence of her attorney and prepared a lengthy Presentence Investigation Report that has been provided to the sentencing judge.

Since her arrest and release, Francis has been engaged in outpatient drug abuse treatment and complied with all of the conditions of her release. She has frequent contact with her two teenage children, who intend to return to her home if she is not sentenced to prison. She has returned to employment with the law

office, and has worked out a payment arrangement with the bank regarding her home mortgage.

Francis has a two-year associates degree in paralegal studies. She has no previous criminal history, other than a misdemeanor DUI in 2001. Her parents are still alive and live in the family home in Missoula. Her father is a retired Montana Highway Patrol officer, and her mother worked as a teller at a local bank until her retirement. Francis has one younger sister who is single and employed as a software designer in San Francisco. There is no history of abuse or addiction in the family, and they remain very supportive of Francis and believe that all of her legal troubles relate to her addiction to opiates caused by her automobile accident in October, 2015.

JANE DOE
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
jane.doe@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JOHN DAVIS, *aka Scooter Davis*, and FRANCIS JACKSON,** **Defendants.**	**CR 18- -M-DLC** **INDICTMENT** **CONSPIRACY TO DISTRIBUTE HEROIN** **Title 21 U.S.C. § 846 (Count I)** **(Penalty: Mandatory minimum ten years to life imprisonment, $10,000,000 fine, and at least five years supervised release)** **DISTRIBUTION OF HEROIN** **Title 21 U.S.C. § 841(a)(1) (Count II)** **(Penalty: 20 years imprisonment, $1,000,000 fine, and at least three years supervised release)** **FORFEITURE** **Title 21 U.S.C. §§ 853(a)(1), (2) and 881(a)(7)** **TITLE 21 PENALTIES MAY BE ENHANCED FOR PRIOR DRUG-RELATED FELONY CONVICTIONS**

THE GRAND JURY CHARGES:

COUNT I

Beginning in approximately January 2017, and continuing until approximately March 2017, at Missoula, in Missoula County, in the State and District of Montana, and elsewhere, the defendants, JOHN DAVIS, *aka Scooter Davis*, and FRANCIS JACKSON, knowingly and unlawfully conspired with each other, and with others both known and unknown to the Grand Jury, to distribute, in violation of 21 U.S.C. § 841(a)(1), one kilogram or more of a substance containing a detectable amount of heroin, a Schedule I controlled substance, in violation of 21 U.S.C. § 846.

COUNT II

On or about March 1, 2017, at Missoula, in Missoula County, in the State and District of Montana, the defendant, FRANCIS JACKSON, knowingly and unlawfully distributed a substance containing heroin, a Schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1).

FORFEITURE ALLEGATION

Upon conviction of either of the offenses set forth in this indictment, the defendants, JOHN DAVIS, *aka Scooter Davis*, and FRANCIS JACKSON, shall forfeit, pursuant to 21 U.S.C. §§ 853(a)(1), (2) and 21 U.S.C. § 881(a)(7): (1) any property constituting and derived from any proceeds obtained, directly and

indirectly, as a result of the violations; and (2) any property used and intended to be used, in any manner and part, to commit, and facilitate the commission of, the offenses.

If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p).

A TRUE BILL.

_____
FOREPERSON

_____
KURT G. ALME
United States Attorney
Attorney for Plaintiff

_____
JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney
Attorney for Plaintiff

MONTANA JUDICIAL INSTITUTE
MISSOULA, MONTANA

Materials produced by
MICHAEL J. DONAHOE
Deputy Federal Defender
FEDERAL DEFENDERS OF MONTANA

1. WHERE DO FEDERAL CRIMINAL CASES REALLY BEGIN?

a. Statistics uniformly show that those among us who will be inclined to violate the law in a serious way generally suffer from one or more of the following:

i. Organic brain impairment and/or some form of diagnosable mental illness.

ii. Addiction disorder to include alcoholism and addiction to street and/or prescription drugs.

iii. Lack of parental guidance.

iv. Poverty.

v. Difficult educational experiences including discipline problems consistent academic failure often resulting in expulsion or voluntary termination from school (dropout).

The New York Times

October 9, 2009
Study Finds High Rate of Imprisonment Among Dropouts

By SAM DILLON

On any given day, about one in every 10 young male high school dropouts is in jail or juvenile detention, compared with one in 35 young male high school graduates, according to a new study of the effects of dropping out of school in an America where demand for low-skill workers is plunging.

The picture is even bleaker for Mrican-Americans, with nearly one in four young black male dropouts incarcerated or otherwise institutionalized on an average day, the study said. That compares with about one in 14 young, male, white, Asian or Hispanic dropouts.

Researchers at Northeastern University used census and other government data to carry out the study, which tracks the employment, workplace, parenting and criminal justice experiences of young high school dropouts.

"We're trying to show what it means to be a dropout in the 21st century United States," said Andrew Sum, director of the Center for Labor Market Studies at Northeastern, who headed a team of researchers that prepared the report. "It's one of the country's costliest problems. The unemployment, the incarceration rates – it's scary,"

A coalition of civil rights and public education advocacy groups and a network of alternative schools in Chicago commissioned the report as part of a push for new educational opportunities for the nation's 6.2 million high school dropouts.

"The dropout rate is driving the nation's increasing prison population, and it's a drag on America's economic competitiveness," said Marc H. Morial, the former New Orleans mayor who is president of the National Urban League, one of the groups in the coalition that commissioned the report. "This report makes it clear that every American pays a cost when a young person leaves school without a diploma."

The report puts the collective cost to the nation over the working life of each high school dropout at $292,000. Mr. Sum said that figure took into account lost tax revenues, since dropouts earn less and therefore pay less in taxes than high school graduates. It also includes the costs of providing food stamps and other aid to dropouts and of incarcerating those who turn to crime.

Daniel J. Losen, a senior associate at the Civil Rights Project at the University of California, Los Angeles, said the study was consistent with other economic studies of the dropout crisis, though he said the methodology of its cost-benefit analysis "lacked transparency."

"The report's strength is that it reveals in clear terms that there's a real crisis with the high numbers of young, especially minority males, who drop out of school and wind up incarcerated," Mr. Losen said.

Previous studies have come up with estimates of the same order of magnitude on the social cost of low graduation rates. A 2007 study by Teachers College, Princeton and City University of New York researchers, for instance, estimated that society could save $209,000 in prison and other costs for every potential dropout who could be helped to complete high school.

The new report, in its analysis of 2008 unemployment rates, found that 54 percent of dropouts ages 16 to 24 were jobless, compared with 32 percent for high school graduates of the same age, and 13 percent for those with a college degree.

Again, the statistics were worse for young African-American dropouts, whose unemployment rate last year was 69 percent, compared with 54 percent for whites and 47 percent for Hispanics. The unemployment rate among young Hispanics was lower, the report said, because included in that category were many illegal immigrants, who compete successfully for jobs with native-born youths.

The unemployment rates cited for all groups have climbed several points in 2009 because of the recession, Mr. Sum said.

Young female dropouts were nine times more likely to have become single mothers than young women who went on to earn college degrees, the report said, citing census data for 2006 and 2007.

The number of unmarried young women having children has increased sharply in some communities in part, Mr. Sum said, because large numbers of young men have dropped out of school and are jobless year round. As a result, young women do not view them as having the wherewithal to support a family.

"None of these guys can afford to own a home, they just don't have any money," he said. "And as a result, any time they father a child it's out of wedlock. It wasn't like this 30 years ago."

He cited his hometown, Gary, Ind., as an example. "Back in the 1970s, my friends in Gary would quit school in senior year and go to work at U.S. Steel and make a good living, and young guys in Michigan would go to work in an auto plant," he said. "You just can't do that anymore. Today, you have a lot of dropouts who are jobless year round."

2. WHY DEFEND SOMEONE WHO FITS WITHIN THIS PROFILE?

Federal criminal defense practice has its roots in the Fifth and Sixth Amendments to the United States Constitution:

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 68-69, 53 S.Ct., at 64, 77 L.Ed. 158.

Gideon v. Wainwright, 83 S.Ct. 792, 797 (1963)

3. WHERE DO THESE AMENDMENTS COME FROM?

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut ali quo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legal judicium parium suorum vel per legem terre.

Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.

No free man shall be taken or imprisoned or deprived or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.

To no one will we sell, to no one will we deny or delay right or justice.

Magna Carta, §29 (1215)

Offense Level Computation

The 2016 Guidelines Manual, incorporating all guideline amendments, was used to determine the defendant's offense level. USSG §1B1.11.

Count 2: Distribution of Heroin

Base Offense Level: The guideline for 21 U.S.C. § 841(a)(1) offense, Distribution of Heroin, is found in U.S.S.G. §2D1.1 of the guidelines. That section provides that an offense involving the distribution of at least 1 kilogram but less than 3 kilograms of heroin has a base offense level of 30. U.S.S.G. §2D1.1. **30**

Specific Offense Characteristics: Pursuant to USSG §2D1.1(b)(1), if a dangerous weapon (including a firearm) was possessed, increase by two levels. During a search of Scooter's residence and while Jackson was present, law enforcement seized five semi-automatic firearms, 3 pounds of heroin, ammunition, miscellaneous drug distribution equipment and paraphernalia, including a digital scale, small baggies, syringes, and $27,400 in cash. Pursuant to relevant conduct listed in USSG §1B1.3, Jackson is held accountable for Scooter's possession of the firearms, which was within the scope of their jointly undertaken criminal activity to distribute heroin, in furtherance of that activity, and reasonably foreseeable. **+2**

Victim Related Adjustment: None. **0**

Adjustment for Role in the Offense: The defendant is considered a minor participant in the criminal activity; therefore, decrease by two levels. USSG §3B1.2(b). **-2**

Adjustment for Obstruction of Justice: None. **0**

Adjusted Offense Level (Subtotal): **30**

Chapter Four Enhancement: None. **0**

Acceptance of Responsibility: The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. U.S.S.G. §3E1.1(a). **-2**

Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. U.S.S.G. §3E1.1(b). **-1**

Total Offense Level: **27**

Criminal History Computation

1. The defendant has one misdemeanor DUI conviction occurring 2001. Given the time frame, that conviction does not score under the Guidelines, resulting in a subtotal criminal history score of zero.

2. The total criminal history score is zero. According to the sentencing table in USSG Chapter 5, Part A, a criminal history score of zero establishes a criminal history category of I.

PART D. SENTENCING OPTIONS

3. **Statutory Provisions:** The maximum term of imprisonment is 20 years. 21 U.S.C. § 841(b)(1)(C).

4. **Guideline Provisions:** Based upon a total offense level of 27 and a criminal history category of I, the guideline imprisonment range is 70 months to 87 months.

FRANCIS JACKSON---MT Judicial Institute

Jackson is held accountable for distributing a total of 1.36 kilograms of heroin (or 3.01 pounds) during the instant offense. Jackson was directly involved in two controlled buys on February 15th and March 1st of 2017, which resulted in the sale of 5 grams of heroin. She is also held accountable for 3 pounds of heroin which was seized by law enforcement from her codefendant's residence. Jackson was present at her codefendant's residence during the search. Pursuant to USSG §1B1.3, a relevant conduct analysis was conducted. Under relevant conduct, it was determined Jackson knowingly entered into a jointly undertaken criminal activity with her codefendant, given her agreement to distribute heroin for him. He was also found in possession of five semi-automatic firearms and drug distribution equipment. The heroin and firearms seized from his residence was in furtherance of the conspiracy and reasonably foreseeable to Jackson; therefore it is included in her Guideline calculation above.

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

November 1, 2016

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

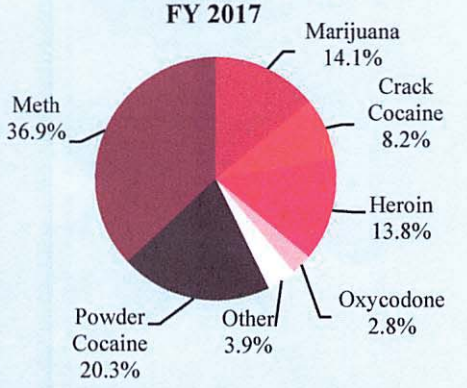
that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- THERE WERE 66,873 CASES REPORTED TO THE UNITED STATES SENTENCING COMMISSION IN FISCAL YEAR 2017.
- OF THESE CASES, 19,240 INVOLVED DRUG TRAFFICKING.[1]
- SIX DRUG TYPES ACCOUNT FOR NEARLY ALL DRUG TRAFFICKING OFFENSES.

Quick Facts

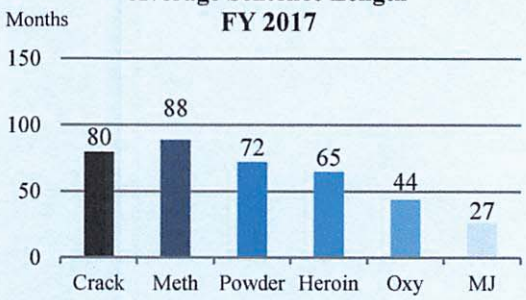
Drug Trafficking Offenses

Distribution of Drug Types
FY 2017



Top Five Districts Drug Trafficking Offenders FY 2017
Western District of Texas (N=1,605)
District of Arizona (N=1,127)
Southern District of Texas (N=993)
Southern District of California (N=990)
Southern District of Florida (N=634)

Average Sentence Length
FY 2017



[1] Drug trafficking offenses include cases with complete guideline application information in which the offender was sentenced under USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life), or 2D1.14 (Narco-Terrorism).

[2] Offender and offense characteristics as well as the length of punishment differ by primary drug type. Separate Quick Facts publications are available for each primary drug type at *www.ussc.gov/research/quick-facts.*

The information presented below provides an overview of drug trafficking offenses, though this information may vary depending on the type of drug involved in the offense.

Offender and Offense Characteristics[2]

- In fiscal year 2017, the majority of drug trafficking offenders were men (84.1%).
- Half of the offenders were Hispanic (49.8%) followed by Black (24.7%), White (22.4%), and Other Races (3.1%), although this rate varied by drug type.
- The average age of these offenders at sentencing was 36 years.
- Almost three-quarters of all drug trafficking offenders were United States citizens (73.9%), although this rate varied substantially depending on the type of drug involved.
- Nearly half (47.9%) of drug traffickers had little or no prior criminal history (*i.e.*, were assigned to Criminal History Category I).
- Drug trafficking sentences were increased for:
  - 19.6% of offenders because the offense involved the possession of a weapon;
  - 7.3% of offenders for having a leadership or supervisory role in the offense.
- Drug trafficking sentences were decreased for:
  - 21.2% of offenders because they were a minor or minimal participant in the offense;
  - 32.2% of offenders because they met the safety valve criteria in the sentencing guidelines.

Punishment

- Most drug trafficking offenders were sentenced to imprisonment (95.6%).
- Three-quarters of drug traffickers were sentenced either within the guideline range (35.5%) or below the range at the government's request (39.4%). An additional 23.6% of drug traffickers received a non-government sponsored below range sentence, with the remaining 1.6% of offenders sentenced above the guideline range.
- The average sentence for drug trafficking offenders was 70 months. However, the average sentence varied depending on the type of drug trafficked in the offense.
- 45.3% of all drug trafficking offenders were convicted of a drug offense carrying a mandatory minimum penalty; however, only half of these offenders (50.0%) remained subject to that penalty at sentencing.
  - 21.3% provided the government with substantial assistance in the investigation or prosecution of other offenders, 20.5% were eligible for relief through the statutory safety valve provision, and 8.3% received both forms of relief.

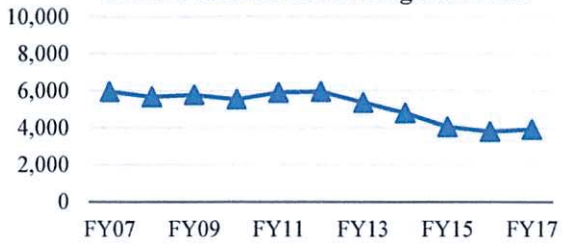
Quick Facts

Drug Trafficking Offenses

Six drug types accounted for 96.1% of drug trafficking offenses in fiscal year 2017.

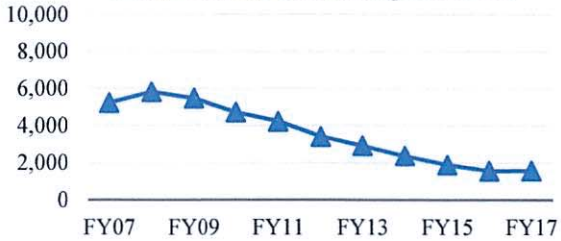
The number of powder cocaine traffickers had been relatively stable until a steady decline began in fiscal year 2013 with the number of offenders regaining stability in recent years.

Powder Cocaine Trafficking Offenders



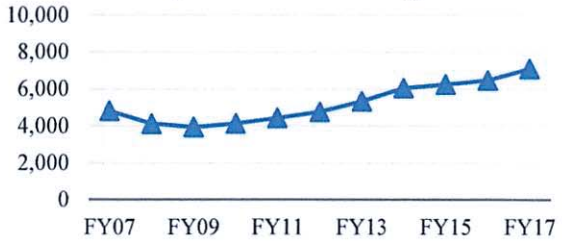
The number of crack cocaine traffickers has decreased substantially since fiscal year 2008 when reductions in crack cocaine penalties were first implemented.

Crack Cocaine Trafficking Offenders



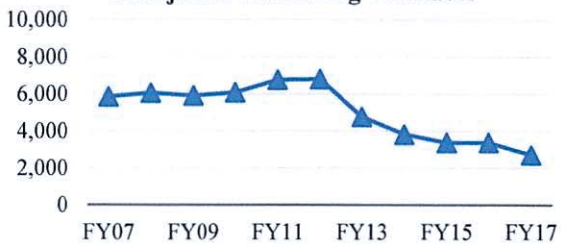
The number of methamphetamine traffickers decreased after fiscal year 2007, but has been increasing since fiscal year 2009.

Methamphetamine Trafficking Offenders



The number of marijuana traffickers rose slightly over time until a sharp decline in fiscal year 2013, which continued through fiscal year 2017.

Marijuana Trafficking Offenders

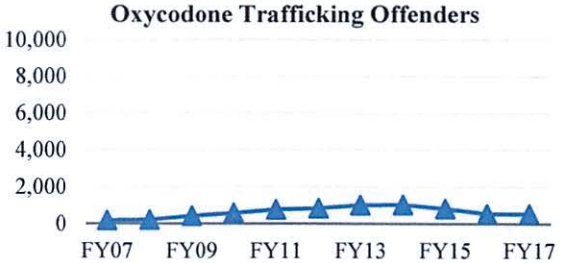


The number of heroin traffickers had been slowly increasing since fiscal year 2007, but has remained relatively stable in recent years.

Heroin Trafficking Offenders

The number of oxycodone traffickers increased from fiscal year 2007 through fiscal year 2014 before declining and leveling off in recent years. In fiscal year 2017 the number of oxycodone traffickers was only about half of the fiscal year 2014 number.

Oxycodone Trafficking Offenders



SOURCE: United States Sentencing Commission, 2007-2017 Datafiles, USSCFY07- USSCFY17.

*For other **Quick Facts** publications, visit www.ussc.gov/research/quick-facts.*

One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
www.ussc.gov
@theusscgov

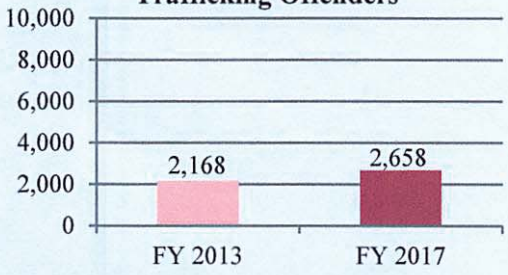
Quick Facts

- THERE WERE 66,873 CASES REPORTED TO THE UNITED STATES SENTENCING COMMISSION IN FISCAL YEAR 2017.
- OF THESE CASES, 19,240 INVOLVED DRUG TRAFFICKING.[1]
- 13.8% OF DRUG TRAFFICKING OFFENSES INVOLVED HEROIN.

Heroin Trafficking Offenses

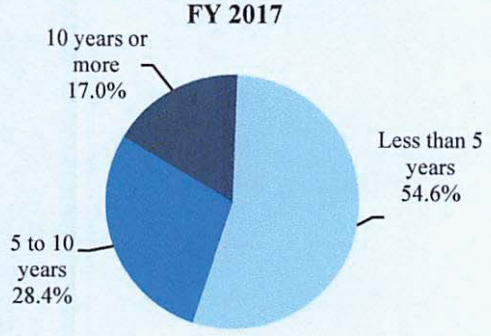
In fiscal year 2017, there were 2,658 heroin trafficking offenders, who accounted for 13.8% of all offenders sentenced under the drug trafficking guidelines. The number of heroin offenders has increased by 22.6% since fiscal year 2013.

Number of Heroin Trafficking Offenders



Top Five Districts Heroin Trafficking Offenders FY 2017
Southern District of New York (N=160)
District of Connecticut (N=82)
District of Maryland (N=82)
District of New Jersey (N=80)
Southern District of Ohio (N=80)

Sentence Length of Heroin Trafficking Offenders FY 2017



[1] Drug trafficking offenses include cases with complete guideline application information in which the offender was sentenced under USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life), or 2D1.14 (Narco-Terrorism).

Offender and Offense Characteristics

- In fiscal year 2017, the majority of heroin trafficking offenders were men (85.9%).
- Just over 40 percent of heroin trafficking offenders were Black (42.7%) followed by Hispanic (40.1%), White (15.6%), and Other Races (1.5%).
- The average age of these offenders at sentencing was 35 years.
- More than 80 percent of heroin trafficking offenders were United States citizens (82.8%).
- Almost 40 percent (39.1%) of heroin trafficking offenders had little or no prior criminal history (*i.e.*, assigned to Criminal History Category I) while 11.6% were Career Offenders (§4B1.1).
- The median Base Offense Level in these cases was 26. This corresponds to a quantity of drugs between 400 and 700 grams of heroin.
- Heroin trafficking sentences were increased for:
  - 21.0% of offenders because the offense involved the possession of a weapon;
  - 9.3% of offenders for having a leadership or supervisory role in the offense.
- Heroin trafficking sentences were decreased for:
  - 14.8% of offenders because they were a minor or minimal participant in the offense;
  - 23.8% of offenders because they met the safety valve criteria in the sentencing guidelines.

Punishment

- Most heroin trafficking offenders were sentenced to imprisonment (96.3%).
- The average sentence for heroin trafficking offenders was 65 months.
- Less than half of all heroin trafficking offenders were convicted of an offense carrying a mandatory minimum penalty (43.7%).
  - However, 44.2% of these offenders were not subject to any mandatory minimum penalty at sentencing because:
    - 21.0% provided the government with substantial assistance in the investigation or prosecution of other offenders, 16.9% were eligible for relief through the statutory safety valve provision, and 6.4% received both forms of relief.

Quick Facts

Heroin Trafficking Offenses

Sentences Relative to the Guideline Range

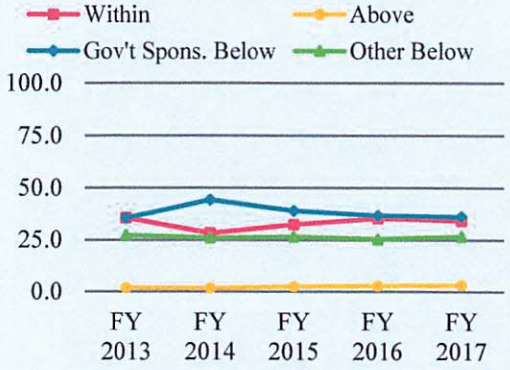
- The rate of within range sentences for heroin trafficking offenders fell from fiscal year 2013 to fiscal year 2014, increased in fiscal years 2015 and 2016, and decreased slightly in fiscal year 2017. The within-range rate was 34.2% in fiscal year 2017.

- The rate of government sponsored below range sentences for heroin trafficking offenders increased from fiscal year 2013 to fiscal year 2014 before decreasing in each of the past three years. The rate of government sponsored below range sentences was 36.1% in fiscal year 2017.
  - Substantial assistance departures were granted for approximately a quarter of heroin trafficking offenders in fiscal years 2012 through 2015, before decreasing to 21.6% in fiscal year 2016 and 19.8% in fiscal year 2017.
    - In fiscal year 2017, these offenders received an average reduction in their sentence of 52.4%.
  - Early Disposition Program (EDP) departures[2] were granted for a small proportion of heroin trafficking offenders over each of the last five years (3.0% in fiscal year 2017).
    - In fiscal year 2017, these offenders received an average reduction in their sentence of 53.0%.
  - The rate of heroin trafficking offenders receiving a below range sentence sponsored by the government for reasons other than substantial assistance or participation in an EDP has generally increased, from 7.7% in fiscal year 2013 to 13.3% in fiscal year 2017.
    - In fiscal year 2017, these offenders received an average reduction in their sentence of 44.6%.

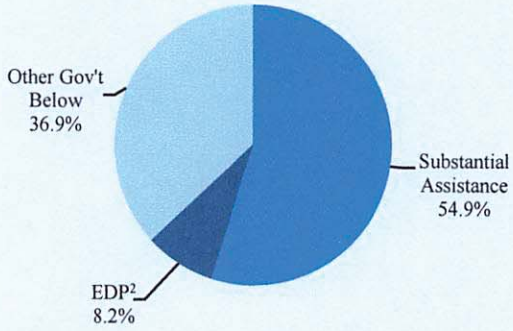
- Non-government sponsored below range sentences have accounted for slightly more than one-quarter of heroin trafficking sentences in each of the past five years. The non-government sponsored below range rate was 26.6% in fiscal year 2017.
  - In fiscal year 2017, these offenders received an average reduction in their sentence of 39.4%.

- The average guideline minimum and average sentence imposed for heroin trafficking have each shown a slight downward trend in four of the past five years, but both increased slightly in fiscal year 2017.
  - The average guideline minimum was 93 months in fiscal year 2013 and decreased to 87 months in fiscal year 2016 before increasing to 88 months in fiscal year 2017;
  - The average sentence imposed decreased from 69 months in fiscal year 2013 to 63 months in fiscal year 2016 before increasing to 65 months in fiscal year 2017.

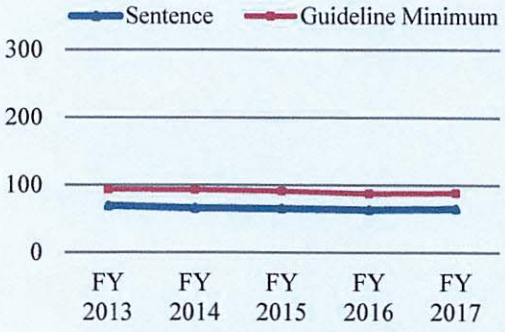
Sentence Relative to the Guideline Range



Government Sponsored Below Range Sentences FY 2017



Average Sentence and Average Guideline Minimum (in months)



[2] "Early Disposition Program (or EDP) departures" are departures where the government sought a sentence below the guideline range because the defendant participated in the government's Early Disposition Program, through which cases are resolved in an expedited manner. *See* USSG §5K3.1.

SOURCE: United States Sentencing Commission, 2013 through 2017 Datafiles, USSCFY13-USSCFY17.

*For other **Quick Facts** publications, visit www.ussc.gov/research/quick-facts.*

One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
www.ussc.gov
@theusscgov

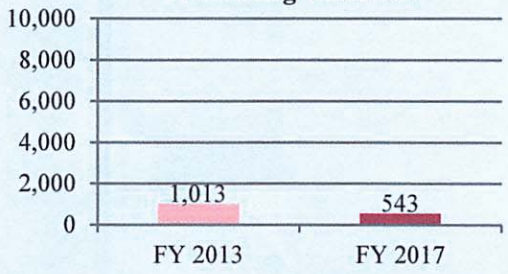
Quick Facts

- THERE WERE 66,873 CASES REPORTED TO THE UNITED STATES SENTENCING COMMISSION IN FISCAL YEAR 2017.
- OF THESE CASES, 19,240 INVOLVED DRUG TRAFFICKING.[1]
- 2.8% OF DRUG TRAFFICKING OFFENSES INVOLVED OXYCODONE.

