****
*** ACTIVITY REPORT ***
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ST. TIME	CONNECTION TEL	CONNECTION ID	NO.	MODE	PGS.	RESULT
*01/30 21:21	66468	DCOS	0042	TRANSMIT ECM	13	OK 03'38
*01/30 22:16	202 647 2762	DOS LEG AFFAIRS	7660	AUTO FAX RX ECM	11	OK 03'28
*01/31 00:04	+2026617110		7661	AUTO FAX RX ECM	2	OK 00'38
*01/31 00:37	913045367920		0043	TRANSMIT	0	NG 00'00
					0	#018
*01/31 01:50	703 749 0040		7662	AUTO FAX RX G3	9	OK 07'11
*01/31 02:28	717 337 6797		7663	AUTO FAX RX ECM	7	OK 02'03
*01/31 02:49			7664	AUTO FAX RX ECM	5	OK 01'23
*01/31 02:55			7665	AUTO FAX RX ECM	3	OK 00'53
*01/31 02:56	2027891116		7666	AUTO FAX RX ECM	1	OK 00'27
*01/31 03:29	202+366+3574		7667	MEMORY RX ECM	4	OK 01'11
*01/31 04:17	913045367920		0044	TRANSMIT	0	NG 00'00
					0	STOP
*01/31 04:25	913045367920		0045	TRANSMIT	0	NG 00'00
					0	#018
*01/31 04:48			7668	AUTO FAX RX ECM	5	OK 01'15
*01/31 06:05			7669	AUTO FAX RX ECM	2	OK 01'07
*01/31 06:21			7670	AUTO FAX RX ECM	3	OK 01'13
*01/31 06:29	202 501 1519	OCIR ASSOC ADMIN	7671	AUTO FAX RX ECM	5	OK 01'43
*01/31 06:32	202 501 1519	OCIR ASSOC ADMIN	7672	AUTO FAX RX ECM	5	OK 01'43
*01/31 07:04			7673	AUTO FAX RX ECM	3	OK 01'15
*01/31 08:24	202 720 8077	USDA CONG. RELAT	7674	AUTO FAX RX ECM	6	OK 02'00
*01/31 09:36	3045367921		7675	AUTO FAX RX ECM	0	NG 00'51
					0	
*01/31 09:41	3045367921		7676	AUTO FAX RX ECM	0	NG 00'50
					0	
*01/31 09:45	3045367921		7677	AUTO FAX RX ECM	0	NG 00'29
					0	
*01/31 19:43			7678	AUTO FAX RX ECM	15	OK 04'44
*01/31 21:12	2022739988	LEGISLATIVE AFRS	7679	AUTO FAX RX ECM	6	OK 01'40
*01/31 21:56	202 647 2762	DOS LEG AFFAIRS	7680	AUTO FAX RX ECM	11	OK 03'23
*01/31 22:20	202 647 2762	DOS LEG AFFAIRS	7681	AUTO FAX RX ECM	3	OK 01'14
*02/01 00:01			7682	AUTO FAX RX ECM	2	OK 00'48
*02/01 00:30	913045367920		0046	TRANSMIT	0	NG 00'00
					0	#018
*02/01 00:31	913045367920		0047	TRANSMIT	0	NG 00'00
					0	#018
*02/01 00:32	913045367920		0048	TRANSMIT	0	NG 00'00
					0	#018
*02/01 01:16	703 749 0040		7683	MEMORY RX G3	5	NG 04'24
					5	#037
*02/01 01:21	63501		0049	TRANSMIT ECM	3	OK 08'28
*02/01 01:43	66468	DCOS	0050	TRANSMIT ECM	3	OK 08'06
*02/01 02:29	703 749 0040		7684	AUTO FAX RX G3	9	OK 07'11
*02/01 03:26	202 456 6703	DCOS	7685	AUTO FAX RX ECM	3	OK 09'42
*02/01 03:40	202 408 4808		7686	AUTO FAX RX ECM	3	OK 00'54
*02/01 05:49	202 228 1178		7687	AUTO FAX RX ECM	2	OK 00'41
*02/01 06:00	93016569041		0051	TRANSMIT ECM	2	OK 00'33
02/01 06:06	92258185	GOV REF MIN	0052	TRANSMIT G3	0	NG 00'12
					0	#001
02/01 06:11	92258185	GOV REF MIN	0053	TRANSMIT ECM	4	OK 01'18

DIRECTOR
OFFICE OF REGIONAL OPERATIONS
GS-15

INTRODUCTION

The Office of Regional Operations (ORO), Office of the Administrator, serves as the Regional Offices' advocate and ombudsman at Headquarters, and is a critical link between the Administrator/Deputy Administrator, the Assistant Administrators, General Counsel, the Inspector General, and the Regional/Deputy Regional Administrators. The Office ensures the integration of Headquarters' policy and concerns into Regional Office operations, as well as the incorporation of Regional Office views and needs in the formulation of Agency and National policy and decision making processes.

MAJOR DUTIES AND RESPONSIBILITIES

1. Serves as the Director for Regional Operations. Represents the Administrator in the area of Headquarters Regional communications on major policy issues and decision processes.

2. Responsible for strengthening existing liaison between the Administrator and Regional Offices. Works with Regional staffs to further the consistent application of national program policies by reinforcing, evaluating and improving existing administrative, procedural, and program policy mechanisms.

3. Coordinates the efforts of principal Headquarters organizational components dealing with broad-gauged and issue-oriented regional problems. Advises the Administrator on more effective use of mechanisms to stimulate regional activities. Continually evaluates policies and technical needs. Suggests areas which require strengthening and methods by which this can be accomplished.

4. Maintains continuing evaluation of regional activities. Ensures that EPA technical directions, administrative orders, and Agency policies include regional perspectives and are adequately provided to Regions to be sure they are clearly understood and are being carried out on a basis that recognizes that regional priorities will vary with actual circumstances of individual cases. Identifies and responds to technical and operational problems and questions arising in connection with program activities impacting upon both Headquarters and the field activities. Establishes procedures and coordinates action for their resolution.

5. Coordinates office programs with other Federal, state and local government agencies. Represents the Administrator and presents the Agency's point of view in conferences and meetings with other Federal agencies and outside groups. Participates in Agency program planning to ensure full consideration of program policy and plans. Provides technical advice and information concerning areas of responsibility to Agency executives, other government agencies, and outside organizations.

6. Exercises management responsibility over staff members making assignments and determining duties and priorities, evaluating employee performance, recommending incentives, initiating corrective actions, assuring safety, keeping employees informed at all times, counseling employees, etc.

7. Exercises continuing responsibility to effectively support the EEO/Affirmative Action Plan and communicating this support to subordinates, taking positive action which will motivate and give opportunity to all personnel.

8. Performs other duties as assigned.

SUPERVISORY CONTROLS

Receives general direction and broad policy guidance from supervisor. Within this broad framework duties are performed with maximum independence subject to review for attainment of objectives and compliance with policies.


A

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22 SEP 95 - FRIDAY

AIR	DELTA AIR LINES INC FLT:1784	COACH	
	LV LOS ANGELES	740A	EQP:BOEING 757
	AR SALT LAKE CITY	1020A	NON-STOP
	PRA 6 SEAT-24D		
AIR	DELTA AIR LINES INC FLT:695	COACH	LUNCH
	LV SALT LAKE CITY	1137A	EQP:BOEING 757
	AR ANCHORAGE	225P	NON-STOP
	PRA 6 SEAT-29D		

25 SEP 95 - TUESDAY

AIR	DELTA AIR LINES INC FLT:2170	COACH	BREAKFAST
	LV ANCHORAGE	635A	EQP:BOEING 757
	AR SALT LAKE CITY	104P	NON-STOP
	PRA 6 SEAT-35C		
AIR	DELTA AIR LINES INC FLT:1785	COACH	
	LV SALT LAKE CITY	156P	EQP:BOEING 757
	AR LOS ANGELES	240P	NON-STOP
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55CM1731

06AB0003 L.A to Anchorag

9/22

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9/21

$6.78

Lv. 12:[redacted] N

Delta

NW 8:35

Dulles

2 hours no seats

12:45pm

Lv. Detroit 2:07

ar. Seattle 5pm

Lv. Detroit 3:10

8:45pm

1:29pm

55CM1731

ACTUAL FTN & TIMES

Actual

Report From Sep/07/1998 To Dec/11/2000

Prepared Dec/11/2000, 13:33

Lead Passenger JACKSON JESSE, JACKSON, REV JESSE

Res #	A/C Type	A/C Reg	ATD Date (utc)	ATD (utc)	From ICAO	To ICAO	ATA (utc)	Actual Flight Time	Distance (N.M.)	Fuel Used (Pounds)	Lead Passenger
2186	C-37A	70400	May/17/2000	23:05	KADW	DNMM	10:00	10+55	4695	32000	Jackson, Rev Jes
	C-37A	70400	May/18/2000	11:35	DNMM	DNAA	12:45	1+10	276	5000	Jackson, Rev Jes
	C-37A	70400	May/19/2000	06:10	DNAA	DNMM	07:05	0+55	276	5000	Jackson, Rev Jes
	C-37A	70400	May/19/2000	10:00	DNMM	GLRB	12:05	2+05	815	13000	Jackson, Rev Jes
	C-37A	70400	May/20/2000	12:30	GLRB	GABS	13:40	1+10	404	6000	Jackson, Rev Jes
	C-37A	70400	May/21/2000	05:15	GABS	KIAD	15:35	10+20	4101	29000	Jackson, Rev Jes
	C-37A	70400	May/22/2000	13:30	KIAD	KADW	13:55	0+25	64	2500	Jackson, Rev Jes

ATCH 1

Actuals Search

Report From Sep/08/1998 To Jun/07/1999

Prepared Jun/16/1999, 12:07

Description COMPLETED

Lead Passenger CLINTON HILLARY

Trip Saved As R

Res #	A/C Type	From Airport	ATD Date (utc)	ATD (utc)	To Airport	ATA Date (utc)	ATA (utc)	Lead Passenger
40	C-9C	ANDREWS AFB/NAF	Sep/23/19	14:35	LA GUARDIA	Sep/23/19	15:20	Clinton Hillary
40	C-9C	LA GUARDIA	Sep/24/19	04:25	ANDREWS AFB/NAF	Sep/24/19	05:15	Clinton Hillary
107	C-20H	LA GUARDIA	Sep/22/19	14:55	ANDREWS AFB/NAF	Sep/22/19	15:45	Clinton Hillary
155	C-9C	ANDREWS AFB/NAF	Oct/18/19	22:10	LA GUARDIA	Oct/18/19	23:05	Clinton Hillary
155	C-9C	LA GUARDIA	Oct/20/19	13:10	LOGAN INTL	Oct/20/19	14:15	Clinton Hillary
155	C-9C	LOGAN INTL	Oct/20/19	14:50	GREEN STATE	Oct/20/19	15:15	Clinton Hillary
155	C-9C	GREEN STATE	Oct/21/19	00:35	ANDREWS AFB/NAF	Oct/21/19	01:40	Clinton Hillary
156	C-9C	ANDREWS AFB/NAF	Oct/22/19	14:50	DETROIT CITY	Oct/22/19	16:00	Clinton Hillary
156	C-9C	DETROIT CITY	Oct/22/19	18:55	CHICAGO-O'HARE INTL	Oct/22/19	20:00	Clinton Hillary
156	C-9C	CHICAGO-O'HARE INTL	Oct/23/19	21:00	ANDREWS AFB/NAF	Oct/23/19	22:30	Clinton Hillary
230	C-9C	ANDREWS AFB/NAF	Nov/01/19	14:00	LEHIGH VALLEY INTL	Nov/01/19	14:40	Clinton Hillary
230	C-9C	LEHIGH VALLEY INTL	Nov/01/19	16:45	WOOD CO WILSON	Nov/01/19	17:50	Clinton Hillary
230	C-9C	WOOD CO WILSON	Nov/01/19	21:35	TAMPA INTL	Nov/01/19	23:35	Clinton Hillary
230	C-9C	TAMPA INTL	Nov/02/19	01:35	ANDREWS AFB/NAF	Nov/02/19	03:20	Clinton Hillary
264	C-32A	ANDREWS AFB/NAF	Nov/16/19	13:52	CORONEL ENRIQUE SOTO CANO AB	Nov/16/19	17:56	Clinton Hillary
264	C-32A	AUGUSTO CESAR SANDINO	Nov/17/19	01:12	EL SALVADOR INTL	Nov/17/19	02:17	Clinton Hillary
264	C-32A	EL SALVADOR INTL	Nov/18/19	15:57	LA AURORA INTL	Nov/18/19	16:25	Clinton Hillary

Res #	A/C Type	From Airport	ATD Date (utc)	ATD (utc)	To Airport	ATA Date (utc)	ATA (utc)	Lead Passenger
264	C-32A	LA AURORA INTL	Nov/19/19	19:50	SANTA ELENA	Nov/19/19	20:25	Clinton Hillary
264	C-32A	SANTA ELENA	Nov/20/19	00:30	LAS AMERICAS INTL	Nov/20/19	03:13	Clinton Hillary
264	C-32A	PUNTA CANA INTL	Nov/21/19	20:00	PORT-AU-PRINCE	Nov/21/19	20:55	Clinton Hillary
264	C-32A	PORT-AU-PRINCE	Nov/22/19	21:48	ANDREWS AFB/NAF	Nov/23/19	01:20	Clinton Hillary
313	C-20B	ANDREWS AFB/NAF	Dec/01/19	16:55	LA GUARDIA	Dec/01/19	17:40	Clinton Hillary
314	C-20B	ANDREWS AFB/NAF	Dec/05/19	14:30	LOGAN INTL	Dec/05/19	15:30	Clinton Hillary
314	C-20B	LOGAN INTL	Dec/06/19	03:15	ANDREWS AFB/NAF	Dec/06/19	04:25	Clinton Hillary
325	C-32A	LA GUARDIA	Dec/04/19	03:54	ANDREWS AFB/NAF	Dec/04/19	04:36	Clinton Hillary
331	C-32A	ANDREWS AFB/NAF	Dec/10/19	17:09	LOS ANGELES INTL	Dec/10/19	22:29	Clinton Hillary
331	C-32A	LOS ANGELES INTL	Dec/11/19	03:22	SAN FRANCISCO INTL	Dec/11/19	04:17	Clinton Hillary
331	C-32A	SAN FRANCISCO INTL	Dec/12/19	02:45	ANDREWS AFB/NAF	Dec/12/19	07:10	Clinton Hillary
472	C-137C	ANDREWS AFB/NAF	Feb/07/19	06:05	VALKENBURG NAVY	Feb/07/19	13:30	Clinton Hillary
472	C-137C	VALKENBURG NAVY	Feb/07/19	19:22	QUEEN ALIA INTL	Feb/08/19	00:01	Clinton Hillary
472	C-137C	QUEEN ALIA INTL	Feb/08/19	19:37	SCHIPHOL	Feb/09/19	01:05	Clinton Hillary
472	C-137C	SCHIPHOL	Feb/09/19	14:21	ANDREWS AFB/NAF	Feb/09/19	22:15	Clinton Hillary
498	C-9C	ANDREWS AFB/NAF	Feb/02/19	19:45	LA GUARDIA	Feb/02/19	20:45	Clinton Hillary
602	C-9C	ANDREWS AFB/NAF	Mar/03/19	13:15	LA GUARDIA	Mar/03/19	14:00	Clinton Hillary
602	C-9C	LA GUARDIA	Mar/04/19	21:15	WASHINGTON DULLES INTL	Mar/04/19	22:30	Clinton Hillary
653	C-137C	MILDENHALL AB	Mar/21/19	08:13	CAIRO INTL	Mar/21/19	12:45	Clinton Hillary
653	C-137C	CAIRO INTL	Mar/23/19	10:40	LUXOR	Mar/23/19	11:45	Clinton Hillary
653	C-137C	LUXOR	Mar/25/19	09:41	CARTHAGE	Mar/25/19	13:25	Clinton Hillary
653	C-137C	CARTHAGE	Mar/26/19	12:16	HABIB BOURGUIBA	Mar/26/19	12:45	Clinton Hillary
653	C-137C	HABIB BOURGUIBA	Mar/26/19	19:55	CARTHAGE	Mar/26/19	20:25	Clinton Hillary
653	C-137C	CARTHAGE	Mar/27/19	10:52	MOULAY ALI CHERIF	Mar/27/19	13:15	Clinton Hillary
653	C-137C	MOULAY ALI CHERIF	Mar/28/19	12:19	MENARA	Mar/28/19	13:10	Clinton Hillary
653	C-137C	MENARA	Mar/29/19	09:20	OUARZAZATE	Mar/29/19	09:55	Clinton Hillary
653	C-137C	OUARZAZATE	Mar/29/19	17:15	MENARA	Mar/29/19	17:40	Clinton Hillary

Res #	A/C Type	From Airport	ATD Date (utc)	ATD (utc)	To Airport	ATA Date (utc)	ATA (utc)	Lead Passenger
653	C-137C	MENARA	Apr/01/19	09:20	SALE	Apr/01/19	12:22	Clinton Hillary
653	C-137C	SALE	Apr/01/19	14:17	ANDREWS AFB/NAF	Apr/01/19	22:25	Clinton Hillary
711	C-9C	ANDREWS AFB/NAF	Apr/13/19	18:50	BOCA RATON	Apr/13/19	20:45	Clinton Hillary
711	C-9C	FT LAUDERDALE-HOLLYWOOD INTL	Apr/14/19	00:45	ANDREWS AFB/NAF	Apr/14/19	02:55	Clinton Hillary
712	C-9C	ANDREWS AFB/NAF	Apr/14/19	12:40	CHICAGO-O'HARE INTL	Apr/14/19	14:30	Clinton Hillary
712	C-9C	CHICAGO-O'HARE INTL	Apr/14/19	21:00	ANDREWS AFB/NAF	Apr/14/19	22:30	Clinton Hillary
713	C-9C	ANDREWS AFB/NAF	Apr/19/19	12:05	LA GUARDIA	Apr/19/19	12:55	Clinton Hillary
713	C-9C	LA GUARDIA	Apr/21/19	02:15	ANDREWS AFB/NAF	Apr/21/19	03:05	Clinton Hillary
714	C-32A	ANDREWS AFB/NAF	Apr/22/19	21:54	NIAGARA FALLS INTL	Apr/22/19	22:47	Clinton Hillary
714	C-32A	NIAGARA FALLS INTL	Apr/23/19	02:26	ANDREWS AFB/NAF	Apr/23/19	03:13	Clinton Hillary
715	C-20B	ANDREWS AFB/NAF	Apr/29/19	12:10	LA GUARDIA	Apr/29/19	12:50	Clinton Hillary
715	C-20B	LA GUARDIA	Apr/30/19	02:50	ANDREWS AFB/NAF	Apr/30/19	03:35	Clinton Hillary
741	C-32A	ANDREWS AFB/NAF	May/11/19	17:14	SHANNON	May/11/19	23:40	Clinton Hillary
741	C-32A	SHANNON	May/12/19	13:54	ALDERGROVE	May/12/19	14:35	Clinton Hillary
741	C-32A	ALDERGROVE	May/13/19	11:22	HEATHROW	May/13/19	12:20	Clinton Hillary
741	C-32A	HEATHROW	May/13/19	21:24	CAPODICHINO MIL	May/13/19	23:35	Clinton Hillary
741	C-32A	CAPODICHINO MIL	May/14/19	22:22	SHANNON	May/15/19	01:27	Clinton Hillary
741	C-32A	SHANNON	May/15/19	02:26	ANDREWS AFB/NAF	May/15/19	08:55	Clinton Hillary
835	C-20B	ANDREWS AFB/NAF	May/07/19	13:45	GREATER BUFFALO INTL	May/07/19	14:40	Clinton Hillary
835	C-20B	GREATER BUFFALO INTL	May/07/19	20:00	TETERBORO	May/07/19	20:55	Clinton Hillary
835	C-20B	TETERBORO	May/08/19	00:01	ANDREWS AFB/NAF	May/08/19	00:55	Clinton Hillary
883	C-32A	ANDREWS AFB/NAF	May/19/19	16:23	GRAND CANYON NATL PARK	May/19/19	20:40	Clinton Hillary
883	C-32A	GRAND CANYON NATL PARK	May/20/19	03:11	FLAGSTAFF PULLIAM	May/20/19	03:35	Clinton Hillary
883	C-32A	DENVER INTL	May/21/19	01:47	SANTA FE CO MUN	May/21/19	02:45	Clinton Hillary
883	C-32A	SANTA FE CO MUN	May/23/19	01:54	ANDREWS AFB/NAF	May/23/19	05:11	Clinton Hillary
891	C-20C	FLAGSTAFF PULLIAM	May/20/19	18:40	DENVER INTL	May/20/19	19:40	Clinton Hillary
930	C-20B	ANDREWS AFB/NAF	May/25/19	16:55	JACKSONVILLE INTL	May/25/19	18:30	Clinton Hillary

Res #	A/C Type	From Airport	ATD Date (utc)	ATD (utc)	To Airport	ATA Date (utc)	ATA (utc)	Lead Passenger
951	C-20B	ANDREWS AFB/NAF	Jun/02/19	12:13	LA GUARDIA	Jun/02/19	12:55	Clinton Hillary
951	C-20B	LA GUARDIA	Jun/02/19	23:30	ANDREWS AFB/NAF	Jun/03/19	00:15	Clinton Hillary
952	C-20H	ANDREWS AFB/NAF	Jun/04/19	14:00	LOGAN INTL	Jun/04/19	15:05	Clinton Hillary
952	C-20H	LOGAN INTL	Jun/05/19	03:05	ANDREWS AFB/NAF	Jun/05/19	04:10	Clinton Hillary

UNITED STATES DISTRICT COURT
District of Alaska
H. Russel Holland
Judge
222 West 7th Avenue - No. 54
Anchorage, Alaska 99513-7545

The President

The White House

Washington, D.C. 20500-0003

20500/0003

REV_00457351

ARLENE HILMER
County Services Director

Washington State Republican Party
16400 Southcenter Parkway, Suite 200
Seattle, WA 98188
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Email: miltarlene@att.net Web site: www.wsrp.org

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Judges [Candidates] [3]

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REV_00457353

DISTRICT OF COLUMBIA

1893 - Court of Appeals for the District of Columbia established. Three judgeships created. - Act of February 9, 1893, 27 STAT. 434.

1930 - Two additional judgeships created. - Act of June 19, 1930, 46 STAT. 785.

1938 - One additional judgeship created. - Act of May 31, 1938, 52 STAT. 584.

1949 - Three additional judgeships created. - Act of August 3, 1949, 63 STAT. 493.

1978 - Two additional judgeships created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - One additional judgeship created. - Act of July 10, 1984, 98 STAT. 333.

Total Authorized Judgeships - 12

FIRST CIRCUIT

1801 - First Circuit created consisting of the districts of Maine, New Hampshire, Massachusetts, and Rhode Island. Three circuit judgeships created. - Act of February 13, 1801, 2 STAT. 89.

1802 - Act of February 13, 1801 repealed. First Circuit consisted of New Hampshire, Massachusetts and Rhode Island. Circuit judgeships abolished. - Act of April 29, 1802, 2 STAT. 156.

1820 - District of Maine added to First Circuit. - Act of March 30, 1820, 3 STAT. 554.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1905 - One additional judgeship created. - Act of January 21, 1905, 33 STAT. 611.

1915 - District of Puerto Rico added to First Circuit. - Act of January 28, 1915, 38 STAT. 803.

1978 - One additional judgeship created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Two additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

Total Authorized Judgeships - 6

SECOND CIRCUIT

1801 - Second Circuit created consisting of the districts of Connecticut, Vermont, Albany (New York), and New York. Circuit court with three judgeships established. - Act of February 13, 1801, 2 STAT. 89.

1802 - Act of February 13, 1801 repealed. Second Circuit consisted of Connecticut, Vermont, and New York. Circuit judgeships abolished. - Act of April 29, 1802, 2 STAT. 156.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1887 - One additional judgeship created. - Act of March 3, 1887, 24 STAT. 492.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1902 - One additional judgeship created. - Act of April 17, 1902, 32 STAT. 106.

1929 - One additional judgeship created. - Act of January 17, 1929, 45 STAT. 1081.

1938 - One additional judgeship created. - Act of May 31, 1938, 52 STAT. 584.

1961 - Three additional judgeships created. - Act of May 19, 1961, 75 STAT. 80.

1978 - Two additional judgeships created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Two additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

Total Authorized Judgeships - 13

THIRD CIRCUIT

1801 - Third Circuit created consisting of the districts of New Jersey, the Eastern and Western districts of Pennsylvania, and Delaware. Circuit Court with three judgeships established. - Act of February 13, 1801, 2 STAT. 89.

1802 - Act of February 13, 1801 repealed. Third Circuit realigned to consist of New Jersey and Pennsylvania. Circuit judgeships abolished. - Act of April 29, 1802, 2 STAT. 156.

1866 - District of Delaware added to Third Circuit. - Act of July 23, 1866, 14 STAT. 209.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1899 - One additional judgeship created. - Act of February 23, 1899, 30 STAT. 846.

1930 - One additional judgeship created. - Act of June 10, 1930, 46 STAT. 538.

1936 - One temporary judgeship created. - Act of June 24, 1936, 49 STAT. 1903.

1938 - Temporary judgeship made permanent. - Act of May 31, 1938, 52 STAT. 584.

1944 - One additional judgeship created. - Act of December 7, 1944, 58 STAT. 796.

1948 - District of the Virgin Islands added to Third Circuit. - Act of June 25, 1948, 62 STAT. 870.

1949 - One additional judgeship created. - Act of August 3, 1949, 63 STAT. 493.

1961 - One additional judgeship created. - Act of May 19, 1961, 75 STAT. 80.

1968 - One additional judgeship created. - Act of June 18, 1968, 82 STAT. 184.

1978 - One additional judgeship created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Two additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

1990 - Two additional judgeships created. - Act of December 1, 1990, 104 STAT. 5089.

Total Authorized Judgeships - 14

FOURTH CIRCUIT

1801 - Fourth Circuit created consisting of the districts of Maryland, and Eastern and Western Virginia. Circuit Court with three judgeships established. - Act of February 13, 1801, 2 STAT. 89.

1802 - Act of February 13, 1801 repealed. Fourth Circuit realigned to consist of Maryland and Delaware. Circuit judgeships abolished. - Act of April 29, 1802, 2 STAT. 156.

1866 - Fourth Circuit reformed to include Maryland, West Virginia, Virginia, North Carolina, and South Carolina. - Act of July 23, 1866, 14 STAT. 209.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1922 - One additional judgeship created. - Act of September 14, 1922, 42 STAT. 837.

1961 - Two additional judgeships created. - Act of May 19, 1961, 75 STAT. 80.

1966 - Two additional judgeships created. - Act of March 18, 1966, 80 STAT. 75.

1978 - Three additional judgeships created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - One additional judgeship created. - Act of July 10, 1984, 98 STAT. 333.

1990 - Four additional judgeships created. - Act of December 1, 1990, 104 STAT. 5089.

Total Authorized Judgeships - 15

FIFTH CIRCUIT

1801 - Fifth Circuit created consisting of the districts of North Carolina, South Carolina, and Georgia. Circuit court with three judgeships established. - Act of February 13, 1801, 2 STAT. 89.

1802 - Act of February 13, 1801 repealed. The Fifth Circuit realigned to consist of Virginia and North Carolina. Circuit judgeships abolished. - Act of April 29, 1802, 2 STAT. 156.

1866 - Fifth Circuit reconstituted to include Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. - Act of July 23, 1866, 14 STAT. 209.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1899 - One additional judgeship created. - Act of January 25, 1899, 30 STAT. 803.

1930 - One additional judgeship created. - Act of June 10, 1930, 46 STAT. 538.

1938 - One additional judgeship created. - Act of May 31, 1938, 52 STAT. 584.

1942 - One additional judgeship created. - Act of December 14, 1942, 56 STAT. 1050.

1948 - District of the Canal Zone added to Fifth Circuit. - Act of June 25, 1948, 62 STAT. 870.

1954 - One additional judgeship created. - Act of February 10, 1954, 68 STAT. 8.

1961 - Two additional judgeships created. - Act of May 19, 1961, 75 STAT. 80.

1966 - Four additional temporary judgeships created. - Act of March 18, 1966, 80 STAT. 75.

1968 - The four temporary positions created in 1966 were made permanent and two additional judgeships created. - Act of June 18, 1968, 82 STAT. 184.

1978 - Eleven additional judgeships created. - Act of October 20, 1978, 92 STAT. 1629.

1980 - Fifth Circuit reorganized into two circuits, the Fifth (with 14 judgeships and consisting of Louisiana, Mississippi, Texas and the Canal Zone, which closed 3/31/82) and the Eleventh (with 12 judgeships and consisting of Alabama, Florida, Georgia). - Act of October 14, 1980, 94 STAT. 1994.

1984 - Two additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

1990 - One additional judgeship created. - Act of December 1, 1990, 104 STAT. 5089.

Total Authorized Judgeships - 17

SIXTH CIRCUIT

1801 - Sixth Circuit created consisting of the districts of Eastern and Western Tennessee, Kentucky, and Ohio. Circuit court with one circuit judgeship established. - Act of February 13, 1801, 2 STAT. 89.

NOTE: The other two judgeships in the circuit court were to be held by the present district court judges of Kentucky and Tennessee. Upon their deaths circuit judges were to be appointed.

1802 - Act of February 13, 1801 repealed. Sixth Circuit reformed to consist of South Carolina and Georgia. Circuit judgeships abolished. - Act of April 29, 1802, 2 STAT. 156.

1866 - Sixth Circuit reconstructed to be composed of Ohio, Michigan, Kentucky and Tennessee. - Act of July 23, 1866, 14 STAT. 209.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1899 - One additional judgeship created. - Act of January 25, 1899, 30 STAT. 803.

1928 - One additional judgeship created. - Act of May 8, 1928, 45 STAT. 492.

1938 - One additional judgeship created. - Act of May 31, 1938, 52 STAT. 584.

1940 - One additional judgeship created. - Act of May 24, 1940, 54 STAT. 219.

1966 - Two additional judgeships created. - Act of March 18, 1966, 80 STAT. 75.

1968 - One additional judgeship created. - Act of June 18, 1968, 82 STAT. 184.

1978 - Two additional judgeships created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Four additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

1990 - One additional judgeship created. - Act of December 1, 1990, 104 STAT. 5089.

Total Authorized Judgeships - 16

SEVENTH CIRCUIT

1866 - Seventh Circuit created consisting of the districts of Indiana, Illinois, and Wisconsin. - Act of July 23, 1866, 14 STAT. 209.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1895 - One additional judgeship created. - Act of February 8, 1895, 28 STAT. 643.

1905 - One additional judgeship created. - Act of March 3, 1905, 33 STAT. 992.

1938 - One additional judgeship created. - Act of May 31, 1938, 52 STAT. 584.

1949 - One additional judgeship created. - Act of August 3, 1949, 63 STAT. 493.

1961 - One additional judgeship created. - Act of May 19, 1961, 75 STAT. 80.

1966 - One additional judgeship created. - Act of March 18, 1966, 80 STAT. 75.

1978 - One additional judgeship created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Two additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

Total Authorized Judgeships - 11

EIGHTH CIRCUIT

1866 - Eighth Circuit created consisting of Minnesota, Iowa, Missouri, Kansas, and Arkansas. - Act of July 23, 1866, 14 STAT. 209.

1867 - District of Nebraska added to Eighth Circuit. - Act of March 25, 1867, 15 STAT. 5.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1876 - District of Colorado added to Eighth Circuit. - Act of June 26, 1876, 19 STAT. 61.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1894 - One additional judgeship created. - Act of July 23, 1894, 28 STAT. 115.

1903 - One additional judgeship created. - Act of January 31, 1903, 32 STAT. 791.

1911 - Eighth Circuit reorganized to contain Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah and Oklahoma. - Act of March 3, 1911, 36 STAT. 1131.

1925 - Two additional judgeships created. - Act of March 3, 1925, 43 STAT. 1116.

1929 - Eighth Circuit divided and the Tenth Circuit created. Eighth Circuit includes Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Missouri and Arkansas. Five judgeships retained. - Act of February 28, 1929, 45 STAT. 1346.

1940 - Two additional judgeships created. - Act of May 24, 1940, 54 STAT. 219.

1966 - One additional judgeship created. - Act of March 18, 1966, 80 STAT. 75.

1978 - One additional judgeship created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - One additional judgeship created. - Act of July 10, 1984, 98 STAT. 333.

1990 - One additional judgeship created. - Act of December 1, 1990, 104 STAT. 5089.

Total Authorized Judgeships - 11

NINTH CIRCUIT

1866 - Ninth Circuit created consisting of California, Oregon, and Nevada. - Act of July 23, 1866, 14 STAT. 209.

1869 - One circuit judgeship created. - Act of April 10, 1869, 16 STAT. 44.

1891 - Circuit Court of Appeals established. One additional judgeship created. - Act of March 3, 1891, 26 STAT. 826.

1895 - One additional judgeship created. - Act of February 18, 1895, 28 STAT. 665.

1911 - Ninth Circuit reorganized to contain California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii. - Act of March 3, 1911, 36 STAT. 1131.

1929 - District of Arizona added to Ninth Circuit. - Act of February 28, 1929, 45 STAT. 1346.

1929 - One additional judgeship created. - Act of March 1, 1929, 45 STAT. 1414.

1935 - One additional judgeship created. - Act of August 2, 1935, 49 STAT. 508.

1937 - Two additional judgeships created. - Act of April 14, 1937, 50 STAT. 64.

1948 - The District of Alaska added to Ninth Circuit. - Act of June 25, 1948, 62 STAT. 870.

1951 - The District of Guam added to Ninth Circuit. - Act of October 31, 1951, 65 STAT. 723.

1954 - Two additional judgeships created. - Act of February 10, 1954, 68 STAT. 8.

1968 - Four additional judgeships created. - Act of June 18, 1968, 82 STAT. 184.

1977 - District of Northern Mariana Islands created and added to the Ninth Circuit. - Act of November 8, 1977, 91 STAT. 1265.

1978 - Ten additional judgeships created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Five additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

Total Authorized Judgeships - 28

TENTH CIRCUIT

1929 - Tenth Circuit created consisting of Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico. Four judgeships created. - Act of February 28, 1929, 45 STAT. 1346.

1949 - One additional judgeship created. - Act of August 3, 1949, 63 STAT. 493.

1961 - One additional judgeship created. - Act of May 19, 1961, 75 STAT. 80.

1968 - One additional judgeship created. - Act of June 18, 1968, 82 STAT. 184.

1978 - One additional judgeship created. - Act of October 20, 1978, 92 STAT. 1629.

1984 - Two additional judgeships created. - Act of July 10, 1984, 98 STAT. 333.

1990 - Two additional judgeships created. - Act of December 1, 1990, 104 STAT. 5089.

Total Authorized Judgeships - 12

ELEVENTH CIRCUIT

1980 - Eleventh Circuit with 12 judgeships was created consisting of Alabama, Florida and Georgia. - Act of October 14, 1980, 94 STAT. 1994.

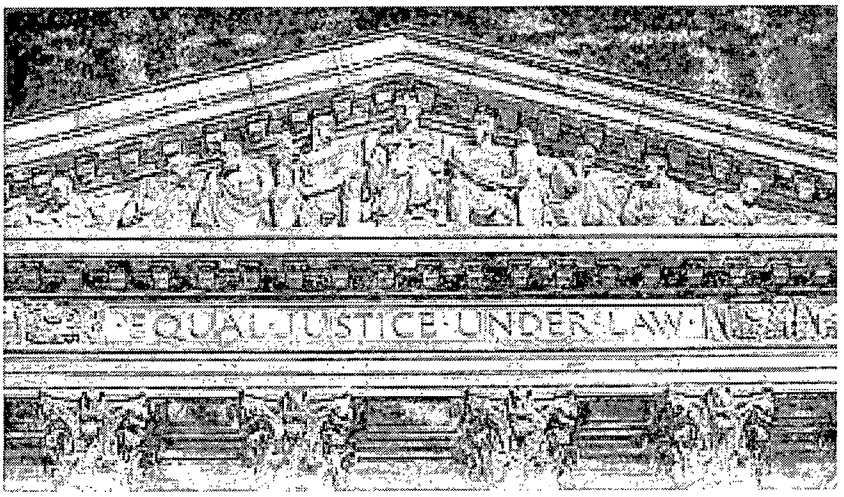
Total Authorized Judgeships - 12

FEDERAL CIRCUIT

1982 - Federal Circuit consisting of all Federal judicial districts. Circuit court with 12 judgeships. - Act of April 2, 1982, 96 STAT. 25.

Total Authorized Judgeships - 12

Understanding the Federal Courts



The Constitution and the Federal Judiciary

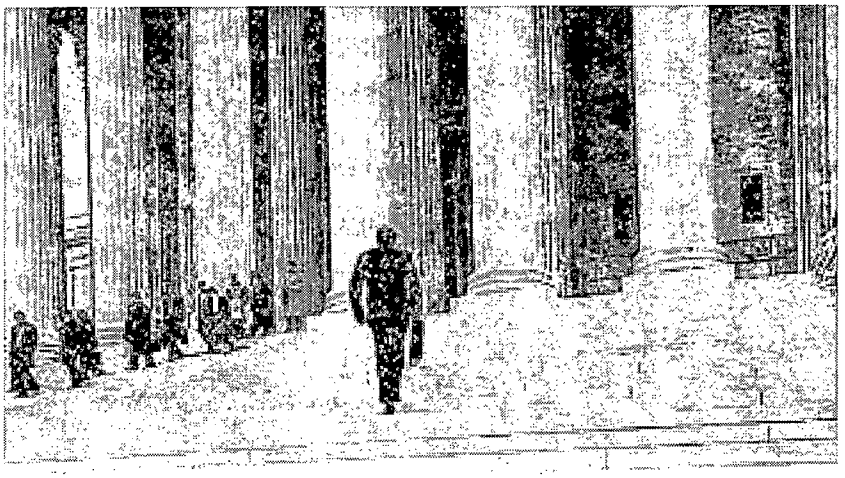
Article III of the United States Constitution establishes the judicial branch as one of the three separate and distinct branches of the federal government. The other two are the legislative and executive branches.

The federal courts often are called the guardians of the Constitution because their rulings protect rights and liberties guaranteed by the Constitution. Through fair and impartial judgments, the federal courts interpret and apply the law to resolve disputes. The courts do not make the laws. That is the responsibility of Congress. Nor do the courts have the power to enforce the laws. That is the role of the President and the many executive branch departments and agencies.

The Founding Fathers of the nation considered an independent federal judiciary essential to ensure fairness and equal justice for all citizens of the United States. The Constitution they drafted promotes judicial independence in two major ways. First, federal judges are appointed for life, and they can be removed from office only through impeachment and conviction by Congress of "Treason, Bribery, or other high Crimes and Misdemeanors." Second, the Constitution provides that the compensation of federal judges "shall not be diminished during their Continuance in Office," which means that neither the President nor Congress can reduce the salary of a federal judge. These two protections help an independent judiciary to decide cases free from popular passion and political influence.

U.S. Constitution
Article III

The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.



The Federal Courts in American Government

The three branches of the federal government — legislative, executive, and judicial — operate within a constitutional system known as "checks and balances." This means that although each branch is formally separate from the other two, the Constitution often requires cooperation among the branches. Federal laws, for example, are passed by Congress and signed by the President. The judicial branch, in turn, has the authority to decide the constitutionality of federal laws and resolve other disputes over federal laws, but judges depend upon the executive branch to enforce court decisions.

The Federal Courts and Congress

The Constitution gives Congress the power to create federal courts other than the Supreme Court and to determine their jurisdiction. It is Congress, not the judiciary, that controls the type of cases that may be addressed in the federal courts.

Congress has three other basic responsibilities that determine how the courts will operate. First, it decides how many judges there should be and where they will work. Second, through the confirmation process, Congress determines which of the President's judicial nominees ultimately become federal judges. Third, Congress approves the federal courts' budget and appropri-

ates money for the judiciary to operate. The judiciary's budget is a very small part — substantially less than one percent — of the entire federal budget.

The Federal Courts and the Executive Branch

Under the Constitution, the President appoints federal judges with the "advice and consent" of the Senate. The President usually consults senators or other elected officials concerning candidates for vacancies on the federal courts.

The President's power to appoint new federal judges is not the judiciary's only interaction with the executive branch. The Department of Justice, which is responsible for prosecuting federal crimes and for representing the government in civil cases, is the most frequent litigator in the federal court system. Several other executive branch agencies affect the operations of the courts. The United States Marshals Service, for example, provides security for federal courthouses and judges, and the General Services Administration builds and maintains federal courthouses.

Within the executive branch there are some specialized subject-matter courts, and numerous federal administrative agencies that adjudicate disputes involving specific federal laws and benefits programs. These courts include the United States Tax Court, the United States Court of Military Appeals, and the United States Court of Veterans Appeals. Although these courts and agencies are not part of the judiciary established under Article III of the Constitution, appeals of their decisions typically may be taken to the Article III courts.

With certain very limited exceptions, each step of the federal judicial process is open to the public.

The Federal Courts and the Public

With certain very limited exceptions, each step of the federal judicial process is open to the public. Many federal courthouses are historic buildings, and all are designed to inspire in the public a respect for the tradition and purpose of the American judicial process.

An individual citizen who wishes to observe a court in session may go to the federal courthouse, check the court calendar, and watch a proceeding. Any-

one may review the pleadings and other papers in a case by going to the clerk of court's office and asking for the appropriate case file. Unlike most of the state courts, however, the federal courts generally do not permit television or radio coverage of trial court proceedings.

The right of public access to court proceedings is partly derived from the Constitution and partly from court tradition. By conducting their judicial work in public view, judges enhance public confidence in the courts, and they allow citizens to learn first-hand how our judicial system works.

In a few situations the public may not have full access to court records and court proceedings. In a high-profile trial, for example, there may not be enough space in the courtroom to accommodate everyone who would like to observe. Access to the courtroom also may be restricted for security or privacy reasons, such as the protection of a juvenile or a confidential informant. Finally, certain documents may be placed under seal by the judge, meaning that they are not available to the public. Examples of sealed information include confidential business records, certain law enforcement reports, and juvenile records.

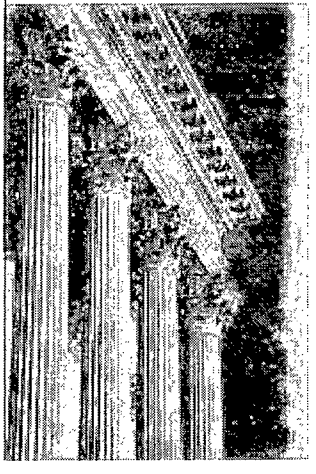
Structure of the Federal Courts

The Supreme Court is the highest court in the federal judiciary. Congress has established two levels of federal courts under the Supreme Court: the trial courts and the appellate courts.

Trial Courts

The United States district courts are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Each district includes a United States bankruptcy court as a unit of the district court. Three territories of the United States — the Virgin Islands, Guam, and the Northern Mariana Islands — have district courts that hear federal cases, including bankruptcy cases.

There are two special trial courts that have nationwide jurisdiction over certain types of cases. The Court of International Trade addresses cases involving international trade and customs issues. The United States Court of Federal Claims has jurisdiction over most claims for money damages against the United States, disputes over federal contracts, unlawful "takings" of private property by the federal government, and a variety of other claims against the United States.



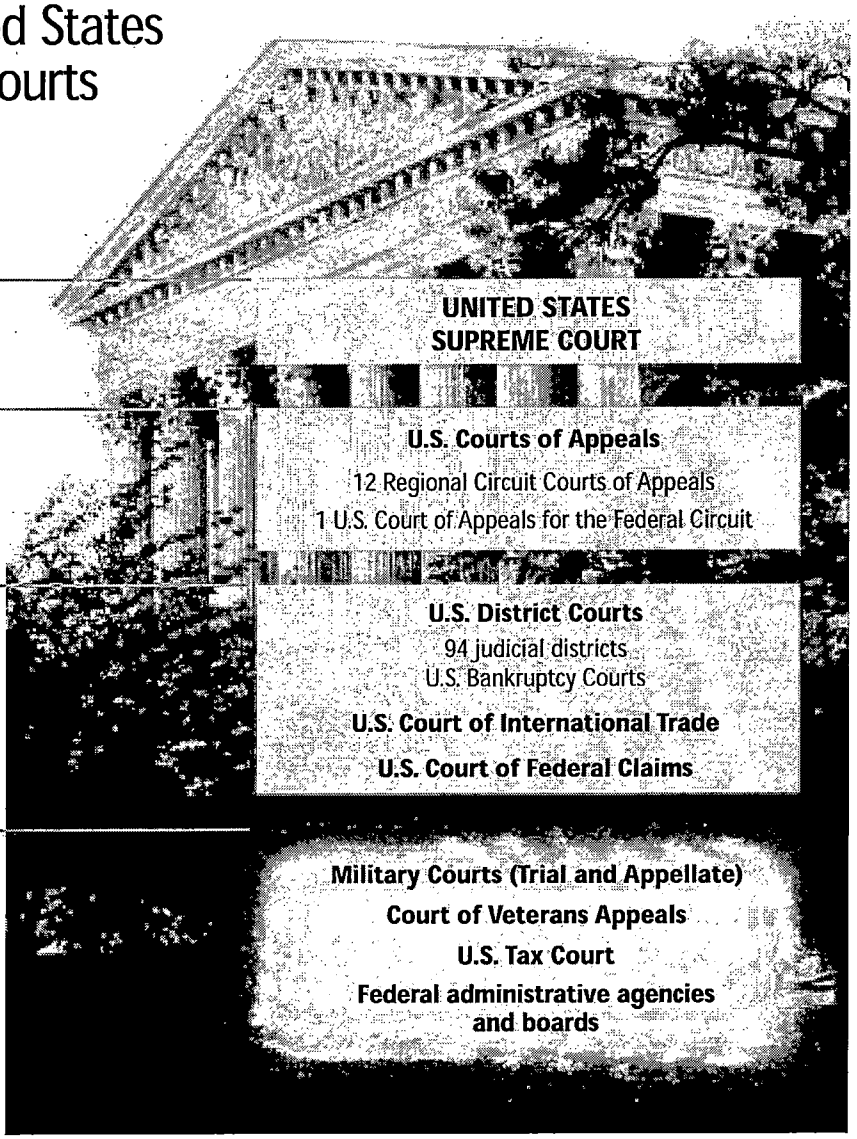
Appellate Courts

The 94 judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

United States Supreme Court

The United States Supreme Court consists of the Chief Justice of the United States and eight associate justices. At its discretion, and within certain guidelines established by Congress, the Supreme Court each year hears a limited number of the cases it is asked to decide. Those cases may begin in the federal or state courts, and they usually involve important questions about the Constitution or federal law.

The United States Federal Courts



The Jurisdiction of the Federal Courts

Before a federal court can hear a case, or "exercise its jurisdiction," certain conditions must be met. First, under the Constitution, federal courts exercise only "judicial" powers. This means that federal judges may interpret the law only through the resolution of actual legal disputes, referred to in Article III of the Constitution as "Cases or Controversies." A court cannot attempt to correct a problem on its own initiative, or to answer a hypothetical legal question.

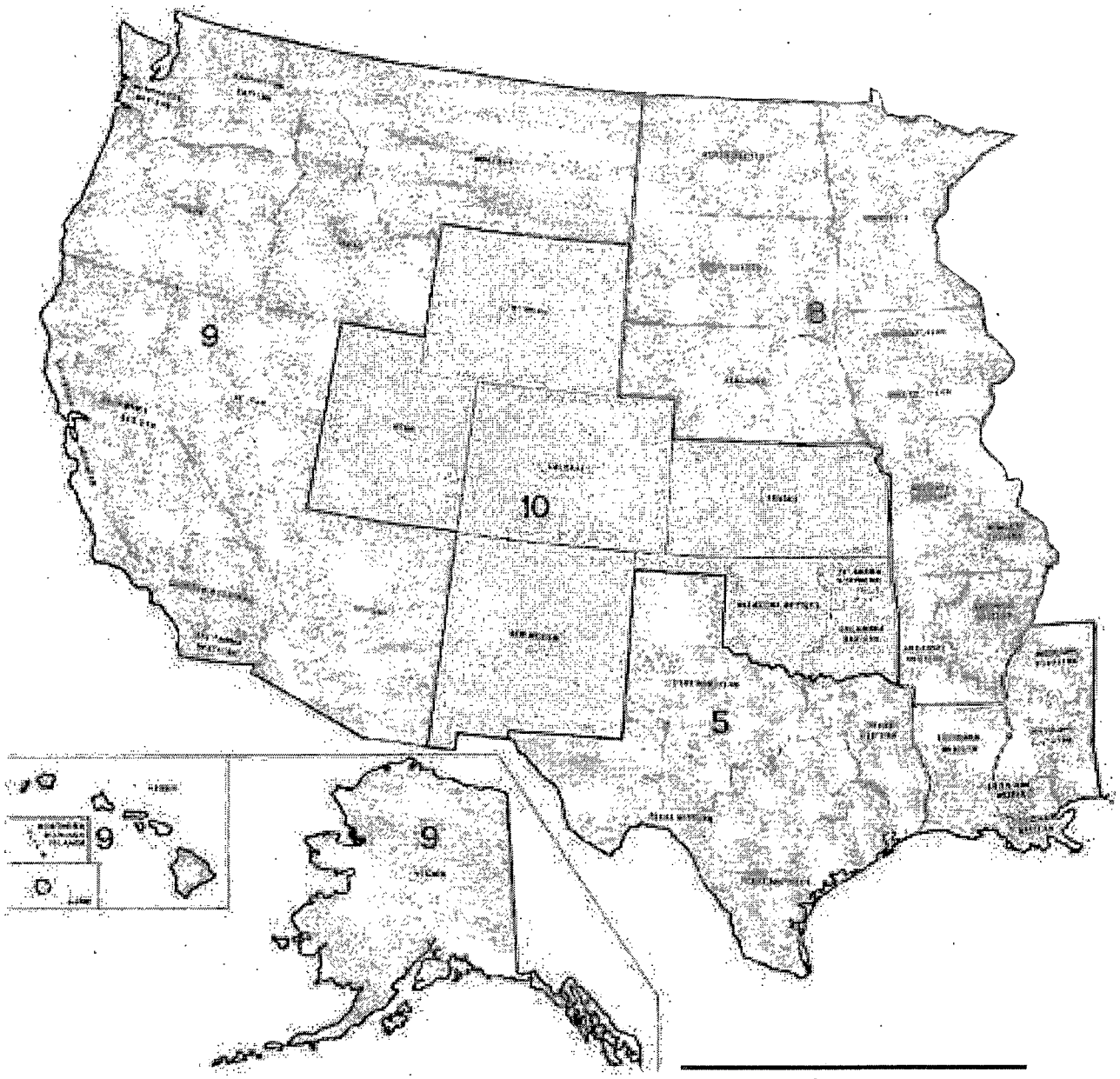
Second, assuming there is an actual case or controversy, the plaintiff in a federal lawsuit also must have legal "standing" to ask the court for a decision. That means the plaintiff must have been aggrieved, or legally harmed in some way, by the defendant.

A court cannot attempt to correct a problem on its own initiative, or to answer a hypothetical legal question.

Third, the case must present a category of dispute that the law in question was designed to address, and it must be a complaint that the court has the power to remedy. In other words, the court must be authorized, under the Constitution or a federal law, to hear the case and grant appropriate relief to the plaintiff. Finally, the case cannot be "moot," that is, it must present an ongoing problem for the court to resolve. The federal courts, thus, are courts of "limited" jurisdiction because they may only decide certain types of cases as provided by Congress or as identified in the Constitution.

Although the details of the complex web of federal jurisdiction that Congress has given the federal courts is beyond the scope of this brief guide, it is important to understand that there are two main sources of the cases coming before the federal courts: "federal question" jurisdiction, and "diversity" jurisdiction.

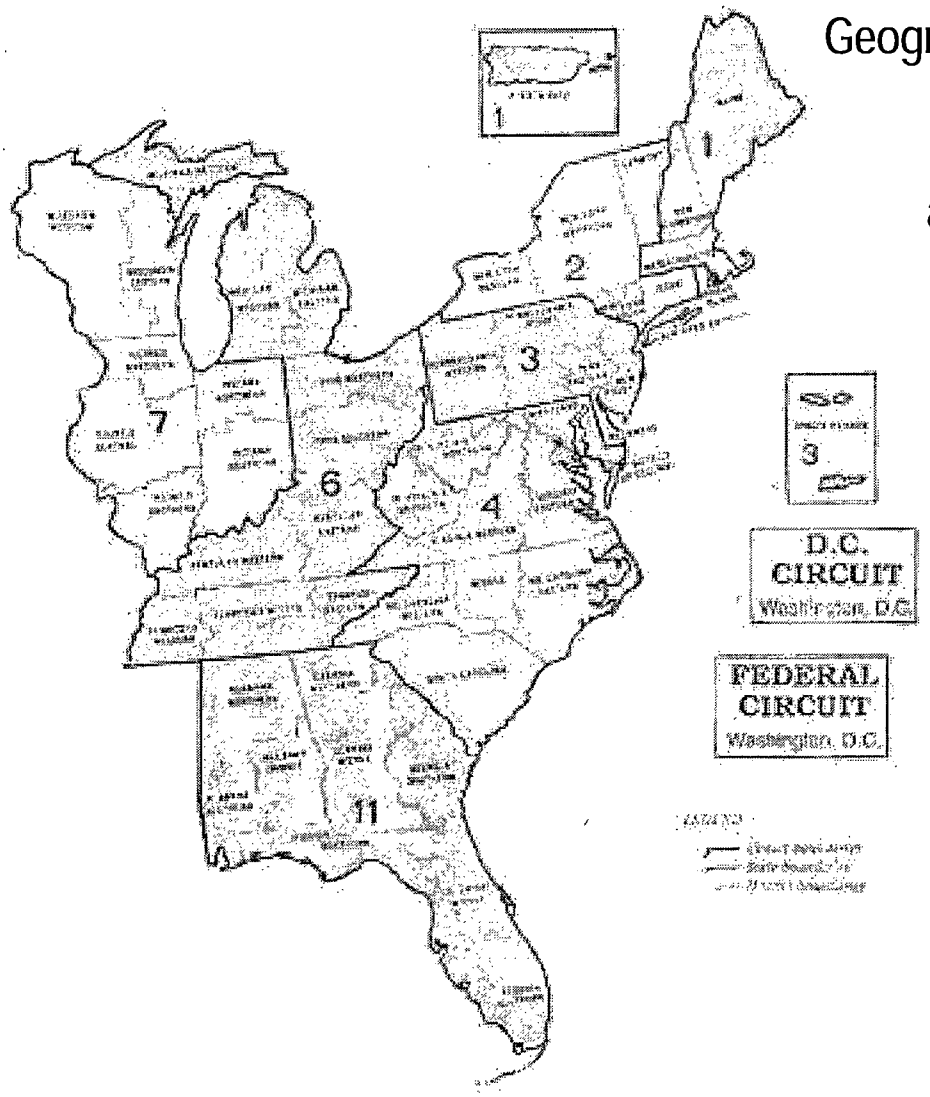
In general, federal courts may decide cases that involve the United States government, the United States Constitution or federal laws, or controversies between states or between the United States and foreign governments. A case that raises such a "federal question" may be filed in federal court. Ex-



amples of such cases might include a claim by an individual for entitlement to money under a federal government program such as Social Security, a claim by the government that someone has violated federal laws, or a challenge to actions taken by a federal agency.

A case also may be filed in federal court based on the "diversity of citizenship" of the litigants, such as between citizens of different states, or between United States citizens and those of another country. To ensure fairness to the out-of-state litigant, the Constitution provides that such cases may be heard in a federal court. An important limit to diversity jurisdiction is

Geographic Boundaries of United States Courts of Appeals and United States District Courts

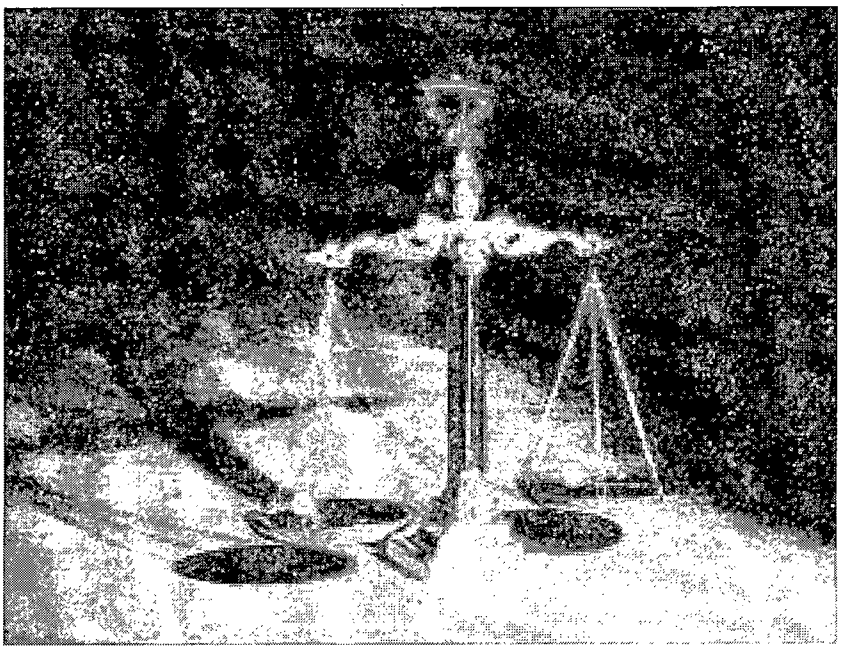


that only cases involving more than $75,000 in potential damages may be filed in a federal court. Claims below that amount may only be pursued in state court. Moreover, any diversity jurisdiction case regardless of the amount of money involved may be brought in a state court rather than a federal court.

Federal courts also have jurisdiction over all bankruptcy matters, which Congress has determined should be addressed in federal courts rather than the state courts. Through the bankruptcy process, individuals or businesses that can no longer pay their creditors may either seek a court-supervised

liquidation of their assets, or they may reorganize their financial affairs and work out a plan to pay off their debts.

Although federal courts are located in every state, they are not the only forum available to potential litigants. In fact, the great majority of legal disputes in American courts are addressed in the separate state court systems. For example, state courts have jurisdiction over virtually all divorce and child custody matters, probate and inheritance issues, real estate questions, and juvenile matters, and they handle most criminal cases, contract disputes, traffic violations, and personal injury cases. In addition, certain categories of legal disputes may be resolved in special courts or entities that are part of the federal executive or legislative branches, and by state and federal administrative agencies.



United States Judges

The work of the federal courts touches upon many of the most significant issues affecting the American people, and federal judges exercise wide authority and discretion in the cases over which they preside. This section discusses how federal judges are chosen, and provides basic information on judicial compensation, ethics, and the role of senior and recalled judges.

Appointment and Compensation

Justices of the Supreme Court, judges of the courts of appeals and the district courts, and judges of the Court of International Trade, are appointed under Article III of the Constitution by the President of the United States with the advice and consent of the Senate. Article III judges are appointed for life, and they can only be removed through the impeachment process. Although there are no special qualifications to become a judge of these courts, those who are nominated are typically very accomplished private or government attorneys, judges in state courts, magistrate judges or bankruptcy judges, or law professors. The judiciary plays no role in the nomination or confirmation process.

CODE OF CONDUCT FOR UNITED STATES JUDGES

A judge should uphold the integrity and independence of the judiciary.

A judge should avoid impropriety and the appearance of impropriety in all activities.

A judge should perform the duties of the office impartially and diligently.

A judge may engage in extra-judicial activities to improve the law, the legal system, and the administration of justice.

A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.

A judge should regularly file reports of compensation received for law-related and extra-judicial activities.

A judge should refrain from political activity.

Bankruptcy judges are judicial officers of the district courts and are appointed by the courts of appeals for 14-year terms. Magistrate judges are judicial officers of the district courts and are appointed by the judges of the district court for eight-year terms. The President and the Senate play no role in the selection of bankruptcy and magistrate judges. Judges of the Court of Federal Claims are appointed for terms of 15 years by the President with the advice and consent of the Senate.

Each court in the federal system has a chief judge who, in addition to hearing cases, has administrative responsibilities relating to the operation of the court. The chief judge is normally the judge who has served on the court the longest. Chief district and court of appeals judges must be under age 65 to be designated as chief judge. They may serve for a maximum of seven years and may not serve as chief judge beyond the age of 70.

All federal judges receive salaries and benefits that are set by Congress. Judicial salaries are roughly equal to salaries of Members of Congress.

Judicial Ethics

Federal judges abide by the Code of Conduct for United States Judges, a set of ethical principles and guidelines adopted by the Judicial Conference of the United States. The Code of Conduct provides guidance for judges on issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities, and the avoidance of impropriety or even its appearance.

Judges may not hear cases in which they have either personal knowledge of the disputed facts, a personal bias concerning a party to the case, earlier involvement in the case as a lawyer, or a financial interest in any party or subject matter of the case.

Many federal judges devote time to public service and educational activities. They have a distinguished history of service to the legal profession through their writing, speaking, and teaching. This important role is recognized in the Code of Conduct, which encourages judges to engage in activities to improve the law, the legal system, and the administration of justice.

Senior and Recalled Judges

Court of appeals, district court, and Court of International Trade judges have life tenure, and they may retire if they are at least 65 years old and meet certain years of service requirements. Most Article III judges who are eligible to retire decide to continue to hear cases on a full or part-time basis as "senior judges." Retired bankruptcy, magistrate, and Court of Federal Claims judges also may be "recalled" to active service. Without the efforts of senior and recalled judges, the judiciary would need many more judges to handle its cases. Senior judges, for example, typically handle about 15-20% of the appellate and district court workloads.

Senior judges typically handle about 15–20% of the appellate and district court workloads.

The Federal Judicial Process in Brief

This section describes three key features of the federal judicial system and gives an overview of the process in criminal cases, civil cases, and bankruptcy proceedings. Also included are brief descriptions of jury service and selection procedures and the appeals process.

An Adversarial System

The litigation process in United States courts is referred to as an "adversarial" system because it relies on the litigants to present their dispute before a neutral fact-finder. According to American legal tradition, inherited from the English common law, the clash of adversaries before the court is most likely to allow the jury or judge to determine the truth and resolve the dispute at hand. In some other legal systems, judges or other court officials investigate and assist the parties to find relevant evidence or obtain testimony from witnesses. In the United States, the work of collecting evidence and preparing to present it to the court is accomplished by the litigants and their attorneys, normally without assistance from the court.

Fees and the Costs of Litigation

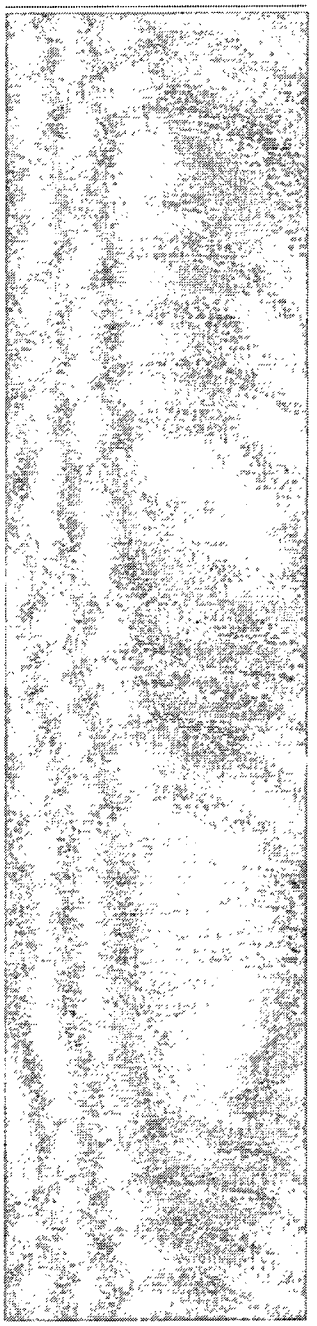
Another characteristic of the American judicial system is that litigants typically pay their own court costs and attorneys fees whether they win or lose. The federal courts charge fees that are mostly set by Congress. For example, it costs $150 to file a civil case. Other costs of litigation, such as attorneys and experts fees, are more substantial. In criminal cases the government pays the costs of investigation and prosecution. The government also provides a lawyer without cost for any criminal defendant who is unable to afford one. In civil cases, plaintiffs who cannot afford to pay court fees may seek permission from the court to proceed without paying those fees.

Procedural Rules for Conducting Litigation

There are federal rules of evidence, and rules of civil, criminal, bankruptcy and appellate procedure that must be followed in the federal courts. They are designed to promote simplicity, fairness, the just determination of litigation, and the elimination of unjustifiable expense and delay. The rules are

drafted by committees of judges, lawyers, and professors appointed by the Chief Justice. They are published widely by the Administrative Office for public comment, approved by the Judicial Conference of the United States, and promulgated by the Supreme Court. The rules become law unless the Congress votes to reject or modify them.

To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.



Civil Cases

A federal civil case involves a legal dispute between two or more parties. To begin a civil lawsuit in federal court, the plaintiff files a complaint with the court and "serves" a copy of the complaint on the defendant. The complaint describes the plaintiff's injury, explains how the defendant caused the injury, and asks the court to order relief. A plaintiff may seek money to compensate for the injury, or may ask the court to order the defendant to stop the conduct that is causing the harm. The court may also order other types of relief, such as a declaration of the legal rights of the plaintiff in a particular situation.

To prepare a case for trial, the litigants may conduct "discovery." In discovery, the litigants must provide information to each other about the case, such as the identity of witnesses and copies of any documents related to the case. The purpose of discovery is to prepare for trial by requiring the litigants to assemble their evidence and prepare to call witnesses. Each side also may file requests, or "motions," with the court seeking rulings on the discovery of evidence, or on the procedures to be followed at trial.

One common method of discovery is the deposition. In a deposition, a witness is required to answer under oath questions about the case asked by the lawyers in the presence of a court reporter. The court reporter is a person specially trained to record all testimony and produce a word-for-word account called a transcript.

To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute. In particular, the courts encourage the use of mediation, arbitration, and other forms of alternative dispute resolution, or "ADR," designed to produce an early resolution of a dispute without the need for trial or other court proceedings. As a result, litigants often decide to resolve a civil lawsuit with an agreement known as a "settlement."

If a case is not settled, the court will schedule a trial. In a wide variety of civil cases, either side is entitled under the Constitution to request a jury trial. If the parties waive their right to a jury, then the case will be heard by a judge without a jury.

At a trial, witnesses testify under the supervision of a judge. By applying rules of evidence, the judge determines which information may be presented in the courtroom. To ensure that witnesses speak from their own knowledge and do not change their story based on what they hear another witness say, witnesses are kept out of the courtroom until it is time for them to testify. A court reporter keeps a record of the trial proceedings. A deputy clerk of court also keeps a record of each person who testifies and marks for the record any documents, photographs, or other items introduced into evidence.

As the questioning of a witness proceeds, the opposing attorney may object to a question if it invites the witness to say something that is not based on the witness's personal knowledge, is unfairly prejudicial, or is irrelevant to the case. The judge rules on the objection, generally by ruling that it is either sustained or overruled. If the objection is sustained, the witness is not required to answer the question, and the attorney must move on to his next question. The court reporter records the objections so that a court of appeals can review the arguments later if necessary.

At the conclusion of the evidence, each side gives a closing argument. In a jury trial, the judge will explain the law that is relevant to the case and the decisions the jury needs to make. The jury generally is asked to determine whether the defendant is responsible for harming the plaintiff in some way, and then to determine the amount of damages that the defendant will be required to pay. If the case is being tried before a judge without a jury, known as a "bench" trial, the judge will decide these issues. In a civil case the plaintiff must convince the jury by a "preponderance of the evidence" (i.e., that it is more likely than not) that the defendant is responsible for the harm the plaintiff has suffered.

Criminal Cases

The judicial process in a criminal case differs from a civil case in several important ways. At the beginning of a federal criminal case, the principal actors are the U.S. attorney (the prosecutor) and the grand jury. The U.S. attorney represents the United States in most court proceedings, including all criminal prosecutions. The grand jury reviews evidence presented by the U.S. attorney and decides whether there is sufficient evidence to require a defendant to stand trial.

After a person is arrested, a pretrial services or probation officer of the court immediately interviews the defendant and conducts an investigation of the defendant's background. The information obtained by the pretrial services or probation office will be used to help a judge decide whether to release the defendant into the community before trial, and whether to impose conditions of release.

The standard of proof in a criminal trial is proof "beyond a reasonable doubt," which means the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime.

At an initial appearance, a judge advises the defendant of the charges filed, considers whether the defendant should be held in jail until trial, and determines whether there is probable cause to believe that an offense has been committed and the defendant has committed it. Defendants who are unable to afford counsel are advised of their right to a court-appointed attorney. The court may appoint either a federal public defender or a private attorney who has agreed to accept such appointments from the court. In either type of appointment, the attorney will be paid by the court from funds appropriated by Congress. Defendants released into the community before trial may be required to obey certain restrictions, such as home confinement or drug testing, and to make periodic reports to a pretrial services officer to ensure appearance at trial.

The defendant enters a plea to the charges brought by the U.S. attorney at a hearing known as an arraignment. Most defendants — more than 90% — plead guilty rather than go to trial. If a defendant pleads guilty in return for the government agreeing to drop certain charges or to recommend a lenient sentence, the agreement often is called a "plea bargain." If the defendant pleads guilty, the judge may impose a sentence at that time, but more commonly will schedule a hearing to determine the sentence at a later date. In most felony cases the judge waits for the results of a presentence report, prepared by the court's probation office, before imposing sentence. If the defendant pleads not guilty, the judge will proceed to schedule a trial.

Criminal cases include a limited amount of pretrial discovery proceedings similar to those in civil cases, with substantial restrictions to protect the identity of government informants and to prevent intimidation of witnesses. The attorneys also may file motions, which are requests for rulings by the court before the trial. For example, defense attorneys often file a motion to suppress evidence, which asks the court to exclude from the trial evidence that the defendant believes was obtained by the government in violation of the defendant's constitutional rights.

In a criminal trial, the burden of proof is on the government. Defendants do not have to prove their innocence. Instead, the government must provide evidence to convince the jury of the defendant's guilt. The standard of proof in a criminal trial is proof "beyond a reasonable doubt," which means the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime.

If a defendant is found not guilty, the defendant is released and the government may not appeal. Nor can the person be charged again with the same crime in a federal court. The Constitution prohibits "double jeopardy," or being tried twice for the same offense.

If the verdict is guilty, the judge determines the defendant's sentence according to special federal sentencing guidelines issued by the United States Sentencing Commission. The court's probation office prepares a report for the court that applies the sentencing guidelines to the individual defendant and the crimes for which he or she has been found guilty. During sentencing, the court may consider not only the evidence produced at trial, but all relevant information that may be provided by the pretrial services officer, the U.S. attorney, and the defense attorney. In unusual circumstances, the court may depart from the sentence calculated according to the sentencing guidelines.

A sentence may include time in prison, a fine to be paid to the government, and restitution to be paid to crime victims. The court's probation officers assist the court in enforcing any conditions that are imposed as part of a criminal sentence. The supervision of offenders also may involve services such as substance abuse testing and treatment programs, job counseling, and alternative detention options.

Jury Service

Perhaps the most important way individual citizens become involved in the federal judicial process is by serving as jurors. There are two types of juries serving distinct functions in the federal trial courts: trial juries (also known as petit juries), and grand juries.

Trial jury

A civil trial jury is typically made up of 6 to 12 persons. In a civil case, the role of the jury is to listen to the evidence presented at a trial, to decide whether the defendant injured the plaintiff or otherwise failed to fulfill a legal duty to the plaintiff, and to determine what the compensation or penalty should be. A criminal trial jury is usually made up of 12 members. Criminal juries decide whether the defendant committed the crime as charged. The sentence usually is set by a judge. Verdicts in both civil and criminal cases must be unanimous, although the parties in a civil case may agree to a non-unanimous verdict. A jury's deliberations are conducted in private, out of sight and hearing of the judge, litigants, witnesses, and others in the courtroom.

Grand jury

A grand jury, which normally consists of 16 to 23 members, has a more specialized function. The United States attorney, the prosecutor in federal criminal cases, presents evidence to the grand jury for them to determine whether there is "probable cause" to believe that an individual has committed a crime and should be put on trial. If the grand jury decides there is enough evidence, it will issue an indictment against the defendant. Grand jury proceedings are not open for public observation.

Jury selection procedures

Potential jurors are chosen from a jury pool generated by random selection of citizens' names from lists of registered voters, or combined lists of voters and people with drivers licenses, in the judicial district. The potential jurors complete questionnaires to help determine whether they are qualified to serve on a jury. After reviewing the questionnaires, the court randomly selects individuals to be summoned to appear for jury duty. These selection methods help ensure that jurors represent a cross section of the community, without regard to race, gender, national origin, age or political affiliation.

JUROR QUALIFICATIONS AND EXEMPTIONS

Qualifications to be a Juror

United States citizen

At least 18 years of age

Reside in the judicial district for one year

Adequate proficiency in English

No disqualifying mental or physical condition

Not currently subject to felony charges

Never convicted of a felony *(unless civil rights have been legally restored)*

Exemptions from Service

Active duty members of the armed forces

Members of police and fire departments

Certain public officials

Others based on individual court rules *(such as members of voluntary emergency service organizations and people who recently have served on a jury)*

Temporary Deferrals of Service

May be granted at the court's discretion on the grounds of "undue hardship or extreme inconvenience."

TERMS OF JURY SERVICE

Length of Service

Trial jury service varies by court

Some courts require service for one day or for the duration of one trial; others require service for a fixed term of up to one month (or more if a trial is longer).

Grand jury service may be up to 18 months.

Payment

$40 per day; in some instances jurors may also receive meal and travel allowances.

Employment Protections

By law, employers must allow employees time off (paid or unpaid) for jury service. The law also forbids any employer from firing, intimidating, or coercing any permanent employee because of their federal jury service.

Being summoned for jury service does not guarantee that an individual actually will serve on a jury. When a jury is needed for a trial, the group of qualified jurors is taken to the courtroom where the trial will take place. The judge and the attorneys then ask the potential jurors questions to determine their suitability to serve on the jury, a process called voir dire. The purpose of voir dire is to exclude from the jury people who may not be able to decide the case fairly. Members of the panel who know any person involved in the case, who have information about the case, or who may have strong prejudices about the people or issues involved in the case, typically will be excused by the judge. The attorneys also may exclude a certain number of jurors without giving a reason.

Bankruptcy Cases

Federal courts have exclusive jurisdiction over bankruptcy cases. This means that a bankruptcy case cannot be filed in a state court.

The primary purposes of the law of bankruptcy are: (1) to give an honest debtor a "fresh start" in life by relieving the debtor of most debts, and (2) to repay creditors in an orderly manner to the extent that the debtor has property available for payment.

A bankruptcy case normally begins by the debtor filing a petition with the bankruptcy court. A petition may be filed by an individual, by a husband and wife together, or by a corporation or other entity. The debtor is also required to file statements listing assets, income, liabilities, and the names and addresses of all creditors and how much they are owed. The filing of the petition automatically prevents, or "stays," debt collection actions against the debtor and the debtor's property. As long as the stay remains in effect, creditors cannot bring or continue lawsuits, make wage garnishments, or even make telephone calls demanding payment. Creditors receive notice from the clerk of court that the debtor has filed a bankruptcy petition. Some bankruptcy cases are filed to allow a debtor to reorganize and establish a plan to repay creditors, while other cases involve liquidation of the debtor's property. In many bankruptcy cases involving liquidation of the property of individual consumers, there is little or no money available from the debtor's estate to pay creditors. As a result, in these cases there are few issues or disputes, and the debtor is normally granted a "discharge" of most debts without objection. This means that the debtor will no longer be personally liable for repaying the debts.

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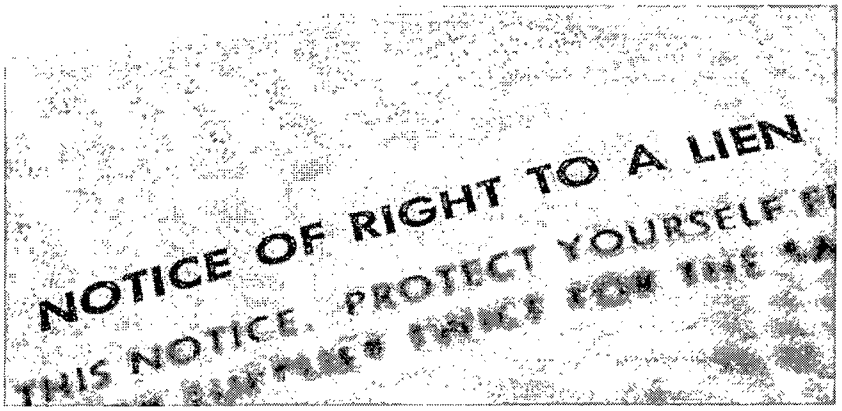


Some bankruptcy cases are filed to allow a debtor to reorganize and establish a plan to repay creditors, while other cases involve liquidation of the debtor's property.

In other cases, however, disputes may give rise to litigation in a bankruptcy case over such matters as who owns certain property, how it should be used, what the property is worth, how much is owed on a debt, whether the debtor should be discharged from certain debts, or how much money should be paid to lawyers, accountants, auctioneers, or other professionals. Litigation in the bankruptcy court is conducted in much the same way that civil cases are handled in the district court. There may be discovery, pretrial proceedings, settlement efforts, and a trial.

CATEGORIES OF BANKRUPTCY CASES

Chapter 7 (Liquidation)

Chapter 7 is designed to repay debts owed to creditors by selling most of the debtor's property. When a Chapter 7 case is filed, a trustee is appointed to take over the debtor's property for the benefit of the debtor's creditors. The debtor, however, is allowed to keep a limited amount of "exempt" property specified by law. The trustee then sells all non-exempt property of the debtor and distributes it to creditors in accordance with procedures set forth in the bankruptcy laws.

Chapter 13 (Debt Adjustment of An Individual)

In a Chapter 13 bankruptcy, the debtor may keep his or her property, but must repay creditors in installments taken from the debtor's future earnings. A debtor is required to submit a plan for approval by the court specifying how and when the debts will be repaid to creditors. A trustee is appointed in a Chapter 13 case, and a portion of the debtor's future income in most cases is paid to the trustee, who then pays creditors.

Chapter 11 (Reorganization)

Chapter 11 is designed mainly to give an ongoing business an opportunity to resolve financial problems through reorganization. A trustee is not normally appointed. The debtor is allowed to continue to operate the business under court supervision.

Chapter 12 (Debt Adjustment of a Family Farmer)

Chapter 12 is similar in many respects to Chapter 13, except that it is available only to family farmers.

Chapter 9 (Debt Adjustment of a Municipality)

Chapter 9 is available only to a political subdivision (i.e., a city, town, or county), public agency, or other instrumentality of a state.

The Appeals Process

The losing party in a decision by a trial court in the federal system normally is entitled to appeal the decision to a federal court of appeals. Similarly, a litigant who is not satisfied with a decision made by a federal administrative agency usually may file a petition for review of the agency decision by a court of appeals. Judicial review in cases involving certain federal agencies or programs — for example, disputes over Social Security benefits — may be obtained first in a district court rather than directly to a court of appeals.

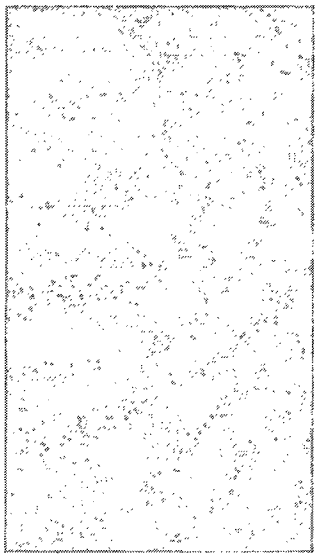
In a civil case either side may appeal the verdict. In a criminal case, the defendant may appeal a guilty verdict, but the government may not appeal if a defendant is found not guilty. Either side in a criminal case may appeal with respect to the sentence that is imposed after a guilty verdict.

In most bankruptcy courts, an appeal of a ruling by a bankruptcy judge may be taken to the district court. Several courts of appeals, however, have established a Bankruptcy Appellate Panel consisting of three bankruptcy judges to hear appeals directly from the bankruptcy courts. In either situation, the party that loses in the initial bankruptcy appeal may then appeal to the court of appeals.

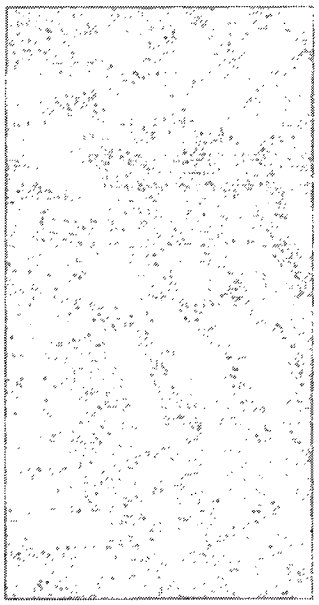
A litigant who files an appeal, known as an "appellant," must show that the trial court or administrative agency made a legal error that affected the decision in the case. The court of appeals makes its decision based on the record of the case established by the trial court or agency. It does not receive additional evidence or hear witnesses. The court of appeals also may review the factual findings of the trial court or agency, but typically may only overturn a decision on factual grounds if the findings were "clearly erroneous."

Appeals are decided by panels of three judges working together. The appellant presents legal arguments to the panel, in writing, in a document called a "brief." In the brief, the appellant tries to persuade the judges that the trial court made an error, and that its decision should be reversed. On the other hand, the party defending against the appeal, known as the "appellee," tries in its brief to show why the trial court decision was correct, or why any error made by the trial court was not significant enough to affect the outcome of the case.

In a criminal case the defendant may appeal a guilty verdict, but the government may not appeal if a defendant is found not guilty.



The court of appeals decision usually will be the final word in the case, unless it sends the case back to the trial court for additional proceedings, or the parties ask the U.S. Supreme Court to review the case.



Although some cases are decided on the basis of written briefs alone, many cases are selected for an "oral argument" before the court. Oral argument in the court of appeals is a structured discussion between the appellate lawyers and the panel of judges focusing on the legal principles in dispute. Each side is given a short time — usually about 15 minutes — to present arguments to the court.

The court of appeals decision usually will be the final word in the case, unless it sends the case back to the trial court for additional proceedings, or the parties ask the U.S. Supreme Court to review the case. In some cases the decision may be reviewed en banc, that is, by a larger group of judges (usually all) of the court of appeals for the circuit.

A litigant who loses in a federal court of appeals, or in the highest court of a state, may file a petition for a "writ of certiorari," which is a document asking the Supreme Court to review the case. The Supreme Court, however, does not have to grant review. The Court typically will agree to hear a case only when it involves an unusually important legal principle, or when two or more federal appellate courts have interpreted a law differently. There are also a small number of special circumstances in which the Supreme Court is required by law to hear an appeal. When the Supreme Court hears a case, the parties are required to file written briefs and the Court may hear oral argument.

Federal Judicial Administration

Individual Courts

The day-to-day responsibility for judicial administration rests with each individual court. Each court is given the responsibility by statute and administrative practice to appoint support staff, supervise spending, and manage the court's records.

The chief judge of each court plays a key leadership role in overseeing and coordinating the efficient operations of the court. Although the chief judge is generally responsible for overseeing day-to-day court administration, important policy decisions are made by the judges of the court working together.

The primary administrative officer of each court is the clerk of court. The clerk manages the court's non-judicial functions in accordance with policies set by the court, and reports directly to the court through its chief judge. Among the clerk's many functions are:

- Maintaining the records and dockets of the court
- Paying all fees, fines, costs and other monies collected into the U.S. Treasury
- Administering the court's jury system
- Providing interpreters and court reporters
- Sending official court notices and summons
- Providing courtroom support services

The judicial council is authorized by statute to issue orders to promote accountability and the "effective and expeditious administration of justice within its circuit."

The Circuit Judicial Councils

At the regional level, a "circuit judicial council" in each circuit oversees the administration of the courts located in its geographic circuit. Each circuit judicial council consists of the chief circuit judge, who serves as the chair, and an equal number of other circuit and district judges.

COURT SUPPORT STAFF

In addition to their personal chambers staff of law clerks and secretaries, judges rely on central court support staff to assist in the work of the court. These staff include:

Clerk
The chief administrative officer of the court, who keeps court records, handles court monies, and supervises court operations.

Circuit Executive
Performs a broad range of administrative tasks under the direction of the regional circuit judicial council.

Court Reporter
Makes a word-for-word record of court proceedings and prepares a transcript.

Court Librarian
Maintains court libraries and assists in meeting the information needs of the judges and lawyers.

Staff Attorneys and Pro Se Law Clerks
Assist the court with research and drafting of opinions.

Pretrial Services Officers and Probation Officers
Interview defendants before trial, investigate their backgrounds, file reports to assist judges in deciding on pretrial release and sentencing of convicted defendants, and supervise released defendants.

The judicial council oversees numerous aspects of court of appeals and district court operations. It is authorized by statute to issue orders to promote accountability and the "effective and expeditious administration of justice within its circuit." Aside from its fundamental responsibility to ensure that individual courts are operating effectively, the judicial council is responsible for reviewing local court rules for consistency with national rules of procedure, approving district court plans on topics such as equal employment opportunity and jury selection, and reviewing complaints of judicial misconduct. Each judicial council appoints a "circuit executive," who works closely with the chief circuit judge to coordinate a wide range of administrative matters in the circuit.

The Judicial Conference of the United States and National Administration

The Judicial Conference of the United States

The Judicial Conference of the United States is the federal courts' national policy-making body. The Chief Justice of the United States presides over the Judicial Conference, which consists of 26 other members including the chief judge of each court of appeals, one district court judge from each regional circuit, and the chief judge of the Court of International Trade. The Judicial Conference works through committees established along subject matter lines to recommend national policies and legislation on all aspects of federal judicial administration. Committees include budget, rules of practice and procedure, court administration and case management, criminal law, bankruptcy, judicial resources (judgeships and personnel matters), automation and technology, and codes of conduct.

