

# University of the District of Columbia Law Review David A. Clarke School of Law

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## PROLOGUE

Henry P. Gassner\*

The 2003-2004 Editorial Board envisions the *Law Review* of the University of the District of Columbia David A. Clarke School of Law (*UDC/DCSL Law Review*) as a vehicle for serving the community by raising awareness of important legal issues of social concern, with particular emphasis on public interest issues facing the District of Columbia. Prior issues of this *Law Review*, by focusing attention on important social issues, such as weaknesses in District of Columbia's juvenile justice and legal services delivery systems, have led to the adoption of measures that have helped to improve these systems. Our aspiration is to build a *Law Review* consistent with the ideals which inspired David A. Clarke and the founders and supporters of our law school, the ideals of using our legal talents and training to help produce progressive social change.

In keeping with this aspiration, this issue publishes articles and presentations originating in two public interest-oriented programs at the U.D.C. School of Law in 2003-2004, one a colloquium sponsored by the Law School and the other a symposium sponsored by the *Law Review*. In addition, this issue has the honor of publishing the first part of the Honorable Inez Smith Reid's biography of the Honorable Julia Cooper Mack, one of the heroes of D.C. legal history. Judge Reid, in her article *infra*, describes Judge Mack as "the first African-American woman to be nominated by a President of the United States and confirmed by the Senate to sit on a state-equivalent court of last resort," the District of Columbia Court of Appeals.

The colloquium on *Zealous Advocacy in a Time of Uncertainty: Understanding Lawyers' Ethics*, April 25, 2003, sponsored by the School of Law, was inspired by the publication of the third edition of *Understanding Lawyers' Ethics* by Professors Monroe Freedman and Abbe Smith.<sup>1</sup> Dean Katherine S. "Shelley" Broderick, in her *Introduction, infra*, provides an overview for the articles from this colloquium, which explore important issues in legal ethics in the post-Enron, post-9/11 world.

The *Law Review* sponsored the symposium *In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital*, on November 21, 2003. The main purpose of the symposium was to alert the wider community to issues that we believe should be of serious concern to all of us, and to encourage dialogue on these issues. Panels of experts discussed (a) the treatment of and restrictions on demonstrators; (b) the treatment of immigrants; (c) job security and bargaining

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\* Editor-in-Chief of the UDC-DCSL Law Review for the 2003-2004 academic year.

1 MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004).

rights of government employees; (d) the relationship between the federal and D.C. governments in times of crisis; and (e) the use of surveillance cameras.

The featured luncheon speaker, David Cole, Professor of Law at Georgetown University Law Center, reminded us of the issues which he had explored in his book *Enemy Aliens, Double Standards and Constitutional Freedoms in the War on Terrorism*.<sup>2</sup> He argued that measures taken after 9/11 in the name of national security had undermined the fundamental civil liberties of foreign nationals and minority communities in our country, and that these measures were ineffective and counter-productive, weakening world respect for American democratic institutions. Nadine Strossen, President of the American Civil Liberties Union and Professor at the New York Law School, ended the day with a presentation urging our participation in the Safe and Free campaign to convince the American public and our legislators that we can maintain our safety without giving up our civil liberties. Excerpts from her presentation are included in this volume.

The panel discussion on demonstrators' rights led to two full articles and one published presentation. In *The Policing of Demonstrations in the Nation's Capital*, Ralph Temple, who served as legal director of the American Civil Liberties Union of the National Capital Area from 1966 to 1980, reviews the experience of demonstrations in Washington from the Vietnam War period to today. He then analyzes the January 24, 2005 Consent Order in *Abbate v. Ramsey*<sup>3</sup> and the First Amendment Rights and Police Standards Act of 2004,<sup>4</sup> enacted by the D.C. Council on January 27, 2005.<sup>5</sup> Both the Consent Order and the Act provide important safeguards protecting the rights of demonstrators in the nation's capital. The Act, attached as an appendix to the article, could usefully serve as a model for other jurisdictions throughout our nation concerned with the issue of safeguards for demonstrators' rights.

Mary Cheh, Professor of Law at the George Washington University Law School, in *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, examines the distinctions made between restrictions based on the content of speech versus regulating the time, place, and manner of speech. She argues for more nuanced distinctions which would establish "intermediate scrutiny" for restrictions impeding the right to demonstrate at a time and place and in

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2 DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

3 Consent Order, *Abbate v. Ramsey*, 03-CV-767 (Jan. 24, 2005), available at [www.dcd.uscourts.gov/03-767a.pdf](http://www.dcd.uscourts.gov/03-767a.pdf).

4 The legislative history and the original and final text of Bill 15-968 are available at [www.dccouncil.washington.dc.us/lims/BillRecord.asp?billid=checked](http://www.dccouncil.washington.dc.us/lims/BillRecord.asp?billid=checked).

5 Under the District of Columbia's limited home rule, this Act will become law if it survives a thirty-day congressional review period.

a manner permitting the demonstration to be seen and heard by the object of the protest. Professor Cheh examines, as an example, how such a standard could be applied to Lafayette Park, across the street from the White House.

The presentation by the Honorable Kathy Patterson, at that time Chair of the D.C. Council Committee on the Judiciary, provides insight on the issues of demonstrators' rights and the use of surveillance cameras from the point of view of a legislator. Subsequent to the Symposium, Councilmember Patterson's Committee on the Judiciary held public hearings in December 2003 on the issue of First Amendment rights of demonstrators. All the other participants on the symposium panel on demonstrators' rights testified at these hearings. Thereafter, in July 2004 Councilmember Patterson and seven other members of the D.C. Council introduced the First Amendment Rights and Police Standards Act of 2004. Councilmember Patterson provided the leadership which guided the bill through further public hearings to its approval by a 12-1 vote. The Act incorporates many of the recommendations of the other participants on this panel.

The panel discussion of treatment of immigrants led to one full article and two shorter presentations. In *The Chimera and the Cop*, Michael Hethmon, Staff Attorney at the Federation for American Immigration Reform, argues for a greater role for local and state law enforcement officers in the enforcement of federal immigration law. Katherine Culliton, an immigration rights attorney for the Mexican American Legal Defense and Education Fund, has allowed us to publish her November 18, 2003 testimony before the Senate Judiciary Committee hearing on *America After 9/11: Freedom Preserved or Freedom Lost?* In this testimony, which she summarized for us at the symposium, Ms. Culliton argued that racial profiling and other unnecessary post-9/11 measures have exacerbated discrimination against Latino citizens and immigrants, and she recommended measures for alleviating these problems. Finally, Denyse Sabagh, former national President of the American Immigration Lawyers Association and current General Counsel for the Association, provided her perspective as a practicing immigration lawyer after 9/11.

The article by Mark Roth, General Counsel of the American Federation of Government Employees (AFGE), Gony Frieder, Staff Counsel for Local 1, AFGE, and Anne Wagner, Assistant General Counsel of AFGE, examines the effects of 9/11 on *Job Security and Bargaining Rights of Federal Government Employees*. The authors argue that "the federal government has used September 11 as a pretext for dismantling labor rights." They point to the irony of the justifications claimed for the need to reduce labor rights, since the union membership of "the hundreds of firefighters and police officers who died" on September 11 in no way interfered with the "heroic performance of their duties." The article focuses

particularly on the labor rights issues affecting the employees of the Department of Homeland Security and the Transportation Security Administration.

In the last article to emerge from the symposium, the DC Appleseed Center for Law and Justice examines the issues of *Managing Federal Security-Related Street Closures and Traffic Regulations in the District of Columbia*. The authors, Appleseed staff members and attorneys from the law firm of Arnold & Porter LLC, argue for greater involvement of the District of Columbia government in making such decisions in a collaborative manner, and that such collaboration would “maximize safety, minimize disruption” and lead to more appropriate responses to future security threats.

Professor David Cole noted in his luncheon presentation that most conferences he has attended on the symposium topic consisted of government spokesmen speaking to law enforcement officers, or of the ACLU and kindred spirits speaking to themselves. He saluted this symposium and our law school for bringing in so many people with diverse perspectives, and the willingness of people from various sides of the issue to attend and speak together. While many of these participants could not take the time to put their ideas into written form, we are very grateful for their contributions to the panel discussions, which enriched the dialogue and the variety of viewpoints presented. We would like to express our appreciation to: Johnny Barnes, ACLU of the National Capital Area; Cedric Laurant, Electronic Privacy Information Center; Robert Toone, Senator Kennedy’s legal counsel on the Senate Judiciary Committee; Clifford Fishman, Columbus School of Law, Catholic University; Doug Hartnett, Government Accountability Project; Don Wasserman, former Chair, Federal Labor Relations Authority; Arthur Lerner, Labor Relations Officer, Federal Emergency Management Agency; Chris Voss, D.C. Emergency Management Authority; James Austrich, D.C. Department of Transportation; Marshall Fitz, American Immigration Lawyers Association; Elliot Minberg, People for the American Way; Michael Rolince, FBI; Sarah Kendall, Department of Homeland Security; and Mara Verheyden-Hillard, Partnership for Civil Justice. Their presentations contributed to our understanding of the issues and to the quality of the debate. (It should be emphasized that, at least in most cases, people were speaking for themselves rather than their organizations.)

Finally, I would like to thank Dean Shelley Broderick, for all her help with and support of both programs featured in this issue, Professor William McLain for his assistance in formulating the concepts for the civil liberties symposium, all the faculty members who helped with various aspects of the programs, and, most of all, Professor Joseph B. Tulman and Law Librarian Helen Frazer, our Law Review Advisors.

**DAVID A. CLARKE SCHOOL OF LAW**  
**University of the District of Columbia**

**SYMPOSIUM**

**In the Aftermath of September 11:  
Defending Civil Liberties in the Nation's Capital**

**November 21, 2003**

**THE POLICING OF DEMONSTRATIONS IN THE  
NATION'S CAPITAL: LEGISLATIVE AND JUDICIAL  
CORRECTIONS OF A POLICE DEPARTMENT'S  
MISCONCEPTION OF MISSION AND  
FAILURE OF LEADERSHIP**

**Ralph Temple\***

*Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*  
United States Constitution, First Amendment

*I do solemnly swear . . . that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . So help me God.*  
Oath of Office, D.C. Chief of Police

*Ain't it a thing of beauty to see our folks up there ready to go.*  
D.C. Chief of Police Charles H. Ramsey, admiring columns of his officers on September 27, 2002, as they prepared to arrest four hundred peaceful protesters and bystanders they had herded into Pershing Park. *The Washington Post*, Sept. 28, 2002, at B-4, col. 6.

**INTRODUCTION<sup>1</sup>**

In January 2005 two historic reform measures were imposed on the Metropolitan Police Department of the District of Columbia to eliminate abuses of the First Amendment rights of demonstrators in the nation's capital that had persisted for almost four decades. The first, on January 24, 2005, was the consent order in an

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\* Ralph Temple, a Washington D.C. trial lawyer, served as legal director of the American Civil Liberties Union of the National Capital Area from 1966 to 1980, and taught at the law schools of Harvard University (1958-59), George Washington University (1959-62), Georgetown University (1975), and Howard University(1969-70). Professor Will McLain of the University of the District of Columbia David A. Clarke School of Law, Arthur Spitzer, Legal Director of the American Civil Liberties Union of the National Capital Area, and Henry Gassner, Editor-in-Chief, *UDC/DCSL L. Rev.*, made substantial contributions of research and editing to this article.

1 An earlier version of this article was presented in December 2003, as a report of the American Civil Liberties Union of the National Capital Area, at hearings of the Judiciary Committee of the District of Columbia Council. Many of the recommendations of that report were incorporated in the First Amendment Rights and Police Standards Act of 2004, enacted by the D.C. Council on Jan. 26, 2005, which is discussed in Part IV of this article and included as an appendix.

American Civil Liberties Union lawsuit, *Abbate v. Ramsey*, No. 03-CV-0767 (D.D.C.),<sup>2</sup> proscribing certain police practices and placing the Department under the Court's jurisdiction for three years to ensure compliance. The second was the enactment by the District of Columbia Council of the First Amendment Rights and Police Standards Act of 2004, prohibiting specific police abuses. The new law which, on the January 26, 2005 deadline, Mayor Anthony Williams neither signed nor vetoed, must still withstand review by the United States Congress. This article documents the history of police abuses which culminated in these actions of judicial and legislative intervention and describes the restraints these interventions place on police practices.

America has a rich tradition of protest demonstrations which have served as a major instrument of non-violent political and social reform.<sup>3</sup> No twentieth century nation has been as successful as the United States in harmonizing so ethnically, racially and politically diverse a population with so little violence. The transformational power of mass protests has played a major role in that history. The American labor movement of the 1920s and 30s, the anti-Vietnam War movement of the 1960s and '70s, and the 1960s civil rights movement are the most outstanding examples of social revolutions without major bloodshed. That is why Justice Thurgood Marshall argued passionately for preserving sites in Washington, D.C. as the traditional place of "some of the most rousing political demonstrations in the Nation's history."<sup>4</sup> Police flouting of the First Amendment rights of speech and assembly not only undermines the rule of law, it subverts a vital mechanism of our democracy.

The Metropolitan Police Department (M.P.D.) of the District of Columbia has efficiently and professionally handled numerous mass demonstrations in the nation's capital. Yet the Department has repeatedly failed in handling demonstrations at which significant numbers of arrests were anticipated. In the last fifty years, there have been three major periods of mass arrests: the April 1968 riots,<sup>5</sup> the 1969 to 1971 anti-Vietnam War demonstrations,<sup>6</sup> and the April 2000 to present anti-globalization demonstrations.<sup>7</sup> In each of these periods, the police engaged in indiscriminate arrests, unwarranted assaults with clubs and gas, and unlawfully prolonged detentions. A major feature of the police actions has been the failure to record arrest information that would permit the prosecution of

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2 Consent Order, *Abbate v. Ramsey*, 03-CV-767 (Jan. 24, 2005), available at [www.dcd.uscourts.gov/03-767a.pdf](http://www.dcd.uscourts.gov/03-767a.pdf).

3 See, e.g., LUCY BARBER, *MARCHING ON WASHINGTON: THE FORGING OF AN AMERICAN TRADITION* (2002).

4 *Clark v. Committee for Community Non-Violence*, 468 U.S. 288, 303 (1984) (dissenting opinion).

5 See *Sullivan v. Murphy*, 478 F.2d 938, 946 (D.C. Cir. 1973).

6 See *id.* at 942.

7 See Part I, Sections B and C of this article, *infra*.

rightfully arrested protesters and the discipline of wrongfully acting police officers. The arrests were made, not for criminal prosecution, but solely to clear and keep people off the streets—an unlawful use of the power of arrest.<sup>8</sup>

Of course, many large demonstrations have occurred in Washington, D.C. without any significant problems. Non-problematic demonstrations, conducted with official sanction and cooperation, such as the Million Man March,<sup>9</sup> the Million Mom March,<sup>10</sup> or the anti-war demonstrations of October 26, 2002,<sup>11</sup> and October 25, 2003,<sup>12</sup> posed mainly logistical problems. Peripheral disorders occurred in those, too, but police officers, under orders to do so, were able efficiently to isolate and control those incidents. When properly directed, D.C. police officers have shown time and again that they can lawfully and professionally handle whatever problems arise. A good example is one of the few problematic demonstrations where the D.C. police excelled—the Ku Klux Klan march down Pennsylvania Avenue in October 1990.<sup>13</sup> The police, under court order to permit the march, were pelted along the parade route with rocks, bottles, and curses by enraged crowds from which the officers protected a handful of robed Klan marchers. It was one of the Metropolitan Police Department's hardest assignments and finest moments.

But virtually all other problematic demonstrations—those in which the sponsors pre-announce civil disobedience, such as traffic blocking, or in which some factions are bent on vandalism or disorder—have been another matter. It is those demonstrations that challenge D.C. police management to honor and protect First Amendment rights of free speech and assembly while maintaining order. And that is where the leadership of the Metropolitan Police Department (M.P.D.) has, with rare exception, failed. M.P.D. management has regularly abused several of its powers in such demonstrations: the parade permit law, the power of the police to clear an area due to emergency or disorder, the power of arrest, and the power to detain before presentation to a magistrate.<sup>14</sup>

In the most recent such action, as of this writing, on September 27, 2002, D.C. police herded over 400 anti-globalization protestors into Pershing Park at 15th

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8 See *Sullivan*, 478 F.2d, at 954-55, 970.

9 Michael Fletcher & Hamil R. Harris, *Black Men Jam Mall for a 'Day of Atonement,'* WASH. POST, Oct. 17, 1995, at A-1.

10 Susan Levine, *Many Mom's Voices are Heard on Mall*, WASH. POST, May 15, 2000, at A-1.

11 Monte Reel & Manny Fernandez, *Anti-War Protests Largest Since '60s*, WASH. POST, Oct. 27, 2002, at C-1.

12 Eric Lichtblau, *Demonstrators Demand U.S. Withdraw Troops from Iraq*, N.Y. TIMES, Oct. 26, 2003, at 20.

13 Mary Jordan & Linda Wheeler, *14 Hurt as Anti-Klan Protestors Clash with Police*, WASH. POST, Oct. 29, 1990, at A-1, A-8.

14 See Section I of this article, *infra*.

Street and Pennsylvania Avenue, N.W., then enclosed and arrested them.<sup>15</sup> Even the M.P.D. has acknowledged that these arrests were unlawful.<sup>16</sup> Public concern aroused by these police abuses led to hearings before the D.C. Council Committee on the Judiciary and to the enactment of the First Amendment Rights and Police Standards Act of 2004.<sup>17</sup> In addition, in response to one of the ensuing lawsuits, *Abbate v. Ramsey*,<sup>18</sup> *supra*, the District of Columbia accepted a settlement agreement and consent order that included a personal apology by the D.C. Police Chief, the payment of substantial damages to those arrested, and significant limits on police authority in handling demonstrations.

Part I of this article shows that the abuses of September 27, 2002, which precipitated the legislative hearings and the lawsuit resulting in reform, were not an isolated incident and that similar abuses occurred during the April 2000 antiglobalization demonstrations. Indeed, these abuses date back to the Vietnam War, thirty years ago, when the federal courts condemned them and awarded victimized demonstrators millions of dollars in damages. Part II suggests that civil disobedience and disruptions during mass demonstrations can be handled within the bounds of the law. D.C. police supervisors' unlawfulness has been a failure of will, not necessity. Part III points to the media's unwavering support, until recently, as a major factor in encouraging Metropolitan Police Department management to continue to rely on unlawful methods. Part IV summarizes the reforms under the *Abbate* Consent Order and the First Amendment Rights and Police Standards Act of 2004, with the Act attached as an appendix. These reforms could be a useful model for other jurisdictions throughout the country.

### I. THE HISTORY OF PREEMPTIVE AND BRUTAL D.C. POLICE ACTIONS IN DEMONSTRATIONS

In the April 1968 riots following the assassination of Dr. Martin Luther King, Jr., 6,000 people were arrested and detained in the District over a period of a few days in the three areas racked by widespread arson, vandalism, and looting.<sup>19</sup> During the Vietnam War, from the late 1960s to the mid 1970s, there were mass arrests of antiwar protesters in the District, culminating in the first week of May 1971, during which almost 15,000 people were arrested and preventively de-

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15 Manny Fernandez & David A. Fahrenthold, *Police Arrest Hundreds in Protest*, WASH. POST, Sept. 28, 2002, at A-1.

16 Carol D. Leonnig, *IMF Arrests Improper Police Found*, WASH. POST, Sept. 13, 2003, at B-2.

17 The legislative history of Bill 15-968 is available at [www.dccouncil.washington.dc.us](http://www.dccouncil.washington.dc.us). Its text is attached to this article as an appendix.

18 *Abbate v. Ramsey*, No. 03-CV-0767 (D.D.C.), which was filed by the American Civil Liberties Union of the National Capital Area on behalf of seven plaintiffs arrested in Pershing Park, who were seeking damages and injunctive relief.

19 See WILLIAM DOBROVIR, JUSTICE IN A TIME OF CRISIS, A STAFF REPORT TO THE DISTRICT OF COLUMBIA ON THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS (1969), cited in *Sullivan v. Murphy*, 478 F.2d 938, 946 n.11 (D.C. Cir. 1973).

tained.<sup>20</sup> The third period of mass arrests began with the anti-globalization demonstrations of April 2000 and extends to the present. In none of these episodes were the illegal methods relied upon by D.C. police management necessary.

#### A. *Riots and Demonstrations, 1968-1971*

During the 1968 riots, from April 4th to April 8th, the police indiscriminately swept people off the streets in riot areas, never recording the circumstances and basis for the arrests.<sup>21</sup> With the jails overflowing and booking procedures overwhelmed, those arrested, including many innocent people, were held for days without being brought to the local court—then called the D.C. Court of General Sessions. When they were brought to court, the judges, in violation of the right to individual consideration, set across-the-board bail-bonds of \$1,000.00 as a way of keeping people locked up.<sup>22</sup> On April 8, 1968, the American Civil Liberties Union of the National Capital Area challenged the arrests and detentions by filing a lawsuit in federal court against then-Chief Judge Harold Greene and a dozen of the other judges, the United States Attorney, the Corporation Counsel, the Chief of Police, and the Director of the Department of Corrections. The suit was immediately dismissed, but the day it was filed the government began rapidly freeing people and almost all were out within twenty-four hours.<sup>23</sup>

Subsequently, a Committee on the Administration of Justice under Emergency Conditions of the Judicial Conference of the District of Columbia Circuit concluded that the system of justice had broken down. It recommended that measures be developed and implemented to maintain order *within* the law, including the development of rapid field arrest-recording procedures.<sup>24</sup> The Metropolitan Police Department then developed a field arrest form procedure.<sup>25</sup>

From 1969 to 1971, however, during the mass arrests of the Vietnam War, the Metropolitan Police Department abandoned that procedure and resumed its practice of sweeping people up indiscriminately and without recording the basis for arrests. The major events occurred in the first week of May 1971. On Monday, May 3, 1971, the D.C. police, fearing that 100,000 anti-war protesters would try to block bridges and intersections, arrested almost 8,000 people in a single day. The police mass arrest procedures, all over the city, were so indiscriminate that federal employees on their way to work, journalists, attorneys, and other bystanders were also seized.<sup>26</sup> On Tuesday, May 4th, 3,000 orderly demonstrators were encir-

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20 *Sullivan v. Murphy*, 478 F.2d 938, 942 (D.C. Cir. 1973).

21 *Id.* at 946.

22 *See DOBROVIR*, *supra* note 19.

23 David A. Jewell, *Liberty Union's Suit Angers Court*, WASH. POST, Apr. 9, 1968, at A-7.

24 *See DOBROVIR*, *supra* note 19.

25 *See Sullivan*, 478 F.2d , at 946.

26 *Id.* at 948-50. *See also* ACLU OF THE NATIONAL CAPITAL AREA, MAYDAY 1971: ORDER WITHOUT LAW (1972). A copy of this eighty page report detailing police actions during the first week

pled and arrested on 10th Street at the Justice Department for failing to disperse, despite the fact that the dispersal order was a pretense, since people were not allowed to leave.<sup>27</sup> On Wednesday, May 5th, 1,200 people were encircled and arrested in the same way on the U.S. Capitol steps while listening to a Congressman's speech.<sup>28</sup> Of the 14,517 arrests of "Mayweek 1971" there were only 128 convictions after trial on the merits.<sup>29</sup> All the rest were declared "invalid and unconstitutional."<sup>30</sup> Millions of dollars in damages were paid out by the District of Columbia under court award or settlement.<sup>31</sup>

The first of the police practices that was condemned by the federal courts was the use of the power of arrest, solely to clear the streets, without attempting to record information that would justify the arrest. The United States Court of Appeals for the District of Columbia Circuit stated:

On May 3, 1971, when Washington, D.C. was confronted with a threat to bring the orderly conduct of the Federal government to a standstill, the public authorities responded by ordering mass arrests. There was no declaration of martial law. Yet the procedures for requiring that arrests be accompanied by some indication of the basis therefore . . . were terminated. The innocent as well as the guilty were in large numbers swept from the streets and placed in detention facilities . . . .

[P]olice officials laid primary emphasis upon mass arrests as a means of clearing the streets. The premise of the legal system, that unlawful arrests can be avoided or remedied by holding individual policemen accountable, evaporated . . . This lack of accountability was heightened by the fact that officers appeared on duty without customary name tags or numbered badges . . .<sup>32</sup>

The court declared "as a legal principle corollary to the Fourth Amendment's protection," that "any arrest that was not accompanied by a contemporaneous Polaroid photograph and field arrest form executed by one who was in fact the arresting officer" was "presumptively invalid," with such assumption rebuttable only by the Government showing probable cause in particular cases.<sup>33</sup>

In another of its major lawsuits, the ACLU of the National Capital Area brought a class action suit on behalf of participants, observers, and bystanders at

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of May 1971 may be obtained from the ACLU of the National Capital Area (telephone 202-457-0800).

27 See ACLU, *supra* note 26, at 23-27.

28 *Id.* at 29-34. See also *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977).

29 *Sullivan*, 478 F.2d, at 942, 956.

30 *Sullivan v. Murphy*, 380 F. Supp. 867, 868-69 (D.D.C. 1974).

31 See, e.g., *Dellums*, 566 F.2d 167.

32 *Sullivan*, 478 F.2d, at 959, 967.

33 *Id.* at 967.

demonstrations occurring from November 1969 through May 1971.<sup>34</sup> The complaint alleged that whenever D.C. police deemed it necessary to take law enforcement action during demonstrations, there followed unwarranted dispersals, indiscriminate arrests, excessive violence, and unduly prolonged and abusive post-arrest detentions.<sup>35</sup> During a three-week trial, plaintiffs presented the testimony of 75 witnesses and over 100 documentary exhibits, including police officials' sworn answers to interrogatories, Metropolitan Police Department General Orders and other directives, training materials, correspondence regarding complaints, deposition and trial transcripts in this and other demonstration cases, and police department movies of police actions.<sup>36</sup>

After the trial, the United States District Court for the District of Columbia found that M.P.D. management was responsible for consistently unlawful actions in the demonstrations.<sup>37</sup> The Court concluded, among other things, that on February 19, 1970, in an unnecessary application of the parade permit law, the police had caused "chaos" by attacking, "stampeding," and arresting orderly demonstrators on Virginia Avenue near the Watergate Apartments:

Although the demonstrators had not sought a parade permit for the march to the Watergate, notices on campus posted prior to the 19th announced the intended course of the demonstration. The police department was aware of the proposed activities and in anticipation of difficulties staged a large number of officers from the Civil Disturbance Unit [CDU] around the apartment complex. . . .

Most of the persons arrested were not engaged in any unlawful conduct . . .<sup>38</sup>

The Court found similarly excessive police actions in the whole series of demonstrations from 1969 to 1971:

[O]fficers of the CDU repeatedly took actions which were unreasonable and unnecessary in the performance of their duties, including: arresting persons who had not engaged in illegal conduct; excessive use of force; unrestricted and hazardous use of chemical agents (primarily gas); unjustified maintenance of police lines and initiation of sweeps; failure to give sufficient warning to demonstrators of the establishment of police lines; and re-

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34 *Washington Mobilization Comm. v. Cullinane*, 400 F. Supp. 186 (D.D.C. 1975), *rev'd*, 566 F.2d 107, *reh'g denied*, 566 F.2d 124 (D.C. Cir. 1977). A majority of five of the nine members of the full court issued opinions stating that the reversal was erroneous but that there was a new chief of police, and that the police tactics had already been condemned in *Sullivan v. Murphy* and other cases, and were not expected to recur. 566 F.2d 124, 129.

35 *Washington Mobilization Comm.*, 400 F. Supp. at 190.

36 *Id.* at 191.

37 *Id.* at 208.

38 *Id.* at 194, 195.

fusing to advise arrestees of the charges being placed against them or of their constitutional rights . . .<sup>39</sup>

The District Court also found that “a pervasive pattern of lack of restraint by police was discernible from the police films and supported by the testimony of witnesses”; and that “wanton use of physical force also accompanied the arrests made on [the George Washington University] campus in the late afternoon.”<sup>40</sup>

The Court condemned the excessive use of riot batons, chemical Mace, and gas.<sup>41</sup> Finally, the Court found unlawful conditions of detention and the denial of the right to be brought promptly before a judicial officer or released on collateral,<sup>42</sup> concluding:

[W]hether the [police] department purposely failed to make . . . [sufficient] plans in order to prolong the booking process, thereby keeping the demonstrators off the streets, [could] not be conclusively determined from the record. Whatever the motivation, however, the net effect of keeping persons in detention for such extraordinary long periods of time was unlawful.<sup>43</sup>

The Court issued detailed instructions for the correction of these practices and policies, including a ban on dispersing demonstrators “unless a breach of the peace involving a substantial risk of violence has occurred or will occur,” a ban on mass arrests without immediately “recording information necessary to establish probable cause,” and directing that a new police manual for handling demonstrations and prompt release of arrestees be prepared and submitted to the court for approval.<sup>44</sup>

Those reforms were never carried out. A three-judge panel of the United States Court of Appeals reversed the District Court’s ruling.<sup>45</sup> The ACLU challenged the action of the panel, asking the full nine-member U.S. Court of Appeals to rehear the case and to reinstate the District Court’s ruling. A majority of five of the nine judges of the full United States Court of Appeals then issued opinions stating that the three-judge panel’s reversal was *wrong*, but that, rather than prolong the litigation, they would deny a rehearing and rely upon the Metropolitan Police Department, which by then had a new chief of police, voluntarily to change its mass demonstration policies and practices.<sup>46</sup>

39 *Id.* at 208.

40 *Id.* at 195.

41 *Id.* at 198, 204, 213.

42 *Id.* at 205-08, 214-15.

43 *Id.* at 215.

44 *Id.* at 218-19.

45 *Washington Mobilization Comm.*, 566 F.2d at 107 (D.C. Cir. 1977).

46 *Washington Mobilization Comm.*, *reh'g denied en banc*, 566 F.2d 124, 129 (D.C. Cir. 1977).

Four months later, in January 1978, D.C. police management issued two new mass arrest manuals which failed to correct, and which indeed perpetuated, the three principal police practices which had been condemned: (i) arrests without recording the facts essential to establish probable cause; (ii) the establishment of “police lines” and the authority to order demonstrators to disperse whenever there was a “potential” for “large scale unlawful activity” (instead of the constitutional standard of a clear and present danger); and (iii) needless and protracted booking procedures which assured unduly prolonged detention of those arrested. On September 10, 1979, John Vanderstar of the law firm of Covington & Burling, on behalf of the ACLU, wrote to the Corporation Counsel urging that the District require the Metropolitan Police Department to revise its manuals to correct these three practices.<sup>47</sup> The M.P.D. refused to do so.

The U.S. Court of Appeals’ reliance on M.P.D. management was a mistake. Covington and Burling, again acting as volunteer ACLU attorneys, succeeded in negotiating these reforms into the *Abbate* Settlement Agreement of January 24, 2005.<sup>48</sup> In addition, the District Court’s directives for corrective action in the *Washington Mobilization* case and the proposals in the Covington & Burling letter of September 10, 1979 provided useful input to the D.C. Council in preparing the First Amendment Rights and Police Standards Act of 2004, enacted on January 26, 2005. These reforms are discussed *infra* in Part IV of this article and included as an appendix.

### B. *The April 2000 World Trade Demonstrations*

In the current period of mass arrests, beginning with the 1,300 people arrested in the April 2000 anti-globalization demonstrations and culminating most recently in the September 27, 2002 arrests of 649 protesters,<sup>49</sup> more than 400 of them in Pershing Park, the Metropolitan Police Department once more employed the same illegal methods: unlawful dispersals, arrests, brutality, and prolonged and abusive detentions. There was one unprecedented and particularly egregious innovation: the raid on the demonstrators’ headquarters under the guise of enforcing the fire code.

#### 1. Unlawful Preemption and Shutting Down the Demonstrators’ Center

At the April 2000 demonstrations, Metropolitan Police Department management employed unconstitutional prior restraints in the form of “preemptive” actions:

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47 Letter from John Vanderstar of Covington & Burling to Corporation Counsel Judith Rodgers (Sept. 10, 1979) (on file with the author).

48 Settlement Agreement, *Abbate v. Ramsey*, 03-CV-767 (Jan. 24, 2005), available at [www.dcd.uscourts.gov/03-767.pdf](http://www.dcd.uscourts.gov/03-767.pdf).

49 Fernandez & Fahrenthold, *supra* note 15.

*News report:* "In a pre-emptive show of force, the police this morning shut down the headquarters of protesters . . ."50

*News report:* "All weekend long the police acted sternly and preemptively . . . making mass arrests of even peaceful marchers."51

*News report:* "[Mayor Anthony Williams] said . . . that the mass arrests of peaceful protesters last night were justified as a matter of prudence."52

It is a violation of the law for police to act preemptively because they anticipate that demonstrators will at some time later in the day or the weekend attempt to block traffic. Such action is a "prior restraint," long recognized by the courts as presumptively unconstitutional. Only when there is a "clear and present danger"—disorder unfolding at that very instant—may the government impose a prior restraint on free speech activity.<sup>53</sup> Yet prior restraint was the policy and purpose of the September 27th arrests—preventive action because demonstration sponsors had announced they would block traffic and "shut down the city."

The April 15th Saturday morning raid on the demonstrators' coordinating center was an unusually blatant and dangerous violation of civil liberties. Arriving with two fire marshals, D.C. police inspected the building, found violations of the fire code, and proceeded to force two hundred protesters and coordinators out of the building, confiscate their communications equipment and political paraphernalia, and seal the building.<sup>54</sup> Demonstration coordinators were not allowed back in the building until Monday night, April 17th, after the demonstrations were over.<sup>55</sup> Although police officials insisted to the media that the action was taken solely for the safety of the occupants and not to interfere with the planned demonstrations, it is obvious that the action was, as the *New York Times* accurately characterized it, "preemptive." There were also indications that D.C. undercover police had infiltrated the demonstrators' gatherings to gain access to the building and seek out the fire code violations that would be the

50 John Kifner, *Police Move Against Trade Demonstrators*, N.Y. TIMES, Apr. 16, 2000, at 6.

51 John Kifner & David Sanger, *Financial Leaders Meet As Protesters Clog Washington*, N.Y. TIMES, Apr. 17, 2000, at A-1.

52 *Id.* at A-8.

53 See, e.g., *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1996) (finding that San Francisco police should have recognized that preemptive prevention of a demonstration against the Rodney King verdict was unconstitutional), based upon, *inter alia*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (requiring for the banning of a speech in a public forum that it be (1) "directed to inciting or producing imminent lawless action" and (2) "likely to produce such action"); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 180-81 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement."); and *Kunz v. New York*, 340 US 290, 294 (1951) (holding that disorder in prior public meetings is not sufficient grounds because "[t]here are appropriate public remedies . . . if appellant's speeches should result in disorder or violence").

54 Kifner, *supra* note 50.

55 David Montgomery & Neely Tucker, *Protesters Looking to Los Angeles After Detour to D.C. Court*, WASH. POST, Apr. 19, 2000, at A-14.

pretext of the raid.<sup>56</sup> This unsavory spying is a regression to D.C. police participation in the FBI's unlawful COINTELPRO program of the 1960s and 1970s for which damages were awarded against the District.<sup>57</sup>

What was particularly troubling about this violation of the demonstration coordinators' Fourth and Fifth Amendment rights to freedom from unreasonable search and confiscation of property and First Amendment rights of speech and assembly is that it establishes a precedent for taking the same action against any organization the government chooses to target. The chances are extremely high that technical fire code violations can be found in any building in the city. Today it is the anti-globalization movement, but tomorrow it could be the *Washington Post*.

## 2. Preemptive Encirclement and Arrest

As illustrated in the following *New York Times* news report, the police tactics in April 2000 were precisely those for which they have now admitted error in the September 27, 2002 Pershing Park arrests:

By late evening . . . about 600 people had been arrested. They faced charges of parading without a permit and possibly obstructing traffic, although the march, under continuous police escort, caused little serious disruption on the city streets as the marchers mainly stayed on sidewalks. The group of demonstrators had been marching through downtown streets—progressively blocked off by the police during the day—when they found themselves blocked, then surrounded by city police officers on a block of 20th Street, between K Street and Pennsylvania Avenue . . . .

Although the marchers and their supporters on nearby sidewalks chanted for the police to let them go, Police Chief Ramsey said later that the crowd had refused police orders to disperse. Reporters who had observed the march had not heard any such order.<sup>58</sup>

In addition, on April 2000, as on September 27, 2002, M.P.D. management's excuse for arresting orderly demonstrators was the failure to obtain a parade permit and the failure to obey an order to disperse. But, as recognized by the District Court in the *Washington Mobilization* case,<sup>59</sup> since the purposes of the parade permit law are to avoid two groups competing for the same spot, and to provide sufficient notice of a march so there can be police on hand to divert traffic and maintain order, it is a misuse of that law for the police to escort orderly marchers and divert traffic, then to invoke the parade permit law as a pre-

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<sup>56</sup> *Id.*

<sup>57</sup> *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984).

<sup>58</sup> *Kifner*, *supra* note 50.

<sup>59</sup> *See supra* note 38 and accompanying text with quotation.

text for preventive arrests. Section 107(f) of the D.C. Council's First Amendment Rights and Police Standards Act of 2004, discussed *infra* in Part IV and appended to this article, is designed to prevent this type of abuse in the future.

### 3. Police Assaults

Despite the fact that the vast majority of demonstrators were non-violent, the police were quick to resort to violence, "responding forcefully to any . . . who defied them," using "pepper spray and what appeared to be a form of anti-riot gas or smoke grenades and charg[ing] into the protesters beating them with long sticks."<sup>60</sup> Police roughed up a plainly identified *Washington Post* reporter, then arrested her when she complained, struck an Associated Press radio reporter from behind, and assaulted non-resisting demonstrators.<sup>61</sup> In one incident, the police, instead of just removing protesters from the path of a bus, doused them with pepper spray before dragging them away.<sup>62</sup> Even the inadequate police directives of thirty years ago prohibited such use of chemical agents against "passive crowds or at the scene of a sit-down or arm-lock type of demonstration where the objective is simply to move a group or effect arrests."<sup>63</sup>

### 4. Unlawfully Prolonged and Abusive Detention

Despite the minor nature of the charges and despite the fact that there was no documentation to establish probable cause, arrestees were held for many hours on buses, without access to food, water, or counsel, and for many more hours before release. One report presented this perspective:

For [Thies] Broderson, who grew up in Germany, the police tactics—11 hours in handcuffs for a misdemeanor charge, no food, no water, no access to a lawyer—were uncomfortable reminders of his nation's past. "It was real police-state measures. Not the sort of thing one would expect in the capital of a democracy."<sup>64</sup>

The Police Department has shown itself incapable of self-correction. The District of Columbia Council had ample justification for the corrective measures it

<sup>60</sup> Kifner & Sanger, *supra* note 51.

<sup>61</sup> *Post Photographer Detained by Police*, WASH. POST, April 16, 2000, at A-28; Petula Dvorak & Michael E. Ruane, *Police, Protestors Claim Victory; Scattered Scuffles and Arrests Punctuate a Largely Peaceful Day*, WASH. POST, Apr. 17, 2000, at A-1.

<sup>62</sup> Joseph Kahn & John Kifner, *World Trade Officials Pledging To Step Up Effort Against AIDS*, N.Y. TIMES, Apr. 18, 2000, at A-1.

<sup>63</sup> Metropolitan Police Department General Order, Series 805, No. 1 (December 1, 1971), at 6, (quoted in *Washington Mobilization Committee*, 400 F. Supp. at 204).

<sup>64</sup> Dvorak & Ruane, *supra* note 61. On July 27, 2000, the Partnership for Civil Justice filed a class action suit on behalf of those arrested in the police actions of April 2000, seeking damages and injunctive relief. As of this writing, that suit, *Alliance for Global Justice v. District of Columbia*, No. 01-CV-0811 (D.D.C.), is still in litigation.

has taken in approving the First Amendment Rights and Police Standards Act of 2004, discussed *infra* in Part IV of this article.

### C. *The September 27, 2002 Demonstrations*

The terrorist attacks of September 11, 2001 imposed on Washington, D.C. a new tension and a heightened sense of insecurity that have affected all law enforcement agencies. The invasion and occupation of Iraq and other government actions following the terrorist attacks have initiated a new wave of protest demonstrations in Washington. As in the Vietnam War protests, law enforcement agencies have tended to overreact at the expense of First Amendment rights, for example, by attempting to clamp down on demonstrations in general, and at such key locations as the White House and the United States Capitol. Such efforts to restrict the right to assemble were rebuffed by the courts thirty years ago,<sup>65</sup> and once more are being challenged.<sup>66</sup>

There are no good reasons for such restrictions because there is no connection between terrorist attacks and demonstrations. There has never been a life-threatening attack emanating from a protest demonstration in Washington. Nor can protection against terrorism excuse preemptive, arbitrary, or harsh actions in handling demonstrations. As detailed in this report, Metropolitan Police Department management consistently resorted to these methods long before there was any threat of terrorist attacks.

Nothing could more tellingly demonstrate the need for correction of police policy and practice than the mishandling of the September 27, 2002 demonstrations. The M.P.D. has acknowledged that, on September 27, 2002, its officers herded over four hundred protesters into Pershing Park at 15th Street and Pennsylvania Avenue, N.W., then corralled and arrested them, as well as journalists, legal observers, and passersby caught in the police trap, including a Justice Department lawyer on his way to work.<sup>67</sup> Those arrested were treated punitively by being kept handcuffed on buses for many hours, then held at various police facilities for another twenty hours or more, while handcuffed ankle to opposite wrist.<sup>68</sup>

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65 See, e.g., *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (injunction against limits on White House area demonstrations); *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (three-judge court), *summarily affirmed*, 409 U.S. 972 (1972) (declaring unconstitutional a statute banning demonstrations on Capitol grounds).

66 See, e.g., *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002) (invalidating ban on demonstrations in front of Capitol steps).

67 See Leonnig, *supra* note 16; Fahrenthold & Nakamura, *Doubt Cast on Arrests of IMF Protestors*, WASH. POST, Feb. 27, 2003, at B-1 and B-8.

68 See Prof. Jonathan Turley, *Un-American Arrests*, WASH. POST, Oct. 6, 2002, at B-8; Editorial, *Mishandled Mass Arrests*, WASH. POST, Mar. 4, 2003, at A-22.

Mayor Anthony Williams and Chief of Police Charles H. Ramsey have attempted to rationalize these arrests by “defending” the rank and file police officers who carried out the Chief’s policies. They also argue that the police should not be second-guessed for tough decisions made in the urgency of street dynamics. Thus, according to Mayor Williams, “It’s important . . . to recognize that when [the police] are on the spot and making very, very difficult decisions, it’s important to back them up.”<sup>69</sup> And Chief Ramsey, in a memorandum to the Mayor recommended that no police official should be disciplined for the mishandling of the September 27th demonstrations because of “good faith” errors during “quickly-evolving events.”<sup>70</sup> But it is the Chief and the Mayor, not their officers, who are principally at fault, and they should not try to hide behind the rank and file.

Moreover, the Pershing Park arrests were not an on-the-spot police response. They were a pre-planned maneuver, as is evident from the precise way in which assembling demonstrators were diverted from Freedom Plaza into Pershing Park, and in which seventy-five bicycling demonstrators from Union Station were channeled by a heavy police escort into the park. The tactic was part of Chief Ramsey’s general policy of preemptive action, as were the prolonged detentions, designed to prevent those arrested from participating in other demonstration activity that weekend.

The simplicity of the September 27th demonstrations highlights the M.P.D.’s failure to master the art of maintaining order while obeying the law themselves. They were dealing with a relatively small demonstration of no more than 2,000,<sup>71</sup> unusually light traffic, no violence, virtually no disorder (two smashed windows and several overturned newspaper boxes), and a police presence at the scene that “overwhelmed” the demonstrators, enabling police “easily . . . to out-number protesters whenever they felt the need.”<sup>72</sup>

Chief Ramsey and his commanders have never had to deal with major disorders like the city-wide riots of 1968 or the massive civil disobedience of Mayweek 1971, in which the Judicial Conference and the courts admonished the police to do better. Even with the far smaller and less challenging demonstrations of April 2000, and the simple demonstrations of September 2002, M.P.D. management resorted to preemptive and unrecorded arrests, unnecessary club and gas attacks, and unlawfully harsh and prolonged detention.

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69 David A. Fahrenthold & David Nakamura, *supra* note 67.

70 Leonnig, *supra* note 16.

71 Fernandez & Fahrenthold, *supra* note 15.

72 *Id.*; Monte Reel, *A Day of Tightly Controlled Chaos*, WASH. POST, Sept. 28, 2002, at B-1, B4.

## 1. No Justification to Arrest or to Disperse

M.P.D. management's mishandling of the September 27th demonstrations was far more serious than the mere failure to give a dispersal order and to allow those in Pershing Park to comply. The protesters were not disorderly or impeding traffic, and there were more than enough police officers on hand to maintain order. There was no good reason for the police to order them to disperse, let alone arrest them. They were peaceably assembled in a public park in the nation's capital to petition for a redress of grievances, an exercise of First Amendment rights, in the words of the Supreme Court, "in their most pristine and classic form."<sup>73</sup>

In two other incidents that same day, the police also overreacted. One or two people threw rocks through the windows of a Citibank branch office at K Street and Vermont Avenue, N.W. But instead of apprehending only the perpetrators, the police arrested the entire group of 150 demonstrators. A second group of 42 demonstrators was arrested on Connecticut Avenue between K and L Streets, N.W., apparently because a few of them had been walking in the street rather than on the sidewalk. These mass arrests were unlawful, inasmuch as hardly any of the arrestees had violated the law. Group guilt and punishment are not the norm or the law in this country.<sup>74</sup>

The problem *can* become complicated where a handful of people in the midst of a crowd of hundreds begin throwing objects at the police. In that circumstance, it may not be feasible for the police to attempt to penetrate a large crowd to make arrests. Even then, the group should not be dispersed because of the actions of a few. The police can try to end the disorderly conduct by working with

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73 *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Following the settlement agreement in *Abbate v. Ramsey*, *supra* note 48, discussed in Part IV *infra*, the M.P.D. is still faced with two additional lawsuits arising from the Pershing Park arrests, *Barham v. Ramsey*, No. 02-CV-2283 (D.D.C.), a class action filed by the Partnership for Civil Justice, seeking both damages and injunctive relief, and *Chang v. U.S.*, No. 02-CV-2010 (D.D.C.) seeking damages for eight of those arrested. In *Abbate* and *Barham*, the district court ruled, 338 F. Supp. 2d 48 (D.D.C. Sept. 24, 2004), with regard to the portions of these suits claiming against Assistant Chief Newsham, Chief Ramsey, and Mayor Williams, in their personal capacities, that (i) Newsham does not have qualified immunity for his actions since "it is clear that the mass arrest in Pershing Park ran afoul of the First and Fourth Amendment constitutional protections" and that "no reasonable police officer could claim to be unaware" of this, *id.* at 58-59; (ii) Ramsey does not have qualified immunity with respect to the Pershing Park arrests since his "reliance on . . . Newsham's on-scene report does not excuse . . . approval of unlawful arrests, and does not rise to the level of investigation that . . . the situation warranted," *id.* at 61; (iii) the Mayor has qualified immunity since he "had reason to believe his subordinates would comply with federal law and MPD policies," *id.* at 65; and (iv) Ramsey and the Mayor are not personally liable with respect to the claims for excessive force or length of detention, *id.* at 66-70. Litigation with respect to *Barham* and *Chang* is continuing.

74 *Reel, supra*, note 72, at B-1. The ACLU of the National Capital Area has filed a class action lawsuit on behalf of these two groups of arrestees, *Burgin v. District of Columbia*, No. 03-CV-2005 (D.D.C.) (filed September 26, 2003). This suit has been certified as a class action and discovery is underway as of this writing.

the demonstrators' representatives on the scene, if any, or by bull-horn admonitions. Failing that, it is usually a better policy for the police to wait out limited object-throwing, under the protection of their riot gear and shields, rather than to disperse a large group because of the violence of a few. Only if a significant proportion of a group becomes disorderly are dispersal and arrests appropriate.

These mass arrests of nearly 200 additional people were another instance of the D.C. police overreacting in circumstances where they were well in control and could have managed the incident without arresting innocent demonstrators.

## 2. Unlawful Use of Arrest and Detention Just to Clear the Streets

The arrests of September 27, 2002 were also unlawful and lacking in good faith because no effort was made to record the name of each arresting officer who could testify to a particular individual's violation of the law. The only lawful basis for arrests is to charge and prosecute those arrested. Because it is virtually impossible to show probable cause without such a contemporaneous record,<sup>75</sup> and because there were no exigent circumstances preventing such recording of the approximately 400 arrests, it is clear that the police made such arrests with no intention of establishing probable cause.

The failure to create such records has an additional serious consequence: if there were some demonstrators who *did* break the law, they also could not be prosecuted because there was no way to establish their guilt. The District's taxpayers will ultimately have to pay them compensation for false arrest, even if their arrests were proper, because of the decision by M.P.D. management to dispense with lawful arrest procedures. This costly police abuse has now been banned by both the *Abbate* Settlement Agreement<sup>76</sup> and Consent Order,<sup>77</sup> and by section 110 of the First Amendment Rights and Police Standards Act of 2004, both of which are discussed in Part IV *infra*.

## 3. Police Assaults

D.C. police were also accused of unjustifiably beating and pepper spraying protesters and onlookers,<sup>78</sup> and an investigation of police violence was demanded by a law professor.<sup>79</sup> We know of no instance in which M.P.D. management has formally held an officer accountable for an unwarranted assault in a demonstration.

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<sup>75</sup> As noted in the text accompanying footnote 33, in *Sullivan*, 478 F.2d at 967, the court held that arrests without contemporaneous field arrest forms executed by the actual arresting officer were "presumptively invalid," a presumption rebuttable only by the Government showing probable cause in a particular case.

<sup>76</sup> *Supra* note 48.

<sup>77</sup> *Supra* note 2.

<sup>78</sup> *Fernandez & Fahrenthold*, *supra* note 15.

<sup>79</sup> Prof. Jonathan Turley, *supra* note 68.

#### 4. Unlawfully Prolonged and Abusive Detention

For such minor charges as parading without a permit and failure to obey an officer—even if the charges had been documented, which they weren't—those arrested should have been promptly released on citation. Instead they were held for periods exceeding twenty-four hours. But these arrests, unlawful at their inception, were never intended to comply with law. The detentions were prolonged solely for the purpose of removing people from the streets and keeping them from participating in demonstrations. Chief Ramsey told *The Washington Post*, “These people that are apprehended are going to miss several protests because they’ll be behind bars.”<sup>80</sup> Watching the arrests of the demonstrators in Pershing Park, the Chief attempted to justify his preventive action by saying that if people were allowed to leave the police encirclement, “they leave here and go someplace else and do something else.”<sup>81</sup>

The conditions in which people were held were abusive and unlawful. The punitive intention of M.P.D. management is exposed by the decision to cuff those detained, ankle to opposite wrist, for many long hours. This particular violation stands out for its cruelty. The First Amendment Rights and Police Standards Act of 2004, discussed *infra* in Part IV and appended to this article, seeks in sections 111, 112, and 113 to remedy the chronic abuses of prolonged and oppressive detentions, as does the *Abbate* Consent Order.

## II. A FAILURE OF LEADERSHIP

### A. *Misconception of Mission*

The police wrongdoings of September 27, 2002, like those of April 2000, are failures of leadership. M.P.D. management misconceive their mission as keeping the traffic moving at all costs. That is not the mission. The police have their powers for the purpose of upholding the law, and the highest law they are sworn to uphold is the United States Constitution. When M.P.D. management direct and permit officers to act outside the law, they impose upon their officers the attributes of a uniformed and armed street gang, diminishing them and undermining the rule of law.

It is clear that M.P.D. management were deeply affected by the disorders that attended some—but not all—of the anti-globalization demonstrations in Seattle from November 30 to December 2, 1999. As a result, they became determined not to permit another “Seattle” in Washington, D.C. That, in itself, is a legitimate goal. However, resorting to lawless police measures to prevent another Seattle was a drastic mistake. Seattle was not a catastrophe that warranted the suspen-

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<sup>80</sup> Monte Reel & Manny Fernandez, *Police, Protesters In D.C. Prepare For Day of Disruption*, WASH. POST, Sept. 27, 2002, at B-1.

<sup>81</sup> Reel, *supra* note 72, at B-1, B-4.

sion of the Constitution in the nation's capital. Moreover, the First Amendment aspects of even the Seattle episode had major beneficial repercussions, raising American and international consciousness about world trade issues and changing the political and economic agendas of the world trade organizations. Demonstrators should be stopped from blocking traffic and building entrances if possible. Compliance with constitutional rights and the law may require the police to take more time and care in their actions, so that there may be some temporary blockages. Such disruptions, if any, are not as socially destructive as the damage done to the Constitution and to the rule of law by unlawful police actions.

The challenge posed by large groups assembling in Washington, D.C., especially when civil disobedience is likely to occur, is great. But, as the United States District Court stated in 1975 in the *Washington Mobilization* case, "the police may not simply claim exasperation at the enormity of the task and defer constitutional precepts to convenience."<sup>82</sup>

## B. *Misdirection, Misrepresentation and Cover-Up*

### 1. Misdirection

The cop on the street in a demonstration has a tremendously challenging job. He or she must be ready to take action to suppress disorder and to subdue violence. Most D.C. police officers are up to these tasks. They have the quickness of mind and reaction, the physical stamina and strength, and the resolution and courage to deal with the challenges. They also have the toughness of mind, if called upon, to handle the hardest part of the job, the part on which they most need training, encouragement, and support: the ability not to overreact, not to have hair-trigger nerves, and to remain cool, disciplined, and restrained in the face of stress and provocation. But D.C. police officers are not called upon to utilize these skills and, indeed, efforts to do so are undermined by M.P.D. supervisors.

Police management set the tone and the atmosphere, and when the Chief of Police displays a willingness to disregard the law, to confront and arrest peaceful protesters, to misrepresent and cover up mistakes and violations of proper procedures, it has a powerfully corrupting effect on the entire police force. The Mayor's support of such actions by the Police Chief further undermines the professionalism of the force.

Chief Ramsey, in preparation for problematic demonstrations, bought into the rhetoric of some of the demonstration sponsors by emphasizing that some were threatening to "shut down the city" or to "take over the city." The Chief at first defended the September 27th Pershing Park arrests on the grounds that "[t]hey

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82 *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 217 (D.D.C. 1975).

can't come here and say they're going to shut down the city, and then turn around and get angry when they're not allowed to.”<sup>83</sup>

It is neither disciplined nor strategic to take such rhetoric at face value and to treat the demonstrations, as did the Chief, as a confrontation and a contest of wills. Rather, mass demonstrations must be dealt with as what they actually are—a complex dynamic involving many different groups engaged in a wide variety of actions which require specific, measured, and discerning responses to specific behavior. But the Chief's message to the force was: it's us against them. This in turn led to an aggressive and militaristic presentation to the demonstrators, regardless of their demeanor, as in this description of D.C. police at the April 2000 demonstrations: “Lines of police officers in riot helmets stamped their feet rhythmically and pumped their nightsticks in front of their chests as they moved in on the protesters.”<sup>84</sup>

This perspective also explains the Chief's satisfaction soon after the unlawful Pershing Park arrests when he said, “a lot of the wind was taken out of their sails Friday.”<sup>85</sup> This undisciplined and unwise mind-set is the cause of the needless arrests and assaults on non-lawbreaking demonstrators, and the harsh and prolonged post-arrest detention that have characterized M.P.D. management's actions.

Ironically, these unlawful methods did not even yield the benefit of keeping the city fully functioning. Police barricaded and closed off central downtown areas, got the Transit Authority to close several central subway stops, and advised federal employees and motorists to stay off the streets. As a result, in April 2000 and September 2002, most federal employees did not come into work on demonstration days, traffic was remarkably light even in rush hours, many downtown businesses closed, and “[p]arts of the downtown corridor appeared largely abandoned by the usual crowds, given over to police and chanting protesters.”<sup>86</sup> In a sense, the Metropolitan Police Department itself became the instrument of those demonstration sponsors who called for “shutting down” the city.

The message which the leadership communicated to the men and women of the police force should have been something like: *Some demonstration sponsors are calling for the blocking of traffic and buildings—our job is to stop them from doing that and we will. But at the same time many demonstrators will be orderly and it is critical that we fully protect their right to assemble and protest. We must not let the need to deal with violators cause us to act against innocents in the vicinity. That is the real challenge to us this weekend.*

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83 *Did D.C. Police Go Too Far?*, WASH. POST, Oct. 1, 2002, at B-1, B-4.

84 Kifner, *supra* note 50.

85 Manny Fernandez & Monte Reel, *Against War, A Peaceful March*, WASH. POST, Sept. 30, 2002, at B-1, B-5.

86 Fernandez & Farenthold, *supra* note 15.

However, for problematic demonstrations, M.P.D. supervisors have habitually provided the force with poor training, poor supervision, and poor attitude. In addition, police officials personally engaging in public misconduct have provided bad role models for the rank and file. For example, in April 2000, Assistant Chief Terrance W. Gainer on one occasion directed his officers to point their gas launchers directly at demonstrators.<sup>87</sup> On other occasions, when police officers confronting protesters removed their badges in violation of department policy—a form of cover-up to escape accountability for wrongdoings about to ensue<sup>88</sup>—Assistant Chief Gainer and Chief Ramsey condoned it.<sup>89</sup>

## 2. Misrepresentation and Cover-Up

Another form of cover-up was the misrepresentations of police officials when they raided and closed down the demonstrators' communications center on April 15, 2000, seizing their computers, political props, and handouts. Chief Ramsey and Assistant Chief Gainer told the press it was solely because of fire hazards and a concern for the safety of those in the center.<sup>90</sup> This was no less a lie just because it was an obvious lie.

Nor is Chief Ramsey embarrassed by resorting to fanciful excuses for disregarding criminal behavior by his officers. When asked about police clubbing non-violent demonstrators, the Chief responded that it might have been done by demonstrators dressed up as officers.<sup>91</sup>

More recently, Chief Ramsey repeatedly insisted that an order to disperse was given to the demonstrators arrested in Pershing Park on September 27, 2002, even though he had secretly acknowledged in a March 13, 2003 memorandum to the Mayor that no such order had been given.<sup>92</sup> The Mayor's aides told reporters that the Metropolitan Police Department's Internal Affairs Report about the Pershing Park arrests could not be released because it contained confidential information concerning the discipline of certain police officials. The report, in fact, contained nothing regarding discipline; so this, too, was a lie.<sup>93</sup>

It is rare for the Department to admit error, and left to its own devices it is unlikely that this internal investigation and report would ever have come into being, particularly because the preemptive arrests of the Pershing Park protesters were carried out pursuant to a policy and practice that Chief Ramsey had imple-

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87 Dvorak & Ruane, *supra* note 61, at A-1, A-6.

88 See *Sullivan*, 478 F.2d at 967.

89 Dvorak & Ruane, *supra* note 61, at A-6; Steve Twomey, *Businesses Lock Up, Batten Down For Protests*, WASH. POST, Apr. 15, 2000, at A-12; David Montgomery, *Protests End With Voluntary Arrests*, WASH. POST, Apr. 18, 2000, at A-1, A-17.

90 Kifner, *supra* note 50.

91 David Montgomery, *IMF Meets During Standoff*, WASH. POST, Apr. 17, 2000, at A-1, A-7.

92 Leonnig, *supra* note 16.

93 *Id.*

mented in the April 2000 arrests. It was only because of the persistent demands of D.C. Council Judiciary Committee Chair Kathy Patterson upon the Mayor that the Department ultimately was forced to conduct a real investigation and prepare a report. And even then, the Police Department's admission that the Pershing Park arrests were unlawful would never have been made public, and Chief Ramsey's misrepresentation would not have been exposed, if a federal judge had not ordered the report released.<sup>94</sup>

### 3. Lack of Accountability

Metropolitan Police Department management have historically been unwilling to hold police officers accountable for wrongful conduct in demonstrations, no matter how plain the wrongdoing or how severe the consequences. For example, the only discipline that ensued from the Pershing Park arrests was a slap on the wrist in the form of a "minor reprimand" to Assistant Chief Peter Newsham who had ordered the arrests without justification and in violation of the First Amendment, the laws against wrongful arrest, and police department procedures.<sup>95</sup> He caused over 400 people to be arrested, handcuffed, separated from their property, and confined under harsh conditions for periods exceeding twenty-four hours, and his only discipline was a reprimand. Discipline should be more commensurate with the magnitude of the wrong committed and the suffering caused. Even the minor reprimand would not have occurred if the Mayor had not overruled Chief Ramsey, who recommended that there be no discipline at all.<sup>96</sup> On the other hand, it might have been unfair to really discipline Assistant Chief Newsham, since it appears that he was following Chief Ramsey's orders and was taking the blame to cover for the Chief.

Apart from Mr. Newsham, we know of no police officer being formally disciplined for any of the incidents in the demonstrations of April 2000 and September 2002. This is not surprising in light of Chief Ramsey's public clash with the Mayor on the subject. Following the April 2000 demonstrations, the Mayor announced: "The chief has stated . . . that all complaints are going to be investigated immediately and taken seriously . . . I think this police department has shown the ability to investigate itself and police itself well."<sup>97</sup> Later that day, when told what the Mayor had said, Chief Ramsey responded: "Unless there is overwhelming evidence that an officer physically abused someone, I intend to give them all medals, not discipline, because they did a good job."<sup>98</sup>

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94 *Id.*

95 *Id.*

96 *Id.*

97 Kathryn Sinzinger, *Patterson, Graham Seek MPD Inquiry*, COMMON DENOMINATOR, Apr. 24, 2000, at 1, 8.

98 *Id.*

It is extraordinary that a police chief would (i) prejudge complaints before they are considered, (ii) exclude consideration of all complaints other than those of physical abuse, and (iii) impose an unlawfully difficult standard for complainants to meet, namely “overwhelming evidence.” This unwillingness to hold officers accountable is longstanding. In the *Washington Mobilization* case in which the United States District Court found numerous instances of intentionally unlawful arrests and assaults on demonstrators in a series of demonstrations over a two-year period, the Court found that “not a single formal disciplinary action was taken against any officer involved in the demonstrations considered in this case.”<sup>99</sup>

More than thirty years ago, during the Mayweek 1971 demonstrations, the *Washington Post* published a front page photograph of Deputy Chief Theodore Zanders, then Commander of the Metropolitan Police Department’s Civil Disturbance Unit, in direct violation of M.P.D. directives, spraying chemical Mace at a distance of less than three feet on a group of demonstrators blocking an intersection. The District Judge in the *Washington Mobilization* case stated: “The Court feels compelled to comment that if the Commander of the CDU . . . conducts himself in a manner contrary to . . . [Police Department] policies, then it is not unlikely that this . . . will also be manifested among his subordinates.”<sup>100</sup>

That is precisely what we are seeing today. M.P.D. management should not be allowed to escape their delinquencies by attempting to shift the focus to their police officers. It is not the officers who are to blame. It is the Chief who is responsible for the misdirection and lack of accountability which encourage excessive actions. As envisaged in the American system, in which a tripartite government structure is designed to provide checks and balances, the M.P.D.’s abdication of its responsibilities has resulted in the judicial and legislative interventions described in Part IV, *infra*.

### III. THE UNDERMINING ROLE OF AN UNCRITICAL PRESS

“How did it come to this?” asked the *Washington Post* in its March 4, 2003 editorial condemning the police for the September 27, 2002 Pershing Park arrests.<sup>101</sup> The answer to that question goes back thirty years, which is when D.C. Police management began using and the *Post* began praising the methods it now condemns. Even when the *Post* finally recognized that there had been widespread police lawlessness in Mayweek 1971, as described in Section I.A of this article,

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99 *Washington Mobilization Committee*, 400 F. Supp.186, 205 (D.D.C. 1975).

100 *Id.* at 204.

101 Editorial, *Mishandled Mass Arrests*, *supra* note 68.

the *Post* rationalized, as the Mayor does now, that it was “not prepared to second-guess Chief Wilson on the mass arrest tactics he adopted.”<sup>102</sup>

Still today, as the *Post* condemns the Pershing Park arrests as being “so over the line that the city ultimately declined to prosecute any of those arrested, because it lacked probable cause,”<sup>103</sup> it perpetuates a myth of its own creation:

For many years D.C. police officers have enjoyed a well-deserved reputation for their deft handling of large public demonstrations. Thousands of people have managed to mass in the city, petition their government or protest public policy, and then depart town without leaving lawsuits behind.<sup>104</sup>

The fact is that the M.P.D. has rarely handled a major problematic demonstration well. That was so in 1971 and it is still the case today. The *Post's* reference to “deft handling” of demonstrations is to the mostly non-problematic demonstrations that occupied the three decades between the end of the Vietnam War in the mid-1970s and the beginning of the anti-globalization demonstrations in the late-1990s. Most demonstrations in those years presented no great challenge to the police. When D.C. police were again challenged by problematic demonstrations in April 2000, as described in Section I.B of this report, they again engaged in the same unlawful methods as in the 1960s and 1970s, and again left a trail of lawsuits behind.

The *Post* at first turned a blind eye even to D.C. police officers' disregard of the law in the Pershing Park arrests that the *Post* now condemns. Sometimes this took the form of describing the “over the line” police tactics in jovial and approving tones, as in a story about the seventy-five bicycling demonstrators whom the police channeled from Union Station into Pershing Park to be unlawfully trapped, arrested, and detained. The story, entitled “Taken for a Ride,” and subtitled “Police Turn the Bike Strike into a Tour de Force,” says of the gathering demonstrators, “They never saw it coming.” It describes the police waiting to escort the unsuspecting demonstrators into the Pershing Park trap as follows:

[Y]ou could tell that the D.C. police bikers thought this whole scene was a hoot. They straddled their two-wheelers across the street, watching, smiling sometimes. They could afford to be patient. The route may have been “secret,” but the police had a pretty good idea of how this adventure was going to end anyway. Everyone else was in for a surprise.<sup>105</sup>

These tactics—encircling, trapping, and arresting orderly demonstrators and then preventively holding them for days under harsh conditions—dated back to

102 Editorial, *Establishing Justice and Insuring Tranquility*, WASH. POST, May 23, 1971, at B-6. The failures of the *Washington Post's* news coverage and editorials concerning the Mayweek 1971 mass arrests are discussed in detail in ACLU, *supra* note 26, at 54-57.

103 Editorial, *It Takes A Judge*, WASH. POST, Sept. 13, 2003, at A-20.

104 Editorial, *Mishandled Mass Arrests*, *supra* note 68.

105 David Montgomery, *Taken for a Ride*, WASH. POST, Sept. 28, 2002, at C-1, C-4.

the 1970s, when they were declared unlawful. But at the time of the Pershing Park arrests in September 2002—the arrests which, by March 2003, the *Post* found to be “over the line”—the *Post* was amused at the clever trick the police were playing on the demonstrators.

The question is why the *Post* waited over five months to condemn these tactics, and did so only after an internal police report acknowledged that they were unlawful. And why, when the same unlawful measures were used against the April 2000 anti-globalization demonstrators, did the *Post* praise them in an editorial entitled “Hail To The Chief and His Cops.”<sup>106</sup>

The reporting and editorializing of the rest of the press and of the TV networks were just as far off the mark. The *New York Times*, for example, praised the D.C. police in April 2000 for the “preemptive” and “wholesale arrests simply to clear the streets,” apparently oblivious to the fact that “preemptive” is synonymous with “prior restraints,” which violate the First Amendment.<sup>107</sup> But it is appropriate to concentrate on the *Washington Post* because, along with the *New York Times*, it has a tremendous effect, both locally and nationally, in setting the tone of the news.<sup>108</sup> Moreover, there is no city in America where a newspaper has so fulfilled its role as the Fourth Estate, the ex-officio branch of our political mechanisms which monitors, exposes, and forces reform when the government fails. The *Washington Post* has probably been involved in every major reform that has taken place in this city in the last fifty years. But, until the recent Pershing Park revelations, the *Post* has rarely taken a position against unlawful police methods during mass demonstrations. This is a major failure of the *Washington Post* in serving the people of the District of Columbia.

The harm done by media praise for unlawful police actions is profound. In any political system there are natural tensions. It is difficult for a police chief to inculcate in his or her police force the discipline necessary to operate professionally in a mass demonstration when some demonstrators are engaging in disruptive or confrontational actions. It is even harder for a mayor to put pressure on a police chief who is unwilling to do so. When the newspaper that is the leading force in shaping public and political opinion praises the police for keeping the traffic flowing, even if it means operating outside of the law, it places a nearly insurmountable burden on any more disciplined approach.

The media should do better. They should apply the same critical journalistic and editorial vigor and scrupulousness to illegal police actions in demonstrations as they apply to money and sex scandals.

Fortunately, the *Washington Post* appears to have had a change of heart. On December 17, 2003, on the opening day of public hearings by the D.C. Council’s

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106 Editorial, *Hail to the Chief and His Cops*, WASH. POST, Apr. 19, 2000, at A-26.

107 Editorial, *The Protesters and the Bank*, N.Y. TIMES, Apr. 18, 2000, at A-24.

108 See ERIC ALTERMAN, WHAT LIBERAL MEDIA?, at 106 (2003).

Committee on the Judiciary investigating police practices in recent demonstrations, the *Post* editorially encouraged the Committee's investigation of police abuses in demonstrations:

The committee is expected to probe allegations of the use of subterfuge and preemptive actions taken by the D.C. police to prevent people from assembling . . . to plan protests at the International Monetary Fund and the World Bank meetings in April 2000 [and] . . . the mass arrests and detention of people assembled in Pershing Park on September 27, 2002 [and] . . . alleged excess use of force by police in an April 2003 demonstration . . . District residents are likely to gain a sense of how far their department has fallen.<sup>109</sup>

The *Post* also called upon the Mayor to sign the Council's resulting enactment of the First Amendment Rights and Police Standards Act of 2004, in its editorial of January 26, 2005.<sup>110</sup> It is to be hoped that the *Post's* new sensitivity to the constitutional rights of demonstrators is permanent.

As the late James Heller, then-Chairman of the local ACLU, wrote in a 1971 letter to the *Washington Post*, "When all three branches of government either cooperate in or bless wholesale official illegality, the Fourth Estate should be fulfilling its role as vigorous critic . . . ."<sup>111</sup>

#### IV. LEGISLATIVE AND JUDICIAL REFORM: THE FIRST AMENDMENT RIGHTS AND POLICE STANDARDS ACT OF 2004 AND THE *ABBATE* CONSENT ORDER

In January 2005, the District of Columbia, rather than risking a trial of its September 2002 abuses in Pershing Park, entered a Settlement Agreement backed by a Consent Order in the ACLU lawsuit, *Abbate v. Ramsey*.<sup>112</sup> As Judge Emmet Sullivan stated in approving and ordering the settlement, it is "truly historic."<sup>113</sup> In addition to a \$425,000 damage award, estimated to yield about \$50,000 per plaintiff, exclusive of attorneys fees and costs,<sup>114</sup> each plaintiff will receive a letter of apology from the Chief of Police, stating, among other things, that "Our investigation shows that you should not have been arrested or detained . . . and that "we sincerely regret any hardships that our mistakes . . . may have caused you."<sup>115</sup> Most importantly, the Consent Order, in supervising enforcement of "Objectives" (a) through (k) following paragraph 13 of the Settlement

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109 Editorial, *Spotlight on the Cops*, WASH. POST, Dec. 17, 2003, at A-42.

110 Editorial, *The Price of Bad Policing*, WASH. POST, Jan. 26, 2005, at A-20.

111 Letter reprinted in ACLU, *supra* note 26, at 57.

112 *Supra* notes 2 and 48.

113 Carol D. Leonnig & Del Quintin Wilber, *D.C. Settles With Mass Arrest Victims*, WASH. POST, Jan. 25, 2005, at A-1, A-5.

114 *Id.*

115 Settlement Agreement, *supra* note 48, paragraph 10.

Agreement, imposes a series of restrictions on police actions in dealing with demonstrations, described *infra*.<sup>116</sup>

Further, the M.P.D. *must* “perform and demonstrate its performance” in complying with these restrictions “through objectively verifiable means and methods” which are spelled out in the Settlement Agreement (Paragraph 13). Specific procedures are established for the court to receive and adjudicate complaints of non-compliance. The Objectives must be written into the M.P.D.’s Mass Demonstration Handbook (Paragraph 12 of the Settlement Agreement), and changes cannot be made without advance notification of, and if there is objection, negotiation with the ACLU, the National Lawyers Guild, and the plaintiffs (Paragraph 15).

The order remains in effect for three years after which it is null and void (Consent Order, next to last paragraph).

The other and more profound action was the District of Columbia’s enactment of the First Amendment Rights and Police Standards Act of 2004. The Act resulted from public hearings, on December 17 and 18, 2003, by the Council’s Committee on the Judiciary, under the leadership of Chairperson Kathy Patterson. The Committee received the data in this article and testimony from numerous critics of the M.P.D. Police officials defended their actions. While admitting that some mistakes were made, Chief Ramsey said the police did nothing unlawful and denied trying to limit free speech rights of demonstrators.<sup>117</sup>

Following those hearings, on July 13, 2004, Bill 15-968, the First Amendment Rights and Police Standards Act of 2004, was introduced by eight of the thirteen members of the Council, and, following further hearings, was approved by the Council on December 21, 2004 by a twelve to one vote.<sup>118</sup>

Under the District of Columbia’s limited home rule, no D.C. enactment can become law until it has survived a thirty-day congressional review period. After a bill has been passed by the Council and signed, or not vetoed, by the Mayor, it becomes an act. Then it goes to Congress for review. If Congress takes no action within thirty days, the act becomes law. If Congress disapproves the act, it does so by passing a joint resolution by both houses disapproving the act and then the joint resolution goes to the President to be signed.<sup>119</sup>

On January 26, 2005, the veto deadline, Mayor Anthony Williams, announced that he would neither veto nor sign Bill 15-968. This means that the Bill becomes

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116 *Id.* paragraphs 11-13.

117 *See, e.g.,* Arthur Santana, *At Hearing D.C. Police Faulted on Mass Arrests*, WASH. POST, Dec. 18, 2003, at B-3; Arthur Santana, *Ramsey Defends Surveilling Protestors*, WASH. POST, Dec. 19, 2003, at B-5; Matthew Cella, *Chief Denies Violating Protest-Speech Rights*, WASH. TIMES, Dec. 19, 2003, at B-1.

118 The legislative history and the original and final text of Bill 15-968 are available at [www.dccouncil.washington.dc.us](http://www.dccouncil.washington.dc.us).

119 LEAH F. CHANIN, PAMELA J. GREGORY, SARA K. WIAANT, *LEGAL RESEARCH IN THE DISTRICT OF COLUMBIA, MARYLAND AND VIRGINIA*, app. 1, at 1-61 (2d ed. 2000).

an Act, and will become law if it survives the thirty-day congressional review period. The Mayor said that Bill 15-968 goes too far and is superfluous in light of the consent order issued two days earlier in the *Abbate* case, which the Mayor said provides the only reforms that are necessary.<sup>120</sup> The Mayor's failure to act may have reflected the 12-1 vote by which the Council approved the Act, making an override of a veto likely. He may have also been hoping that the Act would not survive the thirty-day congressional review period.

A Congressional veto would be a drastic mistake for a number of practical reasons even beyond the protection of First Amendment rights in the nation's capital. First and foremost, police abuses are too expensive. Those which the new Act is designed to remedy cost the District of Columbia over \$5 million in the 1970s.<sup>121</sup> The suits now pending for the police actions of the last few years, which have already cost the District \$425,000 in the *Abbate* settlement covering only seven named plaintiffs, promise to increase District liability far above the five million dollar mark.<sup>122</sup> Hopefully, Congress will be more restrained than to interfere with the District of Columbia's interest in democratic self-rule. If Congress does intervene, it should be prepared to assume the costs of liability in all demonstration cases.

Whether or not Congress allows the Act to become law,<sup>123</sup> it will still serve as model legislation for other cities. The record documented in this article and in public hearings demonstrates that the Mayor is wrong in saying that the Act goes too far or that the *Abbate* consent order is sufficient. The consent order remains in effect for only three years, while the reforms in the Act would remain in effect unless amended or repealed. In addition, the *Abbate* order deals with only seven of the sixteen major reforms in the Act, and in some cases provides only suggestive rather than mandatory restraints on consistently abusive police actions. The sixteen major reforms in the Act are as follows, with those addressed in the *Abbate* order marked with an asterisk. The entire text of the Act is reprinted as an appendix to this article.

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120 Associated Press, *Williams Opposes Protester Bill*, Jan. 26, 2005, available at <http://www.wjla.com/news/stories/0105/202883.html>.

121 The class action in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), alone cost the District of Columbia \$3 million.

122 Plainly, straight extrapolation from the *Abbate* settlement does not necessarily apply, but if the *Abbate* settlement of a net of \$50,000.00 per plaintiff were a measure, the *Barham* class action for 400 individuals arrested in Pershing Park (*supra* note 73) could by itself cost the District in the range of \$20 million.

123 Even if the Act survives the thirty day review period, it is still vulnerable to congressional override. Congress generally rejects DC legislation, not by exercising its thirty-day veto power, but by attaching riders to appropriations bills for D.C. funding. For example, riders on appropriations bills have kept a medical marijuana initiative approved by D.C. voters from taking effect, and have prevented similar initiative efforts from appearing on the ballot. See, e.g., Arthur Santana, *Court Blocks D.C. Vote on Medical Use of Marijuana*, WASH. POST, Sept. 20, 2002 at A-4.

1. The Act begins with a statement that it is the declared policy of the District of Columbia that persons and groups have a First Amendment right to conduct demonstrations “near the object of their protest.” The Act requires the MPD “to recognize and implement” this policy (sections 103, 104(a), 107(a)).

2. The Act substitutes for the existing permit system a notice system under which demonstrators need not seek permission to demonstrate, but merely have to provide advance notice. The M.P.D. may then impose reasonable time, place and manner restrictions by issuing an “Approval of Plan” for the demonstration. The demonstrators may negotiate with the M.P.D. or appeal to the Mayor regarding any provisions in the plan to which they object (sections 104(b), 105, 106).

3. No notice is required of a group that plans to remain on sidewalks and obey traffic lights, or of a group of less than 50 persons (section 105(d)).

\*4. The police may not disperse or arrest demonstrators solely for failing to give advance notice, but shall accommodate such demonstrations if possible (section 107(f)(1)-(2)). *Abbate* does the same (*Abbate* Settlement Agreement, Objective (b)).

\*5. The police may not disperse a demonstration unless a “significant number or percentage of the assembly participants” violate “or are about to” violate the law; otherwise only those in the group who are actually violating the law may be dispersed or arrested. The clear and present danger standard is articulated as “an imminent likelihood of violence endangering persons or threatening to cause significant property damage” (sections 104(b)(2)(C), 107). *Abbate* urges but does not require such an approach (Objective (b)).

\*6. Dispersals must be preceded by clear and audible notices with adequate amplification, and an opportunity to leave (section 107(e)). *Abbate* Objective (b).

7. Police may not encircle demonstrators unless there is “probable cause” for and an intention to make specific arrests of a “significant number or percentage” of the participants, or to provide for the safety of the demonstrators (section 108).

\*8. Police officers must wear identifying badges and name plates, and, while policing demonstrations, must wear “enhanced” identification “even if wearing riot gear” (sections 109, 321). *Abbate* Objective (c).

\*9. The police must contemporaneously record every arrest, and the Chief of Police must account in writing for any failure to do so (section 110). *Abbate* Objective (a).

\*10. Restraints, including handcuffs, may be placed on those arrested only if necessary, and not in any manner that causes pain (section 111). *Abbate* Objectives (i), (j), and (k).

\*11. The M.P.D. must have adequate staff and processing systems to “ensure” that persons arrested in a demonstration are promptly processed for release or

presentation in court; all such persons must be given a written notice of their rights; M.P.D. must provide food to any person not released within a reasonable time of arrest (sections 112, 113). *Abbate* Objectives (e), (f),(g), and (h).

12. The media shall be allowed maximum access to police actions during demonstrations (section 114).

13. Riot-gearred police may not be deployed unless there is “danger of violence” (section 116(a)).

14. Police may not use “large scale canisters of chemical irritant” against demonstrators unless such use is “necessary to protect officers or others from physical harm or to arrest actively resisting subjects” and the official authorizing such use must file a written report of justification; use of chemicals to disperse demonstrators is only permitted when “participants or others are committing acts of public disobedience endangering public safety or security” (section 116(b)).

15. The M.P.D. may investigate demonstration planners and participants only if there is “reasonable suspicion” of criminal activity, defined as “a belief based on articulable facts” and not “a mere hunch,” nor based on “lawful political affiliation or activity.” Restrictions are also placed on “preliminary inquiries” designed to determine whether there are grounds for an “investigation,” and the permissible techniques of investigations and inquiries are limited. Written authorizations and accountability are required throughout the system (sections 202(11), 205-212).

16. The requirements of the Act may be relied upon in lawsuits against the police (sections 117, 213).

### CONCLUSION

The misconception of mission and failure of leadership which for almost forty years have characterized the M.P.D.’s mishandling of mass demonstrations are not confined to the DC police but may also be found in other big cities’ police practices. These problems have intensified among police departments across the nation as they have become increasingly militarized.<sup>124</sup> The trend of the nation’s police towards increasingly militarized aggression against demonstrators has been spurred by three factors: (1) An overreaction to an unprepared Seattle police force being overwhelmed by civilly disobedient anti-world trade protesters in No-

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<sup>124</sup> See, e.g., *THE MIAMI MODEL* (a film of the Miami police, resembling a military battalion brutalizing peaceful demonstrators in November 2003 anti-world trade demonstrations), available at <http://www.fliff.com/2004/listings/miamimodel.htm>. See also James Bovard, *Time to Curb SWAT Rampages*, FUTURE OF FREEDOM FOUND. COMMENTARIES (Sept. 1999), available at <http://www.fff.org/comment/ed0999j.asp>; Brian Rappert, *A Framework for the Assessment of Non-Lethal Weapons*, 20 MED., CONFLICT & SURVIVAL 35, 54(2004) available at <http://www.google.com/search?q=cache:UIjYBF6N7UcJ:www.ex.ac.uk>. Indeed, it appears that the use of armored riot squads against peaceful demonstrators may even be spreading to small demonstrations in small towns. See Beth Quinn, *ACLU Decries Use of Force by Police at Bush Event*, OREGONIAN, Jan. 7, 2005, at E-5.

vember 1999; (2) A sense of greater license in the name of anti-terrorism as a result of the September 11, 2001 attacks; and (3) An escalation in marketing by the police armaments industry.<sup>125</sup>

For these reasons, the First Amendment Rights and Police Standards Act of 2004 is a major and timely legislative achievement that should serve as a model bill for other cities in reining in preemptive and violent police abuses of demonstrators.

Unlike the Chinese police in Tiananmen Square or the police in Moscow or Istanbul, the top priorities of the Metropolitan Police Department of the District of Columbia and of police forces throughout the country should not be preventing temporary blockages of building entrances and traffic. The top priorities should include upholding the rule of law and the Constitution to which they have sworn allegiance. As the United States Supreme Court declared in 1937:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly . . . . Therein lies the security of the republic, the very foundation of constitutional government.<sup>126</sup>

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125 See, e.g., Eric Lipton, *Security Nominee got Rich on Tasers: Kerik's Relationship With Stun-Gun Firm Earned Him Millions*, S.F. CHRON., Dec. 10, 2004, at A-8.

126 *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

**APPENDIX  
THE FIRST AMENDMENT RIGHTS AND POLICE STANDARDS  
ACT OF 2004**

**ENROLLED ORIGINAL**

AN ACT

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

*Codification  
District of  
Columbia  
Official Code*

2001 Edition

2005 Winter  
Supp.

West Group  
Publisher

To establish a policy for the District of Columbia regarding First Amendment assemblies; to require the Metropolitan Police Department (“MPD”) to recognize and implement District policies regarding First Amendment assemblies, to require the Mayor to issue regulations governing the issuance of approved plans for First Amendment assemblies, to prohibit the use of a police line to encircle participants in a First Amendment assembly unless MPD has probable cause to arrest, and has decided to arrest, the participants, to require MPD to adopt a method of identifying officers during First Amendment assemblies that provides for more visible identification, to require that MPD officers document, either in writing or electronically, all arrests made during First Amendment assemblies, to establish a policy regarding the use of restraints while processing persons arrested during a First Amendment assembly, to require MPD to promptly process persons arrested in connection with a First Amendment assembly, to require MPD to provide persons arrested in connection with a First Amendment assembly with a written notice identifying their release options, to require the Chief of Police to issue rules regarding the issuance of police passes for members of the media, and to require appropriate training for MPD personnel who handle First Amendment assemblies; to amend the Office of Citizen Complaint Review Establishment Act of 1998 to give the Police Complaints Board the authority to monitor and evaluate police handling of First Amendment assemblies; to establish a policy of the District regarding MPD’s investigation and surveillance of political activity and organizations, to establish a District policy that all MPD investigations and preliminary inquiries involving First Amendment activities shall be conducted for a legitimate law enforcement objective, to require the Chief of Police to issue regulations governing investigations and preliminary inquiries involving First Amendment activities, to allow MPD to conduct limited preliminary inquiries relating to upcoming First Amendment assemblies without additional authorization, to establish rules for maintaining MPD Intelligence Section files and records, to require that information entered into Intelligence Section files be evaluated for source reliability, and content validity and accuracy, to require the Office of the District of Columbia Auditor to audit annually MPD files and records relating to investigations and preliminary inquiries involving First Amendment activities, and to provide that standards for police conduct may be relied upon by persons exercising First Amendment rights in any action alleging violations of statutory or common law rights; to establish procedures regarding the post-and-forfeit procedure and its use in resolving criminal charges, to require that MPD members, while in uniform, wear or display their nameplate and badge, and not remove or cover this identifying information or prevent persons from reading it, to provide that the provisions of this act establishing standards for police conduct may be relied upon by persons exercising First Amendment rights in any action alleging violations of statutory or common law rights; and to amend the Office of Citizen Complaint Review Establishment Act of 1998 to establish Police Complaints Board jurisdiction over complaints from members of the public alleging that MPD

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officers failed to wear required identification or refused to identify themselves when requested to do so by a member of the public.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "First Amendment Rights and Police Standards Act of 2004".

## TITLE I. FIRST AMENDMENT ASSEMBLIES.

## Sec. 101. Short title.

This title may be cited as the "First Amendment Assemblies Act of 2004".

## Subtitle A.

## Sec. 102. Definitions.

For the purposes of this title, the term:

(1) "First Amendment assembly" means a demonstration, rally, parade, march, picket line, or other similar gathering conducted for the purpose of persons expressing their political, social, or religious views.

(2) "MPD" means the Metropolitan Police Department.

## Sec. 103. Policy on First Amendment assemblies.

It is the declared public policy of the District of Columbia that persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, and to engage in First Amendment assembly near the object of their protest so they may be seen and heard, subject to reasonable restrictions designed to protect public safety, persons, and property, and to accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes.

## Sec. 104. Reasonable time, place, and manner restrictions on First Amendment assemblies.

(a) The MPD shall recognize and implement the District policy on First Amendment assemblies established in section 103 when enforcing any restrictions on First Amendment assemblies held on District streets, sidewalks, or other public ways, or in District parks.

(b) The MPD may enforce reasonable time, place, and manner restrictions on First Amendment assemblies by:

(1) Establishing reasonable restrictions on a proposed assembly prior to its planned occurrence though the approval of a plan, where the organizers of the assembly give notice;

(2) Enforcing reasonable restrictions during the occurrence of an assembly for which a plan has been approved, which are in addition to the restrictions set forth in the approved plan, where the additional restrictions are:

(A) Ancillary to the restrictions set forth in the approved plan and are designed to implement the substance and intent in the approval of the plan;

(B) Enforced in response to the occurrence of actions or events unrelated to the assembly that were not anticipated at the time of the approval of the plan and that were not caused by the plan-holder, counter-demonstrators, or the police; or

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(C) Enforced to address a determination by the MPD during the pendency of the assembly that there exists an imminent likelihood of violence endangering persons or threatening to cause significant property damage; or

(3) Enforcing reasonable restrictions on a First Amendment assembly during its occurrence where a plan was not approved for the assembly.

(c) No time, place, or manner restriction regarding a First Amendment assembly shall be based on the content of the beliefs expressed or anticipated to be expressed during the assembly, or on factors such as the attire or appearance of persons participating or expected to participate in an assembly, nor may such restrictions favor non-First Amendment activities over First Amendment activities.

Sec. 105. Notice and plan approval process for First Amendment assemblies--generally.

(a) It shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, or in a District park, without having provided notice or obtained an approved assembly plan.

(b) The purpose of the notice and plan approval process is to avoid situations where more than one group seeks to use the same space at the same time and to provide the MPD and other District agencies the ability to provide appropriate police protection, traffic control, and other support for participants and other individuals.

(c) Except as provided in subsection (d) of this section, a person or group who wishes to conduct a First Amendment assembly on a District street, sidewalk, or other public way, or in a District park, shall give notice and apply for approval of an assembly plan before conducting the assembly.

(d) A person or group who wishes to conduct a First Amendment assembly on a District street, sidewalk, or other public way, or in a District park, is not required to give notice or apply for approval of an assembly plan before conducting the assembly where:

(1) The assembly will take place on public sidewalks and crosswalks and will not prevent other pedestrians from using the sidewalks and crosswalks;

(2) The person or group reasonably anticipates that fewer than 50 persons will participate in the assembly, and the assembly will not occur on a District street; or

(3) The assembly is for the purpose of an immediate and spontaneous expression of views in response to a public event.

(e) The Mayor shall not enforce any user fees on persons or groups that organize or conduct First Amendment assemblies.

(f) The Mayor shall not require, separate from or in addition to the requirements for giving notice of or applying for approval of an assembly plan for a First Amendment assembly, that persons give notice to, or obtain a permit or plan from, the Chief of Police, or other District officials or agencies, as a prerequisite for making or delivering an address, speech, or sermon regarding any political, social, or religious subject in any District street, sidewalk, other public way, or park.

(g) The Mayor shall not require, separate from or in addition to the requirements for giving notice of or applying for approval of an assembly plan for a First Amendment assembly, that persons give notice to, or obtain a permit or plan from the Chief of Police, the Department of Consumer and Regulatory Affairs, or any other District official or agency as a prerequisite for using a stand or structure in connection with such an assembly; provided, that a First Amendment assembly plan may contain limits on the nature, size, or number of stands or structures to be used as required to maintain public safety. Individuals conducting a First Amendment assembly under subsection (d) of this section may use a stand or structure so long as it does not prevent others from using the sidewalk.

## ENROLLED ORIGINAL

(h) The Mayor shall not require, separate from or in addition to the requirements for giving notice of or applying for approval of an assembly plan for a First Amendment assembly, that persons give notice to, or obtain a permit or plan from, the Chief of Police, the Director of the Department of Consumer and Regulatory Affairs, or any other District official or agency as a prerequisite for selling demonstration-related merchandise within an area covered by an approved plan or within an assembly covered by subsection (d) of this section; provided, that nothing in this subsection shall be construed to authorize any person to sell merchandise in a plan-approved area contrary to the wishes of the plan-holder.

Sec. 106. Notice and plan approval process for First Amendment assemblies—processing applications; appeals; rules.

(a)(1) Subject to the appeal process set forth in subsection (d) of this section, the authority to receive and review a notice of and an application for approval of a plan for a First Amendment assembly on District streets, sidewalks, and other public ways, and in District parks, and to grant, deny, or revoke an assembly plan, is vested exclusively with the Chief of Police or his or her designee.

(2) Persons or groups providing notice to and applying for approval of a plan from the District government to conduct a First Amendment assembly on a District street, sidewalk, or other public way, or in a District park, shall not be required to obtain approval for the assembly from any other official, agency, or entity in the District government, including the District of Columbia Emergency Management Agency, the Mayor's Special Events Task Group, or the Department of Parks and Recreation.

(b)(1) The Chief of Police shall take final action on a notice of and an application for approval of a plan for a First Amendment assembly within a reasonably prompt period of time following receipt of the completed application, considering such factors as the anticipated size of the assembly, the proposed date and location, and the number of days between the application date and the proposed assembly date, and shall establish specific timetables for processing an application by rules issued pursuant to subsection (e) of this section.

(2) Except as provided in paragraph (3) of this subsection, where a complete application for approval of a First Amendment assembly plan is filed 60 days or more prior to the proposed assembly date, the application shall receive final action no later than 30 days prior to the proposed assembly.

(3) Following the approval of an assembly plan in response to an application pursuant to paragraph (2) of this subsection, the Chief of Police may, after consultations with the person or group giving notice of the assembly, amend the plan to make reasonable modifications to the assembly location or route up until 10 days prior to the assembly date based on considerations of public safety.

(c) The Chief of Police shall inform the person or group giving notice of an assembly, in writing, of the reasons for any decision to:

(1) Deny an application for approval of a First Amendment assembly plan;

(2) Revoke an assembly plan prior to the date of the planned assembly; or

(3) Approve an assembly plan subject to time, place, or manner restrictions that the applicant has advised the Chief of Police are objectionable to the applicant.

(d)(1) Any applicant whose proposed assembly plan has been denied, revoked prior to the date of the planned assembly, or granted subject to time, place, or manner restrictions deemed objectionable by the applicant, may appeal such decision to the Mayor or the Mayor's designee, who shall concur with, modify, or overrule the decision of the Chief of Police.

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(2) The Mayor shall make a decision on appeal expeditiously and prior to the date and time the assembly is planned to commence, and shall explain in writing the reasons for the decision.

(e)(1) Within 90 days of the effective date of this act, the Mayor, pursuant to Title 1 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code 2-501 *et. seq.*), and in accordance with this title, shall issue rules governing the approval of plans to persons or groups seeking to conduct a First Amendment assembly on District streets, sidewalks, or other public ways, or in District parks.

(2) Existing procedures for the issuance of permits to persons or groups seeking to conduct a First Amendment assembly on District streets, sidewalks, or other public ways, or in District parks, that are not inconsistent with this title shall remain in effect pending the issuance of the rules promulgated under paragraph (1) of this subsection.

**Sec. 107. Police handling and response to First Amendment assemblies.**

(a) The MPD's handling of, and response to, all First Amendment assemblies shall be designed and implemented to carry out the District policy on First Amendment assemblies established in section 103.

(b)(1) Where participants in a First Amendment assembly fail to comply with reasonable time, place, and manner restrictions, the MPD shall, to the extent reasonably possible, first seek to enforce the restrictions through voluntary compliance and then seek, as appropriate, to enforce the restrictions by issuing citations to, or by arresting, the specific non-compliant persons, where probable cause to issue a citation or to arrest is present.

(2) Nothing in this subsection is intended to restrict the authority of the MPD to arrest persons who engage in unlawful disorderly conduct, or violence directed at persons or property.

(c) Where participants in a First Amendment assembly, or other persons at the location of the assembly, engage in unlawful disorderly conduct, violence toward persons or property, or unlawfully threaten violence, the MPD shall, to the extent reasonably possible, respond by dispersing, controlling, or arresting the persons engaging in such conduct, and not by issuing a general order to disperse, thus allowing the First Amendment assembly to continue.

(d) The MPD shall not issue a general order to disperse to participants in a First Amendment assembly except where:

(1) A significant number or percentage of the assembly participants fail to adhere to the imposed time, place, and manner restrictions, and either the compliance measures set forth in subsection (b) of this section have failed to result in substantial compliance or there is no reasonable likelihood that the measures set forth in subsection (b) of this section will result in substantial compliance;

(2) A significant number or percentage of the assembly participants are engaging in, or are about to engage in, unlawful disorderly conduct or violence toward persons or property; or

(3) A public safety emergency has been declared by the Mayor that is not based solely on the fact that the First Amendment assembly is occurring, and the Chief of Police determines that the public safety concerns that prompted the declaration require that the First Amendment assembly be dispersed.

(e)(1) If and when the MPD determines that a First Amendment assembly, or part thereof, should be dispersed, the MPD shall issue at least one clearly audible and understandable order to disperse using an amplification system or device, and shall provide the participants a reasonable and adequate time to disperse and a clear and safe route for dispersal.

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(2) Except where there is imminent danger of personal injury or significant damage to property, the MPD shall issue multiple dispersal orders and, if appropriate, shall issue the orders from multiple locations. The orders shall inform persons of the route or routes by which they may disperse and shall state that refusal to disperse will subject them to arrest.

(3) Whenever possible, MPD shall make an audio or video recording of orders to disperse.

(f)(1) Where a First Amendment assembly is held on a District street, sidewalk, or other public way, or in a District park, and an assembly plan has not been approved, the MPD shall, consistent with the interests of public safety, seek to respond to and handle the assembly in substantially the same manner as it responds to and handles assemblies with approved plans.

(2) An order to disperse or arrest assembly participants shall not be based solely on the fact that a plan has not been approved for the assembly.

(3) When responding to and handling a First Amendment assembly for which a plan has not been approved, the MPD may take into account any actual diminution, caused by the lack of advance notice, in its ability, or the ability of other governmental agencies, appropriately to organize and allocate their personnel and resources so as to protect the rights of both persons exercising free speech and other persons wishing to use the streets, sidewalks, other public ways, and parks.

#### Sec. 108. Use of police lines.

No emergency area or zone will be established by using a police line to encircle, or substantially encircle, a demonstration, rally, parade, march, picket line, or other similar assembly (or subpart thereof) conducted for the purpose of persons expressing their political, social, or religious views except where there is probable cause to believe that a significant number or percentage of the persons located in the area or zone have committed unlawful acts (other than failure to have an approved assembly plan) and the police have the ability to identify those individuals and have decided to arrest them; provided, that this section does not prohibit the use of a police line to encircle an assembly for the safety of the demonstrators.

#### Sec. 109. Identification of MPD personnel policing First Amendment assemblies.

The MPD shall implement a method for enhancing the visibility to the public of the name or badge number of officers policing a First Amendment assembly by modifying the manner in which those officers' names or badge numbers are affixed to the officers' uniforms or helmets. The MPD shall ensure that all uniformed officers assigned to police First Amendment assemblies are equipped with the enhanced identification and may be identified even if wearing riot gear.

#### Sec. 110. Documentation of arrests in connection with a First Amendment assembly.

(a) The MPD shall cause every arrest in connection with a First Amendment assembly to be documented, in writing or electronically, by the officer at the scene who makes the arrest.

(b) Except as provided in subsection (c) of this section, the arrest documentation shall be completed at a time reasonably contemporaneous with the arrest, and shall include:

- (1) The name of the person arrested;
- (2) The date and time of the arrest;
- (3) Each offense charged;
- (4) The location of the arrest, and of each offense;
- (5) A brief statement of the facts and evidence establishing the basis to arrest the person for each offense;
- (6) An identification of the arresting officer (name and badge number); and
- (7) Any other information the MPD may determine is necessary.

ENROLLED ORIGINAL

(c)(1) The Chief of Police may implement a procedure for documenting arrests in connection with a First Amendment assembly different from that set forth in subsection (b) of this section where the Chief determines that an emergency exists with regard to a specific First Amendment assembly, and that implementation of the alternative procedure is necessary to assist police in protecting persons, property, or preventing unlawful conduct; provided, that any such procedure shall adequately document the basis that existed for each individual arrest.

(2) The determination of the Chief of Police made pursuant to paragraph (1) of this subsection shall be made in writing and shall include an explanation of the circumstances justifying the determination.

(3) The determination of the Chief of Police made pursuant to paragraph (1) of this subsection shall be valid for a period of 24 hours, and may be renewed by the Chief, or in the Chief's absence, the Chief's designee.

Sec. 111. Use of handcuffs, plastic cuffs, or other physical restraints on persons arrested in connection with a First Amendment assembly.

(a) The MPD shall adhere to the standard set forth in subsection (b) of this section in using handcuffs, plastic cuffs, or other physical restraints on any person arrested in connection with a First Amendment assembly who is being held in custody in the following circumstances:

(1) The arrestee is being held in a police processing center:

(A) To determine whether the arrestee should be released or the method for release;

(B) To determine whether the arrestee should be presented to court; or

(C) Pending presentation to court;

(2) The arrestee is being held in an unsecured processing center, and is not being held in a cell; or

(3) The arrestee is charged solely with one or more misdemeanor offenses, none of which have, as one of their elements, the commission of a violent act toward another person or a threat to commit such an act, or the destruction of property, or a threat to destroy property.

(b) With regard to any person who is being held in custody by the MPD in the circumstances identified in subsection (a) of this section, the MPD shall use handcuffs, plastic cuffs, or other physical restraints only to the extent reasonably necessary, and in a manner reasonably necessary, for the safety of officers and arrestees; provided, that no such person shall be restrained by connecting his or her wrist to his or her ankle, and no such person shall be restrained in any other manner that forces the person to remain in a physically painful position.

(c) Nothing in this section is intended to restrict the otherwise lawful authority of the MPD to use handcuffs, plastic cuffs, or other physical restraints on persons arrested in connection with a First Amendment assembly at the time of or immediately following arrest, while arrestees are being transported to a processing center, or while arrestees are being transported to or from court.

Sec. 112. Prompt release of persons arrested in connection with a First Amendment assembly.

(a)(1) The MPD shall promptly process any person arrested in connection with a First Amendment assembly to determine whether the person is eligible for immediate release pursuant to a lawful release option, and shall promptly release any person so eligible who opts for release.

(2) The MPD shall promptly release any person arrested in connection with a First Amendment assembly who, it is subsequently determined, should not be charged with any offense, or as to whom arrest documentation has not been prepared and preserved.

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(b)(1) The MPD shall require that an officer holding a supervisory rank document and explain any instance in which a person arrested in connection with a First Amendment assembly who opts for release pursuant to any lawful release option or who is not charged with any offense is not released within 4 hours from the time of arrest.

(2) The MPD shall provide to any person not released within a reasonable time of arrest food appropriate to the person's health.

(c) The Chief of Police shall issue an annual public report that:

(1) Identifies the number of persons in the preceding year who were arrested in connection with a First Amendment assembly and opted for release pursuant to any lawful release option or were not charged with any offense and were not released from custody within 4 hours after the time of arrest;

(2) Discusses the reasons for the delay in processing such persons for release; and

(3) Describes any steps taken or to be taken to ensure that all such persons are released within 4 hours from the time of arrest.

(d) The MPD shall ensure that it possesses an automated information processing system that enables it to promptly process for release or presentation to the court all persons arrested in connection with a First Amendment assembly, and shall ensure that such system is fully operational (with respect to its hardware, software, and staffing) prior to a First Amendment assembly that has a potential for a substantial number of arrests.

Sec. 113. Notice to persons arrested in connection with a First Amendment assembly of their release options.

(a) The MPD shall fully and accurately advise persons arrested in connection with a First Amendment assembly of all potential release options when processing them for release from custody or for presentation to court.

(b)(1) The MPD shall provide a written notice identifying all release options to each person arrested in connection with a First Amendment assembly who is charged solely with one or more misdemeanor offenses. The notice shall clearly indicate that the options are alternative methods for obtaining a prompt release, and that the availability of each option is dependent on a determination that the arrestee is eligible to participate in that release option. The notice shall also identify the misdemeanor charges lodged against the arrestee.

(2) The notice required by paragraph (1) of this subsection shall be offered in the Spanish language to those persons who require or desire notice in this manner, and shall be offered in other languages as is reasonable to ensure meaningful access to the notice for persons who are limited English proficient.

Sec. 114. Police-media relations.

(a) Within 90 days of the effective date of this act, the Chief of Police, pursuant to Title 1 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code 2-501 *et seq.*), shall issue rules governing police passes for media personnel.

(b) Within 90 days of the effective date of this act, the Chief of Police shall develop and implement a written policy governing interactions between the MPD and media representatives who are in or near an area where a First Amendment assembly is ongoing and who are reporting on the First Amendment assembly. The policy shall be consistent with the requirements of subsection (c) of this section.

(c)(1) The MPD shall allow media representatives reasonable access to all areas where a First Amendment assembly is occurring. At a minimum, the MPD shall allow media representatives no less access than that enjoyed by members of the general public and, consistent

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with public safety considerations, shall allow media representatives access to promote public knowledge of the assembly.

(2) The MPD personnel located in or near an area where a First Amendment assembly is ongoing shall recognize and honor media credentials issued by or officially recognized by the MPD.

(3) The MPD shall make reasonable accommodations to allow media representatives effectively to use photographic, video, or other equipment relating to their reporting of a First Amendment assembly.

**Sec. 115. Training for handling of, and response to, First Amendment assemblies.**

The Chief of Police shall ensure that all relevant MPD personnel, including command staff, supervisory personnel, and line officers, are provided regular and periodic training on the handling of, and response to, First Amendment assemblies. The training shall be tailored to the duties and responsibilities assigned to different MPD positions and ranks during a First Amendment assembly. The training shall include instruction on the provisions of this title, and the regulations issued hereunder.

**Sec. 116. Use of riot gear and riot tactics at First Amendment assemblies.**

(a) Officers in riot gear shall be deployed consistent with the District policy on First Amendment assemblies and only where there is a danger of violence. Following any deployment of officers in riot gear, the commander at the scene shall make a written report to the Chief of Police within 48 hours and that report shall be available to the public on request.

(b)(1) Large scale canisters of chemical irritant shall not be used at First Amendment assemblies absent the approval of a commanding officer at the scene, and the chemical irritant is reasonable and necessary to protect officers or others from physical harm or to arrest actively resisting subjects.

(2) Chemical irritant shall not be used by officers to disperse a First Amendment assembly unless the assembly participants or others are committing acts of public disobedience endangering public safety and security.

(3) A commanding officer who makes the determination specified in paragraph (1) of this subsection shall file with the Chief of Police a written report explaining his or her action within 48 hours after the event.

**Sec. 117. Construction.**

The provisions of this title are intended to protect persons who are exercising First Amendment rights in the District of Columbia, and the standards for police conduct set forth in this title may be relied upon by such persons in any action alleging violations of statutory or common law rights.

**Subtitle B.**

**Sec. 141. Section 5 of the Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1104), is amended by adding a new subsection (d-1) to read as follows:**

“(d-1) The Board may, where appropriate, monitor and evaluate MPD’s handling of, and response to, First Amendment assemblies, as defined in section 102 of the First Amendment Rights and Police Standards Act of 2004, passed on 2<sup>nd</sup> reading on December 21, 2004 (Enrolled version of Bill 15-968), held on District streets, sidewalks, or other public ways, or in District parks.”.

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Sec. 142. Section 705.1 of the District of Columbia Municipal Regulations is amended by striking the phrase "regulation." and inserting the phrase "regulation; provided, that the term "parade" shall not include a First Amendment assembly, as that term is defined in section 102(1) of the First Amendment Rights and Police Standards of 2004, passed on 2<sup>nd</sup> reading on December 21, 2004 (Enrolled version of Bill 15-968)." in its place.

Sec. 143. Chapter 21 of Title 24 of the District of Columbia Municipal Regulations is amended as follows: DCMR

- (a) Section 2102.3 is amended to read as follows:  
"2102.3 Passes shall be in the form and number approved by the Chief of Police."
- (b) Section 2102.4 is repealed.

**TITLE II. POLICE INVESTIGATIONS CONCERNING FIRST AMENDMENT ACTIVITIES.** DCMR

Sec. 201. Short title.

This title may be cited as the "Police Investigations Concerning First Amendment Activities Act of 2004".

Sec. 202. Definitions.

For the purposes of this title, the term:

- (1) "First Amendment activities" means constitutionally protected speech or association, or conduct related to freedom of speech, free exercise of religion, freedom of the press, the right to assemble, and the right to petition the government.
- (2) "First Amendment assembly" means a demonstration, rally, parade, march, picket line, or other similar gathering conducted for the purpose of persons expressing their political, social, or religious views;
- (3) "Informant" means a person who provides information to the police department motivated by the expectation of receiving compensation or benefit, or otherwise is acting under the direction of the MPD.
- (4) "Intelligence Section" means the Intelligence Section of the Special Investigations Division of MPD, or its successor section or unit.
- (5) "Intelligence Section file" means the investigative intelligence information gathered, received, developed, analyzed, and maintained by the Intelligence Section of the Metropolitan Police Department, pursuant to an investigation or preliminary inquiry involving First Amendment activity.
- (6) "Legitimate law enforcement objective" means the detection, investigation, deterrence, or prevention of crime, or the apprehension and prosecution of a suspected criminal; provided, that a person shall not be considered to be pursuing a legitimate law enforcement objective if the person is acting based upon the race, ethnicity, religion, national origin, lawful political affiliation or activity, or lawful news-gathering activity of an individual or group.
- (7) "Mail cover" means the inspection and review of the outside of envelopes of posted mail and other delivered items.
- (8) "Mail opening" means the opening and inspection and review of the contents of posted mail and other delivered items.
- (9) "Minimization procedures" means reasonable precautions taken to minimize the interference with First Amendment activities, without impairing the success of the investigation or preliminary inquiry.
- (10) "MPD" means the Metropolitan Police Department.

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(11) "Reasonable suspicion" means a belief based on articulable facts and circumstances indicating a past, current, or impending violation of law. The reasonable suspicion standard is lower than the standard of probable cause; however, a mere hunch is insufficient as a basis for reasonable suspicion. A suspicion that is based upon the race, ethnicity, religion, national origin, lawful political affiliation or activity, or lawful news-gathering activity of an individual or group is not a reasonable suspicion.

**Sec. 203. Purpose; scope.**

This title establishes the responsibilities of and procedures for the MPD relating to investigations and preliminary inquiries, including criminal intelligence investigations and inquiries, that may affect activities protected by the First Amendment. This title does not apply to criminal investigations or inquiries that do not involve First Amendment activities.

**Sec. 204. Policy on investigations and inquiries involving First Amendment activities.**

The MPD shall conduct all investigations and preliminary inquiries involving First Amendment activities for a legitimate law enforcement objective and, in so doing, shall safeguard the constitutional rights and liberties of all persons. MPD members may not investigate, prosecute, disrupt, interfere with, harass, or discriminate against any person engaged in First Amendment activity for the purpose of punishing, retaliating, preventing, or hindering the person from exercising his or her First Amendment rights.

**Sec. 205. Authorization for investigations involving First Amendment activities.**

(a) The MPD may conduct a criminal investigation that involves the First Amendment activities of persons, groups, or organizations only when there is reasonable suspicion to believe that the persons, groups, or organizations are planning or engaged in criminal activity, and the First Amendment activities are relevant to the criminal investigation.

(b) Except as provided in subsection (e) of this section, a MPD member may undertake an investigation under this section only after receiving prior written authorization from the Commander, Office of the Superintendent of Detectives, or such other MPD commander of similar rank designated by MPD regulations. No MPD member may conduct an investigation involving First Amendment activities without the authorization required by this section.

(c) To obtain authorization for an investigation under this section, a MPD member shall submit a memorandum to the Commander, Office of Superintendent of Detectives, or such other MPD commander of similar rank as designated by MPD regulations:

- (1) Identifying the subject of the proposed investigation, if known;
- (2) Stating the facts and circumstances that create a reasonable suspicion of criminal activity; and
- (3) Describing the relevance of the First Amendment activities to the investigation.

(d)(1) Written authorization of an investigation under this section may be granted for a period of up to 120 days where the designated commander determines that there is reasonable suspicion of criminal activity.