Oxycodone Trafficking Offenses

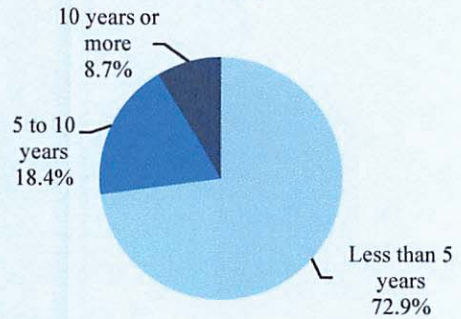
In fiscal year 2017, there were 543 oxycodone trafficking offenders, who accounted for 2.8% of all offenders sentenced under the drug trafficking guidelines. The number of oxycodone offenders has decreased by almost half (47.8%) since fiscal year 2014 when there were 1,040 such offenders.[2]

Number of Oxycodone Trafficking Offenders



Top Five Districts Oxycodone Trafficking Offenders FY 2017
Eastern District of Pennsylvania (N=76)
Southern District of New York (N=38)
Eastern District of Kentucky (N=32)
Eastern District of Arkansas (N=30)
District of South Carolina (N=24)

Sentence Length of Oxycodone Trafficking Offenders FY 2017



Offender and Offense Characteristics

- In fiscal year 2017, approximately three-quarters of oxycodone trafficking offenders were men (73.7%).
- Almost 45 percent of oxycodone trafficking offenders were White (44.4%) followed by Black (38.5%), Hispanic (12.0%), and Other Races (5.2%).
- The average age of these offenders at sentencing was 42 years.
- Nearly all oxycodone trafficking offenders were United States citizens (96.3%).
- Half (50.6%) of oxycodone trafficking offenders had little or no prior criminal history (*i.e.*, assigned to Criminal History Category I) while 4.1% were Career Offenders (§4B1.1).
- The median Base Offense Level in these cases was 26. This corresponds to a quantity of drugs between 1,990 and 3,483 30-milligram instant release pills.
- Oxycodone trafficking sentences were increased for:
  - 10.5% of offenders because the offense involved the possession of a weapon;
  - 16.0% of offenders for having a leadership or supervisory role in the offense.
- Oxycodone trafficking sentences were decreased for:
  - 7.2% of offenders because they were a minor or minimal participant in the offense;
  - 27.8% of offenders because they met the safety valve criteria in the sentencing guidelines.

Punishment

- Most oxycodone trafficking offenders were sentenced to imprisonment (87.1%).
- The average sentence for oxycodone trafficking offenders was 44 months.
- There is no mandatory minimum penalty for illegally trafficking oxycodone.

[1] Drug trafficking offenses include cases with complete guideline application information in which the offender was sentenced under USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life), or 2D1.14 (Narco-Terrorism).

[2] Data not depicted in bar chart.

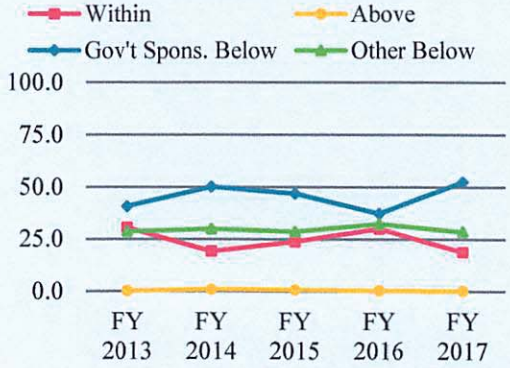
Quick Facts

Oxycodone Trafficking Offenses

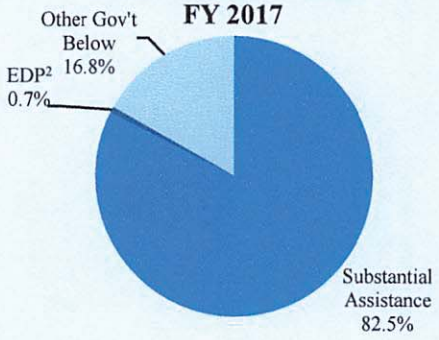
Sentences Relative to the Guideline Range

- After decreasing from fiscal year 2013 to fiscal year 2014, the rate of within range sentences for oxycodone trafficking increased from fiscal years 2014 through 2016. However, the within-range rate decreased substantially in fiscal year 2017, dropping from 30.0% in fiscal year 2016 to 18.8%.
- In contrast, the rate of government sponsored below range sentences for oxycodone trafficking offenders increased substantially in fiscal year 2017 after decreasing in recent years. The government sponsored below range rate in fiscal year 2017 was 52.5%.
  - Substantial assistance departures were granted for approximately one-third of offenders in fiscal year 2013 through 2015 but were granted for only a quarter of offenders in fiscal year 2016. In fiscal year 2017, this rate increased to 43.3%
    - In fiscal year 2017, these offenders received an average reduction in their sentence of 63.0%.
  - In each of the last five years, Early Disposition Program (EDP) departures[3] were rarely granted for oxycodone trafficking offenders.
  - The rate of oxycodone trafficking offenders receiving a below range sentence sponsored by the government for reasons other than substantial assistance or participation in an EDP peaked at 16.8% in fiscal year 2014 before decreasing each year thereafter. In fiscal year 2017, the rate was 8.8%.
    - In fiscal year 2017, these offenders received an average reduction in their sentence of 54.1%.
- The rate of non-government sponsored below range sentences for oxycodone traffickers has remained relatively stable over the past five years, ranging from a low of 28.5% in fiscal year 2015 to a high of 32.4% in fiscal year 2016. In fiscal year 2017, the rate of non-government sponsored below range sentences for oxycodone traffickers was 28.6%.
  - In fiscal year 2017, these offenders received an average reduction in their sentence of 51.0%.
- The average guideline minimum for oxycodone trafficking has fluctuated over the past five years while average sentences have generally decreased.
  - The average guideline minimum decreased from 80 months in fiscal year 2014 to 69 months in fiscal year 2016 before increasing to 79 months in fiscal year 2017;
  - The average sentence imposed decreased from 53 months in fiscal year 2013 to 44 months in fiscal years 2016 and 2017.

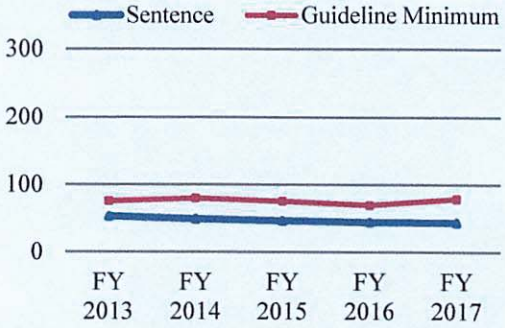
Sentence Relative to the Guideline Range



Government Sponsored Below Range Sentences FY 2017



Average Sentence and Average Guideline Minimum (in months)



[3] "Early Disposition Program (or EDP) departures" are departures where the government sought a sentence below the guideline range because the defendant participated in the government's Early Disposition Program, through which cases are resolved in an expedited manner. *See* USSG §5K3.1.

SOURCE: United States Sentencing Commission, 2013 through 2017 Datafiles, USSCFY13-USSCFY17.

*For other **Quick Facts** publications, visit www.ussc.gov/research/quick-facts.*

One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
www.ussc.gov
@theusscgov

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
tara.elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **MARK ROCKWELL GIES,** **Defendant.**	**CR 18- 39 -M- DLC** **INDICTMENT** **POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE** **Title 21 U.S.C. § 841(a)(1)** **(Counts I and II)** **(Penalty: Count I: Mandatory minimum five to 40 years imprisonment, $5,000,000 fine, and at least four years supervised release. Count II: Mandatory minimum ten years to life imprisonment, $10,000,000 fine, and at least five years supervised release.)** **TITLE 21 PENALTIES MAY BE ENHANCED FOR PRIOR DRUG-RELATED FELONY CONVICTIONS**

THE GRAND JURY CHARGES:

COUNT I

On or about December 5, 2017, near St. Regis, and within Mineral County, in the State and District of Montana, the defendant, MARK ROCKWELL GIES, knowingly and unlawfully possessed with the intent to distribute, five grams or more of actual methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1).

COUNT II

On or about January 16, 2018, at Polson and within Lake County, in the State and District of Montana, the defendant, MARK ROCKWELL GIES, knowingly and unlawfully possessed with the intent to distribute, 50 grams or more of actual methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1).

//

//

//

//

//

//

//

A TRUE BILL

Foreperson signature redacted. Original document filed under seal.

KURT G. ALME
United States Attorney

for: JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Crim. Summons____
Warrant: ✓
Bail: ____

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
Email: Tara.Elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **MARK ROCKWELL GIES,** **Defendant.**	**CR 18-39-M-DLC** **OFFER OF PROOF**

Defendant has signed a plea agreement which contemplates his plea of guilty to Count II of the Indictment, which charges the crime of possession with the intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). The defendant's plea of guilty will be unconditional.

The United States presented any and all formal plea offers to the defendant in writing. The plea agreement entered into by the parties and filed with the Court represents, in the government's view, the most favorable offer extended to the defendant. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012).

ELEMENTS. In order to prove the charge contained in Count II of the Indictment against the defendant at trial, the United States would have to prove the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed more than 50 grams of actual methamphetamine,

Second, the defendant possessed said methamphetamine with the intent to distribute it to another person.

PROOF. If called upon to prove this case at trial, and to provide a factual basis for the defendant's plea, the United States would present, by way of the testimony of law enforcement officers, lay and expert witnesses, and physical evidence, the following:

On or about January 16, 2018, at Polson and within Lake County, in the parking lot at Kwa Taq Nuk, a Flathead Tribal Police Officer personally observed Gies and other individuals in two vehicles conduct activity that was consistent with drug trafficking, and then observed Gies drop items out of the vehicle window; law

enforcement retrieved the items, which included a digital scale and methamphetamine. Later, during a pat-down search of Gies, methamphetamine was also discovered on his person.

In the Spring of 2018, the U.S. Department of Justice Drug Enforcement Agency Western Laboratory completed a laboratory analysis on the above-mentioned methamphetamine, and it was determined to be over 50 grams of pure methamphetamine.

A Montana Highway Patrol Officer would testify that, in December of 2017, he pulled Gies over during a routine traffic stop and, after a subsequent Missoula County District Court search warrant was executed, discovered methamphetamine in the vehicle.

When interviewed by law enforcement in December of 2017, Gies admitted he distributed methamphetamine.

DATED this 7th day of September, 2018.

KURT G. ALME
United States Attorney

/s/ Tara J. Elliott
Assistant U.S. Attorney
Attorney for Plaintiff

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
Email: Tara.Elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **MARK ROCKWELL GIES,** **Defendant.**	**CR 18-39-M-DLC** **PLEA AGREEMENT**

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, represented by Tara J. Elliott, Assistant United States Attorney for the District of Montana, and the defendant, Mark Rockwell Gies, and the defendant's attorney, Craig Shannon, have agreed upon the following:

1. **Scope:** This plea agreement is between the United States Attorney's Office for the District of Montana and the defendant. It does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority, or the United States Probation Office.

2. **Charges:** The defendant agrees to plead guilty to count II of the indictment, which charges the crime of possession with the intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). This offense carries a mandatory minimum punishment of ten years to life imprisonment, a $10,000,000 fine, five years of supervised release, and a $100 special assessment.

At the time of sentencing, if the Court accepts this plea agreement, the United States will move to dismiss count I of the indictment.

3. **Nature of the Agreement:** The parties agree that this plea agreement will be governed by: Rule 11(c)(1)(A) and (B), *Federal Rules of Criminal Procedure*. The defendant acknowledges that the agreement will be fulfilled provided the United States: a) moves to dismiss, and the Court agrees to dismiss, count I of the indictment; and b) makes the recommendations provided below. The defendant understands that if the agreement is accepted by the Court, there will not be an automatic right to withdraw the plea even if the Court does not accept or follow the recommendations made by the United States.

4. Admission of Guilt: The defendant will plead guilty because the defendant is guilty of the charge contained in count II of the indictment. In pleading guilty, the defendant acknowledges that:

First, the defendant knowingly possessed more than 50 grams of actual methamphetamine; and

Second, the defendant possessed said methamphetamine with the intent to distribute it to another person.

5. Waiver of Rights by Plea:

(a) The government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement given under oath during the plea colloquy.

(b) The defendant has the right to plead not guilty or to persist in a plea of not guilty.

(c) The defendant has the right to a jury trial unless, by written waiver, the defendant consents to a non-jury trial. The United States must also consent and the Court must approve a non-jury trial.

(d) The defendant has the right to be represented by counsel and, if necessary, have the Court appoint counsel at trial and at every other stage of these proceedings.

(e) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and the defendant's attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

(f) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(g) At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence. If the witnesses for the defendant would not appear voluntarily, their appearance could be mandated through the subpoena power of the Court.

(h) At a trial, there is a privilege against self-incrimination so that the defendant could decline to testify and no inference of guilt could be drawn from the refusal to testify. Or the defendant could exercise the choice to testify.

(i) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal the conviction to the Ninth Circuit Court of Appeals for review to determine if any errors were made that would entitle the defendant to reversal of the conviction.

(j) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, Federal Rules of Criminal Procedure. By execution of this agreement, the defendant waives that right and agrees to hold that hearing before, and allow the Rule 11 colloquy to be conducted by, the U.S. Magistrate Judge, if necessary.

(k) If convicted in this matter, a defendant who is not a citizen of the United States may be removed from the United States, denied citizenship, and denied admission to the United States in the future. The defendant understands that by pleading guilty pursuant to this agreement, the defendant is waiving all of the rights set forth in this paragraph. The defendant's attorney has explained those rights and the consequences of waiving those rights.

6. **Recommendations:** The United States will recommend the defendant's offense level be decreased by two levels for acceptance of

responsibility, pursuant to USSG §3E1.1(a), unless the defendant is found to have obstructed justice prior to sentencing, pursuant to USSG §3C1.1, or acted in any way inconsistent with acceptance of responsibility. The United States will move for an additional one-level reduction, pursuant to USSG §3E1.1(b), if appropriate under the Guidelines. The parties reserve the right to make any other arguments at the time of sentencing. The defendant understands that the Court is not bound by this recommendation.

7. **Sentencing Guidelines:** Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

8. **Appeal Waivers:**

(a) Waiver of Appeal of the Sentence – 5K motion: The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). Under appropriate circumstances, the United States may move, but has not made any commitment as part of this agreement to move, for a reduction of sentence pursuant to USSG §5K1.1 to reward the defendant for any substantial assistance provided before sentencing. If such a motion is made and the Court accepts the plea agreement, the defendant waives all right to appeal any aspect of the sentence, including conditions of probation or supervised release, imposed by the Court.

If a motion for downward departure is made under USSG §5K1.1, the defendant also agrees to waive the right to collaterally attack the judgment or sentence pursuant to 28 U.S.C. § 2255. This waiver does not prohibit the right to pursue an action alleging ineffective assistance of counsel.

The United States emphasizes, and the defendant again acknowledges, that no such motion is bargained for in this agreement. No commitment to make such a motion has been made as part of the plea agreement, and the defendant has been made specifically aware that Department of Justice policy does not authorize any individual prosecutor to file such a motion or make such a commitment without express written approval of the U.S. Attorney or a Committee of other prosecutors designated and empowered by the U.S. Attorney to approve such a motion. USAM 9-27.400.

(b) Waiver and Dismissal of Appeal of the Sentence – Rule 35 motion: The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). Under appropriate circumstances, the United States may move, but has not made any commitment as part of this agreement to move, for a reduction of sentence pursuant to Rule 35, *Federal Rules of Criminal Procedure*, to reward the defendant for any substantial assistance the defendant provides after sentencing. If such a motion is made, and granted by the Court, the defendant agrees to waive any appeal of the sentence and

judgment imposed, and dismiss any pending appeal of the judgment and sentence previously taken.

If a Rule 35 motion for reduction of sentence is made and granted by the Court, the defendant also agrees to waive the right to collaterally attack the judgment or sentence pursuant to 28 U.S.C. § 2255. This waiver does not prohibit the right to pursue an action alleging ineffective assistance of counsel.

The United States emphasizes, and the defendant again acknowledges, that no such motion is bargained for in this agreement. No commitment to make such a motion has been made as part of the plea agreement, and the defendant has been made specifically aware that Department of Justice policy does not authorize any individual prosecutor to make such a commitment without express written approval of the U.S. Attorney, or a Committee of other prosecutors designated and empowered by the U.S. Attorney to approve such a motion. USAM 9-27.400.

9. **Voluntary Plea:** The defendant and the defendant's attorney acknowledge that no threats, promises, or representations have been made to induce the defendant to plead guilty, and that this agreement is freely and voluntarily endorsed by the parties.

10. **Detention/Release After Plea:** Pursuant to 18 U.S.C. § 3143(a)(2), the defendant acknowledges that the defendant will be detained upon conviction unless (A)(i) the Court finds there is a substantial likelihood that a motion for

acquittal or new trial will be granted or (ii) this agreement provides that the United States will recommend that no sentence of imprisonment be imposed and (B) the Court finds, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to any other person or the community. Then, if exceptional circumstances exist, the defendant may be released upon conditions.

11. Breach: If the defendant breaches the terms of this agreement, or commits any new criminal offenses between signing this agreement and sentencing, the U.S. Attorney's Office is relieved of its obligations under this agreement, but the defendant may not withdraw the guilty plea.

12. Entire Agreement: Any statements or representations made by the United States, the defendant, or defense counsel prior to the full execution of this plea agreement are superseded by this plea agreement. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. This plea agreement constitutes the entire agreement between the parties. Any term or condition which is not expressly stated as part of this plea agreement is not to be considered part of the agreement.

///

///

///

///

KURT G. ALME
United States Attorney

TARA J. ELLIOTT
Assistant U.S. Attorney
Date: 8/31/18

MARK ROCKWELL GIES
Defendant
Date: 8-29-18

CRAIG SHANNON
Defense Counsel
Date: 8-30-18

J. THOMAS BARTLESON
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front St., Ste. 1100
Helena, MT 59626
Phone: (406) 457-5120
Fax: (406) 457-5130
Email: Thomas.Bartleson@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JEFFERY ANDREW BURNS and CYARA JOAVANY WHITLOCK,** **Defendants.**	**CR 18-** 42 **-M-** DWM **INDICTMENT** **CONSPIRACY TO POSSESS OXYCODONE WITH INTENT TO DISTRIBUTE** **Title 21 U.S.C. § 846 (Count I)** **(Penalty: Twenty years imprisonment, $1,000,000 fine, and at least three years supervised release.)** **ATTEMPTED FRAUDULENT ACQUISITION OF OXYCODONE** **Title 21 U.S.C. § 843(a)(3) and Title 18 U.S.C. § 2** **(Count II)** **(Penalty: Four years imprisonment, $250,000 fine, and one year supervised release.)** **TITLE 21 PENALTIES MAY BE ENHANCED FOR PRIOR DRUG-RELATED FELONY CONVICTIONS**

THE GRAND JURY CHARGES:

COUNT I

That between on or about August 1, 2016, and continuing until on or about August 31, 2016, at Missoula, within Missoula County, in the State and District of Montana, and elsewhere, the defendants, JEFFERY ANDREW BURNS and CYARA JOAVANY WHITLOCK, knowingly and unlawfully conspired and agreed with each other, with Alex Vaughn Bradford, and with other persons, known and unknown to the Grand Jury, to possess with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), Oxycodone, a Schedule II controlled substance, in violation of 21 U.S.C. § 846.

COUNT II

On or about August 13, 2016, at Missoula, within Missoula County, in the State and District of Montana, the defendants, JEFFERY ANDREW BURNS and CYARA JOAVANY WHITLOCK, knowingly and intentionally attempted to obtain and acquire Oxycodone, a Schedule II controlled substance, by misrepresentation, fraud, forgery, deception, and subterfuge, and made a material step in order complete said crime by presenting a forged and fraudulent prescription at Rosauer's Pharmacy, and aided and abetted the same, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 843(a)(3).

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.

KURT G. ALME
United States Attorney

for JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Crim. Summons_____
Warrant: ✓✓
Bail: _____

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, Montana 59807
105 E. Pine, 2nd Floor
Missoula, Montana 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
Email: Tara.Elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **ROBERTA ROSE WIDDICOMBE,** **Defendant.**	**CR 18-01-BU-DLC** **OFFER OF PROOF**

Defendant has signed a plea agreement which contemplates her plea of guilty to count I of the Indictment, which charges the crime of conspiracy to distribute heroin in violation of 21 U.S.C. § 846. The Defendant's plea of guilty will be unconditional.

The United States presented any and all formal plea offers to the Defendant in writing. The plea agreement entered into by the parties and filed with the court represents, in the Government's view, the most favorable offer extended to the Defendant. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012).

ELEMENTS. In order to prove the charge contained in count I of the Indictment against the Defendant at trial, the United States would have to prove the following elements beyond a reasonable doubt:

First, there was an agreement between two or more persons to distribute heroin; and

Second, the Defendant became a member of the conspiracy knowing of at least one of its objectives and intending to help accomplish it.

PROOF. If called upon to prove this case at trial, and to provide a factual basis for the Defendant's plea, the United States would present, by way of the testimony of law enforcement officers, lay and expert witnesses, and physical evidence, the following:

The Missouri River Drug Task Force conducted two separate controlled purchases involving Widdicombe in November and December of 2016. On November 30, 2016, a Confidential Informant (CI #1) purchased two grams of heroin from Widdicombe, and on December 6, 2016, in a transaction that

Widdicombe had arranged, CI #1 purchased one gram of heroin from Widdicombe's co-conspirator.

A second and third Confidential Informant (CI #2 and CI #3) would testify that they personally witnessed Widdicombe in possession of heroin, that Widdicombe is a heroin distributor, and that they each sold heroin to Widdicombe.

Widdicombe later admitted that she purchased and resold heroin from the winter of 2015 through the winter of 2016 in the Bozeman area.

DATED this 4th day of June, 2018.

KURT G. ALME
United States Attorney

/s/ Tara J. Elliott
Assistant U.S. Attorney
Attorney for Plaintiff

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
Tara.Elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **ROBERTA ROSE WIDDICOMBE,** **Defendant.**	**CR 18- 01 -BU- DLC** **INDICTMENT** **CONSPIRACY TO DISTRIBUTE HEROIN** **Title 21 U.S.C. § 846 (Count I)** **(Penalty: 20 years imprisonment, $1,000,000 fine, and at least three years supervised release)** **DISTRIBUTION OF HEROIN** **Title 21 U.S.C. § 841(a)(1)** **(Counts II and III)** **(Penalty: 20 years imprisonment, $1,000,000 fine, and at least three years supervised release)** **TITLE 21 PENALTIES MAY BE ENHANCED FOR PRIOR DRUG-RELATED FELONY CONVICTIONS**

THE GRAND JURY CHARGES:

COUNT I

Beginning in approximately Winter of 2015, and continuing until approximately Winter of 2016, in Gallatin and Park Counties, in the State and District of Montana, and elsewhere, the defendant, ROBERTA ROSE WIDDICOMBE, knowingly and unlawfully conspired with others, both known and unknown to the Grand Jury, to distribute, in violation of 21 U.S.C. § 841(a)(1), heroin, a Schedule I controlled substance, in violation of 21 U.S.C. § 846.

COUNT II

On or about November 30, 2016, in Park County, in the State and District of Montana, the defendant, ROBERTA ROSE WIDDICOMBE, knowingly and unlawfully distributed heroin, a Schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1).

COUNT III

On or about December 6, 2016, in Park County, in the State and District of Montana, the defendant, ROBERTA ROSE WIDDICOMBE, knowingly and unlawfully distributed heroin, a Schedule I controlled substance, in violation of

//

//

21 U.S.C. § 841(a)(1).

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.

FOREPERSON

KURT G. ALME
United States Attorney

for

JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Crim. Summons____
Warrant: ✓
Bail: _____

TARA J. ELLIOTT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2nd Floor
Missoula, MT 59802
Phone: (406) 542-8851
FAX: (406) 542-1476
Email: Tara.Elliott@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **ROBERTA ROSE WIDDICOMBE,** **Defendant.**	**CR 18-01-BU-DLC** **PLEA AGREEMENT**

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, represented by Tara J. Elliott, Assistant United States Attorney for the District of Montana, and the defendant, Roberta Rose Widdicombe, and the defendant's attorney, Dylan McFarland, have agreed upon the following:

1. Scope: This plea agreement is between the United States Attorney's Office for the District of Montana and the defendant. It does not bind any other

federal, state, or local prosecuting, administrative, or regulatory authority, or the United States Probation Office.

2. Charges: The defendant agrees to plead guilty to count I of the indictment, which charges the crime of conspiracy to distribute heroin, in violation of 21 U.S.C. § 846. This offense carries a maximum punishment of 20 years imprisonment, a $ 1,000,000 fine, three years of supervised release, and a $100 special assessment.

At the time of sentencing, if the Court accepts this plea agreement, the United States will move to dismiss counts II and III of the indictment.

3. Nature of the Agreement: The parties agree that this plea agreement will be governed by Rule 11(c)(1)(A) and (B), *Federal Rules of Criminal Procedure*. The defendant acknowledges that the agreement will be fulfilled provided the United States: a) moves to dismiss, and the Court agrees to dismiss, counts II and III of the indictment and does not pursue other charges against the defendant; and b) makes the recommendations provided below. The defendant understands that if the agreement is accepted by the Court, there will not be an automatic right to withdraw the plea even if the Court does not accept or follow the recommendations made by the United States.

4. Admission of Guilt: The defendant will plead guilty because the defendant is guilty of the charge contained in count I of the indictment. In pleading guilty, the defendant acknowledges that:

Count I:

First, there was an agreement between two or more persons to distribute heroin; and

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

5. Waiver of Rights by Plea:

(a) The government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement given under oath during the plea colloquy.

(b) The defendant has the right to plead not guilty or to persist in a plea of not guilty.

(c) The defendant has the right to a jury trial unless, by written waiver, the defendant consents to a non-jury trial. The United States must also consent and the Court must approve a non-jury trial.

(d) The defendant has the right to be represented by counsel and, if necessary, have the Court appoint counsel at trial and at every other stage of these proceedings.

(e) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and the defendant's attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

(f) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(g) At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence. If the witnesses for the defendant would not appear voluntarily, their appearance could be mandated through the subpoena power of the Court.

(h) At a trial, there is a privilege against self-incrimination so that the defendant could decline to testify and no inference of guilt could be drawn from the refusal to testify. Or the defendant could exercise the choice to testify.

(i) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal the conviction to the Ninth Circuit Court of Appeals for review to determine if any errors were made that would entitle the defendant to reversal of the conviction.

(j) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, Federal Rules of Criminal Procedure. By execution of this agreement, the defendant waives that right and agrees to hold that hearing before, and allow the Rule 11 colloquy to be conducted by, the U.S. Magistrate Judge, if necessary.

(k) If convicted in this matter, a defendant who is not a citizen of the United States may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The defendant understands that by pleading guilty pursuant to this agreement, the defendant is waiving all of the rights set forth in this paragraph. The defendant's attorney has explained those rights and the consequences of waiving those rights.

6. **Recommendations:** The United States will recommend the defendant's offense level be decreased by two levels for acceptance of responsibility, pursuant to USSG §3E1.1(a), unless the defendant is found to have obstructed justice prior to sentencing, pursuant to USSG §3C1.1, or acted in any way inconsistent with acceptance of responsibility. The United States will move for an additional one-level reduction, pursuant to USSG §3E1.1(b), if appropriate under the Guidelines. The parties reserve the right to make any other arguments at the time of sentencing. The defendant understands that the Court is not bound by this recommendation.

7. **Sentencing Guidelines:** Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

8. **Appeal Waivers:**

Waiver of Appeal of the Sentence – 5K motion: The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). Under appropriate circumstances, the United States may move, but has not made any commitment as part of this agreement to move, for a reduction of sentence pursuant to USSG §5K1.1 to reward the defendant for any substantial assistance provided before sentencing. If such a motion is made and the Court accepts the plea agreement, the

defendant waives all right to appeal any aspect of the sentence, including conditions of probation or supervised release, imposed by the Court.

If a motion for downward departure is made under USSG §5K1.1, the defendant also agrees to waive the right to collaterally attack the judgment or sentence pursuant to 28 U.S.C. § 2255. This waiver does not prohibit the right to pursue an action alleging ineffective assistance of counsel.

The United States emphasizes, and the defendant again acknowledges, that no such motion is bargained for in this agreement. No commitment to make such a motion has been made as part of the plea agreement, and the defendant has been made specifically aware that Department of Justice policy does not authorize any individual prosecutor to file such a motion or make such a commitment without express written approval of the U.S. Attorney or a Committee of other prosecutors designated and empowered by the U.S. Attorney to approve such a motion. USAM 9-27.400.

Waiver and Dismissal of Appeal of the Sentence – Rule 35 motion: The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). Under appropriate circumstances, the United States may move, but has not made any commitment as part of this agreement to move, for a reduction of sentence pursuant to Rule 35, *Federal Rules of Criminal Procedure*, to reward the defendant for any substantial

assistance the defendant provides after sentencing. If such a motion is made, and granted by the Court, the defendant agrees to waive any appeal of the sentence and judgment imposed, and dismiss any pending appeal of the judgment and sentence previously taken.

If a Rule 35 motion for reduction of sentence is made and granted by the Court, the defendant also agrees to waive the right to collaterally attack the judgment or sentence pursuant to 28 U.S.C. § 2255. This waiver does not prohibit the right to pursue an action alleging ineffective assistance of counsel.