The Administrative Office of the United States Courts

The Administrative Office provides a broad range of legislative, legal, financial, automation, management, administrative, and program support services to the federal courts. The Administrative Office, an agency within the judicial branch, is responsible for carrying out the policies of the Judicial Conference of the United States. A primary responsibility of the Administrative Office is to provide staff support and counsel to the Judicial Conference and its committees. The numerous responsibilities of the Administrative Office also include: collecting and reporting judicial branch statistics, devel-

oping budgets, conducting studies and assessments of judiciary operations and programs, providing technical assistance to the courts, developing training programs, and fostering communications within the judiciary and with other branches of government and the public.

The Director of the Administrative Office, who is appointed by the Chief Justice in consultation with the Judicial Conference, serves as the chief administrative officer of the federal courts. Congress has vested many of the judiciary's administrative responsibilities in the Director. Recognizing, however, that the courts can make better business decisions based on local needs, the Director in the last few years has delegated the responsibility for many administrative matters to the individual courts. This concept, known as "decentralization," allows each court to operate with considerable autonomy and sound management principles in accordance with policies and guidelines set at the regional and national level.

The Federal Judicial Center

The Federal Judicial Center provides training and research for the federal judiciary in a wide range of areas including court administration, case management, budget and finance, human resources, and court technology. It develops orientation and continuing education programs for judges and other court personnel, including seminars, curriculum materials for use by individual courts, monographs and manuals, and audio, video, and interactive media programs. The Center conducts studies of judiciary operations, and makes recommendations to the Judicial Conference for improvement of the administration and management of the federal courts. The Center's operations are overseen by a board of directors consisting of the Chief Justice, the Director of the Administrative Office, and seven judges chosen by the Judicial Conference.

Judicial Panel for Multidistrict Litigation

The Judicial Panel for Multidistrict Litigation has the authority to transfer cases that are pending in different districts but involve common questions of fact (for example, mass tort actions arising from airplane crashes, breast implants, or asbestos) to a single district for coordinated or consolidated pretrial proceedings. The Panel consists of seven court of appeals and district court judges designated by the Chief Justice.

"Decentralization" allows each court to operate with considerable autonomy and sound management principles in accordance with policies and guidelines set at the regional and national level.

United States Sentencing Commission

The U.S. Sentencing Commission establishes sentencing guidelines for the federal criminal justice system. The Commission also monitors the performance of probation officers with regard to sentencing recommendations, and has established a research program that includes a clearinghouse and information center on federal sentencing practices. The Sentencing Commission consists of a chairman, three vice chairs, and three other voting commissioners who are appointed for six-year terms by the President.

The Judiciary's Budget

In recognition of the constitutional separation of powers among the three branches of the federal government, Congress has given the judiciary authority to prepare and execute its own budget. The Administrative Office, in consultation with the courts and with various Judicial Conference committees, prepares a proposed budget for the judiciary for each fiscal year. The proposal is reviewed and approved by the Judicial Conference and is submitted to the Congress with detailed justifications. By law, the President must include in his budget to Congress the judiciary's budget proposal without change. The appropriation committees of the Congress conduct hearings at which judges and the Director of the Administrative Office frequently present and justify the judiciary's projected expenditures.

After Congress enacts a budget for the judiciary, the Judicial Conference approves a plan to spend the money, and the Administrative Office distributes funds directly to each court, operating unit, and program in the judiciary. Individual courts have considerable authority and flexibility to conduct their work, establish budget priorities, make sound business decisions, hire staff, and make purchases, consistent with Judicial Conference policies.

Commonly Asked Questions About the Federal Judicial Process

How do I file a civil case? Is there a charge?
A civil action is begun by the filing of a complaint. Parties beginning a civil action in a district court are required to pay a filing fee set by statute. The current fee is $150. A plaintiff who is unable to pay the fee may file a request to proceed in forma pauperis. If the request is granted, the fees are waived.

How do I file a criminal case?
Individuals may not file criminal charges in federal courts. A criminal proceeding is initiated by the government, usually through the U.S. attorney's office in coordination with a law enforcement agency. Allegations of criminal behavior should be brought to the local police, the FBI, or other appropriate law enforcement agency.

How do I file for bankruptcy protection? Is there a charge?
A bankruptcy case is begun by the filing of a petition. The required forms are available from the bankruptcy court clerk's office or at many stationery stores. There is a range of filing fees for bankruptcy cases, depending on the chapter of the bankruptcy code under which the case is filed. Chapter 7, the most common type filed by individuals, involves an almost complete liquidation of the assets of the debtor, as well as a discharge of most debts. There is a fee of $175 to file a case under Chapter 7.

How can I find a lawyer?

Local bar associations usually offer lawyer referral services, often without charge. The clerk's office in each district court usually is able to help find a referral service. But personnel in the clerk's office and other federal court employees are prohibited from providing legal advice to individual litigants.

Defendants in criminal proceedings have a right to a lawyer, and they are entitled to have counsel appointed at government expense if they are financially unable to obtain adequate representation by private counsel. The Criminal Justice Act requires a court determination that a person is financially eligible for court-appointed counsel. Defendants may be required to pay some of these costs.

There is no general right to free legal assistance in civil proceedings. Some litigants obtain free or low-cost representation through local bar association referrals, or through legal services organizations. Litigants in civil cases may also proceed pro se; that is, they may represent themselves without the assistance of a lawyer.

How are judges assigned to a particular court?

Each federal judge is commissioned to a specific court. Judges have no authority to hear cases in other courts unless they are formally designated to do so. Because of heavy caseloads in certain districts, judges from other courts are often asked to hear cases in these districts.

How are judges assigned to specific cases?

Judge assignment methods vary, but the basic considerations in making assignments are to assure an equitable distribution of caseload among judges and to avoid "judge shopping." The majority of courts use some variation of a random drawing under which each judge in a court receives roughly an equal caseload.

What is a U.S. Magistrate Judge?

Magistrate judges are appointed by the district court to serve for eight-year terms. Their duties fall into four general categories: conducting most of the initial proceedings in criminal cases (including search and arrest warrants, detention hearings, probable cause hearings, and appointment of attorneys); trial of certain criminal misdemeanor cases; trial of civil cases with the consent of the parties; and conducting a wide variety of other proceedings referred to them by district judges (including deciding motions, reviewing petitions filed by prisoners, and conducting pretrial and settlement conferences).

How can I check on the status of a case?

The clerk's office responds without charge to most inquiries on the status of a case. There is a fee to conduct certain searches and retrieve some information, and to make copies of court documents. Most federal courts have automated systems that allow for the search and retrieval of case-related information at the public counters in the courthouse, and electronically from other locations. In many bankruptcy and appellate courts, telephone information systems enable callers to obtain case information by touch-tone phone. Court dockets and opinions may also be available on the Internet. The federal judiciary's Internet homepage, www.uscourts.gov, includes links to individual court websites, as well as a directory of court electronic public access services. (This brochure also includes a directory of federal courts).

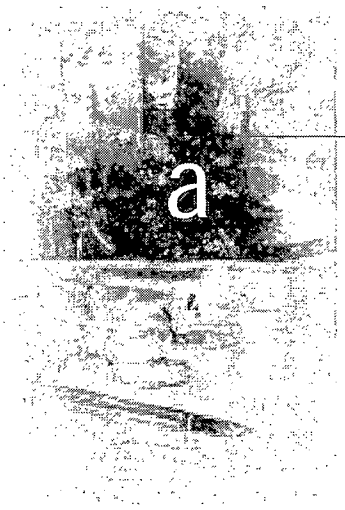
How quickly does a court reach a decision in a particular case?

All cases are handled as expeditiously as possible. The Speedy Trial Act of 1974 establishes special time requirements for the prosecution and disposition of criminal cases in district courts. As a result, courts must give the scheduling of criminal cases a higher priority than civil cases. The Act normally allows only 70 days from a defendant's arrest to the beginning of the trial.

There is no similar law governing civil trial scheduling, but on average the courts are able to resolve most civil cases in less than a year. Depending on its complexity, a particular case may require more or less time to address. There are numerous reasons why the progress of a particular case may be delayed, many of which are outside the court's control. Cases may be delayed because settlement negotiations are in progress, or because there are shortages in judges or available courtrooms.

How are staff hired in the federal courts?

The federal court system's personnel decisions are decentralized. This means that each court conducts its own advertising and hiring for job positions. Judges select and hire their own chambers staff. The clerk of court and certain other central court staff are hired by the court as a whole. Other court staff are hired by the clerk of court, who acts under the supervision of the court. Some employment opportunities are listed on the judiciary's Internet homepage, www.uscourts.gov, but often the clerk's office or Internet website of a particular court is the best source for a complete listing. The federal judiciary is committed to the national policy of ensuring equal employment opportunity to all persons.



Common Legal Terms

acquittal
Judgment that a criminal defendant has not been proved guilty beyond a reasonable doubt. In other words, a verdict of "not guilty."

affidavit
A written statement of facts confirmed by the oath of the party making it, before a notary or officer having authority to administer oaths.

affirmed
In the practice of the court of appeals, it means that the court of appeals has concluded that the lower court decision is correct and will stand as rendered by the lower court.

answer
The formal written statement by a defendant responding to a civil complaint and setting forth the grounds for his defense.

appeal
A request made after a trial by a party that has lost on one or more issues that a higher court (appellate court) review the trial court's decision to determine if it was correct. To make such a request is "to appeal" or "to take an appeal." One who appeals is called the "appellant;" the other party is the "appellee."

appellate
About appeals; an appellate court has the power to review the judgment of a lower court (trial court) or tribunal. For example, the U.S. circuit courts of appeals review the decisions of the U.S. district courts.

arraignment
A proceeding in which an individual who is accused of committing a crime is brought into court, told of the charges, and asked to plead guilty or not guilty.

b

bail
Security given for the release of a criminal defendant or witness from legal custody (usually in the form of money) to secure his appearance on the day and time set by the court.

bankruptcy
A legal process by which persons or businesses that cannot pay their debts can seek the assistance of the court in getting a fresh start. Under the protection of the bankruptcy court, debtors may discharge their debts, usually by paying a portion of each debt. Bankruptcy judges preside over these proceedings.

bench trial
Trial without a jury in which a judge decides which party prevails.

brief
A written statement submitted by each party in a case that explains why the court should decide the case, or particular issues in a case, in that party's favor.

C

chambers
A judge's office, typically including work space for the judge's law clerks and secretary.

capital offense
A crime punishable by death.

case law
The law as reflected in the written decisions of the courts.

chief judge
The judge who has primary responsibility for the administration of a court; chief judges are determined by seniority.

clerk of court
An officer appointed by the judges of the court to assist in managing the flow of cases through the court, maintain court records, handle financial matters, and provide other administrative support to the court.

common law
The legal system that originated in England and is now in use in the United States that relies on the articulation of legal principles in a historical succession of judicial decisions. Common law principles can be changed by legislation.

complaint
A written statement filed by the plaintiff that initiates a civil case, stating the wrongs allegedly committed by the defendant and requesting relief from the court.

contract
An agreement between two or more persons that creates an obligation to do or not to do a particular thing.

conviction
A judgment of guilt against a criminal defendant.

counsel
Legal advice; a term also used to refer to the lawyers in a case.

court
Government entity authorized to resolve legal disputes. Judges sometimes use "court" to refer to themselves in the third person, as in "the court has read the briefs."

court reporter
A person who makes a word-for-word record of what is said in court, generally by using a stenographic machine, shorthand or audio recording, and then produces a transcript of the proceedings upon request.

damages
Money paid by defendants to successful plaintiffs in civil cases to compensate the plaintiffs for their injuries.

default judgment
A judgment rendered in favor of the plaintiff because of the defendant's failure to answer or appear to contest the plaintiff's claim.

defendant
In a civil case, the person or organization against whom the plaintiff brings suit; in a criminal case, the person accused of the crime.

deposition
An oral statement made before an officer authorized by law to administer oaths. Such statements are often taken to examine potential witnesses, to obtain discovery, or to be used later in trial. See **discovery**.

discovery
The process by which lawyers learn about their opponent's case in preparation for trial. Typical tools of discovery include depositions, interrogatories, requests for admissions, and requests for documents. All of these devices help the lawyer learn the relevant facts and collect and examine any relevant documents or other materials.

docket
A log containing the complete history of each case in the form of brief chronological entries summarizing the court proceedings.

en banc
"In the bench" or "as a full bench." Refers to court sessions with the entire membership of a court participating rather than the usual number. U.S. circuit courts of appeals usually sit in panels of three judges, but all the judges in the court may decide certain matters together. They are then said to be sitting "en banc" (occasionally spelled "in banc").

equitable
Pertaining to civil suits in "equity" rather than in "law." In English legal history, the courts of "law" could order the payment of damages and could afford no other remedy. See **damages.** A separate court of "equity" could order someone to do something or to cease to do something. See, e.g., **injunction.** In American jurisprudence, the federal courts have both legal and equitable power, but the distinction is still an important one. For example, a trial by jury is normally available in "law" cases but not in "equity" cases.

evidence
Information presented in testimony or in documents that is used to persuade the fact finder (judge or jury) to decide the case in favor of one side or the other.

f

federal public defender
An attorney employed by the federal courts on a full-time basis to provide legal defense to defendants who are unable to afford counsel. The judiciary administers the federal defender program pursuant to the Criminal Justice Act.

federal question jurisdiction
Jurisdiction given to federal courts in cases involving the interpretation and application of the U.S. Constitution, acts of Congress, and treaties.

felony
A serious crime carrying a penalty of more than a year in prison. See also **misdemeanor.**

file
To place a paper in the official custody of the clerk of court to enter into the files or records of a case.

g

grand jury
A body of 16-23 citizens who listen to evidence of criminal allegations, which is presented by the prosecutors, and determine whether there is probable cause to believe an individual committed an offense. See also **indictment** and **U.S. attorney.**

h

habeas corpus
A writ (court order) that is usually used to bring a prisoner before the court to determine the legality of his imprisonment. Someone imprisoned in state court proceedings can file a petition in federal court for a "writ of habeas corpus," seeking to have the federal court review whether the state has violated his or her rights under the U.S. Constitution. Federal prisoners can file habeas petitions as well. A writ of habeas corpus may also be used to bring a person in custody before the court to give testimony or to be prosecuted.

hearsay
Statements by a witness who did not see or hear the incident in question but heard about it from someone else. Hearsay is usually not admissible as evidence in court.

impeachment
1. The process of calling a witness's testimony into doubt. For example, if the attorney can show that the witness may have fabricated portions of his testimony, the witness is said to be "impeached;" 2. The constitutional process whereby the House of Representatives may "impeach" (accuse of misconduct) high officers of the federal government, who are then tried by the Senate.

indictment
The formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify having a trial; it is used primarily for felonies. See also **information.**

in forma pauperis
"In the manner of a pauper." Permission given by the court to a person to file a case without payment of the required court fees because the person cannot pay them.

information
A formal accusation by a government attorney that the defendant committed a misdemeanor. See also **indictment.**

injunction
A court order prohibiting a defendant from performing a specific act, or compelling a defendant to perform a specific act.

interrogatories
Written questions sent by one party in a lawsuit to an opposing party as part of pretrial discovery in civil cases. The party receiving the interrogatories is required to answer them in writing under oath.

issue
1. The disputed point between parties in a lawsuit; 2. To send out officially, as in a court issuing an order.

judge
An official of the judicial branch with authority to decide lawsuits brought before courts. Used generically, the term judge may also refer to all judicial officers, including Supreme Court justices.

judgment
The official decision of a court finally resolving the dispute between the parties to the lawsuit.

jurisdiction
1. The legal authority of a court to hear and decide a case; 2. The geographic area over which the court has authority to decide cases.

jury
The group of persons selected to hear the evidence in a trial and render a verdict on matters of fact. See also **grand jury**.

jury instructions
A judge's directions to the jury before it begins deliberations regarding the factual questions it must answer and the legal rules that it must apply.

jurisprudence
The study of law and the structure of the legal system.

lawsuit
A legal action started by a plaintiff against a defendant based on a complaint that the defendant failed to perform a legal duty which resulted in harm to the plaintiff.

litigation
A case, controversy, or lawsuit. Participants (plaintiffs and defendants) in lawsuits are called litigants.

m

magistrate judge
A judicial officer of a district court who conducts initial proceedings in criminal cases, decides criminal misdemeanor cases, conducts many pretrial civil and criminal matters on behalf of district judges, and decides civil cases with the consent of the parties.

misdemeanor
An offense punishable by one year of imprisonment or less. See also **felony**.

mistrial
An invalid trial, caused by fundamental error. When a mistrial is declared, the trial must start again with the selection of a new jury.

motion
A request by a litigant to a judge for a decision on an issue relating to the case.

n

nolo contendere
No contest. A plea of nolo contendere has the same effect as a plea of guilty, as far as the criminal sentence is concerned, but may not be considered as an admission of guilt for any other purpose.

O

opinion
A judge's written explanation of the decision of the court. Because a case may be heard by three or more judges in the court of appeals, the opinion in appellate decisions can take several forms. If all the judges completely agree on the result, one judge will write the opinion for all. If all the judges do not agree, the formal decision will be based upon the view of the majority, and one member of the majority will write the opinion. The judges who did not agree with the majority may write separately in dissenting or concurring opinions to present their views. A dissenting opinion disagrees with the majority opinion because of the reasoning and/or the principles of law the majority used to decide the case. A concurring opinion agrees with the decision of the majority opinion, but offers further comment or clarification or even an entirely different reason for reaching the same result. Only the majority opinion can serve as binding precedent in future cases. See also **precedent**.

oral argument
An opportunity for lawyers to summarize their position before the court and also to answer the judges' questions.

P

panel
1. In appellate cases, a group of judges (usually three) assigned to decide the case; 2. In the jury selection process, the group of potential jurors; 3. The list of attorneys who are both available and qualified to serve as court-appointed counsel for criminal defendants who cannot afford their own counsel.

party
One of the litigants. At the trial level, the parties are typically referred to as the plaintiff and defendant. On appeal, they are known as the appellant and appellee, or, in some cases involving administrative agencies, as the petitioner and respondent.

petit jury (or trial jury)
A group of citizens who hear the evidence presented by both sides at trial and determine the facts in dispute. Federal criminal juries consist of 12 persons. Federal civil juries consist of at least six persons. See also **jury** and **grand jury**.

petty offense
A federal misdemeanor punishable by six months or less in prison.

plaintiff
The person who files the complaint in a civil lawsuit.

plea
In a criminal case, the defendant's statement pleading "guilty" or "not guilty" in answer to the charges. See also **nolo contendere**.

pleadings
Written statements filed with the court which describe a party's legal or factual asser-

tions about the case.

precedent
A court decision in an earlier case with facts and legal issues similar to a dispute currently before a court. Judges will generally "follow precedent"—meaning that they use the principles established in earlier cases to decide new cases that have similar facts and raise similar legal issues. A judge will disregard precedent if a party can show that the earlier case was wrongly decided, or that it differed in some significant way from the current case.

procedure
The rules for conducting a lawsuit; there are rules of civil procedure, criminal procedure, evidence, bankruptcy, and appellate procedure.

presentence report
A report prepared by a court's probation officer, after a person has been convicted of an offense, summarizing for the court the background information needed to determine the appropriate sentence.

pretrial conference
A meeting of the judge and lawyers to plan the trial, to discuss which matters should be presented to the jury, to review proposed evidence and witnesses, and to set a trial schedule. Typically, the judge and the parties also discuss the possibility of settlement of the case.

pretrial services
A department of the district court that conducts an investigation of a criminal defendant's background in order to help a judge decide whether to release the defendant into the community before trial.

probation
1. A sentencing alternative to imprisonment in which the court releases convicted defendants under supervision of a probation officer, who makes certain that the defendant follows certain rules (e.g., gets a job, gets drug counseling, etc.); 2. A department of the court that prepares a presentence report.

probation officer
Officers of the probation office of a court. Probation officer duties include conducting presentence investigations, preparing presentence reports on convicted defendants, and supervising released defendants.

pro per
A slang expression sometimes used to refer to a pro se litigant. It is a corruption of the Latin phrase "in propria persona."

pro se
A Latin term meaning "on one's own behalf"; in courts, it refers to persons who present their own cases without lawyers.

prosecute
To charge someone with a crime. A prosecutor tries a criminal case on behalf of the government.

record
A written account of the proceedings in a case, including all pleadings, evidence, and exhibits submitted in the course of the case.

R

remand
The act of an appellate court sending a case to a lower court for further proceedings.

reverse
The act of an appellate court setting aside the decision of a trial court. A reversal is often accompanied by a remand to the lower court for further proceedings.

sentence
The punishment ordered by a court for a defendant convicted of a crime.

sentencing guidelines
A set of rules and principles established by the United States Sentencing Commission that trial judges use to determine the sentence for a convicted defendant.

S

service of process
The delivery of writs or summonses to the appropriate party.

settlement
Parties to a lawsuit resolve their dispute without having a trial. Settlements often involve the payment of compensation by one party in at least partial satisfaction of the other party's claims, but usually do not include the admission of fault.

sequester
To separate. Sometimes juries are sequestered from outside influences during their deliberations.

statute
A law passed by a legislature.

statute of limitations
A law that sets the deadline by which parties must file suit to enforce their rights. For example, if a state has a five year statute of limitations for breaches of contract, and John breached a contract with Susan on January 1, 1995, Susan must file her lawsuit by January 1, 2000. If the deadline passes, the "statute of limitations has run" and the party may be prohibited from bringing a lawsuit; i.e. the claim is "time-barred." Sometimes a party's attempt to

assert his or her rights will "toll" the statute of limitations, giving the party additional time to file suit.

subpoena
A command, issued under authority of a court or other authorized government entity, to a witness to appear and give testimony.

subpoena duces tecum
A command to a witness to appear and produce documents.

summary judgment
A decision made on the basis of statements and evidence presented for the record without a trial. It is used when it is not necessary to resolve any factual disputes in the case. Summary judgment is granted when—on the undisputed facts in the record—one party is entitled to judgment as a matter of law.

temporary restraining order
Prohibits a person from taking an action that is likely to cause irreparable harm. This differs from an injunction in that it may be granted immediately, without notice to the opposing party, and without a hearing. It is intended to last only until a hearing can be held. Sometimes referred to as a "T.R.O."

testimony
Evidence presented orally by witnesses during trials or before grand juries.

toll
See **statute of limitations**.

tort
A civil wrong or breach of a duty to another person. The "victim" of a tort may be entitled to sue for the harm suffered. Victims of crimes may also sue in tort for the wrongs done to them. Most tort cases are handled in state court, except when the tort occurs on federal property (e.g., a military base), when the government is the defendant, or when there is diversity of citizenship between the parties.

transcript
A written, word-for-word record of what was said, either in a proceeding such as a trial, or during some other formal conversation, such as a hearing or oral deposition.

trustee
In a bankruptcy case, a person appointed to represent the interests of the bankruptcy estate and the unsecured creditors. The trustee's responsibilities

may include liquidating the property of the estate, making distributions to creditors, and bringing actions against creditors or the debtor to recover property of the bankruptcy estate.

uphold
The appellate court agrees with the lower court decision and allows it to stand. See **affirmed**.

U

U.S. Attorney
A lawyer appointed by the President in each judicial district to prosecute and defend cases for the federal government. The U.S. Attorney employs a staff of Assistant U.S. Attorneys who appear as the government's attorneys in individual cases.

venue
The geographical location in which a case is tried.

V

verdict
The decision of a trial jury or a judge that determines the guilt or innocence of a criminal defendant, or that determines the final outcome of a civil case.

voir dire
The process by which judges and lawyers select a trial jury from among those eligible to serve, by questioning them to make certain that they would fairly decide the case. "Voir dire" is a phrase meaning "to speak the truth."

warrant
A written order authorizing official action by law enforcement officials, usually directing them to arrest the individual named in the warrant. A search warrant orders that a specific location be searched for items, which if found, can be used in court as evidence.

W

witness
A person called upon by either side in a lawsuit to give testimony before the court or jury.

writ
A formal written command or order, issued by the court, requiring the performance of a specific act.

writ of certiorari
An order issued by the U.S. Supreme Court directing the lower court to transmit records for a case which it will hear on appeal.

SOURCES OF ADDITIONAL

United States District Courts

STATE	District	Number of Authorized Judgeships	Location
Alabama	Northern district	7	Birmingham, AL 35203
	Middle district	3	Montgomery, AL 36101
	Southern district	3	Mobile, AL 36602
Alaska		3	Anchorage, AK 99513
Arizona		9	Phoenix, AZ 85025
Arkansas	Eastern district	5	Little Rock, AR 72203
	Western district	3	Fort Smith, AR 72902
California	Northern district	14	San Francisco, CA 94102
	Eastern district	6	Sacramento, CA 95814
	Central district	27	Los Angeles, CA 90012
	Southern district	8	San Diego, CA 92189
Colorado		7	Denver, CO 80294
Connecticut		8	New Haven, CT 06510
Delaware		4	Wilmington, DE 19801
District of Columbia		15	Washington, DC 20001
Florida	Northern district	4	Tallahassee, FL 32301
	Middle district	11	Jacksonville, FL 32201
	Southern district	17	Miami, FL 33128
Georgia	Northern district	11	Atlanta, GA 30335
	Middle district	4	Macon, GA 31202
	Southern district	3	Savannah, GA 31412
Guam		1	Agana, GU 96910
Hawaii		3	Honolulu, HI 96850
Idaho		2	Boise, ID 83724
Illinois	Northern district	22	Chicago, IL 60604
	Southern district	3	East St. Louis, IL 62202
	Central district	3	Springfield, IL 62705
Indiana	Northern district	5	South Bend, IN 46601
	Southern district	5	Indianapolis, IN 46204
Iowa	Northern district	2	Cedar Rapids, IA 52401
	Southern district	3	Des Moines, IA 50309
Kansas		5	Wichita, KS 67202
Kentucky	Eastern district	5	Lexington, KY 40596
	Western district	4	Louisville, KY 40202
	Eastern and Western	1	
Louisiana	Eastern district	13	New Orleans, LA 70130
	Middle district	2	Baton Rouge, LA 70821
	Western district	7	Shreveport, LA 71101
Maine		3	Portland, ME 04101
Maryland		10	Baltimore, MD 21201
Massachusetts		13	Boston, MA 02109
Michigan	Eastern district	15	Detroit, MI 48226
	Western district	4	Grand Rapids, MI 49503
Minnesota		7	St. Paul, MN 55101
Mississippi	Northern district	3	Oxford, MS 38655
	Southern district	6	Jackson, MS 39201
Missouri	Eastern district	6	St. Louis, MO 63101
	Western district	5	Kansas City, MO 64106
	Eastern and Western	2	

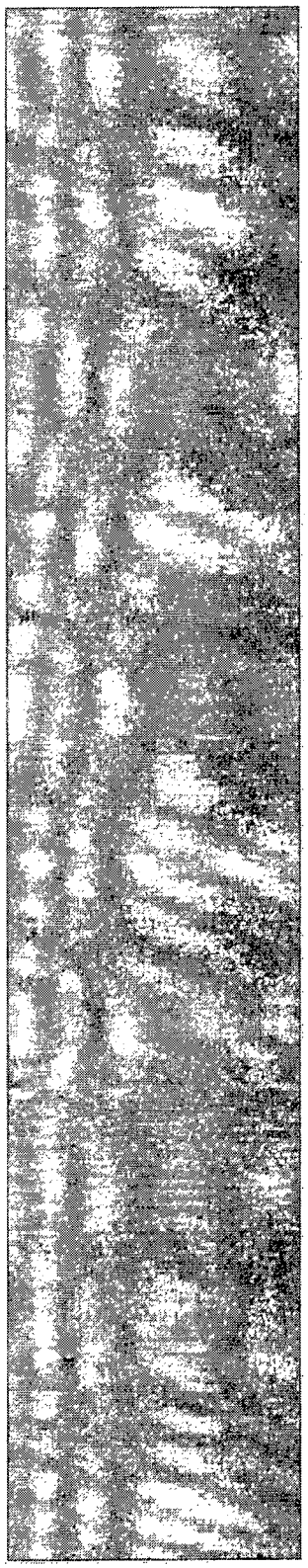
Resources

United States District Courts (cont'd)

STATE	District	Number of Authorized Judgeships	Location
Montana		3	Billings, MT 59101
Nebraska		3	Omaha, NE 68101
Nevada		5	Las Vegas, NV 89101
New Hampshire		3	Concord, NH 03301
New Jersey		17	Newark, NJ 07102
New Mexico		6	Albuquerque, NM 87103
New York	Northern district	4	Syracuse, NY 13261
	Eastern district	15	Brooklyn, NY 11201
	Southern district	28	New York, NY 10007
	Western district	4	Buffalo, NY 14202
North Carolina	Eastern district	4	Raleigh, NC 27611
	Middle district	4	Greensboro, NC 27402
	Western district	3	Asheville, NC 28801
North Dakota		2	Bismarck, ND 58502
N. Mariana Islands		1	Saipan, N. Mar. I. 96950
Ohio	Northern district	11	Cleveland, OH 44114
	Southern district	8	Columbus, OH 43215
Oklahoma	Northern district	3	Tulsa, OK 74103
	Eastern district	1	Muskogee, OK 74401
	Western district	6	Oklahoma City, OK 73102
	Northern, Eastern, and Western	1	
Oregon		6	Portland, OR 97205
Pennsylvania	Eastern district	22	Philadelphia, PA 19106
	Middle district	6	Scranton, PA 18501
	Western district	10	Pittsburgh, PA 15230
Puerto Rico		7	Hato Rey, PR 00918
Rhode Island		3	Providence, RI 02903
South Carolina		10	Columbia, SC 29201
South Dakota		3	Sioux Falls, SD 57102
Tennessee	Eastern district	5	Knoxville, TN 37901
	Middle district	4	Nashville, TN 37203
	Western district	5	Memphis, TN 38103
Texas	Northern district	12	Dallas, TX 75242
	Southern district	19	Houston, TX 77208
	Eastern district	7	Tyler, TX 75702
	Western district	11	San Antonio, TX 8206
Utah		5	Salt Lake City, UT 84101
Vermont		2	Burlington, VT 05402
Virgin Islands		2	St. Thomas, V.I. 00801
Virginia	Eastern district	10	Alexandria, VA 22320
	Western district	4	Roanoke, VA 24006
Washington	Eastern district	4	Spokane, WA 99210
	Western district	7	Seattle, WA 98104
West Virginia	Northern district	3	Elkins, WV 26241
	Southern district	5	Charleston, WV 25329
Wisconsin	Eastern district	5	Milwaukee, WI 53202
	Western district	2	Madison, WI 53701
Wyoming		3	Cheyenne, WY 82001

United States Courts of Appeals

Court of Appeals	Districts Included in Circuit	Number of Authorized Judgeships	Location/Postal Address
Federal Circuit	United States	12	Washington, DC 20439
District of Columbia Circuit	District of Columbia	12	Washington, DC 20001
First Circuit	Maine Massachusetts New Hampshire Rhode Island Puerto Rico	6	Boston, MA 02109
Second Circuit	Connecticut New York Vermont	13	New York, NY 10007
Third Circuit	Delaware New Jersey Pennsylvania Virgin Islands	14	Philadelphia, PA 19106
Fourth Circuit	Maryland North Carolina South Carolina Virginia West Virginia	15	Richmond, VA 23219
Fifth Circuit	Louisiana Mississippi Texas	17	New Orleans, LA 70130
Sixth Circuit	Ohio Kentucky Michigan Tennessee	16	Cincinnati, OH 45202
Seventh Circuit	Illinois Indiana Wisconsin	11	Chicago, IL 60604
Eighth Circuit	Arkansas Iowa Minnesota Missouri Nebraska North Dakota South Dakota	11	St. Louis, MO 63101
Ninth Circuit	Alaska Arizona California Hawaii Idaho Montana Nevada Oregon Washington Guam N. Mariana Islands	28	San Francisco, CA 94101
Tenth Circuit	Colorado Kansas New Mexico Oklahoma Utah Wyoming	12	Denver, CO 80294
Eleventh Circuit	Alabama Florida Georgia	12	Atlanta, GA 30303



SOURCES OF ADDITIONAL INFORMATION

Publications

The Federal Courts and What They Do
(Federal Judicial Center, 1997)

Long Range Plan for the Federal Courts
(December 1995)

Judiciary website addresses

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

Federal Judicial Center
www.fjc.gov

About the Administrative Office of the United States Courts

Created by an Act of Congress in 1939, the Administrative Office of the U.S. Courts supports the work of the judicial branch. Its director, who serves as the chief administrative officer for the federal courts, is appointed by the Chief Justice of the United States in consultation with the Judicial Conference of the United States.

The Administrative Office provides staff support and counsel to the judiciary's policy-making body, the Judicial Conference of the United States, and its committees. It monitors and assesses judiciary operations and emerging issues, makes recommendations for new policies and programs, and implements and promotes the Judicial Conference's policies.

The Administrative Office develops programs, systems and methods to support and improve judicial administration. It provides a broad array of administrative, legal, technical, communications, and other services that support the operation of the federal appellate, district, and bankruptcy courts, and the defender services and probation and pretrial services programs. Among its many functions, the Administrative Office develops and administers the judiciary's budget; audits court financial records; manages the judiciary's payroll and human resources programs; collects and analyzes statistics to report on the business of the courts; manages the judiciary's automation and information technology programs; conducts studies and reviews of programs and operations; develops new business methods for the courts; provides training and technical assistance; issues manuals, directives, rules, and other publications; fosters and coordinates communications with the legislative and executive branches; and provides public information.

The Administrative Office's director has delegated to the individual courts many of his statutory administrative authorities. As a result, each court can plan, organize and manage its business activities and expenditures, consistent with policies and spending limits, to meet its particular needs. This decentralization of administrative authority benefits both the courts and the taxpayers because it reduces bureaucracy and encourages innovation and economy.

Facsimile Transmittal

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Number of Pages (including cover sheet): 4

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DATE: 8/31 # of pages including this sheet: 3

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- ☐ Ashley Cohen
- ☐ Kate Fernstrom
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Counsel's Office, White House
~~Kavanaugh, Brett~~
Kavanaugh, Brett

Subject Files

[Judges] Eastern District of Washington

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THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 2/5/2003

NAME OF CORRESPONDENT: Mary Place

SUBJECT: Rec. Lonny R. Suko for Distl. Ct of E. WA

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	1/8/2003	C		
	Brett	A				

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS:

ADDITIONAL CORRESPONDENTS: **MEDIA:**

REV_00457414

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

ID# 549848
PAGE 1

DATE RECEIVED: 02/04/2003

NAME OF CORRESPONDENT: THE HONORABLE MARY PLACE

SUBJECT: RECOMMENDATION FOR UNITED STATES MAGISTRATE LONNY R. SUKO FOR UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON POSITION

		ACTION		DISPOSITION		
ROUTE TO: OFFICE/AGENCY	**(STAFF NAME)**	**ACTION CODE**	**DATE YY/MM/DD**	**TYPE RESP**	**C D**	**COMPLETED YY/MM/DD**
COUNSEL TO THE PRESIDENT	ALBERTO GONZALES	ORG	2003/02/04			

ACTION COMMENTS

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS

ADDITIONAL CORRESPONDENTS: 0

MEDIA: LETTER

INDIVIDUAL CODES:

REPORT CODES:

USER CODE:

EXEC. OFC. PRESIDENT
COUNSEL TO THE PRESIDENT
2003 FEB -5 PM 5:34

SCANNED BY ORM

ACTION CODES:
A - APPROPRIATE ACTION
C - COMMENT/RECOMMENDETION
D - DRAFT RESPONSE
F - FURNISH FACT SHEET
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OUTGOING CORRESPONDENCE:
TYPE RESP = INITIALS OF SIGNER
CODE = A
COMPLETED = DATE OF OUTGOING

REFER QUESTIONS AND ROUTING UPDATES TO RECORDS MANAGEMENT (ROOM 72, OEOB) EXT-62590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 1/9/2003

NAME OF CORRESPONDENT: George Nethercutt

SUBJECT: **moving forward on Washington State commission**

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	12/14/2002	C		
	Brett	A				

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS:

ADDITIONAL CORRESPONDENTS: **MEDIA:**

Forward to Brett ?

RGE R. NETHERCUTT, JR.
5TH DISTRICT, WASHINGTON

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SUBCOMMITTEES:
AGRICULTURE
INTERIOR
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VICE CHAIRMAN

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Congress of the United States
House of Representatives
Washington, DC 20515–4705

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555 SOUTH MAIN STREET, SUITE C
COLVILLE, WA 99114
(509) 684–3481

www.house.gov/nethercutt (web)
www.house.gov/nethercutt/contact (e-mail)

December 14, 2002

The Honorable Patty Murray
United States Senate
173 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Maria Cantwell
United States Senate
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Murray and Cantwell:

As our letter dated October 17, 2002 indicated, there is a pending vacancy in the U.S. District Court for the Eastern District of Washington. On May 30, 2003, United States District Court Chief Judge William Fremming Nielsen intends to take senior status, and the Administration has asked our help in evaluating and identifying viable candidates to fill this position.

Since we have not heard from you, we plan to move forward with our suggestion and will create an advisory commission composed of six Eastern Washington residents - three Republicans and three Democrats - to recommend potential replacements for the position. The commission will be charged with selecting three exceptionally well-qualified candidates to recommend to the White House.

Best wishes.

Sincerely,

GEORGE R. NETHERCUTT, JR.
Representative in Congress

DOC HASTINGS
Representative in Congress

cc: Alberto R. Gonzales, Counsel to the President

EXEC. OFC. PRESIDENT
COUNSEL TO THE PRESIDENT
2003 JAN -9 PM 1:14

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Judges [Eismann, Daniel T.]

OA/NARA#: 1823/1741
9631

Box 31
Folder 15

REV_00457418

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Judges [Estrada, Miguel]

DOCUMENT: R23/1741
9631

Box 31
Folder 16

REV_00457419

GIBSON, DUNN & CRUTCHER LLP
A Registered Limited Liability Partnership
Including Professional Corporations
1050 Connecticut Avenue N.W.
Washington, District of Columbia 20036

TELEPHONE: (202) 955-8500
FACSIMILE: (202) 467-0539

FACSIMILE TRANSMISSION INFORMATION

May 21, 2002

TO:

Name:	Brett Kavanaugh	Company:	
Facsimile No.	(202) 456-1647	City:	Washington
Main No.	(202) 456-7984	State:	DC
Name:	Chris Bartolomucci	Company:	
Facsimile No.	(202) 456-1647	City:	Washington
Main No.	(202) 456-7963	State:	DC

FROM: Miguel A. Estrada Room: DC-9133 Direct Dial: (202) 955-8257

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 15, 2002

Miguel Estrada
Gibson Dunn & Crutcher
1050 Connecticut Ave NW # 900
Washington, DC 20036

Dear Mr. Estrada:

In connection with your nomination to the United States Court of Appeals for the D.C. Circuit, I write to request that you send the Judiciary Committee appeal recommendations, certiorari recommendations, and amicus recommendations you worked on while at the United States Department of Justice. If you do not have these documents in your possession, please advise where we may obtain them.

Sincerely,

PATRICK LEAHY
Chairman

Counsel's Office, White House

Kavanaugh, Brett

Subject File

Judges - Federal Circuit, Correspondence, Bar Association

OA/NARA #: 341 | 237
9122

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Kavanaugh, Brett

Judges [Filip, Mark Robert]

Subject Files

OA/NARA#: 1823/1741
9631

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Kavanaugh, Brett

Subject Files

Judges - First Year Judicial Appointment Statistics

OA/NARA: 1823/1741
9631

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REV_00457424

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Kavanaugh, Brett

Subject Files

Judges [Fischer, Nora Berry]

OA/NARA#: 1823/1741
9631

Box 31
Folder 20

Pietragallo, Bosick & Gordon

Attorneys at Law

Phone: (412) 263-1821 Fax: (412) 261-5295
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Nora Barry Fischer

NORA BARRY FISCHER is a partner at Pietragallo, Bosick & Gordon. She holds a Martindale Hubbell "AV" Rating. Ms. Fischer is also a Fellow of the American College of Trial Lawyers.

Ms. Fischer's practice includes product liability including toxic tort litigation; insurance and bad faith litigation; medical malpractice defense; insurance coverage interpretation and alternative dispute resolution. She has represented General Electric in both toxic tort and products cases for nearly 15 years.

Ms. Fischer is a trained mediator. She is also a former Dalkon Shield Referee. As Special Master, Court of Common Pleas, Allegheny County, she handles conciliations, non-jury and jury trials by consent of the parties. She has also served as Adjunct Settlement Judge, and Arbitrator, District Court for the Western District of Pennsylvania; and as a mediator through the West Virginia State Bar Association.

Ms. Fischer received her law degree from Notre Dame Law School and is a Magna Cum Laude graduate of St. Mary's College. She is admitted to practice in the state and corresponding federal courts of Illinois, Pennsylvania and West Virginia; and before the Supreme Court of the United States. She has acted as a National Institute of Trial Advocacy Instructor at both the University of Pittsburgh School of Law and at Duquesne University School of Law.

Ms. Fischer is the recipient of the 2001 Anne X. Alpern Award which was conferred on her by the PBA Commission on Women in the Profession in recognition of accomplishments in her legal career and in mentoring other women attorneys. She has held a number of posts in the local and state bar organizations. She is the current Vice President of the Academy of Trial Lawyers of Allegheny County and an active member of the Executive Women's Council of Pittsburgh and Insurance Professionals of Pittsburgh.

Recent seminar appearances include a presentation on Federal Practice and Procedure; the Code of Civility for Judges and Lawyers at the 2001 Allegheny County Bar Association Bench Bar Conference; ADR for the American Corporate Counsel Pittsburgh Chapter; contract negotiation for the Roentgen Ray Society of Pittsburgh and a Bad Faith Law Update for The Pennsylvania Bar Institute.

Counsel's Office, White House

Kavanaugh, Brett

Subject File

Judges - Focus Group

Box 31
Folder 21

OA/NARA #: 2175 / 2086
9795

Counsel's Office, White House
Kavanaugh, Brett

Subject File

Judges - Future Vacancy Resumes

OA/NARA #: 18231741
9631

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FACSIMILE COVER SHEET

TO:	**Brett Kavanaugh**
FAX NUMBER:	**202-456-1647**
FROM:	**Steve Colloton**
DATE:	**February 11, 2001**
PAGES:	**6 + cover sheet**

Counsel's Office, White House

Kavanaugh, Brett

Subject File

Judges - General History, Articles by Goldman

OA/NARA #: 2179/2090
9799

Box: 31
Folder: 23

Reagan's judicial legacy: completing the puzzle and summing up

During his two terms in office, Ronald Reagan appointed 47 per cent of the federal bench. His judicial legacy will be with us well into the next century.

by Sheldon Goldman

Ronald Reagan stepped down from the presidency on January 20, 1989, enormously popular and leaving office with a final approval rating exceeding every president since Franklin Roosevelt.[1] His popularity, no doubt, helped elect his vice-president, George Bush, to the presidency, thus continuing Republican domination of the White House. While it is too soon to tell what Reagan's place in history will be, it is appropriate to examine his presidential legacy. Like Franklin Roosevelt, Ronald Reagan saw the federal judiciary as crucial to achieving a major part of his presidential agenda and like Roosevelt, he also left his imprint on the judicial branch of government. It is the purpose of this article to examine several facets of that imprint with special attention to the last two years of Reagan's judicial appointments (previous articles focused on the major judicial appointment events of Reagan's first six years).[2]

In his two terms of office Ronald Reagan appointed three associate justices and one chief justice of the Supreme Court. To other Article III courts of general jurisdiction,[3] Reagan named 78 appeals court judges and 290 district court judges who were confirmed by the Senate (there were others nominated who were not confirmed). In total, Reagan filled 372 out of a total of 736 such positions.[4] It should be noted that while 372 represents slightly more than half the Article III judiciary, that figure overstates the number of individuals actually appointed because it includes the 18 appointments that were elevations to the appeals courts of district judges originally appointed by Reagan, and one appointment that was an elevation to the Supreme Court of an appeals judge (Antonin Scalia) earlier appointed by Reagan. Furthermore, that figure includes two who resigned, three who retired and two who died. Thus, when

U.S. District Judges George Marovich and Alfred Wolin were among the over 350 judges appointed by Ronald Reagan.

I would like to thank the Research Council and Dean Samuel F. Conti of the Graduate School of the University of Massachusetts at Amherst for a Faculty Fellowship Award which enabled me to conduct this research. I am also grateful to Senator Joseph Biden's staff at the Senate Judiciary Committee for their help and cooperation and to Assistant Attorney General Stephen J. Markman and his staff at the Office of Legal Policy for their assistance. All errors of fact and interpretation are mine alone.

1. Roberts, *Reagan's Final Rating is Best of Any President Since 40's*, NEW YORK TIMES, January 18, 1989, at A-1, A-14.

2. *See* Goldman, *Reaganizing the judiciary: the first term appointments*, 68 JUDICATURE 313 (1985); and *Reagan's second term judicial appointments: the battle at midway*, 70 JUDICATURE 324 (1987).

3. Note that this article only considers appointees to Article III courts of general jurisdiction and does not include appointees to such specialized courts as the Court of International Trade or the U.S. Court of Appeals for the Federal Circuit. The Article III courts of general jurisdiction confront the wide range of constitutional and statutory law issues that are of special interest for students of the judiciary and for administrations.

4. The figure of 736 was calculated as follows: According to FEDERAL COURT MANAGEMENT STATISTICS, 1987 (Washington, D.C.: Administrative Office of the United States Courts, 1988), at 167, there are 575 federal district court positions of which four are not lifetime positions (two judgeships are for the Virgin Islands, and one each for Guam and the Northern Mariana Islands). Thus we begin with 571 lifetime district court positions to which we add the 156 positions on the numbered courts of appeals and the District of Columbia circuit (see FEDERAL COURT MANAGEMENT STATISTICS, p. 29) and the 9 positions on the Supreme Court. In my previous article, *Reagan's second term judicial appointments, supra* n. 2 at 325, I inadvertently gave the incorrect figure of 741. Note that in 1984 Congress created 85 new judgeships—24 to the appeals courts and 61 to the district bench. Eight of the new district court judgeships, although lifetime appointments, were not permanent judgeships (that

Ronald Reagan left office in 1989, his judicial legacy literally was 346, or 47 per cent, of the judges in active service on Article III courts of general jurisdiction.

Judicial selection was not a low-profile activity during the Reagan era. This was especially true for the last half of Reagan's second term. Unlike his first six years, Reagan faced a Senate controlled by Democrats who used their clout to closely scrutinize nominations and even stop some dead in their tracks. Several nominees were controversial and during the 100th Congress (1987-88) five were eventually withdrawn and 16 (not all of them controversial) were not confirmed (see "controversial nominations," page 328). The most publicized and heated controversy was over the nomination of Robert H. Bork to the seat on the Supreme Court vacated by retiring Justice Lewis Powell. After a major media campaign (a first for a Supreme Court nomination) waged against Bork, intensive lobbying, and an unprecedented lengthy televised confirmation hearing before the Senate Judiciary Committee with the nominee extensively answering questions about Court cases and doctrines, the Bork nomination failed on a roll call vote in the Senate. President Reagan then announced his intention of nominating Douglas Ginsburg, like Bork, a former law professor and a Reagan appointee serving on the U.S. Court of Appeals for the District of Columbia Circuit. But revelations concerning his use of marijuana many years earlier resulted in such an outcry from conservatives that the nomination was never formally submitted to the Senate. On his third try to fill the vacancy, Reagan was more successful. Conservative Ninth Circuit Judge Anthony Kennedy was unanimously confirmed and took his seat on the Court on February 18, 1988.

That 1988 was a presidential election year also seemed to be a factor in the selection process. By August 1988, at least 20 nominations appeared stalled in the Senate. Republicans in turn began stalling the passage of legislation. Eventually a compromise was reached so that eight pending nominations to the district courts and two to the appeals courts of general jurisdiction were allowed through in October.

Throughout the second term, the administration appeared not to waver in its commitment to seek out and nominate those in harmony with the president's judicial philosophy. In practice, this meant looking for judges whose philosophy was opposed to the judicial activism that produced Court rulings prohibiting prayer in the public schools, establishing a constitutional right of privacy including the right to reproductive autonomy, interpreting the equal protection clause to favor women and minorities and elevating the rights of criminal defendants beyond that which a conservative reading of the Constitution requires. Attorney General Edwin Meese III maintained the same high profile he assumed earlier in the second term, but his being investigated by independent counsel James C. McKay placed Meese on the defensive and may have detracted from his effectiveness. In August 1988, after McKay's report cleared Meese of any criminal actions, Meese resigned and was replaced by Richard Thornburgh. Attorney General Thornburgh did not have the opportunity to influence judicial selection during the waning months of the Reagan presidency.

Eight years of Reagan judicial appointments have left a major and what is likely to be an enduring legacy. This article shall first summarize the changes in judicial selection during the Reagan years. Previous examinations of Reagan's appointments[5] are supplemented here with a focus on the last two years' appointments comparing professional, demographic and attribute profiles to those from the first half of the second term and from the first term. The professional, demographic and attribute profiles of all of Reagan's appointees are compared to those from the preceding administrations of Democrat Jimmy Carter, Republicans Gerald Ford and Richard Nixon and Democrat Lyndon Johnson. In summing up the Reagan judicial legacy, we shall also consider how successful the administration was in recruiting those whose judicial philosophy was in tune with that of the president. Finally, we will speculate on the future direction of judicial selection in the Bush administration.

Data sources for the four tables in this article include questionnaires submitted by the judicial nominees to the Senate Judiciary Committee, transcripts of confirmation hearings, personal interviews and various biographical directories.[6] In some instances, state legislative handbooks and newspaper stories from the appointees' home states proved helpful. Several judges were gracious enough to answer my queries concerning missing biographical data. Clues to religious origin occasionally were found in certain reference books.[7]

The tables contain data only on those actually confirmed by the Senate. During the last two years of the Reagan administration, 66 federal district judges were confirmed, 3 nominations were withdrawn and 9 were not acted upon. For the courts of appeals during the last two years, 15 judges were confirmed to the numbered federal circuits and the U.S. Court of Appeals for the District of Columbia, 2 nominations were withdrawn and 6 were not acted upon.

Selection under Reagan

The Reagan administration was responsible for major innovations in the selection process which endured throughout the two terms. The Office of Legal Policy was the locus of judicial selection activity. The screening process was systematized and, for the first time in the history of judicial selection, all leading candidates for judicial positions were brought to Washington for extensive interviewing by Justice Department personnel. If a candidate had previous judicial experience, that person's record would be carefully examined. Articles and speeches of candidates likewise were scrutinized. Arguably, the Reagan administration was engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the

is, after five years the first vacancy on each of the eight district courts goes unfilled). Technically, then, there are 563 *permanent* lifetime district court positions. The total number of *permanent* Article III judgeships considered in this study is 728.

5. *See* the citations in note 2 *supra*.

6. The various directories include *The American Bench* (4th edition), *Martindale-Hubbell Law Directory*, and *Who's Who* (national and regional editions).

7. Kaganoff, A DICTIONARY OF JEWISH NAMES AND THEIR HISTORY (New York: Schocken Books, 1977) and Smith, NEW DICTIONARY OF AMERICAN FAMILY NAMES (New York: Harper & Row, 1973).

8. In general, *see*, Goldman, *Judicial Appointments and the Presidential Agenda* in Brace, Harrington, and King (eds.), THE PRESIDENCY IN AMERICAN POLITICS chap. 2 (New York: New York University Press, 1989), and Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 AMER. BAR FOUND. RES. J. 285 (1984).

nation's history, surpassing Franklin Roosevelt's administration.[8] But to say this is not to give support to the charge that a "litmus test" on specific issues governed the selection process. There is no evidence that judicial candidates were asked how they would rule in any case involving a specific Court precedent the Reagan administration opposed as liberal judicial activism.[9] There may be a fine line between broad judicial philosophy and how a judge would rule in specific cases raising controversial precedents, but there is no indication that Justice Department officials crossed that line and improperly sought assurances from prospective judges about how they would rule.

The President's Committee on Federal Judicial Selection was another major innovation of the Reagan administration. It was chaired by the counsel to the president and included the assistant to the president for personnel, the assistant to the president for legislative affairs, the attorney general, the deputy attorney general, the deputy assistant attorney general and the assistant attorney general for legal policy. The committee, which met in the White House, was of both symbolic and practical significance. At the symbolic level, it demonstrated the importance given judicial selection by the Reagan administration and the recognition that the appointment process, by placing on the bench those opposed to the creation of new rights by liberal activist courts, could be used to achieve the administration's social agenda. At the practical level, the committee was able to evaluate candidates for judicial nomination, taking into consideration not only philosophical and ideological concerns but also political concerns such as the backing of Republican senators and other party leaders.

Another significant feature of the Reagan administration's selection process was its somewhat distant relationship with the American Bar Association Standing Committee on Federal Judiciary. Since the committee began functioning in the 1950s, no previous Republican administration was as distant. The committee was given one name and not several to evaluate for each vacancy. There was no close working relationship between Justice officials and the committee chairperson as had occurred in the 1950s and 1960s. And it is likely that the committee's rating process, particularly its use of the split rating of *Qualified/Not Qualified*, was a source of dissatisfaction in the Justice Department. The split rating of *Qualified/Not Qualified* means that a majority or substantial majority of the committee votes a *Qualified* designation but one or more members dissent and vote *Not Qualified*. The ABA committee insists that anyone receiving a *Qualified* rating, even if there is dissent among some members, is fully qualified for the federal bench. Yet there is the suspicion that those receiving this split rating are only marginally qualified. Adding to the strain between the Justice Department and the committee was the fact that the number and per cent of such split ratings was greater during Reagan's second term. The ABA Committee offers no reasons for its individual ratings, does not provide the raw vote totals and its meetings are not open to the public. The closed door nature of the committee's work gave rise to a law suit brought by a coalition of conservative and liberal public interest groups, which is before the Supreme Court.[10]

District court appointments

Table 1 presents selected backgrounds and attributes of the 66 Reagan appointees to the federal district courts con-

9. *See* the discussion in Goldman, *Reagan's second term judicial appointments*, *supra* n. 2, at 326.

10. The case is *Public Citizen v. U.S. Dept. of Justice* and the issue is whether the ABA committee is subject to the Federal Advisory Committee Act. That law mandates public access to meetings and committee records as well as balanced committee membership for advisory groups to federal agencies. The lower federal court ruled that although the ABA committee was an advisory group subject to the law, applying the law to judicial selection would be an unconstitutional infringement on the exclusive power residing in the president alone to nominate judges.

Table 1 How the Reagan appointees to the district courts confirmed during 1987-88 compare to those confirmed during 1985-86 and during Reagan's first term (1981-84)

	1987/1988 appointees % N	1985/1986 appointees % N	1981-1984 appointees % N
Occupation			
Politics/government	13.6%	18.9%	7.8%
	9	18	10
Judiciary	36.4%	33.7%	40.3%
	24	32	52
Large law firm			
100+ partners/associates	15.2%	3.2%	3.1%
	10	3	4
50-99	7.6%	6.3%	3.1%
	5	6	4
25-49	6.1%	8.4%	5.4%
	4	8	7
Moderate size firm			
10-24 partners/associates	9.1%	8.4%	12.4%
	6	8	16
5-9	7.6%	4.2%	13.2%
	5	4	17
Small firm			
2-4 partners/associates	1.5%	10.5%	8.5%
	1	10	11
Solo practitioners	3.0%	3.2%	2.3%
	2	3	3
Professor of law	—	3.2%	2.3%
	—	3	3
Other	—	—	1.6%
	—	—	2
Experience			
Judicial	40.1%	45.3%	50.4%
	27	43	65
Prosecutorial	43.9%	45.3%	43.4%
	29	43	56
Neither one	34.8%	23.2%	28.7%
	23	22	37
Undergraduate education			
Public-supported	39.4%	34.7%	34.1%
	26	33	44
Private (not Ivy)	47.0%	53.7%	49.6%
	31	51	64
Ivy League	13.6%	11.6%	16.3%
	9	11	21
Law school education			
Public-supported	42.4%	40.0%	44.2%
	28	38	57
Private (not Ivy)	40.9%	46.3%	47.3%
	27	44	61
Ivy League	16.7%	13.7%	8.5%
	11	13	11

Table 1 (continued)

	1987/1988 appointees % N	1985/1986 appointees % N	1981-1984 appointees % N
Gender			
Male	93.9%	91.6%	90.7%
	62	87	117
Female	6.1%	8.4%	9.3%
	4	8	12
Ethnicity or race			
White	90.9%	92.6%	93.0%
	60	88	120
Black	3.0%	3.2%	0.8%
	2	3	1
Hispanic	4.5%	4.2%	5.4%
	3	4	7
Asian	1.5%	—	0.8%
	1	—	1
A.B.A. ratings			
Exceptionally well qualified	1.5%	3.2%	6.9%
	1	3	9
Well qualified	60.6%	50.5%	43.4%
	40	48	56
Qualified	37.9%	46.3%	49.6%
	25	44	64
Party			
Democratic	3.0%	8.4%	3.1%
	2	8	4
Republican	93.9%	88.4%	96.9%
	62	84	125
Independent	3.0%	3.1%	—
	2	3	—
Past party activism	53.0%	58.9%	62.0%
	35	56	80
Religious origin or affiliation*			
Protestant	57.6%	63.2%	58.9%
	38	60	76
Catholic	30.3%	25.3%	34.1%
	20	24	44
Jewish	10.6%	11.6%	6.9%
	7	11	9
Net Worth			
Under $200,000	12.1%	20.0%	18.6%
	8	19	24
200,000-499,000	39.4%	36.8%	37.2%
	26	35	48
500,000-999,999	22.7%	21.0%	21.7%
	15	20	28
1+ million	25.8%	22.1%	22.5%
	17	21	29
Total number of appointees	66	95	129
Average age at nomination	47.6	48.2	49.6

*There was one appointee classified as non-denominational.

Table 2 How Reagan's appointees to the district courts compare to the appointees of Carter, Ford, Nixon and Johnson

	Reagan % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Occupation					
Politics/government	12.8%	4.4%	21.2%	10.6%	21.3%
	37	9	11	19	26
Judiciary	37.2%	44.6%	34.6%	28.5%	31.1%
	108	90	18	51	38
Large law firm					
100+ partners/associates	5.9%	2.0%	1.9%	0.6%	0.8%
	17	4	1	1	1
50-99	5.2%	6.0%	3.9%	0.6%	1.6%
	15	12	2	1	2
25-49	6.6%	6.0%	3.9%	10.1%	—
	19	12	2	18	—
Moderate size firm					
10-24 partners/associates	10.3%	9.4%	7.7%	8.9%	12.3%
	30	19	4	16	15
5-9	9.0%	10.4%	17.3%	19.0%	6.6%
	26	21	9	34	8
Small firm					
2-4 partners/associates	7.6%	11.4%	7.7%	14.5%	11.5%
	22	23	4	26	14
Solo practitioners	2.8%	2.5%	1.9%	4.5%	1.5%
	8	5	1	8	14
Professor of law	2.1%	3.0%	—	2.8%	3.3%
	6	5	—	5	4
Other	0.7%	0.5%	—	—	—
	2	1	—	—	—

(continued on page 322)

firmed during 1987-88 as compared to the 95 appointees confirmed during 1985-86 and the 129 confirmed during the first term. Table 2 compares all 290 appointees from both terms to the district court appointees of the Carter, Ford, Nixon and Johnson administrations.

Occupation. The figures for occupation at time of appointment in Table 1 suggest that there was a trend during the second term of recruiting from the largest law firms. During 1987-88, about 29 per cent came from large law firms, compared to about 12 per cent during the first term. Overall, as seen in Table 2, the proportion of all Reagan appointees recruited from the largest law firms was greater than the proportion of the four previous administrations; and from the superfirms (100 or more partners/associates) about three times the proportion of the Carter appointees. Overall, the Reagan administration also recruited more than one out of three of its appointees directly from the judiciary, a record exceeded only by the Carter administration.

The 1987-88 appointees also continued the trend from earlier in the second term of turning to U.S. attorneys for district court positions. About 11 per cent of the second term appointees were recruited from the U.S. Attorney's office, a figure closer to that for the Nixon administration than that for the Carter administration.

During his last two years, Reagan did not appoint any law professors, in contrast to the record for the first six years. Considering the importance placed by the administration on judicial philosophy, its low overall rate of appointment of law professors was unexpected. The Carter, Nixon and Johnson administrations all appointed higher proportions of law professors.

Experience. During 1987-88, the proportion of Reagan appointees without either judicial or prosecutorial experience rose to over one out of three appointees. However, as seen in Table 2, for all Reagan appointees the overall proportion was almost identical to that for the Carter appointees. The first term appointees had more judicial than prosecutorial experience, the second term appointees reflected a decrease in judicial experience. The composite figures for the Reagan appointees in Table 2 show that of the last five administra-

tions, only the Reagan and Carter administrations put greater emphasis on judicial over prosecutorial experience. Judicial experience provides an administration with a track record with which to evaluate judicial nominees. Interestingly, had all the Reagan nominees during 1987-88 been confirmed, there would have been an even larger proportion of those with judicial experience.

Education. A majority of the Reagan appointees had their undergraduate and law school education in the private sector. Of all five administrations, the Reagan appointees had the lowest proportion of graduates from the prestige Ivy League law schools. Even if such prestige non-Ivy League law schools as Berkeley, Chicago, Duke, Michigan, N.Y.U., Stanford and Virginia are considered, the proportion of Reagan appointees with a prestige legal education rises to only about 29 per cent.

Affirmative Action. The Reagan administration's record of selecting qualified women was not as good in 1987-88 as it had been earlier although overall, the Reagan administration was second only to the Carter administration in the number and proportion of women appointed to the bench. The record of appointment of African-Americans was the worst since the Eisenhower administration. The proportion of Hispanic-American appointees, however, was second only to the Carter administration. It is possible that the Reagan administration saw more political mileage from the appointment of Hispanic-Americans than of African-Americans.

ABA ratings. As seen in Table 1, although in 1987-88 there was only one appointee with the highest rating of *Exceptionally Well Qualified* from the ABA Standing Committee on Federal Judiciary, the proportion of appointees designated *Well Qualified* reached a high point for the administration. As Table 2 shows, the proportion of all Reagan appointees in the top two designations was the largest for all five administrations. If the ABA ratings are considered to represent the quality of the appointees, the Reagan district court appointees can be seen on the whole as the most professionally qualified group of appointees in the past 25 years.

The down side of the ABA ratings, as far as the administration was concerned, was the proportion of appointees given a split *Qualified/Not Qualified* rating. During the second term, of the 69 appointees with a *Qualified* rating, about one-fourth had a split rating with a minority rating of *Not Qualified*. Of all second

Table 2 (continued)

	Reagan % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Experience					
Judicial	46.6% 135	54.5% 110	42.3% 22	35.2% 63	34.4% 42
Prosecutorial	44.1% 128	38.6% 78	50.0% 26	41.9% 75	45.9% 56
Neither one	28.3% 82	28.2% 57	30.8% 16	36.3% 65	33.6% 41
Undergraduate education					
Public-supported	35.5% 103	57.4% 116	48.1% 25	41.3% 74	38.5% 47
Private (not Ivy)	50.3% 146	32.7% 66	34.6% 18	38.5% 69	31.1% 38
Ivy League	14.1% 41	9.9% 20	17.3% 9	19.6% 35	16.4% 20
None indicated	—	—	—	0.6% 1	13.9% 17
Law school education					
Public-supported	42.4% 123	50.5% 102	44.2% 23	41.9% 75	40.2% 49
Private (not Ivy)	45.5% 132	32.2% 65	38.5% 20	36.9% 66	36.9% 45
Ivy League	12.1% 35	17.3% 35	17.3% 9	21.2% 38	21.3% 26
Gender					
Male	91.7% 266	85.6% 173	98.1% 51	99.4% 178	98.4% 120
Female	8.3% 24	14.4% 29	1.9% 1	0.6% 1	1.6% 2
Ethnicity or race					
White	92.4% 268	78.7% 159	88.5% 46	95.5% 171	93.4% 114
Black	2.1% 6	13.9% 28	5.8% 3	3.4% 6	4.1% 5
Hispanic	4.8% 14	6.9% 14	1.9% 1	1.1% 2	2.5% 3
Asian	0.7% 2	0.5% 1	3.9% 2	— —	— —
A.B.A. ratings					
Exceptionally well qualified	4.5% 13	4.0% 8	— —	5.0% 9	7.4% 9
Well qualified	49.7% 144	47.0% 95	46.1% 24	40.2% 72	40.9% 50
Qualified	45.9% 133	47.5% 96	53.8% 28	54.8% 98	49.2% 60
Not Qualified	— —	1.5% 3	— —	— —	2.5% 3
Party					
Democratic	4.8% 14	92.6% 187	21.2% 11	7.3% 13	94.3% 115
Republican	93.4% 271	4.4% 9	78.8% 41	92.7% 166	5.7% 7
Independent	1.7% 5	2.9% 6	— —	— —	— —
Past party activism	58.6% 170	60.9% 123	50.0% 26	48.6% 87	49.2% 60
Religious origin or affiliation*					
Protestant	60.0% 174	60.4% 122	73.1% 38	73.2% 131	58.2% 71
Catholic	30.4% 88	27.7% 56	17.3% 9	18.4% 33	31.1% 38
Jewish	9.3% 27	11.9% 24	9.6% 5	8.4% 15	10.7% 13
Total number of appointees	290	202	52	179	122
Average age at nomination	48.7	49.7	49.2	49.1	51.4

*There was one Reagan district court appointee classified as non-denominational.

11. *See* the discussion in Goldman, *Reagan's second term judicial appointments, supra* n. 2, at 329.

12. This has become an increasingly difficult attribute to discern if it is not mentioned in the questionnaires or standard biographical sources. *See* the discussion in Goldman, *Reagan's second term judicial appointments, supra* n. 2, at 330.

13. The Commission on Executive, Legislative and Judicial Salaries recommended that the salaries of federal district judges be raised to $135,000, federal appeals court judges to $140,000, associate justices on the Supreme Court to $165,000 and the Chief Justice of the United States to $175,000. *See,* NEW YORK TIMES, December 14, 1988, at B-12. President Reagan accepted these recommendations. The raises were to go into effect on February 8, 1989, but were tied to unpopular congressional pay increases and thus the entire package was disapproved by both houses of Congress. The resolution of disapproval was signed by President Bush just hours before the raises would have become law.

term appointees, about 11 per cent had such split ratings compared to only about 2 per cent of the first term appointees. It is possible that a small but growing proportion of appointees are not as well qualified as the bulk of the appointees. This might reflect the growing difficulty in light of low judicial salaries of recruiting the best legal talent during the second term. It should also be recognized, however, that split ratings may also result from gender, ethnicity or occupational biases on the part of one or more ABA committee members.[11]

Table 3 How the Reagan appointees to the appeals courts confirmed during 1987-88 compare to those confirmed during 1985-86 and during Reagan's first term (1981-84)

	1987/1988 appointees % N	1985/1986 appointees % N	1981-1984 appointees % N
Occupation			
Politics/government	13.3% 2	6.2% 2	3.2% 1
Judiciary	73.3% 11	40.6% 13	61.3% 19
Large law firm			
100+ partners/associates	6.7% 1	6.2% 2	— —
50-99	— —	3.1% 1	3.2% 1
25-49	— —	9.4% 3	6.4% 2
Moderate size firm			
10-24 partners/associates	— —	6.2% 2	3.2% 1
5-9	6.7% 1	6.2% 2	6.4% 2
Small firm			
2-4 partners/associates	— —	3.1% 1	— —
Solo practitioners	— —	— —	— —
Professor of law	— —	15.6% 5	16.1% 5
Other	— —	3.1% 1	— —
Experience			
Judicial	73.3% 11	43.8% 14	70.9% 22
Prosecutorial	53.8% 8	25.0% 8	19.3% 6
Neither one	13.2% 2	53.1% 17	25.8% 8
Undergraduate education			
Public-supported	33.5% 5	15.6% 5	29.0% 9
Private (not Ivy)	53.3% 8	56.2% 18	45.2% 14
Ivy League	13.3% 2	28.1% 9	25.8% 8
Law school education			
Public-supported	60.0% 9	34.4% 11	35.5% 11
Private (not Ivy)	13.3% 2	37.5% 12	48.4% 15
Ivy League	26.6% 4	28.1% 9	16.1% 5
Gender			
Male	100.0% 15	90.6% 29	96.8% 30
Female	— —	9.4% 3	3.2% 1
Ethnicity or race			
White	100.0% 15	100.0% 32	93.5% 29
Black	— —	— —	3.2% 1
Hispanic	— —	— —	3.2% 1
A.B.A. ratings			
Exceptionally well qualified	20.0% 3	9.4% 3	22.6% 7
Well qualified	53.3% 8	37.5% 12	41.9% 13
Qualified	26.6% 4	53.1% 17	35.5% 11
Party			
Democratic	— —	— —	— —
Republican	93.3% 14	96.9% 31	100.0% 31
Independent	6.7% 1	— —	— —
Other	— —	3.1% 1	— —

(continued on page 324)

Other Considerations. As seen in Table 1, the second term appointees reflected slightly less partisanship in terms of party affiliation than the first term appointees. The same was true for prominent party activism although there were those with noteworthy political and professional credentials (see "The appointees' political and legal credentials," page 326). Overall, as shown in Table 2, the proportion of Republicans appointed by Reagan was close to the proportion of Democrats appointed by Carter. And overall, the proportion with a background of prominent party activism was close to the high level seen for the Carter appointees and greater than the levels for the Ford, Nixon and Johnson appointees.

Tables 1 and 2 offer the religious origins or religious affiliations of the appointees.[12] Overall, Reagan appointed a larger proportion of Catholics than did Carter, and about the same proportion as that appointed by Johnson. This is the highest proportion of Catholics ever appointed by a Republican administration and suggests that Catholics are well-represented in the pool of Republicans from which judges are chosen.

The net worth of the Reagan appointees is shown in Table 1. During 1987-88, over one in four appointees were millionaires. The relatively large number of millionaires underscores a consequence of relatively low judicial pay and is consistent with a rationale for the pay increases recommended in 1988 by the Commission on Executive, Legislative and Judicial Salaries. Without a more competitive pay scale, we can expect an increase in the number of wealthy individuals who become judges as some non-wealthy highly qualified lawyers will not be able to afford a pay cut to go on the bench.[13]

The average age of the Reagan appointees decreased from the first to the second term, as seen in Table 1. The proportion of those appointed under the age of 40 rose from about 7 per cent for the first term to over 12 per cent for the second

term. The proportion *under* the age of 45 was 37 per cent for the second term compared to 26 per cent in the first term and about 20 per cent for the Carter appointees. This, too, is perhaps a consequence of low judicial salaries as younger, less experienced, lawyers fill some positions that older lawyers cannot afford to take. An alternative explanation is that the administration looked for qualified younger candidates who shared the administration's judicial philosophy as a way of prolonging the Reagan legacy. Overall, as demonstrated by Table 2, the Reagan appointees were the youngest group of appointees of all five administrations, but the differences were not dramatic.

Appeals court appointments

Table 3 reports the findings of the backgrounds and attributes of the Reagan administration's 15 appointees to the courts of appeals during 1987-88 and compares them to the findings for the 32 judges appointed in 1985-86 and the 31 in the first term. Table 4 offers composite figures for all 78 Reagan appointees to the appeals courts as compared to the 56 Carter, 12 Ford, 45 Nixon and 40 Johnson appointees. Because of the relatively low numbers of judges, particularly in the columns in Table 3 but also to some extent in Table 4 especially with the Ford appointees, percentage differences must be treated with caution.

Occupation and experience. When examining occupation at the time of appointment, as seen in Table 3, two findings stand out. During the first half of the second term about two out of five appointees were serving in the judiciary, down from three in five of the first term appointees. But during the last half of the second term, the proportion of sitting judges elevated to the appeals courts climbed to about three out of four. Of these 11 judges, eight were elevated from the federal districts to which they had been appointed previously by Reagan and the remaining three were state judges. By returning to the earlier pattern of elevating lower court judges, the ABA ratings improved substantially (discussed shortly). The other major finding is that during the last half of the second term, no law professors were appointed, in marked contrast to the first six years.[14] Nevertheless, the Reagan legacy must be

Table 3 (continued)

	1987/1988 appointees % N	1985/1986 appointees % N	1981-1984 appointees % N
Past party activism	73.3%	78.1%	58.1%
	11	25	18
Religious origin or affiliation			
Protestant	60.0%	40.6%	67.7%
	9	13	21
Catholic	26.6%	40.6%	22.6%
	4	13	7
Jewish	13.3%	18.7%	9.7%
	2	6	3
Net worth			
Under $200,000	26.6%	15.6%	10.0%
	4	5	3
200,000-499,000	6.7%	40.6%	36.7%
	1	13	11
500,000-999,999	46.7%	31.2%	30.0%
	7	10	9
1+ million	20.0%	12.5%	23.3%
	3	4	7*
Total number of appointees	15	32	31
Average age at nomination	50.5	48.3	51.5

*Net worth was unavailable for one appointment.

Table 4 How Reagan's appointees to the appeals courts compare to the appointees of Carter, Ford, Nixon and Johnson

	Reagan % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Occupation					
Politics/government	6.4%	5.4%	8.3%	4.4%	10.0%
	5	3	1	2	4
Judiciary	55.1%	46.4%	75.0%	53.3%	57.5%
	43	26	9	24	23
Large law firm					
100+ partners/associates	3.9%	1.8%	—	—	—
	3	1	—	—	—
50-99	2.6%	5.4%	8.3%	2.2%	2.5%
	2	3	1	1	1
25-49	6.4%	3.6%	—	2.2%	2.5%
	5	2	—	1	1
Moderate size firm					
10-24 partners/associates	3.9%	14.3%	—	11.1%	7.5%
	3	8	—	5	3
5-9	6.4%	1.8%	8.3%	11.1%	10.0%
	5	1	1	5	4
Small firm					
2-4 partners/associates	1.3%	3.6%	—	6.7%	2.5%
	1	2	—	3	1
Solo practitioners	—	1.8%	—	—	5.0%
	—	1	—	—	2
Professor of law	12.8%	14.3%	—	2.2%	2.5%
	10	8	—	1	1
Other	1.3%	1.8%	—	6.7%	—
	1	1	—	3	—
Experience					
Judicial	60.3%	53.6%	75.0%	57.8%	65.0%
	47	30	9	26	26
Prosecutorial	28.2%	32.1%	25.0%	46.7%	47.5%
	22	18	3	21	19
Neither one	34.6%	37.5%	25.0%	17.8%	20.0%
	27	21	3	8	8
Undergraduate education					
Public-supported	24.4%	30.4%	50.0%	40.0%	32.5%
	19	17	6	18	13
Private (not Ivy)	51.3%	50.0%	41.7%	35.6%	40.0%
	40	28	5	16	16
Ivy League	24.4%	19.6%	8.3%	20.0%	17.5%
	19	11	1	9	7
None indicated	—	—	—	4.4%	10.0%
	—	—	—	2	4
Law school education					
Public-supported	39.7%	39.3%	50.0%	37.8%	40.0%
	31	22	6	17	16
Private (not Ivy)	37.2%	19.6%	25.0%	26.7%	32.5%
	29	11	3	12	13
Ivy League	23.1%	41.1%	25.0%	35.6%	27.5%
	18	23	3	16	11

Table 4 (continued)

	Reagan % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Gender					
Male	94.9%	80.4%	100.0%	100.0%	97.5%
	74	45	12	45	39
Female	5.1%	19.6%	—	—	2.5%
	4	11	—	—	1
Ethnicity or race					
White	97.4%	78.6%	100.0%	97.8%	95.0%
	76	44	12	44	38
Black	1.3%	16.1%	—	—	5.0%
	1	9	—	—	2
Hispanic	1.3%	3.6%	—	—	—
	1	2	—	—	—
Asian	—	1.8%	—	2.2%	—
	—	1	—	1	—
A.B.A. ratings*					
Exceptionally well qualified	16.7%	16.1%	16.7%	15.6%	27.5%
	13	9	2	7	11
Well qualified	42.3%	58.9%	41.7%	57.8%	47.5%
	33	33	5	26	19
Qualified	41.0%	25.0%	33.3%	26.7%	20.0%
	32	14	4	12	8
Not Qualified	—	—	8.3%	—	2.5%
	—	—	1	—	1
Party					
Democratic	—	82.1%	8.3%	6.7%	95.0%
	—	46	1	3	38
Republican	97.4%	7.1%	91.7%	93.3%	5.0%
	76	4	11	42	2
Independent	1.3%	10.7%	—	—	—
	1	6	—	—	—
Other	1.3%	—	—	—	—
	1	—	—	—	—
Past party activism	69.2%	73.2%	58.3%	60.0%	57.5%
	54	41	7	27	23
Religious origin or affiliation					
Protestant	55.1%	60.7%	58.3%	75.6%	60.0%
	43	34	7	34	24
Catholic	30.8%	23.2%	33.3%	15.6%	25.0%
	24	13	4	7	10
Jewish	14.1%	16.1%	8.3%	8.9%	15.0%
	11	9	1	4	6
Total number of appointees	78	56	12	45	40
Average age at nomination	50.0	51.9	52.1	53.8	52.2

*There was one Johnson appointee for whom no report was requested.

seen as including such brilliant law professors as Frank Easterbrook, John Noonan, Richard Posner, Kenneth Ripple, Antonin Scalia, Deanelle Tacha and Ralph Winter.

In Table 4 we see that overall, more Reagan appointees came directly from the judiciary than did Carter appointees and that the proportion who were judges at the time of their appointment was about the same as that of the Nixon and Johnson appointees. For the most part, this was also true for judicial experience (with the exception that slightly more Johnson than Reagan appointees had previous judicial experience). The overall proportion of law professors was about as high as that for the Carter appointees and markedly higher than that for the Nixon, Ford and Johnson administrations. About one in eight Reagan appointees came from large law firms, the highest proportion of all five administrations.

Table 4 also reveals that the Reagan appointees' ratio of judicial experience over prosecutorial experience was the highest of all administrations with the exception of Ford's (and the small number of Ford appointees requires extreme caution in interpreting those findings). About one in three Reagan and Carter appointees had neither judicial nor prosecutorial experience.

Education and affirmative action. As seen in Table 4, the majority of Reagan appointees, like those of previous administrations, attended private undergraduate and law schools. Although the proportion of the Reagan appointees with a prestige Ivy League law school education was the lowest of all five administrations, when prestigious non-Ivy League law schools are included, the proportion of Reagan appointees rises to about 45 per cent.

The record of women appointees to the appeals courts during the second term was an uneven one as suggested by Table 3. During 1985-86 about 9 per cent of the appointees were women. During 1987-88 there were no women appointees. But this is misleading because the administration nominated two women whose nominations were not acted upon. If they and the four men whose nominations also were not acted upon are included in the 1987-88 statistics, then the administration would have continued its 9 per cent rate of women appointments. Overall, as seen in Table 4, the proportion of women appointees was a poor second to the Carter administration record. However, the Reagan legacy also includes the historic appointment of the first woman to the Supreme Court.

The Reagan record on appointments of African-Americans, Hispanic-Americans, and Asian-Americans was a poor one. Only one African-American and one Hispanic-American were appointed. No Asian-Americans were selected.

ABA ratings. Table 3 demonstrates a remarkable difference in proportions between the ABA ratings of the 1985-86 appointees and those appointed in 1987-88. Overall, as shown in Table 4, while the proportion of Reagan appointees with the highest rating of *Exceptionally Well Qualified* was exceeded only by the Johnson appointees, the proportion with the lowest *Qualified* rating was the highest for all five administrations. And, for the second term appointees, more than half of those receiving the lowest rating received a split *Qualified/Not Qualified* rating. Also for the first time a member of the judiciary (from the state bench) was given such a split rating. Although there may be some biases in the rating process, any serious consideration of ABA ratings tends to the conclusion that the Reagan legacy may be one of a marginal lowering of the quality of the appeals bench. Of course, if the ABA ratings are not taken seriously, such a conclusion is not warranted.

Other considerations. No Democrat received an appointment to the appeals courts. One has to go back to the Warren Harding administration to find the last instance of an administration failing to find even one nominal member of the opposition party worthy of judicial ap-

14. One law professor, Bernard Siegan, was nominated, but his nomination was eventually withdrawn after the Senate Judiciary Committee voted against confirmation. See "Controversial nominations," page 328.

pointment to an appeals court.[15] The Reagan administration, as we saw, did appoint some Democrats to the district bench. The Reagan legacy for the appeals courts may be that the appeals courts are much too important to risk appointing a Democrat who might not fully share the judicial philosophy of the administration. Whatever the reasons, the appearance of extreme partisanship and thorough philosophical screening seemed to strain relationships with the Democrats on the Senate Judiciary Committee and this was dysfunctional for the administration during 1987-88. A better strategy for the administration might have been to nominate a few conservative and moderate Democrats. That does not mean that all political problems or tensions the administration had with Senate Democrats would have disappeared, but it might possibly have made for a smoother confirmation process.

The religious origin or affiliation of the 1987-88 Reagan appointees is compared to that of the 1985-86 and first term appointees in Table 3. Again we see that the last half of the second term was closest to the first term record and different from the first half of the second term. The composite figures for all Reagan appointees compared to previous administrations, shown in Table 4, reveal that the Reagan administration appointed a larger proportion of Catholics and almost the same proportion of Jews as previous Democratic administrations. This may reflect the changing composition of party elites from which judges are recruited but also may reflect the complete elimination of any subtle religious discrimination in judicial selection.

In Table 3, there are figures for the net worth of the Reagan appointees. The proportion of well-to-do appointees (net worth in excess of half a million dollars) was highest for the 1987-88 appointees, followed by that for the first term appointees. In contrast, the majority of the 1985-86 appointees were less well-to-do (net worth under $500,000). Table 3 also contains figures for the average age of the appointees which suggests that the 1985-86 appointees were the youngest group of appointees of the Reagan years, averaging three years younger than the first term appointees and, as seen in Table 4, averaging three and a half years younger than the Carter appointees, four years younger than the Ford and Johnson appointees and five and a half years younger than the Nixon appointees.[16] Even when the average age of all Reagan appointees was calculated, as presented in Table 4, we see that the Reagan

15. *See,* LEGISLATIVE HISTORY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND THE JUDGES WHO SERVED DURING THE PERIOD 1801 THROUGH MAY 1972 U.S. Senate, Committee on the Judiciary, 92nd Cong., 2nd Sess. 2 (1972).

The appointees' political and legal credentials

The following are some of the Reagan appointees confirmed by the 100th Congress in 1987 or 1988 who had noteworthy political and legal credentials. This listing is more in the way of a sampling and is not meant to be inclusive. Furthermore, those appointees with outstanding legal credentials who did not have a prominent political background are not included here.

• Richard J. Arcara was the successful Republican candidate for Erie County District Attorney in 1981 and 1985. Before that, he had been U.S. attorney, assuming that position in 1975. The ABA rated him *Well Qualified* for the federal district bench.

• Clarence A. Beam was a Republican Party activist and served one term in the U. S. House of Representatives. He was appointed by President Reagan to the federal district court in 1982 and elevated to the Eighth Circuit in 1987. He was unanimously rated *Well Qualified* by the ABA.

• Richard J. Daronco was active in Westchester County Republican politics before entering judicial service at the local and state levels in which he served for 16 years before ascending the federal district court bench. After only a year of federal service, he was assassinated on May 21, 1988, by the father of a losing litigant.

• David S. Doty was active in Republican politics including service as co-chair of Law Students for Nixon in 1960. For 25 years, he was a member of a large and distinguished Minneapolis law firm and was a senior partner at the time of his appointment to the federal district court. The ABA unanimously rated him as *Well Qualified.*

• Jan Ely DuBois had been active in Senator Arlen Specter's campaigns for district attorney and then for the U.S. Senate. For 30 years he was a member of a major Philadelphia law firm. He was unanimously rated *Well Qualified* by the ABA for the federal district bench.

• John M. Duhe, Jr., had been active in Republican politics in Louisiana serving on the Republican Executive Committee for Iberia Parish. He was appointed to the federal district bench in 1984 and elevated in 1988 to the Fifth Circuit. He was unanimously rated *Well Qualified* by the ABA.

• David M. Ebel was editor in chief of the University of Michigan Law Review and subsequently served as a law clerk to Justice Byron White. He was active in Republican politics in Colorado and in 1987 served on the Bob Dole for President Steering Committee. From 1966 until taking his place on the Tenth Circuit, he was a member of a prestigious Denver law firm. The ABA rated him *Well Qualified.*

• T. S. Ellis, III, graduated magna cum laude from Harvard Law School and began a distinguished 18-year career with a prestigious Richmond, Virginia law firm. In 1984, he joined the board of directors of the Virginia Poverty Law Center. He was active in state and national Republican politics. He was unanimously rated *Well Qualified* by the ABA.

• Robert S. Gawthrop, III, had been active in Republican politics and had once served as campaign chairman of the Chester county (Pennsylvania) Republican Party. He served as an assistant district attorney for seven years and in 1977 was elected judge of the Court of Common Pleas of Chester County, the position he held at the time of his appointment to the federal district bench. The ABA rated him *Well Qualified.*

• Morton I. Greenberg was a member of the board of editors of the *Yale Law Journal.* He was active in local New Jersey Republican politics. He served as an assistant county prosecutor and in the state attorney general's office. He be-

appointees were about two years younger than the Carter, Ford and Johnson appointees and close to four years younger than the Nixon appointees. On the whole, it would appear that there was some tendency to select younger judges, perhaps reflecting a desire to prolong the Reagan legacy on the bench.

The Meese effect?