(2) If the MPD seeks to continue an investigation past 120 days, a new memorandum and approval shall be obtained for each subsequent 120-day period. The new memorandum shall describe the information already collected and demonstrate that an extension is reasonably necessary to pursue the investigation.

(3) The Chief of Police shall approve investigations open for more than one year, and shall do so in writing, stating the justification for the investigation.

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(e) If there is an immediate threat of criminal activity, an investigation under this section may begin before a memorandum is prepared and approved; provided, that written approval must be obtained within 24 hours from the Chief of Police or his designee.

(f) An investigation involving First Amendment activities shall be terminated when logical leads have been exhausted and no legitimate law enforcement purpose justifies its continuance.

**Sec. 206. Authorization for preliminary inquiries involving First Amendment activities.**

(a) The MPD may initiate a preliminary inquiry involving First Amendment activities, to obtain sufficient information to determine whether or not an investigation is warranted, where:

(1) The MPD receives information or an allegation the responsible handling of which requires further scrutiny; and

(2) The information or allegation received by MPD does not justify opening a full investigation because it does not establish reasonable suspicion that persons are planning or engaged in criminal activity.

(b)(1) A MPD member may undertake a preliminary inquiry involving First Amendment activities, to obtain sufficient information to determine whether or not an investigation is warranted, only by receiving prior written authorization from the Commander, Office of Superintendent of Detectives, or such other MPD commander of similar rank designated by MPD regulations.

(2) Except as provided in section 209, no MPD member may conduct a preliminary inquiry involving First Amendment activities without the authorization required by this section.

(c) To obtain authorization for a preliminary inquiry, a MPD member shall submit a memorandum to the Commander, Office of Superintendent of Detectives, or such other MPD commander of similar rank designated by MPD regulations:

(1) Identifying the subject of the proposed inquiry, if known;

(2) Stating the information or allegations that are the basis for the preliminary inquiry; and

(3) Describing the relevance of the First Amendment activities to the inquiry.

(d)(1) A preliminary inquiry under this section may be authorized for a period of up to 60 days.

(2) If the MPD seeks to continue this preliminary inquiry beyond 60 days, a new memorandum and approval must be obtained for an additional 60-day period. The new memorandum must describe the information already collected and demonstrate that an extension is reasonably necessary to pursue the inquiry.

(3) The Chief of Police shall approve a preliminary inquiry under this section that is to remain open for more than 120 days, and shall do so in writing, stating the justification for the preliminary inquiry.

(e) A preliminary inquiry under this section shall be terminated when it becomes apparent that a full investigation is not warranted.

**Sec. 207. Techniques and procedures for investigations and preliminary inquiries.**

(a) The investigative techniques used in any particular investigation or preliminary inquiry shall be dictated by the needs of the investigation or inquiry.

(b) The MPD shall employ minimization procedures in all investigations and preliminary inquiries involving First Amendment activities. Where the conduct of an investigation or preliminary inquiry presents a choice between the uses of more or less intrusive methods or

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investigative techniques, the MPD shall consider whether the information could be obtained in a timely and effective way by the less intrusive means.

(c) The following techniques may be used in an authorized investigation or authorized preliminary inquiry involving First Amendment activities, without additional authorization:

- (1) Examination of public records and other sources of information available to the public;
- (2) Examination of MPD indices, files, and records;
- (3) Examination of records and files of other government or law enforcement agencies;
- (4) Interviews of any person; and
- (5) Physical, photographic, or video surveillance from places open to the public or otherwise legally made available.

(d) Undercover officers, informants, and mail covers may be used in an authorized preliminary inquiry after written approval and authorization is obtained from the Chief of Police or his designee. Mail openings and Wire Interception and Interception of Oral Communications, as defined in D.C. Official Code § 23-541, shall not be used in a preliminary inquiry.

(e) The following techniques may be used in an authorized investigation involving First Amendment activities, after written approval and authorization is obtained from the Chief of Police or his designee:

- (1) Wire Interception and Interception of Oral Communications, as defined in D.C. Official Code § 23-541;
- (2) Undercover officers and informants; and
- (3) Mail covers, mail openings, pen registers, and trap and trace devices.

(f) If there is an immediate threat of criminal activity, verbal authority by the designated MPD commander to use the investigative techniques described in subsection (d) and (e) of this section is sufficient until a written authorization can be obtained; provided, that other legal requirements have been met. The required written authorization shall be obtained within 5 days of the occurrence of the emergency.

#### Sec. 208. Rules for investigations and preliminary inquiries.

(a) Within 90 days of the effective date of this title, the Chief of Police, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), and in accordance with this title, shall issue rules governing investigations and preliminary inquiries involving First Amendment activities, including the authorization, conduct, monitoring, and termination of investigations and preliminary inquiries, and the maintenance, dissemination, and purging of records, files, and information from such investigations and preliminary inquiries.

(b) The rules issued under subsection (a) of this section shall require the MPD to direct undercover officers and informants to refrain from:

- (1) Participating in unlawful acts or threats of violence;
- (2) Using unlawful techniques to obtain information;
- (3) Initiating, proposing, approving, directing, or suggesting unlawful acts or a plan to commit unlawful acts;
- (4) Being present during criminal activity or remaining present during unanticipated criminal activity, unless it has been determined to be necessary for the investigation;
- (5) Engaging in any conduct the purpose of which is to disrupt, prevent, or hinder the lawful exercise of First Amendment activities;

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(6) Attending meetings or engaging in other activities for the purpose of obtaining legally privileged information, such as attorney-client communications or physician-patient communications; and

(7) Recording or maintaining a record concerning persons or organizations who are not a target of the investigation or preliminary inquiry, unless the information is material to the investigation or preliminary inquiry, or the information would itself justify an investigation or preliminary inquiry under this title.

(c) The rules issued under subsection (a) of this section shall require that all members assigned to the Intelligence Section, Special Investigations Branch, attend training on this title and the rules. The rules shall require that all members of the Intelligence Section sign an acknowledgment that they have received, read, understood, will abide by, and will maintain a copy of this title and the rules.

#### Sec. 209. Preliminary inquiries relating to First Amendment assemblies.

(a) A MPD member may initiate a preliminary inquiry relating to a First Amendment assembly, for public safety reasons, without authorization, as follows:

(1) Members may gather public information regarding future First Amendment assemblies and review notices and approved assembly plans.

(2) Members may communicate overtly with the organizers of a First Amendment assembly concerning the number of persons expected to participate, the activities anticipated, and other similar information regarding the time, place, and manner of the assembly.

(3) Members may communicate overtly with persons other than the organizers of a First Amendment assembly to obtain information relating to the number of persons expected to participate in the assembly.

(4) Members may collect information on prior First Amendment assemblies to determine what police resources may be necessary to adequately protect participants, bystanders, and the general public, and to enforce all applicable laws.

(b) Filming and photographing First Amendment assemblies may be conducted by MPD members for the purpose of documenting violations of law and police actions, as an aid to future coordination and deployment of police units, and for training purposes. Filming and photographing of First Amendment assemblies may not be conducted for the purpose of identifying and recording the presence of individual participants who are not engaged in unlawful conduct.

#### Sec. 210. Authorized public activities.

Nothing in this title shall be interpreted as prohibiting any MPD member from, in the course of their duties, visiting any place, and attending any event that is open to the public, or reviewing information that is in the public domain, on the same terms and conditions as members of the public, so long as members have a legitimate law enforcement objective; provided, that any undercover activities shall be authorized as required by section 207.

#### Sec. 211. Files and records.

(a) Information to be retained in an Intelligence Section file shall be evaluated for the reliability of the source of the information and the validity and accuracy of the content of the information prior to filing. The file shall state whether the reliability, validity, and accuracy of the information have been corroborated.

(b) The MPD shall not collect or maintain information about the political, religious, social, or personal views, associations, or activities of any individual, group, or organization

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unless such information is material to an authorized investigation or preliminary inquiry involving First Amendment activities.

(c) No information shall be knowingly included in an Intelligence Section file that has been obtained in violation of any applicable federal, state, or local law, ordinance, or regulation. The Chief of Police, or his designee, shall be responsible for establishing that no information is entered in Intelligence Section files in violation of this subsection.

(d) The MPD may disseminate information obtained during preliminary inquiries and investigations involving First Amendment activities to federal, state, or local law enforcement agencies, or local criminal justice agencies, only when such information:

- (1) Falls within the investigative or protective jurisdiction or litigation-related responsibility of the agency;
- (2) May assist in preventing an unlawful act or the use of violence, or any other conduct dangerous to human life; or
- (3) Is required to be disseminated by an interagency agreement, statute, or other law.

(e) All requests for dissemination of information from an Intelligence Section file shall be evaluated and approved by the Chief of Police or his designee. All dissemination of information shall be done by written transmittal or recorded on a form that describes the documents or information transmitted, and a record of the dissemination shall be maintained for a minimum of one year.

(f) Intelligence Section file information shall not be disseminated to any non-law enforcement agency, department, group, organization, or individual, except as authorized by law.

(g) The Chief of Police or his designee shall periodically review information contained in Intelligence Section files and purge records that are not accurate, reliable, relevant, and timely.

#### Sec. 212. Monitoring and auditing of investigations and preliminary inquiries.

(a) Authorizations of investigations and preliminary inquiries involving First Amendment activities are to be reviewed every 90 days by a panel of no fewer than 3 MPD commanding officers designated by the Chief of Police.

(b) The Commander, Office of the Superintendent of Detectives, or a commander of similar rank designated in the MPD regulations, shall monitor the compliance of undercover officers and informants with the requirements of this title.

(c) The Chief of Police shall annually prepare a report on the MPD's investigations and preliminary inquiries involving First Amendment activities. The report shall be transmitted to the Mayor and Council and a notice of its publication shall be published in the District of Columbia Register. The report shall include, at a minimum,

- (1) The number of investigations authorized;
- (2) The number of authorizations for investigation sought but denied;
- (3) The number of requests from outside agencies, as documented by forms requesting access to records of investigations conducted pursuant to this title;
- (4) The number of arrests, prosecutions, or other law enforcement actions taken as a result of such investigations; and
- (5) A description of any violations of this title or the regulations issued pursuant to this title, and the actions taken as a result of the violations, including whether any officer was disciplined as a result of the violation.

(d)(1) The Office of the District of Columbia Auditor ("ODCA") shall serve as auditor of MPD's investigations and preliminary inquiries involving First Amendment activities in order to assess compliance with this title.

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(2) On an annual basis, the ODCA shall audit MPD files and records relating to investigations and preliminary inquiries involving First Amendment activities. In conducting the audit, the ODCA shall review each authorization granted pursuant to sections 205 and 206, requests for authorization that were denied, and investigative files associated with the authorizations. The ODCA shall prepare a public report of its audit that shall contain a general description of the files and records reviewed, and a discussion of any substantive violation of this title discovered during the audit. A preliminary report of the audit shall be provided by the ODCA to the Chief of Police for review and comment at least 30 days prior to issuance of a final audit.

(3) The ODCA shall have access to MPD files and records for purposes of its audit of investigations and preliminary inquiries involving First Amendment activities.

(4) In discharging its responsibilities, the ODCA shall protect the confidentiality of MPD files and records.

**Sec. 213. Construction.**

The provisions of this title are intended to protect persons who are exercising First Amendment rights in the District of Columbia, and the standards for police conduct set forth in this title may be relied upon by such persons in any action alleging violations of statutory or common law rights.

**TITLE III. POST-AND-FORFEIT PROCEDURE; DISPLAY OF IDENTIFICATION BY POLICE OFFICERS.**

**Sec. 301. Short title.**

This title may be cited as the "First Amendment Assembly Enforcement and Procedure Act of 2004".

**Subtitle A.**

**Sec. 302. Enforcement of the post-and-forfeit procedure.**

(a) For the purposes of this section, the term "post-and-forfeit procedure" shall mean the procedure enforced as part of the criminal justice system in the District of Columbia whereby a person charged with certain misdemeanors may simultaneously post and forfeit an amount as collateral (which otherwise would serve as security upon release to ensure the arrestee's appearance at trial) and thereby obtain a full and final resolution of the criminal charge.

(b) The resolution of a criminal charge using the post-and-forfeit procedure is not a conviction of a crime and shall not be equated to a criminal conviction. The fact that a person resolved a charge using the post-and-forfeit procedure may not be relied upon by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action to impose any sanction, penalty, enhanced sentence, or civil disability.

(c) Whenever the Metropolitan Police Department ("MPD") or the Office of the Attorney General for the District of Columbia tenders an offer to an arrestee to resolve a criminal charge using the post-and-forfeit procedure, the offer shall be accompanied with a written notice provided to the arrestee describing the post-and-forfeit procedure and the consequences of resolving the criminal charge using this procedure.

(d) The written notice required by subsection (c) of this section shall include, at a minimum, the following information:

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(1) The identity of the misdemeanor crime that is to be resolved using the post-and-forfeit procedure and the amount of collateral that is to be posted and forfeited;

(2) A statement that the arrestee has the right to choose whether to accept the post-and-forfeit offer or, alternatively, proceed with the criminal case and a potential adjudication on the merits of the criminal charge;

(3) If the arrestee is in custody, a statement that if the arrestee elects to proceed with the criminal case he or she may also be eligible for prompt release on citation, or will be promptly brought to court for determination of bail;

(4) A statement that the resolution of the criminal charge using the post-and-forfeit procedure will preclude the arrestee from obtaining an adjudication on the merits of the criminal charge;

(5) A statement that the resolution of the criminal charge using the post-and-forfeit procedure is not a conviction of a crime and may not be equated to a criminal conviction, and may not result in the imposition of any sanction, penalty, enhanced sentence, or civil disability by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action;

(6) A statement that the agreement to resolve the charge using the post-and-forfeit procedure is final after the expiration of 90 days from the date the notice is signed and that, within the 90-day period, the arrestee or the Office of the Attorney General may file a motion with the Superior Court of the District of Columbia to set aside the forfeiture and proceed with the criminal case; and

(7) A statement that, following resolution of the charge using the post-and-forfeit procedure, the arrestee will continue to have an arrest record for the charge at issue, unless the arrestee successfully moves in the Superior Court of the District of Columbia to seal his or her arrest record.

(e) The notice required by subsection (c) of this section shall be offered in the Spanish language to those persons who require or desire notice in this manner, and shall be offered in other languages as is reasonable to ensure meaningful access to the notice for persons who are limited English proficient.

(f) An arrestee provided the written notice required by subsection (c) of this section who wishes to resolve the criminal charge using the post-and-forfeit procedure shall, after reading the notice, sign the bottom of the notice, thereby acknowledging the information provided in the notice and agreeing to accept the offer to resolve the charge using the post-and-forfeit procedure. After the arrestee signs the notice, the arrestee shall be provided with a copy of the signed notice.

(g) Within 90 days of the Superior Court of the District of Columbia issuing an updated bond and collateral list, the Chief of Police shall issue a list of all misdemeanor charges that MPD members are authorized to resolve using the post-and-forfeit procedure, and the collateral amount associated with each charge. The Chief shall make the list available to the public, including placing the list on the MPD website.

(h) The Mayor shall submit an annual public report to the Council identifying the total amount of money collected the previous year pursuant to the post-and-forfeit procedure and the number of criminal charges, by specific charge, resolved the previous year using the post-and-forfeit procedure. The data shall be reported separately for instances in which the post-and-forfeit procedure is independently used by the MPD (without the approval, on a case-by-case basis, of either the Office of the Attorney General or the Superior Court of the District of Columbia), and for all other instances in which the post-and-forfeit procedure is used. The report also shall identify the fund or funds in which the post-and-forfeit moneys were placed.

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**Subtitle B.**

**Sec. 321. Police identifying information.**

Every member of the Metropolitan Police Department ("MPD"), while in uniform, shall wear or display the nameplate and badge issued by the MPD, or the equivalent identification issued by the MPD, and shall not alter or cover the identifying information or otherwise prevent or hinder a member of the public from reading the information.

**Subtitle C.**

**Sec. 331.** Section 8(a) of the Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1107(a)), is amended as follows:

(a) Paragraph (4) is amended by striking the word "or" at the end.

(b) Paragraph (5) is amended by striking the period at the end and inserting the phrase "; or" in its place.

(c) A new paragraph (6) is added to read as follows:

"(6) Failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public."

Amend  
§ 5-1107

**TITLE IV. FISCAL IMPACT STATEMENT; EFFECTIVE DATE.**

**Sec. 401. Fiscal impact statement.**

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

**Sec. 402. Effective date.**

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

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Chairman  
Council of the District of Columbia

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Mayor  
District of Columbia

# DEMONSTRATIONS, SECURITY ZONES, AND FIRST AMENDMENT PROTECTION OF SPECIAL PLACES

Mary M. Cheh\*

## I. INTRODUCTION

Recent events reveal a marked increase in government limitations on public protests and demonstrations. Certain areas, such as public space near the White House, have been effectively placed off limits to demonstrators. Protestors are put out of sight, down the road, or otherwise away from the object of their protest. The Secret Service has created “security zones” insulating the President and his entourage from the sights and sounds of opposition marches and demonstrations. And the police are using sophisticated tactics, such as surveillance, infiltration, disinformation, and preemptive arrests to undermine and frustrate the ability of protestors to conduct their marches and send their message to the larger public. While it may seem that 9/11 and the war on terrorism would make these actions even more defensible than they might otherwise be, actually the opposite is true. Most of the demonstrations affected by government suppression tactics are just those “troublesome” popular risings—opposition to war, globalization economics, and loss of privacy and freedom—that serve to check government overreaching but which may find little outlet in mainstream forms of communication. Yet First Amendment doctrine, in particular the time, place, and manner test, has become too flabby and unstable to reliably counter the government’s sophisticated dilution and weakening of public demonstrations and the consequent enervation of dissent. To protect rights of protest and to restore integrity to “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,”<sup>1</sup> this symposium paper calls for a recasting of the time, place and manner test<sup>2</sup> and a recognition of a First Amendment doctrine of “special places.”

Part II of this article surveys the recent tactics used by the government to contain protest and demonstrations, focusing particularly on demonstrations in Washington, D.C. Part III identifies the essential liberty interest in protecting protest and demonstrations in the streets, the people’s forum. Then Parts IV and V evaluate the effectiveness of the time, place, and manner test and the tensions arising from a facile either/or contrast with content control. Part VI suggests a more nuanced, intermediate scrutiny doctrine of special places, and, finally, Part

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1 U. S. CONST., Amend. 1.

2 See, e.g., *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984).

VII suggests how this new doctrine would work in the example of Washington, D.C.'s Lafayette Park.

## II. THE TACTICS OF SUPPRESSION

Recent tactics of suppressing and frustrating marches, demonstrations, and political dissent have moved beyond the blunt, obvious, and plainly unlawful use of fire hoses, baton beatings, and mass arrests.<sup>3</sup> It is not that the police have entirely abandoned violence and improper use of force to control demonstrators. Just ask the 150 protestors injured when Miami police attacked them with batons, rubber bullets, concussion grenades, and pepper spray as they marched against the Free Trade Area of the Americas meeting in November 2003.<sup>4</sup> Rather, police have added to their repertoire tactics designed to dilute, cabin, and render irrelevant marches and demonstrations opposing government policies concerning war, globalization, and civil liberties. Such tactics are more dangerous to First Amendment values because they are more insidious. They frustrate and diminish public protest but are less likely to generate sympathy for protestors or arouse public ire.<sup>5</sup>

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3 See SARAH BULLARD, *FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE* 33 (1993) (over one thousand civil rights workers arrested during Mississippi Freedom Summer in 1964); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY: 1954-1992* 115 (1993) (over one thousand protestors jailed at one time during protests in Albany, Georgia in 1961-62); *id.* at 118, 127-28 (over twenty thousand protestors jailed during protests in Birmingham, Alabama in 1963); HENRY HAMPTON & STEVE FAYER, *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950s THROUGH THE 1980s* 222 (1990) (thousands jailed during protests in Selma, Alabama, including over three thousand during one week in 1965); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* 190-93 (1987) (describing Birmingham firefighters' use of hoses on children and other civil rights protestors, with water powerful enough to rip the bark off trees); *see also* *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 111 (D.C. Cir. 1977) (rejecting claims by anti-war protestors for injunctive restrictions on the crowd-control tactics used by Washington, D.C. police after plaintiffs adduced in a three-week trial evidence that D.C. police, in an effort to quell Vietnam War protests in 1969-1971, used stationary police lines to block the progress of marches; used moving police lines, or "sweeps," to enforce dispersal orders; and made widespread use of the District's "failure to move on" statute to conduct mass arrests of nonviolent demonstrators).

4 Forty police agencies provided 2,500 officers, funded in part by money from the \$8.5 billion Congressional appropriation for Iraq and Afghanistan, to watch over several thousand demonstrators who demonstrated against globalization and free trade policies during meetings of negotiators on the Free Trade Area of the Americas in Miami in November. Police beat and routed groups of demonstrators including medics tending to wounded protestors. The police say they took no action until demonstrators threw projectiles or failed to disperse when ordered. *See, e.g.,* Les Kjos, *FTAA Dispute Roars On*, UNITED PRESS INTERNATIONAL, Dec. 4, 2003 (hereinafter UPI); Forrest Norman, *Dangerous Medicine For Street Medics Tending To FTAA Protestors, Neutrality Was No Match For Brutality*, MIAMI NEW TIMES, Dec. 4, 2003.

5 For example, the vicious and brutal actions of the police at the 1968 Democratic Convention in Chicago, widely viewed as a police riot, generated sympathy and support for the anti-Vietnam War movement. Of course not all violent action against protestors generates sympathy or solidarity, at

### A. *Special Places Put Off Limits—the Case of Lafayette Park*

Lafayette Park is a peaceful city block of greenery located directly across from the White House on Pennsylvania Avenue. The park, together with the sidewalk in front of the White House, has been the site of political protests for over 80 years. And for just about as long the government has sought to limit or end such protests.

During the period from September 11, 2001 to March 2004, United States Park Police regulations prevented all demonstrations of more than 25 persons in the park.<sup>6</sup> In August 2002, a federal judge upheld the 25 person protest ban and denied a request by a Christian activist group that wanted to hold prayer vigils across the street from the White House to commemorate the one-year anniversary of September 11th. The judge ruled that the National Park Service, acting on a series of requests from the Secret Service, was justified in denying all permits for large demonstrations in the park since the terrorist attacks.<sup>7</sup> The ban for August and September was based partly on classified intelligence information “regarding threats to the President and the White House complex,” according to the government’s court filing.<sup>8</sup> More broadly, however, and likely the reason the ban remained in place for over two years, was the government’s contention that the “necessity of limiting large group activity in Lafayette Park is based on the ability of the Secret Service to observe and detect individuals who may either constitute an immediate threat or be preparing for a future threat against the White House.”<sup>9</sup>

The restrictions on demonstrations in the park are not merely a post-9/11 phenomenon. From 1967 to 1977, during the Vietnam War, a series of legal challenges called the “Quaker Action” cases were required to invalidate a 100-person limit on White House sidewalk demonstrations and a 500-person limit on Lafayette Park demonstrations.<sup>10</sup> Only a few years later, Lafayette Park resumed its

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least not in all quarters. In the Miami protests referred to above, on the very same day that the AFL-CIO was calling for the resignation of Miami police Chief John Timoney for the attacks on protestors, the Chamber of Commerce was giving him an award for the same event. See UPI, *supra* note 4.

6 See *infra* note 104.

7 Mahoney v. Norton, DDC No. 1: 02CV01715 (Aug. 29 and Sept. 5, 2002) (on file with the author).

8 Neely Tucker, *Ban on Rallies Upheld for Lafayette Square; Park Service May Deny Permit for Vigils, Judge Tells Christian Activist Group*, WASH. POST, Aug. 30, 2002, at B3.

9 *Id.* (quoting the government’s legal brief).

10 See *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969) (known as “Quaker Action I”) (affirming the district court’s preliminary injunction against the White House restrictions on demonstrations); *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (Quaker Action IV) (affirming the district court’s findings that the White House restrictions on sidewalk and Lafayette Park demonstrations were unconstitutional, and that the government could only set limits at or above 750 for the White House sidewalk and 3,000 for Lafayette Park; the Court of Appeals further required the government to implement a procedure to waive the limit for demonstrations larger than 3,000 for the park); *A Quaker Action Group v. Andrus*, 559 F.2d 716 (D.C. Cir. 1977)

role as a First Amendment battleground when Reagan Administration Secretary of the Interior James Watt announced upon assuming office that he intended to ban all demonstrations in front of the White House and in Lafayette Park. The Interior Department then issued regulations restricting demonstrations on the White House sidewalk<sup>11</sup> To avoid arrest, demonstrators must keep moving. At the time the regulations were adopted, the government contended that little was lost by restricting activity on the sidewalk because demonstrators with signs could convey their messages across the street in the park.<sup>12</sup> But a series of creeping regulations followed for Lafayette Park as well. For example, persons protesting in the Park may not have signs “larger than three feet by three feet, demonstrators must remain within three feet of their signs, and they must not “camp.”<sup>13</sup>

It was this last restriction, prohibiting “camping,” that gave rise to a Supreme Court decision on the First Amendment and Lafayette Park. In *Clark v. Community for Creative Non-Violence*,<sup>14</sup> the Court held that the demonstrators’ permit, issued by the National Park Service, authorized erection of two symbolic tent cities to demonstrate the plight of the homeless, but did not permit demonstrators to sleep in the tents. The plaintiffs “sought to begin their demonstration on a date full of ominous meaning to any homeless person: the first day of winter.”<sup>15</sup> “The primary purpose for making sleep an integral part of the demonstration was ‘to re-enact the central reality of homelessness,’ and to impress upon public consciousness, in as dramatic a way as possible, that homelessness is a widespread problem, often ignored, that confronts its victims with life-threatening deprivations.”<sup>16</sup>

But the Court held that the sleeping ban did not violate the First Amendment because it was a reasonable time, place, and manner limitation to protect the park. The regulation narrowly served the government’s substantial interest in maintaining the parks in an attractive and intact condition for visitors. In dissent, Justices Marshall and Brennan noted: “Missing from the majority’s description is any inkling that Lafayette Park and the Mall have served as the sites for some of the most rousing political demonstrations in the Nation’s history . . . . [T]hese areas constitute ‘a fitting and powerful forum for political expression and political protest.’”<sup>17</sup>

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(*Quaker Action V*) (clarifying its earlier opinion to also require a waiver procedure for the 750-person limit on the White House sidewalk demonstrations).

11 Mark A. Venuti, *Lafayette Park: We Can Stand a Little ‘Visual Blight,’* WASH. POST, Feb. 14, 1988, at C8.

12 *Id.*

13 *Id.*

14 468 U.S. 288 (1984).

15 *Id.*

16 *Id.* at 304 (internal citations omitted).

17 *Id.* at 303

B. *Out of Site, Out of Mind. Putting Demonstrators at a Distance.*

One of the most common tactics authorities employ to tame dissent is placing demonstrators a significant distance from the event they are protesting, or from those individuals with whom they wish to communicate. Prior to the 2000 Democratic National Convention at the Staples Center in Los Angeles, the city police department, in conjunction with convention planners, the United States Secret Service, and other agencies, established a “secured zone” around the Staples Center that encompassed numerous streets, sidewalks, and buildings—an area of more than eight million square feet.<sup>18</sup> A small protest site (the “Official Demonstration” area) was designated for use during the convention—it stood 260 yards from the entrance to the Staples Center.<sup>19</sup> The City of Los Angeles explained the breadth of the “secured zone” and the placement of the protest site on the basis of security concerns, offering as consolation to those wishing to express dissent in the presence of Convention delegates the observation that there was a “sight line” from the demonstration area to the Staples Center.<sup>20</sup> But the convention planners also arranged for a “media village” housing 10,000 members of the media, with their equipment, to sit on the “sight line” between the Staples Center and the Official Demonstration area.<sup>21</sup> A federal district court found, upon reviewing these plans, that “at this crucial political event, those who do not possess a ticket to the convention cannot get close enough to the facility to be seen or heard. The First Amendment does not permit such a result.”<sup>22</sup> Not only are protestors put away from the object of their protests, they are also corralled and put in pens. The protestors are walled off, kept for long periods of time in police designated spaces, and effectively locked up. The New York City police are facing a lawsuit over this and other tactics they used during a large February 2003 anti-war protest.<sup>23</sup>

Such tactics are not simply limited to protecting politicians from unseemly opinions. In April 2003, a number of protest groups descended upon the city of Augusta, Georgia to demonstrate against the Augusta National Golf Club during its annual Masters golf tournament. The groups hoped to draw attention to the men-only membership of the club. But as the city prepared for the estimated 900

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18 *Service Employee Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 968 (C.D. Cal. 2000).

19 *Id.* at 972.

20 *Id.*

21 *Id.*

22 *Id.* The Republican Convention of 2000 held in Philadelphia produced a more creative suppression of dissent; city officials gave, wholesale, permits to Republican groups to occupy all nearby sites and thus foreclose others from use. See Jonathan Janiszewski, *Comment: Silence Enforced Through Speech: Philadelphia and the 2000 Republican Convention*, 12 TEMP. POL. & CIV. RTS. L. REV. 121 (2002).

23 Ian Urbina, *Police Face Lawsuits over Tactics at Big Protests*, N.Y. TIMES, Nov. 19, 2003, at B4.

demonstrators with 125 sheriff's deputies and state troopers, it determined that the groups would have to congregate on a five-acre lot half a mile from the main entrance to Augusta National Golf Club, completely out of sight of the golf course.<sup>24</sup> The sheriff's deputies, it was planned, would use their cruisers, lined bumper to bumper, as barriers separating the various protest groups and establishing penned-in areas.<sup>25</sup> "We'll let 'em do it, get it over with and then go home," Lt. Johnny Whittle of the Richmond County Sheriff's Department said. "Hopefully, everybody will be happy and have fun."<sup>26</sup> The Eleventh Circuit Court of Appeals upheld a lower court's ruling rejecting the protestors' request to demonstrate outside of the front gate of the golf club.<sup>27</sup>

### C. Presidential "Security Zones"

The problem of distancing demonstrators from the object of their dissent is particularly acute regarding the President. Indeed, the American Civil Liberties Union (ACLU) recently filed a lawsuit alleging an unconstitutional "pattern and practice" of discrimination against demonstrators by the Secret Service. The suit alleges that the Secret Service, by restricting protest activities to designated "protest zones,"<sup>28</sup> excludes protestors both from areas that are open to the general public and from areas where supporters of the President are permitted. Frequently, these protest zones are located so far away, or positioned in such a manner, that the protesters cannot see or hear, nor be seen or heard by, the President or other federal officials and the general public attending the event.<sup>29</sup>

For instance, in anticipation of a December 12, 2002, Presidential visit to Philadelphia, the local chapter of one of the nation's largest progressive activist organizations contacted the Philadelphia Police Department to notify it of the group's plan to demonstrate in front of a local Marriott Hotel, in view of the Presidential motorcade.<sup>30</sup> When the group arrived at that location, however, members of the Police Department informed them that protest was allowed only behind barriers that the Department had erected at a nearby intersection, where the motorcade would not pass on its way to the hotel entrance.<sup>31</sup> Yet other members of the public were allowed free access to the sidewalk immediately adjacent to the hotel's entrance, in view of the passing motorcade, even without going through any

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24 Bill Pennington, *GOLF; Soddan Lot Will be Site of Protests Tomorrow*, N.Y. TIMES, Apr. 11, 2003, at S3.

25 *Id.*

26 *Id.*

27 Union Tribune News Services, *Burk Loses Appeal over Gate Picket*, SAN DIEGO UNION TRIBUNE, Apr. 10, 2003, at D10.

28 ACLU website, at [www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86](http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86).

29 Amended Complaint, *Acorn v. City of Philadelphia*, 2004 U.S. Dist. LEXIS 8446 (E.D. 2004) (No. 03-4312) (hereinafter "Complaint").

30 *Id.*

31 *Id.*

visible security measures.<sup>32</sup> Moreover, when the protestors were permitted to move north from the “protest area,” their passage toward the motorcade route was quickly blocked again by a line of police officers. Individuals espousing views clearly supportive of the President, however, were allowed to remain on the final one-third of that block—an area otherwise restricted by security—and could be easily seen and heard by the President’s motorcade.<sup>33</sup> As the ACLU complaint asserts, “Philadelphia police officers were fully aware that Bush administration supporters were occupying an area that [the protest group] was led to believe had been closed for demonstration purposes by order of the Secret Service.”<sup>34</sup>

A similar incident occurred in September 2003, when the President delivered a speech in western Pennsylvania. Police were instructed by the Secret Service to force all protesters into a designated assembly area—a “designated free speech zone”—located in a large baseball field surrounded by a six-foot high chain-link fence.<sup>35</sup> Indeed, though only one protest group sought and obtained a permit to demonstrate in the baseball field, any individual with a sign critical of the President was forced into that area; police arrested those who refused such confinement.<sup>36</sup> A police officer subsequently testified that his orders came directly from the Secret Service: “There was a brief meeting. People were detailed to different areas and it was explained the assembly area was [in the ballpark], and the people protesting were to go into the assembly area.”<sup>37</sup> Thus, one individual carrying a sign that read, “The Bush family must surely love the poor. They have made so many of us,” was arrested for disorderly conduct when he refused to enter the baseball field to join all of those protesting President Bush’s visit.<sup>38</sup>

In January of this year, President Bush made a swing through the South and stopped in Atlanta, Georgia to place a wreath on the grave of the Rev. Dr. Martin Luther King, Jr. When hundreds of demonstrators showed up to meet him, they were kept at a distance by barriers and the President was shielded from their view by a line of busses with police clad in riot gear standing on top.<sup>39</sup> The President has even tried to carry his insulating security zone on trips abroad. When President Bush traveled to London in November, 2003, the Secret Service, anticipating large crowds protesting the war in Iraq, wanted to cordon off a huge swath

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32 *Id.*

33 *Id.*

34 *Id.*

35 ACLU website, [www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86](http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86).

36 Transcript of Proceedings, *Pennsylvania v. Neel* (2002), Defendant’s Exhibit 2 (on file with the author).

37 *Id.* at 9.

38 *Id.* at 11-16.

39 Richard W. Stevenson, *Protestors Chant and Boo As Bush Honors Dr. King*, N.Y. TIMES, Jan. 16, 2004, at A11.

of that city. But British officials said no, and the protests occurred without incident.<sup>40</sup>

It should be noted that these are not isolated incidents. The ACLU has asserted that the same tactics have been employed on at least fifteen different occasions around the country.<sup>41</sup>

#### D. *Public Relations and Preemption—Keeping the Crowds Small and Divided*

Although it is nothing new,<sup>42</sup> police are using a variety of tactics to disorient, disrupt, and disperse protestors. For example, police have used the tactic of grossly exaggerating the size of protest crowds and advising the public to brace for violence and disruption. Police forces then swell, assisted by outside agencies, and display a show of force sometimes rivaling the size of the actual protestors. Such tactics permit the police to scare off people who may have wanted to participate in the protest but were afraid of getting caught up in violence and to then congratulate themselves that they prevented the hyped up harm.

Other tactics include preemptive arrests; delayed release of arrestees until a protest has ended; so-called “trap and detain” actions that isolate groups of protestors, pen them, and order dispersal under threat of arrest; arrest for minor infractions such as blocking an intersection or being off a permitted parade route; and “fire inspection” of premises used as headquarters for protest activity. According to lawsuits now pending, all of these tactics were used against people demonstrating against the actions of the World Bank and the International Monetary Fund (IMF) during the groups’ meetings in Washington between 2000 and 2003.<sup>43</sup> And such tactics have been copied elsewhere.<sup>44</sup>

Sometimes the police play fast and loose with permits and approvals. Consider the case of the thousands of women called the “Code Pink” Women for Peace.<sup>45</sup> They wanted to protest President Bush’s planned war against Iraq and, although they were permitted to march through certain Washington D.C. streets, they were denied a permit to march on the sidewalk directly in front of the White House. Instead police said that they would allow a few groups of 25 protestors to march

40 Warren Hogue, *The Struggle for Iraq: Allies*, N.Y. TIMES, Nov. 12, 2003, at A8.

41 Complaint, *supra* note 29.

42 LUCY BARBER, *MARCHING ON WASHINGTON: THE FORGING OF AN AMERICAN POLITICAL TRADITION* (2002).

43 David A. Fahrenthold & Manny Fernandez, *City's Quandary: Peaceful Streets vs. Right to Assemble*, WASH. POST, Oct. 17, 2002, at T10; *Did D.C. Police Go Too Far?* WASH. POST, Oct. 1, 2002, at B1.

44 Robyn E. Blummer, *Miami Crowd Control Would Do Tyrant Proud*, ST. PETERSBURG TIMES, Nov. 30, 2003, at 1P (police shot rubber bullets and paint balls filled with pepper spray to disperse a crowd of protestors).

45 An anti-war group so named to respond to the government’s color-coded terror alert system. Their chant: “Bush says Code Red; we say Code Pink.” Sylvia Moreno & Lena H. Sun, *In Effort to Keep the Peace, Protestors Declare ‘Code Pink’*, WASH. POST, Mar. 9, 2003, at C1.

on the Pennsylvania Avenue pedestrian mall in front of the White House. Initially even these groups were denied entry, but were later admitted, and then told that the area around Lafayette Square was closed and they must leave. Some refused and were arrested.<sup>46</sup>

### III. POLITICAL DISSENT AND THE SPECIAL VALUE OF PROTESTS AND DEMONSTRATIONS

It would be fair to ask why we should worry very much about limits on protests and demonstrations since public debate, such as it is, is almost exclusively conducted in the media. And, in any event, it may be that few are listening.<sup>47</sup> For many of us, people on street corners handing out leaflets are just an annoyance. The soapbox orator in the park doesn't exist or is viewed as a crank. Protestors who interfere with traffic are reviled and cursed. And, in Washington, D.C., the Mecca of mass demonstrations, most marches have become a tame and bureaucratic affair where protestors and police follow a script, and the chief disagreement is over how many people actually showed up. As Professor Lucy G. Barber notes in her history of marches on Washington, marches are now such commonplace, negotiated events that they are barely worthy of public notice. "The conventionality, familiarity, and predictability of marches have encouraged journalists to treat marches as unremarkable events, to pay less attention to their political demands, and to give them minimal coverage."<sup>48</sup>

Yet it is just when crises such as war or civil rights struggles or dire economic hardships emerge that the confrontational, boisterous, and sometimes disobedient demonstrations rise up. These are the "troublesome" demonstrations that oppose government policy and show the resolve to change it. And people do take notice. Demonstrations, particularly troublesome demonstrations, are one of the few remaining ways for dissenting views to be aired and to be made known to the larger public. The street corner remains the people's forum and, given media consolidation, homogenization, partisan tilt, and shrinking public access, the people's forum "takes on new importance for democratic theory."<sup>49</sup> As Justice Brandeis eloquently reminded us, the protection of protest, contrary voices, dissent and the myriad forms of robust and challenging speech is essential to secure liberty:

Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a public duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they

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46 *Id.*

47 The fact that the public may have turned away from dissenting voices is itself a reason to strengthen protection for those voices. *See infra*, notes 50-58 and surrounding text.

48 BARBER, *supra*, note 42, at 225.

49 Owen M. Fiss, *Silence on the Street Corner*, 26 *SUFFOLK U.L. REV.* 1, 3 (1992).

knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.<sup>50</sup>

Thus public protest informs the public and serves as a safety valve. And, as First Amendment instrumentalists and those who celebrate free expression for its facilitation of truth and progress know, exposure to dissident voices can teach tolerance,<sup>51</sup> shake us up,<sup>52</sup> and be the catalyst of fundamental societal change.

Confrontational and troublesome protests and demonstrations, particularly those held in Washington D.C., have had a direct effect on the great public questions of the day. For years women suffragists kept their cause before the American people through marches and picketing throughout the Nation's capital, and most provocatively in front of the White House.<sup>53</sup> The "Bonus Marchers," thousands of desperate, unemployed World War I veterans, revealed their plight to the nation when they came to Washington, D.C. in 1932 to ask Congress to accelerate payment of their wartime "bonuses."<sup>54</sup> And the great civil rights marches of the 1960's, in Washington D.C. and throughout the South, awakened the Nation to the brutality and injustices of segregation and fueled support for passage of the Civil Rights Act of 1964.<sup>55</sup> By the early 1970's and after the repeated anti-war marches on Washington, commentators were beginning to see protests and demonstrations as a distinctive and integral part of democratic life, and they understood the phenomenon as an agent of political change, which undoubtedly it had become.<sup>56</sup>

Thus protests and demonstrations aimed at government officials and government policy are "high value"<sup>57</sup> speech, that is, political speech of the purest form. These are active forms of political participation that can energize the participants

50 *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (dissenting).

51 LEE BOLLINGER, *THE TOLERANT SOCIETY* 8-11, 104-05 (1986).

52 STEVEN SHIFFIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 86-87 (1990).

53 See BARBER, *supra* note 42, at 44-74.

54 *Id.* at 75-107.

55 Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *Yale L.J.* 999, 1000-01 (1989); DAVID J. GAROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* 133-78 (1978); JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 254-55 (1993).

56 See BARBER, *supra* note 42, at 180.

57 High value speech is a term used by courts and commentators to denote political speech or discussion or debate of public policy or public affairs. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 37 (1993) (defining "political speech" and asserting that it is "high value" speech); see also David E. Steinberg, *Alternatives to Entanglement*, 80 *Ky. L.J.* 691, 714 (1992) (exploring implications of placing high value on political speech).

and change the country. Protests and demonstrations provide solidarity, political momentum, and they permit communication with otherwise distant and perhaps unaware leaders. It is democracy in its most elemental and, sometimes, its most powerful form. For some, especially people of limited means, it may be the only way to express dissent, and for their dissent to be seen or heard.<sup>58</sup>

The right to engage in protests and to express oneself in the immediacy of a public moment and in the proximity of controversial public events is also valuable as a liberty interest of the participant. She partakes of a higher form of self realization, an expression of one's complete citizenship, something more than the solitary and infrequent activity of voting.<sup>59</sup>

But protests against government officials and government policy present a direct and immediate challenge to the status quo. And because they are a challenge, because they often use radical rhetoric and unconventional methods, because they question basic assumptions and assail public leaders and presidents, because they sometimes employ tactics of civil disobedience and may involve groups viewed as troublemakers and malcontents, these protests have historically been, and are still now, resolutely suppressed. We now consider why First Amendment law, as currently cast, is too weak and deferential to be a reliable bulwark against such suppression.

#### IV. THE FIRST AMENDMENT AND THE INCREASINGLY DEFERENTIAL TIME, PLACE AND MANNER TEST

Modern First Amendment doctrine draws a sharp line between government regulation of expression aimed at the content or communicative impact of speech and regulation aimed at the time, place, and manner of expression or the non-communicative aspects of expressive behavior. This line is thought to be an effective means of ferreting out illicit government attempts to censor certain views<sup>60</sup> while at the same time permitting the government to regulate in a wide range of

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58 See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 314 (1984) (Marshall, J. dissenting) ("A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse."); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 765, 806-810 (1986) ("Inexpensive media—such as leaflets, parades, street demonstrations, and picketing—are simply more important to poorly financed communicators than to the wealthy.") (hereinafter "Lonely Pamphleteers").

59 See Susan Williams, *Content Discrimination and the First Amendment*, 139 U. PENN. L. REV. 615, 681 (1991) (discussing the value of expression from a democratic theory perspective and the recent republican revival) (hereinafter Williams).

60 "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451-56 (1996); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 254 WM. & MARY L. REV. 189, 189-97 (1983).

areas, such as banning open burning or prescribing school dress codes, where the regulations are not aimed at expression but may have a substantial effect on it. Content regulations must satisfy strict scrutiny,<sup>61</sup> or sometimes the most "exact-ing scrutiny,"<sup>62</sup> and rarely will they survive.

Time, place, and manner (TPM) controls, on the other hand, must meet a lesser test. The Supreme Court, citing *Heffron v. International Society for Krishna Consciousness*, routinely states the test as follows: The regulation must, in fact, be content neutral, it must be justified by a "significant governmental interest," and there must be "ample alternative channels" for the affected party to communi-cate his message.<sup>63</sup>

Another familiar formulation of the TPM test comes from *O'Brien v. United States*:<sup>64</sup>

A government regulation is sufficiently justified . . . if it furthers an impor-tant or substantial government interest; if the governmental interest is unre-lated to the suppression of free expression; and if the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>65</sup>

One would be forgiven for viewing the TPM test as pretty tough to meet. The government's interest must be "significant" and some fairly close tailoring seems contemplated. But while forgiven, one would be wrong. First, the astute observer will note that the two formulations of the TPM test are not the same. The *O'Brien* test, with its talk of "substantial" government interests and restriction "no greater than is essential," has a strict speech-protective cast. But the *O'Brien* test was forged in the context of the distinct problem of symbolic-speech<sup>66</sup> and, although the Court continues to cite it and purports to rely on it for TPM analy-sis, the *Heffron* test has become the operative approach in TPM cases.<sup>67</sup> And,

61 *E.g.*, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("[C]ontent-based burdens on speech raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government.").

62 *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (upholding campaign-free zones near polling places on election day).

63 *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding agricultural state fair regulation limiting fairgrounds distribution and sale of literature to a fixed booth location). The strands of the modern TPM test were first seen in cases decided in the 1930's and 1940's. *See, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding regulation of sound trucks).

64 391 U.S. 367 (1968).

65 *Id.* at 374.

66 *See Williams, supra* note 59, at 619-620 (noting the collapse of previously separate TPM regulations and symbolic speech regulations into one standard).

67 *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804-812 (1984).

second, with some exceptions, the *Heffron* test has become a flabby, deferential presumption in favor of government regulation and maintenance of the status quo.

Commentators have criticized the evolution of the time, place, and manner test into a subjective and deferential reasonableness/balancing test.<sup>68</sup> For example, speaking of protests and demonstrations, Professor C. Edwin Baker has noted that the test inevitably favors maintaining the status quo and the maintenance of order. “The daily orientation [of decision makers such as judges and politicians] predictably leads to a very restrictive view of the desirability and reasonableness of dissenting, disruptive activities.”<sup>69</sup> And, “[b]alancing analyses most commonly and most logically employ some version of a utilitarian or public welfare standard” and a discounting or outright rejection of dissenting or dissident preferences.<sup>70</sup>

In some sense it was inevitable that the test would degenerate in this fashion. After all, the First Amendment is often championed by dissidents, radicals, and hated groups. Similar to the dynamic in the Fourth Amendment where rights are often championed by criminals, a reasonableness test, administered by those whose success lies in the order and comfort of the status quo, will tend to disapprove of expressive conduct deemed threatening, confrontational, unfamiliar, or disliked. In addition there is the tendency of ad hoc reasonableness tests to weigh the government interest in regulating at wholesale (e.g., the general interest in public order) against the value of the activity at retail (e.g., why does this group have to march right here, right now; don’t they have other ways to communicate their message). Thus cast, it is almost inevitable that the government’s interests will outweigh the individual’s.

The ills of the reasonableness test and its applications are many and severe. In terms of protests and demonstrations, TPM restrictions that put protestors away from the object of their protest or out of sight dilute their message just as surely as if the government forced them to substitute a nice word for a bad one.<sup>71</sup> These kind of TPM restrictions also weaken public discourse, public exposure to dissenting voices, and the chance for public understanding. TPM restrictions that keep crowds small or render them irrelevant discount each person’s liberty and associational interest in expressing oneself through joining others in protest. TPM restrictions on demonstrations also target certain formats for dissent. They thus discriminate against people who have limited means to use alternative avenues of communication and discriminate against the kind of messages likely to be sent by

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68 *E.g.*, *Lonely Pamphleteers*, *supra* note 58.

69 C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits And Time, Place, And Manner Regulations*, 78 Nw. U. L. Rev. 937, 942 (1983).

70 *Id.* at 943-44.

71 See *Cohen v. California*, 403 U.S. 15 (1971) (government could not sanitize protestor’s message of “F— the Draft”).

such individuals. And the troublesome protests can easily be made targets, because they most easily enable the government to conjure up danger and make vague claims about security and terrorist attacks.<sup>72</sup>

Looking at the components of the TPM test, we see that courts invariably approve almost any government interest as "significant." The government may regulate the time, place and manner of expression to prevent visual blight,<sup>73</sup> protect privacy,<sup>74</sup> reduce noise,<sup>75</sup> and control crowds.<sup>76</sup> The government is rarely put to its proofs about the likelihood that the projected harms will actually occur.

As for the narrow tailoring prong, the record is mixed. Some courts vigorously police a loose fit between the government's claimed objectives and restraints on speech while others do not. The Supreme Court invited this variability by dropping the one requirement of narrow tailoring that would keep the government honest while also providing heightened speech protection, namely, the least restrictive means test. Under such a test, the government has to consider whether there are alternative ways for it to accomplish its objectives. If such alternatives exist, and if they are less restrictive of expression, then the government has to employ them. The Court specifically held in *Ward v. Rock Against Racism* and subsequent cases that, under current TPM doctrine, the government is *never* required to show that it used the least restrictive means to advance its interests. As Justices Marshall, Brennan, and Stevens noted in the *Rock Against Racism* case, when one jettisons least restrictive means, there goes the heart of the narrow tailoring requirement:

Until today, a key safeguard of free speech has been the government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. . . . By holding that the guidelines (on noise regulation) are valid time, place, and manner restrictions, notwithstanding the availability of less intrusive but effective means of controlling volume, the majority deprives the narrow tailoring requirement of all meaning.<sup>77</sup>

The "sufficient alternative channels" prong of the TPM test also undervalues speech by inviting judges to determine, from their perspective, who the intended audience is and whether they think demonstrators had ample opportunity to get their message out. But with protests and marches, there may not be *any*, much

72 Compare *Mahoney v. Norton*, *supra* note 5, (upholding government's claims) with *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990) (rejecting government's claims).

73 *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

74 *Frisby v. Schultz*, 487 U.S. 474 (1988).

75 *Kovacs v. Cooper*, 336 U.S. 77 (1949).

76 *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981).

77 *Id.* at 803.

less any sufficient, alternative. Protests at some sites may be unique. If a group wants to petition the government or bring its grievances to Congress, there may be no even remotely equivalent alternative to going to the steps of the Capital, the “centerpiece of our democracy.”<sup>78</sup> And even if a site is not unique, one’s message must be set in a particular context at a particular time. When a group wants to protest a governor’s refusal to halt an execution scheduled for January 1st, its message is diluted, even nullified, if they are forced to object in a place distant from the Governor’s office on January 2nd. Courts have shown some sensitivity to time and place, but not always and not reliably.<sup>79</sup>

#### V. THE CONTINUUM OF CONTENT CONTROL AND TIME, PLACE AND MANNER CONTROL

Because the protection of expression turns so dramatically on whether courts view government action as aimed at content or, instead, as simply a TPM regulation, it is perfectly understandable that litigants have struggled mightily to cast government action as content control. One example is the ACLU’s suit against the City of Philadelphia for unlawfully funneling those protesting a presidential visit in 2002 into a “protest zone” away from President Bush’s motorcade. The suit appears to object to the government’s action as content control. That is, the ACLU notes that only those *protesting*, and indeed only those protesting *against* President Bush, were relegated away from the hotel area where the Bush entourage was to pass and where the visit would be anchored.<sup>80</sup> Members of the public were given free access to sidewalks adjacent to the hotel’s entrance, and people showing support for the President were permitted to gather in an area where they could be seen and heard by the President, part of the same area put off limits to the protestors. The distinction between protestors and members of the public seems, however, to be a regulation of protestors without regard to their message and, thus, under conventional doctrine, would fall under the TPM test. The distinction between the protestors and those demonstrating support for the President, however, does treat speakers differently based on their messages and, as such, would face strict scrutiny.

The problem with such an approach—trying to shoehorn all regulation of protest into a form of content control—is that the government’s answer might just be to create Presidential security zones that keep *everyone* at a distance. But equal-

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78 *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2003).

79 *Compare Schneider v. State*, 308 U.S. 147, 163 (1939) (striking down a ban on handbilling saying that any inquiry into alternatives available to the defendant is not appropriate because “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place”) with *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (approving ban on posting signs on public property and simply asserting that adequate alternatives exist).

80 See Complaint, *supra* note 29.

ity of treatment is not enough if everyone is to be treated equally shabbily. Moreover, try as one might, not all of these regulations, such as treating protestors differently from passers-by, can be fit into the content side of the current TPM/content control dichotomy. There may be a third way.

The discussion thus far has assumed that government regulations on expression can or should be divided into content or TPM controls. But, in fact, it is not at all clear that thinking about First Amendment protections is best done by putting all government regulation into one category, content control with its stringent test of strict scrutiny, or into another, TPM controls and its flimsy test of reasonableness.<sup>81</sup> It is not clear that the current line between content control and TPM control is defensible or that, even if some such line is defensible, it makes sense to put restrictions on protestors on the TPM side. It may be that government regulations affecting expression are best viewed along a continuum, and that there should be a category of "quasi-content" control.

The current content control/TPM dichotomy makes sense if we assume that the singular and worst thing the government can do in regulating expression is aim at suppressing particular messages. And indeed this kind of action is undoubtedly perilous to liberty and a free, open, and democratic society. As Justice Jackson observed in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional horizon, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."<sup>82</sup> Yet there are circumstances where, even though the government may not be aiming at speech as such, its regulation of the time, place, or manner of speech can have similarly devastating and distorting effects. Consider, for example, the difference between the government banning all large protest marches in the capital (a TPM regulation) and the government banning all large demonstrations in the capital which oppose the war on terrorism (a content regulation). The government claimed it needed the first ban so the streets would always be unobstructed in case a terrorist act necessitated immediate evacuation of the city. The government claimed it needed the second ban because protests against the war on terrorism might encourage a terrorist attack. The first action would be judged under a general reasonableness standard while the second would face strict scrutiny. Yet, in either case, the end result, or effect, of the government's action would have been to impose a substantial barrier to expressing opposition to government policy on terrorism.

Another shortcoming of the content/TPM dichotomy is that many different kinds of speech regulation are lumped on the TPM side of the line and then

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81 Many commentators have criticized this development, and one writer believes that the Court's preoccupation with content control is a main reason why TPM regulations have become just a neglected category of "other." See Williams, *supra* note 59, at 623.

82 319 U.S. 624 (1943).

evaluated under one all purpose test. The result is not always a sensible calibration of the different circumstances of each case but a general and deferential reasonableness test. Consider, for example, that TPM regulations fall on two quite different kinds of expressive activity. In some cases, the government's regulation touches only tangentially on expression, in that it is regulating activities that have no expressive qualities except that the speaker chooses to engage in these activities in order to "say something." Thus the government might regulate open burning, but someone might want to start a fire in order to protest nuclear energy policy. In such a case, starting a fire is not, of itself, an expressive activity nor, ordinarily, would it be understood as such. It only intersects with expressive activity because of the intention of the speaker. This connection could make an endless array of actions a matter of First Amendment protection. If that protection were anything but minimal, ordinary health and safety measures might be cast aside. There are other TPM regulations, however, that regulate activities that are expressive in themselves.

Actions such as protests, marches, demonstrations, and leafletting are speech by other means. Regulation of these activities is a direct restriction of expression, and we need not know the intention of the speaker to appreciate it as such. The fact that the government may not be aiming at the protestors' *particular* messages does not diminish the fact that the *activity of expression* is directly infringed. Courts have sometimes made this distinction, and commentators have attempted to capture it by casting free speech regulations into content control, control of expressive activities, and incidental regulation of speech.<sup>83</sup> Not everyone agrees on the same taxonomy,<sup>84</sup> but the effort is a recognition that separation of all speech controls into just two categories is inadequate.

There is a third way that the current content/TPM dichotomy fails to account for "quasi-content" effects, namely discrimination against certain forms or categories of expression. When the government, although not aiming at particular messages, systematically suppresses certain forms or formats of expression, such as banning leafletting or suppressing mass demonstrations, it is in fact discriminating against certain messages—anti-war, anti-establishment—and certain speakers—dissidents, and radicals. Some speakers may not have the means to command media attention or use more expensive or more sophisticated means of expression. They may have only the streets.<sup>85</sup>

Finally the current content/TPM dichotomy fails to account for the fact that sometimes the time, place, or manner of speech is the message, or at least is so

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83 See, e.g., David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 499-500 (1988) (describing incidental regulation as generally applicable laws applied to expressive conduct).

84 Indeed the categories set up in this paper, content controls, quasi-content controls, and TPM controls differ from the classifications used by Professor Day. *Id.*

85 See *Lonely Pamphleteers*, *supra* note 58.

inextricably bound up with it that certain controls of TPM are necessarily content or quasi-content controls. For example, when activists wanted to call attention to homelessness in the nation's capital and to the callous indifference of the powerful and secure to the plight of the homeless, it was a dramatic message of itself to sleep outside, in winter, across from the most famous house in the world, the White House.<sup>86</sup>

## VI. RECASTING CONTENT/TPM FOR DEMONSTRATIONS AND PROTESTS AND A DOCTRINE OF SPECIAL PLACES

So, what is to be done? Is there a way to create a rich, speech-protective doctrine that also allows legitimate and measured regulation of the TPM of expressive conduct? What workable rules can we adopt? Commentators have offered some solutions. In a 1995 *Yale Law Journal* article, for example, Ronald J. Krotoszynski argued that we should recover a balancing test employed by District Judge Frank M. Johnson, a brilliant and courageous defender of the Constitution.<sup>87</sup> That balancing test, used by Judge Johnson to grant protestors the right to engage in a peaceful civil rights march from Selma to Montgomery, Alabama, explicitly recognized that the right to protest should receive greater judicial protection depending on the scope of the wrongs at issue. Thus government attempts to curtail protests against racial discrimination at the height of the 1960's civil rights struggles would have to be especially urgent and narrowly drawn. Courts would be less demanding about the same restrictions if the march concerned, say, a protest over the closing of an HOV lane. As sensible as this approach feels intuitively, it has been appropriately ignored because it offers little guidance and invites individual judges to weigh the importance of social issues on their own personal policy scale.

Another suggestion has come from Professor Vincent Blasi. He has argued that protest rights should be protected more or less depending on the historical context; that is, we should ask whether the protest arises at a time when the public is intolerant.<sup>88</sup> In other words, judges should be especially vigilant and protective of protest actions in times of suppression and conformity. This is a useful but perhaps fragile innovation. Judges need more than reminders to "stand tall" when assaults on liberty seem pervasive. As the late professor and dean John Hart Ely reminded us, in times of paranoia and intolerance, judges can be as

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<sup>86</sup> See *Community for Creative Non-Violence*, 468 U.S. 288 (1984).

<sup>87</sup> Ronald J. Krotoszynski, *Celebrating Selma: The Importance Of Context In Public Forum Analysis*, 104 *YALE L. J.* 1411, 1413-14 (1995).

<sup>88</sup> Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 *COLUM. L. REV.* 449, 449-52 (1985).

easily swept up as the rest of us.<sup>89</sup> But, as he also reminded us, judges are less likely to be swept up if they have something more than general admonitions to guide them. What they need are concrete rules; rules that are decided upon ahead of time and that structure and steer a judge even in the most contentious times.<sup>90</sup> Professor Ely suggested strong categorical tests that would be crafted in times of quiescence and that would, when the storms hit, tie judges to the mast. Although he was speaking of how we should deal with the problem of “dangerous speech,” his insights are directly relevant to the matter of protests and demonstrations.

The threads of a sturdy test can already be found among the decided cases. First, courts have recognized the importance of protestors’ rights to be near the object of their protest and to be seen or heard by their intended audience.<sup>91</sup> A particularly sensitive protection of such rights can be found in *Bay Area Peace Navy v. United States*.<sup>92</sup> There the court considered the constitutionality of a 75 yard security zone which prevented small boats from demonstrating in front of a pier holding 3,000 invited military and civilian guests watching a parade of naval ships during “Fleet Week.” The court described Fleet Week as “the largest annual Naval event in the United States . . . intended to demonstrate that the Navy is well-prepared, effective and represents a sound investment of public funds.”<sup>93</sup> The protest boats carried signs and included a water-borne theatrical production expressing anti-war views. The court invalidated the government’s security zone as overbroad, not demonstrably necessary to serve a real as opposed to hypothetical objective, and not saved by the existence of alternative means of communication. Although the court invoked the conventional language of the TPM tests, it displayed a stringency in application which was decidedly weighted toward the free speech interests.

The court accepted the government’s argument that prevention of a terrorist attack or serious injury or the promotion of marine safety are significant government interests, but the court insisted that there be “tangible evidence” to show that these interests were threatened. It also insisted that there be tangible evidence that the Navy could not achieve its objectives with a smaller security zone. And it refused to accept that there were ample alternative means for the plaintiffs to convey their message if they had gotten bigger signs or bigger boats or passed out pamphlets on land. An alternative is not effective, the court said, if

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89 John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975) (hereinafter Ely, *Flag Desecration*); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 57 (1980).

90 Ely, *Flag Desecration*, *supra* note 89, at 1501.

91 See, e.g., *infra* note 97.

92 914 F.2d 1224 (9th Cir. 1990).

93 *Id.* at 1225.

“the speaker is not permitted to reach the intended audience.”<sup>94</sup> In that instance the demonstrators could not convey their theatrical protest to the persons on the pier unless they were able to move in closer. The court also noted that alternative means are not adequate if they are more expensive than the prohibited means, since some speakers may have only limited means.<sup>95</sup>

The Supreme Court, too, has recognized the need for stringent First Amendment proximity rules for speakers in the abortion protest cases. However the Court’s leading case in the area, *Madsen v. Women’s Health Center*,<sup>96</sup> arises in the context of an injunction against protestors<sup>97</sup> which the Court said made it a case for scrutiny beyond a conventional TPM case. But the approach is instructive. The Court applied a test of intermediate scrutiny bordering on strict scrutiny. “When evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.” Although the dissenters said the majority was not protective enough, the Court carefully preserved the protestors’ rights to peacefully approach persons using the services of a clinic and struck down a 36 foot buffer zone around clinic property (although upholding a 36 foot buffer zone around clinic entrances and driveway).

Decided cases also stiffen First Amendment protection for protest and demonstrations when the venue, such as the grounds of a legislature, is especially connected to operation of the democratic process or is near the institutions of governmental power. Courts have struck down, for example, bans on demonstrations on the steps of the U.S. Capitol,<sup>98</sup> the sidewalks around the Supreme

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94 *Id.* at 1229. *See also* *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333, 339-40 (W.D. Va. 1987) (holding university regulation prohibiting erection of protest shanties on lawn of building where Board of Visitors meets is not rendered valid by permission to erect shanties elsewhere on campus, in a place not visible to the Board, the intended audience); *Dr. Martin Luther King Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976) (parade route through black neighborhood not constitutional alternative to route through white neighborhood when intended audience was white).

95 914 F.2d at 1229 n.3.

96 512 U.S. 753 (1994).

97 *Id.* The majority believed that injunctions should be viewed more rigorously than statutes since they represented only the view of a single judge and not a legislative choice to promote particular societal interests, and because they carry greater risks of censorship and discrimination. Justice Stevens thought the opposite approach was called for, since an injunction, entered into in response to proven wrongdoing, could be precisely targeted to the harms and not become a rule binding on the whole community.

98 *Lederman v. United States*, 291 F. 3d 36, 44 (D.C. Cir. 2003).

Court,<sup>99</sup> and statehouse grounds.<sup>100</sup> But these cases are few among many, and speech-protective outcomes are unpredictable.<sup>101</sup>

What is needed is a structured rule of decision. That rule should be: whenever there are expressive activities such as marches, protests, or demonstrations directed at government officials or policies, such activity is presumptively permitted to take place at a time and at a place proximate to the object of the protest and in such a manner as to be seen and heard by the object of the protest. Demonstrators who want to dissent from the policies of the major political parties, for example, should be permitted to hold their protest within sight and sound of the Convention delegates and not put out of sight in a demonstration zone. Moreover marches, protests, or demonstrations directed at government officials or policies are presumptively entitled to occupy special places of protest and venues for the redress of grievances. These are public spaces around governing institutions, such as state houses, Congress, the White House, the Supreme Court, state courts, and such spaces as have evolved to be recognized areas of political protest such as the Ellipse in Washington D.C. or town that squares in local communities. Any government regulation or condition that materially interferes with such a march, protest, or demonstration must substantially serve important government objectives and use the least restrictive means available.

This “intermediate scrutiny” test is not a panacea, and it is not even fully categorical in its cast. But it does tell the judge where the baseline is, imposes a heavy burden on the government to justify restrictions, and requires proof that alternatives were considered and no less restrictive means were available to deal with a real and substantial government problem.<sup>102</sup>

## VII. HOW IT SHOULD WORK—THE CASE OF LAFAYETTE PARK

If there is a “special place” for holding political demonstrations, it is Lafayette Park in Washington, D.C. Facing directly opposite the front of the White House, this seven acre square patch is our American Hyde Park Corner. Together with

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99 *United States v. Grace*, 461 U.S. 171, 180 (1983).

100 *Edwards v. South Carolina*, 372 U.S. 229, 236-39 (1963).

101 For example, courts have also upheld bans or restrictions on protests in Lafayette Park, on the sidewalk in front of the White House, and near the entrance to the United Nations. *See, e.g.*, *Clark v. Community for Creative Non-violence*, *supra* note 58 (Lafayette Park); *A Quaker Action Group v. Hickel*, *supra* note 10 (White House sidewalk); and *United for Peace & Justice v. City of New York*, 243 F. Supp. 2d 19, *aff'd*, 323 F.3d 175 (2d Cir. 2003) (United Nations).

102 As an analogy to the point that judges need structured decision-making in times of stress on liberties, a recent article notes that during wartime, courts, contrary to conventional thinking, *do* play a significant role in checking executive power. That role is not, however, one of substantive judgment but of making sure that institutional structures and processes have been preserved and followed. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW, 1 (Jan. 2004), at <http://www.bepress.com/til/default/vol5/iss1/art1>.

the Mall area of the Capital, it has been the forum for powerful expressions of dissent and political protest. On any given day, there could be three or more demonstrations going on in the park.<sup>103</sup> But after 9/11, that changed.

Since September 11, 2001, groups larger than 25 may not protest or demonstrate in Lafayette Park.<sup>104</sup> There is no such limit if a large group, such as a group of tourists, wants to enter the park, not to demonstrate, but, rather, to meet, take in the scenery, or discuss the comparative beauty of capital cities around the world. The 25-person demonstration ban is precisely the kind of case that should be reviewed under a new speech-protective, intermediate test. First, the site is not only a First Amendment “special place,” it is unique. Second, the limit applies to demonstrations, a plainly expressive activity. And, third the limit has a substantial and material effect on protests. It effectively eliminates any large gathering in the park to express dissent.

The 25-person ban has already been challenged and upheld.<sup>105</sup> But if the intermediate test were applied, the ban would surely fall. Under that test, the numerical limitation is presumptively invalid, and the burden falls to the government to show it served a substantial government interest and was the least restrictive means of doing so.

In the actual challenge to the 25-person ban, the government filed an affidavit that the ban was needed as a protection against terrorists, specifically that (a) innocent demonstrators could be used as a cover for a terrorist attack on the White House or as a way to maintain surveillance on the White House, (b) the fact of a large demonstration might give terrorists special incentive to act because there would be media coverage, and (c) terrorists might attack the demonstrators. The government offered no proof of actual danger, and no support for the scenarios it painted. And, the government’s position did not rest on the specifics of any actual protest. The trial judge appeared to accept, uncritically, the government’s claims. Although concern for the President and the well being of innocent protestors is a substantial government interest, the unsupported specter of terrorism is not a sufficient basis for the ban. Nor is the ban well tailored. It is underinclusive and overinclusive. A large group of tourists might serve the same “cover” purpose for terrorists, but such a group is permitted access. It is overinclusive because it is not obvious why 26 or even 30 or 100 demonstrators are not as easily monitored as 25. And, there are less restrictive alternatives readily available.

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103 *Clark v. Community for Creative Non-Violence*, 468 U.S. at 288 (1984).

104 As this article went to press, the 25 person ban was lifted—at least for the time being. Since September 11, 2001, and until March 2004, the Department of the Interior imposed the ban pursuant to monthly requests from the Secret Service. Because the Secret Service did not make a request in either March or April, protests in the park are not now subject to restrictions beyond those required by the Department’s normal regulations. Telephone interview with Randy Myers, Attorney-Advisor, Solicitor’s office, Dep’t of Interior (Apr. 5, 2004).

105 *Mahoney v. Norton*, *supra* note 6.

There can be a sufficient police presence, entrances can be monitored, and devices to check packages and to detect weapons or other dangerous items are available. Indeed the President will probably be more protected during a demonstration, given the security precautions that might be taken. Consistent with that assumption is the fact that there has *never* been a large demonstration near the White House that has posed a threat.

If the government's speculative reasoning is sufficient for the numerical ban in Lafayette Park, there is no place that cannot be similarly restricted. Neither the steps of the Capitol, nor the sidewalks of the Supreme Court, nor even "Freedom Plaza," a park located across the street from the Mayor and Council's offices in Washington, D.C. The Lafayette Park ban illustrates why judges need a pre-existing, sturdy, and structured First Amendment test; otherwise they will be swept along by government generalities and color-coded alerts.

### VIII. CONCLUSION

The current moment in history is not the most dangerous we have witnessed for individual liberties or for the First Amendment freedom to dissent. But there are worrisome signs, and one is the spate of actions aimed at "troublesome" protests and demonstrations. Thousands of people have marched and demonstrated against current government policies concerning the war on terrorism, globalization, restriction on liberties, and environmental destruction. They have been met with violence, disruption, infiltration by police, surveillance, arrests, and stringent time, place, and manner restrictions. Very recently a federal grand jury issued subpoenas to four anti-war protestors and Drake University ordering them to provide information about an antiwar forum sponsored by the University's chapter of the Lawyers Guild and held at the school in the fall of 2003. Federal officials wanted, among other things, membership lists, agendas, and annual reports of the Lawyers Guild as part of an investigation, ostensibly, into an attempted trespass on an Iowa National Guard base in Iowa the day after the forum.<sup>106</sup> In the face of criticism, the U.S. Attorney's office withdrew the subpoenas,<sup>107</sup> but a chilling effect may linger. And, in the Fall of 2003, a confidential FBI memorandum, revealed by the *New York Times*, showed that the FBI is collecting extensive information on the tactics, training, and organization of antiwar demonstrators and asking local officials to report "suspicious" information to counter-terrorism units.<sup>108</sup>

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106 Monica Davey, *An Antiwar Forum in Iowa Brings Federal Subpoenas*, N.Y. TIMES, Feb. 10, 2004, col. 5, at 14.

107 Jeff Eckhoff & Mark Seibert, *U.S. Officials Drop Activist Subpoenas; Judge Lifts Drake Gag Ordering Probe of Antiwar Protest*, DES MOINES REGISTER, Feb. 11, 2004, at A1.

108 Nat Hentoff, *J. Edgar Hoover Back at the 'New' FBI*, VILLAGE VOICE, Dec. 16, 2003, at 30.

In the face of these developments, it is not premature to think about the ways we protect the right to dissent. This symposium paper has focused on just one slice of the issue, namely, how courts monitor government restrictions on the time, place, and manner of demonstrations and protests. Current First Amendment doctrine is neither hardy enough nor reliable enough to insure that debate on public issues remains "uninhibited, robust, and wide-open."<sup>109</sup> What is needed is a structured, speech-protective test that can withstand the crisis of the moment. Rules to protect the timing, proximity, and special places of protests and demonstrations are one way to start.

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109 *New York Times v. Sullivan*, 376 U.S. 254 (1964) (announcing new first amendment rules for libel actions).

## **PRESENTATION BY COUNCILMEMBER KATHY PATTERSON\***

**November 21, 2003**

As is often the case with complicated issues, I come to the David A. Clark School of Law Symposium today with more questions than answers. But I thought it might be instructive for others to see the issue of civil liberties from the perspective of a legislator. I see five issues that I would pose as questions pertinent to the discussion today and also front-burner issues for the District of Columbia Council's Committee on the Judiciary, which I chair.

First, when does use of closed-circuit television technology cease to protect the public safety and intrude on rights to privacy? Second, where should the line be drawn between police actions that are protective and police actions that are preemptive? A third issue: is it ever justified for police to act against individuals based on the content of their speech? The final two questions emerge from the other three: what is the capacity of the police department in the nation's capital to effectively police itself against unwarranted violations of civil liberties? And finally: who makes these decisions; who answers these questions? What is operational and what is policy? What is a policy I can appropriately articulate as a District of Columbia legislator versus what should be undertaken as a matter of national policy by my counterparts at the other end of Pennsylvania Avenue?

All of these issues are in play at the moment in a Judiciary Committee investigation of the policies and practices of the Metropolitan Police Department in handling demonstrations. That investigation arose from the April 2000 anti-globalization protests and the arrests made during a weekend of antiwar and anti-globalization demonstrations in September 2002. We scheduled two days of public hearings in mid-December, and anticipate issuing a report with findings and recommendations early in calendar 2004.

Many of you are aware of legislation pending before the Council to govern the use of closed circuit television by the Metropolitan Police Department, and the ACLU's local leadership has very usefully presented the Committee with an alternative draft bill for our consideration. For those less familiar, the District's police force built what is now called the Joint Operations Command Center at police headquarters consisting of a huge bank of television screens displaying, when operational, scenes captured by fourteen video cameras mounted atop buildings throughout the downtown area. The center is operational—the cameras

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\* Councilmember Kathleen Patterson has served as Chair of the D.C. Council Committee on the Judiciary since January 2001. This committee has oversight responsibility for public safety, emergency preparedness, criminal justice and legal affairs. Councilmember Patterson has represented Ward Three on the D.C. Council since 1994.

are turned on—whenever there is a major event in the city. It was last operational on the weekend of October 24-25, 2003, during anti-war demonstrations.

The legislation, like the governing regulations that were already approved by the D.C. Council, require public notification whenever the department's CCTV system goes live. The notice posted to the web on October 20 includes this explanation routinely included in MPD press releases:

The Metropolitan Police Department's CCTV system is a secure, wireless network of 14 cameras owned and operated by the MPD. These cameras are mounted on various buildings primarily in the downtown DC area. They focus on public spaces around the National Mall, the US Capitol, the White House, Union Station and other critical installations, as well as major arteries and highways that pass through downtown DC. Under DC regulations, additional cameras can be added to the network on a temporary or permanent basis following a period of public comment. During exigent circumstances, additional cameras can be deployed on a temporary basis without advance public notice, but with a post-deployment notification to the public.

The CCTV system is not a round-the-clock video monitoring operation. The system is activated only during major events in the District (such as large-scale demonstrations, the Fourth of July celebration, Presidential Inaugurations, etc.) or during periods of heightened alert for terrorism. CCTV camera feeds are displayed in the MPD's Joint Operations Command Center (JOCC), a secure facility located on the 5th Floor of police headquarters. The JOCC is operated by the MPD, but may include staff from other federal, regional, state and local public safety agencies participating in joint operations.

The MPD's use of CCTV is designed to ensure the protection of personal privacy rights. The CCTV network has no audio capability; it provides video images of public spaces only. The cameras can pan at 360 degrees and tilt at 180 degrees. The cameras do have the capability to zoom in on a particular location, but are used primarily to monitor wide areas of public space, not the individuals within that space. The CCTV system does not use face-recognition or any other biometric technology. Both DC regulations and internal MPD policy expressly prohibit the arbitrary monitoring of individuals or monitoring of individuals based on race, gender or other factors. Regulations and policies also prohibit the use of the CCTV system for the purpose of infringing on First Amendment rights.

The Joint Operation Command Center was created, the cameras bought and installed, without a review of these actions by the Council. Police leaders have testified that they considered this center and its capacity to have been appropriate, forward-looking operational responses to security needs and the availability

of technology—an example of protection and not preemption. Planning for the center began in the wake of the anti-globalization protests in Seattle, Washington, in 1999. The closed circuit system was first used on September 11, 2001.

I believe it would be irresponsible for me or any other policymaker to fail to use technology that can help keep people safe. I am not troubled by the existence of the technology and the Joint Operations Command Center. I have a number of questions about the use of the technology—when and with what level of notice. The legislation, like regulations already in place, requires notification and reporting on the use of the technology. And the legislation prohibits any further deployment of additional, more intrusive technologies without explicit Council approval.

I believe the surveillance capability offers a useful, and justified, means of monitoring and responding to a major incident. If someone set off explosives at the Wilson Building, the Metropolitan Police Department would have, among other tools, a television picture of the building and its surroundings and that could aid in securing the scene. Here is a real world question we will ask at the hearings in December. Last September nearly 400 persons were arrested in Pershing Park between the White House and the Wilson Building—and were arrested illegally. I want to know what the command staff at the Joint Operations Command Center saw that day and whether they, with a bird's eye view of the park through the surveillance cameras, concurred with the commander's frontline assessment that this crowd was dangerous and needed locking up.

Our investigation is basically second-guessing police department decisions made that day. Another question: what second guessing did the department itself undertake that day? Did the surveillance cameras capture what news tapes appear to have captured: that the crowd was calm and peaceful?

In the months and, now, years, since September 11, 2001, the issue of protection versus privacy has taken on an urgency. When it comes to the views of the American public, the lines may well have shifted in the direction of security and away from the protections of personal privacy. That is surely the case with regard to federal law and regulation. Those I represent, residents of the nation's capital, expect policymakers to take any and every action possible to provide protection from harm; protection from potential terror. Part of my job is to anticipate where and how public policy can support and promote personal safety.

Another issue we are exploring in the Judiciary investigation, the second issue I noted at the outset, has to do with whether actions are preemptive; whether a police action is undertaken expressly to frustrate an individual's right to free expression. This issue arose in April 2000 when the police department and the Department of Fire and Emergency Medical Services closed down the building used as a "convergence center"—an office and meeting place used by the anti-globalization groups. The city's fire marshall inspected the building and cited the occupants for a series of building code and fire code violations. We are examining this

issue based on allegations that the action was “pretextual,” that is, though some violations were discovered, the inspection itself was designed to thwart legitimate protest activity. In the three years since the first globalization protests here in the District, law enforcement agencies have taken other actions that appear preemptive, including cordoning off large sections of downtown and removing newspaper boxes. The justification: protecting against newsstands being hurled through store windows. The arrests in September 2002 in Pershing Park, similarly, are alleged to have been preemptive, designed to remove from the streets individuals who would likely have participated in demonstrations over the following days.

There is an extent to which preemptive actions are precluded by Constitutional protections and this issue is part of ongoing lawsuits in U.S. District Court here. There is, further, though, the issue of how public policy should address this matter in the District of Columbia. Should we enact as law, or require the promulgation of law enforcement regulations that provide assurances well beyond those afforded by the Constitution? I believe we should, and welcome discussion on this point.

Another allegation included in the Judiciary Committee’s current investigation holds that police actions here in the last three years have been based on the content of speech. The IMF-World Bank protests and police response in Seattle in 1999 led to significant property damage and physical harm. Anti-globalization demonstrations and police response in Genoa, Italy, resulted in the death of a protester. The demonstrations that have a longer history in the District of Columbia such as the annual anti-abortion marches and one-time events like the Million Mom March have not produced the kind of police planning and deployment that has marked the IMF-World Bank meetings here since Seattle. My constituents, and perhaps even a majority of participants in this symposium, would likely consider it reasonable to put more planning and greater levels of police deployment into anti-globalization demonstrations than the Million Mom March. But when is it appropriate—desirable even—and when is it patently unconstitutional to base law enforcement responses on the message brought forward by demonstrators? I welcome dialogue on this point.

Turning to a simpler if not an easier question, and another one to which I do not yet have the answer: is the District’s Metropolitan Police Department capable of policing itself to preclude and prevent violations of civil liberties? It is a matter of public record today that the Metropolitan Police Department’s own internal investigation of the September 2002 mass arrests in Pershing Park found that the Department violated its own general orders. None of the nearly 400 arrests led to prosecution. In the wake of that event, and that finding, we are attempting to assess whether there were signals given within the department itself that might have indicated a problem with those arrests, prior to the concerns raised with the Committee during a public hearing in October of last year. We are reviewing the department’s standing protocols for planning and deploying for demonstrations,

as well as the operational plans for each individual protest, looking specifically at the April 2000 anti-globalization protests, the January 2001 inaugural protests, and the September 2002 antiwar and anti-globalization protests.

What we are doing in the Committee today is a one-time investigation. But in asking the question about the department's capacity at self-examination I hope we can preclude the need for any subsequent, similar investigations. It is my hope that we can be assured that the Metropolitan Police Department's own institutional structure, rules and processes would either preclude any violation of law or general order, or, in the event of any excess or violation, generate its own review and discipline. I anticipate that our conclusions and recommendations will address ways to strengthen the Department's and the District government's, capacity at self-policing in this arena.

Finally, on all of these questions there is an underlying issue of who sets the balance between security and public safety on the one hand, and individual rights and personal privacy on the other. The D.C. Council has approved regulations and is considering legislation to govern the use by police of closed circuit television for surveillance. The federal government deploys a far larger number of surveillance cameras in public space in the District of Columbia, but there has been no comparable policy review of those cameras and their deployment by the federal government. It may be that the District of Columbia Council Judiciary Committee concludes that there have been excesses and preemptive actions with regard to demonstrations in the District. And we can and will address those issues. But if those excesses were prompted by federal law enforcement, how do we go about asserting our own jurisdictional rights?

There clearly is no shortage of key issues to be debated as broadly and as exhaustively as possible. I welcome this Symposium today, and your comments on all of these points.

# THE CHIMERA AND THE COP: LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW

Michael M. Hethmon\*

*Iobates sent Bellerophon away with orders to kill the Chimera that none might approach; a thing of immortal make, not human, lion-fronted and snake behind, a goat in the middle, and snorting out the breath of the terrible flame of bright fire.*

—Homer, Iliad 6.179-182.

## INTRODUCTION

The questions of if, when, and how local police can enforce federal immigration laws go to the heart of the legal hunt for the chimera that is contemporary American immigration law.<sup>1</sup> In the opening years of this century, the estimated illegal alien population in the United States has reached historic levels. The national response to the attacks of September 11, 2001 transformed what had been largely a municipal conflict between ethnic organizations, the immigration bar, and local governments in high-immigration jurisdictions into a much larger national debate about national security, civil liberties, and federalism.<sup>2</sup> After the devastating attacks on the United States, the public demanded a wide-ranging response.<sup>3</sup>

Congress believed that terrorists were able to enter the United States undetected, to violate the terms of their admission with impunity, and to move freely within our borders without interference from law enforcement officers. As a legislative response, Congress enacted the USA PATRIOT Act,<sup>4</sup> the Homeland Se-

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1 A chimera is a mythical monster compounded of incongruous parts.

2 See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004).

3 MUZAFFAR A. CHISTI, DORIS MEISSNER, DEMETRIOS G. PAPADEMETRIOU, JAY PETERZELL, MICHAEL J. WISHNIE & STEPHEN W. YALE-LOEHR, *AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER 9-11*, Migration Policy Institute (2003) [hereinafter CHISTI ET AL. *AMERICA'S CHALLENGE*].

4 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

curity Act,<sup>5</sup> and the Enhanced Border Security and Visa Entry Reform Act.<sup>6</sup> A common goal of these three measures was to improve federal and local cooperative efforts to detect and detain aliens participating in terrorist activities in the United States.

The introduction during the 108th Congress of bills and presidential proposals to manage the illegal immigration crisis through a combination of amnesty and expanded guest worker programs has further raised public awareness of the extent to which local law enforcement has been impacted by the presence of rapidly expanding populations of illegal aliens.

The primary goal of this article is to identify and describe the current state of law, from a perspective that is supportive of enhanced cooperative enforcement of immigration law at the federal and local levels. A secondary objective is to discuss questions about the viability of local enforcement initiatives that have been raised by the immigration bar and federal law enforcement agents.

Part I begins with a defense of the doctrine of the inherent authority of local police to enforce federal immigration law, and a critique of the opposing doctrine of local non-cooperation. Part II summarizes current law of interest to local and state law enforcement agencies that seek to support the enforcement of federal immigration law, including civil and criminal violations related to illegal entry, unlawful presence, and illegal reentry, Immigration and Nationality Act (INA) felonies and misdemeanors, including criminal enforcement of alien registration laws, and federal document fraud and false statement crimes. Part III provides an analysis of issues faced by local police making “reasonable suspicion” and “probable cause” determinations while enforcing federal immigration law.

Part IV identifies and briefly discusses federal law regulating the detention and transfer by state and local law enforcement agencies of aliens detained or incarcerated for immigration law violations. Part V is a checklist of nine practical issues that local police departments should consider before initiating a new local enforcement policy. Part VI mentions the policy arguments against local enforcement that have been widely discussed by opponents of local enforcement. Finally, Part VII identifies significant concerns from the perspective of federal immigration officers.

## **I. INHERENT AUTHORITY FOR LOCAL ENFORCEMENT OF IMMIGRATION LAW**

It is frequently asserted that being an illegal alien is “not a crime” because the detention and removal of most illegal aliens by the federal government is a civil matter. This claim is based on a misunderstanding of the relationship between federal criminal and immigration law, and the enforcement role given to local government by the Constitution and the Congress. Unsanctioned entry into the

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5 Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

6 Pub. L. No. 107-173, 116 Stat. 543 (May 14, 2002).

United States is a crime.<sup>7</sup> Congress has firmly established that there is a significant public interest in the effective enforcement of immigration law.<sup>8</sup> The authority of state and local police to make arrests for violation of federal law is not limited to cases in which they are exercising delegated federal power.<sup>9</sup> Local or state law enforcement departments and personnel may not interpret or enforce state law so as to obstruct federal law.<sup>10</sup> Federal law encourages state and local enforcement of immigration law.<sup>11</sup> To turn an official blind eye to violations of federal immigration law in such circumstances is not an exercise of state sovereignty, but rather impermissible passive resistance to federal law.<sup>12</sup>

Congress could have chosen to limit local enforcement pursuant to its plenary power over immigration, but it has not done so. In the absence of a limitation on local enforcement powers, the states are bound by the Supremacy Clause of the United States Constitution to enforce violations of the federal immigration laws. "The statutory law of the United States is part of the law of each state just as if it were written into state statutory law."<sup>13</sup>

State and local police officers are generally permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests.<sup>14</sup> State and local law enforcement officials have the general power to investigate and arrest violators of federal immigration statutes without prior INS knowledge or approval, as long as state law does not restrict such general

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7 Plyler v. Doe, 457 U.S. 202, 205 (1982) (citing 8 U.S.C. § 1325 (1982)).

8 U.S. v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); INS v. Miranda, 459 U.S. 14, 19 (1982).

9 U.S. v. Di Re, 332 U.S. 581, 591 (1948). Historically, U.S. states have extensively regulated immigration. See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law, 1776-1875*, 93 COLUM. L. REV. 1833 (1993). Modern federal democracies like Canada and Germany also have devolved immigration policy to constituent states. See Peter Schuck, *Some State-Federal Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 388 (2002).

10 Printz v. U.S., 521 U.S. 898, 930 (1997).

11 U.S. v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir. 1999), cert. denied, 528 U.S. 913 (1999).

12 City of New York v. U.S., 179 F.3d 29, 35 (2d Cir. 1999), cert. denied, 528 U.S. 1115 (2000).

13 People v. Barajas, 81 Cal. App. 3d 999, 1006 (1978) (citing Hauenstein v. Lynham, 100 U.S. 483, 490 (1880), People ex rel. Happell v. Sichos, 23 Cal. 2d 478, 491(1943), and 150 A.L.R. 1431). See also Dep't Public Safety v. Berg, 674 A.2d 515, 519 (Md. 1994) (stating that an act of Congress establishes a policy for "all the people and all the states," as if it "emanated from [a state's] own legislature." This principle is "underscored by [Art. 2 of the Maryland Declaration of Rights]").

14 Florida Avocado Growers Inc. v. Paul, 373 U.S. 132, 146 (1963); Ker v. California, 374 U.S. 23, 38 (1963).

power.<sup>15</sup> “A state trooper has general investigative authority to inquire into possible immigration violations.”<sup>16</sup>

The United States has a “compelling interest” in the criminal prosecution of immigration law violators, which is part of a comprehensive, essential sovereign policy of uniform immigration law enforcement.<sup>17</sup> Congress has specifically included local law enforcement officials among those who could arrest for violation of the federal illegal presence misdemeanor. Section 1324(c) of Title 8 of the United States Code now reads:

No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, *and all other officers whose duty it is to enforce criminal laws.*<sup>18</sup>

Sections 1324, 1325, and 1326 of Title 8 were all enacted on June 27, 1952, as sections 274, 275, and 276 respectively of the Immigration and Nationality Act of 1952.<sup>19</sup> As originally drafted, none of these sections contained any language of limitation or exclusion regarding the power of arrest.<sup>20</sup> Section 1324 was then amended to add, “No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service . . . and all other officers *of the United States* whose duty it is to enforce criminal laws.”<sup>21</sup> The intention of Congress at that juncture cannot be misunderstood. Arrests for violation of section 1324 were to be made only by federal personnel, while by clear implication section 1325 and section 1326 arrests were to be made by state and local officers as well.<sup>22</sup>

However, later in the legislative process the words “of the United States” were *stricken* from section 1324 by further amendment.<sup>23</sup> In *People v. Baraja*, a California court concluded, “[t]hat change can only mean that the scope of the arrest

15 *Miller v. U.S.*, 357 U.S. 301, 305 (1958); *U.S. v. Haskin*, 228 F.3d 151 (2d Cir. 2000); *Marsh v. U.S.* 29 F.2d 172 (2d Cir. 1929) (stating that in New York state it is a general practice for local police officers to arrest suspects for federal crimes, and that the Supremacy Clause makes a federal law as valid a command within a state’s borders as one of its own statutes, even if the offender cannot be prosecuted in state courts).

16 *U.S. v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (citing *U.S. v. Saldana*, 453 F.2d 352 (10th Cir. 1972)).

17 *U.S. v. Aguilar*, 871 F.2d 1436, 1469 (9th Cir. 1989).

18 8 U.S.C. 1324(c), INA § 274(c) (2004) (emphasis added); *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999, 1005 (1978).

19 Pub. L. No. 82-414, § 274-76, 66 Stat. 228-29 (1952).

20 Immigration and Nationality Act, H.R. 5678, 82nd Cong. (Oct. 9, 1951) (as introduced by Rep. Walter).

21 H.R. REP. NO. 82-1365, at 92 (1952) (emphasis added).

22 *People v. Barajas*, 81 Cal. App. 3d 999, 1005-06 (1978). See also E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, 302-305 (1981).

23 98 CONG. REC. 4444 (Apr. 25, 1952) (H.R. 5678 as passed by House).

power under section 1324 was *enlarged*; in no way can it mean that the scope of arrest under the other two sections was restricted. Such an acute *non sequitur* would attribute to the Congress both serious inconsistency and profound lack of logic.”<sup>24</sup>

In 1996, Congress further clarified that a formal agreement is *not necessary* for “any officer or employee” of a State or local agency “to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States,” or “to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>25</sup>

Federal courts have recognized that the INA generally does not preclude state and local governments from enforcing their own non-immigration-related laws against immigrants.<sup>26</sup> In *De Canas v. Bica*, the United States Supreme Court held in 1976 that a local regulation of immigration is unconstitutional only if it makes “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>27</sup> Under the *De Canas* rule, immigration-related state and local laws will be preempted only by exception.

The arrest, detention, or transportation of aliens by local police enforcing criminal provisions of the INA is not a regulatory “determination” of the conditions on alien entrance and residency, but merely enforcement of the previously determined conditions.<sup>28</sup> States can prosecute illegal aliens under state laws without running afoul of the INA.<sup>29</sup> State and local law enforcement officers are not required to follow the regulations governing administration by federal agents of the civil provisions of the INA.<sup>30</sup> Most state and local laws do not attempt to regulate who may come to and stay in the United States, and thus do not impinge

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24 *People v. Barajas*, 81 Cal. App. 3d 999, 1005-06 (1978).

25 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), § 133, Pub.L. No. 104-208, 110 Stat. 3009-563 (1996).

26 *E.g.*, *New Jersey v. United States*, 91 F.3d 463, 467 (3d Cir. 1996) (New Jersey’s prisons contain illegal immigrant criminals because “[t]he state has made its own decision to prosecute illegal aliens for acts they committed in violation of New Jersey’s own criminal code . . .”).

27 *De Canas v. Bica*, 424 US 351, 355 (1976).

28 *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983).

29 The Secretary of Homeland Security may not remove an alien sentenced to imprisonment until the alien is released from imprisonment, 8 U.S.C. § 1231(a)(4)(A) (2004), except that in the case of an alien confined pursuant to a final conviction for a non-violent offense who is in the custody of a state or political subdivision, removal may be authorized if the chief state official determines that removal is appropriate and in the best interest of the state, and submits a written request to DHS. 8 U.S.C. § 1231(a)(4)(B)(ii) (2004).

30 *Gates v. Superior Court*, 193 Cal. App. 3d 205 (1987).

upon the federal government's exclusive power to regulate immigration, even if they affect immigrants.<sup>31</sup>

Other important amendments to federal law enacted in 1996 were intended by Congress to encourage state and local agencies to participate in the process of enforcing civil as well as criminal federal immigration laws by providing incentives such as reduced liability and specialized training.<sup>32</sup> Section 133 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) specifically created a formal mechanism for federal-local cooperation in the area of immigration law enforcement so that local police could effectively carry out enforcement of immigration laws in a correct and efficient manner, subject to the "direction and supervision of the United States Attorney General." However, section 133 may not be construed to require a formal agreement in order for "any officer or employee" of a State or a political subdivision to communicate with the Department of Homeland Security regarding the immigration status of any individual, to report knowledge that a particular alien is not lawfully present in the United States, or "otherwise to cooperate" with the Department in "the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."<sup>33</sup>

#### *United States vs. Vasquez-Alvarez*

An important 1999 decision in the Tenth Circuit Court of Appeals upheld the independent authority of local police departments to enforce federal immigration law, as long as state law prescribing police power of arrest authorized such an arrest.<sup>34</sup> The U.S. Department of Justice endorsed the doctrine in this case in an internal policy change promulgated in April 2002. Fifth Circuit and Tenth Circuit precedent are in accord on this issue.<sup>35</sup>

In February 1998, an Immigration and Nationality Service (INS) agent eating dinner at an Edmond, Oklahoma restaurant observed an apparent drug transaction in the parking lot. The agent noted only the color and make of the two vehicles involved, and that one of the parties was a Hispanic male. The INS

31 Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 B.Y.U. L. REV. 899 (1997).

32 *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999).

33 8 U.S.C. § 1357(g), INA § 287(g) (2004). See *infra* note 267.

34 *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999). Only Oregon has expressly restricted federal immigration law cooperation by statute, ORS 181.150, and the Oregon limitations have been interpreted narrowly. *Oregon v. Rodriguez*, 854 P.2d 399 (1993). Even if construed restrictively, ORS 181.150 may still be subject to challenge for conflict with federal statutes prohibiting state restrictions on employee non-cooperation.

35 See *Lynch v. Cannatella*, 810 F.2d 1363, 1370-71 (5th Cir. 1987) (stating that no federal statute, including former Immigration and Nationality Act 1223(a), precludes state or local law enforcement agencies from taking other action to enforce this nation's immigration laws).

agent suspected that an illegal drug transaction had occurred and that one of the parties to the transaction was an illegal alien. He referred the matter to the Edmond police department for further investigation.

While the police were investigating the incident several days later at the restaurant, one of the suspects disclosed to the Edmond police that he was an illegal alien. The local officer arrested the illegal alien, Ontoniel Vasquez-Alvarez, for illegal presence, a federal misdemeanor, and transported him to the city jail for an immigration hold. A post-detention check of the alien's fingerprints revealed that he was using an alias, had two prior felony convictions, and had been deported three times.

The alien was charged with illegal reentry under 8 U.S.C. § 1326. The federal public defender moved to suppress his identity, fingerprints, and statements to local police, claiming that the arrest violated 8 U.S.C. § 1252(c), a 1996 statute that permits state and local law enforcement officers to make a warrantless arrest and detain an illegal alien if (1) the arrest is permitted by state and local law, (2) the alien was previously deported after a felony conviction, and (3) prior to arrest, the local officer obtained "appropriate confirmation" of the alien's status from the INS.

The District Court agreed that the arrest did not appear to comply with section 1252(c), but held that suppression was not an appropriate remedy. On appeal to the Tenth Circuit Court of Appeals, the alien argued that section 1252(c) was the exclusive authority for local police to arrest for violations of federal immigration law, that the arrest did not comply with section 1252(c), and that suppression was the appropriate remedy.

The Tenth Circuit ruled that, under long-standing case law, *state and local law enforcement officers have a general authority to arrest for violations of federal law, as long as state law authorizes such an arrest.*<sup>36</sup> Section 1252(c) did not preempt that power, but instead added an "additional vehicle for enforcement." The Court also found that the legislative history and the design of the statute were a "*clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.*"<sup>37</sup> The U.S. Supreme Court declined to accept a petition for certiorari from the alien.

#### *Recent Debate on the Inherent Power Doctrine*

Opponents of local police enforcement have focused on changing political attitudes toward immigration law enforcement to argue that local enforcement of civil violations of federal immigration law is unlawful. State and local police are said in general to lack the legal authority to enforce civil immigration law, unless a specific cooperative agreement, executed with the Department of Homeland

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36 *Vasquez-Alvarez*, 176 F.3d at 1296.

37 *Id.* at 1300 (emphasis added).

Security or the Attorney General after a determination that a “mass influx” of illegal aliens is imminent, has delegated enforcement powers to state or local law enforcement agencies.<sup>38</sup>

An alternative but weaker argument is that legal authority of local police to enforce federal immigration is ambiguous, inconsistent, or unproven. Advocates of this view point to variations between statements by Attorney General John Ashcroft and the White House to support their position.<sup>39</sup> The variant view, for which a single letter from White House counsel Alberto Gonzales is cited as evidence, is that state and local police have inherent authority to enforce civil immigration law only if violators’ names have been placed in the National Crime Information Center (NCIC) database.<sup>40</sup>

Under Attorney General Ashcroft, the U.S. Department of Justice took the position that state and local police have inherent authority to enforce civil immigration laws. The current view of the U.S. Department of Justice appears to be that the inherent authority of state governments to make arrests for violations of federal law is “not the creation of the federal government.” Federal law permits federal, state, and local law enforcement officials alike to arrest an individual they have encountered who is “an alien of national security concern who has been listed in the NCIC for violating immigration law,” and to transfer such alien into the custody of the Department of Homeland Security (DHS).<sup>41</sup>

In announcing the development of the National Security Entry-Exit Registration System (NSEERS) on June 5, 2002, Attorney General John Ashcroft referred to this authority when requesting that state and local police voluntarily arrest aliens who have violated both (1) criminal provisions of the Immigration and Nationality Act, and (2) civil provisions that render an alien deportable, if the alien has been listed in the NCIC, because the federal government has determined that they are special risks because (a) they present national security concerns or (b) are absconders who have not complied with a final order of removal. According to the Department of Justice, the federal government has never pre-

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38 *Backgrounder: Immigration Law Enforcement by State and Local Police*, (National Immigration Forum) May 2004, available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=572> (arguing that Congress created specific and limited avenues for local police to take on civil immigration law enforcement).

39 *Id.*; *State and Local Enforcement of Federal Immigration Law*, AILA ISSUE PAPER (American Immigration Lawyers’ Association), Mar. 4, 2003.

40 Letter from Counsel to the President Alberto Gonzales to Demetrios Papademetriou, Migration Policy Institute (Oct. 24, 2002), available at <http://www.migrationpolicy.org/files/whitehouse.pdf>.

41 Office of Legislative Counsel undated internal memorandum, pg. 59, attachment to Letter from Acting Asst. Attorney General Jamie E. Brown to Hon. James Sensenbrenner, Jr., House Comm. on the Judiciary (May 30, 2002) (on file with author).

empted this authority. The only barriers to executing such arrests are statutes or policies that states or municipalities may have imposed upon themselves.<sup>42</sup>

The most extensive statements to date of the U.S. Department of Justice's doctrine of inherent authority have been made by Kris W. Kobach, former counsel to Attorney General Ashcroft, in testimony to both houses of Congress.<sup>43</sup> In his written statement, Kobach explained that the power to arrest and take temporary custody of an immigration law violator is a subset of the broader power to "enforce" federal immigration law. The inherent arrest authority is narrower than the statutory authority to "enforce" immigration law under section 287(g) of the Immigration and Nationality Act (INA) because it does not encompass the enumerated powers exercised by agents of the U.S. Immigration and Customs Enforcement (ICE) to interrogate a suspected alien, to initiate removal proceedings, or to physically remove an alien from the territory of the United States, et cetera.<sup>44</sup>

A 1996 opinion of the Office of Legal Counsel has been cited by opponents of local enforcement as correctly arguing that local police may only enforce the criminal provisions of federal immigration law.<sup>45</sup> Kobach responded that this internal guidance was withdrawn in April 2002 because it erroneously asserted that Congress had *preempted* state arrests for civil violations of the Immigration and Nationality Act.<sup>46</sup>

Kobach explained that the inherent arrest authority of states arises from their pre-constitutional status as sovereign entities. The powers retained by the states at the time of ratification proceeded "not from the people of the United States, but from the people of the several states," and remain unchanged, except as they have been "abridged" by the Constitution.<sup>47</sup> The authority of a state to arrest for violations of federal law is thus not delegated, but "inheres in the ability of one sovereign to accommodate the interests of another sovereign."<sup>48</sup>

Kobach noted that this federalism-based analysis has a strong judicial pedigree. The U.S. Supreme Court has acknowledged this doctrine for more than

42 *Id.* at 59-60.

43 *Local Enforcement of Immigration Laws: Hearing on H.R. 2671 Before the House Subcomm. on Immigration, Border Security, and Claims, of the House Comm. on the Judiciary*, 108th Cong. (Oct. 1, 2003) (testimony of Kris W. Kobach) [hereinafter Kobach House Testimony]; *Coordinated Enforcement of Immigration Laws to Stop Terrorists; Hearing Before Senate Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 108th Cong. (Apr. 22, 2004) (testimony of Kris W. Kobach) [hereinafter Kobach Senate testimony].

44 Kobach House testimony, *supra* note 43, at 1.

45 U.S. Department of Justice Office of Legal Counsel, Memorandum Opinion for the U.S. Att'y., Southern Dist. of California, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), available at [www.usdoj.gov/olc/immstop1a.htm](http://www.usdoj.gov/olc/immstop1a.htm).

46 Kobach House Testimony, *supra* note 43, at 2.

47 *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819).

48 Kobach House testimony, *supra* note 43, at 2.

half a century, stating that “in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.”<sup>49</sup> More specifically, the Court has held that in the circumstance “of an arrest for violation of federal law by state peace officers, . . . the lawfulness of the arrest without warrant is to be determined by reference to state law.”<sup>50</sup>

Finally, Kobach pointed out multiple reasons that make a particularly strong case for the absence of congressional preemption of state enforcement authority. State arrests for violations of federal law involve action by a state executive branch agency to assist the federal government in the enforcement of federal law. Kobach identified the “critical starting presumption” that it would be irrational for the federal government to intend to deny itself assistance offered by the states. No appellate court has expressly ruled that states are preempted from arresting aliens for civil violations of immigration law. Kobach characterized as “utterly unsustainable” the claim that field preemption exists to bar the authority of state police to arrest for civil violations of immigration law, but not for criminal violations of those laws, since neither federal case law nor federal regulations have ever held that civil provisions of immigration law “create a pervasive regulatory scheme indicating congressional intent to preempt, while the criminal provisions do not.”<sup>51</sup>

### *Prohibitions on Police Non-cooperation with Immigration Law Enforcement*

In 1996 Congress responded to widespread citizen complaints about resistance and obstruction of INS enforcement activities by local governments by enacting the welfare reform (PRWORA)<sup>52</sup> and illegal immigration reform (IIRAIRA)<sup>53</sup>

49 U.S. v. Di Re, 332 U.S. 581, 589 (1948).

50 Miller v. U.S., 357 U.S. 301, 305 (1958) (citing U.S. v. Di Re, 332 U.S. 581, at 589 (1948)).

51 Kobach Senate testimony, *supra* note 43, at 2.

52 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, § 434, codified as 8 U.S.C. § 1644 (2004): (“Notwithstanding any other provision of Federal, State, or local law, no state or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

53 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, § 642, codified as 8 U.S.C. § 1373 (2004):

(a) In general. Notwithstanding any other provision of Federal, State, or local law, a Federal State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

statutes. The omnibus legislation contained provisions that prohibited restrictions on the authority of any government entity or official to share immigration or citizenship status information. Under 8 U.S.C. § 1373 and 8 U.S.C. § 1644, no governmental agency may be prohibited from maintaining or exchanging information regarding the citizenship or immigration status of any individual with the Department of Homeland Security, or any other federal, state, or local government entity.

Both statutes are crafted using the broadest possible preemptory language.<sup>54</sup> The National Employment Law Project, an opponent of immigration law enforcement, has argued that IIRAIRA restricts agency policies that prohibit “maintaining” immigration status information, but does not preclude local policies to forego recording of immigration information entirely.<sup>55</sup> The Congressional legislative history discredits this claim:

The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision [PRWORA section 434] is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local law enforcement and the INS. The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the U.S. undetected and unapprehended.<sup>56</sup>

In support of the view that local non-cooperation ordinances and policies are lawful, the National Council for La Raza has cited three settlements between 1984 and 1995 that were said to prohibit communication.<sup>57</sup>

Local, state, or federal government agencies that sanction or retaliate against employees or officials who report immigration law violations to ICE or the Bor-

(2) maintaining such information.

(3) exchanging such information with any other Federal, State or local government entity.

54 “Notwithstanding any other provision of Federal, State, or local law, . . .”

55 REBECCA SMITH, *LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS’ RIGHTS*, Chap. 2, 13 (National Employment Law Project, updated Nov. 2003) (citing IIRAIRA § 642(b)(2)), available at [http://www.nelp.org/iwp/reform/state/low\\_pay\\_high\\_risk.cfm](http://www.nelp.org/iwp/reform/state/low_pay_high_risk.cfm).

56 Conference Report on H.R. 4, Personal Responsibility and Work Opportunity Reconciliation Act of 1995, 141 Cong. Rec. H15433 (Dec. 21, 1995), 104th Congress 1st Session, Vol. 141 No. 206.

57 Michele Waslin, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos*, 9 National Council of La Raza Issue Brief 7-8 (Feb. 2003) (citing *Velazquez v. Ackermann*, No. C-84-20723-JW (D. Cal. 1992); *Mendoza v. City of Farmersville*, No. CV-F-93-5789 (D. Cal. 1998); and *De Haro v. City of St. Helena*, No. CV-F-93-5789 (D. Cal. 1995)) available at <http://www.nclr.org/content/publications/detail/1390>).

der Patrol can be sued by the whistleblower under 8 U.S.C. § 1373 or 8 U.S.C. § 1644 for damages and costs. In a 1998 administrative case supported by FAIR, a California state government employee was awarded reinstatement and retroactive pay, benefits, and seniority after she was wrongly terminated for contacting the INS.<sup>58</sup>

In a widely noted decision, the Second Circuit Court of Appeals rejected a challenge to these statutes on constitutional grounds by the City of New York. After enactment of PRWORA in 1996, New York City sued the federal government, claiming the restrictions on non-cooperation ordinances violated the Tenth Amendment and exceeded the plenary power of Congress over immigration. New York City claimed it had over 400,000 illegal alien residents at that time, many of them living in mixed households with legal aliens and U.S. citizens. The City argued that a guarantee of confidential treatment would insure that illegal aliens were not afraid to report crimes or seek treatment for contagious diseases. New York City asserted that it could elect not to participate in a federal regulatory program, and that the federal government could not disrupt the operations of local governments through legislation.

The federal district court rejected New York's claims in 1997.<sup>59</sup> On appeal by the City, the Second Circuit Court of Appeals confirmed that the statutory ban on non-cooperation policies was constitutional.<sup>60</sup> A policy protecting only non-citizens was not a general rule that protected confidential information for citizens and aliens alike, but instead it had the intent and effect of obstructing federal officials "while allowing local employees to share freely the information in question with the rest of the world."<sup>61</sup> New York City had no right to "passive resistance," because such claims violate the Supremacy Clause of the U.S. Constitution:

The City's sovereignty argument asks us to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs. If Congress may not forbid states from outlawing even voluntary cooperation with federal programs by state and local officials, states will at times have the power to frustrate effectuation of some programs. Absent any cooperation at all from local officials, some federal programs may fail or fall short of their goals unless federal officials resort to legal processes in every routine or trivial matter, often a practical impossibility. *For example, resistance*

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58 *In re San Joaquin County District Attorney's Office Family Support Division v. Tamara L. Lowe*, Cal. Civil Service Commission No. NB1776 (July 31, 1998).

59 *City of New York v. U.S.*, 971 F. Supp. 789 (S.D.N.Y. 1997).

60 *Id.*; 179 F.3d 29 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 932 (2000).

61 *Id.* at 36-37.

to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), was often in the nature of a refusal by local government to cooperate until under a court order to do so.<sup>62</sup>

Perhaps the most effective argument by supporters of the view that local non-cooperation ordinances are lawful is the recitation of the growing number of municipal governments that have enacted such measures and have not experienced hostile legal challenges.<sup>63</sup> These sanctuary policies effectively prohibit city employees, including police, from reporting immigration violations to federal authorities.

Anti-cooperation measures “testify to the sheer political power of immigrant lobbies, a power so irresistible that police officers shrink from even mentioning the illegal-alien crime wave.”<sup>64</sup> However, acknowledgement that resistance to federal immigration law is open and notorious in many localities with large illegal alien populations does not negate the existence of significant case law supportive of local or citizen remedies against such abuse.

For example, a local government agency custom or policy that extends affirmative benefits to a suspect class where such preferences are otherwise prohibited by federal law, such as the protection from detention for immigration violations or unlawful access to local government services, has been found to violate the constitutional rights of a broad class of citizens and legal non-citizen residents to due process and equal protection of the law.<sup>65</sup>

Similarly, a policy or custom of acceptance of consular identification by a state or a political subdivision of a state could deprive legal residents of the jurisdiction of a constitutional right under color of state law.<sup>66</sup> By its nature, this violation is ongoing. Citizens, who have a constitutional right to expect the protection of federal laws which prohibit unauthorized activities by non-citizens are denied equal protection when a police department or magistrate acts in a manner that encourages or assists persons selected on the basis of nationality or alienage to engage in such unlawful activities.<sup>67</sup>

Article 36 of the Vienna Convention on Consular Relations requires authorities to inform detained or arrested foreign nationals that they have a right to have

62 *Id.* at 35 (emphasis added).

63 *E.g.* New York Mayoral Executive Order 41 (Sept. 17, 2003) (creating a city-wide confidentiality policy); San Francisco Admin. Code § 12H (1989); Portland City Code Chapt. II Art. II Sec. 21-25 (June 2, 2003); Seattle Municipal Code 4.18/ Ordinance 121063 (Feb. 5, 2003).

64 Heather MacDonald, *The Illegal-Alien Crime Wave*, 14 CITY JOURNAL 1 (2004), available at [http://www.city-journal.org/html/14\\_1\\_the\\_illegal\\_alien.html](http://www.city-journal.org/html/14_1_the_illegal_alien.html).

65 *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Pyke v. Cuomo*, 258 F.3d 107, 108-9 (2d Cir. 2001).