The United States emphasizes, and the defendant again acknowledges, that no such motion is bargained for in this agreement. No commitment to make such a motion has been made as part of the plea agreement, and the defendant has been made specifically aware that Department of Justice policy does not authorize any individual prosecutor to make such a commitment without express written approval of the U.S. Attorney, or a Committee of other prosecutors designated and empowered by the U.S. Attorney to approve such a motion. USAM 9-27.400.

9. **Voluntary Plea:** The defendant and the defendant's attorney acknowledge that no threats, promises, or representations have been made to induce the defendant to plead guilty, and that this agreement is freely and voluntarily endorsed by the parties.

10. Detention/Release After Plea: The defendant acknowledges that she will continue to be detained upon conviction.

11. Breach: If the defendant breaches the terms of this agreement, or commits any new criminal offenses between signing this agreement and sentencing, the U.S. Attorney's Office is relieved of its obligations under this agreement, but the defendant may not withdraw the guilty plea.

12. Entire Agreement: Any statements or representations made by the United States, the defendant, or defense counsel prior to the full execution of this plea agreement are superseded by this plea agreement. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. This plea agreement constitutes the entire agreement between the parties. Any term or condition which is not expressly stated as part of this plea agreement is not to be considered part of the agreement.

///

///

///

///

///

///

///

KURT G. ALME
United States Attorney

TARA J. ELLIOTT
Assistant U. S. Attorney
Date: 5/24/18

ROBERTA ROSE WIDDICOMBE
Defendant
Date: 5-23-18

DYLAN MCFARLAND
Defense Counsel
Date: 5/24/18

TE RW DC 5/24/18
AUSA DEF ATTY Date

Tribal Criminal jurisdiction: a muddled and complex jurisdictional scheme

And this is the easy part.

Scope of Criminal Jurisdiction within Indian Country

- The boundaries of modern tribal criminal jurisdiction are defined by a handful of clear rules
  - limit on sentence length
  - a categorical prohibition against prosecuting most non-Indians and
- many grey areas in which neither Congress nor the Supreme Court has specifically addressed a particular question.

Factors that must be considered when looking at Criminal jurisdiction within Indian Country

- ✓Historical considerations impact tribal jurisdiction
- ✓Limitations placed on tribal jurisdiction by tribal custom and traditions, treaties or federal statutes
- ✓What is “Indian Country”

What Sovereigns Can Have Criminal Jurisdiction in Indian Country?

- Three different governments maybe able to exercise criminal jurisdiction in Indian Country depending on an analysis of several key factors and laws
  1. State
  2. Tribal
  3. Federal

Tribes have both Limited and General Jurisdiction

- What questions need to be asked?
  - Who is involved?
  - What is involved?
  - What is the status of the land where the incident or issue occurred?
  - What laws are involved
    - Legislative
    - Judicial
    - Treaties

General Rule based on Worcester v Georgia, 31 U.S. 515 (1832)

- Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is *exclusive."*
- The laws of the state have no force within tribal territories.

Crow Dog

Spotted Tail

Federal Response

- Crow Dog Arrest and charged with murder by Territory of Dakota
- Sentence to death
- Files a writ of Habeas Corpus
- U.S. Supreme Court finds no federal jurisdiction based on treaty language and statutes.
- Congress reacts by passing the Major Crimes Act in 1885

Major Crimes Act

- Extends federal jurisdiction into Indian Country for enumerated major crimes
- Only applies to offenses where the Perpetrator is Indian

Criminal Jurisdiction in Indian Country

General Rules

- States generally have no jurisdiction over crimes committed in Indian Country, unless the requirements of Public 280 have been met.
- Tribes generally have jurisdiction over all crimes committed by all Indians, regardless of membership, that occur within Indian Country. *Duro Fix*
- The federal government generally has concurrent jurisdiction with tribes over all felonies/enumerated crimes committed by Indians against Indians, Indians against non-Indians, and **all** misdemeanors and felonies committed by non-Indians against Indians that occur within Indian Country.

“Indian Country” Defined

- The first step in determining what government has jurisdiction is defining **whether the crime was committed in Indian Country.**
- “Indian Country” means

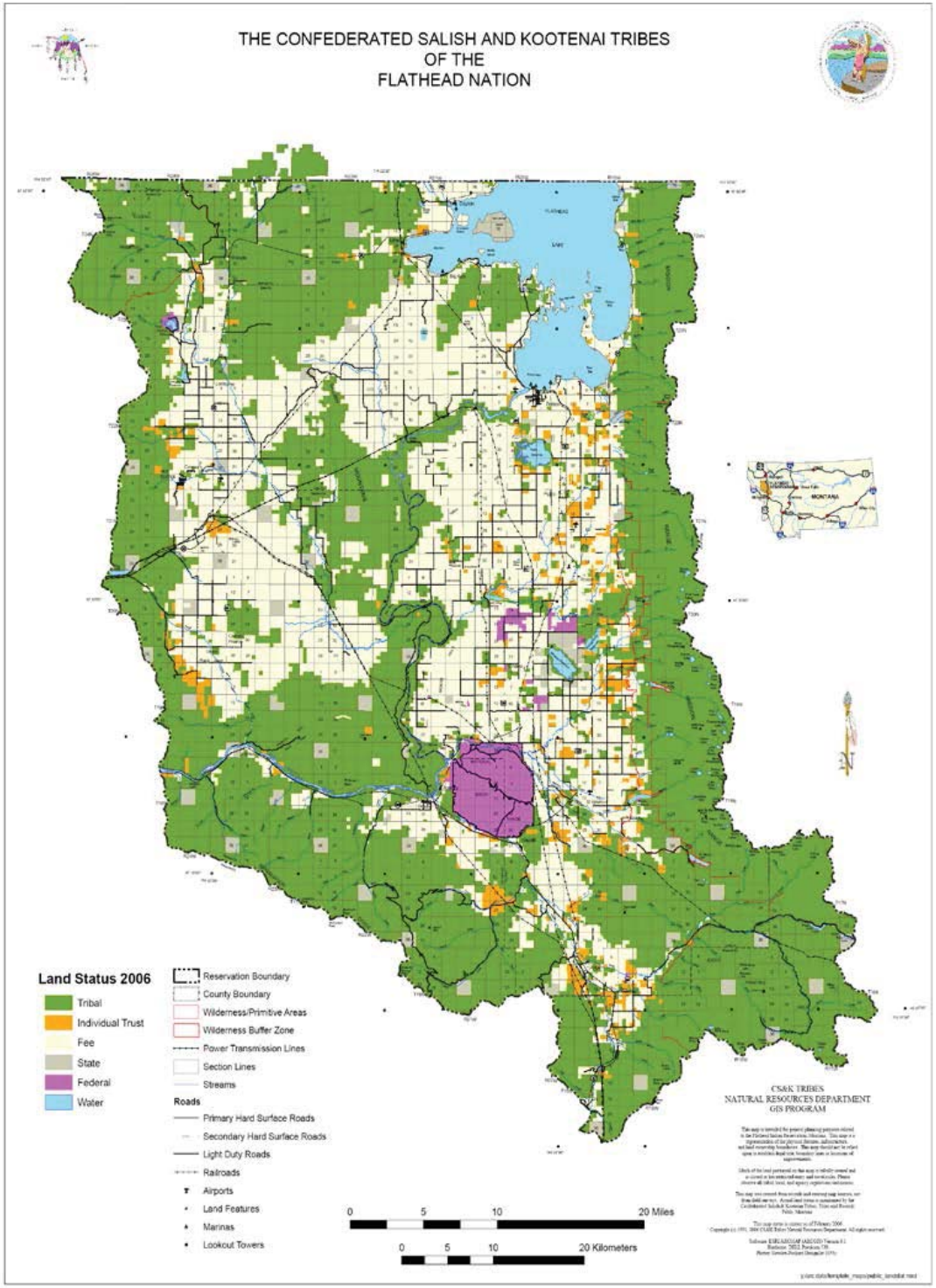
  1) all land within the limits of an Indian reservation;

  2) all dependent Indian communities within the territory of the United States; and

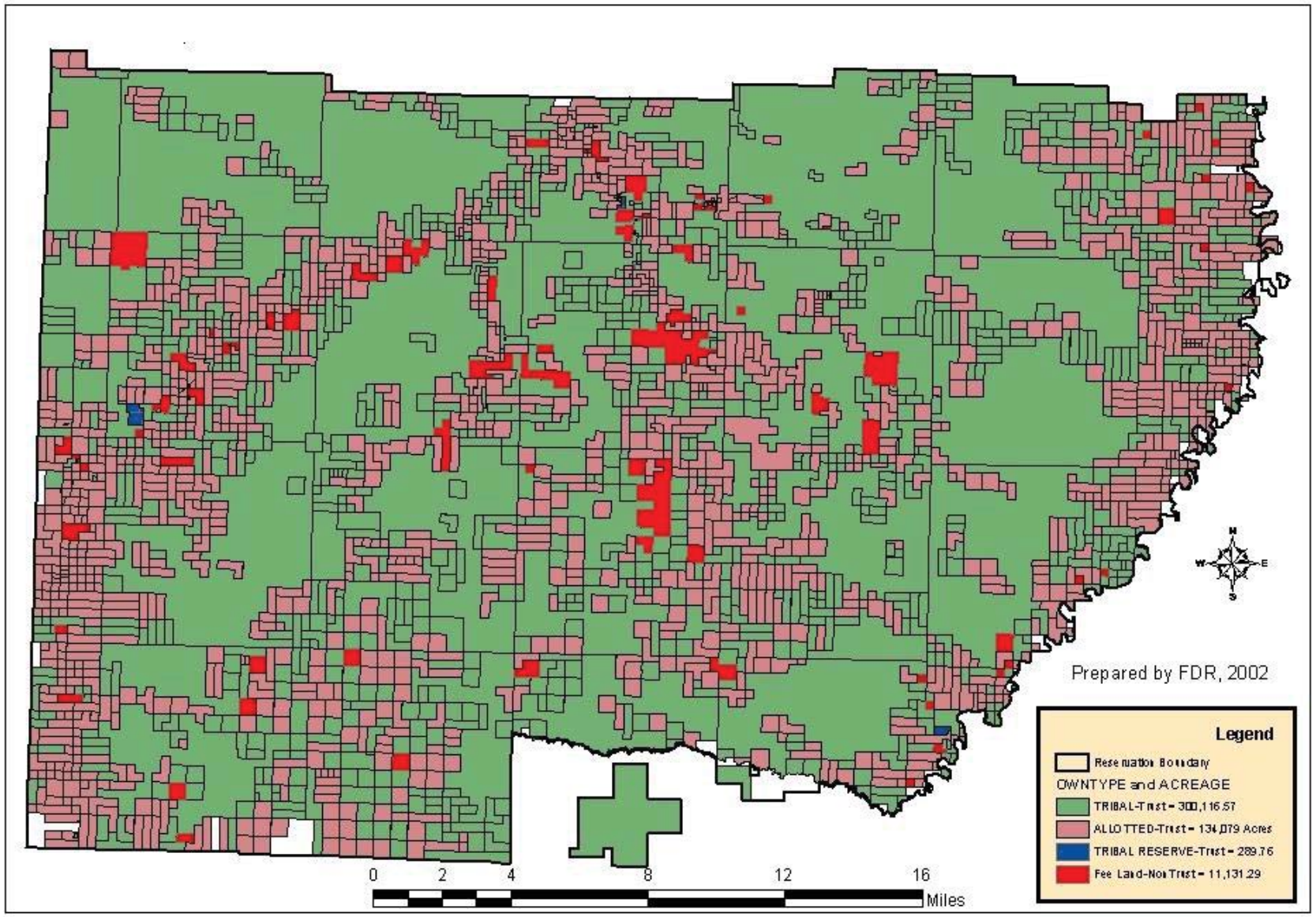
  3) all Indian allotments held in trust by the United States.

18 U.S.C. § 1151

What does a map of an Indian Reservation look like?



NORTHERN CHEYENNE RESERVATION-LAND STATUS



Who is an "Indian" for Purposes of Criminal Jurisdiction

- It is a fundamental right of every tribal nation to define who its members are, but for purposes of criminal jurisdiction, the U.S. government uses its own definition of who is an "Indian."
- To be considered an Indian under §§ 1152 or 1153, the individual must have a sufficient connection to an Indian tribe that is *recognized by the federal government.* Affiliation with a tribe that does not have federal recognition does not suffice.
- Can be an Indian and NOT enrolled in a Federally Recognized Tribe.

Changes in Criminal Powers

- Tribal Law and Order Act
- Violence Against Women Act, 2013 reauthorization – modifies the *Oliphant* decision.
  - recognizes tribes' **inherent power** to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country.

Who has jurisdiction- Non P.L. 280?

Actor	Victim	Crime	Location	Jurisdiction
Indian	Indian	Enumerated/ felony	Indian Country	Tribal and Federal
Indian	Indian	Misdemeanor	Indian Country	Tribal only
Indian	Non-Indian	Enumerated/ Felony	Indian Country	Tribal and Federal
Indian	Non-Indian	Misdemeanor	Indian Country	Tribal only
Non-Indian	Indian	Misdemeanor or enumerated/ felony	Indian Country	Federal only **unless** tribal has special Domestic Violence Jurisdiction
Non-Indian	Non-Indian	Misdemeanor or enumerated/ felony	Indian Country	State only
Indian/Non-Indian	Indian/Non-Indian	Misdemeanor or enumerated/ felony	Outside Indian Country	State only

INDIAN COUNTRY JURISDICTION GRAPH
PUBLIC LAW 280-Confederated Salish and Kootenai Tribes

Alleged Perpetrator	Alleged Victim	Crime	Location	Jurisdiction
Indian	Indian	felony	Indian Country	Tribal or State-determined based on PL 280 agreement. Remains where ever filed first when agreement followed.
Indian	Indian	Misdemeanor	Indian Country	Tribal unless transferred to State
Indian	Non-Indian	Felony	Indian Country	Tribal or State-determined based on PL 280 agreement. Remains where ever filed first when agreement followed.
Indian	Non-Indian	Misdemeanor	Indian Country	Tribal unless transferred to State
Indian	Victimless	Misdemeanor	Indian Country	Tribal unless transferred to State
Indian	Victimless	Felony	Indian Country	Tribal or State-determined based on PL 280 agreement. Remains where ever filed first when agreement followed.
Non-Indian	Indian	Misdemeanor or Felony	Indian Country	State only
Non-Indian	Non-Indian	Misdemeanor or Felony	Indian Country	State only
Indian/Non-Indian	Indian/Non-Indian	Misdemeanor or felony	Outside Indian Country	State only Unless is federal offense

MONTANA JUDICIAL INSTITUTE

October 2018

Tribal Courts and Civil Jurisdiction

John Harrison, Staff Attorney
Confederated Salish and Kootenai Tribes
(406) 675-2700 ext. 1185
john.harrison@cskt.org

"[Q] uestions of jurisdiction over Indians and Indian country remain a " ' complex patchwork of federal, state, and tribal law' which is better explained by history than by logic." *United States v. Bruce,* 394 F.3d 1215, 1218 (9th Cir. 2005)(quoting *Duro v. Reina,* 495 U.S. 676, 680 n. 1(1990)).

PART ONE – Some Basics

I. What is Jurisdiction?

A. Jurisdiction is a government's general power to exercise authority over all persons and things within its territory. (Black's Law Dictionary, 11th Ed.)

Types of Jurisdiction

- Regulatory
- Criminal
- Civil

B. A court's power to hear and decide a case or issue a decree. (Id.)

II. Jurisdiction in a Judicial Setting

A. For a court to hear a case it must have three forms of jurisdiction.

1. Subject matter: A court's power to hear the case and type of relief sought.
2. Personal: A court's power to bring a person into its adjudicative process.
3. Issue: A court's power to rule on matters properly brought before it.

B. Courts are defined as courts of general jurisdiction or limited jurisdiction.

- State courts are courts of general jurisdiction.
- Federal courts are courts of limited jurisdiction.

III. What is the Scope of Tribal Court Jurisdiction?

Tribal Courts are courts of general *and* limited jurisdiction. The jurisdictional authority of Tribes has evolved over time. Understanding the scope of tribal court jurisdiction begins with understanding some of the history of federal Indian policy.

PART TWO – SOME HISTORY

I. Key Historic Periods

A. Pre-Constitutional (1492-1787)

- Tribes were independent nations controlling their aboriginal territory. Tribes had full authority over their lands and territory. Tribes were fully autonomous, governing themselves and resolving disputes.

- Tribes did not employ formal hierarchical governance as we know it. Consent of the governed was important, and councils, respected elders, or spiritual leaders often delivered justice using traditions and customs. The concept of justice did not just rely on punishing a wrongdoer, but keeping the community intact and functioning.

B. Treaty Making (1789-1871)

- Tribes executed treaties with the United States through negotiations between sovereign nations. Tribes ceded vast tracts of their aboriginal lands, reserving to themselves a homeland (e. g. the Flathead Indian Reservation) for their exclusive use and occupation, along with a number of reserved rights off-reservation (such as the right to hunt and fish in traditional areas).

- Treaties were the highest law of the land, and defined the relationship between the United States and Indian tribes.

- As this era progressed the treaty terms became much less favorable to tribes, and were executed primarily to remove Indians from the path of American settlement. The treaties more closely resembled contracts of adhesion.

C. Allotment and Assimilation (1887-1928)

- The General Allotment Act of 1887, 24 Stat. 388 (Dawes Act) was the principle way the United States could assimilate Indians into American society and open up tracts of land within Indian reservations held in communal tribal ownership.

- In his first State of the Union Address in 1901, President Theodore Roosevelt referenced United States Board of Indian Commissioners Chairman Merrill Gates' statement that the General Allotment Act would serve as "a mighty pulverizing engine to break up the tribal mass."

- Under the Act, individual Indians would be given between 80-160 acres of reservation land to be held in trust by the United States for 25 years. The Act authorized the Secretary of Interior to negotiate with tribes for the sale of "surplus" lands that would then be opened to homesteading by non-Indian settlers.

- After a period of 25 years, unencumbered fee title passed to the individual Indian allottees. The land was then freely alienable and subject to state property taxes.

- Through predatory purchases, loss from non-payment of taxes, and disposal of "surplus" lands, Indian landholdings on reservations nationwide were reduced from 138 million acres to 48 million acres.

- Along with the loss of tribal lands, the Act broke up tribal communities, and destabilized traditional tribal governance and dispute resolution. It also allowed for a significant population of non-Indians to reside on Indian reservations, creating a "checkerboard" of land ownership within Indian reservations.

D. New Deal and Indian Reorganization (1928-1930's)

- In response to the disastrous consequences of the failed allotment and assimilation policies, Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq. (Wheeler-Howard Act of June 18 1934)(the "IRA").

- The IRA ended the allotment of Indian lands, allowed the Secretary of Interior to repurchase some of the lands lost during allotment and hold tribal and individual Indian allotments in trust for tribes and their members.

- Pursuant to the IRA, tribes could elect to "re-organize" themselves as constitutional governments, and establish federally chartered corporations to conduct business operations.

- The Secretary of Interior provided model constitutions that tribes could adopt. Most of these constitutions remain in place, with some changes to allow for less federal oversight of tribal governmental decisions. Model IRA constitutions did not have a separation of powers provision, and did not establish independent judicial branches.

- The IRA remains one of the cornerstones of modern federal Indian policy.

E. Self-Determination (1973-present)

- The Nixon Administration embarked on a policy of American Indian self-determination, with the goal of promoting Indian tribes' control of their own affairs on their reservations, and reaffirmed the trust obligation that the federal government had towards tribes.

- The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq. (transferred to 25 U.S.C. § 5301, et. seq.) allowed for tribes to contract with the Secretary of Interior, as well as the Secretary of Health, Education and Welfare in order for tribes to directly assume responsibility for federal Indian programs, services and functions.

- In the self-determination era, Congress has appropriated funds for the BIA in order to assist tribes in developing their capacity for self-governance. Recognizing the importance of Tribal Courts, the federal government has invested in the development of the tribal judiciary.

II. Key Judicial Decisions by Era

Congress has never explicitly defined the extent of Indian tribes' civil regulatory or adjudicative authority within Indian Country. Federal courts have had to define the scope of tribal civil authority, usually through challenges raised by non-Indians, or a state's attempt to exert regulatory or adjudicatory control over reservation lands.

A. Treaty Making Era

The United States Supreme Court first interpreted the relationship between the United States and Indian tribes through three cases often referred to as the "Marshall Trilogy" after Chief Justice John Marshall:

1. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823)(holding tribes' right of occupancy, or "aboriginal title" was a property interest recognized in law, but existing at the will of the discovering sovereign, now the United States).

2. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831)(holding Indian tribes are sovereign nations in *all* aspects, *except* when it comes to their relationship with the United States, which has full authority over the "dependent" tribal nations).

3. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832)(holding Indian tribes are distinct political communities with authority over their lands and those who reside within them, subject only to the ultimate authority of the United States).

The Marshall Trilogy established bright lines of tribal jurisdiction:

- Tribes had full jurisdiction over on-reservation activities, to the exclusion of state law;
- Tribes retained all sovereign powers, unless relinquished through treaty or expressly limited by the plenary power of the United States Congress;
- Tribal sovereignty could only be limited through an Act of Congress.
- Tribes continued to utilize traditional forms of government and dispute resolution.

B. Post-Allotment Era

- With the division of tribal lands under federal allotment policies, many reservations ended up with a "checkerboard" of land ownership. Much of the land throughout the reservation was held in fee simple, either by tribal members or the significant number of non-Indian settlers, while other land was held by the United States on behalf of tribes or individual tribal members. The post-Allotment era created complex jurisdictional problems, with the United States, tribes and states all asserting jurisdiction to varying degrees within Indian reservations.

- With the loss of communally held tribal land, tribes' traditional governing structures were lost or significantly diminished. Tribes suffered a corresponding loss in their ability to use customary practices of dispute resolution to manage conflict.

- Post-Allotment, the federal government assumed the primary role of dispute resolution, particularly when conflicts arose between Indians and non-Indians. Federal law and policy was applied on reservations by:
    - The United States military, or;
    - The Secretary of Interior through:
        - Reservation Indian Agents directly resolving disputes;
        - Courts of Indian Offenses that utilized rules and procedures pursuant to the Code of Federal Regulations ("CFR courts");
        - Tribal Courts established and overseen by Indian Agents.

C. Indian Reorganization and Self-Determination Eras

While the separation of powers and the establishment of an independent judiciary were not part of IRA model constitutions, many tribes chose to establish their own tribal courts in order to carry out the duties of a constitutional form of government. The development of tribal courts continued into the self-determination era, and became an important aspect of tribal self-governance. As tribes' governing and judicial capabilities developed, tribes sought increased control over their territories. Non-Indians and states often challenged tribal authority. With no clear statutory direction, federal courts were once again called upon to define the reach of tribal civil jurisdiction.

1. *Williams v. Lee,* 358 U.S. 217 (1959)

   - In *Williams* a non-Indian store owner located on the Navajo Reservation brought a debt collection action against a tribal member in an Arizona state court.
   - Stating that "the basic policy of *Worcester* has remained" the Supreme Court held that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them." *Williams,* 358 U.S. at 219-220.
   - The *Williams* decision reaffirmed the Marshall Trilogy, with the Supreme Court finding that tribes had civil jurisdiction over their territory, with state jurisdiction ending at the reservation boarder.

2. *Montana v. United States,* 450 U.S. 544 (1981)

   - *Montana* was a dispute between the Crow Tribe and Montana over regulatory authority of hunting and fishing by non-Indians on non-Indian owned fee land within the Crow Reservation.
   - The Supreme Court held that a tribe's status as a domestic dependent limited its sovereignty to self-government and authority over internal tribal matters. Moreover, with the exceptions of consenting non-Indians, or a significant impact on the health, welfare, or political integrity of a tribe, tribal regulatory jurisdiction did not extend to non-Indians on non-Indian fee lands.
   - The *Montana* decision did away with the bright line rule that tribes had civil jurisdiction within their reservation, allowing for state jurisdiction within a reservation when the issue involved non-Indians on lands not owned or controlled by a tribe.
   - In a subsequent case, the Supreme Court held that a tribal court's adjudicative jurisdiction over civil matters did not extend beyond the tribe's regulatory jurisdiction, thus tribal courts were subject to the same jurisdictional limitations set out in *Montana. See, Strate v. A-1 Contractors,* 520 U.S. 438 (1997).
   - An entire body of caselaw has developed regarding whether a tribe retains jurisdiction over non-members under one of the *Montana* exceptions.

III. Determining Tribal Civil Jurisdiction Today

Williams v. Lee is still good law when the matter involves a reservation-based tribal defendant. Otherwise *Montana* controls, absent one of the exceptions. Deciding the extent of tribal civil jurisdiction now requires an initial factual inquiry, including:

- Who are the parties?
- Where did the conduct occur?
- What is the status of the land ownership?
- Who is the plaintiff and who is the defendant?
- What is the subject matter being heard?

A. Scope of Tribal Court Jurisdiction

- Currently tribal courts are courts of general jurisdiction for tribes and their members, resolving internal disputes such as reservation governance and challenges under the tribal constitution, domestic relations and tribal member probate of non-trust property.

- Tribal courts are courts of limited jurisdiction in other matters, particularly disputes involving non-members.

- Tribal Courts are governed by laws and procedures set out by the governing body of a tribe or the tribal judiciary, along with any controlling federal law. All tribal governments are subject to the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. which was a statutory imposition of most of the Bill of Rights, since Indian tribes are not subject to the United States Constitution.

B. Who Determines What Court Has Jurisdiction?

- The Supreme Court has held that tribal courts have the first opportunity to determine their own jurisdiction. *See, National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. Laplante,* 480 U.S. 9 (1987).

- Parties contesting jurisdiction must first exhaust their remedies in tribal court before asking a federal court to hear a challenge to tribal court jurisdiction.

- Federal courts can review a finding of tribal court jurisdiction to see if it is proper. Absent a clear lack of jurisdiction federal courts will typically uphold a tribal court finding of jurisdiction.

C. Special Circumstances Where Tribes Retain Civil Jurisdiction

- Under some circumstances tribal civil jurisdiction may extend to areas where the tribe would not automatically retain jurisdiction.

- Examples are adjudicative jurisdiction over off-reservation child adoption and custody proceedings involving Indian children; legislative jurisdiction of non-Indian gaming on reservations; tribal members exercising treaty rights on off-reservation lands.

PART THREE – BRINGING A CASE IN A TRIBAL COURT

The judicial power of the Confederated Salish and Kootenai Tribes (CSKT) is vested in the Tribal Court, and the Tribal Court of Appeals. The Tribal Council has the constitutional authority to enact Tribal Ordinances, such as Ordinance 103-A, commonly known as the CSKT Laws Codified. The following sections are taken from the CSKT Laws Codified, and illustrate some examples of what types of civil cases might come before a Montana tribal court, how they can be brought, and what types of judicial remedies are available. A unique feature of the CSKT judiciary is the availability of traditional tribal remedies in certain cases.

I. CIVIL ACTIONS

Tribal Code: The CSKT Tribal Court hears CIVIL CAUSES of ACTION that are based on both common law and statutory duties, to the extent it has jurisdiction.

Title IV, Chapter 1 – Civil Actions, Limitations, and Liability

Part 1 – Civil Actions

4-1-102. Availability of Civil Actions. (1) Civil actions are those causes, within the jurisdiction of the Tribal Court, originating in:

(a) Tribal law, Tribal custom or tradition as defined by statute or Tribal Code rule or decision,

(b) common law or equity, if not inconsistent with Tribal law, and

(c) federal or Montana statute if the Tribal Court has the power to effectuate the statutory remedies. *Note that this provision is subject to a number of limitations, e.g. if another court has already taken jurisdiction over an action, or if it has been accepted by a federal court under the Federal Tort Claims Act (FTCA).*

4-1-103. Bases for Civil Actions. A civil action arises out of:

(1) an obligation, which is a legal duty by which one person is bound to do or not do a certain thing and arises from contract or operation of law; or

(2) an injury, which may be to a person or to property. An injury to property consists of depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Every other injury is an injury to the person.

II. TORTS

The Tribal Court will hear typical TORT actions, including survival and wrongful death (4-1-106); actions by parent/guardian for injury to child or ward (4-1-107); negligent and intentional torts (4-1-301); and products liability (4-1-303).

The SOL is typically three (3) years from the date of accrual (4-1-201); subject to extensions set out in the Tribal Code (4-1-202).

REMEDIES include monetary damages, and traditional remedies.

MONETARY DAMAGES can be awarded for compensatory (4-2-202) and punitive (4-2-213). *Note (1) there is a cap on damages awarded in judgments against tribal governmental and corporate entities ($250K or policy limits for single transaction; $750K or policy limits for multiple plaintiffs based on a single common transaction).*

Punitive damages require a determination by the trier of fact that there has been actual fraud or malice. Punitive damages cannot be awarded in contract actions, or unless provided by statute, actions against governmental entities, or where barred by or limited by statute.