It is clear that the Reagan administration sought to place on the bench those compatible with the president's judicial philosophy. There was the expectation that they would be sympathetic to the social agenda positions of the administration which were a reaction to what the administration saw as judicial legislation of new rights. This was particularly true for appeals court appointments and the absence of appointments to Democrats during the entire Reagan administration suggests that Attorney General William French Smith during the first term and Attorney General Edwin Meese III during the second term were equally dedicated to achieving this goal. Yet the figures in Table 3 for the 1985-86 appointees hints that there may have been a special Meese effect in judicial selection for the appeals courts. These appointees, as compared to the first term and 1987-88 appointees, had less professional experience, had lower ABA ratings, had the highest level of past party activism, were less well-off financially and were the youngest group of appeals court judges appointed since the beginnings of the modern appeals courts.[17] The conclusion is irresistible (even if the evidence is circumstantial) that the attorney general was fine tuning the selection process to place on the bench younger, vigorous, more aggressive supporters of the administration's judicial philosophy that would indeed constitute a lasting Reagan legacy on the courts second in importance only to the U.S. Supreme Court.

The question, of course, is why did Meese let up somewhat during the last two years? We can only speculate but there are several plausible explanations. First, the attorney general came under increasing attack being linked to alleged criminal violations which resulted in the appointment of an independent counsel. This, no doubt, was a drain on the attorney general's time and energies and may have diverted some of his attention from judicial selection. Second, the long battle over the nomination of Robert Bork to the Supreme Court no doubt

16. More than one-third (34.4 per cent) of the 1985-86 appointees were under the age of 45 but only 13.3 per cent of the 1987-88 appointees and 16 per cent of the first term appointees were that young. *Also see* Goldman, *The Age of Judges: Reagan's Second Term Appeals Court Appointees Compared to the Appointees of Presidents Since 1891*, 73 A.B.A. J. 94 (1987).

17. Goldman, *The Age of Judges, supra* n. 16.

came a superior court judge in 1973 serving with distinction until his appointment to the Third Circuit in 1987. He was rated *Exceptionally Well Qualified* by the ABA.

• Kenneth M. Hoyt was active in Republican politics and among his partisan activities was membership in the Texas Council of Black Republicans. He began service on the state bench in 1981 and was rated *Well Qualified* by the ABA for the federal district court.

• William D. Hutchinson was a Republican member of the Pennsylvania House of Representatives for 10 years. He had served as an assistant district attorney for six years. In 1981, he was elected to the Supreme Court of Pennsylvania and was serving on that court when picked for the U. S. Court of Appeals for the Third Circuit in 1987. The ABA rated him *Well Qualified.*

• George M. Marovich was a Republican precinct captain for 14 years. He became a judge on the Circuit Court for Cook County, Illinois in 1976 and served for 12 years before his appointment to the federal district court. The ABA unanimously rated him *Well Qualified.*

• Robert P. Patterson, Jr., had long been associated with Republican circles, including holding the position of Veterans' Chairman of New York State Citizens for Eisenhower in 1956. He served as president of the New York State Bar Association, as U.S. attorney and, from 1956 until becoming a federal district judge, was a member of the prestigious firm bearing his name, Patterson, Belknap, Webb, & Tyler. He was rated *Well Qualified* by the ABA.

• Anthony J. Scirica was active in Republican politics in Pennsylvania and served for eight years as a member of the state house of representatives. He had experience as an assistant district attorney and was on the state bench when he was appointed to the federal district bench in 1984. He was elevated to the Third Circuit in 1987. The ABA rated him *Exceptionally Well Qualified.*

• George C. Smith had been active in politics and among his activities was serving as Ohio chairman of Youth for Eisenhower for President in 1956. He served as an assistant local prosecutor and from 1971-1980 was prosecuting attorney for Franklin County (Ohio). He began his judicial career in 1980, first serving as a municipal court judge and later as a judge on the Franklin County Common Pleas Court from which he was recruited for the federal district bench. The ABA unanimously rated him *Well Qualified.*

• Ernest C. Torres was a Republican state representative in the Rhode Island House of Representatives for five years and in three of them was deputy minority leader. He then left the legislature to serve as an associate justice of the Rhode Island Superior Court. In July 1986, he became a partner in a prestigious Providence law firm. Some 16 months later he was confirmed by the Senate for the federal district judgeship he now occupies. He received a *Well Qualified* ABA rating.

• Alfred M. Wolin had been active in the campaigns of a Republican congressman. He had prosecutorial experience at the municipal level and in 1980 ascended the New Jersey state bench before becoming a federal district judge in December 1987. The ABA unanimously rated him *Well Qualified.*

• Thomas S. Zilly was managing editor of *Cornell Law Quarterly.* He was active in Senator Slade Gorton's campaigns. For 26 years, he was a member of a major Seattle law firm before joining the federal district bench. He received a *Well Qualified* rating from the ABA.

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also diverted the attorney general's energies. And last, but perhaps most important, Democrats took control of the Senate with the election of 1986. This meant that nominees with more traditional credentials stood the best chance of getting through the Senate. The administration could not afford the kind of fights that Democrats had waged on the floor of the Senate over several controversial nominations in 1985-86 because Republicans no longer had a majority in the Senate.[18]

Decisional success?

The ultimate Reagan legacy is not simply the almost half of the judiciary in active service at the start of 1989 but rather the accumulation of their decisions now and in the future. Will the Reagan judiciary incrementally change the shape of civil liberties law returning it to its pre-Warren Court status? Have the Reagan appointees in fact tended to use their judicial discretion in the ways hoped for by the Reagan administration? The answer to both questions is a tentative yes, although it is not clear that the Reagan appointees, on the whole, have been markedly more conservative than the appointees of previous Republican presidents.[19] Some observers are of the view that the Reagan administration indeed was successful in packing the courts with ideological supporters, that the results can already be seen and that this is the most profound Reagan legacy.[20] However, it is important to differentiate the policymaking activity of the lower federal courts from that of the U.S. Supreme Court. The lower federal courts are obligated to follow Supreme Court precedents. The most anti-abortion Reagan appointee must follow *Roe v. Wade*[21] until it is modified or overturned by the Supreme Court itself. The most pro-prayer in the public schools judge must defer to *Abington School District v. Schempp*.[22] The most anti-exclusionary rule appointee cannot ignore *Weeks v. United States*[23] and *Mapp v. Ohio*.[24] Thus, it is misleading to suggest that the Reagan appointees to the lower federal courts have already dramatically reversed civil liberties law. It is also misleading to stereotype all Reagan appointees as extreme right-wing. To be sure, known liberal activists represented the antithesis of the Reagan judicial philosophy and of course were not appointed. But the political realities of the judicial selection process meant that occasionally political moderates received appointments even to the appeals courts. Yet the potential is there for the bulk of the Reagan appointees to help bring about a fundamental change in civil lib-

18. *See* the discussion of controversial nominations in Goldman, *Reagan's second term judicial appointments, supra* n. 2, at 336-337.

19. *See* the discussion of the studies in Goldman, *Reagan's second term judicial appointments, supra* n. 2, at 335-338. *Also see* Tomasi and Velona, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987). In general, *see* O'Brien, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION (New York: Priority Press, 1988).

20. Schwartz, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (New York: Charles Scribner's Sons, 1988).

21. 410 U.S. 113 (1973).

22. 374 U.S. 203 (1963).

23. 232 U.S. 383 (1914).

24. 367 U.S. 643 (1961).

Controversial nominations

During the last two years of the Reagan presidency there was no more controversial judicial nomination than that of Robert H. Bork to the Supreme Court in 1987. Robert Bork had been a well-known Yale Law School professor, had served as solicitor general from 1973-77, and was serving on the U.S. Court of Appeals for the District of Columbia Circuit, a post to which he had been appointed by President Reagan in 1982 when picked for elevation. He gained the reputation of being an intellectually forceful judge who aggressively championed the judicial philosophy he shared with the administration. It is likely that Bork received the nomination because the administration saw him as a conservative intellectual leader who with Scalia, O'Connor and Rehnquist would provide a critical intellectual mass to push the Court along the philosophical lines favored by the administration.

What happened following the nomination requires a detailed description and analysis that cannot be provided here. The end result was that Robert Bork's nomination went down to defeat on the floor of the Senate by a vote of 42

AP/WIDE WORLD PHOTOS

Robert H. Bork

for and 58 against confirmation. Supporters of Bork saw a grave injustice done to a brilliant legal mind. They saw an unprecedented media campaign waged against Bork by civil liberties and civil rights groups which they claimed distorted Bork's views and record. They noted that Bork had been unusually forthcoming with his unprecedented answering at length and in great detail questions about constitutional law and judicial philosophy before the Senate Judiciary Committee. Opponents of the nomination referred to Bork's published writings before going on the District of Columbia bench and his opinions, public speeches, and media interviews after becoming a judge to demonstrate that in their view he was a judge who had already made up his mind on the major issues of the day, an ideologue with an out of the mainstream agenda who was so biased against most claims of individual rights as to be unable to dispense impartial justice. They dismissed Bork's insistence at the hearings that he would respect precedent in landmark racial equality decisions and in some other areas as merely confirmation conversion at odds with his record. Bork subsequently resigned from the U.S. Court of Appeals for the District of Columbia.

Another contentious but less publicized controversy centered around the nomination on February 2, 1987, of Bernard H. Siegan to the U.S. Court of Appeals for the Ninth Circuit. A law professor at the University of San Diego School of Law, Professor Siegan authored two books whose constitutional views were deemed by his opponents as

erties law but this is contingent upon major policy change on the Supreme Court. Thus, it is to the Supreme Court that we look for the foundation of the Reagan legacy, his appointments of Associate Justices Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy, and the elevation of William Rehnquist to the chief justiceship.

By every indication, as of this writing, the Reagan administration's legacy is indeed a profound one on the Supreme Court. The conservative majority has been consolidated under the leadership of Chief Justice Rehnquist.[25] It has hinted of its willingness to reconsider precedents that broadly interpreted rights[26] and has exercised its own brand of judicial activism in striking down a governmental affirmative action program designed to protect minority businesses from racial discrimination.[27] Justice Harry Blackmun publicly expressed his fear that *Roe v. Wade* was in jeopardy.[28] There is a feeling of anticipation in right-wing circles and dread in liberal circles about what is to come. Of course both camps may be wrong. After all, it would likely be a self-inflicted wound and hardly an act of judicial statesmanship for the Court now to overrule such precedents as *Roe v. Wade* that have been well established and upon which patterns of behavior and the expectations of millions of Americans have been based, however wrong the conservative justices may believe these decisions to have been in the first place. Rights once given are not easily taken away. However, it is realistic to expect at the very least continued incremental change in the direction favored by the Reagan administration. In the final analysis the Reagan judicial legacy will be with us well into the next century.[29]

What's ahead

The election of George Bush in 1988 ensured the success of the Reagan legacy. Although as of now there are uncertainties as to how judicial selection will be conducted in the Bush administration and to what extent there will be a systematic attempt to recruit judges who share a conservative judicial philosophy, we can reasonably expect several things. First, the large majority of those selected will be Republicans. This means that whether it is deliberate or not, most of those appointed will be conservatives who share a judicial philosophy compatible with that of the Reagan appointees. Second, we can expect that the large majority of appointees will continue to be white males. However, at the very least, the Bush administration will match the Reagan administration's proportion of women appointees and likely will

25. *See* Davis, JUSTICE REHNQUIST AND THE CONSTITUTION (Princeton: Princeton University Press, 1989).

26. Patterson v. McClean Credit Union, 108 S. Ct. 1419 (1988).

27. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989). Reagan administration Solicitor General Charles Fried was quoted as calling the decision "great news" that made his four years of service as solicitor general "worth it." Greenhouse, *Court Bars a Plan to Provide Jobs to Minorities*, NEW YORK TIMES, January 24, 1989, at A-19.

28. *Justice Fears for Roe Ruling*, NEW YORK TIMES, September 14, 1988, at A-24.

29. In general, *see* Murphy, *The Legacy of Reagan's Judicial Strategy*, in Berman, ed., THE REAGAN IMPRINT (Baltimore: Johns Hopkins Press, 1989), especially Part II-D and Part III.

extremist and representing a selective activism in its advocacy of judicial protection of property rights over protection of civil rights and liberties. His opponents failed to be satisfied by Siegan's assurances made during his confirmation hearing that he would follow the Supreme Court and that his own views are irrelevant. Siegan's supporters claimed that once again a brilliant legal mind was being opposed because of politics. Close to a year and a half after he was nominated, Siegan's nomination was rejected on July 14, 1988, by the Senate Judiciary Committee by a vote of 8-6. The Committee then voted not to report the nomination to the full Senate. Some two months later, the nomination was officially withdrawn.

Seven other nominations to appeals courts during 1987-88 went nowhere for a variety of reasons. One nomination, that of New Yorker Stuart A. Summit to the Second Circuit, was tantalizingly close to confirmation, having been cleared by the Judiciary Committee on August 11, 1988. But, apparently, Republican Senator D'Amato put a hold on the nomination for reasons that are unclear,

AP/WIDE WORLD PHOTOS

Bernard H. Siegan

and the nomination died with the end of the 100th Congress.

Twelve nominations (three of which were withdrawn) to the district bench were unconfirmed during 1987-88. At least nine of them caused some degree of controversy behind the scenes. One nominee, already under fire for alleged political favoritism as a judge, withdrew after it was revealed he visited a massage parlor in 1971. Another nominee, Vaughn R. Walker, a Stanford Law School graduate and a member of a prestigious San Francisco law firm, was opposed by gay rights' groups because he had successfully represented the United States Olympic Committee in its suit to prevent the use of the term "olympics" in the Gay Olympics. California Senator Cranston opposed the nomination and it was never voted on in committee. Still another nominee, Pennsylvania state court Judge James R. McGregor, went unconfirmed because, according to newspaper accounts, he was too liberal for Republican Senator Gordon J. Humphrey of New Hampshire who obstructed the nomination at the end of the 100th Congress. This particular judgeship (on the Western District of Pennsylvania) had been vacant since July 2, 1985, and it had taken the Reagan administration over two and a half years to come up with a nomination.

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exceed it. Whether the proportion will match that of the Carter administration is unknown. But the pool of qualified women is now much larger than it was more than a decade ago. Thus, if the administration is serious about (in George Bush's words) "appointing to the bench the best qualified candidates we can find—regardless of race or gender"[30] it would be incredible if the new administration did not exceed the Reagan administration's record.

As for the appointment of African-Americans, Hispanic-Americans and Asian-Americans, there is the possibility that the administration will make a conscious effort to better the Reagan record, which for African- and Asian-Americans would not be difficult. Third, without a badly needed pay increase for the judiciary, it will be increasingly difficult to recruit non-millionaire high quality legal talent particularly in the major metropolitan areas. It is also likely that those from the upper end of the socio-economic spectrum will continue to be substantially represented because the Republican party tends to attract and draw from those at that end of the spectrum.

During much of Reagan's second term, the administration was at odds with liberal Senate Democrats on the Senate Judiciary Committee over the appointment process.[31] Perhaps this is why George Bush, during the presidential campaign, told *Judicature* that as president he would "commission a study to recommend procedures and guidelines to insure that federal judges continue to be of the highest legal and ethical standards."[32] The Bush administration is seeking to establish its own identity. This may be the reason why it was reported that responsibility for judicial selection may be shifted from the Office of Legal Policy and that the White House may become even more involved in the screening of judicial candidates.[33]

In the months ahead, it will be of interest to see how the Bush administration approaches affirmative action. Will it actively seek to find qualified women and minorities? Also of interest will be whether the administration will consciously aim to pick judges who share a conservative judicial restraint philosophy. If so, will the Bush administration utilize the innovative Reagan administration approach which involved extensive interviewing of leading candidates? Will the administration make some attempt at bipartisan appointments at the appeals court level? Still another matter of considerable interest is the new administration's relationship with the ABA Standing Committee on Judiciary. Will the administration go back to the procedure of an earlier era and have greater involvement of the ABA committee in the selection process by asking the ABA for preliminary ratings of leading candidates for a particular judicial position, rather than asking the ABA to rate one person already slated for the position? There may be a new relationship with the ABA if reports are true that Attorney General Richard Thornburgh wants as his deputy attorney general Robert B. Fiske, Jr., a former chairman of the ABA committee.[34]

And finally, observers of judicial selection will be closely watching the administration's relationship with Republican senators and with the Democratic controlled Senate Judiciary Committee. Will Republican senators be given greater deference than during the Reagan administration in appointments to federal district courts? Will Republican senators have more influence in appeals court appointments? Will the Thornburgh Justice Department be more solicitous of the Democrats on the Senate Judiciary Committee by avoiding controversial nominees? Will the administration send some nominations of Democrats to the appeals courts and more moderate Republican conservatives, and, if so, can the administration prevent right-wing Republican senators from obstructing those nominations?

There is much speculation as to whom President Bush would appoint to the Supreme Court were a vacancy to occur. As of this writing, there is no basis for informed speculation. One might guess that the safest strategy to avoid a contentious fight in the Senate would be to nominate a conservative judge with low-visibility or possibly a non-controversial member of the administration. Were President Bush to choose the latter route, Attorney General Thornburgh himself or Bush's nominee for solicitor general, Kenneth W. Starr (and former Reagan appointee on the U.S. Court of Appeals for the District of Columbia), would be leading candidates and either appointment would return to an earlier tradition of presidents appointing their attorneys general or other members of their administrations.[35] Of course, much would depend upon which justice was being replaced.

In the cycle of American politics, we have been in a conservative era since 1968 with the Republican party capturing the presidency in five of the six presidential elections although failing to control both houses of Congress. Ronald Reagan was a charismatic leader whose popularity helped solidify Republican control of the White House in 1988. The Reagan judicial legacy must be seen as an impressive one in terms of the systematic selection process developed by the administration, the generally highly professionally qualified group of men and women appointed to the courts, and the determination, met with much success, in selecting for the bench those sharing a conservative judicial philosophy. While the decisional impact of the Reagan appointees is a gradual and incremental one (only with the Supreme Court do we see a more dramatic impact), that legacy will be felt into the next century. The Bush appointees will tend to reinforce that impact. For civil libertarians this means that when the country celebrates the bicentennial of the ratification of the Bill of Rights in 1991 the courts will be dominated by those hostile to a liberal reading of those rights. For judicial conservatives this means a healthy return to government by the elected representatives of the people. Ronald Reagan will be seen as having had the greatest influence on the shape of the American judiciary and law since Franklin Roosevelt. □

30. *Candidates state positions on federal judicial selection*, 72 JUDICATURE 77 (1988).

31. A special hearing by the Senate Judiciary Committee was conducted on this matter on February 2, 1988, entitled *Hearing on the Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench.*

32. *Candidates state positions, supra* n. 30.

33. Kamen and Marcus, *A Chance to Deepen Stamp on Courts*, WASHINGTON POST, January 29, 1989, at A-1, A-6, A-7. It was reported in the *National Law Journal* (April 10, 1989, at page 2), that the Office of Legal Policy is to be replaced by the Office of Policy Development and that judicial selection will not be the responsibility of that office.

34. *National Law Journal*, April 10, 1989, at 2.

35. Of the 103 individuals who have served on the Supreme Court, 18 were recruited from within the administrations (6 attorneys general and 12 other members of the administration).

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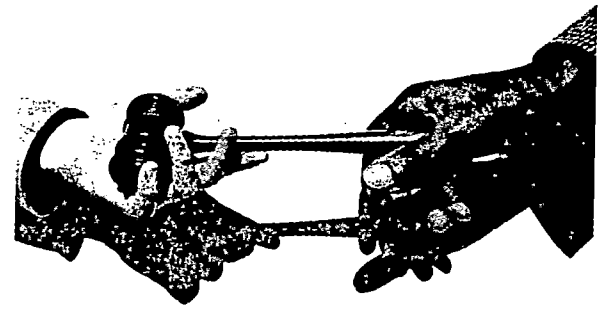

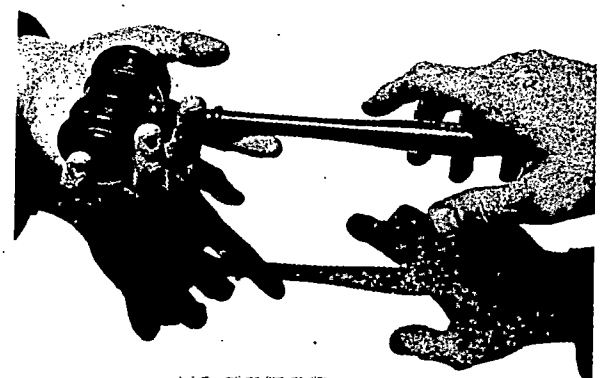

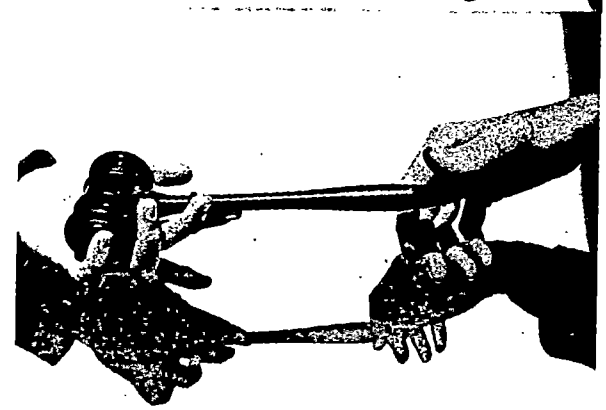

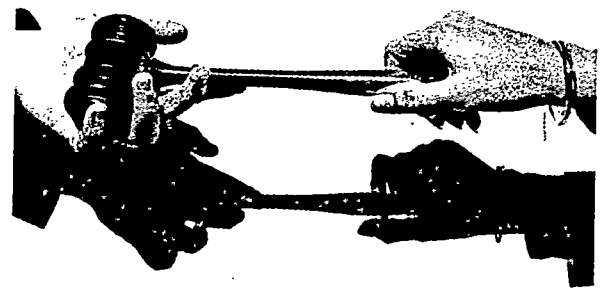

Carter appointed more judges than any other President in history. But more important, he contributed to the professionalization of the judiciary and created new expectations for a more open selection process.

Carter's judicial appointments: a lasting legacy

by Sheldon Goldman

Although Jimmy Carter was denied the opportunity to name even a single justice to the U.S. Supreme Court, he left more of an imprint on the federal bench than any President before him. In one term of office, Carter named more people to lifetime positions on the federal district and appeals courts than any other President in history, primarily because Congress created 152 new lower court judgeships in 1978.

Carter's impact on the judiciary cannot be measured in numbers alone, however (though approximately 40 per cent of the federal bench today consists of Carter appointees). His impact extended to the selection process itself, where he changed the procedures and perhaps even public expectations. Carter had made commitments (1) to open up the selection process so that qualified women and minorities would be recruited for the bench; (2) to institute merit selection; and (3) to attain a more pluralistic judiciary in terms of race, ethnic background, and gender. Now that his term

has ended, we can consider the extent to which he succeeded.

The purpose of this article is to examine the backgrounds of the Carter appointees and to offer a preliminary evaluation of Carter's impact on judicial selection. This analysis draws upon an earlier study of Carter nominees during the first 19 months of his presidency[1] and the trends noted in that article are examined in light of the complete record of the Carter Administration. Comparisons are also made to the appointments of three of Carter's predecessors.

President Carter appointed 202 persons to lifetime federal district court positions and 56 to federal courts of appeals. Carter withdrew four other nominations to the district court, and for political reasons, the Senate did not act upon 12 additional district court nominations and four appeals court nominations during the waning months of the Carter Administration. On January 2, 1981, it was announced that Carter made a recess appointment to one of the 12 district court nominees, Walter M. Heen, of Hawaii, but President Reagan withdrew the nomination on January 21. Our data include only those who were confirmed by the Senate.

This study made use of standard biographical sources, including various editions of *Who's Who*, *The American Bench*, *Martindale-Hubbell's Law Directory*, and state legislative handbooks. Newspapers from the appointees' home states were examined for articles containing biographical information. The unpublished hearings by the Senate Judiciary Committee during the 95th Congress (1977 and 1978) were searched because they contained biographical resumes prepared by the nominees as well as remarks by their home state senators containing background information. For appointees confirmed by the 96th Congress (1979 and 1980), the questionnaires they completed for the Senate Judiciary Committee were exam-

1. Goldman, *A profile of Carter's judicial nominees*, 62 JUDICATURE 246 (1978).

Table 1
How Carter's appointees to the DISTRICT and APPEALS COURTS during the 95th Congress compare to his appointees during the 96th Congress

	DISTRICT COURTS		COURTS OF APPEALS	
	95th Congress	96th Congress	95th Congress	96th Congress
Occupation:				
Politics/gov't	6.2%	3.2%	—	6.8%
Judiciary	41.7	45.4	41.7	47.7
Large law firm	37.5	34.4	25.0	27.3
Moderate size firm	4.2	8.4	16.7	—
Solo or small firm	8.3	3.9	—	2.3
Professor of law	2.1	3.2	16.7	13.6
Other	—	0.7	—	2.3
Undergraduate education:				
Public-supported	47.9	60.4	41.7	27.3
Private (not Ivy)	35.4	31.8	41.7	52.3
Ivy League	16.7	7.8	16.7	20.4
Law school education:				
Public-supported	39.6	53.9	41.7	38.6
Private (not Ivy)	33.3	31.8	33.3	15.9
Ivy League	27.1	14.3	25.0	45.4
Experience:				
Judicial	47.9	56.5	58.3	52.3
Prosecutorial	35.4	39.6	41.7	29.6
Neither one	33.3	26.6	25.0	40.9
Party:				
Democrat	95.8	93.5	91.7	88.6
Republican	4.2	4.6	—	6.8
Independent	—	1.9	8.3	4.6
Past party activism:	58.3	61.0	83.3	70.4
Religious origin or affiliation:				
Protestant	56.2	59.7	75.0	56.8
Catholic	33.3	26.0	16.7	25.0
Jewish	10.4	14.3	8.3	18.2
Ethnicity or race:				
White	87.5	76.0	66.7	81.8
Black	8.3	15.6	25.0	13.6
Hispanic	4.2	7.8	—	4.6
Asian	—	0.7	8.3	—
Sex:				
Male	87.5	85.1	100.0	75.0
Female	12.5	14.9	—	25.0
A.B.A. ratings:				
Exceptionally well qual.	6.2	3.2	16.7	15.9
Well qualified	58.3	43.5	58.3	59.1
Qualified	33.3	52.0	25.0	25.0
Not qualified	2.1	1.3	—	—
TOTAL number of appointees	48	154	12	44

ined.[2] Most of the hearings of the Senate Judiciary Committee during the 96th Congress were or are in the process of being published and were also consulted.

District court appointments

Table 1 compares the Carter appointees during the first half of his presidency, coinciding with the tenure of the 95th Congress, to the last half of his Administration, which was concurrent with the 96th Congress. For our purposes the Carter appointees from the 95th Congress will be called Carter I appointees and those appointed during the 96th Congress will be called Carter II appointees.

Experience: One of the major findings of the earlier study of Carter nominees was that close to half the nominees had previous judicial experience but only one-third had prosecutorial experience. In three previous administrations, appointees reported less judicial and more prosecutorial experience. As Table 1 suggests, this

2. The questionnaire for judicial nominees appears in *Selection and Confirmation of Federal Judges*, Hearing Before the Committee on the Judiciary, U.S. Senate, 96th Congress, 1st Session, 1979, Serial No. 96-21, Part 1, pp. 123-132. The completed questionnaires were examined in the main office of the Senate Judiciary Committee. With the advent of the 97th Congress, they have been sent to the National Archives.

The appointees' political and legal credentials

Politics was still a factor in the selection of judges: many Carter II appointees were once Democratic activists. But these nominees (and others not mentioned) also had impressive legal credentials.

- Bailey Brown, once active in the late 1940s and 1950s in the Kefauver and Gore senatorial campaigns, was also a distinguished federal district court judge since 1961 (rated *exceptionally well qualified* by the A.B.A. for elevation to the Sixth Circuit).
- Richard Cudahy, former state chairman of the Democratic Party in Wisconsin and campaign manager for Senator Proxmire in 1970, was a member of a prestigious Washington, D.C. law firm.
- Boyce Martin, general coordinator and planner for the Kentucky statewide Democratic campaign in 1972, later became chief judge of the Kentucky Court of Appeals.
- Abner Mikva, a Democratic member of the U.S. House of Representatives, was a distinguished congressman.
- Francis D. Murnaghan, a co-chairman in 1964 of Maryland Citizens for Johnson-Humphrey and active supporter of Senator Sarbanes' various campaigns, was a noted Baltimore attorney.
- Jon Newman, former campaign director and administrative assistant to Senator Ribicoff, served as U.S. Attorney and since 1972 as a federal district judge (rated *exceptionally well qualified* by the A.B.A. for elevation to the Second Circuit).
- Henry Politz, who among other political activities was a 1976 Carter elector in the Electoral College, was a well regarded Shreveport, Louisiana, attorney.
- Stephen Reinhardt, a member of the Democratic National Committee from California, was a well known Los Angeles attorney.
- Mary M. Schroeder, once a member of the Arizona Democratic State Committee, was a judge on the Arizona State Court of Appeals.
- James Sprouse, the Democratic candidate for Governor of West Virginia in 1968, later became a judge on the West Virginia Supreme Court of Appeals.
- Patricia Wald, director of policy and issues for Sargent Shriver's vice-presidential campaign in 1972, was an Assistant Attorney General in the Carter Administration at the time of appointment. She was once an attorney with the Mental Health Law Project and before that District of Columbia Neighborhood Legal Services.
- Richard S. Arnold, once an administrative assistant to Senator Dale Bumpers, was a federal district judge since 1978 (rated *exceptionally well qualified* by the A.B.A. for elevation to the Eighth Circuit).
- William Norris, Democratic nominee for State Attorney General in California, was a well-regarded Los Angeles attorney.

—*Sheldon Goldman*

Table 2
How Carter's appointees to the DISTRICT COURTS compare to the appointees of Ford, Nixon and Johnson

	Carter appointees	Ford appointees	Nixon appointees	Johnson appointees
Occupation:				
Politics/gov't	4.0%	21.2%	10.7%	21.3%
Judiciary	44.6	34.6	28.5	31.1
Large law firm	35.1	34.6	39.7	21.3
Moderate size firm	7.4	5.8	11.7	4.9
Solo or small firm	5.0	3.9	6.7	18.0
Professor of law	3.0	—	2.8	3.3
Other	0.5	—	—	—
Undergraduate education:				
Public-supported	57.4	48.1	41.3	38.5
Private (not Ivy)	32.7	34.6	38.5	31.1
Ivy League	9.9	17.3	19.5	16.4
None indicated	—	—	0.6	13.9
Law school education:				
Public-supported	50.5	44.2	41.9	40.2
Private (not Ivy)	32.2	38.5	36.9	36.9
Ivy League	17.3	17.3	21.2	21.3
Experience:				
Judicial	54.5	42.3	35.1	34.3
Prosecutorial	38.6	50.0	41.9	45.8
Neither one	28.2	30.8	36.3	33.6
Party:				
Democrat	94.1	21.2	7.8	94.8
Republican	4.5	78.8	92.2	5.2
Independent	1.5	—	—	—
Past party activism:	60.4	50.0	48.6	48.4
Religious origin or affiliation:				
Protestant	58.9	73.1	72.1	57.4
Catholic	27.7	17.3	18.9	31.9
Jewish	13.4	9.6	8.9	10.7
Ethnicity or race:				
White	78.7	90.4	97.2	96.7
Black	13.9	5.8	2.8	3.3
Hispanic	6.9	1.9	1.1	2.5
Asian	0.5	3.9	—	—
Sex:				
Male	85.6	98.1	99.4	98.4
Female	14.4	1.9	0.6	1.6
A.B.A. ratings:				
Exceptionally well qual.	4.0	—	4.8	7.4
Well qualified	47.0	46.1	40.4	40.9
Qualified	47.5	53.8	54.8	49.2
Not qualified	1.5	—	—	2.5
TOTAL number of appointees	202	52	179	122

trend continued. An even higher proportion of Carter II appointees showed previous judicial experience than Carter I appointees, although there was also a somewhat higher proportion of Carter II than Carter I appointees with prosecutorial backgrounds.

Table 2 presents the comparison of the combined Carter I and Carter II groups to the three previous administrations—Presidents Ford, Nixon, and Johnson. It shows that of all four administrations, Carter's appointed the fewest judges without either judicial or prosecutorial experience.

In the earlier study we speculated that former Attorney General Griffin Bell may have placed greater emphasis on judicial experience because of a desire to staff the judiciary with those of demonstrated judicial temperament. Whatever the reason or reasons, the findings suggest that the Carter Administration is responsible for a major step in the direction of the professionalization of the judiciary. It may have been the beginning of a deliberate effort to promote highly capable state court judges and federal magistrates to the federal bench.

Minorities: President Carter made the most conscious effort in the history of federal judicial selection to place women, black Americans, and Americans of Hispanic origin on the federal bench. He nominated at least one black American to the federal district courts of each of 10 southern and two border states—although two nominees were not confirmed.[3] The numbers and proportions of women, black Americans, and Hispanic (or Spanish ancestry) Americans placed by Carter on the bench are an historic first and a dramatic contrast with previous presidents (Table 2). The proportions of women, blacks, and Hispanic appointees during the Carter II period (Table 1), were even greater than those for the Carter I group. In total, President Carter appointed 28 black Americans, 29 women (including six black women), and 14 of Hispanic origin (including one woman) to lifetime federal district court posts. By the end of the Carter Administration the proportion of women judges on the federal bench had risen from one per cent to close to seven per cent and, for blacks, from four per cent to close to nine per cent.

Large firms: Our earlier study noted that Carter nominees from private law practice tended to come from large law firms,[4] and that trend continued for Carter II appointees (Table 1). Previous studies found that Democratic presidents made significantly larger proportions of appointments to those from moderate or small law firms (note the figures for the Johnson appointees in Table 2) and proportionately fewer appointments from the large firms. Clearly here the Carter appointees demonstrated a break from the past: they showed greater similarity to the two previous Republican administrations than to the previous Democratic administration.

Previous studies have suggested that the appointees of Democratic presidents tended to come from a lower socio-economic level than the appointees of Republican presidents.[5] On this matter it is not possible to draw a conclusion from the current findings. But note in Table 2 that over half the Carter appointees attended the less expensive state-supported colleges or universities and state-supported law schools. These proportions for public-supported education were the largest of all four groups of appointees.

Government posts: Tables 1 and 2 confirm earlier findings that the Carter Administration appointed relatively few persons who held political or governmental posts at the time of appointment. As Table 2 shows, previous administrations appointed sizeable proportions of those serving in governmental posts (primarily U.S. attorneys) but this was distinctly *not* so with the Carter Administration. This reinforces the speculation that Carter—through the

3. Of the 11 states of the old confederacy, Mississippi was the only state for which the Carter Administration did not nominate a black American for the district court bench. In total, 10 blacks were confirmed by the Senate for district court judgeships in nine states of the old South. One each was confirmed for judgeships in Maryland and Missouri.

The nominations of James Sheffield of Virginia and Fred Gray of Alabama were unsuccessful for reasons discussed later in this article. Of the black appeals court appointees from the South and border states, one was from Florida and the other from Missouri. The nomination of a black court of appeals nominee from Texas died with the end of the 96th Congress.

4. For purposes of the earlier and the present study, a large law firm was defined as consisting of five or more members or associates, a moderate size firm was defined as consisting of three or four members or associates, and a small firm consisted of one or two members.

5. *See, e.g.*, the citations and discussion in Goldman and Jahnige, THE FEDERAL COURTS AS A POLITICAL SYSTEM Second Edition 66-74 (New York: Harper & Row, 1976).

Table 3
How Carter's appointees to the COURTS OF APPEALS compare to the appointees of Ford, Nixon and Johnson

	Carter appointees	Ford appointees	Nixon appointees	Johnson appointees
Occupation:				
Politics/gov't	5.4%	8.3%	4.4%	10.0%
Judiciary	46.4	75.0	53.3	57.5
Large law firm	26.8	16.7	24.4	20.0
Moderate size firm	3.6	—	6.7	2.5
Solo or small firm	1.8	—	2.2	7.5
Professor of law	14.3	—	2.2	2.5
Other	1.8	—	6.7	—
Undergraduate education:				
Public-supported	30.4	50.0	40.0	32.5
Private (not Ivy)	50.0	41.7	35.6	40.0
Ivy League	19.6	8.3	20.0	17.5
None indicated	—	—	4.4	10.0
Law school education:				
Public-supported	39.3	50.0	37.8	40.0
Private (not Ivy)	19.6	25.0	26.7	32.5
Ivy League	41.1	25.0	35.6	27.5
Experience:				
Judicial	53.6	75.0	57.8	65.0
Prosecutorial	32.1	25.0	46.7	47.5
Neither one	37.5	25.0	17.8	20.0
Party:				
Democrat	89.3	8.3	6.7	95.0
Republican	5.4	91.7	93.3	5.0
Independent	5.4	—	—	—
Past party activism:	73.2	58.3	60.0	57.5
Religious origin or affiliation:				
Protestant	60.7	58.3	75.6	60.0
Catholic	23.2	33.3	15.6	25.0
Jewish	16.1	8.3	8.9	15.0
Ethnicity or race:				
White	78.6	100.0	97.8	95.0
Black	16.1	—	—	5.0
Hispanic	3.6	—	—	—
Asian	1.8	—	2.2	—
Sex:				
Male	80.4	100.0	100.0	97.5
Female	19.6	—	—	2.5
A.B.A. ratings:				
Exceptionally well qual.	16.1	16.7	15.6	27.5
Well qualified	58.9	41.7	57.8	47.5
Qualified	25.0	33.3	26.7	20.0
Not qualified	—	8.3	—	2.5
No report requested	—	—	—	2.5
TOTAL number of appointees	56	12	45	40

influence of Griffin Bell—gave a higher priority to judicial than prosecutorial experience.

Other factors

Carter, like Presidents before him, appointed primarily those who shared his political party affiliations and, like previous administrations, many of those selected had a background of prominent partisan activism. Indeed, as Table 2 shows, there was a larger proportion of Carter appointees with previous party activism than for each of the preceding three administrations. It is unlikely that political activity and political connections were the *sole* basis for selection, but qualified candidates with prominent partisan activism or connections usually had the edge over those without it.

Women appointees were the major exception to this rule. Twenty-two of the 29 women appointed by Carter to the district courts did *not* have a record of prominent partisan activism. The figures were different for other groupings. Put differently, while slightly over 71 per cent of white males appointed by Carter had a background of some prominent partisan activism sometime in their past, only 24 per cent of the women appointees had such a record. About 75 per cent of the black appointees and 57 per cent of those of Hispanic origin had such partisan backgrounds.

The religious origin or affiliation of the Carter appointees was similar to the appointees of other Democratic Presidents. Carter, like Johnson before him, appointed proportionately more Roman Catholics and Jews than did Republican presidents Nixon and Ford (Table 2)—a finding that reflects to some extent the religious composition of the political parties themselves. Nevertheless, Protestants[6] constituted the majority of the appointees of all four

Carter chose an unprecedented number of women, blacks, and Hispanics for the appellate bench.

administrations.

The American Bar Association ratings of the appointees are included in Tables 1 and 2. The Carter II appointees received less favorable ratings than the Carter I appointees, but overall, the ratings were comparable to those for the appointees of previous administrations.

Three of Carter's appointees were designated *Not Qualified* by the A.B.A. Standing Committee on Federal Judiciary. One of those was so rated because of his age; another appointee (a southern black) had the support of a minority of the committee for a *Qualified* rating. Only one of those receiving the *Not Qualified* rating was so voted unanimously on the basis of his professional conduct. However, this appointee had been recommended by a senator's merit selection commission.[7]

Appeals court appointees

Trends identified in the earlier study were not definite, since the first group of appointees numbered only 12. It contained a large proportion of non-white appointees but no women. The Carter II group consisted of 44 appointees, and they demonstrate that the Administration remedied the initial absence of women. Carter chose an unprecedented number of women, blacks, and those of Hispanic origin for appointments to the second highest bench in the nation. Nine distinguished black jurists (including one woman) were named by Carter, two Hispanic-Americans, one Asian-American, and 11 women.[8]

Party affiliation played the same role it has

6. For purposes of this study, those affiliated with the Greek Orthodox, Mormon, and Bahai faiths were placed in the Protestant classification. There were a total of three Mormon appointees and one each of the Greek Orthodox and Bahai religions (these figures are for both district and appeals appointees).

7. Unpublished hearings on the nomination of Donald E. O'Brien before the Senate Judiciary Committee, 95th Cong., 2d Sess., October 4, 1978, Page 4. The hearings (page 10) also reveal that the Iowa State Bar Association strongly supported O'Brien.

8. Women were named to the Second, Third, Fifth, Sixth, Ninth, Tenth, and District of Columbia circuits. Blacks were appointed to the Second, Third, Fifth, Sixth, Eighth, Ninth, and District of Columbia circuits.

played traditionally: the merit-type nominating process was essentially merit selection of Democrats. Carter II appointees included more token Republicans and Independents than the Carter I groups, however. Overall, more Carter appointees demonstrated a record of prominent partisan activism some time in their backgrounds than appointees of the three previous administrations (see Table 3). But they also demonstrated excellent legal credentials (See "The appointees' political and legal credentials" on page 347).

Just as with the district court appointees, the large majority of the women appointed by Carter to the appeals courts did not have a record of prominent party activism. The black appeals court appointees, unlike the district court appointments, also showed relatively little party activism. Thus, 81 per cent of the white males had partisan activism in their backgrounds, but only 44 per cent of the women appointees and one-third of the black appointees. In their quest to appoint well qualified women and blacks, the Carter Administration departed from the political criteria that have traditionally played such an important role in the selection process (and still play a role for white males).

For the appeals court, the Carter Administration appointed the largest proportion of judges without either judicial or prosecutorial experience. But one must recognize that half of the Carter II appointees without either judicial or prosecutorial experience were women. Indeed, eight of the 11 women appointees had no judicial or prosecutorial experience (73 per cent) while only about one-fourth of the white males lacked such backgrounds.

Occupation: Carter named an unprecedented number (and proportion) of law professors to the appeals courts, and a lower proportion than for previous administrations of those who were state court judges or federal district court judges. Does this finding contradict the earlier suggestion that the Administration was encouraging the professionalization of the judiciary? No, it doesn't. For if the women appointees are eliminated from the figures, the proportion of sitting judges elevated to the appeals courts rises to over half, which is comparable to the Nixon and even Johnson administrations. Further, when women appointees are eliminated from the figures, the proportion of appointees with judicial experience in their backgrounds rises to 60 per cent.

Education and religion: The findings show no distinct pattern for education. Interestingly, close to half of the Carter II appointees attended an Ivy League law school, and compared to the other three administrations, Carter appointed the largest proportion of Ivy League law trained appeals judges. If the Ivy League law schools are among the best in the nation, then Carter's appointees received a high quality legal education, perhaps the best of any group of appointees in recent decades. The A.B.A. ratings also suggest that Carter's appointees were of high quality. Three out of four Carter appointees were rated *Well Qualified* or *Exceptionally Well Qualified*. None was rated *Not Qualified*.

The findings for religious affiliation were consistent with previous findings. The proportions of Catholics and Jews were almost identical with those from the administration of fellow Democrat Lyndon Johnson and contrasted with the Nixon and Ford records.

The politics of selection

Nomination: The years of the Carter presidency were years of change in the judicial selection process, primarily as a result of the creation and use of merit-type nominating commissions. For district court nominations, most Democratic senators, at the urging of the Administration, instituted nominating commissions,[9] and for appeals court nominations, Carter himself created the U.S. Circuit Judge Nominating Commission with at least one panel for each circuit.[10]

9. Nominating commissions were created in 30 states. For an extensive and perceptive analysis of the workings of these commissions and their impact on the judicial selection process, *see* Neff, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES, (Chicago, American Judicature Society, 1981).

See also Slotnick, "Reforming the Judicial Selection Process: Implications for Senatorial Advice and Consent," paper delivered at the Annual Meeting of the Midwest Political Science Association, 1980 and Parris, "The President, the Senate, and the Judges: Innovation in the Federal Judicial Selection Process, 1977-1980," paper delivered at the Annual Meeting of the Midwest Political Science Association, 1980.

10. See the thorough analysis by Berkson and Carbon, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES, (Chicago, American Judicature Society, 1980).

Three out of four Carter appointees were rated well or exceptionally well qualified by the A.B.A.

The workings and evaluation of the commissions have been extensively considered elsewhere by others.[11] We simply observe here that the end results of the nomination process suggest less of a break with traditional concerns in the process than might otherwise have been thought. However, the commissions may have opened up the nomination process to the extent that individuals are considered for nomination who otherwise might never have had a chance for a judgeship, particularly women and minorities. Of course the Carter Administration set the tone with its avowed objective of actively recruiting women and minorities.[12]

Confirmation: The Senate confirmation process changed when Senator Edward Kennedy assumed the chairmanship of the Senate Judiciary Committee at the start of the 96th Congress. One of Kennedy's major innovations was the establishment of the committee's own investigatory staff to examine the backgrounds of the nominees independent of the Justice Department so that the committee could make its own evaluations. Such investigations became of critical importance for two southern nominations, the most dramatic instance, that of Charles B. Winberry Jr., who was nominated for the federal district bench in North Carolina.

Winberry, who was once campaign manager for Senator Robert Morgan, was rated *Qualified* by the A.B.A., but on the basis of the investigatory staff's work, the Senate Judiciary voted not to approve Winberry. The A.B.A. Committee, apprised of the new charges, conducted its own investigation and changed its rating to *Not Qualified.*[13] It was the first time in modern history that the Senate Judiciary Committee opposed a fellow senator of the president's party from the state of a vacancy and rejected a nominee found qualified (at least initially) by the A.B.A.

Delay and doom: The Senate Judiciary Committee's investigatory staff also turned up information that delayed and in effect buried the nomination of the first black to a federal district judgeship in Virginia. When Virginia state court judge James Sheffield, rated as *Qualified* by the A.B.A., was informed of the allegations at his confirmation hearing, he asked for a postponement so that he could prepare a response to them.[14] In reality, the nomination was killed.

During the time of the 1980 presidential campaign, 16 pending nominations (including Sheffield's) faced Republican opposition because they were vacancies that Republicans thought that the next President should fill. Once Ronald Reagan was elected, those 16 nominations were doomed. Had the investigation of Sheffield not proceeded the way it did, (and the Justice Department had already investigated the same allegations and had cleared Sheffield,[15]) he might have been confirmed before the fall campaign was underway. Here, then, Senator Kennedy's innovation did not help achieve his own goal of seeing qualified blacks recruited for the federal bench.

Senator Kennedy also announced that a senator would no longer be allowed to quietly kill a nomination simply by failing to return a blue slip. Rather, the Senate Judiciary Committee would decide whether or not to proceed on *all* nominations[16]—forcing senators to be more open in their support or opposition of nominees.

The process in the Senate was perhaps more open than ever before. For example, Fred Gray, a prominent black civil rights lawyer in Alabama, was nominated for a district court posi-

11. *See* Neff, *supra* n. 9. and Berkson and Carbon, *supra* n. 10. *Cf.* Slotnick, *Federal Appellate Judge Selection*, JUSTICE SYSTEM J. (forthcoming).

12. *See*, in general, Lipshutz and Huron, *Achieving a more representative federal judiciary*, 62 JUDICATURE 483 (1979) and Goldman, *Should there be affirmative action for the judiciary?*, 62 JUDICATURE 488 (1979).

13. *See* the account in *Congressional Quarterly Weekly Report*, vol. 38, no. 10, March 8, 1980, p. 674.

14. *See* N.Y. TIMES, October 10, 1980, p. A-18.

15. Interview with Philip Modlin, Office of the Deputy Attorney General, U.S. Department of Justice, December 19, 1980.

16. BOSTON GLOBE, January 26, 1979, p. 2. *See also* Neff, *supra* n. 9, at chap. 3.

tion but was actively opposed by the A.B.A. Standing Committee on Federal Judiciary and by others. Alabama Senator Howell Heflin initially supported the nomination but later withdrew his support in a letter to Kennedy. Gray then offered to withdraw if another black lawyer "acceptable to the black community" was nominated instead.[17] Ultimately, a young, Yale-educated, black attorney was nominated and quickly confirmed, one of the last of the Carter appointees.

The ratings game: Another change in the confirmation process was the Senate Judiciary Committee receptivity to The Federation of Women Lawyers and the National Bar Association ratings of nominees. The A.B.A. Committee, of course, also continued to provide ratings, but the trend was unmistakable that the A.B.A. committee was losing its premier position in the professional evaluation of judicial candidates. The panels of the circuit judge nominating commission created by Carter and the commissions created by the senators offered their own professional evaluations of the candidates and the Senate Committee seemed to welcome all evaluations. The A.B.A. Committee's influence with the Administration and the

17. N.Y. TIMES, August 13, 1980, p. A-18.

The battle over the First Circuit vacancy

Senator Kennedy himself had a direct impact on the filling of the new position created in 1978 in the First Circuit as part of the Omnibus Judgeship Act. The New York Times reported in late November, 1978, that the new First Circuit judgeship was promised to Massachusetts and that Kennedy's choice "is expected to be Archibald Cox, the Harvard Law School professor and former Watergate prosecutor."[1] This was the beginning of an impasse that lasted close to two years.

Apparently the Carter Administration did not appreciate this leak since it appeared to undermine the integrity of the circuit judge nominating commission Carter created. The Administration no doubt was not eager to provide a precedent for other senators of shortcircuiting the commission process (by suggesting in advance who will be chosen) and denying the Administration the right to make its own choices. Carter warmly praised Kennedy's choices for four federal district court positions in Massachusetts,[2] but when Kennedy began pushing for Cox's appointment (after the list from the commission with Cox's name on it was sent to the President), the Administration said Cox was too old for the post. Kennedy's challenge to Carter for the presidential nomination resulted in a stalemate—and the continued vacancy on the First Circuit.

Once Carter won renomination, Carter began negotiations with Kennedy to obtain his support in the general election campaign. One of Kennedy's conditions (which Carter accepted) was that Carter nominate Stephen Breyer, Kennedy associate and chief counsel to the Senate Judiciary Committee (and Harvard Law School Professor) to the vacancy on the First Circuit.[3] On the home front in the committee, Senator Kennedy won support for Breyer from the ranking Republican member of the committee, Senator Strom Thurmond.[4] Thus after the election, Carter nominated Breyer, whose name was one of three on a list forwarded to Carter from the nominating commission for the First Circuit. Thurmond, the future chairman of the Senate Judiciary Committee, kept the Republicans in line; Breyer was confirmed, the last Carter appointee to the federal courts.

In this example, the commission became a front for the traditional selection process. Whether or not they realized it, the commissioners and the other competitors for the vacancy were participating in a charade first with Cox and then with Breyer. Although both Cox and Breyer possess outstanding credentials and a fine appointment resulted, the means by which that end came about point up the difficulties that can potentially occur with the commission concept and the need for skepticism about what commissions can actually do in light of the deep political roots of judicial selection.

—*Sheldon Goldman*

1. N.Y. TIMES, November 28, 1978, p. A-16.
2. BOSTON GLOBE, January 26, 1979, p. 2.
3. BOSTON GLOBE, November 12, 1980, p. 3.
4. *Id.*

Senate Committee may have been the least since the A.B.A. began rating nominees almost three decades ago.

Conclusions

The election of Ronald Reagan and the assumption of control of the Senate by the Republicans are bound to temper the changes in the selection process as well as the profile of the judiciary that occurred during the years of the Carter presidency. Yet, I think we can identify a Carter legacy.

- First, the Carter appointees constitute a substantial proportion of the judiciary (approximately 40 per cent) and most of them will remain on the bench well beyond the tenure of the Reagan Administration. These appointees are primarily moderate to liberal in their outlook.[18] Unless there is a succession of conservative Republican presidents, a potent and long-lasting moderate to liberal political perspective will characterize a substantial proportion of the federal judiciary. This may tend to moderate any extreme conservative direction the Supreme Court might take as a possible result of Reagan appointments to the Court. One might also expect somewhat higher dissent levels as the Carter appointees clash with the more conservative Reagan appointees on the courts of appeals.

- Second, part of Carter's legacy may be to raise expectations that women, blacks, Hispanics, and other minorities will be actively recruited for the bench. Indeed, during the 1980 presidential campaign, Ronald Reagan pledged that: "one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find, one who meets the high standards I will demand for all my appointments."[19] (Conservative Sixth Circuit judge Cornelia Kennedy appears to have the inside track for any such appointment.) The Reagan Administration probably will not come close to matching the Carter record of women and minority appointments to the lower courts, but the Reagan record nonetheless will probably be considerably closer to the Carter record than to Nixon and Ford. Political pressure will be especially strong toward putting more women on the bench. Note that at the same time that Reagan promised to appoint a woman to the Supreme Court he also asserted: "I will also seek out women to appoint to other federal courts in an effort to bring about a better balance on the federal bench."[20]

- Third, the Carter legacy surely suggests the desirability of opening up the nominating process through nominating commissions and extending the recruitment net. Republican senators may well continue the use of nominating commissions. Note also that Reagan asserted during the campaign that he would use advisory committees "of eminent legal and judicial experts" to make recommendations for all judicial appointments.[21] Whatever develops during his Administration, it is doubtful that there will be a return to the relatively narrow recruitment process that was typical before Carter's presidency.

- Fourth, Carter's and the senators' use of merit selection nominating commissions points up the fact that, when politicians and bar leaders talk about merit selection, they are talking about different things. The politicians for the most part want merit selection of the party faithful, and it is unrealistic to expect any fundamental change in a tradition that goes back to the beginnings of the republic. It may not even be desirable to change this tradition if it is not used to keep out women and minorities (recall how the Carter Administration handled this) or others with exceptional qualifications and if it means that only clearly capable people are appointed.

In sum, it will be interesting to see what kind of people the new President appoints, to what extent the selection process changes, and how changes affect the mix of appointees. But whatever happens in the future, the Carter record has already been made and I suggest that it may emerge as his major domestic achievement. □

18. This is an impression gained not only from various descriptions of the appointees and from their completed questionnaires, but also from the Neff and Berkson/Carbon surveys. See Neff, *supra* n. 9, at chap. 7, Table 7-4, and Berkson and Carbon, *supra* n. 10, at 137.

19. N.Y. TIMES, October 15, 1980, p. A-24.

20. *Id.*

21. *Id. See also, How Reagan will pick judges is unclear, but philosophy will play an important role,* CONGRESSIONAL QUARTERLY WEEKLY REPORT, Vol. 39, No. 7, February 14, 1981, page 299.

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Clinton's nontraditional judges: creating a more representative bench

More than 60 percent of President Clinton's judicial appointees thus far have been women and minorities. In accordance with the concept of affirmative action, this diversification of the federal bench is not being achieved at the expense of qualifications.

by Sheldon Goldman and Matthew D. Saronson

The Clinton administration is in the process of implementing a revolutionary change in the composition of the federal bench. More than three-fifths of all appointees through July 1, 1994, have been women and minorities. This pace of affirmative action judicial selection represents a sharp break from the past.

In effect, President Bill Clinton, with the cooperation of Democratic senators, is rapidly moving to diversify the federal bench and creating a judiciary more representative of the gender and racial composition of the United States.

This development is significant. Women and racial minorities (particularly African Americans) historically have faced tremendous obstacles to becoming lawyers and federal judges. Before 1961, only two women, one African American male, and one male with a Mexican father had been appointed to lifetime positions on federal courts of general jurisdiction. Even after 1961, few women and minorities were appointed, although the pace picked up considerably under the Carter administration.[1] Thus, the appointment of women and minorities in significant numbers suggests that the selection process does not discriminate against these groups.

Also, if federal courts are to have legitimacy among all segments of the American population, no segment should feel excluded on the basis of gender or minority status. Moreover, an integrated bench offers judges the opportunity to educate each other about a variety of issues, including those involving race and gender.[2] Indeed, women and minorities are thought to bring to the bench a special sensitivity and perhaps unique perspectives on these issues. But whatever the rationale for affirmative action for the judiciary, it is clear that in contemporary American politics it is politically unacceptable for women, accounting for half the population, or for racial minorities, accounting for one-fourth the population, to be denied more than token representation on the bench.[3]

This article outlines the changes on the federal bench the Clinton adminis-

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1. The numbers for the Carter, Reagan, and Bush administrations are provided in Table 3. The Kennedy and Johnson administrations named three women to the district courts and one to an appeals court. Nine African Americans (including one woman) were named to the district bench and three to appeals courts (two of the three were elevations from the district bench). Four Hispanics and one Asian American were named to district courts. And Lyndon Johnson appointed Thurgood Marshall, the first African American to serve on the U.S. Supreme Court.

The Nixon and Ford administrations named two women, nine African Americans, three Hispanics, and one Asian American to district courts. One Asian American was named to an appeals court.

2. A more elaborate defense of affirmative action for the judiciary can be found in Goldman, *Should there be affirmative action for the judiciary?*, 62 JUDICATURE 488 (1979).

3. The issue of a representative judiciary is addressed in Perry, A "REPRESENTATIVE" SUPREME COURT? (New York: Greenwood, 1991). *Also see* Daly, Bell, Berns, Goldman, and Hatch, WHOM DO JUDGES REPRESENT? (Washington, D.C.: American Enterprise Institute, 1981).

Evidence that women appeals court judges are significantly more liberal in employment discrimination cases than their male colleagues is presented in Songer, Davis, and Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994).

tration is bringing about and examines some of the backgrounds and attributes of Clinton's judicial appointees who are women and minorities compared to those who are white males. The former are commonly referred to as "nontraditional" appointees, while the latter are labeled "traditional."[4] In addition, the overall portrait of Clinton's appointees are compared to the appointees of his three immediate predecessors.

The importance of the initial findings provide the rationale for this article. A more comprehensive study of the Clinton judicial selection process and those judges confirmed by the Senate will be prepared at the conclusion of the 103rd Congress.[5]

Changing composition

Less than a year and a half into his presidency, President Clinton already has had an impact on the gender and racial makeup of the federal bench. As seen in Table 1, there has been a substantial percentage increase of gender and racial diversity in almost all categories at the lower federal court level. At the Supreme Court level, a dramatic example of this was the president's doubling of the number of women by appointing Ruth Bader Ginsburg. The composite figures for all three court levels for nontraditional appointees in active service show an increase from 19.5 percent of all authorized judicial positions on the day Clinton was elected to 25.3 percent on July 1, 1994 (assuming all of Clinton's nominees will be confirmed), an increase of 30 percent.

Table 1 also indicates, however, that despite these increases women now account for only 14.6 percent of the federal bench. If Clinton continues to name women at the same rate through his first term, the proportion of women in the federal judiciary is likely to increase to about 19 percent. If that occurs, the proportion of women on the federal bench would be close to the proportion of practicing lawyers who are women.[6] But gender equity on the federal bench will still be far from complete in terms of representation of women as a proportion of the American populace, and it should be stressed that currently on most federal courts there is either a token woman or no women at all.

Table 1 Proportion of nontraditional federal judges in active service, courts of general jurisdiction, November 3, 1992 to July 1, 1994

	1992 % (N)	1994[a] % (N)	% increase
U.S. district courts			
Women	10.5%* (68)	14.4%* (93)	36.8%
African American	5.3% (34)	7.9% (51)	50.0%
Hispanic	4.5% (29)	5.3% (34)	17.2%
Asian	0.6% (4)	0.8% (5)	25.0%
Native American	0.0% (0)	0.2% (1)	100.0%
Total nontraditional#	19.1% (123)	25.7% (166)	35.0%
U.S. courts of appeals			
Women	13.2%** (22)	14.9%** (25)	13.6%
African American	5.4% (9)	7.2% (12)	33.3%
Hispanic	2.4% (4)	3.0% (5)	25.0%
Asian	0.6% (1)	0.0% (0)	(-100.0)%
Total nontraditional#	20.9% (35)	24.0% (40)	14.3%
U.S. Supreme Court			
Women	11.1%*** (1)	22.2%*** (2)	100.0%
African American	11.1% (1)	11.1% (1)	0.0%
Total nontraditional#	22.2% (2)	33.3% (3)	50.0%
All three court levels			
Women	11.1% (91)	14.6% (120)	31.9%
African American	5.4% (44)	7.8% (64)	45.4%
Hispanic	4.0% (33)	4.6% (38)†	15.2%
Asian	0.6% (5)	0.6% (5)	0.0%
Native American	0.0% (0)	0.1% (1)	100.0%
Total nontraditional#	19.5% (160)	25.3% (208)	30.0%

[a] Table includes all Clinton nominations made until July 1,1994 and assumes they will be confirmed.

The total does not double count those who were classified in more than one category. Also note that from November 3, 1992, until July 1, 1994, nine nontraditional district judges and two nontraditional appeals court judges left active service. Also, Ruth Bader Ginsburg was elevated from the U.S. Court of Appeals for the District of Columbia Circuit to the U.S. Supreme Court.

* Out of 645 authorized lifetime positions on the U.S. district courts.

** Out of 167 authorized lifetime positions on the numbered circuits and the U.S. Court of Appeals for the District of Columbia Circuit, all courts of general jurisdiction.

*** Out of 9 authorized positions on the U.S. Supreme Court.

† Federal District Judge José A. Cabranes was nominated on May 24, 1994, for elevation to the Court of Appeals for the Second Circuit. Although he is counted in both the district and appeals figures above, he is only counted once in the summary figures.

The African American proportion of the federal judiciary increased from 5.4 percent on the day Clinton was elected to 7.8 percent some 17 months later. If Clinton continues at the same rate, the proportion of African Americans on the bench by the end of his first term may exceed 10 percent. This is larger than the proportion of African Americans in the legal profession but smaller than their proportion of the American population.[7] It can thus be argued that continuing efforts beyond Clinton's first term will be needed to achieve and maintain racial diversity on the bench.

The Hispanic proportion of the bench increased from 4.0 percent to 4.6 percent. President Clinton did not take the opportunity of a second vacancy on the Supreme Court to name José Cabranes, the outstanding and highly regarded chief judge of the U.S. District Court of Connecticut, who was strongly backed by the Hispanic National Bar Association and the Congressional Hispanic Caucus.[8] It is possible that given another associate justiceship to fill, Clinton will turn to Judge Cabranes (whom Clinton subsequently elevated to the Second Circuit) or another Hispanic. Given the same pace, by the end of his first term Clinton will increase the proportion of Hispanics on the federal bench to more than 5 percent. This exceeds the proportion of lawyers who are Hispanic but is considerably less than the proportion of Hispanics in the population.[9]

Asian Americans are not well represented on the bench, and this is unlikely to change dramatically in the

4. Elliot Slotnick was the first to use the terms "traditional" and "nontraditional" in his discussion of the Carter administration's judicial appointees. Carter was the first president to move beyond token appointments of women and minorities to the lower federal courts. *See* Slotnick, *The paths to the federal bench: gender, race, and judicial recruitment variation*, 67 JUDICATURE 370 (1984).

This article uses the term "appointees" to include not only those confirmed by the Senate but those whose nominations were pending before the Senate at the time the article was written. The discussion in this article assumes that those nominated by President Clinton will be confirmed.

5. According to *The Third Branch* (August 1994, at 6), as of August 1 there are 94 vacancies on district and appeals courts. Added to the 88 named by June 1, and the 18 named in June and July, Clinton has 200 positions that he has filled or will be able to fill. Additional vacancies can be expected.

6. The Bureau of Labor Statistics has put the proportion of women lawyers in 1993 at 22.9 percent. Bureau of Labor Statistics, 41 EMPLOYMENT AND EARNINGS 206 (January 1994).

7. The Bureau of Labor Statistics reports that 2.7 percent of lawyers in 1993 were black, *supra* n. 6.

8. N.Y. Times, April 16, 1994, at 8.

9. The Bureau of Labor Statistics reports that 2.1 percent of lawyers in 1993 were Hispanic, *supra* n. 6.

Table 2 Clinton's nontraditional appointees compared to his traditional appointees to the lower federal courts*

	Nontraditional % (N)	Traditional % (N)
Occupation		
Politics/government	10.7% (6)	6.2% (2)
Judiciary	60.7% (34)	34.4% (11)
Large law firm		
100+ members	5.4% (3)	18.8% (6)
50-99	1.8% (1)	9.4% (3)
25-49	3.6% (2)	—
Medium size firm		
10-24 members	1.8% (1)	6.2% (2)
5-9	3.6% (2)	6.2% (2)
Small firm		
2-4 members	5.4% (3)	6.2% (2)
Solo	3.6% (2)	—
Professor of law	3.6% (2)	9.4% (3)
Other	—	3.1% (1)
Experience		
Judicial	66.1% (37)	37.5% (12)
Prosecutorial	42.9% (24)	46.8% (15)
Neither	19.6% (11)	31.2% (10)
Undergraduate education		
Public	44.6% (25)	40.6% (13)
Private	37.5% (21)	40.6% (13)
Ivy League	17.9% (10)	18.8% (6)
Law school education		
Public	39.3% (22)	31.2% (10)
Private	41.1% (23)	31.2% (10)
Ivy League	19.6% (11)	37.5% (12)
ABA rating		
Well qualified	55.4% (31)	84.4% (27)
Qualified	42.9% (24)	15.6% (5)
Not qualified	1.8% (1)	—
Political identification		
Democrat	89.3% (50)	88.4% (27)
Republican	1.8% (1)	6.2% (2)
Independent	7.1% (4)	6.2% (2)
Unknown/other	1.8% (1)	3.1% (1)
Past political activism	46.4% (26)	78.1% (25)
Religious origin or affiliation		
Protestant	57.1% (32)	31.2% (10)
Catholic	28.6% (16)	31.2% (10)
Jewish	7.1% (4)	31.2% (10)
Unknown	7.1% (4)	6.2% (2)
Net worth		
Less than $200,000	19.6% (11)	9.4% (3)
$200,000-499,999	28.6% (16)	9.4% (3)
$500,000-999,999	32.1% (18)	34.3% (11)
$1+ million	19.6% (11)	46.9% (15)
Gender		
Male	48.2% (27)	100.0% (32)
Female	51.8% (29)	—
Ethnicity/race		
White	39.3% (22)	100.0% (32)
African American	41.4% (23)	—
Hispanic	16.1% (9)	—
Asian	1.8% (1)	—
Native American	1.8% (1)	—
Average age at nomination	47.2	53.3
Total number of appointees	56	32

*Includes all those nominated by President Clinton as of June 1,1994. For purposes of this table and discussion in the text it is assumed that all nominees will be confirmed, thus the use of the term "appointees."

near future. The same appears true for Native Americans, although Clinton did appoint a member of a Native American tribe.[10]

Comparing Clinton's appointees

How do the backgrounds and attributes of Clinton's nontraditional appointees compare with those of his traditional appointees? How do his appointees on the whole compare with the appointees of the three previous administrations? Tables 2 and 3 shed light on these questions.

Table 2 presents backgrounds and attributes for the appointees to lifetime positions on the lower federal courts of general jurisdiction for the first 16 months of the Clinton administration.[11] Of the president's 88 appointees, 56 are nontraditional.[12] Of these, 52 percent (29) are women, and about 24 percent of the female appointees (7 of the 29) are minorities. About 41 percent (23 of the 56) of the nontraditional appointees are African American, and about 16 percent (9 of the 56) are Hispanic. One appointee each is Asian American and Native American.

Occupation and experience. A substantially higher proportion of the nontraditional individuals came from the judiciary (primarily as state judges or federal magistrates) or held a political or government lawyer position. In contrast, close to half of the traditional appointees came from private law practice. A higher proportion of traditional appointees were professors of law.

Close to twice the proportion of nontraditional appointees had previous judicial experience, but the traditional appointees had a larger propor-

10. At least one other federal judge is of Native American ancestry. On the questionnaire completed for the Senate Judiciary Committee in 1979, one judge indicated he was of Native American stock but was not, in the judge's words, "full blooded." He made no mention of being a member of a particular tribe. He therefore was not categorized as a Native American.

11. Data were collected from the questionnaires the nominees completed for the Senate Judiciary Committee, confirmation hearings, biographical directories including THE AMERICAN BENCH (7th edition) and WHO'S WHO, Martindale-Hubbell Law Directory, local newspaper stories, various boards of elections, local newspaper stories and reporters, professional colleagues, personal interviews, and responses from the Clinton nominees to questions posed in letters sent by Sheldon Goldman.

12. Of the 88, 82 were confirmed as of August 23, 1994.

tion with prosecutorial experience. A larger proportion of the traditional appointees had neither judicial nor prosecutorial experience.

The different professional profile of Clinton's nontraditional appointees reflects, in part, the greater opportunities for women and minorities in the public sector than in private practice. The emphasis on those with a proven judicial track record is an indication of the administration's concern with recruiting high-quality nontraditional candidates whose suitability for federal judicial appointment is apparent from their records. These findings are similar to those of Slotnick's study comparing President Jimmy Carter's nontraditional and traditional appointees.[13]

Education. Although the undergraduate educational profile of both groups of appointees is similar, the law school profile shows pronounced differences. Close to twice the proportion of traditional appointees attended an Ivy League law school, while a larger proportion of nontraditional appointees attended a public-supported law school. These findings may suggest that more nontraditional appointees came from less financially secure backgrounds, thus requiring a less expensive law school education.[14]

ABA ratings. More than 80 percent of the traditional appointees and well over half the nontraditional appointees received the highest rating given by the American Bar Association's Standing Committee on Federal Judiciary. One nontraditional appointee, however, was rated "not qualified." Although collectively the nontraditional appointees had lower ratings, the ratings for Clinton's nontraditional appointees exceeded the overall ratings of the Nixon, Ford, and Reagan appointees and came close to matching the overall ratings of the Bush and Carter appointees. By ABA standards, Clinton's nontraditional appointees were, with few exceptions, generally as high a quality, if not higher, than the appointees of all other presidents over the past four decades.[15]

Party identification and activism. About 9 out of 10 nontraditional and traditional appointees are affiliated or identified with the Democratic party. This same-party appointment pattern is consistent with the records of previous presidents. Of greatest significance is the relatively low percentage of nontraditional appointees with a record of past political activism.[16] Clearly the administration and Democratic senators, eager to recruit highly qualified nontraditional candidates, were not screening out those without a record of political activity. Partisan activism played more of a role with the traditional candidates, but even here, given the exceptionally high proportion with the highest ABA rating, it appears that only highly qualified candidates were chosen.

Religion. The religious background of the nontraditional appointees is weighted towards those with a Protestant heritage, and the majority of traditional appointees are Catholics and Jews. There is no evidence that religion played any role in the selection of lower court judges.[17] The figures for religious origin are reflective of the tendencies since the 1930s of certain groups, such as Catholics, Jews, and non-white Protestants, to be identified with the Democratic party.

Net worth. More than twice the proportion of traditional candidates are millionaires. At the other end of the economic spectrum, more than twice the proportion of nontraditional appointees have a net worth less than $200,000. These findings are similar to those of Slotnick for Carter's nontraditional appointees.[18] The career paths of nontraditional appointees are often less lucrative than those of traditional appointees in private practice. As opportunities for women and minority lawyers improve in the private sector, and the private sector becomes a source of recruitment of nontraditional candidates, income disparities may become less evident.

Age. The nontraditional appointees are markedly younger than the traditional appointees, by an average of six years, although both groups are grounded within at least the mid-range of middle-age. Carter's nontraditional appointees were also younger than his traditional appointees, a finding reported by Slotnick.[19] Unlike the Bush and Reagan administrations, there is no evidence that the Clinton administration deliberately sought to appoint younger people.

Comparisons with predecessors

The profile of Clinton's judges can perhaps be best understood by comparing a composite of all his lower court appointees to those of his three immediate predecessors (Table 3).[20]

Education. Overall, the Clinton appointees have the largest proportion of all four administrations of those with a prestige Ivy League undergraduate and law school education. More than one in four Clinton appointees were graduated from either Columbia, Cornell, Harvard, Yale, or the University of Pennsylvania law schools. If prestigious non-Ivy League law schools such as Berkeley, Chicago, Duke, Georgetown, Michigan, New York University, Northwestern, Stanford, Texas, and Virginia are included, the proportion of Clinton appointees with a prestige legal education rises to 48.9 percent, exceeding the proportions of the

13. Slotnick, *supra* n. 4, at 382-384. One difference in our findings compared to Slotnick's is that he found no difference in prosecutorial experience between traditional and nontraditional appointees.

14. *Cf.* Slotnick, *supra* n. 4, at 377-378.

15. *See* Chase, FEDERAL JUDGES: THE APPOINTING PROCESS 178 (Minneapolis: University of Minnesota Press, 1972) for the figures for the Eisenhower and Kennedy administrations. For subsequent administrations, see Goldman, *Bush's judicial legacy: the final imprint*, 76 JUDICATURE 287, 293 (1993).

Slotnick found that 24.7 percent of Carter's nontraditional appointees received the highest ABA ratings compared to 68.4 percent of Carter's traditional appointees. Slotnick, *supra* n. 4, at 381. Our findings show that 55.4 percent of Clinton's nontraditional appointees had the highest ABA rating compared with 84.4 percent of the traditional appointees.

16. This was as true for the male nontraditional appointees as for the female appointees. This contrasts with Slotnick's finding of gender differences on his politicization measures with women engaging in less political activity than men. *See supra* n. 4, at 378-380.

17. Note, however, that in 1993 religion was apparently of some consideration in filling the Supreme Court vacancy created by the retirement of Justice Byron White. A *New York Times* story reported that Clinton desired to "appoint the first Jew to the bench since Abe Fortas resigned in 1969." N.Y. Times, June 11, 1993, at A-18.

18. *Supra* n. 4, at 375.

19. *Id.* Interestingly, our research reveals that the average age of Carter's nontraditional appointees was 48, almost one year *older* than the Clinton nontraditional appointees. The average age of Carter's traditional appointees was 51.2, more than two years *younger* than the Clinton traditional appointees.

20. The findings for the Bush, Reagan, and Carter appointees are drawn from Goldman, *supra* n. 15, at 282-297.

Table 3 Backgrounds of Clinton's judicial appointees to the lower federal courts compared to the appointees of Bush, Reagan, and Carter*

	Clinton % (N)	Bush % (N)	Reagan % (N)	Carter % (N)
Undergraduate education				
Public	43.2% (38)	41.6% (77)	33.2% (122)	51.6% (133)
Private	38.6% (34)	44.9% (83)	50.5% (186)	36.4% (94)
Ivy League	18.2% (16)	13.5% (25)	16.3% (60)	12.0% (31)
Law school education				
Public	36.4% (32)	48.1% (89)	41.8% (154)	48.1% (124)
Private	37.5% (33)	34.6% (64)	43.8% (161)	29.5% (76)
Ivy League	26.1% (23)	17.3% (32)	14.4% (53)	22.5% (58)
Experience				
Judicial	55.7% (49)	49.7% (92)	49.5% (182)	54.3% (140)
Prosecutorial	44.3% (39)	37.3% (69)	40.8% (150)	37.2% (96)
Neither	23.9% (21)	31.9% (59)	29.6% (109)	30.2% (78)
Occupation				
Politics/government	9.1% (8)	10.8% (20)	11.4% (42)	4.7% (12)
Judiciary	51.1% (45)	45.4% (84)	41.0% (151)	45.0% (116)
Large law firm				
100+ members	10.2% (9)	10.3% (19)	5.4% (20)	1.9% (5)
50-99	4.5% (4)	7.6% (14)	4.6% (17)	5.8% (15)
25-49	2.3% (2)	5.9% (11)	6.5% (24)	5.4% (14)
Medium size firm				
10-24 members	3.4% (3)	8.6% (16)	9.0% (33)	10.5% (27)
5-9	4.5% (4)	5.4% (10)	8.4% (31)	8.5% (22)
Small firm				
2-4 members	5.7% (5)	2.7% (5)	6.3% (23)	9.7% (25)
Solo	2.3% (2)	1.1% (2)	2.2% (8)	2.3% (6)
Professor of law	5.7% (5)	1.1% (2)	4.3% (16)	5.4% (14)
Other	1.1% (1)	1.1% (2)	0.8% (3)	0.8% (2)
ABA rating				
Extremely well/well qualified	65.9% (58)	58.9% (109)	55.2% (203)	56.2% (145)
Qualified	32.9% (29)	41.1% (76)	44.8% (165)	42.6% (110)
Not qualified	1.1% (1)	—	—	1.2% (3)
Political identification				
Democrat	87.5% (77)	5.4% (10)	3.8% (14)	90.3% (233)
Republican	3.4% (3)	88.6% (164)	94.0% (346)	5.0% (13)
Independent	6.8% (6)	5.9% (11)	1.9% (7)	4.7% (12)
Unknown/other	2.3% (2)	—	0.3% (1)	—
Past political activism	57.9% (51)	62.7% (116)	60.9% (224)	63.6% (164)
Net worth**				
Less than $200,000	15.9% (14)	9.2% (17)	17.1% (63)	33.3% (66)
$200,000-499,999	21.6% (19)	30.8% (57)	36.4% (134)	38.4% (76)
$500,000-999,999	33.0% (29)	25.4% (47)	24.2% (89)	17.7% (35)
$1+ million	29.5% (26)	34.6% (64)	22.0% (81)	5.1% (10)
Unknown	—	—	0.3% (1)	5.6% (11)
Gender				
Male	67.0% (59)	80.5% (149)	92.4% (340)	84.5% (218)
Female	32.9% (29)	19.5% (36)	7.6% (28)	15.5% (40)
Ethnicity/race				
White	60.2% (53)	89.2% (165)	93.5% (344)	78.7% (203)
African American	27.3% (24)	6.5% (12)	1.9% (7)	14.3% (37)
Hispanic	10.2% (9)	4.3% (8)	4.1% (15)	6.2% (16)
Asian	1.1% (1)	—	0.5% (2)	0.8% (2)
Native American	1.1% (1)	—	—	—
Percentage white male	36.4% (32)	72.4% (134)	86.4% (318)	66.3% (171)
Average age at nomination	49.4	48.2	49.0	50.1
Total number of appointees	88	185	368	258

*This table assumes that Clinton's nominees until June 1, 1994, will be confirmed by the Senate.

**The figures for the Carter appointees are for those confirmed by the 96th Congress when financial statements from judicial nominees were first required by the Senate. Professor Elliot Slotnick generously provided the net worth figures for all but 11 Carter appointees (for whom no data were available). Net worth was unavailable for one Reagan appointee.

previous three administrations.[21]

Experience. The Clinton appointees have the largest proportion of those with previous judicial experience (the Carter appointees were a close second) and with previous prosecutorial experience. In fact, only about one in four Clinton appointees have neither judicial nor prosecutorial experience. This suggests that Clinton's judges have exceptionally strong professional backgrounds, a finding consistent with that for educational background.

Occupation. A majority of Clinton's judges, unlike those of the previous three administrations, came to the federal bench directly from the judiciary (as state judges, federal magistrates, or federal district judges). It is also notable that a lower proportion of Clinton appointees than Bush appointees came from large law firms, but a larger proportion of Clinton appointees than Carter appointees were from such firms.

ABA ratings. Evidence suggesting the high quality of Clinton's appointees is provided by the ABA ratings. About two thirds received the highest "well qualified" rating. A smaller percentage of the Bush, Reagan, and Carter appointees received the highest ratings.[22] Thus, by ABA standards, the Clinton appointees overall are the best qualified for federal judgeships since the ABA began to rate judicial candidates in the 1950s.

Party identification and activism. The large majority of Clinton appointees are Democrats, following the historic precedent of presidents naming members of their political parties. However, of all four administrations, the Clinton appointees have the lowest proportion of those with some background of political activism. Unlike earlier eras of American politics, it is now increasingly more realistic for highly qualified lawyers and judges to

21. The proportion of Carter appointees with a prestige legal education was 41.9 percent; the proportion of Reagan appointees was 39.1 percent; and the proportion of Bush appointees was 36.2 percent.

22. Before the Bush administration, the ABA had two high ratings, "exceptionally well qualified" and "well qualified." The "exceptionally well qualified" rating was dropped in 1989; thus for purposes of comparison with the Reagan and Carter administrations, the two highest ratings for those administrations are combined and are compared to the "well qualified" ratings of appointees of the Bush and Clinton administrations.

aspire to federal judgeships even without a background of political activity. This is particularly true for nontraditional candidates, as suggested earlier.

Net worth. The percentage of Clinton's appointees whose net worth exceeds $1 million is lower than that of the Bush appointees but higher than that of the Reagan appointees and dramatically higher than that of the Carter appointees. The percentage of Clinton's appointees whose net worth is less than $500,000 is the lowest for all four administrations.

Age. The average age of the Clinton appointees was 49.4 at the time of appointment, compared to the Bush judges' average of 48.2. Of all four administrations, the Clinton appointees are the third oldest (the Carter judges had the oldest average age at 50.1).

Nontraditional appointments. Each of the previous four administrations broke historical records in their nontraditional appointments. The Carter administration was the first to move beyond tokenism in the naming of women, African Americans, and Hispanics. One-third of Carter's judicial appointments were nontraditional. In absolute numbers, Carter made 87 nontraditional appointments. The Reagan administration was the first Republican administration to move beyond tokenism, making 50 nontraditional (or 13.6 percent of all) appointments to the lower federal courts and naming the first woman to the U.S. Supreme Court. The Bush administration surpassed the Carter administration in the proportion of women appointed. More than one in four Bush appointees were nontraditional. In absolute numbers there were 51 nontraditional Bush appointees to the lower federal courts, and Bush appointed the second African American to the nation's highest court.

But it is the Clinton administration that has taken a major new path in judicial selection. His is the first to nominate nontraditional candidates to a majority of all judgeships. More than 60 percent of Clinton's judicial nominees are nontraditional. The proportion of women and blacks is about double that of the Carter administration, and there was a two-thirds increase over the Carter proportion of Hispanics. In absolute numbers, Clinton made 56 nontraditional appointments to the lower federal courts and named the second woman to serve on the Supreme Court.

Clinton's appointees suggest the emerging triumph of affirmative action.

Emergence of affirmative action

The nontraditional Clinton appointees to the federal bench suggest the emerging triumph of affirmative action. In accord with the concept of affirmative action as widening the recruitment net to bring in highly qualified women and minorities, greater diversity has not come at the expense of qualifications. Clinton's nontraditional appointees are as qualified, if not more so in terms of their ABA ratings and professional experience, as the appointees of Reagan and Bush. There is also less political activism among the nontraditional appointees, which reflects the effort to reach out to people who historically would not have been considered for judicial posts. The end result is a more diversified federal bench consistent with the principle of merit.

As the judiciary becomes more representative of the American people, it can be expected to increase confidence in the judicial system among women and minorities. And as more and more nontraditional judges are appointed, nontraditional perspectives or sensitivities will be added to the mix of factors that shape American law. Furthermore, the educational effect of large numbers of women and minorities serving as federal judges can be considerable. Men will see women, and whites will see judges of other races, performing ably on the bench. Young women and young people of color will see that hard work and talent can open doors once closed because of gender and race.

Nontraditional judges, however, still constitute a relatively small proportion of the federal bench despite the fact that highly qualified women and minorities are available. Furthermore, there are still circuits and district courts in which no woman or African American has ever sat as a permanent member.[23] The court of appeals for the First Circuit and the federal district bench in 15 states have never been integrated in terms of gender.[24] Similarly, racial integration of African Americans has failed to come to the courts of appeals for the First, Fourth, Seventh, and Tenth Circuits as well as to district courts in 26 states.[25]

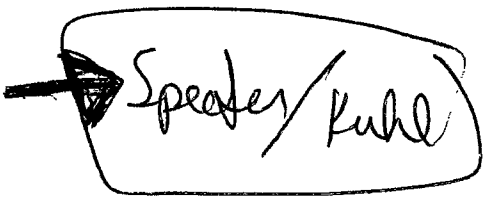
Clearly, the Clinton administration has work to do to redress the gender and racial imbalance on the federal bench. Nevertheless, it is making spectacular progress. In terms of diversifying the bench, the Clinton administration's record of judicial selection thus far has set a precedent against which the records of subsequent administrations will be compared.

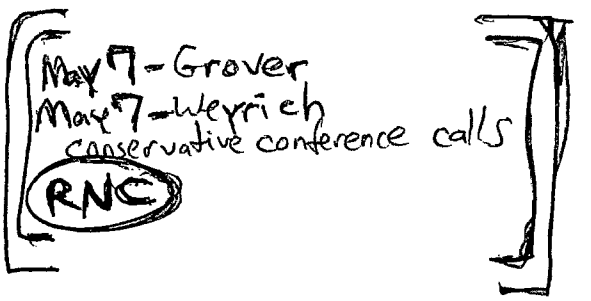
23. The same is true, of course, for Hispanics, Asian Americans, and Native Americans. The federal courts in which they have or are currently serving are as follows. Hispanics serve on the courts of appeals for the First, Second, Fifth, and Ninth Circuits. And they serve or have served on federal district courts in Arizona, California, Connecticut, Florida, Illinois, Indiana, Michigan, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas, the District of Columbia, and Puerto Rico. Asian Americans have only served on the court of appeals for the Ninth Circuit and on the federal district bench in the states of California, Hawaii, and New York. The one Native American serves in Oklahoma.

24. This may soon change for the First Circuit. Senator Edward Kennedy has recommended Sandra L. Lynch to fill the vacancy created by the elevation of Stephen Breyer to the Supreme Court. *See* Boston Globe, August 14, 1994, at A33.

The states in which no woman has served or has been nominated to serve are Alaska, Idaho, Iowa, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Dakota, Utah, Vermont, and Wyoming.

25. No African American has served on the federal district court bench in Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.