66 42 U.S.C. § 1983 (2004).

67 *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) (stating that although there is no general constitutional right to police protection, the state may not discriminate in providing such protection).

their consulates notified of their status without delay.<sup>68</sup> Article 36 does not create an enforceable right of action in U.S. courts for alien detainees.<sup>69</sup> The courts have not addressed whether a municipal police department may assert that it has an affirmative duty to comply with consular notification treaties, but may also elect to knowingly restrict communication of the same status-based information to U.S. immigration authorities.

Aggrieved residents may sue in state or federal court to block unlawful municipal passive resistance policies, and may sue officials and employees in their official or private capacities for violations of their rights.<sup>70</sup> Local government officials do not possess Eleventh Amendment immunity or qualified immunity when sued in their official capacity for prospective injunctive or declaratory relief to end statutory and constitutional violations.<sup>71</sup> Qualified immunity does not shield government officials, or private parties acting in concert with public officials, from complaints for injunctive relief.<sup>72</sup>

## PART II. CURRENT IMMIGRATION ENFORCEMENT LAW

In practice, local and state police infrequently rely on their inherent power to enforce federal immigration law. Typically, a person is detained or arrested by police for a criminal offense under state or local law. The immigration status of the arrested person then comes into question based on information identified in a post-arrest investigation. Even if local police authority is construed to restrict an officer's arrest power for a purely civil violation of immigration law, police retain expansive enforcement authority under federal criminal law. Part II surveys that body of existing law, and its enforcement by local police agencies.

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68 Vienna Convention on Consular Relations, Art. 36 (1)(b), April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261:

(If [the detainee] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.)

69 *U.S. v. Nai Fook Li*, 206 F.3d 56, 60-63 (1st Cir. 2000), *cert. denied*, 531 U.S. 956 (2000).

70 *Yellow Freight Systems v. Donnelly*, 494 U.S. 820, 823 (1990) (stating that federal and state courts have concurrent jurisdiction over federal civil rights suits).

71 *Burnham v. Ianni*, 119 F.3d 668, 673 (8th Cir. 1997); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 588-89 (10th Cir. 1994) (regarding 11th Amendment immunity); *Kikumura v. Hurley*, 242 F.3d 950, 956 (10th Cir. 2001) (regarding qualified immunity).

72 *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992).

*Immigration Status Offenses*

## A. Unlawful Presence

The distinctions between unlawful presence in the United States, illegal entry, and illegal reentry are important, and may be confusing to police officers whose primary experience has been the enforcement of state criminal laws.

Unlawful presence is a civil violation of federal law. The general rule against illegal presence in U.S. immigration law is that any alien who is “present in the United States without being admitted or paroled” or who arrives in the U.S. “at any time or place other than as designated by the Attorney General” is inadmissible.<sup>73</sup>

Most aliens from Mexico and Canada who are detained in the United States without proof of legal admission are routinely offered administrative voluntary departure.<sup>74</sup> As a matter of administrative economy, the Border Patrol or U.S. Immigration and Customs Enforcement will generally not initiate removal proceedings or assess fines unless the alien is a recidivist.

Unlike apprehension, the removal of aliens from the U.S. is exclusively a federal function. Only a federal immigration judge may order that an alien be deported. Local and state courts lack the authority to require removal or departure as a condition of bond, parole, or as part of a plea bargain.<sup>75</sup>

The “bars to admissibility” imposed by Congress in 1996 are significant sanctions for illegal aliens detained in the interior of the country. Any alien who voluntarily departs the U.S. after being unlawfully present for more than 180 days but less than one year is inadmissible for three years from the date of the alien’s departure. Aliens who do *not* depart voluntarily or who are unlawfully present for one year or more are inadmissible for ten years after the date of departure or removal. Illegal aliens who have been in the country for less than six months at the time of apprehension thus have a strong incentive to disclose their illegal immigration status and immediately request or accept voluntary departure.<sup>76</sup>

Bars to admissibility are important enforcement tools that penalize illegal aliens who later seek to reenter the U.S. lawfully or try to adjust their status through legal means, such as marriage or permanent immigration programs, after first entering unlawfully or overstaying their visas. It is good practice for police departments to routinely record information on illegal aliens who are identified during the course of routine police activities and to report the information to

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73 INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2004).

74 See *infra* note 289, and accompanying text.

75 *Boutilier v. INS*, 387 U.S. 118 (1967), *U.S. v. Chukwura*, 5 F.3d 1420 (11th Cir 1993); *U.S. v. Quaye*, 57 F.3d 447 (5th Cir 1995). However, procedures for “judicial deportation” by federal district courts are provided in INA § 238(c), 8 U.S.C. § 1228(c). See *infra* notes 300-305.

76 8 U.S.C. § 1182(a)(9)(B) (2004).

ICE, in order to document illegal presence for enforcement of the three-year and ten-year bar to reentry.

## B. Illegal Entry Criminal Offenses

An alien can unlawfully enter or remain in the United States in five different ways:

- (i) Present without inspection (PWI). Any alien who enters U.S. territory without presenting himself or herself to an immigration inspector at a designated point of entry is "PWI."<sup>77</sup>
- (ii) Appearing for inspection at a point of entry without proper documents.<sup>78</sup> Typically, this provision applies to persons who attempt to enter at U.S. land borders hoping that their documents will not be checked.
- (iii) Appearing for inspection and making a material misrepresentation that makes the alien excludable.<sup>79</sup> The misrepresentation could be made with false documents, false statements to the inspector, or presentation of a valid visa that was obtained by fraud.
- (iv) Overstaying the time period authorized for a temporary period of stay after entering the country legally.<sup>80</sup>
- (v) Entering the United States legally, but becoming deportable for other violations of the terms of admission. Common grounds for deportability include unauthorized employment and conviction of an aggravated felony or a crime of moral turpitude.<sup>81</sup>

The criminal offense of illegal entry is found in Immigration and Nationality Act section 275. Any alien who enters (or attempts to enter) the U.S. (i) without inspection (PWI), or (ii) who "eludes examination or inspection, or (iii) by "a willfully false or misleading misrepresentation or the willful concealment of a material fact" has committed a *criminal misdemeanor*, punishable by a fine and up to six months in prison.<sup>82</sup>

Misdemeanor prosecutions for section 275 are uncommon, because the great majority of illegal aliens will accept voluntary departure if apprehended. A section 275 charge usually results from plea-bargaining by a federal prosecutor on more serious crimes such as section 274 smuggling felonies (discussed below).

<sup>77</sup> 8 U.S.C. § 1182(a)(6); 8 U.S.C. § 1201(f); 8 U.S.C. § 1225(a) (2004). In 1996, section 414 of the Anti-Terrorism and Effective Death Penalty Act (Pub. L. No. 104-132, 110 Stat. 1214) and section 301 of IIRAIRA removed entry without inspection as a ground for deportation and substituted being present in the United States without admission or parole as a ground for inadmissibility.

<sup>78</sup> 8 U.S.C. § 1182(a)(7) (2004).

<sup>79</sup> 8 U.S.C. § 1182(a)(6)(C)(i) (2004).

<sup>80</sup> 8 U.S.C. § 1182(a)(9)(b)(ii) (2004).

<sup>81</sup> See generally 8 U.S.C. § 1227(a) (2004).

<sup>82</sup> INA § 275(a), 8 U.S.C. § 1325(a) (2004).

However, many prosecutors fail to make use of the general federal statute that permits large fines for all federal immigration crimes *beyond* the fines authorized by the individual statutes. Such fines on convicted individuals can range up to \$250,000 for a felony and \$100,000 for a misdemeanor.<sup>83</sup>

### C. Illegal Entry and Reentry Felonies

While criminal penalties for a single illegal entry are relatively light, multiple illegal entries and illegal re-entry are separate, serious felonies.

First, a subsequent or multiple “commission” of an illegal entry or attempted entry is a felony punishable by up to two years imprisonment.<sup>84</sup> An alien who voluntarily admits to having entered illegally should be asked if he or she crossed the border on a prior occasion. If the alien gives a positive response, but cannot provide evidence that the prior entry or entries were lawful, local police in all states have probable cause to arrest the declarant for felony multiple illegal entry.

Second, Immigration and Nationality Act section 276 (Reentry of Removed Alien) makes it a felony for any alien who (i) has been denied admission, was excluded, deported, or removed, or has departed the U.S. under a voluntary departure order, (ii) to thereafter enter, attempt to enter, or be found “at any time” in the U.S., (iii) without the advance permission of the Attorney General, (iv) unless the alien demonstrates he or she was not required to obtain advance permission.<sup>85</sup>

The five-year statute of limitations in 18 U.S.C. § 3282 applies to an illegal reentry offense, but the crime is not complete and the statute does not begin to run until the U.S. Immigration and Customs Enforcement discovers the illegal alien’s presence in the United States.<sup>86</sup> The crime is also not completed so long as the alien uses false statements or identity to avoid detection.<sup>87</sup>

The penalty for an illegal reentry conviction is a fine and up to two years imprisonment. This penalty increases to ten years imprisonment if the alien was removed after: (i) commission of three drug-related misdemeanors, a crime against the person, or a felony; (ii) subversion, sabotage, terrorist activities, membership in a totalitarian organization, or designation as a national security risk; or (iii) illegal reentry after being paroled from a U.S. prison sentence.<sup>88</sup> Conviction for an aggravated felony increases the possible prison sentence to up to twenty years.

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83 18 U.S.C. § 3571 (2004).

84 *Id.*

85 INA § 276, 8 U.S.C. § 1326(a) (2004).

86 *U.S. v. Mercedes*, 287 F.3d 47, 54 (2d Cir. 2002).

87 *Id.* at 55.

88 8 U.S.C. § 1326(b) (2004).

#### D. Alien Smuggling Felonies under Immigration and Nationality Act Section 274(a)

Immigration and Nationality Act (INA) section 274 (Bringing in and Harboring Illegal Aliens) encompasses a range of crimes associated with illegal immigration under the rubric of “alien smuggling.” The four major crimes under section 274(a) of INA (‘bringing in,’ transporting, harboring, and ‘inducing’ illegal aliens) are described separately below. Together they form a comprehensive definition of the federal crime of alien smuggling that prosecutors and police can use to attack the economic basis of illegal alien settlement in local jurisdictions, as well as related support activities, from the conspiracy and preparation stages in the sending country to illegal operations within the United States.<sup>89</sup> An alien convicted under this statute is deemed to be an “aggravated felon” subject to mandatory federal detention and removal.<sup>90</sup>

It is well established that “any person” is subject to criminal liability for section 274 felonies and that the term is to be construed broadly.<sup>91</sup> Section 274 clearly reaches public officials and government employees. The courts have rejected claims that section 274 felonies apply only to professional smugglers or operators of sweatshops.<sup>92</sup>

The crime typically thought of as alien smuggling, “bringing” illegal aliens to the United States, makes it a felony for any person to (i) knowingly bring to or attempt to bring (ii) an alien, regardless of immigration status, (iii) to the United States “in any manner whatsoever” (iv) at any place other than a designated port of entry.<sup>93</sup> A separate misdemeanor offense criminalizes bringing or attempting to bring an alien to the United States “knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to enter or reside in the United States” regardless of where or how the alien entered U.S. territory.<sup>94</sup> Law enforcement officers in jurisdictions away from the international borders make arrests leading to “bringing to” convictions infrequently, because

89 U.S. v. Sanchez-Vargas, 878 F.2d 1163, 1169 (9th Cir. 1989).

90 8 U.S.C. § 1101(a)(43)(N) (2004) (designating violations of INA § 274(a)(1) or (b) as aggravated felonies, with an exception for a first conviction where the offense was committed only for the purpose of assisting, abetting, or aiding the alien’s spouse, child, or parent to violate a provision of the INA); Patel v. Ashcroft, 294 F.3d 465, 470 (3d Cir. 2002).

91 U.S. v. Zheng, 306 F.3d 1080, 1085 (11th Cir. 2002); U.S. v. Oloyede, 982 F.2d 133, 136 (4th Cir. 1993); Villegas-Valenzuela v. INS, 103 F.3d 805, 809 (9th Cir. 1996).

92 Zheng, 306 F.3d at 1085; U.S. v. Sanchez-Vargas, 878 F.3d 1163, 1169 (9th Cir. 1989).

93 8 U.S.C. § 1324(a)(1)(A)(i), INA § 274(a)(1)(A)(i) (2004).

94 8 U.S.C. § 1324(a)(2), INA § 274(a)(2) (2004). Felony penalties are imposed if the offense is committed for purposes of committing a felony, for commercial advantage or private financial gain, or where the alien is not immediately brought and presented to an appropriate immigration officer at a designated point of entry. 8 U.S.C. § 1324(a)(2)(B) (2004).

the offense is considered complete once the alien reaches an “immediate destination” in the United States.<sup>95</sup>

In contrast, the other related felony offenses under section 274 of INA are a powerful enforcement tool for local and state police. First, section 274(a)(1)(A)(iii) of INA makes it a felony for any person to (i) “conceal, harbor, or shelter from detection” (ii) any alien (iii) in any place, including any building or means of transportation, (iv) knowing or *in reckless disregard of* the fact that the alien has come to, entered, or remained in the U.S. in violation of law.”<sup>96</sup>

“Harboring” includes any conduct that tends to substantially help an alien to remain in the United States unlawfully.<sup>97</sup> There is no requirement that the felonious conduct be part of a process of smuggling aliens into United States or directly connected with an alien’s illegal entry. Providing housing for illegal aliens, assistance in obtaining employment, coaching aliens to claim legal status or to use a false name, and attempts to prevent detection by the authorities have all been held to constitute harboring.<sup>98</sup> Harboring can occur outdoors as well as in a building.

“Shielding from detection” does not need to be clandestine.<sup>99</sup> The government does not need to show intent to evade federal immigration enforcement officials, but only that the defendant’s conduct “tend[ed] directly or substantially to facilitate an alien’s remaining in the United States in violation of law.”<sup>100</sup> Taking actions that “facilitate” an alien’s employment have been held to constitute acting “in reckless disregard” of a worker’s illegal status.<sup>101</sup>

Criminal liability for harboring or sheltering could arise from acceptance of a Mexican *matricula consular*—which, presented without proper immigration documents, is *prima facie* evidence of illegal alien status—by a local government agency that, for example, provided housing or utility assistance, made referrals to a public or private job assistance program, or detained *matricula* presenters for violation of city ordinances and released them without verifying their immigration status with the U.S. Immigration and Customs Enforcement.<sup>102</sup>

Second, section 274(a)(1)(A)(ii) of INA makes it a felony for any person to (i) transport, move, or attempt to move (ii) an alien (iii) within the U.S. (iv) by means of transportation or otherwise (v) knowingly or recklessly disregarding the fact that the alien has come to, entered, or remains in violation of law and (vi) “in

95 U.S. v. Aslam, 936 F.2d 751, 755 (2d Cir. 1991).

96 8 U.S.C. § 1324(a)(1)(A)(iii), INA § 274(a)(1)(A)(iii) (2004) (emphasis added).

97 U.S. v. Lopez, 521 F.2d 437, 441 (2d Cir. 1975).

98 U.S. v. Kim, 193 F.3d 567, 574 (2d Cir. 1999); U.S. v. Pong Sub Shin, No. 98-1142, 1999 U.S. App. LEXIS 902 (2d Cir. *unpub.* 1999).

99 U.S. v. Rubio-Gonzalez, 674 F.2d 1067, 1073 (5th Cir. 1982).

100 U.S. v. Aguilar, 871 F.2d 1436, 1463 (9th Cir. 1989) (emphasis added).

101 U.S. v. Myung Ho Kim, 193 F.3d 567, 572-73 (2d Cir. 1999).

102 A legal analysis of liability issues related to local government acceptance of consular identification cards is available from the FAIR legal department.

furtherance of such violation.”<sup>103</sup> Intent to further the alien’s presence in the U.S. is a required element, but may be established by indirect evidence.<sup>104</sup> An offer of employment plus voluntary transportation, or payment for transportation plus lodging or other arrangements,<sup>105</sup> assistance in loading aliens into vehicles driven by other defendants,<sup>106</sup> or providing one leg of an illegal alien’s travel within the U.S.<sup>107</sup> will satisfy the furtherance element. Local police conducting traffic stops should be aware of indicators of reckless endangerment during transportation, including transporting persons in the back of a pick-up truck,<sup>108</sup> or without an adequate number of safety belts or seats,<sup>109</sup> transporting children or other vulnerable persons in the trunk or other enclosed area,<sup>110</sup> or carrying substantially more passengers than the rated capacity of a motor vehicle or vessel.<sup>111</sup>

Third, section 274(a)(1)(A)(iv) of INA makes it a felony for any person to (i) encourage or induce (ii) an alien (iii) to come to, enter or reside in the U.S. (iv) knowing or recklessly disregarding the fact that the alien’s entry or residence is in violation of law.<sup>112</sup> This statute is intended to criminalize a broad range of activities that assist illegal aliens in the United States.

“Encourage” means to knowingly instigate, help, or advise. “Induce” means to knowingly bring on or about, to effect, cause, or influence an act or course of conduct.<sup>113</sup> “Encouraging” includes actions that permit illegal aliens “to be more confident that they could continue to reside with impunity in the United States,” or actions that offer illegal aliens “a chance to stand equally with all other American citizens.”<sup>114</sup> To prove that an official or employee of a Georgia state or local government “encouraged or induced” illegal Mexican aliens, all that a prosecuting party needs to establish is that such persons knowingly helped or advised the aliens.<sup>115</sup>

Specific actions found to constitute encouraging include counseling illegal aliens to continue working in the U.S. or assisting them to complete applications with false statements or obvious errors or omissions.<sup>116</sup> The fact that the illegal alien may be a refugee fleeing persecution is not a defense to this felony, since

103 8 U.S.C. § 1324(a)(1)(A)(ii), INA § 274(a)(1)(A)(ii) (2004).

104 *U.S. v. Beltran-Garcia*, 179 F.3d 1200, 1205 n.4 (9th Cir. 1999).

105 *E.g.*, *U.S. v. One 1985 Ford F-250 Pickup*, 702 F. Supp. 1308 (E.D. Mich. 1988); *U.S. v. One 1982 Chevrolet Crew-Cab Truck*, 810 F.2d 178 (8th Cir. 1987).

106 *U.S. v. Colwell*, 7 Fed. Appx. 555, 557; 2001 U.S. App. LEXIS 3996 (9th Cir. 2001).

107 *U.S. v. Hernandez-Guardado*, 228 F.3d 1017, 1024 (9th Cir. 2000).

108 *U.S. v. Cuyler*, 298 F.3d 387, 391 (5th Cir. 2002).

109 *U.S. v. Maldonado-Ramires*, 384 F.3d 1228, 1229-30 (10th Cir. 2004).

110 *U.S. v. Miguel*, 368 F.3d 1150, 1155 (9th Cir. 2004).

111 *U.S. v. Rodriguez-Lopez*, 363 F.3d 1134, 1137-38 (11th Cir. 2004).

112 8 U.S.C. § 1324(a)(1)(A)(iv), INA § 274(a)(1)(A)(iv) (2004).

113 *U.S. v. He*, 245 F.3d 954, 959 (7th Cir. 2001).

114 *U.S. v. Oloyede*, 982 F.2d 133, 136 (4th Cir. 1993).

115 *He*, 245 F.3d at 957-59.

116 *Oloyede*, 982 F.2d at 137.

U.S. law and the United Nations Protocol on Refugees both require that an alien claiming asylum must report to immigration authorities “without delay” upon entry to the U.S.

Fourth, it is a felony to conspire to commit any of the bringing in, harboring, sheltering, transporting, or encouraging felonies under section 274(a)(1)(A) of INA.<sup>117</sup> Indictments for section 274(a) of INA smuggling crimes can include conspiracy as a separate offense.<sup>118</sup> The three elements of criminal conspiracy are (i) an agreement by two or more persons to engage in illegal activity, (ii) an overt act by at least one person taken in furtherance of the agreement, and (iii) intent to commit the illegal activity.<sup>119</sup> Even if the conspiracy fails to achieve its aim, it is often punished separately and as severely as the single offender crime, because a group having some illegal purpose is more dangerous than an individual who has the same purpose.<sup>120</sup>

The distinction between principals and accessories in alien smuggling crimes has been eliminated by the section 274(a)(1) of INA aiding and abetting statute.<sup>121</sup> Aiding and abetting an alien smuggling offense may apply to conduct before or after the alien has entered the U.S.<sup>122</sup> The statute allows conviction for an alien smuggling felony even if not all of the elements of the alien smuggling crime are proven. Indictments for both an alien smuggling crime and for aiding and abetting that crime are permissible. Defendants convicted of aiding and abetting or conspiracy to commit section 274(a)(1) of INA alien smuggling felonies are subject to the same fines and prison sentences imposed for the primary offenses.<sup>123</sup>

Persons indicted for section 274(a) of INA criminal alien smuggling offenses may also be indicted under the generic federal aiding and abetting<sup>124</sup> or accessory

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117 8 U.S.C. § 1324(a)(1)(A)(v)(I), INA § 274(a)(1)(A)(v)(I) (2004).

118 INA § 274 (a)(1)(A)(v) (2004) makes (1) conspiracy to commit a § 274(a) offense and (2) aiding and abetting a § 274(a) offense separate felonies. The general conspiracy to commit any offense against the United State statute (18 U.S.C. § 371) is also often added to indictments for alien smuggling offenses.

119 *U.S. v. Colwell*, 7 Fed. Appx. 555, at 557 (9th Cir. 2001), citing *U.S. v. Hill*, 953 F.2d 452, 457 (9th Cir. 1991).

120 *Callanan v. U.S.*, 364 U.S. 587, 593 (1961); *Krulewitch v. U.S.*, 336 U.S. 440, 448-49 (1949).

121 8 U.S.C. § 1324(a)(1)(A)(v)(II) (2004).

122 *U.S. v. Zhou Liang*, 224 F.3d 1057, 1060 (9th Cir. 2000) (offense of attempted alien smuggling can be committed extraterritorially and continue into U.S. territory).

123 Penalties for violations of 8 U.S.C. § 1324(a)(1) are set by § 1324(a)(1)(B) (2004).

124 18 U.S.C. § 2 (2004). The primary difference between an aiding and abetting conviction under the Title 8 and Title 18 statutes is the sentencing provision. *U.S. v. Tyson Foods*, No. 4:01-CR-061, 2003 U.S. Dist. Lexis 20174 (E.D. Tenn. 2003). See also the analysis of congressional intent to increase penalties for alien smuggling crimes committed for commercial purposes that underlies different penalties for aiding and abetting under 8 U.S.C. § 1324(a)(1) and aiding and abetting an 8 U.S.C. § 1324(a)(2) alien smuggling offense under 18 U.S.C. § 2 in *U.S. v. Angwin*, 271 F.3d 786, 800-804 (9th Cir. 2001), cert. denied, 535 U.S. 966 (2002).

after the fact statutes.<sup>125</sup> Generic aiding and abetting is not a lesser-included offense for a conviction under section 274(a) of INA,<sup>126</sup> but is implicit in all alien smuggling indictments.<sup>127</sup>

No policy or humanitarian argument has been identified by the courts that would negate the criminal *mens rea* of reckless disregard for the fact that aliens are present in the United States in violation of law. Neither sanctuary nor humanitarian concern is a valid defense to either civil or criminal violations of the Immigration and Nationality Act. It is illegal for non-profit, religious, or civic organizations to knowingly assist in the commission of an alien smuggling felony, regardless of claims that their members' convictions may require them to assist aliens.<sup>128</sup> The First Amendment does not protect actions that aid illegal aliens to remain in the United States.<sup>129</sup>

Illegal aliens are not a suspect class entitled to Fourteenth Amendment-based strict scrutiny of any discriminatory classification based on that status, nor are they defined by an immutable characteristic, since their status is the product of conscious unlawful action.<sup>130</sup> Identity is not a constitutionally protected privacy right, and an illegal alien has no expectation of privacy from another person's knowledge of his or her immigration status.<sup>131</sup>

#### E. Hiring More than Ten Illegally Smuggled Aliens in One Year

In addition to civil penalties for individual hires of unauthorized aliens, section 274(a)(3) of INA makes it a *felony* for any person to (i) hire (ii) within any 12-month period (iii) at least ten individuals (iv) with *actual* knowledge that the individuals hired (v) were not legal permanent residents and had not been authorized to work by the INS, and (vi) had been "brought to" the United States in violation of section 274(a) of INA.<sup>132</sup>

125 8 U.S.C. § 3 (2004). Whoever, knowing that an alien smuggling offense has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension is an accessory after the fact. Specific or willful intent is not required. An accessory to an alien smuggling offense may be sentenced or fined not more than half the maximum punishment prescribed for the principal.

126 U.S. v. Pruitt, 719 F.2d 975, 978 (9th Cir. 1983), *cert. denied*, 464 U.S. 1012 (1983).

127 U.S. v. Rashwan, 328 F.3d 160, 165(4th Cir. 2003), *cert. denied*, 540 U.S. 922 (2003).

128 AFSC v. Thornburgh, 961 F.2d 1405 (9th Cir. 1992), Intercommunity Ctr. for Peace and Justice v. INS, 910 F.2d 42 (2d Cir. 1990).

129 U.S. v. Merkt, 794 F.2d 950, 954-57.

130 Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

131 U.S. v. Rodriguez-Arreola, 270 F.3d 611, 616-19 (8th Cir. 2001). *See also* Jane Doe 1 v. Merten, 219 F.R.D. 387, 392 (E.D. Va. 2004), ("unlawful or problematic immigration status is simply not the type of 'personal information of the utmost intimacy'" to permit illegal aliens to proceed anonymously in civil cases); Mendoza v. Zirkle Fruit Co., No. CY-00-3024, Memorandum Order, at 4-5 (E.D. Wa. Apr. 25, 2003) (immigration status data on I-9 Form is not information protected by federal privilege or privacy law).

132 8 U.S.C. § 1324(a)(3) (2004).

This statute is intended to target employers of illegal aliens who have also participated in alien smuggling crimes. Evidence that the employer had *actual* (not circumstantial) knowledge of the alien smuggling activity is generally the most difficult element for a section 274(a)(3) conviction.<sup>133</sup> This felony has also been the predicate crime in most successful immigration-related civil racketeering (RICO) litigation.<sup>134</sup>

#### F. Operating a Sweatshop

It is a *felony* to knowingly establish a “commercial enterprise” for the purpose of evading any provision of federal immigration law. Violators may be fined or imprisoned for up to five years.<sup>135</sup>

#### G. Possession of Firearms and Ammunition by Aliens

Aliens who are illegally or unlawfully in the United States are prohibited from shipping, transporting, possessing, or receiving any firearm or ammunition.<sup>136</sup> The definition of firearm includes any weapon that will expel a projectile or any “destructive device.”<sup>137</sup>

It is also a *felony* for any person, including a licensed firearms dealer, to sell or give a firearm to a person the transferor knows, or has reasonable cause to believe, is an alien in the U.S. in violation of law.<sup>138</sup> Under the Brady Handgun Act, dealers may not transfer a handgun to an individual unless the recipient certifies in writing that he or she is not an illegal alien or—with limited exceptions—a non-immigrant legal alien.<sup>139</sup> In a private sale, the seller has the legal responsibility to determine that he or she is not transferring a firearm to a person who is not lawfully entitled to receive it. Illegal aliens can also be convicted for making false statements in connection with a weapons transaction.<sup>140</sup> Violation of these statutes is an *aggravated felony*, punishable by ten years imprisonment, a fine, and deportation of the convicted alien.

### *Criminal Enforcement of Alien Registration Laws*

All aliens fourteen years of age or older who are in the United States for thirty days or more by statute must be registered and fingerprinted.<sup>141</sup> Parents or legal guardians must register alien children who are younger than fourteen. The De-

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133 See, e.g., *Sys. Mgmt. Inc. v. Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000).

134 *Comm. Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374 (2d Cir. 2001).

135 8 U.S.C. § 1325(d) (2004). See, e.g., *U.S. v. Matsumaru*, 244 F.3d 1092 (9th Cir. 2001).

136 18 U.S.C. § 922(g)(5) (2004), referring to 18 U.S.C. § 921(3)(A) (2004).

137 8 U.S.C. § 1227(a)(2)(C) (2004).

138 18 U.S.C. § 922(d)(5) (2004).

139 18 U.S.C. § 922(s)(3)(B)(v) (2004).

140 18 U.S.C. § 922(a)(6) (2004).

141 8 U.S.C. § 1301 (2004).

partment of Homeland Security issues a certificate of registration or a permanent resident card to every alien who registers. Non-immigrants must also report address changes every three months on Form AR-11, available at post offices.

Every alien who has been issued a registration document is required to carry the document on his or her person.<sup>142</sup> Federal regulations specify the immigration documents that are evidence of alien registration.<sup>143</sup>

The U.S. Supreme Court has held that the unregistered presence of an alien in the United States is in itself a crime. The United States has an express public policy against the presence of an unregistered alien in this country.<sup>144</sup>

Violators of registration requirements are subject to civil and criminal penalties. Since September 11, federal prosecutors have increasingly used registration laws as a simple tool to fight illegal immigration. Willful failure or refusal to comply with registration requirements<sup>145</sup> and knowingly making false statements on a registration application<sup>146</sup> are both *criminal misdemeanors*, subject to a \$1,000 fine and/or six months imprisonment. Failure to register is a continuing violation for which there is no statute of limitations.<sup>147</sup> Other related *criminal misdemeanors* are failure to have a registration card in personal possession (\$100 fine and/or 30 days imprisonment),<sup>148</sup> and failure to report a change of address (\$200 fine and/or 30 days).<sup>149</sup> Any alien convicted of making a false statement on a registration application or who fails to report a change of address without a reasonable excuse must be detained by law enforcement officials and removed by U.S. Immigration and Customs Enforcement. Counterfeiting registration documents is a *felony* punishable by five years imprisonment and/or a \$5,000 fine.<sup>150</sup>

A law enforcement officer has probable cause to detain an individual who admits he or she is an alien (legal or illegal) but is not in possession of registration documents.<sup>151</sup> Since failure to register is a *continuing crime*,<sup>152</sup> the offense is a

142 8 U.S.C. § 1304(e) (2004).

143 8 C.F.R. § 264.1(b) (2004); I-94 (Arrival-Departure Record); I-95 (Crewmen's Landing Permit); I-184 (Alien Crewmen Landing Permit and ID Card); I-185 (Nonresident Alien Canadian Border Crossing Card); I-186 (Nonresident Alien Mexican Border Crossing Card); I-221 (Order to Show Cause & Notice of Hearing); I-551 (Permanent Resident Card); I-688 (Temporary Resident Card); I-688A (Employment Authorization Card); I-688B (Employment Authorization Document); I-766 (Employment Authorization Document). An INS/DHS endorsement in the passport of an alien applicant for adjustment is also evidence of registration.

144 *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984).

145 8 U.S.C. § 1306(a) (2004).

146 8 U.S.C. § 1306(c) (2004).

147 *U.S. v. Franklin*, 188 F.2d 182, 186-87 (7th Cir. 1951).

148 8 U.S.C. § 1304(e) (2004).

149 8 U.S.C. § 1306(b) (2004).

150 8 U.S.C. § 1306(b)-(d) (2004).

151 *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 219 (9th Cir. 1995).

152 *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 n.3 (1984).

criminal misdemeanor committed in a law enforcement officer's presence, a crime for which a warrantless arrest can be made in most jurisdictions.

However, it remains unsettled whether recently arrived *illegal* aliens who enter the U.S. without inspection, and thus were never "issued" registration documents, can be charged with violating the statute requiring possession of registration documents.<sup>153</sup> Currently the best practice for local officers questioning an alien without documentation is to first inquire if the alien has been in the United States for more than thirty days, and to then ask if the alien received an I-94 form (Arrival-Departure Report) at inspection, or if the alien has a "green card" or other document fulfilling the registration requirement.<sup>154</sup>

If during a consensual encounter or Terry stop the alien claims to have no registration document because he is a United States citizen, and then provides the local officer with a false or forged document, probable cause may exist to arrest the alien for a felony false claim of U.S. citizenship.<sup>155</sup> Alternatively, if the alien freely admits that he is illegally in the U.S., the officer may detain the alien for pickup by the U.S. Immigration and Customs Enforcement.

#### *Federal Document Fraud and False Statement Crimes*

Illegal aliens seeking to evade detection can be arrested on federal felony charges for false or fraudulent use of a number of documents that are frequently presented to local police officers. Materiality is not an element of federal false statement crimes unless specifically included in the statute.<sup>156</sup>

Section 1546 of Title 18 of the United States Code criminalizes the use or attempted use of false or unlawfully obtained immigration documents by an alien as evidence of authorization to enter, stay, or work in the United States. Section 1546(a) prohibits five types of fraud and misuse of entry documents. Under this section, it is a *felony* to:

- (1) knowingly forge, counterfeit, alter, or falsely make any document prescribed by statute or regulation for entry into the U.S., or as evidence of authorized stay or employment in the U.S. Specific documents include immigrant or non-immigrant visas, permits, border crossing cards, and alien registration receipts;

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153 U.S. v. Mendez-Lopez, 528 F. Supp 972, 973-74 (N.D. Okla. 1981).

154 "Green card" is the colloquial term for an alien registration receipt card. U.S. v. Salinas-Calderon, 728 F.2d 1298, 1298 n.1 (10th Cir. 1984).

155 18 U.S.C. § 911 (2004). Answering affirmatively to the question "Are you a U.S. citizen?" constitutes a claim of citizenship if made to a local law enforcement officer. Smiley v. U.S. 181 F.2d 505, 507 (9th Cir. 1950), *cert. denied*, 340 U.S. 817 (1950).

156 U.S. v. Hart, 291 F.3d 1084 (9th Cir. 2002) (holding materiality not an element of 8 U.S.C. § 1542 false statement in passport application); U.S. v. Abuagla, 336 F.3d 277 (4th Cir. 2003) (holding materiality not an element of 18 U.S.C. § 1015(a) false statement in a naturalization proceeding).

- (2) “utter,”<sup>157</sup> use, attempt to use, possess, obtain, accept, or receive any such document, knowing that it was forged, counterfeited, altered or falsely made, was procured by a false claim or statement, or was otherwise procured by fraud or unlawfully obtained;
- (3) possess or sell a blank permit or visa printing plate, or security paper used to print visas, documents, or permits;
- (4) impersonate another person or falsely use the name of a dead person, or to evade or attempt to evade the immigration laws by appearing under an assumed or false name—without disclosing one’s true identity—while applying for any visa, permit, or other document required for entry to the U.S., or when applying for admission to the U.S.; or
- (5) sell, or otherwise dispose of, or to offer to sell or otherwise dispose of, or to utter any visa, permit, or other document required for admission to the U.S.

Section 1546 covers the possession of any knowingly forged document designated by statute or regulation for entry into, stay in, or employment in the United States. Possession of a counterfeit or altered foreign passport has been held to violate section 1546(a).<sup>158</sup> It is not necessary for a conviction under section 1546(a) to prove intent to violate “immigration law” or to obtain an “immigration benefit.” Under section 1546(a), impersonation while seeking admission into the U.S. is a *felony*, even if the alien was not applying for an entry document.

#### False Birth Certificates

Any person who knowingly presents a false or forged birth certificate issued by any state, or a copy thereof, or any other document issued under any law of the United States, to support a claim of U.S. citizenship by a person not born in the United States, has violated three related federal felony statutes.<sup>159</sup>

#### Federal False Claims Regarding Immigration Status

Illegal aliens frequently attempt to use real documents under false pretenses in order to receive federal public benefits and work authorization, or remain in the United States without detection. The broad federal statute criminalizing false statements is 18 U.S.C. § 1001, which makes it a federal *felony* to (1) falsify, conceal, or cover up by any trick, scheme, or device, (2) make any false, fictitious, or fraudulent statements or representations, or (3) make use of any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, (4) with respect to any matter within the jurisdiction of any United

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157 Generally, to put a document into circulation or public use.

158 *U.S. v. Osiemi*, 980 F.2d 344 (5th Cir. 1993); *U.S. v. Rahman*, 189 F.3d 88, 118 (2d Cir. 1999), *cert. denied* 120 S.Ct. 439 (1999).

159 18 U.S.C. § 1015(c) (2004); 18 U.S.C. § 1425 (2004); 18 U.S.C. § 1426(a)-(c), (h) (2004).

States department or agency.<sup>160</sup> Under section 1001, the presentation of fraudulent documents to *local peace officers* is a federal felony. If a false statement is made to a local law enforcement agency through the use of *any* false document which conceals that the person making the false representation is illegally in the United States in violation of federal immigration law, that statement would fall “within the jurisdiction of a United States agency.”<sup>161</sup>

A false claim to U.S. citizenship for the purpose of obtaining a federal or state benefit, or to work, or to vote, is a separate crime, punishable by up to five years imprisonment.<sup>162</sup>

### Felony Identification Document Fraud

Immigration document fraud is a felony enforceable by local police officers under 18 U.S.C. § 1028. The statute criminalizes eight types of knowing conduct that relate to false identification documents and which, with the exception of (4) on the list, must additionally either (i) appear to be issued under the authority of the United States, or (ii) be “in or affect interstate or foreign commerce”:

- (1) to produce a document without lawful authority;<sup>163</sup>
- (2) to transfer a document knowing that it was stolen or produced without lawful authority;
- (3) to possess five or more documents with intent to use or transfer unlawfully;
- (4) to possess a document with the intent to defraud the United States;
- (5) to produce, transfer or possess a document-making implement to be used in the production of a false identification document;
- (6) to possess a stolen or unlawfully produced document that appears to be a United States identification document;
- (7) to transfer or use, without lawful authority, a “means of identification of another person” with the intent to commit, aid, or abet any violation of federal law, or any felony under any applicable state or local law; or

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<sup>160</sup> 18 U.S.C. § 1001 (2004).

<sup>161</sup> U.S. v. Montemayor, 712 F.2d 104, 107 (5th Cir. 1983); U.S. v. Gilliland, 312 U.S. 86, 93 (1941) (holding that the term “jurisdiction” merely incorporates Congress’ intent that the statute apply whenever false statements would result in the perversion of the authorized functions of a federal department or agency); U. S. v. Lewis, 587 F.2d 854, 857 (6th Cir. 1978) (holding that proof of defendant’s knowledge that a federal agency was involved in the matter is not an essential element of a section 1001 conviction).

<sup>162</sup> 8 U.S.C. § 1015(e), (f) (2004). This provision is also distinct from a false claim of citizenship under 8 U.S.C. § 911 (2004). See *supra* note 155.

<sup>163</sup> ‘Producing’ an identification document includes obtaining the document unlawfully from a motor vehicle department employee or other innocent third party. U.S. v. Rashwan, 328 F.3d 160, 165 (4th Cir. 2003).

(8) to traffic in authentication features for use in false documents or document making machinery.<sup>164</sup>

The legislative history of 8 U.S.C. § 1028(a)(4) suggests that a conviction for felony document fraud could be obtained for the misuse of a consular identification card by an illegal alien, including the controversial *matricula consular* issued by Mexican consulates in the United States, to obtain a government benefit or service for which lawful presence is a prerequisite.<sup>165</sup> The definition of “identification document” in section 1028(d)(2) includes a document intended or commonly accepted for the purpose of identification of individuals, that is made or issued by a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization. Violation of a federal, state or local law is not an essential element of a conviction for use of an identity document to defraud the United States.<sup>166</sup>

Other commonly accepted documents whose misuse is criminalized by section 1028 include INS Form I-94 (Arrival and Departure Record), social security cards, and state university identification cards.<sup>167</sup> Use of blank identification documents that have not been completed with information relating to a particular individual is also prohibited.<sup>168</sup> Penalties upon conviction are heavy, including a fine and imprisonment for up to fifteen years, and forfeiture of any personal property used or intended to be used to commit the offense.<sup>169</sup>

### Felony Misuse of Social Security Numbers

Any person who, for *any* purpose, but with intent to deceive, falsely represents a social security number to have been assigned to him or to another person, when in fact such number was not assigned as represented, or any person who alters, buys, sells, or counterfeits a social security card, or possesses a counterfeit card with intent to sell or alter it, has committed a federal *felony*.<sup>170</sup> Intentional use of a false social security card is a serious offense that can warrant an upward departure from federal sentencing guidelines.<sup>171</sup> In post 9-11 terrorism investigations, section 408(a)(7) has been widely used to prosecute individuals using false identi-

164 18 U.S.C. § 1028 (2004).

165 H.R. Rep. No. 97-802, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3519, 3527.

166 *United States v. McCormick*, 72 F.3d 1404, 1407 (9th Cir. 1995).

167 *U.S. v. Pahlavi*, 802 F.2d 1505, 1506 (4th Cir. 1986) (regarding I-94 forms); *U.S. v. Quinteros*, 769 F.2d 968, 970 (4th Cir. 1985) (regarding social security numbers).

168 *U.S. v. Castellanos*, 165 F.3d 1129, 1130 (7th Cir. 1999).

169 18 U.S.C. § 1028(b) (2004).

170 42 U.S.C. § 408(a)(7) (2004).

171 *U.S. v. Sullivan*, 895 F.2d 1030, 1032 (5th Cir. 1990); *U.S. v. Scott*, 915 F.2d 774, 777 (1st Cir. 1990).

ties. Federal law enforcement officials have used section 408 as statutory authority to secure a search warrant.<sup>172</sup>

The felony provisions of 42 U.S.C. § 408 are particularly effective in charging illegal aliens because the elements of proof are more flexible than those required by 18 U.S.C. § 1028.<sup>173</sup> Use of a false social security number on a non-federal document, such as a local business license or credit card, is actionable.<sup>174</sup> Proof that the defendant used the false number or card for financial gain is not required.<sup>175</sup> Each misrepresentation on a credit card, bank account application, state driver's license, benefits application, or federal document relating to employment (Forms I-9 or W-4) involves a separate set of predicate facts which may each be charged as a separate felony.<sup>176</sup> Mere possession of a social security card or number that does not belong to a defendant can establish felonious intent.<sup>177</sup>

### III. LOCAL POLICE COMPLIANCE WITH FOURTH AMENDMENT PROTECTIONS.

Part III discusses the interplay between the identification and detention by local police of aliens who have violated federal immigration law, and the constitutional protections against arbitrary arrest accorded all persons in the United States, regardless of immigration status. Whether at the hands of state or federal officers, arrests and detentions are at a minimum subject to the Fourth Amendment.<sup>178</sup> The ability to recognize indicia of illegal alien status, and to understand the links between such indicia and criminal violations of immigration and other federal criminal law, is essential to establishing reasonable suspicion in the local law enforcement context within constitutional bounds.

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172 John K. Webb, *Use of the Social Security Fraud Statute in the Battle Against Terrorism* (42 U.S.C. § 408(a)(7)(A)-(C)), 50 U.S. ATT'YS' BULL. 1 (May 2002), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5003.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5003.pdf).

173 *U.S. v. Pryor*, 32 F.3d 1192, 1194 (7th Cir. 1994) (stating that using a fraudulently obtained social security number for identification purposes demonstrated a willful knowing intent to deceive); *U.S. v. Silva-Chavez*, 888 F.2d 1481, 1482 (5th Cir. 1989) (stating that the 'for any other purpose' element was to be interpreted broadly); *U.S. v. Means*, 133 F.3d 444, 447 (6th Cir. 1998); *U.S. v. McCormick*, 72 F.3d 1404, 1406 (9th Cir. 1995). *But see U.S. v. Doe*, 878 F.2d 1546, 1553-54 (1st Cir. 1989) (in which handing over a false social security card together with other personal effects collected at time of arrest was not considered to be misuse of the card with "intent to deceive").

174 42 U.S.C. § 408(a)(7)(C) (2004).

175 *Silva-Chavez*, 888 F.2d at 1482.

176 *U.S. v. Castaneda*, 9 F.3d 761, 765 (9th Cir. 1993) ("Defendant may properly be charged with committing the same offense more than once as long as each count depends on a different set of predicate facts.").

177 *U.S. v. Charles*, 949 F. Supp 365-66 (D.V.I. 1996); *U.S. v. Teitloff*, 55 F.3d 391, 394 (8th Cir. 1995).

178 *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir 1983). *But see* discussion of *U.S. v. Esparza-Mendoza*, *infra*, holding that Fourth Amendment does not apply to aliens reentering the U.S. after removal.

*Reasonable Suspicion of Immigration Law Violations*

## Voluntary Encounter Context

A consensual encounter between a police officer and a private citizen does not trigger the Fourth Amendment prohibition against a police seizure of a person without a reasonable suspicion of criminal activity. Most citizens will respond to a police request. The fact that people do so, and do so without being told they are free not to respond, does not eliminate the consensual nature of the response.<sup>179</sup>

A consensual “encounter” only becomes an unlawful “seizure” when a reasonable person in the same circumstances would not feel free to leave.<sup>180</sup> “Circumstances that might indicate a seizure include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request would be compelled.”<sup>181</sup>

Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street, in public places, or on public conveyances, and putting questions to them, if they are willing to listen. Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.<sup>182</sup> Where bus travelers were briefly detained by INS agents at a scheduled rest stop and not otherwise delayed in their journey, a brief questioning regarding citizenship was a minimal intrusion on the bus travelers’ privacy interests, which was outweighed by the government’s substantial interest in controlling illegal immigration.<sup>183</sup>

When a police officer approaches an individual and asks questions or requests identification, no seizure occurs as long as the officer does not convey that compliance is required.<sup>184</sup> A state trooper who approached the driver of a van fueling at a highway truck stop, and who did not show his weapon or touch the driver, but asked for a drivers license, vehicle registration, and insurance papers, was found to have engaged in a consensual encounter, even though he had unsuccessfully used his flashing lights and loudspeaker in a show of force to ask the driver of the van to pull over outside the truck stop.<sup>185</sup>

179 *INS v. Delgado*, 466 U.S. 210, 215-17 (1984).

180 *U.S. v. Perez-Sosa*, 164 F.3d 1082, 1084 (8th Cir. 1998) (citing *United States v. Hathcock*, 103 F.3d 715, 718 (8th Cir.), *cert. denied*, 521 U.S. 1127 (1997)).

181 *Id.* (internal quotations omitted).

182 *U.S. v. Drayton*, 536 U.S. 194, 201 (2000).

183 *U.S. v. Angulo-Guerrero*, 328 F.3d 449, 453 (8th Cir. 2003) (concurring opinion).

184 *Florida v. Bostick*, 601 U.S. 429, 434-35 (1991).

185 *U.S. v. Perez-Sosa*, 164 F.3d 1082, 1083-84 (8th Cir. 1998).

During a consensual questioning, a respondent may claim to be a U.S. citizen, lawful permanent resident, or to have some other immigration status authorizing his or her presence in the United States. The former INS recommended that its enforcement officers question a person as to citizenship status using a standard format: “*Of what country are you a citizen?*” This awkward format requires the respondent to demonstrate his or her understanding of the English language and to make a “thoughtful” active response.<sup>186</sup> A mere response by itself is not conclusive. An officer in this circumstance may then ask to see the person’s documents.

*United States v. Esparza-Mendoza*

One recent case in Utah has held that aliens who have illegally reentered the United States are not persons covered by Fourth Amendment protections.<sup>187</sup> On appeal, the Tenth Circuit held that there had not been any Fourth Amendment violation, so that there was no need to decide whether the illegal alien was entitled to protection under the Fourth Amendment.<sup>188</sup>

In March 1997, Jorge Esparza-Mendoza, a Mexican citizen, illegally entered the United States, and never legalized his status. In 1999, he was convicted of a felony and deported to Mexico. He again illegally entered the United States, was discovered by local police while they were investigating a domestic altercation between two women, and was charged with illegal reentry.<sup>189</sup>

At trial, the defendant moved to suppress his identification card, arguing that he was detained and forced to present his identification card without probable cause. The court denied the motion on the novel ground that, as a previously removed alien felon, Esparza-Mendoza could not assert a violation of the Fourth Amendment because he was not one of “the people” the Amendment protected and did not have a “sufficient connection” to the United States. As a Mexican citizen, the defendant had illegally entered the United States twice, and would in all probability be deported to Mexico again, upon his release from prison.

Esparza-Mendoza argued that he was detained and forced to present his identification without reasonable suspicion or probable cause. The court agreed that the defendant was detained for a brief period without reasonable suspicion, circumstances normally violative of Fourth Amendment rights. However, the underlying question was whether the defendant had the *capacity* to raise a Fourth Amendment claim. District Judge Paul Cassell framed the issue as “whether the disputed search and seizure has *infringed an interest* of the defendant which the Fourth Amendment was designed to protect.”

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186 INS Inspector’s Field Manual (IFM) § 12.3.

187 *U.S. v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (D. Utah 2003).

188 *U.S. v. Esparza-Mendoza*, 386 F.3d 953 (10th Cir. Oct. 14, 2004).

189 *Esparza-Mendoza*, 265 F. Supp. 2d 1254 at 1255.

The application of the Fourth Amendment to previously removed aliens is unresolved in both the Supreme Court and the Tenth Circuit. Judge Cassell found the 1990 Supreme Court precedent in *United States v. Verdugo-Urquidez* “most instructive.”<sup>190</sup> The key to *Verdugo-Urquidez* was its formulation of the “sufficient connection” test. In that case, the Court considered a challenge by a Mexican resident to a search of his residence in Mexico by American law enforcement officials. The Court declared: “While this textual exegesis is by no means conclusive, it suggests that ‘the people’ protected by the Fourth Amendment and by the First and Second Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>191</sup>

Judge Cassell then examined the historical background in Anglo-American common law regarding the attachment of alien felons to the political community. He found that criminal aliens have not been considered part of, or connected to, the nation’s political community, and that historical materials proved that “the Framers were doing everything possible to exclude such persons from the national community.”<sup>192</sup> Esparza-Mendoza was entitled to those rights that follow from *mere presence* in this country, but lacked entitlement to those rights which arise from being a *member* of the American society, including Fourth Amendment protections.

Judge Cassell further supported his conclusion with the doctrine that trespassers, who are found illegally on property, lack the right to raise Fourth Amendment challenges to searches of that property.<sup>193</sup> He held that precisely the same thing could be said of the defendant in this case, whom he characterized as being a trespasser in this country.<sup>194</sup>

The defendant argued that if the court excluded him from Fourth Amendment protection, “police officers would go unchecked in their interactions with suspected illegal aliens.” In response, the court noted the importance of not allowing policy considerations to dictate its interpretation of constitutional provisions. Judge Cassell nonetheless chose to address this concern “because of the importance of preventing police misconduct.” The court held that the Fourth Amendment was not the sole constitutional restraint on police activity, since the Fifth Amendment guaranteed “all persons” protection against deprivations of life, liberty, or property without due process of law.

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190 *Id.* at 1259, citing *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

191 *Id.* at 1262, citing *Verdugo-Urquidez* at 265.

192 *Id.* at 1269.

193 *Id.* at 1271, citing *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387 (1978).

194 *Id.* at 1271.

The District Court also held that the extension of the Fourth Amendment and its exclusionary rule to aliens previously removed for criminal reasons would have the potential to interfere with the effectiveness of criminal sanctions.<sup>195</sup>

The question of whether illegal aliens who have *not* been deported meet the ‘sufficient connection test’ was not before the court. However, Judge Cassell noted that case law appears to recognize an ascending scale of rights for aliens, and wrote that whether aliens who have not been previously deported are distinguishable from alien felons who have been deported was a question to be addressed “another day.”<sup>196</sup>

### Terry Stop or Investigative Detention Context

State and local officers, like their federal counterparts, have authority to detain persons for a brief warrantless interrogation (or ‘Terry stop’) based upon reasonable suspicion that the person has committed a violation of federal law—including federal immigration law.<sup>197</sup> An investigative detention is a seizure of limited scope and duration. To be lawful:

- (i) the officer’s action must be justified by reasonable suspicion at its inception; and
- (ii) the scope of the detention must be reasonably related to the circumstances that justified the interference in the first place.

Reasonable suspicion must exist at all stages of the detention, but it need not be based on the same facts throughout.<sup>198</sup>

A traffic stop constitutes a seizure and therefore must be “reasonable.”<sup>199</sup> A stop is reasonable if it is based on either an observed traffic violation, or a reasonable articulable suspicion that such a violation has occurred or is occurring.<sup>200</sup> Reasonable suspicion must have a “particularized and objective basis” for suspecting criminal activity.<sup>201</sup>

In a routine traffic stop, a local officer with “reasonable suspicion” can detain an individual to ask a moderate number of questions intended to determine identity and obtain information that would confirm or dispel suspicions.<sup>202</sup> It is permissible in a determination of identity during a lawful stop to inquire, “Where are you from?” to verify immigration status.<sup>203</sup>

195 *Id.* at 1271-73.

196 *Id.* at 1273.

197 *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987).

198 *U.S. v. Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir. 1998), citing *Terry v. Ohio*, 392 U.S. 1 (1968).

199 *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

200 *U.S. v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995).

201 *U.S. v. Cortez*, 449 U.S. 411, 417-18 (1981).

202 *Berkemeer v. McCarty*, 468 U.S. 420, 439 (1984).

203 *Gomez v. State of Florida*, 517 So. 2d 110, 1987 Fla. App. LEXIS 11754 (1987).

It is essential for local officers to remember that foreign appearance based on ethnic characteristics or language can only be considered *in combination with* other specific circumstances that the officer can describe in words.<sup>204</sup> For example, reasonable articulable suspicion existed where an Oklahoma state patrol officer asked occupants of a van whether they were “legal” based *in part* on their ethnic appearance, where the vehicle had been stopped for an apparent seat belt violation, and the occupants were first questioned about their travel plans and asked what family or other relationships existed between the passengers.<sup>205</sup>

Observations made while investigating a traffic violation or other offense can provide an independent basis for reasonable suspicion that either the driver or his passengers have violated federal immigration laws, which would then permit further detention to investigate the immigration violations as part of the Terry stop procedure.<sup>206</sup>

Reasonable suspicion existed to temporarily detain and investigate the traveling companion of a person whom police suspected of illegal entry, where the police could describe indications that both persons were acting in concert.<sup>207</sup> In a routine traffic stop in South Dakota, a highway patrol officer who questioned a vehicle *passenger* regarding his citizenship and immigration status did not violate his Fourth Amendment right against unreasonable search and seizure when the driver, who was a legal resident, had told the officer his passenger was not “legal.”<sup>208</sup> The Eighth Circuit Court of Appeals held that even if the officer had lacked reasonable suspicion to question the driver, evidence of alienage obtained during the questioning could be used against the illegal alien *passenger* in a subsequent criminal case.<sup>209</sup>

The identity of an alien in a criminal or removal proceeding is not a constitutionally protected privacy right, nor suppressible as the fruit of an unlawful arrest.<sup>210</sup> An illegal alien has no expectation of privacy from another person’s knowledge of his or her unlawful immigration status. The exclusionary rule, which suppresses statements and other evidence obtained in an unlawful warrantless search or arrest, does not apply in deportation proceedings. Even if local police first discover the identity of an illegal alien through an unlawful search or arrest, it may still be used in a subsequent civil deportation proceeding.<sup>211</sup>

204 Meissner, D., INS memo HQQPS 50/19-P, Attachment A-7, May 22, 1998.

205 U.S. v. Favela-Favela, 41 Fed. Appx.185, 190 (10th Cir. unpub. 2002).

206 U.S. v. Wilson, 7 F.3d 828, 834 (9th Cir. 1993).

207 U.S. v. Tehrani, 49 F.3d 54, 59 (2d Cir. 1995).

208 U.S. v. Rodriguez-Arreola, 270 F.3d 611, 611-13 (8th Cir. 2001).

209 *Id.* at 616. Questioning a detained person regarding their immigration status does not require a particularized reasonable suspicion that the detainee has violated federal immigration law. Muehler v. Mena, No. 03-1423, 2005 U.S. LEXIS 2755 (Mar. 22, 2005).

210 INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

211 U.S. v. Aldana-Roldan, 932 F. Supp 1455, 1456 (D. Fla. 1996).

Unless state or local police have received firm and specific information that federal authorities will not prosecute INA misdemeanors, they may impose investigative detention based on reasonable suspicion that an alien has not registered with DHS, is not in possession of required registration documents, or has illegally entered the United States.<sup>212</sup>

*United States v. Soto-Cervantes*

A New Mexico case from the Tenth Circuit, where local police detained an alien for investigation of immigration status when he presented an apparently genuine (although subsequently determined to be invalid) alien registration document, illustrates how a federal court analyzed a police claim of reasonable suspicion of immigration law violations that arose during a street investigation of drug activity.<sup>213</sup>

Bernalillo County sheriffs' deputies properly detained a suspect based on indicia of illegal alien status *after* the original suspicion that the detainee was involved in drug activity was dispelled. First, several factors that did not independently amount to reasonable suspicion justified the initial detention under a "totality of the circumstances" analysis: (1) an anonymous tip (that drug distribution was occurring on a street corner involving Mexican nationals and a gray pick-up truck); (2) the officer's prior knowledge that drug activity had occurred in the surrounding area; and (3) the officer's observation of a group of five individuals scattering behind a wall.<sup>214</sup>

No contraband or weapons were found on any of the individuals. When asked for identification, two persons produced alien registration cards, two had no ID documents, and a fifth stated that he was in the U.S. illegally. All suspects appeared nervous when questioned about identification. However, an NCIC check on the defendant's alien registration card was negative for prior arrest history.<sup>215</sup>

Despite the lack of evidence to further detain the defendant for state drug violations, the Court of Appeals found that, based on three factors, reasonable articulable suspicion still existed for a continued investigative detention while INS agents were contacted to investigate federal immigration law violations: (1) the officer's prior experience that approximately half of all alien registration cards shown to him turned out to be fake; (2) the area of detention, which was known to be frequented by Mexican illegal aliens; and (3) the nervousness of the defendant when asked for identification.<sup>216</sup>

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212 U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion for the U.S. Att'y. Southern Dist. of California, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996).

213 U.S. v. Soto-Cervantes, 138 F.3d 1319 (10th Cir. 1998), *cert. denied*, 525 U.S. 853 (1998).

214 *Id.* at 1323.

215 *Id.* at 1321.

216 *Id.* at 1323-24.

The Court held that, while none of the factors alone could support a finding of reasonable suspicion, the "totality of the circumstances" justified detention pending further investigation by INS agents even though the drug inquiries were complete. Under these circumstances, the fact that the documentation did not appear to be obviously counterfeited did not prevent further detention until the INS could make a more expert evaluation. The negative NCIC prior arrest report did not require that officers let the suspect go, since the NCIC did not at that time provide information concerning immigration status.<sup>217</sup>

Upon arrival of the INS agent, further evidence was found which independently justified yet a third extension of investigative detention and a complete verification of the detainee's immigration status: (1) a discrepancy between numbers on the front and back of the card; and (2) multiple issue dates on the card, indicating that the alien might have been previously deported.<sup>218</sup>

### *Probable Cause for Detention or Arrest of Suspected Illegal Aliens*

A local police officer's lack of knowledge of the immigration laws does not preclude a court from finding that probable cause to detain an illegal alien existed. Probable cause for arrest is measured against an objective standard.<sup>219</sup> If this objective test is met, it is unnecessary that a police officer also have a subjective belief that he has a basis for making the arrest.<sup>220</sup> Probable cause exists where the facts and circumstances within a police officer's trustworthy information are sufficient in themselves to warrant the belief of a man of reasonable caution that an offense has been or is being committed by the person to be arrested.<sup>221</sup> The fact that an officer lacks expertise in a particular field does not mean probable cause is lacking, for lack of experience does not prevent a police officer from "sensing the obvious."<sup>222</sup> Probable cause for detention on federal charges may be established entirely by hearsay.<sup>223</sup>

A motorist's negative response to the question whether the motorist and passenger were "legal" during a lawful investigative stop established probable cause to arrest the driver and passenger for a suspected violation of federal immigration

217 *Id.*

218 *Id.* at 1324.

219 *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

220 *Florida v. Royer*, 460 U.S. 491, 507 (1983); *U.S. v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999) (holding that the fact that an officer did not believe there was probable cause and proceeded on a consensual or Terry-stop rationale would not foreclose establishing custody by proving probable cause).

221 *U.S. v. Salinas-Calderon*, 728 F.2d 1298, 1300 (10th Cir. 1984) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

222 *Id.* at 1301 (citing *U.S. v. Strahan*, 674 F.2d 96, 100 (1st Cir.), *cert. denied*, 456 U.S. 1010 (1982)).

223 *Fed. R. Crim. P.* 4(b).

law.<sup>224</sup> Even where the local officer did not have a subjective belief in his own mind that probable cause existed to arrest a suspect, the government may *subsequently* establish probable cause by identifying a suspect's statements or actions that could have indicated a possible violation of federal immigration laws.

In a 1999 Utah traffic stop of illegal aliens (resulting in an arrest for cocaine possession), a state trooper asked the suspects about their "travel plans."<sup>225</sup> The suspects responded that they were coming from Mexico, and one passenger appeared to nod 'yes' when the officer then asked if they were "legal." Although the officer was not aware that he had what the Tenth Circuit Court of Appeals calls "the general authority to investigate and make arrests for violations of federal immigration laws," and so testified at trial, the Court found that the arrest was lawful because probable cause existed as a matter of law.<sup>226</sup>

Probable cause to arrest for alien-smuggling existed in a consensual encounter at a rest-stop where the passengers in a van spoke no English, had no resident alien cards, green cards, or passports, three of the passengers possessed unofficial identification cards issued two days before in Arizona, and the alien driver stated to a Nebraska state patrol officer that his passengers were from Mexico.<sup>227</sup>

Probable cause to establish that a person is in the United States in violation of federal law can be established by the failure of an alien to produce alien registration documents, or the presentation of conflicting immigration documents.

When a person, during a consensual encounter in an urban bus station, disclosed to an undercover officer that he was not a citizen and that his "papers" were at home in another state, reasonable suspicion existed that the alien had committed an offense, and probable cause existed for his arrest.<sup>228</sup>

Presentation of conflicting immigration-related documents by a person of unconfirmed identity encountered at business premises where an INS investigation was underway constituted probable cause to detain such person.<sup>229</sup>

#### IV. THE ALIEN DETENTION POWER OF LOCAL LAW ENFORCEMENT AGENCIES

A perceived lack of authority to detain illegal aliens for pick-up by federal immigration agents and difficulty in obtaining reimbursement for detention costs have been common concerns for many local jurisdictions. The survey of federal law and regulations in Part IV demonstrates that local police have more flexibil-

224 U.S. v. Santana-Garcia, 264 F.3d 1188, 1193 (10th Cir. 2001).

225 Questions about travel plans are routine, and may be asked as a matter of course without exceeding the proper scope of a traffic stop. U.S. v. West, 219 F.3d 1171, 1176 (10th Cir. 2000).

226 *Santana-Garcia*, 264 F.3d at 1193-94 (quoting from U.S. v. Vasquez-Alvarez, 176 F.3d 1294, 1296, 1299, 1300 n.4 (10th Cir. 1999)).

227 U.S. v. Perez-Sosa, 164 F.3d 1082, 1084 (8th Cir. 1998).

228 *State of Louisiana v. Nebar*, 529 So. 2d 117 (La. 1988).

229 *Yam Sang Kwai v. INS*, 411 F.2d 683, 687 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877 (1969).

ity than is generally understood to detain illegal aliens in custody under delegated federal authority.

*Detention of Illegal Aliens for Transfer to Federal Custody*

An ‘immigration hold’ (or ‘detainer’) is an authorization made by an immigration officer to a state, county, or other local law enforcement agency, which requests the local agency to detain a person for U.S. Immigration and Customs Enforcement for possible future proceedings under the immigration laws.<sup>230</sup> An immigration hold is an arrest without warrant made pursuant to 8 U.S.C. § 1357(a)(2). An immigration hold may only be authorized by a federal immigration officer, and only when the officer has determined that there is reason to believe that the person to be held:

- (i) is an alien;
- (ii) is in the United States in violation of the immigration laws; and
- (iii) is likely to escape before a warrant can be obtained for his arrest.<sup>231</sup>

Unless an alien has been granted voluntary departure pursuant to 8 U.S.C. § 1229(b), current federal regulations require that U.S. ICE make a determination within 48 hours of arrest as to whether:

- (i) the alien will be “continued in custody” or “released on bond or recognizance”; and
- (ii) a “Notice to Appear” or warrant of arrest will be issued.

However, “in the event of an emergency or other reasonable circumstance,” a custody determination may be made “within an additional reasonable period of time.”<sup>232</sup>

An alien detained solely on the basis of an immigration hold or other “status-based” offense applicable only to aliens has not been arrested, and cannot invoke the Speedy Trial Act,<sup>233</sup> Federal Rule of Criminal Procedure 5(a), or the procedural provisions of the Interstate Agreement on Detainers,<sup>234</sup> unless the detention was merely a ruse to retain custody of the alien pending a subsequent indictment on a criminal charge arising from the same unlawful act.<sup>235</sup>

230 Classes of officers authorized to issue a detainer are listed in 8 CFR § 287.7(b).

231 8 U.S.C. § 1357(a)(2), INA § 287(a)(2)(2004).

232 8 C.F.R. § 287.3(d) (2004).

233 18 U.S.C. §§ 3161-74 (2004); *U.S. v. Encarnacion*, 239 F.3d 395, 398-99 (1st Cir. 2001), *cert. denied*, 532 U.S. 1073 (2001).

234 18 U.S.C. Appx.

235 *U.S. v. Noel*, 231 F.3d 833, 836-37 (11th Cir. 2000); *U.S. v. Cepeda-Luna*, 989 F.2d 353, 356 (9th Cir. 1993).

*State Incarceration of Undocumented Criminal Aliens*

If “the chief executive officer” of a state or a political subdivision of a state submits a written request to the Secretary of Homeland Security, the Department must either:

- (i) enter into a contractual arrangement which provides for compensation to the state or local government, as appropriate, with respect to the incarceration of “an undocumented criminal alien”; or
- (ii) take the undocumented criminal alien into federal custody and incarcerate the alien.<sup>236</sup>

An “undocumented criminal alien” for purposes of this statute is an alien who has committed two or more misdemeanors or a single felony, and also has:

- (i) entered the U.S. without inspection (PWI);
- (ii) been the subject of removal proceedings at the time of arrest (an absconder); or
- (iii) been admitted as a nonimmigrant, but is out of status at the time of arrest.<sup>237</sup>

“Compensation” is defined as the average cost of incarceration in the relevant state, as determined by the federal government.<sup>238</sup>

During the ten-year period from enactment through fiscal year 2004, claims for compensation have been limited by statute to funds appropriated by Congress, as distributed by grants from the U.S. Department of Justice, and in practice have only amounted to a fraction of the total costs incurred by cities and states.<sup>239</sup>

However, the statutory limitation against state or local claims against the United States based on the availability of appropriations terminated on October 1, 2004.<sup>240</sup> With the intervention of the local city or county executive, every police department now has the potential ability to transfer a detained alien who has been convicted of a second misdemeanor into federal custody, or else claim compensation at a per diem rate for continued incarceration in a local facility.<sup>241</sup>

*Institutional Removal from Local and State Prisons*

Historically, almost eighty percent of foreign-born prisoners turn out to be removable criminal aliens. Based on this ratio, it was estimated in 1997 that about

236 8 U.S.C. § 1231(i)(1), INA § 241(i)(1) (2004), originally enacted as the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 20301 (1994), transferred by IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009 §328(a)(1)(A) (1996).

237 INA § 241(i)(3) (2004).

238 INA § 241(i)(2) (2004).

239 Pub. L. No. 103-322, § 20301(a) (1994). *See also* 61 Fed. Reg. 38218 (July 23, 1996).

240 Pub. L. No. 103-322, § 20301(c) (1994).

241 *California v. Dept. of Justice*, 114 F.3d 1222, 1224 (D.C. Cir. 1997).

40,000 additional removable criminal aliens enter U.S. federal, state, and local prisons each year.<sup>242</sup>

The Immigration and Nationality Act requires the Department of Homeland Security to hold removal proceedings on site at some federal, state, and local prisons and jails. DHS is also required to complete those removal proceedings, "to the extent possible," before the alien finishes serving a criminal sentence for an underlying aggravated felony.<sup>243</sup> This requirement is implemented through the Institutional Removal Program (IRP).

Established under the Immigration Reform and Control Act of 1986, the IRP is a cooperative effort among U.S. Immigration and Customs Enforcement, the Executive Office for Immigration Review, and federal and state correctional agencies to identify removable aliens incarcerated in correctional institutions and complete administrative removal proceedings before the end of an alien's sentence. The goal of immediate deportation at the time the alien's prison sentence is completed promotes an efficient use of limited federal detention space, and reduces threats to public safety by effecting immediate deportation upon completion of the alien's sentence.<sup>244</sup>

The former INS was criticized for poor performance in locating removable aliens in state, county, and municipal jails.<sup>245</sup> Although the IRP dates to 1986, it operated on an *ad hoc* basis until 1994.

The IRP represents a significant opportunity for local and state corrections agencies to achieve needed bed-space savings. The most significant obstacle for the program from the local and state perspective was the failure of the former INS to identify removable aliens and commence institutional removal proceedings in an expeditious manner.<sup>246</sup>

Legislation has been proposed in Congress to expand the program beyond its present operation in states with the largest number of criminal aliens. Improvements in interagency data sharing should improve the process. The potential of the program to excise alien felons and career criminals from local communities is clear. However, in practice, state and local police contributions are limited to improved screening of arriving prisoners. The capability of U.S. ICE to complete

242 *Criminal Immigration Deportation Program Oversight Hearing Before House Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 104th Cong. 7 (July 15, 1997) (statement of Rep. Lamar Smith, Chairman House Subcomm. on Immigration and Claims), available at <http://commdocs.house.gov/committees/judiciary/hju54765.000/hju54765>.

243 8 U.S.C. § 1228(a)(1), (a)(3)(A), INA § 238(a)(1), (a)(3)(A)(2004).

244 INS Fact Sheet, Sept. 22, 1999, available at <http://uscis.gov/graphics/publicaffairs/factsheets/removal.htm>.

245 U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS' ENFORCEMENT EFFORTS TO REMOVE IMPRISONED ALIENS CONTINUE TO NEED IMPROVEMENT (GAO/GGD-99-3) 4-6 (1998).

246 See, e.g., *Criminal Immigration Deportation Program Oversight Hearing Before House Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 104th Cong. (July 15, 1997) (statement of Anthony J. Annucci, Dep. Comm'r. and Counsel, N.Y. State Dept. of Correctional Services).

institutional removal hearings prior to completion of the alien inmate's sentence remains the *de facto* limit for programmatic success.

*Transfer to Federal Custody of Illegal Aliens Arrested for  
Controlled Substance Violations*

The Department of Homeland Security is required to “effectively and expeditiously take custody” of an alien who has been “arrested” by a state or local law enforcement official for:

a violation of any law relating to controlled substances, if the official . . . (1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States, (2) expeditiously informs an appropriate officer or employee of [DHS] of the arrest and facts concerning the status of the alien, and (3) requests [DHS] to determine whether to issue a detainer.<sup>247</sup>

For purposes of this provision, “arrested” means the alien has been taken into physical custody for a criminal violation, booked, charged, or otherwise officially processed, and provided an initial appearance before a “judicial officer” and informed of the charges and the right to counsel.<sup>248</sup>

*Temporary Local Detention of Criminal Aliens without  
Bond under Federal Law*

The Bail Reform Act of 1984 created a powerful detention provision that authorizes a state or local police officer to arrest any alien other than a legal permanent resident for a federal “offense,” and to request a local magistrate to temporarily detain the alien for up to ten days without bail while awaiting transfer into federal custody, so long as the alien is found to be a “flight risk” or “danger to any other person or the community.”

For any offense against the United States, the offender may, by any . . . mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and *at the expense of the United States*, be arrested and imprisoned, or released as provided in . . . [18 U.S.C. §§ 3141 et seq.], as the case may be, for trial before such court of the United States as by law has cognizance of the offense.<sup>249</sup>

The authority to make arrests for federal offenses under 18 U.S.C. § 3041 extends to state and local law enforcement officers.<sup>250</sup> The arrest for a federal of-

247 8 U.S.C. § 1357(d), INA § 287(d) (2004).

248 8 C.F.R. § 287.1(d) (2004).

249 18 U.S.C. § 3041 (2004) (emphasis added).

250 *U.S. v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977) (finding that reference in statute to mayor includes local police).

fense must be within the arrest power granted to the police officer under state law in his jurisdiction, including requirements for warrantless arrests. Thus the 18 U.S.C. § 3041 power extends to the federal immigration misdemeanor of illegal entry only in states where police are authorized to arrest for federal misdemeanors in general. As a practical matter, use of this federal arrest power is particularly appropriate for immigration law enforcement where police have established probable cause to arrest for violations of federal fraudulent document and false statements laws, as well as for alien smuggling felonies or illegal reentry felonies.

“A judicial officer authorized to order the arrest of a person under section 3041. . . before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings,” pursuant to 18 U.S.C. §§ 3141-56.<sup>251</sup> The judicial officer is normally a federal magistrate, but the statute expressly provides for a determination of temporary detention to be made by a state official described in 18 U.S.C. § 3041.<sup>252</sup>

If the arrestee brought before the judicial officer is *not* a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in 8 U.S.C. § 1101(a)(20)), and it is found that the alien may flee or pose a danger to any other person or the community, the judicial officer may order that, pending trial, *the person may be temporarily detained to permit deportation or exclusion.*<sup>253</sup>

In this circumstance, the judicial officer must (“shall”) (1) order the detention of the alien for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and (2) direct the government attorney or representative to notify the appropriate official of the U.S. Immigration and Customs Enforcement. Under § 3142(d), Congress intended to provide that it is reasonable to detain an individual who is an alien and a flight risk—i.e., an illegal alien—for as long as seventeen days without an arraignment or an indictment.<sup>254</sup> The alien for whom detention is sought has the burden of proving to the court such person’s U.S. citizenship or lawful admission for permanent residence.<sup>255</sup>

An apparent advantage for the local agency of an arrest and charge under federal statutes is that an alien detained in these circumstances is arrested and imprisoned “*at the expense of the United States.*”<sup>256</sup>

An illegal alien is an inherent flight risk.<sup>257</sup> The U.S. Supreme Court has noted that the probability that a deportable criminal alien will abscond if released

251 18 U.S.C. § 3141(a) (2004).

252 See also Fed. R. Crim. P. 5(a). However, a U.S. Marshal is not a judicial officer for Bail Reform Act purposes.

253 18 U.S.C. §§ 3142(a)(3), (d)(1)(B), and (d)(2) (2004).

254 U.S. v. Melendez, 55 F. Supp. 2d 104, 110 n.7 (D.P.R. 1999).

255 18 U.S.C. § 3142(d)(2) (2004).

256 8 U.S.C. § 3041 (2004) (emphasis added).

257 Melendez, 55 F. Supp. 2d at 110, n.6; U.S. v. Garcia-Ortiz, 310 F.3d 792, 795 (5th Cir. 2002).

on bail is unacceptably high, in the range of twenty to twenty-five percent.<sup>258</sup> For example, after arrest on a charge of alien smuggling and assault on a federal police officer, an illegal alien was properly held in temporary detention without a bail hearing under 18 U.S.C. § 3142(d) where the illegal alien was a flight risk due to lack of local family ties.<sup>259</sup> An illegal alien facing both deportation and criminal charges with potential prison sentences over ten years could be detained without bail as a flight risk under 18 U.S.C. § 3142(e), notwithstanding the presence of the alien's family and his ability to post bond based on local real property collateral.<sup>260</sup> An alien who (1) entered the U.S. illegally, (2) possessed a fraudulent green card, and (3) faced a prison sentence for a drug offense followed by deportation was deemed a flight risk justifying detention without bail.<sup>261</sup>

The risk of flight for an illegal alien charged with reentry is "enormous," and no "reasonable court" would release such a defendant on bail.<sup>262</sup> An illegal alien's familial ties to his native country are a factor increasing the risk of flight.<sup>263</sup> Even a permanent legal alien can be detained as a flight risk under section 3142(e) where there has been an individualized determination that the alien has "demonstrated a consistent disregard for the law," and the alien has continuing ties and substantial assets in a foreign country.<sup>264</sup>

An order of temporary detention for ten days under section 3142(d) does not preclude a subsequent consideration of detention pending trial under section 3142(f) before the temporary detention period has expired.<sup>265</sup> Similarly, although it is better practice to hold the hearings under paragraph (d) of section 3142 on temporary detention pending U.S. ICE notification and the hearings under paragraph (e) on detention pending trial due to flight risk, it is permissible to make the two determinations separately or sequentially.<sup>266</sup>

#### PART V. PRACTICAL IMPLEMENTATION OF A LOCAL IMMIGRATION LAW ENFORCEMENT PROGRAM

It is vital that local law enforcement agencies facing a significant influx of suspected illegal aliens follow certain general steps to insure that the purpose and scope of any new enforcement activity is clearly understood in the community. With careful planning and support, local government and law enforcement can

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258 *Demore v. Kim*, 538 U.S. 510, 518-20 (2003).

259 *U.S. v. Mercedes*, 154 F. Supp. 2d 234 (D.P.R. 2001).

260 *U.S. v. Delgado-Rodriguez*, 840 F. Supp. 191 (N.D.N.Y. 1993). *See also* *U.S. v. Moranda-Roman*, 757 F. Supp. 950 (N.D. Ill. 1993).

261 *U.S. v. Perez*, 1993 U.S. App. LEXIS 4191 (10th Cir. 1993 unpub.).

262 *Melendez*, F. Supp. 2d at 109.

263 *Id.*

264 *U.S. v. Martinez*, No. 00cr10172-NG, at 10-11, 102 F. Supp. 2d 39 (D. Mass. 2000).

265 *U.S. v. Moncada-Pelaez*, 810 F.2d 1008, 1010 (11th Cir. 1987).

266 *U.S. v. Bercerra-Cobo*, 790 F.2d 427, 429 (5th Cir. 1986).

play a role in the detection and apprehension of illegal aliens in a way that will facilitate their removal by the federal government while avoiding communal confrontations. Planning is particularly important to avoid actions that could constitute unconstitutional discrimination against citizens and lawfully-present aliens on the basis of national origin or foreign appearance. The following list is illustrative of a general sequence of planning actions that could be used to implement a new immigration law enforcement program in a local jurisdiction:

**1. Apply to the U.S. Department of Homeland Security for certification and training of designated local officers as local immigration law enforcement officers under a Section 133 cooperative agreement.**<sup>267</sup> While such formal measures are not obligatory, a ‘Section 133’ agreement can provide local officers with federal liability protections and immunities when conducting warrantless investigations and detentions for civil violations of immigration law. Florida, South Carolina, and Alabama state law enforcement agencies have executed Section 133 agreements with DHS, with significant variations tailored to the perceived needs and interests of the individual state.<sup>268</sup>

**2. Undertake an initial impact assessment of the alien population in the local jurisdiction.** Contacts with other local government agencies, community, non-profit and public service organizations, as well as the agency’s own intelligence sources, should be made to develop a best estimate of the size, distribution, and profile of aliens, both legal and unauthorized, who are present in the jurisdiction. Departmental records should be reviewed to identify locations where arrests of persons who were subsequently identified as illegal aliens have clustered. Update the database regularly, and brief patrol and supervisory officers on the key findings. Knowledge of prior patterns of violations is an important element for establishing reasonable suspicion.

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267 8 U.S.C. § 1357(g), INA § 287(g) (2004). Upon approval of the cooperative agreement by the Attorney General, the designated local officer becomes a limited federal immigration official. The designated local officer is subject to the “direction and supervision of the Attorney General” while performing the immigration enforcement function, and, if the written agreement so specifies, may use federal property and facilities to accomplish that function. 8 U.S.C. § 1357(g)(4)-(g)(5) (2004). Before the federal government may accept the agreement, the Attorney General must determine that the designated officer is qualified to perform the agreed-upon immigration function. The agreement must require the designated officer to know and adhere to federal law relating to the function, and must contain a written certification that the designated officer(s) “have received adequate training regarding the enforcement of relevant Federal immigration laws.” 8 U.S.C. § 1357(g)(2) (2004). Additionally, the agreement must specify the officer’s “powers and duties,” “the duration of the [officer’s] authority” and the Department of Justice agency that will supervise and direct the officer on behalf of the Attorney General. 8 U.S.C. § 1357(g)(5) (2004).

268 For a description of the Florida and Alabama programs, see April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Immigration Laws since 9/11*, 55 ALA. L. REV. 1149, 1156-59 (2004).

**3. *Keep the U.S. Immigration and Customs Enforcement informed of all activities, beginning in the planning stages.*** Discuss options to integrate the local departmental plan with a QRT (Quick Response Team) program in the jurisdiction. U.S. ICE enforcement officers will appreciate and respond to a “value-added” approach that adds more in capability than it consumes in limited federal resources.

**4. *Implement separate arrest and detention procedures for (1) illegal aliens detained for state or federal criminal violations, and (2) illegal aliens who are simply deportable.*** Removal (deportation) is a civil penalty, not criminal punishment. Illegal aliens who are only status violators should be detained separately from criminal suspects, where possible. Alien status violators require separate warnings from the standard Miranda warnings. Such aliens should be detained in the least restrictive environment consistent with their inherent flight risk, until they can be transferred to federal custody. Aliens detained for criminal violations, including the federal immigration crimes of illegal reentry, document fraud, smuggling and harboring crimes, etc., can generally be processed using existing criminal procedures.

Communication and coordination with the U.S. Attorney’s office and the federal magistrate’s office (including pretrial services personnel) responsible for the local jurisdiction is also an essential activity.

**5. *Complete budget and legal program reviews with local government and agency legal counsel.*** Ensure that the local government with jurisdiction over the police department has planned for the costs associated with the detention of illegal aliens pending their transfer to federal custody, and taken steps to minimize or shift such costs to the federal government.

**6. *Consider hiring a consultant to conduct in-house immigration enforcement training, perhaps in a cooperative effort with other jurisdictions.*** Retired senior Border Patrol and INS personnel are available at reasonable cost.

**7. *Ensure that the public is informed in advance of changes in enforcement policy.*** If, as is often the case, the police department determines that the illegal alien population in its community is largely composed of a dominant nationality, creation of a communication strategy to inform this community is critical. A successful public information program will also have the effect of deterring illegal aliens from remaining in the jurisdiction, which is the most cost-effective solution. In contrast, a sudden, secret crackdown, no matter how well intentioned, will run the risk of generating protests that can cripple a local program.

**8. *Raise awareness of the scope and impact of immigration-related crime among local civic and community organizations concerned with public health,***

*safety, and environmental issues.* Publicize points of contact in the agency or organization for community reporting and confidential whistleblowers. Help community groups to educate the public to identify and report document fraud, unauthorized employment, illegal uses of residential housing, and smuggling/harboring violations in their neighborhoods. In particular, provide the public with materials that describe acceptable examples of indicia of immigration-related crime, other than “looks foreign,” “doesn’t speak English,” and other unacceptable national origin or racial profiling criteria.

**9. Consider a transitional “warning” period for landlords and employers in the community before moving to a full enforcement program.** Notify these important stakeholders of the unlawful presence of illegal aliens on their premises before invoking U.S. ICE assistance. Notice also can establish prior criminal knowledge, intent, and liability should prosecution become an option.

#### PART VI. POLICY ARGUMENTS AGAINST LOCAL ENFORCEMENT

*According to the best accounts which I have been able to obtain, this Chimæra was nearly, if not quite, the ugliest and most poisonous creature, and the strangest and unaccountablest, and the hardest to fight with, and the most difficult to run away from, that ever came out of the earth’s inside.*

—Nathaniel Hawthorne, *Bellerophon and the Chimera* (1852).

Since 9-11, organizations opposing immigration law enforcement have developed a critique of local enforcement of federal immigration law. Two common themes are briefly discussed in Part VI.<sup>269</sup>

#### *Racial Profiling of Immigrant Communities*

Opponents assert that attempts by local law enforcement agencies to enforce immigration law have led to false arrests and civil rights violations of people who

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<sup>269</sup> Numerous extensive policy critiques of local enforcement are available in the legal literature. See, e.g., April McKenzie, *A Nation of Immigrants or A Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA.L.REV. 1149, 1164-65 (2004) (local enforcement jeopardizes community policing, undocumented aliens are the wrong group to target); David Coles, *Enemy Aliens*, 54 STANFORD L. REV. 953, 957 (2002) (treating citizens and non-citizens differently as response to 9/11 is normatively and constitutionally wrong); Jill Keblawi, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U.L. REV. 817, 846-47 (2004) (states should forbid local enforcement of civil immigration law); Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 93 (2002) (INS and state and local law enforcement collaboration will almost certainly lead to racial and civil rights violations).

look or sound foreign but who are lawfully present in the United States.<sup>270</sup> Immigration law enforcement by local police officers is said to undermine trust between immigrant communities and the police.<sup>271</sup> The adoption of policies that enable local police to act as *de facto* immigration agents are said to seriously erode community police relations in immigrant communities. To obtain information on unforeseen terrorist threats, it is argued that local police must build ties with immigrant communities that preclude enforcement of immigration law.<sup>272</sup>

At bottom, the profiling and community trust arguments represent a political rejection of the broken windows theory of criminology, which holds that failure to police small transgressions of social norms undermines the willingness of a population to enforce social order and produces higher levels of crime and violence.<sup>273</sup> Advocacy group claims that immigrant communities will naturally resent and resist enforcement of immigration law are anecdotal, and have never been empirically verified.<sup>274</sup>

Discussion of illegal alien crime rates has become a political taboo. However, evidence is growing that some local police departments have become so intimidated by rapid growth in the immigrant population that they are willing to ignore the law and tolerate violence to avoid community unrest. An estimated ninety-five percent of the 1,200 to 1,500 fugitives with outstanding warrants for homicide in Los Angeles are illegal aliens. In 2003 an estimated two-thirds of approximately 17,000 felony warrants in Los Angeles were for illegal aliens. Police officers have estimated that seventy percent of the criminals in the Washington Heights district of Manhattan are illegal aliens.<sup>275</sup>

Police department evidence also points to strategic planning by organized criminal gangs to benefit from non-cooperation policies. For example, in Los Angeles a high percentage of Mexican and Central American criminal gang members are illegal aliens. Illegal alien runners, known as “border brothers” to police, are reported to work off the debt incurred to the traffickers who smuggled them into the United States through street sales of narcotics. Although police intelli-

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270 See, e.g., Akram & Johnson, *Race, Civil Rights, and Immigration Law After September 11 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 303 (2002) (Arabs and Muslims are ‘racialized’ immigrant groups subjected to ‘demonization’ by the federal government and Jewish organizations).

271 AILA Issue Paper, *State and Local Enforcement of Federal Immigration Law*, updated Mar. 4, 2003.

272 CHISTI ET AL., *AMERICA’S CHALLENGE*, *supra* note 3, at 16.

273 See, e.g., Wilson & Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

274 See, e.g., Anwar Iqbal, *Muslim youths turned in by their own*, UPI (Aug. 6, 2002) (reporting that many of the hundreds of Muslims arrested in the United States since Sept. 11 for immigration violations and suspected links to terrorist groups were turned in by their friends and relatives over petty disputes), available at <http://www.upi.com/view.cfm?StoryID=20020806-015713-9252r>.

275 Heather MacDonald, *The Illegal-Alien Crime Wave*, 14 CITY JOURNAL 1 (2004), available at [http://www.city-journal.org/html/14\\_1\\_the\\_illegal\\_alien.html](http://www.city-journal.org/html/14_1_the_illegal_alien.html).

gence officers claim to know the immigration status of many of these street criminals, they are prohibited by Los Angeles Special Order 40, enacted in 1979, from arresting gang members on immigration violations, and may not notify the U.S. Immigration and Customs Enforcement about illegal aliens arrested for misdemeanors or ordinance violations. In practice, the ban extends to deported aliens who have illegally reentered the United States in violation of 8 U.S.C. § 1326.<sup>276</sup> There appears to be a direct relationship between the percentage of illegal aliens in a given police jurisdiction and the level of crime. Non-cooperation policies strip away the ability of local police to remove alien felons from the community, leaving them free to engage in criminal occupations and prey upon citizens and legal aliens.

*Local Police Lack the Experience and Training to Enforce  
Federal Immigration Law*

Opponents argue that federal immigration law is a complicated body of law that requires extensive training and expertise to properly enforce, because there are many different ways for people to be lawfully present in the United States and the federal government issues many different types of documents that entitle such lawful presence.<sup>277</sup>

Supporters of local law enforcement would respond that the identification and initial detention of immigration law violators is based on relatively simple legal concepts. "Arrest is the easy part."<sup>278</sup> The arresting officer must make a two-part determination: first that the person is an alien; and second that the alien is subject to removal from the United States. Neither determination is inherently more complex or difficult for a trained law enforcement officer than the comparable determination of the identity and status of a suspected domestic violator or absconder. Local police departments in practice provide more extensive training and oversight of civil rights issues than does U.S. CIS or the Bureau of Customs and Border Protection (BCBP), because local police are subject to greater criminal and civil liability for civil rights violations.

The former INS, now Department of Homeland Security, is required by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) to respond to inquiries by federal, state, and local government agencies seeking to verify or determine the citizenship or immigration status of any individual within the jurisdiction of the agency for any lawful purpose.<sup>279</sup>

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<sup>276</sup> *Id.*

<sup>277</sup> AILA Issue Paper, *State and Local Enforcement of Federal Immigration Law*, updated Mar. 4, 2003.

<sup>278</sup> Interview with James Dorcy, INS (re'td.), President, FAIR Law Enforcement Advisory Council (Dec. 2003).

<sup>279</sup> 8 U.S.C. § 1373(c) IIRAIRA § 642(c) (2004).

One enforcement-oriented verification resource whose availability and use by local and state police has “skyrocketed” since September 11, 2001 is the Department of Homeland Security Law Enforcement Support Center (LESC). LESOC is described as a national enforcement operations and intelligence center that gathers information from eight DHS databases,<sup>280</sup> the National Crime Information Center (NCIC), the Interstate Identification Index (III) and other state criminal history indices.<sup>281</sup> U.S. Immigration and Customs Enforcement claims that local police callers to LESOC can receive an initial analysis of an individual’s immigration status within ten minutes.<sup>282</sup>

In contrast, the aspects of immigration law dealing with eligibility for a visa or other form of admission to the United States, adjustment of immigration status, and relief from removal are not only complex, but also arguably lack internal consistency and coherence. Local law enforcement agencies do not participate in these more complex areas of immigration law.

## **PART VII. THE CONCERNS OF FEDERAL LAW ENFORCEMENT OFFICERS**

Federal law enforcement officers have the primary responsibility for immigration law enforcement in the regulatory scheme enacted by Congress, as well as exclusive responsibility for deportation and removal activities. From the federal law enforcement officer’s perspective, immigration enforcement is a four-step process, for which the apprehension of the alien is only the first of three essential steps. The second step is administrative processing of the apprehended alien, and consists of documenting and narrating the cause for the arrest, and preparing formal statements equivalent to a charge sheet in criminal law, identifying the statute or regulation upon which a removal proceeding will be initiated.<sup>283</sup> The remaining steps, adjudication of the removal proceeding and the final physical deportation action, are exclusively the responsibility of the federal government.

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280 Including former INS, Customs, and Federal Protective Service databases, and the SEVIS, NSEERS and US VISIT databases developed by DHS.

281 “In FY 2002, the LESOC received 426,895 law-enforcement inquiries. These included 309,489 from state and local law enforcement, 24,646 inquiries regarding foreign nationals seeking to purchase firearms, and 24,646 investigative inquiries. The LESOC lodged 2,112 detainers for the detention of unauthorized aliens. Additionally, the LESOC processed 3,818 queries relating to NCIC hit confirmation requests.” *Oversight Hearing on Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement Before House Subcomm. on Immigration, Border Security and Claims of the House Comm. on the Judiciary*, 108th Cong. 12 (Apr. 10, 2003), (Statement of Asa Hutchinson), available at <http://judiciary.house.gov/media/pdfs/printers/108th/86409.PDF>.

282 Press Statement of Undersecretary for Border and Transportation Security Asa Hutchinson, Homeland Security Supporting Local Law Enforcement Center (Aug. 19, 2003), text available at <http://www.immigration.com/newsletter1/lesehomet.html>.

283 8 U.S.C. § 1229(a); 8 C.F.R. § 239.1 (2004).

*Resource Starvation and the Removal Chokepoint*

The logistical and resource requirements created by federal deportation responsibilities must be considered when evaluating local agency immigration enforcement actions. The risk of operational gridlock due to "resource starvation" in the detention and removal units is a major concern of federal immigration officers.

U.S. Immigration and Customs Enforcement policy dating to the Clinton Administration directs that eighty percent of its available bed space in detention centers must be reserved for mandatory detention of aliens. Priority is to be given to arriving aliens in expedited removal proceedings, followed by all other aliens in removals. Aliens with final orders of removal are the lowest priority.<sup>284</sup> Nationwide, the Department of Homeland Security has only about 20,000 detention "beds," while the number of absconders with orders of final removal is estimated at 400,000 to 500,000, and the population of removable illegal aliens at nine to eleven million.<sup>285</sup> DHS thus lacks the dedicated funding and deportation personnel to handle any significant increase in detentions by local law enforcement. The rate at which the Department of Homeland Security can accept the transfer of immigration law violators from local to federal custody is thus determined by the physical capability of the Detention and Removal Division of the U.S. Immigration and Customs Enforcement to detain and deport aliens with final orders of removal.

In the case of aliens who are nationals of foreign countries contiguous to the United States,<sup>286</sup> including Mexico, Canada and adjacent island nations,<sup>287</sup> the alien may request administrative voluntary departure in lieu of formal proceedings.<sup>288</sup> The processing officer under most circumstances is authorized to administratively offer voluntary departure, allowing the alien to return to his or her home country without extensive detention or delay.<sup>289</sup> Most apprehensions

284 INS Exec. Assoc. Cmm'r. Michael Pearson, *Detention Guidelines* (Oct. 7, 1998), reproduced at 75 INTERPRETER RELEASES 1508 (Nov. 2, 1998).

285 Michael Garcia, *Immigration and Customs Enforcement: Balancing the Needs of Openness and Homeland Security*, Address at the Heritage Foundation, July 23, 2003, available at <http://www.ice.gov/graphics/news/testimonies/st030723.pdf>.

286 A foreign contiguous territory shares a common boundary with the United States. 8 C.F.R. § 241.25(2) (2004).

287 Adjacent islands are St. Pierre and Miquelon, Cuba, the Dominican Republic, Haiti, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea. 8 U.S.C. § 1101(b)(5), INA §101(b)(5) (2004).

288 8 U.S.C. § 1229(a) (2004); 8 C.F.R. § 240.25 (2004).

289 Administrative voluntary departure (also described as departure "under threat of deportation") occurs with the permission of the Attorney General [now Secretary of Homeland Security] in lieu of removal proceedings. The alien leaves with the knowledge that he does so in lieu of being placed in proceedings. *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003).

made by the Border Patrol along and near the border result in administrative voluntary departure.

Aliens from contiguous countries apprehended in the interior of the country can also be offered administrative voluntary departure and be transported directly to the border from the interior. In practice, aliens apprehended in the interior are commonly released “on their honor” to voluntarily return home, due to a lack of appropriated funds and the resulting lack of government-paid transportation. Immigration officers believe that very few of these aliens ever voluntarily depart the United States.

Aliens who do not come from contiguous countries (perhaps fifty percent of aliens residing illegally in the United States) must be detained and appear before an immigration judge.<sup>290</sup> Constitutionally, an alien detained during a removal proceeding who has not been determined to be a criminal alien or terrorist may be released on bond.<sup>291</sup> The bond amount may be set by the detaining authority or by an immigration judge. If the detained alien can post the bond amount, a hearing date will be set, and the alien ordered to appear on that date.

In order for an appearance bond system to work effectively, the alternative of detention must be available. Often, a shortage of detention bed space due to insufficient appropriated resources leaves U.S. ICE no alternative but to release the alien without a money bail on his or her own recognizance (OR), trusting the alien to appear for a hearing. Not surprisingly, rates of failure to appear at removal proceedings for both cash-bonded and OR-bonded aliens are very high.

Provided that the alien actually appears for a hearing, and that the immigration judge finds that the government has sustained its case for removal, the alien would normally be ordered removed, or possibly granted voluntary departure.

If the alien is detained at the time the order is given, it would not seem to be too complicated for the government to execute the removal. In practice, appeal by the alien and the continual lack of resources places physical limits on removal operations. Long-term detention is both extremely costly and constitutionally disfavored, and the right to habeas corpus applies just as much to detained aliens as it does to detained citizens.<sup>292</sup> In practice, a very high proportion of aliens who have had hearings tend to wind up back out in the community. When their cases are weak or hopeless, they tend to disappear into the underworld of immigrant enclaves.

Finally, there remains the physical deportation from the United States of aliens with a final order of removal. For aliens granted voluntary departure who remain in custody of the government from time of apprehension until arrival at

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290 The alien executes Form I-274, and is removed “under safeguards.” 8 C.F.R. § 240.25(b) (2004).

291 8 U.S.C. § 1226(a)(1), INA § 236(a)(1) (2004).

292 *Zadvydas v. Davis*, 533 U.S. 678 (2001).

the border, the process is simple. The alien is escorted across the border and the departure is witnessed by an immigration officer. The alien is then, of course, free to turn around and promptly attempt another illegal entry from Mexico or, to a lesser degree, Canada.

Aliens from noncontiguous countries with final orders of removal are an entirely different matter.<sup>293</sup> Two major practical impediments to prompt physical removal are determination of the country of deportation, including obtaining travel documents for the alien, and the lack of resources required for transportation. An alien in a removal proceeding is entitled to designate a preferred country of deportation, and must be assisted in making application for travel or departure documents.<sup>294</sup> Verification of the alien's nationality and issuance of travel documents can be a time-consuming process, during which the alien will typically remain in custody at DHS expense. Dilatory tactics by the alien are common.

Most aliens do not have funds or refuse to use their personal funds to purchase their transportation back home. The government must purchase a one-way ticket to the home country. Many transportation companies will not allow aliens being deported to board their aircraft unless they are escorted by an immigration officer. Often, in the case of aliens with a potential for violence, more than one escort is necessary, raising the cost of transportation and lodging for the alien and multiple escorts. The costs of physical removal for even a single such alien can be enormous.<sup>295</sup>

The perennial failure of Congress to appropriate sufficient resources to the immigration enforcement branch responsible for detention and removal leaves the system unable to meet its unfunded mandates. As a result, hundreds of thousands of aliens ordered removed remain at liberty within the borders of the United States.<sup>296</sup> This "let them go culture" of federal immigration authorities has been fiercely criticized by supporters of local enforcement policies.<sup>297</sup> Yet, even if all absconders were identified and detained by local police, the Border Patrol, or other immigration officers, the Department of Homeland Security has been left with little choice but to turn them loose. The lack of resources commit-

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293 See generally 8 U.S.C. § 1231; 8 C.F.R. § 241 (2004).

294 8 U.S.C. § 1231(b)(2), INA § 241(b)(2), (2004).

295 Telephone interview with James Dorcy, INS (re'td.), President, FAIR Law Enforcement Advisory Council (Dec. 2003).

296 U.S. Immigration and Customs Enforcement (ICE) News Release, July 2, 2004, available at <http://www.ice.gov/graphics/news/newsreleases/articles/070204dro.htm>, (ICE has a 10-year strategic national initiative focused on locating, apprehending, and removing more than 400,000 absconders, which includes 80,000 criminal fugitive aliens with outstanding final orders of removal who are hiding in the United States).

297 See, e.g., *Local Enforcement of Immigration Laws, Hearing on H.R. 2671 Before House Subcomm. on Immigration, Border Security and Claims of the House Comm. on the Judiciary*, 108th Cong. (Oct. 1, 2003) (testimony of James R. Edwards Jr., Hudson Institute).

ted to detention and removal creates a bottleneck that will only worsen as the other three steps in the enforcement process become more effective and efficient.

*Voluntary Departure as a Condition of Plea Bargains in State  
and Local Criminal Cases*

Congressional action to allow state or local judges to conduct removal proceedings as part of the sentencing process for alien criminal offenders has been proposed as an efficient partial solution to the removal bottleneck.<sup>298</sup> The existing two-track system of separate removal and state criminal proceedings creates an enormous duplication of effort. Sentencing decisions and deportation decisions often turn on the same events and the same equitable factors. Time spent in federal detention is the most costly component of the mismatch between the criminal and immigration enforcement systems.<sup>299</sup>

A federal criminal provision dating to 1976 authorizes deportation as a condition of supervised release.<sup>300</sup> As amended by the 1984 Sentencing Reform Act, the provision stated that “[i]f an alien is subject to deportation, the court may provide that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.”<sup>301</sup> However, conflicts between federal circuit courts on the scope of the statute, and the reluctance of the former INS to relinquish control over the deportation process, have effectively relegated this judicial power to the status of an unused appendage.<sup>302</sup>

In 1994 Congress again amended the INA to explicitly grant federal courts jurisdiction to issue removal orders.<sup>303</sup> In 1996 Congress expanded this authority by repealing a previous limitation that judicial orders could only be entered against aliens deportable for crimes involving moral turpitude or aggravated felonies. The INA now provides that a federal district judge may enter a removal order “at the time of sentencing against an alien who is deportable.”<sup>304</sup> How-

298 See Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge As Immigration Judge*, 51 EMORY L.J. 1131 (2002); Martin Arms, *Judicial Deportation Under 18 USC § 3583(d): A Partial Solution to Immigration Woes?*, 64 U. CHI. L. REV. 653 (1997).

299 Taylor & Wright, *supra* note 298, at 1138.

300 18 U.S.C. § 4212 (1976) [repealed by Pub. L. No. 98-473, 98 Stat. 2027 (1984)].

301 18 U.S.C. § 3583(d), Pub. L. No. 98-473, 98 Stat. 1837-2034 (1984).

302 Compare *U.S. v. Kassar*, 47 F.3d 562 (2d Cir. 1995); *U.S. v. Xiang*, 77 F.3d 771 (4th Cir. 1996); *U.S. v. Quaye*, 57 F.3d 447 (5th Cir. 1995); and *U.S. v. Phommachanh*, 91 F.3d 1383 (10th Cir. 1996) (finding no judicial deportation, only delivery of alien to INA upon supervised release); with *U.S. v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) (holding statute authorizes judicial order of deportation).

303 Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 224, 108 Stat. 4305, 4322.

304 Codified as amended at 8 U.S.C. § 1228(c)(1), INA § 238(c)(1) (2004).

ever, former INS again reacted cautiously. As a consequence, use of the new authority has been limited.<sup>305</sup>

Considering the institutional resistance to judicial deportation, a more practical legislative approach that would support federal-local cooperation would be to authorize state courts to negotiate a 'supervised' voluntary departure agreement as part of a plea bargain in a state criminal case.

Detention and removal is already mandatory for aliens convicted of the most serious of the state crimes classified as aggravated felonies.<sup>306</sup> A state voluntary departure statute would thus be directed at the many minor criminal offenses committed by illegal aliens tried in state courts that are not aggravated felonies, but which nonetheless require significant expenditure of state or local judicial and correctional resources.

Sentencing judges could authorize an order of voluntary departure subject to several conditions unique to the state and local contexts. First, there must be a requirement that the voluntary departure order be filed with U.S. ICE, who would need to retain a veto power to prevent abuses by criminal alien felons. Second, the state or local jurisdiction that negotiated the plea bargain should be required to physically escort the alien into the custody of U.S. ICE at an international port of departure. The cost of such transportation would be more than offset by the direct savings in incarceration costs and the indirect benefit of removing habitual petty criminal aliens from the jurisdiction.

### *Criminalization of Immigration Status Violations*

In an attempt to cut what is often seen as a legal Gordian knot, legislation has been introduced in both houses of Congress to criminalize illegal presence.<sup>307</sup> The sponsors propose the enactment of a new section 275A to the Immigration and Nationality Act that would make it a federal felony for an alien to be "present in the United States" in violation of the INA. By increasing the term of imprisonment from six months to one year, these measures would increase the penalty for the first commission of a crime of illegal entry under section 275(a) of INA from a misdemeanor to a felony.<sup>308</sup> The apparent intent of the legislation is to routinely charge many or most apprehended illegal aliens under this provision.

The Bureau of Immigration and Customs Enforcement operates a deliberately simple deportation system, streamlined to permit the quick resolution of very

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305 Memorandum from Comm'r Doris Meissner to INS District Directors, Guidance re: Judicial Orders of Deportation (Feb. 22, 1995), *reprinted in* 72 INTERPRETER RELEASES 449, at 462 (1995).

306 8 U.S.C. § 1228, INA § 238 (2004).

307 Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. § 103; "Homeland Security Enhancement Act (HESA) of 2003. S. 1906, 108th Cong. § 103.

308 Both bills would also make the assets of any such alien subject to federal criminal forfeiture laws.

large numbers of deportation actions.<sup>309</sup> The former INS rarely used the criminal illegal entry provisions of section 275 of INA because of a lack of resources. Each alien charged with a federal crime must, *inter alia*, be “Miranda-ized,” provided legal counsel by the federal public defender’s office, and given a prompt bail hearing. The civil immigration enforcement provisions have been used to avoid that dilemma.

A more effective approach would be to focus on *documents* rather than “presence.” The current federal scheme requires virtually every alien to register no later than thirty days after entry, carry registration documents on his or her person, and, beginning in fiscal year 2005, to record both their entry and exit to and from the U.S through the US VISIT system.<sup>310</sup> US VISIT is a document and database-driven system. Once reasonable suspicion to ‘stop’ an individual has been established during the officer’s routine duties, it would be much more efficient for local police to determine whether or not the temporarily detained alien possesses a required valid registration document, rather than attempting to develop probable cause to arrest the alien for an immigration crime whose primary element is one or more violations of immigration status or illegal entry that, by definition, have occurred outside of the presence of the local officer.

An amendment to raise the existing misdemeanor-level penalties in Immigration and Nationality Act Title II Chapter 7 (Registration of Aliens) for willful failure to register, or for willful failure to carry a registration document on the person, up to the one-year felony level, being proposed for an “illegal presence” offense under section 275 of INA, would be a practical and constitutional approach. Failure to register after entry without inspection should also be criminalized at the same level, but without the “willful” element, as criminal intent, in this circumstance, is demonstrable by the act itself.

The primary advantage of a document-driven enforcement system is that it shifts the initial burden of proof of compliance with federal immigration law from the local police officer to the alien, and sets the clearest possible bright-line rule as to what constitutes a criminal violation. Assuming that a request for identification documents occurred within the limitations of a consensual encounter or lawful temporary police stop, the local officer would need only to confirm (1) that the alien possessed a valid document, (2) if a reasonable doubt existed, whether the document was genuine, and (3) whether evidence indicated that the violation was not inadvertent, for example by a legal alien who merely forgot his document at home.

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309 U.S. v. Lopez-Mendoza, 468 U.S. 1032, 1048 (1984).

310 8 U.S.C. §§ 1301-1306 (2004); *see generally* United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”) Authority to Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry, DHS Interim Rule, 69 FR 53318 (Aug. 31, 2004).

The only inquiry by police into personal status or history prior to a determination that probable cause existed to detain the alien would be whether the person was a United States citizen. A false claim to citizenship is a felony, and in practice the great majority of illegal aliens understand the consequences and are reluctant to lie about citizenship status.<sup>311</sup> By contrast, making “illegal presence” a felony, with the intention of using it as a routine enforcement tool, would require the officer to engage in risky behavior, raising many of the privacy, Fourth and Fourteenth Amendment concerns that animate opponents of local enforcement on both the right and left.

### *Prosecutorial Discretion*

A final concern is the difficulty police departments face in reliably predicting whether the federal government will initiate civil or even criminal proceedings against aliens detained by the local force. The former INS had taken the position that the 1996 illegal immigration reforms had given it increased prosecutorial discretion to commence removal proceedings under the exclusive jurisdiction provision of section 242(g) of INA, as a balance to other provisions that “sharply curtailed” discretion to grant relief from deportation.<sup>312</sup>

In November 2000, outgoing INS Commissioner Doris Meissner issued a more sweeping policy memorandum stating that the federal government has very broad discretion to decline to enforce immigration law violations.<sup>313</sup> The extent of this doctrine, which has not been clarified by the current administration, represents a significant practical limit to the ability of local law enforcement to remove identified illegal aliens from their jurisdiction.

Meissner defined the “favorable exercise of prosecutorial discretion” as a discretionary decision not to assert the full scope of the INS’ enforcement authority as permitted under the law, and asserted that the former INS “exercises it every day.”<sup>314</sup> Examples of this executive authority not to act included not initiating removal proceedings, not maintaining custody of an alien, and taking “other action in lieu of removing the alien.” According to Meissner, the doctrine is so deeply entrenched in federal administrative law that even a statute directing that DHS “shall” remove removable aliens would not be construed to limit agency

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311 18 U.S.C. § 911. See discussion in Part III, *supra*.

312 8 U.S.C. § 1252(g). See, e.g., letter from Ass’t Att’y General Robert Ruben to Rep. Barney Frank, Jan. 19, 2000, reprinted in 77 INTERPRETER RELEASES 217 (Feb. 14, 2000).

313 Doris Meissner, Memorandum for Regional Directors, Exercising Prosecutorial Discretion, HQOPP 50/4 (Nov. 17, 2000), available at [www.ilw.com](http://www.ilw.com). See also Paul W. Virtue, *Restoring Fairness: A Look at Prosecutorial Discretion*, 12 BENDER’S IMMIGR. BULL. 555 (June 15, 2000) (prosecutorial discretion needed to ameliorate 1996 criminal deportation provisions); Memorandum of INS Gen’l. Counsel Bo Cooper, INS Exercise of Prosecutorial Discretion, reprinted in 77 INTERPRETER RELEASES (2000).

314 *Id.* at 2.

discretion. In contrast, Meissner concluded that where immigration law requires “affirmative acts of approval or grants of benefits,” such discretion does not in theory exist. Prosecutorial discretion is constructed doctrine, distinct from the exercise of statutory discretion in many benefit eligibility determinations.<sup>315</sup>

Meissner asserted that agency assessment of whether a “substantial federal interest” is at stake controls whether discretion may be exercised. State interests cannot be considered, because immigration is exclusively a federal responsibility, and no adequate state law remedies are available. Therefore, investigations intended to identify a “high-priority” individual are to be “favored” over investigations that by their nature identify larger numbers of lower-priority (“a broader variety”) of removable aliens. Meissner specifically noted that even the removal of criminal aliens from county jails, while formally a high priority, nonetheless was suitable for exercise of prosecutorial discretion. Even where there was reason and evidence to believe that an alien is removable, a decision to exercise enforcement alternatives “requires an individualized determination.” Enforcement personnel in particular need “openness” to the knowledge that the Service was not legally required to institute proceedings in every case.<sup>316</sup>

The expansive view of prosecutorial discretion that has arisen since 2000 represents an administrative attempt to reject the popular notion that the Department of Homeland Security has any ministerial obligation whatsoever to U.S. citizens who are aggrieved by violations of immigration law. It is a perverse and profoundly undemocratic permutation of the plenary doctrine. It stands in sharp and ironic contrast to the position of the Bureau of Citizenship and Immigration Services (BCIS) that many requests from an alien for adjudication of immigration benefits, described in almost contractual terms as “services,” can create enforceable duties or obligations on the part of the federal government.<sup>317</sup>

### CONCLUSION

*Bellerophon killed the Chimera, obeying the portents of the immortals.*

—Homer, Iliad 6.183.