TRADITIONAL REMEDIES (4-2-101) are available where the parties are of the same tribe or band forming the CSKT and partake of the cultural heritage, and there is consent of the parties to the traditional remedy proposed. The Tribal Court can order a combination of traditional and statutory remedies in the interest of justice.

III. JURISDICTION

The CSKT Code has expressly provided for those who wish to invoke the Tribal Court's jurisdiction. The Tribes exercise jurisdiction to the fullest extent possible, not inconsistent with federal law.

Title I, Chapter 2, Courts

Part 1 – Establishment and Jurisdiction

1-2-104. Civil Jurisdiction. (1) The Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, shall have jurisdiction of all suits wherein the parties are subject to the jurisdiction of this Court, and over all other suits which are brought before the Court by stipulation of parties not otherwise subject to Tribal jurisdiction. In suits brought by nonmembers against members of the Tribes or other person subject to the jurisdiction of the Court, the complainant shall stipulate in his or her complaint that he or she is subject to the jurisdiction of the Tribal Court for purposes of any counterclaims which the defendant may have against him or her.

Consistent with federal law, the Tribal Court's JURISDICTION is EXCLUSIVE, except where there is agreement between the Tribes and the State or Federal governments providing for CONCURRENT jurisdiction. (1-2-105) enumerates the concurrent situations, e.g. domestic relations (excluding adoption unless Tribal Court consents); compulsory school attendance; operation of motor vehicles; all criminal laws of Montana pertaining to felony offenses, etc.

Where questions of JURISDICTION are raised in the Tribal Court, all other proceedings are held in abeyance. Tribal Court rulings on jurisdiction are considered FINAL ORDERS subject to appeal to the CSKT Tribal Court of Appeals.

The SOVEREIGN IMMUNITY of the CSKT Government and its employees acting in their official capacity are bars to Subject Matter Jurisdiction. (4-1-401).

The Tribes have provided for LIMITED WAIVERS of sovereign immunity. (4-1-402). Such waivers include express waivers issued by the Tribal Council or found in statute, declaratory and injunctive relief sough under the Tribal Constitution or ICRA (25 U.S.C. § 1302, etc.) Where Tribal Corporations have "sue and be sued" clauses, suit is authorized pursuant to the terms of the clause.

IV. OTHER FORMS OF CIVIL ACTIONS INVOLVING THE CSKT.

Federal Tort Claims Act, 28 U.S.C. § 2680 (FTCA). For civil actions against Tribal Programs, Services and Functions carried out by the CSKT pursuant to an Annual Funding Agreement under the Tribal Self-Determination Act (Compacted Program) or P.L. 93-638, the action must typically be brought under the FTCA in federal court, with the United States as the sole defendant.

Wrongful Discharge/Employment Grievance. Wrongful Discharge actions are available to contract or non-permanent status employees pursuant to the terms of CSKT Ordinance 93B. Permanent-status employees discharge and grievance remedies are set out under the CSKT Personnel Ordinance (69C) and involve administrative remedies subject to the Tribal

Administrative Procedure Ordinance, with any judicial action coming after completion of the administrative process.

Work Related Injuries. The CSKT participates in the state fund for worker's compensation, and the Tribal Court will not hear claims related to work related injuries that would properly be heard in the Montana Worker's Compensation forums.

Actions Brought Pursuant to the Indian Civil Rights Act. The Tribal Court has the authority to hear claims against the CSKT properly brought under the Indian Civil Rights Act, by individuals seeking redress against actions of the CSKT government.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES R. SMITH, *Plaintiff-Appellant,* v. SALISH KOOTENAI COLLEGE; COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, *Defendants-Appellees.*	No. 03-35306 D.C. No. CV-02-00055-LBE OPINION

Appeal from the United States District Court
for the District of Montana
Leif B. Erickson, Magistrate Judge, Presiding

Argued and Submitted En Banc
June 23, 2005—San Francisco, California

Filed January 10, 2006

Before: Mary M. Schroeder, Chief Judge,
Pamela Ann Rymer, Michael Daly Hawkins,
Barry G. Silverman, Susan P. Graber, Ronald M. Gould,
Richard A. Paez, Marsha S. Berzon, Richard R. Clifton,
Jay S. Bybee, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge Gould

COUNSEL

Rex Palmer, Attorneys Inc., P.C., Missoula, Montana, for the plaintiff-appellant.

Robert J. Phillips, Phillips & Bohyer, P.C., Missoula, Montana, for defendant-appellee Salish Kootenai College; John T. Harrison, Legal Department, Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Pablo, Montana, for defendant-appellee Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Mary L. Smith, Washington, D.C., for amicus curiae National Congress of American Indians.

OPINION

BYBEE, Circuit Judge:

The question presented in this case is whether a non-Indian plaintiff consents to the civil jurisdiction of a tribal court by

filing claims against an Indian defendant arising out of activities within the reservation where the defendant is located. Appellant James Smith, who is not a member of the Confederated Salish and Kootenai Tribes ("the Tribes") of the Flathead Reservation, filed a claim in tribal court against Salish and Kootenai College ("SKC") arising out of an automobile accident. After a jury returned a verdict in favor of SKC, Smith sought an injunction in federal court, alleging that the tribal court lacked subject matter jurisdiction. The tribal courts had previously held that they had jurisdiction to adjudicate the case, and the district court agreed and denied the injunction. Concluding that Smith's suit is within the first exception of *Montana v. United States*, 450 U.S. 544 (1981), and the rule in *Williams v. Lee*, 358 U.S. 217 (1959), we affirm.

I. FACTS AND PROCEDURAL HISTORY

Salish and Kootenai College was established by the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana. Its mission is "to provide quality postsecondary educational opportunities for Native Americans" and "to promote and help maintain the cultures of the Confederated Tribes of the Flathead Indian Nation." Mission Statement, http://www.skc.edu/ (last visited Oct. 17, 2005). SKC is located on tribal land in Pablo, Montana, where it reports 56 full-time instructors, 28 part-time instructors, and more than 1100 students. More than three-quarters of SKC's students are affiliated with an Indian tribe; more than one-third of these are affiliated with the Confederated Salish and Kootenai. The Tribes incorporated SKC under tribal law in 1977, and a year later SKC was incorporated under state law. Under its articles of incorporation, SKC may sue and be sued in its corporate name in the tribal courts. Its bylaws stipulate that each of the seven members of the Board of Directors must be an enrolled member of the Confederated Salish and Kootenai Tribes. The Tribal Council appoints the members of

the Board and may remove them. SKC admits nonmembers of the Tribes.

Smith was enrolled as a student at SKC, although he is a member of the Umatilla Tribe and not of the Confederated Salish and Kootenai Tribes. As part of a course in which he was enrolled, Smith was driving a dump truck, owned by SKC, on U.S. Highway 93 within the Flathead Reservation. Two fellow students were passengers in the truck. Allegedly, the right rear main leaf spring broke, causing the truck to veer sharply and roll over. One passenger, Shad Eugene Burland, was killed, and Smith and a second passenger, James Finley, were seriously injured. Both Burland and Finley were enrolled members of the Confederated Salish and Kootenai Tribes.

The procedural history that culminates in this appeal is complex. Burland's estate filed a wrongful death action in tribal court against SKC and Smith. SKC filed a cross-claim against Smith. Finley then filed suit against SKC and Smith, and Smith filed his own cross-claim against SKC. The tribal court consolidated the cases, and all claims were settled except Smith's cross-claim against SKC. Rather than withdrawing his cross-claim and filing in another court, Smith elected to litigate the claim fully in tribal court. The tribal court realigned the parties, naming Smith as the plaintiff and SKC as the defendant. The claims went to a jury, which returned a verdict in favor of SKC.

Following the unfavorable verdict, Smith argued for the first time that the tribal court did not have subject matter jurisdiction. He first sought post-judgment relief in tribal court. At the same time, he filed an appeal of the judgment with the tribal appeals court, which remanded to the tribal trial court to determine jurisdiction. The tribal court determined that it had jurisdiction, and Smith again filed an appeal with the tribal appeals court. While his second tribal-court appeal was pending, Smith filed a motion for an injunction in federal dis-

trict court on the ground of lack of jurisdiction, and sought to file his cross-claim as an original complaint in that court.

Before the federal district court ruled on the injunction, the tribal appellate court issued an opinion affirming the tribal court's jurisdictional ruling. The federal district court then issued its order finding that the tribal court had jurisdiction and denying the injunction. Smith appealed the judgment of the district court. A panel of our court reversed on the ground that the tribal court lacked jurisdiction over Smith's claims. *Smith v. Salish Kootenai Coll.*, 378 F.3d 1048 (9th Cir. 2004). We vacated that opinion and granted en banc review. 407 F.3d 1267 (9th Cir. 2005).

II. STANDARD OF REVIEW

The question of tribal court jurisdiction is a federal question of law, which we review *de novo*. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990). We review findings of fact for clear error. *Id.* at 1313.

III. ANALYSIS

A

Sixteen years ago, we observed that "[t]here is no simple test for determining whether tribal court jurisdiction exists." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989). The statement is no less true today. We recently noted that questions of jurisdiction over Indians and Indian country remain a " 'complex patchwork of federal, state, and tribal law,' which is better explained by history than by logic." *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (quoting *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990)).

Our analysis of the tribal court's jurisdiction starts with the Supreme Court's decision in *Montana*, a "pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *see County of Lewis v. Allen*, 163 F.3d 509, 513 (9th Cir. 1998) (en banc). In *Montana*, the Court found that tribal courts have two bases for their authority. First, tribes possess inherent power "necessary to protect tribal self-government [and] to control internal relations." *Montana*, 450 U.S. at 564. This includes the inherent power "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Id.* Second, tribes possess such additional authority as Congress may expressly delegate. *Strate*, 520 U.S. at 445; *Montana*, 450 U.S. at 564. As no party contends that Congress has expressly granted the Confederated Salish and Kootenai Tribes the authority to hear this suit, we will consider only whether the Tribes have such inherent authority. *See United States v. Lara*, 541 U.S. 193, 210 (2004).

"Indian tribes have long been recognized as sovereign entities, 'possessing attributes of sovereignty over both their members and their territory.' " *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975))). The basis for tribal jurisdiction is the tribes' inherent need to define the terms for enrollment, to determine the continuing status of their members, and to regulate relations among their members. *Strate*, 520 U.S. at 459; *Montana*, 450 U.S. at 563-64. Owing to their historical status as "dependent sovereign[s]" within the United States, the tribes hold territory reserved by the United States for the tribes as their principal physical asset. *Lara*, 541 U.S. at 229 (Souter, J., dissenting). The tribes retain legislative and adjudicative jurisdiction to provide for disposition of reserved lands and to regulate activities on those lands.

[1] In general, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. This principle is "subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446. The Court first identified these two exceptions in *Montana*. There, it explained that

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).[1]

[1]Ordinarily, so long as there is a "colorable question" whether a tribal court has subject matter jurisdiction, federal courts will stay or dismiss an action in federal court "to permit a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction in a *civil* dispute between Indians and non-Indians that arises on an Indian reservation." *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc); *see Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("Exhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise . . . ."). The district court did not issue its decision until Smith had exhausted his appeals in the Confederated Salish and Kootenai tribal courts.

The Court's recent cases, and our own experience with the *Montana* exceptions, demonstrate that there are two facts courts look to when considering a tribal court's civil jurisdiction over a case in which a nonmember is a party. First, and most important, is the party status of the nonmember; that is, whether the nonmember party is a plaintiff or a defendant. As Justice Souter observed in *Nevada v. Hicks*, "[i]t is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." 533 U.S. 353, 382 (2001) (Souter, J., concurring). The Court has repeatedly demonstrated its concern that tribal courts not require "defendants who are not tribal members" to "defend [themselves against ordinary claims] in an unfamiliar court." *Strate*, 520 U.S. at 442, 459. Second, the Court has placed some store in whether or not the events giving rise to the cause of action occurred within the reservation. *See Hicks*, 533 U.S. at 360 ("The ownership status of land . . . is only one factor to consider . . . ."). Within the reservation, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians . . . even on non-Indian fee lands," *Montana*, 450 U.S. at 565, but subject to an exception not relevant here, "there can be no assertion of civil authority beyond tribal lands." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.12 (2001).

[2] The interaction of these factors—the status of the parties and the connection between the cause of action and Indian lands—is complex. Nevertheless, the cases provide some guidance for our discussion, and we can summarize them as follows. First, where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction. *See Williams v. Lee*, 358 U.S. 217 (1959). Second, where the nonmembers are *defendants*, the Court has thus far held that the tribes lack jurisdiction, irrespective of whether the claims arose on Indian lands. *See Hicks*, 533 U.S. at 356 (claims arose on Indian fee lands); *Montana*, 450 U.S. at 547 (claims arose on non-Indian lands within the reservation). Our own

cases, however, suggest that whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands.[2] Finally, where *neither* party is a tribal member the tribe lacks jurisdiction to adjudicate claims arising from an accident on a public highway within the reservation. *Strate*, 520 U.S. at 456-59.

The Court has drawn an important observation from this history. It has "never held that a tribal court had jurisdiction over a nonmember defendant." *Hicks*, 533 U.S. at 358 n.2. Nevertheless, it has "le[ft] open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.*[3]

---

[2]*Compare Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001) (cause of action arose on non-Indian fee land within the reservation; no jurisdiction in tribal courts); *Burlington N. RR. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (cause of action arose on railroad right-of-way within the reservation; no jurisdiction in tribal courts); *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999) (cause of action arose on state highway within reservation; no need to exhaust claims in tribal courts); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (cause of action arose on U.S. highway within reservation; judgment of tribal court not entitled to recognition in U.S. courts); *and Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (county taxed member-owned land within reservation; no jurisdiction in tribal courts to enjoin the county), *with McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002) (cause of action arose out of accident on tribal road; tribal court had jurisdiction); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (cause of action arose out of accident on tribal roads; remanded for exhaustion of tribal determination of jurisdiction); *and Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989) (contracts with tribe for activities on reservation; tribal court's determination of jurisdiction entitled to comity).

[3]In light of the Court's observations on the relevance of party status, we are puzzled by the dissent's insistence that the *Montana* "framework applies to legal actions involving 'nonmembers' without limitation," and that we have "err[ed]" in holding that jurisdiction may turn on "whether the nonmember party is a plaintiff or defendant." Dissent at 129-30. Party status is plainly relevant, as the Court has repeatedly made clear. *See Hicks*, 533 U.S. at 358 & n.2; *id.* at 382 (Souter, J., concurring); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854-55 (1985).

We next consider the status of the parties to this litigation and whether the claims are related to tribal lands.

B

1

[3] Smith's status as a nonmember is clear. James Smith is a not a member of the Confederated Salish and Kootenai Tribes. He is a member of the Umatilla Tribe, but for purposes of determining the tribal civil jurisdiction of the Salish and Kootenai Tribal Courts, he is a nonmember. *See Hicks*, 533 U.S. at 377; *see also Duro v. Reina*, 495 U.S. 676, 695-96 (1990).

What is less clear is whether Smith is a plaintiff or a defendant. The original suits were filed against Smith and SKC by Burland's estate and Finley; in that action, Smith was named as a defendant. Smith did not challenge the tribe's jurisdiction; instead, he filed a cross-claim against SKC, which had filed its own cross-claim against Smith. Prior to trial, the parties resolved all the claims except for Smith's cross-claim against SKC. The tribal court realigned the parties, and Smith became the plaintiff.

[4] In the posture in which this case came to us, Smith is the plaintiff. It is irrelevant for our purposes that Smith was originally named as a defendant. Courts may realign parties, according to their ultimate interests, whether the realignment has the effect of conferring or denying subject matter jurisdiction on the court. *See Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965); *see also* FED. R. CIV. P. 19(a) ("If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff."); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 177-78 (6th ed. 2002).

2

We next turn to the status of the defendant, SKC. SKC is neither a Tribe nor a member of the Tribes. Although in the original suit, the Confederated Salish and Kootenai Tribes were sued as a defendant along with Smith and SKC, the Tribes were dismissed on the ground that they had not waived their immunity in tribal court. SKC did not contend then and does not contend here that it shares the Tribes' immunity. Nor does SKC contend that it is eligible for tribal membership, which under the Tribes' constitution is limited to natural persons.

Civil tribal jurisdiction is not limited to matters affecting the tribe *qua* tribe or its members *qua* members. "[T]ribal self-government" is at the heart of tribal jurisdiction. *Montana*, 450 U.S. at 564. Tribes may govern themselves through entities other than formal tribal leadership. Of course, not every enterprise that is owned or staffed by members of a tribe may be considered a tribal entity for purposes of tribal jurisdiction, *see Atkinson Trading*, 532 U.S. at 657, but we have previously recognized that there are entities that are sufficiently identified with the tribe that they may be considered to be "tribal."

Whether an entity is a tribal entity depends on the context in which the question is addressed. *See Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 376 (10th Cir. 1986) (stating that "the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration"). It is nevertheless useful to look at analogous cases, outside the area of tribal civil jurisdiction, where courts have been called upon to identify tribal entities. In *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998), we considered whether the Modoc Indian Health Project was a "tribe" and therefore exempt from the definition of a covered "employer" in Title VII. *See* 42 U.S.C. § 2000e(b) (2003). We found that Modoc was a "nonprofit corporation

created and controlled by the Alturas and Cedarville Rancherias, both federally recognized tribes." *Pink*, 157 F.3d at 1187. Modoc's board of directors were appointed by federally recognized tribes and "served as an arm of the sovereign tribes, acting as more than a mere business." *Id.* at 1188. We concluded that Modoc was exempt. Our holding is consistent with decisions in other circuits. *See*, *e.g.*, *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (community college chartered, funded, and controlled by Tribe is a tribal agency entitled to sovereign immunity); *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1125, 1126 (10th Cir. 1999) (housing authority was "an enterprise designed to further the economic interests of the Absentee Shawnee tribe, and the tribe has exclusive control over the appointment and removal of its decisionmakers"; holding that the housing authority was exempt under Title VII); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (for Title VII purposes, " 'a housing authority, established by a tribal council pursuant to its powers of self-government, is a tribal agency[,]' . . . . rather than a separate corporate entity created by the tribe" (quoting *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670 (8th Cir. 1986))); *Dille*, 801 F.2d at 373 (holding that a council composed of tribes to manage their energy resources was a tribe for Title VII purposes).

By contrast, in *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), we considered whether the Chapa-De Indian Health Program was subject to subpoena by the National Labor Relations Board. Chapa-De had been authorized by the Rumsey Indian Rancheria, a federally recognized tribe, and was a "tribal organization" for purposes of the Indian Self Determination Act, 25 U.S.C. § 450b(*l*). None of its board of directors was a member of the Rumsey Tribe, although there were tribal members on the advisory board. Almost half of Chapa-De's patients and its employees were not Native Americans, and it operated facilities on non-Indian land. We concluded that, although Chapa-De served the

health needs of the tribe, its *labor relations* were not "an intramural activity related to self-governance." *Chapa De*, 316 F.3d at 1000. Where the standard was "whether the NLRB 'plainly lack[ed]' jurisdiction," we concluded that "[j]urisdiction [was] not plainly lacking." *Id.* at 997, 1001 (quoting *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001)).

SKC is located on tribal lands on the Flathead Reservation, is incorporated under tribal and state law, and is described in its articles of incorporation as "[a] tribal corporation." SKC may sue and be sued in its corporate name in tribal court. Under SKC's bylaws, the Tribal Council appoints the board of directors, who must be members of the Tribes, and may remove members of the board. Although SKC does not claim that it is immune from suit in tribal courts, the Tribes created it and continue to exercise some control over the institution. Most students receiving degrees are Native Americans, and thirty-four percent of students are from the Confederated Salish and Kootenai Tribes. The college favors Native Americans in hiring, and about forty percent of faculty members are Indians. Even though the Tribes do not fund the college, SKC has been identified as a "tribal governmental agency." *See Bartell v. Am. Home Assurance Co.*, 49 P.3d 623, 624 (Mont. 2002) (referring to finding in federal district court). On the basis of this record, the Tribal Court of Appeals concluded that "SKC is a tribal entity closely associated with and controlled by the Tribes. For purposes of determining jurisdiction, it must be treated as a tribal entity." Similarly, the district court found that "SKC is a tribal entity or an arm of the tribe for purposes of federal Indian law regarding tribal court jurisdiction."

[5] We do not disagree with these assessments. This case is much closer to *Modoc* and the Eighth Circuit's decision in *Hagen* than it is to *Chapa De*. Like the Modoc Indian Health Project, SKC is a nonprofit corporation created as a "tribal corporation." *See Pink*, 157 F.3d at 1188. As in *Hagen*, and

unlike *Chapa De*, SKC's directors are members of the Tribes, selected and subject to removal by the Tribal Council. *Chapa De*, 316 F.3d at 1000; *Hagen*, 205 F.3d at 1042. The college, though open to nonmembers such as Smith, is located on tribal lands within the reservation and serves the Confederated Salish and Kootenai Tribes, unlike the Chapa De health program, which served tribal members and nonmembers in four facilities, none of which was on the reservation. *Chapa De*, 316 F.3d at 997, 1000. We conclude that SKC is a tribal entity and, for purposes of civil tribal court jurisdiction, may be treated as though it were a tribal "member."

3

We next turn to whether the claims bear some connection to Indian lands. This fact is significant, though not dispositive. In *Hicks*, the Court emphasized that "*Montana* applies to both Indian and non-Indian land. The ownership status of the land, in other words, is only one factor to consider." *Hicks*, 533 U.S. at 360; s*ee also id.* at 381 (Souter, J., concurring) (stating that "a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted"). Our inquiry is not limited to deciding precisely when and where the claim arose, a concept more appropriate to determining when the statute of limitations runs or to choice-of-law analysis. Rather, our inquiry is whether the cause of action brought by these parties bears some direct connection to tribal lands. *See Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073-74 (9th Cir. 1999); *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919-20 (9th Cir. 1992) (en banc).

[6] Smith brought two claims against SKC. First, he alleged that SKC was both negligent and strictly liable for its failure to maintain the truck and its leaf spring. Second, he alleged spoliation of evidence. Smith suffered his injuries on U.S.

Highway 93, which, as a federal highway within the reservation, is neither tribal land nor controlled by members of the Tribes. *See Strate*, 520 U.S. at 454-55. Both of Smith's claims, however, implicated SKC's actions on the college campus, not on the highway. Unlike the accident in *Strate*, where the plaintiff alleged that the defendants' negligence on public roads caused her injuries, Smith alleged negligence occurring on the reservation, on lands and in the shop controlled by a tribal entity, SKC.

[7] His spoliation claim similarly implicated SKC's actions at the college. Smith alleged that SKC destroyed notes from the post-accident investigation and that this destruction interfered with his ability to pursue his claims. SKC admitted that at least one of its employees took notes of interviews with students concerning the accident and the notes were "no longer available." The record is not clear where the notes were created or destroyed, though the district court assumed the destruction occurred at SKC. Whether or not the notes were in fact lost or destroyed on tribal lands, SKC had control over the notes. For our purposes, Smith's claim arose out of activities conducted or controlled by a tribal entity on tribal lands.

C

We finally consider whether the tribal courts had sufficient interest to justify the exercise of subject matter jurisdiction in this case. We recognize that Smith's suit does not fit obviously within the two exceptions set out in *Montana*. Smith is not engaged in any of the illustrative "consensual relationships" described in *Montana*: "commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Any contractual relationship Smith had with SKC as a result of his student status is too remote from his cause of action to serve as the basis for the Tribes' civil jurisdiction. *See Atkinson Trading*, 532 U.S. at 656; *Strate*, 520 U.S. at 457. Smith might fit within the second Montana exception, which allows for tribal jurisdiction where the conduct of a non-member "threatens or

has some direct effect on the . . . economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Court in *Montana* cited *Williams*, the case most closely analogous to Smith's, as an example of both the first and second exceptions. *Id.* at 565-66. Denying jurisdiction to the tribal court would have a direct effect on the welfare and economic security of the tribe insofar as it would seriously limit the tribe's ability to regulate the conduct of its own members through tort law. *See infra* pp. 125-27. But, because we conclude that Smith's agreement to invoke the jurisdiction of the tribal court fits more comfortably within the first exception, we need not decide whether the second also applies.

Although we find that Smith's claims do not fit easily with the literal examples cited in the first *Montana* exception, we nevertheless believe that the Tribes' exercise of civil jurisdiction is consistent with the principles set forth in *Montana* and succeeding cases. This case, unlike the Court's decisions in *Hicks*, *Strate*, and *Montana*, involves a nonmember plaintiff. In this regard Smith is similarly situated to the principal case cited as an example of the *Montana* exceptions: *Williams v. Lee*. This is important, because as a plaintiff Smith chose to appear in tribal court. We are of the opinion that, even though his claims did not arise from contracts or leases with the Tribes, Smith could and did consent to the civil jurisdiction of the Tribes' courts. And in this case, the exercise of tribal jurisdiction is consistent with the limited sovereignty of the Tribes.

1

In *Williams*, Hugh Lee, a non-Indian, brought suit in Arizona state court against Paul Williams, who was a Navajo Indian. Williams purchased goods at Lee's store on the reservation and failed to pay for them. Williams argued that exclusive jurisdiction lay in the tribal courts because Arizona had not accepted concurrent jurisdiction under a congressional act. The Supreme Court agreed. Noting that the Navajo courts

"exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants," the Court found that it was "immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 222, 223.

The Court's recent decisions in *Hicks* and *Strate* reaffirm the validity of *Williams*. Most recently, in *Hicks*, the Court cited *Williams* as an example of "private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into." 533 U.S. at 372. Elsewhere the Court made clear that *Williams* was a case involving "claims brought against tribal defendants." *Id.* at 358 n.2; s*ee also Strate*, 520 U.S. at 457; *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 148 (1984). Similarly, in *Strate*, the Court was careful to frame the issue as concerning "the adjudicatory authority of tribal courts over personal injury actions *against defendants* who are not tribal members." 520 U.S. at 442 (emphasis added); s*ee also id.* (holding that "tribal courts may not entertain claims *against nonmembers* arising out of accidents on state highways" (emphasis added)).

[8] Smith is within the *Williams* rule. Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against SKC. Although he did not have a prior contractual relationship with a tribal member, he brought suit against SKC, a tribal entity, for its allegedly tortious acts committed on tribal lands. We do not think that civil tribal jurisdiction can turn on finely-wrought distinctions between contract and tort. *See* W. PAGE KEETON, et al., PROSSER AND KEETON ON TORTS 4-5 (5th ed. 1984).[4] As in *Williams*, we

[4]To the extent our opinion in *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001), states that *Montana's* first exception is limited to "commercial dealing, contracts, leases, or other arrangements" and that "such [other] arrangements also must be of a commercial nature," we disapprove the statement. We think the Court's list in *Montana* is illustrative rather than exclusive. Our holding in *Boxx*—that the tribal courts lack jurisdiction over a suit by an Indian plaintiff against a non-Indian defendant arising out of an automobile accident on non-Indian lands within the reservation—is not in question.

think it was "immaterial that [Smith] is not [a member]" once he chose to bring his action in tribal court. *Williams*, 358 U.S. at 223.

The Supreme Court has referred to *Montana*'*s* principles as "pertain[ing] to subject-matter, rather than merely personal, jurisdiction." *Hicks*, 533 U.S. at 367 n.8; *see also Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997). The Court, however, has never defined Indian tribal "subject matter jurisdiction" with the same precision as we use that term when speaking of the subject matter jurisdiction vested and circumscribed by Article III. In the federal courts, "[s]ubject-matter jurisdiction . . . functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Ins. Corp. of Ire. Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). As a consequence, parties to a suit in federal court "may not confer jurisdiction . . . by stipulation," *California v. LaRue*, 409 U.S. 109, 113 n.3 (1972), *abrogated on other grounds by 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996), or other " 'prior action or consent of the parties,' " *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) (quoting *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951)). Indeed, even though Smith invoked the jurisdiction of the tribal courts, he may still challenge the court's subject matter jurisdiction on appeal. *See Am. Fire & Cas.,* 341 U.S. at 17-18; *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

In contrast to the strictures of federal court jurisdiction, "tribal adjudicatory jurisdiction over non-members is . . . ill-defined." *Hicks*, 533 U.S. at 376 (Souter, J., concurring) (internal quotation marks omitted; alteration in original). In *Strate*, the Court observed that "in civil matters 'the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative

or judicial decisions.' " 520 U.S. at 449 (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. at 855-56). More recently, in *Hicks*, the Court identified this "careful examination" *Hicks*, 533 U.S. at 399 (O'Connor, J., concurring), as "a proper balancing of state and tribal interests." *Id.* at 374.