B

Documents 6-8

Documents 9 - 14

C

Air Force One – Seattle to San Francisco (68 seats) Flight Time: One hr 40 min (no interchange)

13

1.	THE PRESIDENT	30.	
2.	Secretary Brown	31.	PRA 3
3.	Bruce Lindsey	32.	
4.	Dee Dee Myers	33.	
5.	Marsha Scott	34.	Press
6.	Don Steinberg, NSC	35.	Press
7.	Todd Stern	36.	Press
8.	Tom Epstein	37.	Press
9.	Anne Walley	38.	Press
10.	Andrew Friendly	39.	Press
11.	Wendy Smith	40.	Press
12.	Joshua King	41.	Press
13.	Jeremy Gaines	42.	Press
14.	Ken Chitester	43.	Press
15.	Jill Schuker, Commerce	44.	Press
16.	Melinda Yee, Commerce	45.	Press
17.	Jay Hodes, Commerce	46.	Press
18.	Bob McNeely, WH Photo	47.	Press
19.	Lcdr. Bob Walters	48.	Jon Thornton, WHTV
20.	Dr. Connie Mariano	49.	Warren Kinlaw, WHTV
21.	Capt. Mark Rogers, WHMO	50.	Sfc. Phil Young, WHTA
22.	Col. Thomas Hawes, WHCA	51.	Manolito Bautista, WHSM
23.	Lt. Theresa Gee, medic	52.	USAF
24.		53.	USAF
25.	PRA 3	54.	USAF
26.		55.	USAF
27.		56.	USAF
28.		57.	USAF
29.		58.	USAF

Support Plane – Seattle to Andrews AFB (47 seats) Flight Time: Four hours 20 minutes

1.	Ambassador Kantor	25.	Sylvia Matthews, NEC
2.	Heidi Schulman	26.	Bill Whyman, NEC
3.	Rep. Jim McDermott	27.	Sandra Kristoff, NSC
4.	Roy Neel	28.	Kent Wiedeman, NSC
5.	Mark Gearan	29.	Kris Cicio, NSC
6.	Sandy Berger	30.	Cathy Millison, NSC
7.	Ambassador Blanchard	31.	Kay LaPlante, NSC
8.	Nancy Soderberg	32.	Dan Poneman, NSC
9.	Doris Matsui	33.	Bob Manzaneras, NSC
10.	Maria Haley	34.	Joan Spero, State Dept.
11.	Michael Lufrano	35.	Mary McGuire, State Dept.
12.	Ann Stock	36.	Lt. Gen. Barry McCaffrey, JCS
13.	Sarah Ryan	37.	Ambassador Freeman, DOD
14.	Helen Dickey	38.	Caren Wilcox, DNC
15.	Betty Currie	39.	Barbara Kinney, WH Photo
16.	Ann Edwards	40.	Brad Smith, WH Photo
17.	Nancy Ward	41.	Mark Schmeets, WH Photo
18.	David Leavy	42.	Pam Gray, steno
19.	Chad Griffin	43.	Maj. Leo Mercado
20.	Ambassador Yerxa, USTR	44.	Lt. Gina Keefer, medic
21.	Ambassador Barshefsky, USTR	45.	Lt. Mike Lucas, WHSM
22.	Bo Cutter, NEC	46.	Mike McGrath, WHSM
23.	Bob Fauver, NEC	47.	Mario Ares, WHTA
24.	Bob Kyle, NEC		

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as of Fri 11/19/93 10:25 pm

14

Notes made by Erskine Bowles (Document Numbers 000149-150).

In addition to federal student aid, you may also be eligible for a **Hope** or a **Lifetime Learning** income tax credit, both of which you claim when you file your taxes. For more information on these tax credits, this application, and the U.S. Department of Education's student aid programs, call 1-800-4FED-AID (1-800-433-3243) Monday through Friday between 8:00am and 8:00pm eastern time. If you are hearing impaired, call TDD 1-800-730-8913. You can also look on the internet at **http://www.ed.gov/offices/OPE**

You should submit this application as early as possible, but not before January 1, 1999. Any 1999-2000 Renewal FAFSA dated or received before January 1, 1999 will be returned unprocessed.

This application cannot be processed after June 30, 2000.

Deadline Dates for State Student Aid.

Generally, state aid comes from your state of legal residence. Check with your financial aid administrator at your college about state and college sources of student financial aid. State deadlines are below.

AZ June 30, 2000 *(date received)*
*^CA March 2, 1999 *(date postmarked)*
DE April 15, 1999 *(date received)*
* DC June 24, 1999 *(date received by state)*
FL May 15, 1999 *(date processed)*
HI March 1, 1999
IL First-time applicants – September 30, 1999
Continuing applicants – May 31, 1999
(date received)
^ IN For priority consideration – March 1, 1999
(date postmarked)
^ IA June 1, 1999 *(date received)*
* KS For priority consideration – April 1, 1999
(date processed)
KY For priority consideration
– March 15, 1999 *(date received)*
^ LA For priority consideration
– April 15, 1999 *(date postmarked)*
ME May 1, 1999 *(date received)*
MD March 1, 1999 *(date postmarked)*
^ MA For priority consideration – May 1, 1999
(date received)
MI High school seniors – February 21, 1999
College students – March 21, 1999
(date received)
MN June 30, 2000 *(date received)*
MO April 1, 1999 *(date received)*
MT For large schools – March 1, 1999
For small schools – April 1, 1999
NH May 1, 1999 *(date received)*
NJ 1998-99 Tuition Aid Grant Recipients
– June 1, 1999
All other applicants
– October 1, 1999, for fall and spring terms
– March 1, 2000, for spring term only
(date received)
*^NY May 1, 2000 *(date postmarked)*
NC March 15, 1999 *(date received)*
ND April 15, 1999 *(date processed)*
OH October 1, 1999 *(date received)*
OK April 30, 1999 *(date received)*
OR May 1, 2000 *(date received)*
* PA All 1998-99 State grant recipients
– May 1, 1999
Non-1998-99 State grant recipients in degree programs – May 1, 1999
All other applicants – August 1, 1999
(date received)
PR May 2, 2000 *(date application signed)*
RI March 1, 1999 *(date received)*
SC June 30, 1999 *(date received)*
TN May 1, 1999 *(date processed)*
*^WV March 1, 1999 *(date received)*

Check with your financial aid administrator for these states: AL, AK, *AS, AR, CO, *CT, *FM, GA, *GU, ID, *MP, *MH, MS, *NE, *NV, *NM, *PW, *SD, *TX, UT, *VT, *VI, *VA, WA, WI, and *WY.

* Additional form may be required. ^ Applicants encouraged to obtain proof of mailing.

Renewal FAFSA on the Web

You can submit your 1999-2000 Renewal FAFSA over the internet. Here's how to get started:

1. Get an EAC

To use Renewal FAFSA on the Web, you will need an EAC (Electronic Access Code). Visit our website at **http://www.fafsa.ed.gov** and follow the link to "Request an EAC." Read the instructions and submit the required identifying information. You will receive your EAC in the mail in a secure envelope in 7-10 days. Request your EAC as soon as possible, but **not before November 23, 1998.**

2. Access Your Information

Once you obtain an EAC, you can electronically access your information and update the information that has changed since last year. Processing is free and secure, and generally is completed 7-14 days faster than if you filled out and mailed a paper application. You should file as soon as possible, but **not before January 4, 1999.**

Step One — You (the Student)

14-15. Are you a U.S. citizen?/Alien Registration Number

If you are an eligible noncitizen, review or correct your eight or nine digit Alien Registration Number. Generally, you are an eligible noncitizen if you are: (1) a U.S. permanent resident and you have an Alien Registration Receipt Card (I-151 or I-551); (2) a conditional permanent resident (I-151C); or (3) an other eligible noncitizen with an Arrival-Departure Record (I-94) from the U.S. Immigration and Naturalization Service showing any one of the following designations: "Refugee," "Asylum Granted," "Indefinite Parole," "Humanitarian Parole," or "Cuban-Haitian Entrant."

16. What is your marital status as of today?

17. Enter the month and year you were married, separated, divorced, or widowed.

18-22. For each question, please mark whether you will be full time, 3/4 time, half time, less than half time, or not attending. Mark "full time" if you are not sure.

For undergraduates, full time generally means taking at least 12 credit hours in a term or 24 clock hours per week. 3/4 time generally means taking at least 9 credit hours in a term or 18 clock hours per week. Half time generally means taking at least 6 credit hours in a term or 12 clock hours per week. Provide this information about the college you plan to attend.

23. What is the highest school your father completed?

24. What is the highest school your mother completed?

Step One, continued...

30. What degree or certificate will you be working towards during 1999-2000? Write in the one-digit code for the type of degree or certificate you expect to receive.

Enter **1** for 1st bachelor's degree
Enter **2** for 2nd bachelor's degree
Enter **3** for associate degree (occupational or technical program)
Enter **4** for associate degree (general education or transfer program)
Enter **5** for certificate or diploma for completing an occupational, technical, or educational program of less than two years
Enter **6** for certificate or diploma for completing an occupational, technical, or educational program of at least two years
Enter **7** for teaching credential program (nondegree program)
Enter **8** for graduate or professional degree
Enter **9** for other/undecided

31. What will be your grade level when you begin the 1999-2000 school year?

32. Will you have a high school diploma or GED before you enroll?

33. Will you have your first bachelor's degree before July 1, 1999?

34. In addition to grants, are you interested in student loans (which you must pay back)?

35. In addition to grants, are you interested in "work-study" (which you earn through work)?

36. If you receive veterans' education benefits, for how many months from July 1, 1999, through June 30, 2000, will you receive these benefits?

37. What is the amount of your veterans' education benefits per month?

38. For 1998, have you filed your IRS income tax return, your tax return for Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau, or your foreign tax return?

39. What income tax return did you file or will you file for 1998?

If you filed or will file a foreign tax return, use the information from your foreign tax return to fill out this form. Convert all figures to U.S. dollars, using the exchange rate that is in effect today.

If you filed or will file a tax return with Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau, use the information from these tax returns to fill out this form.

40. If you have filed or will file a 1040, were you eligible to file a 1040A or 1040EZ?

In general, you are eligible to file a 1040A or 1040EZ if you make less than $50,000, do not itemize deductions, do not receive income from your own business or farm, and do not receive alimony or capital gains. You are not eligible if you receive self-employment income, alimony, capital gains, or itemize deductions.

Step One, continued...

41. What was your (and your spouse's) adjusted gross income for 1998?

Adjusted gross income is on IRS Form 1040–line 33; 1040A–line 18; or 1040EZ–line 4.

42. Enter the total amount of your (and your spouse's) income tax for 1998.

Income tax amount is on IRS Form 1040–line 49; 1040A–line 32; or 1040EZ–line 10.

43. Enter your (and your spouse's) exemptions.

Exemptions are on IRS Form 1040–line 6d or on 1040A-line 6d. For Form 1040EZ, if you answered "Yes" on line 5, use worksheet line F to determine the number of exemptions ($2700 equals one exemption). If you answered "No" on line 5, enter 01 if you are single, or 02 if you are married.

44. Enter your Earned Income Credit from IRS Form 1040–line 59a; 1040A–line 37a; or 1040EZ–line 8a.

45-46. How much did you (and your spouse) earn from working in 1998? Answer this question whether or not you filed a tax return.

This information may be on your W-2 forms, or on IRS Form 1040–lines 7, 12, and 18; on 1040A–line 7; or on 1040EZ–line 1.

47-48. Go to pages 6 and 7 of this booklet. Turn the booklet sideways, and enter all of the items that apply to you (and your spouse) in the column **on the left.** Enter the student total for Worksheet A in question 47. Enter the student total for Worksheet B in question 48.

49. What is the total current balance of your (and your spouse's) cash, savings, and checking accounts?

50-52. What is the current net worth of your (and your spouse's) investments (50), business (51), and investment farm (52)?

Net worth means current value minus debt. If net worth is one million or more, enter 999999. If net worth is negative, enter 0

Investments include real estate (other than your home), trust funds, money market funds, mutual funds, certificates of deposit, stocks, bonds, other securities, installment and land sale contracts (including mortgages held), commodities, etc. Investment value includes the market value of these investments. Do not include the value of life insurance and retirement plans (pension funds, annuities, IRAs, Keogh plans, etc.) or the value of prepaid tuition plans. Investment debt means only those debts that are related to the investments.

Business value includes the market value of land, buildings, machinery, equipment, and inventory. Business debt means only those debts for which the business was used as collateral.

Do not include a farm that you live on and operate in your investment farm net worth.

continued on Page 8...

- **Even though you may have few of these items, review each line carefully.**
- **Keep these worksheets with a copy of your application. Your school may ask to see them.**

Worksheet A

Question 47 Student/Spouse	Calendar Year 1998	Question 70 Parent(s)
$	Payments to tax-deferred pension and savings plans (paid directly or withheld from earnings) as reported on the W-2 Form. Include untaxed portions of 401(k) and 403(b) plans.	$
$	Deductible IRA and/or Keogh payments: IRS Form 1040–total of lines 23 and 29; or 1040A–line X	$
$	Child support received for all children. Don't include foster care or adoption payments.	$
$	Welfare benefits, including Temporary Assistance for Needy Families (TANF). Don't include food stamps.	$
$	Tax exempt interest income from IRS Form 1040–line 8b; or 1040A–line 8b	$
$	Foreign income exclusion from IRS Form 2555–line 43; or 2555EZ–line 18	$
$	Untaxed portions of pensions from IRS Form 1040–(line 15a minus 15b) plus (16a minus 16b); or 1040A–(line 10a minus 10b) plus (11a minus 11b) excluding rollovers	$
$	Credit for Federal tax on special fuels from IRS Form 4136–Part III – nonfarmers only	$
$	Social Security payments that were not taxed	$
$	Housing, food, and other living allowances paid to members of the military, clergy, and others (including cash payments and cash value of benefits)	$
$	Workers' Compensation	$
$	Veterans noneducation benefits, such as Death Pension or Dependency & Indemnity Compensation (DIC)	$
$	Any other untaxed income and benefits, such as VA Educational Work-Study allowances, untaxed portions of Railroad Retirement Benefits, Black Lung Benefits, Refugee Assistance, etc. Don't include student aid, JTPA benefits, or benefits from flexible spending arrangements, e.g., cafeteria plans.	$
$	Cash or any money paid on your behalf, not reported elsewhere on this form	XXXXXXXXXX
$	**Student (and spouse) Total** (Enter this amount in question 47.)	**Parent(s) Total** (Enter this amount in question 70.) $

Worksheet B

Question 48 Student/Spouse	Calendar Year 1998	Question 71 Parent(s)
$	Education credits (Hope and Lifetime Learning Tax Credits) from IRS Form 1040-line 44; or 1040A-line 29.	$
$	Child support you or your spouse (or your parents) paid because of divorce or separation. Do not include support for children in your (or your parents') household, as reported in question 59 (or question 77 for your parents).	$
$	Taxable earnings from Federal Work-Study or other need-based work programs	$
$	AmeriCorps awards — allowances and benefits	$
$	Student grant and scholarship aid in excess of the tuition, fees, books, and supplies that was reported in question 41 for students and 64 for parents	$
$	**Student (and spouse) Total** (Enter this amount in question 48.)	**Parent(s) Total** (Enter this amount in question 71.) $

Step Two — Student Status

55. As of today, are you married?

Answer yes if you are separated, but not divorced.

56. Are you an orphan or ward of the court or were you a ward of the court until age 18?

57. Are you a veteran of the U.S. Armed Forces?

Answer **"Yes"** (you are a veteran) if (1) you have engaged in active service in the U.S. Armed Forces (Army, Navy, Air Force, Marines, and Coast Guard), or were a cadet or midshipman at one of the service academies, and (2) you were released under a condition other than dishonorable. You should also answer "Yes" if you are not a veteran now but will be one by June 30, 2000.

Answer **"No"** (you are not a veteran) if (1) you have never served in the U.S. Armed Forces, or (2) you are an ROTC student, a cadet or midshipman at a service academy, or a National Guard or Reserves enlistee (and were not activated for duty). You should also answer "No" if you are currently serving in the U.S. Armed Forces and will continue to serve through June 30, 2000.

58. Do you have dependents other than a spouse? Answer "Yes" to this question only if:

(1) You have children who receive more than half of their support from you, **or**
(2) You have dependents (other than your children or spouse) who live with you and receive more than half of their support from you, now and through June 30, 2000.

Step Three — Household Information

Complete this step only if you answered "Yes" to any question in Step Two.

59. How many people are in your (and your spouse's) household? Include only:

- yourself (and your spouse, if you have one), and
- your children, if you provide more than half of their support, and
- other people if they now live with you, and you provide more than half of their support and will continue to provide more than half of their support from July 1, 1999 through June 30, 2000.

60. How many in question 59 will be college students between July 1, 1999, and June 30, 2000?

Count yourself as a college student even if you will attend college less than half time in 1999-2000. Include others only if they will attend at least half time in 1999-2000 in a program that leads to a college degree or certificate.

Step Four — Parental Information

Complete this step if you answered "No" to all questions in Step Two. You may also be required to complete Step Four if you are a graduate health profession student.

Who is considered a parent in Step Four?

If your parents are both living and married to each other, answer the questions about them. (You will be providing information about two people.)

If your parent is widowed or single, answer the questions about that parent. (You will be providing information about one person.) If your widowed parent has remarried as of today, answer the questions about that parent and the person whom your parent married. (You will be providing information about two people.)

If your parents have divorced or separated, answer the questions about the parent you lived with most during the past 12 months. If you did not live with one parent more than with the other, answer in terms of the parent who provided the most financial support during the last 12 months, or during the most recent year that you actually were supported by a parent. (You will be providing information about one person.) If this parent has remarried as of today, answer the questions on the rest of this form about that parent and the person whom your parent married. (You will be providing information about two people.)

61. For 1998, have your parents filed their IRS income tax return, their tax return for Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau, or their foreign tax return?

62. What income tax return did your parents file or will they file for 1998?

If they filed or will file a foreign tax return, use the information from their foreign tax return to fill out this form. Convert all figures to U.S. dollars, using the exchange rate that is in effect today.

If they filed or will file a tax return with Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau, use the information from these tax returns to fill out this form.

63. If your parents have filed or will file a 1040, were they eligible to file a 1040A or 1040EZ?

In general, your parents are eligible to file a 1040A or 1040EZ if they make less than $50,000, do not itemize deductions, do not receive income from their own business or farm, and do not receive alimony or capital gains. Your parents are not eligible if they receive self-employment income, alimony, capital gains, or itemize deductions.

64. What was your parents' adjusted gross income for 1998?

Adjusted gross income is on IRS Form 1040–line 33; 1040A–line 18; or 1040EZ–line 4.

Step Four, continued...

65. Enter the total amount of your parents' income tax for 1998.

Income tax amount is on IRS Form 1040–line 49; 1040A–line 32; or 1040EZ–line 10.

66. Enter your parents' exemptions.

Exemptions are on Form 1040–line 6d or on Form 1040A-line 6d. For Form 1040EZ, if your parent(s) answered "Yes" on line 5, use line F to determine the number of exemptions ($2700 equals one exemption). If your parent(s) answered "No" on line 5, enter 01 if single, or 02 if married.

67. Enter your parents' Earned Income Credit from IRS Form 1040–line 59a; 1040A–line 37a; or 1040EZ–line 8a.

68-69. How much did your parents earn from working in 1998? Answer this question whether or not your parents filed a tax return.

This information may be on their W-2 forms, or on IRS Form 1040–lines 7, 12, and 18; on 1040A–line 7; or on 1040EZ–line 1.

70-71. Go to pages 6 and 7 of this booklet. Turn the booklet sideways, and enter all of the items that apply to your parents in the column **on the right.** Enter the parent total for Worksheet A in question 70. Enter the parent total for Worksheet B in question 71.

72. What is the total current balance of your parents' cash, savings, and checking accounts?

73-75. What is the current net worth of your parents' investments (73), business (74), and investment farm (75)?

Net Worth means current value minus debt. If net worth is one million or more, enter 999999. If net worth is negative, enter 0

Investments include real estate (other than your parents' home), trust funds, money market funds, mutual funds, certificates of deposit, stocks, bonds, other securities, installment and land sale contracts (including mortgages held), commodities, etc. Investment value includes the market value of these investments. Do not include the value of life insurance and retirement plans (pension funds, annuities, IRAs, Keogh plans, etc.) or the value of prepaid tuition plans. Investment debt means only those debts that are related to the investments.

Business value includes the market value of land, buildings, machinery, equipment, and inventory. Business debt means only those debts for which the business was used as collateral.

Do not include a farm that your parents live on and operate in your parents' investment farm net worth.

76. What is your parents' marital status as of today?

Step Four, continued...

77. How many people are in your parents' household? Include only:

- yourself and your parents, and
- your parents' other children, if (a) your parents provide more than half of their support or (b) the children could answer "No" to every question in Step Two, and
- other people if they now live with your parents, and your parents provide more than half of their support and will continue to provide more than half of their support from July 1, 1999 through June 30, 2000.

78. How many in question 77 will be college students between July 1, 1999, and June 30, 2000?

Count yourself (the student) as a college student even if you will attend college less than half time in 1999-2000. Include others only if they will attend at least half time in 1999-2000 in a program that leads to a college degree or certificate.

Step Five — School Information

Review any college names and addresses preprinted on this form. If you want information to be sent to that same college in 1999-2000, fill in the oval marked "Yes" next to the college name. Also fill in the oval that corresponds to your housing plans.

If you do not want information to be sent to a college that is preprinted on this form, fill in the oval marked "No." When you fill in "No," you may write in a new college's federal school code. Look for federal school codes at your college financial aid office, at your public library, or on the internet at http://www.ed.gov/offices/OPE. If you cannot get the federal school code, write in the new college's complete name, address, city, and state. Also fill in the oval that corresponds to your housing plans.

Step Six — Signature and Date

95-96. Date and Signature:

You (the student) and one parent whose information is provided in Step Four must sign and date this form or the form will be returned unprocessed. Everyone signing this form is certifying that all information on the form is correct and that they are willing to provide documents to verify the accuracy of the information. **Do not sign, date, or mail this form before January 1, 1999.** Any 1999-2000 Renewal FAFSA dated or received before January 1, 1999 will be returned unprocessed.

97-99. Preparer's information:

If this form was filled out by someone other than you, your spouse, or your parent(s), that person must complete this part. The preparer must sign and date the form, certifying that the information is correct and complete. An original signature is required, although the preparer may use a preprinted address label or a rubber stamp to fill in address information.

Information on the Privacy Act and use of your Social Security Number.

We use the information that you provide on this form to determine if you are eligible to receive federal student financial aid and the amount that you are eligible to receive. Section 483 of the Higher Education Act of 1965, as amended, gives us the authority to ask you these questions and to collect your social security number.

State and institutional student financial aid programs may also use the information that you provide on this form to determine if you are eligible to receive state and institutional aid and the need that you have for such aid. Therefore, we will disclose the information that you provide on this form to each institution you list in questions 83–93, state agencies in your state of legal residence, and the state agencies of the states in which the colleges that you list in questions 83–93 are located.

If you are applying solely for federal aid, you must answer all of the following questions that apply to you: 1–9, 14–16, 25, 28–29, 32–33, 38–42, 44–65, 67–79, 82, and 95–96. If you do not answer these questions, you will not receive federal aid.

Without your consent, we may disclose information that you provide to entities under a published "routine use." Under such a routine use, we may disclose information to third parties that we have authorized to assist us in administering the above programs; to other federal agencies under computer matching programs, such as those with the Social Security Administration, Selective Service System, Immigration and Naturalization Service, and Veterans Administration; to your parents or spouse; and to members of Congress if you ask them to help you with student aid questions.

If the federal government, the U.S. Department of Education, or an employee of the U.S. Department of Education is involved in litigation, we may send information to the Department of Justice, or a court or adjudicative body, if the disclosure is related to financial aid and certain conditions are met. In addition, we may send your information to a foreign, federal, state, or local enforcement agency if the information that you submitted indicates a violation or potential violation of law, for which that agency has jurisdiction for investigation or prosecution. Finally, we may send information regarding a claim that is determined to be valid and overdue to a consumer reporting agency. This information includes identifiers from the record; the amount, status, and history of the claim; and the program under which the claim arose.

State Certification.

By submitting this application, you are giving your state financial aid agency permission to verify any statement on this form and to obtain income tax information for all persons required to report income on this form.

The Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 says that no one is required to respond to a collection of information unless it displays a valid OMB control number, which for this form is 1840-0110. The time required to complete this form is estimated to be from 20 to 30 minutes, including time to review instructions, search data resources, gather the data needed, and complete and review the information collection. If you have comments about this estimate or suggestions for improving this form, please write to: U.S. Department of Education, Washington DC 20202-4651.

Exhibit V-D

Free Application for Federal Student Aid

OMB 1840-0110 **July 1, 1999 — June 30, 2000 school year**

Use this form to apply for federal student grants, work-study money, and loans.

You can also apply over the **internet** at: http://www.fafsa.ed.gov instead of using this paper form. In addition to federal student aid, you may also be eligible for a **Hope** or a **Lifetime Learning** income tax credit, both of which you claim when you file your taxes. For more information on these tax credits, this application, and the U.S. Department of Education's student aid programs, call 1-800-4FED-AID (1-800-433-3243) Monday through Friday between 8:00am and 8:00pm eastern time or look on the internet at http://www.ed.gov/offices/OPE If you are hearing impaired, call TDD 1-800-730-8913.

Your answers on this form will be read by a machine. Therefore,

- use black ink or #2 pencil and fill in ovals completely, like this: ●
- print clearly in CAPITAL letters and skip a box between words: | 1 | 5 | | E | L | M | | S | T |
- report dollar amounts (such as $12,356.00) like this: $ | | 1 | 2 | , | 3 | 5 | 6 | (no cents)
- write numbers less than 10 with a zero (0) first: | 0 | 7 |

Yellow is for students and purple is for parents.

- If you are filing a **1998 income tax return,** we recommend that you fill it out before completing this form. However, you do not need to send your income tax return to the IRS before you fill out this form.
- After you complete this application, make a copy of it. Then **send the original of pages 3 through 6** in the attached envelope or send it to Federal Student Aid Programs, P.O. Box 4008, Mt. Vernon, IL 62864-8608.
- Send in this application—pages 3 through 6—only between **January 1, 1999, and June 30, 2000.**
- You should hear from us within four weeks. If you do not, please call 1-319-337-5665.
- If you or your family has **unusual circumstances** (such as loss of employment or major medical expenses) that might affect your need for student financial aid, check with the financial aid office at the college you plan to attend.
- With this form you may also be able to apply for student **aid from other sources, such as your state or college.** The deadlines for states (see below) or colleges may be as early as January 1999, and you may be required to complete additional forms.

Now go to page 3 and begin filling out this form. Refer to the notes as needed.

Deadline dates for state aid. Generally, state aid comes from your state of legal residence. **Check with your high school guidance counselor** or the financial aid administrator at your college about state and college sources of student financial aid. State deadlines are below.

AZ June 30, 2000 *(date received)*
*^CA March 2, 1999 *(date postmarked)*
DE April 15, 1999 *(date received)*
* DC June 24, 1999 *(date received by state)*
FL May 15, 1999 *(date processed)*
HI March 1, 1999
IL First-time applicants – September 30, 1999
Continuing applicants – May 31, 1999 *(date received)*
^ IN For priority consideration – March 1, 1999 *(date postmarked)*
^ IA June 1, 1999 *(date received)*
* KS For priority consideration – April 1, 1999 *(date processed)*
KY For priority consideration – March 15, 1999 *(date received)*
^ LA For priority consideration – April 15, 1999 *(date postmarked)*
ME May 1, 1999 *(date received)*
MD March 1, 1999 *(date postmarked)*
^ MA For priority consideration – May 1, 1999 *(date received)*
MI High school seniors – February 21, 1999
College students – March 21, 1999 *(date received)*
MN June 30, 2000 *(date received)*
MO April 1, 1999 *(date received)*
MT For large schools – March 1, 1999.
For small schools – April 1, 1999
NH May 1, 1999 *(date received)*
NJ 1998-99 Tuition Aid Grant Recipients – June 1, 1999
All other applicants
– October 1, 1999, for fall and spring terms.
– March 1, 2000, for spring term only
(date received)
*^NY May 1, 2000 *(date postmarked)*
NC March 15, 1999 *(date received)*
ND April 15, 1999 *(date processed)*
OH October 1, 1999 *(date received)*
OK April 30, 1999 *(date received)*
OR May 1, 2000 *(date received)*
* PA All 1998-99 State grant recipients – May 1, 1999
Non-1998-99 State grant recipients in degree programs – May 1, 1999
All other applicants – August 1, 1999 *(date received)*
PR May 2, 2000 *(date application signed)*
RI March 1, 1999 *(date received)*
SC June 30, 1999 *(date received)*
TN May 1, 1999 *(date processed)*
*^WV March 1, 1999 *(date received)*

Check with your financial aid administrator for these states: AL, AK, *AS, AR, CO, *CT, *FM, GA, *GU, ID, *MP, *MH, MS, *NE, *NV, *NM, *PW, *SD, *TX, UT, *VT, *VI, *VA, WA, WI, and *WY.

* Additional form may be required ^ Applicants encouraged to obtain proof of mailing.

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Notes for questions **14–15** (page 3)

If you are an eligible noncitizen, write in your eight or nine digit Alien Registration Number. Generally, you are an eligible noncitizen if you are: (1) a U.S. permanent resident and you have an Alien Registration Receipt Card (I-151 or I-551); (2) a conditional permanent resident (I-151C); or (3) an other eligible noncitizen with an Arrival-Departure Record (I-94) from the U.S. Immigration and Naturalization Service showing any one of the following designations: "Refugee," "Asylum Granted," "Indefinite Parole," "Humanitarian Parole," or "Cuban-Haitian Entrant." If you are in the U.S. on only an F1 or F2 student visa, or only a J1 or J2 exchange visitor visa, or a G series visa (pertaining to international organizations), you must fill in oval **c**. If you are neither a citizen nor eligible noncitizen, you are not eligible for federal student aid. However, you may be eligible for state or college aid, and, thus, you should still consider filling out this form.

Notes for questions **18–22** (page 3)

For undergraduates, full time generally means taking at least 12 credit hours in a term or 24 clock hours per week. 3/4 time generally means taking at least 9 credit hours in a term or 18 clock hours per week. Half time generally means taking at least 6 credit hours in a term or 12 clock hours per week. Provide this information about the college you plan to attend.

Notes for question **30** (page 3) — Enter the correct number in the box in question 30.

Enter **1** for 1st bachelor's degree
Enter **2** for 2nd bachelor's degree
Enter **3** for associate degree (occupational or technical program)
Enter **4** for associate degree (general education or transfer program)
Enter **5** for certificate or diploma for completing an occupational, technical, or educational program of less than two years
Enter **6** for certificate or diploma for completing an occupational, technical, or educational program of at least two years
Enter **7** for teaching credential program (nondegree program)
Enter **8** for graduate or professional degree
Enter **9** for other/undecided

Notes for question **31** (page 3) — Enter the correct number in the box in question 31.

Enter **1** for 1st year/never attended college
Enter **2** for 1st year/attended college before
Enter **3** for 2nd year/sophomore
Enter **4** for 3rd year/junior
Enter **5** for 4th year/senior
Enter **6** for 5th year/other undergraduate
Enter **7** for graduate/professional or beyond

Notes for questions **39 c. and d.** (page 4) and **62 c. and d.** (page 5)

If you filed or will file a foreign tax return, use the information from your foreign tax return to fill out this form. Convert all figures to U.S. dollars, using the exchange rate that is in effect today.

If you filed or will file a tax return with Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau, use the information from these tax returns to fill out this form.

Notes for questions **40** (page 4) and **63** (page 5)

In general, a person is eligible to file a 1040A or 1040EZ if the person makes less than $50,000, does not itemize deductions, does not receive income from his or her own business or farm, and does not receive alimony or capital gains. The person is not eligible if the person receives self-employment income, alimony, capital gains, or itemizes deductions.

Notes for questions **43** (page 4) and **66** (page 5) — only for people who filed a 1040EZ

On the 1040EZ, if a person answered "Yes" on line 5, use worksheet line F to determine the number of exemptions ($2700 equals one exemption). If a person answered "No" on line 5, enter 01 if the person is single, or 02 if the person is married.

Notes for questions **50–52** (page 4) and **73–75** (page 5)

Net worth means current value minus debt.

Investments include real estate (other than your home), trust funds, money market funds, mutual funds, certificates of deposit, stocks, bonds, other securities, installment and land sale contracts (including mortgages held), commodities, etc. Investment value includes the market value of these investments. Do not include the value of life insurance and retirement plans (pension funds, annuities, IRAs, Keogh plans, etc.) or the value of prepaid tuition plans. Investment debt means only those debts that are related to the investments.

Business value includes the market value of land, buildings, machinery, equipment, and inventory. Business debt means only those debts for which the business was used as collateral.

Notes for question **57** (page 4)

Answer **"Yes"** (you are a veteran) if (1) you have engaged in active service in the U.S. Armed Forces (Army, Navy, Air Force, Marines, and Coast Guard), or were a cadet or midshipman at one of the service academies, and (2) you were released under a condition other than dishonorable. You should also answer "Yes" if you are not a veteran now but will be one by June 30, 2000.

Answer **"No"** (you are not a veteran) if (1) you have never served in the U.S. Armed Forces, or (2) you are an ROTC student, a cadet or midshipman at a service academy, or a National Guard or Reserves enlistee (and were not activated for duty). You should also answer "No" if you are currently serving in the U.S. Armed Forces and will continue to serve through June 30, 2000.

Free Application for Federal Student Aid

OMB 1840-0110

July 1, 1999 — June 30, 2000 school year

Step One: **For questions 1-37, leave blank any questions that do not apply to you (the student).**

1-3. Your name — 1. LAST NAME | 2. FIRST NAME | 3. M.I.

4-7. Your permanent mailing address — 4. NUMBER AND STREET (INCLUDE APARTMENT NUMBER); 5. CITY (AND COUNTRY, IF NOT U.S.); 6. STATE; 7. ZIP CODE

8. Your Social Security Number — ___ – ___ – ____

9. Your date of birth — MONTH / DAY / YEAR (19__)

10. Your permanent telephone number — AREA CODE ___ ___ – ____

11. Do you have a driver's license? Yes ○ 1 No ○ 2

12-13. Driver's license number and state — 12. LICENSE NUMBER; 13. STATE

14. Are you a U.S. citizen? Pick one. **See Page 2.**

- **a.** Yes, I am a U.S. citizen. ○ 1
- **b.** No, but I am an eligible noncitizen. **Fill in question 15.** ○ 2
- **c.** No, I am not a citizen or eligible noncitizen. ○ 3

15. ALIEN REGISTRATION NUMBER — A ____

16. Marital status as of today

- I am single, divorced, or widowed. ○ 1
- I am married. ○ 2
- I am separated. ○ 3

17. Month and year you were married, separated, divorced, or widowed — MONTH / YEAR

For each question (18 - 22), please mark whether you will be full time, 3/4 time, half time, less than half time, or not attending. Mark "Full time" if you are not sure. See page 2.

18. Summer 1999	Full time ○ 1	3/4 time ○ 2	Half time ○ 3	Less than half time ○ 4	Not attending ○ 5
19. Fall semester or quarter 1999	Full time ○ 1	3/4 time ○ 2	Half time ○ 3	Less than half time ○ 4	Not attending ○ 5
20. Winter quarter 1999-2000	Full time ○ 1	3/4 time ○ 2	Half time ○ 3	Less than half time ○ 4	Not attending ○ 5
21. Spring semester or quarter 2000	Full time ○ 1	3/4 time ○ 2	Half time ○ 3	Less than half time ○ 4	Not attending ○ 5
22. Summer 2000	Full time ○ 1	3/4 time ○ 2	Half time ○ 3	Less than half time ○ 4	Not attending ○ 5

23. Highest school your father completed	Middle school/Jr. High ○ 1	High school ○ 2	College or beyond ○ 3	Other/unknown ○ 4
24. Highest school your mother completed	Middle school/Jr. High ○ 1	High school ○ 2	College or beyond ○ 3	Other/unknown ○ 4

25. What is your state of legal residence? STATE ___

26. Did you become a legal resident of this state before January 1, 1994? Yes ○ 1 No ○ 2

27. If the answer to question 26 is **"No,"** give month and year you became a legal resident. MONTH / YEAR

28. Most male students must register with Selective Service to get federal aid. Are you male? Yes ○ 1 No ○ 2

29. If you are male (age 18-25) and not registered, do you want Selective Service to register you? Yes ○ 1 No ○ 2

30. What degree or certificate will you be working towards during 1999-2000? **See page 2** and enter the correct number in the box. ___

31. What will be your grade level when you begin the 1999-2000 school year? **See page 2** and enter the correct number in the box. ___

32. Will you have a high school diploma or GED before you enroll? Yes ○ 1 No ○ 2

33. Will you have your first bachelor's degree before July 1, 1999? Yes ○ 1 No ○ 2

34. In addition to grants, are you interested in student loans (which you must pay back)? Yes ○ 1 No ○ 2

35. In addition to grants, are you interested in "work-study" (which you earn through work)? Yes ○ 1 No ○ 2

36. If you receive veterans' education benefits, for **how many months** from July 1, 1999 through June 30, 2000 will you receive these benefits? ___

37. **Amount per month?** $ ___

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For 38-52, if you are now married (even if you were not married in 1998), report both your and your spouse's income and assets. If you are not married, answer these questions about you and ignore the references to "spouse." If the answer is zero or the question does not apply to you, enter 0.

38. For 1998, have you filed your IRS income tax return or a tax return listed in **question 39**?

a. I have already filed. ○ 1 **b.** I will file, but I have not yet filed. ○ 2 **c.** I'm not going to file. **(Skip to question 45.)** ○ 3

39. What income tax return did you file or will you file for 1998?

a. IRS 1040 ..... ○ 1
b. IRS 1040A, 1040EZ, 1040Telefile ..... ○ 2
c. A foreign tax return. **See Page 2.** ..... ○ 3
d. A tax return for Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau. **See Page 2.** ..... ○ 4

40. If you have filed or will file a 1040, were you eligible to file a 1040A or 1040EZ? **See page 2.** Yes ○ 1 No/don't know ○ 2

41. What was your (and spouse's) adjusted gross income for 1998? Adjusted gross income is on IRS Form 1040–line 33; 1040A–line 18; or 1040EZ–line 4. $,

42. Enter the total amount of your (and spouse's) income tax for 1998. Income tax amount is on IRS Form 1040–line 49; 1040A–line 32; or 1040EZ–line 10. $,

43. Enter your (and spouse's) exemptions. Exemptions are on IRS Form 1040–line 6d, and on Form 1040A–line 6d. For Form 1040EZ, **see page 2.**

44. Enter your Earned Income Credit from IRS Form 1040–line 59a; 1040A–line 37a; or 1040EZ–line 8a. $,

45-46. How much did you (and spouse) earn from working in 1998? Answer this question whether or not you filed a tax return. This information may be on your W-2 forms, or on IRS Form 1040–lines 7, 12, and 18; or on 1040A–line 7; or on 1040EZ–line 1.

You (45) $,
Your Spouse (46) $,

47. Go to page 8 of this form; complete the column on the left of **Worksheet A**; enter student total here. $,

48. Go to page 8 of this form; complete the column on the left of **Worksheet B**; enter student total here. $,

49. Total current balance of cash, savings, and checking accounts $,

For 50-52, if net worth is one million or more, enter $999,999. If net worth is negative, enter 0.

50. Current net worth of investments (investment value minus investment debt) **See page 2.** $,

51. Current net worth of business (business value minus business debt) **See page 2.** $,

52. Current net worth of investment farm (Don't include a farm that you live on and operate.) $,

Step Two: If you (the student) answer "Yes" to any question in Step Two, go to Step Three. If you answer "No" to every question, skip Step Three and go to Step Four.

53. Were you born before January 1, 1976? ..... Yes ○ 1 No ○ 2

54. Will you be working on a degree beyond a bachelor's degree in school year 1999-2000? ..... Yes ○ 1 No ○ 2

55. As of today, are you married? (Answer yes if you are separated, but not divorced.) ..... Yes ○ 1 No ○ 2

56. Are you an orphan or ward of the court or were you a ward of the court until age 18? ..... Yes ○ 1 No ○ 2

57. Are you a veteran of the U.S. Armed Forces? **See page 2.** ..... Yes ○ 1 No ○ 2

58. Answer "Yes" if: (1) You have children who receive more than half of their support from you; **or**
(2) You have dependents (other than your children or spouse) who live with you and receive more than half of their support from you, now and through June 30, 2000. ..... Yes ○ 1 No ○ 2

Step Three: Complete this step only if you answered "Yes" to any question in Step Two.

59. How many people are in your (and your spouse's) household? **See page 7.**

60. How many in question 59 will be college students between July 1, 1999, and June 30, 2000? **See page 7.**

Now go to Step Five. (If you are a graduate health profession student, you may be required to complete Step Four even if you answered "Yes" to any questions in Step Two.)

Step Four: Please tell us about your parents. See page 7 for who is considered a parent. Complete this step if you (the student) answered "No" to all questions in Step Two.

For 61 - 75, if the answer is zero or the question does not apply, enter 0.

61. For 1998, have your parents filed their IRS income tax return or a tax return listed in **question 62**?

a. My parents have already filed. ○ 1 **b.** My parents will file, but they have not yet filed. ○ 2 **c.** My parents are not going to file. **(Skip to question 68.)** ○ 3

62. What income tax return did your parents file or will they file for 1998?

a. IRS 1040 ..... ○ 1
b. IRS 1040A, 1040EZ, 1040Telefile ..... ○ 2
c. A foreign tax return. **See Page 2.** ..... ○ 3
d. A tax return for Puerto Rico, Guam, American Samoa, the Virgin Islands, Marshall Islands, the Federated States of Micronesia, or Palau. **See Page 2.** ..... ○ 4

63. If your parents have filed or will file a 1040, were they eligible to file a 1040A or 1040EZ? **See page 2.** Yes ○ 1 No/don't know ○ 2

64. What was your parents' adjusted gross income for 1998? Adjusted gross income is on IRS Form 1040–line 33; 1040A–line 18; or 1040EZ–line 4. $,

65. Enter the total amount of your parents' income tax for 1998. Income tax amount is on IRS Form 1040–line 49; 1040A–line 32; or 1040EZ–line 10. $,

66. Enter your parents' exemptions. Exemptions are on IRS Form 1040–line 6d and on Form 1040A–line 6d. For Form 1040EZ, **see page 2.**

67. Enter your parents' Earned Income Credit from IRS Form 1040–line 59a; 1040A–line 37a; or 1040EZ–line 8a. $,

68-69. How much did your parents earn from working in 1998? Answer this question whether or not your parents filed a tax return. This information may be on their W-2 forms, or on IRS Form 1040–lines 7, 12, and 18; or on 1040A–line 7; or on 1040EZ–line 1.

Father/ Stepfather (68) $,

Mother/ Stepmother (69) $,

70. Go to page 8 of this form; complete the column on the right of **Worksheet A**; enter parent total here. $,

71. Go to page 8 of this form; complete the column on the right of **Worksheet B**; enter parent total here. $,

72. Total current balance of cash, savings, and checking accounts $,

For 73–75, if net worth is one million or more, enter $999,999. If net worth is negative, enter 0.

73. Current net worth of investments (investment value minus investment debt) **See page 2.** $,

74. Current net worth of business (business value minus business debt) **See page 2.** $,

75. Current net worth of investment farm (Don't include a farm that your parents live on and operate.) $,

76. Parents' marital status as of today? (Pick one.) Married ○ 1 Single ○ 2 Divorced/Separated ○ 3 Widowed ○ 4

77. How many people are in your parents' household? **See page 7.**

78. How many in question 77 will be college students between July 1, 1999, and June 30, 2000? **See page 7.**

79. What is your parents' state of legal residence? STATE

80. Did your parents become legal residents of the state in question 79 before January 1, 1994? Yes ○ 1 No ○ 2

81. If the answer to question 80 is "No," enter month/year for the parent who has been a legal resident the longest. MONTH / YEAR

82. What is the age of your older parent?

Step Five: Please tell us which schools should receive your information.

For each school (up to six), please provide the federal school code and indicate your housing plans. Look for the federal school codes at your college financial aid office, at your public library, on the internet at http://www.ed.gov/offices/OPE, or by asking your high school guidance counselor. If you cannot get the federal school code, write in the complete name, address, city, and state of the college.

	Federal school code	*OR* Name of college	College street address and city	State	Housing Plans
83.					84. on campus ○ 1 off campus ○ 2 with parent ○ 3
85.					86. on campus ○ 1 off campus ○ 2 with parent ○ 3
87.					88. on campus ○ 1 off campus ○ 2 with parent ○ 3
89.					90. on campus ○ 1 off campus ○ 2 with parent ○ 3
91.					92. on campus ○ 1 off campus ○ 2 with parent ○ 3
93.					94. on campus ○ 1 off campus ○ 2 with parent ○ 3

Step Six: Please read, sign, and date.

By signing this application, you agree, if asked, to provide information that will verify the accuracy of your completed form. This information may include a copy of your U.S. or state income tax form. Also, you certify that you (1) will use federal student financial aid only to pay the cost of attending an institution of higher education, (2) are not in default on a federal student loan or have made satisfactory arrangements to repay it, (3) do not owe money back on a federal student grant or have made satisfactory arrangements to repay it, and (4) will notify your school if you default on a federal student loan. If you purposely give false or misleading information, you may be fined $10,000, sent to prison, or both.

95. Date this form was completed.

MONTH / DAY / 1999 ○ or 2000 ○

96. Student signature

1

Parent signature (one parent whose information is provided in Step Four.)

2

If this form was filled out by someone other than you, your spouse, or your parent(s), that person must complete this part.

Preparer's Name and Firm _____

Address _____

97. Social Security # ___ - ___ - ____

OR

98. Employer ID # ___ - _____

SCHOOL USE ONLY

D/O ○ 1 Federal School Code

FAA Signature

1

99. Signature and Date 1 _____

MDE USE ONLY

Special Handle ___ - _____

Notes for question 59 (page 4)

Include in your household:

- yourself (and your spouse, if you have one), and
- your children, if you provide more than half of their support, and
- other people if they now live with you, and you provide more than half of their support and will continue to provide more than half of their support from July 1, 1999 through June 30, 2000.

Notes for questions 60 (page 4) and 78 (page 5)

Count yourself as a college student even if you will attend college less than half time in 1999-2000. Include others only if they will attend at least half time in 1999-2000 in a program that leads to a college degree or certificate.

Notes for questions 61–82 (page 5) Step Four: Who is considered a parent in this Step?

If your parents are both living and married to each other, answer the questions about them. (You will be providing information about two people.)

If your parent is widowed or single, answer the questions about that parent. (You will be providing information about one person.) If your widowed parent has remarried as of today, answer the questions about that parent and the person whom your parent married. (You will be providing information about two people.)

If your parents have divorced or separated, answer the questions about the parent you lived with most during the past 12 months. If you did not live with one parent more than with the other, answer in terms of the parent who provided the most financial support during the last 12 months, or during the most recent year that you actually were supported by a parent. (You will be providing information about one person.) If this parent has remarried as of today, answer the questions on the rest of this form about that parent and the person whom your parent married. (You will be providing information about two people.)

Notes for question 77 (page 5)

Include in your parents' household:

- yourself and your parents, and
- your parents' other children if (a) your parents provide more than half of their support or (b) the children could answer "No" to every question in Step Two, and
- other people if they now live with your parents, your parents provide more than half of their support and will continue to provide more than half of their support from July 1, 1999 through June 30, 2000.

Information on the Privacy Act and use of your Social Security Number.

We use the information that you provide on this form to determine if you are eligible to receive federal student financial aid and the amount that you are eligible to receive. Section 483 of the Higher Education Act of 1965, as amended, gives us the authority to ask you these questions and to collect your social security number.

State and institutional student financial aid programs may also use the information that you provide on this form to determine if you are eligible to receive state and institutional aid and the need that you have for such aid. Therefore, we will disclose the information that you provide on this form to each institution you list in questions 83–93, state agencies in your state of legal residence, and the state agencies of the states in which the colleges that you list in questions 83–93 are located.

If you are applying solely for federal aid, you must answer all of the following questions that apply to you: 1–9, 14–16, 25, 28–29, 32–33, 38–42, 44–65, 67–79, 82, and 95–96. If you do not answer these questions, you will not receive federal aid.

Without your consent, we may disclose information that you provide to entities under a published "routine use." Under such a routine use, we may disclose information to third parties that we have authorized to assist us in administering the above programs; to other federal agencies under computer matching programs, such as those with the Social Security Administration, Selective Service System, Immigration and Naturalization Service, and Veterans Administration; to your parents or spouse; and to members of Congress if you ask them to help you with student aid questions.

If the federal government, the U.S. Department of Education, or an employee of the U.S. Department of Education is involved in litigation, we may send information to the Department of Justice, or a court or adjudicative body, if the disclosure is related to financial aid and certain conditions are met. In addition, we may send your information to a foreign, federal, state, or local enforcement agency if the information that you submitted indicates a violation or potential violation of law, for which that agency has jurisdiction for investigation or prosecution. Finally, we may send information regarding a claim that is determined to be valid and overdue to a consumer reporting agency. This information includes identifiers from the record; the amount, status, and history of the claim; and the program under which the claim arose.

State Certification.

By submitting this application, you are giving your state financial aid agency permission to verify any statement on this form and to obtain income tax information for all persons required to report income on this form.

The Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 says that no one is required to respond to a collection of information unless it displays a valid OMB control number, which for this form is 1840-0110. The time required to complete this form is estimated to be one hour per response, including time to review instructions, search data resources, gather the data needed, and complete and review the information collection. If you have comments about this estimate or suggestions for improving this form, please write to: U.S. Department of Education, Washington DC 20202-4651.

Worksheets – Even though you may have few of these items, check carefully.

Keep these worksheets with a copy of your application. Do **not** mail these worksheets in with your application.

Worksheet A

For question **47:** Enter and add together all of the following that apply to you (and your spouse) in the column on the left. Enter the total amount in question 47 on page 4 of this form.

For question **70:** Enter and add together all of the following that apply to your parents in the column on the right (if you are required to complete Step 4 of the application). Enter the total amount in question 70 on page 5 of this form.

For question 47 Student (and spouse)	**Calendar Year 1998**	**For question 70 Parent(s)**
$	Payments to tax-deferred pension and savings plans (paid directly or withheld from earnings) as reported on the W-2 Form. Include untaxed portions of 401(k) and 403(b) plans.	$
$	Deductible IRA and/or Keogh payments: IRS Form 1040–total of lines 23 and 29; or 1040A–line 15	$
$	Child support received for all children. Don't include foster care or adoption payments.	$
$	Welfare benefits, including Temporary Assistance for Needy Families (TANF). Don't include food stamps.	$
$	Tax exempt interest income from IRS Form 1040–line 8b; or 1040A–line 8b	$
$	Foreign income exclusion from IRS Form 2555–line 43; or 2555EZ–line 18	$
$	Untaxed portions of pensions from IRS Form 1040–(line 15a minus 15b) plus (16a minus 16b); or 1040A–(line 10a minus 10b) plus (11a minus 11b) excluding rollovers	$
$	Credit for Federal tax on special fuels from IRS Form 4136–Part III – nonfarmers only	$
$	Social Security payments that were not taxed	$
$	Housing, food, and other living allowances paid to members of the military, clergy, and others (including cash payments and cash value of benefits)	$
$	Workers' Compensation	$
$	Veterans' noneducation benefits, such as Death Pension or Dependency & Indemnity Compensation (DIC)	$
$	Any other untaxed income and benefits, such as VA Educational Work-Study allowances, untaxed portions of Railroad Retirement Benefits, Black Lung Benefits, Refugee Assistance, etc. Don't include student aid, JTPA benefits, or benefits from flexible spending arrangements, e.g., cafeteria plans.	$
$	Cash or any money paid on your behalf, not reported elsewhere on this form	XXXXXXXXX
$ _____	(Enter this amount in question 47.) (Enter this amount in question 70.)	$ _____
Student (and spouse) total		**Parent(s) total**

Worksheet B

For question **48:** Enter and add together all of the following that apply to you (and your spouse) in the column on the left. Enter the total amount in question 48 on page 4 of this form.

For question **71:** Enter and add together all of the following that apply to your parents in the column on the right (if you are required to complete Step 4 of the application). Enter the total amount in question 71 on page 5 of this form.

For question 48 Student (and spouse)	**Calendar Year 1998**	**For question 71 Parent(s)**
$	Education credits (Hope and Lifetime Learning Tax Credits) from IRS Form 1040-line 44; or 1040A-line 29.	$
$	Child support you or your spouse (or your parents) paid because of divorce or separation. Do not include support for children in your (or your parents') household, as reported in question 59 (or question 77 for your parents).	$
$	Taxable earnings from Federal Work-Study or other need-based work programs	$
$	AmeriCorps awards — allowances and benefits	$
$	Student grant and scholarship aid in excess of the tuition, fees, books, and supplies that was reported in question 41 for students and 64 for parents	$
$ _____	(Enter this amount in question 48.) (Enter this amount in question 71.)	$ _____
Student (and spouse) total		**Parent(s) total**

MORE ABOUT STUDENT FINANCIAL AID...

Congratulations! You're taking the first step in the financial aid process, completing the Free Application for Federal Student Aid (FAFSA). It will take us 3-4 weeks to process your form and send you a Student Aid Report by mail. Your Student Aid Report will summarize the data that you reported on your application. Please check the information carefully to make sure that it is accurate. Make sure that you keep a copy of the Student Aid Report and note the **DRN** (Data Release Number) in the upper right hand corner of the first page—you will need the **DRN** if you decide to apply to additional schools. If the information is complete, an **Expected Family Contribution (EFC)** will be printed next to the DRN. The EFC is based on the income and expense information that you provide on the FAFSA, and your school will use it to award your financial aid.

If you believe that you have special circumstances that should be taken into account, such as a significant change in income from one year to the next, you should contact the financial aid administrator at the school(s) to which you are applying. If the circumstances warrant it, the aid administrator has the authority to change your dependency status or to adjust the data used to calculate your EFC. But please remember that the aid administrator can't do this automatically—there have to be very good reasons to make an adjustment. The aid administrator's decision is final and cannot be appealed to the U.S. Department of Education.

YOUR FINANCIAL AID PACKAGE...

The school to which you are applying will prepare a financial aid package to help meet your financial need. **Financial need** is the difference between your **cost of attendance** at the school (including living expenses) and your EFC. Your aid package cannot exceed your financial need, but some forms of self-help assistance may be used to meet your EFC. The school will notify you of your aid package.

You must maintain eligibility for the aid programs to receive the awards. If you are selected for the verification process, you may be required to submit certain documentation, such as a copy of your family's IRS tax forms, prior to receiving any aid.

AID FROM THE STUDENT FINANCIAL ASSISTANCE PROGRAMS...

Your financial aid package is likely to include funds from the Student Financial Assistance Programs. These programs, administered by the U.S. Department of Education, provide 70% of all student financial assistance (over $40 billion a year):

Federal Pell Grants

Available to undergraduate students only. For the 1998-99 school year, awards ranged from $400 to $3,000—these are grants, which do not have to be repaid.

Federal Stafford Loans

▲ Subsidized ▲Unsubsidized

These are student loans which must be repaid. If your school participates in the Federal Direct Loan Program, your Stafford Loan will be made through the school. (For other schools, the Stafford Loan will be made through a private lender.) Stafford loans are available to graduate and undergraduate students. First-year undergraduates are eligible for loans up to $2,625. Amounts for undergraduate students increase to as much as $5,500 annually after two years of study. Interest rate: variable, but never exceeds 8.25%

If you qualify (based on need) for a subsidized Stafford loan, the government will pay the interest on your loan in school, during the 6-month "grace period," and during any deferment periods. You are responsible for paying all of the interest that accrues on an unsubsidized Stafford Loan.

Federal PLUS Loans

These are unsubsidized loans made to parents that must be repaid. PLUS Loans are made either through the school (Direct Loans) or through a private lender. (If you are independent or your parents cannot get a PLUS loan, you are eligible to borrow additional Stafford funds.) Interest rate: variable, but never exceeds 9%

Campus-Based Programs

▲ Supplemental Educational Opportunity Grants ▲ Work-Study ▲ Perkins Loans

Campus-based funds are awarded by the school. SEOG is a grant available for undergraduates only; awards range from $100-$4,000. Federal Work-Study provides jobs to undergraduate and graduate students who are then paid an hourly rate at minimum wage or above. Perkins Loans are low-interest (5%) loans that must be repaid; the maximum annual loan amount is $3,000 for undergraduate students and $5,000 for graduate students.

Tax Credits

▲ Hope Tax Credit ▲ Lifetime Learning Tax Credit

These income tax credits reduce your or your family's federal taxes. They are based on your college tuition and fee charges, minus grants, scholarships, and other tax-free educational assistance. The Hope Tax Credit can be claimed during the first two years of college, up to a maximum of $1,500. The Lifetime Learning Tax Credit is available for any level of postsecondary study up to a current maximum of $1,000. If your parents or anyone else claims you on their income tax return, they would be eligible to take the credit on their taxes. If you are not claimed as a dependent on anyone else's tax return, you would be eligible to claim the credit. The credits are not available to single filers with adjusted gross incomes greater than $50,000 or joint filers with adjusted gross incomes greater than $100,000. Also note that only one type of credit (Hope or Lifetime Learning) may be claimed for the student in any given year.

The actual amount of your financial aid award will depend not only on your financial need, but on your cost of attending school, enrollment status (full-time or part-time), and whether you attend school for a full academic year or less. To receive aid from these programs, you ❶ must be an eligible citizen or permanent resident of the United States with a valid Social Security Number ❷ must have a high school diploma or a General Education Development certificate (or pass an approved "ability to benefit" test) ❸ must enroll in an eligible program as a regular student seeking a degree or certificate. (If you are a male, you must also have registered for Selective Service, if you are in the applicable age range for registration.)

TO APPLY ELECTRONICALLY OR TO FIND OUT MORE ABOUT FEDERAL STUDENT AID, VISIT THE U.S. DEPARTMENT OF EDUCATION'S WEB SITE AT:

www.ed.gov/studentaid

This site has a searchable list of Federal School Codes, which you will need to complete Step Five of the Free Application for Federal Student Aid.

HOW YOU WILL RECEIVE YOUR FINANCIAL AID...

Aid from the Student Financial Assistance Programs will be paid to you through the school. Your aid awards will almost always be paid to you by the semester, quarter, or other payment period. Typically, the school will first use the aid to pay any tuition and fee charges (and room and board, if provided by the school). The remainder will be paid to you for your other living expenses. Aid funds may not be credited for books and supplies and other school charges unless you have authorized this in writing.

HOW TO BE A WISE CONSUMER...

Getting a postsecondary education is a major investment of time and money—make sure that the school you attend is right for you. When choosing a school, you'll want to consider things like the quality of instructors and school facilities, as well as information about students at the school, such as the percentage of students who complete the program, the percentage of students who find jobs, and the percentage of students who default on their student loans. The school is required to inform you of its aid procedures and deadlines, and how and when you'll receive your aid award. Be sure that you've read and understood the school's refund policy and satisfactory progress policy. Keep copies of your enrollment agreement, the school's catalog, and all loan documents that you have received.

WHERE CAN I GET MORE INFORMATION ABOUT OTHER SOURCES OF STUDENT AID?

The financial aid office at the school you plan to attend is the best place to begin your search for free information. The financial aid administrator can tell you about student aid available from your state, from the school itself, and from other sources. You can also find free information about student aid in the reference section of your local library (usually listed under "student aid" or "financial aid"). These materials usually include information about federal, state, institutional, and private aid.

Information about student aid may also be available from foundations, religious organizations, community organizations, and civic groups, as well as organizations related to your field of interest, such as the American Medical Association or American Bar Association. Check with your parents' employers to see if they award scholarships or have a tuition payment plan.

Please remember: Applying for federal student aid is free!

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Stamp your UPS Shipper Number or place parcel register tape above the address label.

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REV_00457493

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 4/4/02

NAME OF CORRESPONDENT: Harlie Vick

SUBJECT: depositions against Clintons and the Communist Par

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A	3/20/02	C		
	Brett	A				

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS:

ADDITIONAL CORRESPONDENTS: **MEDIA:**

No response necessary.
Brett Kavanaugh

REV_00457494

Staff to Brett.

PRA 6

EXTREMELY CRITICAL !!!!!!!

To: Karl Roe

From Harlie Vick

I want to report a bunch of depositions I have against the Clintons and the Communist Party. Urgent please respond as soon as possible. I need to talk to you and work things out.
ANSWER TODAY IF POSSIBLE.

Harlie Vick Harlie Vick

PRA 6

Brett- 4/11/02

Can we just not respond and add to Her "File", pls?

Thanks—

~~Kathy~~

No response

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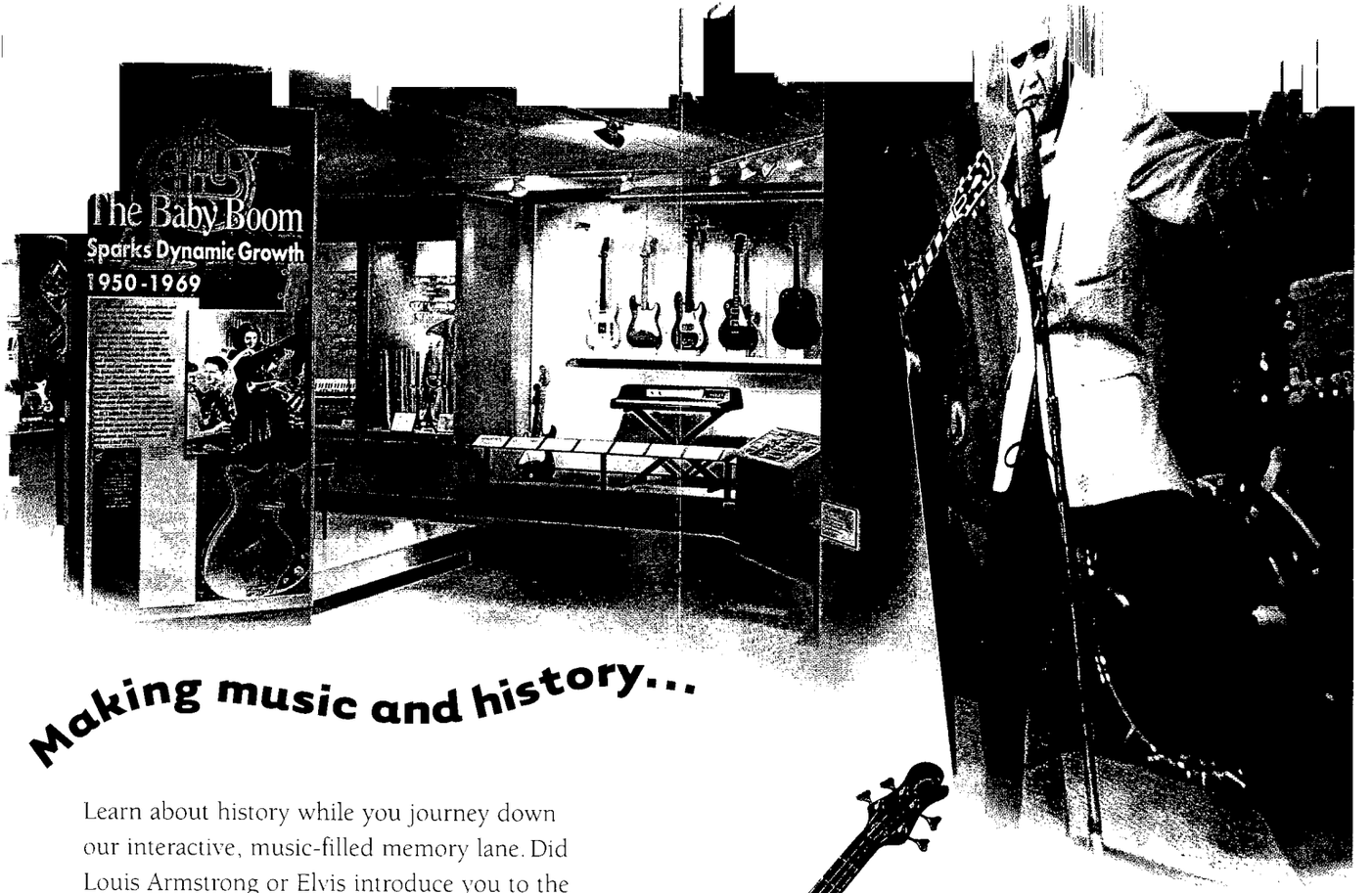


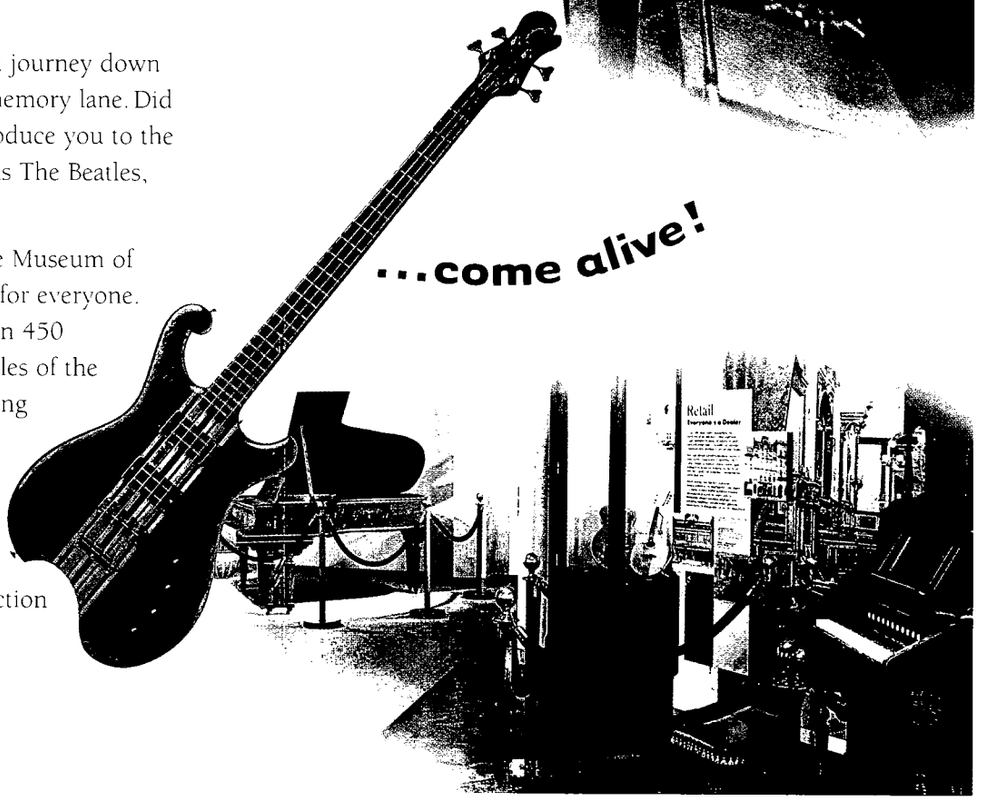
Making music and history...

Learn about history while you journey down our interactive, music-filled memory lane. Did Louis Armstrong or Elvis introduce you to the world of music? Perhaps it was The Beatles, The Rolling Stones or KISS.

Whatever your preference, the Museum of Making Music has something for everyone. The exhibits include more than 450 vintage instruments and samples of the most memorable tunes spanning more than 100 years.

Best of all, the museum puts the music products industry into historical context, so you see the connection between making history... and making music.

...come alive!



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Music through the years...

The museum is divided into five exhibits:

1890-1909
America's Music Industry Comes of Age
Pianos grace the homes of over one million Americans who play the latest Tin Pan Alley tunes.

1910-1929
The Long Boom Before the Bust
Jazz, the dance craze, silent movies and the radio create work for thousands of musicians.

1930-1949
We'll Try Anything Years
Benny Goodman launches the country's enthusiasm for swing.

1950-1969
The Baby Boom Sparks Dynamic Growth
Elvis Presley, The Beatles and rock 'n roll ignite American teenagers' passion for music.

1970-1989
The World Turned Upside Down
MTV, FM radio and electronic instruments help diversify and commercialize rock music.

Historically speaking...

Throughout the museum, music is seen through the lens of history.

Consider this:

- When the stock market crashed in 1929, the industry found itself on the brink of ruin.
- During World War II, instrument manufacturers used their facilities to produce wartime goods, ranging from airplane wings to compasses.
- Post-war prosperity brought renewed interest in music, as instrument sales soared and rock 'n roll captivated American teenagers.
- A recession and the Vietnam War signaled hard times for the music products industry, but it rebounded with the introduction of digital technology.

Did you know?

In the late 1800s women were considered more marriageable if they could play the piano.

In order to preserve their reputations, women were cautioned against too much dancing in the 1920s.

New York disc jockey Alan Freed coined the term "rock 'n roll" in reference to music that combined rhythm and blues and country western.

MTV, introduced in 1983, earned $8 million in profits during its first year-and-a-half of operation.

Explore mu interac

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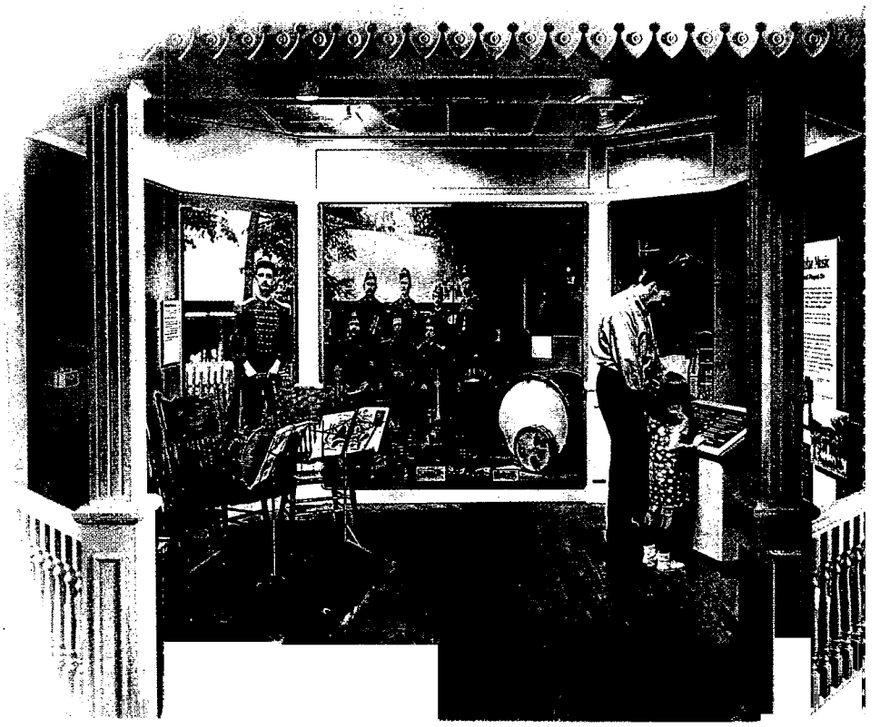
Explore music in an interactive environment

Like to experience music hands-on?

The museum provides many opportunities:

- At listening stations, hear the tunes that shaped – and continue to shape – our collective musical experience.
- Try your hand at playing drums, a guitar or a digital keyboard. Or visit our museum store and play an electric violin and acoustic guitar. No musical ability required!



Members are music to our ears...

Membership benefits

- Unlimited FREE admission to the museum for one year
- 10% Discount in the museum store
- Subscription to the Museum of Making Music newsletter
- Invitations to special museum events

Membership Application

❑ Mr ❑ Ms ❑ Mrs ❑ Mr & Mrs ❑ Other

Member's name (please print)

Name on second membership card (for Family/Contributing categories)

Address

City/State/Zip

Phone number E-mail address

Number of children under 18 in household:

How did you hear about the museum?

❑ New member ❑ Renewing member

❑ Gift membership from: Name

Address

Phone number

Membership categories

❑ $25 Individual (free admission for individual)

❑ $50 Family (free admission for 2 adults and your children under 18)

❑ $100 Contributing (free admission for family, as above, and 12 one-time guest admission passes)

Method of payment

❑ Check $

❑ Credit Card $

❑ Visa
❑ Mastercard
❑ American Express

Card Number Exp. Date

Signature

Daytime Phone Fax

Send to: Museum of Making Music
5790 Armada Drive • Carlsbad, CA 92008

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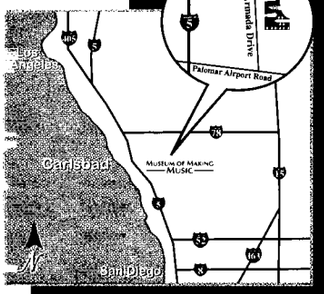
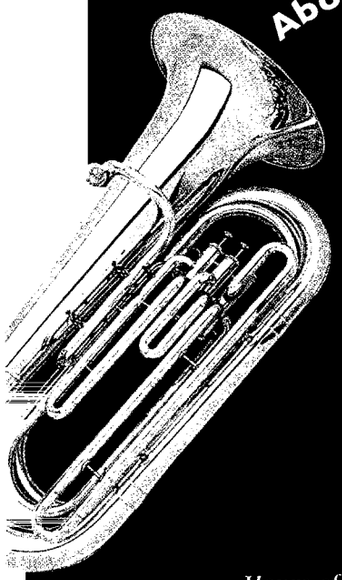


Take I-5 north or south.
Exit east onto Cannon Rd.
Go to the top of the hill.
Turn right on LEGO Drive.
At the traffic circle, go right onto Armada Drive. We are inside the NAMM Building on the left-hand side.

5790 Armada Drive
Carlsbad, CA 92008

About NAMM...



The Museum of Making Music is located in the corporate headquarters of NAMM—International Music Products Association®. A private, non-profit association, NAMM celebrates its 100th birthday in 2001, making it one of the oldest trade organizations in America.

ADMISSION:
$5 *for adults*
$3 *for seniors, students, active military with ID, children ages four to 18*
FREE for children ages three and under.

Hours of operation:
10 a.m. to 5 p.m.
Tuesday through Sunday

MUSEUM OF MAKING MUSIC
5790 Armada Drive • Carlsbad, California 92008
Toll Free: (877) 551-9976 • Fax (760) 438-8964
www.museumofmakingmusic.org

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Fill your life with music, new friends, fun, and accomplishment

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Carolyn Grant

Executive Director

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Main: 760.438.5996
Fax.760.438.8964

www.museumofmakingmusic.org
carolyng@namm.com

Learning to Play Music

Learn to play music in a band or orchestra as a senior adult -- even if you have no musical experience!

Playing music is a special joy and it will help you maintain mental and physical health. It is also a way of experiencing life: playing music from the past keeps us in touch with those feelings; daily practice keeps us active in the present, and striving for new goals attaches us to the future. One band member describes it as "serious fun."

As a member of the New Horizons Band,® you will meet new friends and work with them as a team to learn music for concerts and other performances in the community. New Horizons ensembles typically perform many times each year in venues ranging from formal concerts to shopping malls to parks to retirement and nursing homes.

There are also a number of annual music institutes you can attend which cater to New Horizons musicians in locations like Aspen, CO; Lake Placid, NY; Door County, WI; Sydney, Australia or Palm Springs, CA.

It's Easy and Fun!

As an adult, you have advantages that will help you learn music. If you played an instrument in school years ago, you will be amazed at how much you remember and how quickly you will be able to play again. Even if you've never played music, you are already familiar with the sound of a lot of the music that will be included in your early instruction.

"I joined the New Horizons Band because I enjoyed playing in high school and welcomed the opportunity to play again."
-A New Horizons Band member

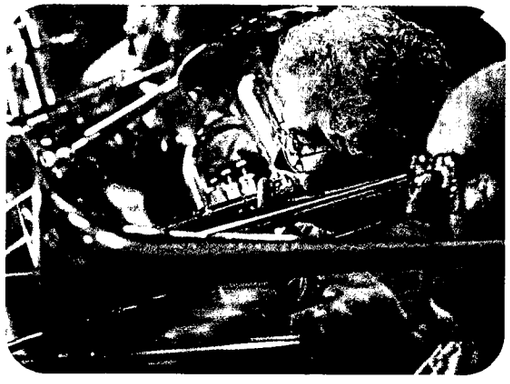
Most adults are more motivated, self-disciplined, and have more time to practice than their younger counterparts. If you attend lessons and practice, you'll be playing music before you know it! From then on, it's even more fun to play with others in classes, chamber music groups, bands and orchestras.

In one study, nearly everyone who participated in a New Horizons Band felt that their accomplishments met or exceeded their expectations.

REV_00457501

Getting Started

The first step in getting started is attending an informational meeting at which all of your questions will be answered by a music teacher and music dealer. You will also have a chance to meet some of the other people who will be participating. If you are not able to attend that meeting, contact the sponsoring music dealer, ask whatever questions you have and plan to be at the first class.



"I love making music a part of each day, new friendships, and band camps."

-A New Horizons Band member

Choosing an Instrument

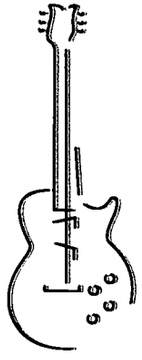
- Re-learn to play the instrument that you played earlier in life.
- Choose an instrument that has a sound or look that you like.
- Check with the band director to see which instrument is needed in the band.

When selecting an instrument, keep in mind that in a very small number of cases, physical characteristics may indicate that a particular instrument will be relatively easy or difficult. Options can be discussed with the music teacher.

Obtaining an Instrument

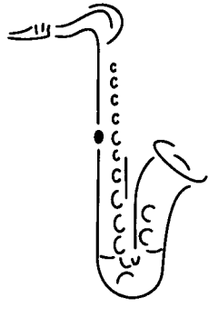
Use Your Own.

If you already have an instrument or if you'll be using an instrument that your children left behind, be sure to take it into a repair shop to make sure that it is in excellent working condition. Some music students become frustrated because they try to learn on an instrument that no one can play.



Rent an Instrument.

Music dealers in your area rent instruments for a very reasonable monthly fee. It is usually possible to exchange for another instrument if you change your mind. Talk to your New Horizons teacher and check the yellow pages. In many cases, a music dealer has been involved in planning your local New Horizons program and will understand your special needs.



Buy an Instrument.

Once you're certain of the instrument you'd like to play, purchase one at your local music store. It is recommended that you learn the basics on a particular instrument before making a purchase.

History of the New Horizons Band®

The first New Horizons Band was started by professor Roy Ernst at the Eastman School of Music in 1991 and is currently supported by a grant from NAMM International Music Products Association® and the National Association of Band Instrument Manufacturers (NABIM). The word spread through articles in publications such as the New York Times and a feature spot on the NBC Today Show. There are now more than thirty New Horizons Bands in the United States, with many more bands and orchestras in the planning phase.

Local Information

If you don't have a New Horizons Band or Orchestra in your area, write, call or e-mail:

NAMM
5790 Armada Drive
Carlsbad, CA 92008
Tel (800) 767-6266
Fax (760) 438-7327
e-mail: namm@namm.com

Your interest may help to get a New Horizons program started in your area.

NAMM®
International Music Products Association®

NABIM

REV_00457502

1ST CITY SAVINGS
Federal Credit Union
P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

NCUA

PRA 6

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PRA 6

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Account PRA 6 REED, MARY D Effect: 06/18/01 Post: 06/18/01 Tlr: 0391

(See receipt for reference)

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51/58 - 51/50 - ~~57~~ 51 -
1985 - 1985 - ($15.

1996 - Elgin

PRA 6

- telepha...

another
5159
5/15

Purpose of check: STAE FARM INSURANCE $169.00
DETACH

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Federal Credit Union
P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

NCUA

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(See receipt for reference)

Purpose of check: THE GAS COMPANY $45.00
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1ST CITY SAVINGS
Federal Credit Union
P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

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Purpose of check: STAE FARM INSURANCE $169.00 00

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Federal Credit Union

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P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

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(See receipt for reference)

Purpose of check: THE GAS COMPANY $45.00 00

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Federal Credit Union

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P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

PRA 6

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(See receipt for reference)

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1ST CITY SAVINGS
Federal Credit Union

NCUA

PRA 6

P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

Account PRA 6 REED, MARY D Effect: 06/18/01 Post: 06/18/01 Tlr: 0391

(See receipt for reference)

Purpose of check: STAE FARM INSURANCE $169.00 00 PRA 6

DETACH

1ST CITY SAVINGS
Federal Credit Union

NCUA

PRA 6

P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

Account PRA 6 REED, MARY D Effect: 06/22/01 Post: 06/22/01 Tlr: 039

(See receipt for reference)

Purpose of check: THE GAS COMPANY $45.00 00 PRA 6

DETACH

1ST CITY SAVINGS
Federal Credit Union

NCUA

PRA 6

P.O. Box 2007 • Glendale, CA 91209-2007 • (800) 944-2200

Account PRA 6 REED, MARY D Effect: 06/22/01 Post: 06/22/01 Tlr: 0391

(See receipt for reference)

REV_00457505

Mary Dean Reed, in Pro Per
Marriott Courtyard
13480 Maxella Ave, Room 251
Marina del Rey, California until 6/27/01
(310)822-8555X251

16748 C Smoky Hill Rd, #249
Centennial Colorado 80015

ATTORNEYS FOR PLAINTIFF(S)

Attorney for Plaintiff:
Mary Dean Reed, in Pro Per

LODGED

01 JUN 22 PM 3:07

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

Mary Dean Reed, M. Dean Reed Productions(the Ale Factory)

PLAINTIFFS)

The United States of America, State of California, County of Los Angeles, Controller's Office (County of Los Angeles), The Mafia and the "O" Bloodline

CASE NO. 01-05340CBM(MCX)

Request: To Attain Previous Attorney

DEFENDANT(S)

The plaintiff ask the court indulgence in hiring the Regan and Braun Law firm in this matter who have some knowledge of this case. After the release of them, other things became apparent and the conclusion was immature.

Respectfully Submitted,

Mary Dean Reed

Mary Dean Reed

Date_____

_____

Judge

REV_00457506

MARY DEAN REED
1800 West 43rd Street
Los Angeles, CA 90062
323-291-9961

Plaintiff in pro per

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARY DEAN REED, M. DEAN REED PRODUCTIONS (THE ALE FACTORY), PLAINTIFF(S) v. THE UNITED STATES OF AMERICA, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, CONTROLLER'S OFFICE (COUNTY OF LOS ANGELES), THE MAFIA AND THE "O" BLOODLINE, DEFENDANTS	CASE NO. 01-05340 CBM (MCX) ~~COMPLAINT~~ Motion FOR DAMAGES FDIC & CITY OF LOS ANGELES Hearing date: September 10, 2001 10:00 A.M.

This is a further Complaint because this was not included when this Plaintiff visited the Central District Court and found this paper would not be in the works with the other Complaint. Yet this information was submitted by Mary Dean Reed in pro per. Mary Dean Reed in pro per asks that the Court allow the FDIC and the City of Los Angeles be added as defendants because the City allowed and co-partnered in the taking of the "The Walls" money. The O Bloodline and the Mafia do not plan sharing the responsibility but both are equally to blame. It is the Plaintiff Mary

Dean Reed's responsibility to seek the truth and find the profit.

The FDIC did not share in the responsibility yet accepted what the banks did and did not return the Plaintiff Mary Dean Reed's money. This the Plaintiff Mary Dean Reed blames the FDIC. They did not take responsibility for the Bank of America who had the money. The Plaintiff Mary Dean Reed is not certain to whom or what bank received the money, but wants all of it returned to her and those who help make it. The Mafia and O Bloodline certainly did not make the money. Universal, Disney, Viacom, Steven Spielberg and Whitney Houston assisted. The Plaintiff Mary Dean Reed is still Mary Dean Reed of M. Dean Reed Productions. The City of Los Angeles stole some of this money and paid some of their bills without the Plaintiff Mary Dean Reed's permission. The Mafia and O Bloodline had the City to share in the theft so they would not be held accountable.

DATED: July 12, 2001

Respectfully submitted:

Mary Dean Reed, in Pro Per

MARY DEAN REED, in Pro Per

ADDRESS AND TELEPHONE NUMBER OF ATTORNEY(S)	Address Change
Mary Dean Reed, in Pro Per Marriott Courtyard (310)822-8555 X 251 13480 Maxella Ave, Rm 251 until 6/27/01 Marina Del Rey, California 90292 16748 C Smoky Hill Rd,#249 Centennial, Colorado 80015 ATTORNEYS	

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Mary Dean Reed m. Dean Reed Productions PLAINTIFF(S) VS The United States of America, State of California, County of Los Angeles Controller's Office (County of Los Angeles), The Mafia and "O"Bloodline DEFENDANT(S)	CASE NUMBER CV 01-05340 CBM (MCx) PROOF OF SERVICE ACKNOWLEDGMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On 7/13/01, 20____, I served a true copy of Change of Address / Clerk Failure, Attorney & Payment / Calendar (Mafia/Stop Stealing) / IRS DFC & City & LA / Expense to meet Money Request Package by ☐ personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(B); ☐ by depositing it in the United states Mail in a sealed envelope with the postage thereon fully prepaid to the following: (list names and addresses for person(s) served. Attach additional pages if necessary.)

The United States of America
State of California, County of Los Angeles (Controller's Office)
County of Los Angeles.

Place of Mailing: Los Angeles

Executed on 7/13/, 20 01 at Los Angeles, California

(OVER)

PLEASE CHECK ONE OF THESE BOXES IF SERVICE IS MADE BY MAIL:

** I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.

** I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I hereby certify under the penalty of perjury that the foregoing is true and correct.

** Mary Dem
SIGNATURE OF PERSON MAKING SERVICE

ACKNOWLEDGEMENT OF SERVICE

I, _____, Received a true copy of the within document on _____, 20_____.

_____
(Signature)

for: _____
(Party Served)

7-2-01

CLOSED
BY
LETTER

7-21-01

To: Brett M. Kavanaugh Esq.
Associate Counsel
to the President
Eisenhower Executive Ofc. Bldg.
17th St. & Pennsylvania Ave. NW
Washington, DC 20502
Ph. 202-456-7984
FAX. 202-456-1647

Re: Contract/Joint Venture

Dear Brett,

I have not heard from you regarding my letter of 7-18-01. We do have several other potential interested joint venture investors, and would like to hear from George, this comming week.

The judges in my Intellectual Property cases continue to dismiss my complaints by not Constitution Contract Rulings. The original judgements in the original cases can be reversed, if the judges wish to avoid liability for their breach of their binding oath contract for which no immunity exists, as a binding contract is binding.

While I understand that the defendant's in my Intellectual Property Complaints, have contributed to George, as the oil Companies, there is no reason for them not to pay for what they have pirated, or enter into a profitable new venture for everyones profit.

Please forward the contracts to Nick, and myself this comming week.

Yours Truly

George May

PRA 6

Private equity firm enriches ex-officials

Former President Bush and James Baker are among those quietly cashing in on their government experience.