There is a substantive, well-defined and functional body of federal statutory and case law to support the independent enforcement of both criminal and civil federal immigration law by local and state law enforcement officers, as well as a much higher level of federal-local law enforcement cooperation than has existed over the past generation.

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315 *Id.* at 3.

316 *Id.* at 7.

317 “USCIS allows the DHS to improve the administration of benefits and immigration services for applicants by exclusively focusing on immigration and citizenship services.” <http://uscis.gov/graphics/aboutus/thisisimm/index.htm>.

The objections to local enforcement and increased federal-local cooperation are not well grounded in any significant jurisprudence, but are instead essentially political in nature. Those interests who favor greatly expanded immigration in general also oppose enforcement of existing laws against illegal immigration.

Cooperative federal-local enforcement programs, based on alien registration and other documentary control systems applicable only to non-citizens, offer the most effective and nondiscriminatory means of detection and control of aliens unlawfully present in the United States.

The real practical limits on local enforcement remain the fiscal and operational shortfalls in federal detention and removal programs. Congress could choose to further devolve statutory plenary power onto local and state police. But until the federal government adequately funds the federal removal process, the chimera will continue to devour citizens and aliens alike, and the heroes in blue will be fighting in a labyrinth of dead ends, not on a fair or just field of law.

# HOW RACIAL PROFILING AND OTHER UNNECESSARY POST-9/11 ANTI-IMMIGRANT MEASURES HAVE EXACERBATED LONG-STANDING DISCRIMINATION AGAINST LATINO CITIZENS AND IMMIGRANTS

Katherine Culliton\*

Latinos are uniting with other immigrant communities and people of color in being extremely concerned about unnecessary post-9/11 actions that have led to civil liberties and civil rights violations.<sup>1</sup> Although the Latino voting power has presumably increased, infringements of Latinos' and Latinas' civil rights appear to be on the rise. This is because many of the measures taken in the name of fighting terrorism have not been effective at finding terrorists, but have resulted in civil liberties and civil rights violations. Lessening of civil liberties and due process protections disproportionately affects Latino communities, who are less likely to have access to counsel and other legal and economic safeguards that other Americans enjoy.<sup>2</sup> Furthermore, Latino communities are about forty per cent immigrant, and it is immigrants who are being wrongfully targeted since 9/11.<sup>3</sup> The wrongful targeting of immigrants and people of color who may "look like" immigrants has led to serious infringements of Latino civil rights since 9/11. This article and the author's November 2003 Senate Judiciary Committee testi-

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1 The substance of this law review article was submitted as written testimony by the author on behalf of the Mexican American Legal Defense and Educational Fund (MALDEF) at the November 18, 2003, Senate Judiciary Committee Hearing on "America After 9/11: Freedom Preserved or Freedom Lost?" (Transcripts of the hearing and all testimony submitted on file with the author.) MALDEF is a national, non-profit, non-partisan organization that has been defending the civil rights of Latinos for thirty-five years. The author is pleased to present this article as part of the *UDC-DCSL Law Review* symposium *In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital*.

2 See, e.g., *Justice on Trial: Racial Disparities in the American Criminal Justice System*, LCCR/LCCREF REPORT (Leadership Conference on Civil Rights & Leadership Conference on Education Fund, Washington, D.C.), at <http://www.civilrights.org/index.html>.

3 *Wrong Then, Wrong Now: Racial Profiling Before & After September 11, 2001*, LCCR/LCCREF REPORT, Feb. 2003 (Leadership Conference on Civil Rights & Leadership Conference on Education Fund, Washington, D.C.), at <http://www.civilrights.org/index.html> [hereinafter *Wrong Then, Wrong Now*].

mony document and analyze some of the most egregious infringements of Latino immigrants' rights in the post-9/11 climate.

The first section of this article focuses on the exacerbation of racial profiling caused by certain discriminatory post-9/11 measures; the next section documents ten ways in which Latino immigrants' rights have been unfairly infringed by unnecessary measures taken in the name of national security; and the final section sets forth conclusions and recommendations for corrective measures that the Congress and the Administration must take in order to protect homeland security and restore fundamental civil rights.

### INCREASING USE OF RACIAL PROFILING BY LAW ENFORCEMENT OFFICIALS

Arab and Muslim communities have been wrongfully targeted and their civil liberties limited since 9/11.<sup>4</sup> Moreover, the use of racial profiling, i.e., profiling based on race, ethnicity, or national origin or religion, through Special Registration and similar post-9/11 policies—none of which has made America safer<sup>5</sup>—has exacerbated the long-standing problem of racial profiling of Latinos.<sup>6</sup>

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4 See, e.g., *Special Registration: Discrimination and Xenophobia as Government Policy*, AALDEF REPORT, Nov. 13, 2003 (Asian American Legal Defense and Educational Fund, New York, N.Y.), at <http://www.aaldef.org/news.html#regisreport>.

5 See, e.g., Bill Dedman, *Fighting Terror/Words of Caution Airport Security: Memo Warns Against Use of Profiling as a Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27 (discussing the *Assessing Behaviors* memorandum by senior U.S. law enforcement officials, circulated to American law enforcement agents worldwide, suggesting that over-reliance on profiles “is not as useful as looking for behavior that might precede another attack”); David A. Harris, *Racial Profiling Revisited: ‘Just Common Sense’ in the Fight Against Terror?*, CRIMINAL JUSTICE 40-41 (Summer 2002). See also MUZAFFAR A. CHISHTI, DORIS MEISSNER, DEMETRIOS G. PAPADEMETRIOU, JAY PETERZELL, MICHAEL J. WISHNIE, & STEPHEN W. YALE-LOEHR, MIGRATION POLICY INSTITUTE, AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES AND NATIONAL UNITY AFTER SEPTEMBER 11 (June 2003), available at [www.migrationpolicy.org](http://www.migrationpolicy.org); FIONA DOHERTY, KENNETH HURWITZ, ELISA MASSIMINIO, MICHAEL MCCLINTOCK, RAJ PUROHIT, CORY SMITH, REBECCA THORNTON & STEPHEN VLADECK, LAWYERS COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 24 (2002) (“Vincent Cannistraro, former head of counterterrorism at the CIA, believes the FBI’s decision to round up 5,000 Arabs for questioning is ‘counter-productive. . . . It is a false lead. It may be intuitive to stereotype people, but profiling is too crude to be effective. I can’t think of any examples where profiling has caught a terrorist.’”), available at [http://www.watchingjustice.org/pub/doc\\_160/loss.report.pdf](http://www.watchingjustice.org/pub/doc_160/loss.report.pdf).

6 MALDEF, CIVIL RIGHTS CONCERNS WITHIN THE DEPARTMENT OF HOMELAND SECURITY (Feb. 25, 2003) [hereinafter MALDEF CIVIL RIGHTS CONCERNS] (documenting post 9/11 racial profiling); MICHELE WASLIN, NATIONAL COUNCIL OF LA RAZA, COUNTERTERRORISM AND THE LATINO COMMUNITY SINCE SEPTEMBER 11 8 (NCLR Issue Brief No. 10, April 2003) (“Racial profiling is of particular concern to the Latino community because of an increasingly well-documented history of profiling tactics by local, state, and federal law enforcement.”). See also CARMEN T. JOGE, NATIONAL COUNCIL OF LA RAZA, THE MAINSTREAMING OF HATE: A REPORT ON LATINOS AND HARASSMENT, HATE VIOLENCE AND LAW ENFORCEMENT ABUSE IN THE ‘90s (NCLR, Nov. 1999), (describing a long-standing pattern of selective enforcement of the law against Latinos).

In June 2003, the Department of Justice (DOJ) issued “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” (“Guidance”),<sup>7</sup> as requested by President Bush, prohibiting racial profiling by federal law enforcement agencies. However, the DOJ left open the possibility for exceptions to the new federal rules against racial profiling “for law enforcement activities or other efforts to defend and safeguard against threats to national security or the integrity of the nation’s borders. . . .”<sup>8</sup> “Guidance” leaves too much discretion as to whether and how race and national origin profiling could be used. The exceptions to the racial profiling prohibition could easily swallow the rule.

The DOJ and the DHS have not yet clarified that the use of racial profiling—e.g., profiling based on race, ethnicity or national origin—should also be prohibited in national security measures, at the borders, and in matters involving immigration. This directly impacts Latino communities, forty percent of whom are immigrants. The long history of unconstitutional racial profiling at the Southwestern border has been exacerbated and allowed to spread by the federal government’s failure to clarify that racial profiling was not only wrong then (pre-9/11), but is also wrong now (post-9/11).<sup>9</sup>

While MALDEF is very concerned about national security, it is of equal concern that these civil rights and civil liberties violations have not made America any safer. Americans need to be united in the war against terrorism. Tactics such as racial profiling lead to alienating the very communities who may have valuable information about possible criminals and terrorists.<sup>10</sup>

### POST-9/11 POLICIES HAVE NEGATIVELY AFFECTED LATINO IMMIGRANTS’ RIGHTS

While most of the reports that have been issued regarding civil rights and due process violations, such as the Office of Inspector General (OIG) of the Department of Justice Report criticizing the treatment of 762 immigrants held since

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7 UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm).

8 *Id.*

9 *See Wrong Then, Wrong Now*, *supra* note 3.

10 More than eighty anti-immigrant legislative and administrative policies have been implemented since 9/11, and they have not been effective in finding terrorists. Donald Kerwin, *Counterterrorism and Immigrants’ Rights Two Years Later*, 80 INTERPRETER RELEASES (Oct. 13, 2003) (“Many immigration policy changes adopted in the guise of national security since 9/11 did not make us safer and, in fact, may even undermine our national security.”); Roberto Suro, *Who are “We” Now? The Collateral Damage to Immigration, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* (Richard C. Leone & Greg Anrig, Jr., ed., 2003) (discussing lack of effectiveness); Mark Fazlollah, *Agency Inflates Terrorism Charges*, DULUTH NEWS TRIBUNE, May 16, 2003, available at <http://www.duluthsuperior.com/mld/duluthtribune/5874897.htm>; *See also* CHISHTI ET AL., AMERICA’S CHALLENGE, *supra* note 5 (also discussing counter-effectiveness of post-9/11 measures targeting immigrants).

9/11,<sup>11</sup> have focused on Arabs, Muslims, and Sikhs, Latinos have also been negatively affected by post-9/11 strategies and tactics.

Below is a short list of ten tactics or policies that have adversely affected Latinos:

1. Since 9/11, a number of Latino workers have been rounded up through aggressive enforcement measures such as "Operation Tarmac." The premise that airport workers pose security risks was doubtful to begin with, and shown to be false after no terrorists were identified through this operation.<sup>12</sup> If immigrants, including Legal Permanent Residents (LPRs), pose too much risk because of their immigration status to work in airport food services, it seems ironic that they are serving so honorably in the war in Iraq.
2. Former Secretary of Homeland Security Tom Ridge made a statement to the Hispanic press that undocumented persons pose no *per se* national security risk,<sup>13</sup> yet immigration enforcement and unconstitutional profiling of Latino immigrants in the name of national security has become the new *status quo*.<sup>14</sup>
3. A NOW Legal Defense Fund survey demonstrated that fear of deportation was the most significant reason that battered immigrant women are much less likely to report abuse. This reality has been exacerbated by state and local police threatening to enforce civil immigration laws, in the name of fighting the war against terrorism.<sup>15</sup> This is in direct contradiction to the legal protections for immigrant women set forth in the Violence Against Women Act.<sup>16</sup>

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11 U.S. DEP'T. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE SEPTEMBER 11 ATTACKS (June 3, 2003).

12 *Hearing on INS Interior Enforcement: Hearing Before the House Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 107th Cong. (June 19, 2002) (statement of Marisa Demeo, Regional Counsel, MALDEF D.C.).

13 Then Secretary of Homeland Security Tom Ridge announced that he believes that undocumented immigrants do not present any security risk, and that he is in favor of legalization of their status. *Ridge Says Talks on Migration Pact with Mexico Could Come Soon*, THE BULLETIN'S FRONT-RUNNER, July 1, 2003, available at LEXIS, News Library.

14 MALDEF CIVIL RIGHTS CONCERNS, *supra* note 6.

15 *Concerning N.Y. City Executive Order 124: Hearing Before the House Comm. on the Judiciary, Subcomm. on Immigration, Border Security and Claims*, 108th Cong. 26 (Feb. 27, 2003) (testimony of Lesley Orloff, Director Immigrant Women Program, NOW Legal Defense and Education Fund, concerning N.Y. City's "Sanctuary" policy and the effect of such policies on public safety, law enforcement, and immigration).

16 *See Recent Developments, U.S. 9th Circuit makes Landmark Decision Protecting Immigrant Women's Rights Under the 1994 Violence Against Women Act*, in REFUGEE RIGHTS, IMMIGRATION AND REFUGEE SERVICES OF AMERICA, U.S. COMMITTEE FOR REFUGEES (2003) (discussing wrongful

4. Because community policing is a valuable tool for public safety, numerous police departments across the country have made public statements against becoming involved in civil immigration enforcement.<sup>17</sup> Yet former Attorney General Ashcroft and the 111 House co-sponsors of the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act) continue to misstate that state and local police have “inherent authority” to enforce federal civil immigration laws. Such misstatements have already resulted in serious and widespread local police abuse of the fundamental civil rights of Latino immigrants and citizens alike.<sup>18</sup>
5. Abuses of the 9/11 detainees happened in the context of immigration detention, setting questionable precedents. Immigration detention conditions, which were already abysmal, are unlikely to improve. For children and adults, many of whom may have valid immigration claims and are Latino, detention conditions in general have been substandard. Immigrants are mixed with criminals, and cases of physical abuse and substandard facilities have been common.<sup>19</sup>
6. Latino immigrants’ due process rights are limited by the precedent set through the mistreatment of the 9/11 detainees. Access to counsel, the right to know the charges, the right to bail and the right to a defense have all been put into question for immigrants.<sup>20</sup> These are all funda-

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deportation of battered immigrant women with rights to remedies under the Violence Against Women Act, as well as asylum and refugee law, and under the new T visa) (copy on file with author).

17 See, e.g., Press Release, National Immigration Forum, *Big City Police Say They Should Not Be Immigration Agents*, 4 IMMIGRATION FAX SHEET (Nov. 10, 2003) (on file with author); National Immigration Forum, *Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws* (updated July 31, 2003) (on file with author).

18 Section 2, MALDEF CIVIL RIGHTS CONCERNS, *supra* note 6; See also *Local Enforcement of Immigration Laws: Hearing on H.R. 2671 Before House Comm. on the Judiciary, Subcomm. on Immigration, Border Security and Claims*, 108th Cong. (2003) (testimony submitted by Katherine Culliton, Mexican American Legal Def. & Educ. Fund) (citing cases) (on file with author).

19 See, e.g., FLORIDA IMMIGRANT ADVOCACY CENTER, UPDATE (2002/2003) (abysmal detention conditions for women, children, asylum seekers) (on file with author); see PHYSICIANS FOR HUMAN RIGHTS, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003), available at [http://www.phrusa.org/campaigns/asylum\\_network/detention\\_execSummary/](http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/); John Mintz, *Report Faults Handling of Immigrant Children*, WASH. POST, June 19, 2003, at A7.

20 OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) (reporting pre-emptive detentions without bond months longer than permitted under special provisions of the USA PATRIOT Act; lack of access to counsel and other due process violations; abuse and mistreatment) available at <http://www.usdoj.gov/oig/special/0306/index.htm>. See also Steve Fainaru, *Report: 9/11 Detainees Abused; Justice Dept. Review Outlines Immigrant Rights Violations*, WASH. POST, June 3, 2003, at A1.; Eric Lichtblau,

- mental rights that belong to every person, under the Bill of Rights, and yet they are being taken away from immigrants.<sup>21</sup>
7. Human rights violations at the southwestern border have increased. Thousands of people have been detained and deported, but no terrorist suspects have been identified. Violence and deaths in the desert have increased since 9/11.<sup>22</sup>
  8. Despite an increase in interior enforcement agents to 5,500 officers, the Bureau of Customs and Border Patrol Chief Bonner recently reversed the long-standing policy that the Border Patrol should not conduct interior enforcement. Chief Bonner's decision overrides an August 8, 2003 memo, issued by San Diego Border Patrol Chief William Veal, which reaffirmed a "long standing agency policy" preventing Border Patrol agents from conducting sweeps near residential areas and places of employment. Chief Veal had also restated that interior enforcement should be conducted by the properly authorized federal immigration agency, not the Border Patrol. This older directive was based on legal decisions supporting community safety and just access to social services. Its reversal has caused fear and violence in faith-based service centers and on border city streets, and it is very likely to lead to racial profiling.<sup>23</sup>
  9. Despite the Administration's promises and the express requirements of Section 458 of the Homeland Security Act,<sup>24</sup> backlogs in immigration services have been increasing, in part because the new Bureau of Citizenship and Immigration Services (BCIS) is doing enforcement work.<sup>25</sup>

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*U.S. Report Faults the Roundup of Illegal Immigrants After 9/11: Many With No Ties to Terror Languished in Jail*, N.Y. TIMES, June 3, 2003, at A1.

21 See also *Demore v. Kim*, 538 U.S. 510 (2003).

22 Niko Price, *U.S.-Mexico Border Patrol Failing, Crackdown along U.S.-Mexico Border to Prevent Terrorists from Entering the U.S. Hasn't Stopped Even One Known Militant Since Sept. 11*, available at [http://stevequayle.com/News.alert/03\\_Global/031103.border.porous.html](http://stevequayle.com/News.alert/03_Global/031103.border.porous.html) ("A crackdown along the U.S.-Mexico border designed to prevent terrorists from entering the United States hasn't stopped even one known militant from slipping into America since Sept. 11, an Associated Press investigation has found. Instead, the tightening net of Border Patrol and Immigration agents has slowed trade, snarled traffic and cost American taxpayers millions, perhaps billions, while hundreds of migrants have died trying to evade the growing army of border authorities.").

23 See Letter from Immigrants' Rights Coalition, Enforcement Committee, to Stuart Verdery, Assistant Secretary for Border and Transportation Security Policy and Planning, Border and Transportation Security Directorate, Department of Homeland Security (Oct. 13, 2003) (attaching legal analysis) (on file with author).

24 Homeland Security Act of 2002, Pub. L. No. 107-296, § 458 (2002) ("objective of the total elimination of the backlog [in processing immigration benefit applications] one year after the date of the enactment" [Nov. 25, 2002]).

25 See, e.g., Bureau of Citizenship and Immigration Services (BCIS), *Messy Bureaucratic Backlogs Plague Bureau of Citizenship and Immigration Services* (Independent Monitoring Board, Aug. 29, 2003) (on file with author).

The former Immigration and Naturalization Service bureaucracy was so mismanaged that it will take years to re-organize the new BCIS to ensure accuracy and efficiency. This leaves many Latino immigrants out of status through no fault of their own.<sup>26</sup>

10. Family- and employer-sponsored visas from Mexico have current backlogs of ten years. Citizens and LPRs who want to reunite their families either have to wait up to ten years, or they risk undocumented immigration. Employers who hire hard-working Latino immigrants, upon whom the U.S. economy depends, must wait years and years for the current “legal” procedures to be completed. Due to this irony, millions of hard-working immigrants and close family members are in an undocumented status.<sup>27</sup> The backlogs must be reduced, and the only way to do so is through comprehensive immigration reform, which has been delayed and perhaps even derailed by the post-9/11 anti-immigrant backlash.

### CONCLUSIONS AND RECOMMENDATIONS

MALDEF urges Congress and the Administration to restore immigrants’ civil rights, so that we can identify the real terrorists and preserve American democracy. The anti-immigrant backlash since 9/11 has severely and negatively affected Latino communities in ways that Congress and the Administration must recognize and correct.

The Department of Justice (DOJ) and the Department of Homeland Security (DHS) must immediately enact policies prohibiting racial profiling under any circumstances. Current policies are undermining our collective national security and violating peoples’ fundamental constitutional rights to freedom from discrimination. It is up to the DOJ and the DHS to enact anti-racial profiling policies, before further damage is done.

For its part, Congress should enact the 2003 End Racial Profiling Act (ERPA), in order to clarify that racial profiling is prohibited for federal as well as state and local police, under any circumstances, including post-9/11 national security, border and immigration issues. Under ERPA and under current constitutional law, there are certain limited exceptions when race, ethnicity or national origin may be used to identify suspects or groups of suspects. In those cases, race, etc. may be only one of many factors used to identify suspects. Moreover, race, ethnicity

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<sup>26</sup> See, e.g., *Padilla v. Ridge*, Complaint No. M-03-126 (S.D. Tex. 2003) (class action of persons with valid immigration rights approved by the judiciary unable to receive documentation from the DHS due to backlogs and other breaches of due process rights under the 4th Amendment of the U.S. Constitution) (copy on file with author).

<sup>27</sup> U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA SERVICES, 7 VISA BULLETIN, No. 63 (Oct. 17, 2003) (immigrant numbers for November 2003) (on file with author).

or national origin may not, in any circumstances, be used before reasonable suspicion based on individualized behavior has developed.<sup>28</sup>

First responders, such as state and local police, should concentrate on protecting against crime and terrorism, while maintaining community policing practices, recognizing America as a nation of immigrants. Congress and the DHS should re-clarify that civil immigration enforcement is under the exclusive jurisdiction of the DHS.

Congress and the Administration must restore all of the due process rights put in jeopardy through the policies practiced during the detention of the “September 11th Detainees.” At the very least, the recommendations of the Office of Inspector General of the Department of Justice must be enacted, and Congress must ensure continued oversight of immigration detention conditions and all immigration proceedings.

Effective access to the protections of the rights of battered immigrant women, asylum seekers, and persons entitled to the new T-visa must be effectively ensured and guaranteed by the DOJ and the DHS.

Congressional oversight of the DHS immigration bureaus (the Bureau of Immigration and Customs Enforcement, the Bureau of Customs and Border Patrol, and the Bureau of Citizenship and Immigration Services) must include input from immigrants and civil rights groups, and work to effectively ensure against abuses of immigrants’ rights.

MALDEF supports the rule of law and is not against enforcement of federal immigration laws. But Congress and the Administration have acknowledged that the system is broken; therefore, comprehensive immigration reform is needed before any massive enforcement effort would not lead to serious due process violations and permanent damage to democracy and the American economy.

The same reasons for immigration reform that existed prior to 9/11 are even more important today. America is a nation of immigrants, and our economy is dependent upon immigrant labor. The former Immigration and Naturalization Service and former immigration policy reflected a system that was badly broken and out of touch with reality. Comprehensive immigration reform must be a priority for Congress and the Administration.

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28 For further information on ERPA, which will be reintroduced in the 109th Congress, contact the offices of Representative Conyers or Senator Feingold. For further information on applicable law, see *Wrong Then, Wrong Now*, *supra* note 3.

## **Remarks of Denyse Sabagh\***

I had some prepared remarks, but since I am the last speaker [on the Immigration Panel] and we don't have much time, I will dispense with them. I want to give a perspective and my experience as a practicing lawyer after 9/11. But first, I would like to compliment the panel. It is very interesting to be on a panel with people of similar and, yet, very different perspectives regarding the same events. We can all learn from each other. I have had the opportunity to be on a panel with many of the speakers and also work with Mike Rolince and the FBI, in their outreach efforts to the Arab Community. But after 9/11 what happened in the legal world and in the real world was this.

The legal foundation as we knew it changed, and it kept changing rapidly, and we didn't really know what it was. You have heard today about secret hearings. But, when they first started, nobody knew what they were. I am a past president of the American Immigration Lawyers Association. We started to get calls from our members saying, "Listen, we have a secret hearing." "What is this secret hearing?" "I don't know about this secret hearing." And the lawyers tried to determine the legal basis for the hearings. We asked the government if there was a legal memorandum and were told there was not. After many calls and investigation, we finally found out that the Chief Judge of the Executive Office of Immigration Review had issued a memorandum which gave specific instructions on how to handle hearings for people whose cases the government wished to keep secret. It wasn't published and there was no guidance given to the legal community.

So it took us a while to understand what was going on and what the memorandum said. As it turned out, the memorandum was referring to a regulation which already existed, which usually gives the immigrant the opportunity to ask for a closed hearing for various reasons. It is a regulation which is used on a case by case basis. But, this memorandum created a blanket basis to close hearings for people who had been deemed to be on some special interest list from the Attorney General.

The practical reality, on the ground, was that the lawyer would go to these hearings. The case was not on the docket so lawyers weren't even sure they had a case. When the case did come up, someone came out of the courtroom to advise that case was being called. The entire courtroom was cleared. Nobody else was

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allowed in the courtroom except for the judge, the lawyer, the client and the trial attorney for the government. In these secret hearing cases, the Immigration Service (now Immigration & Customs Enforcement) had made a decision for “no bond.” So, at the time of the hearing, the clients were in jail. The lawyers would file bond requests and provide evidence that the client was not a flight risk or a danger to the community, the normal legal standard.

However, the normal legal standard was not applied. The reality on the ground was that you are looking at an immigration judge and saying, “I believe my client is entitled to bond.” And the Judge is looking at you thinking, “You have got to be out of your mind. You think we are going to give this guy a bond after he’s been painted with the terrorism brush?” The government supported their position with a memorandum that was provided in court on the day of the hearing. It was the same affidavit in each case but with a short part about the particular person. It was an affidavit from the FBI prepared for the purpose of keeping people in jail. The memorandum didn’t talk much about the specific individual. It was about eight pages of general and inflammatory information of the events of 9/11. And, maybe one page about the client. At the end of the memorandum, it basically said the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individual who had been detained. The FBI has been unable to rule out the possibility that the respondent is somehow linked to, or possessed knowledge of, the terrorist attacks. So basically what it said was, “We can’t rule him in, and we can’t rule him out, so, judge, you must keep him in jail until we figure it out.”

Well, I guess Mike [Rolinec, an FBI Special Agent participating on the panel] would say that is a fair thing to do. However, it seems less fair when you have a client sitting in jail for months and the FBI still hasn’t figured it out. In addition, in many cases, the clients wanted to cooperate. The lawyer advised the FBI that the clients were willing to cooperate. In many cases, the lawyers advised that the client would talk to whoever they wanted them to talk to. The clients would say, “We didn’t have anything to do with it.” But it didn’t matter; it was like talking to the wall. I can’t tell you how many conversations I had with either the Immigration Service or FBI. I said, “Listen, we will cooperate. We will do whatever it takes. What’s the problem? Tell us what the problem is.” The answer was “I’m sorry we can’t talk to you about it.” My response was “Can you give me any information about it?” The answer was “No.” In many instances, the clients did cooperate with the FBI, were interviewed numerous times, but yet they still sat in jail for months. This treatment also highlighted a very serious concern that the foundation of our legal system was changing from “innocent until proven guilty” to “guilty until proven innocent.”

In essence, many people, even those who cooperated with the FBI, ended up in jail, not because of terrorist activities, but because of immigration violations. In

many instances, the immigration violations were minimal, such as a student who dropped to a lower course load, or visitors who overstayed their visa. They were not horrible or tremendously terrible violations. Nor were they bad people. However, they were kept in jail for these violations. Also, many people did cooperate with the FBI and some of them landed in jail because of the cooperation. I represent a lot of Arab and Muslim clients in the community and most of them want to cooperate. I have not represented one who doesn't want to help. Half the time, I am the one that says, "Well wait a minute, let's talk about what you are going to talk about to see if there is any exposure."

One of the other things that happened was the new close working relationship between the FBI and the Department of Homeland Security. Under the circumstances, it made sense. However, the lines of authority and communication were blurred. The lack of clarity and transparency in its implementation were unnecessary and made things very difficult. Before 9/11, an immigration agent would be the law enforcement officer with authority. After 9/11, we would see both the immigration agents and the FBI agents knocking on doors of clients, in many instances, around five and six in the morning, to arrest people. It was not clear who was running the case and who had the ultimate authority. In particular, a constant refrain when talking to an immigration agent would be, "Well, we need to get clearance from the FBI before your guy will get out."

Now, a couple of years later and with the benefit of experience, it is clear that the lines of authority must be clear and the process must be transparent. We are a nation of laws. It is critical to maintain our system of due process, especially in times of crisis. If a person is going to be arrested, he must know why and understand the process articulated in order to defend himself.

One of the most immediate actions taken after 9/11 was passage of the Patriot Act. The truth be told, Congress didn't need the Patriot Act for the immigration issues. It was overkill. They already had a ton of laws and regulations on the books and then they made more. In terms of the detentions, most immigrants weren't detained under the Patriot Act. They were detained under existing immigration regulations and new regulations. A panoply of new regulations was published after 9/11. The first regulation that was passed was September 20, 2001, nine days after 9/11. It was a regulation that allowed detention without charges for forty-eight hours or an additional reasonable period of time, in the event of an emergency or other extraordinary circumstances.

So what do you think the government used to detain people? They used the regulations; they didn't need the Patriot Act. They then published a regulation on October 31, 2001, which provided for automatic stays of bond decisions. In the event your client was lucky enough to get an immigration judge who ordered a bond based upon a strong presentation of evidence proving that he was not a

flight risk or danger to the community, he still wouldn't get out of jail. Most people detained after 9/11 stayed in jail for long periods of time even though they had no relation to 9/11.

These are just some of the regulations and policies that went into effect. If I had more time I would go through all of them with you.

I wanted to comment on Mike's comments saying that the FBI doesn't ask questions about a person's religion. They didn't have to ask those questions because they had only targeted most males from Arab and Muslim countries.

This is the reality of how things happened on the ground.

# JOB SECURITY AND BARGAINING RIGHTS OF FEDERAL GOVERNMENT EMPLOYEES

Mark D. Roth, Gony Frieder and Anne Wagner\*

## INTRODUCTION

From the beginning of his administration, President George Walker Bush undertook to curtail employment rights, particularly those previously enjoyed by federal government workers. In the wake of the September 11th attacks, however, the Bush Administration was able to launch a full-scale attack on federal employment rights under the guise of national security. While the expansion of government power in the name of national security has come under substantial media and political scrutiny, much of this attention has focused on the threat posed to individual rights. Increased federal power under the USA PATRIOT Act<sup>1</sup> and other measures<sup>2</sup> ostensibly intended to enhance capacity to identify, apprehend, and prosecute terrorists has indeed impacted civil liberties.<sup>3</sup> However, a diminished core of civil liberties is not the only casualty. The federal government has used September 11th as a pretext for dismantling labor rights and workers' unions as well.<sup>4</sup> This is particularly ironic in light of the fact that

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While all the authors are attorneys for the American Federation of Government Employees (AFGE), a union representing 600,000 federal civilian employees, the views in this article are those of the authors, and not necessarily those of the AFGE or its membership. This paper was written for a presentation delivered on November 21, 2003, at the University of the District of Columbia David A. Clarke School of Law.

1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

2 See, e.g., Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 49 U.S.C.); see also 5 U.S.C. § 5313 (2004); 5 U.S.C. § 8331 (2004); 26 U.S.C. § 9502 (2004); 31 U.S.C. § 1105 (2004).

3 See, e.g., Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons For Citizens and Noncitizens*, 28 ST. MARY'S L. J. 833, 841-69 (1997); Joseph Margulies, *A Year and Holding: Limbo Is No Place to Detain Them*, WASH. POST, Dec. 22, 2002, at B1 (reporting the indefinite holding of "unlawful belligerents" from Pakistan and Afghanistan in Guantanamo Bay, Cuba).

4 See, e.g., Molly Seltzer, Comment, *Federalization of Airport Security Workers: A Study of the Practical Impact of the Aviation and Transportation Security Act from a Labor Law Perspective*, 5 U. PA. J. LAB. & EMP. L. 363, 366-67 (2003) (stating that a key factor in the decision to federalize airport security personnel was probably the prohibition of strikes by federal workers).

many of those who lost their lives—the hundreds of firefighters and police officers who died in the heroic performance of their duties that day—were union members. Part I of this article reviews the history of the Bush Administration's efforts to void or nullify labor and employment rights of federal employees, beginning shortly after President Bush's inauguration. Parts II and III show how the Bush Administration intensified these efforts after September 11, 2001. This article focuses particularly on the abrogation of basic employment rights of employees of the Transportation Security Administration and the Department of Homeland Security, warning of the danger that these policies will spread throughout the federal civilian workforce.

### I. EFFORTS BY THE BUSH ADMINISTRATION TO ABOLISH LABOR AND EMPLOYMENT RIGHTS PREDATED THE TRAGEDY OF SEPTEMBER 11

Within days of President Bush's inauguration, he began his relentless attack on employee rights. In January 2001, the Bush Administration infuriated labor and employee rights advocates when he nominated Linda Chavez to be the new Secretary of the Department of Labor.<sup>5</sup> The labor movement was concerned with earlier statements in which Ms. Chavez had criticized minimum wage laws, overtime protections, federal family leave laws, and anti-discrimination laws.<sup>6</sup> For example, Ms. Chavez had asserted that minimum-wage law was an impediment to the labor market,<sup>7</sup> and had characterized women who filed sexual harassment lawsuits as "crybabies."<sup>8</sup> Ms. Chavez ultimately withdrew from the nomination, after allegations mounted that she had housed and employed an illegal alien without payment of Social Security taxes.<sup>9</sup>

The labor movement had little time to celebrate Ms. Chavez's withdrawal from the nomination process when the Bush Administration kowtowed to corporate America by first postponing, then suspending, and finally eliminating a final rule<sup>10</sup> that required federal agencies to review a company's record of compliance

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5 Technically, Linda Chavez was nominated to be Secretary of the Department of Labor on January 2, 2001, when Bush was still President Elect. See *Bush picks Chavez for Labor, Abraham for Energy, Mineta for Transportation*, CNN.COM at <http://www.cnn.com/2001/ALLPOLITICS/stories/01/02/bush.transition/> (Jan. 2, 2001).

6 AFL-CIO, *Nominated Linda Chavez to Become Labor Secretary*, BUSHWATCH, (Jan. 2001) at <http://www.afl-cio.org/issuespolitics/bushwatch/index.cfm> (an online column published by the AFL-CIO).

7 *Confirmation Questions*, (PBS Newshour radio broadcast, Jan. 8, 2001) (Comment of Greg Tarpinian in an interview with Ray Suarez) (transcript on file with author).

8 AFL-CIO BUSHWATCH, *supra* note 6.

9 CNN.com, *Retribution Sank Nomination, Chavez Says* (Jan. 9, 2001) at <http://www.cnn.com/2001/ALLPOLITICS/stories/01/09/bush.wrap/>.

10 Federal Acquisition Regulations (hereinafter FAR) § 9.104-1(d), 65 Fed. Reg. 80256 (Dec. 20, 2000).

with specified areas of law,<sup>11</sup> including labor and employment laws, before awarding the company a government contract. The rule implemented during the Clinton administration had “clarif[ied] what constitute[d] a ‘satisfactory record of integrity and business ethics,’”<sup>12</sup> a pre-existing criterion for awarding government contracts, by naming specific areas of compliance to be examined, as well as directing an emphasis on recent conduct.<sup>13</sup> Dubbing the rule a “blacklist,”<sup>14</sup> business groups had opposed the rule when it was initially proposed, and several had also filed suit in the U.S. District Court for the District of Columbia attempting to block its implementation.<sup>15</sup> References to this litigation were included in the Civilian Agency Acquisition Council Letter initially postponing the rule’s implementation, as well as every government memorandum and Federal Register notice vis-à-vis the rule, thereafter, until its elimination.<sup>16</sup>

On February 17, 2001, President Bush then stunned the labor movement with the issuance of four executive orders diminishing labor rights. Two of these revoked existing executive orders protecting workers’ rights,<sup>17</sup> and two affirmatively granted or clarified employer rights.<sup>18</sup> President Bush touted these four executive orders as “based on the principles of fair and open competition, neutrality in government contracting, effective and efficient use of tax dollars and the

11 The rule covered labor and employment, tax, antitrust, environmental, and consumer protection laws.

12 FAR § 9.104-1(d), 65 Fed. Reg. 80256 (Dec. 20, 2000).

13 *Id.*

14 Kent Hoover, *Businesses Oppose Contractor Responsibility’ Rule*, DENV. BUS. J. (July 31, 2000), available at <http://denver.bizjournals.com/denver/stories/2000/07/31/newscolumn3.html>.

15 *Id.*

16 Civilian Agency Acquisition Council Letter 2001-1, Memorandum for Civil Agencies Other than NASA (Jan. 31, 2001), available at <http://www.wrf.com/db30/cgi-bin/pubs/acquisitioncouncilletter.pdf>. Administrative agencies quickly issued additional memoranda that effectively delayed implementation of the contractor responsibility regulation. See, e.g., U.S. Department of Transportation, Memorandum (Feb. 1, 2001); U.S. Department of Treasury, Procurement Instruction Memorandum No. 01-1 (Feb. 5, 2001); and U.S. Department of Agriculture, AGAR Advisory No. 33 (Feb. 6, 2001). On April 3, 2001, the Federal Acquisition Regulations (FAR) Council issued an interim rule that stayed indefinitely the December 2000 contractor ethics requirement. 66 Fed. Reg. 17753-17756 (Apr. 3, 2001). The FAR Council simultaneously issued a notice of rulemaking announcing its reconsideration of the contractor ethics regulations it had issued less than four months earlier. 66 Fed. Reg. 17758-17760 (Apr. 3, 2001). It surprised few when the FAR Council eliminated the contractor ethics regulations on December 27, 2001. 66 Fed. Reg. 66984-66990 (Dec. 27, 2001).

17 Exec. Order No. 13,203, 66 Fed. Reg. 11,227 (Feb. 17, 2001) (titled “Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships”); and Exec. Order No. 13,204, 66 Fed. Reg. 11,228 (Feb. 17, 2001) (titled “Revocation of Executive Order on Non-displacement of Qualified Workers Under Certain Contracts”).

18 Exec. Order No. 13, 202, 66 Fed. Reg. 11, 225 (Feb. 17, 2001) (titled “Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects”) and Exec. Order No. 13,201, 66 Fed. Reg. 11, 221 (Feb. 17, 2001) (entitled “Notification of Employee Rights Concerning Payment of Union Dues or Fees”).

legal right of workers to be notified of how their dues may be used.”<sup>19</sup> Needless to say, not all agreed with Bush’s portrayal of the executive orders’ accomplishments. With five short sentences, Executive Order 13,203 nullified thirty-two years of work in the federal sector towards cooperative programming between management and its workforce.<sup>20</sup> Before the issuance of Executive Order 13,203, federal executive agencies were required to create labor-management partnerships through which labor representatives could meet with management to discuss a plethora of concerns with the hope that unfair labor practice allegations, grievances, administrative complaints and lawsuits could be nipped in the bud. Similarly, management could meet with labor representatives to talk over their concerns so that changes in workers’ terms and/or conditions of employment could be effected expeditiously and without violating any regulations, negotiated contracts, and/or laws. While President Bush asserted that the order would save taxpayer dollars, American Federation of Government Employees (AFGE) then National President Bobby Harnage responded:

In one day, President Bush has torn apart what has taken years to craft—the development of a government workplace that is people-driven, highly flexible, creative and responsive to the changing needs of the American people. It is the American taxpayers who will suffer as a result of Bush’s actions. Partnerships have led to increased efficiency and service to the public. Costs have been reduced while customer service has dramatically improved, and so has employee morale. It is apparent that Bush wants to return to the outmoded and arcane top-down, decision-making management theories developed in the late 1800’s. Bush’s willingness to allow his advisors to carry out personal agendas and vendettas to tear down something both management and labor supported is a clear signal that he is not the “uniter” he professed to be during the campaign.<sup>21</sup>

Executive Orders 13,201, 13,202, and 13,204 targeted private-sector workers employed by contractors to the federal government and the unions representing those workers. Executive Order 13,201 required companies with certain government contracts to inform workers of their right to refrain from joining a union or

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19 White House Statement by the Press Secretary Regarding Executive Orders (Feb. 17, 2001), available at <http://www.whitehouse.gov/news/releases/2001/02/20010221-4.html>.

20 Press Release, American Federation of Government Employees (AFGE), Bush Halts Federal Partnerships: Tough Luck Taxpayers! (Feb. 16, 2001) (on file with authors). *But see* Rob Kirkner & Steve Sharfstein, *Aligning Traditional Collective Bargaining with Non-traditional Labor Relations*, at <http://www.ilrf.net/Aligning%20Traditional%20Collective%20Bargaining.pdf> (concluding that consensual methods of collective bargaining will continue to be used in tandem with traditional collective bargaining, notwithstanding the issuance of the executive order).

21 Press Release, AFGE, Bush Halts Federal Partnerships: Tough Luck Taxpayers!, *supra* note 20.

paying certain union fees—what is commonly referred to as *General Motors*<sup>22</sup> and *Beck*<sup>23</sup> rights. Contractors were required to post notices stating that, under federal law, “employees cannot be required to join a union or maintain membership in a union in order to retain their jobs.”<sup>24</sup> Contractors who did not comply with the order faced cancellation of current government contracts, as well as disqualification from future consideration.<sup>25</sup> President Bush justified the order as “promot[ing] economy and efficiency in Government procurement,”<sup>26</sup> because “[w]hen workers are better informed of their rights . . . their productivity is enhanced.”<sup>27</sup> This particular notification, however, stands in stark contrast to other legally required notices such as those mandated by anti-discrimination laws, family friendly laws, or medical leave laws. These other laws require that employers notify employees of their rights with respect to their *employers*, rather than their rights with respect to their *unions*. As such, the notification was a direct slap at unions.

In response to Executive Order 13,201, the UAW-Labor Employment and Training Corp. (“UAW”) and three unions filed suit<sup>28</sup> in the United States District Court for the District of Columbia, seeking to enjoin the executive order.

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22 Referring to the requirements articulated in *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

23 Referring to the requirements articulated in *Communications Workers v. Beck*, 487 U.S. 735, 745, 762-63 (1988).

24 The Notification was required to include the following text:

Notice to Employees Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, or grievance adjustment. If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments. For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address: National Labor Relations Board, Division of Information, 1099 14th Street, NW, Washington, DC 20570. To locate the nearest NLRB office, see NLRB’s website at [www.nlr.gov](http://www.nlr.gov). The last sentence of the Notice, however, shall be omitted in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 152 et seq.).

Exec. Order No. 13,201, 66 Fed. Reg. 19,988-89 (Apr. 18, 2001).

25 *Id.* at § 2(a)(2).

26 *Id.* at § 1(a).

27 *Id.*

28 *UAW-Labor Employment And Training Corp. v. Chao*, No. 01CV00950, 2002 U.S. Dist. WL 21720, at \*1 (D.D.C. 2002).

The plaintiffs claimed that the order was preempted by the National Labor Relations Act (“NLRA”),<sup>29</sup> and that the President had exceeded his authority when issuing the executive order.<sup>30</sup> The district court found for the plaintiffs, holding that the NLRA prohibited obligating employers to post such notices and preempted Executive Order 13,201.<sup>31</sup> The district court issued a permanent injunction barring enforcement of the Executive Order.<sup>32</sup> The Department of Labor appealed the decision,<sup>33</sup> and the ruling was reversed.<sup>34</sup> Although the appellate court rejected the government’s argument that the rule merely inserted “conditions into a contract that businesses voluntarily accept” but did not set a broad policy,<sup>35</sup> the court nevertheless found that the Executive Order was not preempted by the NLRA and that President Bush did not exceed his authority under the Procurement Act.<sup>36</sup> The unions filed a petition for a rehearing *en banc*,<sup>37</sup> as well as a petition for *certiorari* to the Supreme Court.<sup>38</sup> However, the executive order remained in effect while the petition was pending, and ultimately both petitions were denied.<sup>39</sup>

Executive Order 13,202 barred federal agencies or any government contractor seeking subcontractors from requiring project labor agreements on federally funded construction projects. In response to criticism, the White House amended Executive Order 13,202 in April 2001 to require contractors who had already begun work under a pre-existing project labor agreement to adhere to the terms of the agreement.<sup>40</sup> Executive Order 13,204, the last of the February 17th executive orders, revoked Executive Order 12,933. The revoked order<sup>41</sup> had aimed to protect the working poor employed by a federal contractor that provided mainte-

29 29 U.S.C. §§ 151 et seq. (2004).

30 *UAW-Labor Employment And Training Corp. v. Chao*, 2002 U.S. Dist. WL 21720, at \*9 (D.D.C. 2002).

31 *Id.* at \*8.

32 *Id.* at \*1, \*9-10.

33 *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003).

34 *Id.* at 362.

35 *Id.* at 363.

36 40 U.S.C. § 471 et seq. (now codified as amended at 40 U.S.C. § 101 et seq.).

37 *UAW-Labor Empl. & Training Corp. v. Chao*, No. 02-5080, 2003 U.S. App. LEXIS 19043 (D.C. Cir. Sept. 11, 2003).

38 124 S. Ct. 2014 (2004).

39 *Id.*

40 Exec. Order No. 13,208, 66 Fed. Reg. 18,717 (Apr. 6, 2001); *see also* Statement by the Press Secretary (Apr. 6, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/04/20010406-4.html>.

41 The older order required that when the government changed maintenance contractors for jobs such as janitorial service, food service, landscaping, or laundry, the new service provider must hire qualified displaced workers before hiring additional new staff. As explained in the preamble of the executive order, this provision was included to benefit both affected workers and the government agencies receiving building services. The order protected workers by giving them a first right of refusal for maintenance positions with the new contractor when faced by layoffs from their previous

nance and building services in federal facilities, if the government contract expired without renewal or was terminated.

America's workers were struck another blow on March 21, 2001, when President Bush signed a congressional repeal of a final Occupational Safety & Health Administration (OSHA) rule establishing an ergonomics standard scheduled to take effect in October 2001. Although the rule had been promulgated during the Clinton administration, it had begun as a Republican initiative and had taken more than ten years to develop.<sup>42</sup> Utilizing the Congressional Review Act in a manner never used before, the repeal also prohibited OSHA from issuing a similar standard in the future without congressional approval.<sup>43</sup> The standard had focused on preventing repetitive stress injuries. OSHA had estimated that the standards would prevent 460,000 workers from getting hurt on the job each year. The agency calculated that the \$9 billion a year saved by businesses due to reduced leave, improved employee retention, reduced medical expenses, and reduced workers' compensation would more than cover the estimated \$4.5 billion it would cost to implement the standards.<sup>44</sup> However, a coalition of some 250 businesses estimated the cost at more than \$100 billion.<sup>45</sup> Two business groups filed petitions for judicial review of the standards, and the U.S. Chamber of Commerce and the National Association of Manufacturers voiced their desire for the standards' elimination.<sup>46</sup> President Bush characterized the OSHA standards as "unduly burdensome and overly broad,"<sup>47</sup> and signed the bill repealing the standards.

By April 2001, the Bush Administration had already delivered a clear message that it was opposed to what had previously been considered the most basic workers' rights. Speaking at a press conference on April 4, 2001, the late Senator Paul Wellstone exclaimed:

Based on the President's track record so far, it seems that in the next four years Americans will see harsh policies rolling back workers' rights and pro-

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employers. In addition, the provision benefited government agencies by minimizing disruption during any period of transition.

42 See Statement of Congressman Pete Stark in opposition to S.J. Res. 6, to repeal the ergonomics standard (Mar. 7, 2001), available at <http://www.house.gov/stark/documents/107th/ergstand.html>.

43 See AFL-CIO, *Repealed Key Worker Safety Rule*, BUSHWATCH, (March 2001), at <http://www.afl-cio.org>.

44 CBSNews.com, *The War Over Worker Safety* (Nov. 13, 2000), at <http://www.cbsnews.com/stories/2000/11/11/tech/main248792.shtml?CMP=ILC-SearchStories>; and see Ori Twersky, WebMD.com, *Bush Set to Repeal Clinton's Ergonomics Rule* (Mar. 7, 2001), at [http://my.webmd.com/content/article/30/1728\\_74120?src=INKtomi&condition=HOMe\\_&\\_Top\\_Stories](http://my.webmd.com/content/article/30/1728_74120?src=INKtomi&condition=HOMe_&_Top_Stories).

45 CBSNews.com, *supra* note 44.

46 *Id.*

47 *Id.*

tections . . . . For someone who campaigned on changing the tone in Washington, this is no way to encourage bipartisanship.<sup>48</sup>

## II. SEPTEMBER 11 DEMANDS THE ULTIMATE SACRIFICE FROM MANY UNION WORKERS

On September 11, 2001, the people of the United States of America awoke to tragedy as a large, commercial passenger airplane crashed into the first of the World Trade Center (WTC) twin towers. Flight 11, traveling at an estimated 400 miles per hour, struck the north tower at 8:46 a.m., and set it on fire. It was quickly apparent that the crash was not a result of accident, but instead a coordinated act of violence. Flight 176, another large commercial passenger airplane, hit the south tower of the WTC at 9:03 a.m. As the world was coming to understand that something was horribly amiss in New York City (NY City), its attention was abruptly shifted to Washington, D.C., when, at 9:37 a.m., Flight 77 crashed into the Pentagon. The horrors continued in quick succession: at 9:59 a.m. the south tower of the WTC collapsed; at 10:03 a.m. Flight 93 crashed in Shanksville, Pennsylvania (approximately 11 minutes from the intended Washington, D.C. airspace); at 10:10 a.m., a portion of the Pentagon collapsed; and, at 10:28 a.m., the north tower of the WTC collapsed and enshrouded NY City with smoke and ash. When asked at a 2:30 p.m. news conference about the estimated number of people killed, Mayor Giuliani responded, "I don't think we want to speculate about that—more than any of us can bear."<sup>49</sup>

While most Americans were paralyzed by the reports, America's emergency responders were mobilizing. Within four minutes of Flight 11's crash into the north tower, the first of the New York Fire Department's (NYFD) fire trucks arrived on the scene. Two minutes after Flight 176's crash into the south tower, the NYFD issued its second alarm and deployed trucks to the south tower. At 9:26 a.m., the Federal Aviation Administration (FAA) ordered a national "groundstop" that grounded all civilian aircraft in the United States, regardless of destination. At 9:45 a.m., the FAA ordered a shutdown of all U.S. airspace, requiring some 4,500 airborne planes to land as soon as possible. The shutdown was the first unplanned mass shutdown in American history. By the evening, more than fifty NYFD companies had been deployed, the NY Police Department reported that seventy-eight officers were missing, and concerns for the fire fighters who were first to respond were mounting. In total, twenty-three city police

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48 Senator Paul Wellstone, Statement on the Bush Administration's Repeal of the Contractor Responsibility Rules, Apr. 4, 2001, available at [http://www.truthout.com/docs\\_01/0075\\_Wellstone.Rules.htm](http://www.truthout.com/docs_01/0075_Wellstone.Rules.htm).

49 *Chronology of Events on September 11, 2001*, FAA FACTSHEET (released Aug. 12, 2002) at <http://www.faa.gov/newsroom/FactSheets.cfm>; see also CNN.com, *Special Report: America Remembers*, available at <http://www.cnn.com/SPECIALS/2002/america.remembers/sept11.section.html>.

officers and 343 city firefighters were killed responding to the 9/11 terrorist attacks.

In the following days, hundreds of unionized trade workers assisted in the search for survivors.<sup>50</sup> So many construction workers volunteered, in fact, that a construction union hiring hall ran a full-page newspaper advertisement encouraging workers to return to work, as every large-scale construction job in NY City had shut down.<sup>51</sup> Ultimately, the crews who staffed the monumental clean up of Ground Zero were union crews.

President Bush, in a proclamation on September 11, ordered the flag of the United States to be flown at half-staff “[a]s a mark of respect for those killed by the heinous acts of violence.”<sup>52</sup> This was the first of numerous proclamations, remarks, and speeches in which the President honored those who were victims of the attacks, as well as those workers who assisted with the aftermath.<sup>53</sup> From the combined tragedies in NY City, Washington, DC, and Pennsylvania, more than 1,000 union members died.<sup>54</sup>

Notwithstanding the President’s accolades on behalf of workers—workers who were or are union members—the President soon resumed his plunder of workers’ rights and organized labor. This time, however, the President capitalized on the climate of fear consuming the nation. Instead of predicating these take-aways on neutrality in contracting and economic concerns, the President based his actions on the need to promote national security at a time of war.

50 Tom Robbins, *Can Unions Seize the Post-9-11 Moment? Waiting for Labor to Rise*, VILLAGE VOICE, Jan. 2, 2002, available at <http://www.alternet.org/module/printversion/12157>.

51 *Id.*

52 Proclamation No. 7461 of September 11, 2001, 66 Fed. Reg. 47,939 (Sept. 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-1.html>.

53 See, e.g., President George W. Bush, Remarks at National Day of Prayer and Remembrance Service, PUB. PAPERS (Sept. 17, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html> (“Now come the names, the list of casualties we are only beginning to read. . . . They are the names of rescuers, the ones whom death found running up the stairs and into the fires to help others. We will read all these names. We will linger over them, and learn their stories, and many Americans will weep. . . . We see our national character in rescuers working past exhaustion. . . .”); President George W. Bush, Remarks to Police, Firemen, and Rescuers at the World Trade Center Site in New York City, PUB. PAPERS (Sept. 17, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-9.html> (“I want you all to know that America today . . . is on bended knee in prayer for the people whose lives were lost here, for the workers who work here. . . .”); President George W. Bush, Remarks by the President on Arrival at the White House, PUB. PAPERS (Sept. 24, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html>; President George W. Bush, Remarks to Employees in the Dwight D. Eisenhower Executive Office Building, PUB. PAPERS (Sept. 24, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010917.html>.

54 Katia Hetter, *Labor Convention Addresses 9/11*, NEWSDAY.COM (Dec. 4, 2001), available at <http://www.newsday.com/business/local/newyork/ny-bzaf1042496675dec04.story>.

### III. BUSH ADMINISTRATION SEEKS TO ABOLISH LABOR AND EMPLOYMENT RIGHTS AFTER THE TRAGEDY OF SEPTEMBER 11

In the wake of the horrific events of September 11, America appeared to be willing to accept government-imposed restrictions on liberty in the name of national security.<sup>55</sup> Relying on a President who promised to lead us to a safer world through a war on terrorism, a traumatized nation did not particularly question the purpose or scope of the federal government's response.

In the name of national security, some of those diminished freedoms have included citizens being held without charges, bail or counsel;<sup>56</sup> restrictions on academic scientific research, especially in the area of infectious diseases;<sup>57</sup> and the creation of secret military tribunals.<sup>58</sup> Just as disturbing, or perhaps more so, is an annual survey, released by the First Amendment Center shortly before the one year anniversary of September 11, which found for the first time that about half of those surveyed believed it was appropriate to limit academic freedom; would support the curtailment of the right of free speech by placing a ban on criticizing the military; and would endorse the government to monitor religious groups in the name of national security, even if it violated the group's religious freedom.<sup>59</sup>

With a public apparently willing to accept the government's expansive view of its powers to ensure national security, President Bush deployed his anti-labor agenda with little meaningful resistance.<sup>60</sup> Specifically, his administration has slashed the right to collective bargaining, eliminated civil service protections and

55 Roger Abrams, Op-Ed, *As You Were Saying: Americans Can't Allow Liberty to be Casualty of War on Terror*, BOSTON HERALD, July 28, 2002. See also Dan Meyer & Everett Volk, 'W' for War and Wedge? *Environmental Enforcement and the Sacrifice of American Security—National and Environmental—to Complete the Emergence of a New 'Beltway' Governing Elite*, 41 NEW ENG. L. REV. 78 (2003).

56 Abrams, *supra*, note 55.

57 Nathan Heller, *September 11 Research Limits Draw Fire*, HARV. CRIMSON, Feb. 29, 2003, at 1.

58 Editorial, *Justice Decried*, BOSTON GLOBE Dec. 8, 2001, at A18. In a November 13, 2001 Military order, 66 Fed. Reg. 57833, President Bush ordered that non-citizens suspected of terrorism may be tried by military tribunals that allow convictions by a two-thirds vote of a military jury and allow for execution of the convicted without appeal. See also the final Department of Defense rule implementing the military order, 68 Fed. Reg. 39395 (Apr. 30, 2003).

59 Marc R. Masferrer, *Have the Terrorists Destroyed America's Fervor for Freedom?* MILWAUKEE J. SENTINEL, Sept. 7, 2002, at 11A. See also Editorial, *Justice Decried*, BOSTON GLOBE, Dec. 8, 2001, at A18.

60 Meyer & Volk, *supra* note 54. As do the authors of this article, Meyer and Volk argue that Bush has used 9/11 and America's desire for national security as a pretext for furthering its original policy goals. The authors argue that the Bush administration has, since the beginning, pursued an anti-environmental policy. To support their thesis, Meyer and Volk point to the Administration's attack on the Endangered Species Act for the purposes of military training exercises, drilling in Alaska for the purposes of self-sufficiency, and the attack on the federal civilian workforce that monitors environmental sites, law and policy.

benefits for thousands of employees, and promised the wholesale reduction of thousands of government civilian positions through layoffs and contracting out.<sup>61</sup>

This attack has been couched as an effort to achieve the management “flexibility” necessary to meet the heightened threat to national security. Notwithstanding the immediate and heroic response of the unionized New York police and fire departments, and the Federal Emergency Management Administration on September 11, 2001, the Bush Administration has baldly maintained that government cannot be truly responsive to terrorist attack if it has to negotiate with unions.

What Bush downplays—and the American public fails to recognize—is that, for the purpose of national security, *every* presidential administration *already* has flexibility over its staff in executive agencies. The Federal Service Labor Management Relations Statute (FSLMRS),<sup>62</sup> which governs labor relations in the federal sector, explicitly excludes a small number of agencies from coverage for security reasons.<sup>63</sup> It further authorizes the President to exclude additional agencies upon determining that the agency performs intelligence or national security work and that the statute “cannot be applied to that agency in a manner consistent with national security requirements and considerations.”<sup>64</sup> Finally, the FSLMRS provides that in times of national crisis:

The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.<sup>65</sup>

In addition, the Federal Labor Relations Authority, which has exclusive authority to determine appropriate bargaining units, is authorized to exclude employees who are “engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.”<sup>66</sup>

Despite the fact that the FSLMRS plainly provides sufficient flexibility to manage a workforce while accommodating bona fide claims of national security, the Bush administration has undertaken a campaign to eviscerate the labor law entirely. On January 7, 2002, President Bush issued Executive Order 13,252, ex-

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61 See *infra* Section A.

62 5 U.S.C. §§ 7101 et seq. (2004).

63 5 U.S.C. § 7103(a)(3) (2004).

64 5 U.S.C. § 7103(b)(1) (2004).

65 5 U.S.C. § 7103(b)(2) (2004).

66 5 U.S.C. § 7112(b)(6) (2004). The FLRA decisions dealing with this exclusion show an increasing receptivity to the government’s alleged national security concerns. See Dep’t of Energy, Oak Ridge Operations, Oak Ridge, Tenn., 4 FLRA 644, 655-56 (1980); Defense Mapping Agency and AFGE Local 2786, 13 FLRA No. 10 (1983); U.S. Attorney’s Office for the District of Columbia, 37 FLRA No. 90 (1990); U.S. Dep’t of Justice and AFSCME Local 3719, 52 FLRA No. 111 (1997); U.S. Army Corps of Engineers and AFGE Local 3310, 57 FLRA No. 180 (2002); and Soc. Sec. Admin. and AFGE, 59 FLRA No. 26 (2003).

cluding a thousand employees of the Department of Justice from the law's coverage, with no explanation of, much less support for, the presumption that their functions were incompatible with national security.<sup>67</sup> At the same time, he summarily fired seven members of the Federal Service Impasses Panel, effectively halting review of disagreements in bargaining that have come to deadlock.<sup>68</sup>

Bush's administrative agencies have followed his lead in minimizing the reach of the FSLMRS. On January 28, 2003, the Director of the National Imaging and Mapping Agency (NIMA), James R. Clapper, Jr., invoked 10 U.S.C. § 461(c) to terminate collective bargaining rights of employees in units represented by two AFGE locals, which had represented NIMA employees for over twenty years, on the grounds that the agency had added new intelligence-related duties to all NIMA positions.<sup>69</sup> Section 461(c)(2) provided that the determination could "not be reviewed by the Federal Labor Relations Authority or any court of the United States." AFGE opposed the termination of collective bargaining rights to these federal employees, arguing that union representation will not jeopardize security. In support thereof, AFGE argued that the fact that private-sector contractor employees perform the *same* duties as the federal employees at the *same* location under the *same* supervision, and their right to union representation is *not* seen as a threat to national security, belies NIMA's position that union representation for federal employees is a threat. Furthermore, despite its stance that collective bargaining somehow undermines national security, NIMA apparently had no

67 Exec. Order No. 13,252, 67 Fed. Reg. 1601 (Jan. 7, 2002).

68 In a press release, AFGE National President Bobby Harnage stated, "Though Bush may have the lawful right to dump all seven members of the Panel with less than a day's notice, his refusal to announce replacement members is an abuse of authority and renders the labor laws passed by Congress moot. . . . Bush's actions are a disservice to management officials; trying to reach agreement on effective work place changes, and a disincentive to both labor and management when attempting to reach agreement on important collective bargaining issues. . . . Imagine if disaster struck at the Supreme Court and the President simply refused to appoint new justices. In many regards, this is our Supreme Court. Bush has a responsibility to keep the Impasses Panel operating." Press Release, AFGE, AFGE Blasts Bush Banishment of FSIP Members (Jan. 11, 2002), available at <http://www.afge.org/Index.cfm?Page=PPressReleases&PressReleaseID=96>.

69 Section 461(c) stated:

1) If the Director of the National Imagery and Mapping Agency determines that the responsibilities of a position within a collective bargaining unit should be modified to include intelligence, counterintelligence, investigative, or security duties not previously assigned to that position and that the performance of the newly assigned duties directly affects the national security of the United States, then, upon such a modification of the responsibilities of that position, the position shall cease to be covered by the collective bargaining unit and the employee in that position shall cease to be entitled to representation by a labor organization accorded exclusive recognition for that collective bargaining unit.

Since February 2003, section 461(c) was modified by Pub. L. No. 108-136, 117 Stat. 1392 (2003), National Defense Authorization Act for Fiscal Year 2004, by striking "National Imagery and Mapping Agency" each place it appears (other than in section 461(b)) and inserting "National Geospatial-Intelligence Agency."

qualms when it contracted out much of its security-related work to a corporation that had no previous experience in defense mapping.<sup>70</sup>

Similarly, after the AFGE filed a petition with the FLRA seeking to clarify a bargaining unit within the Social Security Administration (SSA) to include three categories of employees: (1) Electronics Technicians, (2) Physical Security Specialists, and (3) Employee Services Specialists, the SSA argued that the positions should be excluded from the bargaining unit on national security grounds, pursuant to section 7112(b)(6).<sup>71</sup> The Regional Director, however, determined that the contested positions were not excludable on the basis of national security, based on *Department of Energy, Oak Ridge Operations*.<sup>72</sup> *Oak Ridge* stated that, in order to exclude an employee from a unit under this section, an agency “must show (1) that the individual employee is engaged in the designated work, and (2) that the work directly affects national security.”<sup>73</sup> The Regional Director found that “while these duties can certainly be construed as engaging these employees in security work, there is no evidence that any of these has a ‘straight bearing or unbroken connection that produces a material influence or alteration’ of national security.”<sup>74</sup>

The SSA appealed the decision, linking the need to preserve economic strength with national security interests, and expressing a need to re-examine the definition of national security post-9/11.<sup>75</sup> Thereafter, the FLRA invited all interested persons to file briefs as *amici curiae* addressing the question “whether, and how, security work ‘directly affects national security’ as that phrase is defined in *Dep’t of Energy, Oak Ridge*.”<sup>76</sup>

The SSA contended that, based on recently adopted legislation and executive orders, the FLRA should broadly expand the definition of “national security” beyond that adopted in *Oak Ridge*.<sup>77</sup> It insisted that “national security” was no longer limited to notions of “national defense.” Rather, national security in-

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70 AFGE Press Release, Statement of AFGE National President Bobby L. Harnage on NIMA’s Decision to Terminate the Collective Bargaining Rights of 1,322, (Feb. 3, 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=195>.

71 Soc. Sec. Admin. and AFGE, 58 F.L.R.A. 170 (2002).

72 Dep’t of Energy, *Oak Ridge Operations v. AFGE*, 4 F.L.R.A. 644 (1980).

73 *Id.* at 655.

74 Soc. Sec. Admin. v. AFGE, 58 F.L.R.A. at 171.

75 *Id.* at 173.

76 67 Fed. Reg. 71175 (Nov. 29, 2002) (quoting *Oak Ridge*, 4 FLRA at 655-56).

77 Soc. Sec. Admin. and AFGE, 59 F.L.R.A. No. 26, 6 (Sept. 12, 2003) (SSA assertion of need to expand definition of “national security” based upon “The Homeland Security Act of 2002, §§ 891, 892, and 1706; the Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c, incorporated as § 1016 of the USA PATRIOT Act; Executive Order 13,228, 66 Fed. Reg. 51816 (Oct. 8, 2001) and Executive Order 13,138, 64 Fed. Reg. 53879 (Sept. 30, 1999). See SSA Brief at 9-13.” Exec. Order No. 13,138 provides that “certain national infrastructures are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the United States. These critical infrastructures include . . . continuity of government.”

cluded any position whose activities “related to the protection and preservation of the economic and productive strength of the United States from illegal acts that did not adversely affect the ability of the United States to defend itself, or that the term ‘national defense’ include defense against acts of terrorism.”<sup>78</sup> The SSA further asserted that the FLRA should hold that when an agency determines a position is “sensitive,” the agency decision “establishes as a matter of law that the position ‘directly affects national security’ within the meaning of § 7112(b)(6).”<sup>79</sup> *Amicus* briefs were submitted by multiple groups and government agencies, including, but not limited to, the Department of Defense (DoD) and the Treasury Department.<sup>80</sup>

In its decision, the FLRA agreed with the DoD that, in determining whether a position should be included in a bargaining unit for the purposes of collective bargaining, the “focus must be on the type and nature of the work performed.”<sup>81</sup> Thus, while having a security clearance did not control, it might be indicative of the sensitivity of the position. The FLRA then reviewed the nature of the work involved and found that the positions “perform work that involves the design, analyzing or monitoring of security systems for the security of, and access to, SSA’s databases and physical facilities.”<sup>82</sup> The FLRA also found that “these systems are directly related to the protection of the economic and productive strength of the Nation, including the security of the Government from sabotage, particularly its databases and physical facilities.”<sup>83</sup> Therefore, the FLRA held that the positions were excludable from the bargaining unit due to national security needs.<sup>84</sup> Based on the FLRA’s expansive reading of national security, one wonders which federal government positions would *not* fall into the category of “national security.”

In addition to the Administration’s effort to reduce federal employee rights to union protections in the guise of national security, President Bush has also continued his efforts to cut the number of federal employees. Before September 11, he had promised to do away with 425,000 civil servants by contracting out their

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78 *Id.*

79 *Id.*

80 In its *amicus* brief, the Department of Defense (DoD) argued that the term “directly affects” should include “those situations whereby the adverse effect to national security is foreseeable and a natural consequence, even though some matters are yet to occur to further those adverse effects.” *Id.* at 7. DoD also argued that “national security” should be expanded to include positions that (1) do not require security clearances, and (2) work to protect the lives of citizens. *Id.* at 8. In the same vein, the Treasury Department argued that “national security” should not be linked to the presence or absence of classified information.

81 *Id.* at 16.

82 *Id.*

83 *Id.*

84 *Id.*

positions.<sup>85</sup> Even while the American public was pressing for the federalization of the airport screening staff, based on their belief that security was a government function, the Bush Administration was pushing for the competitive outsourcing of many security functions.<sup>86</sup> After Thanksgiving 2001, the Department of the Interior sent an e-mail to all employees informing them of the Department's intent to contract out 5% of jobs in the short term, and up to 50% within the next five years.<sup>87</sup>

Even functions the public viewed as clearly governmental were regarded as expendable. On June 6, 2002, President Bush issued an executive order that eliminated the designation of air-controller tasks as inherently governmental.<sup>88</sup> This order paved the way for the privatization of Federal Aviation Administration (FAA) air controllers; it therefore surprised few when Bush began to press the FAA in the summer of 2003 to privatize air traffic control at sixty-nine control towers.<sup>89</sup> On October 4, 2002, the Secretary of the Army, Thomas E. White, directed his management officials, in the name of national security, to submit plans by December 20, 2002, to privatize or outsource approximately two-thirds of the civilian workforce employed by the army.<sup>90</sup> In response to these sweeping moves toward privatization of federal government services, thirty-five senators signed a letter to the Office of Management and Budget expressing their "strong concerns over the Administration's unprecedented plan to privatize the jobs of

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85 *Review the Findings of the Commercial Activities Panel: Hearing before the Subcomm. on Technology and Procurement Policy of the House Comm. on Government Reform, 107th Cong. (Sept. 27, 2002)* (statement of Angela B. Styles, Administrator for Federal Procurement Policy).

86 In the Congressional debate over the Transportation Security Administration, Senator Hollings made an impassioned speech against privatization of federal personnel in sensitive areas such as air traffic control and defense, citing grave security concerns. Within a few months of the speech, however, the Bush administration sought to privatize the very air traffic controllers and Department of Defense personnel whose privatization Senator Hollings had considered absolutely unthinkable. "We would not think for a second of privatizing the air traffic controllers . . . They wanted to privatize over at the Defense Department and they said: You are not privatizing anything over here. We are engaged in security. They cannot be made contract employees." 147 Cong. Rec. S10129 (daily ed. Oct. 3, 2001).

87 Press Release, Public Employees for Environmental Responsibility, Gale ("Typhoon") Norton Wreaks Havoc at Interior Disastrous First Year, Say Employees (Jan. 29, 2002), available at <http://www.peer.org/press/207.html>.

88 Exec. Order No. 13,264, 67 Fed. Reg. 39243 (June 6, 2002).

89 Associated Press, *Air Traffic Controllers Battle White House over Privatization*, FOXNEWS.COM (Aug. 22, 2003), available at <http://www.foxnews.com/story/0,2933,95479,00.html>; Harry Kelber, *Bush Targets Air Traffic Controllers in Campaign to Privatize Federal Jobs*, LABOR TALK (Aug. 20, 2003).

90 Christopher Lee, *Army Weighs Privatizing Close to 214,000 Jobs; One in Six Workers Could Be Affected*, WASH. POST, Nov. 3, 2002, at A1; Associated Press, *Army Considers Privatizing More than 200,000 Jobs*, ST. LOUIS POST-DISPATCH, Nov. 4, 2002, at A.3. However, since the resignation of Secretary White in April 2003, the Army has indefinitely suspended the plan, which had been nicknamed the Third Wave of contracting out. See Christopher Lee, *Army Outsourcing Put on Hold; Plan for Jobs Came to Halt After White's Resignation*, WASH. POST, Jan. 5, 2004, at A15.

850,000 federal employees—nearly half of the federal workforce.”<sup>91</sup> But this opposition, lacking a majority, has not stopped the Bush Administration, which continues to push its competitive outsourcing goals.<sup>92</sup>

### A. *Transportation Security Administration Employees Lack Basic Labor Rights*

The creation of the Transportation Security Administration (TSA) and the resulting condition of its workforce is perhaps the most obvious example of the Bush Administration’s use of the terrorist attacks as a pretext for an assault on employee rights. After September 11, 2001, Americans clearly recognized the failures of the private sector screening workforce and responded by calling for the federalization of those functions. President Bush opposed the federalization of the entire screening workforce. After all, his campaign promise was to reduce the size of the federal civilian workforce; the federalization of the entire screening workforce would increase considerably the size of the federal government workforce and be contrary to the goals of competitive outsourcing. Instead, he supported the Young amendment, which would give federalized employees oversight of the private screening force. This was one of the rare instances after September 11, however, where the public held firm, notwithstanding the desires of the Bush Administration. As a result, a compromise was reached: the entire screening workforce would be federalized until November 2004. Thereafter, the airports would have the right to “opt out” of a federalized workforce.

#### 1. Legislative History

In creating the Transportation Security Administration, Congress identified the lack of a dedicated and trained screening workforce as the underlying cause of a compromised airport security. As Senator John McCain (R-Az) pointed out:

The average turnover, because of the low pay in salary and benefits, at major airports is 125 percent per year. At one airport it is as high as 400 percent per year, but that is because the people who now are employed as

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91 Letter from Ted Kennedy, et al., to Mitchell Daniels, Director, Office of Management and Budget (Feb. 4, 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=195>.

92 On May 29, 2003, OMB announced its revised Circular A-76, which streamlines the process of competitive outsourcing. See Press Release, AFGE, AFGE and Lawmakers Fight Bush Administration Efforts to Privatize the Jobs of Seafood Inspectors (June 16, 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=249>; Press Release, AFGE, House Lawmakers Oppose Privatization of National Park Service (NPS) Jobs (June 17, 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=250>; and Press Release, AFGE, OMB’s Privatization Quota is Still Very Much Alive (July 25, 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=262>.

screeners can make more money by going down and working at a concession at the same airport . . . [and screeners] are low paid, and they are ill-trained.<sup>93</sup>

Representative Allen (D-Me.) made the same point in the House:

What we have here across the country is a system with private companies hiring people at the lowest possible wages with no benefit [sic]. The system is broken, it does not work, and the public knows that. . . . [T]he turnover in these screening positions is 126 percent a year. That means the average screener is on the job for 9 months. It is not possible to have a well-trained, well-educated work force with that kind of turnover . . . . [I]n Portland, Maine, where I come from, they have not been able to hire enough security screeners to deal with the crush of people because they pay \$7.50 an hour and they will not pay a penny more. It needs to change.<sup>94</sup>

Congress resolved that committed and qualified personnel were necessary for the improvement of screening security. Senator Paul Sarbanes (D-Md) averred:

Federalizing security operations throughout U.S. airports is the best answer for improving screener performance. It would raise wages, lower employee turnover, promote career loyalty among screeners, create uniform training among security personnel, and, as a result, strengthen the performance of screeners to discover dangerous objects.<sup>95</sup>

It was believed that improving the working conditions of screeners would have a direct, positive result upon security. Because private companies were not providing a quality workforce due to poor work conditions, Congress concluded that allowing the screeners to remain privatized was harmful for national security. Thus, it decided the best means for improving these employment conditions was to federalize the workforce.

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93 147 CONG. REC. S10,434 (daily ed. Oct. 10, 2001) (statement of Sen. McCain). Senator McCain was not alone in identifying the problem that Congress sought to address in enacting the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001). Senator John Warner (R-Va.) asserted that "screeners are underpaid, overworked, and undertrained," making screening "haphazard." 147 CONG. REC. S11980 (daily ed. Nov. 16, 2001).

94 147 CONG. REC. H7776 (daily ed. Nov. 6, 2001) (statement of Rep. Tom Allen).

95 147 CONG. REC. S10446 (daily ed. Oct. 10, 2001) (statement of Sen. Paul Sarbanes); *see also* 147 Cong. Rec. H7773 (daily ed. Nov. 6, 2001) (statement of Rep. Wynn) ("If we want good screeners, we have to have good pay. We have to have benefits. It is clear that private companies, looking at the bottom line, will not provide this kind of pay, this kind of benefit, and provide us with the kind of quality screeners that we need.")

## 2. The Aviation Transportation Security Act Mandates that TSA Follow Federal Aviation Administration Personnel Procedures

On November 19, 2001, Congress passed the Aviation and Transportation Security Act (ATSA)<sup>96</sup> primarily in order to federalize security-screening operations for passenger air transportation and intrastate air transportation. The ATSA explicitly mandated that, within a year, the TSA shall deploy “a sufficient number of Federal screeners” to conduct the screening of all passengers.<sup>97</sup> Congress, intending to create a trained staff, itself enumerated employment and training standards. Regarding personnel management, the ATSA created a personnel system for the federal screeners that could be interpreted to exempt them from many civil service protections.

The ATSA explicitly mandated that the TSA would apply the personnel management system of the Federal Aviation Administration (FAA), as defined in 49 U.S.C. section 40122.<sup>98</sup> While the FAA system does not afford employees full civil service protections enjoyed by other federal employees, it still preserves many primary protections. The FAA system expressly incorporates the provisions of Title 5 relating to labor-management relations.<sup>99</sup> These include the right to form, join, or assist any labor organization, and the right to engage in collective bargaining.<sup>100</sup> Additionally, the FAA’s personnel management system expressly incorporates the provisions of Title 5 relating to veterans’ preference; whistleblower protections; anti-discrimination protections; workers’ compensation protections; retirement, unemployment compensation, and insurance coverage; and appeal rights to the Merit Systems Protection Board for adverse personnel actions.<sup>101</sup> The FAA is also bound by the Fair Labor Standards Act, (FLSA) and is subject to the Office of Personnel Management (OPM) for adjudication of alleged FLSA violations.<sup>102</sup>

In addition, the ATSA preserved recognition of veterans’ preferences as part of the employment standards for screening personnel, particularly for hiring.<sup>103</sup> Lastly, in a statutory note, the ATSA stated that “notwithstanding any other provision of law,” the TSA Administrator may “employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal

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96 Pub. L. No. 107-71, 115 Stat. 597 (2001).

97 *Id.* at §110(c)(1).

98 *Id.* at §101(n).

99 *See* 49 U.S.C. § 40122(g)(2)(C) (2004).

100 5 U.S.C. § 7102(1) and (2) (2004).

101 49 U.S.C. § 40122(g)(2-3) (2004).

102 *See, e.g.*, U.S. Office of Personnel Mgmt., Office of Merit Systems Oversight and Effectiveness, Classification Appeals and FLSA Programs, OPM decision no. F-2101-H-01 (Jan. 16, 2002).

103 Pub. L. No. 107-71, § 111(2)(f)(2).

service for [airport screeners, and] shall establish levels of compensation and other benefits for individuals so employed.”<sup>104</sup>

The TSA has argued in federal court and before the Federal Labor Relations Authority<sup>105</sup> that the foregoing language signifies that while it follows FAA policies with respect to its employees in general, it is not bound to FAA policies with respect to security screeners. The TSA unabashedly argues this, notwithstanding the fact that security screeners are an overwhelming percentage of their agency. As a result, TSA has declared itself exempt from the FSLMRS, MSPB adjudication in all matters including whistle-blowing appeals, merit system promotion protections, OPM adjudication of compensation and leave, the Veterans Opportunity in Employment Act, and the FLSA.

### 3. Court Holds that TSA Employees Lack Right to Unionize

Based on TSA’s interpretation of section 111(d), set out as a statutory note to 49 U.S.C. § 44935, on January 8, 2003, then Under-Secretary Loy issued a directive that federally employed airport screeners “shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purposes of engaging in such bargaining by any representative or organization.”<sup>106</sup> Given that TSA had not been served with a request to bargain, the clear implication of the directive was that employees should not undertake to organize.<sup>107</sup> Indeed, in many instances, TSA management officials interpreted the directive as proscribing otherwise permissible organizing activities; and the order has had an undeniable chilling effect on federal screeners’ constitutionally protected right to organize.<sup>108</sup>

In response to this directive, AFGE filed suit,<sup>109</sup> seeking a declaration that the directive was *ultra vires*, was contrary to the ATSA, deprived affected federal employees of their constitutional rights to free speech and association under the First Amendment and to equal protection under the Fifth Amendment, and constituted an arbitrary and capricious agency action in violation of the Administrative Procedure Act.<sup>110</sup> The TSA argued that the court was without jurisdiction to rule on the Loy directive on the grounds that the FSLMRS preempted judicial review by giving the FLRA exclusive authority to resolve the question. In the

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104 Pub. L. No. 107-71, §111(d).

105 See AFGE v. Loy, 281 F. Supp. 2d 59 (D.D.C. 2003), *aff’d*, AFGE v. Loy, 367 F.3d 932 (D.C. Cir. 2004); U.S. Dep’t of Homeland Security, Border and Transportation Security Directorate, TSA and AFGE, 59 FLRA No. 63, 13 (2003).

106 See AFGE v. Loy, 281 F. Supp. 2d 59.

107 *Id.* See AFGE’s Opposition to Defendant’s Motion to Dismiss, at 15 (on file with AFGE).

108 Declarations on file with AFGE.

109 See AFGE v. Loy, 281 F. Supp. 2d 59, 63 (D.D.C. 2003), *aff’d*, AFGE v. Loy, 367 F.3d 932 (D.C. Cir. 2004).

110 *Id.*

next breath, however, TSA maintained that the FLRA was also without jurisdiction. In a footnote, the TSA explained that it regarded its decisions with respect to screeners' rights to bargain as unreviewable:

Plaintiffs cannot seek to override that congressionally established scheme by arguing that TSA denies the jurisdiction of the FLRA. TSA's argument that the FLRA lacks jurisdiction, properly understood, is perfectly consistent with the theory that this Court also has no jurisdiction. TSA has not argued that the FLRA is merely the wrong tribunal to consider AFGE's collective bargaining claims in the first instance. . . . TSA's argument is instead that, since section 111(d) exempts TSA from being required to bargain collectively, *no* tribunal can (properly) order such bargaining. If there is first-instance authority to order collective bargaining, that authority belongs to the FLRA or no one. That the correct answer is "no one" does not expand the question into multiple choice of fora.<sup>111</sup>

TSA also argued that its statutory construction interpretation of section 111(d), as exempting screeners from the few civil service protections guaranteed by the FAA personnel management system, was correct and entitled to deference.<sup>112</sup>

Opposing TSA's motion, AFGE argued that the FSLMRS did not preempt judicial review because the question of whether the Loy directive was lawful turned on statutory interpretation of the ATSA and constitutional interpretation, tasks not delegated to the FLRA.<sup>113</sup> The court ultimately decided in favor of TSA, dismissing the statutory claim for lack of subject matter jurisdiction<sup>114</sup> and the constitutional claims for failure to state a claim.<sup>115</sup> AFGE appealed the dismissal to the U.S. Court of Appeals for the District of Columbia Circuit.

On May 14, 2004, the U.S. Court of Appeals for the District of Columbia issued a decision which completely ignored the issues AFGE presented: whether the head of TSA went beyond his authority when he issued the directive prohibiting screeners from collective bargaining.<sup>116</sup> Instead, the Court agreed with the government that the FLRA had the right to first review whether the directive exceeded the agency's authority and/or violated the U.S. Constitution. The decision was not a complete loss, however, for AFGE, TSA screeners who would like to collectively bargain, or the labor movement. In an astounding paragraph, the Court continued to say that once the FLRA made such a review based on an election petition, but before conducting an election, the Court then could hear an

111 *Id.* at n.9 (emphasis added).

112 Defendant's Motion to Dismiss at 3, 16-22 (on file with AFGE); *AFGE v. Loy*, 281 F. Supp. 2d at 63.

113 Plaintiffs' Opposition to Defendant's Motion to Dismiss at 9 (on file with AFGE); *AFGE v. Loy*, 281 F. Supp. 2d at 63.

114 *AFGE v. Loy*, 281 F. Supp. 2d at 63.

115 *Id.* at 65.

116 *AFGE v. Loy*, 367 F.3d 932 (D.C. Cir. 2004).

appeal.<sup>117</sup> With this ruling, the Court created law that conflicts with rulings in other parts of the country and expanded its right to review the FLRA. Nevertheless, until another case is procedurally posed to re-address the issue before the appellate court, the TSA security screeners remain bereft of the right to collective bargaining.

#### 4. TSA Working Conditions Reflect Lack of Bargaining Rights

Throughout 2002 and 2003, AFGE received an overwhelming response from TSA screeners around the country, describing working conditions that should not be tolerated in a modern civil service. These included: terminations for union activity; threats to terminate for union activity; terminations based on inaccurate suitability (criminal and credit history) determinations; inconsistent application of rules; cronyism; mandatory overtime without sufficient notice; late pay, wrong pay, or no pay; hazards to screener health; sexual harassment; no veterans' preference; and major affronts to worker dignity. Many of these problems had no avenue of redress, as meaningful grievance processes available to other federal employees are unavailable to TSA screeners.

The fundamental unfairness of depriving federal screeners of the right to engage in collective bargaining over workplace conditions was highlighted by an incident that occurred one spring day after Loy issued the directive.<sup>118</sup> The TSA employees worked side-by-side with employees of the Immigration and Naturalization Service (INS). The unionized INS employees, who were working in the same area as TSA baggage screeners, found that their dosimeters (instruments that measure exposure to radiation) were signaling elevated radiation levels. Pursuant to the INS and AFGE collective bargaining agreement, the INS employees notified their supervisor, who, pursuant to the agreement, ordered the INS employees to leave the area until it was established that it was safe to return. In contrast, the TSA screeners, who were not wearing dosimeters but who had been informed of the radiation alert by the INS employees, made the same appeal to their supervisors. The non-unionized TSA employees were ordered to stay at their posts.

##### a. *TSA Employees Are Deprived of Compensation and Leave Adjudication*

The Office of Personnel Management (OPM) adjudicates federal civilian employee claims against the United States involving compensation and leave. A claim may be submitted by a federal government employee or by the employee's administrative agency on the employee's behalf. The OPM website indicates that

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117 *Id.* at 935-36.

118 Personal communication by an AFGE official who works at the INS with Ms. Gony Frieder, in Washington, D.C. (Feb. 21, 2003).

OPM generally adjudicates compensation and leave claims under either Title 5 of the United States Code or the Fair Labor Standards Act (FLSA).<sup>119</sup>

OPM has refused, however, to adjudicate compensation and leave claims from TSA security screeners. Specifically, OPM refused to hear complaints arising from TSA's refusal to pay screeners for the time spent in the required training and orientation, flatly stating that "OPM does not administer FLSA [sic] for TSA."<sup>120</sup> Thus, TSA security screeners have no avenue for redress of pay concerns beyond internal mechanisms. Of course, had those internal mechanisms worked in the first place, the screeners would not have searched for external adjudication.

**b. *No Right to Representation for TSA Workers***

On November 3, 2003, the Federal Labor Relations Authority (FLRA) determined that the head of TSA "may in his unfettered discretion, among other things, set the terms and conditions of employment for employees carrying out 'screening functions' of the TSA."<sup>121</sup> Thus, the FLRA determined it did not have jurisdiction over AFGE's representation petitions. The FLRA noted that "collective bargaining" was not limited to bargaining. Rather, it "addresses the full array of representational activities by an exclusive representative. As such . . . the Under Secretary's action precludes the recognition of an exclusive representative for any and all representational activity permitted by chapter 71 of Title 5."<sup>122</sup>

With this determination, the FLRA eliminated all protections guaranteed by the FSLMRS, including, but not limited to, the right to have a representative at formal discussions. It is perhaps ironic, in this regard, that as the right to have a representative in the private sector has expanded to include not only employees represented by unions, but also those who are not so represented by unions, in the federal sector—as exemplified by TSA—the right to representation has been eliminated.<sup>123</sup> Indeed, TSA screeners who have attempted to act as representatives for their colleagues have been threatened with discipline.

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119 Available at <http://www.opm.gov/payclaims/index.asp>.

120 In April 2003, Ms. Frieder, an attorney with AFGE, instructed all TSA screeners who called her regarding this matter to file complaints with OPM until, on April 25, 2003, OPM responded via telephone call that "OPM does not administer FLSA for TSA."

121 U.S. Dep't of Homeland Security, Border and Transportation Security Directorate, TSA and AFGE, 59 FLRA No. 63, 13 (2003).

122 *Id.* at 16.

123 *Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.2d 1095 (D.C. Cir. 2001) (finding employer's denial of non-union employee's request that co-worker be present at investigatory interview which employee reasonably believed might result in disciplinary action constituted an unfair labor practice pursuant to the National Labor Relations Act). See also *Trompler, Inc. v. NLRB*, 338 F.3d 747 (7th Cir. 2003) (finding employees at non-union machine shop were engaged in protected concerted activity pursuant to the National Labor Relations Act when they walked off the job to protest supervisor's

### c. *Merit Systems Protection Board Refuses TSA Cases*

The Merit Systems Protection Board (MSPB) was established to protect federal merit systems from prohibited personnel practices and to ensure adequate protection for employees against abuses by agency management. One of the primary functions of the MSPB is to adjudicate employee appeals of adverse personnel actions such as removals, suspensions of more than fourteen days, furloughs, and demotions that cause a monetary loss.

The MSPB Administrative Law Judge (ALJ), however, refused to take jurisdiction over an otherwise appealable adverse personnel action brought by a TSA screener.<sup>124</sup> The TSA had demoted a screening supervisor after his Standard Form 50<sup>125</sup> stated that his probationary period had ended. In the letter of demotion, the TSA represented that the demotion had taken place during the probationary period, and that therefore the screener had no avenue of redress. Nevertheless, the screener appealed the demotion to the MSPB, asserting, in relevant part, that the demotion had occurred outside of his probationary period, and otherwise was not substantiated. The ALJ dismissed the appeal, citing lack of jurisdiction over TSA personnel decisions other than those based on whistleblower allegations. The ALJ ignored the dispute regarding the probationary period.<sup>126</sup> The appellant then petitioned the MSPB to review the ALJ's finding of lack of jurisdiction. The MSPB upheld the underlying decision and similarly ignored the dispute as to whether the appellant was probationary or non-probationary. Specifically, it found that the TSA had the right to discipline and/or terminate a security screener without review by the MSPB pursuant to the statutory note<sup>127</sup> granting the head of TSA authority to discipline and terminate security screeners.

The MSPB has also refused to review cases involving whistleblower retaliation. In *Schott v. Department of Homeland Security*,<sup>128</sup> the MSPB declined to review individual rights of appeals brought by TSA security screeners alleging whistleblower retaliation. This decision eliminated the security screeners' protection from whistleblower retaliation.

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failure to protect employees' rights); *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986) (finding NLRB interpretation that unorganized employees have the right to representation at formal meetings is permissible but not required).

124 *Brooks v. Dep't of Homeland Security*, 95 M.S.P.R. 464 (2004).

125 Standard Form 50 is a government form issued after a change in personnel status. It can indicate, for example, a change in grade or step, a change from temporary to permanent employment status, termination and/or resignation.

126 Whether an employee is a probationary employee or not is important in that it determines whether due process is required when the government takes an adverse personnel action.

127 ATSA, Pub. L. No. 107-71, § 111(d) (2001).

128 *Schott v. DHS*, 97 M.S.P.R. 35 (2004) (on file with AFGE).

**d. Labor Department Fails to Adjudicate Veterans' Preference Violations**

On January 14, 2002, Representative Evans, Ranking Member of the Committee on Veterans' Affairs, requested information on how veterans' preference would be administered in the TSA.<sup>129</sup> In an April 9, 2002 response, the Secretary of Transportation responded that the TSA would apply both the traditional veterans' preference provisions outlined in Title 5 of the United States Code and the preference created in the ATSA itself, which defined "preference-eligible" in a manner different from Title 5.

However, many veterans reported either that the TSA did not apply veterans' preference, or that the preference was applied incorrectly in the hiring process and/or in the amount of leave benefits received, once employed.<sup>130</sup> Typically, federal employees who believe their veterans' preference rights have been violated may seek information and/or file a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS). Complaints must be filed in writing within sixty days of the alleged violation. Mr. Troy Moore, TSA Security Screener, reported that, despite complying with these requirements, the Department of Labor has closed his complaint without resolution because TSA refused to respond.<sup>131</sup>

**B. Bush Demands "Flexible" Personnel Policies in the Department of Homeland Security**

On November 25, 2002, Congress enacted the Homeland Security Act (HSA),<sup>132</sup> creating a new cabinet-level department. By combining twenty-two federal agencies and 170,000 employees into the massive new Department of Homeland Security (DHS), the Act launched the largest government reorganization since 1947.

A significant and hotly contested issue during the debate on creation of the new Department concerned the supposed need for additional personnel flexibility in connection with managing employees of the DHS. In July 2002, the President met with Congress to discuss his opinions on the future Department of Homeland Security.<sup>133</sup> President Bush was candid and vocal about his insistence on manager flexibility in the new Department.

[A]s Congress debates the issue of how to set up this department, I'm confident they're going to look to me to say, well, is it being done right, after

129 Press Release, Lane Evans (Jan. 15, 2002), available at <http://veterans.house.gov/democratic/press/107th/1-15-02screeners.htm>.

130 Veterans' preference increases the rate of leave accrual.

131 Telephone conversation of Mr. Troy Moore with Ms. Gony Frieder (Sept. 24, 2003).

132 Pub. L. No. 107-296 (2002).

133 Ari Fleischer, Press Briefing, July 23, 2002, available at <http://www.whitehouse.gov/news/releases/2002/09/20020923-1.html>.

they got the bill passed. And, therefore, it is important that we have the managerial flexibility to get the job done right. We can't be—we can't be micro-managed. We ought to say, let's make sure authority and responsibility are aligned so they can more adequately protect the homeland. The new Secretary must have the freedom to get the right people in the right job at the right time, and to hold them accountable. He needs the ability to move money and resources quickly in response to new threats, without all kinds of bureaucratic rules and obstacles. . . . The bill doesn't have enough managerial flexibility, as far as I'm concerned. . . . [We need] to make sure that when we look back at what we've done we will have left behind a legacy, a legacy that will allow future Senators and future members of the House and a future President to say, I can better protect the homeland thanks to what was done in the year 2002.<sup>134</sup>

While politicians debated the formation of the Department of Homeland Security, the public wanted to be sure that the right hand knew what the left hand was doing. In March 2002, the media trumpeted the story that the Immigration and Naturalization Service (INS) had just approved visas for study at a Florida flight school—for Mohamed Atta and Marwan Alshehhi, two of the September 11 terrorists.<sup>135</sup> Some Republican representatives quickly accused INS employees of being “completely and totally dysfunctional,”<sup>136</sup> and of being unable “to enforce our laws and protect our borders.”<sup>137</sup> But, in reality, the obviously suspect letters had been sent by Affiliated Computer Services, Inc., a private contractor to the INS.<sup>138</sup> The vilification of federal employees quickly became the favorite pastime of some in Washington, D.C., and assisted the Bush administration's efforts in eliminating important worker protections as part of one of the most far-reaching government reorganizations in American history.<sup>139</sup>

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134 George W. Bush, Remarks on Proposed Legislation to Establish the Department of Homeland Security, PUB. PAPERS (July 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020726-1.html>.

135 See, e.g., Kevin Johnson, *Mail from INS Stuns Flight School; Six Months After 9/11; Letters Say Hijackers's Student Visas Approved*, USA TODAY, Mar. 13, 2002, at A3; Mike Brassfield & Chuck Murphy, *Dead Terrorists Earn U.S. Student Visas*, ST. PETERSBURG TIMES, Mar. 13, 2002, at 1A; Editorial, *Open Mail, Insert INS; The Agency has Invented a Whole New Class of Ineptitude with Posthumous Approval of Visas for Sept. 11 Terrorists*, PORTLAND OREGONIAN, Mar. 14, 2002, at B6; Dan Eggen & Mary Beth Sheridan, *Terrorist Pilots' Student Visas Arrive; Officials Blame 'Antiquated' System for Delay of Paperwork*, WASH. POST, Mar. 13, 2002, at A1.

136 Press Release, AFGE, *Contractor Sent Visas to Terrorists* (Mar. 14, 2002), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=110>.

137 *Id.*

138 *Id.*

139 When it appeared that the Senate version of the bill would be passed without the flexibility President Bush had desired, Ari Fleischer stated at a press meeting:

The President has made it very clear directly to the Congress . . . that he will refuse to accept a bill that limits the flexibility necessary to run the department of homeland security in a way

As demanded by the administration, the HSA strips workplace protections already extant in law in the name of managerial flexibility. Section 841 of the HSA authorized the establishment of a new Human Resource Management System and provides the Administration with the unfettered authority to modify Title 5 of the United States Code in each of the following areas: pay, job classification, performance, disciplinary actions, appeals, and labor-management relations.<sup>140</sup>

Because of forceful lobbying by unions representing federal employees, however, the HSA created a process that would allow employees, through their representing unions, to collaborate in the development of the new system, while leaving the Secretary of DHS with the final authority to impose changes, even over objections from unions or other employee representatives. Thus, after the passage of the Act, DHS officials began meeting with OPM and unions to develop a revised personnel system. As this issue goes to press, DHS management has abandoned the attempt to develop the new policies with union input through mediation facilitated by the Federal Mediation and Conciliation Service.<sup>141</sup> Department representatives label the mediation a failure, and state that the policies should be developed by the Office of Personnel Management Director and DHS Secretary in direct negotiations with union leaders.<sup>142</sup> Representatives of the National Treasury Employees Union drafted a letter to congressional leaders, seeking their help in bringing DHS back to the bargaining table.<sup>143</sup> More than a year after the passage of the HSA, the new personnel system remains unestablished.

### C. *Policies of DHS and TSA May Spread*

Like a domino effect, the gutting of personnel protections within TSA and DHS has caused the Department of Defense (DoD) to evaluate their personnel protections. On April 10, 2003, the DoD formally requested that Congress enact the proposed "Defense Transformation for the 21st Century Act of 2003" creating a so-called "National Security Personnel System" (NSPS) just for DoD. On November 12, 2003, the Senate followed the House in approving the 2004 De-

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that protects the homeland. . . . The President is asking for the same flexibility that other agencies have, the same management flexibilities, same abilities to hire and fire as necessary, to have an agency that is a frontline agency able to carry out and fight and win a war to protect the American people on the homeland.

Ari Fleischer, Press Briefing, Office of the Press Secretary of the White House, Sept. 3, 2002, available at <http://www.whitehouse.gov/news/releases/2002/09/20020903-1.html>.

140 Pub. L. No. 107-296 (2002).

141 Shawn Zeller, *Unions Seek to Force DHS to Keep Negotiating on Personnel Rules* GOVEXEC.COM DAILY BRIEFING (Aug. 25, 2004), available at <http://www.govexec.com/dailyfed/0804/082504sz1.htm>.

142 *Id.*

143 *Id.*

fense Authorization Act, giving DoD the requested, unprecedented personnel authority. The President soon thereafter signed the measure into law.<sup>144</sup>

While ostensibly preserving employees' statutory right to engage in collective bargaining, the DoD Act in fact eliminates the union's ability to bargain effectively—particularly at the local level—through a variety of mechanisms. These include forcing some bargaining to the national level, eliminating the obligation to bargain over the implementation of operational decisions, and using national security as an excuse to take away the collective bargaining rights of many employees. It also limits employee challenges to personnel actions to an internal appeals process, thus depriving hundreds of thousands of employees of third-party review.<sup>145</sup> After an outcry from federal employees and the unions representing them, in or about April 2004, Secretary Rumsfeld repealed a concept paper explaining the implementation of the NSPS and appointed a new officer to preside over the creation of a new concept paper.

#### CONCLUSION

There is no doubt that regardless of the administration, the events of September 11 would have caused any President to evaluate how to use its federal civilian workforce to best protect the interests and citizens of the United States. However, President Bush's evaluation smacks more of an acceleration of his previous anti-labor and anti-federal employee goals in the guise of national security than a true deliberation of how best to protect America.

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144 Pub. L. No. 108-136 (2003).

145 *Id.*

# BALANCING SECURITY AND ACCESS IN THE NATION'S CAPITAL: MANAGING FEDERAL SECURITY-RELATED STREET CLOSURES AND TRAFFIC RESTRICTIONS IN THE DISTRICT OF COLUMBIA

DC Appleaseed Center for Law and Justice\*

## NOTE FROM THE EDITOR:

This report was prepared in December 2003 in order to stimulate a dialogue on the role the District of Columbia government should play with the federal government in attempting to achieve an appropriate balance between physical security and open access to public space when deciding on traffic restrictions around or near federal buildings or federal sites in the District of Columbia. A summary of this report was presented at the UDC/DCSL Law Review November 2003 symposium "In the Aftermath of September 11: Defending Civil liberties in the Nation's Capital." Since this report was prepared there has been an ebb and flow of traffic restrictions imposed and rescinded at various times in line with varying security concerns, usually with little prior consultation with the District government. This report is presented here largely as it was written in December 2003, without attempting to update it to reflect subsequent developments. While the details of the restrictions may change from day to day, the basic concerns outlined in the report and the recommendations for improving coordination between the federal and District governments are still relevant today.

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## I. EXECUTIVE SUMMARY

The appropriate balance between physical security and open access to public space is elusive in this post-September 11th world. This paper is designed to facilitate discussion of the role the District of Columbia government should play with the federal government in attempting to achieve an appropriate balance when deciding on traffic restrictions around or near federal buildings or federal sites in the District of Columbia. The paper examines the history of federal road closures and traffic restrictions in the District, noting current key restrictions and the groups and taskforces that have been convened to discuss, implement, and/or make sense of those restrictions. The paper then analyzes the question of the District's proper role in the federal security-related decision making process.

The paper concludes that if the District were involved in the process the way it should be, some suggested restrictions either would not be made or would be made differently. Other restrictions, if they were implemented, could be implemented more effectively.

The paper recommends:

1. The complex web of interjurisdictional agreements related to security street closure and traffic restriction issues should be formalized and clarified;
2. A joint federal-District group should be established to evaluate security concerns and weigh the costs of diminishing freedom, access, mobility, and convenience;
3. A mechanism should be established that allows for temporary emergency street closings yet requires pre-approval for permanent street closings.

The paper explains why a collaborative, well-coordinated process would maximize safety, minimize disruption, and ensure effective response to any future perceived or real security threat.

## II. INTRODUCTION

During rush hour on the clear, cool morning of March 17, 2003, disgruntled and discouraged fifty-year-old North Carolina tobacco farmer Dwight W. Watson drove himself and his John Deere tractor to the nation's capital. Like so many citizens before him, he came to Washington to protest. And like so many before him, he chose the National Mall as his venue.<sup>1</sup> Shortly after arriving on the Mall, Watson drove into a pond north and west of the Washington Monument and just south of Constitution Avenue, and let it be known that he intended to blow himself up and whatever part of Washington, D.C., he could with him.<sup>2</sup>

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<sup>1</sup> See David Nakamura & Allan Lengel, *Tractor Driver in Standoff with Police on Mall; N.C. Man Claims to Have Explosives*, WASH. POST, Mar. 18, 2003, at B1.

<sup>2</sup> *Id.*

The Mall is national park land, under the jurisdiction and control of the National Park Service (NPS). NPS Park Police officers arrived at the scene and assumed control of the operation shortly after “Tractorman,” as he was soon dubbed by the media, made his violent intentions known. The Park Police were joined by every major federal and local law enforcement agency in the city, including the Metropolitan Police Department (MPD), swelling the ranks of law enforcement officers on the scene to approximately two hundred.<sup>3</sup> By the time traffic management officials from the District’s Department of Transportation (D. Dot) were called to the scene, federal authorities had established a security perimeter that included closing: Constitution Avenue between 15th Street and 23rd Street, N.W., north of the Mall; parts of Independence Avenue, S.W., south of the Mall; and parts of Virginia Avenue, N.W., north of Constitution Avenue. In addition, a portion of 17th Street, N.W., north of Constitution Avenue was being used as a staging area for the police. Traffic was shut down in this very wide area without any consultation with District traffic officials. Traffic was brought to a standstill, not just in the area around the Mall, but in large portions of the entire southern and western metropolitan region.<sup>4</sup>

The Tractorman incident came at a time when the District, and indeed the entire country, was at a heightened state of alert due to fears of terrorism—coming as it did on the eve of American military action in Iraq. The nation’s “Terror Alert Level” had recently been elevated to “Code Orange,” the second highest in the U.S. Department of Homeland Security’s five levels of alert. No one was in a mood to take any chances with Tractorman, so law enforcement officials on the scene gave him a wide berth and decided to wait him out. In the meantime, no traffic moved near the western end of the Mall for three days.<sup>5</sup>

The traffic tie-ups during the Tractorman incident were exacerbated by the federal closure and restrictions of traffic on key thoroughfares in the general area of the Mall, including Pennsylvania Avenue, N.W., and E Street, N.W., north and south of the White House respectively. Those other closed roads, closed in the wake of the events of September 11, 2001, and the bombing of the Murrah Federal Building in Oklahoma City in 1995, might otherwise have helped serve as alternate routes around the Mall. But with them closed, there simply was no place for traffic to go, especially in an east-west direction.<sup>6</sup>

After three days, Tractorman gave himself up, and it turned out that he possessed no explosives. However, although he may not have had or used tangible weapons, the fear, chaos, and disruption his stunt created arguably caused as

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3 See Arlo Wagner, *Standoff on the Mall Tests Patience of Police*, WASH. TIMES, Mar. 19, 2003, at B1.

4 See Katherine Shaver, *Mall Standoff Fuels Evacuation Fears; Traffic Tie-Ups Illustrate Road System’s Vulnerability*, WASH. POST, Mar. 19, 2003, at B1.

5 See *id.*

6 See *id.*

much psychological, financial, and emotional damage as any bomb could have. The region suffered through several of the worst rush hours in the history of the nation's capital. Trucks could not deliver their goods, ambulances could not get through, and fingers pointed blame everywhere. People throughout the area questioned aloud how, if one deranged man on a tractor could cause so much trouble, what kind of trouble a band of dedicated terrorists could cause?<sup>7</sup>

What if District traffic officials had been called in earlier? Could security concerns have been more carefully balanced against the need for public access? According to District officials, the answer is "yes." The District has access to scores of mobile variable message boards, lighted signs that can inform motorists of problems ahead and suggest alternate routes. The District controls the timing of traffic lights throughout the city and District officials are in regular contact with their counterparts in Maryland and Virginia who have access to similar tools to manage traffic. And the District is in regular contact with public information officers from all District agencies, who can get the word out to the public about not just an immediate situation, but also appropriate alternative routes designed and coordinated to facilitate traffic flow throughout the city. During the incident, Independence Avenue was eventually reopened, as was Virginia Avenue. An early careful balancing of the marginal safety improvements gained by closing these two roads against the extreme difficulties caused by their closing (especially in the greater context of all the other road closings) might have resulted in those two roads not having been closed in the first place.

Accordingly, if District officials had been involved earlier, the traffic situation would almost certainly have been eased somewhat. Due to the nature and duration of the Tractorman incident, traffic would have been tied up no matter what. But greater coordination with the District would have facilitated the improvement of traffic conditions in the District and throughout the region.

This incident illustrates a larger issue in the District. Since September 11, 2001, the three branches of the federal government and their constituent agencies have implemented numerous security-related changes that have profoundly impacted negatively on people's daily lives. In Washington, D.C., a major target of terrorist threats, federal agencies have imposed restrictions on access to public space and have exercised control over vehicular and pedestrian traffic by closing streets, limiting access to public buildings, and imposing parking restrictions.<sup>8</sup> Like the actions taken during the Tractorman incident, many of these restrictive actions were abruptly taken without consultation or coordination with the District government. And although many of these other restrictions were once viewed as temporary, most now appear to have become permanent.

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7 See *id.* and *infra* note 70.

8 Current key closures and restrictions at <http://www.dc.gov/closures>.

These restrictions, combined with earlier security restrictions imposed in the District following the bombing of the Murrah Building, have had far-reaching impact. Symbols of our democracy—such as the White House, the Capitol, and Pennsylvania Avenue—have been adversely affected. Traffic congestion in the heart of downtown Washington has intensified, adding up to forty-five minutes to a cross-town trip.<sup>9</sup> This congestion has led to what traffic planners describe as “failed corridors” and “failed intersections” on every street around the White House.<sup>10</sup> These traffic tie-ups have created more than just disruption, inefficiency, and inconvenience for commuters, businesspeople, residents, and shoppers; the tie-ups have created significant public safety problems.<sup>11</sup> Pedestrians must negotiate a maze of barriers, some of which obscure the view of oncoming traffic; drivers are forced to navigate detours and altered traffic patterns, as well as concrete barriers adjacent to roadways. Perhaps most notably, street closures and traffic tie-ups have a tremendous impact on overall mobility, affecting the time it would take the general public to reach safe areas—or evacuate unsafe areas—in the event of a genuine emergency.

In addition, the restrictions have had a significant economic impact. Local businesses have reported that a combination of increased traffic from closed roads and the limitations on truck movement have cost them time, efficiencies, and money.<sup>12</sup> And correspondingly, the restrictions have limited the ability of residents, commuters, and visitors to move about the city. Taken together, the restrictions imposed by the federal government have placed great strains and costs on those who live in, work in, and visit Washington, D.C.

Federal government entities will and must make national security determinations. But any local security measure taken in response to national security de-

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9 For example, Pennsylvania Avenue between 15th and 17th Streets, N.W., handled approximately 26,000 daily car trips at the time it was closed in 1995. See INTERAGENCY TASK FORCE, NAT'L CAPITAL PLANNING COMM'N (NCPC), PENNSYLVANIA AVENUE TRAFFIC ALTERNATIVES ANALYSIS, at 1.1 (Oct. 2001) [hereinafter NCPC PENNSYLVANIA AVENUE TRAFFIC ALTERNATIVES ANALYSIS]. E Street south of the White House handled approximately 12,000 daily car trips. See *id.* Now that both Pennsylvania Avenue and E Street are closed, that traffic must be detoured to the surrounding streets, which already were carrying a maximum load. See *Emergency Preparedness in the Nation's Capital: Hearing Before the Subcomm. on the Dist. of Columbia, Comm. on Gov't Reform*, 107th Cong. (2001) (statement of Mayor Anthony Williams). See also BRUCE HOFFMAN ET AL., RAND, SECURITY IN THE NATIONS CAPITAL AND THE CLOSURE OF PENNSYLVANIA AVENUE: AN ASSESSMENT 2 (2002) [hereinafter RAND REPORT].

10 NCPC PENNSYLVANIA AVENUE TRAFFIC ALTERNATIVES ANALYSIS, *supra* note 9, at 5.2 & 5.3.

11 See also NCPC, THE NATIONAL CAPITAL URBAN DESIGN AND SECURITY PLAN 10 (Oct. 2002) [hereinafter NCPC URBAN DESIGN AND SECURITY PLAN] (noting that “improvements to traffic flow also provide safety benefits related to faster emergency response time and evacuation times, if and when necessary”).

12 See Jon Ward, *Truckless Day Goes Quietly on 17th Street*, WASH. TIMES, Aug. 10, 2002, at A8; see also RAND REPORT, *supra* note 9, at 2.

terminations—including efforts to streamline the measure's effectiveness and minimize the disruption and costs that these decisions impose—should be informed by the knowledge and timely input of District officials. Those officials have a unique understanding and special expertise that should be utilized when, based on national security considerations, federal officials propose street closings and related restrictions on public access. If District officials had been consulted, some proposed restrictions could be implemented differently or avoided altogether. A process that allows timely input by District officials would allow the federal government to both make and implement more effective national security decisions. A collaborative, well-coordinated process would maximize safety, minimize disruption, and ensure effective response to any future perceived or real security threat. This report explains why this is so.

This report reviews the most significant federal pedestrian and vehicular security-related traffic restrictions imposed in the District during the past two decades, examines the federal and local entities with authority over the subject matter, and explains why the District should play a significant and collaborative role in these activities. The report also presents a series of recommendations on how security-related traffic restrictions should be formulated in the future. We believe that these recommendations will help further the goal of protecting the infrastructure and personnel of the federal government in Washington, D.C., in a way that, to the maximum extent possible, maintains the well-being and protects the free movement of the District's citizenry, commuters, and visitors.

### III. METHODOLOGY

In the fall of 2002, the DC Applesseed Center for Law and Justice initiated this project, requesting the assistance of a project team composed of members of the DC Applesseed staff and Board of Directors and attorneys from the law firm of Arnold & Porter LLP. The project was precipitated by the federal ban of truck traffic and strict "no parking" enforcement on 17th Street, N.W., south of Pennsylvania Avenue, and also by a similar security-inspired ban on demonstrations across the street from the White House in Lafayette Park.<sup>13</sup> The District was offered no consultative role in these federal actions. It is now clear that systematic coordination between the federal and District governments would present an opportunity for more effective implementation of road closings and related actions.