The first *Montana* exception recognizes that tribes may exercise jurisdiction over nonmembers of the tribe who enter into "consensual relationships" with the tribe or its members. 450 U.S. at 565. Nonmembers of a tribe who choose to affiliate with the Indians or their tribes in this way may anticipate tribal jurisdiction when their contracts affect the tribe or its members. The principle comes with its own limitation: "A nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another . . . ." *Atkinson Trading*, 532 U.S. at 656. Thus, for example, by their mere presence within a reservation and their "actual or potential receipt of tribal police, fire, and medical services," nonmembers "ha[ve] not consented to the Tribes' adjudicatory authority." *Id.* at 655. Simply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember. *See Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001) (a non-Indian's "socially consensual" relationship with an Indian cannot serve as the basis for tribal civil jurisdiction).

The Court's "consensual relationship" analysis under *Montana* resembles the Court's Due Process Clause analysis for purposes of personal jurisdiction. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations,' " the "constitutional touchstone" being "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 474 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945)). Thus, the " 'unilateral activity of

those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State;' " rather it must be "actions by the defendant *himself* that create a 'substantial connection.' " *Id.* at 474 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and *McGee v. Int'l Life Ins.* Co., 355 U.S. 220, 223 (1957)). In its due process analysis, the Court has emphasized the need for "predictability to the legal system" so that the defendant can "reasonably anticipate being haled into court." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

We refer to the due process cases not to question whether the exercise of tribal civil jurisdiction is in fact subject matter jurisdiction, but to reinforce our observation that a jurisdictional analysis that includes a "proper balancing" of state and tribal interests employs a test more flexible than those defining the strict notions of subject matter jurisdiction under Article III. This is evident in the fact that the Court has held that "consensual relationships" may create jurisdiction, a holding inconsistent with federal subject matter jurisdiction, though perfectly consistent with principles of personal jurisdiction. *See Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228-29 (9th Cir. 1989) (stating that "even if the consent of Stock West was adequate to confer personal jurisdiction onto the tribal court, the question of whether the tribal court has subject matter jurisdiction over the case would still not be resolved"; affirming dismissal of federal suit on grounds of comity). We know of no correlative doctrine or practice in the federal system that would allow a party who would not otherwise be subject to a federal court's subject matter jurisdiction to enter into a consensual relationship—for example, through contract or stipulation—that would confer subject matter jurisdiction on a federal court.

The play in the margins of tribal civil jurisdiction is further evident in the Court's decisions in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union*

Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). In both of those cases, a member of the tribe sued a nonmember in tribal court. Although the Court has since observed that it has "never held that a tribal court had jurisdiction over a nonmember defendant," *Hicks*, 533 U.S. at 358 n.2, in both cases the Court declined to hold that the tribal courts lacked jurisdiction over nonmember defendants. Instead the Court—for reasons of "prudential" exhaustion—remanded the cases to determine whether "the federal action should be stayed pending further Tribal Court proceedings or dismissed." *Iowa Mut.*, 480 U.S. at 20 n.14. In those cases, "[r]espect for tribal self-government made it appropriate 'to give the tribal court a "full opportunity to determine its own jurisdiction." ' " *Strate*, 520 U.S. at 451 (quoting *Iowa Mut.*, 480 U.S. at 16 (quoting *Nat'l Farmers*, 471 U.S. at 857)). Moreover, in those cases the Court expressly declined to extend the rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)—that tribal courts do not have *criminal* jurisdiction to punish non-Indians for offenses committed on the reservation—to tribal courts' *civil* jurisdiction. The Court explained that, "[i]f we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians." *Nat'l Farmers*, 471 U.S. at 854. That the Court declined to adopt the *Oliphant* rule and instead required exhaustion of jurisdiction challenges in the tribal courts necessarily implies that tribal courts retain some civil jurisdiction to decide cases involving nonmembers—"that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . . is not automatically foreclosed." *Id.* at 855; s*ee also Strate*, 520 U.S. at 449 (stating that "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings").

[9] "The power to exercise tribal civil authority over non-Indians derives not only from the tribe's inherent powers necessary to self-government and territorial management, but

also from the power to exclude nonmembers from tribal land." *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (1982)). If the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians. It is true that "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe," *Merrion*, 455 U.S. at 142, but we think that no lesser principle should govern those who voluntarily enter a tribal courtroom seeking compensation from tribal members.[5] Indeed, there may be circumstances in which a nonmember plaintiff may have no forum other than the tribal courts in which to bring his claims.[6] We hold that a nonmember who knowingly enters tribal courts for

[5]We do not decide whether there are limits to the inherent authority of tribal courts in cases brought by nonmember plaintiffs. For example, must a state court recognize a judgment issued in a case brought by a nonmember plaintiff against a nonmember defendant that bore no relationship to the tribe or its lands? Of course, in such a case the tribe may circumscribe the adjudicative jurisdiction of its courts; or, the tribal courts may find that they have no interest in the claims and may decline jurisdiction. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 201 (4th ed. 2004).

[6]There may be situations in which the tribal court has exclusive jurisdiction over the matter, so that if a nonmember plaintiff cannot bring suit against a member in tribal courts, there is no forum in which the case may be heard. *See Williams*, 358 U.S. at 223 (noting that state court had not accepted jurisdiction to hear suit between member and nonmember); *Winer v. Penny Enters., Inc.*, 674 N.W.2d 9 (N.D. 2004) (holding that the state lacked subject matter jurisdiction to hear a suit by a nonmember plaintiff against a member defendant arising out of an accident on a state road within the reservation); s*ee also Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 148 (1984) (stating that "to the extent that [a prior North Dakota decision] permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians . . . it intruded impermissibly on tribal self-governance"). We note that in this case there is concurrent jurisdiction between the tribal and state courts. *See Larrivee v. Morigeau*, 602 P.2d 563, 566-71 (Mont. 1979).

the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of *Montana*.[7]

2

So long as the Indians "remain a 'separate people, with the power of regulating their internal and social relations,' . . . . [making] their own substantive law in internal matters, and . . . enforc[ing] that law in their own forums," tribal courts will be critical to Indian self-governance. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)); s*ee Iowa Mut.*, 480 U.S. at 14. The Tribes' system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its members. Tort liability has historically been a means for compensating injured parties and punishing guilty parties for their willful or negligent acts.

Through his suit, Smith asked the Confederated Salish and Kootenai tribal court to discipline one of their own and order a tribal entity, SKC, to compensate him for the damages he

[7]The Tribes have expressly provided for those who wish to invoke the tribal court's jurisdiction:

> The Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, shall have jurisdiction of all suits wherein the parties are subject to the jurisdiction of this Court, and over all other suits which are brought before the Court by stipulation of parties not otherwise subject to Tribal jurisdiction. In suits brought by non-members against members of the Tribes or other person subject to the jurisdiction of this Court, the complainant shall stipulate in his or her complaint that he or she is subject to the jurisdiction of the Tribal Court for purposes of any counterclaims which the defendant may have against him or her.

CSKT Laws Codified, tit. I, ch. 2, § 1-2-104(1), *available at* http://www.cskt.org/documents/laws-codified.pdf.

suffered allegedly at its hands. The Tribes have a strong interest in regulating the conduct of their members; it is part of what it means to be a tribal member. The Tribes plainly have an interest in compensating persons injured by their own; indeed, in this case, there were two members of the Confederated Salish and Kootenai tribes who also suffered allegedly because of SKC's negligent actions.

[10] If Smith has confidence in the tribal courts, we see no reason to forbid him from seeking compensation through the Tribes' judicial system. Had the jury awarded compensation to Smith, we have little doubt that we would not have entertained a claim by SKC that the tribal courts lacked jurisdiction to enter judgment against it and in favor of a tribal nonmember. Having made that choice, Smith cannot be heard to complain that the judgment was not in his favor.

IV. CONCLUSION

For the forgoing reasons, the judgment of the district court is

AFFIRMED.

GOULD, Circuit Judge, with whom RYMER and CALLAHAN, Circuit Judges, join, dissenting:

I would hold that the Tribal Court of the Confederated Salish and Kootenai Tribes did not have jurisdiction to adjudicate a claim involving Smith, a nonmember of the tribe. It is necessary to part company with the majority, for it parts company with compulsory Supreme Court guidance.

In *Montana v. United States*, 450 U.S. 544 (1981), the United States Supreme Court established the fundamental framework for considering whether a tribal court has jurisdic-

tion over a claim involving any nonmember of the tribe. Under the rule of *Montana*, federal courts must presume that tribal courts lack jurisdiction over lawsuits involving nonmembers unless one of two exceptions specified by the Supreme Court applies:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). Because neither exception applies here, the Tribal Court of the Confederated Salish and Kootenai Tribes lacks jurisdiction to consider a claim involving Smith, a nonmember. In reaching a contrary conclusion, the majority errs and puts our circuit into conflict with recent Supreme Court jurisprudence on the jurisdiction of tribal courts over claims involving tribal nonmembers.

I

The majority errs in its holding that the operation of the *Montana* framework depends on whether the nonmember party is a plaintiff or defendant. In particular, the majority concludes that the case of *Williams v. Lee*, 358 U.S. 217 (1959), provides for tribal jurisdiction whenever a nonmember plaintiff brings suit in tribal court against a member defendant. This reasoning cannot be reconciled with the holding of *Montana* and the fundamental change it wrought in determining whether tribal courts have jurisdiction over all claims involving nonmembers. The plain language of *Montana* indicates that its framework applies to legal actions involving

"nonmembers" without limitation, and this analysis has been repeated in subsequent Supreme Court cases. Moreover, in illustrating the application of the *Montana* framework, the Court has used *Williams* to illustrate examples of the *Montana* framework, indicating that nonmember plaintiffs, as well as nonmember defendants, fall within that doctrine. Indeed, the Supreme Court has stated that in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), it applied the *Montana* framework "without distinguishing between nonmember plaintiffs and nonmember defendants." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). Thus, in claiming that *Williams* compels an exception here to the *Montana* framework, the majority ignores not only the fundamental shift in tribal court jurisdiction that the Court implemented in *Montana*, but also the clear, unqualified language of recent Supreme Court cases considering the jurisdiction of tribal courts.

Whatever tension there may be between the language of *Williams* and the framework that the Supreme Court set forth in *Montana*, the Court itself has indicated that *Williams* is to be understood and interpreted as a part of the *Montana* framework, rather than a doctrine entirely separate from it. *See Montana*, 450 U.S. at 565-66 (citing *Williams* as an example of both exceptions).

II

A

The majority misapplies the holding of *Montana* in concluding that this case falls within the first *Montana* exception, governing "nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." 450 U.S. at 565. Smith's filing of the cross-claim does not establish the relationship necessary to invoke the first exception because a party seeking to invoke tribal court jurisdiction must point not to a "consensual" court proceeding, but to "another *private*

consensual relationship." *Hicks*, 533 U.S. at 359 n.3. The cases that the Supreme Court has cited as illustrative of the first *Montana* exception reinforce the conclusion that the filing of a lawsuit, as Smith did in this case, is not the type of consensual, economic relationship that falls within the first *Montana* exception. *See, e.g.*, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (holding that a tribe may tax members entering the reservation to engage in economic activity); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (allowing a tribal permit tax on nonmember-owned livestock within the reservation); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (allowing a tribal permit tax on nonmembers seeking to conduct business within the reservation).

The majority suggests that the filing of a claim by a nonmember plaintiff in *Williams* was cited by the Supreme Court "as an example of 'private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into.' " Majority opinion, *ante* at 121. But the filing of a civil claim by a nonmember plaintiff was not given by the Supreme Court as an example of the first exception. More accurately, the Supreme Court in *Hicks* cited *Williams* as an example of the type of "private commercial actors" who enter into "consensual relationships," which may permit tribal jurisdiction under the first exception of *Montana*. *Hicks*, 533 U.S. at 372. In *Williams*, the plaintiff owned a store on the reservation, sold goods to the tribal member defendants on credit, and sued, in state court, to collect the debt. 358 U.S. at 217-18. It was in these circumstances that the Supreme Court explained that the plaintiff "was on the Reservation and the transaction with an Indian took place there." *Id.* at 223. Smith does not have any of the attributes of a "private commercial actor" and the filing of a cross-claim is not a "private consensual relationship" as the Supreme Court has interpreted the first exception. *Hicks*, 533 U.S. at 359 n.3; *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001) ("Under *Montana*'s first exception, a relationship

is of the qualifying kind only if it is both consensual and entered into through commercial dealing, contracts, leases, or other arrangements.").

Although defendant Salish Kootenai College argues that the underlying relationship between the college and its students, including Smith, satisfies the requirement that there be a "consensual relationship" between the parties, the Supreme Court has rejected the theory that a relationship so attenuated from the underlying tort claim may provide the basis for tribal court jurisdiction. *Strate*, 520 U.S. at 457; *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). Accordingly, there is this point on which I agree with the majority: "Any contractual relationship Smith had with SKC as a result of his student status is too remote from his cause of action to serve as the basis for the Tribes' civil jurisdiction." Majority opinion, *ante* at 119.

B

The second *Montana* exception is also inapplicable here. The assertion of tribal court jurisdiction over a claim brought by a nonmember plaintiff against a member defendant does not concern "activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446. More importantly, the Supreme Court has expressly rejected the argument that allowing nonmembers access to tribal court for civil litigation purposes falls within the second *Montana* exception. *Id.* at 459 ("Opening the Tribal Court for [a nonmember's] optional use is not necessary to protect tribal self-government . . . ."). Not only is this Supreme Court language binding on us here, but, as with the first *Montana* exception, the cases the Court has used in illustrating the second *Montana* exception are far afield from the tort claims that Smith sought to have adjudicated in tribal court. *See Boxx*, 265 F.3d at 777 ("Even assuming that the Tribe possesses some regulatory and adjudicatory power over the sale and consumption of alcohol, the Tribe is not pre-

vented in any way from exercising such authority by being denied the right to adjudicate this garden variety automobile accident.")

The Supreme Court has noted that "key" to the proper application of the second exception is its preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564) (alterations in original). Examples of circumstances that satisfy the second exception include adoption proceedings, *Fisher v. Dist. Ct. of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 387 (1976), and a "claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store," *Strate*, 520 U.S. at 458 (describing the facts of *Williams*, 358 U.S. at 220). Smith may pursue his case in the state forum without threatening the political integrity or sovereignty of the tribe. *See Strate*, 520 U.S. at 459. The majority is incorrect in suggesting that Smith might fit within the second exception given by *Montana*.

III

The majority also errs in holding that a party may waive lack of tribal court jurisdiction, much as a litigant in any court may waive lack of personal jurisdiction. The Supreme Court has rejected this reasoning, and has held that the "limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe." *Hicks*, 533 U.S. at 367 n.8. It bears repeating that the Supreme Court's statement in footnote 8 of the majority opinion of *Hicks*, penned by Justice Scalia and joined by five other Justices, that *Strate*'s "limitation on jurisdiction over

nonmembers" is a matter of "subject-matter, rather than personal, jurisdiction" is a holding of the Court, as the majority here indulges in "imaginative jurisprudence" with the effect to avoid the implications of this Supreme Court language and instead to chart a new doctrinal course. Tribal courts, however, are courts of limited, not general, subject-matter jurisdiction, and one area in which tribal courts presumptively lack jurisdiction is over claims involving nonmembers of the tribe. *Id.* at 366-68. The majority incorrectly adopts an unrestricted balancing of interests by analogy to the due process standards applicable to personal jurisdiction. But I cannot avoid concluding that here the majority sails on its own course through uncharted waters, rather than in the secure channels of *Montana*, *Strate*, and *Hicks* that have been marked by the Supreme Court.

There is a potential for injustice in any system that allows a party to bring a claim, lose on the merits, and then assert that the court lacked jurisdiction to adjudicate the matter at all, and doubtless this concern may motivate the majority. The problem of potential injustice, however, is not unique to the tribal court setting, but rather is inherent in any system that contains courts of limited jurisdiction, including the federal courts. There is a potential injustice in any case where we vacate a judgment and dismiss for lack of jurisdiction, but it is a necessary consequence of our law of jurisdiction and the concept of limited governmental power. Lack of subject-matter jurisdiction, whether in a federal court or in a tribal court, renders a judgment null and void, and a party may not escape from this long-established doctrine by claiming that a consent can confer jurisdiction on a court. Thus, it is surprising that the majority places such a dominant weight on the assent of Smith, rather than upon the required substantive analysis of the *Montana* exceptions.

IV

In the broader context of tribal court jurisdiction, voluntary attendance at a community college cannot be considered a

consent to tribal court jurisdiction on tort claims arising out of that relationship. The majority, moreover, cannot point to any way in which adjudicating this tort claim in tribal court is " 'necessary to protect tribal self-government or to control internal relations.' " *Id.* at 359 (quoting *Montana*, 450 U.S. at 564) (emphasis omitted). It would be wrong to think that tribal jurisdiction over nonmembers on tort claims is a necessary incident of tribal sovereignty. Neither of the *Montana* exceptions, as construed by binding Supreme Court precedent, applies to the situation here and, therefore, the exercise of tribal jurisdiction over nonmember Smith was not correct. I respectfully dissent, believing that we are bound by *Montana* and its progeny to reverse the judgment of the district court.

IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION, PABLO, MONTANA

JAMES RICHARD SMITH,

Plaintiff-Appellant,

vs.

SALISH KOOTENAI COLLEGE, a Montana Corporation,

Defendant-Appellee.

CAUSE NO. AP-99-227-CV.

OPINION

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Hon. Winona Tanner, presiding.

Rex Palmer, Attorneys, Inc., P.C. and Lon Dale, Milodragovich, Dale, Steinbrenner & Binney, Missoula, Montana, for Appellant James Richard Smith.

Robert Phillips, Phillips & Bohyer, Missoula for Appellee Salish Kootenai College.

Before: MATT and DESMOND, Justices.[1]

DESMOND:

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

The central question before us is whether federal Indian law precludes the Tribal Court of the Confederated Salish and Kootenai Tribes from exercising

[1] Former Chief Justice Patrick L. Smith, who was originally on the panel, resigned his position effective October 22, 2002. No substitute judge has been appointed because §1-2-805, CSKT Laws Codified, provides for a decision to be made by a majority of the panel.

jurisdiction over a tort action involving three students of the Tribes' Salish Kootenai College ("SKC") who were riding in a college vehicle as a part of their regular studies at the college when it crashed. We hold it does not.

On May 12, 1997, as part of their coursework in heavy equipment operation, three SKC students, Appellant James Smith, Shad Burland and James Finley, were traveling in a dump truck owned by the college on U. S. Highway 93, a state highway within the exterior boundaries of the Flathead Indian Reservation. Appellant Smith was driving. Tragically, a single vehicle rollover occurred. Shad Burland was killed and both James Finley and Appellant Smith were injured. Appellant Smith is a member of the Umatilla Tribe. Shad Burland was, and James Finley is, enrolled in the Confederated Salish and Kootenai Tribes ("Tribes").

On September 1, 1999, Mr. Burland's estate filed a civil complaint in the Tribal Court naming as defendants the Confederated Salish and Kootenai Tribes, Salish Kootenai College and Appellant Smith. On December 1, 1999, the complaint was amended and the Tribes were dismissed pursuant to stipulation, having raised the defense of sovereign immunity. On January 31, 2000, SKC cross-claimed against driver Smith. On February 17, 2000, passenger Finley sued SKC and Smith. On February 23, 2000, Smith cross-claimed against SKC. The Finley suit was consolidated with the Burland suit. Following settlement negotiations, the parties stipulated to the dismissal of all parties except Smith and SKC.

Both the Proposed Pretrial Order signed by SKC and Smith and Tribal Trial Judge Winona Tanner's final Pretrial Order described the issues of fact to be tried regarding liability as follows:

> (1) Was Defendant Salish-Kootenai College negligent and, if so, was its negligence a cause of Plaintiff's damages, if any?
>
> (2) Was Plaintiff [Smith] contributorily or comparatively negligent and if so, was his negligence a cause of his damages, if any?

As proposed by Smith and SKC, the final Pretrial Order realigned the remaining designating Appellant Smith as the Plaintiff and SKC as the Defendant.

On September 29, 2000, after a weeklong trial, the jury returned a verdict in favor of SKC. On October 13, 2000, the Tribal Trial Court entered its judgment on the verdict. On the same day, Smith filed a motion in the Tribal Trial Court to vacate the verdict for lack of subject matter jurisdiction. While the post-trial motions were pending before the Tribal Trial Court, Smith filed a Notice of Appeal to this Court on October 27, 2000. On November 1, 2000, the Tribal Trial Court announced that it would stay consideration of the pending motions in light of the appeal having been filed. Therefore, it did not rule on the motion to dismiss for lack of subject matter jurisdiction. On December 21, 2000, Appellant Smith filed a motion with this Court challenging the subject matter jurisdiction of the Tribal Court. We remanded the matter back to the tribal court to allow it to rule on the jurisdictional challenge and to establish a factual record on jurisdiction. On April 6,

2001, the Tribal Trial Court ruled that it did possess subject matter jurisdiction over the matter and Appellant Smith renewed his appeal to this Court.

On July 17, 2001, the Tribal Court of Appeals held oral argument on pending motions regarding scheduling, the transcript and Smith's motion to dismiss for lack of jurisdiction. [2] On October 25, 2001, this Court ordered briefing on the merits to proceed and requested that "if there are additional facts relevant to subject matter jurisdiction that have not been called to the Court's attention in previous briefings, the Court encourages the parties to identify these facts in the upcoming briefing with appropriate citation to the trial transcript or other records before the trial court."[3] Upon completion of the transcript, Appellant filed his opening brief on April 15, 2002 and the Appellee filed its response brief on June 13, 2002. Appellant Smith then requested, and this Court approved, an unopposed motion to allow Smith until September 20, 2002 to file his final Reply brief. Because neither party has accepted this Court's invitation to develop further the factual or legal arguments regarding subject matter jurisdiction, that aspect of the briefing has concluded and this Court is now prepared to rule on its jurisdiction.

---

[2] At the time of the oral argument a complete transcript of the trial was not available. Both parties supported staying the requirement of ordering the complete transcript until the ruling on jurisdiction.

[3] This would allow for the full transcripts to be prepared regarding any jurisdictional factual issues.

II. SUBJECT MATTER JURISDICTION

A. Tribal Law

The Tribal Trial Court correctly ruled that Tribal law authorizes it to exercise jurisdiction over this matter. Title II, §1-2-104, CSKT Laws Codified, provides in relevant part:

> **Civil Jurisdiction.**
>
> ...
>
> (2) To the fullest extent possible, not inconsistent with federal law, the Tribes may exercise their civil, regulatory and adjudicatory powers. To the fullest extent possible, not inconsistent with federal law, the Tribal Court may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:
>
> (a) All persons found within the Reservation.
>
> (b) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:
>
> (i) The transaction of any business within the Reservation;
>
> (ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;
>
> (iii) The entering into of any type of contract within the Reservation or wherein any aspect of any contract is performed within the Reservation;
>
> (iv) The injury or damage to property of the Tribes or a Tribal member.

(3) As used in this section, "person" means an individual, organization, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial activity.

Title II. CSKT Laws Codified.

When we apply this provision to this matter, the result is that the Tribal Court may exercise subject matter jurisdiction. Specifically, the SKC is a person within the meaning of § 1-2-104 (3); the events leading to the accident and this lawsuit arguably fall within each of § 1-2-104 subsections (2)(b) (i) –(iv).

B. Federal Indian Law

The Tribal Trial Court was also correct in ruling that federal Indian law does not preclude it from exercising jurisdiction. Tribal interests significant under federal Indian law support tribal jurisdiction here. Educating tribal members is an important component of self-government as is the adjudication of disputes arising on the reservation. This case is about what forum will determine whether a tribal college committed a tort or torts in the course of its instructional program.

This is not a case that is "'distinctly non-tribal in nature'". Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997). Nor is it a "'run-of-the-mill [highway] accident.'" Id. Rather, this is a case that arose in a distinctly tribal context, i.e., that

of a tribally-established college[4] created to provide advancement for tribal members through education. The case involves three students in the college, two of whom were tribal members. The third, Appellant Smith, a member of the Umatilla Tribe, testified that he enrolled in the Tribal college, "To better my life" and the life of "my family". Transcript, Vol 4, at 32. Assertions and allegations as to causation extend far beyond an accident on a state highway to earlier events at the college pertaining to supervision of the students and control and maintenance of the vehicle.

Historically, federal Indian law has evolved to reflect changes in federal policy, congressional directive and judicial decision-making as well as to respond to a more complex world. As a result, tribal authority has been narrowed in scope from its breadth prior to European contact. Worcester v. Georgia, 31 U.S.(6 Pet.) 515 (1832); United States v. Wheeler, 435 U.S. 313 (1978). Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). Yet we must remember to review each narrow situation in light of the unchanging, broad, basic principles of Federal Indian law, which include sustained federal recognition of and support for tribal self-government. Decisional law has been especially deferential to tribal authority when it is found to be necessary to the preservation of tribal self-government. See,e.g., Williams v. Lee, 358 U.S. 217 (1959). As we discuss below, this case

[4] We take judicial notice that the SKC campus is located on tribal land in Pablo, the tribal center of government.

involves an important component of the preservation of tribal self-government, specifically tribally-controlled education.

Another important component of tribal self-government is that placed in the tribal judiciary, the power to resolve disputes arising on the reservation. This power is derived from tribal inherent authority and has long been recognized and supported by the federal government. Fisher v. District Court, 424 U.S. 382 (1976), Wheeler, infra. For example, the Indian Reorganization Act of 1934, legislation intended to revitalize tribal governments, recognized as an existing power of Indian tribes the power to provide for tribal law and order. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479); Powers of Indian Tribes, 55 Interior Dec. 14 (1934).

Continuing federal support, legislative, executive and judicial, for tribal court jurisdiction and responsibility since the 1960s has encouraged tribes to make significant strengthening changes in their court systems. For example, Congress acted directly in this regard when it enacted "The Indian Child Welfare Act of 1978", affirming broad tribal court authority over child welfare matters involving Indian children both on and off the reservation. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963). Then in 1986 Congress increased the maximum allowable criminal sentences tribal courts can impose. Pub. L. 99-570, 100 Stat. 3207(codified as amended at 25 U.S.C. § 1302). The executive branch supported tribal justice systems in its policy and leadership. United States Supreme Court decisions have recognized and supported tribal judicial authority. See, e.g.,

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987).

However, the Supreme Court has also ruled that in some instances tribal court authority is limited, generally in cases in which a tribal court has exercised jurisdiction over a non-Indian or an Indian who is not a member of the Tribes. See e.g. Oliphant, Strate, infra. Broadly, the Tribal Court has found a limitation on tribal jurisdiction when, in the view of the Court: (1) the exercise of that jurisdiction is inconsistent with the tribe's limited sovereignty resulting from the incorporation of Indian tribes into the United States and (2) the exercise of that jurisdiction is not necessary to the preservation of tribal self-government. The greater the Indian and tribal interests involved in a case the more likely exercise of judicial authority will be found to be necessary to self-government. Here, the Tribes have significant interests in the education of tribal members as well as in regulation of the manner in which that education is delivered.

1. Defining the Parties: the Status of SKC

The legal status of SKC is relevant for purposes of determining subject matter jurisdiction. Essentially Smith argues that because SKC is not a "member" of the Tribes, *ipso facto*, it must be treated as a "nonmember."[5] Smith then concludes that

[5] See, e.g., Smith December 21, 2000 Memorandum in Support of Motion to Dismiss at 10, ("Because SKC is not and could never be a tribal member, the subject matter jurisdiction requirements of Strate are not met."); Smith January 12, 2001 Reply Brief at 8, ("Pursuant to Strate the absence of tribal membership is dispositive of Smith's motion").

the suit is between two "nonmembers" arising on a State highway, and therefore the holding in Strate, precludes tribal court jurisdiction. We disagree.

To treat SKC as a nonmember for purposes of jurisdiction would be to deny both the fundamental nature and identity of the college and the complexity of federal Indian law. The Tribes created SKC for the education and benefit of their members. The name of the college itself—Salish Kootenai College[6]—clearly denotes its specific Tribal nature: it is a college of the Salish and Kootenai people. The Tribes incorporated SKC under Tribal law on November 18, 1977. (McDonald Affidavit, October 29, 1999, ¶3) SKC was later incorporated under state law in 1978.[7] (Id., ¶4). While on the surface its methods of incorporation may indicate a dual identity, from its inception SKC has maintained a Tribal character. Its governing Bylaws—which apply regardless of whether SKC is acting under its tribal or state charter—provide that all members of the Board of Directors must be enrolled members of the Tribes. (SKC Bylaws, Art. III.) The Tribal Council appoints all members of the Board of Directors. Id. The Tribal Council may only remove a board member for just cause by a two-thirds vote of a legal quorum of the council. Id. When a vacancy occurs on the board, the Tribal Council appoints the successor for the remainder of the term. Id. The Board of Directors is required to report to the

---

[6] The Salish Kootenai Community College, Inc. does business as the Salish Kootenai College. (McDonald affidavit, October 29, 1999, ¶2)

[7] The record does not include an explanation for incorporating under both tribal and state law. The fact that the functioning bylaws for the College continue to be the Bylaws adopted at the time that the college was originally tribally-chartered, and the fact that the bylaws continue to vest ultimate control over the selection and removal of the Board of Directors with the Tribal Council are solid indications that the College is functioning primarily under its tribal charter, though possibly not exclusively.