By Leslie Wayne
The New York Times

WASHINGTON — During the presidential campaign last year, former President George Bush took time off from his son's race to call on Crown Prince Abdullah of Saudi Arabia at a luxurious desert compound outside Riyadh to talk about American-Saudi business affairs.

Bush went as an ambassador of sorts, but not for his government. In the same way, Bush's secretary of state, James A. Baker III, recently met with a group of wealthy people at the elegant Lanesborough Hotel in London to explain the Florida vote count.

Traveling with the fanfare of dignitaries, Bush and Baker were using their extensive government contacts to further their business interests as representatives of the Carlyle Group, a $12 billion private-equity firm based in Washington that has parlayed a roster of former top-level government officials, largely from the Bush and Reagan administrations, into a money-making machine.

In a new spin on Washington's revolving door between business and government, where lobbying by former officials is restricted, but soliciting investments is not, Carlyle has upped the ante and taken the practice global. Bush and Baker were accompanied on their trips by former Prime Minister John Major of Britain, another of Carlyle's political stars. With door-openers of this caliber, along with shrewd investment skills, Carlyle has gone from an unknown in the world of private equity to one of its biggest players. Private equity, which involves buying companies in private deals and reselling them, is a high-end business open only to the very rich.

Over the past decade, the Carlyle empire has grown to span three continents and include investments in most corners of the world. It owns so many companies that it is now in effect one of the nation's biggest defense contractors and a force in global telecommunications.

Carlyle's holdings include the former Northrop Grumman plant in Stuart. Carlyle gained control of the 400-employee plant when it paid $1.2 billion last year for Northrop Grumman's jet parts unit.

In getting business for Carlyle, Bush has been impressive. His meeting with the crown prince was followed by a yacht cruise and private dinners with Saudi officials, including King Fahd, all on behalf of Carlyle, which has extensive interests in the Middle East.

Bush led Carlyle's successful entry into South Korea, the fastest-growing economy in Asia. After his meetings with the prime minister and other government and business leaders, Carlyle won a tough competition for control of

Please see CARLYLE, A2

Rules against lobbying don't apply

in private-finance world

CARLYLE

From 1E

KorAm, one of Korea's few healthy banks.

The steady flow of politicians to lucrative private-sector jobs based on their government contacts is a familiar Washington tale. But in this case, it is being played out for more dollars, on a global stage, and in the world of private finance, where the minimal government rules prohibiting lobbying by former officials for a given period are not a factor. These rules say nothing about potential conflicts when former government officials use their connections and insights for financial gain, and they might attract more notice now that George W. Bush is president. Many of those involved with Carlyle, which invests largely in companies that do business with the government or are affected by government regulations, have ties to the Oval Office.

For instance, Frank C. Carlucci, a Reagan defense secretary who as much as anyone is responsible for Carlyle's success, said he met in February with his college classmate Donald Rumsfeld, the secretary of defense, and Vice President Dick Cheney, himself a defense secretary under former President Bush, to talk military matters — at a time when Carlyle has several billion-dollar defense projects under consideration.

Carlyle officials contend the firm's activities do not present any potential conflicts because Bush, Baker and other former Republican officials now at Carlyle — including Carlucci, who is Carlyle's chairman, and Richard G. Darman, Bush's former budget director — do not lobby the federal government.

"Mr. Bush gives us no advice on what to do with with the federal government," said David Rubenstein, the firm's founder and a former aide in the Carter White House. "We've gone over backwards to make sure that we do no lobbying."

Others, however, see little difference between potential conflicts involving lobbying and those involving investments.

"Carlyle is as deeply wired into the current administration as they can possibly be," said Charles Lewis, executive director of the Center for Public Integrity, a nonprofit public interest group based in Washington. "George Bush is getting money from private interests that have business before the government, while his son is president. And, in a really peculiar way, George W. Bush could, some day, benefit financially from his own administration's decisions, through his father's investments. The average American doesn't know that and, to me, that's a jaw-dropper."

It is difficult to determine exactly how much money the senior Bush and Baker have made. Baker is a Carlyle partner, and Bush has the title of senior adviser to its Asian activities. With a market value of about $3.5 billion on Carlyle's equity and with the firm owned by 18 partners and one outside investor, Baker's Carlyle stake would be worth about $180 million if each partner held an equal stake.

Unlike Baker, Bush has no ownership stake in Carlyle. He is an adviser and an investor and is compensated for getting stakes in Carlyle investments.

Carlyle gave the Bush family a hand in 1990 by putting George W. Bush, then struggling to find a career, on the board of a subsidiary, Caterair, an airline-catering company.

7-2-01

To: Nicolas J. Gutierrez, Jr. Esq.
FAX 305-373-2735 J/V Partner

Re: Problem Request
For Funding

Dear Nick,

The Bush Brothers who have a binding oath contract with us Article II, Section 8, Article VI, have not enforced our binding oath contract as required by Article II, Section I, Clause I, and the Fourteenth Amendment.

I have offered the Bush brothers a 50%, joint venture partnership in the recovery of my money from the Condemnation of my 130 acres in Dade County, the Oil Wells, Oil Drilling Permits, Gas and Minerals.

I have offered the Bush Brothers a 50% interest in my Real Estate projects that will generate Billions of dollars a year.

I have offered the Bush Brothers or their attorney a 50% interest in the recovery from the Fortune 1000 Corporations who have pirated my inventions, respective writings, and discoveries protected under English Common Law, and United States Constitution Contract Treaty Law.

I have requested that everyone involved participate in my Real Estate projects, and the building of a new Cargo Airport for the New Cuba. and the building of De-Salt Plants to solve the water problem in Florida. The Bush Brothers have not responded to my offer under their binding oath contract. If the Bush brothers are not re-elected they will have lost the window of opportunity, as all involved. We need a joint venture contract and funding. A joint venture with the fortune 1000 Corporations would make more money for them. The Oil Companies could also participate. Zoning and Environmentalism is racial profiling, as minority's are excluded, under the color of law, color of office, by breach of oath contract.

Yours Truly

George May

PRA 6

07/21/2001 09:22 5613437703 PAGE 04

Bush wants World Bank to convert loans to grants

The president said the grants should pay for school, health, nutrition, water and sanitation programs in underdeveloped countries.

By Lawrence L. Knutson
The Associated Press

WASHINGTON — President Bush, previewing this week's summit in Italy, proposed Tuesday the World Bank give grants to the world's least-developed countries instead of more loans they can't repay.

Bush also said he would seek a new round of trade liberalization negotiations.

Making his proposals at World Bank headquarters on the eve of his departure, Bush suggested the bank and other international lending institutions convert up to half of their payments to grants instead of loans. He said the grants should pay for school, health, nutrition, water and sanitation programs.

The World Bank now makes about $15 billion in loans a year.

"It would be a major step forward," said Bush, because the money would be going to impoverished nations unable to repay their existing loans.

Although many of the older loans are being forgiven, or being refinanced at lower interest rates, "debt relief is really a short-term fix," Bush said. "The proposal today doesn't merely drop the debt; it helps stop the debt."

Still, Bush might have a hard time selling the plan to allies, because he didn't come up with a mechanism for raising the extra cash that would be needed to convert loans to grants, and didn't offer to increase the present $803 million annual U.S. contribution.

The World Bank uses loan repayments to replenish its pool of cash for new loans.

Bush leaves today for a weeklong trip to London, Genoa, Italy; Rome; and Kosovo.

In Genoa, he will attend the annual Group of Eight summit of the heads of state of the world's seven wealthiest industrial democracies — Britain, France, Germany, Japan, Canada, Italy and the United States — and Russia.

Bush told his audience of international aid officials he would press for a new round of global trade talks to "ignite a new era of global economic growth." A previous attempt toward such a round ended in failure at a World Trade Organization meeting in Seattle in December 1999 that was marred by violent demonstrations.

Such protests have become a fixture of international gatherings. Protesters clashed with police and tear gas wafted through the streets of Quebec City earlier this year at a summit attended by Bush and other Western Hemisphere leaders.

"They seek to shut down meetings because they want to shut down free trade," Bush said in a sharp advance denunciation of possible street demonstrations in Italy.

"I respect the right to peaceful expression, but make no mistake — those who protest free trade are no friends of the poor," Bush said.

World Bank officials estimate with Bush's proposal, the United States would have to roughly double its contribution to keep the bank's aid pool at current levels.

Funding could come from U.S. Agency for International Development

U.S. Agency for International Development
Washington, DC 20523

Voluntary Foreign Aid Programs

Report of American Voluntary Agencies Engaged in Overseas Relief and Development Registered with the U.S. Agency for International Development

J. Brian Atwood
Administrator
U.S. Agency for International Development

M. Douglas Stafford
Assistant Administrator
Bureau for Humanitarian Response

Louis C. Stamberg
Director
Office of Private and Voluntary Cooperation

6-26-01

To: Nicolas J. Gutierrez, Jr. Esq.
FAX 305-373-2735

Re: Judges

Dear Nick,

These Fortune 100 Corporations have paid off the judges to issue without subject matter jurisdiction, void judgements to pirate and robb my inventions, discoveries and respective writings.

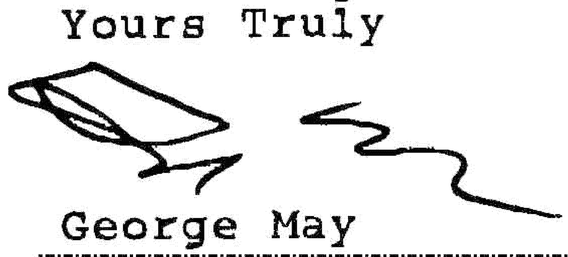
When I discovered their method of operation, I filed motions under my Constitution Contract and English Common Law to have the court enter judgements in my favor, and set trial on the amount of damages due to us.

The paid off judges then issued orders for the clerks of the court to not accept the filings of my motions, to continue to pirate and robb my inventions, discoveries, and respective writings.

I have asked the president and governor to issue an executive order to the judges of the United States and the State of Florida to keep their binding oath contract Article VI, Clause I,2,3, so that we may recover my property, Liberty, money robbed, pirated for everyones benefit and profit, as the Fortune 1000 Corporations have refused to enter into a joint venture agreement for more profit from my creative endevers.

I would like to discuss this business transaction with George, and Jeb, as they would receive far more money from the contract then from the contributions from these Corporations as would the judges. I am willing to pay 50% of the recovery or 50% of the joint venture on new profitable business. I would like the joint venture contract as I have more billion dollar inventions but cannot put them to use in this country.

Yours Truly



George May

PRA 6

JULY 23, 2001

Taco Bell fights over dog rights

By Tania Zamorsky
STAFF REPORTER

IN A CASE of first impression for the 6th U.S. Circuit Court of Appeals, the court threw a bone to plaintiffs suing Taco Bell over the company's alleged use of their "Psycho Chihuahua" in its advertising campaign featuring that breed of dog. *Wrench LLC v. Taco Bell Corp*, No. 99-1807.

The would-be dog owners, Wrench LLC, created their pup as a marketing vehicle and were approached by interested Taco Bell representatives at a 1996 New York trade show. Wrench alleges that Taco Bell breached an implied-in-fact, for-pay agreement that grew out of a series of discussions between the parties, focus group sessions and sample Taco Bell promotional items featuring Wrench's dog.

■ DECISION OF THE WEEK

While acknowledging that they had discussed a Chihuahua idea with the plaintiffs, Taco Bell asserted that its advertising agency, tbwa/chiat/day, independently conceived of the campaign after the account's creative directors saw a Chihuahua trot by, seemingly "on a mission," while they ate at a Mexican sidewalk café. A Michigan federal court judge dismissed the case as preempted by the federal Copyright Act.

The 6th Circuit ruled on July 6 that the extra element of Taco Bell's alleged promise to pay the plaintiffs went beyond the exclusive rights described in § 106 of the Copyright Act, making the claim qualifiedly different from an infringement claim and allowing it to survive preemption.

The plaintiff's attorney, Jeffrey O. Birkhold of Grand Rapids, Mich.'s Warner Norcross & Judd, called the decision, "[t]he first ruling by a federal court of appeals to hold that implied-in-fact contract claims for the use of creative ideas and concepts are not preempted by § 301 of the Copyright Act." Douglas A. Dozeman and Valerie P. Simmons served as co-counsel.

A body of case law that al-

SEE 'CHIHUAHUA' PAGE B8

Chihuahua bites Taco Bell

'CHIHUAHUA' FROM PAGE B1

most uniformly dismissed these types of contracts on preemption grounds had been building up in the district courts, Birkhold explained. "The cases were starting to cite each other," he said.

He noted that the circuit court's application of a new legal analysis to similar facts may now place those contrary lower-court decisions in question.

In basing its holding on the added promise of payment, the 6th Circuit declined to go as far as the 7th and 5th circuits had in *ProCD Inc. v. Zeidenberg* and *Taquino v. Teledyne Monarch Rubber*. Those cases would save claims from preemption because of the additional rights created by any contractual promise, presumably even a Sec. 106-like promise not to copy.

However, the *Taco Bell* suit, while narrower in some ways, may hold special promise for creators. Factually, Birkhold explained, the other two cases were "far afield" from the scenario in which creators often find themselves: discussing ideas with potential purchasers without a written contract.

While noting that proving an implied-in-fact contract can be difficult, Birkhold opined, "If creators can establish, under the laws of their states, that they had a sufficiently detailed relationship leading to an implied-in-fact contract, they now have a very strong federal appeals court decision holding that Sec. 301 will not preempt their claim."

Attorneys for Taco Bell declined to comment. NLJ

implied-in-fact
contract claims

Sec. 106-like promise
not to copy

English common law
invention, discovery,
respected writing

English common law is
law of federal court

E AGAIN

SPORTS PAGE 1C

DAVE CAULKIN/THE ASSOCIATED PRESS

$1.37 BILLION DEAL

Gaming companies to merge

IGT, Anchor to unite, form state's largest public business

By JOHN G. EDWARDS

REVIEW-JOURNAL

International Game Technology, the world's largest slot machine maker, will become the largest public company in Nevada with its $1.37 billion acquisition of Anchor Gaming.

Under the deal, announced late Sunday night, one share of IGT stock will be swapped for each share of Anchor Gaming. IGT will assume $430 million in debt from Anchor.

"No other company offers the depth of talent that IGT and Anchor Gaming will have together, from the executive level to design and manufacturing," T.J. Matthews, chairman and chief executive officer of Anchor, said in a statement.

IGT said the planned deal is expected to increase its profits immediately.

The merger will create a company bigger in stock market value than MGM Mirage, now the largest public company in the state.

The market value of IGT, a Reno-based company, is $4.38 billion, compared with $4.58 billion for MGM Mirage, the giant casino operation based in Las Vegas.

Anchor, a Las Vegas-based slot machine innovator, has a market value of almost $800 million based on its stock price and shares outstanding.

The proposed merger agreement calls for Charles Mathewson to continue as chairman of IGT. Thomas Baker will remain chief executive officer of IGT but will relinquish the title of chief operating officer to Matthews. Matthews will be one of two Anchor representatives on the IGT board. The other representative was not identified.

The merger will create a company with $2 billion in annual revenue. IGT employs 2,500 people in Nevada, including 250 workers in Las Vegas. IGT has a warehouse, showroom and service center in Las Vegas, but the

▶ SEE MERGER PAGE 2A

Meehan bill "gags the forts to get out the black vote. Bush, while avoiding an whom he campa

WHOOL WAS based on GAMBLE MAN INVENTION

▶ MERGER: *Regulators, stockholders must OK deal*

CONTINUED FROM PAGE 1A

manufacturing plant is in Reno.

Anchor executives could not be reached for comment about their staff size.

IGT and Anchor have worked together since 1996 when they formed a joint venture to manufacture slot machines based on the "Wheel of Fortune" television game show. More recently, the two companies began producing "I Dream of Jeannie" slot machines, based on the television program.

"Upon closing, IGT will be able to recognize 100 percent of the joint revenue and profits previously shared by the two companies," Baker said in a statement.

"This is a significant strategic benefit," Baker continued. "We are also very excited about the addition of Anchor Gaming's significant executive talent, which will contribute to further growth of IGT."

The joint venture with IGT has become the lifeblood for Anchor Gaming. Anchor has two casinos in Colorado, a slot machine route in Nevada and a management contract for an Indian casino that opened in April in northern San Diego County.

Charles Mathewson
To continue as chairman of IGT under proposed merger

The merger, if approved by Anchor and IGT stockholders and by regulators, is expected to close in the first quarter of 2002.

Anchor would continue to operate separately although it would be part of an IGT subsidiary.

While the deal calls for a one-for-one, tax-free stock swap, IGT may lower its offer if its stock price exceeds $75 a share around the time when Anchor shareholders vote on the deal.

IGT stock closed Friday at $59.20 a share. Anchor's last trade was for $53.91 a share.

William "Si" Redd founded IGT in 1975 as A-1 Supply. In 1978, Redd developed the first video poker machine. In 1984, Mathewson became chief executive officer. Two years later, he took over as chairman. About that time, the company expanded to international markets.

IGT has been the leading slot machine maker in the world since the late 1980s. Before that, Bally Manufacturing Corp. was the dominant slot maker.

Analysts said IGT prospered because it followed the example set by Universal Distributing, a Japanese company that was the first to use computers in slot machines.

More recently, IGT has become best known for its Megabucks games, which are played at multiple casinos around the state and produce lottery-size jackpots.

IGT reported its net income more than doubled to $53.6 million in the quarter that ended March 31.

In the quarter ending March 31, Anchor reported a loss of $94 million, compared with net income of $13 million in the same period of the prior year.

The loss stemmed primarily from charges of $133 million, mostly for the write-down of the value of Powerhouse Technologies, which Anchor acquired in 1999. Revenues rose 11 percent to $123 million.

Stan Fulton, the founder and chairman of Anchor Gaming, left the company in September.

Earlier this year, IGT completed the purchase of Silicon Gaming, another ailing slot machine company.

Rains cause f

By JENNIFER BUNDY

TH

CHARLESTON, governor's he pressed into ser pluck people off a heart patient t ter heavy rains floods and muds ern and central

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Gov. Bob Wis flooded areas copter was need efforts.

"What we h water. Bridges roads totally co stretches," Wis phone from Pin ern West Virgin for his chopper

Wise declar emergency in Storms in May millions in dam Sixteen count most of those remain eligible saster relief.

"We can't ge water has us bl

WHOOL OF FORTUNE CORP IS IGT & ANCHOR CORP.
WHOOL OF FORTUNE

CORP OWNER WAS MADE AFTER GEORGE MAY INVENTION OF A SLOT MACHINE WITH INCENTIVE BONUS WHOOLS THAT PAYS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 00-4217-CIV-HUCK

GEORGE MAY,

Plaintiff(s)

v.

FEDERICO A. MORENO, *et al.*,

Defendant(s).
_____/

ORDER OF DISMISSAL

This cause is before the Court upon the defendants' various motions to dismiss and for sanctions. *See* DE ## 7,11,16,21 & 24.

The allegations of the Complaint are largely unintelligible. They are somehow related to the dismissal of a prior lawsuit plaintiff filed against three of the four defendants in this case, May v. Huizenga, No. 00-2265-CIV-MORENO. The fourth defendant in this case, the Honorable Federico A. Moreno, presided over that matter. As such, Judge Moreno is entitled to absolute judicial immunity.

Plaintiff's Complaint is incomprehensible and, even under liberal pleading standards, fails to state a cognizable cause of action. *See* Neitzke v. Williams, 490 U.S. 319, 326-28 (1989)(frivolous actions with no arguable basis in law or fact are subject to dismissal for failure to state a claim).

Mr. May is a vexatious plaintiff. His history of abusive litigation is well documented in this district, and need not be repeated here. *See* May v. Hatter, 00-4115-CIV-MOORE (DE # 32, *Order of Dismissal* dated May 15, 2001, adopting Magistrate's findings regarding plaintiff's vexatious litigation history and enjoining plaintiff from filing any further lawsuits without leave of Court); May v. Shell Oil Co., No. 00-2233-CIV-JORDAN (DE # 5, *Order* dated August 30, 2000, setting forth plaintiff's history of filing frivolous lawsuits and requiring plaintiff to attach copy of order to all future complaints filed). When plaintiff filed the instant Complaint, he did

not attach a copy of Judge Jordan's August 30, 2000 order to the Complaint, thereby violating the terms of that order.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that this case is DISMISSED. The Clerk of the Court is directed to mark this case CLOSED and DENY all pending motions as MOOT. The Court retains jurisdiction to consider separate motions for fees and costs by any defendant.

DONE AND ORDERED in chambers, Miami, Florida, this 17 day of July, 2001.

PAUL C. HUCK
United States District Judge

Copies furnished to:
Mark T. Kobelinski, Esq.
David F. Cooney, Esq.
Stephanie S. Curd, Esq.
Michael A. Walleisa, Esq.
George May, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 00-4119-CIV-HUCK

GEORGE MAY,

Plaintiff(s)

v.

CARLOS R. MORENO, *et al.*,

Defendant(s).
_____/

ORDER OF DISMISSAL

This cause is before the Court upon the defendants' various motions to dismiss and for sanctions. *See* DE ## 4 & 13.

The allegations of the Complaint are largely unintelligible. They are somehow related to the dismissal of a prior lawsuit plaintiff filed in the Central District of California against two of the three defendants in this case, May v. Disney Enterprises, Inc. *et al.*, No. 98-5503-CM. The third defendant in this case, the Honorable Carlos R. Moreno, presided over that matter. As such, Judge Moreno is entitled to absolute judicial immunity.

Plaintiff's Complaint is incomprehensible and, even under liberal pleading standards, fails to state a cognizable cause of action. *See* Neitzke v. Williams, 490 U.S. 319, 326-28 (1989)(frivolous actions with no arguable basis in law or fact are subject to dismissal for failure to state a claim).

Mr. May is a vexatious plaintiff. His history of abusive litigation is well documented in this district, and need not be repeated here. *See* May v. Hatter, 00-4115-CIV-MOORE (DE # 32, *Order of Dismissal* dated May 15, 2001, adopting Magistrate's findings regarding plaintiff's vexatious litigation history and enjoining plaintiff from filing any further lawsuits without leave of Court); May v. Shell Oil Co., No. 00-2233-CIV-JORDAN (DE # 5, *Order* dated August 30, 2000, setting forth plaintiff's history of filing frivolous lawsuits and requiring plaintiff to attach copy of order to all future complaints filed). When plaintiff filed the instant Complaint, he did

not attach a copy of Judge Jordan's August 30, 2000 order to the Complaint, thereby violating the terms of that order.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that this case is DISMISSED. The Clerk of the Court is directed to mark this case CLOSED and DENY all pending motions as MOOT. The Court retains jurisdiction to consider separate motions for fees and costs by any defendant.

DONE AND ORDERED in chambers, Miami, Florida, this 17th day of July, 2001.

PAUL C. HUCK
United States District Judge

Copies furnished to:
Margaret C. Simonetti, Esq.
Michael A. Walleisa, Esq.
George May, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 00-4116-CIV-HUCK

GEORGE MAY,

Plaintiff(s)

v.

ROBERT L. HUNT, *et al.*,

Defendant(s).
_____/

ORDER OF DISMISSAL

This cause is before the Court upon Defendants' Motion for Dismissal with Prejudice. Plaintiff filed this action against various defendants on October 31, 2000. Since that date, plaintiff has failed to respond to two motions to dismiss filed by the defendants and has taken no further action on this case. It is therefore

ORDERED AND ADJUDGED that this case is DISMISSED. The Clerk of the Court is directed to mark this case CLOSED and DENY all pending motions as MOOT.

DONE AND ORDERED in chambers, Miami, Florida, this 17 day of July, 2001.

PAUL C. HUCK
United States District Judge

Copies furnished to:
David K. Friedland, Esq.
Michael J. McCue, Esq.
Dana B. Robinson, Esq.
George May, *pro se*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

George May, Plaintiff, vs. Roger L. Hunt Etc. Defendant,	PLAINTIFF'S NOTICE OF VOID ORDER, JUDGEMENT OF MAY 29, 2001, AND JUNE 29, 2001, AND MOTION FOR JUDGEMENT AGAINST THE DEFENDANT'S
George May, Plaintiff, vs. Circus Circus Enterprises, Inc., et. al. Defendant,	CV-S-98-651-KJD(LRL)
George May, Plaintiff, vs. Circus Circus Enterprises, Inc., et. al. Defendant,	CV-S-98-652-KJD(PAL)
George May, Plaintiff, vs. International Game Technology, Inc., et. al. Defendant,	

George May, Plaintiff, vs. Circus Circus Enterprises, Etc. Et. Al. Defendant's	)	CV-S-98-1322-KJD(LRL
George May, Plaintiff, vs. Mark G. Trato's, Circus Circus, Enterprises, Inc., et. al. Defendant's,	)	CV-S-00-760-KJD(RJJ)

PLAINTIFF'S NOTICE OF VOID ORDER, JUDGEMENT, PROHIBITED BY PLAINTIFF'S CONSTITUTION CONTRACT ENTERED ON MAY 29, 2001, AND JUNE 29, 2001, AND PLAINTIFF'S MOTION FOR JUDGEMENT AGAINST THE DEFENDANT PIRATES, ROBBER'S OF THE PLAINTIFF'S ENGLISH COMMON LAW INVENTIONS, RESPECTIVE, WRITINGS, AND DISCOVERIES, FOR THE RELIEF REQUESTED IN THE PLAINTIFF'S COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 15(b), 54(c), 55(a),(b), 56(a), ARTICLE VI, CLAUSE I,2,3, OF THE PLAINTIFF'S CONSTITUTION CONTRACT AND PLAINTIFF'S CONSTITUTION CONTRACT, FORTHWITH

COMES NOW, the plaintiff, George May, and files this his notice of void order, judgement, prohibited by plaintiff's Constitution Contract entered on May 29, 2001, and June 29, 2001, and plaintiff.s motion for judgement against the defendant pirates, robbers, of plaintiff's English Common Law Inventions, Respective Writings, and Discoveries, for the relief requested in the plaintiff's complaints, under Federal Rules of Civil Procedure 15(b), 54(c), 55(a),(b), 56(a), Article VI, Clause I,2,3, of the plaintiff's Constitution Contract, and plaintiff's Constitution Contract, forthwith, for cause herein as follows:

1. The Order, judgement entered by this court on May 29, 2001, and June 29, 2001, is void, not constitution Contractin clear absence of all jurisdiction, without jurisdiction of the subject matter, without subject matter jurisdiction,false, fraudulent and bogus, and is prohibited by the order entered in George May, v. Shell Oil Company, 00-2266-CIV-JORDAN, 2000 WL 1276943 (S.D., FLA.).as it prohibits a "leave to file" injunction which was issued in this case herein. See page 5 order by judge Jordan which also is void, not Constitution Contract in clear absence of all authority, jurisdiction, without jurisdiction of the subject matter, without subject matter jurisdiction, false, fraudulent, and bogus, as a judge cannot war with the Constitution Contract without breaching his Legal Binding Oath Contract to the plaintiff's Constitution contract. COOPER V. AARON 358 U.S. 1.

2. A person may disobey the command of the court if its order transcends its power or authority. 455 So. 2d 1325 (1984).

3. A plaintiff may attack a void order, judgement in any proceeding. United States v. Forma 42 F.3d 759(2d Cir. 1994). Orner v. Shalala 30 F.3d 1307 (10th Cir. 1994); Briley v. Hidalgo, 981 F.2d 246 (5th Cir. 1993).

4. English Common Law is the Law of the United States of America. E. Randolf, Judiciary System, H.R. Doc. 17, 1st Congress 3d Sess. (1790), reprinted in 1 American State Papers The Judiciary Act of 1789, Section 34.

5. English Common Law, and Spanish Common Law is the Law of the United States of America through Article III, Article VI, Clause I,2,3, The Treaty of 1783, The Treaty of 1819, The Treaty of 1848, that is antedated to include all Spanish Treaty's.

6. Discovery is the finding of the Art. 126 U.S. 863.

7. Invention is the devising the means of making it useful. 126 U.S. 863.

8. Mental Achievement is not "Idea". 88 U.S. 21 WALL.

9. Inventive Concept is not Concept. 78 F. Rep. 2d 538.

10. Discovery is not Invention. 126 U.S. 863.

11. Invention is not concept. 126 U.S. 863.

12. Discovery is not Concept. 73 F.2d 539.

13. Inventive Concept is not Idea. 126 U.S. 863.

14. Discovery is not Idea. 126 U.S. 863.

15. Title to the Discovery, Invention is owned by the Creator who was first, by Corroborated post marked dated evidenve. 293 U.S. 1,3,.

16. The Court is required to issue judgement for the plaintiff, under Federal Rule of Civil Procedure 15(b), 54(c), 55(a), (b), 56(a), Aticle VI, Clause I,2,3;782 F. Supp. 389 (N.D. Ill. (1992).

17. The defendant's never, ever, at any time raised any defense to the plaintiff's claims as being the owner of Title to his Discoveries, and Inventions, and the rules of Civil Procedure require a default against the defendant's on the issue of LIability, under Rule 55(a),(b), .

18. That because the defendant's defaulted by their failure to raise any defense, a pre-trial conference could not be had as the court had not ruled a default against the defendant's, and the courts setting of a pre-trial con- was out of time.

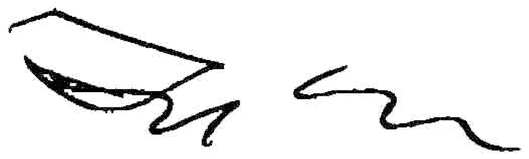
19. That because the setting of a pre-trial conference was out of time, the plaintiff could not be found in contempt of court for not attending a pre-trial conference that was out of time.

20. Since all orders by the court are void, not Constitution Contract, in clear absence of all jurisdiction, and authority, without jurisdiction of the subject matter, without subject matter jurisdiction, false, fraudulent, the plaintiff, George May is entitled to a judgement against the defendant's herein, forthwith.

21. WHEREFORE, the order, judgement entered by this court on May 29, 2001, and June 29, 2001, is void, not Constitution contract, prohibited by the plaintiff's Constitution Contract, Prohibited by the judges Constitution Contract, Prohibited by the Attorney's Constitution Contract, Binding Oath Contract, is in clear absence of all authority, jurisdiction, without subject matter jurisdiction, without jurisdiction of the subject matter, false, fraudulent, and bogus and the plaintiff, George May requests that an honorable court of the United States of America enter judgement against the defendant's herein, for the relief requested in the plaintiff's complaint for their pirating and robbing of the plaintiff's Inventions, Respective Writings, Discoveries, Liberty, and violation of his

Constitution Contract under Federal Rule of Civil Procedure 15(b), 54(c), 55(a),(b), 56(a), Article VI, Clause I,2,3, and the Plaintiff's Constitution Contract.

Respectfully submitted



George May

PRA 6

I hereby certify that a copy of the foregoing was mailed this July 13, 2001, to:

Mark G. Trato's Esq.
Quirk & Trato's
3773 Howard Hughes Parkway,
Suite 500 North
Las Vegas, Nevada 89109

William E. Cooper Esq.

Anthony N. Cabot Esq.
Lionel, Sawyer & Collins
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

George May

7-21-01

To: Brett M. Kavanaugh Esq.
Associate Counsel
to the President
Eisenhower Executive Ofc. Bldg.
17th St. & Pennsylvania Ave. NW
Washington, DC 20502
Ph. 202-456-7984
FAX. 202-456-1647

Re: Contract/Joint Venture

Dear Brett,

I have not heard from you regarding my letter of 7-18-01.

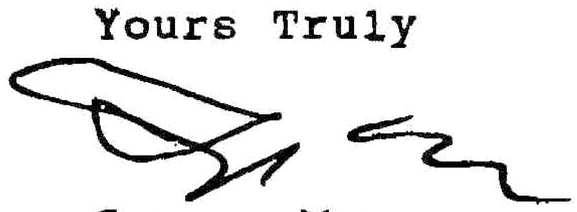
We do have several other potential interested joint venture investors, and would like to hear from George, this comming week.

The judges in my Intellectual Property cases continue to dismiss my complaints by not Constitution Contract Rulings. The original judgements in the original cases can be reversed, if the judges wish to avoid liability for their breach of their binding oath contract for which no immunity exists, as a binding contract is binding.

While I understand that the defendant's in my Intellectual Property Complaints, have contributed to George, as the oil Companies, there is no reason for them not to pay for what they have pirated, or enter into a profitable new venture for everyones profit.

Please forward the contracts to Nick, and myself this comming week.

Yours Truly



George May

PRA 6

7-16-01

To: Brett M. Kavanaugh
Associate Counsel
to the President
Eisenhower Executive Ofc Bldg.
17th St. & Pennsylvania Ave. NW
Washington, DC 20502
PH. 202-456-7984
FAX. 202-456-1647

Re: Contract/Joint Venture

Dear Brett,

Please advise as to when you will have the joint venture contract ready, for myself and Nicolas Gutierrez, so that we may close the property under contract for everyones benefit.

I fully support George W. Bush, and the Republican Party, and could donate more money and intellectual property to their support in the future with help.

The U.S. Agency for International Development, Voluntary Foreign Aid Programs, Washington DC 20523, J. Brian Atwood, Administrator U.S. Agency for International Development, has given USAID GRANTS, to non-profit Corporations for projects as ours and funding should be no problem.

I do have a non-profit Corporation that could be used for these purposes, and development in other Countries. The name of my non-reporting, non-profit Corporations is. Creating Jobs For Life Worldwide, Inc.

Please contact me as soon as possible. Thank you for your help.

Yours Truly

George May

PRA 6

7-2-01

To Alberto Gonzales Esq.
The White House
1600 Pennsylvania Ave. NW
Washington, DC 20500

Re: Joint Venture Contract

Dear Alberto,

Please find enclosed letter to the president, George W. Bush, and Nicolas J. Gutierrez, Jr. Esq., regarding a business contract.

I would like to meet with you and George is possible to discuss these business transaction which would benefit the Bush family, the United States and the greater good for the people of the United States of America.

I have enclosed information on some of the business transactions.

Please contact me regarding this matter as soon as possible, as joint venture funding is needed to proceed.

Thank you for your help.

Yours Truly

George May

PRA 6

Fig. 2. Oil shale deposits of the United States. (*Courtesy of John Ward Smith*)

World War II caused sharp increases in petroleum demand and disrupted both petroleum production and petroleum distribution, reactivating interest in oil shale development. Oil shale production operations during and since World War II have been conducted in Germany, France, Spain, Manchuria (China), Estonia and other areas of the former Soviet Union, Sweden, Scotland, South Africa, Australia, and Brazil. *See* ENERGY SOURCES; MINING.

Shale oil. Shale oil is produced from the organic matter in oil shale when the rock is heated in the absence of oxygen (destructive distillation). This heating process is called retorting, and the equipment that is used to do the heating is known as a retort. The rate at which the oil is produced depends upon the temperature at which the shale is retorted. Most references report retorting temperatures as being about 500°C (930°F).

Retorting temperature affects the nature of the shale oil produced. Low retorting temperatures produce oils in which the paraffin content is greater than the olefin contents; intermediate temperatures produce oils that are more olefinic; and high temperatures produce oils that are nearly completely aromatic, with little olefin or saturate content.

In general, shale oils can be refined to marketable products in modern petroleum refineries. There is no really typical shale oil produced from Green River oil shale, but the oils do share many properties in common. They usually show high pour points, 20–32°C (68–90°F); high nitrogen contents, 1.6–2.2 wt %; and moderate sulfur contents, about 0.5 wt %. High pour points make necessary some processing before the oils are amenable to pipeline transportation. The high nitrogen contents make hydrogenation or coking necessary to reduce the nitrogen contents so that the oils can be processed into fuels. Hydrogenation also reduces the sulfur content. *See* COKING (PETROLEUM); DESTRUCTIVE DISTILLATION; HYDROGENATION.

United States technology. The two general approaches to recovering shale oil from Green River Formation oil shales are (1) mining, crushing, and aboveground retorting, called conventional processing; and (2) in-place processing. The basic problems facing conventional processing are handling and heating huge amounts of low-grade ore and disposing of huge volumes of spent shale, the residue remaining after oil production. The in-place approach largely avoids the problems of handling

REV_00457537

issues like technology, improved member benefits, multijurisdictional practice, ancillary businesses, and lingering questions about multidisciplinary practice. And we'll strive to continue to improve diversity in our profession, on our standing committees, and on our Board of Governors. I am proud
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Oath of Admission to The Florida Bar

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

Letters

The authors a
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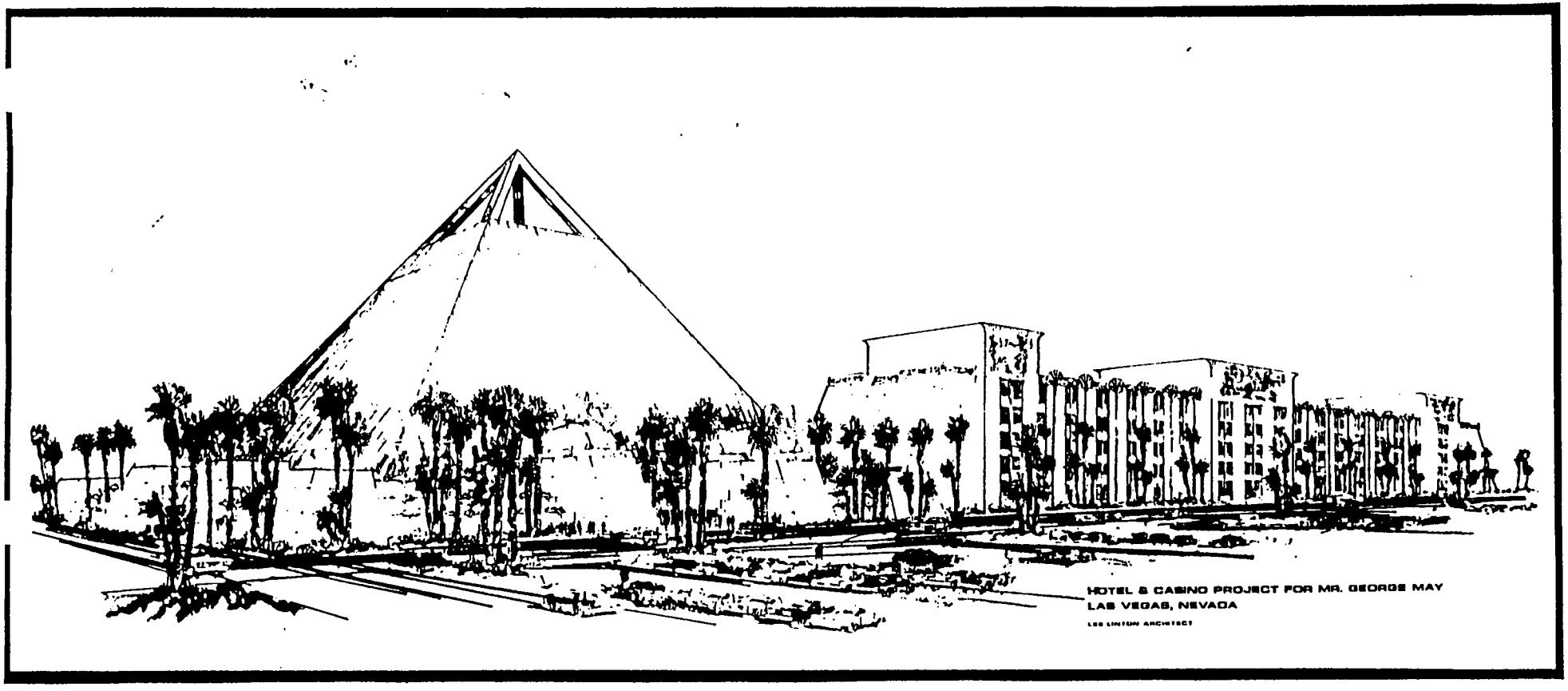
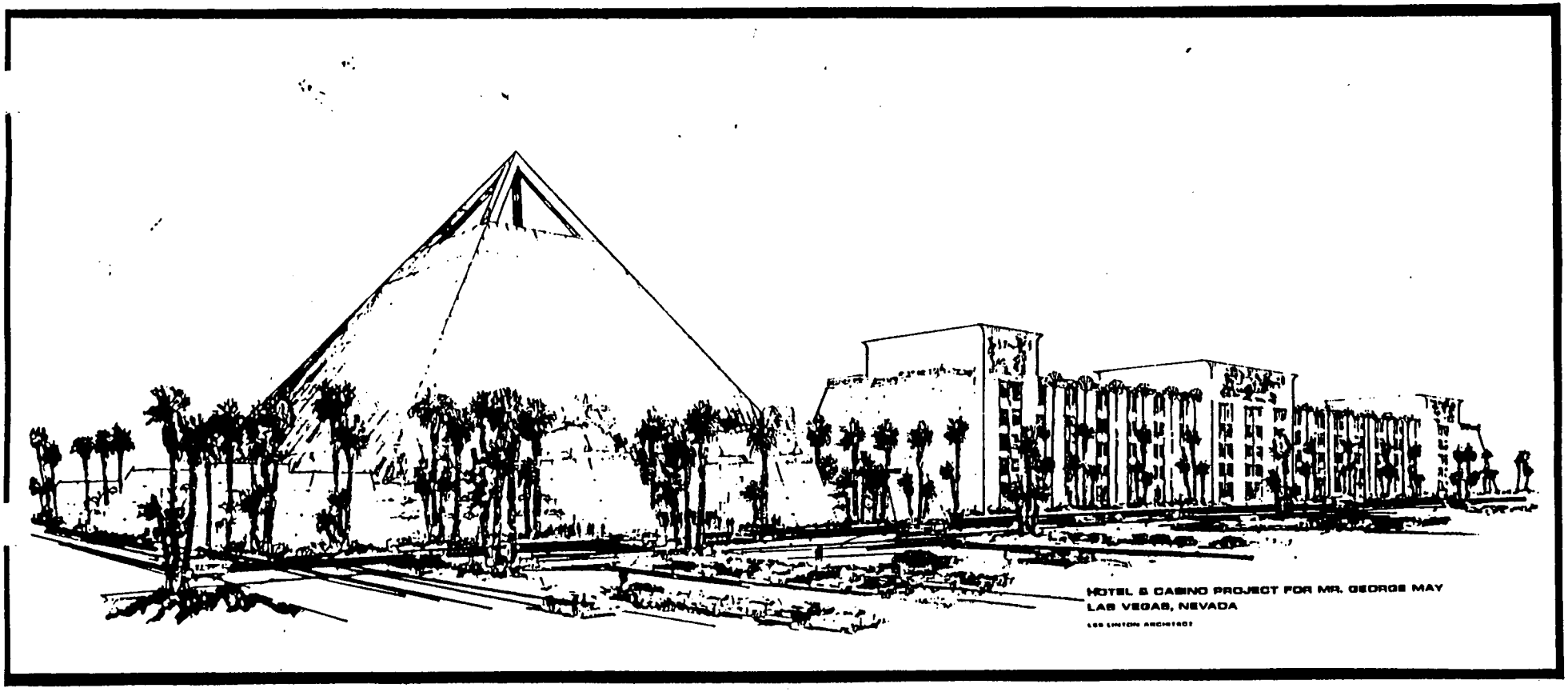
has passed, or t





IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FRANK MCLAIN and HARLEY MCLAIN,	)	
	)	Cause No. CV 00 222 BLG - RWA
PLAINTIFFS,	)	
	)	
v.	)	
	)	**ORDER FOR QUO WARRANTO**
GEORGE W. BUSH, et al.,	)	
	)	
DEFENDANTS.	)	
	)	

Having reviewed all the information presented by the Plaintiffs for a proceeding in the nature of Quo Warranto, the Court finds that there is probable grounds for such a proceeding and that a remedy does exist. The Court recognizes the information as filed and IT IS ORDERED that process issue summoning George W. Bush and Richard Cheney to answer to the Writ of Quo Warranto.

DONE and DATED this _____ day of _____, 2001.

_____
United States District Judge

0015572
DUCHIN BAR
SUNVALLEY RESORT
SUNVALLEY, ID 83353

DATE	TIME
03/28/01	09:52PM

AMOUNT 66.50

0

TIP _____

TOTAL 20.00

ACCT: 4936575969810665 EXP: 0302
AIA A0000007 REF # 020371234
TCH # 7200322

SIGNATURE

I AGREE TO PAY ABOVE TOTAL AMOUNT
ACCORDING TO CARD ISSUER AGREEMENT

REV_00457542

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4187 OFFERED BY MR. HORN

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Presidential Records Act Amendments of 2002".

SEC. 2. PROCEDURES FOR CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE.

(a) IN GENERAL.—Chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"§ 2208. Claims of constitutionally based privilege against disclosure

"(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

"(A) promptly provide notice of such determination to—

"(i) the former President during whose term of office the record was created; and

"(ii) the incumbent President; and

"(B) make the notice available to the public.

"(2) The notice under paragraph (1)—

"(A) shall be in writing; and

"(B) shall include such information as may be prescribed in regulations issued by the Archivist.

"(3)(A) Upon the expiration of the 20-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the public the record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President a claim of constitutionally based privilege against disclosure under subsection (b).

"(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 20 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

"(C) Notwithstanding subparagraphs (A) and (B), if the period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire between January 19 and July 20 of the year in which

"(b)(1) For purposes of this section, a claim of constitutionally based privilege against disclosure shall be asserted personally by the former President or incumbent President, as applicable, and shall be submitted to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate.

"(2) A former President or the incumbent President shall notify the Archivist of a privilege claim under paragraph (1) on the same day that the claim is submitted under paragraph (1).

"(c)(1) The Archivist shall not make publicly available a Presidential record that is subject to a privilege claim submitted by a former President until the expiration of the 20-day period (excluding Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist receives the claim.

"(2) Upon the expiration of such period the Archivist shall make the record publicly available unless otherwise directed by a court order in an action initiated by the former President under section 2204(e).

"(d)(1) The Archivist shall not make publicly available a Presidential record that is subject to a privilege claim submitted by the incumbent President unless—

"(A) the incumbent President withdraws the privilege claim; or

"(B) the Archivist is otherwise directed by a final court order that is not subject to appeal.

"(2) This subsection shall not apply with respect to any Presidential record required to be made available under section 2205(2)(A) or (C).

"(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpena, judicial subpena, or judicial process.".

(b) CONFORMING AMENDMENTS.—(1) Section 2204(d) of title 44, United States Code, is amended by inserting ", except section 2208," after "chapter".

(2) Section 2207 of title 44, United States Code, is amended in the second sentence by inserting ", except section 2208," after "chapter".

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"2208. Claims of constitutionally based privilege against disclosure.".

SEC. 3. EXECUTIVE ORDER OF NOVEMBER 1, 2001.

Executive Order number 13233, dated November 1, 2001 (66 Fed. Reg. 56025), shall have no force or effect.

ATTACHMENT B

A

Counsel's Office, White House

Kavanaugh, **Brett**

Subject Files

Robert Wollner v. POTUS

OA/NARA#: 1822/1740
9630

Box 51
Folder 8

Counsel's Office, White House

Kavanaugh, Brett

Roger L. Shoffstall v. POTUS

Subject Files

OA/NARA#: 1822/1740
9630

Box 51
Folder 9

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 0520 0018 6901 7480

FAIRBANKS, AK 99701

Postage	$ 3.50	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)		Clerk: KGWDC8
Total Postage & Fees	$ 6.90	04/19/01

Recipient's Name (Please Print Clearly) (To be completed by mailer)
Presiding Judge, Superior Court, 4th District
Street, Apt. No.; or PO Box No.
604 Barnette Street
City, State, ZIP+ 4
Fairbanks, Alaska 99701

PS Form 3800, February 2000 See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 0520 0018 6901 7503

WASHINGTON, DC 20543

Postage	$ 3.50	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)		Clerk: KGWDC8
Total Postage & Fees	$ 6.90	04/19/01

Recipient's Name (Please Print Clearly) (To be completed by mailer)
William Rehnquist, U.S. Supreme Court
Street, Apt. No.; or PO Box No.
One First Street, NE
City, State, ZIP+ 4
Washington, D.C. 20543

PS Form 3800, February 2000 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
William Rehnquist, Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C.
20543

RECEIVED
SUPREME COURT
MAILROOM
APR 30 2001

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* B. Date of Delivery

C. Signature
X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RECEIVED
SUPREME COURT
MAILROOM
APR 30 2001

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 0520 0018 6901 7503

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska 99701

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* B. Date of Delivery
4/20/01

C. Signature
X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Copy from service label)*
7000 0520 0018 6901 7480

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

REV_00457552

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8652

FAIRBANKS, AK 99701

Postage	$ 3.50	UNIT ID: 0707
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	~~3.20~~	Clerk: KFOTD3
Total Postage & Fees	**$** 10.10	05/22/01

Sent To: Presiding Judge, Superior Court, FAK, 4th Judicial Dist.
Street, Apt. No.; or PO Box No.: 604 Barnette Street
City, State, ZIP+4: Fairbanks, Alaska ~~99707~~ 99701

PS Form 3800, May 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8669

WASHINGTON, DC 20543

Postage	$ 3.50	UNIT ID: 0707
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	~~3.20~~	Clerk: KFOTD3
Total Postage & Fees	**$** 10.10	05/22/01

Sent To: William Rehnquist, U.S. Supreme Court
Street, Apt. No.; or PO Box No.: One First Street, NE
City, State, ZIP+4: Washington, D.C. 20543

PS Form 3800, May 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8676

WASHINGTON, DC 20500

Postage	$ 3.50	UNIT ID: 0707
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	~~3.20~~	Clerk: KFOTD3
Total Postage & Fees	**$** 10.10	05/22/01

Sent To: George Bush, U.S. President
Street, Apt. No.; or PO Box No.: 1600 Pennsylvania Avenue
City, State, ZIP+4: Washington, D.C. 20500

PS Form 3800, May 2000

REV_00457553

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C.
20543

RECEIVED MAY 29 2001 SUPREME COURT MAIL ROOM

RESTRICTED DELIVERY

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8669

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature
X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☒ Yes

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
George Bush
U.S. President
White House Office
1600 Pennsylvania Avenue
Washington, D.C.
20500

RESTRICTED DELIVERY

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8676

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery
MAY 29 2001

C. Signature
X WHITE HOUSE MAIL ROOM ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☒ Yes

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska
99701

RESTRICTED DELIVERY

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8652

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery
5/25/01

C. Signature
X Marie E. Baker ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☒ Yes

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

REV_00457554

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7099 3400 0016 1190 2981

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Recipient's Name (Please Print Clearly) (to be completed by mailer)
William Rehnquist, U.S. Supreme Court
Street, Apt. No.; or PO Box No.
One First Street, NE
City, State, ZIP+4
Washington, D.C. 20543

PS Form 3800, February 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8690

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Sent To
U.S. President George Bush
Street, Apt. No.; or PO Box No.
1600 Pennsylvania Ave., White House Office
City, State, ZIP+4
Washington, D.C. 20500

PS Form 3800, May 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7099 3400 0016 1190 2974

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Recipient's Name (Please Print Clearly) (to be completed by mailer)
Presiding Judge, Superior Court of AK, 4th Judicial District
Street, Apt. No.; or PO Box No.
604 Barnette Street
City, State, ZIP+4
Fairbanks, Alaska 99701

PS Form 3800, February 2000 — See Reverse for Instructions

REV_00457555

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C.
20543

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature
X
☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RECEIVED MAY 30 2001 SUPREME COURT, U.S. MAILROOM

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

RESTRICTED DELIVERY

2. Article Number *(Copy from service label)*
7099 3400 0016 1190 2981

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
George Bush
U.S. President
White House Office
1600 Pennsylvania Avenue
Washington, D.C.
20500

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery MAY 29 2001

C. Signature
X [illegible] MAIL ROOM
☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

RESTRICTED DELIVERY

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8690

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska
99701

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery 5/29/01

C. Signature
X
☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

RESTRICTED DELIVERY

2. Article Number *(Copy from service label)*
7099 3400 0016 1190 2974

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

REV_00457556

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8683

WASHINGTON, DC 20543

Postage	$ 3.50	UNIT ID: 0707
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	~~3.20~~	Clerk: KTXJFD
Total Postage & Fees	$ 10.10	06/04/01

Sent To
William Rehnquist, U.S. Supreme Court
Street, Apt. No.; or PO Box No.
One First Street, NE
City, State, ZIP+4
Washington, D.C. 20543

PS Form 3800, May 2000 See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8744

WASHINGTON, DC 20500

Postage	$ 3.50	UNIT ID: 0707
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	~~3.20~~	Clerk: KTXJFD
Total Postage & Fees	$ 10.10	06/04/01

Sent To
U.S. President George Bush
Street, Apt. No.; or PO Box No.
1600 Pennsylvania Ave., White House Office
City, State, ZIP+4
Washington, D.C. 20500

PS Form 3800, May 2000 See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8737

FAIRBANKS, AK 99701

Postage	$ 3.50	UNIT ID: 0707
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	~~3.20~~	Clerk: KTXJFD
Total Postage & Fees	$ 10.10	06/04/01

Sent To
Presiding Judge, Superior Court of AK, 4th Judicial District
Street, Apt. No.; or PO Box No.
604 Barnette Street
City, State, ZIP+4
Fairbanks, AK 99701

PS Form 3800, May 2000

REV_00457557

20543

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street NE
Washington, D.C. 20543

RECEIVED
SUPREME COURT, U.S.
MAILROOM
JUN 8 2001

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature
X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8683

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

George Bush
U.S. President
White House Office
1600 Pennsylvania Ave.
Washington, D.C. 20500

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery
JUN 8 2001

C. Signature
X [illegible] ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8744

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

9262 99701

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska
99701

A. Received by *(Please Print Clearly)* | B. Date of Delivery
6/5/01

C. Signature
X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8737

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

REV_00457558

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8713

WASHINGTON, DC 20543

Postage	$ 3.50	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	3.20	Clerk: KFN80G
Total Postage & Fees	**$ 10.10**	05/25/01

Sent To
William Rehnquist, U.S. Supreme Court
Street, Apt. No.; or PO Box No.
One First Street, NE
City, State, ZIP+ 4
Washington, D.C. 20543

PS Form 3800, May 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8720

WASHINGTON, DC 20500

Postage	$ 3.50	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	3.20	Clerk: KFN80G
Total Postage & Fees	**$ 10.10**	05/29/01

Sent To
U.S. President George Bush
Street, Apt. No.; or PO Box No.
1600 Pennsylvania Ave., White House Office
City, State, ZIP+ 4
Washington, D.C. 20500

PS Form 3800, May 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1530 0005 2219 8706

FAIRBANKS, AK 99701

Postage	$ 3.50	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	3.20	Clerk: KFN80G
Total Postage & Fees	**$ 10.10**	05/25/01

Sent To
Presiding Judge, Superior Court of AK, 4th Judicial District
Street, Apt. No.; or PO Box No.
604 Barnette Street
City, State, ZIP+ 4
Fairbanks, Alaska 99701

PS Form 3800, May 2000 — See Reverse for Instructions

REV_00457559

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street NE
Washington, D.C. 20543

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature

X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RECEIVED JUN 30 2001 SUPREME COURT MAILROOM

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8713

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

George Bush
U.S. President
White House Office
1600 Pennsylvania Avenue
Washington, D.C. 20500

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery
JUN 1 2001

C. Signature
X [illegible] ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8720

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska 99701

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery
5/29/01

C. Signature
X [signature] ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ■ Yes

2. Article Number *(Copy from service label)*
7000 1530 0005 2219 8706

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

REV_00457560

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1670 0011 1576 6040

WASHINGTON, DC 20543

Postage	$ 0.55	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	3.20	Clerk: KYD2Y3
Total Postage & Fees	$ 7.15	06/06/01

Sent To: William Rehnquist, U.S. Supreme Court
Street, Apt. No., or PO Box No.: One First Street, NE
City, State, ZIP+4: Washington, D.C. 20543

PS Form 3800, May 2000 — See Reverse for Instructions

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 1670 0011 1576 6019

WASHINGTON, DC 20500

Postage	$ 0.55	UNIT ID: 0706
Certified Fee	1.90	
Return Receipt Fee (Endorsement Required)	1.50	Postmark Here
Restricted Delivery Fee (Endorsement Required)	3.20	Clerk: KYD2Y3
Total Postage & Fees	$ 7.15	06/06/01

Sent To: U.S. President George Bush
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Total Postage & Fees	$ 10.10	06/14/01

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U.S. Postal Service
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Total Postage & Fees	$ 10.10	06/14/01

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CERTIFIED MAIL

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Roger Shoffstall

PRA 6

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PRA 6

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PRA 6

REV_00457565

Counsel's Office, White House

Kavanaugh, Brett

[P2, P6/b6 Folder 8]

Subject Files

OA/NARA#: 2171/2082
9701

Box 51
Folder 10

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[Rules Governing Partisan Political Activity]

Box 51
Folder 11

OA/NARA #: 2125/2086
9795

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Kavanaugh, Brett

Subject Files

Rules of Engagement

OA/NARA#: 2163/2074
9693

Box 51
Folder 12

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Kavanaugh, Brett

Subject Files

Rules Regarding Classified Information

OA/NARA#: 2163/2074
9693

Box 51
Folder 14

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Subject Files

[S.878 - To create Additional Federal court Judgeships]

Box 51
Folder 15

OA/NARA #: 2175/2086
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Subject Files

Binder - Sacramento Lawyer, August 1998, EP2, P6/66J

OA/NARA#: 1651/1519
9602

Box 51
Folder 16

Counsel's Office, White House

Kavanaugh, Brett

[Sample Speeches][Folder 1]

Subject Files

OA/NARA#: 337/233
9118

Box 51
Folder 17

70TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 1757

TO DISCONTINUE CERTAIN REPORTS NOW REQUIRED BY LAW TO BE MADE TO CONGRESS

MAY 18, 1928.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. MACGREGOR, from the Committee on Expenditures in the Executive Departments, submitted the following

REPORT

(To accompany H. R. 12064)

The Committee on Expenditures in the Executive Departments, to which was referred the bill (H. R. 12064) to discontinue certain reports now required by law to be made to Congress, having had the same under consideration, recommends that the bill be amended as indicated below, and that as amended it be passed.

Amend the title by striking out the word "annually" after the word "made".

Amend section 1 by numbering each paragraph serially.

Page 1, line 4, strike out the word "annually" after the word "made".

Page 1, line 6, strike out the words "preparation and" after the word "the".

Page 8, strike out all of lines 1 to 4, both inclusive.

Page 9, line 3, strike out the abbreviation "etc." after the word "materials," and insert the words "and so forth."

Page 11, line 1, strike out the word "and" after the word "Congress" and insert in lieu thereof the word "on".

Page 16, strike out all of lines 19 to 21, both lines inclusive.

Page 20, line 18, strike out the second parenthesis, insert a colon and the words, figures, and marks: "Title 21, section 93, United States Code.)".

Page 22, line 21, strike out the word "quality" and in lieu thereof insert the word "quantity".

Page 23, line 10, strike out all of this line after the word "volume" and insert "18, page 352; Title 15, section 178, United States Code.)".

Page 24, line 2, strike out the figures "32" after the word "Volume," and insert in lieu therefore the figures "31".

★ 5-19-28
H R—70-1—vol 4——55

Page 27, strike out lines 7 to 10, both lines inclusive.

Page 28, strike out all of section 2, lines 12 to 23, both lines inclusive, and insert a new section as follows:

SEC. 2. Every executive department and independent establishment of the Government shall, upon request of the Committee on Expenditures in the Executive Departments, or of any seven members thereof, furnish any information requested of it relating to any matter within the jurisdiction of said committee.

Page 28, after the new section 2, as above cited, add another new section as follows:

SEC. 3. Section 3220 Revised Statutes (Title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:

"*Refundments; taxes and penalties.*—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal revenue districts and alphabetically arranged, of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section."

BASIS FOR PROPOSED LEGISLATION

Under a standing rule of the House of Representatives the Clerk of the House submits to the House of Representatives at the beginning of each session of Congress a list of reports and statements that are required to be made to Congress by public officials under existing law. (See H. Doc. No. 83, 70th Cong., 1st sess.) The United States Bureau of Efficiency at the request of the chairman of the Committee on Appropriations of the House of Representatives made a study of each of the reports and statements listed in the document. As a result of its study the Bureau of Efficiency submitted to the chairman of the Committee on Appropriations a report covering every item listed in the document above referred to. In its report the bureau recommended the repeal of certain statutory requirements affecting a large number of the items carried in the document. After a study of the report the bill (H. R. 12064) was drafted to carry into effect the recommendations made by the Bureau of Efficiency.

The Committee on Expenditures in the executive departments, in addition to having before it the report of the Bureau of Efficiency, communicated with the several departments and establishments in which it is proposed to discontinue the submission of certain reports and statements to the Congress, and also consulted chairmen of committees of the House of Representatives to which such reports are, or would be, submitted.

PURPOSE OF THE PROPOSED LEGISLATION

The bill (H. R. 12064) proposes to repeal certain acts or parts of acts requiring the submission to Congress, to the extent of such requirement, of the reports and statements listed in the bill. Many of these statutory requirements are absolete, while others require

reports or statements that have no value and serve no useful purpose. Some of the departments and establishments have discontinued submitting these valueless reports and statements to the Congress, while others still comply with the statutory requirement. None of the reports or statements that it is proposed to discontinue are now ordered printed by the House of Representatives.

DETAILED STATEMENT

The reasons for the repeal of the legislation requiring the submission to Congress of the report or statement covered by each item in the bill (H. R. 12064), in its amended form, are briefly as follows:

(NOTE.—For this reference the paragraphs of the bill are considered as numbered consecutively.)

The information called for, under the requirements for paragraphs Nos. 1, 4, 6, 7, 10, 22, 23, 24, 41, 42, 61, 62, 65, 66, 70, 71, 72, 84, 87, 89, 90, 92, 106, 112, and 123 of the bill, is submitted to the Bureau of the Budget in connection with estimates for appropriations, thus making the submission of separate statements unnecessary. Similar data is also developed by the various subcommittees of the Committee on Appropriations charged with the handling of appropriation measures.

The reports called for under the provisions of law covering paragraphs Nos. 2, 3, 5, 8, 12, 13, 14, 28, 29, 30, 31, 32, 33, 38, 40, 44, 46, 48, 53, 54, 55, 56, 58, 59, 63, 64, 67, 68, 69, 74, 88, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 107, 114, 115, 118, 119, 124, and 125 are of no value to the departments and establishments making the same and they serve no useful purpose.

The requirement for the report listed under paragraph No. 9 is obsolete, it having been superseded by the Budget and Accounting Act of 1921.

The requirement for the statement listed as paragraph No. 11 is obsolete as the classification act of 1923, and the rules and regulations promulgated thereunder requires the departments to either dismiss the inefficient or to assign them to work in a lower classification grade at a salary not in excess of the middle step of the new grade, thus making this statement unnecessary.

The requirements for the statements listed under paragraphs Nos. 15, 16, and 37 are obsolete, these requirements being temporary war measures only.

The reports required under paragraphs Nos. 17 and 18 are no longer ordered printed by the House of Representatives. The data from which these two reports are compiled forms a part of the permanent records of the Treasury Department. The reports are of no value to the department and they serve no useful purpose.

All changes made in customs districts and ports of entry are printed in Treasury Decisions, thus making the submission of a separate document as called for by the requirement for paragraph No. 19 useless. This report as a separate document would have no value and serve no useful purpose.

The Treasury Department states that the making of separate reports under paragraphs Nos. 20 and 21 serves no useful purpose as matters of this kind should be included in the annual report of the Secretary of the Treasury.

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S. HRG. 101-1225

THE ABA ROLE IN THE JUDICIAL NOMINATION PROCESS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE ROLE OF THE AMERICAN BAR ASSOCIATION IN THE JUDICIAL EVALUATION PROCESS

JUNE 2, 1989

Serial No. J-101-20

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

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SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [6]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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October 10, 2001

THE CLAIMS

Legal Community Divided by Prospect of Lawsuits

By WILLIAM GLABERSON

Despite efforts by the leading national trial-lawyers' group to promote an alternative to lawsuits for victims of the Sept. 11 attacks, some lawyers have in recent days begun breaking ranks and promising multibillion-dollar suits.

"They're all going to be socked real hard," Aaron J. Broder, a veteran New York trial lawyer, said yesterday of the airlines and other American businesses and government agencies, adding that he disapproved of other lawyers discouraging suits. "Right now, everybody's so patriotic they've forgotten about the fact that there are defendants and wrongdoers here," he said.

Such comments are dividing lawyers across the country, with some worrying that trial lawyers may wound their reputations by drawing criticism that they are greedily capitalizing on the country's pain.

Many of the lawyers who are shying away from suits are suggesting that victims instead consider filing claims under a procedure set up by Congress last month as part of a bailout for the airline industry. That procedure will compensate victims in unspecified amounts from government funds. The measure is intended to shield the airlines from potentially crushing liabilities.

But some lawyers have said the claims procedure will likely give victims only modest awards. They are pledging huge lawsuits against the airlines, airport security companies, airplane makers, the owners of the World Trade Center and others.

The emerging debate involves a complex analysis of whether survivors might get bigger awards from suits or claims. The claim provisions, passed on Sept. 21, require claimants to give up the right to sue the airlines and others who were not directly involved in terrorism if they seek compensation from the fund.

Some lawyers who favor the claims process say they fear that trial lawyers, who are often criticized for fostering suits to collect large fees, could provoke new restrictions on their profession if they are aggressive at a time of national crisis. "Those that detest us will jump all over us and use, for their purposes, any behavior that they think is an attempt to unjustly profit from this tragedy," said Martin W. Edelman, a New York trial lawyer who is active in trial lawyers' associations in New York and nationwide.

Since the days immediately following the attack, the national plaintiffs' lawyers group, the Association of Trial Lawyers of America, has been playing an unusual role. The group, which usually lobbies for more expansive rights to sue, was influential in drafting the measure requiring people who file claims for government money to give up the right to sue. Two days after the attacks,

Leo V. Boyle, the association's president, called upon lawyers to observe a moratorium on suits related to Sept. 11. The national group has offered to provide lawyers free to victims who file claims, and is working to set up that program with lawyers around the nation and the New York State Trial Lawyers Association.

Mr. Boyle said the leaders of the national trial lawyers' group quickly realized that insurance would not be adequate to cover the losses stemming from the attacks. The two airplanes that crashed into the trade center are believed to have had about $3 billion in insurance while the damages in New York have been estimated at more than $50 billion. Under the legislation, Congress declared that the airlines would not have to pay any sums to victims in excess of their insurance coverage.

The claims process, among other advantages, would be faster than a lawsuit. Applicants are promised a decision within 120 days, instead of the years that court cases typically take. And in the claims process, a plaintiff would not have to prove anyone was at fault. But the claims process will not award punitive damages. And the amounts paid out must be reduced by the amount any family has received from private insurance, death benefits or government assistance.

Some lawyers said it would be impossible to evaluate whether the claims procedure will be adequate until federal officials delineate specific rules and begin reviewing applications this year. But even some of those lawyers flatly predicted that liability suits would be filed.

In Cincinnati, Stanley M. Chesley, a lawyer who specializes in cases involving multiple deaths and injuries, said he and others would consider potential claims that flaws in the trade center's design impeded escape, or that the security officials in the second tower to be hit might have compounded the losses by encouraging people to remain in the building.

This week, legal tempers began to flare as lawyers like Mr. Broder began preparation for lawsuits. Mr. Broder, 77, a former law partner of F. Lee Bailey, bought three-line advertisements on the front page of The New York Times yesterday and today. Addressed to disaster victims, yesterday's advertisement said, "The fund may be wrong for you," and offered a free consultation.

Mr. Edelman, the New York lawyer who is active in the national and state trial lawyers' groups, said that in many cases the talk of suing was irresponsible. He predicted that lawyers who went that route would ultimately be sued by their clients for malpractice for urging them to bypass the claims process.

"You've made enough money," Mr. Edelman said he would tell other lawyers. "Be responsible."

Mr. Broder called those remarks "false, contemptible and despicable," adding that some of the victims who get lawyers free of charge from lawyers groups to file claims may be badly served. "They may get what they pay for," he said.

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October 10, 2001

Review & Outlook

War Profiteers

Things must be getting back to normal: There's litigation in the air. Yesterday the Supreme Court denied an appeal from Microsoft, which means that the case will continue to work its way through the lower courts. At the same time, the High Court shut down an effort to reverse a state ban on cities suing gun manufacturers over crime costs. Meanwhile, the trial lawyers are crossing their hearts and hoping everyone believes they have no intention of litigating liability for the World Trade Center attack.

The day after the worst atrocity on American home soil, trial lawyers association president Leo V. Boyle posted a letter on the group's Web site titled "A National Tragedy." For "the first time in our history," Mr. Boyle announced, "the Association of Trial Lawyers of America, in this time of national crisis, urges a moratorium on civil lawsuits that might arise out of these awful events."

Oh, bravo. Now, we don't question their horror at the attack. But if our tort warriors really wanted to demonstrate solidarity with the nation -- and especially with those families whose loved ones were buried in the rubble of lower Manhattan -- a pledge to accept a reform limiting outrageous fees would be more persuasive than a moratorium with no real meaning. Especially when they can count on friends in Congress to protect their core interests. Does anyone believe that Tom Daschle and Richard Gephardt didn't know exactly what they were doing when they made sure that the airline bailout bill that ended up going before both their houses wasn't the one that would have limited attorneys fees?

The lost passage we refer to appears in the version of the bill introduced by Rep. Don Young (R., Ark.). It reads as follows: "ATTORNEY FEES. -- Reasonable attorneys fees for work performed in any action commenced pursuant in this section shall be subject to the discretion of the court, but in no event shall any attorney charge, demand, receive, or collect for services rendered, fees in excess of 25% of the damages ordered by the court to be paid pursuant to this section." Contingency fees, of course, normally scale up from 33%.

With airlines desperate for cash and warning of imminent bankruptcies, it wasn't likely in any event that the bill was going to get held up over lawyers fees. Now any future claimants have two choices: Either sue in federal court in New York, or submit a claim to a federal compensation fund to be administered by a special master appointed by the Attorney General -- and give up the right to sue.

The devil . . . er, the plaintiffs bar . . . is in the details.

ATLA says it is encouraging people to take the administrative route and has set up a program to provide pro bono representation for those in need. But because no one knows what the criteria or award levels will be, victims and their families not in immediate need of money will likely hang back until they see what's what -- one reason a moratorium has little significance now. After all, claimants have two years to file. And whatever pious advisories ATLA might send its members, they're still free to do what comes naturally.

This is all the more reason to try to rescue some good from the wreckage by applying a reform endorsed by George W. Bush in the campaign: Redefine the fee relationship between a tort lawyer and his client

as a fiduciary one. A version of this principle already operates in so-called securities cases. Here, lawyers fees are determined by the lodestar method: They submit bills detailing the hours they worked, which a court then multiplies by a reasonable rate that factors in a measure of the risk involved. Not only would such a reform ensure that money from this tragedy go to widows and orphans rather than their attorneys; it would set a badly needed example for all future mass tort claims. Courts are still dealing with cases from the 1993 World Trade Center bombing.

Tort lawyers, of course, shrink from the sunshine of hourly rates. They'd be loath to abandon the percentage-of-the-take arrangement, which can translate into hourly rates of tens of thousands of dollars. It strikes us that behind ATLA's counsels of restraint lurks an understanding that theirs is not the kind of business that would show very well in the public spotlight of this particular crisis.

All the more reason to address the issue head-on, with clarifying legislation if necessary and administratively where possible. We would think, for example, that a ruling on reasonable fees would be one of the first issues a special master for the September 11 attacks would address, especially for a largely administrative process where no one has to prove causation. And if the master does limit fees on the administrative side, it becomes even more important to have them limited on the courtroom option, so that attorneys advising their clients which road to take do so without a strong personal incentive to sue.

ATLA's pronouncements of self-restraint notwithstanding, the fact that their Congressional partners deep-sixed any limitations on legal fees in the airline bailout bill tells us that some folks want this door kept ajar. If only on the principle of helping those who have a hard time helping themselves, we'd sure like to know if we could count on ATLA's support for some supplemental legislation making it harder for the lawyers to stick their hands into the pockets of the victims.

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Terrorism Insurance Backup File [2]

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Pool Re (Pool Reinsurance Co. Ltd.)

Purpose -- To create an independent, mutual reinsurance company backed by the government that provides reinsurance to member companies for property loss and business interruption due to fire and explosion from "acts of terrorism" (primarily car bombs) that the insurance and reinsurance markets would not otherwise insure. Since its inception in 1993, Pool Re has covered three major losses for a total of 600 million pounds.

Participants -- Member companies are insurers (and Lloyd's syndicates) authorized to underwrite property insurance and business interruption for risks located in England, Wales and Scotland. Currently there are about 200 members, including all of the largest insurers in the U.K. commercial insurance market.

Reinsurance Coverage -- Members are required to offer reinsurance to first line insurers in excess of the retention, which is 100,000 pounds per "head of cover" per incident or 2.5 million pounds per policy per cover per incident. "Heads of cover" include: (1) buildings and completed structures, (2) other property (including contents, engineering contractors and computers), (3) business interruption, and (4) book debts (unclear how many heads of cover there actually are). Insureds have the option of buying protection beyond the 100,000 pounds of coverage, in which case the insurer cedes the additional premium to Pool Re, which assumes the risk.

Government (Retrocession) Liability -- Under the retrocession agreement, the government becomes liable to make payments to Pool Re when Pool Re's financial resources, including a [500 million] pound loan facility, have been exhausted. Members may reinsure only with Pool Re, which agrees to reinsure each member in excess of its retention. The Reinsurance (Acts of Terrorism) Act of 1993 enabled the Secretary for Trade and Industry to enter into the retrocession agreement with Pool Re subject to the consent of the Treasury. Pool Re's only retrocessionaire is the government.

Premiums -- Pool Re is funded through "market" rate premiums set by the government in exchange for the government underwriting excess exposure to the fund. Companies pay rates depending on the locations of risks in different geographic zones -- currently 150 pounds per million pounds of coverage in metropolitan areas, and 30 pounds per million of coverage in rural areas. The retrocession agreement provides that when Pool Re's funds reach one billion pounds, a retrocession premium becomes payable to the government. If Pool Re incurs an underwriting loss (an underwriting year is closed after three years), each member must pay an additional premium equivalent to 10% of the underwriting loss subject to a maximum of 10% of the premium income it paid to Pool Re for the underwriting year in question. If Pool Re makes an underwriting profit, each member is entitled to a 10% return premium.

Certification -- According to the retrocession agreement, the Secretary of State is required to provide a certificate to the effect that an "act of terrorism" has occurred for which indemnity is claimed under a reinsurance agreement.

Dispute resolution -- The agreements provide a dispute resolution procedure in addition to the usual arbitration clause.

The Road to Reform

How the trial lawyers can be fought

MICHAEL J. HOROWITZ

IMAGINE yourself the CEO of a major corporation approached by your chief marketer with plans for next year's sales campaign. "Let's save lots of money by putting fewer features on next year's widgets," he says. "Then let's ask our customers to buy lots of them by promising we'll make them happier after our profits increase." How long would it take you to fire that guy?

Amazingly, conservative Republicans, moderate Democrats, and the American business community have spent hundreds of millions of dollars—and precious political capital—on tort-reform campaigns that differ little from the widget marketer's scheme. Here's the pitch: "Because tort judgments are too high, Congress should limit the amount of damages its constituents can recover. Because there are too many tort claims, congressmen should vote to limit their constituents' right to sue."

It's not surprising that these multimillion-dollar campaigns have abysmally failed to restrain the growing power of the tort system to mow down whole industries in single cases. It's equally obvious that they've been unable to limit the growing number of tort-lawyer *billionaires* soon likely to have more disposable income to "invest" in politics than all candidates now spend on all elections in any given year. Voters know that the tort system is counterproductive and corrupt, but they've managed to restrain their enthusiasm for reforms asking them to sacrifice their rights to make the world safer for the Fortune 500.

Fortunately, there are better and more far-reaching routes to change. Strategically designed "new agenda" tort reforms increase rather than diminish consumer rights, benefit only those corporate defendants who first offer significant benefits to tort claimants, and require lawyers to comply with ethics rules mandating that they return unreasonable fees to their clients.

These reforms make political as well as policy sense: They provide immediate and tangible benefits to consumers—the reverse of traditional tort-reform proposals, whose direct savings go to corporate defendants. Also, importantly, they focus less on what injured parties receive than on the system's transaction costs—its growing, astonishing propensity to give more money to lawyers than to injured parties. For these reasons alone, new-agenda reforms enjoy strong support from both parties, from liberals as well as conservatives, and from overwhelming numbers of editorial boards and commentators.

A small number of business leaders have seen the need to shift to new-agenda reforms. They have been less concerned with eye-catching outrages like the McDonald's hot-cup-of-coffee case, and more focused on why, when a drunken doctor saws off the wrong leg, the tort system awards multimillion-dollar fees to lawyers who take few meaningful risks and add little value to their clients' claims. The reformers have been most interested in altering perverse incentives that encourage lawsuits rather than settlements. They have understood the value of broad, bipartisan reform coalitions—and the folly of waging wars that pit businesses against consumers. Unfortunately, however, they have yet to convince most of their business colleagues to abandon the old take-rights-away reform strategies.

The Bush administration has paid lip service to new-agenda reforms, but—sadly and surprisingly—has reverted to the old, failed scripts when the chips have been down. Here's what's available on the tort-reform front and what the Bush administration has done—or more accurately failed to do—in three critical areas.

Malpractice reform. Not surprisingly, Tom Daschle has eaten the administration's lunch on the patients' bill of rights. In the debate, the White House has taken the classic loser's position: accepting the Democrats' emphasis on lawsuits, but also calling for such "responsible" restrictions as capped pain-and-suffering damages and procedural barriers against getting to court. Predictably, the White House position hasn't held, and the president has been tagged with the classic Republican caricature: "too close to big business" and "no friend of the little guy."

A better approach to malpractice reform was proposed more than 15 years ago by—remarkably—Richard Gephardt. His reform required malpractice claimants seeking pain-and-suffering damages to prove their cases under a near-impossible "beyond any reasonable doubt" standard—*but only if* they had first received and rejected defendant offers to pay all of their lost wages, unreimbursed medical costs, and reasonable hourly attorney fees.

Had the White House gone with the Gephardt bill—or with a more consumer-friendly version introduced in 1995 by Sens. Mitch McConnell and Spencer Abraham—it could have seized the initiative in the patients'-rights debate. It would have been on the side of quickly reimbursing malpractice victims for their actual losses. It would have been able to exploit Rep. Gephardt's claim that the reform created a "preferable system [that] makes . . . recovery . . . cheaper, more rational, and . . . fairer." Gephardt, now the House minority leader, would surely have opposed the legislation he once championed—and Republicans would have been able to exploit that opposition as evidence of the tort bar's veto power over Democratic-party policies. Ironically, the reform would have effectively abolished—not merely capped—most malpractice pain-and-suffering claims; it also would have achieved massive attorney-fee reductions, and far greater health-care cost savings than the administration's current proposal will ever produce.

Years ago, Dick Gephardt figured out a way to reform the medical-malpractice system by devising *newer* rather than *fewer* consumer rights. To its great disadvantage, the Bush administration has not done so. Along with health-care consumers, it's paying a steep price for that failure.

Auto Choice. The administration is missing an equally great opportunity by failing to promote auto-insurance legislation strongly supported by an amazing coalition: Dick Armey, Mitch McConnell, the Chamber of Commerce, John McCain, Joe Lieberman, the Democratic Leadership Council, Michael Dukakis, National Conference of Black Mayors president

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/ellington Webb, the *New York Times*, USA *Today*, and 9 of the ountry's 16 largest-circulation newspapers.

The bill offers drivers the right to decide whether to partici- ate in, and pay for, the auto-tort system's wildly expensive pain- nd-suffering component. It separates pain-and-suffering claims rom the "economic loss" elements of state tort law, and allows :onsumers to choose both coverages—or economic-loss cover- ige only. It thus empowers drivers to opt for $40 *billion* in annu- al insurance-rate reductions; New York senator Pat Moynihan described it, in 1998, as "the largest tax cut of the decade."

Today, many drivers spend more on annual insurance premi- ums than their cars are worth, and a high proportion of the country's working-poor drivers must spend *more than 30 percent of their total disposable income* to buy minimum-coverage policies that barely compensate those they injure. Auto-choice reform deals directly with this problem by permitting drivers to save, on average, 23 percent of their total auto-insurance costs—with low-income drivers able to save an average of 36 percent. The reform reverses the priorities of a system that now pays billions for whiplash claims but only nine cents on the dollar to accident victims whose medical and other economic injuries exceed $100,000. (This is why Jim Brady and the International Brain Injury Association support auto-choice reform.)

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Reforming lawyer fees enforces the central premise of all codes of legal ethics.

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Because pain-and-suffering cash awards are calculated at two to three times medical costs and thus generate wildly excessive use of physician and chiropractor services, the reform would also target the system's principal source of fraud. It would undo the system's inexcusable payment of two dollars to lawyers for every dollar paid for medical services, lost wages, and related out-of-pocket costs, and would radically reduce the tort bar's estimated $15 billion to $20 billion annual take from auto cases. The reform would tap into growing voter outrage at the cost of driving, and force its opponents to claim that Americans can't be trusted to decide whether to spend $40 billion per year on pain-and-suffering insurance, on safer cars, or on food and medicine for their families.

Failure to support this reform loses the president the opportunity to join Michael Dukakis and the *New York Times* in opposing an unpopular, fraud-driven system. It's hard to see why he doesn't take it up.

Lawyer fees. Directly related to the integrity of the country's legal, commercial, and political systems, this may be the most important of all tort reforms. Its purpose is to enforce the central premise of all codes of legal ethics—that lawyers are fiduciaries subject to outside, neutral review to determine whether their clients have been fairly and reasonably treated.

The issue arises because of the rapidly growing epidemic of manifestly unethical multibillion-dollar fees paid to lawyers in mass-tort cases. These fees, paid as flat percentages of final settlements, often exceed effective rates of $200,000 *per hour* and bear little relation to the risks assumed by the lawyers when they were hired. The fees are paid nonetheless, because a whole industry put at risk of bankruptcy by the verdict of a single jury has no prudent alternative but to settle such a case without regard to its legal merits; and such a settlement can be reached only if the lawyers who brought the case are satisfied.

To be sure, appropriate incentives are needed to permit lawyers to represent consumers against powerful business interests. But "mere" multimillion-dollar paydays for prevailing lawyers should be more than adequate to do so—an obvious point, proven by the so-called "shareholder" cases brought on behalf of injured investors. In those cases, courts establish "lodestar" hourly rates roughly equal to what defense lawyers receive, and then multiply the rates by as much as six times to compensate winning plaintiffs' attorneys for the risks they assumed and the excellence of their work. The lure of $1,000- to $2,500-per-hour payments has more than ensured a full supply of sophisticated counsel in shareholder cases—and makes abundantly clear that ten- and eleven-figure mass-tort-case paydays involve unethical expropriations of clients' money.

Enacted in 1996, the Jim and Tammy Faye Bakker provisions of the tax code offer a model for reform. They compel fiduciaries receiving unreasonably large payments from charities, pension funds, or foundations to return their excess payments or pay two dollars to the IRS for every unreasonable dollar kept. Applying the same provision to the mass-tort lawyers—whose ethics codes expressly restrict them to reasonable fees—would ensure multibillion-dollar client paybacks.

Happily, the president endorsed this reform during the campaign, and again in his budget. Unhappily, it's not clear that he will seriously press for its enactment.

Strange that this should be so, for the president should know from his Texas experience what the country will look like if 20 or so tort-lawyer billionaires are created in the next five to ten years through gun-to-the-head payoffs from the soft-drink, fast-food, oil, alcohol, gun, and other industries. He should understand the undemocratic character of nationwide "tort taxes" enacted without congressional approval. He should realize that the reform will generate direct tension between client-voters and overreaching lawyers. He should welcome an up-or-down congressional vote on whether it should be the Massachusetts Health Department—or the small group of politically wired lawyers who brought a late-filed, copycat tobacco lawsuit—that receives the bulk of an incredible $750 million fee now scheduled to be paid. The president and the country would profit from debate over whether Maryland taxpayers—or Democratic contributor Peter Angelos—should receive the overwhelming share of the $1.2 billion tobacco fee that Angelos is seeking, for a case brought under a statute that, in the words of the state-senate president, "changed centuries of precedent to ensure a win."

Today's tort-reform debate echoes the days when the Left controlled politics by offering bigger and better voter benefits, with conservatives consigned to minority status for doing little but saying "no" and "less."