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13 The Council of the District of Columbia's Committee on the Judiciary, through public hearings and legislation, has addressed constitutional and civil rights issues associated with protests in the District. See COUNCIL OF THE DISTRICT OF COLUMBIA, COMM. ON THE JUDICIARY, PUBLIC ROUNDTABLES, Nov. 16, 2001, and Jan. 24, 2002; Omnibus Anti-Terrorism Act of 2002, 49 D.C. Reg. 10012, (Nov. 8, 2002). See also COUNCIL OF THE DISTRICT OF COLUMBIA, COMM. ON THE JUDICIARY, REPORT ON BILL 14-373, THE OMNIBUS ANTI-TERRORISM ACT OF 2002 (Apr. 4, 2002).

The Office for National Capital Region Coordination (ONCRC) within the U.S. Department of Homeland Security was created to “oversee and coordinate Federal programs for and relationships with state, local, and regional authorities in the National Capital Region.”<sup>14</sup> Issuance of this report is timed to be available as that office creates its regional plan for the National Capital area.

In addition to extensive legislative and legal research, the project team interviewed staff and discussed this report with a wide array of public and private officials, including those in: the Office of Congresswoman Eleanor Holmes Norton; the office of the City Administrator of the District of Columbia; the office of the District’s Deputy Mayor for Public Safety and Justice; the D.C. Metropolitan Police Department; the D.C. Fire Department; District Department of Transportation (D. DoT); the D.C. Emergency Management Agency (EMA); the Office of National Capital Region Coordination of the Homeland Security Department (ONCRC); the Capitol Police; the Council of the District of Columbia; and business and civic leaders in the District.

#### IV. BACKGROUND

##### A. *Historical Summary*

Increased security around government facilities has occurred throughout the nation over the last decade in response to security threats. But the restrictions undertaken by federal agencies in the District have had more lasting effects than in other cities because the sheer number and size of federal offices in the District make provision of security for these buildings far more likely to cause spillover effects on surrounding commercial and residential neighborhoods.<sup>15</sup> The situation in the District is further complicated by its unique governmental structure. Under the U.S. Constitution, Congress possesses plenary authority over District affairs, and the federal government thus asserts greater control over areas around federal buildings in the District than it does in other jurisdictions.<sup>16</sup>

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14 Homeland Security Act of 2002, Pub. L. No. 107-296, § 882, 116 Stat. 2135, 2246.

15 Many federal and District agencies and entities have their own police forces. See *Hearing before the Subcomm. on the Dist. of Columbia of the Comm. on Gov’t Reform*, 106th Cong. 1-4 (Sept. 20, 2002) (statement of George Vandenburg); see App. B.

16 See U.S. CONST. art. I, § 8, cl. 17 (“Congress shall have the power to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States . . . .”); *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 76 (1982) (“[C]ongress’ power over the District of Columbia encompasses the *full* authority of the government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative.”). Unlike other provisions of the federal Constitution, the District Clause also provides general police power authority. See *Palmore v. United States*, 411 U.S. 389, 397 (1973) (“[C]ongress may . . . exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes.”); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108 (1953)

According to the Home Rule Act<sup>17</sup>—and consistent with prior delegations of authority by Congress—the District government has “exclusive jurisdiction” over most of the local streets and highways within the District.<sup>18</sup> After over one hundred years of controlling the city’s streets and highways, the District government has developed several entities designed to evaluate the necessity of closures and restrictions and the ramifications of such actions. The District also maintains an agency, the sole task of which is responding to local emergencies.<sup>19</sup> A comprehensive regulatory scheme for both temporary and permanent restrictions on street use governs the areas under municipal jurisdiction.<sup>20</sup> This complex regulatory scheme is well-designed to protect the rights of property owners, but was not developed with a view toward security-justified constraints.

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(“The power of Congress over the District of Columbia relates . . . to all the powers of legislation which may be exercised by a state in dealing with its affairs.”) (quotation marks and citation omitted).

17 The first section of the Home Rule Act states that:

[s]ubject to the retention by Congress of the ultimate legislative authority over the Nation’s Capital granted by article I, section 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

Home Rule Act of 1973, Pub. L. No. 93-198, § 102, 87 Stat. 774, 850 (1973).

18 See D.C. CODE ANN. § 9-101.02 (2001). This provision (which predates Home Rule) specifies that:

The Mayor of the District of Columbia shall have the care and charge of, and the exclusive jurisdiction over, all the public roads and bridges, except such as belong to and are under the care of the United States, and except such as may be otherwise specially provided for by Congress.

19 See App. A.

20 In the D.C. Alley Closing and Acquisition Procedures Act of 1982, specifying how to permanently close a street, D.C. CODE ANN. § 9-202.01-14 (2001), Congress reworked a 1932 statute that had been enacted (statement of Rep. Black) because Congress tired of having to make what Congress characterized as purely municipal decisions about whether or not to close a street. See, e.g., 72 CONG. REC. 287 (1932) (“It is highly absurd that the Congress of the United States, carrying on its shoulders the weighty problems of the country, should have to pass separate acts every time the District Commissioners require a blind alley to be closed in Washington, or some side street that does not mean anything.”) (quoted in *Techworld Dev. Corp. v. D.C. Pres. League*, 648 F. Supp. 106, 111 (D.D.C. 1984)) [hereinafter “Techworld”]. The District’s Historic Preservation Review Board must review any street or alley closing sought within the boundaries of the L’Enfant Plan. See 24 D.C. MUN. REGS. § 1402.1. The L’Enfant Plan is generally bounded by Florida Avenue and Benning Road on the north; the Anacostia and Potomac Rivers to the east and south; and Rock Creek to the west. Likewise, all street and alley closings within those boundaries are referred to the NCPC unless all abutting property owners consent to the closure. See *id.* § 1402.2-5. Regulations restrict the placement of obstructions on public rights-of-way. See *id.* § 2001.2-3. In addition, the District’s EMA currently administers temporary permits for various events, including those involving street closures, at <http://www.dcema.dc.gov/services/permits/index.shtm>.

Two statutory exceptions limit the general grant to the District of the power to control its streets: when Congress “specially provide[s]” otherwise, or when the land both “belong[s] to and [is] under the care of the United States.”<sup>21</sup> Congress has, for example, “specially provided” for federal control over most of the monumental core of the District. The federal government has enhanced power over the Capitol Grounds, National Park Service land (including Lafayette Park, the Mall, and the White House Park), and the Supreme Court grounds.<sup>22</sup> Similarly, the District has no rights over federal land: the Council of the District of Columbia has no authority to “enact any act . . . which concerns the . . . property of the United States.”<sup>23</sup>

Several federal entities with exclusive jurisdiction over certain District parcels are involved in restricting public access.<sup>24</sup> Among the most visible authorities responsible for the most security-intensive sites within the District are the Secret Service, the Capitol Police Board, and the National Park Service.<sup>25</sup>

### B. *Prominent Restrictions on Public Access in the District*

#### 1. Closure of Pennsylvania Avenue to Vehicular Traffic

On the morning of Saturday, May 20, 1995, following the Murrah Building bombing in Oklahoma City, the Secret Service closed Pennsylvania Avenue north of the White House to all but federally authorized vehicles.<sup>26</sup> This closure was ordered under authority inferred from the general statutes authorizing the Secret Service to take certain temporary measures to ensure the security and safety of

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21 D.C. Code § 9-101.02 (2004). Determining who has title and “care” may not be straightforward, in certain cases, at least in areas close to federal buildings or on the borders of the federal reservations. *See, e.g., Hearing Before the Council of the Dist. of Columbia* (1995) (statement of the Office of the Surveyor) (stating that title to all of Pennsylvania Avenue is held in the United States and that part of it is in Appropriation No. 1, “one of 17 areas appropriated for the use of the United States Government” according to the King Plats of 1803, and noting that it is not known how and when the city obtained jurisdiction over this land).

22 *See* App. A.5.

23 D.C. CODE ANN. § 1-206.02(a)(3) (2001). A similar provision in the U.S. Code for streets under federal ownership prevents local encroachment. 40 U.S.C. § 8121(a)(1) (2004) (authorizing the Secretary of the Interior to prevent the “improper appropriation or occupation” of any public street or reservation within the District of Columbia that “belongs to the federal Government”).

24 Numerous federal reservations exist within the boundaries of the District, including, for instance, the St. Elizabeths campus, and the land on which many federal agencies are placed. They are not considered in any further detail here. *See generally* 40 U.S.C. chs. 61-81 (2004) (detailing provisions governing other federal buildings and parks within the District).

25 These entities—and additional relevant federal agencies—are described in detail in App. A.

26 For more on the specific circumstances of the Pennsylvania Avenue closing, *see, e.g., DeNeen L. Brown & Sandra Torry, D.C. Anxious About Impact of Pennsylvania Ave. Closing: Officials Ponder Cost to City, Businesses, Commuters*, WASH. POST, May 22, 1995, at A1.

the President, his family, and staff.<sup>27</sup> Closure of Pennsylvania Avenue was carried out as a temporary emergency measure on the basis of an internal (and still partly classified) security review that concluded that no other measure could adequately protect the White House from the risk of truck bombs.<sup>28</sup> Rules promulgated following the closure of Pennsylvania Avenue suggest that the restrictions are permanent and have effectively displaced the original announcement of the closure as a short-term emergency measure.<sup>29</sup> The Secret Service has not publicly wavered from the position that Pennsylvania Avenue should remain closed indefinitely.

Various attempts have been made to reopen the street to vehicular traffic and, for a time, the closure remained quite controversial—even within Congress. For example, most recently, on March 21, 2001, hearings on the effect of the Avenue's closure on both the District and the region were held by Congresswoman Morella before the District of Columbia Subcommittee of the House Government Reform Committee.<sup>30</sup> A resolution urging the reopening of Pennsylvania Avenue was ordered to be reported out of Committee later in 2001.<sup>31</sup> In addition, local officials sent letters to the Bush Administration requesting that Pennsylvania Avenue be reopened. No similar efforts, however, were made after September 11th.

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27 The closure of Pennsylvania Avenue was initially effected by Treasury Order 170-09, Off. Mem. 170-09 (May 12, 1995) [hereinafter, "Mem. Op."], available at [http://www.usdoj.gov/olc/penns\\_opn.htm](http://www.usdoj.gov/olc/penns_opn.htm), issued the day the street was closed, and was justified by the Justice Department, providing analysis of the legal authority for the temporary closing of Pennsylvania Avenue north of the White House and noting that, because it was an emergency measure, other statutory provisions, such as the Federal Administrative Procedure Act, 5 U.S.C. § 551(4) (2004), could be ignored. The Mem. Op. concludes that because the Home Rule Act prohibits the District government from enacting legislation concerning the functions or property of the United States, see District of Columbia Self-Government and Government Reorganization (Home Rule) Act, Pub. L. No. 93-198, § 602, 87 Stat. 774, 894-5 (1973), the District government lacked power to interfere with the Secret Service's efforts to protect the President. See Mem. Op. at 11. However, it was Congress and not the District government that transferred control over District streets to the District, so it is not the District alone seeking to control Pennsylvania Avenue; it is the District acting under the express authority of Congress. See An Act for the Government of the District of Columbia and for Other Purposes, ch. 337, § 2, 18 Stat. 166 (1874). The Mem. Op. cites *Techworld Dev. Corp. v. D.C. Pres. League*, 648 F. Supp. 106, 111 (D.D.C. 1986), see *supra* note 14, for the proposition that Treasury Department statutes essentially trump that express congressional grant to the District of the power over District streets. See Mem. Op. at 6-7. In *Techworld*, however, it was the District and not the federal government that was seeking to close a street, so the Opinion's reliance on *Techworld* is inappropriate.

28 The security review's recommendation was initially rejected by the Clinton Administration and put in place only several weeks after the Oklahoma City bombing. See RAND Report, *supra* note 9, at 16.

29 See 31 C.F.R. § 413.1(a)(2004) (closing the 1600 block of State Place, and South Executive Avenue to all non-official vehicular traffic).

30 See *Emergency Preparedness in the Nation's Capital: Hearing Before the Subcomm. on the Dist. of Columbia, Comm. on Gov't Reform*, 107th Cong. (2001).

31 See H.R. Res. 125, 107th Cong. (2001).

In October 2002, the National Capital Planning Commission (NCPC) released *The National Capital Urban Design and Security Plan*, a result of “close collaboration among the federal and District of Columbia governments, the professional planning and design community, security agencies, and civic, business, and community groups.”<sup>32</sup> Among other things, that plan recommended that Pennsylvania Avenue north of the White House remain closed to vehicular traffic (except for a proposed shuttle bus system, or “circulator,” which would allow tourists, residents, and federal workers to navigate the closed area), that new pedestrian-oriented public space be created, and that feasibility studies of a possible tunnel under Pennsylvania Avenue or E Street be conducted.<sup>33</sup> On March 12, 2003, the NCPC approved a concept design for Pennsylvania Avenue north of the White House that incorporated the recommendations in the October 2002 plan, but that also required that the pedestrian orientation to the development be reversible.<sup>34</sup> That plan was formally approved by the NCPC in September 2003. President Bush’s FY 2004 proposed budget included \$15 million for the construction of improvements to Pennsylvania Avenue.<sup>35</sup>

## 2. Proliferation of Barriers

After the 1995 Oklahoma City bombing, federal and other governmental buildings across the nation sought to reduce the risk of damage from similar attacks. In the District, a variety of physical barriers now surround the perimeter and block the entranceways of various federal as well as local and non-governmental buildings. These barriers include Jersey barriers, bollards, Delta barriers (also known as Nasatka barriers) which pop up from the ground, and temporary planters (many sprouting nothing more than weeds and grass).<sup>36</sup> These various barriers are not only unsightly; they are also potentially hazardous to pedestrians and drivers.

## 3. Increase of Security Perimeters Following September 11th

After September 11, 2001, the number of traffic, parking, and pedestrian restrictions around federal installations increased dramatically, not just in the District but nationwide. The post-September 11th restrictions on access and traffic imposed by the Secret Service around the White House Park (which remains

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32 NCPC URBAN DESIGN AND SECURITY PLAN, *supra* note 11, at 1.

33 *See id.* at 19-21.

34 *See* Press Release, NCPC Commission Unanimously Approves Concept Design for Pennsylvania Avenue in Front of the White House; Plan Will Create a Welcoming and Beautiful Main Street for America (Mar.12, 2003), available at [http://www.ncpc.gov/publications/Press\\_Releases/2003/pr031203.html](http://www.ncpc.gov/publications/Press_Releases/2003/pr031203.html).

35 *See* Office of Management and Budget, District of Columbia, available at <http://www.whitehouse.gov/omb/budget/fy2004/agencies.html>.

36 *See generally* NCPC URBAN DESIGN AND SECURITY PLAN, *supra* note 11.

under the jurisdiction of the National Park Service) were not subjected to the evaluation and scrutiny that accompanied the earlier closure of Pennsylvania Avenue to vehicles. Further, regulations have not been promulgated to address the new and proliferating restrictions around the White House.

#### 4. History of Restrictions Around the White House

Until World War II, the White House grounds were largely open to the public, albeit heavily patrolled—even during most of the Civil War. In 1983, following the terrorist attacks in Beirut on the Marine barracks; the Reagan administration requested a plan for alternative uses of Pennsylvania Avenue. (A similar plan had been proposed during the Kennedy Administration as a beautification rather than security measure.) The Reagan-era plan by architect Carl Warnecke—the same person who had proposed the earlier measure to President Kennedy and who designed many of the improvements to Lafayette Park in the 1960s and 1970s—suggested construction of a tunnel under the Avenue and the development of a pedestrian plaza. This plan was not implemented; instead, the Secret Service tightened access to the White House for visitors and media, and installed concrete bollards on the sidewalk immediately north of the White House fence. Between 1983 and the closure of the Avenue in 1995, additional barriers, security stations, and electronic sensors were installed.<sup>37</sup>

The recent restrictions around the White House authorized by the Secret Service have been substantial. Immediately after September 11, 2001, the Secret Service ordered the reclosure of E Street—a significant east-west thoroughfare—south of the White House, and it has remained closed ever since.<sup>38</sup> The sidewalk in front of the White House South Lawn is now occasionally placed off limits to pedestrians, and tourists are not always allowed to walk up to the lawn railings to view the White House. Truck traffic on eight blocks of 17th Street<sup>39</sup> west of the White House (from Pennsylvania Avenue to Constitution Avenue) was banned by the Secret Service in August 2002.<sup>40</sup> In addition, following a request first made by the Secret Service in September of 2001, the Park Service has denied all requests for large demonstrations or special events in Lafayette Park, the Ellipse, and on the sidewalks north of the White House. This ban on large demonstrations in Lafayette Park, renewed on a monthly basis, remains in effect.<sup>41</sup> In addi-

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37 For a more detailed summary of the history of security measures around the White House, see RAND Report, *supra* note 9, at 8-17.

38 That stretch of E Street was closed following the Oklahoma City bombing, but reopened on November 21, 2000, after adjustments to the street flow were completed.

39 17th Street is an important north-south artery that provides access to Virginia.

40 See Spencer S. Hsu, *Penn. Ave. Security Prompts Truck Ban; Change Affects 8 Blocks Near the White House*, WASH. POST, Aug. 9, 2002, at B1.

41 See Letter from U.S. Dep't of the Interior, Nat'l Park Service (May 28, 2003) (extending "partial and temporary public use limitation" on "large" demonstrations and special events for Lafay-

tion, the Secret Service now readjusts the “perimeter” around the White House in response to issuance of Homeland Security alerts.<sup>42</sup> These “temporary” restrictions on access around the White House complex issued by the Department of Homeland Security have been announced through routine press releases that provide no legal justification.

## 5. Capitol Area Restrictions

Following September 11th, a number of streets under the jurisdiction of the Capitol Police Board were closed.<sup>43</sup> Except for Constitution and Independence Avenues, the streets immediately bordering the Senate and House Office Buildings are now closed to vehicular traffic; several appear to be closed permanently. Truck traffic not related to the construction of the Capitol Visitor Center (CVC) has been restricted around and diverted from the Capitol Complex. Pop-up Delta barriers that can be activated to block traffic were installed at Independence Avenue on the south side of the Capitol and are being installed at Constitution Avenue north of the Capitol. More significant changes and restrictions on access, including the permanent closure of Independence and Constitution Avenues to traffic,<sup>44</sup> further extending the security perimeter for the Capitol Police, and closing the streets adjacent to the Supreme Court to all but local traffic, have been proposed but not yet implemented, partly as a result of local and Congressional opposition.<sup>45</sup>

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ette Park in response to the Secret Service’s latest monthly request since September 24, 2001); *see also* Mahoney v. Norton, Civ No. 02-1715 (D.D.C. Sept. 25, 2001) (discussing the NPS policy to limit all demonstrations to groups of less than 25 persons).

42 *See* Press Release, U.S. Secret Service (Mar. 18, 2003) (announcing “adjustments” to the perimeter of the White House, closing Pennsylvania Avenue to pedestrian traffic, on the eve of Operation Traffic Freedom), *available at* <http://www.secretservice.gov/press/pub1103.pdf>; *see* Press Release, U.S. Secret Service (May 7, 2003) (announcing reopening of these areas to pedestrian traffic), *available at* <http://www.secretservice.gov/press/pub1603.pdf>.

43 The Capitol Police Board is composed of the Senate Sergeant at Arms (SSaA), the Architect of the Capitol (AoC), and the House Sergeant at Arms (HSaA). *See* 2 U.S.C. § 1969(a) (2004). Under this authority, the Board has promulgated Traffic and Motor Vehicle Regulations for the U.S. Capitol Grounds, which were most recently revised in 1983. *See id.* at § 1969(b). The Mayor of the District of Columbia is required to “cooperate” in the preparation of these regulations. *See id.* § 1969(c). The AoC is more generally responsible for the maintenance, operation, development, and preservation of the United States Capitol Complex, which includes the Capitol, the congressional office buildings, the Library of Congress buildings, the Supreme Court building, the U.S. Botanical Garden, the Capitol Power Plant, and other facilities, *available at* [http://www.aoc.gov/AOC/aoc\\_overview.htm](http://www.aoc.gov/AOC/aoc_overview.htm).

44 *See* Spenser S. Hsu, *High Court Asks for 2 Street Closings; Security Proposal Irks D.C. Officials*, WASH. POST, May 25, 2002, at B1.

45 *See id.*

### C. *Regional Emergency Taskforces*

Since the September 11, 2001 attacks, several regional taskforces have worked to smooth the interjurisdictional problems involved in regional coordination of emergency response. These temporary working groups were convened at approximately the same time as the District created its District Emergency Response Plan.<sup>46</sup> These regional groups were designed to ensure that localities could better coordinate and prevent a repeat of the confusion that occurred immediately following the September 11th attacks. These groups, however, have focused either on implementing emergency response coordination following a catastrophic event or on promulgating regional evacuation and traffic management plans. The groups have not focused on evaluating the specifics or impacts of any particular individual mid- or long-term security restriction or protection strategy.<sup>47</sup>

#### 1. The Metropolitan Washington Council of Governments (CoG) Emergency Response Plan

Shortly after September 11, 2001, CoG created a Taskforce on Homeland Security and Emergency Response for the National Capital Area. This taskforce worked on creating a Regional Emergency Coordination Plan, a structure through which local, state, federal, and private sector partners may coordinate their response to regional incidents and emergencies.<sup>48</sup> The CoG taskforce also developed a Regional Incident Communication and Coordination System ("RICCS") to enhance communications among local officials in the event of a regional emergency.

#### 2. The Greater Washington Board of Trade (GWBoT) Regional Preparedness and Recovery Taskforce

Similarly, in November 2001, the Potomac Conference of the GWBoT established a Regional Preparedness and Recovery Taskforce. That taskforce was directed to participate in and complement the work underway at CoG and to assist private businesses in the region with the development of their own emergency preparedness plans.

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<sup>46</sup> See App. B.

<sup>47</sup> See paragraphs 1-3 below. Conversely, the NCPC has considered the aesthetic long-term effects of temporary security restrictions.

<sup>48</sup> These responsibilities were given to the National Capital Region Emergency Preparedness Council on November 13, 2002, a more permanent part of the CoG structure that replaced the earlier ad hoc committee.

### 3. The August 5, 2002 Homeland Security Summit

One of the first attempts to further integrate the federal government into these regional initiatives appears to have been the National Capital Region Summit on Homeland Security held on August 5, 2002. At that meeting, chaired by Tom Ridge (then the Director of the White House's Office of Homeland Security), representatives of Virginia, Maryland, and the District of Columbia signed an eight-point "Commitments to Action" which committed their governments to improve regional coordination during emergencies in partnership with the Homeland Security Office.<sup>49</sup> Responsibility for furthering the agenda agreed to by the Commitments to Action has now moved to ONCRC. The August 5, 2002, summit (and the perceived need for sustained federal involvement) was part of the impetus for the creation of the ONCRC to coordinate regional emergency preparation.

## V. ANALYSIS

### A. *The District Government Is Well Suited to Assess and Implement Traffic and Other Restrictions in the District of Columbia*

It is in the best interests of the federal government to work closely with the District government in implementing street closures and traffic restrictions. As a historical matter, in 1932 Congress delegated to the District authority over the local streets to relieve itself of the "absurd" responsibility of having to address these types of routine matters legislatively.<sup>50</sup> In passing the Home Rule Act in 1973, Congress further ceded to the District powers over other "essentially local" matters and recognized the District government's superior ability to exercise traditional municipal powers.<sup>51</sup> As a practical matter, since receiving and long exercising this authority, the District, like all other local governments, has developed an expertise in providing municipal services. The District employs persons of particular experience and qualification. It has established an infrastructure designed to deliver these services. And, perhaps most importantly, for local issues, the District's government of locally elected representatives is more likely to respond to the needs of its citizenry and other relevant constituencies than are federal government agencies.

This is especially true in the area of traffic management.<sup>52</sup> Actions taken by entities of the federal government to close streets or make other traffic restric-

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49 Eight "Commitments to Action" were agreed to by the three jurisdictions on the following subjects: (1) Citizen Involvement in Preparedness; (2) Decision-Making and Coordination; (3) Emergency Protective Measures; (4) Infrastructure Protection; (5) Media Relations and Communication; (6) Mutual Aid; (7) Terrorism Prevention; and (8) Training and Exercises.

50 See *supra* Section IV.A and *supra* note 20.

51 See *supra* Section IV.A and *supra* note 17.

52 See *supra* Section IV.A.

tions have tangible and intangible consequences. Such actions will almost certainly disrupt customary traffic patterns in areas far removed from the area in which the action was taken or, as mentioned earlier, even hinder the ability of the District to provide emergency services in a timely manner. For example, the 1995 closing of Pennsylvania Avenue north of the White House forced Metro to re-route twenty-five bus lines at an estimated annual cost of \$314,000.<sup>53</sup>

Traffic flow within the District, or within any city, depends on capacity and alternate routes (sometimes called “redundancy”). Closing major thoroughfares reduces street capacity and redundancy and thereby reduces the efficiency and safety of the public. The fewer choices the public has to avoid or escape emergencies, the greater the risk that an emergency will cause harm. Furthermore, increased auto emissions from more idling vehicles stuck in traffic has raised carbon monoxide levels in the city and increased EPA compliance concerns for the District.<sup>54</sup> Because District officials deal with such issues on a daily basis,<sup>55</sup> they have developed the expertise necessary to assess the risks of certain changes to traffic movements and to make alternative recommendations.

Regardless of the exact consequences of any given restriction, the District's experience and expertise in this area—as well as the District's crucial stake in the issue—make it important that the District be involved in the decision-making process with federal entities to identify those consequences, assess their likely impact, and design an implementation plan that minimizes that impact. When national security considerations require restrictions on local traffic or other local access, the local government is well suited to help design and implement such restrictions in the least disruptive way. The local government is also able to provide expertise that could avoid the imposition of unnecessarily disruptive or ineffective restrictions. District officials will also have insight into alternative modes of implementation.

An important successful example of this cooperation between the federal and District governments is the Capitol Police's response to security threats to the Capitol Building and neighboring House and Senate Office Buildings following the events of September 11, 2001. The first post-September 11th security proposals the Capitol Police put forward involved closing both Constitution and Independence Avenues north and south of the Capitol to all public vehicular traffic. In consultation with a joint District-federal taskforce, however, the Capitol Police instead agreed that, through the use of an array of devices in coordination with the District's traffic monitoring programs, suspicious trucks and other vehicles

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53 See Paul Bedard, *Closing Costs Won't Open Avenue, Traffic, Pollution Rise as District's Loss Nears \$1 Million*, WASH. TIMES, May 3, 1997, at A1.

54 See *id.*; see also *Emergency Preparedness in the Nation's Capital: Hearing Before the Subcomm. on the Dist. of Columbia, Comm. on Gov't Reform, 107th Cong. (2001)* (statement of Mayor Anthony Williams).

55 See generally App. B.

could be identified, tracked, told to stop, and when necessary intercepted and stopped a safe distance from potential targets. The result, according to District transportation officials, is that major thoroughfares on Capitol Hill have remained open to drivers and the Capitol Police have achieved the level of security they sought.

The principal objection federal entities appear to have to an arrangement in which the federal government consults and cooperates with the District is that national security priorities could be hindered. However, as shown on Capitol Hill, with real and substantive cooperation and consultation on negotiating street closures and other traffic restrictions, such priorities can be maintained, if not enhanced, even when consultation with District officials leads to a proposed restriction not being implemented at the time or in the manner originally envisioned. Security measures around federal buildings and monuments can be made in such a way that they improve the overall security of the District itself to the benefit of its residents and commuters, many of whom work in or near these buildings, and of its visitors, who frequent the District's monuments. Accordingly, by coordinating with the District in advance and allowing the District to participate in the implementation of the chosen action, the concerns of all affected parties can be considered and, to the extent possible, efficiently accommodated. In other words, balance between security and access can be achieved.

*B. The Federal Presence Imposes Costs on the District, and Those Costs Should Be Minimized Through Interjurisdictional Cooperation or Compensation*

The District of Columbia, as the seat of the federal government, incurs significant costs not experienced by other municipalities of comparable size and population. Some of these costs result from the increased need for security at various special events, demonstrations, and protests, both planned and unplanned, for which the nation's capital is often the preferred venue. In a report recently issued to Congress, the General Accounting Office (GAO) concluded that the demands placed upon the District by the federal presence limit the District's ability to provide adequate public safety services.<sup>56</sup> Recognizing the additional costs of the federal presence, the U.S. government has, in many instances, provided compensation to the District.<sup>57</sup> In the Appropriations Acts for the District for the past three fiscal years, Congress appropriated \$11 million (FY 2004), \$15 million

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<sup>56</sup> See 2003 GAO, REPORT NO. GAO-03-666, DISTRICT OF COLUMBIA: STRUCTURAL IMBALANCE AND MANAGEMENT ISSUES, 63 (2003) [hereinafter GAO REPORT].

<sup>57</sup> For instance, federal officials initially stated that the federal government would compensate the District for the costs of the closure of Pennsylvania Avenue. See Deneen L. Brown & Sandra Torry, *D.C. Anxious About Impact of Pennsylvania Ave. Closing; Officials Ponder Cost to City Businesses, Commuters*, WASH. POST, May 22, 1995, at A16 (quoting Ronald K. Noble, Undersecretary for Enforcement at the Treasury Department). In the environmental assessment released in 1997, the Treasury estimated the cost of the closure at \$412,000. See Stephen C. Fehr, *Report on Pennsylvania*

(FY 2003) and approximately \$16 million (FY 2002) to a general fund used to reimburse the District for expenses necessary for the provision of security “due to the fact that the District of Columbia is the seat of the Federal Government and headquarters of many international organizations.”<sup>58</sup>

With respect to specific events, approximately \$3.4 million of the District’s FY 2002 appropriations amount was earmarked to reimburse the District for expenses incurred to provide security for the planned September 2001 meetings of the World Bank and the International Monetary Fund (IMF). Likewise, Congress also appropriated \$6 million and \$5.7 million respectively to reimburse the District for expenses incurred in connection with the 2001 and 1997 presidential inaugurations.<sup>59</sup>

The federal government has, therefore, shown a willingness to provide some level of compensation when the costs imposed by the federal presence take the form of readily quantifiable costs borne by the District.<sup>60</sup> However, the GAO reports that the compensation typically provided by Congress fails to fully reimburse the actual costs sustained by the District.<sup>61</sup> Traditionally, Congress has not compensated the District for costs imposed by other activities of the federal government—for example, road closures and other traffic restrictions—for which costs are more difficult to quantify.<sup>62</sup> The difficulty of quantification should not, however, preclude the federal government from assessing these costs and implementing closures and restrictions in ways that minimize costs as much as possible.

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*Avenue Closing Hits a Dead End*, WASH. POST, June 3, 1997, at B1. To our knowledge, no direct compensation for this closure has been paid.

58 Pub. L. No. 108-199, 118 Stat. 111 (2004); S. Rep. 107-225 to Pub. L. No. 108-7, 117 Stat. 11 (2002); District of Columbia Appropriations Act, Pub. L. No. 107-96, 115 Stat. 923 (2001).

59 See District of Columbia Appropriations Act, Consolidated Appropriations Resolution, Pub. L. No. 107-96, 115 Stat. 923 (2001); Pub. L. No. 106-522, 114 Stat. 2440 (2000); Pub. L. No. 104-194, 110 Stat. 2356 (1996).

60 See NCPC PENNSYLVANIA AVENUE TRAFFIC ALTERNATIVES ANALYSIS, *supra* note 9; see also generally NCPC URBAN DESIGN AND SECURITY PLAN, *supra* note 11.

61 See GAO REPORT, *supra* note 56, at 70.

62 The closures of sections of Pennsylvania Avenue and E Street in the vicinity of the White House were thoroughly studied by the NCPC as part of its October 2001 report suggesting modifications and improvements in this historic area. The NCPC’s Interagency Task Force highlighted the severe disruptions the road closures have had on traffic patterns in the downtown area, which have strained the downtown economy and potentially slowed economic development. Although, as noted, the exact costs arising from these road closures are difficult to quantify, the NCPC estimates the costs of proposed alternatives (east-west tunnels of varying lengths and locations) designed to restore pre-closure traffic patterns to be between \$55 and \$135 million. Notably, the Task Force found a need for at least one of these alternatives in order to sustain the downtown area’s long-term growth and vitality. These estimates far exceed the \$11 million appropriated in FY 2004 for improvements to the area, and it is not clear whether this allocation may lawfully be used in the construction of one of the alternatives discussed by the NCPC. The NCPC report does not identify which entity—the District or the federal government—would be expected to bear the cost (or the excess cost) of constructing the alternative. See NCPC PENNSYLVANIA AVENUE TRAFFIC ALTERNATIVES ANALYSIS, *supra* note 9.

Rather, in evaluating whether a road closure or traffic restriction is justified by a legitimate security interest, it would be more effective for the federal government to include appropriate District officials in those discussions at the outset, and, should the road closure or traffic restriction be deemed appropriate, to employ District procedures, infrastructure, and personnel in its implementation. As discussed above, District officials are better situated to assess the likely impact of a course of action and, acting in the District's interest, would therefore be better able to minimize the financial impact imposed on the local infrastructure.

Furthermore, taking action without discussion with the District regarding the costs imposed by certain proposed actions and ways to minimize those costs will put the District in the difficult position of needing to quantify those costs after-the-fact.<sup>63</sup> It is well established, of course, that when unilateral federal action affects property owned by the District, the federal government may also have a legal duty to provide compensation. The Supreme Court has recognized that the Fifth Amendment's Takings Clause applies when the federal government "takes" property belonging to a state or municipality.<sup>64</sup> Whether a road closure or traffic restriction would amount to a taking is a complex and fact-specific inquiry. But intergovernmental takings law makes clear that the federal government may have a duty to compensate the District for the costs imposed by unilateral federal action, especially if these actions are tantamount to a physical condemnation of District property.<sup>65</sup> Of course, were the federal government to achieve its desired course of action through consensual negotiation, the District would effec-

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63 Costs associated with removing metered parking spaces, however, are not difficult to quantify. *The Washington Times* reports that the District estimated in 1995 that lost parking meter revenue from Pennsylvania Avenue could reach \$752,000 a year, for example. See Brian Bloomquist, *D.C. Ponders Closure Battle*, WASH. TIMES, May 23, 1995, at C4.

64 See *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.").

65 When the federal government takes public roads, courts have held that compensation should be measured not by the fair market value of the property taken, but by the cost of providing a substitute. See *United States v. City of New York*, 168 F.2d 387, 389 (2d Cir. 1948); *United States v. Des Moines County*, 148 F.2d 448, 449 (8th Cir. 1945); see also *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) ("The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property (citation omitted). This might be the case, for example, with respect to *public facilities such as roads or sewers.*" (emphasis supplied)). This may be of particular importance to the District given the NCP's assessment of the projected costs for the proposed alternatives for the Pennsylvania Avenue and E Street routes. But note that "substitution costs" are only appropriate when a substitute is "reasonably necessary." See *United States v. Sts., Alleys & Pub. Ways*, 531 F.2d 882, 885 (8th Cir. 1976); *Wash. v. United States*, 214 F.2d 33, 44 (9th Cir. 1954).

tively be adopting the course of action as its own, thus obviating or undercutting any potential takings claim; equitable compensation would thus be left to the parties to determine, rather than for a court. This rationale provides yet another reason for the federal government to work closely with the District in adopting and implementing national security-related restrictions.

In fact, given that in the present circumstances numerous federal agencies impose national security-related restrictions on the District without ever coordinating with other federal agencies—or with the District itself—such restrictions are not the result of a careful balancing of the perceived national security gain against the possible disruption, costs, and safety concerns raised by the restriction. If such a balance were struck, and the input from District officials timely sought, it seems quite likely that some of the restrictions would not be imposed at all, and others would be imposed in a far more efficient fashion.<sup>66</sup>

## VI. RECOMMENDATIONS

DC Appleseed recommends the following:

### A. *Formalize and Clarify in a Public Agreement the Complex Web of Interjurisdictional Agreements Related to Security Street Closures and Traffic Restrictions*

As this report shows, no clear understanding currently exists as to how security-related street closings and other restrictions on public access should be imposed in the District of Columbia. All affected parties would benefit from such an understanding. Because of the significant consequences that street closings, traffic restrictions, and related actions impose on the District of Columbia and surrounding jurisdictions, and because of the constructive role the District government could play in such actions, the relationship between the District, federal agencies, and surrounding jurisdictions on security-related street closures and traffic restrictions should take the form of a published agreement. The agreement itself should provide for flexibility and allow quick and decisive action under emergency circumstances, and public disclosure of the agreement should not compromise public safety or security.

### B. *Establish a Joint Federal-District Group to Evaluate Security Concerns and Weigh the Costs of Diminishing Freedom, Access, Mobility, and Convenience*

Before such an agreement can be formalized, a mutually agreeable mechanism must be established that satisfies federal agencies that federal personnel, build-

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<sup>66</sup> For example, District officials have pointed to lanes of traffic adjacent to federal buildings, which had been open to traffic prior to September 11, 2001, that are now used as parking areas for federal employees. Federal officials have benefited from the convenience of this type of closing; but, as a result, mobility in the District has been hindered.

ings, and assets are properly protected while also recognizing that the District has a proper role and legitimate stake in any traffic or parking issues on District streets. Underlying any such agreement must be a frank discussion about the rationale for and short- and long-term costs of undertaking security-related traffic and parking restrictions and road closures. These costs are not merely financial—they include potential public safety concerns, as well as such fundamental quality of life issues as loss of freedom, access and mobility, deteriorating air quality, and general inconvenience.

Congresswoman Eleanor Holmes Norton has introduced a bill in Congress, H.R. 1365, to establish the “United States Committee on an Open Society and Security,” which would formally establish a federal panel to evaluate the costs of closing roads and restricting traffic and parking.<sup>67</sup> The panel would consist of twenty-one members drawn from a number of professions and its deliberations would be open and designed to encompass a broad range of opinions and viewpoints. Congresswoman Norton’s proposal focused on all federal installations nationwide.

A similar panel with a narrower mandate would surely facilitate the type of discussion that should precede any proposed security-related traffic restriction in the District. Such a panel could be a stand-alone entity or could be formed as a committee of an already established organization such as the joint federal-local NCPC. The panel should comprise national security experts, representatives from local community and business groups, District government officials, and representatives of relevant federal agencies and offices. Such a panel would, among other things, assess the threat level for each potential target, identify and ascertain costs of actions, then formulate an appropriate security response to that threat, taking cost and other negative impacts into consideration. The panel could look into the appropriateness of security-related street closures and traffic restrictions imposed prior to the panel’s formation. Such a panel could also analyze how traffic restrictions intended to secure federal installations could affect the movement and possible evacuation of other people in other public or private buildings in the District.

C. *Establish a Mechanism that Allows Temporary Emergency Street Closings but Requires Pre-Approval for Permanent Street Closings*

Even within a framework of discussion and evaluation, quick action may be needed. In emergencies, federal agencies may need to act on very short notice and with minimal advance discussion. A protocol must be established by the

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67 The function of such a Commission would be to “study and make findings and recommendations relating to the question of how the Government of the United States may, in a balanced manner, provide for both security and public access to Federal buildings and spaces.” Proposed H.R. 1365, 107th Cong. 4 (2003).

panel described above, or one similar to it, that outlines the parameters of what a federal agency or entity may do with regard to traffic and parking restrictions on an emergency basis; requires periodic reevaluations to determine how long such restrictions may last or how they should be adjusted; and provides a formula for determining appropriate compensation to the District during the period the emergency action is in place.

In addition, a plan should be put in place to handle permanent traffic restrictions. To the extent possible, the public should participate in developing such a plan and their contributions should be given great weight in the established deliberative process.

## VII. CONCLUSION

National security concerns often require disruption of normal traffic flow in the District of Columbia. The District government should be involved in decisions affecting those disruptions because it can be a positive force in coordinating with agencies to minimize the disruptive effects and maximize the effectiveness of those decisions. A formal agreement setting out that involvement and participation should be promptly developed. Balance between total security and openness, although elusive, is achievable. For that balance to be achieved, however, the District government must be a part of the decision-making process. A collaborative, well-coordinated process would maximize safety, minimize disruption, and ensure effective response to any future perceived or real security threat.

### VIII. APPENDIX

#### A. Key Relevant Federal Entities

##### 1. Office of National Capital Region Coordination, the Homeland Security Department (ONCRC)

Partly in response to concerns about the lack of involvement of the federal government in regional security response, Senator Sarbanes of Maryland—with the support of Congresswoman Norton, who had sought to have a similar amendment introduced in the House—introduced an amendment to the Homeland Security Act to create an Office of National Capital Region Coordination (ONCRC) as a “single Federal point of contact” within the Department of Homeland Security that would, it was hoped, “become the vehicle used by the multitude of Federal entities in the area to receive vital information and input from the state, local, and regional level in the development of the Federal Government’s planning efforts.”<sup>68</sup> The final Act created ONCRC to “oversee and coordinate Federal programs for and relationships with state, local, and regional authorities in the National Capital Region.”<sup>69</sup>

Michael F. Byrne, a former New York City firefighter and a previous Director within the earlier established Homeland Security Office, was appointed the first Director of National Capital Region Coordination for Emergency Response for the Department of Homeland Security by Secretary Tom Ridge on March 9, 2002. In written testimony presented to the House Government Reform Committee on April 10, 2002, Director Byrne stated that a joint federal committee drawn from all three branches of government to coordinate federal workforce protection and other regional efforts was currently working with state and local law enforcement, emergency management, and transportation agencies to develop practical protocols for security-related street closures.<sup>70</sup> More recently, Mr. Byrne has been active in dispensing Homeland Security grant monies to re-

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68 Press Release of Senator Sarbanes, Homeland Security Bill, Establishment of a New Capital Regional Office within New Department (Nov. 20, 2002), available at [http://sarbanes.senate.gov/pages/press/112002\\_homeland\\_security\\_pass.html](http://sarbanes.senate.gov/pages/press/112002_homeland_security_pass.html).

69 Homeland Security Act of 2002, Pub. L. No. 107-296, § 882, 116 Stat. 2135.

70 See *Hearing Before the Subcomm. on the Dist. of Columbia of the Comm. on Gov't Reform*, 107th Cong. (2003). Most of this hearing focused on the so-called “Tractorman” incident, in which a frustrated tobacco farmer drove his tractor onto the National Mall and threatened to blow himself up. The hearing also included a warning by Committee Chairman Tom Davis that regional traffic management should be “federalized,” available at <http://www.washingtonpost.com/wp-dyn/articles/A5257-2003Apr10.html>.

gional governments.<sup>71</sup> Mr. Byrne recently resigned as Director and the position is currently vacant.<sup>72</sup>

## 2. The Secret Service

Recently transferred to the Department of Homeland Security and owing its origins to efforts to fight counterfeiters in the 19th Century, the Secret Service's primary function is to protect the President of the United States. Under its general statutes, the Secret Service has broad authority to protect both the President and the White House itself from potential security threats.<sup>73</sup> In addition to its other functions, the Secret Service also participates in the planning, coordination, and implementation of security operations at special events of national significance, when authorized to do so by the President.<sup>74</sup> The scope of the Secret Service's authority to effect temporary security restrictions has not been resolved by any court.

## 3. The Capitol Police Board

The Capitol Police Board has exclusive control over all traffic within the 276 acres of Capitol Hill controlled by the Architect of the Capitol, where the boundary between municipal and congressional control appears one of tradition rather than logic.<sup>75</sup> For some of the streets within this area, however, including the important artery of Constitution Avenue, the District maintains control for "maintenance and improvement."<sup>76</sup> As noted earlier, after September 11th, most of the streets within the Police Board's jurisdiction that had not previously been restricted were closed to unauthorized vehicles. Those streets under the Police Board's exclusive control and not subject to the partial authority of the District have been closed off semi-permanently by newly constructed planters and security stations.

Coordination between Congress and the District in implementing security measures around the Capitol, however, has increased. At a September 20, 2002, hearing on Coordination of Emergency Response in the Metropolitan Area, held before the District Subcommittee of the House Government Reform Committee, Terrance W. Gainer, Chief of the U.S. Capitol Police, acknowledged that street

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71 See R. H. Melton, *Region's Security Boosted by \$75 Million; Federal Funds Going To First Responders*, WASH. POST, June 6, 2003, at B1.

72 See *The Region: Homeland Security Regional Chief Leaving*, WASH. POST, Nov. 19, 2003, at B3.

73 The relevant statutes are 3 U.S.C. § 202 (2004) and 18 U.S.C. § 3056 (2004) ("Treasury Department Statutes"), both of which broadly grant authority to protect the President, but offer few specifics as to the limits of that authority.

74 See 18 U.S.C. § 3056(e)(2004).

75 See 40 U.S.C. § 5102(b)(2004).

76 See 40 U.S.C. § 5102(b)(2)(A)(2004).

closures can adversely affect the city and outlined for the Congress the procedures by which the Capitol Police now “closely coordinates” with the District and other agencies when closures and other measures near the Capitol Complex are required.<sup>77</sup> That structure includes an Executive Leadership Steering Committee composed of officials who meet periodically to coordinate security projects between the Capitol and the District.<sup>78</sup>

#### 4. The National Park Service

Lafayette Park, the White House Park, the Ellipse, and the Mall all fall under the control of the National Park Service—as do the sidewalks immediately fronting the White House and various other parks and federal reservations within the District. The Park Service has had a mixed record in the success of security rationales as justifications for restrictions on public access; numerous First Amendment challenges have been made to Park Service regulations that have sought to restrict public activities by citing security concerns, some of which have limited the Park Service’s authority.<sup>79</sup> The success of the Park Service at justifying regulations restricting public activity on the grounds of security rather than aesthetic or other grounds has varied depending on the receptivity of the particular court to governmental arguments about pressing security needs.<sup>80</sup>

#### 5. Supreme Court Grounds

The Supreme Court Grounds include the block on which the Court is situated and parts of the neighboring block to the east across Second Street, N.E.<sup>81</sup> This section of Maryland Avenue is also occasionally closed to vehicular traffic. The Marshal of the Supreme Court and the Supreme Court Police have jurisdiction over the Grounds.<sup>82</sup> Although the Architect of the Capitol performs a number of functions for the Court, the Supreme Court Grounds are statutorily defined separately, as are the grounds for the Library of Congress (LOC).<sup>83</sup>

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<sup>77</sup> See *Emergency Preparedness in the Nation’s Capital: Hearings on Coordination of Emergency Response in the Metropolitan Area Before the Dist. Subcomm. of the House Gov’t Reform Comm.* 107th Cong. 17-21 (2002) (statement of Terrance W. Gainer, Chief of the U.S. Capitol Police).

<sup>78</sup> See *id.*

<sup>79</sup> National Park Service regulations governing the National Capital Area are currently located at 36 C.F.R. § 7.96 (2004).

<sup>80</sup> See *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984) (upholding restrictions on materials used in and location of demonstration on the Pennsylvania Avenue sidewalk and speaking extensively about the White House’s need for security in the face of terrorist threats); *Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (sustaining district court’s rejection of number restrictions on gatherings in Lafayette Park and the White House sidewalk justified in part on concern for the safety and security of the White House).

<sup>81</sup> See 40 U.S.C. § 6101(b) (2004).

<sup>82</sup> See *id.* § 6102.

<sup>83</sup> See *id.* § 6101(b).

## 6. U.S. General Services Administration (GSA)

The GSA handles most property acquisition and rental for the federal government and sets security standards for buildings that the federal government occupies.

## 7. U.S. Office of Personnel Management (OPM)

OPM sets personnel policy for most federal employees and is instrumental to any security plan involving federal workers.

### B. *Key Relevant District Entities*

#### 1. D.C. Emergency Management Agency (EMA)

The EMA coordinates the city's response to disasters and emergencies and works with the Mayor's Special Event Task Group to coordinate special events within the city. The agency monitors weather conditions, fires, and other emergencies, and oversees special events—including the many marches and demonstrations occurring each year. The EMA works closely with other emergency response agencies, including the Metropolitan Police Department, the Department of Fire and Emergency Medical Services, and other District and federal agencies.

#### 2. District Department of Transportation (D. DoT)

The D. DoT manages and maintains transportation infrastructure. The Department's jurisdiction<sup>84</sup> includes planning, design, and maintenance of the District's streets, alleys, sidewalks, bridges, traffic signals, and streetlights.

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84 available at <http://www.ddot.dc.gov/main.shtm>.

## EXCERPTED REMARKS OF NADINE STROSSEN\*

I'm very excited about cultivating the next crop of public interest lawyers. Hopefully, many of you will dedicate your talents and efforts to the ACLU. But whatever you choose to do with your education, I can tell you this: It will be not only for the good of the public, but it will really be for your good, personally.

I can't help evangelizing as somebody who has been practicing law for decades now. So many lawyers are so unhappy, so frustrated, so bored. A couple of years ago, I went to my 20th law school reunion at Harvard Law School. My classmates are people who are at the top of their profession in every conventional way, earning piles of money, heads of major Wall Street law firms, top government officials. Our class is very frank with each other. People don't come to the reunion to brag. They come to visit, commiserate, plan—"Okay so what if we're X years old? You know, in a few more years, what will we do that's even more rewarding?"

At the reunion the question was raised, "How many of you are satisfied with what you are doing?" Of course, my hand shot up, but almost no one else's did. The ones whose hands did go up, interestingly, were the people who were either in public interest law, or teaching, or, in many cases, in government. I would like to emphasize that whatever your passion is, you really owe it to yourself to take the incredible opportunity and power that comes from having a law degree, and apply it not only to serving your clients, which is very important, not only to serving yourself and your family, which is very important, but also to using it to advance your concept of the public good. You have so much power by virtue of your legal education and your law degree, so use it. That is what this law school is encouraging you all to do. So I am as enthusiastic as your own dean.

I'd like to make some remarks about what the ACLU's work has been since that horrendous day of September 11, when we launched our Safe and Free campaign, believing that in this great country, we deserve to be, and can be, both safe and free. What is really exciting is that, especially in the last half year or so, there has been enormous momentum behind our campaign, that has been supported by an incredibly diverse coalition, completely across the political spectrum, completely across the ideological spectrum, all across the country, of concerned individuals who are questioning and resisting the government's own "justified" cutbacks on

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\* Nadine Strossen is Professor of Law at New York Law School and President of the American Civil Liberties Union. These comments are excerpted from Professor Strossen's remarks on November 21, 2003 at a symposium entitled "*In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital.*" They are reprinted here with Professor Strossen's permission. However, she has not reviewed the written version, and all credit and responsibility for the transcription and editing lie with the University of the District of Columbia David A. Clarke School of Law Law Review.

civil liberties in the name of counter-terrorism, and exercising “eternal vigilance.” The eternal vigilance they speak of comes from the famous Thomas Jefferson quote, “Eternal vigilance is the price of liberty.”

But eternal vigilance is *also* the price of security. Just the fact that we assign this label in our efforts against terrorism is no guarantee that it actually is going to be effective in increasing our safety and security. Too many measures that have that label, in fact, turn out to be just an illusion of security, a politically appealing quick-fix, so that politicians can give their constituents the satisfaction that they are doing something. But the something they are doing may, in fact, achieve nothing more than countering our freedom, without, in fact, countering our terrorism.

I’m going to ask you a riddle: You all know I’ve been doing a lot of traveling lately. The place I just came from, where I was this morning and spoke last night, is the state than can claim to be the most pro-civil liberties, the most truly patriotic, in terms of resisting unjustifiable government over-reaching. Every single member of this state’s congressional delegation, both senators and 100% of its members of the House of Representatives have voted for reform legislation to cut back on the USA Patriot Act’s unjustifiable over-reaching.

Who is going to guess which state? It’s Idaho! One of the most conservative Republican states is solidly opposing the extreme measures of the Patriot Act, because this is not a partisan issue.

We shouldn’t be surprised that so much of the resistance is coming from within the President’s own party, including colleagues of Attorney General John Ashcroft.

This is very important because the administration has been trying to dismiss the increasingly strong resistance as mere partisan sniping.

In fact, there really have been enormous gains. I want to give credit to some of the students here who have worked at the ACLU and others to participate in this extraordinarily successful community resolution movement to resist over-reaching by the federal government. It is a movement that is grounded in state’s rights, as well as individual rights. I know that here in this area, Montgomery County [Maryland] passed one of these resolutions. Across the country, as of Monday, which is the last time I checked, these resolutions had been passed by 212 local governments, towns, counties, villages, cities, and 3 states, in a total of 35 states, representing almost 27 million people.

And I have to tell you, this resonates not only in your local community, but it also has an enormous impact in terms of national politics. Members of Congress are getting very nervous, when they voted for the Patriot Act and they see their constituents battling against it.

I recently was at a hearing, testifying before the Senate Judiciary Committee about the enforcement of the Patriot Act and other security measures. We had four civil liberties people and two government supporters, including the ubiquitous Viet Dinh, who now has gone back to teaching at Georgetown Law School. He is widely described, and he acknowledges, that he is the major author of the USA Patriot Act. He is ubiquitous in large part because the Attorney General refuses to make appearances except before hand-picked audiences of law enforcement officials, military officers and others who would be expected to be more sympathetic to him. I have to tell you that even the Republicans on that Committee were frothing at the mouth with anger and frustration at the United States Attorney General who has enough time to go on a Patriot Act road show, but does not have the time to accept repeated invitations to appear before them in their oversight capacity to answer their questions, on behalf of we the people, about how the Patriot Act's powers are being used.

The Committee asked law enforcement officials and government representatives—which of your powers under the Patriot Act and other post-9/11 measures have you found helpful or necessary in order to increase the effectiveness of your efforts to prevent terrorism in the future? The law enforcement and government representatives replied, citing some provisions.

Then the Committee asked us civil libertarian critics from across the political spectrum—which post-9/11 measures do you criticize as violating civil liberties and as not being necessary for the war on terrorism? And you know what? We were talking about two completely different categories. I think this is a very, very important point to note. We have no problems with the vast majority of the provisions of the Patriot Act. There are many common sense provisions, everything from hiring more translators who can actually speak Arabic, having computers that actually function. These are not controversial provisions.

What was so striking is that what the government is hyping as the effective provisions of the Patriot Act are a completely different set of provisions than the ones that we are challenging. So why can't we have common ground, and come together around the SAFE Act? There is some other reform legislation that could tailor back what we criticize completely separate from what our government says that it needs. So I'm very optimistic.

After great pressure was applied to John Ashcroft and the Department of Justice to get information about how often the government had actually used these new powers under Section 215 to gather secret information from libraries or bookstores, he finally agreed to reveal the number. And he revealed that these powers had *never once* been used. This provides further evidence for the fact that the provisions that we are criticizing as unjustifiable intrusions of privacy are not those actually needed and used by the government.

Now roll back to two days after September 11, that is when the Attorney General started saying to Congress, "You have to pass this law, including Section 215. If you try to tinker with it, and we have one terrorist attack, then blood will be on your hands because we absolutely need this power to defend this country against another terrorist attack."

Two years later, in the most sustained, massive anti-terrorist campaign in the entire history of this country, we have not needed to use that power once. So how can he tell us with a straight face that we would endanger the security of this country if we repealed that power?

I am very optimistic. But I am optimistic in a way that I don't want any of you to feel that we can rest on our laurels. Because despite, or maybe because of all of the criticism and rising opposition, the way that this administration is responding is by constantly pressing for even more powers. Section 215 is an issue because, as I mentioned, a judge really doesn't have meaningful oversight. A government agent simply has to allege that the information is sought for a terrorist investigation and then the judge must issue an order.

There is also another provision in the USA Patriot Act that, for some reason, has been much less publicized, that's even more pernicious. It's called Section 505. It's sometimes referred to as Administrative Subpoenas or National Security Subpoenas. Under this provision, the FBI doesn't even have to go to a court at all. The FBI, completely on its own initiative, can gain access to certain financial records held by our banks and credit unions.

I don't know how many of you follow the news carefully. Yesterday, Congress passed a sweeping new expansion to that power, which most members of Congress hadn't noticed until they arrived to vote yesterday. This provision expands the number and kind of records that the government can get without even going to a judge at all.

There was enormous resistance, although unfortunately the measure did pass. But I think the resistance is very, very significant. The measure was passed as part of the 2004 Intelligence Budget, which apparently is something that usually

sails through with no opposition at all. Yesterday, just because of the one provision expanding surveillance, there was substantial resistance, more than one third of the members of the House voted against it. It was a vote of 264 to 163. Among those who voted against it were 15 conservative Republicans. Again, I wished those opposing the measure had triumphed, but looking at the glass half-full, as I always do—as an activist you have to be an optimist—this is extraordinary resistance to a budget that usually slides through.

As you know, I've been criticizing John Ashcroft. The ACLU is a politically non-partisan organization. Believe me, when Janet Reno was Attorney General, we surely criticized her. And one historical context, I want to point out especially to the students here, is that in fairness, if you look through American history, every single time there has been a national security crisis, no matter who is president, no matter who is attorney general, no matter what their political party or philosophical ideology, they have always acted exactly the same way, completely predictably, increasing power to the maximum. To use the most recent example, the biggest terrorist attack before the 9/11 attacks was, of course, the Oklahoma City bombing, and then-President Bill Clinton and then-Attorney General Janet Reno reacted in much the same way that the current attorney general and president have reacted, namely by immediately proposing and pressuring Congress to pass, with minimal debate and deliberation, a sweeping new law that gave them enormous new powers to combat terrorism. What we got in the Clinton administration, although we fought against it—again with an ideologically diverse coalition—what we got was, "Listen to me on this one."

In 1996, the Clinton/Reno bill gave us between 50 and 60 new federal death penalty crimes. I mention this to underscore the point that I think it oversimplifies the problem if we overly demonize George Bush and John Ashcroft administration. We also must be critical of all of those members of Congress who voted for the Patriot Act, since they did not have to do so.

I happened to be in Washington myself on September 11. The head of the ACLU's Legislative Office, a fabulous woman, Laura Murphy, immediately started calling together the analyzers with whom we had worked in countering the 1996 anti-terrorism law. And as I look back on that now, in retrospect, it's amazing to me that this could have been done so quickly at a time when this city was still in a state of paralysis and chaos. We had spearheaded a coalition of 180 citizen's groups that had a press conference at the National Press Club in Washington D.C., having signed onto *10 Principles in Defense of Liberty* at the time of National Crisis. Now this coalition included groups ranging from People for the American Way to the Eagle Forum. We had Americans for Democratic Action and Gun Owners of American, the American Conservative Union and Common

Cause, racial groups and religious groups. It literally was a cross-section of this country.

At the time that they were having the Press Club conference, I was in New York, and I got a call from the head of the New York bureau of National Public Radio, who was beside herself. She said, "Nadine, I can't believe this. No two of these groups have ever agreed on one principle. How could you ever get 180 of them to agree on 10 principles?" I am happy to tell you that this coalition has hung tight ever since then. This means that when a new proposal comes out from the government that intrudes on individual privacy without significant payoffs in terms of national security, we are able to say this is not just civil libertarians who oppose this. It's also the gun and the religious organizations. So far it has been incredibly effective.

I want to read you just a couple of statements from some of our strange bedfellows. One comes from a Republican member of Congress, who is actually a member of the House Republican leadership. He has denounced the Patriot Act, although he actually voted for it. It's embarrassing to do this, but I think it's laudable. We can say you were acting at a time of understandable panic and crisis, but better late than never. We can still repair the damage. And this example is Alaska Congressman Don Young, a member of the House republican leadership. Back in February, here's what he said about the Patriot Act. He said, "I know everybody voted for it, but it was stupid. It was emotional voting. We didn't study it. It was the worst piece of legislation we ever passed."

I heard again from Dean Shelley Broderick that the UDC School of Law has a Second Amendment group. Its members may be pleased to know that one of our supporters is the National Rifle Association, NRA. Now, the NRA has no better friend in government than John Ashcroft. The Second Amendment seems to be the one constitutional right that Ashcroft deeply believes in. Even so, even having campaigned for him to be appointed as Attorney General, as did the American Family Association, the NRA is *still* criticizing his over-reaching. Here's what they sent to NRA members: "Maybe you think that with President George W. Bush in the White House, everything is safe. You think you can put aside your principles to be a loyal conservative. But if we, as conservatives, don't stand up for these fundamental truths, who will? Never accept the idea that surrendering freedom, any freedom, is the price of feeling safe."

We often hear the saying that, "Oh, I'd be willing to give up my freedom in order to gain security." But the truth is that we are willing to give up *other people's* freedom in order to gain a sense of security and the delusion of security. I'm sure David [Cole, symposium keynote speaker] talked to you about that.

I think the best statement of the ACLU's underlying philosophy, which applies here so well, is that all rights are indivisible. If anybody's right is violated, then nobody is safe. Therefore, even for selfish reasons, we have to identify with the plight of the young Muslim immigrants from Arab countries who are disproportionately having their rights violated. To me, the most powerful statement of that idea was from an ACLU colleague of mine, civil liberties lawyer Stephen Rohde, author of *American Words of Freedom*. He did a paraphrase of the famous prose poem, *Then They Came for Me*, written in 1937 by the Reverend Martin Niemoeller about Nazi Germany. Stephen Rohde paraphrases this poem by plugging into it a litany of actual violations, actual policies that have occurred post-9/11. So I'd like to end by reading Stephen Rohde's poem.

### Then They Came For Me

First they came for the Muslims, and I didn't speak up because I wasn't a Muslim.

Then they came for the immigrants, detaining them indefinitely solely upon the certification of the Attorney General, and I didn't speak up because I wasn't an immigrant.

Then they came to eavesdrop on suspects consulting with their attorneys, and I didn't speak up because I wasn't a suspect.

Then they came to prosecute non-citizens before secret military commissions, and I didn't speak up because I wasn't a non-citizen.

Then they came to enter homes and offices for unannounced "sneak and peak" searches, and I didn't speak up because I had nothing to hide.

Then they came to reinstate Cointelpro and resume the infiltration and surveillance of domestic religious and political groups, and I didn't speak up because I no longer participated in any groups.

Then they came to arrest American citizens and hold them indefinitely without any charges and without access to lawyers, and I didn't speak up because I would never be arrested.

Then they came to institute TIPS (Terrorism Information and Prevention System) recruiting citizens to spy on other citizens, and I didn't speak up because I was afraid.

Then they came to institute Total Information Awareness, collecting private data on every man, woman and child in America, and I didn't speak up because I couldn't do anything about it.

Then they came for immigrants and students from selective countries luring them under the requirement of "special registration" as a ruse to seize them and detain them, and I didn't speak up because I was not required to register.

Then they came for anyone who objected to government policy because it only aided the terrorists and gave ammunition to America's enemies, and I didn't speak up . . . because I didn't speak up.

Then they came for me, and by that time, no one was left to speak up.

It is up to all of us to speak up now, before it is too late.

**DAVID A. CLARKE SCHOOL OF LAW**  
**University of the District of Columbia**

**COLLOQUIUM**  
**Zealous Advocacy in a Time of Uncertainty:**  
*Understanding Lawyers' Ethics*

**April 25, 2003**

## COLLOQUIUM INTRODUCTION

### **UNDERSTANDING LAWYERS' ETHICS: ZEALOUS ADVOCACY IN A TIME OF UNCERTAINTY**

**Katherine S. Broderick\***

Can or should a lawyer representing an alleged terrorist ethically allow the government to tape her conversations with her client as a prerequisite to the representation? Can a public defender live up to the promise of *Gideon v. Wainwright*<sup>1</sup> when he is carrying 100 serious felony cases? Should a lawyer who divulges a client confidence to bring down a corrupt judge be sanctioned? What ethical obligations obtain for the lawyer representing the CEO of a thriving start-up when the CEO admits that by over-reporting profits he believes that he has turned the company around? These questions, some of the toughest lawyers face in the post-September 11th, post-Enron and post-Worldcom world, were addressed in a panel discussion at the legal ethics colloquium sponsored in 2003 by the University of the District of Columbia David A. Clarke School of Law (UDC-DCSL) *Law Review* (the *UDC-DCSL Law Review*).

The colloquium celebrated the publication of the third edition of *Understanding Lawyers' Ethics* by Professors Monroe Freedman of Hofstra University and Abbe Smith of Georgetown University Law School.<sup>2</sup> It brought together regional clinical legal educators, local legal services providers, and law faculty and students for a dynamic exchange of viewpoints on challenging ethical issues and questions. Professors Freedman and Smith were accompanied on the panel by Professors Samuel Dash of Georgetown University Law Center, Paul Butler of George Washington University School of Law, and Laurie Morin of UDC-DCSL. Panel moderator Professor Wade Henderson,<sup>3</sup> holder of the Joseph L. Rauh Chair of Public Interest Law at UDC-DCSL, posed difficult hypotheticals and questions to the panel. Their intense discussions provided a jumping off point

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\* Katherine S. "Shelley" Broderick, J.D., is Dean of the University of the District of Columbia David A. Clarke School of Law. Many thanks to Monroe Freedman and Abbe Smith for writing such a compelling book, so inspiring to all involved in the colloquium. Thanks also to Helen Frazer for her contributions to this introduction.

1 332 U.S. 365 (1963) (holding as a fundamental right the Sixth Amendment's guarantee of counsel).

2 MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004).

3 Professor Henderson also serves as Executive Director of the Leadership Conference on Civil Rights, a civil and human rights coalition comprised of more than 180 national organizations representing persons of color, women, children, organized labor, seniors, people with disabilities, gays and lesbians, civil liberties and human rights interests, and major religious institutions.

from which four of the five<sup>4</sup> panelists and Professor Ellen Yaroshefsky<sup>5</sup> of Benjamin N. Cardozo School of Law wrote essays and articles for this issue of the *UDC-DCSL Law Review*.

In this introduction, I will briefly note what sets *Understanding Lawyers' Ethics* apart from other treatises on lawyers' professional responsibility, and why it is such an important book for law students to read and think about as they begin their careers. I will also provide an overview of the colloquium articles included herein and hope to inspire you to read on. Each is well worth the effort.

### *Understanding Lawyers' Ethics*

It is fitting that UDC-DCSL welcomes exploration of Professors Freedman and Smith's work, which expressly adopts a client-centered approach to lawyers' ethics. UDC-DCSL's predecessor, the Antioch School of Law, was a pioneer in the clinical legal education movement in the United States,<sup>6</sup> and UDC-DCSL today continues that tradition. Client-centered legal representation is at the heart of the pedagogy of clinical legal education.<sup>7</sup> This approach categorically rejects the notion that the lawyer knows what is best for a client, including, and especially, clients who have low incomes or a relatively low educational level. Instead, the client-centered lawyer or law student endeavors first to learn the client's goals and then to pursue those goals zealously.<sup>8</sup>

In *Understanding Lawyers' Ethics*, Professors Freedman and Smith characterize the client as a person whom the lawyer has a power to help, rather than as a person over whom the lawyer has power. The authors identify the central concern of lawyers' ethics as "how far [the lawyer] can ethically go" or "how [far the lawyer should] be required to go" so as "to achieve for [their] clients' full and equal rights under law."<sup>9</sup> For Freedman and Smith, client-centered law practice embraces the closely related and complementary notions of client autonomy and zealous advocacy.<sup>10</sup> They define client autonomy as the client's right to decide what her own interests are. They further encourage lawyers and law students to

4 Professors Freedman, Smith, Butler and Morin. Professor Dash died in 2004 before he had completed his article.

5 Professor Yaroshefsky was unable to attend the Colloquium on the date rescheduled after a snowstorm.

6 For a history of this movement, see Margaret Martin Berry, Jon C. Dubin and Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1 (2001).

7 See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 518 n.42 (1990) ("the origins of client-centered lawyering are inextricably the development of 'modern' clinical legal education itself").

8 See generally chapter two of DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

9 MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (2d ed. 2002), at 8.

10 *Id.*

assist in maximizing client autonomy by “counseling candidly and fully regarding the clients’ legal rights and moral responsibilities as the lawyer perceives them and by assisting clients to carry out their lawful decisions.”<sup>11</sup>

Similarly the authors encourage lawyers and law students in the ethic of zeal, quoting approvingly from Section 15 of the 1908 American Bar Association Canons of Professional Ethics, the lawyer’s obligation to give “entire devotion to the interest of the client, warm zeal in maintenance and defense of his rights and the exertion of [the lawyer’s] utmost learning and ability.”<sup>12</sup> They define zeal as referring to the “dedication with which the lawyer furthers the client’s interest.”<sup>13</sup>

In examining these core precepts, Professors Freedman and Smith employ a panoply of provocative examples ranging from the defense of the Unabomber to Abraham Lincoln’s representation of slave owners. They analyze the Model Rules, the Model Code and the Restatement of the Law Governing Lawyers. They also explore opposing views offered by a host of ethics scholars and commentators. Best of all, the authors challenge law students and lawyers to learn the rules of professional conduct by considering them from a client-centered perspective and by testing them against their own moral standards and reasoned judgment.<sup>14</sup> *Understanding Lawyers’ Ethics* is thus an important contribution to the literature of professional responsibility, providing thoughtful guidance for developing ethical approaches to lawyering. The essays in this section of Volume 8 of the *UDC-DCSL Law Review* examine the ethical arguments in support of client confidentiality and truth-telling versus other moral values in the context of tough cases.

Professor Monroe Freedman, in *The Corporate Watchdogs that Can’t Bark: How the New ABA Ethical Rules Protect Corporate Fraud*, emphasizes the importance of principled and consistent development of ethical rules. He presents a compelling hypothetical illustrating significant anomalies in the American Bar Association’s recent amendment to the Model Rules of Professional Conduct. He reads the revised Model Rule 1.6 to protect the interests of a defrauded third party by allowing an attorney to blow the whistle on a client who has committed the fraud. In contrast, Professor Freedman notes that Revised Model Rule 1.12 forbids the lawyer from revealing a corporate client’s fraud outside the company, unless the fraud is reasonably certain to be exposed anyway. He concludes that the new rules protect corporate clients far more than individual clients. Professor Freedman’s analysis is clear and compelling. It sounds with the authority and perspective of a nationally recognized practitioner and scholar who has spent his career representing real clients in difficult cases.

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11 *Id.* at 79.

12 *Id.* at 70.

13 *Id.* at vii.

14 *Id.*

In *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation*, Professor Laurie Morin takes issue with a uniform rule of confidentiality in representing corporate versus individual clients, and proposes a principled exception. Professor Morin's views differ in this respect from those argued by Professors Freedman and Smith in *Understanding Lawyers' Ethics* and elucidated further by Professor Freedman in his essay in this issue. Still, Professor Freedman acknowledges, in *The Corporate Watchdogs that Can't Bark*, that Professor Morin makes an "insightful and powerful case" for her position, and I agree!

Professor Morin constructs an innovative ethical framework for rules of professional conduct that would "make principled distinctions between individual and organizational clients." She would recognize the corporation's special status as a legal entity that "owes its existence to the state," a status based on a "social compact that conveys certain rights upon the corporation in exchange for social benefits it offers investors and the national economy." In her view, however, corporations should not be "accorded human rights of autonomy and dignity." Because the corporation owes its special status to the benefits it offers, Professor Morin proposes "confidentiality rules that treat corporate clients differently from individual clients." Thus, when officers of a corporation "engage in criminal or fraudulent conduct that will harm shareholders and third-party beneficiaries" of the social compact, she concludes that the "corporation has broken trust with the state and the attorney's loyalties should shift to protect the social compact."

In *Telling Stories and Keeping Secrets*, Professor Abbe Smith reveals herself as both an avid storyteller, in fact a storyteller who makes her living as a criminal defense lawyer by "telling tales," and a "confidentiality absolutist." Confidentiality absolutists, she says, believe that the ethical duty to protect client confidences is inviolable, regardless of the cost to society. As in all her extensive scholarship, Professor Smith is clear-headed, provocative, engaging, and funny. She examines three "hard cases," concluding that confidentiality is required even when an innocent life is at stake, judicial corruption is ongoing, or corporate conduct may pose a danger to others. She mitigates this position by imposing a duty on lawyers in such situations to "engage in moral as well as legal counseling with their clients," and to do "everything they can to get clients to do the right thing." Still, Professor Smith makes a compelling case for her belief that "it is more important to maintain and preserve the principle of confidentiality—no matter how difficult the circumstances—than it is to affirm individual lawyer morality."

Professor Paul Butler, in *An Ethos of Lying*, includes laypersons in his analysis of ethical approaches to achieving a just legal system. Taking up Freedman and Smith's sketch of three exceptions they describe in *Understanding Lawyers' Ethics* where they conclude that "moral values . . . take precedence over truthfulness," he proposes a rationale based on situational ethics and system utilitarianism which asserts that in some circumstances lying can be an ethical

behavior. Professor Butler shows how system utilitarianism might apply in the legal system when a potential juror's honesty about her values or beliefs would tend to support the application of discriminatory law. He also discusses the shocking disparity between white and Black defendants in the imposition of the death penalty and the ethical dilemma this poses for some potential jurors. Anyone who truthfully discloses her belief in the sanctity of human life will be barred from serving on death penalty juries, ensuring the application of this discriminatory law. Thus to save individual lives and to promote systemic reform of the judicial system, Professor Butler proposes an ethos of lying. Professor Butler's rigorous and enlightening analysis of how laypersons might apply their moral values and reasoned judgment to achieve a more just legal system is both thoughtful and thought provoking.

Professor Ellen Yaroshefsky's article, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, pulls together significant data illustrating the depth and breadth of the problems extant within the prosecutorial system and proposes important systemic law reform. She provides widespread examples of prosecutorial misconduct and wrongful conviction cases across the nation and questions the lack of public sanctioning of implicated prosecutors. After examining reasons for failure to discipline prosecutorial misconduct, Professor Yaroshefsky proposes that independent commissions established by state and federal courts and legislatures could efficiently stem misconduct. The commissions would be charged with developing protocols for examining cases, making recommendations for systemic change needed to encourage reporting and to deter future misconduct, developing clear standards and transparent procedures, creating an accessible database on all sanctions imposed at any level of review, and developing educational programming designed to increase reporting and sanctioning of misconduct. Professor Yaroshefsky predicts that effective commissions would increase public confidence in the criminal justice system.

*Understanding Lawyers' Ethics* has been the starting point here for a collection of original and useful analyses of the role of ethics in the behavior of individuals in the legal system and in the creation of a more just legal system. Read together, all these articles make a compelling case that moral values and reasoned judgment are integral to a just legal system which, in fact, may perhaps only be maintained and developed by the principled application of ethics by all parties involved, and must be supported by social institutions constructed to create and enforce just rules and laws.

# THE “CORPORATE WATCH DOGS” THAT CAN’T BARK: HOW THE NEW ABA ETHICAL RULES PROTECT CORPORATE FRAUD<sup>1</sup>

Monroe H. Freedman\*

## INTRODUCTION

Attorney Lucy Lawton finds that her client, Curtis Cline, has devised a billing scheme that appears to be defrauding Cline’s customers. Lawton is especially concerned because her services are being used in carrying out the scheme. She confronts Cline and insists that he stop, but Cline refuses. Lawton is not certain, but she reasonably believes that the scheme is both criminal and fraudulent, and that she is the only one who has caught on or is likely to do so.

What is Lawton to do? The answer is: It depends entirely on who Cline is. If Cline is an individual businessman (not a corporate officer), Lawton can ethically blow the whistle on Cline’s fraud and offer to help the defrauded customers get their money back; indeed, she might even be required to do so. But if Cline is the officer of a corporation, Lawton is forbidden under the ABA’s new ethical rules to blow the whistle.<sup>2</sup>

The reason for this anomalous result is that the ABA’s Corporate Task Force has carried out a drafting and public-relations scam that has persuaded the public and commentators that corporate lawyers are now permitted to report their clients’ fraud. In the words of one commentator, the ABA’s new ethical rules have turned corporate lawyers into “corporate watchdogs.”<sup>3</sup> As we will see, however, these corporate watchdogs are forbidden to bark.

Here’s how it works.

## I. THE AMENDMENTS TO MODEL RULE 1.6

Until 2003, MR 1.6 forbade a lawyer to reveal to anyone that her client was defrauding others. Two of ABA’s amendments to MR 1.6<sup>4</sup> have changed that.

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1 This article is adapted from MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* (3d ed. 2004).

2 In her excellent article in this issue of the UDC/DCSL L. REV., Professor Laurie Morin makes an insightful and powerful case for different ethical rules for maintaining confidentiality for individual clients as against corporate clients. Laurie A. Morin, *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation*. Ironically, there are different ethical rules for individuals and corporations, but the difference favors the corporations over the individuals.

3 See, e.g., James Podgers, *Corporate Watchdogs: ABA House Oks Rule That Would Allow Lawyers to Report Financial Wrongdoing*, 2 A.B.A. J. EREPORT 32 (Aug. 15, 2003).

4 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2004), at [http://www.abanet.org/cpr/mrpc/rule\\_1\\_6.html](http://www.abanet.org/cpr/mrpc/rule_1_6.html), Confidentiality of Information, (incorporating the 2003 amendments) states:

The first of these amendments, which added MR 1.6(b)(2), is not unreasonable. It permits the lawyer to reveal client confidences “to the extent the lawyer reasonably believes necessary” to “prevent” the client from committing a crime or fraud that is “reasonably certain” to result in “substantial injury to the financial interests or property of another” and “in furtherance of which the client has used or is using the lawyer’s services.” This allows a lawyer to avoid being the unwilling instrument of a *fraud in progress*. In such a case, for example, the lawyer could tell the party who is being defrauded that he should not rely on representations made by the lawyer that the lawyer has since learned are false.

Moreover, the addition of MR 1.6(b)(2) gives life to MR 4.1(b).<sup>5</sup> The latter rule requires the lawyer to disclose information necessary to prevent assisting a client in any fraudulent or criminal act. However, prior to the amendment to MR 1.6(b)(2), MR 4.1(b) had no practical effect on client fraud, because MR 4.1(b) includes an exception: “unless disclosure is prohibited by Rule 1.6.” Thus, as long as MR 1.6 had no fraud exception, MR 4.1(b) could never have any effect. With the amendment to MR 1.6(b)(2), however, the lawyer would be required to reveal client information when (a) the lawyer reasonably believes divulgence to be necessary to prevent a fraud by the client; (b) the fraud is reasonably certain to

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- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
  - (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    - (1) to prevent reasonably certain death or substantial bodily harm;
    - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
    - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
    - (4) to secure legal advice about the lawyer’s compliance with these Rules;
    - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
    - (6) to comply with other law or a court order.

The 2003 amendments added (2), (3), (4) and (6) in paragraph (b) above as additional circumstances permitting revelation of client information.

<sup>5</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2004), at [http://www.abanet.org/cpr/mrpc/rule\\_4\\_1.html](http://www.abanet.org/cpr/mrpc/rule_4_1.html), Truthfulness in Statements to Others, (which has not been amended) states:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

result in substantial injury to the financial interests of another; and (c) the client has used or is using the lawyer’s services in furtherance of the fraud.

The second amendment to MR 1.6, the addition of MR 1.6(b)(3), is far broader. It permits the lawyer to “mitigate or rectify” substantial injury to the financial or property interests of another when the injury already “has resulted.” This is an extreme form of blowing the whistle on a client. Even though the fraud has been completed, the lawyer is allowed to go to the third party, volunteer information about the client’s fraud, and offer to mitigate or rectify the fraud by testifying in a legal action on behalf of the third party against the lawyer’s own client.

Such testimony by the lawyer would be permitted under the law of *evidence* by the traditional crime/fraud exception to the lawyer-client evidentiary privilege. But *ethical rules* permitting a lawyer to *volunteer* client information, even regarding a crime, have traditionally been limited to the information necessary to *prevent* the crime, not to “mitigate or rectify” it. Under the ABA’s 1969 Model Code of Professional Responsibility, for example, the lawyer was permitted to reveal “[t]he intention of his client to commit a crime and the information necessary to prevent the crime.”<sup>6</sup> There was no exception relating to a completed crime.

Similarly, MR 1.6(b)(1) of the current ethical rules permits a lawyer to reveal client confidences to *prevent* death or substantial bodily harm, but does not permit the lawyer to reveal client confidences about a death or physical harm that has already occurred. Ironically, therefore, under amended MR 1.6, the ABA has provided greater protection to someone who has lost money to the client through fraud than to a person who has been intentionally maimed by the client, or to someone whose spouse has been murdered by the client.

## II. THE AMENDMENTS TO MODEL RULE 1.13

The amendments to Model Rule 1.6 are a major victory for those who have long lobbied for a fraud exception to confidentiality. How much of a victory would it have been, however, if the exception were subject to the following condition: “provided that the lawyer shall not act to prevent, mitigate, or rectify a client’s fraud unless it is in the interests of *the client* to do so, *and unless the fraud is reasonably certain to be revealed anyway.*”

That proviso expresses what the ABA Corporate Task Force has achieved in its new amendment to MR 1.13. That is, the lawyer for a corporation (referred to in the rule as an “organization”) is permitted to reveal the fraud only if: (a) the board of directors’ failure to take appropriate remedial action is “clearly” criminal;<sup>7</sup> (b) the board’s failure to take appropriate remedial action is “reasonably

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6 MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3) (1969).

7 MODEL RULES OF PROF’L CONDUCT R. 1.13(c)(1) (2004).

certain" to cause "substantial injury to the organization";<sup>8</sup> and (c) reporting out is "necessary" to prevent "substantial injury to the organization."<sup>9</sup> All three of those criteria must be met. In Lucy Lawton's billing-fraud case, none of them is met, so Lawton would be forbidden to blow the whistle on Cline's fraud.

Consider, in contrast to MR 1.13, the language and purpose of the amendments to MR 1.6. Repeatedly, the expressed concern of MR 1.6(b)(2) and (3) is with substantial injury to the financial or property interests of "another"—*not* with the best interests of the client. Indeed, the whole point of the amendments to MR 1.6 is to make the interests of third parties paramount to those of the client in cases of client fraud.

In sharp contrast to MR 1.6, the language in MR 1.13—which determines how corporate lawyers should deal with fraud by corporate clients—makes no reference whatsoever to the interests of anyone other than the corporation. On the contrary, the paramount responsibility of the lawyer under MR 1.13 is solely, and repeatedly, for preventing "substantial injury to the organization" itself.<sup>10</sup> Moreover, whenever a lawyer might consider revealing corporate fraud, she is expressly restricted by an overriding obligation to protect the best interest of the corporate client.<sup>11</sup>

This was not simply an oversight in drafting, and it is not a new issue. Since the early 1980s, similar preferential treatment for corporate clients in the original, unamended version of MR 1.13 has been pointed out, but ignored.<sup>12</sup> The short of it is that MR 1.13 was designed from the outset by the corporate bar to give special protection to corporate clients, and this preferential treatment was accepted by the Kutak Commission in order to get the endorsement of the Model Rules from the ABA's powerful Corporate Section.<sup>13</sup>

8 MODEL RULES OF PROF'L CONDUCT R. 1.13(c)(2) (2004) (emphasis added).

9 *Id.* (emphasis added).

10 MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2004) (one reference); MODEL RULES OF PROF'L CONDUCT R. 1.13(c)(2) (2004) (two references).

11 MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2004) (two references).

12 See, e.g., Monroe Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Confidentiality*, 68 A.B.A. J. 428, 432 (1982):

The proponents of whistle-blowing . . . insist that the whistle-blowing requirement should be imposed only on lawyers for corporations, as distinguished from lawyers representing individuals.

Ironically, the Kutak commission has turned that notion upside-down. While lawyers representing individuals are required to make disclosures in many instances and permitted to make them in many more, lawyers representing business organizations are absolutely forbidden under Rule 1.13(b) and (c), in virtually all circumstances, to reveal even ongoing and future crimes.

See also Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989); MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS*, (1st ed. 1990) (Ch. 10 "Corporate Lawyers and Their Clients: Some Special Ethical Rules"); Monroe Freedman, *The Corporate Bar Protects Its Own*, LEGAL TIMES, June 15, 1992.

13 See sources *supra* note 12.

A. *Reporting Up: Going “Up the Corporate Ladder”*

There is language in MR 1.13 which, when read out of context, appears to require the corporate lawyer to report corporate fraud to the highest authority in the corporation. The language is: “the lawyer shall refer the matter . . . to the highest authority that is authorized to act on behalf of the organization. . . .”<sup>14</sup> Because of this misleading language, there is a misconception that amended MR 1.13 requires the lawyer to report “up the ladder” to the highest authority in the corporation (ultimately to the board of directors) to forestall corporate fraud.<sup>15</sup> This is incorrect for a number of reasons.

First, references to going up the ladder to higher authority in the corporation has been in MR 1.13 all along.<sup>16</sup> Thus, that much-acclaimed amendment in 2003 is not a significant amendment at all.<sup>17</sup>

More important, the lawyer is not *required* by MR 1.13 to go up the ladder. Indeed, she is not even *permitted* to refer the matter to higher authority unless the fraud is “likely to result in substantial injury to the organization.”<sup>18</sup> In our hypothetical case, the fraud is not likely to be detected, so there is not likely to be substantial injury to the corporation if the lawyer remains silent. Accordingly, the lawyer is *forbidden* to go up the ladder.

Furthermore, the lawyer is expressly directed to act “in the best interest of the organization,”<sup>19</sup> and she is further told *not* to go up the ladder if she reasonably believes that doing so is not “necessary in the best interest of the organization.”<sup>20</sup> (Note again that there is not a word here about the best interests—or any interest—of those who are being defrauded.) Since the CEO’s fraud is not likely to be detected, the lawyer could reasonably believe it to be in the best interest of the corporation not to report it to the board, on the grounds that the fewer people who know about the fraud, the better for the corporation. (This would be of particular concern whenever there are independent directors on the board.) In

14 MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2004).

15 See, e.g., STEVEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 143 (2004) (concluding that the amendment to MR 1.13 “create[d] a “presumptive ‘reporting up’ requirement in certain circumstances”).

16 The ABA’s ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 203 (4th ed. 1999) refers to this reporting-up provision in the original MR 1.13 as “loyal disclosure” (within the corporation) as distinguished from the “more common . . . adverse disclosure” (to someone other than the client), citing George C. Harris, *Taking the Entity Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597 (1998).

17 Nor, of course, does the corporate lawyer need permission from MR 1.13 to inform the board of directors of information that is material to the representation. The lawyer has always been required to “keep the client reasonably informed about the status of the matter.” MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3) (2004).

18 MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2004) (first sentence).

19 *Id.*

20 *Id.* (second sentence).

that event, it would not be “necessary in the best interest of the organization” to go up the ladder to the board of directors, and the lawyer would be forbidden to do so.

### B. *Reporting Out: Blowing the Whistle Outside of the Corporation*

Going up the ladder refers only to revealing the CEO’s fraud *within* the organization by going to the “highest authority that can act on behalf of the organization.”<sup>21</sup> As we have seen, even reporting the corporate officer’s wrongdoing within the corporation is severely restricted under MR 1.13(b).

Reporting out—blowing the whistle outside the corporation—is dealt with in MR 1.13(c), which sets out what the lawyer should do, or not do, if the board of directors fails to put a stop to the CEO’s fraud. Here again, there is serious misunderstanding on the part of commentators regarding what the rule actually says.<sup>22</sup> MR 1.13(c)(2) does indeed use the words, “the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure.” But the lawyer must squeeze through several needle-eyes before reaching that point.

First, the board’s failure to act appropriately regarding the fraud must itself be “clearly” a violation of law (that is, not just condoning fraud, but criminal).<sup>23</sup> In addition, the lawyer must reasonably believe that this unlawful act by the board is “reasonably certain” to result in substantial injury to the organization.<sup>24</sup> That quoted language is actually a *more restrictive* condition on the lawyer than that in the original, unamended version of MR 1.13, which required only that the board’s criminal act be “likely” (not, as now, “reasonably certain”) to result in substantial injury to the organization. (Note again, the exclusive emphasis on injury to the organization, not to the defrauded customers.) Thus, if the lawyer reasonably believes that the board’s failure to take remedial action is not “reasonably certain” to injure the company substantially, the lawyer is forbidden to blow the whistle.

After those limitations comes the language, quoted above, that appears to permit reporting out—but in a stringently restrictive context:

. . . the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, *but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.*<sup>25</sup>

21 MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2004).

22 See, e.g., “[T]his ‘reporting out’ authority is a further exception to client confidentiality, beyond the exceptions in Rule 1.6.” GILLERS & SIMON, *supra* note 13, at 143.

23 MODEL RULES OF PROF’L CONDUCT R. 1.13(c)(1) (2004).

24 MODEL RULES OF PROF’L CONDUCT R. 1.13(c)(2) (2004).

25 *Id.* (emphasis added).

As suggested earlier, imagine if the fraud exception to MR 1.6 contained that express proviso: “but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the client.” Would there be any doubt that this “but only if” clause had nullified the fraud exception? As long as the corporation’s fraud is not likely to be exposed otherwise, it cannot be “necessary” for the lawyer to reveal it “to prevent substantial injury to the client.”<sup>26</sup> On the contrary, for the lawyer to blow the whistle would lead directly to “injury to the client” through prosecution and/or civil suits.

Here, then, is the position of the lawyer in our hypothetical case. She reasonably believes that (a) the CEO’s fraud is not likely to be found out; (b) the board’s failure to act is not clearly criminal; (c) the board’s inaction is not reasonably certain to result in substantial injury to the company; (d) revealing the fraud outside the company is likely to cause substantial injury to the company (*i.e.*, prosecution and/or civil suits); and (e) reporting out is not necessary to prevent substantial injury to the company. If the lawyer reasonably believes any one of those things, she is forbidden under MR 1.13 to take any action, directly or indirectly, to reveal the company’s fraud outside the company.<sup>27</sup>

### III. SUMMARY OF THE EFFECTS OF THE 2003 AMENDMENTS

In short, amended MR 1.6 permits, and might require, a lawyer to blow the whistle on an individual (non-corporate) client’s fraud, but MR 1.13 forbids it when the client is a corporation. This is accomplished by making injury to the interests of third parties the paramount concern of MR 1.6, and making the interests of the corporation the overriding concern of MR 1.13.

In a case in which it is likely that an individual (non-corporate) client will continue to get away with defrauding third parties unless the lawyer reveals it, under MR 1.6 the lawyer may reveal the client’s fraud, because doing so is reasonably necessary to protect the paramount interests of the defrauded third parties. But under MR 1.13, on the same facts, the lawyer is forbidden to reveal a corporate client’s fraud, because revealing the fraud is contrary to protecting the overriding interest of the corporation. Put another way, the lawyer for the corpo-

26 Of course, if the corporation’s fraud *is* likely to be exposed otherwise than through the lawyer, then permitting the lawyer to report out at that point becomes inconsequential (although it might enable the lawyer to appear to be distancing herself, if belatedly, from the fraud).

27 Comment [6] to MR 1.13 does not change this result. Indeed, if it did, the text of the rule would control. “The Comments are intended as guides to interpretation, but the text of each rule is authoritative.” MODEL RULES OF PROF’L CONDUCT, Preamble and Scope, paragraph [21] (2004). Moreover, Comment [6] reiterates the restrictive language of the rule itself:

Under Paragraph (c) the lawyer may reveal such information *only when* the organization’s highest authority insists upon or fails to address threatened or ongoing action that is *clearly* a violation of law, *and then only* to the extent the lawyer reasonably believes necessary to prevent *reasonably certain* substantial injury to the organization. [Emphasis added.]

ration is expressly forbidden to reveal the client's fraud outside the company unless the fraud is reasonably certain to come out anyway.<sup>28</sup>

Thus, the ABA continues to give the interests of corporate clients far greater protection than those of individual clients, while persuading the public and commentators that it has taken serious measures to deal with corporate fraud.

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28 A majority of states already permit or, in some cases, require a lawyer to reveal client confidences to prevent a client's fraud. Morin, *supra* note 2, citing authorities. However, all of these states also have versions of MR 1.13 that effectively restrict the lawyer for a corporation from blowing the whistle.

# BROKEN TRUST AND DIVIDED LOYALTIES: THE PARADOX OF CONFIDENTIALITY IN CORPORATE REPRESENTATION

Laurie A. Morin\*

## INTRODUCTION

Should a lawyer protect her client's confidences when she knows that client is about to perpetrate a fraud that will cause substantial financial harm to third parties? For decades, the response of the organized bar has been a resounding "yes."<sup>1</sup> Until August 2003, the American Bar Association's (ABA's) Model Rules of Professional Conduct (Model Rules) provided that a lawyer owes her client a duty of loyalty to preserve the client's confidences, even if that client is about to commit a criminal fraud.<sup>2</sup> The recent wave of corporate scandals that led to record-breaking bankruptcies and investor losses prompted the ABA to reconsider the issue. In August 2003, the House of Delegates adopted revisions to the Model Rules that permit (but do not require) disclosure of client confidences to prevent or mitigate the effects of a client crime or fraud on third parties in furtherance of which the lawyer's services were used.<sup>3</sup>

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\* Associate Professor of Law, David A. Clarke School of Law at the University of the District of Columbia. Thanks to Dean Shelley Broderick for conceiving and planning the colloquium that led to this article. I was inspired to be in the presence of so many great thinkers on the subject of lawyers' ethics: Monroe H. Freedman, Abbe Smith, Sam Dash, Paul Butler, and Wade Henderson. Their insightful remarks prompted me to probe my own point of view and deepen my thinking on a difficult topic. I was also moved by the elegant simplicity of Professor Freedman and Smith's *UNDERSTANDING LAWYERS' ETHICS* (2d ed. 2002), which should be on the bookshelf of every law student and practitioner. My own ideas are not nearly so well thought-out or elegantly expressed, but I hope they will provide a starting point for an important conversation.

1 Unlike most professions, the legal profession in the United States is largely "self-regulating." The American Bar Association (ABA), a private organization, has drafted ethical codes to govern attorneys' relationships with their clients since 1908. These codes are not binding, but have been adopted (and modified) in most states by courts rather than by legislatures. See e.g., *MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS* (2d ed. 2002).

2 *MODEL RULES OF PROF'L. CONDUCT* R. 1.6 (a) (2002) provided that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." R. 1.6(b) provided no exception for client fraud on third parties. Prior to the promulgation of the Model Rules in 1983, the Model Code of Professional Responsibility contained an ambiguous provision that was interpreted to prohibit divulgence of third party fraud. See e.g., *FREEDMAN & SMITH, supra* note 1, at 133-35. The ABA House of Delegates soundly defeated proposals by the Kutak Commission in 1981-82 and by the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) to permit disclosure of client fraud. *Id.* at 139-40.

3 *MODEL RULES OF PROF'L. CONDUCT* R. 1.6(b)(2) & (3) (2003) (amended by the American Bar Association House of Delegates in Denver, Colorado from Report No. 119A).

In this essay, I argue that the ABA missed an opportunity to develop an ethical framework that takes into account the very real differences between individual and organizational clients. The revisions to the Model Rules may indeed help restore public trust and prevent further “intrusion” by the government into regulation of the bar.<sup>4</sup> However, they also perpetuate the profession’s failure to wrestle with a central problem in its one-size-fits-all ethical code:<sup>5</sup> giving an organization rights comparable to those of a human being. Because an organization is not a human being, the principles underlying representation of individuals do not provide a coherent guiding rationale for representation of organizations.

Professors Monroe Freedman and Abbe Smith, in their elegant primer on legal ethics, eloquently describe the “traditionalist, client-centered view of the lawyer’s role in an adversary system”—a view “rooted in the Bill of Rights and in the autonomy and the dignity of the individual.”<sup>6</sup> They align themselves with the ABA’s historical position on client confidentiality, arguing that “in a free society the public interest is served when individual dignity is respected, when autonomy is fostered, and when equal protection before the law is enhanced through professional assistance.”<sup>7</sup> Moreover, they argue that creating a relationship of trust and confidence with the client places the lawyer in a position to persuade the client “to accept the lawyer’s advice to do the right thing.”<sup>8</sup>

It is difficult to take issue with an ethical framework that champions individual rights of autonomy and dignity, and I agree with Professors Freedman and Smith

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4 The legal profession has jealously guarded its self-regulatory status, and I believe that the House of Delegates’ reversal of its long-standing position in August 2003 was based as much on its fear of state regulation as on any principled change of heart regarding client confidentiality. *See e.g.*, FREEDMAN & SMITH, *supra* note 1, at 2 (questioning the justifications for self-regulation).

5 Historically, rules governing attorney-client relationships did not distinguish between individual and organizational clients. FREEDMAN & SMITH, *supra* note 1, at 139-40. The ABA did make some attempt to address the growing demands of organizational representation when it enacted the Model Rules of Professional Conduct in 1983. *Id.* MODEL RULES OF PROF’L CONDUCT R. 1.13 (a) specifically recognizes that an attorney who is employed or retained by an organization represents the organization as a whole, not the individual constituents. Attorneys who represent organizational clients are subject to the confidentiality provisions of MODEL RULES OF PROF’L CONDUCT R. 1.6. Rule 1.13 (c) was also amended to permit disclosure of organizational client confidences when the highest authority in the organization fails to address a clear violation of law that the lawyer “reasonably believes is reasonably certain to result in substantial injury to the organization.” MODEL RULES OF PROF’L CONDUCT R. 1.13(c) (2003) (amended by the American Bar Association House of Delegates in Denver, Colorado from Report No. 119A). The rule provides some guidance for managing internal conflicts that may arise between the constituents and the organization, but does not provide a principled framework for making the tough decisions that arise when corporate officers breach their fiduciary duties to the corporation.

6 FREEDMAN & SMITH, *supra* note 1, at vii.

7 *Id.* at 127-28.

8 *Id.* at 128. Freedman and Smith cite “significant evidence of the success of lawyers in inducing their clients to act legally and morally.” *Id.* One might argue, however, that the remarks of experienced lawyers quoted in the comments to the Model Rules are self-serving and open to question.

that those principles should be paramount when the client is a living, breathing human being. However, I believe that the same principles produce paradoxical results when applied to organizational clients.

If it is accepted that corporations should not be accorded human rights of autonomy and dignity, what should be the theoretical framework governing a lawyer's relationship with her corporate clients?<sup>9</sup> I believe that the governing principle should be grounded in the corporation's unique status as a legal entity "which owes its existence to the state."<sup>10</sup> I argue that status is based on a social compact that conveys certain rights upon the corporation in exchange for the social benefits it is presumed to offer to investors and to the overall economy.<sup>11</sup> When officers at the highest level in the corporate structure engage in criminal or fraudulent conduct that will harm shareholders and third-party beneficiaries of this social compact,<sup>12</sup> I argue that the corporation has broken trust with the state, and the attorney's loyalties should shift to protect the social compact. While this may sound like a radical proposal, the shift in loyalties that I am proposing would only come into play in those relatively rare situations where the lawyer knows to a certainty that the client is determined to follow a course of criminal or fraudulent conduct that so breaks the corporation's social compact that the client is no longer entitled to benefit from the status legal personhood bestows.

Based on this theory, I am in favor of confidentiality rules that treat organizational clients differently from individual clients. When an attorney knows that a corporate manager or officer is engaging in criminal or fraudulent conduct that will substantially harm the organization, I support mandatory up-the-ladder reporting requirements. When the highest officials in the company persist in a course of conduct that is criminal or fraudulent, and is likely to have a substantial adverse impact on third parties, I support noisy withdrawal and discretionary disclosure of client confidences to the extent necessary to prevent or mitigate the harmful effects of the fraud.<sup>13</sup> My aim in this essay is not to analyze some of the

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9 Throughout this article, I use the term "corporation" as a stand-in for a wide variety of state-sanctioned organizational clients, including non-profit organizations, partnerships, tenants' associations, and the like.

10 See e.g., ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW, 1 n.2 (1999), and cases cited therein.

11 See e.g., *id.* at 35. Corporations are granted limited liability which encourages savings, investment, and the pooling of capital by numerous investors. This incentive to capital formation is in turn essential to an efficient stock market. *Id.*

12 The third-party beneficiary concept is a contracts doctrine that recognizes rights of beneficiaries who are not parties to the contract, in certain limited circumstances. See RESTATEMENT (SECOND) CONTRACTS, § 302 (1981). In Section III(B), *infra*, I argue that investors, employees, consumers and creditors of the corporation are third-party beneficiaries of the compact between the state and the corporation.

13 Based upon their articulated position on client confidentiality, I think it is safe to assume that Professors Freedman and Smith would disagree with at least a portion of the rules I endorse here. Their book heartily endorses the ABA's historical refusal (prior to 2003) to amend the rules to allow

vexing technicalities of the proposed rules,<sup>14</sup> but rather to begin to develop a theoretical framework for rules of professional conduct that would make principled distinctions between individual and organizational clients.

I am cognizant that my proposed framework would create some practical difficulties. There is widespread belief in the legal profession that client confidentiality is essential to creating a trusting relationship.<sup>15</sup> If clients know their attorneys will report illegal actions, the argument goes, they will simply fail to seek legal advice on important matters and keep their attorneys in the dark about their plans.<sup>16</sup> Lawyers will be deprived of the opportunity to counsel their clients to “do the right thing,” and clients will be deprived of the sound legal advice to which they are entitled.

I agree that client trust is crucial when defending a client, whether an individual or an organization, against criminal charges. My proposed exceptions to the confidentiality rules would not apply to corporate attorneys hired in a defense capacity. However, I doubt that corporate officers who have decided to defraud the public are likely to place their trust in their attorneys or to follow their advice to “do the right thing.” For reasons I will discuss more fully below, I think mandatory up-the-ladder reporting and disclosure rules are more likely to prevent corporate scandals than the current model of absolute confidentiality.

## I. BACKGROUND

### A. *Enron: A Case Study in Corporate Corruption*

At the end of 2001, Enron Corporation sought bankruptcy protection after restating more than \$586 million in formerly claimed earnings. More than 4,500 workers lost their jobs, shareholders lost billions of dollars in investments, and

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disclosure of third party fraud. FREEDMAN & SMITH, *supra* note 1, at 140-43. Freedman and Smith would reject a rule that permitted an attorney to withdraw and disaffirm any work that was used in furtherance of past criminal or fraudulent conduct. They would, however, endorse a noisy withdrawal rule that was limited to preventing future crimes or frauds, because “[i]t assumes a situation in which the client has rejected a relationship of trust and confidence, and has betrayed the lawyer into unwittingly furthering a crime or fraud.” FREEDMAN & SMITH, *supra* note 1, at 143. My rationale is not based on broken trust between the client and the lawyer, but rather on broken trust between the client and the state. Based on that rationale, I do not see a principled reason to limit the lawyer’s ethical responsibilities to preventing future crimes or frauds.

14 There are many questions left open by my proposed noisy withdrawal and disclosure rules. For example, what level of “knowledge” and what degree of harm should trigger the attorney’s ethical responsibility? Should disclosure be discretionary or mandatory? In a corporate structure, should the responsibility rest on every attorney (including outside counsel), or should it reside in the general counsel’s office? Although these concerns are important, I will not address them here. My goal is to begin a dialogue about a different theoretical framework upon which to make principled decisions about the ethics of corporate representation.

15 See e.g., FREEDMAN & SMITH, *supra* note 1, at 127-28, and sources cited therein.

16 *Id.* at 127.

employees lost their life savings, tied up in retirement accounts funded with worthless Enron stock options.<sup>17</sup> In the aftermath, several Enron officials have been charged with self-dealing and fraudulently inflating profits by creating “off-the-book” partnerships to hide the corporation’s looming debt.<sup>18</sup>

Although bankruptcies on the scale of Enron are relatively rare, the complex financial transactions that led to its downfall provide some insight into the challenges facing corporate attorneys. According to court-appointed examiner Neal Batson, Enron transferred as much as five billion dollars worth of liabilities off balance sheet through sham transactions as part of an attempt to manipulate its financial statements.<sup>19</sup> One revenue-generating tactic involved the use of “off-the-books” partnerships set up by Enron’s former Chief Financial Officer Andrew Fastow. The partnerships used bank loans to purportedly buy assets from Enron, generating revenues of almost \$1.4 billion from 1997 to 2001.<sup>20</sup> However, according to Batson’s first report, the transactions were sales in name only; Enron retained all rights to profits and assumed responsibility for all expenses of the assets that had been “sold.”<sup>21</sup> Company employees nicknamed the sham transactions for Star Wars characters, including Jedi, Chewco, and the “global galactic agreement”—names that have become “metaphors for Enron’s hubris and greed.”<sup>22</sup> Former Chief Financial Officer Andrew Fastow allegedly earned more than thirty million dollars from arranging these transactions, according to the report.<sup>23</sup>

Fastow and former Enron Treasurer Ben Glisan, Jr. have pled guilty to charges that they conspired to manipulate Enron’s financial reports, artificially boost share price, and enrich themselves at the expense of Enron and its shareholders.<sup>24</sup> In an attachment to the plea agreement, Fastow explicitly admitted that he

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17 See e.g., *Ex-Enron CFO Pleads Not Guilty; Andrew Fastow is Accused of Enriching Himself Through Fraud that Cost Investors Billions of Dollars*, L.A. TIMES, Nov. 7, 2002, at C5.

18 *Id.*

19 David Teather, *Enron Scams Fill 2,000 Pages: Second Report from Investigator Tells of Increasingly Desperate Efforts to Conceal Financial Disaster*, GUARDIAN, Mar. 7, 2003, at 23.

20 Kurt Eichenwald, *The Findings Against Enron*, N.Y. TIMES, Sept. 23, 2002, at C1.

21 *Id.*

22 Editorial, *Government Takes Next Step on Enron; The Journey of Andrew Fastow, Enron’s Former Jedi, is a Cautionary Tale About Greed*, SAN ANTONIO EXPRESS-NEWS, Oct. 4, 2002 at 6B.

23 Carrie Johnson, *Enron Case Shapes Up As Tough Legal Fight*, WASH. POST, Feb. 18, 2002, at A1.

24 In September 2003, Glisan pled guilty to one count of conspiracy to commit wire and stock fraud. See C. Bryson Hull, *Guilty Plea Eases Burden in Enron Suits*, REUTERS, Sept. 11, 2003. The plea agreement admitted that Glisan and unidentified others “engaged in a conspiracy to manipulate artificially Enron’s financial statements” designed to hide debt. *Id.* Glisan’s plea created enormous pressure on Fastow, who was his immediate supervisor and mentor. On January 15, 2004, Fastow pled guilty to two conspiracy charges, agreeing to serve ten years in prison and repay more than \$29 million stolen from the company and its shareholders. See Howard Witt & Cam Simpson, *Enron’s No. 3 Exec Pleads Guilty*, CHI. TRIB., Jan. 15, 2004, at C1. His wife, Lee Fastow, pleaded guilty to filing a false tax return and consented to serve five months in prison and five in home confinement. *Id.*

and “other members of Enron’s senior management fraudulently manipulated Enron’s publicly reported financial results” with the intent to “mislead investors and others about the true financial position of Enron and, consequently, to inflate artificially the price of Enron’s stock and maintain fraudulently Enron’s credit rating.”<sup>25</sup> Fastow agreed to cooperate with the Department of Justice’s ongoing investigation of top Enron officials, including former Chair Kenneth Lay and CEO Jeffrey Skilling, who continue to maintain that they knew nothing about the fraudulent transactions.<sup>26</sup> It remains to be seen whether any of the attorneys involved in the transactions knowingly participated in criminal or fraudulent conduct, but it is not too soon to say that at least some company officials committed fraud, and that its lawyers and accountants assisted them with the underlying transactions.<sup>27</sup>

To borrow a line from one judge’s scathing commentary on the savings and loan scandal of the 1990’s, “Where were all these professionals [including Enron’s lawyers] . . . when these clearly improper transactions were being consum-

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25 *United States of America v. Fastow*, Cr. No. H-02-0665, Exhibit A to Plea Agreement, ¶1, available at [www.Findlaw.com](http://www.Findlaw.com).

26 The Department of Justice continues to investigate the Enron case aggressively. Skilling was indicted in February 2004 on 35 counts charging him with wire and securities fraud. See Terry Maxon, *Will Charges Reach the Top of Enron? Former Chairman Lay Could Be the Next Step After Ex-CEO Skilling*, DALLAS MORNING NEWS, Feb. 20, 2004, at 1D. Skilling pleaded not guilty to all charges, and his attorneys maintain that he has done nothing illegal. *Id.* As of this writing, Lay had not yet been indicted, and his attorneys have stated that “Lay had no knowledge that any of Enron’s ‘special-purpose entities’ that Fastow created had been used to illegally bolster the company’s books or that Fastow and others were siphoning money into their own pockets.” See *Lay’s Lawyer Talks of ‘Betrayal’; Enron’s Ex-Chairman Denies Knowing of Misdeeds a Day After Fastow’s Guilty Plea*, L.A. TIMES, Jan. 16, 2004, at C3. Lay’s attorney told reporters that Lay asked him to express to the public his sense of betrayal at Fastow’s admission of wrongdoing. *Id.*

27 The government’s case against Enron’s officers is not based on the illegality of individual transactions, but rather on a pattern of transactions intended to defraud investors into believing the company was more solvent than it actually was. See Johnson, *supra* note 23, at A1. The use of off-the-book partnerships to move debt off corporate balance sheets is not necessarily illegal if there was no intent to defraud, according to Peter Romatowski, a white-collar defense attorney at Jones, Day, Reavis & Pogue in Washington, D.C. *Id.* Even if corporate officers were acting with fraudulent intent, their attorneys may have been acting within legal bounds in drafting individual transactions.

Since this article was written, Court-Appointed Examiner Neal Batson issued a final report that concluded “there is sufficient evidence from which a fact-finder could find that certain of Enron’s attorneys” committed a breach of legal ethics, committed legal malpractice based on negligence, or “aided and abetted the Enron officers’ breaches of fiduciary duty.” *In re: Enron Corp.*, Case No. 01-16034 (AJG), United States Bankruptcy Court, Southern District of New York, Appendix C (Role of Enron’s Attorneys) to Final Report of Neal Batson, Court-Appointed Examiner. The Examiner stated although there was little direct evidence of a particular attorney’s knowledge of wrongful conduct by an Enron officer, and although the attorneys affirmatively deny having any such knowledge, there is circumstantial evidence that would be sufficient for a fact-finder to infer actual knowledge of wrongdoing on the part of some attorneys. *Id.* at 2. However, the Examiner acknowledged that a fact-finder could “draw alternative or contrary inferences from the same evidence.” *Id.*

mated?”<sup>28</sup> The cynical answer is that they were knowing participants in the scam, enjoying lavish corporate expense accounts while workers and shareholders bore the brunt of the losses.<sup>29</sup> As I argue below, however, I believe it is more likely that the lawyers’ failure to intervene and to protect Enron from corporate scandal was a natural consequence of ethical responsibilities founded upon loyalty to individuals, and professional norms that encourage attorneys to act as technical advisors divorced from the company’s overall decision-making.

### B. *The Fallout from Enron*

Enron’s collapse foreshadowed a wave of corporate scandals that has resulted in charges of insider trading, self-dealing, bankruptcy, and fraud against dozens of corporate executives.<sup>30</sup> Even non-profit organizations have fallen prey to the

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28 This case arose when the FDIC seized Lincoln Savings and Loan Association and found the thrift to be insolvent by more than \$2.6 billion. See *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers’ Ethics, and the Rule of Law: Introduction*, 66 S. CAL. L. REV. 977, 979-83 (1993); excerpted in DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 228-31 (3d ed. 2001). Kaye, Scholer vigorously fought the Federal Home Loan Bank Board in its attempts to conduct routine examinations of Lincoln. *Id.* at 228-29. In a scathing condemnation of Lincoln’s professional advisers (including Kaye, Scholer), Judge Sporkin asked the following questions:

Where were these professionals (advisers) . . . when these clearly improper transactions were being consummated?