Tribal Council on a regular basis and inform Tribal members of pertinent activities of the Board. (SKC Bylaws, Art II.) The College is to assure job preference in accordance with tribal personnel hiring procedures. Id.

The respected and successful SKC is the pride of the Salish-Kootenai people. The mission of the SKC is to provide quality postsecondary educational opportunities for Native Americans locally, and from throughout the United States. See, Exhibit A, SKC's July 12, 2000 Brief in Support of Partial Summary Judgment, at 1. In performing its educational purpose, the SKC seeks to maintain "the cultural integrity of the Salish and Kootenai people." Id. The college is a major educational institution on the Flathead Reservation, with 38 full-time instructors and 50 part-time instructors. It has over 850 full-time students and another 300 part-time students. Id. at 2. Most of the students are Indians from the Flathead Reservation. Id.

This Court finds that SKC is a tribal entity closely associated with and controlled by the Tribes. For purposes of determining jurisdiction, it must be treated as a tribal entity.[8] To equate SKC's status with that of a non-member when significant tribal interests are present would be neither reasonable nor in keeping with federal Indian law.

[8] Our holding is consistent with the Montana Federal District Court's characterization of SKC in Bartell v. American Home Assurance Company, i.e., that the "Salish-Kootenai College is incorporated as a Tribal non-profit corporation located within the Flathead Reservation." August 10, 2001, Slip Op at 10. In certifying a state law question arising out of the Bartell case to the Montana Supreme Court, the federal court stated "this court has determined that the Salish Kootenai College, Inc. is a governmental agency...." See, also Bartell v. American Home Assurance Company, 310 Mont. 276 (2002).

2. Tribal jurisdiction under Montana v. United States

What is now considered to be the most significant contemporary United States Supreme Court statement of the scope of a tribe's civil jurisdiction over nonmembers is found in Montana v. United States, 450 U. S. 544 (1981). In what at first appeared to be a somewhat narrow view of retained inherent sovereignty, the Court stated, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Or, absent a controlling treaty or other federal enactment, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of a tribe on non-Tribal land. Id.[9] In this case, the parties have not identified any controlling treaty provision or federal statute that would confer civil jurisdiction over nonmembers such as Smith. The question, then, is whether the Tribal Court has jurisdiction under the Tribes' inherent authority.

In Montana , the United Stated Supreme Court reviewed the Ninth Circuit's decision, United States v. Montana, 604 F.2d 1162 (1979), which had upheld the right of the Crow Tribe to regulate all hunting and fishing within the Crow reservation. The Ninth Circuit's decision was based partly on its conclusion that Crow authority over Indians and non-Indians on both Indian and non-Indian land

9 Nevada v Hicks, 533 U.S. 353 (2001), indicates that the Montana rule applies even on Tribal land. Our result would be the same because it is based on this case fitting within both Montana exceptions.

was an incident of the tribe's inherent sovereignty over the entire Crow reservation. 604 F.2d at 1170. The Supreme Court did not disturb the Ninth Circuit's holding that the Crow Tribe could prohibit hunting and fishing on Indian lands or condition entry by charging fees and imposing regulations. But after examining relevant treaties and federal legislation, the Supreme Court concluded that the reach of inherent tribal authority over activities conducted by non-Indians on fee land was limited.

The Montana Court then delineated two now well-known "exceptions" to its general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [citations omitted] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566.

Our examination of Montana's "first exception" results in a determination that Appellant Smith has a "consensual relation" with the Tribes within the meaning of that exception. Smith chose to enroll in the college for the purpose of being educated and trained to be a heavy equipment operator and to obtain his commercial driver's license ("CDL"). Thus he voluntarily engaged in a consensual relationship

with the SKC, a tribal entity within the exterior boundaries of the Flathead Reservation. Appellant Smith acknowledges that he, "was driving the truck as part of his educational requirements as a student at Salish-Kootenai College." Smith Complaint, ¶ 5. All three occupants of the dump truck were enrolled at SKC and studying to become heavy equipment operators. Pretrial Order, ¶ 1. As part of Appellant Smith's requirements to graduate, he had to obtain a CDL and become knowledgeable in operating heavy equipment such as the dump truck that was involved in the accident. Transcript, Vol. 4, at 33-34. The requirements for the CDL involved both course work and operation of heavy equipment. The course work, included classes, conducted on the SKC campus, such as truck driving laws and regulations, heavy machinery operation, and safety instruction. Transcript, Vol. 4, 65.

Further, the record establishes a direct nexus between the voluntary, consensual relationship between Smith and SKC and the civil complaint filed by Smith. His allegations against the college are a direct outcome of the relationship of student-college that he chose to establish.

Since we find that the Tribal Court has jurisdiction over this matter under Montana's first exception, we need go no further. However, because the parties have argued that Strate controls, we will discuss that case below. Before turning to Strate, we will address why this case also fits within the second Montana exception. The Tribal endeavor encompassed in SKC is essential to tribal self-government and

internal relations thus impacting "the political integrity" of the Tribes within the meaning of Montana. In establishing SKC the Tribes were both implementing and sustaining their self-governing powers. As outlined above, the more significant a particular interest is to a tribe the more likely regulation of that interest will be essential to tribal self-government. The competing forum here, the State of Montana, does not appear to have a significant interest in how a tribal college conducts its affairs.

The Tribal Council has decided the availability of higher education to tribal members is important enough to that governing body that it has supported and strengthened SKC for over 25 years. What better measure of the significance of this Tribal activity to the Tribe and its political integrity can there be?

The federal government, 100, has underscored the significance of tribal colleges. One year after the Tribes established SKC, the United States Congress recognized the value of the Tribes' educational policy when it enacted, "The Tribally Controlled Community College Assistance Act of 1978", P.L.95-471, 25 U.S.C. 1801 et seq. Congress stated that its purpose was, "to provide grants for the operation and improvement of tribally controlled community colleges to insure continued and expanded educational opportunities for Indian students." § 25 U.S.C. 1802.

It is difficult to argue that an educated citizenry is not essential to self-government, whether of a tribe or of another government. Therefore, we conclude that jurisdiction in this case can be sustained under the second Montana exception.

3. Tribal jurisdiction under Strate v A-1 Contractors

Smith argues that the Tribes lack jurisdiction in this case under the Supreme Court's holding in Strate. Strate is not controlling. In Strate, a vehicle owned by a non-Indian collided with another vehicle driven by a non-Indian and owned by non-Indian entities on a state highway running through the Fort Berthold Reservation. The injured non-Indian sued the non-Indian driver and owner of the other vehicle in tribal court. In its opinion, applying Montana, the Supreme Court equated the state highway to non-Indian fee lands. It noted (quoting the lower court) that the dispute "arose between two non-Indians involved in a [a] run-of-the-mill [highway] accident." 520 U.S. at 457. The Court also found that the dispute was "distinctly non-tribal in nature." Id.

Here, as pointed out above, Appellant Smith's allegations of fault extend far beyond the accident itself. For example, he asserts there were not adequate seat belts for all three passengers in the dump truck and that the truck encountered mechanical failure causing the accident. The Smith complaint alleges numerous negligence claims against SKC arising from the alleged duty on behalf of SKC "to provide a safe and reasonable educational environment," including (1) a duty to regularly inspect the heavy equipment and vehicles; (2) a duty to provide a vehicle

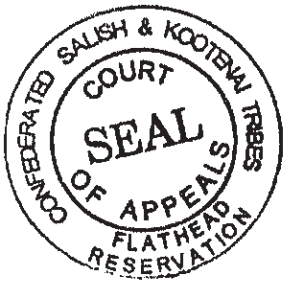
that was safe and a driver with adequate knowledge and experience to handle the dump truck, and (3) a duty to adequately inspect, maintain, or repair the dump truck. Complaint, ¶¶ 3,5,6. Further, in the pretrial order, Smith stated he intended to prove at trial that Smith's lack of experience in driving the dump truck was "due to improper or inadequate training," lack of and/or improper supervision of Smith, improper tires, a defective/cracked leaf spring and lack of and/or improper maintenance of the dump truck. Pretrial Order, at 3. Extensive evidence and witness testimony was offered at trial regarding the SKC's alleged breach of duty to provide a safe environment. Thus Strate is distinguishable from this case.

III. CONCLUSION

In conclusion, the Tribal Trial Court was correct in its determination that it properly exercised jurisdiction over this matter.

The parties have ably briefed the merits of the appeal. The merits were not addressed at oral argument. Unless either party requests oral argument within 20 days, we will proceed to rule on the merits of the appeal.

DATED this 17th day of February, 2003.



Clayton Matt, Justice

Brenda C. Desmond

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the *OPINION* to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 17 day of February, 2003.

Rex Palmer
Attorneys Inc., P.C.
301 W. Spruce
Missoula, Montana 59802

Lon J. Dale
Milodragovich, Dale, Steinbrenner
and Binney, P.C.
Post Office Box 4947
Missoula, Montana 59806-4947

Bob Phillips
Phillips and Bohyer
283 W. Front, Suite 301
Missoula, Montana 59802

Donna Durglo
Clerk of the Tribal Court
Confederated Salish and
Kootenai Tribes
Post Office Box 278
Pablo, Montana 59855

Abigail Dupuis
Appellate Court Administrator

080019

MONTANA JUDICIAL INSTITUTE: APPELLATE COURTS

October 5, 2018

OVERVIEW OF COURT STRUCTURE

Court systems: State Federal and Tribal

- The United States Constitution and U.S. Congress established Federal Courts
- Montana state court system is funded by the Legislature and administrated by Court Administrator's Office.
- Tribal Court: operate on each of Montana's seven Indian Reservations.

Both systems have trial and appellate courts.

- Trial Court: Where a case begins
- Appellate Court: Where a case is reviewed

TRIAL COURTS V. APPELLATE COURTS

Trial Court

Parties present evidence to a trier of fact (judge or a jury).

Parties create a record.

- The record may consist of: physical evidence, transcripts of testimony, attorneys' briefs, and court orders.

Judge makes evidentiary rulings.

Trier of fact determines outcome of case.

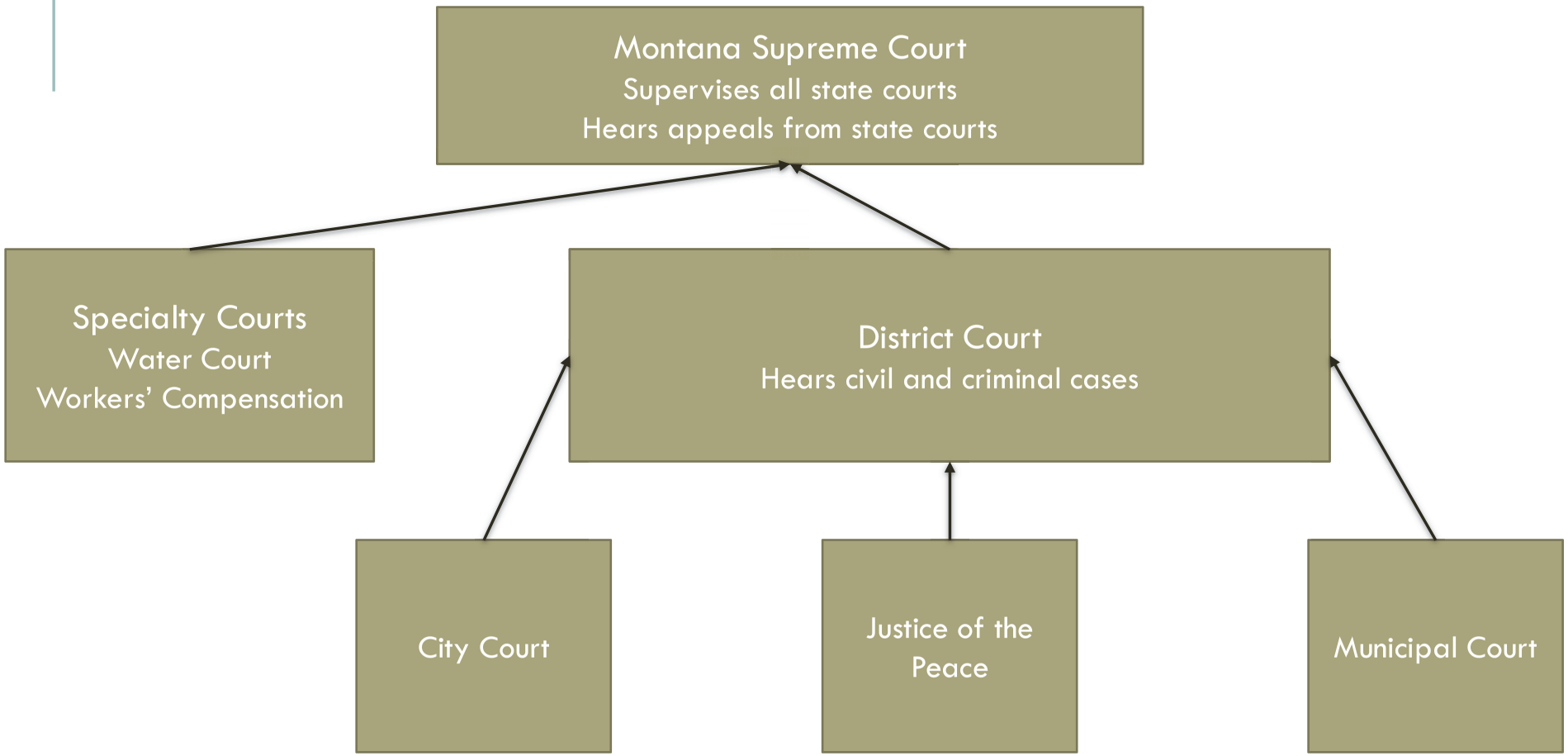
Appellate Court

No trial, parties do not put on evidence, or examine witnesses.

Court reviews the record of the trial court to determine if the trial court made a mistake.

Court may reverse, remand, or affirm a trial courts decision.

MONTANA STATE COURT SYSTEM



MONTANA SUPREME COURT

Consists of seven elected justices: 1 chief justice and 6 associate justices.

Justices are elected to 8 year terms and must be licensed to practice law in Montana.

Appellate jurisdiction over cases from state district court and specialty courts. Appeal may be made when party believes trial court's decision involved a mistake of law, incorrectly interpreted a statute, or violated a person's constitutional rights.

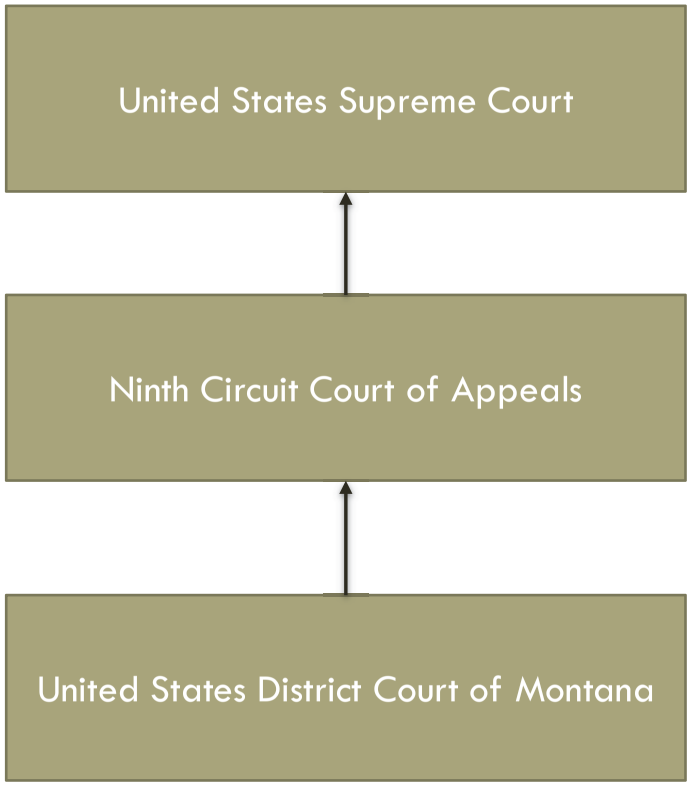
Original jurisdiction in limited cases, for example:

- When MT Supreme Court exercises supervisory control over a district court case.
- When case involves no question of fact, but only a question about a law of the constitution.
  - Ex. Montana Supreme Court exercised original jurisdiction in *Cole v. State ex. rel Brown*

ORIGINAL JURISDICTION: COLE V. STATE EX. REL. BROWN

- Plaintiffs challenged the procedure by which Montana voters approved a voting initiative, Constitutional Initiative-64.
- The initiative limited a person from serving as a particular office for certain specified periods of time.
  - Ex. The initiative limited a person to 6 years in any 12 year period for service in the House of Representatives.
- Proponents of CI-64 drafted it so that voters had to vote for or against term limits for ten offices in one ballot proposition.
- Plaintiffs sought judicial declaration that the C1-64 should be considered void. Plaintiffs also sought injunction decertifying CI-64 election results and prohibiting the Secretary of State from enforcing C1-64.
- Original jurisdiction proved appropriate when the case raised no factual disputes but rather an issue of constitutional law.

FEDERAL COURT SYSTEM IN MONTANA



NINTH CIRCUIT COURT OF APPEALS

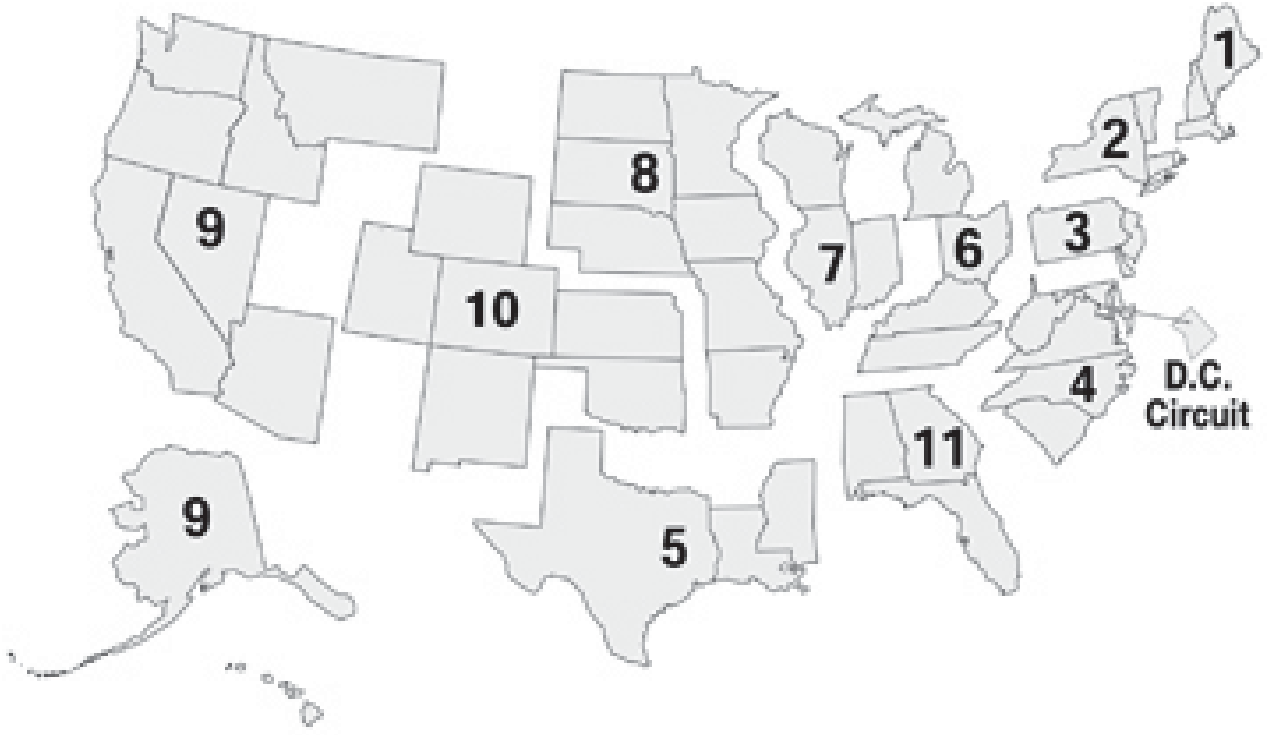
There are 94 federal judicial districts in the United States. These districts are organized into 13 circuits.

- 12 regional court of appeals and 1 U.S. Court of Appeals for the Federal Circuit

Montana is part of the Ninth Circuit Court of Appeals.

- Headquartered in San Francisco, California. Judges travel around the circuit
- Largest of the 13 circuit courts of appeals.
- 29 active judgeships

CIRCUIT MAP



WHAT DO APPELLATE COURTS DO?

Statutory Interpretation

- Process by which Courts apply legislation.
  - Plain meaning: court applies the ordinary meaning of a statute's words. If language is clear and unambiguous no further interpretation is required.
  - Statutes can often be vague as a result of compromise in the legislature; creates the need to look beyond the plain meaning of the statute's words
    - Ex. Montana's tax credit for private schools
  - Legislative history: court looks to history of the statute and the legislature's discussions of the statute.
    - Justice Scalia opposed consideration of legislative history
  - Courts generally steer clear of interpretations that would create a absurd result that the legislature did not intend.

NEED FOR STATUTORY INTERPRETATION

Armstrong v. Kadas

Challenges Department of Revenues actions in enforcing Montana's Scholarship Tax Credit Program.

The program allows individuals and businesses to claim a tax credit for donations (up to $150) to authorized Student Scholarship Organizations, which use the money to create scholarships for students to use at accredited private schools in Montana.

ARMSTRONG V. KADAS

Student Scholarship Organization may only provide scholarships to a "qualified educational provider."

- Montana statutes place no religion-based restrictions on qualifying schools.
- Montana Department of Revenue adopted a rule which prevents students from using scholarship money at any religious school.

The Montana legislature's silence on whether scholarship money can be used at religious school has created ambiguity that may require statutory interpretation.

STATUTORY INTERPRETATION EXAMPLE

In re A.W., 975 P.2d 1250, 1252 (Mont. 1999).

Facts:

- Department of Health and Human Services filed a petition for temporary investigative authority and protective services on behalf of three minor children. Children were appointed a guardian ad litem.
- District Court determined that parents should be required to pay the fees and costs of court appointed guardian if they had the financial resources to do so.

Statute: MCA § 41–3–303(1):

- In every judicial proceeding, the court shall appoint for any child alleged to be abused or neglected a guardian ad litem. The department or any of its staff may not be appointed as a guardian ad litem in a judicial proceeding under this title. When necessary the guardian ad litem may serve at public expense.

IN RE A.W.

Question Presented:

- Does the District Court have statutory authority to order parents who are the subject of a parental neglect or abuse investigation to reimburse the county for costs and fees of the guardian ad litem?

Standard of Review:

- Appellate courts reviews a question of statutory interpretation as a question of law to determine whether the district court's correctly applied the law.

IN RE A.W.

Montana Supreme Court decision:

- Legislative history: considered the purpose of the legislation.
- Statutory context: Considered how § MCA 41–3–303(1) read in relationship to other Montana child abuse statutes.
  - Court determined that if the legislature intended to require financially-capable parents to pay the legislature would have included language similar to other statutes, such as: "The court shall enter an order for costs and fees in favor of the child's guardian ad litem. The order must be made against either or both parents, except that if the responsible party is indigent, the costs must be waived." MCA § 40-4-205
- Determined that the district court erred when it interpreted MCA 41–3–303(1). Reversed the district court's decision.

WHAT DO APPELLATE COURTS DO?

Review of evidentiary ruling

- Trial court acts as gatekeeper: decides what evidence to admit into evidence during trial.
- A party can appeal a trial court's decision to admit or not admit evidence.

EVIDENTIARY REVIEW EXAMPLE

U.S. v. Johnson, 132 F.3d 1279, 1282 (9th Cir. 1997).

- Facts:
  - The Government charged Johnson with Transportation with Intent to Engage in Criminal Sexual Activity. The charge involved conduct where Johnson arranged for a Norwegian minor to stay at his house as part of a foreign-exchange program. Johnson allegedly engaged in sexual activity with the minor.
  - Government wanted the Court to admit evidence that Johnson had engaged in sexual contact with two other teens about 13 years earlier. Court allowed Government to enter that evidence.

U.S. V. JOHNSON

Rule of Evidence: Federal Rule of Evidence 404(b) precludes the admission of prior bad act evidence offered to show criminal propensity. The prior bad act evidence can be offered for other proper purposes, such as to show intent.

Question Presented: Whether the district court erred in admitting prior bad act evidence at Johnson's trial?

Standard of Review: The appellate court reviews the district court's decision to admit evidence for abuse of discretion.

U.S. V. JOHNSON

The Ninth Circuit Appellate Court affirmed the district court's decision.

- Abuse of discretion allows the district court some latitude.
- Ninth Circuit determined:
  - The testimony of prior bad acts proved relevant to show Johnson's intent to engage in unlawful sexual activity.
  - The conduct of the prior bad acts and the current charge proved sufficiently similar
  - Sufficient evidence supported the prior bad act testimony; and
  - Probative value of the evidence outweighed its prejudicial effect.

WHAT DO APPELLATE COURTS DO?

Sentencing review

- Federal district courts sentence defendants based on Sentencing Guidelines
  - The Guidelines assign each offense an "offense level."
  - A defendant's prior criminal history determines the defendant's criminal history category.
  - Court uses these two data points to arrive at a sentencing guideline range.
  - District court has discretion to vary or depart from the guideline range.

SENTENCING REVIEW EXAMPLE

U.S. v. Mohamed, 459 F.3d 979, 981 (9th Cir. 2006)

Facts:

- Mohamed called-in a phony bomb threat to the Department of Homeland Security.
- Sentencing guideline range equaled 12 to 18 months imprisonment.
- District court sentenced Mohamed to prison term of 5 years based on the seriousness of the offense and the importance of deterring similar conduct.
- Mohamed appealed his sentence.

U.S. V. MOHAMED

Questions Presented:

- Whether the district court properly calculated Mohamed's sentencing guideline?
- Whether the district court imposed a reasonable sentence?

Standards of Review:

- Appellate court reviews the district court's construction of the guidelines ***de novo.***
  - *De novo:* "starting from the beginning"
- Appellate court reviews the district court's factual findings for **clear error.**
- Appellate court reviews the district court's application of the guidelines to the facts for **abuse of discretion.**
- Appellate Court determines whether sentence proved **reasonable.**

U.S. V. MOHAMED

Ninth Circuit Court of Appeals decision:

- District court properly calculated guideline range.
- More difficult question: whether sentence 42 months above the guideline range proved reasonable?
  - Appellate Court considered the fact that other courts had approved substantial departures for bomb threat cases.
- Affirmed the district court's sentence as reasonable.

BRIEFING PROCESS

Parties advance their arguments on appeal through briefs.

- Explain the facts of the case, the issue on appeal, and why the party thinks the case should be reversed/affirmed.

Appellant (party bringing the appeal) submits brief.

Appellee submits response brief.

Appellant submits reply brief.

Court can decide the case on the briefs or hold oral argument.

ORAL ARGUMENT PROCESS

The court allows each party limited time to make an argument.

- Ex. 40 minutes for the Appellant and 30 minutes for the Appellee.

Allows attorneys brief opportunity to develop their argument.

Allows the court opportunity to ask questions on points in which the court needs clarification.

ORAL ARGUMENT CLIP: USA V. SISNEROS

WRITTEN OPINIONS

Court explains the rationale for its decision.

1 Justice/Judge is assigned to write the case.

Judges/Justices can dissent or concur with the written opinion.

Published in reporters and online databases.

Sets precedent for future decisions in the state/circuit.

SCOTUS CERTIORARI PROCESS

The United States Supreme Court possesses both original and appellate jurisdiction.

When a party petitions the Supreme Court for review it must ask it to grant a *writ of certiorari*.

- Asked to review about 7,000 cases
- Court only grants cert to around 100-150 cases.

WHAT MAKES A CASE CERT WORTHY?

Supreme Court usually does not intervene simply to correct a misapplication of the law.

Court considers:

- The decision below conflicts with the decision of one or more federal courts of appeals or state courts of last resort on an important issue of federal law;
- The court below decided an important federal question in a way that conflicts with a Supreme Court ruling
- The court below decided a federal question that proves so important that the Supreme Court should address it even absent a conflict; or
- The court below so far departed from the accepted and usual course of judicial proceedings to call for an exercise of the Supreme Court's supervisory power.

Montana Judicial Institute

Missoula, Montana

Resource Materials and References

"Today, education is perhaps the most important function of state and local governments." Earl Warren, *Brown v. Board of Education*, 347 U.S. 484, 493 (1954)

The information in this packet is intended to provide you with reference materials that might be helpful to you and your students. If you find that specific materials are either worthwhile or should be removed from the list, please tell us. Some of the movies contain "adult content" and might not be appropriate for your students.[1]

PRIMARY RESOURCE MATERIALS

- **http://c-span.org/**
- **http://supremecourt.c-span.org/**
- C-Span Classroom will provide free materials for teachers including ideas for lessons and handouts. C-Span has a Teacher Fellowship Program and a Summer Educators' Conference the summer of 2011 in Washington, D.C. It also has a website on the U.S: Supreme Court. See DVD contained with these materials: *The Supreme Court: Home to America's Highest Court.* You can also register as a member of C-Span regarding the DVD and other materials.