New-agenda tort reforms do what supply-side tax cuts have done: allow conservatives to throw away their green eyeshades, offer tangible benefits to consumers, and gain broad support. And, for a change, prevail. **NR**

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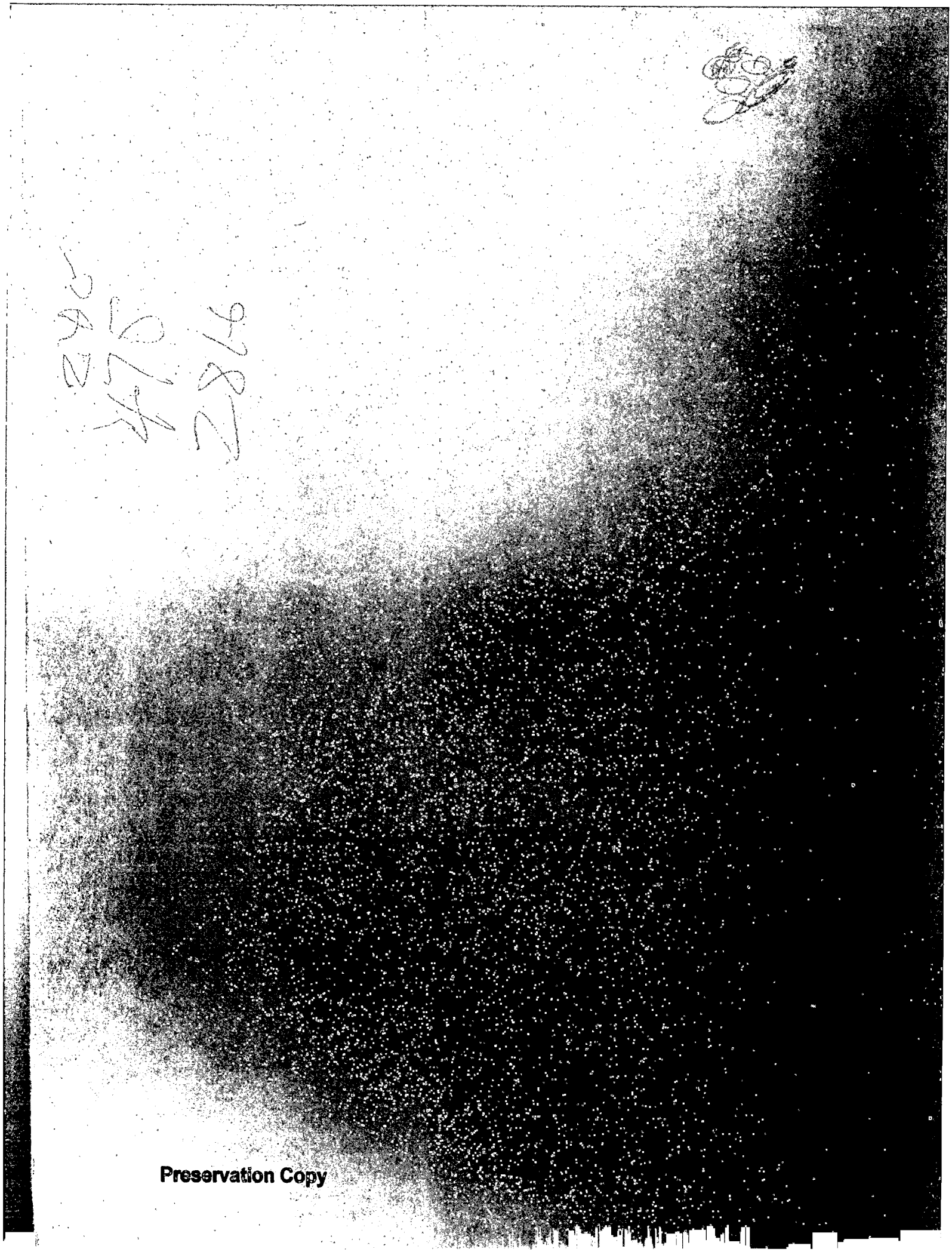

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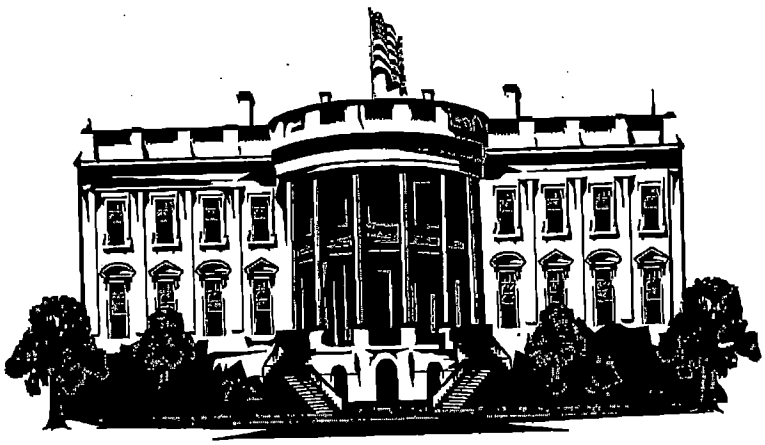

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Can Tort Law Be Ethical?

A proposal to curb ill-gotten gains.

BY MICHAEL HOROWITZ

SOMEONE STICKS A LOADED GUN to your head and asks for your wallet. Do you resist if you know the bullets are cheap and likely (but not certain) to be duds?

Today, mass tort litigation creates similar bet-your-life scenarios for increasing numbers of industries. Federal circuit court judge Richard Posner has noted that when a jury can "hold the fate of an industry in the palm of its hand . . . and hurl [it] into bankruptcy . . . the industry is likely to settle—whether or not it really is liable." Law increasingly counts for little in mass tort cases; fixing the size of payoffs to make the cases go away has become its primary function.

Think otherwise? Then imagine yourself general counsel of McDonald's, faced with a nationwide class action brought on behalf of millions of Happy Meal customers who claim that their diabetes, obesity, and heart attacks were caused by your products, and with a companion series of suits brought by government agencies that paid for their medical care.

Your first reaction would be fury and incredulity. You know—or think you do—that french fries aren't cigarettes. You know that McDonald's tried and failed to sell low-fat hamburgers, that it gainfully employs vast numbers of young people, that millions of customers enjoy its products every day. That's when reality intrudes.

The first dose would come when you noted that the damages claimed in the combined suits vastly exceed the entire net worth of McDonald's—that it will be out of business if the cases are tried and lost. You then realize that the company's files almost certainly contain memos discussing the health effects of your products. You also note that the public is less aware of the risks of eating Big Macs than of smoking Camels, that you've done little to advise your customers of those risks, that many of those patrons are young and unschooled, that you've made it hard for them to know the fat and calorie content of what you sell, that armies of expert witnesses and government officials are prepared to second-guess your menu and recipe decisions and to allege that "junk foods" are killing America. Your government relations vice president then describes the price the company will pay for waging sustained public war on political officials eager for massive lawsuit windfalls they can spend without having to pass tax increases. Your media people also warn that document leaks and angry politicians orchestrated by media-savvy lawyers can metastasize the company's happy face image into a skull and crossbones faster than you can say asbestos or Bill Gates.

Finally, you note that 8 or 9 state supreme courts—or has it now become 19 or 20?—are, like the Florida Supreme Court, dominated by tort lawyers implacably eager to redistribute your assets without regard to fault. And, if that isn't enough, the value of the company's stock has dropped precipitously since the lawsuits were filed. As a prudent lawyer and company officer, you'll soon come to understand what you need to do.

First, make sure all your competitors—Popeyes and Taco Bell, as well as Wendy's and Burger King—are also named in the suit. Then, after learning from your marketing people that the bottom won't drop out of sales as long as you (and your competitors) don't add more than 30 cents to the price of Big Macs, conduct a kabuki ritual of discovery proceedings whose singular objective is a settlement that will increase burger prices by no more than a quarter (with comparable increases for chicken wings and burritos).

Settling will be easy, for all you'll need to do is pay a nickel a burger for the next 25 years to the 300 or so lawyers who brought and control the cases. To be sure, this tort tax on your products will hurt business, and you'll be squeezed some by the nutrition education programs and modest salt and calorie reductions you'll be required to implement as part of the settlement. But offering a nickel rather than a penny a burger for legal fees (and offering government health care programs more lucrative settle-

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ments than individual plaintiffs) will do wonders in getting a settlement you can live with. Among other things, it will convert the lawyers who sued you into self-interested guarantors of the health of the fast food industry; and it will immediately return your stock price to where it was when the cases were brought.

The settlement will of course add eight or ten new tort lawyer billionaires to the Forbes 400 and will give the tort bar more disposable income to "invest" in the political process than all parties now spend in all U.S. elections in any given year. But that will be the next industry's worry, not yours.

The above scenario is, precisely, the story of the great asbestos and tobacco lawsuits of the 1990s. It explains why, in order to save itself, Dow threw its Dow Corning division to the wolves in the junk science breast-implant cases. As former *Washington Post* business editor David Ignatius has written, it will one day be the story of an oil industry that sits with global warming risk memos in its files if droughts or floods depreciate property values in different regions of the country. And consider this recent Department of Agriculture report: Carbonated soda provides more sugar in a typical 2-year-old's diet than cookies, candies, and ice cream combined, while more than half of 8-year-olds drink a can of soda per day and a third of all teenage boys drink at least three cans per day. Do you think for a second that creative tort lawyers won't try to link this "soda addiction" to any number of present and future health and social ills? Are you ready, Coke? Will you be ready when the tort bar dominates 30 state supreme courts? Cheer up, for you'll be able to get out of it all without too much damage if you pay the tort lawyers a penny a can for 25 years or so. On second thought, maybe you'll need a penny and a half to make them go away.

Under every canon of legal ethics, these blackmail scenarios should be proscribed. The central premise of legal ethics—that lawyers are fiduciaries restricted to reasonable and risk-based fees—is shattered when, as in the tobacco cases, lawyers are scheduled to receive $200,000 per hour fees for late-filed, copycat cases. Fee ethics mandates are said to be particularly critical in contingency fee cases where, as courts and scholars have noted, $100-million cases seldom require ten times as much risk and effort as $10-million cases. In fact, the relationship of case size to attorney risk is reversed in mass tort cases, where survival threats to defendants make $245-billion cases easier, rather than a thousand times harder, to win than "mere" $245-million cases.

The central premise of legal ethics is shattered when lawyers receive $200,000 per hour fees for late-filed, copycat cases.

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Can Tort Law Be Ethical?

A proposal to curb ill-gotten gains.

BY MICHAEL HOROWITZ

SOMEONE STICKS A LOADED GUN to your head and asks for your wallet. Do you resist if you know the bullets are cheap and likely (but not certain) to be duds?

Today, mass tort litigation creates similar bet-your-life scenarios for increasing numbers of industries. Federal circuit court judge Richard Posner has noted that when a jury can "hold the fate of an industry in the palm of its hand . . . and hurl [it] into bankruptcy . . . the industry is likely to settle—whether or not it really is liable." Law increasingly counts for little in mass tort cases; fixing the size of payoffs to make the cases go away has become its primary function.

Think otherwise? Then imagine yourself general counsel of McDonald's, faced with a nationwide class action brought on behalf of millions of Happy Meal customers who claim that their diabetes, obesity, and heart attacks were caused by your products, and with a companion series of suits brought by government agencies that paid for their medical care.

Your first reaction would be fury and incredulity. You know—or think you do—that french fries aren't cigarettes. You know that McDonald's tried and failed to sell low-fat hamburgers, that it gainfully employs vast numbers of young people, that millions of customers enjoy its products every day. That's when reality intrudes.

The first dose would come when you noted that the damages claimed in the combined suits vastly exceed the entire net worth of McDonald's—that it will be out of business if the cases are tried and lost. You then realize that the company's files almost certainly contain memos discussing the health effects of your products. You also note that the public is less aware of the risks of eating Big Macs than of smoking Camels, that you've done little to advise your customers of those risks, that many of those patrons are young and unschooled, that you've made it hard for them to know the fat and calorie content of what you sell, that armies of expert witnesses and government officials are prepared to second-guess your menu and recipe decisions and to allege that "junk foods" are killing America. Your government relations vice president then describes the price the company will pay for waging sustained public war on political officials eager for massive lawsuit windfalls they can spend without having to pass tax increases. Your media people also warn that document leaks and angry politicians orchestrated by media-savvy lawyers can metastasize the company's happy face image into a skull and crossbones faster than you can say asbestos or Bill Gates.

Finally, you note that 8 or 9 state supreme courts—or has it now become 19 or 20?—are, like the Florida Supreme Court, dominated by tort lawyers implacably eager to redistribute your assets without regard to fault. And, if that isn't enough, the value of the company's stock has dropped precipitously since the lawsuits were filed. As a prudent lawyer and company officer, you'll soon come to understand what you need to do.

First, make sure all your competitors—Popeyes and Taco Bell, as well as Wendy's and Burger King—are also named in the suit. Then, after learning from your marketing people that the bottom won't drop out of sales as long as you (and your competitors) don't add more than 30 cents to the price of Big Macs, conduct a kabuki ritual of discovery proceedings whose singular objective is a settlement that will increase burger prices by no more than a quarter (with comparable increases for chicken wings and burritos).

Settling will be easy, for all you'll need to do is pay a nickel a burger for the next 25 years to the 300 or so lawyers who brought and control the cases. To be sure, this tort tax on your products will hurt business, and you'll be squeezed some by the nutrition education programs and modest salt and calorie reductions you'll be required to implement as part of the settlement. But offering a nickel rather than a penny a burger for legal fees (and offering government health care programs more lucrative settle-

Michael Horowitz is a senior fellow at the Hudson Institute and director of its Project for Civil Justice Reform.

ments than individual plaintiffs) will do wonders in getting a settlement you can live with. Among other things, it will convert the lawyers who sued you into self-interested guarantors of the health of the fast food industry; and it will immediately return your stock price to where it was when the cases were brought.

The settlement will of course add eight or ten new tort lawyer billionaires to the Forbes 400 and will give the tort bar more disposable income to "invest" in the political process than all parties now spend in all U.S. elections in any given year. But that will be the next industry's worry, not yours.

The above scenario is, precisely, the story of the great asbestos and tobacco lawsuits of the 1990s. It explains why, in order to save itself, Dow threw its Dow Corning division to the wolves in the junk science breast-implant cases. As former *Washington Post* business editor David Ignatius has written, it will one day be the story of an oil industry that sits with global warming risk memos in its files if droughts or floods depreciate property values in different regions of the country. And consider this recent Department of Agriculture report: Carbonated soda provides more sugar in a typical 2-year-old's diet than cookies, candies, and ice cream combined, while more than half of 8-year-olds drink a can of soda per day and a third of all teenage boys drink at least three cans per day. Do you think for a second that creative tort lawyers won't try to link this "soda addiction" to any number of present and future health and social ills? Are you ready, Coke? Will you be ready when the tort bar dominates 30 state supreme courts? Cheer up, for you'll be able to get out of it all without too much damage if you pay the tort lawyers a penny a can for 25 years or so. On second thought, maybe you'll need a penny and a half to make them go away.

Under every canon of legal ethics, these blackmail scenarios should be proscribed. The central premise of legal ethics—that lawyers are fiduciaries restricted to reasonable and risk-based fees—is shattered when, as in the tobacco cases, lawyers are scheduled to receive $200,000 per hour fees for late-filed, copycat cases. Fee ethics mandates are said to be particularly critical in contingency fee cases where, as courts and scholars have noted, $100-million cases seldom require ten times as much risk and effort as $10-million cases. In fact, the relationship of case size to attorney risk is reversed in mass tort cases, where survival threats to defendants make $245-million cases easier, rather than a thousand times harder, to win than "mere" $245-million cases.

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Counsel's Office, White House

Kavanaugh, Brett

Terrorism Insurance - Liability [3]

Subject Files

OA/NARA#: 1825/1743
9633

Box 57
Folder 7

REV_00457604

GENERAL POINTS

- The traditional tort system is designed to ensure that injured victims are compensated by those whose negligence or fault caused the injuries. The ordinary tort system cannot achieve that goal in a mass tort terrorism incident, however, because the resources of liable defendants (including resources from their liability insurance policies) almost never will suffice to compensate the class of successful plaintiff-victims. For that reason, apart from insurance and standard government benefits, mass torts often are resolved through bankruptcy (where plaintiffs rarely receive full compensation) or settlement (again, where plaintiffs rarely receive full compensation).

- Mass torts pose an additional problem in that the number and variety of cases, plaintiffs, defendants, causes of action, liability standards, and damages rules will overwhelm the legal system absent consolidation and uniform rules of substance and procedure. The extraordinary delays inherent in trying to apply the ordinary litigation process to mass torts further frustrate the ultimate goal of providing adequate compensation to injured victims.

- The procedures for litigation arising out of mass tort terrorism incidents must reflect those realities and should seek to achieve four main goals:

  (i) ensure that victims receive adequate compensation, whether from insurance or standard government benefits, or from a tortfeasor in cases of fault;
  (ii) manage the litigation process so that it is as expeditious and equitable as possible for plaintiffs and defendants;
  (iii) provide economic stability by avoiding, where appropriate, widespread bankruptcies from litigation arising out of a mass terrorism incident where terrorists, by definition, are the wrongdoers, not the legitimate bystander property and business owners; and
  (iv) appropriately spread the costs of terrorism incidents without requiring all federal taxpayers, in the first instance, to incur the full costs of compensation for injuries and property damage that insurance otherwise would cover.

- Legislation should merely establish the basic contours of the litigation process, and should not attempt to pre-ordain every substantive and procedural detail, which is best left to the discretion of the district court in light of the facts and circumstances of particular events.

CONSOLIDATION

LANGUAGE

(a) SUBJECT MATTER JURISDICTION. Notwithstanding any other law, within 90 days of an act of terrorism as defined in section 803, the Judicial Panel on Multidistrict Litigation shall assign a single federal district court to conduct pre-trial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from a single act of terrorism as defined in section 803, and shall transfer all such pending civil actions to that district court. The Judicial Panel on Multidistrict Litigation shall select and assign the district court based on the convenience of the parties and the just and efficient conduct of the proceedings. The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all such actions. For purposes of personal jurisdiction, the district court assigned by the Judicial Panel on Multidistrict Litigation shall be deemed to sit in all judicial districts in the United States.

[Subsections (b) and (c) would ensure transfer of cases filed in other courts.]

PURPOSE

- A single federal court and a uniform standard of liability are necessary to ensure that the legal system is not overwhelmed by multiple cases in multiple courts in multiple states -- with similar claims in multiple forums decided under widely varying standards for liability, causation, defenses, and damages.

- Consolidation of cases in a single court is a common procedure in mass tort cases and was a central feature of the legislation recently enacted by Congress for the tort cases arising out of the September 11 attacks.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 408(b) of the Air Transportation Act consolidates all cases arising out of the September 11 attacks in a single federal court.

PUNITIVE DAMAGES

LANGUAGE

(e) PUNITIVE DAMAGES. Punitive damages, exemplary damages, and other damages not intended to compensate the plaintiff for actual losses shall not be available in any civil action subject to this title.

PURPOSE

- In mass tort cases, only a limited pool of resources will be available to plaintiffs who prove liability (whether because of bankruptcy or settlement).

- Because of the limited pool of resources, it would be grossly inequitable and unfair to allow one plaintiff or class of plaintiffs to receive an excessive award -- including a punitive component entirely unrelated to the plaintiff's injuries -- that could greatly limit or outright preclude recovery by other plaintiffs.

- Even for defendants who face no possibility of bankruptcy, the possibility of massive punitive or non-economic damages creates pressure to settle even unmeritorious cases and economic instability for potential defendants in terrorism cases.

- A business defendant who engages in the kind of wrongdoing that otherwise would trigger punitive damages will face a variety of federal and state criminal and administrative investigations and sanctions.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 405(b)(5) of the Air Transportation Act precludes recovery of punitive damages in the victims' claims process, and Section 408(a) limits any recovery against air carriers to the limits of their liability policies, which essentially precludes punitive damages against air carriers.

OFFSET

LANGUAGE

(f) OFFSET. In determining the amount of any money damages available under this title, the court shall offset any compensation or benefits received or entitled to be received by the plaintiff or plaintiffs from any collateral source, including the United States or any federal agency thereof, in response to or as a result of the act of terrorism

PURPOSE

- This procedure, which Congress adopted for the victims claims process applicable to individual cases arising out of the September 11 terrorist attacks, will ensure that plaintiffs are compensated for their losses, yet also prevent double recovery by plaintiffs. It thus will help preserve the limited pool of defendant resources available for successful plaintiffs without penalizing injured victims.

- The procedure is consistent with the principle that first-party private insurance and, where necessary, standard government benefits have been (and should be) the primary means for promptly and appropriately compensating the parties injured in a terrorism attack. Through these resources, injured parties will receive appropriate care and compensation without resort to an inefficient judicial process that would trigger widespread bankruptcies.

- Even in ordinary tort cases, many states offset past and prospective insurance benefits paid or payable to the plaintiff against the plaintiff's recovery.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 405(b)(6) of the Air Transportation Act requires that recovery by a claimant in the victims' claims process be reduced by the amount of collateral source compensation the plaintiff has received or is entitled to receive.

NON-ECONOMIC DAMAGES

LANGUAGE

(g) NON-ECONOMIC DAMAGES. Each defendant shall be liable only for the amount of non-economic damages allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant. No plaintiff may recover non-economic damages unless the plaintiff suffered physical harm.

PURPOSE

- The proposed language is more modest than many proposals: It would not eliminate non-economic damages, nor would it impose proportional fault for *economic* damages. In addition, this proposal for proportional liability for non-economic damages is less restrictive than state law provisions that may apply to many cases litigated under the cause of action recently established by Congress for the September 11 events.

- Without this provision, a court could hold any defendant "jointly and severally" liable for the full amount of the plaintiff's non-economic damages, even for those damages unrelated to the defendant's actions or attributable to the terrorists.

- Some studies suggest that non-economic damages can comprise 40-50% of damages in certain classes of tort cases. If *any* defendant, even the marginally involved, could be made to pay the full extent of non-economic damages in a mass terrorism incident, these damages could easily threaten to bankrupt hundreds of legitimate businesses.

- Limitations on joint and several liability are commonplace. At least thirty-seven states have enacted some form of proportional liability. Indeed, seventeen states have adopted proportional liability *even for economic damages*. Another eight states have adopted proportional liability *for economic and non-economic damages* for any marginally-involved defendant (e.g., one found to be less than 50% at fault).

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 408(a) of the Air Transportation Act limits recovery against air carriers to the limits of their liability policies, which is an effective cap on non-economic damages against air carriers, and applies state law limits on joint and several liability, which in many cases will be more restrictive than this proposal.

SUBSTANTIVE STANDARD FOR LIABILITY

LANGUAGE

(h) SUBSTANTIVE LAW. The standard of care for the federal cause of action . . . shall be gross negligence. Unless otherwise specified in this title, the district court shall derive other substantive principles of liability for the federal cause of action from the principles of the common law.

PURPOSE

- The gross negligence standard is a middle-ground standard between simple negligence and intentional wrongdoing and is particularly appropriate in tort cases where, by definition, the injury has been caused by the criminal acts of an intervening third party, not by legitimate bystander property and business owners.

- A simple negligence standard would generate undue pressure towards a massive settlement and/or bankruptcy, yet legitimate businesses should not be forced to bankruptcy as a result of damage and injuries caused by terrorists, at least absent serious wrongdoing on the part of these legitimate businesses.

- On a forward-looking basis, a simple negligence standard for terrorism cases would inevitably discourage normal economic activity, particularly in locales that are susceptible to terrorist attacks. For similar reasons, the law of torts traditionally has established that criminal acts by an intervening agent are often so unlikely in any *particular* instance or *specific* location that the burden of taking continual precautions against them almost always exceeds the apparent risk.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 408(b) of the Air Transportation Act provides that the substantive standard for liability is to be derived from the law of the State where the incident occurred. That procedure could be unwieldy and unfair in a mass terrorism incident that occurs in multiple states.

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Terrorism Insurance - Liability: Tort Fix - Retrospective

OA/NARA#: 1825/1743
9633

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Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Terrorism Insurance - Liability: Working Group

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[Terrorism Insurance Proposals]

OA/NARA#: 1650/1518
9601

Box 57
Folder 10

CIAT COALITION TO INSURE AGAINST TERRORISM
insure against terrorism.org

July 11, 2002

The Honorable Christopher J. Dodd
Chairman
Subcommittee on Securities and Investment
Committee on Banking, Housing and Urban Affairs
U.S. Senate
534 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

As major consumers of insurance and supporters of a federal backstop for terrorism risk, we are writing to offer our thoughts on key components of S.2600 and H.R.3210 which we believe should form the basis of any compromise legislation resulting from your efforts to reconcile the two bills.

The Coalition to Insure Against Terrorism (CIAT), representing a wide range of businesses and organizations throughout the transportation, wholesale distribution, real estate, manufacturing, construction, entertainment and retail sectors, continues to be a strong supporter of enactment of a federal backstop. The events of September 11th have caused widespread dislocation in the insurance marketplace. As a result, business insurance policy holders increasingly find themselves squeezed between a constricting insurance market and creditors who expect appropriate insurance policies to be in place throughout the war on terrorism. Increasing evidence suggests that this problem, if left unaddressed, could hamper our nation's economic recovery. To this end, it is critical that Congress and the Administration put in place a temporary backstop that will restore some normalcy to the marketplace.

Specifically:

Definition of "terrorism" must be sufficiently broad to ensure insurance coverage for future terrorist attacks: CIAT prefers the "terrorism" definition contained in S.2600 as it appears to be broader than the language in H.R.3210. Moreover, CIAT remains concerned about the exclusion of domestic terrorism from coverage in the newly established federal insurance program. We encourage the conferees to revisit this issue and consider its inclusion.

Congress must enact a backstop of sufficient duration: Markets react most positively to certainty. To provide the necessary certainty, and the flexibility insurers need to price risk, we believe the backstop

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should be in place for the longest time period possible. Moreover, the Secretary of Treasury should be given significant latitude to extend the program should market conditions warrant.

Coverage must be comprehensive: Before September 11, 2001, acts of terrorism were covered under standard "all-risk" policies: this coverage included biological, and chemical events. Currently, the few terrorism policies available in the marketplace are deficient in that they exclude from coverage losses related to biological, chemical, radiological, and cyber attacks. Since these are precisely the risks that our leaders warn us of repeatedly, it is imperative that policies backstopped by the program insure these types of risks. The bill signed by the President should be absolutely clear on this point.

Individual company caps are an essential component of a workable backstop: Without the per-company caps, small to medium-sized insurers would simply not be able to write terrorism risk. Since it is possible that future terrorist attack could result in an insurer becoming insolvent before the program is triggered, many smaller insurers would opt not to participate in the program. As a result, the market would be left to a few large insurance writers resulting in less competition and continued market disruption.

Business interruption should be fully covered: CIAT prefers the definition of "business interruption (BI)" contained in H.R.3210. In the past, BI coverage routinely included lost profits. Unfortunately, the Senate language in S.2600 excludes coverage for lost profits for all except small businesses. BI insurance is not meant to be a boon for those unfortunate enough to have their businesses interrupted by acts of terrorism. Rather, the purpose for insuring against loss profits is an attempt to make a company whole after they are affected.

Sensible litigation management provisions must be included: The President has made it clear that final legislation must contain reasonable liability protections for victims of terrorism. There is strong support for such protections in both the House and Senate. CIAT supports the inclusion of balanced liability protections necessary to shield innocent victims of terrorism and ensure a presidential signature.

CIAT appreciates the tireless efforts of members of both the House and Senate to move this critical legislation to this point in the legislative process. Yet, we realize that a great deal of work remains to reconcile these two bills. To this end, we urge the immediate appointment of conferees so that important issues, like those discussed above, can be resolved and legislation can be sent to the President before the August work period.

Thank you for your support and urgent attention to these matters.

Sincerely,

The Coalition to Insure Against Terrorism

CIAT COALITION TO IN AGAINST TERRO

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Get the Facts

NEW!

The Mortgage Bankers Association of America (MBAA), a CIAT member, has found that the the lack of comprehensive and affordable terrorism insurance for commercial properties has killed an estimated $3.7 billion in deals so far this year, and has delayed or changed the pricing on another $4.5 billion. **Read more about the survey.**

- July 11, 2002: In letters to Senator Christopher Dodd (D-CT) and Rep. Michael Oxley (R-OH), the 65-member Coalition to Insure Against Terrorism offered its thoughts on key components of S.2600 and H.R. 3210 which it believes "should form the basis of any compromise legislation resulting from your efforts to reconcile the two bills." Read the **Letter to Senator Dodd** and **Letter to Representative Oxley** (PDF Documents)

- See a **Comparison of Key Features of the Terrorism Insurance Proposals** -- H.R. 3210 and S.2600 (PDF Document)

- Read our **Read our June 20 Letter to the Senate Leadership Thanking Them for Passage of S.2600** (PDF Document)

- Read our **Read our June 17 Letter to the Senate Urging Cloture and Final Passage of S.2600** (PDF Document)

- Read our **Read our June 13 Letter to the Senate Urging Passage of S.2600** (PDF Document)

- **Economic Perspectives on Terrorism Insurance** - Joint Economic Committee Report (PDF Document)

- **Issue-at-a-Glance**
  A brief look at the problem and what solution CIAT is seeking

- **Frequently Asked Questions about Terrorism Insurance**
  Learn more about CIAT, terrorism insurance and the need for federal legislation

- **Examples Illustrating the Need for Terrorism Insurance**
  From the Golden Gate Bridge to Florida homeowners, these examples clearly illustrate the need for terrorism insurance

- See Our Ads: **Vote for S.2600, Whose Problem Is It (Retail), Whose Problem Is It (Nurse), We Need To Do Something, Whose Problem Is It** and **Homeland INSecurity** (PDF Documents)

- **Read our April 18 Letter to the Senate Leadership Urging Senate Passage of a Terrorism Insurance Bill**

- **Read our February 26 Letter to Senate Leadership**
  On February 26, CIAT sent a letter to Majority Leader Daschle and Minority Leader Lott urging the Senate to address vitally needed terrorism insurance legislation

- **Read the testimony to the House Financial Services Committee**
  CIAT's statement on how much Americans are at risk until Congress passes terrorism insurance protection

- **Read the GAO's Testimony on Terrorism Insurance**
  Rising uninsured exposure to attacks heightens potential economic vulnerabilities (PDF Document)

- **Read the text of Senate Bill 2600**
  (PDF Document)

Coalition to Insure Against Terrorism
1875 Eye Street, N.W., Suite 600, Washington, DC 20006 (202) 419-3267

This web site contains PDF documents.
Download Adobe Acrobat Reader here if you do not already have it.

CIAT COALITION TO IN AGAINST TERRO

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What Others Are Saying

- **President Calls on Senate to Act on Terrorism Insurance Legislation -- Read the White House Press Release**

Why The U.S. Senate Should Pass Terrorism Insurance Legislation:

"...about two-thirds of chief financial officers in the U.S. believe their companies' domestic assets are more of a target than their assets overseas, according to a recent survey commissioned by insurance giant Lloyd's of London and conducted by Harris Interactive...Of even more significance: 64 percent of CFOs have little or no confidence in the insurance industry's ability to provide a comprehensive package to protect against any future terrorist attacks."
— "Reversal of Fortune: Terror Risk Comes Home," CFO.com, April 16, 2002

"'Lloyd's was one of the first markets to respond to U.S. customers' demand for specific terrorism coverage following September 11th,' said [Chairman] Mr. [Sax] Riley. 'However, the limited capacity that Lloyd's and other commercial insurers have available to write this business will not be sufficient in the near-term to satisfy the growing coverage gap in the United States economy.'"
— Lloyd's of London press release, April 18, 2002

"...virtually all terrorism insurance policies have some form of deficiency that leaves lenders and investors with less protection than they had prior to 9/11."
— Moody's Investor's Service, "CMBS 1Q 2002: Rocky Road to Recovery Ahead," April 18, 2002

"...the stability of the market, at least in the short term, lies in the hands of the U.S. Congress. The [Extreme Events] committee agrees that the challenges faced by the U.S. private insurance industry are daunting, and we have only seen the tip of the iceberg of the impact of Sept. 11..."
— American Academy of Actuaries, "Terrorism Insurance Coverage in the Aftermath of Sept. 11," April 18, 2002

"A recent survey by The Bond Market Association found that large lenders have placed on hold or cancelled more than $7 billion -- or 10 percent of the 2001 large loan volume - in commercial mortgage loans, citing the difficulty and expense for property owners trying to find terrorism insurance coverage."
— "Lack of Terrorism Insurance Hurts the CMBS Market," The Bond Market Association - Research, April 18, 2002

"While AIG and a number of other insurers have created a limited market for terrorism insurance in the wake of September 11, there is still an urgent need for the Federal Government to create a reinsurance backstop facility to provide the capacity to cover all businesses that could suffer terror losses. There is simply not enough capacity in the private market to address what is still an infinite risk."
— Statement of American International Group, Inc. Chairman M.R. Greenberg, April 19, 2002

"A panel of experts at the recent Risk and Insurance Management Society's annual conference told risk managers that the probability of another massive terrorist attack occurring the U.S. in the near future is 100%, according to a report by A.M. Best."
— Morgan Stanley, "Insurance - Property & Casualty," April 19, 2002

"We know that terrorists have considered attacks in the U.S. against high-profile

government or private facilities, famous landmarks and U.S. infrastructure nodes such as airports, bridges, harbors and dams."

— CIA Director George J. Tenet

"This is not an insurance industry problem or a policy holder problem — it's a national economic problem that demands a national solution. Affordable, available terrorism insurance is necessary for the economy to function efficiently."

— House Financial Services Committee Chairman Michael Oxley (R-OH)

"[Insurance for terrorist attacks is a] crucial aspect for a fairly large segment of the economy."

— Federal Reserve Chairman Alan Greenspan

"Lenders demand terrorism coverage as an absolute condition for making large-scale commitments. As a result, investment in real estate is faltering, which cannot help the country's efforts to emerge from a recession."

— Deborah Beck, Real Estate Board of New York

"...the potential for more severe economic impacts is increasing as the level of uninsured risk climbs."

— Richard J. Hillman, U.S. General Accounting Office (GAO) Director of Financial Markets and Community Investments

"...the Senate leadership's failure to act on terrorism insurance legislation is imposing a fear tax on America."

— Congresswoman Sue Kelly (R-NY)

Coalition to Insure Against Terrorism
1875 Eye Street, N.W., Suite 600, Washington, DC 20006 (202) 419-3267

CIAT COALITION TO IN AGAINST TERRO

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For Immediate Release - July 29, 2002

Contact:
Jay Hyde, NAREIT, at (202) 739-9425
Darren McKinney, NAM, at (202) 637-3093

CIAT Urges Terror Insurance Conferees To Complete Work by September 11th

Washington, D.C. — The 65-member Coalition to Insure Against Terrorism (CIAT) issued the following statement by spokesperson Martin DePoy following the appointment of House and Senate conferees for consideration of terrorism insurance legislation:

"The Coalition to Insure Against Terrorism (CIAT) welcomes the appointment of House and Senate conferees and is hopeful they can complete their work on the legislation prior to the first anniversary of the September 11th attack on America.

The process to create a short-term federal backstop for comprehensive, affordable terrorism coverage began last November with House passage of such a measure. It took another leap forward with Senate adoption of similar legislation last month. And now that both chambers have appointed conferees, the work of the Congress to reconcile differences between the two measures can begin in earnest.

As they set about their work, we urge all conferees to consider CIAT's longstanding objectives. Specifically, it is our hope that any compromise legislation will include a definition of terrorism that is sufficiently broad to ensure coverage for future terrorist attacks; that the backstop is of sufficient duration; that comprehensive coverage include losses related to biological, chemical, radiological

and cyber attacks; and that individual insurance company caps will be an essential component of any program.

In the eight months since Congress first voted on a terror insurance proposal the absence of comprehensive, affordable coverage has put an increasing number of Americans at needless risk. We ask House and Senate conferees to find common ground on those issues which divide them so that no existing or envisioned properties where Americans work, shop, visit or live will be without this essential economic protection."

###

The Coalition to Insure Against Terrorism represents a wide range of businesses and organizations throughout the transportation, real estate, manufacturing, construction, entertainment and retail sectors. These groups have banded together to speak for business insurance policyholders as part of a continuing effort to win passage of a terrorism insurance plan on Capitol Hill. Visit our web site at insureagainstterrorism.org.

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For Immediate Release - June 18, 2002

Contact:
Jay Hyde, NAREIT, at (202) 739-9425
Darren McKinney, NAM, at (202) 637-3093

Policyholders Hail Senate Approval of Terrorism Insurance Legislation

Washington, D.C. — The Coalition to Insure Against Terrorism (CIAT)today praised the U.S.Senate for its approval of legislation creating a short-term federal backstop for terrorism insurance coverage.

The Senate adopted the Terrorism Risk Insurance Act of 2002 (S.2600) on a vote of 84-14.

"CIAT appreciates the leadership of Senators Daschle and Lott,and is grateful for the active support of so many of their colleagues, in passing the measure," said Martin DePoy, vice president of government relations at the National Association of Real Estate Investment Trusts and a CIAT spokesperson. "For months now,our many members have emphasized that the absence of affordable, comprehensive terror coverage is a jobs issue, as well as an important element of the nation's homeland security."

The 60-member Coalition represents a broad group of policyholders from the transportation, real estate, manufacturing, construction, entertainment and retail sectors that have lost coverage or experienced huge increases in premiums for deficient coverage since the September 11 terrorist attacks.

"There has been little doubt about the overall merits of a federal backstop," DePoy explained. "The President of the United States and his Cabinet, the

Chairman of the Federal Reserve Board, the Joint Economic Committee and business leaders from virtually every sector of the economy agree that a backstop is a necessary ingredient in the recipe for economic recovery. In its absence, the country grows increasingly uninsured and underinsured and Americans find themselves at greater risk of catastrophic loss."

The House of Representatives passed legislation last year that would create a short-term program to cover losses caused by terrorism. The Senate's approval of S.2600 paves the way for Conference consideration of the two measures. "CIAT strongly encourages conferees to work out their differences in a timely manner for the sake of our economic security," DePoy added.

###

The Coalition to Insure Against Terrorism represents a wide range of businesses and organizations throughout the transportation, real estate, manufacturing, construction, entertainment and retail sectors. These groups have banded together to speak for business insurance policyholders as part of a continuing effort to win passage of a terrorism insurance plan on Capitol Hill. Visit our web site at insureagainstterrorism.org.

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Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 5, California.

Paul A. DOWHAL, Plaintiff and Appellant,
v.
SMITHKLINE BEECHAM CONSUMER HEALTHCARE, etc., et al., Defendants and Respondents.

No. A094460.

July 12, 2002.

Citizen, acting on behalf of the public, filed complaint against drug companies, seeking an injunction and alleging that companies placed nicotine delivery products in the stream of commerce without providing adequate pregnancy warning and that those acts constituted an unfair business practice. The Superior Court, San Francisco County, No. 305893, David A. Garcia, J., granted summary judgment to drug companies. Citizen appealed. The Court of Appeal, Jones, P.J., held that drug companies' obligation under state law to warn of reproductive toxicity of nicotine delivery products was exempted from both express and implied federal preemption.

Reversed.

Simons, J., filed a concurring opinion.

[1] Appeal and Error 0

30k0 k.

An appellate court can, but is not required to, take judicial notice of documents that were not presented to the trial court in the first instance.

[2] States 0
360k0 k.

State law that conflicts with a federal statute is without effect. U.S.C.A. Const. Art. 6, cl. 2.

[3] States 0
360k0 k.

Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress; accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis. U.S.C.A. Const. Art. 6, cl. 2.

[4] States 0
360k0 k.

Drug companies' obligation under state law to warn of reproductive toxicity of nicotine delivery products was exempted from both express and implied federal preemption under the Federal Food, Drug, and Cosmetic Act (FDCA) by the savings clause of the Food and Drug Administration Modernization Act of 1997. 21 U.S.C.A. § § 301 et seq.; 21 U.S.C.A. § 379r, subd. (d)(2); West's Ann.Cal.Health & Safety Code § 25249.6.

[5] States 0
360k0 k.

Just as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the states' coordinate regulatory role in the federal scheme.

San Francisco Superior Court, Hon. David A. Garcia.

Eric S. Somers, Mark N. Todzo, Todd E. Robins, Lexington Law Group, LLP, for plaintiff and appellant.

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James P. Bennett, Michelle B. Corash, Maria Chedid, Brooks M. Beard, Morrison & Foerster, LLP, Gene Livingston, Matthew J. Goldman, Livingston & Mattesich Law Corp., Paul D. Fogel, John E. Dittoe, Crosby, Heafey, Roach & May, for defendants and respondents.

Catherine Hanson, Astrid Meghrigian, California Medical Association, Daniel E. Troy, Chief Counsel, Lynn Whipkey Mehler, Associate Chief Counsel, Heidi P. Foster, Assistant Chief Counsel, Food and

Drug Administration, Robert D. McCallum, Jr., Assistant Attorney General, David W. Shapiro, United States Attorney, Douglass Letter, Peter R. Maier, Department of Justice, Amicus Curiae on behalf of defendants and respondents.

JONES, P.J.

*1 Appellant filed an action challenging the failure of respondents to place health warnings mandated by California's Proposition 65 on their nicotine delivery products, marketed over-the-counter as aids to stop smoking. The trial court granted summary judgment to respondents ruling that certain aspects of Proposition 65 are impliedly preempted by the Federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C. § 301 et seq.). Because the FDCA contains a provision that expressly exempts Proposition 65 from federal preemption, we will reverse the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondents in this action manufacture, market, and distribute over-the- counter products, such as gum and patches, that are designed to help people quit smoking through nicotine replacement therapy (the products). [FN1]

Originally, the products were available only by prescription. However in 1993, respondents sought Federal Food and Drug Administration (FDA) approval to sell them over the counter.

One aspect of the approval process involved labeling. The FDCA includes strict labeling rules, stating that a product is deemed to be misbranded if "its labeling is false or misleading in any particular...." (21 U.S.C. § 352, subd. (a).) Respondents' application presented a complex labeling issue because the products contain nicotine, a substance recognized by the State of California to cause reproductive toxicity. (See 22 Cal.Code Regs., tit. 22, (Regs.) § 12000, subd. (c).) On the other hand, FDA officials recognized that the purpose of the products is to help individuals stop smoking, a public health goal that should not be frustrated by overwarning. As the chairman of the FDA's nonprescription drugs advisory committee stated, "[T]his is one of the few instances where we have a product that has come before this committee that I would like lots of people to use, that I think we are underusing.... [¶] So we want to make sure that we are not introducing barriers that would prevent people from using them, and what is worse, somebody continuing to smoke or not calling their physician and talking with him .... [¶] I think, at least as I am interpreting the sense of the committee is that let's be real careful on something we want people to use more of that we don't introduce barriers that would reduce their willingness to use the product."

Partly in an effort to balance these competing concerns, the products underwent an unusually long approval process. At the conclusion of that process, the FDA approved the products for sale subject to specific labeling requirements. In each instance, the FDA mandated that the products carry the following pregnancy warning: "Nicotine can increase your baby's heart rate; ... if you are pregnant or nursing a baby, seek the advice of a health professional before using this product." [FN2] In the course of processing supplemental new drug applications in the years that followed, the FDA told respondents they "must use," "should ... use," or to "please use," the FDA approved pregnancy warning, and that "[m]arketing the product with [labeling] that is not identical to the approved labeling text ... may render the product misbranded and an unapproved new drug."

*2 Proposition 65 was approved by the voters of this state as an initiative on November 4, 1986. As is relevant here, it added section 25249.6 to the Health and Safety Code which states, "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause ... reproductive toxicity without first giving clear and reasonable warning to such individual...." The regulations adopted to implement Proposition 65 state that the required warning "must clearly communicate that the chemical in question is known to the state to cause ... birth defects or other reproductive harm." (Regs., § 12601, subd. (a).) The regulations also describe optional safe harbor warnings that are deemed to be clear and reasonable. (Regs., § 12601, subd. (b).) One of those warning states as follows, "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." (Regs., § 12601, subd. (b)(4)(B).) Finally, the regulations state that the warning may be accomplished in several ways including product labeling, store signs, and public advertising. (Regs., § 12601, subds.(b)(1)(A) through (b)(1)(C).)

In January 1997, respondent McNeil asked the FDA for permission to change the label for its product Nicotrol, to add the Proposition 65 safe harbor

warning that we have quoted. The FDA denied the request telling McNeil it "[m]ust use the labeling that was approved at the time of ... approval."

Later that same year, the United States Congress enacted the Food and Drug Administration Modernization Act of 1997 (Modernization Act of 1997). (See 111 Stat. 2296.) The Modernization Act of 1997 added a new section to the FDCA, 21 United States Code section 379r. Subdivision (a) of section 379r states, in part, "[N]o State or political subdivision of a State may establish or continue in effect any requirement--[¶] .... (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under this Act...." Section 379r also includes a narrowly focused saving clause which states, "This section shall not apply to a State requirement adopted by a State public initiative or referendum enacted prior to September 1, 1997." (21 U.S.C. § 379r, subd. (d)(2).)

In August 1999, appellant, acting on behalf of the public, filed the complaint that is at issue in the present appeal. The complaint names respondents as defendants and contains two causes of action. First, appellant alleged respondents violated Health and Safety Code section 25249.6 because they placed products that contained nicotine into the "stream of commerce" without providing an adequate pregnancy warning as is required by Proposition 65. Second, appellant alleged those same acts (failing to provide an adequate Proposition 65 pregnancy warning) constituted an unfair business practice within the meaning of Business and Professions Code section 17200 et seq. Appellant asked the court to issue an injunction precluding respondents from offering their products for sale in California without providing an adequate Proposition 65 warning.

*3 In November 1999, while the complaint was pending, the FDA granted permission to Novartis Consumer Health Care, Inc., (Novaratis) to sell a smoking cessation product called Habitrol. Although Habitrol contains nicotine and is similar in active ingredients, indication for use, and method of administration to the products at issue in this case, Habitrol carried a different FDA approved pregnancy warning. The Habitrol warning stated as follows, "Nicotine, whether from smoking or medication, can harm your baby." Novartis is not a party to this litigation.

When respondent SmithKline learned about the Habitrol pregnancy warning, it asked the FDA about its own warning. The FDA responded that it was "reviewing its position as it relates to the warnings of nicotine products concerning pregnancy and breast feeding."

In May 2000, respondents SmithKline and McNeil each wrote to the FDA, again pointing out that Habitrol carried a different pregnancy warning. Respondents also noted they were being sued by appellant who was alleging their warning was inadequate. In June 2000, the FDA responded to SmithKline that although it was reviewing its position on the pregnancy warning, SmithKline should continue to "use the current warning."

On July 11, 2000, counsel for SmithKline wrote to the FDA seeking confirmation about the pregnancy warning that was required. The FDA responded by letter 10 days later, stating that the products "must" carry the pregnancy warning that had been specified when they were approved.

In March 2001, the FDA sent a letter to SmithKline stating that even though Habitrol carried a different warning, the instructions concerning respondents' products remained unchanged. "[T]he agency is currently reviewing its position regarding the pregnancy/nursing warning on [over the counter] nicotine replacement products. [¶] ... As we have stated previously, until the agency's review is complete, all sponsors of [over the counter] nicotine replacement products should continue to use the pregnancy/nursing warning that was approved by the agency as part of their [new drug approval]. *Any additional or modified warning may render the product misbranded.*" (Italics added.)

While respondents were working with the FDA in an effort to clarify their obligation to warn, appellant filed a motion for summary adjudication. As is relevant here, appellant asked the court to rule that respondents were required under Proposition 65 to provide a pregnancy warning. Respondents opposed the motion and filed a cross-motion for summary judgment. They argued, in essence, that any obligation to warn, which they may have had under Proposition 65, was preempted by federal law.

The trial court denied appellant's motion for summary adjudication and granted respondents' motion for summary judgment, ruling that appellant's Proposition 65 claims were impliedly preempted by the FDCA. The court explained its decision as follows, "Defendants have been expressly forbidden by the federal government from using the pregnancy warnings on their products that Plaintiff contends are required by state law. [¶] Where, as here, a federal agency requires one thing in accordance with its

statutory authority, and a state statute requires another, and where both requirements cannot be satisfied simultaneously, conflict preemption exists and the state requirement must yield." In addition, the court ruled that any obligation to provide nonlabel warnings was impliedly preempted because "[r]equiring Defendants in advertising to use the same warning that FDA has expressly prohibited them from placing on their labels ... would frustrate the purpose of the FDCA...."

*4 After the court entered judgment in favor of respondents, appellant filed the present appeal.

[1] By letter dated August 17, 2001, while this appeal was pending, the FDA responded to a citizen's petition appellant had filed with the agency on August 2, 2000. [FN3] The FDA said it was "grant[ing] [appellant's] request for a consistent pregnancy warning for all [over the counter nicotine replacement therapy] drug products that clearly and reasonably communicates all of the known harm and conveys the relative reproductive harm of smoking, use of [nicotine replacement therapy] drug products, and total abstinence from nicotine." The FDA proposed that all nicotine replacement products, including the products at issue and Habitrol, bear the following uniform pregnancy warning: "If you are pregnant or breast-feeding, only use this medicine on the advice of your health care provider. Smoking can seriously harm your child. Try to stop smoking without using any nicotine replacement medicine. This medicine is believed to be safer than smoking. However, the risks to your child from this medicine are not fully known." The agency denied appellant's request that it require a warning similar to the "harm your baby" warning on Habitrol.

II. DISCUSSION [FN4]

Appellant contends the trial court erred when it ruled that respondents' obligation to warn under Proposition 65 was impliedly preempted by the FDCA.

[2][3] The supremacy clause of Article VI of the United States Constitution grants to the Congress the power to preempt state law. [FN5] It is axiomatic then that state law that conflicts with a federal statute is " 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (*Cipollone*), quoting *Maryland v. Louisiana* (1981) 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576.) It is equally well established that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.' " (*Cipollone,* at p. 516.) "Accordingly, ' "[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis." (*Ibid.*)

The United States Supreme Court has explained that federal preemption arises in three circumstances. "First, Congress can define explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation] and when Congress has madeits intent known through explicit statutory language, the courts' task is an easy one. [¶] Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' [Citation.] Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: 'Where ... the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' [Citations.] [¶] Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65, fn. omitted.)

*5 The first category above is described as "express preemption," while the second and third categories fall under the rubric of "implied preemption." (*Choate v. Champion Home Builders Co.* (10th Cir.2000) 222 F.3d 788, 792 (*Choate*).)

Here, the trial court ruled respondents' obligation to warn under Proposition 65 was impliedly preempted under the third category. Noting that respondents were "expressly forbidden by the federal government from using the pregnancy warnings ... required by state law," the court concluded the requirements of

both the FDA and Proposition 65 "cannot be satisfied simultaneously...." In addition, the court ruled that any obligation to provide nonlabel warnings was impliedly preempted because "[r]equiring [respondents] in advertising to use the same warning that FDA has expressly prohibited them from placing on their labels ... would frustrate the purpose of the FDCA...."

[4] We turn then, to the pivotal issue in this case: whether the trial court ruled correctly when it held that respondents' obligation to warn under Proposition 65 was impliedly preempted by the FDCA.

To answer this question we focus on what we believe is the controlling statute. The Modernization Act of 1997 had many purposes, one of which was to establish "national uniformity for nonprescription drugs." (See 111 Stat. 2374.) This goal was accomplished by adding 21 United States Code section 379r to the FDCA, subdivision (a) of which states, in part, "[N]o State or political subdivision of a State may establish or continue in effect any requirement ... [¶] (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under this Act...."

The broad language preempting state laws concerning nonprescription drugs is subject to a narrow exception related to state voter initiatives. 21 United States Code section 379r, subdivision (d)(2) states, "This section shall not apply to a State requirement adopted by a State public initiative or referendum enacted prior to September 1, 1997."

Proposition 65, by its terms, mandates warnings that are "different from" and "not identical with" those called for under the FDCA, and thus it comes within the scope of 21 United States Code section 379r, subdivision (a). However Proposition 65 was adopted by the voters of this state as a public initiative in November 1986, and therefore it comes within the saving clause set forth in 21 United States Code section 379r, subdivision (d)(2). As far as we can determine, Proposition 65 is the *only* state initiative or referendum covered by this saving clause.

These two subdivisions, read together, clearly articulate Congress's intent. While state laws governing nonprescription drugs are generally preempted by the FDCA, Proposition 65 is not preempted.

Our reading of 21 United States Code section 379r is confirmed by the legislative history of the statute. Statements made by individual legislators can "provide evidence of Congress'[s] intent" (*Brock v. Pierce County* (1986) 476 U.S. 253, 263, 106 S.Ct. 1834, 90 L.Ed.2d 248), and here, the Congressional Record confirms that Congress intended to exempt Proposition 65 from federal preemption. During the floor debates that led up to the enactment of the statute, Vermont Senator James Jeffords stated, "Now, the States have had authority to move into this area....You have to remember they have had this authority forever, I guess, and only one State has taken it upon themselves to really do anything in this area to try and solve the problem ... [¶] What did we do? *We said, 'OK, California, fine, we will not get involved with preempting you with respect to your laws that are on the books. We will allow those laws to stand. The FDA can work around that.*" (Remarks of Sen. Jeffords, 143 Cong. Rec. S8851-01, S8857 (Sept. 5, 1997), italics added.)

*6 During those same debates, California Senator Barbara Boxer stated, "*Finally, I want to thank Senators GREGG and JEFFORDS for working with me to ensure that California's proposition 65 will not be preempted by the uniformity provisions of this bill.* California's proposition 65 was passed by California voters in 1986 and requires that persons who expose others to certain levels of carcinogens or reproductive toxins give a clear and reasonable warning. [¶] Proposition 65 has successfully reduced toxic contaminants in a number of consumer products sold in California and it has even led the FDA to adopt more stringent standards from some consumer products.... *So I am very pleased that the FDA reform bill now being debated will exempt California's proposition 65.* " (Remarks of Sen. Boxer, 143 Cong. Rec. S9811-04, S9843 (Sept. 24, 1997), italics added.)

The statements we have quoted reinforce our interpretation of 21 United States Code section 379r. Congress clearly did not intend to preempt Proposition 65 under the FDCA. Since "Congress has made its intent known through explicit statutory language, [our] task is an easy one." (*English v. General Electric Co., supra,* 496 U.S. at p. 79.) The trial court erred when it ruled Proposition 65 was preempted by the FDCA.

Respondents do not dispute our interpretation of 21 United States Code section 379r. They concede that under the plain language of that statute, Proposition 65 is not expressly preempted by the FDCA. [FN6] However, respondents contend the expression of legislative intent set forth in the language of the saving clause avoids *express* preemption only, and

has no bearing on implied conflict preemption analysis. According to respondents, *implied* conflict preemption arises from operation of the supremacy clause and turns on the existence of an actual conflict. Here, various actions taken by the FDA prevented them from complying with Proposition 65. Because compliance with both the state Proposition 65 and federal FDA directives are a physical impossibility, Proposition 65 is *impliedly* preempted under the doctrine of implied conflict preemption. This is so despite an explicit statement of Congressional intent to the contrary.

We reject the argument. Respondents have not cited, and we are not aware of, any case that holds a court can ignore Congress's clearly articulated and directly applicable *express* intent to preempt, (or as here, to "save" a particular state statutory scheme from preemption) based on an analysis of what Congress *impliedly* intended to do. We will not be the first.

Respondents base their argument primarily on language taken from a recent Supreme Court case, *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (*Geier*). In *Geier,* the plaintiff was injured when the car she was driving struck a tree. She sued Honda, arguing the car was negligently designed because it lacked a driver's side air bag. The issue on appeal was whether plaintiff's common law tort claim was preempted by the National Traffic and Motor Vehicle Safety Act of 1966 (the Act). The court ruled first that the Act's express preemption clause [FN7] did not apply to the plaintiff's suit. (*Geier, supra,* 529 U.S. at pp. 867-868.) The court was then required to determine whether a saving clause contained in the Act [FN8] precluded the application of ordinary implied preemption principles. The court said it did not, explaining, "We ... conclude that the saving clause ... does *not* bar the ordinary working of conflict pre-emption principles. [¶] Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words '[c]ompliance' and 'does not exempt,' ... sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one.... It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under [the] Act." (*Geier,* at pp. 869-870.)

*7 Respondents interpret this passage as meaning that a saving clause can never preclude the application of implied preemption principles. This interpretation ignores the context of the Supreme Court's statement. The court in *Geier* ruled that the *particular* saving clause at issue did not preclude the application of implied preemption principles. It did not purport to establish some sort of all encompassing rule. This is made clear by the court's analysis. The court said an implied preemption analysis was *not* precluded because "[n]othing in the language of the saving clause suggest[ed] an intent to save state-law tort actions that conflict with federal regulations." (*Geier, supra,* 529 U.S. at p. 869.) Here we are faced with precisely the opposite situation. The saving clause set forth in 21 United States Code section 379r, subdivision (d)(2), not only "suggests" an intent to save some state law claims, it clearly articulates an express intent to save the precise types of claims that are issue in this case. The portion of *Geier* upon which respondents rely is not controlling.

Next, respondents rely on a passage from *Geier* where the court said that the "pre-emption provision, by itself, does not foreclose (through negative implication) 'any possibility of implied [conflict] pre-emption....' " (*Geier, supra,* 529 U.S. at p. 869.) Respondents cite this language as supporting the conclusion that an implied preemption analysis is required in all cases. However, the Supreme Court's statement must be read in the context of the case in which it was made. In *Geier,* the court was faced with a preemption clause that *did not apply* to the claim at issue. (*Id.* at pp. 867- 868.) Thus, the quote, read in context, simply stands for the proposition that an *inapplicable* preemption clause does not preclude the possibility of implied conflict preemption. (See *Choate, supra,* 222 F.3d at p. 794, fn. 8 [interpreting *Geier* this same way].) Here, we are called upon to determine the effect of a clearly applicable saving clause. The quoted language from *Geier* is inapposite.

Finally, respondents rely on language from *Geier* where the court said that "conflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent. [Citations.]" (*Geier, supra,* 529 U.S. at p. 884.) We have no quarrel with this language or the legal principle it describes. It simply stands for the proposition that there can be implied preemption even where Congress did not expressly articulate its intent. Here, we are faced with the very different situation where Congress has expressed its intent,

clearly and specifically. The language quoted cannot reasonably be read to support the conclusion that courts may ignore Congress's clearly articulated intent by applying an implied intent analysis.

[5] In sum, based on our analysis of 21 United States Code section 379r, we conclude the FDCA does not preempt Proposition 65. "Just as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme." (*California v. FERC* (1990) 495 U.S. 490, 497, 110 S.Ct. 2024, 109 L.Ed.2d 474.)

*8 Our concurring colleague believes that Congress's express intention to save Proposition 65 from preemption is essentially irrelevant. According to the concurrence, "[s]imply because Congress insulated Proposition 65 from the express preemption clause does not mean that conflict preemption does not apply." (Conc.opn., p. 5.) We respectfully disagree.

The concurrence bases its argument on language contained in several recent cases that apply federal conflict preemption. (See *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (*Buckman*); *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (*Medtronic*); and *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (*Freightliner*).) However, none of those cases dealt with preemption in a factual context similar to that presented here. Rather, the issue in each case was the scope of federal preemption where express preemption *did not* apply. Specifically, the court in *Buckman* declined to determine whether the express preemption clause at issue was applicable. (*Buckman,* at p. 348, fn. 2.) The same is true of *Medtronic;* the court declined to determine whether an express preemption clause applied. (*Medtronic,* at p. 503.) In *Freightliner,* the court ruled the express preemption clause at issue was inapplicable. (*Freightliner,* at p. 286.) In our view, language contained in those cases is not controlling here. Unlike the courts in *Buckman, Medtronic, and Freightliner,* we are called upon to determine the effect of a directly applicable saving clause that clearly expresses Congress's intent.

Similarly, the concurrence relies on language contained in *Nathan Kimmel, Inc. v. Dowelanco* (9th Cir.2002) 275 F.3d 1199 (*Kimmel*) and *Choate, supra,* 222 F.3d 788. (Conc.opn., p. 2.) But once again, the court in *Kimmel* declined to determine whether the express preemption clause at issue applied, while the *Choate* court found the express preemption clause to be inapplicable. (*Kimmel,* at p. 1204; *Choate,* at p. 794.) Those cases are not persuasive where, as here, we are faced with a clearly and directly applicable saving clause.

The concurrence also suggests it would be anomalous for Congress to enact a federal law that would allow state law conflicts to exist. (Conc.opn., p. 3.) The concurrence relies on language from *Geier* where the court stated, "Why ... would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates...." (*Geier, supra,* 529 U.S. at p. 871.)

Considered in context, we see no reason to read the language quoted as anything more than a comment on the specific safety standard at issue in *Geier.* Moreover, we think it is apparent why Congress would allow Proposition 65 to conflict with otherwise applicable Federal law. Congress was not writing on a blank slate when it decided to impose nationwide labeling uniformity for nonprescription drugs as part of the Modernization Act of 1997. At that point, Proposition 65 had been in effect for many years, and it had proven to be highly effective. As Senator Boxer explained, Proposition 65 had "successfully reduced toxic contaminants in a number of consumer products sold in California and it [had] even led the FDA to adopt more stringent standards [for] some consumer products...." (Remarks of Sen. Boxer, 143 Cong. Rec. S9811-04, S9843, Sept. 24, 1997.) We do not find it unusual that Congress would allow a longstanding and highly effective state law to remain in effect even though it might conflict with otherwise applicable federal law.

*9 Finally, we must comment upon respondents' argument that if at any relevant time they failed to comply with the FDA's repeated directives to use only FDA mandated warnings, they faced sanctions for misbranding. Respondents urge that the FDA's position has consistently made it impossible to comply with both Proposition 65 and the FDCA, and suggest it would be unfair to hold them liable under such circumstances. We need not resolve this controversy. We do observe, nevertheless, that respondents' attempts to comply with their state obligations under Proposition 65 have been hindered by a federal bureaucracy that, at least since the enactment of the Modernization Act of 1997, was either unwilling or unable to recognize the limited scope of its authority. It also appears that respondents

were further hindered by the FDA's admitted failure to issue "definitive advice" about what it deemed to be an appropriate warning label until its August 17, 2001 letter in response to appellant's citizen's petition. We must leave for another day the issue of whether respondents' efforts to satisfy the FDA limit or preclude their liability [FN9] under Proposition 65. [FN10]

III. DISPOSITION

The judgment is reversed. Costs to appellant.

I concur: STEVENS, J.

SIMONS, J., Concurring.

I agree that the judgment must be reversed. However, I respectfully disagree with my colleagues' constitutional analysis. I cannot accept the majority's decision that Congress has excepted the requirements imposed by Proposition 65 [FN1] not only from the express preemption clause but also from the operation of conflict preemption. I would find that Congress did no more in section 412 of the Food and Drug Administration Modernization Act of 1997 (Modernization Act of 1997) (21 U.S.C. § 379r) than save Proposition 65 from the uniformity provisions, while leaving intact the ban on actual conflicts between state and federal law. I would nevertheless reverse the judgment on the ground that no actual conflict has been demonstrated here.

I. PREEMPTION

The relatively clear language of the supremacy clause (U.S. Const., art. VI, cl.2) has generated a considerable jurisprudence on the question of federal preemption of state law. The United States Supreme Court has noted three different categories of preemption. "State action may be foreclosed by express language in a congressional enactment [citation], by implication from the depth and breadth of a congressional scheme that occupies the legislative field [citation], or by implication because of a conflict with a congressional enactment [citation]." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532.) In the last decade, the high court has struggled with the relationship between express and conflict preemption. That is, to the extent that a federal statute expressly addresses the scope of preemption, is there any place for an implied conflict preemption rule? Since the high court's most recent pronouncements on this subject clearly answer this question in the affirmative, I believe the majority's analysis of the manufacturers' conflict preemption argument is flawed.

***10** In *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407, the high court seemed to hold that an express preemption provision precludes the existence of implied preemption: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." In *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 288, 115 S.Ct. 1483, 131 L.Ed.2d 385, however, the court clarified its holding in *Cipollone* and held that an express preemption provision, by itself, does not foreclose, through negative implication, any possibility of implied conflict preemption. (Accord, *Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 869, 120 S.Ct. 1913, 146 L.Ed.2d 914 (*Geier*).) This conclusion was underscored in *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 503, 116 S.Ct. 2240, 135 L.Ed.2d 700, in which the high court recognized that a state statute left untouched by an express preemption clause might still be preempted under conflict preemption analysis. (See *Nathan Kimmel, Inc. v. Dowelanco* (9th Cir.2002) 275 F.3d 1199, 1204 ["We need not determine the exact length of the preemptive shadow cast by the express language of [the statute], however, because ordinary conflict preemption principles dictate that [the plaintiff's] state law claim is *impliedly* preempted by [the Federal Insecticide, Fungicide, and Rodenticide Act]."]; Scordato, *Federal Preemption of State Tort Claims* (2001) 35 U.C. Davis L.Rev. 1, 17-18.)

Under the preemption doctrine, a "saving" clause is a statutory provision that restricts the ambit of federal preemption. In recent years, the high court has considered the relationship between such clauses and conflict preemption and has concluded that the existence of a saving clause does not preclude "the ordinary working of conflict pre-emption principles." (*Geier, supra,* 529 U.S. at p. 869.) In sum, in determining whether a state law is preempted by a federal provision, the current view of the United States Supreme Court is that the state law is subject to an implied conflict analysis, even if the applicable federal law contains express preemption and saving clauses. (*Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, 352, 121 S.Ct. 1012, 148 L.Ed.2d 854; *Geier, supra,* 529 U.S. at p. 869; see also *Nathan Kimmel, Inc. v. Dowelanco, supra,* 275 F.3d at p. 1204; *Choate v. Champion Home Builders*

Co. (10 Cir.2000) 222 F.3d 788, 794.)

The high court has acknowledged the possibility that Congress *could* insert a saving clause that eliminates conflict as well as express preemption. (*Geier, supra,* 529 U.S. at p. 872.) It is no exaggeration to say, however, that the court conveyed substantial skepticism about Congress's interest in ever doing so: "Why, in any event, would Congress not have wanted ordinary pre- emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates.... [I]t would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect." (*Geier,* at pp. 871-872.) "[O]ne can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." (*Id.* at p. 885.) Neither the dissenting nor the majority opinion in *Geier* cited any case in which a saving clause was so construed. Similarly, neither the parties to this appeal nor my colleagues in their majority opinion have found any such case. [FN2] The United States Supreme Court, in fact, has consistently refused to interpret a saving clause broadly when to do so would permit a state enactment to conflict with a carefully devised regulatory scheme. (*Geier,* at pp. 873-874; *United States v. Locke* (2000) 529 U.S. 89, 106-107, 120 S.Ct. 1135, 146 L.Ed.2d 69; *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) 524 U.S. 214, 227-228, 118 S.Ct. 1956, 141 L.Ed.2d 222; *International Paper Co. v. Ouellette* (1987) 479 U.S. 481, 493-494, 107 S.Ct. 805, 93 L.Ed.2d 883; see also *Wyoming v. U.S.* (10th Cir.2002) 279 F.3d 1214, 1234-1235 [saving clause within the National Wildlife Refuge System Improvement Act did not permit state regulation which conflicted with its purpose].)

***11** With that framework in mind, I turn now to the federal law at issue. The Food, Drug and Cosmetic Act (FDCA) was enacted to protect the public from deleterious, adulterated and misbranded items, including over-the-counter drugs. (*United States v. Walsh* (1947) 331 U.S. 432, 434; , 67 S.Ct. 1283, 91 L.Ed. 1585 21 U.S.C. § 331(b).) To protect consumers from dangerous products, the FDCA requires, among other things, that drugs and devices be labeled with warnings of the risks to the user's health. (21 U.S.C. § 352(f); see generally *United States v. Sullivan* (1948) 332 U.S. 689, 696- 697, 68 S.Ct. 331, 92 L.Ed. 297 [sulfathiazole tablets]; *Papike v. Tambrands, Inc.* (9th Cir.1997) 107 F.3d 737, 739 [tampons].) Moreover, the FDCA prohibits labels on drugs and devices that are "false or misleading." (21 U.S.C. § 352(a).)

Prior to the Modernization Act of 1997, the FDCA contained no express preemption clause. States were free to require labels different from those mandated by the Food and Drug Administration so long as those warnings did not actually conflict with federal requirements. (*Savage v. Jones* (1912) 225 U.S. 501, 529-539, 32 S.Ct. 715, 56 L.Ed. 1182 [state labeling requirement held nonconflicting and valid]; cf. *McDermott v. Wisconsin* (1913) 228 U.S. 115, 131-137, 33 S.Ct. 431, 57 L.Ed. 754 [state labeling requirement in conflict with federal standards held invalid].) There is no dispute that, with the enactment of the Modernization Act of 1997, Congress expressly intended to establish national uniformity for labeling of nonprescription drugs and to preempt state law with respect to labeling: "[N]o State ... may establish or continue in effect any requirement--[¶] ... [¶] (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under [the FDCA]." (21 U.S.C. § 379r(a)(2).) The dispute in this case concerns not Congress's intent to preempt state law but its intent to *save* Proposition 65 from this preemption.

Congress carved out of the express preemption clause an exception for certain state initiatives: "*Except as provided in subsection ... (d),*" no state may impose requirements that differ from, add to, or are not identical to federal requirements. (21 U.S.C. § 379r(a), italics added.) Section 379r(d), in turn, provides: "This section shall not apply to a State requirement adopted by a State public initiative or referendum enacted prior to September 1, 1997." Proposition 65 comes within this exception and is apparently the only state initiative to qualify. [FN3] There is no doubt that this saving clause permits California, when acting pursuant to Proposition 65, to require label warnings that differ from, add to, or are otherwise not identical to the label requirements imposed under the FDCA. I cannot accept, however, the majority's conclusion that this saving clause further permits California to impose labeling requirements that actually conflict with federal requirements.

My colleagues conclude that because it is clear that Congress enacted an express preemption clause (creating uniformity) and then expressly saved Proposition 65 from the uniformity requirements, it is inappropriate to search for an implied legislative intent to retain actual conflict preemption. They say:

"Respondents have not cited, and we are not aware of, any case that holds a court can ignore Congress's clearly articulated and directly applicable *express* intent to preempt, (or as here, to 'save' a particular state statutory scheme from preemption) based on an analysis of what Congress *impliedly* intended to do. We will not be the first." (Maj. opn., *ante,* at p. 11.)

*12 This analysis seems to ignore the post-*Cipollone* decisions discussed above. Simply because Congress insulated Proposition 65 from the express preemption clause does not mean that conflict preemption does not apply. Of course, under *Geier,* Congress could express an intent to reverse the normal operation of the supremacy clause and permit conflicting state law to reign supreme, a prospect the high court viewed as unlikely. But the majority does not rely on any textual analysis of either the preemption or the saving clause (21 U.S.C. § 379r) to indicate such a congressional intent.

Certainly nothing in the saving clause warrants a conclusion that Congress wished to bypass the conflict preemption doctrine. In my view, the scope of the saving clause coincides with the scope of the preemption clause. That is, the express preemption clause imposes "national uniformity for nonprescription drugs" (21 U.S.C. § 379r; Pub.L. No. 105-115 (Nov. 21, 1997) 111 Stat. 2296, § 412), and the saving clause creates an exception for California, acting through Proposition 65. As a matter of logic, the saving clause for Proposition 65 does nothing more than serve as a shield, protecting Proposition 65 from the effects of the uniformity provisions of the Modernization Act of 1997. The majority points to no language in the two clauses, and I find none, that permits California to act so as to frustrate any statutory purpose other than uniformity. (See *United States v. Locke, supra,* 529 U.S. at p. 106.) In my view, Proposition 65 remains limited by the doctrine of conflict preemption and may not interfere with the congressional purpose expressed in the FDCA of protecting the consumer from dangerous or misbranded products.

This interpretation of the saving clause does not render it ineffectual. To the contrary, unlike any other state, California (when acting pursuant to Proposition 65) is entitled to adopt warnings different from as well as additional to those required by federal law. Unlike other states, the only limitation California faces is that these warnings may not actually conflict with the FDCA. Proposition 65 is saved by being left precisely where it was before the uniform labeling law of the Modernization Act of 1997 took effect, allowed to impose different, but not conflicting requirements.

My colleagues rely on the comments of Senators Boxer and Jeffords to support their interpretation. Without quarreling with the propriety of relying on such statements, I believe these particular remarks provide little support to their construction. In the portion of Senator Boxer's remarks emphasized by the majority, she is quoted as thanking other Senators "*for working with me to ensure that California's proposition 65 will not be preempted by the uniformity provisions of this bill* " and "*So I am very pleased that the FDA reform bill now being debated will exempt California's proposition 65.*" (Remarks of Sen. Boxer, 143 Cong.Rec. S9811-04, S9843 (Sept. 24, 1997); maj. opn., *ante,* p. 10.) These remarks do not suggest that Senator Boxer believed she had not only managed to fend off the uniformity requirements but had *also succeeded* in eliminating the narrow conflict preemption limitation the initiative had always faced. In fact, in remarks between the ones quoted by my colleagues, Senator Boxer lauds the accomplishments of the proposition: "Proposition 65 has successfully reduced toxic contaminants in a number of consumer products sold in California and it has even led the FDA to adopt more stringent standards for some consumer products." (Remarks of Sen. Boxer, at p. S9843.) These hardly sound like the words of someone who thought it was necessary to change the legal landscape under which the proposition had been functioning.

*13 The remarks of Senator Jeffords must be considered in context. He and Senator Kennedy apparently disagreed about the uniformity provisions relating to the labeling or packaging of *cosmetics.* On September 5, 1997, when the quoted remarks were made (see maj. opn., *ante,* p. 10), this provision as it was then worded, [FN4] concerned Senator Kennedy because it precluded states from enacting legislation to protect their citizens. He described California as being "grandfathered in" (that is protected from the *upcoming* regulatory change) and sought a similar status for Massachusetts and other states. (Remarks of Sen. Kennedy, 143 Cong.Rec. S8851-01, S8860 (Sept. 5, 1997).) Though they preceded the comments of Senator Kennedy, the remarks of Senator Jeffords seem responsive to that concern: i.e., only California had acted in the past to deal with cosmetics and therefore it had received special protection from *future* preemption. (Remarks of Sen. Jeffords, 143 Cong.Rec. S8851-01, S8857 (Sept. 5, 1997).) Senator Jeffords, like Senator Boxer, never alluded to changing the ground rules Proposition 65 faced before the Modernization Act of 1997.

II. PROPOSITION 65 IS NOT PREEMPTED

Having concluded that the doctrine of conflict preemption applies despite the existence of the saving clause, I now turn to the determinative question whether Proposition 65 actually conflicts with federal law. The long- established rule is that an actual conflict between state and federal law will be found either where it is impossible for a private party to comply with both state and federal standards or where under the circumstances of a particular case the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372-373, 120 S.Ct. 2288, 147 L.Ed.2d 352.) As I see it, the principal question requiring analysis here is the latter--whether federal purposes would be thwarted by requiring Proposition 65 compliant language on either packaging labels or point of sale signs. [FN5]

What constitutes a sufficient obstacle to the fulfillment of Congress's objectives so as to create a conflict is "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." (*Crosby v. National Foreign Trade Council, supra,* 530 U.S. at p. 373.) Consideration must also be given to whether state law is an obstacle to the goals expressed in the administrative regulations issued by the agency charged with implementing the federal statute. (*Geier, supra,* 529 U.S. at pp. 874-886 [state tort lawsuit held preempted by vehicle safety regulation issued by the federal Department of Transportation].) In my judgment, Proposition 65 poses no obstacle to the purposes and intended effects of the FDCA or its implementing regulations. *Geier* instructs that "a court should not find pre-emption too readily in the absence of clear evidence of a conflict." (*Geier,* at p. 885.) I find no such evidence here.

***14** As already indicated, a principal purpose of the FDCA is to protect consumers from dangerous products by requiring warnings of the risks to the user's health. (21 U.S.C. § 352(f).) Proposition 65 has the same objective, to give adequate warning to consumers. (Health & Saf.Code, § 25249.6.) Compliance with Proposition 65 would not frustrate the full-notice objective of the FDCA. (Cf. *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby, supra,* 958 F.2d at p. 950 [no conflict between Proposition 65 and Federal Hazardous Substances Act].)

Of course, the newly-added congressional purpose of establishing national uniformity in the labeling of nonprescription drugs (21 U.S .C. § 379r) would be thwarted by state-imposed warnings that are different from the warnings required by the FDCA. But Congress has excepted Proposition 65 from the uniform labeling requirement. (21 U.S.C. § 379r(a), (d)(2).) By expressly allowing California, through Proposition 65, to require labeling that differs from or adds to the labeling required by the FDCA, Congress has nullified any argument that its goal of uniformity would be thwarted by enforcement of Proposition 65. Past assertions by the Food and Drug Administration (FDA) notwithstanding, the mere fact that a proposed warning differs from or adds to the its mandated warning cannot render the product "misbranded."

Another purpose of the FDCA is to protect consumers by ensuring that the labels on drugs and devices are not "false or misleading." (21 U.S.C. § 352(a).) To that end, the FDA regulations require that labeling on over-the- counter drugs be "clear and truthful in all respects." (21 C.F.R. § 330.10(a)(4)(v) (2001).) Labeling must include warnings expressed "in such terms as to render them likely to be read and understood by the ordinary individual, including individuals of low comprehension, under customary conditions of purchase and use." (*Ibid.*) There is nothing in Proposition 65 inconsistent with that federal objective. Proposition 65 requires a "clear and reasonable" message when a product contains a chemical known to cause cancer or birth defects or reproductive harm. (Health & Saf.Code, § 25249.6.) Under state regulations implementing Proposition 65, for consumer products that contain a chemical known to the state to cause reproductive toxicity, a warning in the following language is deemed clear and reasonable: "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." (Cal.Code Regs., tit. 22, § 12601, subd .(b)(4)(B).) The state regulations require that the message be displayed so that it "is likely to be read and understood by an ordinary individual under customary conditions of purchase or use." (Cal.Code Regs., tit. 22, § 12601, subd. (b)(3).)

In a lawsuit filed under Proposition 65, a plaintiff is not required to persuade the court that a particularly worded warning is appropriate. [FN6] Rather, a plaintiff's burden is to demonstrate that a defendant's warning fails to comply with that law's requirements. For this reason, respondents' preemption defense can succeed only if all possible consumer product warnings that would satisfy Proposition 65 actually conflict with the federal standards. (*Comm. of Dental Amalgam Mfrs. & Distribs. v. Stratton* (9th Cir . 1996) 92 F.3d 807, 810; *Chemical Specialties Mfrs.*

Ass'n, Inc. v. Allenby, supra, 958 F.2d at p. 943; People ex rel. Lungren v. Cotter & Co., supra, 53 Cal.App.4th at p. 1393, 62 Cal.Rptr.2d 368.) The state regulations implementing Proposition 65 provide that warnings other than the safe harbor warnings are not precluded as long as the message clearly conveys that the chemical in question is known to cause cancer or birth defects or reproductive harm. (Cal.Code Regs., tit. 22, § 12601, subd. (a).)

*15 The respondents argue, however, that the warning prescribed by the FDA for nicotine replacement therapy (NRT) products establishes a ceiling as well as a floor and that the FDA has prohibited any Proposition 65 warning. This argument is premised on the notion that all possible Proposition 65 warnings would interfere with the FDA's stated policy against overwarning consumers about the risks inherent in NRT products, because this overwarning would discourage consumers from trying to stop smoking.

Respondents have not presented any formal FDA regulation on overwarning. Respondents point to a variety of less formal sources, which, they contend, establish its determination that Proposition 65 warnings constitute overwarning: (1) numerous letters exchanged between the FDA and the respondents, from 1996 through 2001, in which it rejected requests to permit the addition of certain supplemental warnings on NRT products; (2) a letter from the FDA to the California Attorney General, dated June 5, 1998, in which it rejected a request to compel the respondents to add the Proposition 65 safe harbor warning to their products; and (3) the August 17, 2001 FDA response to appellant's citizen petition (the Response), denying appellant's request to add a particular Proposition 65 warning to the products. Respondents' contention is unavailing.

The correspondence between the FDA and respondents was entirely too informal to establish a policy that would justify invoking the supremacy clause to invalidate a state law. The FDA letters seem to be nothing more than a formulaic response directing the manufacturers not to act while a review of the issue was conducted. In fact, in its amicus curiae brief, the FDA acknowledges that the correspondence between it and the manufacturers did not constitute a formal directive or set out a definitive FDA policy on proper warnings.

The FDA's letter to the California Attorney General, by its own terms, rejects only the Proposition 65 safe harbor warning. Moreover, the stated rationale for this conclusion, that the data justifies a warning only that nicotine may increase fetal heart rate, was specifically disavowed by it in the August 2001 Response.

The Response makes no determination that all Proposition 65 warnings conflict with an FDA policy on overwarning. It expresses a concern about any warning that discourages consumer use of NRT products. The FDA determined that consumers might be misled by a warning that contains the phrase "[n]icotine ... *can harm* your baby." Its criticism was directed, however, only at the specific warning proposed by appellant in his citizen petition, which was patterned after the Habitrol warning ["If pregnant or breast-feeding, ask a health professional before use. Nicotine, whether from smoking or medication, can harm your baby. First try to stop smoking without the patch."]. In the FDA's view, the Habitrol warning urged by appellant exaggerates the certainty and dimension of the harm by equating the harm resulting from NRT products with the harm resulting from smoking. Nothing in the Response provides "clear evidence" that the FDA would find all warnings that comply with Proposition 65 to be insufficient or confusing.

*16 It seems more consistent with the language of the Response to view the FDA's concern about overwarning as a corollary of its objective of ensuring clear and accurate labeling. (21 U.S.C. § 352(a); 21 C.F.R. § 330.10(a)(4)(v) (2001).) In its Response, the FDA recognized the particular problems posed by NRT products when fashioning an adequate statement of the risks to the user: "NRT drug products pose significant challenges as compared to other [over-the-counter] drugs as they are indicated to break the addiction to smoking, a condition that is known to cause harm. When determining the proper labeling for these products, the [FDA] is faced with the difficult task of relaying the relative risks of the potential harm from NRT products versus the known harm caused by the continued use of tobacco products. [¶] ... [¶] ... The complexity of the data regarding exposure to nicotine during pregnancy and the relative risks of smoking versus use of NRT products are not easily translated to consumer friendly language on an [over-the-counter] package."

To be sure, a warning imposed by Proposition 65 that is *inaccurate* and misstates the risks of an over-the-counter drug would violate federal standards and be preempted. The manufacturers assert that any Proposition 65 warning would be false because NRT products are not truly "known" to cause reproductive

harm. But this argument misstates the nature of the Proposition 65 warning. Proposition 65 does not require warnings about the harm of using particular products; the Proposition 65 warning is that the product contains a *chemical* known to cause reproductive harm. There is no dispute that the NRT products contain nicotine and that nicotine is linked to reproductive harm. California law explicitly recognizes a causative relationship (Cal.Code Regs., tit. 22, § 12000, subd. (c)), and, as evidenced by this record, California relied upon information obtained from the FDA as a basis for listing nicotine as a reproductive toxin. (See Cal.Code Regs., tit. 22, § § 12000, subd. (a), 12306, subd. (*l*)(4).) Even in its most recent communiqué, based on current data, the FDA continues to recognize a causative connection between nicotine and reproductive harm, although it is unable to quantify the precise contribution of nicotine to reproductive toxicity. [FN7] In its Response, the FDA explained: "[C]hronic nicotine exposure may represent some risk in humans for embryo-fetal lethality.... While smoking has clearly been associated with fetal harm, the contribution of nicotine has not been clearly delineated.... [¶] ... [¶] ... [C]igarette smoking results in the exposure of the fetus to a number of harmful substances, and it is impossible to ascertain the exact contribution of nicotine to the harm caused by smoking."

The FDA's recognition of the possibility of harm from nicotine is further evidenced in the newly-mandated label announced by the FDA in its Response: "**If you are pregnant or breast-feeding, only use this medicine on the advice of your health care provider.** Smoking can seriously harm your child. Try to stop smoking without using any nicotine replacement medicine. This medicine is believed to be safer than smoking. However, the risks to your child from this medicine are not fully known." (Boldface type in original.) The admonition that consumers should try to avoid using the product and use the product only with a doctor's advice, together with the statement that the risks of NRT products are not fully known, reflect the FDA's assessment that nicotine indeed may cause harm.

***17** There is no apparent reason why the new FDA-mandated warning could not be supplemented with the simple insertion, after the first sentence of that warning, of a statement, consistent with Proposition 65, acknowledging the risk that nicotine may cause fetal harm. This supplemental information about nicotine would in no way undermine the congressional goal of protecting consumers from unknown risks. And an accurate statement would certainly not violate the goal of truthful labeling. If anything, such an addition would seem to improve the clarity of the message to the consumer by revealing the reasons for the label's admonitions.

In appropriate circumstances, it may be true that overwarning (or underwarning) of the risks could render a package label "false or misleading." However, in the circumstances here, *when applied to Proposition 65,* there appears to be no basis for the FDA to reject accurate, easily understood supplemental warnings about nicotine simply because the warnings have the potential to discourage the use of an NRT product. Nothing in the FDCA reflects a congressional intent to *limit* clear and accurate warnings of health risks so that consumers might be more inclined to take advantage of certain beneficial products. (*Motus v. Pfizer, Inc.* (C.D.Cal.2000) 127 F.Supp.2d 1085, 1098 & fn. 11.) To the contrary, Congress has expressly allowed California to add its own supplemental warnings through Proposition 65. The FDA has no legitimate reason, within the scope of its authority to implement the FDCA, to soften the warning about nicotine any more than it has legitimate reason to soften warnings on other risky over-the-counter drugs that may have health benefits.

It is worth noting that the FDA's own regulations allow a *manufacturer* to add or strengthen a warning label without waiting for prior FDA approval. (21 C.F.R. § 314.70(c)(2)(i) (2001) .) Contrary to the assertion of the FDA in its amicus curiae brief, a preapproval label supplement is not confined to minor editorial changes. In fact, the regulations allow minor editorial changes to be made without any FDA approval at all. (21 C.F.R. § 314.70(d)(3) (2001).) The implication from the regulations is that additional warnings to the consumer by the manufacturer are too important to defer until after the approval process is complete. It is difficult to understand, then, how the addition of warnings mandated by Proposition 65 would frustrate federal full-notice objectives when warnings voluntarily affixed would not. [FN8]

Respondents may, of course, be correct and the Response may have been intended to state an FDA policy on overwarning that would bar any modification of its proposed warning. The disquiet expressed in that document about the phrase "can harm your baby" may reflect a broad-based concern that would equally ban compliance with Proposition 65 regardless of the language of the warning in its entirety. If so, then it would appear that the FDA's concern for overwarning disguises the its actual goal of establishing label uniformity. In its Response, the FDA concluded that labeling of NRT products should

be "consistent" and "uniform" and, while manufacturers "may also consider a different warning, they will have to provide data to support alternative wording." That pronouncement flies in the face of the saving clause (21 U.S.C. § 379r(d)(2)), by which Congress has given its imprimatur to different or supplemental warnings required by Proposition 65. The FDA recognized the difficulty of achieving the goal of a clear statement of the risks of NRT products but failed to perceive that it is in precisely this type of situation that the Congressional desire to permit variance needs to be honored.