Why didn’t any of them speak up or disassociate themselves from these transactions?

Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

The OTS subsequently filed a notice of ten claims against Kaye, Scholer, alleging that it had knowingly misrepresented or failed to disclose information about Lincoln’s unsound practices to the Bank Board. *Id.* at 230. Kaye, Scholer vigorously contested these charges, producing an opinion by legal ethics Professor Geoffrey C. Hazard, Jr. that concluded that Kaye, Scholer’s actions were consistent with its professional responsibility, and that it would have violated ethical standards to make the disclosures the OTS was seeking. *Id.* Six days later, Kaye, Scholer settled with the OTS for \$41 million. *Id.*

29 That seems to be the sentiment that brought the downfall of Enron’s star accounting advisors, Arthur Andersen Company.

30 Just a cursory survey of the headlines illustrates the pattern of greed and corruption that scandalized the country during the early years of the 21st Century.

*2002 Will Be Remembered as the Year Executives Paid the Price for Cooking Their Books; Wall Street Shame*, SEATTLE TIMES, Dec. 29, 2002, at E1. Enron, Tyco, WorldCom, Arthur Andersen, Credit Suisse First Boston, Global Crossing, Adelphia Communications, Merrill Lynch, ImClone, Dynegy, Halliburton, Qwest, Martha Stewart, Xerox—all appeared in the news in 2002 amidst allegations of insider trading, self-dealing, lavish expense accounts, bankruptcy, fraud and corruption. *Id.*

*Former Tyco Executives Lose in Court Bid to Dismiss \$600 Million in Fraud Charges*, SEATTLE TIMES, June 24, 2003, at D2. State Supreme Court Justice Michael Obus, in rejecting the

culture of greed and corruption. For example, several chapters of the venerable United Way have been charged with inflating reports of their charitable distributions, while hiding expenses and exaggerating the portion of donations going to charitable programs.<sup>31</sup> Nothing since the savings and loans scandals of the 1980's has shaken public trust to this degree.<sup>32</sup>

As one story after another hit the press, lawmakers felt compelled to take action to restore public trust and confidence. The resulting legislation, the Sarbanes-Oxley Act of 2002 (the Act),<sup>33</sup> enacted sweeping reforms to reign in the corporate excesses exemplified by Enron. One portion of the Act required the Securities and Exchange Commission (the Commission) to prescribe minimum standards of professional conduct for attorneys who represent issuers of securities

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motion, said that "There's compelling evidence the defendants took money from Tyco that they were simply not permitted to take." *Id.*

*WorldCom Controller Pleads Guilty; Myers Admits to Falsifying Numbers, Says He Acted at His Superiors' Behest*, WASH. POST, Sept. 27, 2002, at E1. In entering his plea, Myers told the judge, "I was instructed on a quarterly basis by senior management to ensure that entries were made to falsify WorldCom's books to reduce WorldCom's actual reported costs and therefore to increase WorldCom's reported earnings." *Id.* The Securities and Exchange Commission (S.E.C.) sued WorldCom for securities fraud on June 26, 2002, one day after the company announced that it had misstated its financial results by \$3.8 billion. Seth Schiesel & Simon Romero, *WorldCom Strikes a Deal With S.E.C.*, N.Y. TIMES, November 27, 2002, at C1. WorldCom subsequently struck a deal with the S.E.C. to settle the civil fraud suit against the corporation with a permanent injunction and consent decree requiring WorldCom to refrain from breaking securities laws. *Id.*

*Boss Sold \$194m in Stock as Enron Folded*, ADVER., Feb. 18, 2002, at 22. A large portion of the stocks were sold after Enron official Sherron Watkins warned former Enron Chairman Kenneth Lay about improper accounting practices that ultimately led to Enron's collapse. The *New York Times* reported that Lay was encouraging employees to buy shares as he was selling. Lay refused to testify before Congress about the transactions, but a spokesperson said he had remained "confident" in the market and his sales were not related to Sherron's warnings. *Id.*

31 See, e.g., Peter Whoriskey, *Report Says United Way Withheld \$1.3 Million; Group's New Leaders Acting on U.S. Audit*, WASH. POST, Nov. 21, 2002, at B1. The article reported that the United Way of the National Capital Area had retained about \$1.3 million it should have distributed to charities, had taken an unexplained \$3 million short-term loan from the contributions, and had more than \$120,000 in questionable or unsupported expenses. A similar scandal racked the United Way of the Bay Area, which is accused of using "very aggressive accounting" to hide expenses and exaggerate the portions of donations going to charitable programs. Todd Wallack, *United Way Tweaked Its Financial Reports; Accountants Question Charity's Methods*, S.F. CHRON., July 20, 2003, at A1.

32 Public trust of corporations is at an all-time low, according to an October 2002 survey conducted for the Minority Corporate Counsel Association. John Gilbeaut, *Fear and Loathing in Corporate America*, 89 A.B.A. J. 50 (2003). The study of potential jurors revealed that 75% or more harbor a deep distrust of corporations, compared to about 50% historically. *Id.* at 52. In addition to concerns about corporate greed, about 85% of the respondents believe that companies hide dangers associated with their products unless they are forced to reveal them by the government or a lawsuit. *Id.* at 53.

33 The Sarbanes-Oxley Act of 2002 ("the Act"), Pub. L. No. 107-204, 116 Stat. 745 (2002).

before the Commission.<sup>34</sup> Congress mandated that the rules require attorneys to report evidence of a material violation of securities laws or breach of fiduciary duty by an issuer “up the ladder” to the company’s senior management, and if necessary, to the board of directors.<sup>35</sup> However, the Commission’s proposed regulations went even further, requiring “noisy withdrawal” if up-the-ladder reporting did not result in appropriate action by the corporation’s officers and directors.<sup>36</sup> The Commission’s final regulations left the noisy withdrawal provision temporarily on hold, but included provisions permitting attorneys to disclose confidential information to prevent or rectify “the consequences of a material violation . . . that caused, or may cause, substantial injury to the financial interest

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34 *Id.* at § 307.

35 *Id.*

Section 307 of the Act provides as follows:

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

- (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
- (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

36 Proposed Rules for Implementation of Standards of Professional Conduct for Attorneys, 68 FR 6324, (U.S. Sec & Exch. Comm’n. Feb. 6, 2003). Proposed Subsection 205.3(d) would permit or require attorneys, under certain circumstances, to withdraw from representation of an issuer, to notify the Commission that they have done so, and to disaffirm documents filed or submitted to the Commission on behalf of the issuer. *Id.* at 6326. The proposed rule, which is still under consideration by the Commission, distinguishes between in-house and outside attorneys, and between ongoing or future and past violations. In the case of ongoing or imminent violations, outside attorneys are mandated to withdraw, indicating that the withdrawal is based on “professional considerations,” give written notice to the Commission, and disaffirm any documents that may be materially false or misleading. *Id.*, Proposed § 205.3(d)(1)(i). Inside counsel in those circumstances must notify the Commission of intent to disaffirm and promptly disaffirm any opinion, document, affirmation, representation or the like that the attorney has prepared or assisted in preparing that the attorney reasonably believes is or may be materially false or misleading. *Id.*, Proposed § 205.3(d)(1)(ii). The issuer’s chief legal officer must inform any attorney retained or employed to replace the attorney who has withdrawn that the previous attorney’s withdrawal was based on professional considerations. *Id.*, Proposed § 205.3(d)(1)(iii). In addition to soliciting additional comments on the “noisy withdrawal” provision, the Commission has proposed an alternative that requires attorney action only where the attorney reasonably concludes that there is substantial evidence that a material violation is ongoing or about to occur and is likely to cause substantial injury to the issuer. *Id.* at 6328, Alternative Proposed § 205.3(d). Another alternative would require the General Counsel, rather than the outside attorney, to report the violation to the Commission. *Id.*

or property of the issuer or investors in the furtherance of which the attorney's services were used."<sup>37</sup>

### C. *The Debate in the Organized Bar*

The Commission's rule-making process rekindled a new round in a longstanding debate in the organized bar: to what extent should attorneys be permitted or required to disclose confidential client information to prevent or remedy third-party fraud? The traditional view, championed by the American Bar Association (ABA) and reflected in Model Rule 1.6 (prior to its August 2003 amendment), is that the lawyer's duty of loyalty to her client is paramount, and fraud on third parties should never be revealed.<sup>38</sup> However, a majority of states have rejected this absolutist position, and permit (or in some cases require) attorneys to reveal confidential client information to prevent the client from committing fraud.<sup>39</sup> Comments submitted to the Commission during the rule-making process reflected this divergence of viewpoints, with the ABA leading the charge to preserve client confidentiality and professional autonomy.<sup>40</sup>

In August 2003, the debate moved to the floor of the ABA House of Delegates, where amendments permitting disclosure of third party fraud were once

37 Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 CFR § 205.3(d)(2) (2003) provides:

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury . . . suborning perjury . . . or committing any act . . . that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

38 MODEL RULES OF PROF'L. CONDUCT R. 1.6(a) (2002). See *supra* note 2 for a discussion of the history of this rule.

39 Thirty-seven states permit an attorney to reveal confidential client information in order to prevent the client from committing criminal fraud. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 67 (2000), cmt. f, and THOMAS D. MORGAN & RONALD D. ROTUNDA, 2004 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 144-49 (2004) (reproducing the table prepared by the Attorneys' Liability Assurance Society ("ALAS") cited in the Restatement).

40 The Commission received a total of 167 timely comment letters, many of which focused on its authority to enact a "noisy withdrawal" provision and the impact of such a regulation on the attorney-client relationship. Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Executive Summary, 68 FR 6296 at 2 (U.S. Sec & Exch. Comm'n. Feb. 6, 2003). Led by the ABA, many members of the organized bar expressed concern that the Commission's regulations would undermine the relationship of trust and confidence between lawyer and client, and impede the ability of lawyers to steer their clients away from unlawful acts. *Id.* at 31-32 and sources cited therein.

again on the table. After two days of heated debate,<sup>41</sup> the House of Delegates adopted revisions to the Model Rules which permit attorneys to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that would lead to “substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”<sup>42</sup> Information may also be disclosed “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”<sup>43</sup> The revised MR 1.13 permits attorneys to reveal confidential information where the highest authority within the organization proceeds with or fails to address a clear violation of law, and the lawyer “reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,” regardless of whether Rule 1.6 permits such disclosure, “but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”<sup>44</sup>

The House of Delegates’ decision to overturn decades of adherence to its absolutist position on third party fraud<sup>45</sup> was prompted by the need to restore “public trust” in the legal profession. Proponents on the ABA’s Task Force on Corporate Responsibility contend that the revised ethical rules will “significantly enhance the effectiveness of lawyers in the system of checks and balances neces-

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41 The revision to Model Rule 1.6 passed on a vote of 218-201, while the revision to Model Rule 1.13 passed by a wider margin of 239-147. James Podgers, *Corporate Watchdogs: ABA House OKs Rule that Would Allow Lawyers to Report Financial Wrongdoing*, ABA J. EREPORT (Aug. 15, 2003) (copy on file with the author).

42 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2003) (amended by the American Bar Association House of Delegates in Denver, Colorado from Report No. 119A).

43 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(3) (2003) (amended by the American Bar Association House of Delegates in Denver, Colorado from Report No. 119A).

44 MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (2003) (amended by the American Bar Association House of Delegates in Denver, Colorado from Report No. 119A).

45 When the Model Rules were adopted in 1980, the proposed MR 1.6 permitted the lawyer to reveal information to prevent “substantial injury to the financial interest or property of another” or to “rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services ‘have been used.’” See FREEDMAN & SMITH, *supra* note 1, at 139-40, explaining the history of the ABA’s position on disclosure of client fraud. Proposed MR 4.1(b) would have required the lawyer to disclose information necessary to prevent assisting a client in any fraudulent or criminal act. *Id.* at 140. The client fraud provisions were rejected by the ABA House of Delegates by a margin of 207-129. *Id.* MR 4.1(b) was amended by adding the word “unless disclosure is prohibited by Rule 1.6”, thereby negating any impact. *Id.* By similar strong votes, the House of Delegates rebuffed efforts in 1991 and 2001 to amend MR 1.6 to allow lawyers to prevent or rectify client fraud on third parties. *Id.*

sary to restore public trust in corporate responsibility.”<sup>46</sup> Opponents argue that the revised rules “compromise core ethics values, primarily client confidentiality, that help preserve the professional independence of lawyers.”<sup>47</sup> In the sections that follow, I argue that these arguments miss the point when they are applied to clients who are not living human beings, and that the ABA missed an opportunity to develop a theoretical framework that would provide a principled basis for differentiating between individual and organizational clients.

## II. ARGUMENT

### A. *The Paradox of Corporate Representation*

I will begin with the obvious: a corporation is not a person. Although often described as a “legal person,” the corporation is an artificial, intangible entity<sup>48</sup> that can only act through its designated “constituents”—the managers, officers and directors who carry out its affairs.<sup>49</sup> It is only natural for lawyers to develop loyalties to the human managers with whom they work on a daily basis. When those managers are working in tandem to further the corporation’s state-sanctioned goals, the dichotomy between the legal entity that is the client and the constituents who carry out its business does not present an ethical problem for the attorney. However, in those relatively rare instances when one of the organization’s managers engages in conduct that the lawyer knows will be harmful to the corporation, this dichotomy leads to a paradox—the attorney’s loyalty to preserving the dignity and autonomy of the human constituents may put her in conflict with her loyalty to the legal entity that is the real client.

This paradox is built into the Model Rules of Professional Conduct. Model Rule 1.13 reiterates the obvious rule that the client is the organization as a whole, acting through its duly authorized constituents.<sup>50</sup> Under this rule, when a constituent communicates with the attorney in an organizational capacity, the communication is protected under MR 1.6, but this does not make the constituent a client.<sup>51</sup> In fact, if the constituent’s interests become adverse to the organization, the attorney must give the constituent a type of Miranda warning, making it clear that she does not represent the constituent, that the constituent may wish to re-

46 See Podgers, *supra* note 41. Incoming ABA President Dennis W. Archer argued during debate on the measure that “[c]ore values of the legal profession are compromised when a lawyer loses the discretion to disclose wrongdoing that will lead to the commitment of a crime or fraud.” *Id.*

47 *Id.*

48 *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819), described the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of the law.”

49 Model Rule 1.13 uses the term “constituents” to refer to a corporation’s officers, directors, employees and shareholders; and to persons in equivalent positions in other forms of organizations. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2003), cmt. [1].

50 MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2003).

51 MODEL RULES OF PROF’L CONDUCT R. 1.13 (2003), cmt. [2].

tain independent legal counsel, and that her communications may not be protected by the attorney-client privilege.<sup>52</sup>

The attorney must then “proceed as is reasonably necessary in the best interest of the organization.”<sup>53</sup> This includes up-the-ladder reporting unless the lawyer “reasonably believes that it is not necessary in the best interest of the organization to do so.”<sup>54</sup> The amendments to the Model Rules enacted in August 2003 also permit disclosure of client confidences if the highest authority within the organization fails to rectify the situation and the lawyer “reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.”<sup>55</sup>

Model Rule 1.13 represents an interesting attempt to protect an attorney’s loyalty to the legal person that is the client, while encouraging a trusting relationship between the attorney and the human constituents who carry out the organization’s business. The up-the-ladder reporting process implies a strong role for client counseling, as the attorney attempts to persuade managers, officers and ultimately the company’s directors to do the right thing. Professors Freedman and Smith have faith that attorneys in general, and corporate attorneys in particular, will generally be able to persuade their clients not to engage in wrongful action.<sup>56</sup> I fear that there are too many forces in the culture of corporate representation that militate against attorneys engaging in such wise counseling. In the absence of clear ethical requirements, corporate attorneys are much more likely to defer to their clients’ judgment than to raise concerns about potential wrongdoing.

In a professional culture grounded in loyalty to individual autonomy and dignity, a lawyer would have to be almost schizophrenic to suddenly switch loyalties and report a manager’s actions to higher-ups in the organization. In order to avoid such a burden, a lawyer is more likely to act like an ostrich,<sup>57</sup> turning a blind eye to apparent self-dealing, not questioning unorthodox business decisions,<sup>58</sup> and preserving the manager’s confidences at the expense of the organiza-

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52 MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (2003), cmt. [10].

53 MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2003).

54 *Id.*

55 MODEL RULES OF PROF’L CONDUCT R. 1.13(c) (2003).

56 FREEDMAN & SMITH, *supra* note 1, at 128. They cite anecdotal evidence and the cumulative wisdom of generations of trial lawyers that most clients follow their lawyers’ advice and avoid wrongful acts. *Id.* However, they concede that at least some lawyers have a tendency to “preempt their clients’ moral judgments,” most often “assum[ing] that the client wants her to maximize his material or tactical position in every way that is legally permissible, regardless of non-legal considerations.” *Id.* at 60.

57 This ostrich-like behavior is similar to the “intentional ignorance” model Professors Freedman and Smith critique in the criminal defense arena. FREEDMAN & SMITH, *supra* note 1, at 153-54.

58 It is an accepted axiom of corporate representation that lawyers should not question the “business judgment” of corporate managers and officers. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.13 (2003), cmt. [3], which provides that the constituents’ “decisions ordinarily must be

tion. The structure of the modern-day legal profession helps to facilitate this ostrich-like behavior. Increasing specialization makes it less likely that any one attorney understands the “big-picture” of the corporation’s goals and operations. In-house attorneys may handle the day-to-day work, with highly technical tasks parceled out to outside counsel. Most of the attorneys in this vast network are unlikely to have access to top executives or directors, and are unlikely to have much cross-pollination with one another. Specialization and fragmentation make it much less likely that corporate attorneys will operate as “trusted advisers,” and more likely that they will be viewed as “technicians for hire whose advice can be easily disregarded if it isn’t what the company wants to hear.”<sup>59</sup>

Let us look, for example, at the attorneys who represented Enron in creating the off-the-books partnerships and approving the “loans” that were allegedly used to defraud investors. Many questions remain unanswered regarding the role lawyers played in those transactions.<sup>60</sup> The scenario that follows answers those questions based not on fact, but on speculation grounded on what I have gleaned about the cultural norms that drove Enron Corporation to bankruptcy.

Let us assume that outside counsel were brought in by Andre Fastow himself, for the sole purpose of drafting and approving off-the-books partnership agreements and documenting the loans that were their primary assets. We know that Fastow was a charismatic person with a creative mind and sometimes fiery temper. He developed a team that was young and creative, a veritable brain trust of

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accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province.” The rule attempts to make a distinction between every-day business decisions and violations of the constituents’ fiduciary duties to the organization or violations of law. *Id.* I believe, however, that this is a circular argument. A constituent’s breach of his duty of care, if egregious enough to cause substantial injury to the organization, would fall within the lawyer’s ethical purview under this rule. Thus, in cases where there is serious risk to the organization, it is virtually impossible to untangle business judgment from the lawyer’s ethical responsibilities.

59 Steven Pearlstein, *Corporate Counsel Gone Astray*, WASH. POST, Mar. 19, 2003, at E1.

60 We do know that Enron’s primary outside counsel, Vinson & Elkins, participated in the creation of the controversial partnerships and provided advice about their authenticity. See Lisa H. Nicholson, *A Hobson’s Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91, 97 (2002). The firm subsequently conducted a review of the transactions that concluded that the partnerships were technically legal, but could be “portrayed very badly.” *Id.* at 98, and sources cited *supra* in note 30. What is not clear is the extent to which Vinson & Elkins attorneys knew about their clients’ intent to defraud investors with a pattern of misleading transactions.

As discussed above, subsequent to the writing of this article, the court-appointed examiner released a Final Report that provides a detailed evaluation of the role of Enron’s in-house and outside attorneys. Appendix C (Role of Attorneys) to Final Report of Neal Batson, Court-Appointed Examiner, *supra* note 27. Some of the Examiner’s findings may be at odds with the assumptions I have made in this article. However, no fact-finder has yet decided the questions of knowledge and intent that might lead to civil or criminal liability. Moreover, I would submit that the conventions of corporate culture upon which I based my assumptions support the broader point that I am trying to make in this article, even if they prove not to hold true for Enron.

cutting-edge ideas. It is easy to imagine that he drew outside counsel into this creative team, where their technical skills in implementing the various “Star Wars” partnerships would be highly valued, while isolating them from others in the company (such as the CEO) who might be skeptical about the transactions.

As far as we know, the individual transactions Fastow asked the attorneys to facilitate may have been unorthodox but not illegal.<sup>61</sup> Prosecutors recognize that in order to establish criminal fraud, they will have to show that Enron’s executives intended the *overall picture* to be misleading to investors or regulators.<sup>62</sup> Although several officers of the corporation have pleaded guilty to intentional fraud, it remains to be seen whether the attorneys knowingly participated in the crime.<sup>63</sup> A lawyer looking out for the best interest of the corporation should have been at least curious about the purpose for creating the partnerships and whether they were good for the health of the company and its shareholders. But a lawyer with loyalty to Fastow would have every incentive to rely on the “business judgment” of Fastow and his creative team, and to turn a blind eye to any suspected irregularity in the transactions they were asked to facilitate.<sup>64</sup> Moreover, it is unlikely that any one attorney on this creative team had access to the entire pattern of transactions that prosecutors claim were misleading to investors.

Walking the line mandated by the Model Rules in our imaginary scenario would require the utmost nerve, tact and access to top-level executives. Even if these factors were present, more likely than not, fulfilling the mandate would have been an exercise in futility.<sup>65</sup> Fastow’s legal team likely saw the futility of any efforts to dissuade Enron from pursuing the intended plans, and didn’t see the point of risking their lucrative contracts.<sup>66</sup> They were not necessarily corrupt; they were simply caught in the paradox of corporate representation under a code of professional ethics grounded in individual rights.

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61 See, e.g., Joan Biskupic, *Why It's Tough To Indict CEOs*, USA TODAY, July 24, 2002, at 1A.

62 See, e.g., Johnson, *supra* note 27. See also Eichenwald, *supra* note 20, at 5 (“By engaging in transaction after transaction that pushed close to—and in some cases over—the literal requirements of the accounting rules, Enron was able to create an image in its financial disclosures of a company that simply did not exist.”).

63 See *supra* note 27 and accompanying text.

64 See Eichenwald, *supra* note 20, at 5, stating that the court-appointed examiner’s report provides evidence that accountants, executives and bankers failed to take actions that would ordinarily be required for sales of assets, giving rise to an inference that “participants may have been acting with a wink and a nod when providing loans disguised as sales.” *Id.*

65 Enron’s top officials seem to have adopted the ostrich approach themselves. They continue to disavow any knowledge of the transactions that led to Enron’s downfall. *Id.*

66 This is not as far-fetched as it may sound. When one of Arthur Andersen’s accounting experts objected strongly to Enron’s accounting practices, he was promptly taken off the account. Susan Schmidt, *Enron Probers Facing Complex Task; Prosecutors Focusing on Mid-Level Workers to Unravel Executives’ Actions*, WASH. POST, May 29, 2002, at E1.

### B. *In Search of a Principled Underpinning for Corporate Representation*

There is yet another aspect to the paradoxical nature of corporate representation. In those rare instances where an attorney has reported suspected fraud or breach of fiduciary duty all the way up the ladder to the board of directors, and the board refuses to address the attorney's concerns, where does the attorney find guidance for her duty to "act as is reasonably necessary in the best interest of the organization?"<sup>67</sup> In my opinion, the guiding values of preserving human autonomy and dignity are not of much utility in that situation. In fact, loyalty to the autonomy and dignity of the corporation's directors is responsible for the paradoxical result witnessed in Enron and dozens of other cases—the organization as a whole suffers as it is forced to undergo bankruptcy, reorganization, or even dissolution. Shareholders of the corporation also suffer, along with other investors in the stock market, employees, and creditors of the corporation.

I am certainly not the first to suggest that corporate clients do not deserve the same respect for dignity and autonomy as individual clients deserve.<sup>68</sup> However, Professor Freedman and others who find paramount virtue in enhancing clients' autonomy and dignity argue that there is no principled way to distinguish between individual and organizational clients.<sup>69</sup> They argue that alternative frameworks that depend upon lawyers' discretionary or contextual ethical decisions lead to a double standard—one for clients with whom the attorney agrees, and another for clients whose values the attorney does not share.<sup>70</sup>

Although I agree that attorneys should not make ethical decisions about clients based upon their own moral judgments regarding the client's value to society,<sup>71</sup> I believe that there is a principled way to distinguish between the individual and the organization as clients. The distinction is based not on the attorney's

67 MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

68 See e.g., Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 *FORDHAM L. REV.* 1543, 1546 (2002). Rhode argues for a "thinner" sense of client loyalty that takes into account the lawyer's "special obligation to pursue justice," which runs not to particular clients, "but to the rule of law and to the core values of honesty, fairness, and social responsibility that sustain it." *Id.* Professor Rhode points out that unqualified loyalty to a client is particularly difficult to justify "when the client is not a 'free citizen,' but a profit-driven corporation, and the victims are individuals whose health, safety, and autonomy are not adequately represented." *Id.* at 1546.

69 See, e.g., Monroe H. Freedman, *Colloquium: What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?: How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1717, 1724-26 (2002).

70 Professor Freedman criticizes Rhode's proposed "contextual moral framework," arguing that it will inevitably lead to a double standard. He maintains that lawyers act in the interests of justice by "working within the rule of law in our constitutionalized adversary system, [thus] enhanc[ing] our clients' autonomy as free citizens in a free society." *Id.* at 1727.

71 I agree with Professors Freedman and Smith that the only time an attorney is free to fully exercise her own moral judgment is when choosing whom to represent. FREEDMAN & SMITH, *supra* note 1, at 70. Once representation has begun, the attorney has some capacity to pursue her own values by limiting the scope of representation or by withdrawal, when permitted by the rules. *Id.* at

subjective opinion about their clients' respective virtues, but rather on the corporation's unique nature as a creature of the state.

Although the law treats a corporation as a person for many purposes essential to its corporate mission (i.e., entering into contracts, holding property, and the like),<sup>72</sup> it is not the equivalent of a "natural person" for all purposes. The Supreme Court has declined to extend certain constitutional protections that are uniquely human to corporations. For example, a long line of cases has maintained that the right of a person under the Fifth Amendment to refuse to incriminate himself is a purely personal privilege, applying only to natural individuals.<sup>73</sup> Since it is a purely personal privilege, it cannot be utilized by or on behalf of any organization, such as a corporation.<sup>74</sup>

That is not to say that corporations and other organizational clients do not have a right to attorney-client privilege and confidentiality.<sup>75</sup> It is simply to say that the preservation of individual autonomy and dignity are not the appropriate underpinning for that right.<sup>76</sup> The challenge and opportunity facing the bar is to find a principled rationale to support an ethical framework fitting the unique requirements of organizational clients.

I propose to find that rationale in the corporation's unique social compact with the State. Although the primary purpose of a corporation is to earn money for shareholders,<sup>77</sup> a corporation is awarded certain legal rights in exchange for the benefits it provides to the economy and society as a whole.<sup>78</sup> In exchange for recognition of its legal personhood and limited liability, corporations confer an indirect benefit on the public by encouraging investment, increasing the gross

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59. She also has an obligation to counsel clients on matters or factors, including moral considerations, that may influence the client's legal choices. *Id.* at 60-61.

72 See, e.g., PINTO & BRANSON, *supra* note 10, and sources cited therein. Corporations have even been held entitled to certain constitutional protections, such as due process of law. *Santa Clara v. Southern Pac. Ry.*, 118 U.S. 394 (1886).

73 *Hale v. Henkel*, 201 U.S. 43 (1906), holding that a corporation was not entitled to the Fifth Amendment protection against self incrimination because it is a "purely personal" privilege.

74 *Id.*, cited in *Shelton v. United States*, 404 F.2d 1292, 1301 (D.C. Cir. 1968) (upholding the conviction of the Imperial Wizard of the Ku Klux Klan for contempt based upon his refusal to turn over records of Klan organizations to the House Committee on Un-American Activities).

75 See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (recognizing the utilitarian argument that the attorney-client privilege facilitates the corporate lawyer's ability to ensure the client's compliance with the law).

76 Many commentators have argued that human dignity and autonomy rights are irrelevant when applied to corporations. See, e.g., RHODE & LUBAN, *supra* note 28, at 216-18.

77 See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (ordering payment of a dividend to shareholders rather than lowering the price of cars and sharing the profits with consumers).

78 See, e.g., PINTO & BRANSON, *supra* note 10, at 35, and sources cited therein. Despite the fact that a corporation's primary duty is to make money for shareholders, it also may take ethical considerations into account and devote reasonable amounts to public welfare, humanitarian, educational, and philanthropic purposes. See, e.g., A.L.I. Corp. Gov. Proj. § 2.01.

domestic product, and providing employment.<sup>79</sup> This does not make employees, customers, and creditors constituents of the corporation, but I believe it positions them as third party beneficiaries of a social compact between the State and the corporation.<sup>80</sup> I would argue that a lawyer's duty of loyalty to an organizational client is to preserve this unique social compact.

As the allegations against Enron demonstrate, a corporate client can breach this social compact in two ways. Individual managers within the organization can act based on their own benefit rather than the good of the enterprise, or the corporation as a whole can engage in fraudulent and corrupt activities that have an adverse impact on investors and the overall economy. In either event, such actions give rise to broken trust. The constituent who engages in self-dealing has broken the trust relationship with the corporation, and her actions should be reported up-the-ladder to executives or directors who will act in the corporation's best interests. If the board of directors fails to take appropriate action, it has breached the corporation's compact with the state. In those rare and limited circumstances, I argue that the attorney's duties should shift to preserving that social compact.

I would argue that this rationale supports noisy withdrawal and disclosure of client confidences where necessary to prevent or rectify substantial financial harm to investors, employees and other third-party beneficiaries of the company's social compact.<sup>81</sup> As the Supreme Court held with respect to the Fifth

79 PINTO & BRANSON, *supra* note 10, at 35.

80 See *supra* note 12 and sources cited therein. The RESTATEMENT (SECOND) OF CONTRACTS, Section 302, confers third-party beneficiary status on beneficiaries of a contract based primarily on the parties' intent. However, an Introduction to the Chapter on Contract Beneficiaries provides that public policy may confer third-party beneficiary status even when the parties did not explicitly intend to do so.

Where the manifested intention is unclear, rules of law may fill the gap. And in some situations overriding social policies may limit the parties' freedom of contract. Thus Uniform Commercial Code § 2-318 provides for "third party beneficiaries of warranties express or implied," and includes a provision that "A seller may not exclude or limit the effect of this section." Restatement, Second, Torts § 402A deals with the same problem in non-contractual terms. Again, the rights of employees under a collective bargaining agreement are sometimes treated as rights of contract beneficiaries, sometimes as rights based on agency principles, sometimes as rights analogous to the rights of trust beneficiaries. Or the collective bargaining agreement may be treated as establishing a usage incorporated in individual employment contracts, or as analogous to legislation. In any case they are substantially affected by the national labor policy. Such policies are of course beyond the scope of this Restatement. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 14, Contract Beneficiaries (1981).

I would argue that overriding public policy concerns should confer third party beneficiary status on employees, creditors, consumers, and other investors who are substantially impacted by a corporation's breach of its social compact.

81 The proposed rationale, however, would not support the ABA's recent amendments to the Model Rules, which do not distinguish between loyalty to individuals and loyalty to organizational clients. That implies a different question, when should loyalty to the dignity and autonomy of the individual client be trumped by the interests of third parties or the general public? I would draw that

Amendment privilege against self-incrimination, “While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.”<sup>82</sup> Similarly, I would argue that in circumstances where an individual would be entitled to her lawyer’s absolute loyalty, a corporation that has abused its social compact would not be entitled to such loyalty.<sup>83</sup>

### C. *Professional Norms and Practical Realities*

I am cognizant that simply providing a new theoretical framework will not address the practical realities of corporate legal representation. Perhaps the thorniest issue is how to create a trusting relationship with corporate clients with the threat of individual betrayal hanging over the constituents’ heads.

Proponents of strong client confidentiality rules claim that they are essential for cultivating client trust.<sup>84</sup> Without absolute confidentiality, lawyers worry that their clients will avoid seeking legal advice, especially about potentially risky or controversial decisions.<sup>85</sup> In its comments on the Commission’s proposed regulations, the American Bar Association (ABA) suggested that the “noisy withdrawal” provision would “risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driv-

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line where Professors Freedman and Smith left it—only when the fraud is ongoing or in the future, the attorney’s services have been used in perpetuating the fraud, and disclosing the information is likely to have a mitigating effect. FREEDMAN & SMITH, *supra* note 1, at 143.

82 *Hale v. Henkel*, 201 U.S. 43, 59-60 (1906).

83 I do not propose to *eliminate* the duty of confidentiality with respect to corporations; I simply propose to limit the scope of the lawyer’s duty when the corporation has broken its public trust. Modern courts that have considered similar issues with respect to the attorney-client privilege have declined to limit the privilege to a “purely personal” one, similar to the privilege against self-incrimination, largely on utilitarian grounds. See, e.g., RHODE & LUBAN, *supra* note 28, at 218, *citing* *Radiant Burners, Inc. v. American Gas Ass’n.*, 207 F. Supp. 771, 773, 775 (N.D.Ill. 1962), *rev’d*, 320 F.2d 314 (7th Cir. 1963). In the absence of egregious corporate malfeasance, I agree that confidentiality is useful as an incentive for corporate clients to seek legal advice on risky decisions.

84 See e.g., FREEDMAN & SMITH, *supra* note 1, at 127-28. This belief is widely shared by in-house corporate attorneys, according to a recent survey conducted by the American Corporate Counsel Association. See Gilbeault, *supra* note 32, at 54. Fifty-seven percent of the 1200 in-house counsel who responded to the survey said they believe in-house counsel should play just as important a role as a company’s top officers in preventing fraud and other illegal or unethical behavior. However, only 35% supported changing client confidentiality rules to force lawyers to disclose a threat of financial harm or material violation of S.E.C. rules. Forty-seven percent said such changes would cause the client to be less candid, while forty-six percent said in-house counsel should have some discretion to report such wrongdoing. *Id.*

85 See, e.g., Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, *supra* note 36, 68 FR at 6325, *citing* comments received by the Securities and Exchange Commission with respect to its proposed “noisy withdrawal” rule.

ing a wedge into the attorney-client relationship.”<sup>86</sup> Other commenters suggested that the provision would not further the Commission’s goals because it would cause clients to exclude attorneys from discussions that might prompt the attorney to begin the up-the-ladder reporting process.<sup>87</sup> Similarly, the ABA and others argued that the permissive disclosure provision “would undermine the relationship of trust and confidence between lawyer and client, and may impede the ability of lawyers to steer their clients away from unlawful acts.”<sup>88</sup>

For reasons discussed above, I believe that the current rules already engender divided loyalties: between the human constituent with whom the lawyer interacts and the non-human legal person that is the client. I am skeptical that a lot of client counseling takes place within corporate walls, especially with respect to intentional self-dealing and fraud. I also question the anecdotal wisdom that proclaims that absolute client confidentiality is essential.<sup>89</sup> What about the thirty-seven states that permit lawyers to reveal confidential client information in order to prevent the client from committing criminal fraud?<sup>90</sup> I am aware of no evidence that corporate attorneys in those states have been impeded in representing their clients.

On a practical level, ethical rules that require attorneys to let their clients know that they have an obligation of loyalty to the higher goal of the organization’s social compact may make it more difficult to win the trust of managers with whom they work. And a mere change in the rules will not eliminate the specialization, fragmentation and divided loyalties that lead attorneys to engage in ostrich-like behavior. Any real change in the way lawyers view their ethical responsibilities to corporate clients would require changes in professional norms, both in the legal profession and within the walls of corporations. Corporations would have to stop thinking of attorneys as simply “hired guns” and “legal technicians.” For their part, corporate lawyers would have to realign their loyalties with the overall mission of the organizations they represent. Rather than burying

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86 *Id.*, 68 FR at 6329, n.35.

87 *Id.* 68 FR at 6329, n.37.

88 Final Rule: Implementation of Standards of Professional Conduct for Attorneys, *supra* note 41, at 31.

89 Other commentators and courts have questioned the utilitarian rationale supporting the attorney-client privilege, suggesting that the costs and benefits of the privilege may result in a different balance when applied to corporations. *See, e.g.,* RHODE & LUBAN, *supra* note 28, at 216-18, notes 72-73, and sources cited therein.

90 *See supra* note 39 and sources cited therein. There is little empirical evidence about the effect of discretionary or mandatory reporting laws on attorney-client relationships. *See, e.g.,* Nicholson, *supra* note 60, at 147. “There is simply no empirical evidence from which to predict that even in the long run more crimes and frauds will be prevented under a rule of strict confidentiality than under a rule that permits disclosure in certain cases.” *Id.* at n.366, quoting Nancy J. Moore, *Colloquium: What Does it Mean to Practice “In the Interests of Justice” in the Twenty-First Century?: Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 *FORDHAM L. REV.* 1775, 1779 (2002).

their heads in the sand, they would have to actively pursue their fiduciary responsibilities, and encourage corporate officers and directors to do the same.<sup>91</sup>

I join legions of commentators who envision a culture where lawyers once again operate as trusted advisers, valued for their practical wisdom rather than simply their technical skills.<sup>92</sup> My vision does not arise from nostalgia for some sentimental golden days of lawyering, but rather from modern-day realities. Among the many lessons learned from Enron, I believe that corporations have had to wrestle with the necessity for strong, independent corporate governance. I propose that attorneys should be an integral part of that corporate governance team, working in tandem with corporate officers who share fiduciary duties to the company's mission. Their duty of loyalty to the organization's social compact requires nothing less.

### CONCLUSION

In this essay, I have attempted to begin a dialogue about a new way of conceptualizing lawyers' ethical duties to their organizational clients. I do not pretend to have provided all of the answers (or even all of the relevant questions), but I do propose a guiding principle as a framework for analysis. In an era when intangible, state-sanctioned organizations play such a significant role in the lives of so many individuals, it is time to come to terms with the fact that inchoate entities do not have inherent autonomy and dignity rights. A coherent system of legal ethics should be developed to recognize the attorney's duty of loyalty to preserve the corporation's unique social compact with the state, for the benefit of all potential stakeholders.

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91 I recognize that it may not be practical for every attorney in a large corporate legal department to have knowledge of the company's overall operations. I would propose that the ultimate duty of loyalty resides in the general counsel's office, which should coordinate and oversee all the activities of attorneys in specialized departments and outside counsel.

92 See, e.g., Dean Emeritus Paul Brest, quoted in *Symposium: Creative Problem Solving Conference: Conference Transcript Excerpt: Session 2: Training the Creative Problem Solver*, 37 CAL. W. L. REV. 51, 52 (2000); Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998).

# TELLING STORIES AND KEEPING SECRETS

Abbe Smith\*

## INTRODUCTION: STORIES AND SECRETS

Nothing is better than a good story. You don't need to be a trial lawyer to know this, but you wouldn't be a very good trial lawyer if you didn't.<sup>1</sup> There is a reason trial lawyers are favored dinner party guests: if the food is a flop, the energy level low, and the people in attendance do not have much in common, there will at least be a good story for entertainment. Good trial lawyers have the gift of gab and a bounty of endless material.

Criminal trial lawyers have it even better. We don't just recount tales involving conflict and cash; our stories are about life and death and liberty. Ours are the stories of television shows and movies. How many of us secretly (or not so secretly) want to write that one great screenplay, and never have to see a client at the jail on a weekend again?

I often tell my eight-year-old son that an actual *experience* might be good—going on a school field trip, hanging out at the beach, visiting the Baseball Hall of Fame, picking out a puppy to take home—but the *story* about it will be even better. Yes, this is fun, it's great, we're enjoying ourselves—but wait until we tell someone about it! When all else fails—perhaps the outing wasn't as much fun as was hoped—there's the story.

As a criminal defense lawyer, I understand storytelling to be part of the criminal defender's personality.<sup>2</sup> I have always been an avid storyteller—which is partly why I was drawn to criminal defense<sup>3</sup>—and the culture of criminal defense reinforces those tendencies. There are no better storytellers than a table of defenders with a couple of pitchers of beer. Some defenders express the “storyteller within” beyond courtrooms, taverns, and dinner parties. A colleague of mine at the Defender's Association of Philadelphia—a talented career public de-

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1 See generally STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 1–14 (2d ed. 1997) (discussing trial stories).

2 See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 UC DAVIS L. REV. 1203, 1216–18 (2004) (discussing the public defender personality type).

3 See Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances*, 1 CLIN. L. REV. 723, 730 (1995) (noting that among the reasons the author became a public defender was “a fondness for people and the stories they tell [and] a fondness for my own story-telling”).

fender who now tries mostly homicide cases (which, these days, means many capital cases)—is also a published writer of short stories.<sup>4</sup>

And then there is the ethic of lawyer-client trust and confidentiality.<sup>5</sup> How can a criminal defender and compulsive storyteller live comfortably with an ethic that is destined, if not designed, to infringe on storytelling? There is a growing concern, in clinical legal education and elsewhere, about telling client stories,<sup>6</sup> mostly because of the potential exploitation of clients and, secondarily, because it encroaches on client confidentiality. But, what makes these *client* stories, and not *lawyer* stories? So long as the lawyer is mindful of client privacy—by changing client names, dates, and places and altering other identifying details—I believe one can be an accomplished lawyer storyteller and still protect client confidences and secrets.

I confess that I can sometimes be glib about this. I have even been known to refer to the “Good Story Exception” to confidentiality. This “exception” is exactly what it sounds like: it relieves lawyers of the burdens of confidentiality when there is a good story. Of course, this is a narrowly drawn exception: if the story is run-of-the-mill, workaday, or otherwise not very compelling, the exception would not apply. This exception is in keeping with the increasing call for lawyers to violate client confidences in furtherance of the greater social good.<sup>7</sup> But does protecting innocent human life necessarily have more social value than a really good story well told?

4 See, e.g., Marc Bookman, *Spotting Elvis*, 32:22 DESCANT (1992), cited in Smith, *Too Much Heart*, *supra* note 2 at 1235, n.182.

5 See generally MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 127-152 (2d ed. 2002).

6 See, e.g., Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLIN. L. REV. 271 (1998); see also Jacqueline St. Joan & Stacy Salomonsen-Sautel, *The Clinic as Laboratory: Lessons from the First Year of Conducting Social Research in an Interdisciplinary Domestic Violence Clinic*, 47 LOY. L. REV. 317 (2002).

7 See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 106-115 (2000); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 54-62 (1998); MARVIN FRANKEL, *PARTISAN JUSTICE* 63-66, 82-86 (1980); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1090 (1985); see also Stephen Gillers, *A Duty to Warn*, N.Y. TIMES, July 26, 2001, at A25 (arguing that lawyers should be required to reveal client confidences in order to prevent reasonably certain death or substantial bodily harm, especially in a corporate context); *Enron and the Lawyers*, N.Y. TIMES, Jan. 28, 2002, at A14 (editorial arguing in favor of defeated American Bar Association proposal permitting lawyers to violate confidentiality to prevent fraud).

Many lawyers resist these proposals. See Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret?*, N.Y. TIMES, Aug. 11, 2001, at B7 (noting that “[w]hile many lawyers are worried about the erosion of client trust, legal ethicists are worried about the public trust”); Jonathan D. Glater, *A Legal Uproar Over Proposals to Regulate the Profession*, N.Y. TIMES, Dec. 17, 2002, at C1 (describing lawyer resistance to SEC proposal that would require lawyers to take evidence of fraud to a company’s top managers); William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. TIMES, July 31, 2001, at A6 (reporting on the controversy surrounding ABA proposals allowing lawyers to reveal client confidences to prevent fraud, injury, or death).

Glibness aside, how does a professional storyteller—someone who makes a living telling tales and using whatever material is available in order to tell them—accommodate a professional requirement not to tell? How can I—someone who makes her living by talking to judges and juries, clients and witnesses, students and fellows—accommodate a professional requirement to keep my mouth shut? Odd combination though it is, I believe in both telling stories and keeping secrets. I believe that doing both is what good lawyers do. As much as I love a good story—and I love it absolutely—I am equally committed to keeping a secret and keeping it absolutely.

### I. A STORYTELLER AND CONFIDENTIALITY ABSOLUTIST

Lawyers who believe that the ethical duty to protect client confidences is inviolable, no matter the social cost, are “confidentiality absolutists.” To these lawyers—and I am one—client trust is sacrosanct; all other values must give way to the principle of maintaining client trust and confidence. The words “as my client was saying” or “and then my client said” should never pass a lawyer’s lips.

In the course of writing this article, I saw the documentary *Capturing the Friedmans*,<sup>8</sup> a powerful and disturbing film about the disintegration of a middle-class Jewish family in Great Neck, New York, when the father Arnold Friedman and the youngest son Jesse were charged with multiple counts of child sexual abuse. Although both Arnold and Jesse pleaded guilty, the charges seem questionable at best. The pleas were less the result of fact than fear (on the part of Jesse, a soft-spoken, guileless nineteen-year-old), shame (on the part of Arnold, a popular teacher who admitted having a longstanding interest in man-boy sex), and pragmatism (each faced more than a hundred counts of child abuse<sup>9</sup> and life in prison in an era when allegations of child abuse sparked by sensationalist press often became witch hunts<sup>10</sup>) than fact.

For me, one of the most distressing things about the film was the appearance of Jesse’s lawyer, Peter Panaro, who practices in Massapequa, N.Y. In utter violation of lawyer-client confidentiality, Panaro comments at length about his representation of Jesse and his opinion about the outcome of the case.<sup>11</sup> Clearly not among those lawyers who believe there is a professional obligation to preserve

8 CAPTURING THE FRIEDMANS (HBO Documentary 2003).

9 Arnold was indicted on 107 counts, and Jesse faced 245 counts. See Karin Lipson, *Toward an Elusive. A Documentary Filmmaker Exploring the Abuse Cases Against a Great Neck Father and Son Lifts the Curtain on the Family’s Private Drama*, NEWSDAY, Jan. 16, 2003, at B7.

10 See generally PAUL EBERLE, *THE ABUSE OF INNOCENCE: THE McMARTIN PRESCHOOL TRIAL* (1993) (critically examining the 1983 McMartin PreSchool child sexual abuse case in California); see also Ruth Shalit, *Witch Hunt*, THE NEW REPUBLIC, June 19, 1995, at 14 (discussing the questionable law enforcement techniques in the 1985 Amiraault/Fells Acre case in Malden, Massachusetts).

11 Arnold Friedman’s lawyer, Jerry Bernstein, is much more closed-mouthed in the film, which is consistent with previous behavior. See Alvin E. Bessent, *Sex Offenders in Open Letter: We’re Innocent; Victims’ Parents Irked*, NEWSDAY, May 4, 1990, at 6 (reporting that Bernstein refused to com-

client confidences and secrets in the broadest sense,<sup>12</sup> Panaro feels free to talk about everything from his revulsion toward Jesse's father to his belief that Jesse must have been guilty.

Among the things Panaro shares in the film is a plainly apocryphal story about visiting Arnold in federal prison. Panaro claims that, when he was interviewing Arnold about the case, Arnold asked to change tables because he felt "aroused" by a five or six-year-old boy who was being bounced on his father's knee nearby. Panaro claims he was disgusted by this. Aside from this disclosure being hurtful to Jesse, who loved his father, there was absolutely nothing in Arnold's history,<sup>13</sup> personality,<sup>14</sup> or what is known about pedophilia,<sup>15</sup> to support such a tale. Worse is Panaro's account of Jesse's tearful "confession"—which Panaro demanded in order to allow his client to accept a plea offer for 6 to 18 years—that he indeed helped his father molest some boys in the basement of the Friedman home. In the film, Jesse denies his lawyer's account, and clearly did not give Panaro permission to say such a thing. The lawyer's conduct in the film is appallingly unethical.

Confidentiality absolutists believe that attorney-client confidentiality, unlike doctor-patient confidentiality<sup>16</sup> and/or psychotherapist-client confidentiality,<sup>17</sup> is inviolate. In this regard, it is more like priest-penitent confidentiality. It is not

ment on the claim that Arnold Friedman had been pressured into pleading guilty, citing lawyer-client confidentiality). Bernstein's conduct is a refreshing contrast to Panaro's.

12 See, e.g., DC RULES OF PROFESSIONAL CONDUCT, Rule 1.6(a) ("A lawyer shall not knowingly reveal a confidence or secret of the lawyer's client; use a confidence or secret of the lawyer's client to the disadvantage of the client; use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."). Under the DC RULES, "secret" is defined as "information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would likely be detrimental, to the client." Rule 1.6(b). The DC confidentiality rule takes a broad view of client confidences, requiring lawyers to be strongly protective of all information learned in the course of the professional relationship. As the Comments following the Rule states: "A fundamental principle in the client-lawyer relationship is that *the lawyer holds inviolate the client's secrets and confidences*. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Rule 1.6, Comment 4 [emphasis added].

13 He admitted to being drawn to 8- to 12-year-old boys. CAPTURING THE FRIEDMANS, *supra* note 8.

14 He was ashamed about his interest in boys and spent his life hiding it. *Id.*

15 See generally DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 527-28 (4th ed. 1994) (noting that pedophiles who, like Arnold Friedman, are attracted to males are generally attracted to children older than 10).

16 See generally Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177 (1986).

17 See, e.g., Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (1976); see also Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982).

that attorneys, like priests, are stand-ins for God,<sup>18</sup> but that confidences shared in a lawyer's office, police office, or jail cell should be treated as if they were shared in the confessional.<sup>19</sup> In the confessional, candor is essential and must be protected.

The concept of confidentiality has a long history dating back (ignominiously) to ancient Rome, where slaves were prohibited by law from revealing their master's secrets,<sup>20</sup> and (not so ignominiously) attorneys were not allowed to give testimony against clients.<sup>21</sup> The attorney-client privilege was first recognized in England in the late sixteenth century, and provided the basis for the ethical duty of confidentiality in the common law and in various professional codes.<sup>22</sup> The ethical obligation of client confidentiality was recognized in the United States at least by the middle of the nineteenth century.<sup>23</sup> Under the *Field Code of Procedure*, adopted in 1848 in New York, lawyers were required to "maintain inviolate the confidence and at every peril to himself, to preserve the secrets of . . . clients."<sup>24</sup> Under the influential 1887 *Alabama Code of Ethics*, the first formally adopted body of ethical rules, lawyers had "not only a legal duty to maintain the client's confidences under the attorney-client privilege, but . . . an absolute duty to maintain the secrets and confidences of the client at all costs as a matter of professional ethics."<sup>25</sup> The ABA's *Canons of Professional Ethics*, adopted in 1908, expressly protected clients' "secrets or confidences" in Canon 6.<sup>26</sup>

There is a connection between the adversary system, the Bill of Rights, and the ethic of lawyer-client trust and confidence. Trust between lawyer and client has been called the "cornerstone of the adversary system and effective assistance of

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18 See Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose A Client Confidence*, 29 LOY. L.A. L. REV. 1771, 1772 (1996); see also Anthony Cardinal Bevilacqua, *Confidentiality Obligation of the Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733 (1996) (noting that the sacramental seal of confession was divinely instituted by Jesus Christ).

19 See CATHOLIC CODE OF CANON LAW c.983, 1 (2003) (affirming that "it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever"). As in the attorney-client relationship, canon law asserts that confidentiality is essential to maintaining the relationship between priest and penitent. Penitents would not feel free to confess sins and seek spiritual counseling without absolute confidentiality. *Id.*

20 See Carol M. Langford, *Legal Ethics: Reflections on Confidentiality—A Practitioner's Response to Spaulding v. Zimmerman*, 2 J. INST. STUD. LEG. ETH. 183, 185 (1999).

21 See Moore, *supra* note 16, at 199, n.100. There is also a Jewish tradition of forbidding disclosure of confidential information. See Pearce, *supra* note 18, at 1772-76.

22 See *id.* at 199.

23 See FREEDMAN & SMITH, *supra* note 5, at 128-29.

24 L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909, 911 n.6 (1980).

25 *Id.* at 935.

26 See FREEDMAN & SMITH, *supra* note 5, at 130.

counsel.”<sup>27</sup> Just as the Bill of Rights protects individual freedom, lawyers who maintain client confidences protect individual privacy, dignity, and autonomy.<sup>28</sup>

The ethic of lawyer-client confidentiality runs deep in the profession. It is fundamental whether it is called trust, fidelity,<sup>29</sup> or loyalty.<sup>30</sup> As David Luban writes:

Lawyers . . . are expected to keep their clients’ confidences. That is perhaps the most fundamental precept of lawyers’ ethics, the one over which to go to the mat, to take risks, to go to jail for contempt if the alternative is violating it. . . . There is a personal dimension to confidentiality: clients trust their lawyers, and lawyers want to deserve that trust. Any discussion of confidentiality that failed to acknowledge the core values of loyalty and trustworthiness would rightly be accused of lacking heart. And thus it is important to stress that in ordinary circumstances, a lawyer must keep the client’s confidences as a matter of elemental decency, just as we must keep the confidences of a friend.<sup>31</sup>

Lawyers must keep client confidences as a matter of “elemental decency”<sup>32</sup> in ordinary and extraordinary circumstances. These circumstances include life as we know it after September 11, 2001. Since September 11, in the name of security and the war against terror, John Ashcroft’s Justice Department has led an attack on the Bill of Rights unlike anything ever seen before.<sup>33</sup> United States citizens and non-citizens alike are being investigated, jailed, interrogated, tried and pun-

27 *Linton v. Perrinni*, 656 F.2d 207, 212 (6th Cir. 1981) (quoted with approval in *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., concurring)).

28 See generally FREEDMAN & SMITH, *supra* note 5, at 127-152.

29 See Abbe Smith and William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 515-21 (1999) (discussing the “virtue of fidelity”).

30 See *United States v. Costen*, 38 F. 24 (C.C. Colo. 1889) (Justice David J. Brewer writing that the profession and the community can tolerate overzealousness by a lawyer on behalf of a client but “cannot tolerate for a moment . . . disloyalty on the part of a lawyer to his client.”).

31 DAVID LUBAN, *LAWYERS AND JUSTICE* 186 (1988). For a discussion of the sometimes invidious use of the judicial contempt power, see Louis Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 514 (1990).

32 *Id.*

33 See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* (2004); see also Eric Lichtblau & Adam Liptak, *Threats and Responses; On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at 1 (noting the FBI’s broadened powers to conduct surveillance and use intelligence information under the USA Patriot Act, the Justice Department’s new authority to monitor jailhouse conversations between federal inmates and their lawyers, and the secrecy surrounding the detentions of prisoners at Guantanamo Bay and foreign nationals in the United States after the September 11 attacks); Matthew Purdy, *A Nation Challenged: The Law; Bush’s New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at 1 (describing the changed legal landscape since September 11).

ished without the legal protections the United States Constitution (and/or international human rights law) affords.<sup>34</sup> Among other things, prison conversations between lawyers and their clients are routinely being monitored and taped,<sup>35</sup> as are phone conversations.<sup>36</sup> Good lawyers say no to this—and many have. A 2003 *New York Times* article reported that the Pentagon is having a hard time recruiting civilian lawyers to represent detainees held in Guantanamo Bay, Cuba, because “[i]t would be unethical for any attorney to agree to the conditions they’ve set.”<sup>37</sup>

For those of us who believe that confidentiality is absolute, it is better to put oneself at peril rather than reveal a client confidence. One lawyer even has a name for this: “PYAL,” which stands for “Putting Your Ass on the Line for your client.”<sup>38</sup> Confidentiality is worth fighting for because lawyers wouldn’t be able to effectively represent clients without it. Confidentiality permits lawyers to routinely say to clients as we attempt to build a relationship, “trust me.”<sup>39</sup> Confidentiality permits clients to share with their lawyers facts which could be damaging to their cases or which show the clients in a bad light, without fear of disclosure.

34 See Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated “Combatants” Lose Legal Protections*, WASH. POST, Dec. 1, 2002, at 1.

35 See Lichtblau & Liptak, *supra* note 33, at 1.

36 See Seth Rosenfeld, *Looking Back, Looking Ahead; A Nation Remembers; Patriot Act’s Scope, Secrecy Ensnare Innocent, Critics Say*, SAN FRANCISCO CHRON., Sept. 8, 2002, at 1 (reporting that Ashcroft issued a new rule allowing FBI agents to monitor phone calls between lawyers and clients if there is “reasonable suspicion” the conversations may further terrorism).

37 Katharine Q. Seelye, *Aftereffects: Military Tribunals; U.S. Seeking Guantanamo Defense Staff*, N.Y. TIMES, May 23, 2003, at A16 (quoting Don Rehkopf, co-chair of the National Association of Criminal Defense Lawyers’ military law committee). Rehkopf is outraged by the government intrusion in the lawyer-client relationship: “You have to agree to waive the attorney-client privilege so that the government can monitor your conversations. It’s a total farce.” *Id.*

The Pentagon claims they will find the lawyers they need and provide fair trials to the detainees. See John Mintz, *Both Sides Say Tribunals Will Be Fair Trials*, WASH. POST, May 23, 2003, at A3 (quoting chief defense attorney and Air Force Colonel Will A. Gunn: “We’re going to be able to provide a zealous defense for all detainees brought before trial . . . . We’re looking for [defense lawyers who are] fighters . . .”).

38 See LUBAN, *supra* note 31, at 185 (quoting Francis Belge, one of two lawyers involved in the famous Lake Pleasant Bodies Case). In the Lake Pleasant Bodies Case, a man, who was accused of killing a student camping near Lake Pleasant, told his lawyers of two other murders. The lawyers found and photographed the bodies of these other victims but kept the information secret for months notwithstanding a plea from the father of one of the murder victims to reveal her location. See *id.* at 53-54.

39 See Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J. LAW & POL’Y 83, 119-122 (2003) [hereinafter Smith, *The Difference in Criminal Defense*] (discussing the challenges criminal lawyers face in establishing a relationship of trust with clients); see also Eva Nilsen, *Disclose or Not: The Client with a False Identity* in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 214, 225 n.39 (Rodney J. Uphoff ed. 1995) (“[D]isclosure of a client’s confidences can wreak havoc on the client, leaving him feeling betrayed by a lawyer who began the relationship with what now seems like an empty promise of loyalty”).

This allows lawyers to obtain information they need to represent clients effectively.<sup>40</sup>

On the other hand, confidentiality absolutists, like our less absolute colleagues, do what we can to avoid putting ourselves and our clients at peril.<sup>41</sup> Often, we use our storytelling abilities to get out of telling client secrets. When a judge asks whether an accused has a criminal record and the lawyer representing the accused knows only from his or her client that the answer is yes, the smart lawyer might tell a story. "Judge," the lawyer might begin, "this is so typical. It's just like the Pretrial Services Agency not to have that information available. My client has been locked up for more than 24 hours now, supposedly because the people at Pretrial Services need to interview him and assemble information. The last time this happened with another client, it literally took days for them to get their act together. Let me tell you about that case . . . ."

Confidentiality absolutists also believe in our ability to use persuasive storytelling, along with other methods, to get clients to do the right thing. Although trial lawyers like to think of themselves as *trial* lawyers, the bulk of what litigators and non-litigators do is counsel clients. In the aphorism attributed to Elihu Root, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."<sup>42</sup> Thus, most lawyers prefer to rely on their own counseling skills even in difficult situations rather than abdicate their lawyer role and "call the cops." Lawyers who believe in confidentiality feel that, even when the client threatens harm to a third party, lawyers should counsel the client against carrying out such threats rather than contacting the authorities and divulging client confidences.<sup>43</sup>

40 See FREEDMAN & SMITH, *supra* note 5, at 127-28; LUBAN, *supra* note 31, at 181; see also Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

41 One commentator describes the defense lawyers' competing obligations to protect the client and be candid to the court as a "difficult and delicate balancing act." Rodney J. Uphoff, *Confidentiality and Defense Counsel's Duty to Disclose in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER*, *supra* note 39, at 132.

42 MARY ANN GLENDON, *A NATION UNDER LAWYERS* 37 (1994) (quoting aphorism attributed to Elihu Root); see also Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1082 (1979). Lehman notes that people "widely look to lawyers as worthy advisers and take seriously what they have to say. Surely every lawyer has at some time dissuaded a client from some wasteful or destructive pursuit." *Id.*

43 This is so not only in the United States. See *The Law Report* (AUSTRALIAN BROADCAST CORPORATION radio broadcast, Dec. 11, 2002) (criminal defense lawyers discussing *The Ethics of Criminal Defense Lawyers*). In the discussion, Australian defense lawyer Michael Clark stressed the importance of confidentiality: "Confidentiality is paramount. The system doesn't work if that confidentiality isn't maintained, and as difficult as it might be morally, you've just got to wear that." *Id.* When asked what he would do if a client threatened to "get" a prosecution witness, Clark's compatriot Geoff Vickridge replied, "[I]f I believed that there was any credence to be given to what they said . . . the first tack I'd probably take would be to try and scare the client . . . [and] I'd certainly try and point out that it wouldn't be a very smart idea." *Id.* This is the sort of answer you would get from

Those of us who believe in absolute confidentiality argue that such counseling works. There is substantial evidence to back this up.<sup>44</sup> In the *Model Rules*, for example, the American Bar Association affirms that “[b]ased upon experience, lawyers know that almost all clients follow the advice given . . . .”<sup>45</sup> With respect to perjury in criminal cases, “experienced defense lawyers have pointed out time and again that, if permitted to continue to counsel . . . their criminal clients up to the very hour of the client’s proposed testimony, they almost always were successful in persuading the client not to take the stand to testify falsely.”<sup>46</sup>

## II. THE HARD CASES

There are always hard cases. Law practice wouldn’t be nearly as interesting if there weren’t hard cases raising difficult moral dilemmas.<sup>47</sup> For me, the hard cases are (1) the hypothetical client who confesses to a murder for which the wrong man is about to be executed; (2) the real-life client who confides in his lawyer about judicial corruption; and (3) corporate clients who confide in lawyers about wrongful and/or criminal conduct that will likely pose danger to others. The matter of client perjury is not a difficult case for me, so I will not discuss it here.<sup>48</sup>

### A. *The Wrong Inmate About to be Executed*

I became a criminal lawyer because, among other reasons, I wanted to help make sure that no innocent people (at least on my watch) are convicted and imprisoned or put to death. My commitment to this goal—and my life-long opposition to the death penalty—make the “execution of the wrong man” hypothetical especially difficult for me. It would be painful if I ever had to confront this situation in the flesh.

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an assembly of American public defenders. At most, they might send in an office investigator (preferably a former police officer) to scare the client.

44 See FREEDMAN & SMITH, *supra* note 5, at 128.

45 MODEL RULES OF PROF’L CONDUCT, Rule 1.6 cmt. (2000) [hereinafter MODEL RULES].

46 James G. Exum, Jr., *The Perjurious Criminal Defendant: A Solution to His Lawyer’s Dilemma*, VI SOC. RESP. 16, 20 (1980). James Exum is not a defense lawyer, but the Chief Justice of the North Carolina Supreme Court.

47 Some law scholars would like to reconcile these dilemmas and offer an easier and more “moral” life for lawyers. See, e.g., Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. AND MARY L. REV. 1303 (1995). I prefer to struggle through dilemmas and “do good” by doing what I can to achieve my client’s needs and interests.

48 See generally FREEDMAN & SMITH, *supra* note 5, at 153-190. I remain much more concerned about the extent and impact of police perjury than client perjury. See Smith, *The Difference in Criminal Defense*, *supra* note 39, at 98, n.71; see also MONROE FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 91-93 (1975); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); Stanley Z. Fisher, “Just the Facts, Ma’am”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992).

Still, if a client came to me and revealed that he had committed a crime for which an innocent man had been sent to death row, I would use all my powers of persuasion to try to get the client to do the right thing. If the client refused, I would counsel him further. If he refused again, resisted all entreaties, and I were forced to conclude that he could not be moved, I would leave him be and keep his trust. It would not be easy, but I would manage it. In the aftermath, I would do what I could not to take it all on myself—though I imagine I would feel aggrieved and guilt-ridden about the wrongful loss of life—by cursing the incompetence of the police and prosecution and the inherent injustice of the death penalty.

In order to soothe my guilty conscience, I would likely point out that there is no guarantee, if I divulge such a confidence, that it would have any effect on the fate of the wrongly convicted man. The criminal justice system is deeply flawed, and this would be just one more wrongful conviction and punishment.<sup>49</sup> I might say that lawyers are not the only ones placed in this position, and that countless “true perpetrators” have probably unburdened themselves—to their mothers, sisters, lovers, friends—and their secrets have been safe.<sup>50</sup> Probably, these thoughts would provide comfort for a time.

In the rare case where a lawyer feels he or she *must* disclose confidential information to save a life (something I acknowledge might one day happen to me, so I can sympathize with the opposing viewpoint here<sup>51</sup>), I believe he or she will do so even if it means violating professional ethics. In such a case, I doubt the lawyer would be disciplined, or if there is discipline, it probably wouldn't be harsh. I believe it is more important to maintain and preserve the principle of confidentiality—no matter how difficult the circumstance—than it is to affirm individual lawyer morality. I also worry that lawyers will be more likely to exercise their discretion to “save a life” when the clients are indigent criminal defendants or simply indigent.<sup>52</sup> Hence, there will be an even greater divide between the kind of representation afforded some clients and the representation afforded others.<sup>53</sup>

I also worry that there will be a significant spillover to the rest of us from lawyers who too readily disclose client information. There is already a prevalent

49 See, e.g., Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000).

50 See Nancy J. Moore, “*In the Interests of Justice*”: *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1785-86 (2002) (noting that private citizens have no obligation to disclose confidential information in order to protect the lives, health, or financial safety of third parties).

51 See FREEDMAN & SMITH, *supra* note 5, at 145-47.

52 See *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997). In *Purcell*, a legal services lawyer advised the police that his client planned to burn down an apartment building. The police were able to prevent the crime, saving the lives of the people in the building. The Supreme Judicial Court approved the lawyer's conduct, but ruled that the prosecutor could not call the lawyer as a witness against the client in the attempted arson case.

53 See generally FREEDMAN & SMITH, *supra* note 5, at 147.

view that court-appointed lawyers (or legal services lawyers, or public defenders) are not to be trusted—that they are in cahoots with the judge or prosecutor, they don't care about their clients, and you “get what you pay for.” Once lawyers start “ratting out” their indigent clients, those clients will stop disclosing information to lawyers altogether. Frankly, they would be wise to do so.

### B. *Judicial Corruption*

In 1992, Douglas Schafer, a lawyer in Tacoma, Washington, had a conversation with a client named William Hamilton. Hamilton told Schafer that Grant Anderson, who was about to become a Superior Court judge, was going to engage in improprieties as the trustee of a decedent's estate. Soon afterward, Hamilton bought a bowling alley owned by the estate at a below-market price, and, at around the same time, gave Judge Anderson a Cadillac. Hamilton shared this information with Schafer, who, outraged by such blatant judicial corruption, disclosed it to the authorities.<sup>54</sup> Schafer's disclosure had impact. In 1999, in response to the information Schafer conveyed, the Washington Supreme Court removed Judge Anderson from the bench for “a pattern of dishonest behavior unbecoming a judge.”<sup>55</sup> He was also suspended from law practice for two years.

In 2003, attorney Schafer—regarded by some as a whistle-blower willing to risk his career to unveil judicial corruption, and by others as an opportunist motivated by sour grapes<sup>56</sup>—was suspended from law practice for six months for the “willful, unnecessary and repeated violation of his ethical duty not to betray his client's trust.”<sup>57</sup> The ruling by the Washington Supreme Court prompted outcry on the order of “no good deed goes unpunished.”<sup>58</sup>

This is a hard case for me because, to my mind, there is no greater problem in our justice system than judicial corruption. Judicial corruption strikes at the heart of our system of justice; one instance of corruption is enough to taint the whole thing. We give judges enormous power and rely on them to use it wisely. The integrity of our judicial system rests with judges.

It is hard enough for most judges to resist the corruption of vanity and self-importance. We clothe them in ceremonial robes, seat them above us, rise when they enter a room, and address them with honorifics. When judges are found to

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54 See Adam Liptak, *Lawyer Whose Disclosure Brought Down a Judge Is Punished*, N.Y. TIMES, Apr. 20, 2003, at A14.

55 *Id.*

56 *Id.* (noting that Schafer did not inform the authorities of Judge Anderson's misconduct until three years after his client confided in him—when the judge sanctioned him for bringing a frivolous lawsuit in 1995).

57 *Id.*

58 Maggie Mulvihill, *At the Bar: State JC won't let good deed go unpunished*, BOSTON HERALD, Apr. 22, 2003 (calling the Washington Supreme Court decision “mind-twisting”).

have engaged in corrupt conduct—whether as judges or lawyers—they ought to be brought down, and brought down hard.

Still, whatever Schafer's motive,<sup>59</sup> I have no problem with his being disciplined.<sup>60</sup> Schafer should not have divulged his client's confidences, no matter what sort of shenanigans his client was involved in. As Professor Steven Lubet remarked about the Schafer case, "The public has a lot of trouble understanding that lawyers keep secrets for guilty people, but it is important for the functioning of the legal system."<sup>61</sup> Instead, Schafer should have counseled his client to do the right thing: either Hamilton should have gone to the authorities himself or he should have released Schafer to do it. Schafer should have put considerable time and energy into talking to Hamilton about the immorality and illegality of the scheme.

It is important to remember that the client confidences Schafer divulged put his client in jeopardy as well as a corrupt judge. Hamilton's insider deal with his Cadillac *quid pro quo* was surely not lawful. It is also important to note that, according to the record, Hamilton begged his lawyer not to violate lawyer-client confidentiality by going to the authorities.<sup>62</sup>

I think Schafer's punishment was a bit steep. But I am glad the ethical duty of maintaining client confidences lives in Washington State.

### C. Corporate Clients

A number of legal scholars distinguish between corporate lawyers and criminal defense lawyers when it comes to confidentiality.<sup>63</sup> I am sympathetic to this view

59 I am not entirely persuaded by the "sour grapes" theory. It appears that Anderson may not only have been a corrupt judge, but an incompetent one. See David Postman, *Whistle-Blower in Judge's Removal Faces Investigation*, SEATTLE TIMES, July 31, 1999, at A1 (reporting that Schafer first took an interest in Anderson in 1995 when he appeared before the judge and the experience "'caused me to doubt his competency as a judge.'"); see also *Letters to the Editor: Attorney-Client Privilege – When a Client Uses a Lawyer in Crime or Fraud, no Privilege*, SEATTLE TIMES, Aug. 16, 1999, at B5 (Schafer stating: "In reporting Judge Anderson's fraud, I was not being heroic. I was just fulfilling the duty that I believe all lawyers have to report serious misconduct by their peers, particularly those who wear judicial robes. If lawyers won't report corrupt judges, who else will?").

60 The *Seattle Times* reported that Schafer set out to build a case against Judge Anderson after a bad experience with the judge. The judge's rulings in an estate case Schafer was handling caused him to recall what Hamilton had told him about Anderson "milking" an estate he was supposed to be overseeing. Schafer then sought out Hamilton for more information about the judge even though Hamilton repeatedly warned his lawyer not to divulge the confidences he had shared. See Postman, *supra* note 59, at A1.

61 Liptak, *supra* note 54, at A14.

62 See Nicole Brodeur, *In Hot Water for Exposing Injustice*, SEATTLE TIMES, Aug. 5, 1999, at B1 (quoting University of Washington law professor Deborah Maranville: "I would hope that this would be one of the situations where you prosecute the guy . . . [b]ut you take into account the circumstances and don't impose a heavy penalty.'").

63 See, e.g., LUBAN, *supra* note 31, at 219 (noting that an organization "does not have human dignity, because it is not human."); see also RHODE, *supra* note 7, at 107, 111; Gillers, *supra* note 7;

and wish I could agree that a principled line can be drawn.<sup>64</sup> Corporate clients are wealthy and bent on becoming wealthier. The dignity and autonomy interests of corporations and their CEO's are less compelling to me than those of individual criminal defendants.<sup>65</sup> They are motivated by greed, not misfortune or need.<sup>66</sup>

On the other hand, there is a compelling argument that lawyers ought to balance their professional obligations more heavily on the side of the public interest in a corporate context.<sup>67</sup> Corporations are powerful entities. They can do real harm, whether we are talking about product safety, environmental hazards, tax evasion, or fraud.<sup>68</sup> The traditional concern about individual rights is not an effective rejoinder to the claim that confidentiality has been used to shield organizational misconduct.<sup>69</sup>

Still, I believe that lawyers can use their powers of persuasion and more—their social standing<sup>70</sup>—in a corporate context, too. There is a long tradition of the corporate lawyer as “wise counselor.”<sup>71</sup> Corporations do not have court-appointed lawyers; they choose their counsel. No doubt they choose their counsel based on many attributes, including the lawyer's value system. This is all the more reason for these lawyers to engage in moral as well as legal counseling with

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Laurie Morin, *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation*, in this volume.

64 See generally Smith, *The Difference in Criminal Defense*, *supra* note 39 (arguing that, notwithstanding the differences in criminal defense, there ought not be different ethical standards for criminal and civil attorneys).

65 See LUBAN, *supra* note 31, at 218-220.

66 See generally STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

67 See generally Deborah Rhode, *What Does it Mean to Practice Law “In the Interests of Justice” in the Twenty-First Century?*, 70 *FORDHAM L. REV.* 1543 (2002); but see Monroe Freedman, *How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1717, 1725 (2002) (arguing that Rhode's call for “greater moral responsibility” leads to a double standard whereby lawyer conduct deemed as “moral” in one setting is denounced when “done on behalf of clients for whom she lacks sympathy”).

68 Upon leaving public defender practice for a large law firm representing tobacco companies, a long-time defender was reputed to have said, “I've represented individual murderers. Now, I'll represent mass murderers.”

69 See RHODE, *supra* note 7, at 110.

70 Corporate clients and their lawyers are often in the same social milieu. Sometimes, corporate client and lawyer have a personal as well as professional relationship. I always believed this sort of friendship was the genesis of Charles Fried's theory of the lawyer-client relationship. See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations*, 85 *YALE L.J.* 1060 (1976).

71 See generally Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 *DEPAUL L. REV.* 407 (2001); see also ANTHONY KRONMAN, *THE LOST LAWYER* 14-17 (1993) (discussing the lawyer-statesman ideal and “leadership” and “character”).

their clients.<sup>72</sup> They should do everything they can to get these clients to do the right thing.

### CONCLUSION

It could be that, in the end, I don't have much faith in lawyers. I don't want them to exercise their own moral discretion about whether to disclose client confidences.<sup>73</sup> I don't want to give lawyers the authority to determine when it is in the public interest to divulge confidences, even if they were allowed to do so only under limited circumstances, such as "where necessary to avoid 'substantial injustice.'"<sup>74</sup> I worry about lawyers acting as a "self-appointed moral elite,"<sup>75</sup> overlooking or overriding longstanding ethical standards in order to advance their own views of justice.

But, I do believe in the power of lawyer storytelling. I believe that a lawyer's gifts as a storyteller are helpful not only at dinner parties but in courtroom advocacy and client counseling. Ironically, it turns out that telling stories and keeping secrets go quite nicely together. But don't tell anyone.

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72 See FREEDMAN & SMITH, *supra* note 5, at 60-62; see also Freedman, *How Lawyers Act in the Interests of Justice*, *supra* note 67, at 1723.

73 Freedman, *How Lawyers Act in the Interests of Justice*, *supra* note 67, at 1726 (raising a concern that under a regime giving lawyers more individual discretion to "act on the basis of their own principled convictions," many will "inventively find evasive strategies to help their clients to despoil the environment, to evade taxes," and to defeat legitimate product liability claims).

74 SIMON, *supra* note 7, at 62 (describing the "alternative confidentiality standard suggested by the Contextual View").

75 Freedman, *How Lawyers Act in the Interests of Justice*, *supra* note 67, at 1724.

# AN ETHOS OF LYING

Paul Butler\*

## I. INTRODUCTION: "PRECEDENCE OVER TRUTHFULNESS"

When I purchased my copy of *Understanding Lawyers' Ethics*,<sup>1</sup> I heard the predictable jokes. A law professor in line behind me said, "That must be a very thin book." "Yeah," added the sales clerk, "or maybe the inside pages are blank." To be polite, I laughed, although actually I thought the jokes were tired. My laugh was a lie.

I lie like that sometimes, for social reasons. In my scholarship I have endorsed lying in certain cases for political and pragmatic reasons.<sup>2</sup> In both contexts I have considered morality, but ignored ethics.

The moral case for social lies (as a race theorist, I love that they are called "white" lies) is easy. I can't imagine that heaven is full of people who answered truthfully when their elderly aunt asked, "How do you like my pistachio jello mold?" Those kinds of lies seem too commonplace and too inconsequential to deserve an ethos, other than that everybody does it.

The moral case for the political-pragmatic lies I recommend in my academic writing is more complicated. I construct an argument from religion and natural law (by way of criminal law doctrine) that I hope is persuasive.<sup>3</sup>

Now comes *Understanding Lawyers' Ethics* to remind us of the primacy of the ethical case, and even to suggest a framework for an ethos of lying. According to the authors, Monroe H. Freedman and Abbe Smith, "There are moral values that, for us, may take precedence over truthfulness. One is human life, for example, the innocent person on death row."<sup>4</sup> Thus, a lawyer could morally violate her pledge of confidentiality to a client in order to save an "innocent" life. In a similar vein, the authors criticize "ethical rules that place a higher value on telling the truth to the court than on saving innocent human life."<sup>5</sup>

It is unclear whether Freedman and Smith emphasize the sanctity of "innocent" life because that presents the most sympathetic case in which to defend lying, or because they have a different ethical assessment of lying to save the life of a guilty person. In other writing, however, Professor Freedman has been more expansive on this subject.

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1 MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (2<sup>d</sup> ed. 2002).

2 See Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721 (2003).

3 *Id.* at 745-47.

4 FREEDMAN & SMITH, *supra* note 1, at 165-66.

5 *Id.* at 219.

In an article in the *Fordham Law Review*, Freedman discusses the dilemma of a friend who was disappointed that he could never serve on a death penalty jury. When asked on the questionnaire for potential jurors, Freedman's friend—a rabbi—honestly reported his opposition to capital punishment. In the jurisdiction where he lived people with such beliefs were automatically disqualified.<sup>6</sup>

Freedman writes,

I suggested to my friend that his conduct was inconsistent with his asserted moral priorities. The preservation of human life was not paramount for him—telling the truth to the jury commission was. Because of his scruples about answering the questionnaire truthfully, he had been making it impossible for him to serve on a jury and, as a juror, to vote against death.<sup>7</sup>

The story has a happy ending: "After reflection, my friend decided to lie on the next jury questionnaire."<sup>8</sup> Freedman is carefully agnostic. He does not say whether he would have lied in such a situation; he merely provides ethical counsel to the rabbi. Freedman understands that many people would "find lying to a court to be a shocking matter . . . [but his] point is that religion doesn't 'answer' such dilemmas—not, at any rate, in a predictable or consistent way."<sup>9</sup>

Providing predictable, consistent answers is the job of ethics, if not religion. In this essay I consider the case for lying by attorneys to clients, and also lying by potential jurors to get on juries. As a framework for this analysis, I will use the ethos of subversion described in *Understanding Criminal Law*—the rules for when it is okay to break the rules. To begin I will explain my usage of two terms: "ethos" and "lying."

It would overstate Freedman and Smith's ambition to term their analysis of lying an "ethos." Their defense of lying is a minor part of their book, but it is consistent with the whole in that it approaches, in a careful, nuanced way, the problems that lawyers face in the real world. I admire the authors' application of principle to practice. They demand the best from lawyers, and they suggest that this will require lawyers to break promises to clients in rare cases. The authors don't dwell on these exceptional cases, and accordingly my description of a Freedman/Smith ethos of lying makes reasonable inferences from their statements and examples. I hope that my analysis is as careful and deliberate as Freedman and Smith's.

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6 Monroe H. Freedman, *Religion Is Not Totally Irrelevant to Legal Ethics*, 66 *FORDHAM L. REV.* 1299, 1300 (1998).

7 *Id.*

8 *Id.*

9 *Id.*

## II. THE THREE PRINCIPLES OF LYING

The attorney conduct that Freedman and Smith defend is breaking a promise of confidentiality to a client and discrediting the testimony of a truthful witness. Even if that conduct is generally wrong, why is it lying? The best answer is because Freedman and Smith say that it is.<sup>10</sup> One could fairly couch these practices in other terms, but lying is also a fair description.<sup>11</sup> It is a testament to the quality of Freedman's and Smith's scholarship that they pose for themselves the hard case, rather than the easier case.

In Chapter 6, Freedman and Smith state that when a lawyer pledges confidentiality to her client, she is morally bound to abide by that promise.<sup>12</sup> Then, however, the authors announce three exceptions—"moral values that take precedence over truthfulness."<sup>13</sup> They would break their promise to their client (1) to save a human life, (2) to avoid having to go to trial before a corrupted judge or jury, or (3) to defend themselves against formalized charges of unlawful or unprofessional conduct.<sup>14</sup> The Freedman-Smith ethos is situational. Lies are not immoral on some absolute basis.<sup>15</sup>

Freedman and Smith's first principle of ethical lying is that the lie must be justified. Freedman and Smith present three justifications: to save life, to prevent judicial or juror corruption, and to allow a lawyer to defend herself against formal charges. The authors wax eloquent about the first two exceptions: the first is justified because human life is valuable,<sup>16</sup> and the second because corrupt judges or jurors subvert the justice system itself (again, the irony of lawyer subversion to prevent client subversion). They seem defensive about the third exception. They allow that "it is more difficult to defend than the first two," but extract some

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10 FREEDMAN & SMITH, *supra* note 1, at 165-66 (equating violating a pledge of confidentiality to a client with being untruthful) and at 216 (describing impeaching a truthful [rape] victim as communicating "a vicious lie to the jury and to the community"). See also *id.* at 220 ("One can agree with [former United States Supreme Court Chief Justice Warren] Burger that lying is wrong, and still not know the answer to the question of whether it is worse to lie to the client or to allow the client to lie to the court."). For an in-depth analysis of lawyer lying to clients, see Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L.REV. 659 (1990).

11 The philosopher Sissela Bok defines a lie as "any intentionally deceptive message which is stated." SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 14 (1979). Freedman and Smith say they would not warn clients in advance that they might break their vow of confidentiality. Their first example for why such warnings are not necessary is that the warnings might discourage a client from providing information which, if disclosed, could save an innocent life. FREEDMAN & SMITH, *supra* note 1, at 166. This example demonstrates how the lawyer's promise of confidentiality to the client, without stating the exceptions, is a lie, in the Bok sense.

12 FREEDMAN & SMITH, *supra* note 1, at 165.

13 *Id.* at 165-66.

14 *Id.* at 166.

15 See *id.* at 219-20 (critiquing legal absolutism).

16 See *id.* at 220 ("[T]here is something wrong with a system of morality that places a higher value on truth-telling than on the preservation of an innocent person's life.").

moral high ground from the fact that they would not permit a breach of confidentiality to collect a fee, even though the model code would.<sup>17</sup>

It is important to Freedman and Smith that the circumstances in which they would allow the lawyer to violate her pledge of confidentiality will rarely occur. They state that the likelihood of the contingencies is "slight," and that few lawyers would ever be confronted with those problems.<sup>18</sup> Even though a lawyer may ethically violate confidentiality to defend herself against formal charges, this scenario "is sufficiently uncommon to permit an exception without significant systemic threat."<sup>19</sup> Hence, a second principle for the ethos: A necessary condition of lying is that it be limited—the occasions for which it is justified must occur rarely.

The final principle for ethical lying is based on "system utilitarianism."<sup>20</sup> Under this scheme, the ethical lawyer should consider the wisdom of following the rules "in the context of her role in our constitutionalized adversary system."<sup>21</sup> If, in a particular case, following a rule actually defeats the principle embodied by the rule and "harms the system," then the lawyer is not ethically bound to follow the rule. The example they proffer is a defense attorney who wishes to discredit a truthful witness to a crime. The reason the lawyer knows the witness is truthful is because the lawyer and her client have been able to communicate honestly. If honest communications between the two would impede effective examinations of witnesses, then honest communications are discouraged—a net loss for the system. This is too high a price, in the opinion of Freedman and Smith. Thus the dishonesty implicit in discrediting a truthful witness should be tolerated. Lying is justified when it upholds the values of the justice system more than truth telling would.

### III. LYING FOR LAYPERSONS

Professors Freedman and Smith, in their treatise on lawyers' ethics, have constructed a careful, principled defense of lawyers who lie, if they do so with good reason, rarely, and if the lies promote a better system of justice than would exist if the lawyers did not lie. But why should lawyers have all the fun? Can other actors in the legal system engage in ends-justified rule breaking, and should the same ethos apply?

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17 *Id.* at 166, n.52. Their defense of breaching confidentiality to defend against formal charges is premised on two ideas: first, that it is unfair to require one to be self-destructive and second, that "it seems implicit" if the client is going to betray the lawyer.

18 *Id.* at 166.

19 *Id.* (Defining systemic threat as "significant likelihood that the existence of this exception would make clients fearful of confiding in their lawyers.").

20 *Id.* at 221.

21 *Id.*

In an article in the *UCLA Law Review*, I consider the dilemma of people who believe that the death penalty and crack cocaine laws discriminate against African Americans, when they are summoned for jury duty in those cases.<sup>22</sup> If the potential jurors are honest about their beliefs, they will not be impaneled as jurors. So I recommend that they lie. Once on the jury, they should use their power to prevent the application of discriminatory law. The juror in the capital case should, if the case reaches the sentencing phase, vote for life imprisonment rather than death. In the crack cocaine case, the juror should acquit the defendant, since that is her only power to ensure that the defendant escapes discriminatory punishment.

Applying the Freedman/Smith ethos to these cases is possible, but not easy. System utilitarianism requires balancing competing values to determine which more closely replicate the values in the criminal justice system. In my hypothetical, we choose between jurors who are entirely truthful and jurors who thwart the application of a discriminatory law. We cannot have both. A fair system of criminal justice depends on both honest jurors and non-discriminatory laws. It is difficult to know which is most important. Perhaps the degree of discrimination matters. In a capital case, race discrimination leads to death, whereas in a crack case it “only” leads to excessive punishment. Freedman and Smith’s book affirms, more than once, the primacy of human life.<sup>23</sup> If life is the most important value, then lying in a death penalty case is justified.

The juror in a crack cocaine case does not save a life. The best argument that her lie is justified under the Freedman-Smith ethos is that her lie is analogous to the lawyer who lies to prevent corruption, if one views a discriminatory law as “corrupt.” This is, for me, a persuasive argument, but I accept that reasonable people can disagree (especially because the crack law is not officially or legally corrupt—according to most courts disparate punishment for crack cocaine offenses does not offend equal protection).

In addition to the principles of system utilitarianism and justification, an important part of the Freedman-Smith ethos is that the occasions on which lawyers would have to lie should rarely occur. Freedman and Smith believe that lawyers almost never face cases in which a client reveals information which would save an innocent person from death row or expose judicial corruption or provide a defense for the lawyer against ethical charges. The rarity of the occasions on which an attorney could ethically lie would prevent the lies from being a systemic threat.

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22 Butler, *supra* note 2.

23 Though they emphasize “innocent” life in the treatise, Freedman, as noted above, has defended lying to get on juries in capital cases, presumably even if the life sought to be saved is not “innocent.”

The opportunities for potential jurors to lie in death and cocaine cases probably would not be as rare. Substantial numbers of Americans oppose the death penalty, and large numbers of African Americans oppose disparate punishment for crack cocaine as well. Indeed in the *UCLA Law Review* article,<sup>24</sup> the very purpose of the juror subversive action I recommend is to threaten the system—to get the death penalty and crack cocaine laws changed, through a kind of civil disobedience. But, to quibble with one of the Freedman-Smith principles, why should our ethical assessment of an act depend on how frequently the act occurs? The implication is that it could be ethical for one or two starving men to steal bread from the supermarket, but if too many starving men steal, then stealing becomes unethical. Although I agree with Freedman and Smith that there is an important situational component to ethics, I don't know if the number of people who commit an act is an important aspect of assessing its ethical nature.

Professors Freedman, Smith, and I share a belief that breaking rules occasionally is more ethical than following rules. Perhaps only law professors would create rules for subversion! I hope what is embodied in both my efforts and the efforts of Professors Freedman and Smith is a special respect for people who try to achieve justice in the most difficult cases.

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24 Butler, *supra* note 2.

# WRONGFUL CONVICTIONS: IT IS TIME TO TAKE PROSECUTION DISCIPLINE SERIOUSLY

Ellen Yaroshefsky\*

*The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.*

1908 CANONS OF ETHICS\*\*

## INTRODUCTION

Ron Williamson, who came within five days of execution, and Dennis Fritz, who served twelve years of a life sentence, were released from prison in 1999. They were innocent men, wrongfully convicted of the rape and murder of Debra Carter. Arrested five years after her murder and tried separately, the cases against them rested on testimony of a jailhouse informant, a jail trainee, and unreliable hair evidence. Fortunately, there was DNA evidence in the case, and scientific testing exonerated Fritz and Williamson. The evidence instead implicated Glen Gore, the person who should have been the prime suspect. Many of these facts came to light only when Fritz and Williamson filed a civil rights action<sup>1</sup> after Williamson's conviction for murder was overturned (primarily on grounds of ineffective assistance of counsel).<sup>2</sup>

During the course of discovery, the scope of police and prosecutorial misconduct was exposed. In addition to egregious use of fabricated testimony from the informants, the case was permeated with police and prosecutorial suppression of exculpatory evidence. The prosecutor failed to disclose to the defense a two-hour videotaped statement in which Williamson denied the murder and never wa-

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\*\* Canon 5, "The Defense or Prosecution of Those Accused of Crime."

1 *Fritz v. City of Ada, Okla.*, Civ. No. 00-194 (E.D. Okla. filed Apr. 14, 2000) (case settled Oct. 28, 2002; discovery on file with the offices of Cochran, Neufeld and Scheck, 99 Hudson St., N.Y., N.Y.).

2 *Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff'd*, *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997).

vered. The confession of Glen Gore, the murderer, was never disclosed. Gore's false statement the day after the homicide was suppressed and "redone." Statements from the victim's friend implicating Gore were suppressed, as were other plainly material and exculpatory statements from more than twenty other witnesses. Ultimately the civil case settled.<sup>3</sup>

Neither the exoneration nor the civil settlement resulted in scrutiny of the prosecutor's behavior. No disciplinary action was taken against him. No court sanctioned the misconduct or referred him to a disciplinary committee. No internal investigation was undertaken by the prosecutor's office.

While the misconduct in the Fritz and Williamson cases is particularly egregious, and involves both the police and the prosecutor, the lack of accountability for such misconduct is typical and cannot be blamed upon a lack of enforceable standards governing the behavior of prosecutors.<sup>4</sup> Beginning in 1969, all states adopted rules of conduct for lawyers and a lawyer who violates them is subject to sanctions before the disciplinary committee within her jurisdiction.<sup>5</sup> The vast majority of the reported decisions of lawyer discipline are, however, cases involving solo practitioners or those in small firms.<sup>6</sup> Few public prosecutors are brought before disciplinary committees. The reason for this is not the paucity of ethical lapses that should subject prosecutors to sanctions. Bennett Gershman, in his comprehensive treatise, *Prosecutorial Misconduct*, documents hundreds of reported cases in which the misconduct of prosecutors could and should have subjected the offending lawyer to discipline. With few exceptions, it does not happen. Even in the handful of cases where prosecutors are disciplined, the "imposition of a 'slap on the wrist' even for egregious misconduct demonstrates a disciplinary double standard."<sup>7</sup> Scholars and other commentators agree that dis-

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3 *Fritz* Civ. No. 00-194, *see supra* note 1.

4 The decision in *Banks v. Dretke*, 540 U.S. 668 (2004) reversing a death sentence because the Texas prosecutor concealed significant exculpatory and impeaching evidence is a recent instance of violation of prosecutorial ethical standards. *See also* Jeffrey Tooner, *Killer Instincts*, NEW YORKER, Jan. 17, 2005, at 54.

5 All states have versions of the Model Code of Professional Responsibility, the Model Rules of Professional Conduct or similar provisions. Throughout this essay, I refer to the provisions governing the conduct of lawyers as "rules."

6 Most of these disciplinary cases were sanctions for misuse of client funds and neglect of cases. *See, e.g.*, ABA Special Commission on Evaluation of Disciplinary Enforcement Problems and Recommendations in Disciplinary Enforcement 41 (Prelim. Draft, Jan. 15, 1970); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 829, 872 (2002) (conclusions on regulation of lawyers) [hereinafter Zacharias, *Future Structure*].

7 BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT*, § 14.1, n.5 (2d ed. 2001) (hundreds of cases of flagrant misconduct, none of which resulted in punishment) [hereinafter GERSHMAN, *PROSECUTORIAL MISCONDUCT*]. The Center for Public Integrity, an organization of investigative journalists, found that, since 1970, prosecutorial misconduct was a factor in 2,012 cases, causing courts to dismiss charges at trial, reverse convictions or reduce sentences. In 513 additional cases, appellate courts found prosecutorial misconduct sufficiently serious to merit reversal or, at least, additional discussion. In thousands of other cases, the appellate courts found the prosecutor's actions to be

cipline for prosecutors is rare and that there are few, if any, consequences for prosecutorial misconduct.<sup>8</sup> In contrast to discipline for private lawyers, we have hardly moved beyond the 1908 aspirational standard to a regulatory disciplinary model for the errant prosecutor.<sup>9</sup>

Despite some minimal attention to ethics provisions for prosecutors, few bar associations engage in serious discussion of changes to ethics rules governing the behavior of prosecutors.<sup>10</sup> While all courts, prosecutors, and defenders would certainly agree that it is “highly reprehensible” to suppress facts or secrete evidence “capable of establishing the innocence of the accused,” when that happens, the disciplinary consequence is often nil. Aside from increasingly louder complaints from the defense bar, there appears to be an implicit agreement that, absent rare circumstances, offending prosecutors should not be subject to sanctions before disciplinary committees. The work of scholars who have studied the issue and offered useful ideas has been met with little response.<sup>11</sup>

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inappropriate. Steve Weinberg, *Breaking the Rules, Who Suffers When a Prosecutor is Cited for Misconduct*, Dec. 30, 2003, available at <http://www.publicintegrity.org/pm/default.aspx?sid=main> [hereinafter Weinberg, *Breaking*].

8 Edward M. Genson & Mark W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?* 19 LOY. U. CHI. L.J. 39, 47 (1987) (“Disciplinary sanctions are rarely imposed against prosecutors.”); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-98 (1987) (discussing the problem of prosecutors’ ethical violations and the need for a remedy) [hereinafter Rosen]; Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 898 (1997) (concluding disciplinary process is ineffective against prosecutors) [hereinafter Weeks, *No Wrong*]; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, at 745 n.84 (2001) [hereinafter Zacharias, *Professional Discipline*]; but see Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70 (1995) (affirming argument that critics exaggerate the prevalence and seriousness of prosecutorial misconduct) [hereinafter Green, *Policing*]; Bruce A. Green & Fred C. Zacharias, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 226-28 (2000) [hereinafter Green & Zacharias].

9 The profession’s “longstanding failure to address problems in the disciplinary process” is not confined to sanctioning prosecutors, but is problematic for the conduct of all lawyers. See DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE*, 160-61 (2000) [hereinafter RHODE, *JUSTICE*].

10 For that matter, the bar associations do not engage in the discussion of discipline for defense lawyers whose version of zealous advocacy is a “walking violation of the 6th Amendment.” Vanessa Merton, *What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” if You’re Trying to Put That Lawyer’s Client in Jail*, 69 FORDHAM L. REV. 997 (2000). The pervasive issue of lack of accountability for ineffective assistance of counsel is beyond the scope of this essay and merits significant attention.

11 Green, *Policing*, *supra* note 8; Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct, Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1086 (1994) [hereinafter Morton, *Seeking*]; Rosen, *supra* note 8; Walter W. Steele Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 S.W. L.J. 965, 966-67 (1984); Zacharias, *Professional Discipline*, *supra* note 8. See JUSTICE, *supra* note 9 (arguing for reforms of disciplinary systems to regulate the behavior of all lawyers).

In this essay I will argue that wrongful conviction cases demonstrate a serious need to reconsider disciplinary systems as a measure of prosecutorial accountability. I examine the current system of prosecutorial regulation and its rationale. I conclude that it is necessary to establish an independent commission to examine wrongful cases, and to promulgate, implement and enforce disciplinary rules for prosecutors.

## I. WRONGFUL CONVICTIONS

In the past twelve years, groundbreaking work in the use of post-conviction DNA testing to exonerate the wrongfully convicted has challenged the belief that our criminal justice system functions effectively. These miscarriages of justice—often involving defendants convicted of capital offenses—have compelled an examination of the causes of the conviction of innocent people. All too often prosecutorial misconduct is one of primary reasons for these breakdowns in the adversary system.

The Innocence Project<sup>12</sup> reports that of the first seventy-four exonerations, prosecutorial misconduct was a “factor” in forty-five percent of those cases. The vast majority of those instances were cases of destruction or suppression of exculpatory evidence. In some of those cases, prosecutors concluded that the evidence was just not important; in others, and more egregiously, “a team of police and prosecutors were so convinced of their righteousness that they were willing to do anything to get their man.”<sup>13</sup>

The prosecutorial misconduct in those cases cannot be readily excused as mistakes or errors of judgment. In the vast majority of cases, the misconduct was deemed to be grossly negligent or intentional.<sup>14</sup> Few of those prosecutors were disciplined, either internally or through the state disciplinary system. And, while there has yet to be a systematic analysis of the now 140 exonerations by category and severity of error, the existent analyses confirm that prosecutors have rarely been held accountable for their behavior.<sup>15</sup> With rare exception, there has been

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12 The Innocence Project of the Benjamin N. Cardozo School of Law was begun by Barry C. Scheck and Peter Neufeld in 1992. It has now expanded into a national innocence network. See [www.innocenceproject.org](http://www.innocenceproject.org).

13 BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* 226-27 (2001) (discussing the notorious Chicago Rolando Cruz wrongful conviction) [hereinafter *ACTUAL INNOCENCE*].

14 *Id.* at 222. *ACTUAL INNOCENCE* details cases where courts, despite misconduct, upheld the convictions of people later proved to be innocent because of the harmless error doctrine. The hurdle of “harmless error” is the myth that the “criminal justice system tells itself” in order to “absolve police officers and prosecutors of misconduct.” Scheck and Neufeld examined the case files of each of the exonerations and concluded that suppression of exculpatory evidence was the primary factor that led to the conviction in a “not insubstantial” number of cases. Conversation with Barry Scheck, Innocence Project co-director, in N.Y., N.Y. (Dec. 29, 2003) [hereinafter *Scheck Conversation*].

15 *ACTUAL INNOCENCE*, *supra* note 13. One exception is the prosecutor in the Chicago Rolando Cruz case where three prosecutors and four sheriff’s office investigators were indicted for perjury and

no discipline for egregious instances of misconduct that led to these convictions. The recent exoneration of Darryl Hunt in North Carolina is yet another case of a wrongful conviction based upon “use of unreliable witnesses, the illegal withholding of exculpatory material . . . and the refusal to acknowledge clear evidence of innocence.”<sup>16</sup> Those prosecutors have yet to make a motion to vacate his murder conviction or take responsibility for official misconduct.

Nor are prosecutors held accountable in death penalty cases where the defendant is either found to be innocent or otherwise wrongfully convicted. A groundbreaking national study of death penalty verdicts concluded that “serious reversible error . . . permeates America’s death penalty system. Sixty-eight percent of all death verdicts imposed and fully reviewed during the 1973-1995 study period were reversed by courts due to serious error.”<sup>17</sup> In that study, prosecutorial misconduct, primarily the suppression of evidence, accounted for the second highest incidence of serious error.<sup>18</sup> The evidence suppressed in those cases established either the innocence of the defendant or the fact that he did “not deserve the death penalty.” There is little data on the discipline of any of those prosecutors.<sup>19</sup>

A glaring example of the hands-off approach to prosecutorial misconduct is the wrongful rape and murder conviction of Alfred Brian Mitchell wherein crucial notes from the Federal Bureau of Investigation (FBI) laboratory’s DNA unit for testing were suppressed at trial. These notes suggested that the FBI’s tests cleared Mitchell of committing rape, either before or after murdering the victim.

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obstruction of justice. The case against two of the prosecutors was dismissed at the end of the state’s case. The other prosecutor was acquitted. There is no record of discipline of those prosecutors. *Id.* at 232.

16 Bob Herbert, *Getting Away With . . .*, NY TIMES, Jan. 5. 2004, at A17.

17 James S. Liebman & Jeffrey Fagan, *A Broken System Part II: Why There is So Much Error in Capital Cases and What Can Be Done About It*, June 2002, available at <http://www2.law.columbia.edu/brokensystem2/index2.html>.

18 “‘Serious error’ is error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial. The most common errors are (1) egregiously incompetent defense lawyering (accounting for 37% of the state post-conviction reversals) and (2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty (accounting for another 16%-19%, when all forms of law enforcement misconduct are considered). See ACTUAL INNOCENCE, *supra* note 13. “As is true of other violations, these two count as ‘serious’ and warrant reversal only when there is a reasonable probability that, but for the responsible actor’s miscues, the outcome of the trial would have been different.” James S. Liebman & Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, 1973-1995*, available at <http://www2.law.columbia.edu/instructional/services/liebman/>.

19 This study confirms the data from the 1987 study by Professors Bedau and Radelet that identified 350 cases in which defendants were wrongfully convicted of capital or potentially capital crimes. In fifty of those cases, the cause for the erroneous conviction was “prosecution error.” In thirty-five of those cases exculpatory evidence had been suppressed. In the remaining fifteen cases the cause was “other overzealous prosecution.” Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (Table 6) (1987).

Moreover, FBI Special Agent Gilchrist presented false testimony at the trial. In reversing the death penalty, the Tenth Circuit commented not only on Agent Gilchrist, but also on the trial prosecutor:

Gilchrist . . . provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false . . . by evidence withheld from the defense. Compounding this improper conduct was that of the prosecutor, whom the [federal] district court found had "labored extensively at trial to obscure the true DNA test results and to highlight Gilchrist's test results," and whose characterization of the FBI report in his closing argument was "entirely unsupported by evidence and . . . misleading."<sup>20</sup>

In addition to the exoneration cases, other studies confirm the longstanding phenomenon of lack of any consequences for prosecutors who engage in misconduct. The Center for Public Integrity, in an analysis of prosecutorial misconduct, studied post-1970 appellate decisions in each state. Its New York study revealed 1,283 state cases in which defendants alleged prosecutorial error or misconduct. In 277 cases, judges ruled that a prosecutor's conduct prejudiced the defendant and reversed or remanded the conviction or dismissed the indictment. In forty-four other cases, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant. Out of all the defendants who alleged misconduct, ten later proved their innocence. There is no indication that any prosecutor in those cases was subject to discipline.<sup>21</sup>

The recent civil rights lawsuit stemming from Alberto Ramos' wrongful conviction is perhaps the most revealing instance of flaws in the system of prosecutorial accountability. In 1985, Ramos, a college student working as a teachers' aide at a Bronx day care center, was convicted of the rape of a five-year-old girl. He served seven years in prison, suffering physical, sexual and psy-

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20 *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001); ACTUAL INNOCENCE, *supra* note 13, at 226. The legal affairs writer for the *Chicago Tribune*, Ken Armstrong, studied 381 murder convictions that were reversed because of police or prosecutorial misconduct since 1963 and found that "not one of the prosecutors who broke the law in these most serious charges was ever convicted or disbarred. Most of the time they were not even disciplined." *Id.*

21 Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct*, at [www.publicintegrity.org](http://www.publicintegrity.org). The study does not state whether any of the prosecutors were referred to disciplinary committees. There is no record of such action.

Of the cases in which judges ruled that a prosecutor's conduct prejudiced the defendant, 196 involved courtroom behavior such as improper arguments and examination, thirty-nine involved the prosecution's withholding evidence from the defense, twenty-three involved misconduct in grand jury proceedings, six involved harassment of the defendant, three involved the use of perjured testimony, four involved discrimination in jury selection, and two involved vindictive prosecution. The Center for Public Integrity also studied forty-four reported attorney disciplinary cases in various states in which prosecutors appeared before disciplinary committees. In the handful of cases where prosecutors were disciplined for suppressing exculpatory evidence, the discipline was only a public censure.

chological abuse. Through his diligence and that of his counsel, the conviction was set aside because critical exculpatory information was never provided to the defense. This evidence included day care center and Human Resources Administration records (1) documenting the child's sexually provocative behavior which fully explained the behavioral and medical evidence relied upon by the prosecution's expert in concluding that there was abuse, (2) containing the child's statements exonerating Ramos or inconsistent with his guilt, and (3) showing that a key prosecution witness, contrary to her testimony, was not even present to have observed the child's emotional state after the alleged incident.<sup>22</sup>

In the subsequent civil rights case, the court, acknowledging that prosecutors must be insulated against discipline for "good faith, if mistaken, prosecution," concluded that "diligence [had] gone . . . far astray . . . in the present case."<sup>23</sup> The court named the prosecutor,<sup>24</sup> and excoriated her for failure to provide exculpatory statements to the defense<sup>25</sup> and for arguing false information to the jury.<sup>26</sup> There is no record of any discipline within the District Attorney's office. The disciplinary committee closed an investigation after interviewing the prosecutor under oath in a secret proceeding.<sup>27</sup> During the course of discovery, the city produced the most detailed information to date regarding failure to discipline prosecutors for misconduct. Ramos' attorney obtained information about each of the seventy-two reported cases from 1975-1996 (spanning the tenure of two District Attorneys) where Bronx courts had cited prosecutors for several categories of misconduct: withholding of exculpatory evidence (eighteen cases resulting in set aside or overturning of convictions), or presenting false or misleading evidence or argument to the court (fifty-four cases combined). The records, including the personnel records, demonstrated that only one prosecutor was disciplined.

22 *Ramos v. City of New York*, 729 N.Y.S.2d 678, 684 (N.Y. 2001) [hereinafter *Ramos* 2001].

23 *Id.*

24 This is unusual. See GERSHMAN, PROSECUTORIAL MISCONDUCT, *supra* note 7.

25 In *Brady v. Maryland*, 373 U.S. 83, 87 (1963) the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The opinion in *Ramos* 2001 highlights a problem common to *Brady* violations: the prosecutorial determination of what items are "exculpatory." District Attorney Diana Farrell concluded that information that the child was actually sexually knowledgeable prior to the alleged molestation would not exonerate the suspect and hence was not *Brady* material. *Ramos* 2001, *supra* note 22, at 684.

26 Justice Collins, who set aside the conviction, did not "suggest that the District Attorney deliberately and consciously withheld documents but that . . . the handling of the matter was cavalier and haphazard." Such allegations would subject a private lawyer to disciplinary sanctions. *The People of the State of New York v. Alberto Ramos*, No. 3280/84, slip op. at 8 (N.Y. Sup. Ct., June 1, 1992), *aff'd*, 201 A.D.2d 78 (N.Y.1994), 614 N.Y.S.2d 977 (1994).

27 The Disciplinary Committee contacted the Bronx District Attorney's Office about initiating proceedings against Farrell. Staff counsel for the disciplinary committee interviewed Farrell under oath in a secret proceeding and closed the investigation without affording Ramos or his counsel any notice or opportunity to be heard. Interview with Joel Rudin, plaintiff's counsel, in N.Y., N.Y. (Dec. 22, 2003).

In 1978, that prosecutor, who had been named by courts in four cases for misconduct,<sup>28</sup> was suspended for four weeks and lost two weeks' pay. Immediately after he returned to the office, he was granted a bonus, followed by a series of merit increases during the pendency of his case before the disciplinary committee. Moreover, the District Attorney sent a letter to the disciplinary committee requesting that he not be disciplined. Ultimately, there was no record of discipline and no other action appears to have been taken against him.<sup>29</sup> Another prosecutor cited for misconduct by the Bronx courts also received merit and other bonuses after a number of appellate courts criticized his behavior and mentioned him by name. There is no record that he was ever disciplined.<sup>30</sup> When this information was reported in the press, "officials in the Bronx district attorney's office said that the citations were not conclusive evidence that the misconduct occurred willfully, or that a pattern existed, given the high volume of felony cases tried in the 21 year period . . ."<sup>31</sup> This comment reflects a failure of the district attorney's office to take responsibility for prosecutorial practices that lead to wrongful convictions.<sup>32</sup> The *Ramos* case is a glaring example that internal controls to which disciplinary committees defer are ineffective.<sup>33</sup>

The instances of prosecutorial misconduct in these cases cannot be dismissed as simple mistakes or errors of judgment. Instead, the cases reflect the gross negligence or intentional acts of prosecutors, motivated apparently by a mistaken view of pursuing justice, which lead to conviction of men they believe to be guilty. Such cases require an examination of previous tolerance of "overzealous advocacy." After all, some people presumed innocent actually *are* innocent and, but for egregious systemic errors, would not be prosecuted, or would be found not guilty. If disciplinary authorities severely punish lawyers who steal money from clients, it behooves our justice system to at least consider discipline of lawyers

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28 *People v. Galloway*, 54 N.Y.2d 396, 430 N.E.2d 885, 446 N.Y.S.2d 9 (1981); *People v. Bussey*, 62 A.D.2d 200, 403 N.Y.S.2d 739 (1978); *People v. Streeter*, 67 A.D.2d 877, 413 N.Y.S.2d 690 (1979); *People v. Wheeler*, 80 A.D.2d 785, 438 N.Y.S.2d 467 (1981).

29 Interview, Joel Rudin, *supra* note 27.

30 *Id.*

31 Andrea Elliott, *Prosecutors Not Penalized, Lawyer Says*, NY TIMES, Dec. 17, 2003, at B4.

32 Milton Lantigua is yet another person wrongfully convicted in the Bronx, New York. The state appeals court reversed the conviction because the prosecutor failed to correct perjured testimony of its chief witness and failed to disclose the existence of a potential second witness favorable to the defense, an action the court found to be "especially egregious." *People v. Lantigua*, 228 A.D.2d 213, 221, 643 N.Y.S. 2d 963 (1996). Once again, there has been little prosecutorial accountability. Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price*, NY TIMES, Mar. 21, 2004, at 25.

33 It also suggests that the standards for which prosecutors are subject to discipline need review. Gross negligence subjects private lawyers to discipline. Particularly where it has been demonstrated that such gross negligence has resulted in wrongful convictions, individual prosecutors and their offices should be subject to sanctions for actions that might not be intentional, but are nevertheless a serious breach of responsibility.

who, intentionally or through gross negligence, steal years of a person's life and distort our justice system.<sup>34</sup>

*Ramos* raises other questions, including (1) what is the ethical duty of a prosecutor who comes to believe that an innocent person is in prison but strict *habeas corpus* law prevents review of the case; (2) whether it is ethical for a prosecutor to contest a defendant's attempt to secure DNA testing when there is an allegation of innocence; and (3) whether it is ethical to appeal a conviction when the prosecution has reliable evidence of innocence.<sup>35</sup> The failure of internal discipline for prosecutorial misconduct raises the issue of finding alternative means of deterrence and discipline.