The website states:

> "Can your students name all nine Supreme Court justices? Do they know how court cases make it all the way to the Supreme Court? Can they explain the difference between state and federal courts?
>
> If you answered "no" to any of the above questions, let C-SPAN Classrooms free teaching resources help you. Designed to complement C-SPAN's original production, *The Supreme Court: Home to America's Highest Court*, the teaching resources include: six lesson plans, handouts including a pre-test, and 19 video clips extracted from the documentary. Visit www.c-spanclassroom.org now to access these free teaching resources…"

- **http://222.ajs.org/hsc/**

"The American Judicature Society works to maintain the independence and integrity of the courts and increase public understanding of the justice system. We are a nonpartisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice." This link provides you with free lesson plans, videos and other material regarding The High School Curriculum on the Judiciary.

- **http://www.uscourts.gov/EducationalResources.aspx**

---

[1] A special thank you to Professor Huff for assisting in compiling this information. Professor Emeritus of Philosophy Tom Huff grew up, for the most part, in Chicago and received his BA from the University of Colorado and his Ph.D. from Rice University. He joined the philosophy department in 1967 and also began teaching at the law school in 1980. He retired in 2005 but has continued to teach one to three classes per year. Huff has published articles that focus mainly on concepts such as privacy, dignity, and takings. In 1971 and 1992, he won the university's outstanding teaching award.

This links you to the United States Court's Educational Resources. "These [free] materials are ready for immediate classroom and courtroom experiences. They are for high school class visits to local federal courthouses and they are used effectively in classrooms. The events are participatory, true-to-life courtroom simulations – not mock trials – hosted by federal judges with local attorneys; inclusive of all students as active jurors and lawyers; based on recent, teen-relevant Supreme Court cases."

BOOKS OF INTEREST

- ***Keeping Faith with the Constitution,*** by Goodwin Lui, Pamela Karlan, and Christopher Schroeder.

- ***Constitutional Law, Principles and Policies,*** by Erwin Chemerinsky.

- ***America on Trial,*** by Alan M. Dershowitz. The Harvard law professor's book discusses 60 of America's famous cases. Each summary is approximately 10 pages and covers trials such as Salem Witchcraft, the Lincoln Assassins, Lizzie Borden, Lindbergh Kidnapping, O.J. Simpson, Mike Tyson, and the Beating of Rodney King.

- ***The Brethren: Inside the Supreme Court,*** by Bob Woodward and Scott Armstrong (1979). Non-fiction account of the U.S. Supreme Court under the early leadership of Chief Justice Warren Berger. Business Week said, "A provocative book about a hallowed institution...It is the most comprehensive inside story ever written of the most important court in the world. For this reason alone it is required reading." Number one, national best-selling nonfiction book by two-time Pulitzer Prize author Woodward.

- ***Majesty of the Law,*** by Sandra Day O'Connor. Justice O'Connor was the first woman to be appointed and serve as a justice on the U.S Supreme Court and her book provides an interesting insight into the workings of the Court.

- ***Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks,*** by John Noonan. Montana Supreme Court Justice Brian Morris [2] recommends this book which approaches the law from those affected by a

[2] "Justice Morris was born September 5, 1963, in Butte, Montana. He received a B.A. in 1986 and M.A. in 1987 from Stanford University. Justice Morris graduated with distinction from Stanford Law School in 1992. He served as law clerk for the Honorable William H. Rehnquist at the United States Supreme Court and for the Honorable John T. Noonan, Jr., of the United States Court of Appeals for the Ninth Circuit. He worked in private practice in Bozeman from 1995 through 1999. Justice Morris also served as a legal assistant at the Iran-U.S. Claims Tribunal and as a legal officer at the United Nations Compensation Commission in Geneva, Switzerland, before becoming the Solicitor for the Montana Department of Justice in 2001. He served as Solicitor until being elected to the Montana Supreme Court in November 2004. Justice Morris and his wife, Cherche, have three sons and one daughter." http://courts.mt.gov/supreme/bios/morris.mcpx

law rather than the law itself. The book discusses how famous lawyers or judges have "masked" the person and the legal principle prevails. The book discusses the auctioning of slaves, a railroad accident, and others.

- ***The Nine: Inside the Secret World of the Supreme Court*** (2007), by Jeffrey Toobin. National Public Radio said, "*New Yorker* staff writer Jeffrey Toobin's *The Nine* is the latest, and by far the best, in a line of books this year about the Supreme Court." The book, recommended by Justice Morris[3] of the Montana Supreme Court, examines the recent conservative control over the U.S. Supreme Court that resulted when Justice Sandra Day O'Connor retired and Chief Justice Rehnquist died.

- ***Making our Democracy Work: A Judge's View,*** by Justice Stephen Breyer (2001): The NY Times said Supreme Court Justice Breyer's new book is "provocative" and one, "which portrays judges not as aloof, indifferent observers of the American experiment, but as essential partners in that project."

- ***Gideon's Trumpet*** by Anthony Lewis (1964). Florida charged Gideon in 1961 with burglary but the court would not appoint a lawyer to represent him. He was convicted and sentenced to prison. Previously, the U.S. Supreme Court had ruled that the right to counsel under the constitution did not apply to the states. Gideon wrote a letter to the Court and it ruled in his favor creating the right to counsel for indigents. When tried again, he was found innocent. Edgar Award winner for Best Fact Crime book. See movie below starring Henry Fonda.

- ***The Leo Frank Case*** by Leonard Dinnerstein (1968). Non-fiction account of Georgia murder trial. After being found guilty and sentenced to death, the Governor reduced the sentence to life but an angry mob hanged the murderer. Later, it was determined that the defendant was innocent.

- ***Summer for the Gods*** by Edward J. Larson (1997). Alan Dershowitz said, "This book about the Scopes trial is an excellent counterweight to the distortion—made famous by the play and movie "Inherit the Wind."

- ***History on Trial*** by Deborah Lipstadt (2005). Non-fiction account of a libel suit based upon the author/defendant calling a British writer as someone who denied the Holocaust happened.

- ***Until Proven Innocent*** by Stuart Taylor, Jr. and KC Johnson (2007). Discusses the famous lacrosse case at Duke University. It involves rape charges against 3 students. This is a true story that the Wall Street Journal said, "is a stunning book."

- ***Unlikely Heroes*** by Jack Bass. This is a history of the federal judges who courageously implemented *Brown v. Board of Education* in the South.

- ***In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*** (2002) by William L. Dwyer. The author, a former Washington state lawyer and Federal District Judge, discusses criticisms of the jury system and offers suggestions on how to improve it.

- ***The Rosenberg File: Second Edition*** by Ronald Radosh and Joyce Milton (1983 but reissued with new material in 1993). A New York Times Best Nonfiction Book (one of best 10 books in 1983 by *NY Times Book Review*), the authors explore the evidence in this controversial criminal case.

- ***Revolutionaries: A New History of the Invention of America*** by Jack Rakove. This discusses the creation of America.

- ***The Bill of Rights*** by Akhil Reed Amar.

- ***Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*** by Noah Feldman is about four of the most important justices appointed by FDR; Jackson, Black, Douglas, and Frankfurter. The book includes an analysis of some of the most important cases decided by the Court at this time in history.

- ***Vignettes of Legal History*** by Julius J. Marke (1965). The author served as a professor and librarian in of NYU School of law for over 30 years. Ronald Brown, Associate Director for Collection Services, New York University School of Law Library, stated, "it is one of the finest legal history books ever written—erudite, yet eminently readable."

- ***Originalism: A Quarter Century of Debate, ed.*** by Steven Calabresi

The following have been reprinted with the permission by the Montana Bar Association from its publication, *The Montana Lawyer*, in its August 2004 issue.[3]

---

[3] Thank you to the individuals and sources who helped compile this list:
- University and Montana Law Professor Fritz Snyder.
- UM Law Librarian Stacey Gordon.
- David Bachman of the Vanderbilt University Law Library.
- The Appalachian School of Law, for its recommended reading list.
- The authors of the book "Reel Justice, the Court room Goes to the Movies."
- The Internet Movie Data Base at *imdb.com*.
- Those marked with an * have been added to the list.

Theories of [Law] Justice

Taking Rights Seriously and Life's Dominion, by Ronald Dworkin*

Law Pragmatism and Democracy, by Richard Posner*

The Constitution in Exile, by Andrew Napolitano*

Beyond All Reason: The Radical Assault on Truth in America, by Daniel Farber and Suzanna Sherry (1997).

Law's Order: What Economics Has to Do with Law and Why It Matters, by David Friedman (2000).

In Defense of Natural Law, by Robert P. George (1999).

Christian Perspectives on Legal Thought, edited by Michael McConnell, et al. (2001).

Judges and the Courts

The Supreme Court from c-span eds. by Brian Lamb, Susan Swain, and Mark Farkas*

Law Without Values: The Life, Work, and Legacy of Justice Holmes, by Albert W. Alschuler (2000).

The Nature of the Judicial Process, by Justice Benjamin Cardozo (1921).

Chief Justice: A Biography of Earl Warren, by Ed Cray (1997).

A People's History of the Supreme Court, by Peter Irons (1999).

Defending Constitutional Rights, edited by Frank M. Johnson and Toney Freyer (2001.

Storm Center: The Supreme Court in American Politics, by David O'Brien (5th ed. 2000).

A Matter of Interpretation: Federal Court and the Law, by Justice Antonin Scalia (1997).

Thurgood Marshall: American Revolutionary, by Juan Williams (1998).

The Brethern: Inside the Supreme Court, by Bob Woodward and Scott Armstrong (1979).

Judges on Judging ed. by David O'Brien *

Law and Society

Coyote Warrior by Paul VanDevelder*

Blood Struggle: The Rise of Modern Indian Nations by Charles Wilkinson*

The Tempting of America: The Political Seduction of the Law, by Robert H. Bork (1990).

Rainbow Rights: The Role of Lawyers & Courts in the Lesbian & Gay Civil Rights Movement, by Patricia Cain (2000).

The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion, by Steph Carter (1993).

Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade, by David J. Garrow (rev. 1998).

Shades of Freedom: Racial Politics and Presumptions of the American Legal Process, by A. Leon Higginbotham, Jr. (1996).

Crime and Law Enforcement

Against Our Will: Men, Women, and Rape, by Susan Brownmiller (1976).

No Equal Justice: Race and Class in the American Criminal Justice System, by David Cole (1999).

Newjack: Guarding Sing Sing, by Ted Conover (2000).

Crime and Punishment in American History, by Lawrence Friedman (1993).

Drug Crazy: How We Got Into This Mess and How We Can Get Out, by Mike Gray (1998).

In the Spirit of Crazy Horse, by Peter Matthiessen (1983).

An Affair of State: The Investigation, Impeachment, and Trial of President Clinton, by Richard Posner (1999).

Actual Innocence: Five Days to Execution and Other Dispatches from Wrongly Convicted, by Barry Scheck, et al. (2000).

Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book, by Rodney A. Small (1999).

Legal History

Public Vows: A History of Marriage and the Nation by Nancy Cott (2000).

Contempt of Court: The Turn-of-the-Century Lynching That Launched 1000 Years of Federalism, by Mark Curriden and Leroy Phillips, Jr. (1999).

The Story of My Life, by Clarence Darrow (1932).

Sisters In Law: Women Lawyers in Modern American History, by Virginia Drachman (1998).

Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality, by Richard Kluger (1977).

The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President, by Vincent Bugliosi (2001).

Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion, by Edward J. Larson (1997).

Marbury v. Madison: The Origins and Legacy of Judicial Review, by William E. Nelson (2000).

The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law, by Darien McWhirter (1997).

Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice, by David Oshinsky 1996).

Original Meanings: Politics and Ideas in the Making of the Constitution, by Jack Rakove (1997).

In Defense of American Liberties: A History of the ACLU, by Samuel Walker (2d ed. 1999).

Slavery, Law and Politics: The Dred Scott Case in Historical Perspective, by Dan Edward Fehrenbacher (1981).

Mutiny on the Amistad, by Howard Jones (reissue 1997).

The Life of the Law: The People and Cases that have Shaped Our Society, from King Alfred to Rodney King, by Alfred H. Knight (repr. 1998).

The Buffalo Creek Disaster, by Gerald M. Stern (1977).

McLibel: Burger Culture on Trial, by John Vidal (1998).

James Madison and the Creation of the American Republic by Jack Rakove *

Ratification The People Debate the Constitution, 1787-1788 by Pauline Maier by Pauline Maier. Detailed history of the ratification debates. *

The Transformation of American Law 1780-1860 and 1870-1960 by Morton Horwitz

Law in Literature

The Death of Ivan Ilych by Leo Tolstoy*

In Cold Blood, by Truman Capote (1965).

The Ox-Bow Incident, by Water Van Tilburg Clark (1942).

Paris Trout, by Peter Dexter (1989).

Crime and Punishment, by Fyodor Dostoevsky (1886).

An American Tragedy, by Theodore Dreiser (1925).

Follow Me Down, by Shelby Foote (1950).

Snow Falling on Cedars, by David Guterson (1995).

The Trial, by Franz Kafka (1937).

The Executioner's Song, by Norman Mailer (1979).

The Crucible, by Arthur Miller (1953).

The Good Mother, by Sue Miller (1986).

Rumpole of the Bailey, by John Mortimer (1980).

The Trial and Death of Socrates, by Plato (about 380 B.C.).

Trial and Error: An Oxford Anthology of Legal Stories, edited by Fred Shapiro, et al. (1997).

MOVIES:

- **Sweet Hereafter (1997).** An accident in a small town rips apart its citizens and a lawyer enters the scene but only creates more problems. One brave soul finds the way to address the tragedy of the events. 250 critics placed this in their top ten list and Newsweek called the movie "mesmerizing." Nominated for 2 Academy Awards. Justice Morris recommendation.

- **North Country (1995).** This is a fictionalized account of America's first class action lawsuit for sexual harassment. Roger Ebert gave it 5 stars. It stars Sissy Spacek, Charlize Theron and Richard Jenkins. Nominated for 2 Academy Awards. Justice Morris recommendation.

- **In the Name of the Father (1994).** This movie is a drama based on the autobiography *Proved Innocent: The Story of Gerry Conlon of the Guildford Four*, and tells the story of the IRA's bombing of two English pubs. Four people were falsely convicted of the deaths of five people. Seven Academy Award nominations including best picture. Justice Morris recommendation.

- **QB VII** (1974). Queen's Bench Room 7 by ***Exodus*** author Leon Uris. Doctor is accused of performing medical experiments for Nazi's in concentration camp. Became T.V. miniseries. Nominated for 13 Emmy Awards, won six.

- **Gideon's Trumpet** (1980). Stars Henry Fonda. Criminal defendants have a right to be represented by an attorney. Title from biblical story: Judges 7:16-22.

- **The Passion of Joan of Arc** (1928) (based on a real trial)

- **The Trial** (1962)

- **The Wrong Man** (1957) (based on a real trial)

- **A Cry in the Dark** (American Film Institute recommendation)

- **In Cold Blood** (1967). Based on Truman's Capote's book. Nominated for 4 Academy Awards and won 3.

- **Ox-Bow Incident** (1943) Henry Fonda stars. Nominated for Academy Award for Best Picture in 1943.

- **A Civil Action** (1998) Stars John Travolta and Robert Duvall. Nominated for one Academy Award.

- **The Devil and Daniel Webster** (1941). One Academy nomination.

- **Capturing the Friedmans** (2003) Documentary involving high school teacher charged (along with one son) of committing sexual crimes against other children

- **Death and the Maiden** (1994). Story of a rape and torture in South America. Star Sigourney Weaver accuses Ben Kingsley of the crimes.

MOVIES RANKED BY THE AMERICAN BAR ASSOCIATION

Published with permission from an American Bar Association article that appeared in the August 2008 *ABA Journal*: "Earlier this year, the ABA Journal asked 12 prominent lawyers who teach film or are connected to the business to choose what they regard as the best movies ever made about lawyers and the law. We've collated their various nominees to produce our jury's top picks.

Together these films represent 31 Oscar wins and another 85 nominations as befits the best work of some of the greatest actors, writers and directors of their time."

1. **To Kill A Mockingbird** (1962)

Gregory Peck lends his legendary dignity to the role of Atticus Finch, Harper Lee's iconic small-town attorney... the movie was an instant classic, as lawyer Finch rises above the naked racism of Depression-era Alabama to defend a crippled black man ... falsely accused of rape by a lonely, young white woman. Finch's quiet courage is seen through the eyes of Scout ... his 6-year-old daughter, and embraced by an emerging generation of lawyers as the epitome of both moral certainty and unyielding trust in the rule of law...

TRIVIA: Three Oscar wins. Finch was Lee's mother's maiden name.

2. **12 Angry Men (1957)**

Henry Fonda produced and starred in this faithful adaptation of Reginald Rose's critically acclaimed stage play chronicling the hostile deliberations of a jury in a death penalty case. A lone juror (Fonda) expresses his doubts about what seems at first an open-and-shut prosecution...What tumbles out of the ensuing discussion is a gut-wrenching examination of the prejudices, prejudgments and personal psychological baggage these assembled citizens have brought to a life-or-death debate over the fate of the young Puerto Rican defendant. Based on Rose's own experience as a juror in a manslaughter trial...

TRIVIA: Lost all three Oscar nominations to *The Bridge on the River Kwai*.

3. **My Cousin Vinny** (1992)

Vincent "Vinny" Gambini (Joe Pesci) is a brash Brooklyn lawyer who only recently managed to pass the bar exam on his sixth try. He's representing his cousin and a friend--two California-bound college students who are arrested for capital murder after a short stop at a convenience store in rural Alabama. Still, the rule of law prevails in the

courtroom of Judge Chamberlain Haller (Fred Gwynne). The movie packs in cinema's briefest opening argument ("Everything that guy just said is bullshit."), its best-ever introduction to the rules of criminal procedure, and a case that hinges on properly introduced expert testimony regarding tire marks left by a 1964 Skylark and the optimal boiling time of grits.

TRIVIA:: Marisa Tomei won the Oscar for best supporting actress.

4. Anatomy of a Murder (1959)

Otto Preminger directs this realistic study of an Army lieutenant accused of murdering a bartender who allegedly raped his coquettish wife. An A-list cast is headed by James Stewart as the defense attorney, George C. Scott as prosecutor, Ben Gazzara as the defendant and Lee Remick as his wife. The surprise, though, is the stupendous performance in the role of the judge by real-life lawyer Joseph Welch, who represented the Army in the McCarthy hearings. The plot skips nimbly through a thicket of ethical dilemmas involved in representing a murder defendant. It was inspired by an actual case and adapted from a novel written by a Michigan Supreme Court judge. The original score is by Duke Ellington, who makes a cameo.

TRIVIA: Nominated for seven Oscars. Lost for "Best Picture" to *Ben-Hur* .

5. Inherit the Wind (1960)

Two grand old lions of the screen, Spencer Tracy and Frederic March, play two grand old lions of the law, Clarence Darrow and William Jennings Bryan, as they grapple in the historic 1925 Scopes "monkey trial" in backwoods Dayton, Tenn. The film…is a fictionalized account, and the characters' names are changed…but much of the courtroom testimony was taken straight from the trial transcript…

TRIVIA: "He that troubleth his own house shall *inherit the wind."* Proverbs 11:29 [nominated for 4 Academy Awards]

6. Witness for the Prosecution (1957)

The legendary Billy Wilder… directs from a script by the legendary mystery writer Agatha Christie. But it's the legendary Charles Laughton who fills the screen as the pompous barrister who is supposed to be retired after recovering from an illness but can't resist taking a puzzling murder case. Real-life wife Elsa Lanchester is his sharp-tongued nurse, and the two sparkle as they verbally spar. Tyrone Power is the playboy defendant; Marlene Dietrich is his wife and, surprisingly, the witness in question. It's not the only surprise, as befits a Dame Agatha story. Watch for yourself.

TRIVIA: Nominated for six Oscars. Dietrich was crushed not to be among those nominated.

7. Breaker Morant *(1980)*

Australian director Bruce Beresford adapts the story of three fellow countrymen who fight for the British Empire in the colonial Boer War in South Africa and are tried and

convicted of war crimes. The issues raised in the 1901 guerrilla-war trial echo through decades of 20th century wars: Which orders to follow, which civilians are the enemy, etc. Includes outstanding performances, especially by Edward Woodward and Bryan Brown as the Australian officers and by Jack Thompson as their disheveled defense attorney.

TRIVIA: Oscar-nominated for "Best Adapted Screenplay". Ordinary people took the trophy.

8. **Philadelphia** (1993)

Tom Hanks won an Oscar as an Ivy-educated gay attorney who claims his big-time law firm fired him after discovering he contracted AIDS. The somewhat dated and self-righteous script is saved by Denzel Washington's vibrant and nuanced performance as the solo personal injury lawyer who takes the case when everyone else turns Hanks' character down, and who comes to terms with his own homophobia. Bruce Springsteen fans will enjoy the Boss's Oscar-winning title song.

TRIVIA: That the film is "inspired in part" by the life and litigation of Geoffrey Bowers, an attorney who died of aids, is the result of a real-life lawsuit.

9. **Erin Brockovich** (2000)

Julia Roberts does an Academy Award-winning turn as the real-life paralegal and sassy single mom whose dogged investigation into a suspicious real estate case turns up a pattern of illegal dumping of highly toxic hexavalent chromium and one of the heftiest class action suits in U.S. history…

TRIVIA: The real Brockovich and the real Masry make cameo appearances in a restaurant.

10. **The Verdict** (1982)

Paul Newman is a washed-up, alcoholic lawyer who gets handed a medical-malpractice case and sees it as one last chance to get his career right… Tight and tense direction by Sidney Lumet (12 Angry Men, Dog Day Afternoon).

TRIVIA: Nominated for five Oscars in the year of Gandhi

11. **Presumed Innocent (1990)**

Lawyer-novelist Scott Turow's best-seller features Harrison Ford as Rusty Sabich, a top-notch prosecutor who finds himself accused of murdering a colleague with whom he's had an affair. Through his lawyer… Sabich discovers the seamy side of himself and the criminal law-a view that both offends and saves him…

TRIVIA: Produced by Alan J. Pakula, who early in his career produced *To Kill* a *Mockingbird*

12. Judgement at Nuremberg (1961)
Stanley Kramer directed this searing portrayal of the Nazi war crimes trials set in 1948. The … script focuses, in particular, on charges brought against four German judges who are accused of allowing their courts to become accomplices to Nazi atrocities. An American judge, Dan Haywood (Spencer Tracy), finds himself trying to understand how these once-esteemed colleagues allowed themselves to be used. He gets little or no help from average Germans, who are busy distancing themselves from Germany's Nazi past. When one of the judges, Ernst Janning (Burt Lancaster), breaks from the others and confesses, it becomes clear that-whatever their original intentions-these judges have chosen political obligations over their personal senses of right and wrong.

TRIVIA: Won two Oscars. Marlene Dietrich, who personally experienced the Nazi regime, was allowed to write many
of her own lines. [Nominated for 11 Oscars. Based on a real trial]

13. A Man for All Seasons (1966)
Paul Scofield's Oscar-winning performance as Sir Thomas More, the Tudor-era judge made chancellor of England. He is caught in the political struggle involving Henry VIII's decision to defy the Roman Catholic Church and divorce his wife to wed Anne Boleyn. Lines… are frequently quoted in U.S. court opinions: "I know what's legal, not what's right. And I'll stick to what's legal." And: "This country is planted thick with laws, from coast to coast--man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then?" TRIVIA: Won six Oscars, including "Best Picture" and "Best Director" (Fred Zinnemann). [Based on a real trial]

14. A Few Good Men (1992)
Say what you will about Tom Cruise, but he is high-octane as a reluctant Navy **JAG** litigator in Rob Reiner's suspenseful film iteration of this military courtroom drama… Two low ranking Marines from the Guantanamo Bay naval base are being court-martialed for the death of another, allegedly part of an unofficial punishment known as a "code red." The Marines say they were following orders. Their unapologetic commander, Col. Nathan Jessep (an absolutely electric Jack Nicholson) says they acted on their own. The truth, if you can handle it, turns out to be something more complicated than a sense of duty-but sometimes, exactly that.

TRIVIA: Sorkin based his original play on a military case prosecuted by David Iglesias, later U.S. Attorney for New Mexico.

15. Chicago (2002)
Lawyers tap-dance all the time, but Richard Gere does so pretty darn well as sleaze ball attorney Billy Flynn in the film adaptation of the highly successful Bob Fosse musical. Catherine Zeta-Jones and Renee Zellweger play celebrity murderers who cynically parlay their Jazz Age notoriety into a vaudeville act. Maurine Dallas Watkins' original play,

Chicago, or Play Ball, produced as a silent film by Cecil B. DeMille in 1927 (and later, the 1942 Ginger Rogers vehicle Roxie Hart), is based on two actual murder trials she covered as a reporter for the Chicago Tribune.

TRIVIA: Won six Oscars…

16. Kramer VS. Kramer (1979)
Dustin Hoffman and Meryl Streep both won Oscars as Ted and Joanna Kramer, an estranged couple fighting over custody of their son. Ted deals with real fatherhood for the first time as a single dad when Joanna leaves him. But he must also face his own failures when Joanna resurfaces demanding to gain custody of their son. An ali-tao-painful reminder of the human toll that is possible when domestic relations litigation takes a nasty turn.

TRIVIA: Won five Oscars…

17. *The Paper Chase* (1973)
James T. Hart (Timothy Bottoms) is a first-year law student desperately seeking the approval of Harvard's sternest professor, Charles W. Kingsfield Jr. (John Houseman). He begins to get the respect that he's earned, only to discover that the young woman he's involved with (Lindsay Wagner) is the professor's daughter. The real drama, however, is the demanding milieu of Harvard Law School, where reputations can be made and broken in a single, grueling class.

TRIVIA: Houseman reprised his Oscar-winning role as Kingsfield for four seasons on television.

18. Reversal of Fortune (1990)
Before there was an O.J. to help confuse us about the difference between innocent and not guilty, there was Claus von Bulow. Jeremy Irons won an Oscar for his portrayal of the feckless von Bulow, crassly dependent husband of Newport, R.I., socialite Sunny von Bulow, who lapsed into a coma when she was allegedly injected with an overdose of insulin. Tried and convicted of attempted murder in 1982, largely on privately gathered evidence, von Bulow hires Alan Dershowitz, the now ubiquitous Harvard law professor, whose account of the case is the basis for this movie. The law line of the movie occurs when von Bulow is attempting to explain to Dershowitz (Ron Silver) what actually happened: "No," shrugs Dershowitz. "Never let defendants explain; puts most of them in an awkward position." "How do you mean?" asks von Bulow. "Lying," says Dershowitz. [Nominated for 3 Academy Awards, won 1]

TRIVIA: Dershowitz appears in cameo as a judge on the appellate court.

19. Compulsion (1959)
In 1924, Chicago is rocked by a spectacular murder, apparently committed by two brilliant teenagers from wealthy families who have sought to plot and execute the perfect crime. An aging legendary lawyer, Jonathan Wilk (Orson Welles), is hired to defend the

young men with the modest hope of sparing them from the gallows. The film is based on Clarence Darrow's actual defense of Nathan Leopold and Richard Loeb, director Richard Fleischer turns the sordid details of their vicious crime into a passionate attack on the death penalty.

TRIVIA: When studio publicists advertised the film's connection to the Leopold and Loeb case, Leopold sued for invasion of privacy. He lost.

20. And Justice for All (1979)

An angry Al Pacino… plays Arthur Kirkland, the very best lawyer he knows in Baltimore. His client is losing his marbles; his girlfriend is losing her patience; the senior judge plots suicidal fantasies. Moreover, he is trapped into representing a judge accused of rape-a judge who is gleefully ignoring the incarceration of a very innocent and distressed Kirkland client. All of this is thrown together in a final courtroom harangue that makes Pacino's bank robber mugging in Dog Day Afternoon sound like Trappist prayer. You think I'm outta order? Hey, courtroom or not, it's Pacino.

TRIVIA: Jack Warden, who plays a suicidal judge, appears in two other films on the *ABA Journal's* "25 Greatest Legal Movies", 12 *Angry Men* and *The Verdict.* [Nominated for 2 Academy Awards]

21. In the Name of the Father (1993)

Pete Postlethwaite and Daniel Day-Lewis play Giuseppe and Gerry Conlon, a real-life father and son falsely accused of participating in two separate IRA bombing sprees outside London. The film chronicles their struggle to convince British courts of their innocence. After 15 years, human rights lawyer Gareth Peirce (Emma Thompson) is able to prove that police had altered records of their interrogations, forcing a British court to release the younger Conlon and his three alleged co-conspirators. Six others were exonerated after serving their sentences. A seventh, Giuseppe Conlon, died in prison.