***18** In summary, I would conclude that Proposition 65 is not saved from any actual conflict with federal labeling standards. However, no actual conflict exists. Compliance with both Proposition 65 and federal regulations would not be physically impossible, nor would compliance with Proposition 65 interfere with congressional or FDA purposes. I concur in the majority's decision that the judgment must be reversed.

FN1. Respondents are GlaxoSmithKline Consumer Healthcare, LP, which markets Nicorette and NicoDerm CQ; McNeil Consumer Products Company and Pharmacia & Upjohn, Inc., which have marketed Nicotrol; Aventis Pharmaceuticals Inc., which is involved in the packaging of NicoDerm CQ; Alza Corporation, which manufactures NicoDerm CQ, and Costco Wholesale Corporation, Lucky Stores, Inc., Rite Aid Corporation, Safeway, Inc., and Walgreen Co., which retail Nicorette, NicoDerm CQ and/or Nicotrol.

FN2. The warnings for the various products differ in some minor respects. No party to this appeal contends the differences are relevant for purposes of this appeal.

FN3. On October 4, 2001, appellant and respondents filed a joint request asking this court to take judicial notice of the August 17, 2001 letter. An appellate court can, but is not required to, take judicial notice of documents that were not presented to the trial court in the first instance. (See, e.g., *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325, 48 Cal.Rptr.2d 87, 906 P.2d 1242.) We will exercise our discretion and grant the request in this instance in order to provide context and background for our discussion.

FN4. While this appeal was being briefed, the parties filed two additional requests for judicial notice. We deferred ruling on the requests until our decision on the merits of the appeal. (Cf. *People v. Preslie* (1977) 70 Cal.App.3d 486, 493-494, 138 Cal.Rptr. 828.)
Having now considered the requests, we rule as follows:
On July 23, 2001, appellant filed a request asking this court to take judicial notice of three documents that relate to the efforts of Novartis to gain approval of its product Habitrol. Novartis is not a party to this appeal, and Habitrol is not one of the products at issue. The documents were not presented to the trial court in the first instance. We decline to consider them. (See *Brosterhous v. State Bar, supra,* 12 Cal.4th at p. 325, 48 Cal.Rptr.2d 87, 906 P.2d 1242.)
On December 4, 2001, amicus the People of the State of California filed a request asking this court to judicially notice (1) a letter from the FDA to an attorney concerning a different over-the-counter product, (coal tar shampoo,) (2) a motion for summary judgment filed in a different case by a litigant who is not a party to this appeal, and (3) a letter sent in 1989 to the FDA by the President's Office of Management and Budget. None of the documents were presented to the trial court. None of them are directly relevant to issues on appeal. We decline to consider them. (See *Brosterhous v. State Bar, supra,* 12 Cal.4th at p. 325, 48 Cal.Rptr.2d 87, 906 P.2d 1242.)

FN5. The United States Constitution, Article VI, clause 2 states, "... the laws of the United States ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

FN6. The FDA, which has filed an amicus brief, agrees with this assessment. It concedes 21 United States Code section 379r "exempts Proposition 65 from express

preemption...."

FN7. The express preemption clause stated, "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal Standard. [Citation.]" (*Geier, supra,* 529 U.S. at p. 867.)

FN8. The saving clause at issue in *Geier* stated, " '[C]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law.' " (*Geier, supra,* 529 U.S. at p. 868.)

FN9. We note that a court imposing a penalty for violating Proposition 65 must evaluate several factors including, "[t]he nature and extent of the violation," "[w]hether the violator took good faith measures to comply with [Proposition 65]," "[t]he willfulness of the violator's misconduct," and "[a]ny other factor that justice may require." (Health & Saf.Code, § 25249.7, subds. (A), (D), (E), & (G).)

FN10. Having reached this conclusion, we need not address the other arguments that have been advanced.

FN1. In 1986, the California voters adopted the Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65. (Health & Saf.Code, § 25249.5 et seq.)

FN2. At oral argument, appellant cited *Louisiana Public Service Comm'n v. FCC* (1986) 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 as a case in which the high court found that Congress had waived conflict preemption. That case, however, dealt with very different issues than our case. In *Louisiana Public Service,* the high court faced the contention that certain orders by the Federal Communications Commission (FCC) relating to the depreciation of telephone plant and equipment preempted inconsistent state regulation. In the Communications Act of 1934, Congress granted regulatory authority to the FCC over " 'interstate and foreign commerce in wire and radio communication,' [citation], while expressly denying [the FCC] 'jurisdiction with respect to ... intrastate communication service,' [citation]," which was left to the states. (*Louisiana Public Service,* at p. 360.) The high court defined its task as "simply to determine where Congress *has* placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate telephone service." (*Id.* at p. 359.) *Louisiana Public Service* was, then, simply a statutory construction case, where Congress had created dual regulation of the telephone industry. The Communications Act of 1934 had no relevant express preemption clause or saving clause, and there was no dispute that if the FCC had jurisdiction to establish the relevant depreciation methods, the challenged state methods were in conflict and would have been preempted.

FN3. Other states may apply for an exemption from uniform labeling, but such an exemption is conditioned on the absence of an actual conflict with federal law. (21 U.S.C. § 379r(b)(1)(B).)

FN4. This provision was apparently redrafted before the senate proceedings on September 24, 1997, to permit states to enact legislation unless the FDA had already acted in that specific area. This "compromise" was satisfactory to Senator Kennedy. (Remarks of Sen. Kennedy, 143 Cong.Rec. S9811-04, *supra,* at p. 9818.)

FN5. The doctrine of conflict preemption is also triggered when compliance with both state and federal law is impossible because one requires what the other prohibits. (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10

L.Ed.2d 248.) Here, the trial court concluded that such a conflict existed in this case, resting its conclusion on the difference between plaintiff's proposed warnings and the federal requirements. I disagree with that conclusion. The FDCA and its implementing regulations require particular warning *labels on the package* for over-the-counter products. (21 U.S.C. § 352(f); 21 C.F.R. § § 201.60, 201.66 (2001).) Even if one were to conclude that Proposition 65 requires a warning that contradicts the federal requirements (a conclusion I do not draw), the state law does not mandate that the warning appear on the package label. Proposition 65 requires "clear and reasonable warning" of chemicals known to cause cancer or reproductive toxicity. (Health & Saf.Code, § 25249.6.) A " '[w]arning' ... need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like...." (Health & Saf.Code, § 25249.11, subd. (f).) The "safe harbor" regulations provide that the warning may be placed either on the product label *or* on a sign posted at the retail outlet in a visible place specifying the products containing chemicals that are known to the state to cause cancer, birth defects, or reproductive harm. (Cal.Code.Regs., tit.22, § 12601, subds.(b)(1)(A), (b)(1)(B), (b)(3).) Thus, Proposition 65 can be complied with by using point of sale signs. (*Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby* (9th Cir.1992) 958 F.2d 941, 947, 949-950 [fungicides and insecticides]; *People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal.App.4th 1373, 1393-1396, 62 Cal.Rptr.2d 368 [paint].) And these "signs do not constitute labeling." (*Chemical Specialties Mfrs. Ass'n,* at p. 947.) Complying with both Proposition 65 and the federal requirements is not physically impossible.

FN6. In fact, in the complaint filed by appellant in this case, he suggests no specific warning requirement. In a contemporaneously filed motion for a preliminary injunction, however, he did propose one.

FN7. When classified as prescription products, NRT products contained the following FDA-mandated label identifying nicotine as a "mediator" in reproductive harm: "Cigarette smoking during pregnancy is associated with an increased risk of spontaneous abortion, low birth weight infants and perinatal mortality. Nicotine and carbon monoxide are considered the most likely mediators of this outcome."

FN8. The FDA emphasizes that a manufacturer is required to explain the "basis" for a preapproval change in label. (21 C.F.R. § 314.70(c) (2001).) It argues that the fact that a manufacturer is required by Proposition 65 to add warnings would not provide a satisfactory *scientific* explanation of the basis for the change of label. The argument is not persuasive. In light of the saving clause enacted by Congress expressly allowing the different or supplemental warnings called for by Proposition 65, a manufacturer's need to comply with Proposition 65 provides adequate justification for the change of label.

2002 WL 1486578 (Cal.App. 1 Dist.)

END OF DOCUMENT

H

United States District Court,
C.D. California.

Flora MOTUS, Plaintiff,
v.
PFIZER INC. (Roerig Division), et al., Defendants.

No. CV 00-00298 AHM (SHx).

Dec. 12, 2000.

Wife of patient who committed suicide after taking anti-depressant drug brought suit against drug manufacturer, alleging wrongful death and negligence, strict liability, and a survival action for the pain, suffering, and losses that patient sustained while using the drug. Drug manufacturer moved for partial summary judgment. The District Court, Matz, J., held that: (1) federal law governing warning labels on drugs approved by the Food and Drug Administration (FDA) did not preempt failure-to-warn claim brought under state law by wife of patient who committed suicide after taking anti-depressants; (2) permitting state law claims for failure to warn did not conflict with the purposes and objectives of Congress by over-deterring use of the medicine; and (3) wife stated claim under California law premised on strict liability based on inadequate warning.

Motion denied.

West Headnotes

[1] States ⇨18.3
360k18.3 Most Cited Cases

There are three ways in which federal law will preempt a state law, including (1) Congress explicitly defines the extent to which its enactment preempts state law, (2) state law regulates conduct in a field that Congress intended federal government to occupy exclusively, and (3) state law actually conflicts with federal law; these categories are not rigidly distinct, but may overlap.

[2] States ⇨18.3
360k18.3 Most Cited Cases

Party contending that claim is preempted bears burden of establishing preemption.

[3] Drugs and Narcotics ⇨20.1
138k20.1 Most Cited Cases

[3] States ⇨18.65
360k18.65 Most Cited Cases

Federal law governing warning labels on drugs approved by the Food and Drug Administration (FDA) did not preempt failure-to-warn claim brought under state law by wife of patient who committed suicide after taking anti-depressants; adopting the stronger suicide warnings that wife advocated under state law would not make it impossible for drug manufacturer to comply both with wife's demands for additional warnings and with FDA's requirement that drug manufacturer use the exact labeling approved by the agency, which contained only a modest suicide warning. Federal Food, Drug, and Cosmetic Act, § 505(d, e), 21 U.S.C.A. § 355(d, e).

[4] Drugs and Narcotics ⇨20.1
138k20.1 Most Cited Cases

[4] States ⇨18.65
360k18.65 Most Cited Cases

Permitting state law claims for failure to warn of possibility of suicide as result of taking anti-depressant drug did not conflict with the purposes and objectives of Congress by over-deterring use of the medicine approved by the Food and Drug Administration (FDA) or by reducing the drug label's effectiveness in communicating necessary information to doctors, and thus, state law claim was not preempted by federal drug labeling laws, where there was no persuasive evidence establishing threat of overdeterrence from strengthening suicide warning labels for the drug, and drug already contained modest warning concerning suicide. Federal Food, Drug, and Cosmetic Act, §§ 505(d), 903(b)(2)(B), 21 U.S.C.A. §§ 355(d), 393(b)(2)(B).

[5] Drugs and Narcotics ⇨18
138k18 Most Cited Cases

Under California law, wife of patient who committed suicide after taking anti- depressant drug stated claim against the drug manufacturer for strict liability premised on inadequate warning about increased possibility of suicide.
***1086** George W. Murgatroyd, III, Karen Ann Barth, Baum Hedlund Aristei Guilford & Downey, Los Angeles, CA, for plaintiff.

Pierce O'Donnell, Ann M. Mortimer, Randy R. Merritt, Daniel C. Tepstein, O'Donnell & Shaeffer, Los Angeles, CA, Malcolm E. Wheeler, Amy L. Padden, James E. Hooper, Michael L. O'Donnell, Wheeler Trigg & Kennedy, Denver, CO, for defendants.

ORDER DENYING PFIZER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MATZ, District Judge.

INTRODUCTION

Victor Motus suffered from depression. To help deal with that illness, sometime in November 1998 he began taking the drug "Zoloft," which is manufactured by defendant Pfizer Inc. ("Pfizer"). Zoloft was prescribed and supplied to Victor Motus by his internist, to whom Pfizer had provided a supply of Zoloft as a sample. For the approximately one week that he took Zoloft, Victor Motus experienced agitation, confusion and suicidal thinking. On November 12, 1998, he took his life by shooting himself.

Plaintiff Flora Motus ("Motus") was married to Victor Motus. She has brought this lawsuit, removed here from state court, seeking recovery on three claims: ***1087** (1) "wrongful death/negligence"; (2) strict liability; and (3) "survival action" for the pain, suffering and losses that Victor Motus sustained while using Zoloft. Her complaint alleges, among other things, that Pfizer "negligently ... fail[ed] to adequately warn the medical community, the general public and plaintiff's decedent, Victor Motus ... of the dangers, contraindications and side effects ... of Zoloft" [Complaint, ¶ 27] and that in the United States "Zoloft was not properly labeled by defendants [FN1] ... and was not accompanied by proper warnings for safe, informed use ... [T]he labeling ... did not warn physicians in general and Decedent in particular of the dangers inherent in its use, particularly that the drug can cause the user to become violent and suicidal." Complaint, ¶ 58.

FN1. Various "DOES" are sued along with Pfizer.

Here is the suicide-related precaution that Pfizer gave:

> *Suicide*--The possibility of a suicide attempt is inherent in depression and may persist until significant remission occurs. Close supervision of high risk patients should accompany initial drug therapy. Prescriptions for Zoloft (sertraline) should be written for the smallest quantity of capsules consistent with good patient management, in order to reduce the risk of overdose.

DSUF, ¶ 20.

Now Pfizer has moved for partial summary judgment dismissing plaintiff's "inadequate warning" claims. Pfizer seeks an order that as a matter of law it may not be held liable for its failure to include in the labeling for Zoloft a warning of the risk of suicide. Pfizer argues that under both California law and federal "conflict" preemption doctrine, plaintiff's state law claims based on Pfizer's failure to include a suicide warning in Zoloft's labeling are barred because the Food and Drug Administration ("FDA") has already considered and rejected the inclusion of such a warning in Zoloft's labeling. Motus responds that 1) although FDA did approve Pfizer's proposed labeling for Zoloft without the suicide warning, FDA did not prohibit Pfizer from adding such a warning and 2) Congress has not preempted state tort law claims for failure to warn just because FDA has approved a manufacturer's proposed warnings.

The Court DENIES defendant's motion for partial summary judgment. As set forth in more detail below, Pfizer has failed to establish that a plaintiff is barred from asserting state law tort claims based on failure to warn of a suicide risk.

FACTS [FN2]

FN2. All the facts recited in this Order are undisputed unless otherwise noted.

A. Statutory Background

One aspect of the FDA's mission is to ensure that drugs sold in the United States are "safe and effective." 21 U.S.C. § § 355(d) and 393(b)(2)(B). To obtain FDA approval of a drug, a manufacturer must submit a New Drug Application ("NDA"). 21 U.S.C. § 355(b). NDAs must include: "full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use ... and specimens of the labeling proposed to be used for such drug." *Id.* The FDA will disapprove an NDA if:

> (1) the investigations ... do not include adequate tests ... to show whether or not such drug is safe for use ... (2) the results of such tests show that such drug is unsafe for use ... or do not show that such drug is safe for use ... (4) ... [there is] insufficient information to determine whether such drug is safe for use ... or (7) based on a fair evaluation of all material facts, [the product's] labeling is false or misleading in any particular...

21 U.S.C. § 355(d).

If FDA approves an NDA, FDA will withdraw that approval if:

> ***1088** clinical or other experience, tests, or other scientific data show that such drug is unsafe ... [or] that new evidence of clinical experience, not contained in such application or not available to the Secretary until after such application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved, evaluated together with the evidence available to the Secretary when the application was approved, shows that such drug is not ... safe for use ... or that the application contains any untrue statement of a material fact.

21 U.S.C. § 355(e).

B. The Zoloft New Drug Application

On April 13, 1988, Pfizer submitted an NDA to the FDA seeking approval to market Zoloft for treatment of depression. Defendant's Statement of Uncontroverted Facts

("DSUF"), ¶ 11. Zoloft is the registered trademark and brand name in the United States for sertraline hydrochloride. DSUF, ¶ 2. Sertraline hydrochloride is one of a class of medicines commonly referred to as "selective serotonin reuptake inhibitors," or "SSRIs." *Id.*

Pursuant to Title 21 U.S.C. § 355, the statute governing New Drug Applications, Pfizer submitted 117 volumes of safety and efficacy data on Zoloft that Pfizer had developed during the preceding seven years. DSUF, ¶ 12; 21 U.S.C. § 355(b). These submissions included information about suicidality in patients given Zoloft, placebos and other drugs, although plaintiff disputes the completeness and accuracy of the information. DSUF, ¶ 13; Opposition, passim.

On November 19, 1990, FDA convened a committee of experts, the Psycho- pharmacological Drugs Advisory Committee ("PDAC"), to review the Zoloft NDA and to advise FDA regarding the medicine's safety and efficacy. DSUF, ¶ 14. As part of his presentation of safety data, one of the PDAC experts, Dr. James Knudson, addressed suicide attempts in Zoloft, placebo and active-control treated patients during the clinical studies of Zoloft. DSUF, ¶ 17. Dr. Knudson stated that:

> Realizing the difficulty in interpreting data where analyses ignore differential exposure time, this table does show that disproportionate numbers of suicides do not occur among the three treatment groups. All suicide attempts appeared in depressed patients, none in the obese.

Id. At the conclusion of the meeting, the PDAC voted unanimously that the evidence Pfizer produced had shown that Zoloft "is safe when used in the treatment of depression." DSUF, ¶ 18.

On September 30, 1991, FDA issued its "approvable" letter for the Zoloft NDA. DSUF, ¶ 18. The letter stated that FDA has "proposed a number of changes to the draft labeling submitted in your July 24, 1990 amendment" and it proposed some different labeling. *Id.* The precaution section of the proposed labeling included this statement regarding suicide:

> *Suicide*—The possibility of a suicide attempt is inherent in depression and may persist until significant remission occurs. Close supervision of high risk patients should accompany initial drug therapy. Prescriptions for Zoloft (sertraline) should be written for the smallest quantity of capsules consistent with good patient management, in order to reduce the risk of overdose.

DSUF, ¶ 20. The FDA letter instructed Pfizer to "[p]lease use the proposed text verbatim." (As was shown above, Pfizer eventually did so.) DSUF, ¶ 19. [FN3] In addition, FDA stated that final approval required Pfizer's responses to issues raised in the letter. Defendant's Motion for Partial Summary Judgment ("Defendant's Motion"), ***1089** Declaration of Martha Brumfield ("Brumfield Dec."), Exh .3.

> FN3. In addition to asserting that the data that Pfizer provided to FDA was incomplete and inaccurate, plaintiff contends that Pfizer, not FDA, drafted this language. Murgatroyd Dec., ¶ 3, Exh. A, RFA # 144.

FDA granted final approval of the Zoloft NDA on December 30, 1991. DSUF, ¶ 21. Working from a draft submitted by Pfizer, FDA also prepared a final "Summary Basis of Approval" for Zoloft. DSUF, ¶ 22; Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment ("Opposition"), Declaration of George Murgatroyd ("Murgatroyd Dec."), Exh. A, Response to Request for Admission Nos. 138, 139. Section 5.2.2.4.1 addressed the occurrence of suicide events in the database of tested sertraline users. DSUF, ¶ 22. That section stated that with respect to suicidality in therapeutic depression trials "[r]eview of the rates of events defined by baseline to endpoint shifts in HAMD Item 3 scores [i.e., measurement of suicidal ideation] and baseline to endpoint changes in HAMD Item 3 scores showed results favoring [Zoloft] over placebo and supported the comparability of the [Zoloft] and active control groups." DSUF, ¶ 22.

Following its approval of Zoloft for treatment of depression, FDA also approved Zoloft as safe and effective for treatment of obsessive compulsive disorder (October 25, 1996), pediatric obsessive compulsive disorder (October 10, 1997), panic disorder (July 8, 1997) and post-traumatic stress disorder (December 7, 1999). [FN4] DSUF, ¶¶ 45-48. (The latter approval was granted after Victor Motus took his life.)

> FN4. The Court overrules plaintiff's FRE 402 and 403 objections to these facts. Further, at the hearing on this motion, counsel for Pfizer asserted that FDA reconsidered the issue of suicide and Zoloft on each occasion that it approved Zoloft for a new use. Pfizer's motion papers do not specify what evidence proves such reconsiderations were undertaken. The Court has reviewed the Exhibits (5-9 in Brumfield's Declaration) related to FDA's subsequent approvals of Zoloft and found only one document regarding whether FDA reconsidered the suicide issue. That document is a report, apparently prepared by Pfizer at FDA's request, detailing Pfizer's findings concerning the relation between the use of Zoloft by adults and children for obsessive compulsive disorder and suicide related behavior. Brumfield Dec., Exh. 9. The report concluded, inter alia, that rate of suicidal behavior

for adolescents treated with sertraline for obsessive- compulsive disorder was within the range described in normal population samples of adolescents.

C. Other SSRI's and Labeling About Suicide [FN5]

FN5. The Court overrules plaintiff's FRE 402 and 403 objections to these facts. Plaintiff's own complaint refers to the risks posed by Prozac and to an article describing the risks of Prozac, and cites a quote from Pfizer that Zoloft works "just like Prozac" with the same side effects. Complaint, ¶¶ 16-18. The evidence is also relevant to establish how the FDA handled concerns about SSRI-induced suicidal ideations.

Before and during FDA's consideration of the Zoloft NDA, FDA considered claims that other SSRIs, such as Prozac, cause suicide.

In early 1990, an article was published about Prozac that led to a much- publicized public debate about whether fluoxetine induced suicidal ideation in patients. On October 10, 1990, Sanford Block of the Church of Scientology's "Citizens Commission on Human Rights," ("CCHR") filed with FDA a petition claiming that Prozac caused suicidality and asking FDA to withdraw its approval of Prozac. DSUF, ¶ 26. On May 23, 1991, Drs. Ida Hellander and Sidney M. Wolfe of"Public Citizen Health Research Group" ("PCHRA") filed a petition asking FDA to revise Prozac's labeling and "to include a box warning [ ] regarding its association with intense, violent suicidal preoccupation, agitation and impulsivity in a small minority of patients." DSUF, ¶ 27.

On July 26, 1991, FDA denied the CCHR petition, stating that "[t]he data and information available at this time do not indicate that Prozac causes suicidality or violent behavior..." DSUF, ¶ 28.

On September 20, 1991, FDA convened the PDAC to further its "scientific investigation ***1090** into suicidal ideation, suicidal acts, and other violent behavior reported to occur in association with the pharmacological treatment of depression." DSUF, ¶ 30. In his opening remarks to the committee meeting, Dr. Paul Leber, the then-Director of the FDA Division of Neuropharmacological Drug Products, stated that the "net effect" of "modifying antidepressant drug labeling" "might be a reduction in the use of antidepressants in the treatment of depression, and that the result might cause overall injury to the public health." DSUF, ¶ 37. "Excerpted comments" of Dr. Leber also show that he stated that "if Prozac is not more likely to induce suicidal thoughts, acts and other violent behaviors, a labeling change of the sort contemplated by some, beyond being false and misleading, might well have a net adverse effect." *Id.* On the question whether "there is credible evidence to support a conclusion the antidepressant drugs cause the emergence and/or intensification of suicidality and/or other violent behaviors," the PDAC voted unanimously that there was no such evidence. DSUF, ¶ 39. As to the question whether "there is evidence to indicate that a particular drug or drug class poses a greater risk for the emergence and/or intensification of suicidal thoughts and acts and/or violent behaviors," the PDAC also voted unanimously that there was not. DSUF, ¶ 40.

On June 3, 1992, FDA denied the PCHRA petition because the evidence was "not sufficient to reasonably conclude that the use of Prozac is possibly associated with suicidal ideation and behavior..." DSUF, ¶ 43.

Finally, on January 2, 1997, Ms. Rosellen Meysenburg petitioned FDA to require that Prozac's suicidality warning be expanded to indicate that "people who are considered at risk for suicide and who begin to take the antidepressant drug fluoxetine hyudrochloride [sic] should be carefully observed and should consider taking a sedative as well." On June 25, 1997, FDA stated: "[t]he agency has continued to monitor carefully reports of a possible connection between Prozac and increased suicidality. However, no credible scientific evidence has caused the agency to depart from its conclusion that the current Prozac labeling appropriately reflects the level of concern about Prozac and suicidality. Therefore, your petition requesting revision of the labeling for Prozac is denied." DSUF, ¶ 56.

LEGAL STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248, 106 S.Ct. at2510. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the

absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir.2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by ***1091** pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.' " *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S.Ct. 1597, 1603, 143 L.Ed.2d 966 (1999) (*citing Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." F.R.Civ.P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.; Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.' " *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1551-52, 143 L.Ed.2d 731 (1999) (*citing Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citation omitted).

DISCUSSION

A. Federal Preemption

[1] The Supreme Court has explained that there are three ways in which federal law will preempt a state law:

> scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized:
>
> "Where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest."
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990) (citations omitted) (holding that nuclear fuel production employee's state law claim for intentional infliction of emotional distress was not preempted by the Energy Reorganization Act). These categories are not "rigidly distinct;" in particular, "conflict" ***1092** and "field" preemption often overlap. *Id.* at 79 n. 5, 110 S.Ct. 2270.

[2] The party contending that a claim is preempted bears the burden of establishing preemption. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n. 6 (9th Cir.1995). [FN6]

> FN6. The Court notes that several Supreme Court cases describe a presumption against finding preemption, especially where state or local regulation of matters related to health and safety are concerned. *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). Pfizer points out that cases like *Hillsborough* that employ the presumption do not address conflict preemption. The Court need not decide whether a presumption against preemption applies because the Court decides that Pfizer has not established preemption, even absent a presumption.

Pfizer makes no express or field preemption argument. Instead, Pfizer argues that "plaintiff's attempt to use state tort law to require warnings that Zoloft causes suicide" conflicts with (1) FDA's various determinations regarding Zoloft's and SSRI's warnings and (2) the federal statutory and regulatory objective of ensuring that labeling effectively communicates the scientific information physicians need to make informed judgments. Defendant's Motion, p. 16-17.

1. Conflict Preemption

a. Impossibility of Compliance

[3][4] In its opening motion papers, Pfizer asserts that federal law preempts plaintiff's claims based on failure to warn because "the state law advocated by plaintiff would make it impossible for Pfizer to comply both with plaintiff's demands for additional warnings and with FDA's requirement that Pfizer use the exact labeling approved by the agency. *See Hurley v. Lederle Labs.*, 863 F.2d 1173, 1179 (5th Cir.1988)." Defendant's Motion, p. 19.

Plaintiff responds that because FDA standards for labeling are minimum standards, FDA approval of Pfizer's proposed label does not mean that state law claims based on that labeling are preempted. Opposition, p. 20, 22.

As plaintiff correctly argues, most courts have found that FDA regulations as to design and warning standards are minimum standards which do not preempt state law defective design and failure to warn claims. *See, e.g., Hill v. Searle Labs.*, 884 F.2d 1064, 1068 (8th Cir.1989) ("FDA approval is not a shield to liability ... FDA regulations are generally minimum standards of conduct unless Congress intended to preempt common law, which Congress has not done in this area."); *Kociemba v. Searle & Co.*, 680 F.Supp. 1293, 1299 (D.Minn.1988) ("The mere fact that the Cu-7 received FDA approval does not, by itself, indicate that Congress impliedly intended to preclude state tort actions against prescription drug manufacturers. This is especially true in light of the widely held view that FDA regulation of prescription drugs establishes minimum standards, both as to design and warning," *citing Graham v. Wyeth Labs.*, 666 F.Supp. 1483 (D.Kan.1987), *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir.1981) and *Salmon v. Parke Davis & Co.*, 520 F.2d 1359 (4th Cir.1975)); *Mazur v. Merck & Co.*, 742 F.Supp. 239, 247 (E.D.Pa.1990) ("mere compliance with FDA suggestion, or for that matter, regulation or order, does not mean that state tort law becomes irrelevant...[C]ompliance with an FDA regulation may establish that the manufacturer met the appropriate minimum standards of due care, but compliance does not necessarily absolve the manufacturer of all liability ... Manufacturers must meet state safety requirements, whether codified or embodied in the common law, in addition to satisfying initial FDA requirements"). Indeed, Pfizer cites not a single case holding that FDA prescription drug requirements preempted state law claims. [FN7]

> FN7. Pfizer does however offer *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), for the proposition that even minimum standards may preempt state law tort claims. Reply, p. 5. But in *Geier*, the Supreme Court expressly found that the Department of Transportation saw the disputed standard "not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems..." *Geier*, 120 S.Ct. at 1915, 1922 ("This lawsuit actually conflicts with [the safety standard]. DOT saw [the safety standard] not as a minimum standard ... In petitioners' and the dissent's view, [the safety standard] sets a minimum airbag standard ... But that was not the Secretary's view."). In any case, even if standards deemed "minimum" could conflict with state law tort suits, the warning labeling standards here do not because, as explained shortly, Pfizer has not established that federal regulations or FDA meant to prohibit Pfizer from strengthening its warnings.

***1093** So it is *Hurley* that Pfizer relies on for the proposition that an FDA determination of proper drug labeling can conflict with state law requiring additional or changed labeling. In *Hurley*, the Fifth Circuit held that federal regulations *did not* preempt the plaintiff's state law product liability claims based on the allegedly unreasonable dangerousness and inadequate warnings of a whooping cough vaccine. 863 F.2d at 1176-1177. In dicta, however, the *Hurley* Court stated that:

> The defendants propose that the question of adequacy of the warning is preempted by federal law since the warning used was FDA approved ... This is the one question in this case for which the defendants' arguments on preemption are compelling ... In the area of approving warnings ... the FDA ... accepts information given by manufacturers proposing the licensing of a particular vaccine, and determines a proper warning based upon the information provided ... A state law determination on this issue should not be interjected to overrule the decision of the FDA. Such a procedure would place vaccine manufacturers in a position where they could not comply with both obligations. The FDA extensively regulates the contents and wording of these product inserts ... A manufacturer must first provide all the relevant information to the FDA, which then determines a warning it deems appropriate. The manufacturer is required to print that precise warning in its product insert ... Most important, the manufacturers cannot change the language in the product insert without FDA approval. 21 C.F.R. § 601.12. It would be patently inconsistent for a state then to hold the manufacturer liable for including that precise warning when the manufacturer would otherwise be liable for not including it ... [S]uch a case would fit one of the scenarios ... indicating preemption: the state statute actually and directly conflicts with federal law.

Hurley, 863 F.2d at 1179.

Hurley dealt with and depended on federal regulations

governing vaccines and other "biologics." The Court finds Pfizer's reliance on this language in *Hurley* misplaced. The dicta Pfizer relies on described one provision, 21 C.F.R. § 601.12, as "[m]ost important" to its statement of possible preemption. At the time *Hurley* was decided, 21 C.F.R. 601.12(b) stated that "[p]roposed changes in manufacturing methods and labeling may not become effective until notification of acceptance is received from the Director, Center for Biologics evaluation." [FN8] That provision formed the basis for the Fifth Circuit's decision that a "biologics" manufacturer could not simultaneously comply with FDA labeling requirements and a state law requiring different warnings. Neither party has indicated and nothing in the record indicates that the regulations governing "biologics" have any bearing on this case.

> FN8.21 C.F.R. § 601.12 was subsequently amended to allow certain labeling changes prior to FDA approval. 21 C.F.R. § 601.12(f)(2)(i).

The regulations that do apply here, but that did not apply in *Hurley*, militate strongly in favor of finding no conflict preemption, because they provide that Pfizer *may* strengthen Zoloft's warnings ***1094** without prior FDA approval. 21 C.F.R. § 314.70 is the federal regulation governing supplements to approved NDAs. It states that a change to labeling that "add[s] or strengthen[s] a contraindication, warning, precaution, or adverse reaction" is within the category of changes that "may be made before FDA approval." 21 C.F.R. § 314.70(c)(2)(i). Therefore, unlike in *Hurley*, here it is not true that "the manufacturers cannot change the language in the product insert without FDA approval" and is not true that a manufacturer "would otherwise be liable" for strengthening an FDA-approved warning. The FDA Commissioner's own comments support this view:

> The commissioner also advises that these labeling requirements do not prohibit a manufacturer ... from warning health care professionals whenever possibly harmful adverse effects associated with the use of the drug are discovered. The addition to labeling ... of additional warnings ... is not prohibited by these regulations... In the case of an approved NDA, § 314.8(d) [now § 314.70(c)(2)(i)] permits the addition to the drug's labeling ... of information about a hazard without advance approval by the FDA ... At least one Court has held that an NDA holder may have a duty to add a warning before FDA approval of a supplemental application.

21 Federal Register 37447 (1979). There appears to be no inherent conflict between state law requiring a stronger warning for Zoloft and the FDA's approval of Zoloft's present warning.

In its Reply Memorandum, Pfizer supplements its argument from *Hurley* with additional "impossibility of compliance" arguments based on a federal statute and regulations:

> Since FDA has expressly and repeatedly found that there is "no credible evidence" to support an association between SSRIs and suicide any inclusion in Zoloft's labeling of the warnings advocated by plaintiff would violate the statutory and regulatory prohibition against labeling that "is false or misleading in any particular." 21 U.S.C. § 355(e); 21 C.F.R. § 201.56(a)-(b). Inclusion of any such warning would violate the regulatory requirement that labeling must warn only of "[k]nown hazards and not theoretical possibilities" and must not include any "statement of differences of opinion." 21 C.F.R. § 201.57(d), 1.21(c)(1). It would violate the limitation that labeling statements are permitted "only if they are supported by scientific evidence." 44 Fed.Reg. 37434, 37441 (June 26, 1979).

Reply, p. 14-15.

First, several of the regulations cited by Pfizer do not apply to its alleged failure to warn. [FN9] It is true that 21 C.F.R. § 1.21(c)(1) states that § 1.21(a) does not "[p]ermit a statement of differences of opinion with respect to warnings..." but neither plaintiff nor defendant have asserted that plaintiff wishes to add such a statement. It is also true that 21 C.F.R. § 201.57(d) states that "[k]nown hazards and not theoretical possibilities shall be listed, e.g., if hypersensitivity to the drug has not been demonstrated, it should not be listed as a contraindication." But this language applies only to listing of "contraindications," or "those situations in which the drug should not be used because the risk of use clearly outweighs any possible benefit..." It does not apply to listings of "warnings"--which is what is at stake here and which is governed by a separate regulatory provision in § 201.57(e). Notably, Pfizer does not cite that regulation, which appears not to pose any conflict, in that it does not impose specific prohibitions. ***1095** Section 201.57 delineates the "specific requirements on content and format of labeling for human prescription drugs" and subsection (e) specifically governs "warnings." In its entirety, subsection (e) states as follows:

> FN9. Pfizer also cites to several comments of the FDA commissioner, which are now memorialized in the federal register, that come under the heading not of "warnings," but of "adverse reactions," a different part of prescription drug labeling that is subject to its own separate requirements. Reply, p. 15, Fed.Reg. 37453; 21 C.F.R. § 201.57(e) (governing warning labeling); 21 C.F.R. § 201.57(g) (governing adverse reaction labeling).

> Under this section heading, the labeling shall describe serious adverse reactions and potential safety hazards, limitations in use imposed by them, and steps that should be taken if they occur. The labeling shall be revised to

include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved. A specific warning relating to a use not provided for under the "Indications and Usage" section of the labeling may be required by the Food and Drug Administration if the drug is commonly prescribed for a disease or condition, and there is lack of substantial evidence of effectiveness for that disease or condition, and such usage is associated with serious risk or hazard. Special problems, particularly those that may lead to death or serious injury, may be required by the Food and Drug Administration to be placed in a prominently displayed box. The boxed warning ordinarily shall be based on clinical data, but serious animal toxicity may also be the basis of a boxed warning in the absence of clinical data. If a boxed warning is required, its location will be specified by the Food and Drug Administration. The frequency of these serious adverse reactions and, if known, the approximate mortality and morbidity rates for patients sustaining the reaction, which are important to safe and effective use of the drug, shall be expressed as provided under the "Adverse Reactions" section of the labeling.

Unlike the provision on "contraindications," which does seem to point out one type of statement that *may not* be included in the "contraindication" section of drug labeling, the provision on "warnings" very clearly lists only those statements that must be included, not statements that may *not* be included.

Although some of the federal statutory and regulatory law Pfizer cites does appear to apply to Zoloft's warning label, that law does not establish conflict preemption because Pfizer has not established that plaintiff's theory of liability would require warnings that would violate federal law. It is true that prescription drug labeling may not be "false or misleading in any particular." 21 U.S.C. § 355(d); 21 C.F.R. § 201.56(b). It is also true that, as described in the federal register commentary and codified in section 201.56(a), labeling must be based on "the essential scientific information needed for the safe and effective use of the drug." 21 C.F.R. § 201.56(a); Fed Reg. 37441. But Pfizer has not attacked any specific warning as "false or misleading" or not based on "the essential scientific information needed" for safe use. Instead, Pfizer attacks plaintiff's general allegation of failure to warn. Defendant's Motion, p. 3-4. [FN10]

> FN10. In fairness to Pfizer, plaintiff evidently has not yet identified the precise warning that she thinks Pfizer should have provided. As the Court stated at the hearing on this motion, this has proven vexing to the Court, too, because it would be much easier to analyze whether a supposedly necessary warning conflicted with the federal requirement if one knew what the warning said.

The Court finds Pfizer's attack overbroad. Although certain suicide warnings could violate federal law because they were false or misleading or were not based on "the essential scientific information needed" for safe use, the Court does not think that any and every suicide-related warning that might be required under state law is necessarily false or misleading, or not based on "the essential scientific information needed" for safe use. For example, in her opposition, plaintiff discussed the SSRI warning recommended by the Medicines Control Agency, the British equivalent of the FDA: "occasionally, ***1096** thoughts of suicide or self harm may occur or increase in the first few weeks of treatment with sertraline, until the antidepressant effect becomes apparent. Tell your doctor immediately if you have any distressing thoughts or experiences." Opposition, p. 23. In its Reply Memorandum, Pfizer did not refer to or attack this example of a warning. The Court has no basis to find that a restrained warning like this one is necessarily false or misleading, or not based on "the essential scientific information needed" for safe use. Therefore, the Court is not persuaded that to the extent that plaintiff's claims are based on failure to warn, they necessarily would violate federal law, regulations or policies.

Moreover, and perhaps most importantly, although FDA did not require Pfizer to include suicide-related warnings in Zoloft's label, FDA has not prohibited Pfizer from doing so. On the occasions cited by Pfizer that FDA considered links between suicide and SSRIs, FDA did find that the evidence did not support requiring manufacturers to include additional suicide-related warnings. But FDA never stated that it would be impermissible to include additional warnings. This is consistent with the regulatory provision governing warning labels, 21 C.F.R. § 201.57(e), which indicates only those warnings that must be included in drug labeling, but does not prohibit any warnings.

Pfizer suggests that FDA *impliedly* prohibited additional suicide-related warnings, based on a comment of Dr. Paul Leber, the former Director of Neuropharmacological Drug Products, that "a labeling change of the sort contemplated by some" could be "false and misleading." Defendant's Motion, p. 10; Gaul, Dec., Exh.15. But Pfizer has not established that the labeling change "contemplated" by plaintiff's law suit is "a labeling change of the sort contemplated by some"; it is not clear just what "sort" of labeling change Leber is referring to; and, as discussed above, plaintiff has not limited herself to advocating any particular warning. Further, the Court does not agree that an excerpted comment of an FDA doctor, phrased as a hypothetical, made in ostensibly informal introductory comments to a meeting of the PDAC, and presented here

only in a footnote constitutes formal FDA prohibition of any and every strengthened suicide-related warning.

To summarize, several other courts have determined that FDA requirements are minimum standards and that FDA approval is not a shield to liability; 21 C.F.R. § 314.70(c)(2)(i) permits manufacturers to strengthen warning labels without prior FDA approval; Pfizer has not limited its attack to any specific warnings; and finally the FDA has not made any statement that Pfizer could not include a strengthened suicide warning. In light of these factors, the Court finds that Pfizer has not established that it would be impossible to comply simultaneously with FDA requirements and with a state law or decision requiring a strengthened warning.

b. Frustration of Congressional Purpose

Pfizer asserts that permitting plaintiff's state law claims for failure to warn would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress:

> Plaintiff seeks to require warnings that FDA has determined are not only unnecessary and unsupported by scientific data and information, but false, misleading and potentially harmful to the public. Such warnings would overdeter use of the medicine, reduce the labeling's effectiveness in communicating necessary information to doctors, and impair the value of federally mandated labeling by undermining physicians' ability to rely on the labeling as scientifically based and accurate.

Defendant's Motion, p. 21.

Pfizer relies on many of the same regulations for its "frustration of purpose" argument that it relied on for its "impossibility of compliance" argument. Defendant's ***1097** Motion, p. 21-22. Pfizer essentially argues that permitting a strengthened suicide warning in Zoloft's labeling would violate the federal purpose--embodied in the regulations--of ensuring that doctors act on accurate, scientifically established information. But the Court has already found that plaintiff's state law failure to warn claims do not conflict with federal statutory prohibitions and requirements because those claims do not necessarily call for false and misleading labeling or labeling not based on scientific information. The Court therefore also finds that plaintiff's state law "failure to warn" claims for relief do not necessarily conflict with the regulations' straightforward purpose of ensuring that doctors receive accurate, scientifically based information.

Pfizer also argues that permitting plaintiff to proceed with these claims would conflict with congressional purposes, because it would "overdeter" use of Zoloft. Defendant's Motion, p. 21-23. According to Pfizer, "[a]dding warnings that FDA has determined to be unsupported would give physicians a false impression of the risks entailed in prescribing the drug, thereby deterring its use ... [and] ... would inhibit physicians from using the drug to provide their patients the available benefit..." *Id.* at 22.

At the hearing on this motion, counsel for Pfizer indicated that three sources, independent of FDA, supported this assertion. The first is "A Report of the Surgeon General on Mental Health." Declaration of Dr. Roger Lane ("Lane Dec."), Exh. 2. The Court has read the excerptof this report that Pfizer submitted. Although it states that SSRIs are "a first-choice medication in treating depressed suicidal children and adolescents" and that "[t]he incidence of treatment related suicidal thoughts for the SSRIs is low and comparable to the rate observed for other antidepressants" it nowhere expressly addresses the issue of overdeterrence. Exh.2, p. 58,61.

Next, Pfizer's counsel referred to a statement of the American Psychiatric Association ("APA"). The Court found one exhibit in Dr. Lane's Declaration that the APA published but this document merely listed the "criteria for major depressive episode[s]" and has no relation to overdeterrence. Lane Dec., Exh.3. However, on November 28, 2000, the day after the hearing on this motion, Pfizer filed an APA "news release" to which Pfizer's counsel had referred. The "news release" concerns the FDA's denial of CCHR's petition to ban Prozac outright. It does indeed state that "our members have reported to us that the CCHR media campaign to discredit Prozac frightened many people with depression into discontinuing their medicine without first discussing it with their physicians, and discouraged others from seeking needed treatment." But the mere fact that a negative media campaign may have overdeterred prospective SSRI users does not mean that a modest warning label that Doctors could evaluate would do the same thing. Indeed, the "news release" itself states that psychiatrists routinely warn patients that antidepressants may contribute to suicidal action: "([m]any patients, however, are so depressed that they don't have the energy to act on [suicidal] thoughts," "antidepressants ... may lead to an increase in energy before it eliminates suicidal thoughts" and "[p]sychiatrists routinely alert patients and their families to this possibility...").

Third, Pfizer's counsel directed the Court's attention to the American College of Neuropsychopharmacology's Consensus Statement on Suicidal Behavior and Psychotropic Medication. Lane Dec., Exh.6. The Statement does assert that "[t]here is no evidence that antidepressants such as ... fluoxetine trigger emergent suicidal ideation over and above rates that may be associated with depression and other antidepressants." Exh.6, p. 112. However, the Statement does not explicitly address the overdeterrence issue. Moreover, it indicates that "case reports suggest that a

small minority of patients may experience *1098 emergent suicidal thoughts or evince such behavior during the pharmacological treatment of depression" and that "[p]atients should be warned that suicidal ideation may occasionally worsen in the course of treatment ... and that such an event would be a reason for immediately contacting their doctor. Applying this standard clinical practice to all patients would constitute a reasonable safeguard in the event that there are, indeed, a small minority of vulnerable patients who are at risk for emergent suicidal ideation." *Id.* at 112, 114.

In sum, the Court finds an absence of persuasive evidence establishing a threat of overdeterrence from strengthening suicide warning labeling for SSRIs. Indeed, several of the sources suggest that overdeterrence is not a concern because they recommend providing modest warnings that antidepressants may contribute to suicidal thoughts or action.

Pfizer also asserts that FDA's own rationale for rejecting strengthened suicide warnings for SSRIs was concern about overdeterrence. In support, Pfizer cites to the opening remarks to a PDAC committee meeting of Dr. Paul Leber, the then-Director of the FDA Division of Neuropharmacological Drug Products. Leber stated that:

> It is very difficult for us to be Solomon-like in situations as complex and vexing as this ... We have to recognize that the 'net effect' of 'modifying antidepressant drug labeling' 'might be a reduction in the use of antidepressants in the treatment of depression, and that the result might cause overall injury to the public health ... many letters we receive ... emphasize this point. Whether they are correct or not, I am not going to speak to that, but certainly it is a concern.'

DSUF, ¶ 37; Gaul Dec., Exh. 14, p. 662-3. Further, the "Excerpted Comments" of Dr. Leber's remarks state that "if Prozac is not more likely to induce suicidal thoughts, acts and other violent behaviors, a labeling change of the sort contemplated by some, beyond being false and misleading, might well have a net adverse effect." *Id.*

The Court is not persuaded that FDA has found or has relied on a finding that strengthened suicide warnings would overdeter SSRI use. First, Leber's comments state only that strengthened suicide warnings "*might* " overdeter SSRI use. Leber himself states that:

> [i]t is easy enough for me to understand why someone could conclude it would be constructive and in the interest of public health to inform individuals using the drug, and the practitioners, about the high rate of reporting ... [I]t is not difficult to appreciate the arguments of those who advocate what have you got to lose? Why not at least point out that some people believe there is a special linkage between Prozac and suicidal ideation.

Exh. 14, p. 663. Leber's introductory comments set out different positions on SSRI labeling and do not discuss "whether they are correct or not." *Id.* at 662. Second, Pfizer has not established that Leber's ostensibly informal introductory comments to a committee meeting represent the formal position of the FDA.

The evidence Pfizer cites does not establish a threat of overdeterrence or a congressional purpose of preventing overdeterrence. [FN11] Thus, Pfizer has not presented surveys, statistical data or other facts. Pfizer may be correct in its assertion ... but it may not be. Potential users of Zoloft might continue to ingest it but simply be more vigilant about noticing the emergence of or an increase in suicidal ideation and more likely to call their doctor in the event of an adverse reaction.

> FN11. Pfizer presents no legislative history or other evidence suggesting that in creating the FDA and enacting drug laws Congress intended to prevent or even considered overdeterrence of drug use.

*1099 Pfizer also argues, based on *Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981), that preemption is appropriate because FDA's approval of Pfizer's labeling for Zoloft and determination that Pfizer was not required to add to the label should be "entitled to considerable deference." Defendant's Motion, p. 25. In *Kalo Brick*, a shipper brought an action against a railroad to recover under state law for failure to provide adequate rail service. The railroad had abandoned a railroad line and, pursuant to the Interstate Commerce Act ("ICA"), the Interstate Commerce Commission ("ICC") had approved that abandonment. The Supreme Court held that the ICA preempted the shipper's state law claims. *Id.* at 327, 101 S.Ct. 1124. Pfizer argues that *Kalo Brick* is instructive because in both that case and here an agency was empowered to approve defendant's challenged conduct, balanced the relevant interests and then approved the conduct. Defendant's Motion, p. 24-5.

Kalo Brick is inapposite. In that case, the Supreme Court specifically held that the "findings by the Commission, made pursuant to the authority delegated by Congress, simply leave no room for further litigation over the matters respondent seeks to raise in state court." *Id.* at 327, 101 S.Ct. 1124. In accordance with that holding, the Court repeatedly emphasized the pervasive and exclusive nature of the ICA:

> The [ICA] is among the most pervasive and comprehensive of federal regulatory schemes...[T]he authority of the [ICC] to regulate abandonments is exclusive ... The breadth of the Commission's statutory discretion suggests a congressional intent to limit judicial

> interference ... The Act in fact spells out with considerable precision the remedies of a shipper ... Congress intended that an aggrieved shipper should seek relief in the first instance from the Commission ... It would vitiate the overarching congressional intent of creating an efficient an nationally integrated railroad system ... to permit the State of Iowa to use the threat of damages to do exactly what the Commission is empowered to excuse. A system under which each State could, through its own courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the [ICA].

Kalo Brick, 450 U.S. at 318, 321-2, 323, 325-6, 101 S.Ct. 1124. In contrast, several courts have held that food and drug regulation and FDA determinations regarding labeling standards are not so broad or exclusive as to preempt state law claims. *See supra* at p. 10-11. Because *Kalo Brick* was based largely on the pervasive and exclusive nature of the ICA, it does not require preemption here.

In sum, the Court finds that Pfizer has failed to establish that plaintiff's state law failure to warn claims conflict with congressional purposes.

In fact, the Court notes that permitting plaintiff's state law "failure to warn" claims may complement the congressional purposes of FDA regulations. Pfizer does not dispute that the FDA and its governing statute and regulations serve the purpose of enhancing drug safety. Defendant's Motion, p. 20-21; 21 U.S.C. § § 355(d) and 393(b)(2)(B). As plaintiff asserts, state law suits against drug manufacturers for defective drug design or failure to warn can serve the same public safety purpose as federal regulations by punishing perpetrators and thus preventing future harm. [FN12] *Bansemer v. Smith* ***1100** *Labs.*, 1990 WL 132579, *3 (E.D.Wis.1988). Indeed, state suits may complement the regulatory methods of promoting safety by directly flushing out more information about the risks of drugs and indirectly encouraging manufacturers to make complete risk disclosures to the FDA. *Id.* at *4 (quoting *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541-42 (D.C.Cir.1984)). [FN13]

> FN12. The Court acknowledges that just because federal law and state law serve the same general purpose does not mean that no conflict can exist. Defendant's Motion, p. 20 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 1923-25, 146 L.Ed.2d 914 (2000)). However, the Court has examinedPfizer's asserted bases for a conflict and has rejected them.
>
> FN13. Plaintiff asserts that the FDA has itself acknowledged "the importance of jury verdicts and the fact that they can help the FDA learn about the dangers of drugs." Opposition, p. 24. Plaintiff cites the following language from the FDA's denial of the CCHR petition to withdraw approval of Prozac: "On the other hand, an actual court finding of a causal relationship between Prozac and violent behavior would be relevant. In that event, the agency would be able to evaluate the scientific basis for the court's conclusion and consider whether the court's conclusion warranted a modification of its own position." Gaul Dec., Exh. 12, p. 513. FDA made this comment in response to CCHR's assertion that several lawsuits had been filed against Lilly based on Prozac's alleged causation of tardive dyskinesia. FDA's response was that mere filings are irrelevant but that actual court findings could be. Although the factual context of the comment is different from the circumstances here (e.g., different drug, different alleged adverse effect), the comment nonetheless does indicate that judicial findings based on scientific evidence may play a role in FDA determinations and could affect FDA's position on the issue of health risks.

B. Bar under California Law

[5] Pfizer argues that plaintiff's California state law strict liability inadequate warning claims are barred under the California Supreme Court case of *Carlin v. Superior Court*, 13 Cal.4th 1104, 1115, 56 Cal.Rptr.2d 162, 920 P.2d 1347 (1996). In *Carlin*, a prescription drug user brought a products liability action against a drug manufacturer for failure to warn about known or reasonably scientifically knowable dangerous propensities of a drug. Despite the defendant's argument that permitting plaintiff's strict liability claims to proceed would create a conflict with FDA labeling regulations, the Court held that plaintiff successfully stated a cause of action for strict liability premised on failure to warn. *Carlin*, 13 Cal.4th at 1113, 1118, 56 Cal.Rptr.2d 162, 920 P.2d 1347. Pfizer nevertheless relies on the following dicta from *Carlin*:

> [I]n the case of an alleged "known" risk, if state-of-the art scientific data was fully disclosed to the FDA and it determined, after review, that the pharmaceutical manufacturer was not permitted to warn—e.g., because the data was inconclusive or the risk was too speculative to justify a warning--the manufacturer could present such evidence to show that strict liability cannot apply; the FDA's conclusion that there was, in effect, no "known risk" is controlling.

Carlin, 13 Cal.4th at 1114-1115, 56 Cal.Rptr.2d 162, 920 P.2d 1347. Based on this dicta, Pfizer argues that because FDA has not found that SSRIs cause suicide, plaintiff cannot establish that Pfizer knew that SSRIs and Zoloft

cause suicide and therefore cannot make out a strict liability claim. Defendant's Motion, p. 15.

The Court rejects this argument. First, the language Pfizer relies on is only dicta and did not affect the Court's ultimate holding that plaintiff's claims *could* proceed. Second, the dicta refers only to the effect on FDA determinations on the issue of "known risks"; it does not say anything about the other possible basis that a plaintiff may, and that Motus did, assert for strict liability failure to warn claims--namely, that a manufacturer reasonably *should have known* about certain risks. Complaint, ¶ 33 ("defendants knew or should have known that their product was unsafe."). Third, the dicta does not state that an FDA determination is wholly preemptive; it instead states merely that "the manufacturer could present such evidence [of FDA's determination] to show that strict liability cannot apply," which is consistent with the California Supreme Court's statement that: "[i]n appropriate cases, FDA action or inaction, *though not* ***1101** *dispositive,* may be admissible ... to show whether a risk was known ..." *Carlin,* 13 Cal.4th at 1114, 1115, 56 Cal.Rptr.2d 162, 920 P.2d 1347 (emphasis added). Fourth, the dicta expressly states that it applies only to those situations in which FDA "determined, after review, that the pharmaceutical manufacturer was not permitted to warn ..." The Court has already found that FDA has never determined that Pfizer was not *permitted* to strengthen the Zoloft suicide warning, but instead determined only that Pfizer was not *required* to include strengthened warnings. For these reasons, *Carlin* is inapposite. [FN14]

> FN14. Plaintiff attacks *Carlin* 's dicta because it requires that "state-of-the-art scientific data concerning the alleged risk was fully disclosed to the FDA..." and plaintiff asserts that Pfizer did not disclose all risk-related data to FDA. Opposition, p. 10. It is not clear that this issue may be or need be evaluated by the Court and the Court does not reach it on this motion.

CONCLUSION

For the foregoing reasons and good cause appearing therefor, the Court DENIES defendant's motion for partial summary judgment.

IT IS SO ORDERED.

END OF DOCUMENT

NO. A094460

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

PAUL A. DOWHAL,
an individual,

Plaintiff and Appellant

v.

SMITHKLINE BEECHAM CONSUMER HEALTH CARE, LP; MCNEIL CONSUMER PRODUCTS COMPANY, A DIVISION OF MCNEIL-PPC, INC.; PHARMACIA & UPJOHN, INC.; ALZA CORPORATION; AVENTIS PHARMACEUTICALS, INC.; PERRIGO COMPANY; COSTCO COMPANIES, INC.; LUCKY STORES, INC.; RITE AID CORPORATION; SAFEWAY, INC.; WALGREEN COMPANY,

Defendants and Respondents.

On Appeal From A Judgment Based On An Order Granting
Motion for Summary Judgment and Denying
Cross Motion for Summary Adjudication

Superior Court of the State of California For
The County of San Francisco
Honorable David A. Garcia, Judge Presiding

Unfair Competition Case (*See* Bus. & Prof. Code § 17209 and Cal. Rule of Court 16(d))

AMICUS CURIAE BRIEF OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS/RESPONDENTS SMITHKLINE BEECHAM CONSUMER HEALTHCARE LP, ET AL.

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Code of Ala. § 6-11-20

*** CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 9, 2002. ***

TITLE 6. CIVIL PRACTICE
CHAPTER 11. DAMAGES
ARTICLE 2. PUNITIVE DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Code of Ala. § 6-11-20 (2002)

§ 6-11-20. Generally -- Definitions

(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the State of Alabama.

(b) As used in this article, the following definitions shall apply:

(1) Fraud. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.

(2) Malice. The intentional doing of a wrongful act without just cause or excuse, either:

a. With an intent to injure the person or property of another person or entity, or

b. Under such circumstances that the law will imply an evil intent.

(3) Wantonness. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.

(4) Clear and convincing evidence. Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

(5) Oppression. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

HISTORY: Acts 1987, No. 87-185.

NOTES:
CROSS REFERENCES. --This law is referred to in: § 28-9-11. Fraud, accrual of claim, § 6-2-3.

Fraud, misrepresentation and deceit, generally, § 6-5-100.

ALABAMA LAW REVIEW. --A suggestion for limited tort reform: Allocation of punitive damage awards to eliminate windfalls. 44 Ala. L. Rev. 61 (1992).
Survey of 1998-99 Developments in Alabama Case Law. 51 Ala. L. Rev. 409 (1999).

CUMBERLAND LAW REVIEW. --The constitutionality of punitive damages: Pacific Mutual Life Insurance Co. v. Haslip. 21 Cumb. L. Rev. 585 (1991).
Punitive damages in Alabama: Post-verdict review, tort reform, and Haslip. 22 Cumb. L. Rev. 255 (1992).
Symposium on tort reform: IV. Punitive damages: Where we stand. 24 Cumb. L. Rev. 441 (1994).
Symposium on tort reform: V. Debate: What is the role or function of punitive damages? 24 Cumb. L. Rev. 453 (1994).

HOWELL: PRACTICE FORMS. --§ 10-1-1.

ROBERTS, CUSIMANO: TORT LAW. --1.1.3; 4.0; 4.1; 20.12; 20.12, n. 114; 20.12.2; 20.12.3; 20.12.3, n. 142; 20.19; 21.5; 22.2; 24.0.1; 24.6, n. 88; 25.2, n. 9; 27.0.5; 30.9, n. 121; 33.4; 42.4.1, n. 76; 42.0; 42.0, n. 12; 42.4; 42.4.1; 42.4.1, n. 77; 42.4.1; 42.4.2, n. 78; 42.4.3; 42.4.3, n. 79.

ALR. --Equity court's power to award. 58 ALR4th 844.

CASE NOTES
General comment
Arbitration agreements
Award excessive
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Construction with other law
Damages
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Source: Legal > States Legal - U.S. > Alabama > Statutes & Legislative Materials > AL - Code of Alabama ⓘ
TOC: Code of Alabama > /. . . / > ARTICLE 2. PUNITIVE DAMAGES > § 6-11-21. Limitation and exceptions
Terms: "punitive damages" (Edit Search)

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Code of Ala. § 6-11-21

*** CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 9, 2002. ***

TITLE 6. CIVIL PRACTICE
CHAPTER 11. DAMAGES
ARTICLE 2. **PUNITIVE DAMAGES**

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Code of Ala. § 6-11-21 (2002)

§ 6-11-21. Limitation and exceptions

(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to **punitive damages** shall have been established under applicable laws, no award of **punitive damages** shall exceed three times the compensatory damages of the party claiming **punitive damages** or five hundred thousand dollars ($ 500,000), whichever is greater.

(b) Except as provided in subsection (d) and (j), in all civil actions where entitlement to **punitive damages** shall have been established under applicable law against a defendant who is a small business, no award of **punitive damages** shall exceed fifty thousand dollars ($ 50,000) or 10 percent of the business' net worth, whichever is greater.

(c) "Small business" for purposes of this section means a business having a net worth of two million dollars ($ 2,000,000) or less at the time of the occurrence made the basis of the suit.

(d) Except as provided in subsection (j), in all civil actions for physical injury wherein entitlement to **punitive damages** shall have been established under applicable laws, no award of **punitive damages** shall exceed three times the compensatory damages of the party claiming **punitive damages** or one million five hundred thousand dollars ($ 1,500,000), whichever is greater.

(e) Except as provided in Section 6-11-27, no defendant shall be liable for any **punitive damages** unless that defendant has been expressly found by the trier of fact to have engaged in conduct, as defined in Section 6-11-20, warranting **punitive damages,** and such defendant shall be liable only for **punitive damages** commensurate with that defendant's own conduct.

(f) As to all the fixed sums for **punitive damage** limitations set out herein in subsections (a), (b), and (d), those sums shall be adjusted as of January 1, 2003, and as of January 1 at

three-year intervals thereafter, at an annual rate in accordance with the Consumer Price Index rate.

(g) The jury may neither be instructed nor informed as to the provisions of this section.

(h) This section shall not apply to class actions.

(i) Nothing herein shall be construed as creating a right to an award of **punitive damages** or to limit the duty of the court, or the appellate courts, to scrutinize all **punitive damage** awards, ensure that all **punitive damage** awards comply with applicable procedural, evidentiary, and constitutional requirements, and to order remittitur where appropriate.

(j) This section shall not apply to actions for wrongful death or for intentional infliction of physical injury.

(k) "Physical injury" for purposes of this section, means actual injury to the body of the claimant proximately caused by the act complained of and does not include physical symptoms of the mental anguish or emotional distress for which recovery is sought when such symptoms are caused by, rather than the cause of, the pain, distress, or other mental suffering.

(/) No portion of a **punitive damage** award shall be allocated to the state or any agency or department of the state.

HISTORY: Acts 1987, No. 87-185; Acts 1999, No. 99-358.

NOTES:
EFFECTIVE DATES. Acts 1999, No. 99-358, effective June 7, 1999. Rewrote this section.

RELATED STATUTES. Acts 1999, No. 99-358, § 2: "Nothing contained in this act shall be construed to allow the award of damages in excess of amounts authorized by Section 11-93-1, et seq., Code of Alabama 1975; nor shall any provision of this act supersede or amend in any way the provisions of Section 6-11-26, Code of Alabama 1975."
Acts 1999, No. 99-358, § 4: "This act shall apply to all actions commenced more than 60 days after the effective date of this act."

CROSS REFERENCES. --This law is referred to in: § 6-11-22.

ALABAMA LAW REVIEW. --A suggestion for limited tort reform: Allocation of **punitive damage** awards to eliminate windfalls. 44 Ala. L. Rev. 61 (1992).
Survey of 1999 Alabama Legislation. 51 Ala. L. Rev. 907 (2000).

CUMBERLAND LAW REVIEW. --The constitutionality of **punitive damages:** Pacific Mutual Life Insurance Co. v. Haslip. 21 Cumb. L. Rev. 585 (1991).
Punitive damages in Alabama: Post-verdict review, tort reform, and Haslip. 22 Cumb. L. Rev. 255 (1992).
Symposium on tort reform: IV. **Punitive damages:** Where we stand. 24 Cumb. L. Rev. 441 (1994).
Damage caps in Alabama's civil justice system: An uncivil war within the state. 29 Cumb. L. Rev. 201 (1998).
Article: Trial by Jury and Statutory Caps on **Punitive Damages:** Lessons for Alabama from Ohio's Constitutional History. 31 Cumb. L. Rev. 287 (2000/2001).

HOWELL: PRACTICE FORMS. --§ 10-1-1.

ROBERTS, CUSIMANO: TORT LAW. --20.12, n. 114; 20.12.3; 20.13.6; 20.19; 21.5; 24.6, n.

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Code of Ala. § 6-11-23

*** CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 9, 2002. ***

TITLE 6. CIVIL PRACTICE
CHAPTER 11. DAMAGES
ARTICLE 2. **PUNITIVE DAMAGES**

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Code of Ala. § 6-11-23 (2002)

§ 6-11-23. Evidence

(a) No presumption of correctness shall apply as to the amount of **punitive damages** awarded by the trier of the fact.

(b) In all cases wherein a verdict for **punitive damages** is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of **punitive damages.** Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for **punitive damages** has been rendered. After such post verdict hearing the trial court shall independently (without any presumption that the award of **punitive damages** is correct) reassess the nature, extent, and economic impact of such an award of **punitive damages,** and reduce or increase the award if appropriate in light of all the evidence.

HISTORY: Acts 1987, No. 87-185.

NOTES:
CUMBERLAND LAW REVIEW. --The constitutionality of **punitive damages:** Pacific Mutual Life Insurance Co. v. Haslip. 21 Cumb. L. Rev. 585 (1991).
Punitive damages in Alabama: Post-verdict review, tort reform, and Haslip. 22 Cumb. L. Rev. 255 (1992).
Symposium on tort reform: IV. **Punitive damages:** Where we stand. 24 Cumb. L. Rev. 441 (1994).

HOFFMAN, GUIN: PROCEDURE. --§ 12.8.

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Terms: **"punitive damages"** (Edit Search)

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Code of Ala. § 6-11-24

*** CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 9, 2002. ***

TITLE 6. CIVIL PRACTICE
CHAPTER 11. DAMAGES
ARTICLE 2. **PUNITIVE DAMAGES**

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Code of Ala. § 6-11-24 (2002)

§ 6-11-24. Appeals; presumptions and reassessment

(a) On appeal, no presumption of correctness shall apply to the amount of **punitive damages** awarded.

(b) The appellate court shall independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence.

HISTORY: Acts 1987, No. 87-185.

NOTES:
CUMBERLAND LAW REVIEW. --The constitutionality of **punitive damages:** Pacific Mutual Life Insurance Co. v. Haslip. 21 Cumb. L. Rev. 585 (1991).
Punitive damages in Alabama: Post-verdict review, tort reform, and Haslip. 22 Cumb. L. Rev. 255 (1992).
Symposium on tort reform: IV. **Punitive damages:** Where we stand. 24 Cumb. L. Rev. 441 (1994).

HOFFMAN, GUIN: PROCEDURE. --§ 12.8.

ROBERTS, CUSIMANO: TORT LAW. --20.19; 42.4.1; 42.4.4; 42.5; 43.0; 43.1.4.

CASE NOTES

CONSTITUTIONALITY. Court reversed itself and ruled this section to be constitutional; Ala. Code § 6-11-24(a), held to be unconstituitonal in 1991, is now binding on Alabama courts. Horton Homes, Inc. v. Brooks, -- So. 2d -- (Ala. Nov. 30, 2001), 2001 Ala. LEXIS 431, cert. denied, -- U.S. --, 122 S. Ct. 1911, 152 L. Ed. 2d 821 (2002).

CITED IN Wilson v. Dukona Corp., 547 So. 2d 70 (Ala. 1989); Ocean Cruise Lines v. Abeta Travel Serv., Inc., 562 So. 2d 205 (Ala. 1990); Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1990).

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TOC: Code of Alabama > /. . . / > ARTICLE 2. PUNITIVE DAMAGES > **§ 6-11-24. Appeals; presumptions and reassessment**
Terms: **"punitive damages"** (Edit Search)
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Terms: **"punitive damages"** (Edit Search)

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Code of Ala. § 6-11-25

*** CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 9, 2002. ***

TITLE 6. CIVIL PRACTICE
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♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Code of Ala. § 6-11-25 (2002)

§ 6-11-25. Setting aside or reversing award, new trial

Nothing in this article is intended to limit the ability of a trial or appellate court to set aside or reverse an award of **punitive damages,** or to order a new trial.

HISTORY: Acts 1987, No. 87-185.

NOTES:
CROSS REFERENCES. --This law is referred to in: § 28-9-11.

CUMBERLAND LAW REVIEW. --**Punitive damages** in Alabama: Post-verdict review, tort reform, and Haslip. 22 Cumb. L. Rev. 255 (1992).
Symposium on tort reform: IV. **Punitive damages:** Where we stand. 24 Cumb. L. Rev. 441 (1994).

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Terms: **"punitive damages"** (Edit Search)
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Source: Legal > States Legal - U.S. > Alaska > Statutes & Legislative Materials > **AK - Alaska Statutes**
TOC: Alaska Statutes > /. . . / > CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT > **Sec. 09.17.020. Punitive damages**
Terms: **"punitive damages"** (Edit Search)

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Alaska Stat. § 09.17.020

*** CURRENT THROUGH 2001 SUPPLEMENT ***
*** (ANNOTATIONS CURRENT THROUGH DECISIONS RECEIVED BY MARCH 10, 2002) ***
*** (2001 1ST SESSION OF THE TWENTY-SECOND STATE LEGISLATURE) ***
*** (2001 1ST SPECIAL SESSION OF THE LEGISLATURE) ***

TITLE 9. CODE OF CIVIL PROCEDURE
CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Alaska Stat. § 09.17.020 (2001)

Sec. 09.17.020. **Punitive damages**

(a) In an action in which a claim of **punitive damages** is presented to the fact finder, the fact finder shall determine, concurrently with all other issues presented, whether **punitive damages** shall be allowed by using the standards set out in (b) of this section. If **punitive damages** are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of **punitive damages** to be awarded.

(b) The fact finder may make an award of **punitive damages** only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous, including acts done with malice or bad motives; or

(2) evidenced reckless indifference to the interest of another person.

(c) At the separate proceeding to determine the amount of **punitive damages** to be awarded, the fact finder may consider

(1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;

(2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;

(4) the duration of the conduct and any intentional concealment of the conduct;

(5) the attitude and conduct of the defendant upon discovery of the conduct;

(6) the financial condition of the defendant; and

(7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and **punitive damages** awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of **punitive damages** to be awarded, and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of **punitive damages** to be determined under (c)(3) or (6) of this section may not be conducted until after the fact finder has determined that an award of **punitive damages** is allowed under (a) and (b) of this section. The court may issue orders as necessary, including directing the parties to have the information relevant to the amount of **punitive damages** to be determined under (c)(3) or (6) of this section available for production immediately at the close of the initial trial in order to minimize the delay between the initial trial and the separate proceeding to determine the amount of **punitive damages.**

(f) Except as provided in (g) and (h) of this section, an award of **punitive damages** may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff in the action; or

(2) the sum of $ 500,000.

(g) Except as provided in (h) of this section, if the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of **punitive damages** not to exceed the greatest of

(1) four times the amount of compensatory damages awarded to the plaintiff in the action;

(2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or

(3) the sum of $ 7,000,000.

(h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of **punitive damages** awarded by the court or jury may not exceed

(1) $ 200,000 if the employer has less than 100 employees in this state;

(2) $ 300,000 if the employer has 100 or more but less than 200 employees in this state;

(3) $ 400,000 if the employer has 200 or more but less than 500 employees in this state; and

(4) $ 500,000 if the employer has 500 or more employees in this state.

(i) Subsection (h) of this section may not be construed to allow an award of **punitive damages** against the state or a person immune under another provision of law. In (h) of this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

(j) If a person receives an award of **punitive damages,** the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover **punitive damages.**

HISTORY: (§ 1 ch 139 SLA 1986; am § 10 ch 26 SLA 1997)

NOTES:
CROSS REFERENCES. --For prohibition on recovery of **punitive damages** against the state, see AS 09.50.280.

For provisions relating to the effect of 1997 addition of subsections (e) and (j) on Rules 26 and 58, Alaska Rules of Civil Procedure, respectively, see §§ 48 and 49, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

EFFECT OF AMENDMENTS. --The 1997 amendment, effective August 7, 1997, rewrote this section.

EDITOR'S NOTES. --Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."

NOTES TO DECISIONS

APPLICABILITY OF SECTION. --This section applies to all cases accruing after its effective date, August 7, 1997, and cannot be applied to cases accruing before that date, because of express legislative intent to the contrary. Norcon, Inc. v. Kotowski, 971 P.2d 158 (Alaska 1999).

BURDEN OF PROOF. --In an instruction on **punitive damages,** failure to instruct the jury on the clear and convincing evidence burden of proof was plain error. Alaska Marine Pilots v. Hendsch, 950 P.2d 98 (Alaska 1997).

CLEAR AND CONVINCING EVIDENCE. --While peaceful picketing is a protected form of speech, threats of bodily harm, personal assaults, and property destruction on a picket line are not constitutionally protected, and such actions provided ample evidence of conduct which justified a **punitive damage** award under the clear and convincing standard. International Bhd. of Elec. Workers, Local 1547 v. Alaska Util. Constr., Inc., 976 P.2d 852 (Alaska 1999).

QUOTED IN State Farm Mut. Auto. Ins. Co. v. Weiford, 831 P.2d 1264 (Alaska 1992); Ace v. Aetna Life Ins. Co., 139 F.3d 1241 (9th Cir. 1998), cert. denied, 525 U.S. 930, 119 S. Ct. 338, 142 L. Ed. 2d 279 (1998).

CITED IN Johnson & Higgins of Alaska, Inc. v. Blomfield, 907 P.2d 1371 (Alaska 1995); MAPCO Express, Inc. v. Faulk, 24 P.3d 531 (Alaska 2001).

COLLATERAL REFERENCES. --Availability and scope of **punitive damages** under state

Cal Civ Code § 3294

*** THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT (2001 SESSION) ***
INCLUDING URGENCY LEGISLATION THROUGH 2002 REG. SESS. CH. 379, 9/5/02 AND
2001-2002 3RD EXTRA SESS. CH. 4XXX, 5/06/02

CIVIL CODE
DIVISION 4. General Provisions
PART 1. Relief
TITLE 2. Compensatory Relief
CHAPTER 1. Damages in General
ARTICLE 3. Exemplary Damages

✦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Cal Civ Code § 3294 (2002)

§ 3294. When permitted

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

HISTORY:

Enacted 1872. Amended Stats 1905 ch 463 § 1; Stats 1980 ch 1242 § 1; Stats 1982 ch 174 § 1; Stats 1983 ch 408 § 1.

Amended Stats 1987 ch 1498 § 5; Stats 1988 ch 160 § 17; Stats 1992 ch 178 § 5 (SB 1496).

NOTES:

AMENDMENTS:

1905 Amendment:

Substituted (1) "In an" for "In any" at the beginning of the section; (2) "express or implied, the plaintiff" for "actual or presumed, the jury"; and (3) "recover" for "give" after "may".

1980 Amendment:

(1) Designated the former section to be subd (a); (2) deleted "express or implied," after "or malice," in subd (a); and (3) added subds (b) and (c).

1982 Amendment:

Substituted "and conscious disregard, authorization, ratification" for ", ratification," after "advance knowledge" in subd (b).

1983 Amendment:

Added subd (d).

1987 Amendment:

(1) Added "it is proven by clear and convincing evidence that" in subd (a); (2) added "despicable" and "willful and" in subd (c)(1); (3) substituted "despicable conduct that subjects" for "subjecting" in subd (c)(2); and (4) added subd (e).

1988 Amendment:

Routine code maintenance.

1992 Amendment:

Amended subd (d) by substituting (1) "Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure" for "Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code"; and (2) "377.62" for "377".

HISTORICAL DERIVATION:

Field's Draft NY CC § 1839.

NOTE-

Stats 1980 ch 1242 provides:

SEC. 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are severable.

Stats 1983 ch 408 provides:

SEC. 2. This act is part of the Crime Victim Restitution Program of 1983 in that it expands the ability of survivors of homicide victims to obtain punitive damages from convicted criminals.

C.R.S. 13-21-102

COLORADO REVISED STATUTES

*** THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT (2002 SESSIONS) ***

TITLE 13. COURTS AND COURT PROCEDURE
DAMAGES
DAMAGES
ARTICLE 21. DAMAGES
PART 1. GENERAL PROVISIONS

C.R.S. 13-21-102 (2002)

13-21-102. Exemplary damages

(1) (a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

(2) Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct which resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

(4) Repealed.

(5) Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings, even if the award or decision is enforced or approved in an action commenced in a court.

(6) In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

HISTORY: Source: L. 1889: p. 64, § 1.R.S. 08: § 2067.C.L. § 6307.CSA: C. 50, § 6.CRS 53: § 41-2-2.C.R.S. 1963: § 41-2-2.L. 86: Entire section amended, p. 675, § 1, effective July 1.L. 95: (4) repealed, p. 14, § 1, effective March 9.

I. General Consideration.
II. Essential Elements.
III. Amount.
IV. Pleading and Practice.
V. Against Whom Awarded.

I.GENERAL CONSIDERATION.

Am. Jur.2d. See 22 Am. Jur.2d, Damages, § § 731, 732, 734, 737, 740, 744, 747, 749-754, 762-764, 766-770, 813-816.

C.J.S. See 25 C.J.S., Damages, § 53.

Law reviews. For comment on Starkey v. Dameron, appearing below, see 6 Rocky Mt. L. Rev. 81 (1933). For note, "Need Punitive Damages Be Proportionate to Compensatory Damages?", see 23 Rocky Mt. L. Rev. 206 (1950). For note, "Exemplary Damages in Colorado -- Punitive or Puny?", see 35 U. Colo. L. Rev. 394 (1963). For comment on Kohl v. Graham, appearing below, see 36 U. Colo. L. Rev. 283 (1964). For article, "Trade Secret Litigation: Injunctions and Other Equitable Remedies", see 48 U. Colo. L. Rev. 189 (1977). For casenote, "Palmer v. A.H. Robins Co.: Problems with Punitive Damages in Products Liability Actions", see 57 U. Colo. L. Rev. 135 (1985). For article, "Help for Colorado Trade Secret Owners", see 15 Colo. Law, 1993 (1986). For article, "Tort Reform's Impact on Contract Law", see 15 Colo. Law. 2206 (1986). For article, "Let the Builder-Vendor Beware: Defenses and Damages in Home Builder Litigation -- Part II", see 16 Colo. Law. 629 (1987). For article, "Introduction to the Tort Reform Symposium: Some Cautioning Implications of Legislative Tort Reform", see 64 Den. U. L. Rev. 613 (1988). For article, "The Assault on Injured Victims' Rights", see 64 Den. U. L. Rev. 625 (1988). For article, "The Impact of Tort Reform on Product Liability Litigation in Colorado", see 30 Colo. Law. 91 (November 2001).

Subsection (4) of this section held unconstitutional. An exemplary damages award is a private property right, and the requirements of subsection (4) of this section constitute a taking of a judgment creditor's private property without just compensation in violation of the fifth and fourteenth amendments to the United States constitution and article II, section 15 of the Colorado constitution. Kirk v. Denver Pub. Co., 818 P.2d 262 (Colo. 1991).

Section does not violate due process clauses of the federal or state constitutions. Malandris v.

Source: Legal > States Legal - U.S. > Connecticut > Statutes & Legislative Materials > **CT - General Statutes of Connecticut - Book Browse** ⓘ
TOC: General Statutes of Connecticut > /.../ > CHAPTER 901 DAMAGES, COSTS AND FEES > **§ 52-240b. Punitive damages in product liability actions.**
Terms: **52-240**
Section: **Conn. Gen. Stat. § 52-240b**

Conn. Gen. Stat. § 52-240b

GENERAL STATUTES OF CONNECTICUT

THIS DOCUMENT IS CURRENT THROUGH THE 2001 EDITION (1999-2000 SESSIONS)

TITLE 52. CIVIL ACTIONS

CHAPTER 901 DAMAGES, COSTS AND FEES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Conn. Gen. Stat. § 52-240b (2001)

§ 52-240b. Punitive damages in product liability actions.

Punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff.

HISTORY: (P.A. 79-483, S. 8.)

NOTES:

Title Notes:

*Cited. 176 Conn. 401, 407-409. Cited. 199 Conn. 496, 507, 513.

Cited. 4 Conn. App. 339, 344, 347.

Cited. 35 Conn. Supp. 609, 614, 615; 36 Conn. Supp. 47, 51.

Chapter Notes:

*See notes to Secs. 52-257, 52-265.

Cited. 235 Conn. 1, 40.

In statutory proceedings, if there is no provision of law or rule governing taxation of costs, costs may be awarded in court's discretion. 21 Conn. Supp. 331.

Cited. 187 Conn. 363, 371. Cited. 210 Conn. 189-191, 193. Product liability act cited. Id. Cited. 212 Conn. 509, 532, 562, 569. Cited. 221 Conn. 674, 681. Cited. 241 Conn. 199.

Cited. 243 Conn. 168.

Cited. 8 Conn. App. 642, 654-656. P.A. 79-483 (products liability law) cited. 16 Conn. App. 558, 562. Cited. 43 Conn. App. 1.

Legislative meaning attributed to words "claimant" and "harm", in Sec. 52-572m(c) and (d) are sufficiently broad to permit an award of punitive damages in connection with a product liability claim involving only damage to property. 39 Conn. Supp. 269-272. Cited. 42 Conn. Supp. 153-155.

Source: Legal > States Legal - U.S. > Delaware > Statutes & Legislative Materials > **DE - Delaware Code Annotated**
TOC: Delaware Code Annotated > /. . . / > SUBCHAPTER VI. GENERAL PROVISIONS > **§ 6855. Punitive damages**
Terms: **"punitive damages" /10 award or assess or recover** (Edit Search)

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18 Del. C. § 6855

*** CURRENT THROUGH DECEMBER 2001 ***
*** (2001 REGULAR SESSION OF THE 141ST GENERAL ASSEMBLY) ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 2002 ***

TITLE 18. INSURANCE CODE
PART I. INSURANCE
CHAPTER 68. HEALTH CARE MEDICAL NEGLIGENCE INSURANCE AND LITIGATION
SUBCHAPTER VI. GENERAL PROVISIONS

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

18 Del. C. § 6855 (2001)

§ 6855. Punitive damages

In any action for medical negligence, punitive damages may be awarded only if it is found that the injury complained of was maliciously intended or was the result of wilful or wanton misconduct by the health care provider, and may be awarded only if separately awarded by the trier of fact in a separate finding from any finding of compensatory damages which separate finding shall also state the amounts being awarded for each such category of damages. Injuries shall not be considered maliciously intended in instances in which unforeseen damage or injury results from intended medication, manipulation, surgery, treatment or the intended omission thereof, administered or omitted without actual malice or if the intended treatment is applied or omitted by mistake to or for the wrong patient or wrong organ.

HISTORY: 60 Del. Laws, c. 373, § 1; 71 Del. Laws, c. 373, § 3.

NOTES:
EFFECT OF AMENDMENTS. --71 Del. Laws, c. 373, effective July 7, 1998, substituted "medical negligence" for "malpractice" in the first sentence.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES FAILED where there was no evidence of "malicious intent" or some other "willful or wanton misconduct" to support an **award of punitive damages.** Myers v. Medical Ctr. of Del., Inc., 86 F. Supp. 2d 389 (D. Del. 2000).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, subchapter, chapter, part or title.

Source: Legal > States Legal - U.S. > Delaware > Statutes & Legislative Materials > **DE - Delaware Code Annotated**

Annotated ⓘ
TOC: Delaware Code Annotated > /. . . ./ > SUBCHAPTER VI. GENERAL PROVISIONS > **§ 6855. Punitive damages**
Terms: **"punitive damages" /10 award or assess or recover** (Edit Search)
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Source: Legal > States Legal - U.S. > Florida > Statutes & Legislative Materials > **FL - LexisNexis Florida Annotated Statutes - Book Browse** ⓘ
TOC: Florida Statutes > /. . . / > PART II DAMAGES > **768.725 Punitive damages; burden of proof.**
Terms: **"punitive damages" /15 assess or award or recover**
Section: **Fla. Stat. § 768.725**

Fla. Stat. § 768.725

LexisNexis (TM) Florida Annotated Statutes

*** THIS DOCUMENT IS CURRENT THROUGH THE 2002 LEGISLATIVE SESSION ***
*** September 2002 Annotation Service ***

TITLE XLV TORTS
CHAPTER 768 NEGLIGENCE
PART II DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Fla. Stat. § 768.725 (2002)

768.725 Punitive damages; burden of proof.

In all civil actions, the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages. The "greater weight of the evidence" burden of proof applies to a determination of the amount of damages.

HISTORY: s. 21, ch. 99-225.

LexisNexis (TM) Notes:
⬇ TREATISES AND ANALYTICAL MATERIALS
⬇ LAW REVIEWS

⬆ TREATISES AND ANALYTICAL MATERIALS

1. 2-50 FLPRAC § 50.32, Florida Civil Practice Guide, Part 6 DAMAGES, § 50.32 Prerequisites to Recovery, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

2. 2-50 FLPRAC § 50.34, Florida Civil Practice Guide, Part 6 DAMAGES, § 50.34 Vicarious Liability, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

3. 2-50 FLPRAC § 50.35, Florida Civil Practice Guide, Part 6 DAMAGES, § 50.35 Amount of Punitive Damages, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

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6. 2-44 FFJURY § 44.70, Florida Forms of Jury Instruction, DivisionII BREACH OF CONTRACT ACTIONS, § 44.70 Wrongful Eviction Damages for Tenant, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

7. 2-60 FFJURY § 60.70, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 60.70 Requirement of Actual Injury, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

8. 2-60 FFJURY § 60.73, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 60.73 Punitive Damages--General Instruction, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

9. 2-61 FFJURY § 61.06, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 61.06 Intent, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

10. 2-61 FFJURY § 61.42, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 61.42 Punitive, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

11. 3-64 FFJURY § 64.82, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 64.82 Punitive Damages (Fla. Std. Jury Instr. [Civ.] MI 4.4g(2)), Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

12. 4-121 FFJURY § 121.60, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 121.60 Driving While Intoxicated--Punitive Damages, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

13. 4-130 FFJURY § 130.100, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 130.100 Punitive Damages Under Civil Remedies Act, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

14. 4-143 FFJURY § 143.02, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 143.02 Plaintiff: Award of Punitive Damages--Bifurcated Case (Fla. Std. Jury Instr. [Civ.] PD 1a.(1), 1a.(2)), Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

15. 4-143 FFJURY § 143.03, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 143.03 Plaintiff: Direct Liability for Acts of Managing Agent or Primary Owner or Certain Others, or Vicarious Liability--Bifurcated Case (Fla. Std. Jury Instr. [Civ.] PD 1a.(3), 1a.(4)), Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

16. 4-143 FFJURY § 143.20, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 143.20 Amount of Punitive Damages--Bifurcated Issue (Fla. Std. Jury Instr. [Civ.] PD 1b.), Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

17. 4-143 FFJURY § 143.30, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 143.30 Plaintiff: Assault and Battery, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

18. 4-143 FFJURY § 143.31, Florida Forms of Jury Instruction, Division III TORT ACTIONS, § 143.31 Plaintiff: Malicious Prosecution, Copyright 2001, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

Source: Legal > States Legal - U.S. > Florida > Statutes & Legislative Materials > **FL - LexisNexis Florida Annotated Statutes - Book Browse**
TOC: Florida Statutes > /. . . / > PART II DAMAGES > **768.73 Punitive damages; limitation.**
Terms: **"punitive damages" /15 assess or award or recover**
Section: **Fla. Stat. § 768.73**

Fla. Stat. § 768.73

LexisNexis (TM) Florida Annotated Statutes

*** THIS DOCUMENT IS CURRENT THROUGH THE 2002 LEGISLATIVE SESSION ***
*** September 2002 Annotation Service ***

TITLE XLV TORTS
CHAPTER 768 NEGLIGENCE
PART II DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Fla. Stat. § 768.73 (2002)

768.73 Punitive damages; limitation.

(1) (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of $ 500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of $ 2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) (a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single

course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced by the amount of any earlier punitive damage awards rendered in state or federal court.