## II. ACHIEVING ACCOUNTABILITY FOR PROSECUTORIAL MISCONDUCT

How can we achieve some measure of accountability for such misconduct and deter similar behavior in the future?

First, of course, is to recognize that action must be taken. Until exonerations became widely known throughout the popular media, few prosecutors, police agencies, courts or legislatures were willing to examine the causes of wrongful convictions. Now, these cases have transformed the debate about reforms in the criminal justice system. They have led to reexamination of the frequency and cause of mistaken eyewitness identification—the single most common cause of conviction of the innocent.<sup>36</sup> As a result of two decades of comprehensive social science research, certain systemic reforms in the conduct of identification procedures are being accepted by courts and law enforcement authorities.<sup>37</sup> Moreover, a method of conducting photographic arrays and lineups known as “sequential presentation with blinded examiners” is being implemented by the state of New Jersey and a number of cities. This method was recently recommended by an

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34 Wrongful conviction cases raise significant questions about the need to revise the disciplinary standards for prosecutors. Prominent among these questions is whether to hold prosecutors accountable if they should have known about the police misconduct, the behavior of perjured witnesses, false scientific evidence, or exculpatory evidence. The 1996 Department of Justice study *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 15* (1996) reported government malfeasance or misconduct in eight of the then twenty eight exonerations. While that study did not make a finding that there was prosecutorial misconduct in those cases, the allegations of perjured testimony, withholding of exculpatory evidence, and submission of intentionally erroneous laboratory reports ought to be sufficient to at least question the role of the prosecutor in the case.

35 *Ramos* 2001, *supra* note 22.

36 Mistaken eyewitness identification was a factor in eighty-one per cent of wrongful conviction cases. *ACTUAL INNOCENCE*, *supra* note 13, at 361.

37 NATIONAL INSTITUTE OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999); *see also* NATIONAL INSTITUTE OF JUSTICE, *EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT* (2003).

innocence commission in North Carolina chaired by the Chief Justice of the North Carolina Supreme Court.<sup>38</sup>

Second, is to address the problem of false confessions, a factor in twenty-two percent of post-conviction DNA exonerations, by measures such as videotaping of precinct interrogations.<sup>39</sup> Recently Illinois adopted this reform in response to its crisis of wrongful convictions.<sup>40</sup> That crisis caused Governor Ryan to declare a moratorium on capital punishment and to issue clemency to 169 people on death row.<sup>41</sup> In Florida, the Sheriff's Office of Broward County has also begun using cameras in interrogation rooms.<sup>42</sup>

Third, post conviction DNA exonerations have generated an epidemic of scandals involving fraud and junk forensic science. Efforts to remedy this problem have produced a series of audits and investigations.<sup>43</sup>

Fourth, suggested reforms for problems of false testimony by jailhouse informants and other cooperating witnesses were the subject of a symposium, and are under discussion.<sup>44</sup> These include detailed recommendations from the Canadian Morin Commission, a thorough wrongful conviction inquiry, which examined the problems with the use of jailhouse informants in criminal cases.<sup>45</sup>

38 Richard Willing, *Police Lineups Encourage Wrong Picks, Experts Say*, USA TODAY, Nov. 26, 2002, at 1A; NORTH CAROLINA ACTUAL INNOCENCE COMMISSION, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION (Oct. 27, 2002), available at <http://www.aoc.state.nc.us/www/ids/News%20&%20Updates/Eyewitness%20ID.pdf> [hereinafter NORTH CAROLINA]; Conrad deFiebre, *Police Plan to Reshuffle the Lineup: Improved Accuracy is Pilot Project Goal*, STAR TRIBUNE, Aug. 31, 2003; see also Barbara L. Jones, *Eyewitness ID Program May Come to Minnesota*, MINNESOTA LAWYER (Sept. 1, 2003), available at [http://www1.minnlawyer.com/story.asp?storyid=2932&terms=eyewitness\(requires registration\)](http://www1.minnlawyer.com/story.asp?storyid=2932&terms=eyewitness(requires registration)); *Police and Prosecutors Team Up for better Eyewitness IDs*, HENNEPIN COUNTY ATTORNEY (Nov. 3, 2003), available at [http://www.hennepinattorney.org/news\\_2.asp?NRRecno=179](http://www.hennepinattorney.org/news_2.asp?NRRecno=179).

39 *Video Recording of Custodial Interrogations: A Resource Guide*, in INNOCENCE PROJECT RESOURCE GUIDE (2d ed. 2003); Monica Davey, *Illinois Will Require Taping of Homicide Interrogations*, N.Y. TIMES, July 17, 2003, at A-16.

40 Criminal Justice Reform Act, Ill. SB 15 (2003).

41 Maurice Possley & Steve Smith, *Clemency for All*, CHICAGO TRIBUNE, Jan. 12, 2003, at 1.

42 Paula McMahon, *Hidden Cameras Earn Rave Reviews in Interrogations*, SOUTH FLORIDA SUN-SENTINEL, Dec. 7, 2003, at 1B.

43 Robert Tanner, *Problems at State Crime Labs Drive Calls for More Regulation, Independence*, ASSOCIATED PRESS NEWSWIRES, Jul. 7, 2003; Matter of Investigation of W. Virginia State Police Crime Laboratory, Serology Div., 438 S.E.2d 501 (W.Va. 1993); Belinda Luscombe, *When the Evidence Lies: Joyce Gilchrist Helped Send Dozens to Death Row. The Forensic Scientist's Errors are Putting Capital Punishment Under the Microscope*, TIME MAGAZINE, May 21, 2001, at 38; Lise Olsen, *Crime Lab Worker Failed to Qualify To Test Hair Samples*, SEATTLE POST-INTELLIGENCER, Jan. 2, 2003, at A1; N.Y. CONSOL. LAW §995 (2004), available at <http://assembly.state.ny.us/leg?cl=39&a=79>; See also Lianne Hart, *DNA Lab's Woes Cast Doubt on 68 Prison Terms*, L.A. TIMES, Mar. 31, 2003 at 19.

44 *Symposium: The Cooperating Witness Conundrum: Is Justice Obtainable*, 23 CARDOZO L. REV. 747 (2002) [hereinafter *Symposium*]. See Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899 (2002).

45 Steven Skurka, *Canada: A Canadian Perspective on the Role of Cooperators and Informants*, *Symposium*, supra note 44, at 759; see HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS

Finally, following the public inquiry model in Canada and the criminal case review commission in England,<sup>46</sup> states have begun to create “innocence commissions” specifically designed to determine what factors led to guilty verdicts in the wrongful conviction cases and to implement reforms based on those lessons.<sup>47</sup>

All of these reforms and proposals, even if fully implemented (and funded where necessary) still would not remedy prosecutorial misconduct.<sup>48</sup> While the focus of this essay is on prosecutorial misconduct, it must be pointed out that “bad lawyering” was a factor in 32% of wrongful conviction cases.<sup>49</sup> Another reason for wrongful conviction is police misconduct (a factor in 50% of cases). Any commission established to examine prosecutorial misconduct should necessarily examine the oversight of police agencies by prosecutors’ offices.<sup>50</sup>

No institution or entity has yet established a system to examine the large percentage of wrongful convictions due to prosecutorial misconduct and to attempt to make recommendations to deter such misconduct. These wrongful convictions have placed the spotlight on the need for a frank, public assessment of accountability systems for prosecutors, including the role of the state disciplinary systems. In such discussion, it should be apparent that the 140 exonerations studied by the Innocence Project are merely the tip of the iceberg. These cases are ones where DNA existed and was preserved, and where there were lawyers who undertook litigation on behalf of that prisoner. The Innocence Project reports that more than half of the cases they accepted had to be closed because evidence had been lost or destroyed.<sup>51</sup> Moreover, these data suggest that there are thousands of cases of wrongfully convicted people who cannot prove their innocence because their cases did not involve DNA.<sup>52</sup>

At the very least, there should be an investigation of each instance of documented misconduct. In other institutions where a serious instance of misconduct

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INVOLVING GUY PAUL MORIN (ONTARIO MINISTRY OF THE ATTORNEY GENERAL 1998) available at <http://attorneygeneral.jus.gov.on.ca/html/MORIN/morin.html>.

46 Barry Scheck & Peter Neufeld, *Toward the Formation of ‘Innocence Commissions’ in America*, 86 JUDICATURE 98 (2002) [hereinafter *Innocence Commissions*].

47 NORTH CAROLINA, *supra* note 38; An Act Concerning the Collection of DNA Samples From Persons Convicted of a Felony, the Preservation and Testing of DNA Evidence and the Review of Wrongful Convictions, Conn. Pub. Act 03-242 (Jul. 9, 2003).

48 NORTH CAROLINA, *supra* note 38. Among the reasons for intractability of a remedy for such misconduct is that courts are unlikely to change the law that insulates prosecutorial misconduct from accountability: immunity doctrines and harmless error analysis. GERSHMAN, PROSECUTORIAL MISCONDUCT, *supra* note 7.

49 Scheck Conversation, *supra* note 14.

50 See ACTUAL INNOCENCE, *supra* note 13, at 361; Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COL. L. REV. 749 (2003) (exploring dynamics between prosecutors and agents).

51 Scheck Conversation, *supra* note 14.

52 Conversation with Peter Neufeld, Innocence Project Co-director, in N.Y., N.Y. (Jan. 16, 2004) [hereinafter Neufeld conversation].

is discovered that threatens life, health, or public welfare, an audit is conducted to determine whether that person engaged in similar misconduct in other cases. The audit includes examination of the supervisors, trainers and protocols. This is done to discover the weaknesses in the system and to take remedial action.<sup>53</sup>

Neither courts, prosecutors' offices, nor any government agency has undertaken such an investigation in wrongful conviction cases based upon prosecutorial error or misconduct. As for the organized bar's regulation of prosecutors, "effective disciplinary action is an illusion."<sup>54</sup>

### III. ETHICS RULES GOVERNING PROSECUTORS

It is not that the ethics rules are bereft of disciplinary standards for prosecutors. While recognizing the unique role and responsibilities of prosecutors, the ethics rules of all jurisdictions claim the authority to regulate their behavior.<sup>55</sup> Most jurisdictions have adopted a version of Model Rule 3.8 titled "Special Responsibilities of a Prosecutor."<sup>56</sup> First adopted in 1983, this rule primarily restated a few of the legal obligations imposed on prosecutors, such as the duty to charge only on the basis of probable cause and the obligation to disclose exculpatory evidence. ABA Amendments to Model Rule 3.8 have added ethical restrictions on subpoenas of criminal defense lawyers and statements to the media.<sup>57</sup> The current Model Rule 3.8 is far from comprehensive and fails to encompass obligations imposed by case law on prosecutors.<sup>58</sup>

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53 Carlisle, *Comment: the FAA v. the NTSB: Now that Congress Has Addressed the Federal Aviation Administration's "Dual Mandate," Has the FAA Begun Living Up to Its Amended Purpose of Making Air Travel Safe, or Is the National Transportation Safety Board Still Doing Its Job Alone*, 66 AIR L. & COM. 741, 757 (2001); see *Innocence Commissions*, *supra* note 46, at 98, 102-103.

54 GERSHMAN, PROSECUTORIAL MISCONDUCT, *supra* note 7, at § 1.8(d); but see Green, *Policing*, *supra* note 8 (arguing that criticisms of failure to discipline prosecutors overlook the importance of informal judicial and professional regulatory controls).

55 Most ethics rules do not apply to prosecutors (e.g., advertising, fees, solicitation). Rules that apply uniquely to prosecutors hold them to a higher standard than private lawyers. See Green & Zacharias, *supra* note 8.

56 MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002) [hereinafter Model Rules].

57 See Bruce A. Green, *Symposium: Ethics 2000 and Beyond: Reform or Professional Responsibility As Usual?: Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1584 n.54 (Nov. 21, 2003) [hereinafter Green, *Prosecutorial Ethics*]. Ethics rules of individual states include additional provisions, but none have comprehensive provisions.

58 Some of these obligations include "a duty: (1) to disclose to the tribunal material facts necessary to correct the court's apparent or possible misunderstanding of the facts bearing on the court's decision; (2) to refrain in closing argument from drawing inferences from circumstantial evidence that are contradicted by extra-record evidence which the prosecutor knows to be accurate, (3) to refrain from seeking a legal ruling that the prosecutor knows to be contrary to law; (4) to call the court's attention to legal or procedural errors; and (5) to correct testimony of a prosecution witness, including testimony elicited by defense counsel on cross-examination, if the prosecutor knows or reasonably should know it is false." *Id.* at 1593.

These omissions are only partially ameliorated by other rules applicable to all lawyers. Rules prohibiting making false statements or offering false evidence, obstructing access to or unlawfully concealing evidence, making non-meritorious claims, and engaging in other conduct involving dishonesty, fraud, deceit or misrepresentation<sup>59</sup> apply universally, and subject prosecutors, as well as other lawyers, to discipline.

Despite these provisions, there is widespread agreement that the ethics rules do not cover the “full range of troubling prosecutorial conduct” and that they are a “woefully incomplete list of obligations that courts would recognize” as binding prosecutors.<sup>60</sup>

Some rules actually misrepresent the prosecutorial role. For example, Model Rule 3.3, barring false statements, does not distinguish between prosecutors and defense counsel. Such distinction does, however, exist. Thus, a prosecutor cannot cross-examine a witness to make that witness appear to be untruthful if she “knows” the witness is, in fact, truthful. A defense lawyer, in contrast, must test the accuracy, reliability and credibility of all witnesses and their testimony.<sup>61</sup>

Other distinctions between the ethical obligations of prosecution and defense counsel flow from the difference in role that is not reflected in the rules.<sup>62</sup> Unlike the criminal defense lawyer, who may press every advantage within the bounds of the law, the prosecutor’s ethical obligation is famously stated in *Berger v. United States*:<sup>63</sup>

[H]e 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. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The American Bar Association (ABA) and various state courts and disciplinary committees are fully aware of the criticisms of the current rules for prosecu-

59 See generally Model Rules 3.1, 3.3, 3.4, 4.3, 4.4, 8.4; see Zacharias, *Professional Discipline*, *supra* note 8, at 722 (studying applicability of specific ethics rules for prosecutors).

60 Green, *Prosecutorial Ethics*, *supra* note 57, at 1597.

61 Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 127-28 (1996); Murray L. Schwartz, *Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1140-45 (1988); ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 370, at 2-237 (2d ed. 1972); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LEGAL ETHICS 79-80 (3d ed. 2004); David G. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1494 (1966); Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 14-15 (1966).

62 For example, prosecutors, unlike private lawyers, are required to “prevent or correct judicial or other procedural errors.” They have a duty not to mislead, cannot make statements contrary to what they know to be true and cannot introduce testimony they suspect to be false. Green & Zacharias, *supra* note 8, at 228.

63 *Berger v. United States*, 295 U.S. 78, 88 (1937).

tors. Nonetheless, after a thorough review of the Rules of Professional Conduct, the ABA's "Ethics 2000 Commission" declined to revise the ethics rules for prosecutors.<sup>64</sup> Despite the fact that the ABA's Criminal Justice Section completed an extensive analysis of the deficiencies in disciplinary provisions for prosecutors (the Kukes Commission Report),<sup>65</sup> the Ethics 2000 Commission apparently concluded that the subject of the need for enhanced disciplinary standards and procedures for prosecutors was so politically controversial that its proposals would encounter not only heated debate but also unyielding opposition.<sup>66</sup> If so, it is unfortunate, as the Commission was certainly well aware of thoughtful suggestions to amend disciplinary rules to codify and enforce the ethical obligations of prosecutors.<sup>67</sup>

Nonetheless, and even in the continuing absence of rules and regulations responding to the realities of the prosecution function and potential misconduct, the governing disciplinary structure offers sufficient standards and mechanisms to prohibit and sanction prosecutors for conduct that, if left unregulated, threatens the integrity of the criminal justice system.

The most common, and in any event, the most dangerous misconduct is the intentional suppression of exculpatory evidence. Despite this well documented and all too recurrent violation of professional responsibility, prosecutors who engage in such tactics are rarely, if ever, disciplined.<sup>68</sup> The same holds true for other categories of sanctionable conduct.<sup>69</sup>

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64 Ethics 2000 is the American Bar Association's Commission that evaluated the Rules of Professional Conduct. Its work began in 1997 and its wide-ranging recommendations were adopted nearly in their entirety at the February 2002 meeting of the ABA House of Delegates. Ethics 2000 recommended only minor changes to exempt prosecutors from some disciplinary obligations under the Model Rules. Green, *Prosecutorial Ethics*, *supra* note 57, at 1581-87.

65 *Id.* (discussing Kukes Report and Commission's decision not to amend R 3.8).

66 *Id.*

67 *Id.*; Stanley Z. Fisher, *The Prosecutor's Ethics Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *FORDHAM L. REV.* 1379, 1422-24 (2000).

68 Bennett L. Gershman, *Brady v. Maryland, a 40th Anniversary Checkup*, in *NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MID-HUDSON TRAINER MATERIALS*, (forthcoming) (on file with author) [hereinafter Gershman, *Brady*]; Rosen, *supra* note 8.

69 A prosecutor's view of the "Top Ten disciplinary rule situations" is:

1. Suppression of exculpatory (and mitigating) evidence;
2. Improper statement to the press;
3. Ex parte communications with the trial court;
4. The threatening of prosecutions not supported by probable cause;
5. Knowing use of false evidence;
6. "No contact rule" violations;
7. False statements of material fact;
8. Threats of criminal prosecution or discipline;
9. Comments to harass or embarrass or influence jurors; and
10. "Being so eager to win, or so angry that you allow your judgment to fail and lose sight of 'seeing that justice is done.'"

#### IV. LACK OF ACCOUNTABILITY

Why have the organized bar and disciplinary committees tolerated this disconnect between the stated ethical duty of prosecutors and the accountability for those whose behavior falls far short of the mark? There are at least six reasons why there is an unwillingness to do little but tinker with exercising disciplinary authority over prosecutors.

The primary reason for the “hands off” approach is the belief that internal controls and judicial oversight effectively and adequately regulate prosecutorial misconduct. Courts, disciplinary committees and the organized bar accede to prosecutors’ claims that layers of supervision within their offices, training systems, internal investigations, and performance evaluations are sufficient to engender and regulate ethical behavior.<sup>70</sup> According to this view, governance via Model Rule 3.8 or some variant thereof, or by means of a specially devised set of standards and rules is not necessary, given such sources of guidance and instruction as the Department of Justice manual and similar state manuals. These publications, with the compilations of constitutional norms, statutory regulations, rules of procedure, and advisory texts containing case law, have been the guideposts for prosecutors.<sup>71</sup> The ABA Standards for Criminal Justice, the Prosecution Function, has also been viewed as setting forth important guidelines that are influential and often cited by courts.<sup>72</sup>

The wrongful conviction cases call into question whether it is now plausible, if it ever was, to rely upon internal controls as the means to deter and sanction prosecutorial misconduct. While federal prosecutors argue that their internal Office of Professional Responsibility (OPR) provides sufficient controls, few observers of that system have confidence that it serves as an adequate mechanism for ensuring prosecutorial accountability. Judges have expressed frustration with the lack of internal discipline for reported misconduct.<sup>73</sup> OPR has been accused of “controlling spin, not a prosecutor’s conduct.”<sup>74</sup> Its conduct, in widely known

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Kris Moore, *Ethics from a Prosecutor’s Point of View*, 16TH ANNUAL JUVENILE LAW CONFERENCE (Feb. 2003), available at [www.juvenilelaw.org/Articles/2003/ProsecutorEthics.pdf](http://www.juvenilelaw.org/Articles/2003/ProsecutorEthics.pdf); see also sources *supra* note 8.

70 See Zacharias, *Professional Discipline*, *supra* note 8, at 762-63.

71 Zacharias, *Future Structure*, *supra* note 6, at 863.

72 *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (finding ABA Guidelines are well-defined norms of practice that set standards for ineffective assistance of counsel inquiry).

73 *United States v. Isgro*, 751 F. Supp. 846 (S.D. Cal. 1990); *Aversa v. United States*, 99 F.3d 1200 (1st Cir. 1996).

74 See Morton, *Seeking*, *supra* note 11, at 1109; Leslie E. Williams, *The Civil Regulation of Prosecutors*, 67 *FORDHAM L. REV.* 3441, 3474-76 (1999) [hereinafter Williams, *Civil Regulation*]; Green, *Policing*, *supra* note 8.

investigations such as *United States v. Isgro*, causes it to maintain a reputation for lacking neutrality and judgment and being “unduly protective.”<sup>75</sup>

The recent reversal of the conviction of Central Intelligence Agency officer Edwin P. Wilson is illustrative. Federal Judge Lynn N. Hughes, in the reversal of that conviction, excoriated twenty-four government lawyers who deliberately deceived the court by introducing false affidavits, failing to disclose crucial evidence, putting on false rebuttal testimony and refusing to correct it.<sup>76</sup> The court’s opinion prompted the Justice Department to begin an ethics investigation. Given the publicity, it is possible that the internal investigation by OPR will lead to internal discipline for some of the lawyers. Skepticism abounds.

The relevant differences between state and federal systems of internal review do not translate into different degrees of cynicism about the effectiveness of prosecutorial self-policing. The *Ramos* civil rights case, demonstrating lack of effective internal controls, is confined to one borough in New York City, but there is no reason to suggest that other jurisdictions differ significantly.<sup>77</sup>

Prosecutors’ manuals can provide useful instruction, and vigilant internal enforcement can influence the conduct of subordinates—especially those committed to a career in the particular department or office. But not all offices have manuals, and not all manuals are read or followed. And, if not more importantly, political and other pressures may induce the leadership itself to disregard, or at least discount, the importance of supervision that insures ethical conduct. Unquestionably, a system dependent on internally developed standards, implemented and enforced internally, embodies all the dangers of sole and self-regulation.<sup>78</sup>

Moreover, the internal control mechanisms, largely shielded from public scrutiny, make it difficult to obtain data about the instances of misconduct and whether prosecutors are subject to internal discipline or referred for disciplinary action. This lack of transparency only serves to increase cynicism about the process and disparages the majority of prosecutors who serve the public with the

75 Green, *Policing*, *supra* note 8, at 86 (discussing the investigation of prosecutors in *United States v. Isgro* and the public perception of OPR).

76 Eric Lichtblau, *Justice Officials Face Inquiry over Testimony in Arms Case*, NY TIMES, Dec. 23, 2003, at A18. In a highly publicized case that shocked intelligence agencies, Edwin P. Wilson was convicted of selling tons of explosives to Libya. Wilson’s defense, that he acted with the support of the CIA, was contradicted by the false CIA affidavit denying that it had asked him to perform any services “directly or indirectly.” *Id.*

77 Gershman, *Prosecutorial Misconduct*, *supra* note 7, at § 14.1 n.2 (criticizing inadequate discipline in all jurisdictions).

78 San Diego County is among the state prosecutor’s offices that have introduced innovations, including a comprehensive manual, in their training program. See Weinberg, *Breaking the Rules*, *supra* note 7; Steve Weinberg, *Changing an Office’s Culture* (Dec. 30, 2003), available at <http://www.publicintegrity.org/pm/default.aspx?sid=sidebars&aid=27>.

highest degree of ethical judgment. While those systems might be effective in given circumstances, the perception is that they are not.<sup>79</sup>

A second reason for deferral of action by disciplinary committees is the existence of, or at least belief in the existence of, judicial oversight of prosecutorial misconduct. This includes reversals of convictions, contempt citations, or other sanctions such as imposition of fines and costs, and criticism in appellate opinions. Such potential sanctions, however, are an insufficient check on prosecutorial overzealous behavior. In a system in which well over ninety per cent of the indictments result in guilty pleas, judges are hardly exposed to prosecutorial misconduct. Moreover, judicial oversight is unlikely to provide a remedy in most cases, because the court's supervisory powers to remedy misconduct have been curtailed by the Supreme Court.<sup>80</sup> Appellate reversal, to the extent it provides a remedy for misconduct, is rare.<sup>81</sup> Except for the very limited cases such as knowing use of false testimony,<sup>82</sup> prosecutors know that there is little, if any, remedy for misconduct because the appellate standard of review is harmless error. Their behavior is judged by the "no harm, no foul" principle."<sup>83</sup>

The harmless error rule, "originally developed as an appellate mechanism to prevent 'the mere etiquette of trials' or the 'minutiae of procedure' from upsetting a verdict . . . has evolved into the most powerful judicial weapon to preserve convictions. . . . [C]ourts . . . have invoked harmless error to preserve convictions despite serious constitutional, evidentiary and procedural violations."<sup>84</sup> While *habeas corpus* historically has been used to protect fundamental constitutional rights, this writ has been substantially weakened by recent court decisions that raise procedural obstacles to the bringing of claims and give increased deference to state court determinations as to whether violations constitute harmless error.<sup>85</sup>

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79 Whatever the reality of instances of misconduct, the fact is that there is little transparency in the prosecution function except for some information about the rare cases that are the subject of media attention. Thus, it is not possible to undertake an independent analysis, so critical to public confidence.

80 Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors*, 65 *FORDHAM L. REV.* 355, 360 (1996) (concluding that even if a court were inclined to consider judicial sanctions, the court's supervisory powers to remedy misconduct have been curtailed by a series of Supreme Court cases) [hereinafter Little, *Who Should Regulate*].

81 GERSHMAN, *PROSECUTORIAL MISCONDUCT*, *supra* note 7, at §14.3.

82 *United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir. 2003) (knowing use of false testimony entails a veritable hair trigger for setting aside the verdict).

83 Charles S. Chapel, *The Irony of Harmless Error*, 51 *OKLA. L. REV.* 501, 504 n.26 (citing Erwin Chemerinsky, *No Harm, No Foul*, *CAL. LAW.* 27, 27 (Jan. 1996)).

84 Bennett L. Gershman, *The New Prosecutors*, 53 *U. Pitt. L. Rev.* 393, 425-26 (1992); Bennett L. Gershman, *The Gate Is Open but the Door Is Locked*, 51 *WASH. & LEE L. REV.* 115, 131 (1994).

85 See generally Bennett L. Gershman, *The Gate Is Open but the Door Is Locked*, 51 *WASH. & LEE L. REV.* 115 (1994).

As the due process revolution has been forced into retreat, so has the willingness to respond to prosecutorial misconduct. Sanctions are rarely imposed.<sup>86</sup>

At the very least, the problem is that the judiciary does not have a consistent approach to reviewing prosecutorial actions.<sup>87</sup> On a practical level, many state judges, concerned about career advancement, are loathe to sanction or report lawyers to disciplinary committees because the judge does not want to alienate the powerful prosecutor's office.<sup>88</sup> The belief in judicial oversight, like the faith in the efficacy of internal controls,<sup>89</sup> results in a lack of accountability because disciplinary committees defer to courts and prosecutors' systems of regulation. Even where some impulse or impetus exists for prosecutors to be regulated by their offices, courts or disciplinary committees, the lack of coordination between these institutions diminishes their responsiveness in taking necessary action. This is especially true where the courts and disciplinary agencies are not informed about internal disciplinary investigations, proceedings or sanctions.

Third, and perhaps the most significant reason for the hands off approach to discipline of prosecutors, is their political power and deference to the executive branch. Prosecutors believe that the problem of prosecutorial misconduct is overstated. The President of the National Association of Assistant United States Attorneys testified that federal prosecutors are subject to "continual and pervasive scrutiny" far beyond that of other lawyers, including being subject to internal discipline within their office for minor infractions, examination by OPR (Office of Professional Responsibility) for more serious infractions, judicial sanctions, reprimand, fines, and prohibition from practice, and that they are themselves subject to prosecution.<sup>90</sup> While this view is not readily accepted outside prosecutors' offices, it appears to be sufficiently influential to discourage state disciplinary bodies from asserting their authority.<sup>91</sup>

Moreover, prosecutors believe that (1) meritless claims of prosecutorial misconduct have become a standard defense tactic;<sup>92</sup> (2) they face misperceptions

86 Rosen, *supra* note 8, at 697; Yaroshefsky, *Introduction, Symposium, supra* note 44, at 757.

87 See generally Stephen A. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1394 (1987) (discussing the lack of a systematic approach to the judiciary's review of prosecutorial activity).

88 Author's conversations with judges.

89 Green, *Policing, supra* note 8, at 72 ("diffusion of regulatory responsibility").

90 *The Effects of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Committee on the Judiciary*, 106th Cong. 62-63 (1999) (statement of Richard L. Delonis, President of the National Association of Assistant United States Attorneys) [hereinafter Delonis].

91 Because most disciplinary authorities have ongoing relationships with state and federal prosecutors' offices in developing and prosecuting private lawyers, they are unlikely to jeopardize that relationship. See Green, *Policing, supra* note 8 at 90.

92 James E. Puntch, Jr., & Nola Foulston, *Responding to Charges of Prosecutorial Misconduct*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS, *DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITY* 135, 141 (Ronald H. Clark ed., 2002) (stating that prosecutors' offices school

and negative images of their activities in the media, such as charges that “prosecutors feel that [they] are above the law”;<sup>93</sup> and (3) it is incorrect to assume that they are not subject to professional discipline.<sup>94</sup> The fact that these views are disputed by defense lawyers and scholars only serves to discourage the organized bar from examining its potentially controversial role. Additionally, deference to the executive branch may reflect the view that the separation of powers doctrine limits the authority of state disciplinary committees, which, as arms of the judiciary, cannot control executive branch decision-making. This issue remains untested in most jurisdictions.<sup>95</sup> Moreover, discipline of federal prosecutors by state authorities may raise supremacy clause issues that those authorities choose to avoid.<sup>96</sup> This further diminishes the likelihood that the bar will develop and impose ethical norms on prosecutors.

The wrongful conviction cases demonstrate that the political power of prosecutors can no longer serve as a reason to maintain the status quo of lack of accountability. The need to challenge the lack of accountability is compounded in this era of expanded prosecutorial power. The federal sentencing guidelines caused a sea change by vesting power in the prosecutor that once resided in the judiciary.<sup>97</sup> Prosecutors, particularly on the federal level, control investigations and effectively wield the ultimate sentencing authority because charging decisions determine the range of the ultimate sentence. Under this system, upwards of ninety-five percent of defendants plead guilty, thus permitting many prosecutorial actions to remain unchecked. Moreover, these changes occurred in an environment of mandatory minimum sentences, skewing the balance of power between courts and prosecutors, and one in which case law significantly decreased the ability of defense lawyers to advocate zealously for clients.<sup>98</sup>

The recent Feeney Amendment (PROTECT Act)<sup>99</sup> vests further power in the executive branch of government, and deprives judges of their traditional role. In

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their lawyers to respond to such allegations as another tactic in the prosecution arsenal) [hereinafter Puntch].

93 Delonis, *supra* note 90, at 57-58.

94 Puntch, *supra* note 92, at 141 (asserting that “prosecutors are increasingly being required to respond to disciplinary complaints” without providing supporting data).

95 Zacharias, *Professional Discipline*, *supra* note 8, at 761; Green & Zacharias, *supra* note 8, at 224-35 (concluding that the reasons for the lack of discipline for federal prosecutors are the distinctive nature of the criminal laws and the uniqueness of law enforcement work, the prosecutor’s unique commitment to seek justice, respect for professional tradition of self-governance and the prosecutor’s status as a government official).

96 Green, *Policing*, *supra* note 8, at 90.

97 Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991).

98 See Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 925-26 (1999).

99 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 § 401 (c)(1)(2)(3) (2003) (Amendment to the Sentencing Re-

the climate created by the Patriot Act,<sup>100</sup> where there are increased prosecutorial tools of unfettered authority, an overly zealous prosecutor is less likely to have his behavior subject to judicial review.<sup>101</sup> As judicial influence and control have waned, so has the opportunity for meaningful judicial oversight over and control of prosecutorial conduct.

Recognizing the human tendency to push margins when there are no sufficiently demanding external controls, it is apparent that this increase in prosecutorial power affords greater opportunity for prosecutors to stretch ethical boundaries. While most prosecutors are honorable, there are individual prosecutors who will take advantage of any system. The current system offers more incentive and opportunity for the errant prosecutor.

Sometimes called the "true believers," these prosecutors, found in offices throughout the United States, believe that "the ends justify the means." Such prosecutors tend to (1) rely on police without question; (2) be insufficiently skeptical about cooperating witnesses and tolerate some degree of prevarication or falsity by those witnesses; and (3) in general, be unwilling to investigate or examine evidence that does not fit within the "winning theory" of the case.<sup>102</sup> These prosecutors are in contrast to the vast majority of open-minded ones who perform their often difficult tasks with a questioning eye and an ability to tolerate discrepancies in testimony of witnesses.

Even where prosecutors are required to disclose evidence, the true believers may engage in a skewed analysis of the facts and risk assessment. Such prosecutors know that the likelihood of reversal is minimal, and that the likelihood of sanctions or any discipline is insignificant. Civil liability often is precluded because of the problems of proof and the expansive scope of immunity.<sup>103</sup> Not infrequently, evidence deemed exculpatory by defense lawyers is not disclosed because prosecutors decide which evidence is "material" based upon their view of what would assist the defense in preparing and presenting its case. Typically,

form Act); see *United States v. Mendoza*, CD Calif Cr 03-730 DT (Jan. 12, 2004) (Order declaring § 401(c)(1)(2)(3) unconstitutional).

100 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* ("USA PATRIOT Act" of 2001), Pub. L. No. 107-56, 115 Stat. 272.

101 See Rachel V. Stevens, *Center for National Security Studies v. United States Department of Justice: Keeping the USA Patriot Act in Check One Material Witness at a Time*, 81 N.C. L. Rev. 2157 (2003); see *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (ruling that, absent Congressional authorization, the President does not have authority to detain as an enemy combatant an American citizen seized on American soil). While the Supreme Court reversed, 124 S. Ct. 2711 (2004), its decision was based on a finding that the Southern District of N.Y. lacked jurisdiction, and did not reach the issue of presidential authority.

102 Nels C. Moss Jr., a St. Louis prosecutor for thirty-three years, known as a "recidivist breaker of the rules by which prosecutors are supposed to operate," characterizes himself as a "hard hitting but honest prosecutor." His record includes seven reversals due to misconduct and seventeen findings that he committed prosecutorial error. Weinberg, *Breaking*, *supra* note 7.

103 *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity from civil suits).

courts uphold this exercise of discretion.<sup>104</sup> Changes in discovery obligations from less of a “cat and mouse game” to relatively open discovery would afford the true believer less opportunity to stretch ethical boundaries in disclosure of evidence.<sup>105</sup> Also observed, not only among true believers, is the all too human tendency to forget one’s role in the midst of a case. The “duty to justice” is often forgotten after the prosecutor has assured herself of the guilt of the defendant and therefore forgets or “fudges” on obligations in order to maximize her chances of winning.<sup>106</sup> Legal rather than ethical constraints guide her behavior. As Joseph Weeks describes the dilemma:

[Y]ou become convinced to a moral certainty that a criminal defendant has committed a serious crime. Of course, he is at present not yet “guilty” of the crime because he has not been found by a jury to have committed it. To make matters worse, from your perspective, he might never be convicted. The police may have bungled the search warrant and, as a consequence, the evidence that would conclusively establish the defendant’s guilt may never be heard by the jury. Miranda warnings may not have been administered and the defendant’s confession might never be heard by the jury. Or perhaps a witness claims to have seen someone other than the defendant fleeing the scene of the crime in an account that, while totally implausible to you, may be just enough to establish a reasonable doubt of the defendant’s guilt in the minds of the jury. *I do not think that it unfairly disparages the honesty and professionalism of prosecutors generally to suppose that a not insubstantial number of them are strongly tempted in such circumstances to serve what they may view as “the higher justice.”*<sup>107</sup>

These growing concerns have not resulted in a concomitant examination of prosecutorial accountability.

A fourth reason for the hands off approach to prosecutorial discipline is resource management. The operational principle of most disciplinary committees is that greed and theft from clients are the most egregious violations. Responding to such misconduct assumes priority. Alleged prosecutorial misconduct is rarely perceived as causing harm to a client because, notwithstanding constitutional

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104 Thus, courts have decided that prosecutors are not, for example, required to reveal evidence that an eyewitness could not state whether the defendant was one of the perpetrators, *United States v. Rhodes*, 569 F.2d 384, 388 (5th Cir. 1978), or the names of witnesses to the crime who saw “nothing,” *Commonwealth v. Satterfield*, 364 N.E.2d 1260, 1263 (Mass. 1970), or that a ballistics report on the murder weapon had no latent prints of value, *People v. Penland*, 381 N.E.2d 840, 843 (Ill. App. 1978). See generally Gershman, *Brady*, *supra* note 68.

105 See generally Bennett Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 328 (2001).

106 Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* 14 GEO. J. LEGAL ETHICS 355, 375 (2001).

107 Weeks, *No Wrong*, *supra* note 8, at 834 (emphasis added).

rights and procedural protections, indicted defendants are commonly presumed to be guilty. While misconduct may harm the perception of the role of the "ministers of justice," it bears little relationship to "justice" itself.<sup>108</sup> In great measure, this is because there is a tacit acceptance of a wide range of behavior in convicting the guilty. Scant resources cannot be utilized to discipline prosecutors for actions that are best considered an "excess of zeal in pursuing the public good."<sup>109</sup>

Fifth, disciplinary agencies have little expertise in ethics in criminal justice issues and perceive that the disciplinary task would engender second guessing government lawyers who are granted wide latitude in the exercise of discretion. Disciplinary committees are loathe to enter the thicket of judging distinctions between mistakes and intentional violations of law and, indeed, disciplinary authorities appear to assume that they are unable to judge such distinctions.<sup>110</sup>

Finally, the sixth reason not to alter the status quo is the lack of consensus about alternative models. The numerous suggestions for change are rarely examined in a comparative or synthesizing manner.<sup>111</sup>

Despite the fact that there are no comprehensive data to document adequately the extent of police and prosecutorial misconduct and its effect upon the reliability of the criminal justice system, we should not await a full study before addressing the growing need to provide accountability for egregious actions. The systems in place are simply not effective in monitoring and preventing such behavior, and the problems are likely to be exacerbated by the increased power of prosecutors. Continued lack of some transparency and greater accountability will only serve to undermine respect for the prosecutorial function and the criminal justice system.<sup>112</sup>

## V. A SYSTEM OF ACCOUNTABILITY

Assuming that wrongful conviction cases lead the bar to reconsider transparency and accountability procedures for prosecutors, will current disciplinary

108 Some prosecutors equate justice with "convicting the guilty." See *id.* In such circumstances, the potential harm to the integrity and reliability of the criminal justice system is not considered.

109 Zacharias, *Professional Discipline*, *supra* note 8, at 757.

110 Zacharias argues that when there have been cases demonstrating "venal incentives," disciplinary committees have proceeded against prosecutors. Zacharias, *Professional Discipline*, *supra* note 8, at 757.

111 Green, *Prosecutorial Ethics as Usual*, *supra* note 15; Rosen, *supra* note 8, at 735-736; Morton, *Seeking*, *supra* note 11, at 1114-15; Zacharias, *Professional Discipline*, *supra* note 8, at 773-776; see also, Green, *Policing*, *supra* note 8; Williams, *Civil Regulation*, *supra* note 74, at 3474-76.

112 "Transparency and accountability" are the buzzwords that set standards to establish public trust for corporate entities, international institutions, and many government offices. They are applicable, in great measure, to prosecutors. Faith Stevelman Kahn, *Transparency and Accountability: Re-thinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 507-08 (2000).

systems undertake that challenge successfully? It is highly unlikely. While there are voices in the bar to amend the disciplinary rules and regulations to keep prosecutors within the “umbrella” of regulation of all lawyers, the unitary model of discipline has not resulted in a system of accountability.<sup>113</sup> If scholars are correct that diffuse regulatory systems result in lack of discipline, and that no institution is in charge, disciplinary committees are unlikely to assume that mantle of control.

Moreover, the existing disciplinary system is not a workable model to regulate prosecutors. First, secrecy is the hallmark of most disciplinary proceedings and significant change in openness of the process is highly unlikely in most jurisdictions. If discipline is to serve as a deterrent to prosecutorial misconduct, the process and its results cannot be secret.<sup>114</sup> It is more likely that the creation of an independent disciplinary body will begin as an open process.

Second, without significant additional resources, state bar disciplinary authorities are unlikely to undertake this work. Even, however, in the unlikely event that sufficient funds were made available to consider adequately allegations of prosecutorial misconduct, and even if such disciplinary committees hired criminal justice professionals, both the lack of perceived influence of those committees in most jurisdictions and the orientation of disciplinary committees as reactive to individual complaints are sufficient reasons to establish an independent commission to monitor disciplinary matters for the prosecutors. Obviously, these issues merit serious discussion in each state.<sup>115</sup>

However configured, a system of highly regarded professionals independent of prosecutors' offices is essential to a workable system of accountability. Only such a commission can assume the mantle of authority and engender the respect necessary to undertake such a task. To be a serious effort, it should be one of peer review by experienced criminal justice professionals with the power to sanction prosecutors who engage in misconduct. While such an alternative to existing dis-

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113 Of course, an adequate disciplinary system cannot eliminate prosecutorial misconduct. The nature of our system suggests that many of the egregious violations will never be discovered. Most cases result in guilty pleas, thus ethical lapses in the investigative, charging and discovery functions are unlikely to see the light of day. As we have moved from an adversarial model of prosecution to an administrative one, as described in Gerard E. Lynch, *Our Administrative System of Justice*, 66 *FORDHAM L. REV.* 2117 (1998), there exists a greater incentive for the errant prosecutor to engage in unethical behavior because the likelihood of discovery is lessened. The hope is that, in tandem with hiring, training, supervision, and internal investigatory systems, an effective, independent disciplinary system will set higher standards for practice and thereby deter misconduct. Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 *ARIZ. L. REV.* 829, 831 (2002) (concluding there is a need for new regulators, not only for prosecutors, but more generally); Rhode, *JUSTICE*, *supra* note 9.

114 Green, *Policing*, *supra* note 8, at 88.

115 Of course, disciplinary committees in individual states may be organized, funded and motivated to undertake this role. Overall, however, the disciplinary committees are unlikely to provide adequate systems of accountability. See Rhode, *JUSTICE*, *supra* note 9.

ciplinary committees might be termed "overenthusiastic,"<sup>116</sup> there does not appear to be a realistic alternative. Such commissions should be created by state and federal courts and by legislatures responsible for lawyer discipline.<sup>117</sup> They must also be adequately funded.

The mission of an independent commission should be to:

- (1) develop protocols for examination of wrongful convictions within the jurisdiction where there are allegations of prosecutorial misconduct;
- (2) examine those cases and make recommendations for systemic change to deter prosecutorial misconduct;
- (3) develop clear and enforceable disciplinary standards for prosecutors, and work with courts, legislatures, and bar associations of each state to insure that these standards are implemented;
- (4) establish a system for discipline of prosecutors that maintains minimum secrecy;<sup>118</sup>
- (5) develop a database for disciplinary cases, readily available to judges, lawyers, and the public, that includes information about judicial sanctions and internal office discipline of individuals subject to sanction;
- (6) assist in development of educational programs for the judiciary, prosecutors, and defense lawyers about reporting lawyer ethical violations;
- (7) evaluate changes to the Code of Judicial Conduct which would encourage judges to report all instances of misconduct to the commission;<sup>119</sup> and
- (8) develop a proactive system to examine a wide range of cases involving misconduct, rather than the current system of reliance upon individual complaints.

Obviously, such a proposal is merely a framework for future discussion and action.

116 Zacharias, *Professional Discipline*, *supra* note 8.

117 Obviously, the commissions must reflect the differences between state and federal systems and the differences among states. For instance, in the federal system, district courts have disciplinary committees that subject lawyers to sanctions. Perhaps the federal system could be a circuit-wide one under the aegis of the Circuit Council. Each state could determine the structure that is most effective, or a commission could be created by the chief state judge with authority to create its own structure for discipline.

118 While this essay focuses on prosecutorial misconduct, the commission should also develop protocols to monitor, sanction, and deter ineffective assistance of counsel, which accounted for thirty-two percent of wrongful conviction cases. *ACTUAL INNOCENCE*, *supra* note 13, at 361.

119 The definition of types of misconduct subject to reporting and the trigger mechanism should be part of the commission's mandate. The commission could consider a presumption that such misconduct be reported or a mandatory reporting requirement for the most egregious forms of misconduct. A system which encourages, or even requires, reports of every suspicion is unworkable and counterproductive. *Doe v. Federal Grievance Committee*, 847 F.2d 57, 63 (2d Cir. 1988) (requiring actual knowledge of witness perjury to trigger ethical duty).

Wrongful conviction cases have decreased public confidence in the integrity of the criminal justice system, and, to the extent that police and prosecutors are responsible for wrongful convictions, in those government offices. These cases make plain that the criminal justice system can no longer afford to ignore the ineffectiveness of internal controls, judicial sanctions, and the disciplinary process to monitor, sanction, and deter prosecutorial misconduct. Most prosecutors consider themselves ethically scrupulous. The continuing failure to provide a system with the necessary transparency, consistency, and accountability is a great disservice to them. It is time to establish and fund independent commissions to do so.

**HISTORICAL LINKS:  
THE REMARKABLE LEGACY AND LEGAL JOURNEY  
OF  
THE HON. JULIA COOPER MACK**

*The Hon. Inez Smith Reid*

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**I. INTRODUCTION**

Surprisingly, perhaps, little attention has been paid to recording, analyzing, and safeguarding the history of the District of Columbia Court of Appeals (the DCCA) in any systematic fashion. Ironically, the DCCA, which is overshadowed by the United States Court of Appeals for the District of Columbia Circuit, often is confused with that court. Laypersons and scholars alike have manifested some difficulty understanding the court system in the District of Columbia. In large measure, this difficulty is traceable to the historic functioning of the United States Court of Appeals for the District of Columbia Circuit as both a federal court and as a local court for the nation’s capital until the Congress of the United States created the DCCA in the early 1970s. It is also attributable to the close relationship between federal law and District of Columbia law. Indeed, District of Columbia law often mirrors federal law since Congress generally enacted statutory law for the District prior to its delegation of certain legislative powers to a newly created local legislature, part of a home rule government, in 1973.<sup>1</sup> Books have been written on the history of the federal courts of the District of Columbia, with passing references to historic, specialized local courts, such as the Juvenile

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\* The Hon. Inez Smith Reid is a judge on the D.C. Court of Appeals. These are the first chapters for a book about the Honorable Julia Cooper Mack, undertaken in fulfillment of the thesis requirement for the University of Virginia Graduate Program for Judges. Unless otherwise noted, background information on Judge Mack comes from the author’s interviews with her on April 23, 2003, April 29, 2003, May 1, 2003, and February 16, 2004.

1 Under Article I, section 8, clause 17 of the U.S. Constitution, Congress has the power “[t]o exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government of the United States . . . .” In 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 777 (1973), commonly known as “the Home Rule Act.”

Court. But comparable historical works on the District of Columbia courts, re-organized by the District of Columbia Court Reform and Criminal Procedure Act of 1970,<sup>2</sup> have not yet emerged. There are, however, fragments of that history located in law review articles, newspaper accounts (some of which may be described as editorial in nature, or even inaccurate), various offices in the District of Columbia Court of Appeals, and the minds of judges who have served on the DCCA since 1971.

The history of the DCCA is significant, not only because it emerged as a political reaction to a federal/local circuit in the nation's capital deemed to be too liberal for the more conservative members of Congress, but also because of its focus on issues confronting District of Columbia residents, and the professional, corporate, or other entities working or doing business in the nation's capital. These issues are wide-ranging—from simple and complex criminal or civil matters, to issues confronting children and their families, to attorney disciplinary matters, and to a host of agency actions relating to workers' compensation, unemployment benefits, historic preservation and zoning, housing, local elections, and government as well as private sector employment. Often they are the same type of issues confronting different geographical areas of American society, but they may be highlighted because the District is the nation's capital, which on numerous occasions serves as a "laboratory" for the nation as a whole.

My goal at the outset of this project was to begin to compile a history of the DCCA, its judges, and its important opinions by focusing upon a limited case study of the Honorable Julia Cooper Mack, the first African American woman to be nominated by a President of the United States and confirmed by the Senate to sit on a state-equivalent court of last resort, that is, the highest court in the state-equivalent jurisdiction. Judge Mack served on the DCCA as first an Associate Judge and then as a Senior Judge, from mid-1975 to December 2001. As my interviews with Judge Mack unfolded, however, it struck me that it was equally essential to make the historical connection between this prominent jurist—known for opinions protective of the welfare and rights of children, the poor, the criminally accused, and the home rule government of the District of Columbia—and Free Negro Aaron Revels who fought in the Revolutionary War, as well as Lewis Sheridan Leary and John Anthony Copeland, Jr., who joined forces with John Brown in an effort to free enslaved men and women and to shield runaway slaves from recapture. What is perhaps remarkable, although not surprising, about this historical link is Judge Mack's virtual silence about her historic family. Her silence is not surprising because she is a characteristically reserved person who keeps her own counsel and rarely shares personal information.

The added historical dimension of my original goal in a sense enhances the thesis with which I began. Given the political environment of the nation's capital,

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2 Pub. L. No. 91-358, 84 Stat. 473 (1970). The Act took effect on February 1, 1971.

I envisioned my thesis not as a definitive resolution but as a modest contribution to understanding whether judges of the District of Columbia's highest local court are influenced by the political whirlwinds that surround them. My thesis is that through twenty-six years of her tenure as an active and senior judge of the DCCA, Judge Julia Cooper Mack kept her own counsel, and her numerous majority, concurring, and dissenting opinions were influenced neither by the exterior political world surrounding her nor by the exhortations of her DCCA colleagues. Rather, Judge Mack's approach to the resolution of legal issues, as an Associate Judge and later a Senior Judge of the DCCA, was impacted by her heritage, her quiet opposition to injustice, her deep concern for the vulnerable members of American society, and by her notions of fair play and justice, all grounded in her experiences in North Carolina and the nation's capital.

For my study, I have adopted a hybrid methodology. It is not the pure approach of Leonard W. Levy in his *The Law of the Commonwealth and Chief Justice Shaw*, which focused in part on the biography of Chief Justice Shaw, but also engaged in "the intensive analysis of major cases," and afforded a glimpse into "a selected aspect of American legal history," such as the era of the Fugitive Slave law and the early days of school segregation in Boston.<sup>3</sup> Nor does my study concentrate on a whole body of law as it existed in a specified time period, such as William E. Nelson's treatment of the law of New York as decided by state court judges over a sixty-year period, which he described as "a monographic, historical synthesis of the century's developments in state constitutional law or in the common law."<sup>4</sup> Neither does my study present an analysis of every single opinion—majority, concurring and dissenting—that Judge Mack has written.

Perhaps my study comes closest to the Leonard Levy model, but it is by no means as comprehensive as Levy's, and it does not offer a definitive view of Judge Mack's approach to a wide range of legal issues confronting the DCCA during her twenty-six year tenure. But it does combine a biographical/case study/general overview approach to Judge Mack and her tenure on the bench. It links the jurist to historical persons, events, and experiences that helped shape her analysis of judicial cases. It uses the case study method to examine cross-racial adoption, a social and cultural issue pertaining to the welfare of black children in need of permanent homes. And it also affords a short, general overview of Judge Mack's approach to home rule issues in the District of Columbia; to certain criminal procedural issues; and to discrimination in employment, housing, and university activities. Simultaneously, the study provides some insight into the history and creation of the unique court system to which Judge Mack was appointed, as

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3 LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 3-5, 19, 109 (1957).

4 WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920-1980* 1 (2001).

well as the backgrounds of some of the judges with whom Judge Mack interacted during her judicial career.

## II. THE EARLY DAYS: A UNIQUE FAMILY AND COURT SYSTEM

### A. *The Family*

Judge Mack's formative years were marked by her heritage and the oral history of that heritage, which is grounded both in the world of North Carolina Free Negroes, and in the resistance of slave Negroes. Both her parents were natives of Fayetteville, North Carolina, and Judge Mack's winding road to the District of Columbia Court of Appeals began in Fayetteville on July 17, 1920.

One of the central landmarks of Fayetteville which stands prominently in Judge Mack's mind is Market House, the historic place where slaves were sold. According to family oral history, her mother's grandfather was sold at Market House. Her father's ancestors, the Learys and the Perrys, were longstanding members of the Free Negro community. The worlds of those free and slave Negroes would coalesce at Harper's Ferry in 1859.

An early member of the Leary/Perry family was Aaron Revels, a Free Black who fought in the Revolutionary War.<sup>5</sup> He has been described as "one of the patriots and soldiers in the struggle for liberty in America," and, as a Free Negro, he "voted after the Constitution of 1776 was ratified."<sup>6</sup> Aaron Revels' daughter, Sara Jane Revels, married Jeremiah O'Leary, whose ancestors were Irish and Croatan Indian.<sup>7</sup> The "O" soon was dropped in favor of "Leary," and the Leary family began its long history.

Matthew Nathaniel Leary, the grandson of Aaron Revels and the son of Jeremiah O'Leary and Sara Jane Revels O'Leary, was born in North Carolina on February 15, 1802 and was reared in Fayetteville; he became a harness maker and a wholesale businessman.<sup>8</sup> He married Juliette Meimoriel in 1825. She was born in France, but was taken to the French West Indies by her mother, Mariette Colostic Williard Meimoriel, and then to Fayetteville, North Carolina.<sup>9</sup> Several

5 See Matthew Leary Perry, *The Negro in Fayetteville*, in JOHN A. OATES, *THE STORY OF FAYETTEVILLE AND THE UPPER CAPE FEAR* 695-96, 708, 714 (1950). Aaron Revels' cousin was the first African American to serve in the United States Senate. *Id.* at 708, 714.

6 Association for the Study of Negro Life and History, Inc., *The Leary Family*, X NEGRO HISTORY BULLETIN 27 (1946) (hereinafter *Leary Family*).

7 *Id.* at 27. Sara Jane Revels' first name also appears in historical works as "Sarah."

8 Perry, *supra* note 5, at 698; *Leary Family*, *supra* note 6, at 27-28. Matthew Nathaniel Leary trained young men in the harness making business, some of whom relocated to Oberlin, Ohio. In addition, he gave money "to [slaves] to purchase their freedom." *Id.*

9 *Id.* at 28. The name of Juliette Meimoriel also appears variously as Mumrelle, Memerelle, and Memriel. Oswald Garrison Villard states that "Jeremiah O'Leary . . . fought in the Revolution under General Nathaniel Greene, and married a woman of mixed blood, partly [N]egro, partly that of Croatan Indian stock of North Carolina, which is believed by some to be lineally descended from the 'lost

children were born to Matthew Nathaniel Leary and Juliette Anna Meimoriel, including Matthew Nathaniel Leary, Jr., Lewis Sheridan Leary, Henrietta Leary, Sara Leary, John Sinclair Leary, and Mary Elizabeth Leary.<sup>10</sup> All of these great grandchildren of Aaron Revels and children of Matthew and Juliette Leary led productive, even distinguished lives, half of them in North Carolina and Washington, D.C., and the other half in Ohio.

Matthew Leary, Jr., became a businessman and politician who served in government posts in Washington, D.C.<sup>11</sup> John Sinclair Leary studied law at Howard University and became the second Negro to be admitted to the North Carolina Bar. He was elected to the state legislature of North Carolina in 1868, served on the school committee for both white and colored schools from 1878 to 1882, and was active in local and national Republican Party politics, beginning in 1867.<sup>12</sup> Mary Elizabeth Leary studied music under private tutors in Fayetteville and Chicago. She attended St. Augustine College in Raleigh, North Carolina and later became a teacher, as well as church organist at St. Joseph's Episcopal Church in Fayetteville. She married Dallas Perry, Sr., known as "an outstanding architect and builder," who became Judge Mack's father's father.<sup>13</sup>

The three Leary children who moved to Ohio were destined to become part of history. The two sisters, Henrietta and Sara Leary, married the Evans brothers, Henry and Wilson, both Free Blacks active in the movement to free slaves and to assist runaway slaves by protecting them from recapture. Both were cabinet makers and upholsterers.<sup>14</sup> When Henrietta and Sara Leary's brother, Lewis Sheridan Leary, joined them in Oberlin, Ohio, he formed ties with the Evans brothers, as well as with John Anthony Copeland, Jr., reported to be his nephew.

Lewis Sheridan Leary and John Anthony Copeland, Jr., lost their lives because they believed deeply in John Brown's mission to Harper's Ferry. As she grew up in Fayetteville, the oral history of Sheridan Leary and John Copeland, reflecting the interrelationship between the world of free and slave blacks, was pressed into Judge Mack's memory. Sheridan Leary, born on March 17, 1835 in Fayetteville,<sup>15</sup> has been described as "[a] handsome light-eyed man who wore his wide-brimmed hat at a rakish tilt," the son of "Julie Memriel, a Guadeloupian."<sup>16</sup> He journeyed to Oberlin, Ohio in 1856 or 1857, where his married sisters lived. The Cheeks

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colonists' left by John White on Roanoke Island in 1587." OSWALD GARRISON VILLARD, JOHN BROWN, 1800-1859, A BIOGRAPHY FIFTY YEARS AFTER 685-86 (1966).

10 Leary Family, *supra* note 6, at 28-30; ROBERT E. GREENE, THE LEARY-EVANS, OHIO'S FREE PEOPLE OF COLOR 10-11, 38 (1979).

11 Leary Family, *supra* note 6, at 28.

12 Perry, *supra* note 5, at 714-15.

13 Leary Family, *supra* note 7, at 30, 32.

14 WILLIAM CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829-65 (1989).

15 VILLARD, *supra* note 9, at 685-86.

16 CHEEK, *supra* note 14, at 355.

state in their extensive work on John Mercer Langston that one of his sisters was named "Delilah." The 1946 *Negro History Bulletin* article on the Leary Family does not mention a sister by the name of Delilah. The article states, however, that there were seven offspring of the union between Juliette Meimoriel and John Mercer Langston, but does not name the seventh child. The Cheeks identify Delilah Copeland as Sheridan and Henrietta's sister, and John Copeland, Jr., as "[Sheridan] Leary's nephew." Villard also identifies Sheridan Leary and John Copeland, Jr., as uncle and nephew,<sup>17</sup> suggesting that there indeed was a third sister, Delilah.<sup>18</sup>

Delilah was married to John Anthony Copeland, Sr., a mulatto, who, like Judge Mack's father's father, earned his living as a carpenter.<sup>19</sup> Delilah and John Copeland, Sr.'s son, John Anthony Copeland, Jr., was born a Free Negro in Raleigh, North Carolina on August 15, 1834, but moved to Oberlin, Ohio with his parents in 1842.<sup>20</sup> He studied in the preparatory department at Oberlin College.<sup>21</sup> Some works indicate that both Copeland, Jr., and Sheridan Leary studied at Oberlin.<sup>22</sup> Sheridan Leary learned the harness making business from his father, Matthew, and worked under a harness maker in Ohio, John Scott. Copeland, Jr., has been depicted as "serious" and "a man of few words."<sup>23</sup> After spending 1854-1855 as a student in Oberlin's preparatory department, Copeland, Jr., assisted his father in the carpentry business. During the evening hours, he often listened intently to the accounts of fugitive slaves who sought refuge in Ohio.<sup>24</sup>

Both Sheridan Leary and Copeland, Jr., came into contact with men known as "rescuers," those who like the Evans brothers sought to rescue blacks from slavery and to prevent their recapture. And they encountered John Mercer Langston, an imposing, brilliant orator who was a graduate of Oberlin, a lawyer and the elected clerk of the Oberlin Township. Like his brother Charles Langston, he passionately deplored slavery, actively opposed the Fugitive Slave Act of 1850, and emerged as a champion of the continuing freedom of black slave fugitives.<sup>25</sup>

17 VILLARD, *supra* note 9, at 684.

18 There is some confusion in the literature as to exactly how John Copeland, Jr., and Sheridan Leary were related, whether through the Leary or the Evans family tree. GREENE, *supra* note 10.

19 CHEEK, *supra* note 14, at 355 and 378 n.23.

20 VILLARD, *supra* note 9, at 684.

21 *Id.*

22 Historian Merrill D. Peterson identified Lewis Sheridan Leary and John A. Copeland, Jr., as "students in the college." MERRILL D. PETERSON, *THE LEGEND REVISITED*, JOHN BROWN 36 (2002). The Cheeks do not identify Sheridan Leary as a student at Oberlin. Nor is he so mentioned, as is Copeland, Jr., in ROBERT SAMUEL FLETCHER, *A HISTORY OF OBERLIN COLLEGE, FROM ITS FOUNDATION THROUGH THE CIVIL WAR* 414 (1943).

23 CHEEK, *supra* note 14, at 356.

24 *Id.*

25 John Mercer Langston later would become Howard University Law School's first dean, and, even later, the United States Minister to Haiti and Santo Domingo. Information in this paper about

Undoubtedly Charles Langston's reaction to the Supreme Court decision in *Dred Scott v. Sandford*,<sup>26</sup> concluding that Dred Scott could not be a citizen of Missouri and belonged to an inferior class of people who constituted mere chattel despite his claim to status as a Free Negro, affected both Sheridan Leary and Copeland, Jr. In a letter to the then Governor of Ohio, Salmon P. Chase, later appointed to the Supreme Court of the United States, in 1864, by Abraham Lincoln, Charles Langston, joined by other blacks from Columbus, Ohio protested the *Dred Scott* decision: "So gross, so monstrous, so unparalleled a judicial outrage . . . overtakes our patience, well nigh extinguishes our hopes — almost goads us into madness."<sup>27</sup>

Sheridan Leary and Copeland, Jr., were members of the Ohio State Anti-Slavery Society.<sup>28</sup> When fugitive slave-hunters seized John Price and took him to Wellington, Ohio in September 1858, Copeland, Jr., was part of a group of black men and white abolitionists who went to Wellington determined to free Price and return him to Oberlin. Copeland, Jr., and two other black men overpowered Price's captors, set him free, and took him to Oberlin. This remarkable rescue, called the Oberlin-Wellington Rescue, served as a catalyst for other anti-slavery activity by the men of Oberlin Township, including their participation in John Brown's raid on Harper's Ferry.<sup>29</sup>

Although Copeland, Jr., was indicted for his role in the John Price rescue, he managed to "evade arrest" and thus was not tried.<sup>30</sup> One month before the early April 1859 trial of the other rescuers, John Brown took to Ohio some blacks who had been freed from slavery in Missouri. Sheridan Leary heard John Brown speak about his mission in opposition to slavery.<sup>31</sup> Four months later, John Mer-

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John and Charles Langston is taken primarily from the work by William and Aimee Lee Cheek. CHEEK, *supra* note 14.

26 60 U.S. 393 (1856).

27 CHEEK, *supra* note 14, at 324.

28 *Id.* at 352.

29 *Id.* at 316-48.

30 *Id.* at 329.

31 Brown had discussed some of his plans with Frederick Douglass over the years in Rochester, New York. He met with Douglass in 1847 and discussed his plan to assist slaves to fight for their freedom by concealing some of them in the Allegheny Mountains in Maryland and Virginia for later battle, and sending some northward to freedom. Douglass summarized Brown's mission as a secret plan to assemble "a few sound men, to establish a base in the mountains to which slaves and free Negroes would come, and . . . a free state would be set up." PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850-1860* 88 (1950). In August 1859, Brown related to Douglass his plans to attack Harper's Ferry, Virginia, and to take as hostages leading citizens of that locality in an effort to gain the release of slaves in the area. While Douglass was not prone to participate in Brown's plan and disapproved of the Harper's Ferry idea, he recruited a runaway slave who resided with him to join Brown. *Id.* at 89. Shields Green, the runaway slave later joined Sheridan Leary and Copeland, Jr., in John Brown's mission. John Brown's mission has been discussed in a number of works, including PETERSON, *supra* note 22, and OSWALD GARRISON VILLARD, *JOHN BROWN* (1943).

cer Langston introduced Sheridan Leary and Copeland, Jr., to John Brown, Jr. John Brown, Jr., had arrived in Ohio in August 1859 to recruit "any Ohioan, white or black, who might be persuaded to strike and die for the American bondman."<sup>32</sup> After listening to Brown, Jr., and hearing the views of John Mercer Langston, Sheridan Leary and Copeland, Jr., cast their lot with Brown, deciding "to die, if need be."<sup>33</sup> On October 6, 1859, they went to Cleveland, met with Brown, Jr., and then began their journey to Harper's Ferry.<sup>34</sup> They arrived at their destination on October 15, 1859. Brown's mission at Harper's Ferry began the following night. Sheridan Leary received a fatal bullet wound in his back on October 17, 1859, as he sought to swim "the rapids of the Shenandoah."<sup>35</sup> Copeland, Jr., was captured, survived cries that he be lynched,<sup>36</sup> but was executed on December 16, 1859, after being tried and found guilty of "murder, and inciting slaves to insurrection."<sup>37</sup> In a letter to his parents, written on November 26, 1859, Copeland, Jr., said:

[M]y fate as far as man can seal it is sealed, but let this not occasion you any misery for remember the cause in which I was engaged, remember that it was a 'Holy Cause,' one in which men who in every point of view better than I am have suffered and died, remember that if I must die I die in trying to liberate a few of my poor and oppress[ed] people from my condition of serveatud which God in his Holy Writ has hurled his most bitter denunciations against and in which men who were by the color of their faces removed from the direct injurious affect, have already lost their lives and still more remain to meet the same fate which has been by man decided that I must meet.<sup>38</sup>

Upon hearing of her son's death, Delilah Copeland stated: "If I could be the means of destroying slavery, I would willingly give up all my menfolk."<sup>39</sup> Later, a

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32 *Id.* at 354.

33 *Id.* at 357.

34 Before he left on his journey to Cleveland and Harper's Ferry, Sheridan Leary asked John Mercer Langston to ensure that his wife, then twenty-three years of age, and child "never know want." *Id.* at 358. Through the efforts of the Langston brothers and others, Sheridan Leary's wife was able to supplement her work as a milliner and to return to the preparatory department at Oberlin College for more schooling. In January 1869, she married Charles Langston. *Id.* at 361-62. Of historical note, Sheridan Leary's wife became the maternal grandmother of the poet, Langston Hughes. PETERSON, *supra* note 22.

35 VILLARD, *supra* note 9, at 445; CHEEK, *supra* note 14, at 358.

36 VILLARD, *supra* note 9, at 445.

37 CHEEK, *supra* note 14, at 358-59. The charge of treason was dropped on the theory that under the *Dred Scott* case, blacks were not citizens and hence could not be found guilty of treason. *Id.* at 358. Shields Green also survived the thrust on Harper's Ferry and, like Copeland, Jr., was tried and adjudged guilty. *Id.*

38 VILLARD, *supra* note 9, at 684.

39 CHEEK, *supra* note 14, at 356.

monument “eight feet high and weighing half a ton” was placed in the Oberlin cemetery in honor of Sheridan Leary, Copeland, Jr., and Shields Green. An inscription on the monument stated simply: “These colored citizens of Oberlin, the heroic associates of the immortal John Brown, gave their lives for the slave.”<sup>40</sup>

By 1859, the year of Harper’s Ferry, coming on the heels of the *Dred Scott* decision, the legal status of Free Negroes in North Carolina, as elsewhere, had declined, and extreme hostility toward them from the larger society had escalated. For example, one North Carolina county issued the following declaration:

We, the Grand Jury of Cleveland County, North Carolina do present, that free Negroes in general are a nuisance to society; and that it would be expedient to have a law requiring them to leave the State, and for a failure to do so, that they should be exposed to public sale, the proceeds arising therefrom be applied to the Literary Fund of our State. Adopted by unanimous consent.<sup>41</sup>

In the same year, a bill was introduced in both houses of the North Carolina legislature “concerning Free Persons of Color.” Under that proposed legislation, Free Negroes were given two years in which to move out of North Carolina, and those who remained without permission of the General Assembly of North Carolina faced arrest and sale as slaves.<sup>42</sup> Although none of the proposed legislation actually passed, the anti-Free Black sentiment was clear. Some Free Negroes found themselves resisting efforts to send them to Haiti or parts of Africa, or to enslave them. Struggles to retain their freedom and livelihoods, and to stave off the type of frustration that prompted pleas for enslavement, became a common experience of Free Negroes in North Carolina in the decade of the 1850s.<sup>43</sup> That struggle continued in the aftermath of the Civil War and Reconstruction. Early members of Judge Mack’s family were typical, perhaps, of Free blacks about whom John Hope Franklin, the historian, said: “Free blacks were a group unto themselves. They worked, played, struggled to improve their legal and economic status . . . . Many of them emerged from the dim shadows of their anomalous position to become not merely distinct persons but even heroic figures.”<sup>44</sup>

Consistent with their rich legacy, and carrying forward the oral history of their ancestors, members of the Leary/Perry families continued the business enterprises and professional occupational traditions of their free black ancestors. They also continued to struggle to maintain their freedom, rights, dignity, and lives.

Four children were born to the union of Mary Elizabeth Perry (the youngest child of Matthew and Juliette Leary) and Dallas Perry. Matthew Leary

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40 *Id.* at 361.

41 JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA: 1790-1860* 213 (ed. 1995).

42 *Id.* at 214.

43 See generally FRANKLIN, *supra* note 41, at 192.

44 *Id.* at x.

Perry, Judge Mack's uncle, became a prominent physician in Fayetteville. He established a non-profit hospital in Fayetteville for the care of pregnant women and children; and he and his brother, Dr. John Sinclair Perry, also a physician, "owned and operated the Mercy Hospital at Hamlet, North Carolina, for a number of years," and also practiced in Wilmington, North Carolina.<sup>45</sup> In addition, he enjoyed a distinguished career in Washington, D.C., as a neuropsychiatrist, serving both at St. Elizabeth's Hospital and the old Freedmen's Hospital (now Howard University Hospital).<sup>46</sup> Mary E. Leary Perry II, Judge Mack's aunt, was a musician who received her training at the New England Conservatory of Music in Boston. She established the Music Department at what eventually became Fayetteville State Teachers College. She also headed the music departments at Shaw University and St. Augustine's College in Raleigh, North Carolina.<sup>47</sup>

Judge Mack's father, Dallas Leary Perry, Jr., was a pharmacist and a pharmaceutical chemist at the Fort Bragg army post.<sup>48</sup> During World War II, he was in charge of the drug manufacturing department there, and made medicines for soldiers.<sup>49</sup> He married Emily McCoy in 1917, a Fayetteville, North Carolina public school teacher. Although she could have traveled north to one of the more prestigious colleges, Emily McCoy elected to stay in North Carolina to be close to her family. So she attended St. Augustine College, an Episcopal college in Raleigh, North Carolina, and entered the teaching profession after her graduation. Dallas and Emily Perry had two children, Mary Elizabeth Perry (Robinson) and Julia Emily Perry (Cooper Mack).

### B. *The Court System*

While the unique history of the Leary/Perry family was evolving, the District of Columbia Court system reflected its own historical uniqueness. Just as the District of Columbia, created as the seat of the federal government through land cession from Maryland and Virginia, is a unique political entity, so too is its court system. Initially, the District of Columbia was dependent on the courts of Maryland and Virginia, whose powers stretched into the federal enclave that became the nation's capital. The District soon acquired its own courts to handle judicial matters in the District's counties—the County of Washington and the County of Alexandria.<sup>50</sup> Emanating from the historic political controversy between John Adams' Federalists and Thomas Jefferson's Anti-Federalists or Republicans, the

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45 Perry, *supra* note 5, at 708-09.

46 *Leary Family*, *supra* note 6, at 34, 47.

47 *Id.* at 34.

48 Judge Mack's father's father was a noted carpenter who made distinctive furniture. Interview with Judge Mack.

49 Perry, *supra* note 5, at 706; author's interview with Judge Mack (Apr. 23, 2003).

50 Edwin Melvin Williams, *The Circuit Court of the District of Columbia, 1801-1863*, in *WASHINGTON PAST AND PRESENT: A HISTORY* 209-10 (John Claggett Proctor ed., 1930).

federal Act of February 27, 1801<sup>51</sup> established a Circuit Court of the District of Columbia with appellate power and local trial authority in both civil and criminal matters, a District Court (charged with maritime matters), as well as an Orphan Court (for trust and probate cases) in each of the counties of the District; and justices of the peace presided over Levy Courts whose jurisdiction covered taxes, liquor licenses, and other matters.<sup>52</sup> Judges were to be appointed by the President of the United States and confirmed by the Senate.<sup>53</sup>

Before Thomas Jefferson could take the oath of office, John Adams quickly named three men to the Circuit Court in the District: Thomas Johnson of Maryland as Chief Judge; James Marshall of Alexandria<sup>54</sup> (the brother of John Marshall, Secretary of State under Adams whose swift appointment to the Supreme Court of the United States as Chief Justice was destined to carve out a new base of power for the Federalists); and William Cranch of Washington. Thomas Johnson declined the appointment and was replaced by William Kilty.<sup>55</sup> Judges of the two Orphan Courts were also appointed. Simultaneously with the designation of Circuit and Orphan Court judges, President Adams signed the commissions of some forty-two justices of the peace.

The first major change in the structure and functions of the District's court system occurred in 1863, also as a result of political controversy spawned by the Civil War. The Civil War produced a clash between military and judicial authority.<sup>56</sup> Fearing that the courts of the District of Columbia might be too sympathetic to southern interests, Congress abolished the Circuit Court and criminal courts, and created a Supreme Court of the District of Columbia by the Act of March 3, 1863.<sup>57</sup> Designed as a court of "general jurisdiction in law and equity," the court consisted of four justices nominated by the President and confirmed by

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51 2 Stat. 103.

52 *Id.* at 210, 247. The Circuit Court took over the functions of the "Hustings Court of Alexandria and the Mayor's Court of Georgetown." *Id.* See also JEFFREY MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE DISTRICT OF COLUMBIA CIRCUIT* 6 (2001); CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT* 8 (1999). As a result of the overload on the Circuit Court, a separate criminal court was created in 1823. Williams, *supra* note 50, at 221.

53 Williams, *supra* note 50, at 210.

54 In the press of his duties during his final days as Secretary of State under Adams, John Marshall asked his brother James to retrieve and deliver commissions to forty-two justices of the peace appointed by President Adams during his last days as President. James Marshall was not able to carry all of the commissions, and one of those left behind belonged to William Marbury. Marbury later sought to obtain his commission. His effort resulted in the well-known case of *Marbury v. Madison*, 5 U.S. 137 (1803).

55 Williams, *supra* note 50, at 211.

56 See Susan Low Bloch & Ruth Bader Ginsburg, *Symposium: The Bicentennial Celebration of the District of Columbia Circuit. Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 *GEORGETOWN L.J.* 549, 552-59 (2002).

57 12 Stat. 762. See Williams, *supra* note 50, at 223; MORRIS, *supra* note 52, at 366.

the Senate.<sup>58</sup> President Lincoln was determined that the Supreme Court would address national issues in a critical period of history. He “considered it of the utmost importance that there should be a court in the national capital composed of judges of national reputation with positive and strong convictions in accord with the policies of the administration on all questions then disturbing the country.”<sup>59</sup> Part of President Lincoln’s concern centered on efforts to re-enslave Free Negroes. In President Lincoln’s view, the courts of the District of Columbia had a duty to protect the freedom of ex-slaves or Free Negroes, rather than aid in the enforcement of the Fugitive Slave Law through the issuance of warrants against persons of color.<sup>60</sup>

Although the Supreme Court of the District of Columbia existed until 1936, the Court of Appeals of the District of Columbia was established, in 1893,<sup>61</sup> solely as an appellate court, to put an end to the anomalous situation under which justices of the Supreme Court sat on cases in their appellate term that had been handled by members of that same court in its trial term. By 1909, a Municipal Court had been created. Eventually, this court exercised “exclusive power in civil cases where the amount in controversy did not exceed \$1,000.”<sup>62</sup>

The Court of Appeals for the District of Columbia steadily increased in power and status as it first transformed itself into the United States District Court of Appeals for the District of Columbia in 1934,<sup>63</sup> to make clear its status as an Article III court, under the Constitution of the United States, rather than an Article I court.<sup>64</sup> Then, in 1942, the court became the United States Court of Appeals for the District of Columbia Circuit, placing it on the same footing with other federal circuit courts.<sup>65</sup> The power of the dual federal/local court system was solidified in 1936 when the Supreme Court of the District of Columbia ceased to exist and the District Court for the District of Columbia took its place.<sup>66</sup> In 1948, the District Court’s name changed to the United States District Court for the District of Columbia, and the title “justice” was dropped in favor of “judge.”<sup>67</sup>

As the Court of Appeals for the District of Columbia Circuit and the United States Court for the District of Columbia increased their powers, lesser courts in the District continued to handle matters viewed as less important. The Police

58 Williams, *supra* note 50, at 226.

59 Williams, *supra* note 50, at 266.

60 Williams, *supra* note 50, at 228.

61 Act of Feb. 9, 1893, 27 Stat. 434.

62 Williams, *supra* note 50, at 250. An appeal from the Municipal Court had to be filed in the Court of Appeals rather than the Supreme Court of the District of Columbia. *Id.*

63 Act of June 7, 1934, 48 Stat. 926.

64 Bloch & Ginsburg, *supra* note 56, at 561.

65 Act of Dec. 9, 1942, 56 Stat. 1094.

66 Act of June 25, 1936, 49 Stat. 1921.

67 Act of June 25, 1948. 62 Stat. 991.

Court, created in 1870, had jurisdiction over matters such as prohibition and regulatory offenses, and the Juvenile Court handled cases involving juvenile delinquents, neglected children, child labor law violations, and school attendance matters.<sup>68</sup>

### III. TWO WINDING ROADS DESTINED TO MEET

The winding road traveled by Julia Emily Perry Cooper Mack and the winding road resulting in the creation of the DCCA were destined to meet. Julia Emily Perry would make her own mark in history, despite a near fatal hit and run accident in childhood in Hamlet, North Carolina that left her with a stutter and slight difficulty with oral communication.<sup>69</sup> Because of the accident, she did not enter formal school until the third grade. Prior to that, she was taught by her mother. She attended the State Normal School in Fayetteville, described by Judge Mack as “a practice school” or a “normal school” with “wonderful teachers.” In addition to the usual curriculum, she was taught black history. Moreover, she was urged to compete in statewide essay competitions. She chuckled over one such competition that she won during the depression. Her essay was on “the family cow,” although she “had never been near a cow.” As a result of her victory, the governor of North Carolina invited her to the State Capitol and escorted her on a tour. Her prize for that victory was \$15.00 in gold.

Although Julia Perry’s parents were protective of her and her older sister Mary “in a dignified way” as they grew up in segregated North Carolina, she was influenced in large measure by “Mama Jul,” her mother’s mother, as well as her father’s accounts of Sheridan Leary. “Mama Jul” believed in resisting wrongdoing, and used to teach Julia Perry to hold her ground when members of the white community wanted to exclude her or push her away, as some white children did when she traversed the sidewalks. “Mama Jul would say, ‘If you let them put you out, I’ll beat you when you get home.’”

Although Julia Perry “g[o]t into a few fights” trying to hold her ground, she adopted her parents’ philosophy: “live to live another day; bide your time.” Nevertheless, her father, whom Judge Mack described as “a gentle, sweet guy,” was always poised to protect his family against harm. After the birth of his first child, he lived through riots in Winston Salem, North Carolina. Family oral history relates that he armed himself and stayed at the window constantly when he was home to stave off any attack on his family. During Julia Perry’s first year of high school in Wilmington, North Carolina where one of her father’s drug stores

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68 Williams, *supra* note 50, at 252-54.

69 Unless otherwise noted, background information on Judge Mack comes from the author’s interviews with her, in Washington D.C., on April 23, 2003, April 29, 2003, May 1, 2003, and February 16, 2004.

was located, her father slept with a gun on his pillow to foil robbery or other potentially harmful behavior by others.

Yet, there were light moments as Julia Perry moved through her segregated community where white newspapers declined to print anything favorable about Negroes. A neighbor, “an amply built lady who was married to a preacher, would go up to the separate water fountains and she would say, ‘Oh, they have white water and they have black water. I think I’ll try a bit of both.’” These kinds of moments taught Julia Perry how “to live with [Jim Crow] and to exist.” But other people along the way urged a more activist stance. During her high school days, an African American aviator, known as “the Black Eagle,” spoke to the student body and advised them to boycott companies that discriminated against Negroes. Later, during World War II when Judge Mack’s first husband, Jerry Cooper, visited her and their baby in North Carolina, he was pushed off the train, despite his Navy uniform. When Julia Perry Cooper recounted this incident to Dr. James Nabrit, Jr., at Howard University where she then worked, he told her all she had to do was “go limp,” but, with a laugh while reminiscing about the incident, Judge Mack stated, “I’m not the ‘go limp’ type.”

As she approached graduation at age sixteen from the E.C. Smith High School in Fayetteville where she excelled in scholarship, debating and dramatics, Julia Perry received scholarships to historic Fisk University and Hampton Institute. She elected to go to Hampton, although her sister Mary had followed her mother’s footsteps to St. Augustine College and graduated at age seventeen. At Hampton, Judge Mack encountered what today would be perceived as a rather strict environment—no dating boys for six months and suspension for smoking in the dorm room. Aside from her academic curriculum, with concentrations in mathematics and English, at the mandatory nightly vespers Julia Perry was exposed to the world of music—Nathaniel Dent in particular, organ music and spirituals. Outstanding personalities of the day would visit the campus, including the educator Mary McCleod Bethune who would recount her contacts with Eleanor Roosevelt.

Judge Mack’s introduction to law came through her avid interest in and love for drama and the theater. In one of the plays produced at Hampton, Julia Perry played the part of a wife on trial for the murder of her husband. The audience served as the jury. A verdict of “not guilty” was rendered at her performance at Hampton, but at another college, she was found guilty. That experience sparked her interest in law, although her entry into law school would be delayed for some time.

After earning her Bachelor of Science degree in 1940, Julia Perry first taught school in North Carolina and Catonsville, Maryland. Her assignment in Catonsville was interrupted when she collapsed from a life-threatening streptococcus infection. Her father arranged for her to be treated at the Johns Hopkins Hospital in Baltimore. As she could find humor in the segregated conditions of Fay-

etteville, North Carolina, Julia Perry also found humor in that illness—watching her concerned parents rush to her side at the hospital—her father pulling on a mask and her mother in her sister’s borrowed fur coat as nerves overcame her. While recovering from that illness, Julia Perry became convinced that she had survived for a reason, and the reason soon became clear.

Beginning in September 1942, Julia Perry Cooper worked as an Assistant Registrar at Fayetteville State Teachers College. Upon her return to the Washington, D.C. area, she used her experience at Fayetteville Teachers College to obtain a position in the Registrar’s office at Howard University as an Admissions Clerk. She served in that capacity from June 1946 to June 1948, a position which allowed her to keep her baby daughter close by, playing on the spacious basement floor.<sup>70</sup> While working in the Howard University complex, Julia Cooper encountered two men who were destined to leave their own historic marks on the worlds of education and law.

It was Dr. Matthew J. Whitehead, then Assistant Registrar at Howard and later President of Miner Teachers College (which became D.C. Teachers College and later was merged into the University of the District of Columbia), who encouraged Julia Perry to go to law school. And she met Dr. James Madison Nabrit, Jr., then a professor at the law school, who would go on to collaborate with attorney Thurgood Marshall on the school desegregation cases of the 1950s, and argue *Brown v. Board of Education*’s companion case, *Bolling v. Sharpe*. In 1960 Dr. Nabrit would become President of Howard University. One other man proved influential in directing Julia Perry Cooper to law school, George Johnson, then Dean of Howard University’s law school. Dean Johnson was instrumental in helping Julia Perry Cooper to win a Jesse Smith Noyes Foundation scholarship to defray the costs of law school, and she was able to work part-time in Dr. Nabrit’s office.

Julia Perry Cooper’s graduating law school class was small, consisting of three women and approximately twenty mature men, generally veterans of World War II, out of a class of some thirty-seven students. Eventually six members of that small class became judges. During the summer months she worked in the office of Dr. Mordecai Johnson, the legendary first African American President of Howard University, appointed in 1926. Among her professors at Howard Law School were Dr. Nabrit, who taught contract law as well as civil rights law, Herbert O. Reid, a civil rights lawyer, and Howard Jenkins, a labor lawyer. She had one female professor, Jane M. Lucas, who resigned at the end of Julia Cooper’s

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<sup>70</sup> By that time, Julia Perry Cooper no longer was with her first husband, Mr. Cooper. She had “a difficult time” with her first marriage when she discovered that her values and interests were not altogether compatible with those of her husband. When their daughter Cheryl was four years old, the Coopers were divorced, and Julia Perry Cooper experienced the life of a single parent attempting to find a decent place to live and a job to support herself and her daughter. Author’s interview with Judge Mack (Feb. 16, 2004).

second year of law school.<sup>71</sup> Aside from proving her ability to master academic legal studies, Julia Perry Cooper manifested the kind of personal qualities essential for leadership. She became the second woman in the history of Howard's law school to attain the position of Chief Justice of the Court of Peers, the law student governing body, and was also a member of the *Howard Law Journal* staff.<sup>72</sup>

After her graduation from law school in 1951, Professor Charles Quick facilitated Julia Perry Cooper's hiring at the federal Office of Price Stabilization, in July 1951, where she wrote documents pertaining to price control rates. Her appointment was announced by a Mr. Manseur who stated: "Our program in keeping with President Eisenhower's wishes calls for the employment of eligible persons to whatever positions they are qualified for. Mrs. Cooper meets the high standards set by our Department under the reorganization program. We expect her to fill her new post with honor and credit to the agency."<sup>73</sup> Her colleagues at the Office of Price Stabilization included Harry Alexander and Harold Leventhal, both of whom would become judges. (Harold Leventhal, who was nominated as a judge on the United States Court of Appeals for the District of Columbia Circuit in 1965 by President Johnson, "brought to [that] Court a quick-witted, superbly analytical and cultivated mind and a ready pen."<sup>74</sup>)

While working on price control matters, Leventhal once unexpectedly called Julia Perry Cooper on a Sunday to help him revise a speech. In making this weekend call for help with what must have been a pressing assignment, Mr. Leventhal must have recognized Julia Perry Cooper's strong analytical mind and her skill in using the written word. Years later, Judge Leventhal would be identified with the liberal wing of the United States Court of Appeals for the District of Columbia under the David Bazelon court.<sup>75</sup> As we shall see, opinions emanating from that wing of the court prompted Congress to enact legislation creating the District of Columbia Court of Appeals in 1970 to stop the flow of opinions deemed favorable to criminal defendants.

When Democrats lost the White House, and the Office of Price Stabilization was closing down because Republicans were not champions of price control, the head of the agency warned Julia Perry Cooper that she would have difficulty finding another job because she was African American, female, and had a child. His words were prophetic and she found herself without a job in March 1953, just

71 HOWARD UNIVERSITY, BISON (1951) (yearbook).

72 During Julia Perry Cooper's first year in law school, Damon Keith served as Chief Justice of the Court of Peers. Later in life he was appointed to the United States Court of Appeals for the Sixth Circuit.

73 Jan. 14, 1954, unidentified newspaper clipping from the files of Judge Mack.

74 MORRIS, *supra* note 52, at 198. Judge Leventhal was educated at Columbia College and Columbia University Law School, and clerked for Supreme Court Justices Harlan Fiske Stone and Stanley Reed. He served as General Counsel of the federal Office of Price Administration from 1940-43. *Id.* at 198-99.

75 Bazelon served as Chief Judge of the court from 1962-1979. MORRIS, *supra* note 52, at 371.

months prior to the Supreme Court's decision in *District of Columbia v. John R. Thompson Co., Inc.*,<sup>76</sup> which not only sustained the use of two Reconstruction Era statutes to attack racial discrimination in the Thompson restaurants in the District of Columbia, but which also paved the way for the Congress of the United States to delegate legislative power to a local District of Columbia legislature.<sup>77</sup>

Julia Cooper Perry soon joined the "mourner's bench" at the Court of General Sessions, waiting for appointments to defend criminal clients. She learned the ropes of a nuts-and-bolts criminal law practice representing "mostly poor and wretched [people]," those who were alcoholics, those involved in domestic violence, prostitutes, and others. She described herself as "a lousy trial lawyer" in what resembled a police court. But she learned the basics of practicing law from other lawyers who also occupied the "mourner's bench." Her tour of duty as a solo practitioner ended as a result of a contact made by her first husband's mother,<sup>78</sup> and the insistence "by civil rights activists" that the federal government cease its discriminatory policies against blacks who sought professional employment in the government.<sup>79</sup>

That contact, and the labors of those who fought racial discrimination in the government, landed Julia Cooper Perry a position in the federal General Services Administration during the McCarthy era, at about a GS-6 or 7 level. She was the first black attorney hired by the GSA.<sup>80</sup> Immediately she felt the sting of prejudice. Her office turned out to be "a little closet," and "[t]he white secretaries were asked if they minded working for [her]." When the contact who helped

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76 346 U.S. 100 (1953).

77 The Supreme Court declared:

[S]o far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted . . . .

We conclude that the Congress had the authority under Art. I, § 8, cl. 17 of the Constitution to delegate its lawmaking authority to the Legislative Assembly of the municipal corporation which was created by the Organic Act of 1871 and that the "rightful subjects of legislation" within the meaning of § 18 of that Act was as broad as the police power of a state so as to include a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia.

*John R. Thompson Co., Inc.*, 346 U.S. at 109, 110 (citation omitted); see also Marvin Caplan *Eat Anywhere!*, 1 WASH. HIST. 25 (1989), for the story of the struggle to desegregate Thompson's restaurants.

78 Author's interview with Judge Mack (Apr. 23, 2003).

79 Derrick Bell, *Essay: A Gift of Unrequited Justice*, 40 How. L.J. 305, 309 (1997).

80 *Id.* at 309.

her secure the GSA position discovered how she was being ostracized in the little closet, he protested and she was moved to a better office.

Julia Cooper Perry's work at GSA centered on the McCarthy hearings, and she was assigned to question witnesses. The experience was "awful." Some of the witnesses "didn't have a chance" and "black folks were persecuted." She was chastised when she did not pronounce "some part of the world correctly." The cafeterias were separated along color lines. But, in 1956, she was rescued from GSA by a job offer from the Department of Justice, where she became the first black female attorney<sup>81</sup> and where she was destined to meet her mentor, Beatrice Rosenberg.<sup>82</sup>

Beatrice Rosenberg, who died in 1989 at age 81, was a consummate, demanding but sensitive career lawyer who discovered upon her return from a vacation that Julia Perry Cooper had been hired to work in her criminal division at the Justice Department. Ms. Rosenberg immediately spotted in Julia Perry Cooper the kind of qualities she valued. Explaining how her close relationship with Ms. Rosenberg developed, Judge Mack stated simply: "She learned that I knew how to write." The two women worked well together, and over the years authored a significant number of briefs for the circuit courts and the Supreme Court of the United States.

A graduate of Wellesley College and the New York University School of Law, Ms. Rosenberg joined the criminal division of the Justice Department in 1943, and rose to the position of chief of the criminal division's appellate section.<sup>83</sup> Judge Mack recalled that the criminal division was filled with young white men and one white woman when she arrived. Ms. Rosenberg proved to be "a hard task master," and "Ivy League schools didn't mean anything to her." She once "hired a guy from Harvard [but] fired him the next day." A bond of friendship grew between Ms. Rosenberg and Julia Perry Cooper, and both immersed themselves in the stressful, demanding job of drafting appellate court briefs. During her tenure at Justice, Julia Perry Cooper labored for Ms. Rosenberg and approximately six Solicitors General. Her name, alongside that of Beatrice Rosenberg, appears as government attorney on briefs filed in countless cases in the late fifties and the decade of the sixties, many of which Ms. Rosenberg argued in the Supreme Court of the United States.<sup>84</sup> Julia Perry Cooper, too, argued cases before

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81 Bell, *supra* note 79, at 309.

82 Around 1956, Julia Perry Cooper married Clifford J. Mack, who had been a helpful friend to Julia Cooper and her daughter. She married Mr. Mack, a person whose qualities she obviously admired and respected, after a talk with her father. They remained together until his death on the eve of her elevation to the DCCA. Author's interview with Judge Mack (Feb. 16, 2004).

83 *Tribute to a Mentor: Woman Lawyer Shaped Careers of Hundreds*, WASH. POST, Dec. 13, 1989, at B5.

84 During Ms. Rosenberg's memorial service, former Solicitor General of the United States and Dean of Harvard Law School, Erwin N. Griswold, stated that Ms. Rosenberg's "more than 30 argu-

the Supreme Court, “the first black woman to represent the federal government in argument before [that] Court.”<sup>85</sup>

The important cases handled by Ms. Rosenberg and Julia Perry Cooper are too numerous to mention here, but they covered areas of search and seizure, deportation and habeas corpus, eavesdropping, and other criminal matters. Of these cases, only three will be mentioned: *Mallory v. United States*,<sup>86</sup> because of its importance to the decision to create the District of Columbia Court of Appeals, and *Hill v. United States*<sup>87</sup> and *Marchibroda v. United States*,<sup>88</sup> because Julia Perry Cooper argued them before the Supreme Court.

*Mallory* is a historic case pertaining to proper criminal procedure for handling criminal suspects after their arrest. William B. Bryant, then an attorney appointed to represent criminal defendant Andrew Mallory in a terrible rape case, and later a Judge of the United States District Court for the District of Columbia, sought to free his client by arguing a violation of criminal procedural rules due to excessive pre-arraignment delay (eighteen hours between arrest and arraignment) and interrogation resulting in a confession by Mr. Mallory. After Mr. Mallory’s conviction, Bryant appealed the case to the United States Court of Appeals for the District of Columbia Circuit. There a panel composed of Judges E. Barrett Prettyman, David Bazelon, and Walter Bastian issued a divided opinion affirming his conviction. The majority found no procedural problem with the delay and the confession, concluding that “the delay was not unreasonable”<sup>89</sup> under *McNabb v. United States*.<sup>90</sup> But Judge Bazelon dissented, calling the delay “inexcusable and illegal.”<sup>91</sup> When the case advanced to the Supreme Court, Julia Cooper Perry and Beatrice Rosenberg were government attorneys on the brief. The Supreme Court unanimously reversed Mr. Mallory’s conviction and, relying on its decision in *McNabb v. United States*,<sup>92</sup> held that arraignment must follow arrest “as quickly as possible,” or any confession obtained could be excluded from evidence in the District of Columbia, notwithstanding its voluntary nature.

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ments before the Supreme Court placed her in a class with Daniel Webster in the 19th century and John W. Davis in this century.” WASH. TIMES, Dec. 13, 1989, at B5.

85 Bell, *supra* note 79, at 309.

86 354 U.S. 449 (1957).

87 368 U.S. 424 (1962).

88 368 U.S. 487 (1962).

89 *Mallory v. United States*, 236 F.2d 701, 703 (D.C. Cir. 1956).

90 318 U.S. 332 (1943).

91 *Mallory*, 236 F.2d at 707.

92 In *McNabb*, 318 U.S. 332, 342 (1943), the Supreme Court required suspects in the custody of law enforcement authorities to be arraigned “without unnecessary delay.” Confessions extracted during periods of unnecessary delay could be excluded from evidence in federal courts, even if voluntary. The *McNabb* legal principle was codified in 1946 in Rule 5 (a) of the Federal Rules of Criminal Procedure.

Justice Frankfurter, writing for a unanimous court and reinforcing the *McNabb* decision, declared:

We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5(a) as a barrier.<sup>93</sup>

As we shall see, application of the *Mallory* principle by the D.C. Circuit bitterly divided the conservative and liberal factions of the court and in part contributed to the creation of the DCCA.

*Hill* and *Machibroda* were Sixth Circuit cases argued by Judge Mack during her tenure in the Department of Justice. In a collateral attack on his conviction for transporting a kidnapped person and a stolen vehicle in interstate commerce, Mr. Hill claimed that his procedural right under Rule 32(a) of the Federal Rules of Criminal Procedure to make a statement personally at his sentencing hearing had been violated. Ruling in favor of the government and affirming Mr. Hill's conviction, a Supreme Court majority held through Justice Stewart "that the failure to follow the formal requirements of Rule 32(a) is not of itself an error that can be raised on collateral attack."<sup>94</sup> *Machibroda* was similar to *Hill* in one respect. Justice Stewart, writing again for the majority, reaffirmed the holding in *Hill*, "that the failure of the District Court specifically to inquire at the time of sentencing whether the petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion . . . or Rule . . ."<sup>95</sup> The majority concluded, however, that Mr. Machibroda's conviction on charges of bank robbery had to be vacated because the trial judge had to hold a hearing regarding Mr. Machibroda's allegations that his pleas of guilty were involuntary and had been induced by governmental promises of leniency, and because "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."<sup>96</sup>

Through *Mallory*, *Hill*, *Machibroda* and countless other criminal cases for which she drafted briefs and presented appellate court argument, Julia Perry Cooper steeped herself in the nuances of criminal procedure. In addition, because of her deep experience of more than a decade in the Department of Justice, she readily understood and could recognize the weaknesses of the government's

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93 354 U.S. at 455-56.

94 368 U.S. at 426.

95 368 U.S. at 489.

96 368 U.S. at 493.

case. Undoubtedly this experience helped to shape the jurist who later would decide important criminal cases appealed to the DCCA.<sup>97</sup>

In January 1968, almost fourteen years after the Supreme Court's landmark decision in *Brown v. Board of Education*,<sup>98</sup> Julia Perry Cooper joined the General Counsel's staff at the Equal Employment Opportunity Commission (EEOC). Her days at the EEOC were difficult ones as she sought to enforce anti-discrimination laws in the midst of internal and external politics and interpersonal conflicts.<sup>99</sup> Reflecting on those days, Judge Mack commented: "I had a lot of courage at EEOC because I had the backing of the Civil Rights Act of 1964."

Of particular note was Julia Perry Cooper's struggle to weed out discrimination against African Americans at the Department of Housing and Urban Development (HUD). Many of these HUD employees had been confined and stalled in GS-3 and GS-4 positions for years. She was "[c]ertified as an Equal Employment Opportunity Appeals Examiner by the Civil Service Commission in 1970,"<sup>100</sup> and was "threatened" by the Civil Service Commission as she held hearings on the plight of these African American government workers. She heard extensive testimony despite the "rude[ness]" she encountered. The "rude[ness]" led her to confer with then Chairman of the EEOC, William H. Brown III, whom Judge Mack described as "a courageous chairman." He sup-

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97 Judge Frank Nebeker became acquainted with Julia Perry Cooper while he served as Chief of the Appellate Division for the Office of the United States Attorney for the District of Columbia. Because of understaffing of that division during his tenure, Ms. Rosenberg asked some of the Justice Department's Criminal Division attorneys to assist him. Julia Cooper Perry wrote "a goodly number" of appellate briefs for the U.S. Attorney's office and "argue[d] the cases." Judge Nebeker recalled that one of the cases assigned to Julia Perry Cooper "was a rape case and at that point rape was a capital crime in the District of Columbia." Although she prepared the brief for the case, "she informed [Frank Nebeker] that she would not argue to uphold a capital verdict." Nebeker argued the case and "lost it, because [one] couldn't get a capital verdict through the D.C. Circuit at that time." Interview with Judge Nebeker (Apr. 7, 2003).

98 347 U.S. 483 (1954).

99 Initially, the EEOC, created by Title VII of the Civil Rights Act of 1964, did not have extensive powers, and could not even initiate a complaint or sue, and generally was dependent on referrals to the Attorney General of the United States. RAYFORD LOGAN & MICHAEL R. WINSTON, *THE ORDEAL OF DEMOCRACY* 39-40, 158-60 (1971). Despite its inability to initiate suits, the EEOC discovered through research by young lawyers that it could enter suits brought by others through the *amicus curiae* route. Julia Perry Cooper and other EEOC lawyers "would appear as *amicus* and argue the case and help with the briefs [of others], and file [their] own brief." Author's interview with Judge Julia Cooper Mack (May 1, 2003).

When she started at the EEOC, Julia Perry Cooper was the only African American woman in the General Counsel's office. She endured clashes at one time between an African American male chairman of the Commission and her Caucasian General Counsel. Once when the situation between the two men became overheated, her General Counsel decided to leave abruptly, and instructed her (his deputy at that time) also to depart. But the Chairman of the Commission ordered her to remain. In reminiscing about that episode, Judge Mack stated: "I didn't know what to do. Finally I said, 'Gentlemen, if you don't care about me, please care about the EEOC.'" *Id.*

100 Bell, *supra* note 79, at 310.

ported her and through the hearings she amassed compelling facts clearly showing the discrimination that the workers suffered. Those testifying at the hearings included "poor people," "the janitors and the messengers," and other low-level employees. HUD took action against the employees, punishing some 103 of those who protested racial discrimination. Through Julia Perry Cooper's persistence, HUD was cited for racial discrimination. In 1971, the agency acknowledged past discrimination, agreed to drop charges against protesting employees,<sup>101</sup> and "conceded its liability."<sup>102</sup>

In a letter dated March 21, 1974, William H. Brown III heaped praise on Julia Perry Cooper for her EEOC work in general, and in particular for her labors on the HUD case. He pointed out that "[t]he only person the charging parties and their attorney and the agency agreed upon to serve as the appeals examiner for the HUD case [was Julia P. Cooper]." She was given EEOC's "highest award" in 1971, "[i]n recognition of her continued dedicated service." Mr. Brown also wrote: "By her own example she perhaps more than anyone in the Commission substantially raised the standards of performance of the lawyers and other employees who came in contact with her. [Employees] turned to her for wise counsel and objectivity. I was never disappointed."<sup>103</sup>

Mr. Brown appointed Julia Perry Cooper to the position of Associate General Counsel, Appeals Division, Office of General Counsel at the EEOC in 1972. That same year, she called her former associate at the Department of Justice, Beatrice Rosenberg, and "asked if she could spare some young lawyers to work in litigation in the appellate section." Ms. Rosenberg replied, "I don't have anyone I want to send but I'd like to come." The two women once again collaborated on legal matters as Julia Perry Cooper "supervised the bringing of hundreds of actions in the federal courts" after Congress conferred on the EEOC the right to sue.<sup>104</sup>

By 1973 and 1974, Julia Perry Cooper's achievements at the EEOC were well recognized. One of her former General Counsels, William A. Carey, commented in 1973: "Julia Cooper is one of the most brilliant attorneys and skilled administrators I have ever known. She deserves a lion's share of credit for most of General Counsel's major achievements. She is warm and friendly, a delightful person to have in a position of authority."<sup>105</sup> In 1974, she was given the coveted Tom C. Clark award by Chief Justice Warren E. Burger "for her dedicated hard work in 'shaping litigation which emerged during the early years of developing the civil

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101 Paul Delaney, *Housing Agency Yields on Race Issue*, N.Y. TIMES, Nov. 24, 1971, at 38.

102 Bell, *supra* note 79, at 310.

103 Letter from William H. Brown III, Chairman of EEOC (Mar. 21, 1974) (on file with author).

104 *Id.* at 310.

105 1 EEOC COMMISSION NEWSLETTER (Nov. 1973).

rights laws.’”<sup>106</sup> Her work at the EEOC undoubtedly was not far from Judge Mack’s mind when she later handled employment discrimination cases in her role as an appellate court judge.

While she was immersed in her work at the EEOC, the District of Columbia Judicial Nomination Commission sent three names including that of Julia Perry Cooper to the White House for a vacancy on the DCCA. One of the other persons on the list was Wiley Branton, a civil rights attorney who, among other assignments, was Thurgood Marshall’s (later Justice Marshall of the Supreme Court) co-counsel in the Little Rock, Arkansas school desegregation case in the 1950s.<sup>107</sup> Julia Perry Cooper, with her vast years of experience as a highly praised, pioneering government lawyer, including many years at the Department of Justice, received the nomination for the vacancy from President Gerald Ford on July 3, 1975, and was confirmed by the Senate on August 1, 1975. She took the oath of office on September 2, 1975.<sup>108</sup> Her winding road finally had met that of the DCCA.

#### *Creation of the District of Columbia Court of Appeals (DCCA)*

At the time of Judge Mack’s appointment to the bench, the DCCA was a very young court. Created by the Court Reform and Criminal Procedure Act of 1970,<sup>109</sup> the court actually began to function in 1971. The genesis of the DCCA is attributable to political dissatisfaction with decisions emanating from the liberal wing of the United States Court of Appeals for the District of Columbia Circuit during the Bazelon Court, when there were classic disagreements between Chief Judge David Bazelon and Judge Warren E. Burger, reflecting the division of the court into clear liberal and conservative camps by 1962.<sup>110</sup> At the time, Richard Nixon occupied the White House and promoted a law and order theme.

According to Christopher Banks, the D.C. Circuit “had a reputation in the 1960s as a liberal or activist bench that was allegedly too sympathetic to the rights of criminal defendants and perhaps the politically disadvantaged.”<sup>111</sup> Morris

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106 Bell, *supra* note 79, at 310.

107 ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 152 (1992). Ultimately the Little Rock school desegregation case, involving resistance by the Governor of Arkansas and others, was argued before the Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958).

108 As her tenure in the DCCA began, Julia Perry Cooper assumed the name of her second husband, Clifford Mack, a government employee whom she had married around 1956. Tragically, he died of cancer before she took the oath of office. Author’s interview with Judge Mack (Feb. 16, 2004).

109 Act of July 29, 1970, 84 Stat. 475, Pub. L. No. 91-358.

110 BANKS, *supra* note 52, at 11-12, 14-18 and accompanying notes. Identified with the liberal camp were Chief Judge David Bazelon and Judges J. Skelly Wright, Charles Fahy, Spottswood Robinson, Henry Edgerton, Harold Leventhal, George T. Washington, and Carl McGowan, while Judges Warren E. Burger, John Danaher, Wilbur Miller, and Walter M. Bastian were considered members of the conservative camp.

111 *Id.* at 11.

agrees: "During the sixties, the Court of Appeals [for the District of Columbia Circuit] was often sharply divided, especially over criminal, landlord-tenant, and mental-health issues. The court was effectively split into 'liberal' and 'conservative' wings."<sup>112</sup>

Chief Judge Bazelon became "the target of extensive criticism (if not vilification) mainly from conservatives, both on and off the court."<sup>113</sup> "Many" trial court judges "objected to being constantly overturned on appeal by the liberal leaning 'Bazelon Court.'"<sup>114</sup> And, the Bazelon Court was reported to have "infuriated President Nixon . . . and political conservatives in Congress who strenuously disagreed with the scope and direction of [the D.C.] [C]ircuit's policymaking in criminal law."<sup>115</sup> Particularly unsettling and galling to political conservatives was their review or recollection of the liberal camp's application of *Mallory* and the tendency of that camp to throw out confessions based on the *Mallory* rule. For example, between 1960 and 1963, one case festered and became a catalyst for change. James Killough murdered his wife and hid her body upon finding that she was having an affair with another man. The trial judge excluded the confession made by Mr. Killough prior to his preliminary hearing because he had been held for thirty hours, but admitted inculpatory statements made after the preliminary hearing. Although he was convicted and a majority of the three judge appellate panel confirmed his conviction, a 5-4 majority of the en banc court reversed on the ground that the confession was wrongfully obtained while Mr. Killough was incarcerated and without counsel. The four dissenters wrote individual opinions which sounded the theme that criminals were being outrageously overprotected. Matters did not improve after Mr. Killough was retried and found guilty, but when once again on appeal, his conviction was reversed, this time because a subsequent confession made to an intern at the jail had been made in confidence, and therefore should not have been admitted into evidence.<sup>116</sup>

Added to the conservative discontent with criminal decisions reflecting the liberal arm of the Bazelon Court were opinions pertaining to the interplay between criminal law and mental health law. These opinions, such as *Rouse v. Cameron*,<sup>117</sup> centered on the right to treatment for those subjected to the criminal process. *Rouse* and other decisions coming out of the D.C. Circuit that were

112 MORRIS, *supra* note 52, at 194.

113 BANKS, *supra* note 52, at 12.

114 *Id.*

115 *Id.*

116 The "story" of the Killough case is recounted in various opinions: *United States v. Killough*, 193 F. Supp. 905 (D.D.C. 1961); *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962); *United States v. Killough*, 218 F. Supp. 339 (D.D.C. 1963); and *Killough v. United States*, 336 F.2d 929 (D.C. Cir. 1964).

117 373 F.2d 451 (D.C. Cir. 1966).

“favorable” to the right to treatment or alternative treatment for the accused or incarcerated “provoked the claim that the D.C. Circuit was more interested in pampering convicted felons than in punishing them.”<sup>118</sup> As criticisms of the D.C. Circuit and its handling of criminal matters grew, and as voices on behalf of home rule for the District of Columbia began to be heard, the Nixon Administration seized the opportunity to remove significant jurisdiction over criminal and civil cases arising in the District of Columbia from the D.C. Circuit.

Using its constitutional Article I authority, the Congress of the United States transformed the courts of lesser importance in the District of Columbia into a new, much more powerful local court system, one expected to be less protective of criminals. A trial court, the Superior Court of the District of Columbia, emerged from a consolidation of three existing courts—the Court of General Sessions, the Juvenile Court, and the Tax Court—and an expansion of the jurisdiction of these consolidated courts.<sup>119</sup> In addition, the District of Columbia Court of Appeals was “disconnected” from the United States Court of Appeals for the District of Columbia Circuit by withdrawing the power of the D.C. Circuit to review decisions of the DCCA.<sup>120</sup> The DCCA is now the “highest court” of the District of Columbia, and although the District is not a state, the DCCA is considered to be “the highest court of a State” for purposes of Supreme Court review. Thus the final judgments and decrees of the DCCA are reviewable only by the Supreme Court of the United States, consistent with the provisions of 28 U.S.C. § 1257.<sup>121</sup> Furthermore, even though limited home rule was conferred on the District of Columbia in 1973, the judges of the D.C. Courts still must be nominated by the President of the United States and confirmed by the Senate.<sup>122</sup>

As Judge Mack took her seat on the DCCA, precedent-setting decisions still were in process because of the newness of the court structure, the home rule government and its policies, and the changing nature of society in general. One of the first areas in which she would have an opportunity to make her mark would be that relating to children and their welfare. Furthermore, her peaceful beginning tenure on the DCCA soon would be interrupted by strong controversy. Just as pointed and heated disagreements erupted in the Bazelon Court, so too

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118 *BANKS*, *supra* note 52, at 17; *see also* *MORRIS*, *supra* note 52, at 221-22.

119 *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). The expansion of jurisdiction was phased in. On August 1, 1972 the Superior Court was given jurisdiction over all criminal appeals under the D.C. Code and on August 1, 1973, the remaining local civil jurisdiction and probate functions were assumed by that court.

120 The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 432; *see also* *Palmore v. United States*, 411 U.S. 389, 393 n.2 (1973); *M.A.P. v. Ryan*, 285 A.2d 310, 311-12 (D.C. 1971); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 463-64 (1983); *Thompson v. United States*, 548 F.2d 1031 (D.C. Cir. 1976).

121 *See* *Key v. Doyle*, 434 U.S. 59, 64 (1977); *see also* D.C. Code § 11-102 (2001).

122 D.C. Code § 11-1501 (2001).

would a contentious atmosphere soon prevail in the Newman Court (headed by Chief Judge Theodore Newman).

#### IV. "WAS IT A LITTLE GIRL?" *IN RE R.M.G.*

"Was it a little girl?" asked Judge Mack as she prepared to discuss *In re R.M.G.*<sup>123</sup> with the author. *In re R.M.G.* stands as an important interracial adoption case. It was considered by the DCCA when controversy surrounded not only the adoption of African American children by white parents, but also the DCCA itself, as the DCCA's African American chief judge and four white members of the court, called the "Gang of Four," engaged in ugly disputes that spilled into the public arena.