TRIVIA: Nominated for seven Oscars. No wins.

22. A Civil Action (1998)

On its surface, this is a David vs. Goliath: Small-firm Boston plaintiffs' lawyers up against two conglomerates whose tannery, they've decided, is responsible for the leukemia-related deaths of eight children. At its core, however, this is a grown-up thriller about the perilous practical consequences of demanding moral outcomes from a legal action better suited to risk-and-reward. John Travolta is earnest as Jan Schlichtmann, the firm's senior partner whose outrage drives the firm into a war of attrition against a better-funded foe. Robert Duvall is adroit as the quirky Jerome Facher, a corporate lawyer whose experience predicts Schlichtmann's every naive move. Best lawyer line goes to Facher: "Pride has lost more cases than lousy evidence, idiot witnesses and a hanging judge all put together. There is absolutely no place in a courtroom for pride."

TRIVIA: Nominated for two Oscars. Schlichtmann still practices law in Beverly, Mass.

23. Young Mr. Lincoln (1939)
Henry Fonda makes an engaging, beardless and believable Abraham Lincoln in John Ford's fictionalized account of Lincoln's early adult years from New Salem to Springfield, and-this being Hollywood-from the lovely and doomed Ann Rutledge to the ambitious and manipulative Mary Todd. The key plot point revolves around a killing that takes place during a July 4 brawl. As a newly minted lawyer, the young Lincoln manages to quell a lynch mob by telling them he needs the two brothers accused in the murder to be his first real clients. The film won an Academy Award for its screenplay and has been named to the National Film Registry.

TRIVIA: Oscar-nominated for best writing, original story. The Academy Award went to Mr. Smith goes to Washington.

24. Amistad (1997)
Steven Spielberg directed this historic drama of the famous 1839 slave ship uprising. An all-star cast includes Matthew McConaughey, Morgan Freeman and Anthony Hopkins as former President John Quincy Adams, who argues the case to the U.S. Supreme Court. Justice Harry Blackmun reads the court's opinion in a cameo role as Justice Joseph Story. The film was criticized for taking liberties with the facts, but it succeeds as a portrayal of antebellum America coming to grips with slavery-and how the law was employed both for and against.

TRIVIA: Nominated for four Oscars.

25. Miracle on 34th Street (1947)
The holiday classic has one of the most improbable courtroom scenes ever. But then, how would you go about proving that your client is the real Santa Claus? John Payne portrays the eager young attorney whose client, one Kris Kringle (played by Edmund Gwenn), calmly insists he's SI. Nick. Maureen O'Hara is the cynical businesswoman who finally believes. Her daughter, a young Natalie Wood, eventually does too. Treacle, to be sure, but with a humorous edge that has kept it going for Christmases past, present and future.

TRIVIA: Won three Oscars and ranked No. 9 among The American Film Institute's "Most Inspiring Films of All Time".

Honorable Mentions

Among the other legal films the ABA Jury cited (in alphabetical order):

THE ACCUSED (1988) Jodie Foster is a woman who is gang-raped in a bar and, when the rapists go free, goads a reluctant prosecutor to pursue the patrons who urged them on. [Academy Award Best Actress and Golden Globe winner]

ADAM'S RIB (1949) George Cukor's mannered comedy, with Spencer Tracy and Katharine Hepburn as married lawyers who oppose each other in court. [Nominated for Academy Award. In National Film registry because it is a significant film]

BEYOND A REASONABLE DOUBT (1956) Dana Andrews is a writer who sets himself up on a murder rap to reveal the shortcomings of circumstantial evidence.

THE CAINE MUTINY (1954) Humphrey Bogart is riveting in this adaptation of Herman Wouk's complex novel about military authority and moral duty. [Nominated for 7 Academy Awards]

CLASS ACTION (1991) A father and daughter clash in and outside the courtroom as they square off in a volatile product liability case.

THE CLIENT (1994) Susan Sarandon is an underwhelming lawyer who finds herself representing a young boy who has witnessed a Mafia hit. [Sarandon nominated for Academy Award for best actress]

COUNSELLOR AT LAW (1933) John Barrymore is a workaholic lawyer who is in danger of losing his family in this William Wyler film.

THE COURT-MARTIAL OF BILLY MITCHELL (1955) Otto Preminger directs Gary Cooper in this tale of the real-life maverick general who thinks an airplane can sink a ship-and is court-martialed for proving it. [Nominated for Academy Award]

THE DEVIL'S ADVOCATE (1997) A new attorney introduced into the world's most powerful law firm discovers that its managing partner is morally challenged. [Al Pacino nominated for MTV Movie Award for Best Villain]

THE FIRM (1993) Tom Cruise is recruited by a prestigious law firm that he gradually learns has a very sinister background. [Nominated for two Academy Awards and won People's Choice Awards for Favorite Dramatic Motion Picture]

THE FORTUNE COOKIE (1966) Walter Matthau and Jack Lemmon romp in this Billy Wilder comedy about a sleazy lawyer who talks a relative into feigning injury for the sake of a lawsuit. [Nominated for 4 Academy Awards. Matthau won best actor in supporting role.]

GHOSTS OF MISSISSIPPI (1996) The true story of efforts to bring to justice Byron De La Beckwith for the 30-year-old murder of civil rights activist Medgar Evers. [Nominated for 2 Academy Awards.]

INTOLERABLE CRUELTY (2003) The Coen brothers reveal their take on divorce law. George Clooney is at his toothy best.

JAGGED EDGE (1985) Defense attorney Glenn Close gets close to a client, played by Jeff Bridges, who is on trial for the murder of his heiress wife. . [Nominated for 1 Academy Award.]

JFK (1991) Oliver Stone takes on New Orleans District Attorney JimGarrison's efforts to solve the Kennedy assassination. History yields to riveting storytelling. . [Nominated for 13 Academy Awards—won 3.]

LEGALLY BLONDE (2001) Reese Witherspoon became one of the most sought-after actresses in Hollywood after ridiculing the elitism of Harvard Law. [Nominated for 2 Golden Globes including Best Picture—Musical or Comedy.]

LIAR, LIAR (1997) A hilarious vehicle for Jim Carrey, who plays a lawyer who finds he is physically incapable of telling a fib. [Carrey nominated for Golden Globe.]

MICHAEL CLAYTON (2007) George Clooney shines in this look at the dark underbelly of big-firm law. [Nominated for 7 Academy Awards including Best Picture—Drama. Won 1.]

MUSIC BOX (1989) Hungarian immigrant Mike Laszlo, accused of being a war criminal, asks his daughter (Jessica Lange) to defend him in court. She learns more about him than she wants to know. [Lange nominated for Academy Award for Best Actress.]

NORTH COUNTRY (2005) It's one woman against the system: The extraordinary Charlize Theron plays a miner who sues the company. [Nominated for 2 Academy Awards.]

THE PELICAN BRIEF (1993) A law student discovers a plot to assassinate U.S. Supreme Court justices in this John Grisham adaptation.
THE PEOPLE VS. LARRY FLYNT (1996) Cameos abound in this portrayal of the trial of the renowned porn publisher. [Nominated for 2 Academy Awards.]

PRIMAL FEAR (1996) Richard Gere is the attorney and Edward Norton a young altar boy accused of killing a priest in a story whose plot twists and turns. . [Nominated for 1 Academy Awards.]

THE RAINMAKER (1997) Another John Grisham lawyer fights the system, this time with Matt Damon starring and Francis Ford Coppola directing. . [Nominated for 1 Golden Globe.]

A TIME TO KILL (1996) An earnest retelling of the Grisham novel about a racially charged killing in the Deep South. Matthew McConaughey and Sandra Bullock spark. [Nominated for 1 Golden Globe.]

Movies reprinted with the permission of the Montana Bar Association in its publication, *The Montana Lawyer*, August 2004:

Libel (1959) – A courtroom drama about an English barrister accused of being an imposter by a wartime buddy.

The Life of Emile Zola (1937) – The biopic of the famous French muckracking writer and his involvement in fighting the injustice of the Dreyfuss Affair.

Billy Budd (1962) – Billy is an innocent, naïve seaman in the British Navy in 1797. When the ship's sadistic master-at-arms is murdered, Billy is accused and tried.

Boomerang (1947) – This dramatization of a factual incident opens in a quiet Connecticut town where a kindly priest is murdered while waiting at a street corner.

I Want to Live (1958) – Woman framed for murder is sentenced to be executed. Starring Susan Hayward.

Knock on Any Door (1949) – Andrew Morton is an attorney who made it out of the slums. Nick Romano is his client, a young man with a long string of crimes behind him. Humphrey Bogart stars.

Losing Isaiah (1995) – An African-American baby, abandoned by his crack-addicted mother is adopted by a white social worker and her husband. Several years later, the baby's mother goes to court to get him back.

M (1931) – When the police in a German city are unable to catch a child-murderer, other criminals join in the manhunt. Stars Peter Lorre, directed by Fritz Lang.

Nuts (1987) – A high-class call girl accused of murder fights for the right to stand trial rather than be declared mentally incompetent. Stars Barbra Streisand and Richard Dreyfuss.

The Onion Field (1979) – A disturbed ex-con and his petty-thief partner kidnap two policemen and end up shooting one in a California onion field. The film explores the nature of the American justice system, as well as the devastating psychological effects on the surviving officer. Written by Joseph Wambaugh.

Paths of Glory (1957) – A kangaroo court-martial sentences three innocent soldiers to death. Stars Kirk Douglas, directed by Stanley Kubrick. . [Based on a real trial]

Presumed Innocent (1990) – Evidence suggesting that a murdered woman was a prosecutor's mistress leads to him being tried for the crime. Starring Harrison Ford; from Scott Turow novel.

Prisoners of the Sun (1990) – At the close of World War II, the liberated POWs tell a gruesome tale of mass executions of Australian airmen in a Japanese prison camp. The Australian Army establishes a War Crimes Tribunal.

10 Rillington Place (1970) – Introduces you to one of the cases that lead to abolition of the death penalty in England.

The Thin Blue Line (1988) – A film that successfully argued that a man was wrongly convicted for murder by a corrupt justice system in Dallas County, Texas.

They Won't Believe Me (1947) – On trial for murder, Larry Ballantyne regurgitates an unbelievable story. Stars Susan Hayward and Robert Young.

They Won't Forget (1937) – A southern town is rocked when a teenaged girl is murdered on Confederate Decoration Day. A small-time lawyer with political ambitions sees the crime as his ticket to the Senate.

Whose Life Is It Anyway? (1981) – A sculptor is paralyzed in a car wreck. All he can do is talk, and he wants to die. In hospital he makes friends with some of the staff, and they support him when he goes to trial to be allowed to die. Starring Richard Dreyfuss.

The Wrong Man (1956) – True story of an innocent man mistaken for a criminal. Starring Henry Fonda, directed by Alfred Hitchcock.

The Young Philadelphians (1959) – Up and coming, young lawyer Anthony Lawrence faces several ethical and emotional dilemmas as he climbs the Philadelphia social ladder. Stars Paul Newman.

Absence of Malice (1981) – A prosecutor leaks a false story that the son of a Mafia boss is a target of a murder investigation, hoping that he will tell them something for protection. The reporter is in the clear under the Absence of Malice rule in slander and libel cases, so the accused man must regain control of his life on different ground.

U.S. District Court for the District of Montana

Grand Jury Charge

Introduction

Good morning ladies and gentlemen. Each of you has been selected to serve as a grand juror in the Missoula Division of the United States District Court for the District of Montana. Sixteen to twenty-three of you will constitute the Grand Jury and you will function in that independent capacity for the next year, meeting about one time each month here in Missoula. Usually you will be here for a day, sometimes two, and occasionally for a longer time though that will likely be a rare circumstance. I am going to instruct you about your role and I want you to listen carefully to my instruction. I am going to give you a direct statement of your role, then I will tell you something about the history of the grand jury and its role in our constitutional form of government. I will then tell you about your powers, your tasks, and the procedures that are going to be followed. I will emphasize your independence in this charge and that is a matter that you must take seriously if the system is going to work properly. You are the conscience of the community and I will tell you more about that as we go along in this instruction. Because you are a body that meets in secret I will advise you about the obligation to abide by the rule of secrecy. Your duties are critical to the administration of justice and you have an obligation to take those duties seriously and to carry them out conscientiously.

The Grand Jury in the Constitution

The Fifth Amendment of the United States Constitution, set forth in the Bill of Rights, says in pertinent part "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury...". Infamous crimes refers to at least all felonies. What this means is that the United States Government, acting through the lawyers in the Department of Justice and the United States Attorney's office, can not charge any person with a federal felony unless you first agree to allow them to do so. Only if twelve members of the Grand Jury agree to return an indictment or true bill against a defendant, can the government charge a crime in federal court

What the Fifth Amendment of the Constitution says in plain and simple terms is that no serious (felony) federal charges may be brought against someone without the approval of a group of citizens, drawn at large from the community, who are entirely free to charge what the government prosecutor proposes, to charge differently, or to not charge at all. You operate in

secret and you are answerable to no one for your decisions. Let me reiterate what I have just instructed. In the course of carrying out your duties you are free to bring the charges the US Attorney asks you to bring, or you can instruct the US Attorney to draft an indictment of greater or lesser charges, or you can decide that under all of the circumstances presented to you that no charge is going to be brought and refuse to return an indictment. The Fifth Amendment deliberately inserts a group of citizens between the governments desire to bring serious criminal charges and its ability to actually to so. The Grand Jury is a constitutional fixture in its own right and belongs to no branch of the institutional government. The Grand Jury serves as a kind of buffer or referee between the Government and the people. Indeed, the Fifth Amendment constitutional guarantee to have a Grand Jury consider whether charges should be leveled by indictment presupposes an investigative body acting independently of either the prosecuting attorney or the judge.

The Historical Foundation of The Grand Jury

The framers of our Federal Constitution deemed the Grand Jury so important for the administration of justice, they included it in the Bill of Rights. As I said before, the Fifth Amendment to the United States Constitution provides in part that no person shall be held to answer for a capital or otherwise infamous crime without action by a Grand Jury. One purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person. This is called determining if "probable cause" exists to bring formal charges, that is a true bill or an indictment. I will tell you what probable cause is later in this instruction. Remember, if law enforcement officials were not required to submit to an impartial and independent grand jury proof of guilt as to a proposed charge against a person suspected of having committed a federal crime, they would be free to arrest a suspect and bring him to trial no matter how little evidence existed to support the charge. As members of the Grand Jury, you, in a very real sense, stand between the government and persons who are accused of serious crime. It is your duty to see that if an indictment is returned charging a federal crime, that indictments are only returned against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to defend themselves against unwarranted charges at trial.

Probable Cause

Let me tell you about the concept of probable cause. Probable cause is a reasonable ground to suspect that a person under investigation has committed or is committing a crime. Probable cause is more than a bare suspicion that a crime has been committed but it is less proof than would be needed to obtain a conviction at trial. A guideline for the Grand Jury to use in determining whether or not probable cause sufficient to merit the return of an indictment exists is: Using common sense and considering the totality of the circumstances, is there a fair probability that each of the elements of the proposed charge could be proven?

Relationships with those under investigation

If a member of the Grand Jury is related by blood or marriage or knows or socializes to such an extent as to find himself or herself in a biased state of mind as to a person under investigation, or is biased for any reason, he or she should not participate in that particular investigation or in the return of the indictment, if the Grand Jury chooses to indict. This does not mean that if you have an opinion you should not participate in the investigation. However, it does mean that if you have a fixed opinion before you hear any evidence, either on the basis of friendship or hatred or some other similar motivation you should not participate in that investigation and in voting on the indictment.

The Powers and Limitations of the Grand Jury

Although as Grand Jurors you have extensive and independent powers, they are limited in several important respects.

You can only investigate conduct which violates federal criminal laws. Criminal activity which violates state law is outside your inquiry. Sometimes, though, the same conduct violates both federal and state law, and this you may properly consider. It is entirely appropriate for you to inquire whether, and to what extent, there is a federal interest in bringing charges that also violate state law. You should not be inhibited or constrained except by your conscience in deciding whether federal charges are warranted against any person or any corporation under federal investigation. The United States Supreme Court has recently determined that trial juries play an important and constitutional role in determining facts that impact sentences for those convicted of federal crimes. Thus, you are not constrained from making inquiry about punishment in the event

of a conviction nor are you prohibited from considering potential punishments in exercising your independence about what charge or charges are warranted under all the facts and circumstances presented to you.

There is also a geographic limitation on the scope of your inquiries in the exercise of your power. You may indict only as to federal offenses committed in the District of Montana, though you may consider activities that occur in any of Montana's fifty-six counties or elsewhere if the conduct is related to federal crimes committed in Montana.

The Grand Jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. You have the power in your hands to charge the offense that the United States Attorney seeks to bring, but you have the independent power to charge a greater offense or a lesser offense; you can charge numerous counts or a single count; and perhaps most significant of all you can charge a capital offense or a noncapital offense and you can do any of these things on the basis of the same facts. Moreover, you are not bound to indict in every case where a conviction can be obtained. You have the power to ask the United States Attorney to advise you as to what crimes, greater or lesser, or what counts, single or multiple, are potentially available under the facts presented to you. The United States Attorney must follow your direction in preparing charges that will be returned as a true bill or in the indictment.

Grand Jury Tasks and Procedures

The cases which you will hear will come before you in various ways. Frequently, suspects are arrested during or shortly after the commission of an alleged crime, and they are taken before a Magistrate Judge, who then holds a preliminary hearing to determine whether there is probable cause to believe that the person has committed a crime. If the Magistrate Judge finds such probable cause, she will direct that the accused be held for your action as the Grand Jury so that you can consider whether there should even be an indictment.

Other cases will be brought before you by the U.S. Attorney or an Assistant U.S. Attorney before an arrest but after an investigation has been conducted by a governmental agency such as the Federal Bureau of Investigation (FBI), the Treasury Department, the Drug Enforcement Administration, postal authorities, or other federal or state law enforcement officials.

Generally those are the two principal manners in which cases will be presented to you for investigation. However, if during the course of your hearings, a different crime other than the one you are investigating surfaces, you have the right to pursue this new crime. Although you can subpoena new witnesses and documents, you have no power to employ investigators or to expend federal funds for investigative purposes. You do have the right to demand more evidence if you are not satisfied that probable cause has been shown by the proof presented to you. Keep this in mind when evidence is presented to you. The United States Attorney is free to deprive the Grand Jury of exculpatory evidence, that is evidence that is favorable to the person or entity under investigation, though you have the power to ask if such evidence exists. You should also know that in presenting evidence to you, the United States Attorney can present unconstitutionally seized evidence or he or she can present evidence to you that is otherwise inadmissible at trial.

If the United States Attorney refuses to assist you or if you believe he or she is not acting impartially, you may take it up with me or any Judge of this Court. You may use this power over the active opposition of the government's attorneys, if you believe it is necessary to do so in the interest of justice.

Since the United States Attorney has the duty of prosecuting persons charged with the commission of federal crimes, he or one of his assistants will present the matters which the government desires to have you consider. He will point out to you the laws which the government believes have been violated, and he will subpoena for testimony before you such witnesses as he may consider important and necessary and also any other witnesses that you may request or direct him to call before you. The Department of Justice has its own policies regarding what crimes should be charged and what penalties should be sought in charging persons with federal crimes. You should bear in mind during your deliberations that you are an independent body that has a constitutional duty that is different from that of the court or that of the Department of Justice. You are not bound by Department of Justice policies, indeed you have the duty to exercise your independence in deciding what, how, or if, charges should be brought against any person or corporation under investigation by you.

Presentation of Evidence

Sixteen of the twenty-three members of the Grand Jury constitute a quorum and must be

present for the transaction of any business. The Foreperson of the Grand Jury is the person vested with the authority to grant or to deny requests by Grand Jurors to be excused from a particular session of the Grand Jury. If at any time there are fewer than sixteen members of the Grand Jury present, even for a moment, the proceedings of the Grand Jury must stop.

The evidence you will consider will normally consist of oral testimony of witnesses as well as documents and writings. Each witness will appear before you individually. When the witness first appears before you, the Grand Jury foreperson will administer the witness an oath, or, when necessary, an affirmation, to testify truthfully. After this has been accomplished the witness may be questioned. Ordinarily, the United States Attorney or one of his assistants questions the witness first. Next, the foreperson may question the witness, and then any other members of the Grand Jury may ask questions. In the event a witness does not speak or understand the English language, an interpreter may be brought into the Grand Jury room to assist in the questioning.

Every witness should be treated courteously and they should be questioned in an orderly fashion. If you have any doubt whether it is proper to ask a particular question, ask the United States Attorney or one of his assistants for advice. It is the duty of the Grand Jurors to take measure of the evidence presented to the Grand Jury, and you are at liberty to take into account any bias, prejudice or other interest any witness may have when you judge the credibility of the evidence presented and whether it amounts to probable cause to believe a crime has been committed or is being committed.

You alone decide how many witnesses you want to hear. You can subpoena witnesses from anywhere in the country, directing the United States Attorney to issue necessary subpoenas. However, persons should not ordinarily be subjected to disruption of their daily lives, harassed, annoyed, or inconvenienced, nor should public funds be expended to bring in witnesses unless you believe they can provide meaningful evidence which will assist you in your investigation.

Every witness has certain rights when he appears before a Grand Jury. The rights are guaranteed to the witness by the Constitution and laws of the United States. The witness has the right to refuse to answer any question if the answer would tend to incriminate him. The witness has the right to know that anything he says may be used against him. If the witness exercises his right against compulsory self-incrimination, the Grand Jury should hold no prejudice against him,

and the decision to invoke the Fifth Amendment Privilege can play no part in the return of any indictment against him.

A witness is not permitted to have a lawyer present with them in the Grand Jury room but the law does permit the witness to confer with his or her lawyer outside the Grand Jury room. Since an appearance before a Grand Jury may present complex legal problems requiring the assistance of a lawyer, you can draw no adverse inference if a witness chooses to exercise the right to consult a lawyer, and leaves the Grand Jury room to confer with the lawyer.

Ordinarily, neither the accused nor any witnesses on his behalf will testify before the Grand Jury. Upon the request of a person under investigation, preferably in writing, you may allow the accused an opportunity to appear before you. L Because the appearance of an accused before you may raise complicated legal problems, you should seek the United States Attorney's advice and, if necessary, the Court's ruling before his appearance is permitted. Before the accused testifies to the Grand Jury, he must be advised of his rights and required to sign a formal waiver of those rights, including the right against self-incrimination. You must be completely satisfied that the accused understands what he is doing. You are not required to summon witnesses which the accused person may want to appear before the Grand Jury to testify unless probable cause for an indictment may be explained away by their testimony.

In making your determination as to whether an indictment is warranted, or whether probable cause exists to return an indictment, you will have to determine if the witnesses you have heard are telling the truth. Neither the Court nor the prosecutors nor any officers of the Court may make this determination for you. Hearsay testimony, that is, testimony as to facts not directly known by the witness of his own personal knowledge and which has been told or related to him by persons other than the accused, may in itself, if deemed by you to be persuasive, provide a basis for finding probable cause for returning an indictment against the accused.

Deliberation and Voting

After you have listened to all of evidence you want to hear in a particular matter, you will then proceed to debate as to whether the accused person should be indicted. No one other than your own members is to be present while you are deliberating or voting. Remember that as Grand Jurors you are the conscience of the community and you are not bound to indict in every case

where a conviction can be obtained. Nor are you bound to indict only those charges presented to you by the United States Attorney or his assistants. You may charge a greater offense, a lesser offense, or you may refuse to indict. You have a constitutional obligation to act independently and as the conscience of our community.

To return an indictment charging an individual with a federal crime, it is not necessary that you find the accused is guilty beyond a reasonable doubt. You are not a trial jury, and your task is not to decide the guilt or innocence of the person charged. One of your tasks is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the accused is guilty of the offense the government seeks to bring against him, or the greater or lesser charge the Grand Jury finds is appropriate based on the proof presented to you. To put it another way, you may vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's believing that the accused is probably guilty of the offense you elect to charge in returning the indictment, assuming you deem indictment is appropriate under the circumstances.

Each Grand Juror has the right to express his view of the matter under consideration. Only after all Grand Jurors have been given full opportunity to be heard will a vote be taken. You may decide after deliberation among yourselves that further evidence should be considered before a vote is taken. In such case, you may direct the United States Attorney to subpoena the additional documents or witnesses you desire to consider.

Your vote must be in secret. When you have decided to vote, the foreperson shall designate a juror as secretary and the secretary will keep a record of the vote, which shall be filed with the Clerk of Court. The record does not include the names of the jurors but only the number of those voting for the indictment, and the number voting against the indictment.

If twelve or more members of the Grand Jury, after deliberation, believe that an indictment is warranted, then you will request the United States Attorney to prepare the formal written indictment. If you have been presented a formal Indictment before you vote, you are at liberty to decide if the charges suggested are the appropriate charge in the case and it is for you to decide of a greater or lesser charge, or a greater or lesser number of counts should be brought. You are not a rubber stamp for the United States Attorney's office, or for the Department of Justice. You are

an independent deliberative body with the duty to exercise your powers as described in this instruction. The indictment must set forth the date and place of the alleged offense, it must assert the circumstances making the alleged conduct criminal, and it must identify the criminal statute violated. The indictment should also accurately state on its face the potential punishment upon conviction of the offenses charged. The foreperson will endorse or sign the indictment as a true bill, and place his or her signature in the space followed by the word "foreperson." If less than twelve members of the Grand Jury vote in favor of an indictment which has been submitted to you for your consideration, the foreperson will endorse the indictment "Not a True Bill" and return it to the Court, and the Court will impound it.

Indictments which have been endorsed as a true bill will be presented to a Judge in open court by your foreperson at the conclusion of each deliberate session of the Grand Jury. In the absence of the foreperson, a deputy foreperson may act in his place and perform all of his functions and duties.

Independence of the Grand Jury

It is extremely important for you to realize that under the United States Constitution, the Grand Jury is independent of the United States Attorney and it is not an arm or agent of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime. You are not a rubber stamp as I have stated before. You are not prosecutors. You are not defense representatives. You are the conscience of the community. There has been some criticism of the institution of the Grand Jury for supposedly acting as a mere rubber stamp approving the prosecutions that are brought before it by government representatives. However, as a practical matter, you must work with the government attorneys but this does not mean you must do their bidding. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance. But, remember, the government attorneys are prosecutors. You are not. If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the United States Attorney.

Just as you must maintain your independence in your dealings with government attorneys,

so should your dealings with the Court be on a formal basis. If you have a question for the Court, or if you have a desire to make a presentment or return an indictment to the Court, you will assemble in the courtroom for these purposes. Moreover, each juror is directed to report immediately to the Court any attempt by any person who under any pretense whatsoever addresses or contacts him or her for the purpose of or with the intent to gain any information of any kind concerning the proceedings of the Grand Jury, or to influence a juror in any manner for any purpose.

The Obligation of Secrecy

Your proceedings are secret and must remain secret permanently unless and until the Court decrees otherwise. You cannot relate to your family, to the news or television reporters, or to anyone that which transpired in the Grand Jury room. There are several important reasons for this requirement. A premature disclosure of Grand Jury action may frustrate the ends of justice by giving an opportunity to the accused to escape and become a fugitive or to destroy evidence. Also, if the testimony of a witness is disclosed, he may be subject to intimidation, retaliation, bodily injury, or other tampering before he testifies at trial. Thirdly, the requirement of secrecy protects an innocent person who may have come under investigation but has been cleared by the actions of the Grand Jury. In the eyes of some, investigation by the Grand Jury alone carries with it a suggestion of guilt. Thus, great injury can be done to a person's good name even though he is not indicted.

To insure the secrecy of Grand Jury proceedings, the law provides that only authorized persons may be in the Grand Jury room while evidence is being presented. Only the members of the Grand Jury, the United States Attorney, or his assistant, the witness under examination, the court reporter, and an interpreter, if required, may be present. If an indictment should ultimately be voted, the presence of unauthorized persons in the Grand Jury room could invalidate it. Particularly remember that no person other than the Grand Jury members themselves may be present in the Grand Jury room while the jurors are deliberating and voting. Although you may disclose matters which occur before the Grand Jury to attorneys for the government for use by such attorneys in the performance of their duties, you may not disclose the contents of your deliberations and the vote of any juror, even to government attorneys.

CONCLUSION

The importance of the service you will perform is demonstrated by the very comprehensive and important oath which you took a short while ago. It is an oath rooted in history, and thousands of your forebears have taken similar oaths. Therefore, as good citizens, you should be proud to have been selected to assist in the administration of the American system of justice.

The United States Attorney assistants will now accompany you, and will assist you in getting organized, after which you may proceed with the business to come before you.

The United States Marshal and his deputies will attend you and be subject to your appropriate orders.

You may now retire.