*In re R.M.G.* involved a little girl born to unmarried African American teenage parents.<sup>124</sup> For approximately three months or more, the teenage biological parents struggled to care and provide for the little girl, with help from the father's mother and stepfather. The biological father of the little girl reportedly left the District of Columbia before the child's birth and moved to Cleveland, Ohio. Care of the little girl became increasingly difficult for the mother. Perhaps realizing that her child's care was inadequate, that the child's health was poor, and fearing that she might be retarded, the mother approached the District of Columbia Department of Human Resources (DHR) (now the Department of Human Services) in January 1978, with a request that the child be placed in foster care. The mother advised neither the father nor his parents of her decision.

DHR placed the little girl with white foster parents who had four biological children and an adopted black child. The foster father was a relatively high ranking military man, and the foster mother was a former member of the Peace Corps. They discovered that the little girl had low body weight, was lethargic, suffered from nausea and diarrhea, and revealed signs of mental retardation. The foster parents nursed the little girl to good health and discovered that she was not mentally retarded but quite intelligent. Once the little girl was in the care of the white foster parents, the bonding process began. They soon expressed a desire to adopt the little girl, and filed a petition for adoption in late April 1978.

Upon learning that the biological father had not been notified about the mother's placement of the child with DHR, the foster parents insisted that notice be sent to him. The biological father took the position that his mother and stepfather, the little girl's grandparents, should be allowed to adopt the child. Hence a competing adoption petition was filed by the paternal grandparents. The

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123 454 A.2d 776 (D.C. 1982).

124 The background of this case is taken from record documents for DCCA appeal No. 79-747, including the trial court's order of May 18, 1979, and the briefs and pleadings filed in the DCCA. Unfortunately the transcripts of the hearing before the trial court could not be located, but the opinion summarizes some of that testimony.

grandmother had remarried after the death of her first husband, and her fourteen-year-old child, the youngest, lived in the home, as well as two of the grandmother's grandchildren. Both grandparents worked but the grandmother voiced a willingness to seek a leave of absence so she could take care of the little girl.

Faced with two competing petitions for adoption of the little girl, one from middle class, stable white foster parents, and one from stable African American grandparents of modest means, the trial judge sensed immediately the importance of the case. Before getting further into the case, we introduce the trial judge, who was elevated from the Superior Court to the DCCA while this case was pending.

#### A. *The Trial Judge*

The Honorable William C. Pryor presided over *In re R.M.G.* A native Washingtonian, born in 1932, he was an only child whose mother worked in the government, was a high school graduate and had wanted at one time to become a lawyer.<sup>125</sup> His father, originally from Charlottesville, Virginia, had at most a second grade education. He worked for a time on the railroads before moving to Washington, D.C. and a job with the local telephone company. He rose from a position of janitor at the company to a manager's position. He manifested a strong work ethic. After putting in his time at the telephone company, he painted houses in the afternoon, and in the evening switched to his door to door salesman's job. On the weekends, he worked as a waiter at a country club.

With their strong work ethic, Bill Pryor's parents challenged him to excel in his studies at Banneker Junior High School and during the year he spent at Dunbar High School, both public schools. After hearing about the Northfield/Mount Herman School in New England, and discovering that, at the time, one only paid what one could afford for the education there, Bill Pryor's parents consented to his transfer to Mount Herman. After completing his studies at Mount Herman, Bill Pryor entered Dartmouth College, and later earned his law degree in 1959 at the Georgetown University law school.

While he was enrolled at Georgetown, Bill Pryor was sent to the federal government's National Institutes of Health (NIH) for a summer internship. Instead of giving this African American law student legal work, NIH used him as a messenger. The following two summers Georgetown sent him to the Department of Justice where he came under the tutelage of attorney Harry Stein. Mr. Stein helped Bill Pryor to hone his writing and research skills in the litigation area. Upon his successful completion of the law school program at Georgetown, Bill Pryor started work as a law clerk in the Department of Justice and soon was selected for the Attorney General's Honor Program. Again, he was placed with

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<sup>125</sup> The biographical information in this section is based primarily on the author's interview with Judge Pryor on May 7, 2003, in Washington, D.C.

Mr. Stein. Bill Pryor found the litigation cases to which he was assigned both exciting and rewarding. Of particular help was Mr. Stein's insistence that, despite Bill Pryor's youthful excitement about an assignment, he slow down and concentrate sufficiently to understand the precise issue before him. He would force Bill Pryor to articulate the precise issue requiring attention because, as Mr. Stein put it, if Bill Pryor "couldn't verbalize it, then [he] didn't understand it."<sup>126</sup>

While Bill Pryor was at Justice, Mr. Stein encouraged him to expand his horizons. Around that time, Robert Kennedy was the Attorney General of the United States, and he held Saturday morning informal meetings with attorneys at Justice. Judge Pryor described sitting on the floor in a big room while Robert Kennedy asked those present, "What are you doing? What would you like to do?" When those questions were posed to Bill Pryor, he told Robert Kennedy that he would "like to see what it's like in court," that he did "a lot of things for the Assistant United States Attorneys, but rarely [did he] get to court." The following Monday, after this exchange with Robert Kennedy, Bill Pryor was "temporarily assigned to go over and work on civil matters at the U.S. Attorney's office."<sup>127</sup>

Bill Pryor was given a warm welcome at the U.S. Attorney's office and was assigned to criminal misdemeanors. The United States Attorney at the time was Oliver Gasch. Prior to being nominated for the federal bench, Oliver Gasch completed paperwork to make Bill Pryor an Assistant United States Attorney. As Judge Pryor put it, the United States Attorney's office then "became [his] life," and he "learned the craft of what [one does] as a lawyer from ground up." He rose to the position of Deputy Chief, Court of General Sessions Branch, and then became Chief of the Grand Jury section.

After serving in the U.S. Attorney's office for a number of years, Bill Pryor accepted a position with the Bell Telephone System in 1964, a move that stirred great pride in his father. But Bill Pryor was "restless," and missed the courthouse. He did not particularly enjoy rate making, the bread and butter duties of attorneys in the Bell System's legal division. One day, the General Counsel of the local Bell alerted him that he would receive a telephone call from Ramsey Clark of the Justice Department. When Bill Pryor met with Ramsey Clark, he was asked to return to the Grand Jury section of the U.S. Attorney's office. Bill Pryor puzzled over the assignment, in November 1967, to a position he had held previously, but the assignment was intentional and planned by forces having a say in the selection of District of Columbia judges.

Fortuitously, Bill Pryor's father-in-law, Mr. Bruce, worked as a doorman at the White House, and had constant contact with the President, since he had "to move the President around the White House campus." While he was escorting the

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126 Author's interview with Judge Pryor in Washington, D.C. (May 7, 2003).

127 *Id.*

President one morning, President Lyndon B. Johnson handed him a list of names and inquired whether he knew anyone on the list. The President explained that selections soon would be made for judgeships on the District of Columbia Court of General Sessions. When Mr. Bruce told the President he knew one name, and identified Bill Pryor, and told the President about him and the relationship between the two, the President insisted that Mr. Bruce tell no one, including his daughter, about their discussion. The President, however, allowed Mr. Bruce to alert Bill Pryor. So, the plan in returning Bill Pryor to his old position in the U.S. Attorney's office was to position him for the appointment to the Court of General Sessions. An appointment from the U.S. Attorney's office, rather than the Bell Telephone Systems, was deemed more appropriate. President Johnson nominated Bill Pryor to the Court of General Sessions on February 23, 1968. He was confirmed by the Senate on March 11, 1968, and took the oath of office on March 21, 1968. When the Court Reform Act of 1970 took effect, Judge Pryor became a Judge of the Superior Court of the District of Columbia. At the time of *In re R.M.G.*, he was assigned to handle family division matters.

#### B. Judge Pryor Tackles *In re R.M.G.*

Judge Pryor undoubtedly approached *In re R.M.G.* as he had been trained to do by Mr. Stein. He knew immediately its importance, and the ultimate focus of the case. As he told this author:

In trying the case, I could tell almost early on, this is unusual because we had a psychiatrist, Frances Welsing . . . . And we had this unusual mix of parties. We had a military family, [including] a lady who had been in the Peace Corps, wanting to adopt this young girl . . . of color. And we had blood relatives. We had a father who was not a large presence in the case—only really the grandmother who sought to adopt the child on behalf of her son—sort of a sketchy group of people over there because they weren't all present. And, you had the social agency. My input became that from the people who sought to adopt the child—non-blood relatives and the grandmother, the social agency and the medical people who were giving their opinions about it. I recognized that we [had] a new issue here: How do you do adoptions when you have this particular issue of ethnicity?<sup>128</sup>

Judge Pryor recalled that the foster father “was a clean cut, wholesome man who wanted to [adopt the little girl], but the [foster] mother was the prime mover. She was the one whose idea it was to adopt.” The foster father confirmed that his wife wanted “very much” to adopt the child, and that he was “very supportive of it.” The foster mother “was very emotional and dedicated to this [little girl], and did not want to lose her.” When the grandmother testified, she reminded Judge

Pryor of his own grandmother, and other grandmothers like her. She was a "very stable woman" and even though her contact with the little girl was limited due to the child's foster care placement, the grandmother was firm in her statement that whatever was hers also belonged to the little girl.

Judge Pryor viewed the District's social agency as neutral, or as Judge Pryor put it, the agency "did sort of a 50-50 presentation in that they could see good points on either side of the case."<sup>129</sup> Furthermore,

[t]hey said, as far as they could determine, there was care and devotion to the child. It was not something casual. On the other hand, they said that the grandmother was the salt-of-the-earth type of person and would extend her every resource to this grandchild, although she had limited resources. And she was a woman, at that time, of advancing years . . . . She was probably in her late fifties or early sixties. So I didn't see her as having a very short life span. The social agency kind of left it at that. They didn't purport to say which one of these would be best. They kind of let that fall to me. I worked very hard on that question, as you can imagine, and came to the conclusion that when you looked at past, present and future, this young child would do well to have the guiding hand of people like her grandmother as she approached life.

The hearing on the adoption petitions covered a three-day period, from April 27-29, 1979. In addition to the foster parents and the little girl's paternal grandmother and her husband, the trial court heard testimony from Dr. Robert Ganter, a child psychiatrist; Doris Kirksey, a social worker assigned to the case of R.M.G.; and Dr. Frances Welsing, also a child psychiatrist.<sup>130</sup> Dr. Ganter contrasted the little girl's condition at the beginning of her placement with the foster parents to her mental and physical status at the time of the hearing. Instead of a sick child who manifested symptoms of mental retardation, the little girl was in very good health, had "bloomed enormously" and evidenced "high average to above average intelligence." Although the trial judge recalled the social agency taking a neutral stance in terms of which petition for adoption should be approved, Ms. Kirskey articulated a recommendation in favor of placement with the grandparents "based on the premise that the best place for a child is . . . with blood relatives." She expressed the view that the little girl would not suffer any harm upon her removal from the home of the foster parents. The recommendation resulted in part from the views of Dr. Welsing.

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129 *Id.*

130 Since the transcripts of the hearing could not be located, the summary of the testimony is based upon the statement of facts found in DCCA's opinion in the case. *In re R.M.G.*, 454 A.2d 776, 780-81 (D.C. 1982). Dr. F. Jay Cooper testified on behalf of the foster parents. Apparently his testimony focused on the adoption factors to be considered by the trial court.

Perhaps the most provocative testimony at the hearing came from Dr. Welsing, who was known then for strong positions on behalf of the African American community. Indeed, her views mirrored those of black social workers in the early decade of the 1970s. Dr. Joyce Ladner, a sociologist/educator, reported that “[i]n 1971 she heard the first organized rumblings against [transracial] adoptions by black social workers. They bitterly criticized adoption agencies for not recruiting black parents and seriously questioned the ability of white people to rear black children.”<sup>131</sup> The rumblings grew to the statement of a clear opposition to interracial adoptions. At its annual meeting in 1972, the National Association of Black Social Workers (NABSW) adopted a resolution condemning transracial adoptions which read in part:

Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.<sup>132</sup>

While these were strong words, even stronger opposition was registered by the black social workers. They perceived interracial adoptions as “cultural genocide.”<sup>133</sup> They appeared most concerned about identity issues that would confront a child adopted by white families. As NABSW explained:

Identity grows on the three levels of all human development, the physical, psychological and cultural and the nurturing of the self identity is a prime function of the family. The incongruence of a white family performing this function for a black child is easily recognized. The physical factor stands to maintain that Child’s difference from the family.<sup>134</sup>

Perhaps the strong NABSW position statement grew out of an increasing trend to place black children with white families. Professor Kennedy noted that because of the number of “parentless black children” in the decade of the 1960s, there was a concerted push by social workers and others to place black children in any home that would accept them. The thrust to find adoptive families for these chil-

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131 JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* xi (1977).

132 *Id.* at 75.

133 RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 452 (2003).

134 LADNER, *supra* note 131, at 78.

dren resulted in thirty-five percent of them being placed with white families in 1971.<sup>135</sup>

Although Judge Pryor was aware of Dr. Welsing before she became a witness in the R.M.G. case, he did not know “her reputation.” As he stated:

I soon began to assess her as she testified in the court. I knew she was a leading thinker in the community. She was very aggressive in the court, very. She said things that were provocative and somewhat hostile about the reasons why this family would want to adopt this child. It turned out that they had already adopted one child of color. She said the reason for wanting to adopt a second child was simply to give this person a playmate. Then she began to talk about the history and the conceptual things about interracial adoptions. That was very sound information she was giving us but at the same time there were these underlying fires that she was also giving us. She was very thorough and very much an informed professional.<sup>136</sup>

Although Dr. Welsing did not cite from scholars and journals during her testimony, she would say, “it’s well known and then she would give an example.” For example, Dr. Welsing declared:

It’s well known . . . that if we take this young person of color and put [her] in a different cultural environment, who knows what her adjustment will be ten years down the road, fifteen years when she becomes dating age—all the things that young women go through? [T]hat’s for you to consider. [T]here’s a lot of writing about it.<sup>137</sup>

After hearing the testimony presented, Judge Pryor focused on “the best interests of the child,” as the paramount concern.<sup>138</sup> He viewed the case as requiring an assessment of “customary” factors in an adoption case, with the one difference being the addition of “ethnicity or race.” which he described to the author as “a new thing to be considered along with all the other [factors].”<sup>139</sup> The seven statutory factors considered by Judge Pryor were:

1. The age of the child.
2. The stability of the adopting family and the reasons for seeking an adoption.
3. Financial and other resources available to the adopting family.
4. Existence of love and affection between the persons involved.

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135 “In 1968, of 3,122 black children placed for adoption nationally, 733—or 23 percent—were placed in white homes; in 1971 the figure was 2,574 out of 7,420 or nearly 35 percent.” KENNEDY, *supra* note 133, at 452.

136 Author’s interview with Judge Pryor in Washington, D.C. (May 3, 2003).

137 *Id.* Judge Pryor stated that after hearing Dr. Welsing’s testimony, he read works on trans-racial adoptions.

138 *In re R.M.G.*, 454 A.2d 776, 781 (D.C. 1982).

139 *See supra* note 136.

5. Blood relationships, if any.
6. Race.
7. Any other significant factors.

Rather than examining these factors only from the perspective of the present day situation, Judge Pryor thought it “equally important [to] weigh these factors in terms of past, present and future.”<sup>140</sup>

The first two factors—“age of the child” and “stability of the adopting family and reasons for seeking an adoption”—appeared to weigh in favor of the foster parents, at least with respect to past and present. Judge Pryor wrote:

It is seen that the child is very young—less than two years old. In her young life she has already undergone significant and probably traumatic changes. According to expert testimony, these changes or shifts are permanently recorded by the mind. Similarly, it is agreed that sudden changes of the family setting or other vital parts of one’s environment can cause uncertainty, emotional distress and a sense of insecurity. Having regard for the history of this case, it is predictable that another change in the life of this child will cause some degree of injury or harm to her.<sup>141</sup>

The next two factors—“financial and other resources available to the adopting family” and “existence of love and affection between the parties involved”—appeared to be favorable to both the foster parents and the grandparents in the eyes of Judge Pryor, although undoubtedly there was some disparity in income. “Both families have shown love and concern for the child. Both families are reasonably stable—the [foster] family has greater financial resources.”<sup>142</sup>

When viewed from a future compass, the factors of “blood relationships” and “race” tipped the balance in favor of the grandparents. Judge Pryor did not consider “blood relationship” as a “conclusive” factor. Indeed, “in the absence of love, affection, stability, and other supportive traits, blood relationship alone confers no special right of parenting.”<sup>143</sup> But, he was not prepared to dismiss this factor altogether. Rather, he determined that “the question [of blood relationship] should also be weighed in the interest of family tradition, culture and other intangibles.”<sup>144</sup>

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140 Author’s interview with Judge Pryor in Washington, D.C. (May 7, 2003).

141 *In re R.M.G.*, 454 A.2d at 781.

142 *Id.* The attorney for the grandparents, Benjamin F. Saulter, J.D., indicated that they were working class people; that the grandmother was a cafeteria worker in the District of Columbia Public Schools, and the grandfather may have been a maintenance worker. Interview with Benjamin F. Saulter, J.D. in Washington, D.C. (Jan. 22, 2004). In contrast, the foster father was in the military and held the rank, at that time, of colonel.

143 *See supra* note 141, at 782.

144 *Id.*

For Judge Pryor, culture undoubtedly had a tie to race, as did considerations of the future, all within the context of "the best interests of the child." Thus, in the last paragraph of his order, he focused on the limitations of the expert testimony, and, implicitly, what the experiences of this little African American girl might be considering her actual racial identity and her nurture in a white family setting:

The question of race is important. It is interesting that all the experts who appeared in this matter agreed that not enough work has been done on the subject as it pertains to adoption. However unpleasant, it would seem that race is a problem which must be considered and should not be ignored or minimized. Conversely, there are no conclusive absolutes to be drawn on the basis of race. It would seem, however, entirely reasonable that as the child grows older the ramifications of this problem would increase. At a later stage, notwithstanding love and affection, severe questions of identity arising from the adoption and race most probably would evolve. In the world at large, as the circle of contacts and routines widens, there are countless adjustments which must be made. Given the total circumstances in this case, the child's present status is relatively secure and carefree. The future, in each of its stages—childhood, adolescence, young adulthood, etc.—would likely accentuate these vulnerable points. The Court does not conclude such a family could not sustain itself. Rather the question is, is there not a better alternative? The Court is concerned that little medical or scientific attention has been devoted to this problem. The Court is concerned that, without fault, the [foster parents] stand to lose a beloved member of their family. However, our test remains the best interest of the child. It is believed that applying all of the factors to be considered, and evaluating the question in terms of past, present and future, that the appropriate alternative is adoption of the child by the [paternal grandparents].<sup>145</sup>

Once Judge Pryor's order was released, the foster parents began a series of procedural steps designed to delay and ultimately to reverse that order, as well as the subsequent decree of adoption in favor of the paternal grandparents. They also added an African American as lead counsel. The trial court entered an interlocutory decree of adoption on June 1, 1979, and after supplemental motions and efforts to persuade the trial court to stay its order were denied, the foster parents filed a notice of appeal on July 6, 1979. They also sought to stay the decree of adoption favoring the paternal grandparents. Their motion for a stay, filed in the DCCA on July 12, 1979, set the stage for later arguments regarding cross-racial adoptions, the testimony of Dr. Welsing, and the absence of constitutional considerations by the trial court. A panel of three DCCA judges denied the motion to stay the adoption order on August 21, 1979, and the foster parents lodged a peti-

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145 *Id.* at 4.

tion for rehearing en banc of that denial on September 4, 1979, continuing to press their contentions regarding the cross-racial factor, Dr. Welsing's testimony, and the constitutional dimension.<sup>146</sup> A temporary stay pending disposition of the petition for rehearing en banc was granted.

Counsel for the grandparents, Benjamin Saulter, attempted to paint the case as one involving a normal "adoption of a child by the child's biological grandparents with the consent of the natural father; and the recommendation of the Department of Human Resources," in opposing the foster parents' petition for rehearing en banc on October 23, 1979. But, in their reply memorandum of October 24, 1979, counsel for the foster parents, Bobby B. Stafford and Julian Karpoff, apparently for the first time in the case, articulated their argument concerning the alleged constitutional dimension of the case:

According to Constitutional theory, race is a suspect classification which can only be permitted upon strict scrutiny and the finding of a compelling state interest served thereby. Appellants contend on this appeal that no such compelling state interest is presented in this case and, in any event, no such strict scrutiny was given by the trial Court.<sup>147</sup>

Mr. Karpoff was deeply offended by the testimony of Dr. Welsing and found it "outlandish and racist." By the time of the appeal, he was "running out of gas." In addition, he believed that Dr. Welsing had "politicized" the case. So, he discussed the case with his long time friend, attorney Bobby Stafford, who became "fascinated" by it and agreed to become part of the legal team for the foster parents.<sup>148</sup>

The petition for rehearing en banc was denied on August 11, 1980 by the full court,<sup>149</sup> however, the order did not lift the temporary stay of the order that had been granted on October 19, 1979. Nevertheless, counsel for the foster parents sought to elevate the issue of the stay to the Supreme Court of the United States. On September 10, 1980, they filed an application for a stay of the trial court's adoption order pending review by the DCCA. In that application, accompanied

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146 The petition for rehearing en banc of the denial of the motion to stay the adoption order cited as "substantial questions for review" the following:

Whether there is sufficient evidence in the record to support the trial Court's deference to the cross-racial aspect of the case; . . .

Whether the trial court erred in barring [the foster parents'] counsel's examination of witness Dr. Welsing regarding the progress made in integration and race relations in the United States in the last 15 years, and related matters;

Whether the trial Court erred in not recognizing and addressing the Constitutional significance of its ruling.

147 Appellants' Reply Memorandum in Support of Their Petition for Rehearing In Banc on Their Motion for Stay Pending Appeal, Oct. 24, 1979, at 1.

148 Author's telephone interview with Julian Karpoff, J.D. (Feb. 3, 2004).

149 The order was issued on behalf of Chief Judge Newman and Associate Judges Kelly, Kern, Gallagher, Nebeker, Harris, Mack, and Ferren.

by their brief which also was filed in the DCCA on the same date, they made a frontal attack on Dr. Frances L. Cress Welsing, describing her as a “racist” and quoting from her article entitled, *Cress Theory of Color-Confrontation*.<sup>150</sup> The Supreme Court denied the stay application on September 16, 1980. However, the DCCA never lifted its temporary stay throughout the protracted proceedings before that court, and counsel for the grandparents filed no papers requesting that it be vacated. Hence, the little girl never was removed from the home of the foster parents, despite the trial court’s order.

### C. *The DCCA Panel of Judges*

The panel drawn to consider the case of R.M.G. on appeal, ironically, was composed of Chief Judge Theodore Newman and Judge Julia Cooper Mack, the only African Americans on the court at the time, and Judge John Ferren. Like Judge Mack, then Chief Judge Newman was born in the South—Birmingham, Alabama—on July 5, 1934.<sup>151</sup> His father was a preacher in the historic African Methodist Episcopal (A.M.E.) Church, who was assigned to Tuskegee, Alabama soon after his son’s birth. Judge Newman attended public schools in Tuskegee until the eleventh grade when he, like Judge Pryor, was sent to the Mount Herman School in Massachusetts. He was admitted to Brown University where he concentrated on philosophy courses. Harvard Law School was his next educational step, and he received his law degree in 1958. His major interests were constitutional law and litigation. Following his graduation from Harvard Law, he served in the Judge Advocate’s arm of the United States Air Force and was stationed in France.

After his military service, Judge Newman accepted a position in the Civil Rights Division of the Department of Justice, but left after eleven months “because of some breaches of promises that had been made to [him] about assignments to a particular branch of the Civil Rights Division.”<sup>152</sup> He entered private practice with the historic firm of Houston, Bryant and Gardner. The Houston name belonged to the venerable Charles Hamilton Houston who masterminded

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150 While the Supreme Court application for a stay contained only two paragraphs from Dr. Welsing’s paper, the brief for the foster parents quoted several excerpts which explained the theory of color confrontation, emphasizing the “numerical inadequacy” and “color inferiority” of Europeans in the face of “the massive majority of the world’s peoples all of whom possessed varying degrees of color producing capacity”; indicating that “whites . . . desire to have colored skin” as evidenced by their actions during the Spring and Summer; that “Whites [regard] mass proximity to Blacks [as] intolerable . . . because the Blacks are inherently more than equal”; and that Whites have a “drive or need to divide the massive majority of ‘non-Whites’ into fractional as well as frictional minorities.” Brief of Appellant at 11-12, 454 A.2d 776 (D.C. 1982).

151 The biographical information on Judge Newman in this section is based primarily on the author’s December 18, 2002 interview with him in Washington, D.C.

152 Author’s interview with Judge Newman in Washington, D.C. (Dec. 18, 2002).

many of the early civil rights cases and who died on April 22, 1950.<sup>153</sup> William Bryant subsequently was appointed to the United States District Court for the District of Columbia. Following his work with the Houston, Bryant & Gardner law firm, Theodore Newman joined another firm that housed two men destined to become judges, Carlisle Pratt and Shellie Bowers.

Judge Newman's elevation to the DCCA in 1976 was grounded in controversy. A lifelong Republican and a man with a brilliant mind, Judge Newman had been nominated to the Superior Court of the District of Columbia by President Nixon in 1970. When a vacancy occurred on the DCCA, word began to filter out that the Judicial Nomination Commission planned to designate an African American as Chief Judge for the first time in the court's history, and that Judge Newman would get the nod upon his nomination by President Gerald Ford, his confirmation by the Senate, and his investiture. Judge Newman informed the author that he served for twelve days as an Associate Judge of the DCCA, instead of as Chief Judge, because out of respect for the then Chief Judge of the Superior Court who was up for re-designation, he did not wish to accept the Chief's position in the DCCA until the re-designation of the Superior Court chief judge had been accomplished.<sup>154</sup> Judge Newman "heard" that prior to his elevation to the DCCA, incumbent judges decided to resist his designation as chief by "start[ing] a campaign to have a then sitting judge designated as chief prior to his selection and confirmation." As he began his tenure as Chief Judge, he greeted controversy which was to persist throughout his tenure as Chief Judge, and which reached a crescendo in 1980, during the panel's consideration of *In re R.M.G.*

As the full court still was considering in early August 1980 whether to grant the foster parents' petition for rehearing en banc of the three judge panel's denial of their petition for a stay of the adoption petition, pending the completion of the panel's work, Chief Judge Newman prepared for what inevitably would become a contentious struggle for re-designation as Chief Judge of the DCCA, for a second four-year term. In late 1980, the ugliness of the re-designation process spilled into the press, as did leaks about the private conferences of the nine judges of the DCCA. Benjamin Weiser of the *Washington Post* portrayed the reappointment process as a "power struggle" pitting "[t]he feisty chain-smoking [Chief Judge] Newman" against "Judge Frank Q. Nebeker, . . . a stern-faced former prosecutor appointed to the court by [President] Richard M. Nixon in 1969, and the virtual leader of the court before [Chief Judge] Newman arrived."<sup>155</sup> Judge Nebeker, a personable man, moved to the District of Columbia from Utah in 1953, and was

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153 The life story of Charles Hamilton Houston has been detailed in a book by Professor Genna Rae McNeil, a book she began as part of her doctoral dissertation at the University of Chicago. GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983).

154 Author's interview with Judge Newman in Washington, D.C. (Dec. 18, 2002).

155 Benjamin Weiser, *Controversy at the Courthouse*, WASH. POST, Oct. 26, 1980, at A1.

given a job in the mail room at the White House.<sup>156</sup> From that position he moved to the Social Office of the White House “within a matter of a few months” to become corresponding secretary for Mrs. Eisenhower. Simultaneously, he attended night law school at American University, graduating in 1956. Upon graduation, he was hired at the Department of Justice, Internal Security Division, to work for Walter Yeagley, who would later become an appellate judge in the District’s local system but who was then a confidential assistant to the Assistant Attorney General in charge of the Internal Security Division. Frank Nebeker was transferred from the Department of Justice to the U.S. Attorney’s office in 1958, and worked first as a misdemeanor prosecutor and then as an appellate lawyer. Subsequently, he accepted an opportunity to work in the Civil Division, but after approximately one and one half or two years was designated Chief of the Appellate Division in the U.S. Attorney’s office, a position he held for seven years prior to his nomination to the appellate bench by President Nixon, and his confirmation and investiture in 1969.

Judge Nebeker depicted the DCCA as initially a “very quiet,” “very conservative, non-fractious” court when he first joined the bench. The *Washington Post* described him as “the power behind the court” who “worked diligently with [Judge Stanley] Harris and other conservative judges to steer the court away from the liberal rulings of the United States Court of Appeals which had governed the District prior to 1970.”<sup>157</sup> After the elevation of Chief Judge Newman, “the court became quite polarized—liberal and conservative,” from Judge Nebeker’s perspective.

The clash between Chief Judge Newman and what became known as “the Gang of Four”—Judges Nebeker, Gallagher, Kern and Harris—may have intensified in June 1980 when the Clerk of the Court, Alexander Stevas, departed to become a deputy clerk of the Supreme Court of the United States. Chief Judge Newman personally wanted to appoint the new clerk, but Judge Nebeker believed that all judges should have a say as to the person appointed. Thus “tug-of-war” over the designation of a new clerk exacerbated interpersonal relations between Chief Judge Newman and some members of the court.

Interpersonal clashes and confrontations increased prior to Chief Judge Newman’s re-designation. An angry Chief Judge Newman was reported to have “slammed his fist on the table” in response to actions by Judge Gallagher and abruptly ended a conference of the nine judges as he “stormed off to lunch.”<sup>158</sup> And, a frustrated Judge Nebeker “tossed his pencil up against the court’s sloping bench in disgust, letting it roll back into his lap,” as he and Chief Judge Newman

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156 The biographical information on Judge Nebeker is based on the author’s interview with him in Washington, D.C. (Apr. 7, 2003).

157 Weiser, *supra* note 155.

158 *Id.*

disagreed openly during an oral argument.<sup>159</sup> And, there were accusations that Chief Judge Newman maneuvered to assign particular judges with a more liberal bent, including himself, to write controversial opinions, including one relating to pretrial detention during the time *In re R.M.G.* was under consideration.<sup>160</sup>

So irate were Judges Nebeker, Harris, Gallagher and Kern that they participated in a two-hour closed-door conference with the Judicial Nomination Commission, in opposition to Chief Judge Newman's re-designation as Chief.<sup>161</sup> The *Washington Post*, which was not known for its support of Chief Judge Newman, described the four judges as having made "a scathing denunciation of [Chief Judge] Newman's judicial behavior and integrity." Judge Nebeker characterized Chief Judge Newman's personality as "explosive" and complained that "independence and free exchange of views has almost disappeared behind closed doors." Judge Kern reportedly added that Chief Judge Newman "has so impaired the court's functioning by his actions and temperament that his colleagues are forced to speak out publicly in order to save the court as an institution." When asked about the reported statements of the four jurists opposing him, Chief Judge Newman stated: "It is inappropriate for me to comment on matters pending before the Commission since their proceedings are confidential. At least as to myself, I intend to honor that obligation of confidentiality."<sup>162</sup>

Joining Chief Judge Newman and Judge Mack as the final member of the panel assigned to *In re R.M.G.* was erudite Judge John Ferren. He was born in Kansas City, Missouri on July 21, 1937.<sup>163</sup> He graduated in 1959 from Harvard College with high honors and was inducted into Phi Beta Kappa. Three years later, he received his law degree from Harvard Law School and joined a Chicago law firm. He served as a member of the Chicago Commission on Human Relations from 1964-66. Soon, he turned to public interest law and advocacy, centering his attention on the delivery of legal services to the poor. He returned to Harvard Law School and launched a program to train clinical law professors. John Ferren's career in the District of Columbia began when he accepted a partnership at Hogan & Hartson, one of the District's finest law firms. He headed a community services department whose mission focused on civil rights cases, as well as poverty law and other types of public interest endeavors. In addition, he held leadership positions on the Washington Lawyers Committee for Civil Rights Under Law, from 1970-77, and the Council on Legal Education for Professional Responsibility, Inc., from 1970-1980. He was nominated by President Jimmy

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159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 The biographical information on Judge Ferren is based on the author's interview with him in Washington, D.C. on Apr. 30, 2003, and on an article in *THE DAILY WASH. L. REP.*, Sept. 1, 1977, at 1585, 1588.

Carter, confirmed by the Senate, and took the oath of office on September 6, 1977 as an Associate Judge of the DCCA.

Judge Ferren described his entry into the DCCA as “a time of enormous tension along largely ideological lines.”<sup>164</sup> “[A] number of cases” awaited his attention because of an en banc vote of 4-4. “[T]here were very strong personality clashes.” Contributing to the tension and personality clashes was the dynamic of Chief Judge Newman’s re-designation process. This was the setting in which *In re R.M.G.* unfolded as the panel prepared to review the briefs and record of the case, and to hear oral argument.

#### D. *The Briefs*

The foster parents resumed their efforts to lift up constitutional equal protection as the overriding aspect of the case. They argued that the little girl had “acquire[d] an independent cultural adaptation and socialization within a particular family . . . which cannot be sacrificed to a skin color racial classification.”<sup>165</sup> Thus, the little girl’s “cultural adaptation” into the family of her white foster parents trumped her African American heritage. As the attorneys for the foster parents phrased it:

[T]he fundamental question posed is what is “Blackness” and what role, if any, do genetic ties play? Is a child who is acclimated to one culture to be earmarked to another because that was the culture of his forbearers? Particularly, should such an earmarking be upon the basis of skin color?<sup>166</sup>

They maintained that the trial court had “maximized race as a relevant consideration.” Moreover, they accused the grandparents of a two-year lack of interest in the little girl, perhaps ignoring the fact that the biological mother neglected to inform the biological father and his parents that she had placed the child in foster care. Significantly, the foster parents argued, in essence, that removal of the child from their home would be disruptive:

The result, as the decision stands, is the disruption of the child’s identity and socialization in blind honor of skin color, or at best, biological identity. To serve such an atavistic notion, the trial court avowedly risks separation trauma and jeopardizes all else.<sup>167</sup> . . . The failure for the trial court to weigh the child’s cultural adaptation and the likelihood that the child would suffer too much trauma if her home life were disturbed was a denial of [the

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164 Author’s interview with Judge John Ferren in Washington, D.C. (Apr. 30, 2003).

165 Appellant’s Brief, at 5, 454 A.2d 776 (D.C. 1982).

166 *Id.*

167 *Id.* at 6.

foster parents'] and the child's Constitutional rights under the Equal Protection doctrine of the Fifth Amendment.<sup>168</sup>

While conceding that "a compelling state interest may be cultural identification," the foster parents insisted that "skin color" could not be a compelling interest, thus attempting to single out "skin color" as the impermissible classification in this case. Finally, the foster parents attacked the trial court's "finding" with respect to race, calling it "the leading factor in the trial court's decision," and contending that the "finding" was based on "unsupported generalities" and "mere speculation"<sup>169</sup> The foster parents then zeroed in on Dr. Welsing's testimony and her *Cress Theory of Color-Confrontation*. They even suggested in their text and accompanying footnote that perhaps the little girl was not Black:

[A]re all Afro-Americans to be regarded and grouped as Blacks, and placed [for adoption] on such a basis?

The subject child is, incidentally, light-skinned, as demonstrated in the photographs admitted as exhibits . . . . If all children with the slightest hinge of color are to be regarded as Blacks, the result is a fitting, if unintended tribute to Jim Crow.<sup>170</sup>

Then, relying on the testimony of their experts, Dr. F. Jay Pepper and Dr. Robert Ganter and their review of pertinent literature on cross-racial adoptions, the foster parents asserted that "no authorities appear which favor biological ties and the literature of cross-racial adoptions, though permeated by ideological tracks, gives authority for the proposition that cross-racial adoptions were an accepted and acceptable practice."<sup>171</sup> Moreover, when the concepts of "attachment and separation" are applied to the little girl's situation, "separating [her] from one family to another at this juncture would result in serious consequences."<sup>172</sup> To highlight the danger of separating the child from the foster parents, they quoted from a treatise titled *Beyond the Best Interest of the Child*<sup>173</sup> stressing, inter alia, that "[c]hange of the caretaking person for *infants and toddlers* further affects the course of their emotional development." Finally, the foster parents reduced the importance of the "blood relation[ship]" factor, arguing that it "pales upon scrutiny" and that "continuity and security of environment, not biology, are the substance of the parental gift."<sup>174</sup>

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168 *Id.* at 7.

169 *Id.* at 10.

170 *Id.* at 11-12.

171 *Id.* at 13.

172 *Id.* at 13.

173 JOSEPH GOLDSTEIN, ALBERT J. SOLNIT & ANNA FREUD, *BEYOND THE BEST INTEREST OF THE CHILD* (1973).

174 Appellant's Brief, at 14, 454 A.2d 776 (D.C. 1982).

The attorney for the grandparents defended the trial court's decision and reviewed the statutory factors to be applied in an adoption case. In particular, the grandparents pointed out that "[a]t the time of the adoption hearing, the [little girl] was just under two years old," and that "the trial court determined that the child was young enough to be moved from one family to another," although with difficulty.<sup>175</sup> In his interview with the author, Mr. Saulter, attorney for the grandparents, revealed his deep concern about the delay in the appellate process, since as time passed, the reluctance to remove the little girl from the home of the foster parents would increase. Indeed, by the time the appellate court decision was released, the little girl had passed her fifth birthday. The grandparents emphasized their blood relationship with the little girl and her racial identity compared with that of the foster parents, but they denied that the trial court "base[d] its decision solely on race."<sup>176</sup> They also highlighted the trial court's examination of the best interests of the child in the context of "past, present and future." They pointed out that, while the Department of Human Resources found both the foster parents and grandparents to be an "appropriate family" for adoption, they "further determined [the grandparents] to be the better choice of the two families to adopt the child," a fact that the trial court "did not mention," but nevertheless "surely" viewed as "an important consideration."<sup>177</sup> Contrary to the foster parent's argument that the natural father and his family expressed no interest in the little girl for a two-year period, the grandparents maintained that he "acknowledged the child, [and] provided support for his child."<sup>178</sup> There was no abuse of discretion, the grandparents argued, because the trial court provided a "sufficient rationale" in writing to satisfy the requirements of law in that it specifically "felt that the child's development through the various stages of childhood, adolescence and young adulthood would best be served by being with its natural family." That decision "was based on reasoning, not caprice," in the grandparents' view.<sup>179</sup>

Finally, in the last section of their brief, the grandparents turned to the issue of race, which the foster parents made the center piece of their brief. Their brief provided no answer to the constitutional argument of the foster parents and indeed discussed no constitutional law cases or equal protection principles. Rather, the grandparents emphasized that District law permitted consideration of race, and indeed required the adoption petition to provide information concerning race, religion, and relationship. Thus, "[w]hile race alone can not be the determining factor in granting an adoption; race is a factor the trial court is permitted

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175 Brief of Appellee, at 8, 454 A.2d 776 (D.C. 1982).

176 *Id.* at 9.

177 *Id.* at 10.

178 *Id.* at 11.

179 *Id.* at 13.

to consider.”<sup>180</sup> Here, the trial court found both families fit to adopt the little girl and, in its discretion, granted the petition of the grandparents. They argued that exercise of that discretion did not rise to the level of abuse, and even if others would have reached a different conclusion, the trial court’s discretion should not be disturbed.<sup>181</sup>

The tape of the January 29, 1981, oral argument in this case cannot be retrieved. However, from appellant’s post argument memorandum, it is possible to discern clues as to the focus of that argument.<sup>182</sup> Apparently at least two lines of questions emerged during the oral argument. One focused on whether the trial court’s judgment could be reversed if it was not “clearly wrong”; that is, if its factual findings did not meet the plainly or clearly erroneous standard. The foster parents again insisted that the trial court’s decision was based on sheer speculation and “the ramblings of Dr. Welsing.”<sup>183</sup> The other line of questions apparently explored whether a presumption could be applied based on race. The foster parents were quick to articulate this issue on their own terms: “Whether a presumption in favor of racial matching in adoptions is good State and/or Constitutional law,” and “[i]s racial matching such a compelling state interest as to justify even a presumption of law in that regard, it being acknowledged, presumably, that an absolute rule is Constitutionally infirm?”<sup>184</sup>

#### E. *The Panel’s Deliberations and Opinions*

Just as tensions in the DCCA generally were high over the re-designation of Judge Newman as Chief Judge, they bubbled rather vigorously as *In re R.M.G.* wound its way slowly through the DCCA process. Judge Ferren felt the discomfort first at the level of the en banc court when, after a panel including Judge Ferren had denied the stay, the full court imposed one on the trial court’s order of adoption, which was never lifted during the pendency of the case. As Judge Ferren commented during his interview with the author:

[F]or reasons that I will never understand, the en banc court granted a stay which no party ever moved to lift . . . for some reason a majority of the court [took that action] and it made me very uncomfortable, just because I wanted to keep things moving.<sup>185</sup>

He mused that the full court may not have wanted to separate the little girl from the foster parents, because of the passage of time:

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180 *Id.* at 14-15.

181 *Id.* at 16.

182 Appellees apparently did not submit a post-argument memo.

183 Post-argument Memorandum of Appellants, at 4 (Mar. 24, 1981).

184 *Id.* at 1, 3.

185 Author’s interview with Judge Ferren in Washington, D.C. (Apr. 30, 2003).

I think there was a sense that this child by this time had bonded with the foster parents and it shouldn't be a ping pong game. And I guess that's right, but the problem was we never really went en banc, so I assume the child stayed with the adopting parents and that was the end of it. There is something that feels very, very strange and unfair and inappropriate about all this. I think the system failed the case, failed the child, failed everybody.

The second point of discomfort for Judge Ferren arose during the panel's deliberations. By this time Judge Pryor was a member of the DCCA, which undoubtedly added to the discomfort. Judge Ferren experienced discomfort also not only because he felt wedged between two African American judges in disagreement, but also because of his perception that Chief Judge Newman was overly harsh with Judge Mack. As he stated:

The conference among the judges was not comfortable because, quite honestly, here I was, not an African American, involved in a case where my two panel members were in sharp disagreement over the decision of still another colleague on our court from his trial judge days. And it was particularly uncomfortable because Judge Newman was quite harsh in his criticism of Judge Mack, feeling that she had no business coming out that way [*i.e.*, favoring reversal and remand]. In fact, . . . I felt that in a way he was harder on her than he was on me, although he thought I was totally wrong.

In attempting to pinpoint the reasons for the disagreement between Chief Judge Newman and Judge Mack, Judge Ferren posited a generational difference regarding two opposite views: one favoring racial integration, the other incorporating aspects of the Black Power doctrine:

I sense, and this is gratuitous, and it may be wrong, but I sensed there was a generational difference between two African American colleagues on how they viewed race as applied in situations like this in the early eighties. Judge Mack had always struck me as very strongly for racial integration, and she was, while not color blind, one whose ideal was a racially integrated community. She was [a] very charitable, very open, very caring, very fair-minded person. I think Judge Newman at the time, oh, I guess kind of coming out of his generation, which is mine, really, had more of a Black Power mentality at the time, if we can use the old sixties expression. And, so I think he was more predisposed to at least emotionally agree with Dr. Welsing. Whether he actually did or not, I don't know, but I could just sense that there was a difference of viewpoint that made me very uncomfortable because I couldn't speak to either in quite the way they could and the conference [was] not [a] happy occasion because I think there was a lot of emotion going on.<sup>186</sup>

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186 *Id.*

If what Judge Ferren perceived as the “harshness” of Chief Judge Newman toward Judge Mack was designed to intimidate her or to persuade her to his views, it was for naught. For Judge Mack is the consummate independent thinker, shaped by a heritage of independent, self-sufficient Free Negroes, and by her own life’s experiences, whether professional or personal. Judge Ferren recognized her strong independent stance on issues. “Judge Mack of all my colleagues was not one that I ever saw knuckle under to anybody for any reason. I think she is a totally principled person who comes down as she comes down.”<sup>187</sup>

Judge Newman acknowledged his strong disagreement with Judge Mack about *In re R.M.G.*, saying: “I think you found a case that Judge Mack and I probably disagreed most intensely about. And it’s interesting because it is about race.”<sup>188</sup> Chief Judge Newman was surprised by Judge Mack’s position in favor of reversal and remand and her explicit view on the use of race in adoption proceedings. He stated:

Judge Ferren never quite understood what Judge Mack and I were disagreeing about. This is one where I would have, in the normal course of things, expected her to be fully in accord with the view I was [espousing]. I was a bit surprised that she wasn’t. Perhaps I just didn’t understand the subtleties of her position.<sup>189</sup>

Under the DCCA practice of pre-assigning one member of the panel to write the opinion for the court, Judge Ferren drew the writing chore for *In re R.M.G.* His duty, as he recognized, was to forge a majority, or to pass the assignment on to judges in the majority. Judge Ferren and Chief Judge Newman locked horns on the constitutional issue; therefore, they were destined to disagree not only about the outcome of the case, but also about its rationale. Interestingly, both judges at the outset began with the proposition that the trial judge should be affirmed. Judge Ferren’s “initial instincts” were to “defer to the trial judge”; he “had a high regard for Judge Pryor [and] was comforted to know that [he] was [assigned to the case].” Moreover, as he pondered the case, Judge Ferren wondered: “How can constitutional considerations impact what is the best interest of the child?” He realized that “not only is race a factor in the statute, but it is a factor in common sense.” Therefore, “it seemed to [Judge Ferren] that it defied any kind of common sense” to say that the Constitution somehow as a document would interdict a trial judge’s findings.

As a former trial judge, Chief Judge Newman plainly favored the principle of deference to the trial judge. And the presence of Judge Pryor as the trial judge in *In re R.M.G.* appeared to have added significance for him. As the two-year period of analysis of the case unfolded, Judge Ferren moved away from his initial

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187 *Id.*

188 Author’s interview with Judge Newman in Washington, D.C. (Dec. 18, 2002).

189 *Id.*

instincts in favor of deference to the trial judge, while Chief Judge Newman adhered to his original course, albeit within the context of the constitutional issue. Judge Ferren wrestled more with that issue and the application of equal protection principles to the case. But, Chief Judge Newman never deviated from his view that "race is a permissible factor" in adoption proceedings. For him, race "is a fact of life." He elaborated:

We are not talking about whether or not a child should stay in foster care as distinguished from adoption by a couple of another race. That's an easy call. We're talking about where there are conflicting petitions for adoption, [and] the other factors are reasonably in balance, is it legitimate to say this child would be better off in a racial grouping of his or her own? There is qualified expert testimony that tends to indicate that that is so.<sup>190</sup>

The analytical tension between Judge Ferren and Chief Judge Newman, which registered divergent views that could not be reconciled into a majority opinion,<sup>191</sup>

190 *Id.*

191 In addressing the constitutional issue, Judge Ferren concluded that the use of race in an adoption setting required strict scrutiny. Judge Newman disagreed, and declared that only intermediate scrutiny was required because the consideration of race in *In re R.M.G.* was benign, not invidious. Under Judge Ferren's strict scrutiny analysis the use of race, "an inherently suspect, indeed presumptively invalid, racial classification in an adoption statute is, in a constitutional sense, necessary to advance a compelling governmental interest: the best interest of the child." 454 A.2d at 788. However, when applied in an adoption setting, race must be "precisely enough tailored to the child's best interest to survive strict scrutiny . . ." *Id.* Otherwise, invidious discrimination may occur. But, for Judge Newman, "the appropriate level of scrutiny [was] not determinative in this case, since the consideration of race is necessary to the achievement of a compelling government interest and thus comports with equal protection even under the strict scrutiny standard." *Id.* at 801. Race consciousness is permissible in an adoption setting, asserted Judge Newman, because of "future hardships to the child when the parents are of a different race." and the "risks of interracial adoption," including a negative impact on the child's identity. *Id.* at 802.

Chief Judge Newman and Judge Ferren reached different conclusions after analyzing the trial court's decision. Judge Ferren identified "evidence" as a key ingredient concerning whether race may be a relevant factor in an adoption setting: "If race is to be a relevant factor, the court cannot properly weight it, either automatically or presumptively—*i.e.*, without regard to evidence—for or against cross-racial adoption. To do so would add a racially discriminatory policy to evaluation of the child's best interest." *Id.* at 787. He regarded "parental attitudes" as significant, and "[b]ecause race may be highly relevant to these parental attitudes . . . it is relevant to the larger issue of the child's best interest." *Id.* Therefore under these circumstances race may enable the trial court and other interested parties "to focus adequately on the child's sense of identity, and thus on the child's best interest." *Id.* at 787-88. In applying the race factor to R.M.G.'s case, Judge Ferren thought that "the trial court's reasoning was [not] sufficiently 'substantial,' [that is], based on a 'firm foundation of record' to withstand scrutiny." *Id.* at 791. Judge Ferren questioned whether the trial court "properly analyzed the racial issue." *Id.* He then constructed a three-step analysis that the trial court should have followed in examining the race factor:

(1) how each family's race is likely to affect the child's development of a sense of identity, including racial identity; (2) how the families compare in this regard; and (3) how significant the racial differences between the families are when all the relevant factors are considered together.

meant that Judge Mack would be the deciding voice.<sup>192</sup> While she voted in favor of the disposition advocated by Judge Ferren, reversal and remand to the trial court for further proceedings in the trial court, she joined neither the analysis of Judge Ferren nor that of Chief Judge Newman. Rather her views are set forth in her concurring opinion.

Judge Mack's characteristic independence is reflected in the first sentence of her concurrence: "In joining the disposition ordered by Judge Ferren, I find it necessary to say in my own words what is, and is not, in issue here."<sup>193</sup> She first dispelled the notion that the adoption statute was unconstitutional on its face because of a racial classification or an impermissible preference:

The Adoption Statute mentions race and religion only as factors to be supplied along with other information in a petition for adoption. D.C. Code 1973, § 16-205. It *does not require* that the court give these factors any consideration whatever; it only provides that the court, after consideration of the petition and other evidence, may enter a decree when it is satisfied that the adoptee is suitable for adoption, that the petitioner is fit and able to provide a proper home and education, and that the adoption will be for the

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*Id.* Judge Ferren acknowledged the "conscientious[ness] and thorough[ness] of the trial court" and its proper treatment of "race as only one of several relevant considerations." *Id.* 792. Nevertheless, its "analysis did not provide the reasoning and the detail necessary to assure a reviewing court that the evaluation of race was precisely tailored to the best interest of the child." *Id.* at 794.

Judge Newman vigorously defended Judge Pryor's decision and his analysis as he reviewed every aspect of the trial judge's decision. He also examined and critiqued then existing cross-racial adoption studies. His constitutional scrutiny of the trial judge's analysis highlighted one of "the risks of interracial adoption," that is, "the child's development of identity." *Id.* at 802. These risks include the child's perception that he or she may not be black, a conflict of loyalties between the child's biological and adoptive cultures; the absence of survival skills essential for blacks; and racial slurs that may become a problem for the adopted child. *Id.* at 802-03. The dissent regarded Judge Ferren's approach to the race factor as "overly narrow." *Id.* at 803-06. Perhaps most distressing to Chief Judge Newman was Judge Ferren's interpretation of an extensive DCCA opinion analyzing the proper exercise of discretion by a trial judge, *Johnson v. United States*, 398 A.2d 354 (D.C. 1979), an opinion which Chief Judge Newman authored and carefully crafted. Judge Newman regarded the trial court's opinion in *R.M.G.'s* case "[a]n economical but clear explanation." *Id.* at 808. And, even under Judge Ferren's three-step evaluation, Judge Pryor's decision was sound. *Id.* at 808-09. In the final analysis, Judge Newman considered that the "other factors [were] in equipoise," and that in the face of such equipoise, "the interracial factor may sway the result," and that is "permissible" in this limited context. *Id.* at 810.

192 Law review articles discussing or mentioning *In re R.M.G.* and related matters include: D. Michael Reilly, *District of Columbia Survey: Constitutional Law: Race As a Factor in Interracial Adoptions*, 32 CATH. U. L. REV. 1022 (1983); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAMILY L. 51 (1990-91); Davidson M. Pattiz, *Note: Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571 (1994); Nancy D. Polikoff, *Context and Common Sense: The Family Law Jurisprudence of Julia Cooper Mack*, 40 HOW. L. J. 443 (1997); Kate Nace Day, *Judicial Voice: Judge Julia Cooper Mack and the Images of the Child*, 40 HOW. L. J. 331 (1997).

193 454 A.2d at 794.

best interest of the adoptee. [D.C. Code] § 16-309. We are thus not faced with a statutory scheme separating persons solely on the basis of racial classifications (*see Loving v. Virginia*, 388 U.S. 1 (1967)), or an affirmative action program allegedly giving preference on the basis of racial classifications (*See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).<sup>194</sup>

Having assured herself that the statute was not unconstitutional on its face, Judge Mack politely but bluntly explained to her colleagues on the panel that the constitutional issue dissipated into a non-issue.

[H]owever tempted one may be to re-argue interesting constitutional issues, I may refrain from doing so. Instead I may agree, magnanimously, with both of my colleagues that the statute is constitutional and add, uncharitably, that I do not think their arguments are relevant.<sup>195</sup>

Once having dispelled the notion that the adoption statute was unconstitutional on its face, she turned to the application of a race factor in the context of the best interests of the child standard.

Several years earlier, in 1978, Judge Mack, reflecting her independent spirit, labored assiduously to persuade the full court to take the unusual step of considering en banc, before a panel opinion issued, a case involving a presumption in favor of the mother in adoption settings.<sup>196</sup> That case, *Bazemore v. District of Columbia*,<sup>197</sup> involved another little girl born out of wedlock who initially lived with her mother and maternal grandparents at the time of a custody struggle. Subsequently, the biological mother surrendered custody of the child to the biological father who was residing in his parents' house, but three years later, the trial court returned the child to the mother on the basis of a presumption favoring custody by a child's natural mother.

Over a partial dissent by Judge Gallagher, with whom Judges Nebeker and Harris joined, Judge Mack, writing for the majority of the en banc judges, addressed and found wanting in *Bazemore* the presumption favoring custody by the mother. Such a presumption was not controlling in custody cases, not only because it is impermissible but also since, in the final analysis, the facts of the particular situation guide the determination of what is in the best interests of the child. Judge Mack wrote in part:

194 *Id.* (emphasis in original).

195 *Id.* at 795.

196 While Judge Mack did not dwell on the tension attending the consideration of *In re R.M.G.*, she recalled that she had "a hard time" in *Bazemore*, 394 A.2d 1377 (D.C. 1977) (en banc). She thought that "some of the men [particularly Judge Gallagher] had no idea of the best interests of the child." The three judge panel in *Bazemore* consisted of Chief Judge Newman, Judge Gallagher and Judge Mack.

197 394 A.2d 1377 (D.C. 1978) (en banc).

In the first place, a rule of law providing that a mother has the strongest claim to the custody of her child obscures, and indeed may be inconsistent with the basic tenet, overriding all others, that the best interest of the child should control . . . .

Besides obscuring the basic issue in the case, the presumption is itself obscure in its application . . . .

Finally, the presumption facilitates error in an arena in which there is little room for error.<sup>198</sup>

Ultimately, then, for Judge Mack the factual underpinning and the record evidence in a case represented crucial indicators of what would be in the best interests of the child. “Surely, it is not asking too much to demand that a court, in making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone.”<sup>199</sup> Hence, said Judge Mack, “in a dispute between a natural mother and father over custody of their child, the trial courts shall decide the delicate question of what is the child’s best interests solely by reference to the facts of the particular case without resort to the crutch of a presumption in favor of either party.”<sup>200</sup>

Judge Mack’s approach in *Bazemore* carried over into her analysis of the *R.M.G.* case. Just as “sex-based distinctions,” such as sex-based presumptions that the mother is the more suitable custodian for a child than the father are impermissible, so too is a race-based distinction. Presumptions are anathema because “[a] presumption is nothing more than a guess based upon probabilities . . . that . . . have not been conclusively established.”<sup>201</sup> As Judge Mack stated in her concurrence in *In re R.M.G.*:

I think that reversal is required in this case because the trial court, unwittingly, employed the factor of race as an impermissible *presumption*. In *Bazemore* . . . , [*supra*] we held that a presumption based upon the sex of a parent has no place in custody proceedings. Similarly, I suggest, a presumption based solely upon the race of competing sets of would-be parents has no place in adoption proceedings. In both instances the court is weighing the best interest of a particular child—an interest in which the human factor of love is paramount.<sup>202</sup>

In concluding her short concurrence, Judge Mack cut through the constitutional argument, ignored the controversy surrounding Dr. Welsing’s testimony, and articulated what for her was the core issue, the best interest of the little girl:

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198 *Id.* at 1382.

199 *Id.* at 1383.

200 *Id.*

201 454 A.2d at 795.

202 *Id.*

For a custody or adoption proceeding, we are not concerned with the best interest of children generally; we are concerned, rather, with the best interest of THE child. While my colleagues are quibbling about “strict scrutiny” and “intermediate scrutiny,” a little girl is reaching school age under the care of the only parents she has ever known. Because I agree with Judge Ferren that a trial court faced with such a “Solomonic” task, must affirmatively justify its judgment in every material respect, I would reverse and remand for a particularized determination, taking into consideration factors bearing uniquely upon this child’s adjustment and development including the significance of giving “full recognition to a family unit already in existence.” See *Quillon v. Walcott*, 434 U.S. 246, 256 (1978). For this purpose, at least, I would downgrade the emphasis on race to the significance it should deserve.<sup>203</sup>

For Judge Mack, then, the formula for resolution of the little girl’s adoption case could not be found in the complex language of constitutional equal protection. Rather, resolution begins with the proposition that any presumption regarding race is impermissible. Once that legal principle is clear, an intense focus on the child whose case is before the court is critical. Generalizations about all or other children are not helpful. Moreover, in examining the particular facts of the child’s situation, trial judges should not forget that ultimately there is a human factor that is paramount, and that is a demonstration of love for the child by those who seek to adopt her.

In the end, the parties, as did Judge Mack in the appellate court, focused primarily on what was in the best interests of the little girl. Judge Pryor discerned that “the parties had decided that so much time had elapsed, that during these tender years children bond to particular people, that the grandmother and others decided, ‘Well, we’ll leave her where she is.’” But, the grandparents would have visitation rights. Judge Newman related what he called “the unpublished sequel.” Since the foster parents had had the little girl for so long and had bonded with her, upon remand the noted attorney Wiley Branton, who was the little girl’s guardian *ad litem*, worked out an arrangement whereby the natural relatives would withdraw their petition in exchange for liberal visitation rights.

Attorney Karpoff, who represented the foster parents, provided the happy ending.<sup>204</sup> The “prominent lawyer” [Wiley Branton] who was asked to mediate the matter arranged for the grandparents and the foster parents to meet at a half-way point. By that time, the foster parents had relocated to Georgia with the little girl. Attorney Karpoff was present when the grandparents and the foster parents met in Charlotte, North Carolina. They “found each other congenial.” The foster parents brought photographs of the little girl and “struck an agree-

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203 *Id.* (emphasis in original) (footnotes and parallel citations omitted).

204 Author’s telephone interview with Attorney Karpoff (Feb. 3, 2004).

ment” under which the grandparents would be able to maintain contact with the child. The foster parents would send photographs to the grandparents, but never again heard from them. Attorney Karpoff retains a picture of the little girl at age seventeen, and received a wedding invitation “a few years ago.” The “little girl,” who as of 2004, would be twenty-six years old, married a “young fellow from Georgia.” Both husband and wife are college educated and have promising careers, according to Attorney Karpoff.<sup>205</sup> Ironically, Judge Mack remembered that “years later,” her own daughter had a friend who “had run into the little girl” and that friend remarked on “how grateful she was” with the ultimate resolution of the case.

In an odd twist of irony, three years after the decision in *In re R.M.G.*, Judge Pryor became the writing judge in a similar case, *In re D.I.S.*,<sup>206</sup> in which the trial judge was faced with competing petitions for adoption from the white foster parents [later only the foster mother as a result of the divorce of the foster parents] and the Guyanese grandmother. Judge Pryor “smiled quietly to [himself]” when he reviewed the case history because it paralleled, in almost every respect, that in *In re R.M.G.* The trial court had to consider competing petitions for adoption of a six-year-old girl, daughter of a Guyanese mother—one from the maternal grandmother, the other from white foster parents. When the biological mother no longer could care for the child due to mental illness, the child ended up with white foster parents who had four children of their own. With the biological father’s consent, the maternal grandmother sought to adopt the child. The psychiatrist presented by the grandmother emphasized the child’s “future needs for cultural and racial support.”<sup>207</sup> The trial judge, as did Judge Pryor in *R.M.G.*, recognized the “bonding between [the child and the foster mother] and ‘that a very good life had been provided for [her] in the care and custody of the [white foster family]’” but nevertheless concluded that the child should be adopted by the maternal grandmother because the child’s “natural family . . . is better equipped as living examples thereof to inject into the life of the adoptee the real sense of her Guyanese/Latino heritage and culture. . . .”<sup>208</sup>

Relying on Judge Mack’s concurrence in *In re R.M.G.*, and pointing out that neither of the other members of the *R.M.G.* panel joined Judge Ferren’s analysis, Judge Pryor declared in part:

We decline to apply the three-step approach articulated by the lead opinion in *R.M.G.* . . . because it represents, in our view, an unwarranted and unwise

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205 Attorney Karpoff described the foster parents as the “biggest-hearted people that you would ever want to meet.” About a dozen foster children went through their home, and “others admired them.” Author’s telephone interview with Attorney Karpoff (Feb. 3, 2004).

206 494 A.2d 1316 (D.C. 1985).

207 *Id.* at 1321.

208 *Id.* at 1321-22.

intrusion into the trial court's exercise of discretion in inter-racial adoption cases. The approach is unwarranted because there is no need to reach the constitutional issue of equal protection in such cases.<sup>209</sup>

In short, Judge Pryor advocated a "flexible approach, which requires the trial judge to carefully weigh all the factors bearing on the child's best interests."<sup>210</sup> This approach clearly was akin to Judge Mack's insistence that the best interests of the child determination should be made on the "specific evidence relating to [the] child [in question]." Interestingly, Judge Ferren who also was on the panel in *In re D.I.S.* did not recall the case when the author interviewed him. His concurring opinion in *In re D.I.S.* reiterates his conviction that the three-step approach he advocated in *In re R.M.G.* should be applied where race is a relevant factor.<sup>211</sup>

Our examination of *In re R.M.G.* demonstrates that Judge Mack was not influenced by the exterior political and socio-cultural world surrounding her where controversy erupted in the 1970s about cross-racial adoptions, and black social workers warned that adoption of black children by whites would result in cultural genocide. Undoubtedly her deep concern for a vulnerable little girl, the struggles of her ancestors and those of her own against racial discrimination, and perhaps her experience in raising her own daughter led her down an independent path in her review of *In re R.M.G.* That same independent spirit, immune from the effects of surrounding controversy and focused on the best interests of the child before the court, may be seen in other cases involving children. For example, in a case raising the issue as to whether a same-sex couple could adopt a child under District law, *In re M.M.D.*,<sup>212</sup> Senior Judge Mack agreed with Judge Ferren that District law permitted petitions for adoption from both same-sex and opposite-sex couples. She took the opportunity to comment on dissenting Judge John Steadman's reliance on the Latin maxim of statutory construction: *Expressio unius est exclusio alterius*. Said Judge Mack:

I write as one who, although never exposed to the scholarly exercise of Latin, heartily embraces the importance of "a common-sense understanding of human thought and expression" alluded to by our dissenting colleague. Nevertheless, I differ with Judge Steadman's ultimate premise that, statutorily speaking, as to who may petition for adoption, the phrase "any person,"

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209 *Id.* at 1326-27.

210 *Id.* at 1327. Attorney Karpoff expressed deep consternation that Judge Pryor actually wrote the opinion for the court in *In re D.I.S.* He even wrote a short article to that effect, but it has never been published. Author's telephone interview with Attorney Karpoff (Feb. 3, 2004).

211 Judge Ferren regarded *In re D.I.S.* as a different case in that not only race but cultural identity was involved, and because, among other things, the foster parents had separated; there were indications of "discriminatory treatment" of the little girl, and the child could obtain support from "her extended natural family." 494 A.2d at 1328.

212 662 A.2d 837 (D.C. 1995).

[in the applicable District code provision] means “one person” and that the only “joint” adoption permitted thereunder is one by a married couple.<sup>213</sup>

In three difficult termination of parental rights (TPR) cases, Judge Mack revealed her understanding of the momentousness of such termination, and her determination that every aspect of the child’s case must be examined in detail by the trial court before parental rights are cut off permanently. And the decision to terminate must be based on clear and convincing evidence. Her independent approach to TPR cases may be seen in her dissent in *In re T.M.*,<sup>214</sup> a case in which a mother had been incarcerated for drug offenses but was attempting to recover from her substance abuse. Judge Mack wrote:

We can all agree that the disruption of any family unit is a heart-rendering experience. However, the incidents attendant to such a disruption are necessarily unique. The court-imposed termination of the parent/child relationship is an extreme remedy that obviously has a significant lifelong impact upon all parties. Therefore, the statutory criteria, established by [the applicable District Code provision] should not be the subject of wooden application. Relevant case law should be flexible and fact-specific. We should not affirm the termination of the parent/child relationship where a less drastic remedy is both available and feasible.<sup>215</sup>

Despite the grim scenario of a twelve-year-old child with a learning disability who had been abandoned by his mother and abused by his father, Judge Mack persuaded her two panel colleagues, Judges John Terry and John Steadman, not to affirm a termination of the biological father’s parental rights in *In re A.B.E.*, 564 A.2d 751 (D.C. 1989), because the time between the trial court’s decision to terminate all parental rights and the oral argument on the appeal revealed some slim hope that the father would be able to exercise his parental functions. Judge Mack did not delude herself about the chances that the father could function consistently, but she was keenly aware of the low prospect of finding adoptive parents for a learning disabled child. As she poignantly declared:

This is a melancholy and exceedingly delicate case, and we do not reach today’s judgment without searching reflection. Three years have now passed since A.B.E.’s termination hearing, an enormous span in the lifetime of a child. In that time, A.B.E. has grown from childhood to adolescence. Our record does not reflect the intervening changes in the family situation, mental and emotional needs, or attitudes toward his own family status and future. In vacating this case and remanding it to the trial court, we therefore instruct the trial court to explore these developments and, upon consid-

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213 *Id.* at 862.

214 665 A.2d 950, 957-58 (D.C. 1995).

215 *Id.*

eration of any relevant changes in the status of this child or other interested parties, to apply the law in a manner consistent with this opinion.<sup>216</sup>

Judge Mack “balanc[ed] the minimal possibilities of adoptive placement against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring,” and “conclude[d] that termination would only cast A.B.E. further adrift.”<sup>217</sup> The third TPR case prompted a separate statement from Judge Mack as her colleagues Judges Terry and Steadman joined to affirm the termination of parental rights of a mother whose behavior toward her two children was “inappropriate and selfish.” In *In re P.D. and D.D.*<sup>218</sup> Judge Mack urged the en banc court to review the case and the policy of permitting a guardian *ad litem* to terminate a parent’s parental rights at a time when the District was being urged by political forces to speed the TPR process.<sup>219</sup> Ignoring those forces, Judge Mack emphasized the constitutionally protected right of natural parents to raise their own children and called TPR “the coldest of acronyms.”<sup>220</sup>

Finally, in a neglect case, Judge Mack once again insisted that the government carry its burden of proof, this time to “show that any failure of proper care [of a child] was not due to the parents’ lack of financial means.”<sup>221</sup> Joined by her colleague Chief Judge Annice Wagner,<sup>222</sup> and over the dissent of Judge Warren King, Judge Mack reacted to the trial judge’s comments in finding the children to be neglected. Speaking to the lack of cleanliness in the home, the trial judge pointed to the cleanliness that a bar of soap could bring to the home, but Judge Mack applied a balancing test to reverse the trial court’s judgment. As she put it:

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216 *In re A.B.E.*, 564 A.2d at 757-58.

217 *Id.*

218 664 A.2d 337, 339 (D.C. 1995).

219 *See id.* at 340-41.

220 *Id.* at 340.

221 *In re T.G.*, 684 A.2d 786, 787 (D.C. 1996).

222 Annice M. Wagner became Chief Judge of the DCCA in June 1994, during Judge Mack’s tenure as a Senior Judge. She was appointed to the DCCA in 1990, after having served as an Associate Judge of the Superior Court beginning in June 1977, assuming the seat of Theodore Newman after he was elevated to the DCCA. Chief Judge Wagner was born and reared in the District of Columbia, and attended public schools, including Dunbar High School. She earned her B.A. and L.L.B. degrees from Wayne State University in Detroit, Michigan. Following her return to the District of Columbia, she practiced with the prestigious Houston and Gardner law firm until she was selected as the first female General Counsel of the then federal National Capital Housing Authority. She then pioneered as the first People’s Counsel for the District of Columbia. The Office of People’s Counsel was created by Congress, and has as its mission the representation of the District’s utility consumers in rate making proceedings before the District of Columbia Public Service commission. Chief Judge Wagner has served as the head of the Conference of Chief Justices, an organization whose membership is composed of the chief judges or justices of state courts. She has taught in the Trial Advocacy workshop at Harvard Law School. Her awards for judicial leadership are numerous. *THE DAILY WASH. L. REP.*, June 17, 1994, at 1196.

There is a point, however, when decision-makers may be called upon to draw a balance between a bar of soap and love, and although we are loathe to second-guess the trial court's findings on this score, we nevertheless feel compelled to reverse the finding of neglect because of the failure of the government to meet its burden of proof.<sup>223</sup>

## V. "YOU RAISED ME UP SO I CAN STAND ON MOUNTAINS"

It is possible in this limited study to convey only a sense of Judge Julia Cooper Mack, the remarkable descendant of Aaron Revels, Lewis Sheridan Leary, John Anthony Copeland, Jr., Juliette Meimoriel, and Dallas Leary and Emily McCoy Perry. In pondering her own historic struggles and achievements, while periodically looking back through the years, Judge Mack may have said to her historic and heroic ancestors, in the words of a song popularized by young artist Josh Groban, "You raised me up so I can stand on mountains." And though she has stood on mountains as she successfully confronted one challenge after another on roads not heretofore traversed by an African American woman, the key to understanding Judge Mack's journey as a jurist is not in the mountains she has scaled. Rather, the key lies in the quiet battles she has waged in the trenches, without losing control—sometimes relying on the power of her written word; other times seeing what others have not seen; and on still other occasions recalling the significance of the Market House in Fayetteville, North Carolina, or the struggles of Free Negroes for dignity, liberty, the right to earn a livelihood, and the political control of one's own destiny.

Much remains to be said about Judge Mack's jurisprudence and her 400-odd majority, concurring, and dissenting opinions. However, in these last few pages we provide only a glimpse into a few of the other subject areas where Judge Mack has demonstrated a quiet independent spirit shaped by her heritage and life's experiences, while ignoring the whirlwinds of exterior political and socio-cultural controversy surrounding the DCCA and its work.

Hers has been a distinct, sometimes lonely, but nonetheless firm voice for what the executive and legislative branches of the District government may do within the limits of the powers delegated by Congress, rather than what these branches of government may not do. As she wrote in a dissenting opinion which advocated broad interpretation of the powers delegated by Congress to the District's legislature under Article 1, Section 8, Clause 17 of the Constitution of the United States: "Any restriction on broad authority should be read narrowly and no limitations not expressly imposed by Congress should be inferred."<sup>224</sup>

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223 *In re T.G.*, 684 A.2d at 790.

224 *District of Columbia v. The Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1373 (D.C. 1980) (en banc) (Mack, J., dissenting). Judge Mack's dissent was joined by then Chief Judge Newman and Judge Pryor. Earlier, Judge Mack was the lone voice dissenting in an en banc

Judge Mack has scrutinized and safeguarded the procedural rights of criminal detainees in such areas as pretrial detention and custodial interrogation. She has examined allegations of racial discrimination in employment and housing; sexual orientation discrimination with respect to tangible benefits provided by a private, religiously-based university; and she has sought to ensure a forum where such allegations could be heard and resolved. This last section of the thesis shifts our attention, in a limited way, to two areas of Judge Mack's jurisprudence, in an effort to test the thesis further—criminal procedural safeguards, and discrimination against those protected by the District of Columbia Human Rights Act.

#### A. "Scrupulously Honored"

We focus first on Judge Mack's approach to criminal procedural safeguards.<sup>225</sup> In examining her jurisprudence in this area, one realizes immediately that she did not sit on criminal cases as the government's judge, despite her extensive experience in the Department of Justice, Criminal Division, as an appellate attorney responsible for handling cases in federal circuits and the Supreme Court of the United States. Rather she sat as one steeped in federal criminal procedure and the history of the Bazelon and Warren courts' analysis of constitutional criminal procedural safeguards. She knew well the precedent of those courts, cases which the government won and lost. But she brought a keen, critical perspective to that precedent and insisted on the importance of factual context in drawing conclusions. This can be seen in her general approach to DCCA criminal cases, and in her decisions relating to constitutional rights as interpreted in the case of *Miranda v. Arizona*,<sup>226</sup> and pretrial detention.

With respect to her general approach to criminal and other cases, Judge Mack clearly respected precedent throughout her career. As she said in her dissent as a

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case involving the taxing power of the District of Columbia and Congress's prohibition—through the Home Rule Act—on enactment by the Council of the District of Columbia of "any tax on the whole or any portion of the personal income, either directly or at the source . . . of any individual not a resident of the District." *Bishop v. District of Columbia*, 411 A.2d 997, 999 (D.C. 1980) (en banc) (Mack, J., dissenting). She complained that the majority's interpretation of the Council's delegated power under the Home Rule Act "deprive[d] the District of Columbia of revenue from the very persons who are the most likely candidates to pay for doing business in the city, contrary to all principles of taxation . . ." *Id.* at 1003. She zealously tried to safeguard the limited legislative powers of the District, but also spoke out against the denial of basic voting rights to the District's citizens, arguing in one of her partial dissenting and concurring opinions "that the Framers never contemplated that Congress would be permitted to use cession to strip away the rights accorded all *state* citizens by the Constitution, rights that 'attached to [District residents] irrevocably' when the District was a part of the ceding states." *Gary v. United States*, 499 A.2d 815, 885 (D.C. 1985) (en banc).

<sup>225</sup> Of necessity, our treatment of Judge Mack's opinions relating to criminal procedural safeguards is limited. For an article that examines Judge Mack's dissents in the Fourth, Fifth, and Sixth Amendment areas, see Cedric Merlin Powell, *Constitutional Rights, Due Process, and the Dissenting Voice*, 40 *How. L.J.* 399 (1997).

<sup>226</sup> 384 U.S. 436 (1966).

Senior Judge relatively late in her career: “I do not—I could not—question the soundness of this precedent [relating to a two-part test for the validity of a show-up identification of a criminal suspect] as a general proposition, especially when applied to post-conviction appeals.”<sup>227</sup> Nevertheless, she firmly believed that the facts of a case were key to determining whether and how a decision in a past case applied to the matter under consideration. As she declared in her dissent in a case involving speedy trial issues: “I understand the allure of the majority’s nonsense analysis in this case, but to state the obvious, the longevity and/or application of any legal principle cannot be divorced entirely from facts.”<sup>228</sup> Precedent should not be applied routinely without studied thought and a careful analysis of the factual context of the case, and trial judges should be given an opportunity to apply precedent correctly in light of the factual record compiled in a case. As Judge Mack put it:

It is fascinating (and somewhat disquieting) to observe how, at the same time, mesmerized deference to legal precedent can defy such precedent . . . . I write this “purported” dissent because, in the posture of the instant case, I am disturbed about the conflicting signals that we are giving trial judges with regard to a “sequential” “two-prong test” . . . . [U]nder the factual pattern of the record before us, I would not reverse, but remand the case to the trial court in order that she might say the magic words, “I find that there was ‘undue suggestivity’ in the identification procedure” (a conclusion which I read the record as supporting), before re-entering her finding of unreliability (which likewise is supported).<sup>229</sup>

In addition to application of precedent within the context of the factual record, Judge Mack’s general approach to criminal cases required a careful determination as to whether a constitutional or a trial error standard should be applied in deciding the disposition of the case after an error in the trial court proceedings was detected. For example, in a case where the majority concluded that the admission of a government witness’ juvenile record showing an adjudication for murder, and cross-examination of that witness based on the juvenile adjudication, would not have affected the outcome of the trial, Judge Mack questioned the legal standard applied by the majority.<sup>230</sup> Her dissent emphasized the application of legal precedent to the specific facts of the case under review, and Judge Mack used those facts to argue that the majority had applied the wrong legal standard in disposing of the case. The proper legal standard was the higher constitutional one, rather than the lower standard governing trial court error:

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227 *United States v. [Rodney] Brown*, 700 A.2d 760, 764 (D.C. 1997) (Mack, J., dissenting).

228 [Lawrence E.] *Givens v. United States*, 644 A.2d 1373, 1375 (D.C. 1994) (Mack, J., dissenting).

229 [*Rodney Brown*], 700 A.2d at 764 (Mack, J., dissenting).

230 [Riley S.] *Walls v. United States*, 773 A.2d 424, 434 (D.C. 2001) (Mack, J., dissenting).

Sometimes in the practice of criminal law, bizarre factual circumstances make it very difficult to apply settled legal principles. In this murder case, I am left with the disquieting thought that we are in no position to conclude that the trial court's curtailment of the cross-examination of a pivotal government witness about his own juvenile adjudication for murder did not result in a violation of the Sixth Amendment to the Constitution . . . .

As to the facts, we know that in the year 1992, a young teenager . . . was shot to death. Appellant Walls was arrested for this murder in 1994. He was tried in 1995 and again in 1996. Both trials resulted in hung juries. This instant appeal is from a conviction obtained in 1997 . . . .

On this record, arguably, I find it difficult to conclude, in this appeal (by Walls from a conviction of murder) that the error in curtailing the cross-examination of Bryan (the key witness against Walls), about his own adjudication for murder, was not one of constitutional magnitude . . . .

On the night when young Jesse Moore was murdered, this witness was no stranger to murder; he had killed as a youngster. At the time, he was still under court supervision for his juvenile murder conviction. He arrived on the murder scene with Walls shortly before the shots rang out; he was the only witness in a position to see who actually fired the gun. Indeed, he was, by all accounts, a key witness. Had the jury known of this witness' juvenile adjudication for murder, it is reasonable to assume that it would have put the whole case in a "different light." As a single error, this curtailment, when considered along with the fact that Bryan was no stranger to lying and had every motive to curry favor with the respective jurisdictions of this area, would undermine confidence in the verdict.<sup>231</sup>

Judge Mack's general approach to criminal cases—application of precedent and the correct legal standard for disposing of the case to the factual setting of the case—often left her at odds with her colleagues, or prompted them to join in her majority opinion.

A few examples evidence Judge Mack's commitment to the constitutional protections articulated in *Miranda*. When the government complained about the suppression of evidence in one case, Judge Mack, joined then by Chief Judge Newman and Judge Ferren, upheld the trial court's order of suppression on Fifth Amendment (rather than Fourth Amendment) grounds, insisting upon the proposition declared by the Supreme court that *Miranda* rights must be "scrupulously honored"; where the defendant was in police custody and invoked her right to counsel, and those rights were not scrupulously honored, the evidence had to be suppressed, even though the trial court concluded that the defendant

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231 *Id.* at 434-36.

“voluntarily and spontaneously chose to speak.”<sup>232</sup> In support of her decision, Judge Mack also pointed to a then recent Supreme Court decision on custodial interrogation,<sup>233</sup> determining that “the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.”<sup>234</sup>

In a somewhat similar case, some eighteen years after Judge Mack convinced her colleagues, Chief Judge Newman and Judge Ferren, to join her 1981 opinion, Judge Mack used a similar analysis to reverse a conviction for possession of a controlled substance on the ground that the suspect had been subjected to the functional equivalent of custodial interrogation.<sup>235</sup> The other two members of the panel agreed with the reversal, although one member set forth his own analysis, concluding that the government had conceded that the defendant was in custody when he was questioned.<sup>236</sup> In a virtually unprecedented decision to reach out to reverse the panel in a case that arguably did not fit the requirements for en banc review (prior decision controls or case is of exceptional importance), a majority of the full court not only granted rehearing en banc but, in 2001, reversed Judge Mack’s 1999 panel opinion.<sup>237</sup> Ironically, the government argued to the en banc court that Mr. Jones was not in custody when he made his incriminating statement<sup>238</sup> and equally ironical, perhaps, the third member of the panel in the 1999 case, who maintained then that the government had conceded that the defendant was in custody, wrote the majority en banc opinion.<sup>239</sup> The majority followed and adopted the government’s en banc argument that the custody question need not be reached because there was no police interrogation;<sup>240</sup> rather, Mr. Jones was asked routine booking questions.<sup>241</sup>

Although she could not help but be deeply distressed at this turn of events, Judge Mack kept her own counsel, buoyed only by the Supreme Court’s then recent opinion reaffirming *Miranda* as a constitutional decision,<sup>242</sup> and the fact that the other member of the original panel also dissented.<sup>243</sup> She was not one to compromise constitutional rights, and in her dissent to the en banc majority opin-

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232 *United States v. [Vivian] Alexander*, 428 A.2d 42, 49-50, 51, 52 (D.C. 1981).

233 *Id.* at 51.

234 *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

235 [*Elton R.*] *Jones v. United States*, 726 A.2d 186 (D.C. 1999).

236 *Id.* at 191 (Schwelb, J., concurring); *but cf.* *Jones v. United States*, 747 A.2d 558, 563-64 (D.C. 1999) (amended form of the opinions) (Schwelb, J., dissenting) (government conceded custody, but suspect’s statement preceded interrogation).

237 *Jones v. United States*, 779 A.2d 277 (D.C. 2001) (en banc).

238 *Id.* at 280-81.

239 *Id.* at 279.

240 *Id.* at 281.

241 *Id.* at 283-84.

242 *See Dickerson v. United States*, 530 U.S. 428 (2000).

243 *Jones*, 779 A.2d at 284 (Reid, J., dissenting).

ion, spoke against the erosion of those rights as interpreted in *Miranda*, stating in part:

[T]his case provides a good opportunity to comment on how far this court (and others) has departed from the directives (reaffirmed and explained) of the United States Supreme Court in *Miranda* . . . and *Innis* . . . While it can fairly be said that this court, as an institution, takes pride in its strict adherence to precise statutory and judicial language, in the instant case, the majority, relying primarily on legal reasoning of court decisions in other jurisdictions, appears to be ignoring the fundamental legal principles it purports to refine.

A paradox meets us initially. The majority tells us that the *Miranda* warnings apply only if “custodial interrogation” exists, *i.e.*, there must be “custody” and “interrogation” at the same time. Yet the majority does not reach the question of “custody” (a question vigorously debated throughout this litigation) because it agrees with the government that, even if the defendant were in custody, his incriminating statement was not the product of police interrogation. That approach, *i.e.*, to not even recognize the impact of custody on this case, arguably catapults us back, historically, to the very reasons for the promulgation of the *Miranda* rules and their constitutional underpinnings.<sup>244</sup>

For Judge Mack, the interrogation which occurred in the *Jones* case and prompted the incriminating statement did not fit the category of routine booking questions, as the majority found, that is, questions normally posed when the police are ready to process and “book” a suspect at the police station.

While it is clear that the biographical questions asked of Jones logically relate to him and his predicament, it is equally evident that [the police officer’s] queries were not made to facilitate booking. The questions were asked at the scene [of the alleged crime]. There was no testimony that they were designed to assist any of the officers in the completion of booking or other administrative forms.<sup>245</sup>

Judge Mack’s refusal to compromise in the Elton R. Jones en banc case was consistent with her position that constitutional rights should not be compromised, even in murder cases where a judge might be inclined to “save” the conviction by resorting to a harmless error analysis. Thus, in a second degree murder case, where even the majority determined that “the trial court erred, as a matter of law, in ruling that [the defendant] was not in custody at the time he gave his written statement and thus erred in concluding that he gave the statement volun-

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244 *Id.* at 288 (Mack, J., dissenting).

245 *Id.* at 292.

tarily[.]”<sup>246</sup> Judge Mack refused to join the majority opinion that used the harmless error standard, resulting in an affirmance of the judgment of conviction.<sup>247</sup> She recognized the clear prohibition on custodial interrogation without the *Miranda* safeguards, especially the right to counsel, but departed from the majority’s reasoning that the constitutional violation did not mandate “automatic reversal” of the conviction.<sup>248</sup> Judge Mack wrote: “On the facts of this case, no fair reading of the record can permit the conclusion that the admission into evidence of [the defendant’s] statement to [the detective] was harmless error. The prosecution, in proving its case for the charge of second-degree murder, relied almost entirely upon this involuntary statement.”<sup>249</sup>

Judge Mack’s historical legacy, her independent spirit, and her steadfast devotion to concepts of liberty and freedom undoubtedly allowed her to focus on the need for vigilant protection of the rights of vulnerable members of society in the face of community and political pressures favoring pretrial detention for some criminal suspects. In a 1981 case that demanded DCCA’s attention during the stormy days of conflict between the more conservative members of the court and then Chief Judge Newman, Judge Mack stood alone above the fray, filing a full dissent to the majority opinion written by Chief Judge Newman.<sup>250</sup> She began by reiterating her devotion to the concept of liberty, as well as to the notion that a person is innocent until proven guilty:

The majority treads where wise men have feared to tread. I am certain that my Brother Newman is not ruling out liberty as a “basic human right.” Yet, this case is as much about the constitutional right to liberty as it is about the constitutional right to bail. Ironically enough, my concern is not with the constitutional rights of Marvin L. Edwards, who has entered pleas of guilty in both cases, and who is no longer being held under the detention statute he challenges. My concern is with *MY* constitutional rights for I, like millions of Americans have lived, for a time at least, believing that the United

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246 [Antone D.] Ruffin v. United States, 524 A.2d 685, 699 (D.C. 1987).

247 *Id.* at 706 (Mack, J., concurring in part and dissenting in part).

248 *Id.* at 707.

249 *Id.* at 709.

250 The case involved is *United States v. [Marvin L.] Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc). At least one of the conservative members of the court accused Chief Judge Newman of “reaching out” to write the majority opinion in this case. Chief Judge Newman wrote a scholarly historical and analytical opinion supporting pretrial detention that was joined by all of the conservative members of the court who opposed his re-designation as Chief Judge in 1980. Judge Nebeker, joined by Judge Harris, filed an opinion concurring in part and dissenting in part; however, the dissent focused only on “the unoccasional announcement by the court that the press has a First Amendment right to attend pretrial detention hearings.” *Id.* at 1346 (Nebeker, J., concurring in part and dissenting in part). Judge Ferren also filed an opinion concurring in part and dissenting in part; he joined Chief Judge Newman’s analysis of the Eighth Amendment issue, but not his analysis of the Fifth Amendment Due Process issue. *Id.* at 1351.

States Constitution prohibited my punishment for a crime until such time as I have been found guilty of committing that crime.<sup>251</sup>

Judge Mack further embraced the concept of the Constitution as a living document and the central role of the Bill of Rights in securing individual liberty:

I am most receptive to the suggestion that the Constitution is a living document; yet I am not embarrassed to say that it borders on a sacred one. If we are tempted to believe that it is necessary that we resolve an ambiguity therein, I would opt for the interpretation that not only makes common sense but that is the very essence of the Bill of Rights — the preservation of individual liberty.<sup>252</sup>

Turning to classic literature, Judge Mack appeared nicely to tweak her colleagues for succumbing to community and political pressures to affirm the legality of pre-trial detention:

The statute which is the subject of this litigation is a “one-of-a-kind” law applying only to the District of Columbia. Its provisions, imaginatively drafted in 1970 by good lawyers who “apparently . . . tried to protect the Act against attack on constitutional grounds,” represent a response to what was thought to be a crisis stemming from crime in the streets. In succumbing to the seductive appeal of sanctioning these provisions designed to prevent crime through detention, the majority of this court follows the example of the Queen immortalized in literature and described by a distinguished commentator as follows:

Witness this classic exchange in Lewis Carroll’s *Through the Looking Glass* [88 Harper & Bros. Ed. 1902]. The Queen observes that the King’s Messenger “is in prison now, being punished; and the trial doesn’t even begin till next Wednesday; and of course the crime comes last of all.” Perplexed, Alice asks, “Suppose he never commits the crime?” “That would be all the better, wouldn’t it?” The Queen replies.<sup>253</sup>

### B. *The Struggle to Be Heard*

Ralph Ellison’s *Invisible Man*<sup>254</sup> comes to mind when the struggles of countless individuals against discrimination and prejudice are considered. Often, part of the historic struggles against discrimination revolved around efforts to be seen and heard, whether in the political or judicial arenas. This section highlights

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251 *Id.* at 1365 (Mack, J., dissenting) (footnotes omitted).

252 *Id.* at 1368 (Mack, J., dissenting).

253 *Id.* (footnotes omitted).

254 (1952).

three cases involving issues of discrimination, the District of Columbia's anti-discrimination law, and Judge Mack's role in those cases. In light of her own legacy and experiences, including her work with the EEOC in its formative years, discrimination cases represented more than a passing interest to her.

In 1977, the Council of the District of Columbia enacted the District of Columbia Human Rights Act (the DCHRA), a broad protection against discrimination. The Council generally intended "to secure an end in the District of Columbia to discrimination for any reason other than individual merit" by eliminating discrimination based on "race, color, religion, national origin, sex, age, marital status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business."<sup>255</sup> Thus, the DCHRA covered discrimination in employment, housing and commercial space, public accommodations, and educational institutions.<sup>256</sup>

Prior to the enactment of the 1977 DCHRA by the District's legislature, Samuel Yette, a journalist and reporter for *Newsweek* magazine was fired in 1972, less than a year after the publication of his book *The Choice: The Issue of Black Survival in America*.<sup>257</sup> He filed a discrimination complaint under the District's earlier police regulation which prohibited an "unlawful employment practice" based on "race, color, religion, national origin or sex" by an employer.<sup>258</sup> The District of Columbia Commission on Human Rights found that *Newsweek* had discriminated against Mr. Yette because of his race and awarded him \$1,000 in damages and \$20,000 in attorneys' fees.<sup>259</sup> A DCCA panel consisting of Judges Fickling,<sup>260</sup> Gallagher, and Yeagley reversed the Commission on the ground that the evidence presented did not support a finding of purposeful discrimination.<sup>261</sup> Mr. Yette filed a petition for rehearing en banc. The petition was denied,<sup>262</sup> but Judge Mack wrote a rather extensive statement of her reasons for voting to grant Mr. Yette's petition.<sup>263</sup>

Judge Mack obviously was troubled by the panel's decision and the full court's decision not to hear Mr. Yette's case. The Commission on Human Rights listened to five days of testimony regarding Mr. Yette's allegations of discrimination, and made factual findings leading to the conclusion that *Newsweek* violated

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255 D.C. Code § 2-1401.01 (2001).

256 D.C. Code § 2-1402.31(a) (2001).

257 (1971).

258 POLICE REGULATIONS OF THE DISTRICT OF COLUMBIA, Article 47, § 4(a) (1970).

259 *Newsweek Magazine v. District of Columbia Comm'n on Human Rights* (Samuel F. Yette), 376 A.2d 777, 779 (D.C. 1977).

260 Judge Fickling heard oral argument and participated in the case conference, but died before the decision in the case was handed down.

261 *Newsweek*, 376 A.2d at 785.

262 *Id.* at 794.

263 *Id.* at 794-798 (Mack, J., Statement of Reasons for Voting to Grant Intervenor Yette's Petition for Rehearing En Banc). Her statement was joined by then Chief Judge Newman.

the District's unlawful employment practice regulation. When the panel reversed the Commission's conclusion without a remand for any additional findings deemed necessary, Judge Mack "[thought the court [had] overstepped the permissive bounds of appropriate review [of an agency's decision] in making its own assessment of the evidence without regard to any findings of the administrative agency."<sup>264</sup> She was bothered by the panel's "distressingly superficial understanding of the identity of employment discrimination" and the need for "expert assistance" and the "technical perception" of a specialized agency such as the Commission in ferreting out discriminatory conduct.<sup>265</sup> In short, she argued that by viewing the case through their own laypersons' lens, members of the panel not only failed to comprehend the nuances and subtleties of discrimination but also removed from the specialized commission the assessment of witness credibility and determination of the weight to be given to the evidence presented. As Judge Mack stated:

As to the narrow issue in dispute—Yette's claim of discriminatory treatment versus Newsweek's assertion of Yette's incompetence—the evidence included, on the one hand the testimony of Yette that he was constantly embarrassed by, and objected to, crude racial references and nicknames, that a disproportionate number of his assignments were related to race, that he was kept for the most part on general "clean-up assignments," and that eventually—after publication of his book *THE CHOICE: ISSUES OF BLACK SURVIVAL IN AMERICA*—meaningful assignments ceased altogether. On the other hand there was the testimony of an imposing array of Washington and New York-based Newsweek employees—predominantly male professionals with service going back many years—who attested to the fact that they had observed no prejudice at the [Washington] Bureau [of Newsweek], that Yette's work (which some admittedly had complimented) was not up to Newsweek standards, that he failed to apprise his supervisor of his whereabouts, and that Newsweek had not been offended by Yette's book but had in fact helped him promote it . . . [M]y concern is that this court has taken from the Human Rights Commissioners—presumably appointed because they possessed technical perception—the task, *inter alia*, of assessing the credibility of witnesses and determining the weight to be accorded their testimony.<sup>266</sup>

Judge Mack ended her Statement with a tie to history, a comment on the deep roots of racism, and the possibility of a remedy:

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264 *Id.* at 795.

265 *Id.*

266 *Id.* at 795-96.

I would note, in conclusion, that millions of Americans recently sat before their television sets mesmerized by the dramatization of the heritage of another black writer [a reference to *Roots* by Alex Haley.] It is a tribute to our psychological growth that we found this production not only entertaining but historically informative. It does not take much imagination to realize that vestiges of that history remain deeply ingrained, though dimly perceived, in the very fabric of our society as the “institutionalized” discrimination to which the Congress has alluded. In my opinion it is time, therefore, that we stop recoiling in a personal sense of outrage at every suggestion of “racism.” It is a time, not to think in terms of “blame” or “fault” or “guilt,” but rather to make a calm and reasoned assessment as to whether there is in any given situation a residue of discriminatory “consequences” from the past, and if so, whether we can devise a remedy which might eliminate those effects with the least cost in human suffering.<sup>267</sup>

Fifteen years later, Judge Mack still attempted to persuade her colleagues to listen, hear, and understand complaints about discrimination, without putting complainants through a labyrinthine, time-consuming, and costly process. Carrie Timus, a mother of a small child, applied for a rental apartment and was turned down. She filed a discrimination complaint with the District of Columbia Office of Human Rights (OHR) on December 5, 1986, alleging discrimination on the basis of family responsibilities, that is, the presence of her two-year-old child. On March 22, 1990, after finding probable cause that the real estate company had discriminated against Ms. Timus, the OHR “administratively closed” her case on the ground that she refused to accept conciliation of her complaint.<sup>268</sup> The conciliation contained a “make whole” remedy. After Judge Mack wrote a majority panel opinion reversing the agency and holding that the DCHRA did not give the OHR power to promulgate a regulation authorizing dismissal of a complaint upon the refusal of conciliation, the real estate company that had refused to rent an apartment to Ms. Timus and her child filed a petition for rehearing en banc, which was granted.<sup>269</sup> The majority en banc court then dismissed Ms. Timus’ petition for review. Its rationale undoubtedly was confusing and bewildering to

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267 *Id.* at 798, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

268 Ms. Timus had asked clarifying questions concerning the “make whole” remedy, some of which apparently were answered to her satisfaction, and some of which remained unclear from her perspective. Her letter of August 5, 1988 requesting additional clarification never received a response, but on March 7, 1990, the agency advised Ms. Timus that if she did not accept the make whole offer, her complaint would be dismissed. She replied on March 19, 1990 that the concerns she expressed in her August 1988 letter had never been addressed. On March 22, 1990, she was advised that her complaint had been “administratively closed.” *Timus v. District of Columbia Dep’t of Human Rights*, 633 A.2d 751, 754-55 (D.C. 1993) (en banc) (per curiam).

269 *Timus v. District of Columbia Dep’t of Human Serv.*, No. 90-465 (D.C. 1992), 1992 D.C. App. LEXIS 77.

Ms. Timus who, by that time, had spent seven years attempting to get someone or some agency to hear the merits of her claim of discrimination on the basis of her family responsibility to her two-year-old child. In an unusual *en banc per curiam* decision authored by two different judges, the court decided that the regulation in question was reasonable and that the court lacked “contested case jurisdiction” to review its application to Ms. Timus’ individual case because, technically, the agency’s dismissal of her case was based on “administrative convenience” and she retained the right to bring a complaint in a trial court.<sup>270</sup>

Then Chief Judge Judith Rogers,<sup>271</sup> who wrote a concurring opinion on the jurisdictional/contested case issue when the Timus case was heard by the panel, fashioned an opinion concurring in the majority’s conclusion that the court had jurisdiction to determine whether Ms. Timus was improperly denied a right to a hearing before the Commission, but dissenting as to the majority’s validation of the “make whole” regulation.<sup>272</sup> Judge Mack joined Chief Judge Rogers’ opinion and attached her panel decision as an appendix. The Rogers/Mack opinion pointed out that the administrative agency’s record clearly failed to support the majority’s conclusion that Ms. Timus’ complaint was dismissed for administrative convenience.<sup>273</sup> Moreover, their reading of the legislative history of the

270 The majority declared:

The fact that this dismissal [for administrative convenience] leaves the complainant with “all rights to bring suit if no complaint had been filed,” calls squarely into question our authority to review directly—that is, on contested case review—the application of [the regulation in question] in any particular case. The reason is that the [District of Columbia Administrative Procedure Act] expressly excludes from the definition of a contested case “[a]ny matter subject to a subsequent trial of the law and the facts de novo in any court.”

633 A.2d at 760.

271 Judith W. Rogers received the nomination for the DCCA from President Reagan in 1983 and was confirmed by the Senate. She was designated as Chief Judge in 1988, to replace then Chief Judge Pryor. Currently, she is an Associate Judge of the United States Court of Appeals. Judge Rogers earned degrees from Radcliffe College and Harvard Law School in 1961 and 1964 respectively. Later, in 1988, she earned a master of laws degree from the University of Virginia Law School. After completing law school and working as a clerk in the then District of Columbia Juvenile court, she became an Assistant United States Attorney for the District of Columbia. She spent part of her career on endeavors to reorganize the courts of the District of Columbia—working with the United States Judicial Conference Committee on the Administration of Justice in 1967, and from 1969 to 1971, with the Deputy Attorney General, United States Department of Justice. Her work helped to produce the District of Columbia Court Reform and Criminal Procedure Act of 1970. Following these endeavors, she served as General Counsel to the Congressional Commission on the Organization of the Government of the District of Columbia, and then accepted a position in the District government to work on legislation that ultimately resulted in the Home Rule Act. She became Corporation counsel of the District of Columbia in 1979 and remained in that position until her elevation to the bench. *DAILY WASH. L. REP.*, Nov. 1, 1988, at 2261, 2264.

272 Judge Ferren filed a separate opinion concurring in part and dissenting in part, and Judge Steadman lodged a dissenting opinion.

273 *Timus*, 633 A.2d at 774 (Rogers, C.J., joined by Mack, J., concurring in part and dissenting in part).

DCHRA provided no support for the proposition that if a complainant refused to accept a conciliation/make whole offer, the complaint could be dismissed: “Forced conciliation is a concept that is foreign to the statutory language,” as they put it.<sup>274</sup> They emphasized the point that under the majority’s construction of the statutory and regulatory scheme governing discrimination complaints, and the tortured path Ms. Timus would have to follow in accordance with that construction, she might well be barred from bringing a lawsuit because of the statute of limitations, and in any event she confronted a path of even more “delay and costly litigation.”<sup>275</sup> Undoubtedly this construction also would undercut the statutory purpose of the District’s civil rights statute and the “expressly determined” legislative mandate “that the elimination of unlawful discrimination is of ‘the highest priority.’”<sup>276</sup>

### C. *Sexual Orientation Discrimination and a Private University’s Religious Freedom*

The third example of Judge Mack’s concern for cases of discrimination involved a unique set of circumstances, locking a renowned Catholic university—Georgetown—in a struggle with students advocating Georgetown’s recognition of a gay rights student organization. DCCA was divided from the outset of this controversial case. The panel composed of Judges Mack, Ferren, and Terry issued a majority opinion, with Judge Mack dissenting. Judge Ferren, writing for the majority, framed the issue before the court as follows:

The only issue on appeal . . . is whether Georgetown’s unwillingness to “recognize” the gay rights groups—as that concept is to be understood—must be excused on the ground that the Human Rights Act, as applied, impermissibly interferes with the University’s constitutional right to the free exercise of religion. We hold that the Constitution does not afford Georgetown its claimed protection.<sup>277</sup>

Thus, the majority sided with the gay rights student organization. Viewing the case differently, and exercising her independent mind, Judge Mack sought a position that would not undercut the university’s doctrinal foundation, but which also would not cast the gay rights students adrift from the university they chose to attend, and isolate them in a discriminatory fashion. She minced no words in rejecting the majority’s rationale:

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<sup>274</sup> *Id.* at 772.

<sup>275</sup> *Id.* at 775-76.

<sup>276</sup> *Id.* at 775.

<sup>277</sup> *Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ.*, 496 A.2d 567, 568 (D.C. 1985).

Requiring the Georgetown University to recognize/endorse two gay rights groups is tantamount to ordering a private actor publicly to embrace the ideology of another. I cannot concur in this bizarre result; I would hold that the Human Rights Act does not compel recognition/endorsement. I would sever the connection between recognition and its incidental benefits, and would find that by withholding recognition the University has not violated the Act.<sup>278</sup>

The full court decided to hear the case, but was deeply split over its resolution. Six opinions resulted—Judge Mack’s opinion for the court, Chief Judge Pryor’s concurring opinion, Judge Newman’s concurring opinion (joined by Judges Mack, Ferren and Terry), Judge Ferren’s opinion concurring in part and dissenting in part (joined by Judge Terry), Judge Belson’s opinion concurring in part and dissenting in part (joined by Judge Nebeker), Judge Terry’s opinion concurring in part and dissenting in part), and Judge Nebeker’s opinion concurring in part and dissenting in part.

Despite the controversy and the divergent views of members of the court, Judge Mack forged a majority for the disposition of the case by maintaining her insistence that “the artificial connection between the ‘endorsement’ and the tangible benefits contained in Georgetown’s scheme of ‘University Recognition’” should be severed.<sup>279</sup> This enabled her to articulate two separate legal principles, one relating to recognition or endorsement or the historic religious university’s approval of the gay students lifestyle,<sup>280</sup> and the other to gay students’ access to the tangible benefits of the university.<sup>281</sup>

Judge Mack set the stage for her conclusion on the recognition or approval issue by carefully tracing the history of Georgetown and examining in detail the trial court testimony of Georgetown’s then President Timothy S. Healy, S.J. She focused on the creation of the University in 1789 by John Carroll, a Jesuit priest; the charter given to Georgetown College in 1815 by the Congress of the United States; the 1833 decree of the Holy See establishing Georgetown as a Pontifical University; its incorporation by Congress in 1844; the establishment of its non-profit corporate status and its designation as a university in 1966; the evolution of Georgetown’s role as an ecclesiastical university with a secular educational mission; and the meaning of university endorsement or university recognition.<sup>282</sup>

278 *Id.* at 582 (Mack, J., dissenting).

279 *Gay Rights Coalition of Georgetown Univ. L. Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. 1987).

280 Judges agreeing that the DCHRA did not require Georgetown to grant university endorsement or recognition to a gay student organization were Chief Judge Pryor, and Judges Mack, Newman, Belson, and Nebeker.

281 Judges concluding that the DCHRA required Georgetown to provide tangible benefits to a gay student organization were Chief Judge Pryor, and Judges Mack, Newman, Ferren, and Terry.

282 *Gay Rights Coalition of Georgetown Univ. L. Ctr.*, 536 A.2d at 5-14.

Turning to the DCHRA, after invoking the avoidance of constitutional issues if possible standard, Judge Mack reiterated a legal principle set forth in her panel dissent: “the Human Rights Act does not require one private actor to ‘endorse’ the ideas or conduct of another.”<sup>283</sup> Reliance on this legal principle enabled her to avoid an interpretation of the DCHRA which would directly conflict with the First Amendment by compelling Georgetown to endorse or recognize the gay students organization; and further, which would place an appellate court in the position of violating its own standard that factual findings of the trial court must be accepted unless they are clearly erroneous.<sup>284</sup> In essence, then, Judge Mack distilled “endorsement” into “a symbolic gesture, a form of speech by a private, religiously affiliated educational institution, an entity free to adopt partisan public positions on moral and ethical issues.”<sup>285</sup>

Having made her pronouncements on “endorsement” or “recognition” by a private actor, Judge Mack adroitly disentangled endorsement and the tangible benefits offered to Georgetown student groups by asserting:

While the “endorsement” and the tangible benefits may be one for Georgetown’s administrative purposes, they are not so in the eyes of the Human Rights Act, nor are they so in the eyes of the First Amendment . . . . We open up the package of “University Recognition” and examine its contents separately.<sup>286</sup>

Judge Mack’s separate examination of the tangible benefits began with the propositions that the DCHRA “provides legal mechanisms to ensure equality of *treatment*, not equality of *attitudes*”; and that “[t]o read into the Human Rights Act a requirement that one private actor must ‘endorse’ another would be to render the statute unconstitutional.”<sup>287</sup>

But before she could declare that Georgetown could not deny gay students tangible benefits, Judge Mack had to confront the implications of Georgetown’s free exercise of religion right on its statutory obligation to grant those benefits. She first determined that:

[Georgetown] allowed the homosexual orientation of the individuals involved—not just the “purposes and activities” of their student organizations—to creep into its decision-making. By failing to confine its objections

283 *Id.* at 17.

284 Judge Mack adhered to the legal principle that “[a]n appellate court may not usurp the role of the factfinder,” thus prompting her to declare:

We cannot label “clearly erroneous” [the trial court’s] “endorsement” finding, i.e., that “University Recognition” at Georgetown contains an expression of religious approval or neutrality towards a student group obtaining that status.

*Id.* at 19.

285 *Id.* at 20.

286 *Id.*

287 *Id.* at 21.

to "purposes and activities" which it found offensive for reasons *independent* of the sexual orientation of the students, Georgetown discriminated.<sup>288</sup>

Then, in response to Georgetown's argument that it was exempt from the reach of the DCHRA and its mandate of equal treatment with respect to tangible benefits, Judge Mack launched into a rather extensive analysis of First Amendment Free Exercise clause cases emanating from the Supreme Court of the United States, as well as the District legislature's decision to include sexual orientation as part of the DCHRA, sociological and behavioral studies of homosexuality, and whether the protection of sexual orientation constituted a compelling governmental interest. She concluded that "[t]he eradication of sexual orientation discrimination is a compelling governmental interest" which "outweighs the burden that compliance with the Human Rights Act would impose on Georgetown's religious exercise"; and that "there are no available means of eradicating sexual orientation discrimination in educational institutions that would be less restrictive of Georgetown's religious exercise."<sup>289</sup>

Judge Mack's majority opinion in the *Gay Rights* case is remarkable because she did not deviate from her assessment of the case or compromise her views to forge a unanimous opinion. Yet, she navigated her way through controversial and complicated issues so skillfully that four other judges concurred separately or concurred in her result.<sup>290</sup> Her opinion also is remarkable because it avoided weakening the District's basic anti-discrimination law, even as it reaffirmed the

288 *Id.* at 29-30.

289 *Id.* at 39.

290 Then Chief Judge Pryor "adopt[ed] the holdings of Judge Mack's opinion," but wrote a brief concurrence explaining what he deemed to be "the effect of [the] decision." *Id.* at 39-40. Judge Newman joined Judge Mack's conclusions but wrote separately, especially with respect to the analysis of the Free Exercise clause issue; Judges Mack, Ferren and Terry joined in Part VI of his concurrence regarding Judge Belson's views of the District legislature's addition of sexual orientation to the list of protected statuses under the DCHRA. *Id.* at 46. Judge Ferren's opinion concurring in part and dissenting in part was joined by Judge Terry. Judge Ferren rejected the distinction between tangible and intangible benefits under the DCHRA, addressed and rejected aspects of Judge Belson's analysis, and set forth his own analysis of the Free Exercise clause issue. *Id.* at 46-62. Judge Belson, joined by Judge Nebeker, concurred in part and dissented in part. He concluded, in part, that if there was a conflict between the rights of Georgetown and those of a gay student organization, Georgetown's rights were "paramount." While he joined Judge Mack's opinion relating to the endorsement/recognition issue, he disagreed with the sections concerning Georgetown's obligation to provide tangible benefits to a gay student organization, and Georgetown's Free Exercise clause rights. *Id.* at 62-74. Judge Terry concurred in part and dissented in part, concluding that the DCHRA requires Georgetown to grant both "University Recognition" and tangible benefits. *Id.* at 74-5. Judge Nebeker, who also joined Judge Belson's opinion, concurred in part and dissented in part. He began his opinion by asserting that: "Today the court uses the state's power to force a religious body, contrary to its basic tenets, to provide services and facilities to those who advocate and proselytize abnormal and criminal sexual practices." He "[found] no factor favoring a state interest under the [DCHRA] which can be balanced against Georgetown's rights," and thought "there [was] every reason in law to hold absolute Georgetown's rights." *Id.* at 75.

historic religious roots of a private university; it honored the intent of the District's legislature by recognizing that sexual orientation stood alongside race, ethnicity and gender as a protected status in the District of Columbia; and it offered an opportunity to a renowned university based in the District of Columbia to continue to take advantage of financing schemes requiring some action by the District of Columbia government, such as the issuance of bonds to support capital projects like dormitory construction, without a violation of the District's anti-discrimination laws. Much has been written about Judge Mack's approach to the *Gay Rights* case. Perhaps no one sums up what Judge Mack accomplished better than one of her former law clerks, Professor Walter J. Walsh: "Judge Mack dares to frame the fearful symmetry of gay rights, religious freedom, and racial equality."<sup>291</sup>

Our venture into these final areas of pretrial detention and custodial interrogation, allegations of racial discrimination in employment and housing, and discrimination on the basis of sexual orientation helps to sustain the validity of our thesis: Through twenty-six years of her tenure as an active and senior judge of the DCCA, Judge Julia Perry Cooper Mack kept her own counsel, and her numerous majority, concurring and dissenting opinions were influenced neither by the exterior political world surrounding her, nor by the exhortations of her DCCA colleagues. Rather, Judge Mack's approach to the resolution of legal issues as an Associate Judge and, later, as a Senior Judge of the DCCA, was impacted by her heritage, her quiet opposition to injustice, her deep concern for the vulnerable members of American society, and her notions of fair play and justice, all spawned by and grounded in her experiences in North Carolina and the nation's capital.

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291 Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 How. L.J. 513, 570 (1997). In addition to his own analysis of the *Gay Rights* case, Professor Walsh summarizes what other scholars have written about the case. *Id.* at 530-53.