(3) The claimant attorney's fees, if payable from the judgment, are, to the extent that the fees are based on the punitive damages, calculated based on the final judgment for punitive damages. This subsection does not limit the payment of attorney's fees based upon an award of damages other than punitive damages.

(4) The jury may neither be instructed nor informed as to the provisions of this section.

(5) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

HISTORY: ss. 52, 65, ch. 86-160; s. 1, ch. 87-42; s. 5, ch. 87-50; s. 1, ch. 88-335; s. 71, ch. 91-282; ss. 2, 3, ch. 92-85; s. 16, ch. 97-94; s. 23, ch. 99-225.

LexisNexis (TM) Notes:
CASE NOTES
TREATISES AND ANALYTICAL MATERIALS
LAW REVIEWS

CASE NOTES

Business & Corporate Entities : Corporations : Shareholders & Other Constituents : Actions Against Corporations

Civil Procedure : Joinder of Claims & Parties : Intervention

Civil Procedure : Alternative Dispute Resolution : Judicial Review

Civil Procedure : Relief From Judgment : Mistake & Excusable Neglect

Evidence : Procedural Considerations : Inferences & Presumptions

Torts : Damages : Damages Generally

Torts : Damages : Punitive Damages

Torts : Damages : Taxation of Damage Awards

Torts : Intentional Torts : Abuse of Process & Malicious Prosecution

Business & Corporate Entities : Corporations : Shareholders & Other Constituents : Actions Against Corporations

1. Fla. Stat. ch. 768.73 did not provide the statutory authority necessary for shareholders' in

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ARTICLE: A Proposal for Federal Product Liability Reform in the New Millennium

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SUMMARY:
... The federal product liability reform effort has a long and checkered history. ... A manufacturer of protective sporting goods equipment has said that raw material suppliers are reluctant to sell to her company because of concerns about "deep pocket" liability. ... B. Federal Product Liability Reform Legislation ... A new trend at the state level reinforces the need for federal product liability reform legislation. ... Supporters of federal product liability reform legislation, however, have never called for a complete federal "takeover" of product liability law. ... Federal product liability reform is also consistent with the trend since the mid-1960s toward increased federal involvement in consumer product safety, an inherent part of interstate commerce. ... For example, until 1976, there were only three reported appellate court decisions upholding awards of **punitive damages** in product liability cases, and the **punitive damages** award in each case was modest in proportion to the compensatory damages awarded. ... Plaintiffs' lawyers argue to juries that large, wealthy corporations will only "get the message" if **punitive damage** awards are substantial. ... Federal legislation also should put reasonable parameters on **punitive damages** to make the punishment fit the offense. ... Some opponents of joint liability reform have argued that the "California approach" somehow discriminates because women or other groups may have fewer economic losses than others. ...

TEXT:
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I. Introduction

The federal product liability reform effort has a long and checkered history. Over the past two decades, attempts at reform have spanned Republican and Democratic congresses and administrations. In 1996, legislation passed out of both the House and Senate, [1] but was vetoed by President Clinton. [2] If political circumstances change in Washington and a president is elected who would support legal reform, supporters of federal product liability law may finally be able to claim victory.

Federal product liability reform legislation is needed because the current state-by-state product liability system is unnecessarily costly, inequitable, and unpredictable. [3] The patchwork state system has stifled innovation, kept beneficial products off the market, and handicapped American firms as they compete in the global economy. [4] Here are some specifics.

Pregnant women no longer have access to a drug once widely prescribed to treat "morning sickness," in part, because of the manufacturer's legitimate concern about overkill in our liability system. [5] A chief executive officer of a biotechnology company has stated that his company decided not to pursue research into the development of an AIDS vaccine because of the current product liability system. [6] A manufacturer of protective sporting goods equipment has said that raw material suppliers are reluctant to sell to her company because of concerns about "deep pocket" liability. [7] As a result, the company was unable to obtain the raw materials needed to produce and market a new baseball safety helmet that functioned well in prototype testing. [8] **[*264]** The company later chose not to produce hockey helmets, even though interest in the sport has grown substantially in the United States. [9] "In the final analysis," the company's chief executive officer told Congress, "we felt we could not pursue this market because of the additional, uncontrollable liability exposure it would create." [10]

Federal product liability reform can right the scales of justice, preserving the tort "punch" while eliminating overkill caused by excessive and uncertain liability. After twenty years of exhaustive study, the time for meaningful reform is now.

This article will briefly describe the extensive history of the federal product liability effort. It will then discuss the need for federal product liability reform and provide factual and public policy reasons to support legislation on the subject. [11] The article will then recommend several reforms that merit congressional action. Finally, the article provides constitutional support for the proposals and illustrates the hollowness of arguments that reform opponents have raised to try to cloud what is clear constitutional law.

II. Historical Background

A. The Federal Interagency Task Force on Product Liability and the Model Uniform Product Liability Act

The federal product liability reform effort has its roots in an in-depth research and analysis conducted by the Federal Interagency Task Force on Product Liability from 1976 to 1980 under Presidents Ford and Carter. [12] The Task Force made two principal recommendations.

First, to give small businesses a fairer opportunity in the liability insurance market, the Task Force recommended federal legislation to allow businesses to form self-insurance pools and purchasing groups. [13] The resulting legislation, the Product **[*265]** Liability Risk Retention Act, became law in 1981. [14] It was extended to all liability coverage (with the exception of

workers' compensation) in 1986. [15] The legislation helped to ensure not only competitive markets, but also that any savings from the stabilization of the tort system would be passed along to insureds and the American public.

Second, the Task Force found that easier self-insurance options alone would not address the product liability problem facing American consumers and businesses. [16] Self-insurers and commercial insurers would still confront growing uncertainties caused by individual, ever-changing, state product liability laws. The Task Force, therefore, recommended and then drafted a model law for use by the states. [17] The Task Force intimated that federal legislation might be needed if the states did not enact the model law in a uniform manner. [18]

The Task Force's Model Uniform Product Liability Act served as the basis of legislation in several states, but was not adopted nationwide. [19] Furthermore, those states that did enact the "Uniform Act" did so in a piecemeal fashion, rather than "uniformly." [20] This led to calls for reform at the federal level.

B. Federal Product Liability Reform Legislation

Serious interest in enacting federal product liability reform legislation began in the early 1980s and continues to this day. While the effort's long history has been documented elsewhere, [21] a brief summary of that history is relevant to illustrate just how carefully and extensively the issue has been studied.

Comprehensive product liability reform bills have been reported out of the House Commerce Committee twice (1988 **[*266]** and 1995), [22] the House Judiciary Committee once (1995), [23] and the Senate Commerce Committee eight times (1982, 1984, 1986, 1990, 1991, 1993, 1995, 1997). [24] In the 104th Congress, legislation finally reached both the Senate and House floors, where it passed both chambers - twice (each chamber passed its own bill in 1995 and then a conference report bill in 1996). [25] President Clinton vetoed that legislation in May of 1996. [26]

In addition to comprehensive efforts, several individual product liability reform bills have been reported out of congressional committees in recent years. [27] Two became law. [28]

The General Aviation Revitalization Act of 1994 (GARA) [29] established an eighteen-year statute of repose for general aviation aircraft used for noncommercial purposes. It reversed the general aviation industry's path toward extinction. As a result of GARA, the general aviation industry is now booming. [30] The other law, the Biomaterials Access Assurance Act of 1998, [31] helped avoid a serious public health crisis by ensuring the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, and hip and knee joints. [32] The supply of those devices had been critically threatened after suppliers made a business judgment to exit the medical device market in order to avoid further legal costs, such as those that accompanied their successful defense of meritless **[*267]** product liability claims. [33] The Biomaterials law encourages those suppliers to reenter the market by allowing them to obtain early dismissal, without extensive discovery or other legal costs, in certain tort suits involving finished medical implants. [34]

III. The Need for Federal Product Liability Reform

A. Problems with a State-by-State Approach

Congress is uniquely suited to enact a national solution to provide predictability in the product liability system. [35] Predictability reduces unnecessary legal costs and enables consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, though useful, cannot solve the national product liability problem because a state cannot regulate product liability problems outside its borders.

United States Department of Commerce data indicate that, on average, over seventy percent of the goods that are manufactured in a particular state are shipped and sold out of that state. [36] Insurers recognized this fact **[*268]** years ago and set insurance rates based on country-wide, not individual state, data.

In that regard, one can contrast product liability with workers' compensation. When a worker is injured because of employer fault or neglect, all the relevant facts usually occur in the same state. For that reason, workers' compensation rates vary from state to state and are based on intrastate data. Putting all this in practical form, if a company moves from State A to State B, its workers' compensation insurance costs will change, but its product liability insurance costs will not.

B. States' Rights Groups and the Need for Federal Reform

Because of the interstate nature of products liability law, the National Governors' Association (NGA) has called upon Congress to enact federal product liability legislation. [37] The NGA's most recent resolution reads, in part, as follows:

The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce .... Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code. [38]

The American Legislative Exchange Council (ALEC), a bipartisan organization of over three thousand state legislators from all fifty states, formed in principal part to protect states' rights, also supports enactment of federal product liability legislation. [39]

C. Judicial Nullification of State Tort Law

A new trend at the state level reinforces the need for federal product liability reform legislation. In response to tort reform legislation that has been enacted in the states, the Association of Trial Lawyers of America ("ATLA"), the primary advocacy organization of the plaintiffs' personal injury bar, has launched **[*269]** a nationwide effort to persuade state courts to nullify state tort reform legislation. [40] While clearly a minority position, a large number of state courts have embraced the trial bar's arguments. [41] There are now over ninety state court decisions striking down state tort reform laws over the past fifteen years. [42] For that reason, it can no longer be suggested that the job of fixing our nation's serious liability problems should be left completely to the states.

Trial lawyer attempts to overturn state legislative tort policy decisions generally rely on obscure provisions of state constitutions, such as "right to remedy" and "open courts" provisions, that have little historical explanation and no "companion" in the United States Constitution. [43] This allows trial lawyers to offer their own explanations to "fill in the gaps" in the historical record. Indeed, former ATLA President Mark Mandell has bragged that a brief written by ATLA and argued by Harvard law professor Laurence Tribe resulted in an Indiana health care liability statute being overturned based on a state constitutional provision "that was previously regarded as toothless." [44]

By relying solely on state constitutions, contingency fee lawyers are able to preclude any appeal of an adverse decision to the United States Supreme Court - there is no federal issue.

Contingency fee lawyers utilize this strategy, because they know that the United States Supreme Court, in constitutional challenges under the Fourteenth Amendment, has made clear distinctions between situations in which a legislature violated a person's fundamental rights and situations in which a legislature made an economic policy decision. Except in a highly discredited period in the Supreme Court's history known as "the Lochner era," [45] which began shortly after the turn of the twentieth **[*270]** century and ended around the mid-1930's, the Supreme Court has shown appropriate deference to legislative policy judgments, even where the justices might not have personally agreed with a legislature's action. [46] Most of the decisions nullifying state tort reforms have not given state legislative policy judgments the same level of respect. [47]

Federal legislation may be the most direct way of responding to the problem of judicial nullification of state tort law. A federal product liability law could not be nullified under a state constitution. That would be prevented by the Supremacy Clause of the United States Constitution. [48] A federal law would have to be examined against the federal constitution. As we explain in this article, we have well-founded reason to believe that a federal product liability reform bill would pass constitutional muster. [49]

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D. Legislatures v. Courts

Some consumer advocacy groups and plaintiffs lawyers have argued that Congress and state legislatures should not enact liability reform legislation. They contend that the subject should be left to the courts to develop on a case-by-case basis. [50] These same arguments are used to support judicial nullification of state tort reform legislation. [51]

Supporters of federal product liability reform legislation, however, have never called for a complete federal "takeover" of product liability law. Instead, the legislation has been premised on the belief that, in a few core areas, Congress is better suited to formulate sound national policy than courts operating in fifty states and the District of Columbia.

In part, this is because of the interstate nature of products liability. It is also because the impacts of liability law go far beyond who should win a particular case. Congress is in the best position to weigh and balance the many competing societal, economic, and policy considerations involved. Through the hearing process, Congress has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. This process allows Congress to engage in broad policy deliberations and to formulate public policy carefully. [52]

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding **punitive damages,** "elementary notions of fairness **[*272]** enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to [liability]...." [53]

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. [54] This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." [55] This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law apply retroactively rather than prospectively, denying "fair notice" to everyone potentially affected. [56]

In addition to the sound public policy reasons that support congressional enactment of product liability reform legislation, there is a very practical reason for congressional involvement: some reforms cannot be achieved through judicial decision. GARA provides an excellent example. That law has worked well, but it could not have been accomplished by a court. First, it is doubtful that a court could draw a bright-line rule cutting off "long-tail" liability for general aviation manufacturers after eighteen years. Second, even if a court issued such a ruling, courts in other jurisdictions could simply choose to ignore it.

IV. The Constitutionality of Federal Product Liability Reform

Congress has the power under the Commerce Clause of the United States Constitution to enact a federal product liability statute that preempts state law. [57] In fact, Congress has long exercised its authority in matters of interstate commerce by **[*273]** enacting statutes that preempt state tort law. [58] Federal product liability reform is also consistent with the trend since the mid-1960s toward increased federal involvement in consumer product safety, an inherent part of interstate commerce. [59]

Despite the long history of congressional involvement in matters affecting interstate commerce and consumer safety, and nearly a century of decisions declaring these laws to be constitutional, [60] we would not be surprised to hear opponents of federal product liability reform raise constitutional questions. [61]

A basic explanation is political. Opponents of federal liability reform initiatives enjoy pointing out an apparent inconsistency in conservative philosophy. [62] For example, Presidents Reagan and Bush both supported federal product liability reform legislation, notwithstanding their strong preference for an expanding role for state governments. [63] Federal civil justice and product liability reform legislation is an exception to the conservative pattern of giving more policymaking authority to the states. [64]

We believe, however, that federal civil justice and liability reform is justified because there are certain rational goals of civil justice reform that, as a practical matter, can only be **[*274]** accomplished at the federal level. The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

A second explanation for the prominence of "federalism" in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and federal legislation is enacted, the United States Constitution may provide the only mechanism to nullify the law. [65]

Nevertheless, we have well-founded reason to believe that a federal product liability law would pass constitutional muster and would be upheld if challenged on constitutional grounds. [66] For almost a century, Congress has enacted legislation altering state tort law, and those laws have been upheld time after time. [67] A court would have to break with long and well-established precedent to strike down a federal product liability reform law. [68]

A. The Commerce Clause and United States v. Lopez

Congress has the power under the Commerce Clause of the United States Constitution to enact federal civil justice reform legislation, and state courts are bound to enforce that law under the Supremacy Clause. The law is clear. [69]

It is nevertheless worth "clearing the fog" about a case that is frequently raised by opponents of federal civil justice reform initiatives to try to cloud the Supreme Court's Commerce Clause decisions and cast doubt on the constitutionality of federal liability reform legislation. [70] The

case is the United States Supreme Court's 1995 decision in United States v. Lopez. [71]

[*275] In Lopez, the Court considered whether Congress's enactment of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," [72] was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "the Act neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce." [73]

Conceptually, Lopez was not even a true Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with "commerce' or any sort of economic enterprise, however broadly defined." [74] Moreover, "Respondent was a local student at a school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm had any concrete tie to interstate commerce." [75]

The Lopez decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce - cases that directly support Congress's Commerce Clause authority over liability law. [76] In fact, rather than limiting Congress's Commerce Clause authority, the decision can be read to support legislation that would, for example, either limit liability for gun manufacturers in order to promote the development of the firearms industry or impose new firearms safety requirements. [77]

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B. The Supreme Court's Recent Tenth Amendment Cases

Some opponents of federal civil justice reform also have questioned whether federal liability reform legislation would violate the Tenth Amendment. [78] It would not.

We recently published an article which provides an in-depth and detailed analysis of the Supreme Court's recent Tenth Amendment decisions, including New York v. United States [79] (the Low-Level Radioactive Waste Policy case) decided in 1992, and Printz v. United States [80] (the Brady Handgun Violence Prevention Act case) decided in 1997. [81] Though these cases provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level, such as a product liability reform law. [82] In fact, the Court's opinions make very clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states. [83] The cases expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state executive officials to administer a federal regulatory scheme. [84] While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not. [85]

V. Product Liability Reform Proposals

Over the past two decades, Congress has explored various ways to bring about greater predictability in product liability law. Some of the "nuts and bolts" issues have largely been resolved. For example, when is a product defective in design, or when is a warning adequate? Certain fundamental rules have emerged over the years on those key issues. They are contained in the **[*277]** Restatement (Third) of Torts: Products Liability, [86] which was approved unanimously by the diverse membership of the American Law Institute on May 20, 1997. [87]

Accordingly, we do not believe it is critical to address those issues at the federal level. Instead, we believe that federal legislation should focus on areas of product liability law that lack predictability. Those are the areas where federal action would do the most good. A few key proposals that have generated bipartisan support in recent congresses and have a strong foundation in both law and sound public policy are discussed below.

A. Barring Claims Because of a Person's Abuse of Alcohol or Drugs or Criminal Acts

In about eleven states, a person who is inebriated or under the influence of illegal drugs can recover in a product liability action even if that illegal condition was a substantial cause of the harm. [88] Some states even permit a felon to recover in a product liability action if he or she is injured while fleeing the scene of a violent crime.

Federal law should put an end to these types of situations. It should provide that if the principal cause of an accident was the claimant's abuse of alcohol or drugs, he or she should no longer be able to recover in a product liability action. [89] It also should prohibit a plaintiff from recovering in a product liability action if he or she was harmed while engaged in, fleeing from, or being apprehended for the commission or attempted commission of a felony.

Federal legislation barring product liability claims because of a plaintiff's abuse of alcohol or drugs or felonious behavior **[*278]** would implement sound public policy. It would tell persons that if they are drunk or on illegal drugs and choose to get behind the wheel of a car or operate some other product, they will not be rewarded through the product liability system if they injure themselves. [90] The same would be true for dangerous criminals who consciously decide to commit a serious crime and are injured in the process. At the same time, law-abiding citizens would be relieved from paying more for the products they purchase in order to subsidize the illegal and irresponsible misconduct of others.

B. Fair Treatment for Product Sellers, Lessors, and Renters

1. Product Seller Fair Treatment Reform

Currently, under the law in about thirty states, product sellers, such as wholesalers, distributors, and retailers, are potentially liable for defects that they are neither aware of nor able to discover. They rarely pay the judgment, however, because in over ninety-five percent of the cases where any liability is present, the product's manufacturer is held responsible for the harm. [91] Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages. [92] This approach generates substantial, unnecessary legal costs, which are passed on to consumers in the form of a "tort tax."

Federal legislation is needed to address "the unfairness and illogic of imposing "strict' liability upon small business product sellers who neither participate in the design process for products they sell, nor create warnings or instructions for a product." [93] Product sellers should be subject to liability only if they are directly at fault for a harm (e.g., they misassembled the product or failed to convey appropriate warnings to customers), unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit. [94] This would encourage product sellers to select the safest products for sale and to deal **[*279]** with responsible manufacturers who would be available and have assets in the United States in case a lawsuit arises because a product was defective. [95] It also would ensure that injured consumers would be able to pursue a recovery from the product seller if recovery could not be obtained from the manufacturer. [96]

There is strong support for product seller fair treatment legislation at the state level. Twenty-one states have enacted product seller fair treatment laws. [97] Some of these laws have existed for almost two decades and none have been repealed. A federal law would work well

too.

2. Fairness for Lessors and Renters

Federal legislation should also provide relief for companies, such as car and truck rental firms, that rent or lease products. [98] In a small minority of states, these companies are subject to liability for the tortious acts of their lessees and renters, even if the rental company is not negligent and there is no defect in the product. [99] The rental company can be held vicariously liable for **[*280]** the negligence of its customer simply because the company owns the product and has given permission for its use. [100] Vicarious liability - liability without regard to fault - increases costs for renters nationwide and imposes an undue burden on interstate commerce. [101]

C. Statute of Repose for All Products

Statutes of repose place an outer time limit on liability involving old products. Like a statute of limitations, a statute of repose specifies the time within which a claimant must file his or her action. The difference is that, in product liability cases, a statute of repose starts to run when the product is sold, not when there has been an injury. The purpose of a statute of repose is to eliminate the heavy burdens presented by claims that can arise many years - even decades - after a product has been sold.

Common sense experience indicates that if a product has performed as intended, day in and day out, year after year, for many years, and a harm occurs, the most likely explanation is that the product wore out, was not properly maintained, or was misused. It would be highly unusual for the harm to be the result of a product defect after many years of reliable use.

Not surprisingly, manufacturers almost always win cases involving old products when they go to trial. [102] The cost of defending such claims, however, can be substantial, both in terms of money spent and "person power" lost while company employees respond to discovery, have their depositions taken, and are forced to sit through lengthy trials. [103] The result is a "great incentive for manufacturers to settle even the flimsiest cases, so long as the settlement is less than or approximately equal to defense costs." [104]

Bills containing a national statute of repose have been considered by every congress for almost two decades. Several have been approved by the House and Senate. [105] One that **[*281]** became law, the General Aviation Revitalization Act of 1994 (GARA), [106] has existed for several years and has worked well. [107]

The General Aviation Manufacturers Association, a national trade association of over fifty manufacturers of fixed-wing aircraft, engines, avionics, and components, submitted its five-year report to the President and Congress on GARA in September of 1999. [108] The report describes the industry's progress in creating over 25,000 new jobs, doubling general aviation aircraft production, doubling export revenues, increasing general aviation research and development by 150%, and establishing new pilot training programs. [109]

The conclusions of the five-year report are consistent with testimony received at a March 1997 hearing by the Consumer Affairs Subcommittee of the Senate Commerce Committee that explored GARA's effects. [110] John Moore, Senior Vice President of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986. As a result of GARA, Cessna is back in the single engine aircraft business. [111] Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled one thousand workers. [112] John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association (AOPA), testified that his members supported GARA, even though it limited their rights to sue. [113] AOPA members realized that they were paying an extraordinary amount for

new aircraft because of manufacturers' long-tail liability exposure for planes that had **[*282]** flown safely for many years. [114] John Peterson of the Montgomery County Action Council of Coffeyville, Kansas, the home of Cessna's new small aircraft plant, testified that, prior to 1995, Montgomery County ranked 98th out of 105 Kansas counties in economic indicators. [115] The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed. [116] After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up 5%, per capita income nearly doubled, and nearly 500 people per year were moving into the county. [117]

Our nation's principal international competitors, the European Community, Australia, and Japan, have adopted ten-year statutes of repose for all products. [118] These laws reinforce a significant competitive disadvantage that American manufacturers face in the global marketplace. Foreign manufacturers are not subject to liability claims based on old products in their home markets, where most of their sales occur, and many do not face claims in the United States involving very old products because they have not been in the American market that long. [119] With a lower-cost home market as their base and fewer transaction costs here in the United States, foreign manufacturers have greater resources available to pursue new technology and are able to offer goods in the United States for less than their American competitors. [120] While the passage of decades may eventually even out the situation in the United States, foreign manufacturers will always have the advantage that comes from more favorable treatment in their home markets. [121] Enactment of a federal statute of repose would help level the playing field between American businesses and their foreign competitors.

[*283] At the state level, twenty states have enacted legislation to deal with the drain on resources and competitive threat to American jobs caused by long-tail product liability. [122] State product liability statutes of repose with fixed time periods range from six years to a maximum of fifteen years; the typical repose period is between ten and twelve years.

Federal product liability legislation should contain a statute of repose applicable to all products. [123] Congress has several options to consider in setting a fixed time period for a federal statute of repose. For example, it could choose the ten-year standard that is law in Europe, Australia, and Japan, or something less. Congress also could choose the twelve-year standard that is typical of many state laws, the eighteen-year standard in GARA, [124] or something in between, such as fifteen years. [125] Federal statute of repose proposals over the years have not covered cases involving "toxic harms" (i.e., latent physical injuries). [126] Congress did this to provide a balanced solution that would address the problem of "long-tail" liability while protecting a claimant's right to bring suit for a latent injury that occurred during the repose period but could not have been discovered in time to bring a claim. [127]

D. Basic Rules for **Punitive Damages**

1. In General

Punitive damages are not normal civil or tort law damages. They are not intended to compensate people to "make them whole" for something they have lost; that purpose is accomplished by compensatory damages, which provide **[*284]** compensation for both economic losses (e.g., lost wages, medical expenses, substitute domestic services) and noneconomic losses (e.g., "pain and suffering"). Rather, **punitive damages** are awarded to punish a defendant and to deter that defendant and others from engaging in the same or similar wrongful behavior in the future. [128] They provide a "windfall recovery" for plaintiffs. [129]

Punitive damages, like many forms of punishment, are by their nature designed to "engender adverse social consequences," including, in many instances, debilitating stigma. [130] Courts and commentators alike have emphasized the "potentially devastating"

ramifications of a **punitive damages** award on a civil defendant's character, reputation, business, and good will. [131]

2. A Brief History

Punitive, or exemplary, damages first received explicit recognition by the English common law in 1763 in two cases involving illegal searches and seizures by officers of the Crown. [132] In Huckle v. Money, [133] the first case to use the term "exemplary damages," and its companion case, Wilkes v. Wood, [134] English courts for the first time expressed that "the punitive and **[*285]** deterrent purposes of damages awards could be separated from their compensatory function." [135]

Huckle and Wilkes were followed by cases approving **punitive damages** awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery, [136] malicious prosecution, [137] false imprisonment, [138] and trespass. [139] **Punitive damages** were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." [140]

As in England, **punitive damages** in colonial America (and through the nineteenth and into the twentieth centuries) were available only in a comparatively small class of torts - "the traditional intentional torts." [141] These included: assault and battery, [142] libel and slander, [143] malicious prosecution, [144] false **[*286]** imprisonment, [145] and intentional interference with property such as trespass and conversion, malicious attachment, or destruction of property, [146] private nuisance, [147] and similar wrongful conduct. [148] In general, **punitive damages** "merited scant attention," because they "were rarely assessed and likely to be small in amount." [149] Typically, **punitive damages** awards only slightly exceeded compensatory damages awards, if at all. [150]

Beginning in the late 1960s, however, American courts began to depart radically from the historical "intentional tort" moorings of **punitive damages** law. [151] The advent of "mass tort" litigation resulted in an increase of **punitive damages** claims against manufacturers, [152] including the possibility of repeated imposition of **punitive damages** for an alleged risk in a single product line. [153]

For example, until 1976, there were only three reported appellate court decisions upholding awards of **punitive damages** **[*287]** in product liability cases, and the **punitive damages** award in each case was modest in proportion to the compensatory damages awarded. [154] Then, in the late 1970s and early 1980s, the size of **punitive damages** awards "increased dramatically," [155] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." [156] "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar **punitive damages** verdict in a product liability case." [157]

This phenomenon is fueled in part by evidentiary rules that permit a contingency fee personal injury lawyer to tell the jury not only about the profit the defendant made on a product, but also the general wealth of the corporation as a whole. [158] Plaintiffs' lawyers argue to juries that large, wealthy corporations will only "get the message" if **punitive damage** awards are substantial. As the United States Supreme Court noted in Honda Motor Co., Ltd. v. Oberg, [159] a product liability **punitive damages** case, "The presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." [160]

[*288]

3. The Need for Federal **Punitive Damages** Reform

The United States Supreme Court has observed that **punitive damages** have "run wild" in the United States, jeopardizing fundamental constitutional rights. [161] The Court has held that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of **punitive damages** awards. [162] The Court also has held that the Constitution provides procedural limits on when and how **punitive damages** may be awarded. [163]

As a practical matter, however, the Supreme Court cannot fashion highly specific rules in the area of **punitive damages.** Legislation is needed to protect fundamental constitutional rights, remove barriers to interstate commerce, and promote economic growth and innovation, while at the same time providing incentives for responsible business practices. [164]

4. Strong Support for Federal **Punitive Damages** Reform

Consistent with the United States Supreme Court's recognition that **punitive damages** are a form of punishment, federal legislation should establish the burden of proof necessary for punishment and make the punishment proportional to the "offense." At present, **punitive damages** laws in many states fail these basic requirements, as evidenced by the **[*289]** United States Supreme Court's observation that **punitive damages** awards in this country have "run wild." [165]

a. "Clear and Convincing Evidence" Burden of Proof

Federal legislation should provide that a claimant must establish proof of **punitive damages** liability by "clear and convincing evidence." [166] This burden of proof standard reflects the quasi-criminal nature of **punitive damages;** it takes a middle ground between the burden of proof standard ordinarily used in civil cases (i.e., proof by a "preponderance of the evidence") and the criminal law standard (i.e., proof "beyond a reasonable doubt"). [167]

The "clear and convincing evidence" burden of proof standard is now law in twenty-nine states and the District of Columbia [168] and has been recommended by each of the principal academic groups to analyze the law of **punitive damages** over the past decade, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws. [169] The Supreme Court has specifically endorsed the "clear **[*290]** and convincing evidence" burden of proof standard in **punitive damages** cases. [170]

There is support for the "clear and convincing evidence" burden of proof standard at the federal level. The Volunteer Protection Act of 1997, [171] which was enacted with strong bipartisan support, requires "clear and convincing evidence" of **punitive damages** liability before **punitive damages** can be imposed against volunteers of nonprofit organizations.

b. Proportionality: Making the Punishment Fit the "Offense"

Federal legislation also should put reasonable parameters on **punitive damages** to make the punishment fit the offense. [172] Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment. [173] Even serious crimes such as larceny, robbery, and arson have sentences defined with a maximum set forth in a statute. [174] As former Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of **punitive damages** into conformity with our notions of just punishment." [175]

[*291] For example, Congress could provide that **punitive damages** may be awarded against larger businesses in an amount up to twice the claimant's economic and noneconomic losses, or $ 250,000, whichever is greater. [176] Furthermore, Congress could provide that the

maximum single punishment against an individual or small business could not exceed two times the amount awarded to the claimant for economic and noneconomic losses, or $ 250,000, whichever is less (i.e., $ 250,000 is the maximum). [177] This lower limit would reflect the practical reality that a **punitive damages** award exceeding $ 250,000 would bankrupt most individuals and small businesses. [178]

Academic groups have recommended limiting **punitive damages** to prevent excessive **punitive damages** awards. [179] At the state level, limits on **punitive damages** awards exist in a number of states. [180]

c. Bifurcation

Federal legislation also should contain a procedural reform called "bifurcation." [181] At either party's request, the trial would be divided so that the proceedings on **punitive damages** would be separate from and subsequent to the proceedings on compensatory damages. Judicial economy would be achieved by **[*292]** having the same jury determine both compensatory damages and **punitive damages** issues.

Bifurcated trials are equitable because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, as stated, plaintiffs' lawyers like to introduce evidence of a company's net worth. Although a jury is often instructed to ignore such evidence unless it decides to punish the defendant, this is difficult, as a practical matter, for jurors to do. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages; they may make an award simply because they believe that the defendant "can afford it." Bifurcation would help prevent that unfair result, because evidence of the defendant's net worth would be inadmissible in the first part (i.e., compensatory damages phase) of the case.

Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof for **punitive damages** (i.e., proof by clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted the procedure as a matter of common law reform. [182] Other states have made changes through court rules or legislation. [183] Bifurcation of **punitive damages** trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws, among other well-known organizations. [184]

5.

"Data Wars" and the In Terrorem Effect of **Punitive Damages**

Opponents of **punitive damages** reform argue that changes in the law are not needed, because headline-grabbing **punitive [*293] damages** awards are often reduced on appeal. [185] One study funded by plaintiffs' lawyers has suggested that there were only 355 **punitive damages** awards in products liability cases from 1965 to 1990. [186] While the author of this study has conceded that this number was only a "guesstimate," [187] the study also overlooked the practical reality that actual punitive awards represent just the tip of the iceberg in regard to their impact. They are dwarfed by the amounts paid out in settlements because of the in terrorem effect of **punitive damages.**

On average, over ninety percent of product liability cases are settled out of court or otherwise disposed of without trial. [188] In many of these cases, the threat of **punitive damages** may be abused as a "wild card" to force higher settlements. [189] As Yale law

professor **George Priest** has observed:

The availability of unlimited **punitive damages** affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a **punitive damages** claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. [190]

[*294] Professor Priest's observation is supported by the findings of a February 1996 Pacific Research Institute for Public Policy study. [191] The Institute's study concluded the following:

1. The unpredictability of a prospective **punitive damage** award contributes significantly to the uncertainty (and therefore the risk) of a court trial outcome.

2. Both the uncertainty posed by the prospect of unlimited **punitive damages,** combined with the relative probability of a **punitive damage** award if a case goes to jury trial, provide litigants who demand **punitive damages** with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or frivolous cases. [192]

6. Unsupported Arguments Challenging Proportionality

It has been argued that proportionality may result in inadequate deterrence. [193] As Thomas Jefferson noted, however, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed." [194] Indeed, federal antitrust laws have worked well for decades with punishment set in proportion to actual losses.

Furthermore, it should be remembered that there is no limit on the number of times a business can be punished and that when a business engages in wrongful conduct it does not know how many people will be hurt and how much harm might occur. There is simply no way for a company to predetermine the actual damages of all persons who may be injured by its conduct. One also must remember that compensatory damages themselves can run very high; they can definitely have a deterrent effect on wrongful behavior as well. [195]

[*295] The argument that proportionality may somehow result in inadequate deterrence has been rebutted by empirical fact. A study by two Cornell University Law School professors and the National Center for State Courts found that awards in product liability **punitive damages** cases, after all appeals were exhausted, have almost always been within two times compensatory damages. [196]

We have been asked, in light of this report, why a so-called "cap" on **punitive damages** is needed? The answer is that the present system is time-consuming and wasteful. It may take months or years until the final "appeal" is determined. It is our judgment that having a firm outer limit on **punitive damages** will reduce appeals and legal costs without sacrificing deterrence. This should benefit both plaintiffs and defendants.

In addition, it has been argued that unlimited **punitive damages** are needed to police corporate wrongdoing. [197] This assertion is not supported by fact. There is no credible evidence that the behavior of businesses is less safe in either those states that have set limits on **punitive damages** or in the six states (Louisiana, Nebraska, Washington, New Hampshire, Massachusetts, and Michigan) that do not permit **punitive damages** at all. [198] Furthermore, plaintiffs in these states have no more difficulty obtaining legal representation than in those states where the "sky is the limit."

Finally, it has been suggested that a proportionality requirement for **punitive damages** could be unfair to women and minority groups that tend to recover less in compensatory damages than other groups because it may reduce the amount such individuals could recover in **punitive damages.** [199] First, this argument misapprehends the basic premise that **punitive damages** have absolutely nothing to do with compensating an individual for a loss - they are purely a "windfall" to the claimant.

[*296] Second, the argument ignores the needs of women and minority groups in business, particularly small businesses, who face threats to their enterprises as a result of unlimited **punitive damages.** The U.S. Small Business Administration's Office of Women's Business Ownership has reported that there are eight million women-owned businesses in the United States. [200] In addition, the U.S. Small Business Administration's Office of Advocacy has reported that, by 1997, there were an estimated 3.25million minority-owned businesses in the United States, generating $ 495billion in revenues and employing nearly 4million workers. [201] From 1987 to 1997, the number of minority-owned businesses increased 168% while revenues grew twice as fast - 343%. [202] **Punitive damages** reform would benefit these businesses greatly.

E. Several Liability for Noneconomic Loss

1. Joint Liability Reform Finds Strong Legal and Public Policy Support

For many years, committees in both the House and Senate have received numerous testimonies about the extreme and unwanted consequences of joint liability. [203] The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. [204] Joint liability is unfair and blunts incentives for safety because it allows negligent actors to **[*297]** under-insure and puts full responsibility on those who may have been only marginally at fault. [205]

Joint liability has caused manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or be chilled from introducing new products. [206] Joint liability also brought about a serious public health crisis that critically threatened the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. [207] Companies had ceased supplying raw materials and component parts to medical implant manufacturers because they found that the costs of responding to litigation far exceeded potential sales revenues, even though courts were not finding the suppliers liable. [208] Congress had to enact legislation, the Biomaterials Access Assurance Act of 1998, [209] so that people who might find themselves in need of a lifesaving medical device would be able to obtain it in this country.

Recognizing the need for reform, over thirty states have abolished or modified the principle of joint liability. [210] They have done so, however, in a great variety of ways and, thereby, have contributed to the already serious problem of inconsistency among our nation's tort laws. That is why federal legislation is needed.

2. The "California Approach" is a Good Model

Past federal bills proposed holding defendants liable only for their "fair share" of responsibility for a claimant's noneconomic damages (e.g., damages for pain and suffering or emotional **[*298]** distress). [211] States could permit the rule of joint liability to apply to economic damages (e.g., medical expenses and lost wages and the cost of substitute domestic services in the case of injury to a homemaker), so that claimants could recover full compensation for those losses. This fair approach provides a good model for future legislation.

The approach finds direct support in a California law that was adopted by voter referendum in 1986. [212] The "California rule" was later adopted in Nebraska after that legislature carefully studied all the arguments for and against joint liability, as well as other approaches. [213] The Nebraska legislature chose the "California rule," because of its basic fairness and ease of application.

The "California rule" regarding fair share liability for noneconomic loss also finds direct support at the federal level. The Volunteer Protection Act of 1997 [214] abolished joint liability for noneconomic damages for volunteers of nonprofit organizations. That law was overwhelmingly supported by a bipartisan majority of Congress. [215]

3. The "California Approach" is Fair and Does Not Discriminate

Some opponents of joint liability reform have argued that the "California approach" somehow discriminates because women or other groups may have fewer economic losses than others. [216] The California approach does not discriminate. In fact, the California Supreme Court has ruled that the California law meets equal protection guarantees found in both the California and United States Constitutions. [217]

Moreover, Suzelle Smith, a highly respected attorney from California who practices both for plaintiffs and defendants, **[*299]** testified before the Consumer Affairs Subcommittee of the Senate Commerce Committee in September 1993 and before the Senate Judiciary Committee in March 1994 that the California approach works, is fair to all groups, and is pro-consumer. [218] She testified that, prior to the California initiative, her experience was that juries often rendered defense verdicts in cases in which a finding to the contrary could mean that a minimally at-fault defendant would be saddled with the entire damage award. [219]

Finally, the argument that holding defendants liable only for their fair share of a claimant's noneconomic loss is somehow unfair to women ignores the needs of women in business. A study by the American Women's Economic Development Corporation showed that the number of people hired by women-owned businesses grew faster than the national average in nearly every major industry and that women-owned firms generated sales of nearly $ 2.38 trillion in 1997. [220] Federal joint liability reform would help these women-owned businesses prosper and continue to grow.

VI. Conclusion

The product liability system is an example of what is wrong with our civil justice system. It is costly, inequitable, and unpredictable. Justice has been exchanged for a lottery. As a result, innovation is chilled, beneficial products are kept off the market, and American firms are basically forced to wear lead boots in their race against international competitors for a piece of the global economy.

Federal product liability legislation can encourage appropriate conduct and sanction bad behavior. The "real" consumers of America, those who purchase and use products on a daily basis, would benefit by getting the products they need and by no longer having to pay unfair and unreasonable "product liability taxes."

While the federal effort has dragged on, the problems created by our patchwork product liability system have grown worse. **[*300]** Congress should close the book on this problem by passing meaningful product liability reform legislation now.

FOOTNOTES:

n1. See H.R. Conf. Rep. No. 104-481 (1996).

n2. See John F. Harris, Clinton Vetoes Product Liability Measure, Wash. Post, May3, 1996, at A14.

n3. See Richard Thornburgh, America's Civil Justice Dilemma: The Prospects For Reform, 55 Md. L. Rev. 1074 (1996) (former Attorney General of the United States calling for federal product liability reform).

n4. See Peter W. Huber, The Legal Revolution and its Consequences (1988); Walter K. Olson, The Litigation Explosion (1991).

n5. See S. Rep. No. 105-32, at 7, 46 (1997).

n6. See id. at 10.

n7. Hearings Before the Consumer Subcomm., Senate Comm. on Commerce, Science and Transp., 103rd Cong. 20 (1993) (statement of Julie Nimmons, CEO, Shutt Sports Group).

n8. See id.

n9. Product Liability Law Revision: Hearing Before the Senate Comm. on Commerce, Science and Transp., 105th Cong. 2 (1997) (statement of Julie Nimmons).

n10. See id.

n11. See H.R. Conf. Rep. No. 104-481 (1996).

n12. See Interagency Task Force On Prod. Liab., U.S. Dep't Of Commerce, Final Report V-19 to V-21 (1976).

n13. See id.

n14. Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (codified as amended at 15 U.S.C. 3901-3906 (1994)).

n15. See 15 U.S.C.3901-3906 (1994).

n16. See Interagency Task Force On Prod. Liab., supra note 12.

n17. See Model Uniform Products Liability Act, 44 Fed. Reg. 62,714 (1979).

n18. See 43 Fed. Reg. 14,612 (1978).

n19. See Victor E. Schwartz & Mark A. Behrens, The Road To Federal Product Liability Reform, 55 Md. L. Rev. 1363, 1366 (1996).

n20. See id.

n21. See id.; Victor E. Schwartz & Mark A. Behrens, Federal Product Liability Reform in 1997: History And Public Policy Support Its Enactment Now, 64 Tenn. L. Rev. 595, 599 (1997).

n22. See H.R. Rep. No. 104-63 (1995); H.R. Rep. No. 100-748 (1988).

n23. See H.R. Rep. No. 104-64 (1995).

n24. See S. Rep. No. 105-32 (1997); S. Rep. No. 104-69 (1995); S. Rep. No. 103-203 (1993); S. Rep. No. 102-215 (1991); S. Rep. No. 101-356 (1990); S. Rep. No. 99-422 (1986); S. Rep. No. 98-476 (1984); S. Rep. No. 97-670 (1982).

n25. See 142 Cong. Rec. H3204 (daily ed. Mar. 29, 1996) (House vote on Product Liability Conference Report); 142 Cong. Rec. S2590 (daily ed. Mar. 21, 1996) (Senate vote on Product Liability Conference Report); 141 Cong. Rec. S6407 (daily ed. May 10, 1995) (vote on Senate bill); 141 Cong. Rec. H3027 (daily ed. Mar. 10, 1995) (vote on House bill).

n26. See The Lawyers' Veto, WallSt.J., May3, 1996, at A12.

n27. See, e.g., H.R. Rep. No. 106-494 (2000) (limits on liability for small businesses in most civil actions and for wholesalers, distributors, and retailers in products liability cases); H.R. Rep. No. 106-410 (1999) (workplace goods statute of repose bill). Both of these bills were passed by the House of Representatives.

n28. Congress also enacted broad legislation covering virtually all civil actions (including product liability claims) involving Year 2000 date-related device or computer system failures. See Y2K Act, Pub. L. 106-37, 113 Stat. 135 (1999).

n29. 49 U.S.C. 40.101 (1994).

n30. See Geoffrey A. Campbell, Study: Business Booms After Tort Reform Enacted, ABA J. 28 (1996).

n31. 21 U.S.C. 1601-1606 (1998).

n32. See S. Rep. No. 105-32, at 58-60 (1997).

n33. See H.R. Rep. No. 105-549, pt.1 (1998).

n34. See id.

n35. In two separate opinions, the West Virginia Supreme Court of Appeals reflected on this issue. In Garnes v. Fleming Landfill, Inc., 413S.E.2d 897 (W.Va. 1991), the court stated:

State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the national economy and national welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Id. at 905. Earlier, in Blankenship v. General Motors Corp., 406S.E.2d 781 (W.Va. 1991), the court opined:

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id. at 786.

n36. See Commodity Transportation Survey, U.S. Dept. of Commerce, Bureau of the Census, Table 1, at 1-7 (1977).

n37. See S. Rep. No. 105-32, at 14 (1997).

n38. Id. (quoting NGA policy EDC-15 (Feb. 7, 1997)).

n39. See id. at 15.

n40. See Constitutional Challenges: An Antidote to Tort "Reform," ATLA Advoc., Nov. 1999, at 1.

n41. See Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, Who Should Make America's Tort Law: Courts Or Legislators? (Wash. Legal Found. Feb. 1997).

n42. See William Glaberson, State Courts Sweeping Away Laws Curbing Suits for Injury, N.Y. Times, July 16, 1999, at A1.

n43. See Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments, Legal Times, Feb. 10, 1997, at S34.

n44. Two More State Supreme Courts Strike Down Tort Reforms, Liability Wk., July 19, 1999, at 7.

n45. In Lochner v. New York, 198 U.S. 45 (1905), the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

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

Id. at 75 (emphasis added).

n46. See Victor E. Schwartz, Mark A. Behrens & Leavy Mathews III, Federalism and Federal Liability Reform: The United States Constitution Supports Reform, 36 Harv. J. on Legis. 269 (1999) (discussing a century of congressional enactments changing state liability law and the cases holding the statutes constitutional) [hereinafter Schwartz, Behrens & Mathews].

n47. See, e.g., Williams v. Wilson, 972 S.W.2d 260, 261 (Ky. 1998) (overturning law that simply required plaintiffs to show that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct [would] result in human death or bodily harm" before **punitive damages** could be imposed and instead holding that the statute violated an obscure constitutional "right" known as the "jural rights" doctrine); State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) (overturning civil justice reform statute based on "single subject" provision of the Ohio Constitution, even though there was no case or controversy before the court). See also Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1113 (Ill. 1997) (Miller, J., dissenting) ("Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature."). See generally Recent Cases, State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative. - State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 113 Harv. L. Rev. 804 (2000).

n48. See U.S. Const. art. VI.

n49. See Schwartz, Behrens & Mathews, supra note 46.

n50. See Product Liability: Hearing on H.R. 10 Before the House Comm. on the Judiciary, 104th Cong. 3-4 (1995) (testimony of Larry Stewart, President, Association of Trial Lawyers of America); Product Liability: Hearing on H.R. 10 Before the House Subcomm. on Commerce, Trade, and Hazardous Material, 104th Cong. 3-6 (1995) (testimony of Larry Stewart); The Product Liability Fairness Act of 1995: Hearing on S. 565, Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transp., 104th Cong. 2-5 (1995) (testimony of Larry Stewart).

n51. See Mark S. Mandell, Preserving Judicial Independence, Trial, Jan. 1999, at 9.

n52. See generally Smith v. Cutter Biological, Inc., 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "there are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures can determine").

n53. BMW v. Gore, 517 U.S. 559, 574 (1996) (emphasis added).

n54. See Berger v. Supreme Court of Ohio, 598 F. Supp. 69 (S.D. Ohio 1984) (upholding a judicial canon restricting a judicial candidate's campaign activities), aff'd, 861 F.2d 719 (6th Cir. 1988), cert. denied, 490 U.S. 1108 (1989). The trial court noted that "the very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office. A judge acts on individual cases, not broad programs." Id. at 76 (emphasis added).

n55. U.S. Const. art. III, 2, cl. 1.

n56. BMW, 517 U.S. at 574.

n57. See U.S. Const. art. I, 8, cl. 3. See also Schwartz, Behrens & Mathews, supra note 46.

n58. See Schwartz, Behrens & Mathews, supra note 46.

n59. See, e.g., Consumer Product Safety Act, 15 U.S.C. 2051-2084 (1972); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1381 (1966) (repealed 1994); Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, 15 U.S.C. 2301-2312 (1982); Federal Hazardous Substances Act, 15 U.S.C. 1261-1278 (1960); Poison Prevention Packaging Act, 15 U.S.C. 1471-1476 (1970); Flammable Fabrics Act, 15 U.S.C. 1191-1204 (1972); and the Medical Device Amendments of 1976, 21 U.S.C. 360c-360ss (1988 & Supp. 1993), to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. 301-395 (1988 & Supp. 1993); Occupational Safety and Health (OSHA) Act, 29 U.S.C. 651-678 (1970).

n60. See Schwartz, Behrens & Mathews, supra note 46.

n61. See, e.g., H.R. Rep. No. 106-494, at 47-49 (2000) (minority views); H.R. Rep. No. 106-410, at 16-18 (1999) (minority views).

n62. Conservatives also enjoy pointing out an apparent inconsistency in liberal philosophy. The same Members who have expressed a resounding "no" to federal civil justice and liability reform legislation strongly support the Consumer Products Safety Commission, in part because products flow in interstate commerce.

n63. See C. Boyden Gray, Regulation and Federalism, 1 Yale J. On Reg. 93, 96-98 (1983) (explaining the Reagan Administration's reasons for supporting national product liability legislation); Joe Davidson, Bill to Limit Product Liability Lawsuits by Consumers Fails in Senate, but Barely, Wall St. J., Sept. 11, 1992, at A4 (stating that "President Bush strongly supported [federal product liability reform legislation] and made it a hot campaign topic with a comment at the Republican convention").

n64. See Robert L. Rabin, Federalism And The Tort System, 50 Rutgers L. Rev. 1 (1997); Symposium, Constructing a New Federalism: Testing Two Assumptions About Federalism and Tort Reform, 14 Yale J. On Reg. 371 (1996); Symposium, Tort Law and Federalism: Whatever Happened to Devolution?, 14 Yale J. On Reg. 329 (1996).

n65. See generally Howard F. Twiggs & Robert S. Peck, Keeping The Common Law: State Courts Have Fundamental Authority to Limit Tort Reform, Legal Times, Mar. 3, 1997, at 30 (arguing in support of judicial nullification of state tort reform legislation).

n66. See Schwartz, Behrens & Mathews, supra note 46.

n67. See id.

n68. See id.

n69. See Sherman Joyce, Federal Product Liability Litigation Reform: Product Liability Law In The Federal Arena, 19 Seattle U.L. Rev. 421 (1996); Schwartz & Behrens, supra note 21 at 604-07; Victor E. Schwartz & Liberty Mahshigian, A Permanent Solution For Product Liability Crises: Uniform Federal Tort Law Standards, 64 Den. U.L. Rev. 685 (1988).

n70. See, e.g., Jerry J. Phillips, Hoist By One's Own Petard: When A Conservative Commerce Clause Interpretation Meets Conservative Tort Reform, 64 Tenn. L. Rev. 647

(1997).

n71. 514 U.S. 549 (1995).

n72. 18 U.S.C. 922(q)(1)(A).

n73. 514 U.S. at 551. See also U.S. Const. art. I, 8, cl. 3. See generally Herbert Hovenkamp, Judicial Restraint And Constitutional Federalism: The Supreme Court's Lopez And Seminole Tribe Decisions, 96 Colum. L. Rev. 2213 (1996); Symposium, The New Federalism After United States v. Lopez, 46 Case W. Res. L. Rev. 633 (1996); Symposium, Reflections on United States v. Lopez, 94 Mich. L. Rev. 533 (1995).

n74. Lopez, 514 U.S. at 561.

n75. Id. at 567.

n76. See Patrick Hoopes, Tort Reform In The Wake of United States v. Lopez, 24 Hastings Const. L.Q. 785 (1997).

n77. See Lopez, 514 U.S. at 562.

n78. See Cynthia C. Lebow, Federalism And Federal Product Liability Reform: A Warning Not Heeded, 64 Tenn. L. Rev. 665 (1997); Beth Rogers, Note, Legal Reform - At The Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act, 21 U. Dayton L. Rev. 513 (1996); Jeffrey White, Does products bill collide with Tenth Amendment?, 33-Nov. TRIAL 30 (1997).

n79. 505 U.S. 144 (1992).

n80. 521 U.S. 898 (1997).

n81. See Schwartz, Behrens & Mathews, supra note 46.

n82. See id.

n83. See id.

n84. See id.

n85. See id.

n86. Restatement (Third) of Torts: Products Liability (1998).

n87. See generally James A. Henderson, Jr. & Aaron D. Twerski, The Politics of the Products Liability Restatement, 26 Hofstra L. Rev. 667 (1998); Victor E. Schwartz, The Restatement (Third) of Torts: Products Liability - The American Law Institute's Process of Democracy and Deliberation, 26 Hofstra L. Rev. 743 (1998); Victor E. Schwartz, The Restatement (Third) of Torts: Products Liability - A Guide to Its Highlights, 34 Tort & Ins. L.J. 85 (1998).

n88. The majority of states have laws which do not permit recovery in this situation. Four states (**Alabama,** Maryland, North Carolina, and Virginia) and the District of Columbia continue to recognize contributory negligence as an absolute defense. Most other states have adopted some form of modified comparative fault standard, which would bar a plaintiff's claim if the plaintiff exceeded a certain percentage of fault (e.g., 50%). See Victor E. Schwartz, Comparative Negligence app. a (3d ed. 1994 & Supp. 1999).

n89. See, e.g., Wash. Rev. Code 5.40.060 (West 1999).

n90. See S. Rep. No. 105-32, at 36 (1997).

n91. See id. at 33.

n92. See id.

n93. M. Stuart Madden, The Vital Common Law: Its Role in a Statutory Age, 18 U. Ark. Little Rock L.J. 555, 570 (1996).

n94. See S. Rep. No. 105-32, at 33-34 (1997).

n95. See id. at 34.

n96. See id.

n97. See Colo. Rev. Stat. 13-21-402 (1998); Del. Code Ann. tit. 18 7001 (1998); Ga. Code Ann. 51-1-11.1 (Supp. 1999); Idaho Code 6-1407 (1999); 735 ILCS 5/2-621 (1999); Iowa Code 613.18 (Supp. 1997); Kan. Stat. Ann. 60-3306 (1998); Ky. Rev. Stat. Ann. 411.340 (Michie/Bobbs-Merrill 1998); La. Rev. Stat. Ann. 9:2800.53 (West 1999); Md. Cts. & Jud. Pro. Code Ann. 5-405 (1999); Mich. Comp. Laws 600.2947(6) (1999); Minn. Stat. 544.41 (West 1998); Mo. Rev. Stat. 537.762 (1999); Neb. Rev. Stat. 25-21,181 (1998); N.C. Gen. Stat. 99B-2 (1999); N.D. Cent. Code 28-01.3-04 (Supp. 1999); N.J. Stat. Ann. 2A:58C-9 (1999); Ohio Rev. Code Ann. 2307.78 (Anderson 1999); S.D. Codified Laws 20-9-9 (1999); Tenn. Code Ann. 29-28-106 (Supp. 1999); Wash. Rev. Code 7.72.040 (West 1999).

n98. See S. Rep. No. 105-32, at 34 (1997).

n99. To provide appropriate levels of protection for people injured by motor vehicles, all states have minimum financial responsibility laws which establish a minimum level of insurance coverage that must be maintained on every vehicle. In most states the financial responsibility laws operate to cover the liability of any driver. Some states do not require liability on the part of the driver to trigger coverage; these states allow unlimited vicarious liability. See Conn. Gen. Stat. Ann. 14-154a (West 1999); D.C. Code Ann. 40-408 (1999); Iowa Code 321.493 (1997); Me. Rev. Stat. Ann. tit. 29-A, 1652-53 (West Supp. 1998); N.Y. Veh. & Traf. 388 (McKinney 1999); R.I. Gen. Laws 31-33-6, 31-33-7 (1998). A few states have restricted the application of their vicarious liability laws to those cases where the rental or leasing company failed to maintain the required insurance coverage under the state's financial responsibility law. See Ariz. Rev. Stat. 28-324 (1999); Neb. Rev. Stat. 25-21,239 (1999) (applying only to trucks); Nev. Rev. Stat. 482.305 (1999). A few states have capped the liability of rental companies at the level of the state's financial responsibility law. See Cal. Veh. Code 17150-51 (West 1999); Idaho Code 49-2417 (1999); Mich. Comp. Laws Ann. 257.401 (West Supp. 1999). Two states have recently enacted laws which limit vicarious liability, but with liability exposures set at a higher level than the preexisting financial responsibility requirements. See Fla. Stat. Ann. 324.021 (West 1999); Minn. Stat. 170.54 (1998).

n100. See S. Rep. No. 105-32, at 34 (1997).

n101. See id.

n102. See H.R. Rep. No. 106-410, at 3 (1999).

n103. See id. at 3.

n104. Id. at 3-4.

n105. Most recently, the House passed the "Workplace Goods Job Growth and Competitiveness Act of 1999," which would create an 18-year statute of repose for durable goods used in the workplace where the claimant has received or is eligible to receive workers' compensation. See Cong. Rec. H183-84 (daily ed. Feb. 2, 2000); see also 142 Cong. Rec. H3204 (daily ed. Mar. 29, 1996) (House vote on Product Liability Conference Report); 142 Cong. Rec. S2590 (daily ed. Mar. 21, 1996) (Senate vote on Product Liability Conference Report); 141 Cong. Rec. S6407 (daily ed. May 10, 1995) (vote on Senate product liability bill); 141 Cong. Rec. H3027 (daily ed. Mar. 10, 1995) (vote on House product liability bill).

n106. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. 40101). See generally Note, David Moffitt, The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994, 1 Syracuse J. Legis. & Pol'y 215 (1995).

n107. See General Aviation Manufacturers Association, A Report to the President and Congress on The General Aviation Revitalization Act, Sept. 1999.

n108. See id.

n109. See id.

n110. See S. Rep. No. 105-32, at 41-42 (1997).

n111. See id. at 41.

n112. See id.

n113. See id. at 42.

n114. See id.

n115. See id.

n116. See id.

n117. See id.

n118. See Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability For Defective Products, 28 O.J. Eur. Comm. (No. L210) 29, art. 11 (July 25, 1985); Product Liability Law, Law No. 85 of 1994, art. 5(1) (Japan). See generally Mark A. Behrens & Daniel H. Raddock, Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access To Recovery Is Limited By Formidable Barriers, 16 U. Pa. J. Int'l Bus. L. 669 (1996). Australia has adopted the EC Product Liability Directive.

n119. See H.R. Rep. No. 106-410, at 5 (1999).

n120. See id.

n121. See id.

n122. See Ark. Code Ann. 16-116-105(c) (Michie 1997); Colo. Rev. Stat. 13-21-403 (1998); Colo. Rev. Stat. 13-80-107(1)(b) (1998); Conn. Gen. Stat. 52-577a (1999); Fla. Stat. Ann. 95.031(b) (1999); Ga. Code Ann. 51-1-11(b)(2) (1999); Idaho Code 6-1403(2) (1999); 735 Ill. Comp. Stat. 5/13-213(b) (West 1997); Ind. Code Ann. 34-20-3-1(b) (1999);

Iowa Code 614.1(2A) (1997); Kan. Stat. Ann. 60-3303 (1997) Ky. Rev. Stat. Ann. 411.310 (1) (Banks-Baldwin 1998); Mich. Stat. Ann. 27A.5805(9) (1999); Minn. Stat. Ann. 604.03 (1998); Neb. Rev. Stat. 25-224 (1998); N.C. Gen. Stat. 1-50(a)(6) (1999); N.D. Cent. Code 28-01.3-08(1) (1999); Or. Rev. Stat. 30.905(1) (1997); Tenn. Code Ann. 29-28-103(a) (1999); Tex. Civ. Prac. & Rem. Code Ann. 16.012 (West 1999); Wash. Rev. Code 7.72.060 (1) (1999).

n123. See H.R. Rep. No. 104-64, at 15-16 (1995).

n124. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. 40101).

n125. See H.R. Rep. No. 104-64, at 15-16 (1995).

n126. See H.R. Rep. No. 106-410, at 2 (1999); S. Rep. 105-32, at 19 (1997).

n127. See H.R. Rep. No. 106-410, at 7 (1999).

n128. All jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan and Washington, permit the award of **punitive damages** in products liability cases. Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit **punitive damages** for purposes of punishment. See Product Liability Desk Reference - A Fifty State Compendium (Morton Daller ed., 1999).

n129. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

n130. See Addington v. Texas, 441 U.S. 418, 426 (1979).

n131. Browning-Ferris v. Kelco Disposal, 492 U.S. 257, 281 (Brennan & Marshall, JJ., concurring). See also International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979) ("the impact of [a **punitive damages** award] is unpredictable and potentially substantial"); Comment, Criminal Safeguards and the **Punitive Damages** Defendant, 34 U. Chi. L. Rev. 408, 417 (1967) (**punitive damages** awards have ""momentous and serious' ... consequences" for civil defendants) (citation omitted).

n132. See James B. Sales & Kenneth B. Cole, Jr., **Punitive Damages:** A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117, 1120 (1984); see also Sharpe v. Brice, 96 Eng. Rep. 557 (C.P. 1774) (illegal search and seizure); Bruce v. Rawlins, 95 Eng. Rep. 934 (C.P. 1770) (illegal search and seizure); Beardmore v. Carrington, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure).

n133. 95 Eng. Rep. 768 (C.P. 1763).

n134. 98 Eng. Rep. 489 (C.P. 1763).

n135. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of **Punitive Damages,** 56 S. Cal. Rev. 1, 14 (1982). In Wilkes, Lord Chief Justice Pratt announced: "[A] jury shall have it in their power to give damages for more than the injury received .... as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes, 98 Eng. Rep. at 498-99. See also Calvin R. Massey, The Excessive Fines Clause and **Punitive Damages:** Some Lessons From History, 40 Vand. L. Rev. 1233 (1987).

n136. See, e.g., Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766); Grey v. Grant, 95 Eng. Rep. 794 (C.P. 1764).

n137. See, e.g., Hewlett v. Cruchley, 128 Eng. Rep. 696 (C.P. 1813); Leith v. Pope, 96 Eng. Rep. 777 (C.P. 1779).

n138. See, e.g., Fabrigas v. Mostyn, 96 Eng. Rep. 549 (C.P. 1774).

n139. See, e.g., Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814); Sears v. Lyons, 171 Eng. Rep. 658 (K.B. 1818). **Punitive damages** also were allowed for seduction. See, e.g., Tullidge v. Wade, 95 Eng. Rep. 909 (C.P. 1769). In addition, for a period, English courts permitted an award of **punitive damages** for criminal conversation (i.e., adultery). See, e.g., Duberly v. Gunning, 100 Eng. Rep. 1226 (K.B. 1792).

n140. James B. Sales, The Emergence of **Punitive Damages** in Product Liability Actions: A Further Assault on The Citadel, 14 St. Mary's L.J. 351, 355 (1983).

n141. The use of "private attorneys general" to sanction antisocial conduct unregulated by the criminal law reached America in 1784. See Genay v. Norris, 1S.C.L. 6 (1784). See also David G. Owen, **Punitive Damages** in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1263, 1287-88 (1976).

n142. See, e.g., Ward v. Blackwood, 41Ark. 295 (1883); Lyon v. Hancock, 35Cal. 372 (1868); Corwin v. Walton, 18Mo. 71 (1853); Trogden v. Terry, 172N.C. 540 (1916); Porter v. Seiler, 23Pa. 424 (1854).

n143. See, e.g., Sheik v. Hobson, 19 N.W. 875 (Iowa 1884); Louisville & Nashville R.R. Co. v. Ballard, 3 S.W. 530 (Ky. 1887); Vanch v. Hall, 3N.J.L. 578 (1809); Gilreath v. Allen, 32N.C. (10Ired.) 67 (1849); Benaway v. Coyne, 3Pin. 196 (Wis. 1851).

n144. See, e.g., Brown v. McBride, 24Misc. 235, 52N.Y.S. 620 (Sup. Ct. Queens County 1898).

n145. See, e.g., Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101 (1893); Green v. Southern Express Co., 41Ga. 515 (1871); Schlencker v. Risley, 4Ill. 483 (1842); Taber v. Hutson, 5Ind. 322 (1854); Parsons v. Harper, 57Va. 64 (1860); Hamlin v. Spaulding, 27Wis. 360 (1870).

n146. See, e.g., Dorsey v. Manlove, 14Cal. 553 (1860); Treat v. Barber, 7Conn. 274 (1828); Singer Mfg. Co. v. Holdfodt, 86Ill. 455 (1877); Taylor v. Giger, 3Ky. 586 (1808); Schindel v. Schindel, 12Md. 108 (1858); Huling v. Henderson, 161Pa. 553 (1894); Bradshaw v. Buchanan, 50Tex. 492 (1878).

n147. See, e.g., Yazoo v. M.V.R. Co., 40 So. 163 (Miss. 1905); Schumacher v. Shawhan Distillery Co., 165 S.W. 1142 (Mo. 1914).

n148. See, e.g., Linsley v. Bushnell, 15Conn. 225 (1842); Whipple v. Walpole, 10N.H. 130 (1839); Meibus v. Dodge, 38Wis. 300 (1875). As in England, **punitive damages** were also awarded in cases involving seduction. See, e.g., Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917); Coryell v. Colbaugh, 1N.J. 77 (1791).

n149. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of **Punitive Damages,** 56 S. Cal. L. Rev. 1, 2 (1982).

n150. See, e.g., Southern Kan. Ry. v. Rice, 16 P. 817 (Kan. 1888) ($ 35 costs and fees, $ 10 injury to feelings, $ 71.75 punitive); Fay v. Parker, 53N.H. 342 (1872) ($ 150 actual, $ 331.67 exemplary); Taylor v. Grand Trunk Ry. Co., 48N.H. 304 (1869) ($ 500 actual damages, $ 858.50 exemplary); Woodman v. Nottingham, 49N.H. 387 (1870) ($ 578 actual,

$ 100 exemplary).

n151. In 1967, a California court of appeals held for the first time that **punitive damages** were recoverable in a strict product liability action. See Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

n152. "Mass tort" litigation began in the late 1960s with cases involving the sale of the anti-cholesterol drug MER/29. See Roginsky v. Richardson-Merrell, Inc., 378F.2d 832 (2dCir. 1967); Paul D. Rheingold, The MER/29 Story - An Instance of Successful Mass Disaster Litigation, 56Cal. L. Rev. 116 (1968). See generally Richard A. Seltzer, **Punitive Damages** In Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency And Control, 52Fordham L.Rev. 37 (1983).

n153. See Victor E. Schwartz, Mark A. Behrens & Lori Bean, Multiple Imposition Of **Punitive Damages:** The Case For Reform, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

n154. See Gillham v. Admiral Corp., 523F.2d 102 (6thCir. 1975) ($ 125,000 compensatory damages, $ 50,000 attorneys' fees, $ 100,000 **punitive damages)**; Toole v. Richardson-Merrell, Inc., 60Cal. Rptr. 398 (Cal. Ct. App. 1967) ($ 175,000 compensatory, $ 250,000 **punitive damages)**; Moore v. Jewel Tea Co., 253N.E.2d 636 (Ill. App. 1969) (affirming $ 920,000 compensatory damages, $ 10,000 **punitive damages)**, aff'd, 263N.E.2d 103 (Ill. 1970).

n155. **George** L. **Priest, Punitive Damages** and Enterprise Liability, 56 S. Cal. L. Rev. 123, 123 (1982).

n156. John Calvin Jeffries, Jr., A Comment on The Constitutionality of **Punitive Damages,** 72Va. L. Rev. 139, 142 (1986).

n157. Symposium, **Punitive Damages:** A Proposal for Further Common Law Development of the Use of **Punitive Damages** in Modern Products Liability Litigation, 40 **Ala.** L. Rev. 919 (1989).

n158. See Kenneth S. Abraham & John Calvin Jeffries, Jr., **Punitive Damages** and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415 (1989); Victor E. Schwartz & Mark A. Behrens, The American Law Institute's Reporters' Study On Enterprise Responsibility For Personal Injury: A Timely Call For **Punitive Damages** Reform, 30 San Diego L. Rev. 263, 271 (1993).

n159. 512 U.S. 415 (1994).

n160. Id. at 432. Honda Motor involved an all-terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill. The Court struck down a **punitive damages** award on the ground that Oregon law violated due process because it did not provide an opportunity for meaningful appellate review of the size of **punitive damages** awards. A year earlier, in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), Justice O'Connor observed:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources: jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from

"wealthy" corporations to comparatively needier plaintiffs.

509 U.S. at 491 (O'Connor, J., dissenting).

n161. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991). See also Honda Motor, 512 U.S. at 432 (stating that **punitive damages** "pose an acute danger of arbitrary deprivation of property," raising serious due process concerns).

n162. See BMW v. Gore, 517 U.S. 559, 585-86 (1996). See also TXO, 509 U.S. at 458; Pacific Mutual, 499 U.S. at 23-24. Cf. Pulla v. Amoco Oil Co., 72F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White) (striking down **punitive damages** award as "excessive, unreasonable and violative of due process").

n163. See Honda Motor Co., 512 U.S. at 432 (1994).

n164. As eminent Professor Aaron Twerski, reporter for the Restatement (Third) of Torts: Products Liability, wrote years ago:

The risk of crushing liability as a result of **punitive damages** is too great. It threatens the business community with the legal equivalent of an atom bomb. It places the entire product liability system in jeopardy of runaway unregulated verdicts. It deserves a clear-cut federal solution.

Aaron Twerski, National Product Liability Legislation: In Search For The Best Of All Possible Worlds, 18 Idaho L. Rev. 411, 475-76 (1982). See also Dick Thornburgh, No End in Sight as **Punitive Damages** Go Up, Up, Up, Wall St. J., Mar. 13, 2000, at A47.

n165. Pacific Mutual, 499 U.S. at 18.

n166. See S. Rep. No. 105-32, at 48-49 (1997).

n167. See Malcolm Wheeler, The Constitutional Case for Reforming **Punitive Damage** Procedures, 69 Va. L. Rev. 269, 298 (1983).

n168. See **Ala.** Code 6-11-20 (1999); Alaska Stat. 09.17.020 (1999); Cal. Civ. Code 3294 (a) (1999); Fla. Stat. ch. 768.73 (1998); Ga. Code Ann. 51-12-5.1 (1999); Iowa Code Ann. 668A.1 (1997); Kan. Stat. Ann. 60-3701(c) (1998); Ky. Rev. Stat. Ann. 411.184(2) (Michie/Bobbs-Merrill 1998); Minn. Stat. Ann. 549.20 (West Supp. 1998); Miss. Code Ann. 11-1-65(1)(a) (Supp. 1998); Mont. Code Ann. 27-1-221(5) (1998); N.J. Stat. Ann. 2A:15-5.12 (1999); Nev. Rev. Stat. Ann. 42-005(1) (1998); N.C. Gen. Stat. 10-15(b) (1999); N.D. Cent. Code 32-03.2-11 (Supp. 1999); Ohio Rev. Code Ann. 2307.80(A) (Anderson 1999); Okla. Stat. Ann. tit. 23, 9.1 (West Supp. 1998); Or. Rev. Stat. 18.537 (1997); S.C. Code Ann. 15-33-135 (Law. Co-op. Supp. 1998); S.D. Codified Laws Ann. 21-1-4.1 (1999); Tex. Civ. Prac. & Rem. Code 41.003 (1999); Utah Code Ann. 78-18-1 (1999); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986); Jonathan Woodner, Co. v. Breeden, 665 A.2d 929 (D.C. 1995); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttel v. Raymond, 494 A.2d 1353 (Me. 1985); Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. 1996); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). One state, Colorado,

requires proof "beyond a reasonable doubt" in **punitive damages** cases. See Colo. Rev. Stat. 13-25-127(2) (1987).

n169. See American Bar Association, Special Committee on **Punitive Damages** of the American Bar Association, Section on Litigation, **Punitive Damages:** A Constructive Examination 19 (1986) [hereinafter ABA Report]; American College of Trial Lawyers, Report on **Punitive Damages** of the Committee on Special Problems in the Administration of Justice 15-16 (1989) [hereinafter ACTL Report]; National Conference Of Commissioners On Uniform State Laws, Uniform Law Commissioners' Model **Punitive Damages** Act 5 (approved on July18, 1996) [hereinafter Uniform Law Commissioners' Model **Punitive Damages** Act]; see also American Law Institute, 2 Enterprise Responsibility for Personal Injury - Reporters' Study 248-49 (1991) [hereinafter ALI Reporters' Study].

n170. See Pacific Mutual, 499 U.S. at 23 n.11 (stating that "there is much to be said in favor of a state's requiring, as many do, ... a standard of "clear and convincing evidence'").

n171. Pub. L. No. 105-19, 111 Stat. 218.

n172. Congress included a cap on **punitive damages** for individuals and small businesses in the Year 2000 Readiness and Responsibility Act, Pub. L. 106-37, 113 Stat. 135 (1999). The "Y2K Act" established procedures and legal standards for lawsuits stemming from Year 2000 date-related computer failures.

n173. See Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence"); Weems. v. United States, 217 U.S. 349, 366-67 (1910) (it is "a precept of the fundamental law" as well as "a precept of justice that punishment should be graduated and proportioned to the offense").

n174. Some examples of federal criminal fines, even for particularly egregious crimes, do not exceed $ 250,000 and include the following: tampering with consumer products ($ 250,000 if death results), U.S. Sentencing Guidelines Manual 2N1.1, 5E1.2 (1998); assault on the President ($ 30,000), U.S. Sentencing Guidelines Manual 2A6.1, 5E1.2 (1998); bank robbery ($ 75,000), U.S. Sentencing Guidelines Manual 2B3.1, 5E1.2; and sexual exploitation of children ($ 100,000), U.S. Sentencing Guidelines Manual 2G2, 5E1.2 (1998). See generally Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for **Punitive Damages** Reform, 40 U.C.L.A. L. Rev. 753 (1993).

n175. Lewis Powell, The "Bizarre" Results of **Punitive Damages,** Wall St. J., Mar. 8, 1995, at A21.

n176. See S. Rep. No. 105-32, at 49 (1997); H.R. Conf. Rep. No. 104-481, at 10 (1996).

n177. See S. Rep. No. 105-32, at 49 (1997); H.R. Conf. Rep. No. 104-481, at 10 (1996). A bill to cap **punitive damages** for individuals and small businesses in all civil actions was reported out of the House Judiciary Committee in February of 2000 by voice vote. See H.R. Rep. No. 106-494 (2000). The House passed the bill on February 16, 2000 by a vote of 221 to 193.

n178. See H.R. Rep. No. 106-494, at 9 (2000).

n179. See ABA Report, supra note 169, at 64-66 (recommending that **punitive damages** awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ACTL Report, supra note 169, at 15 (proposing that **punitive damages** be awarded up to two times a plaintiff's compensatory damages or $ 250,000,

whichever is greater); ALI Reporters' Study, supra note 169, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

n180. See **Ala.** Code 6-11-21 (1999); Alaska Admin. Code tit. 58 9.17.020(f)-(h) (1999); Colo. Rev. Stat. 13-21-102(1)(a)(1998); Conn. Gen. Stat. 52-240b (1999); Fla. Stat. Ann. 768.73(1)(b) (West Supp. 1998); Ind. Code Ann. 34-51-3-4 (1999); Kan. Stat. Ann. 60-3701 (1998); N.J. Stat. Ann. 2A:15-5.14 (West 1999); N.C. Gen. Stat. 1D-25 (1999); N.D. Cent. Code 32.03.2-11(4) (1999); Okla. Stat. tit. 23 9.1 (1998); Tex. Civ. Prac. & Rem. Code Ann. 41.008 (West 1999); Va. Code Ann. 8.01-38.1 (1999).

n181. See S. Rep. No. 105-32, at 52-53 (1997); H.R. Conf. Rep. No. 104-481, at 11-12 (1996).

n182. See Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

n183. See, e.g., Cal. Civ. Code 3295(d) (West Supp. 1999); Minn. Stat. Ann. 549.20 (West Supp. 1999); Miss. Code Ann. 11-1-65(1) (a) (Supp. 1999).

n184. See ABA Report, supra note 169, at 19; ACTL Report, supra note 169, at 18-19; Uniform Law Commissioners' Model **Punitive Damages** Act, supra note 169, at 11; ALI Reporters' Study, supra note 169, at 255 n.41.

n185. See H.R. Rep. No. 106-494, at 41-42 (2000) (minority views); S. Rep. No. 105-32, at 74-75 (1997) (minority views); see also Michael L. Rustad, Unraveling **Punitive Damages:** Current Data And Further Inquiry, 1 Wis. L. Rev. 15 (1998); Marc Galanter, Real World Torts: An Antidote To Anecdote, 55 Md. L. Rev. 1093 (1996); Michael L. Rustad, How The Common Good Is Served By The Remedy of **Punitive Damages,** 64 Tenn. L. Rev. 793 (1997).

n186. See Michael Rustad, Demystifying **Punitive Damages** in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts (Roscoe Pound Found. 1991).

n187. Professor Rustad said in his report: "The actual number of **punitive damages** awards in product liability litigation is unknown and possibly unknowable because no comprehensive recording system exists." Id. at 2 (emphasis added).

n188. See Brian J. Ostrom & Neal B. Kauder, State Justice Inst., Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 24 (1993).

n189. See Stephen Daniels & Joanne Martin, Myth and Reality in **Punitive Damages,** 75 Minn. L. Rev. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried"). Furthermore, in some states, **punitive damages** are not insurable. Thus, a business that does not self-insure can be subject to unwarranted pressure to settle a case for compensatory damages, which are insurable; a **punitive damages** award could end the business.

n190. **George** L. **Priest, Punitive Damages** Reform: The **Case of Alabama,** 56 La. L. Rev. 825, 830 (1996).

n191. Steven Hayward, Pacific Research Inst. Public Pol'y, The Role of **Punitive Damages** In Civil Litigation, New Evidence 8 (1996).

n192. Id.

n193. See, e.g., S. Rep. 105-32, at 76-77 (1997) (minority views).

n194. Thomas Jefferson, A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, in 2 The Papers of Thomas Jefferson 492, 493 (Julian P. Boyd ed., 1950).

n195. For example, in a 1999 product liability case arising out of an alcohol-related automobile accident, a California court left untouched a jury award of $ 107 million in compensatory damages; the court approved **punitive damages** in the case totaling $ 1.09 billion. See Frederic M. Biddle, GM Verdict Cut $ 3.8 Billion in Suit Over Explosion, Wall St. J., Aug. 27, 1999, at B5. In a 1996 **case, an Alabama** jury awarded $ 50 million in compensatory damages and $ 100 million in **punitive damages.** The automobile's manufacturer argued that the plaintiff had been intoxicated and lost control of his car after falling asleep at the wheel. See Hardy v. General Motors Corp., No. CV-93-56 (**Ala.** Cir. Ct. June 3, 1996).

n196. See Edward Felsenthal, **Punitive Damage** Awards Found to be Generally Modest and Rare, Wall St. J., June 17, 1996, at B4.

n197. See, e.g., S. Rep. 105-32, at 76-77 (1997) (minority views).

n198. See W. Kip Viscusi, **Punitive Damages:** The Social Costs of **Punitive Damages** Against Corporations In Environmental and Safety Torts, 87 Geo. L.J. 285, 294 (1998).

n199. See Troy L. Cady, Note, Disadvantaging The Disadvantaged: The Discriminatory Effects of **Punitive Damages** Caps, 25 Hofstra L. Rev. 1005 (1997).

n200. U.S. Small Business Administration (visited Mar. 4, 2000) <http://www.onlinewbc.org/docs/about sba.html>.

n201. See United States Small Business Administration, Office of Advocacy, Minorities in Business (visited Mar. 4, 2000) <http://www/sbaonline.sba.gov.advo/stats/<number>Women & Minorities>.

n202. See id.

n203. See H.R. Rep. No. 106-494 (2000) (civil actions involving individuals and small businesses); S. Rep. No. 105-32 (1997) (product liability); H.R. Rep. 105-101 (1997) (volunteer liability); S. Rep. No. 104-69 (1995) (product liability); H.R. Rep. No. 104-64 (1995) (product liability); H.R. Rep. No. 104-63 (1995) (product liability); S. Rep. No. 103-203 (1993) (product liability); S. Rep. No. 102-215 (1991) (product liability).

n204. See Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197 (Ill. 1983).

n205. For example, in Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987), Disney was required to pay an entire damages award, even though it was only 1% at fault for the claimant's harm.

n206. See Brookings Inst., The Liability Maze: The Impact of Liability Law on Safety and Innovation (Peter W. Huber & Robert E. Litan eds., 1991); National Academy of Engineering, Product Liability And Innovation: Managing Risk in an Uncertain Environment (Janet R. Hunziker & Trevor O. Jones eds., 1994); Testimony of Ms. Julie Nimmons, supra notes 7 & 9.

n207. See Product Liability Reform and Consumer Access to Life-Saving Products: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm., 105th Cong. (1997) (testimony of Mark Behrens).

n208. See id.

n209. Pub. L. No. 105-230.

n210. See Victor E. Schwartz, Comparative Negligence app. b (3d ed. 1994 & Supp. 1999).

n211. See H.R. Rep. No. 106-494 (2000); S. Rep. No. 105-32 (1997); H.R. Rep. 105-101 (1997); S. Rep. No. 104-69 (1995); H.R. Rep. No. 104-64 (1995); H.R. Rep. No. 104-63 (1995); S. Rep. No. 103-203 (1993) ; S. Rep. No. 102-215 (1991).

n212. See Cal. Civ. Code Ann. 1431.2 (West Supp. 1999).

n213. See Neb. Rev. Stat. 25-21,185.10 (1995).

n214. Pub. L. No. 105-19, 111 Stat. 218.

n215. See Dan Carney, Volunteer Liability Limit Heads to President, Cong. Q., May 24, 1997, at 1199 ("The measure passed the House on May 21 by a vote of 390-35, and the Senate cleared it by voice vote later that day. An earlier Senate version passed May 1 by a vote of 99-1.") (omitting references to bill numbers).

n216. See Lucinda M. Finley, Female Trouble: The Implications of Tort Reform For Women, 64 Tenn. L. Rev. 847 (1997).

n217. See Evangelatos v. Superior Ct., 753 P.2d 585 (Cal. 1988).

n218. See S. Rep. No. 105-32, at 57 (1997).

n219. See id.

n220. U.S. Small Bus. Admin., Online Women's Business Center: Women and Small Business - Startling New Statistics (visited Apr. 18, 2000) <http://www.onlinewbc.org/docs/starting/new stats.html>.

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BMW OF NORTH AMERICA, INC., Petitioner, v. IRA GORE, JR., Respondent.

No. 94-896

1994 U.S. Briefs 896

October Term, 1994

May 26, 1995

On Writ Of Certiorari To The Alabama Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment mandates additional procedural or substantive limitations on punitive damage awards by state courts.

View Table of Authorities

INTEREST OF AMICUS CURIAE

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate antitrust, commercial, consumer, environmental and securities fraud cases in federal and state courts. NASCAT's members represent victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity, including victims of the type of consumer fraud at issue in this case. In civil

actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent fraudulent, deceptive and manipulative business practices.

Claims for punitive damages are an important weapon used by NASCAT members to enforce laws protecting investors, consumers, small businesses, the environment and the integrity of the securities markets. Accordingly, with the written consent of the parties NASCAT files this amicus curiae brief in support of Respondent and urges this Court to affirm the decision of the court below. n1

n1 Letters of consent have been filed with the Clerk of the Court. The decision of the Alabama Supreme Court is reported as BMW of North America v. Gore, 646 So. 2d 619 (Ala. 1994) ("BMW"), cert. granted, U.S. , 115 S. Ct. 932 (1995). Citations to the slip opinion reprinted in Appendix A to Petitioner's Brief are cited herein as "A- ."

SUMMARY OF ARGUMENT

In this case, the Alabama Supreme Court affirmed a jury verdict for Respondent, finding that there was substantial and sufficient evidence from which the jury could conclude that Petitioner, BMW of North America, Inc. ("BMW"), a wholly-owned subsidiary of Bayerische Motoren Werke, A.G., had deliberately engaged in a nationwide scheme to conceal from consumers that certain "new" vehicles sold by BMW had, in fact, been refinished before sale to such an extent that the vehicles had suffered a substantial (and undisclosed) decline in market value. A-7a, A-11a. BMW's fraudulent scheme was perpetrated under an official corporate policy of indifference to the consumer. BMW unilaterally elected to disclose damage to its vehicles to consumers only if the cost of repair was more than 3% of the manufacturers' suggested retail price, A-11a, in utter disregard for the impact that such repairs might have on the market value of its customers' substantial investment in the expensive cars sold by BMW. This deliberate consumer fraud, which impacted many consumers in (relatively) small individual amounts but reaped large profits for BMW, is precisely the type of situation in which the individual states should be permitted to fashion punitive damages awards in order to punish and deter corporate wrongdoing. NASCAT supports Respondent's position in this case and believes that the decision of the court below should be upheld for several reasons.

First, in the words of this Court, "[p]unitive damages have long been a part of traditional state tort law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984). n2 As Justice Scalia recently observed in TXO Prod. Corp. v. Alliance Resources Corp., U.S. , 113 S. Ct. 2711 (1993) ("TXO"), "[s]tate legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime, and have frequently exercised that authority in recent years." Id. at 2727-28 (Scalia, J., concurring in judgment) (citing NASCAT's Amicus Curiae Brief). In the last decade, the legislatures of many states have overhauled their respective punitive damage laws and have enacted a range of procedural safeguards and substantive limits, including (1) statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials; and/or (4) some combination of several of these measures. n3 As demonstrated in Part A and Appendices A-F, infra, these changes in state law have been enacted to accommodate the public policy concerns raised by Petitioner and its amici. To the extent further modification of state law is needed, this Court should leave reform of punitive damages law and procedure to the political process, as Justices Scalia, O'Connor and Kennedy have acknowledged. n4

n2 See also Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 278 (1989) ("In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.").

n3 See generally Janie L. Shores, A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls, 44 Ala. L. Rev. 61, 84-89 (1992) (comprehensively outlining limits that many states have placed on punitive damage awards and procedures to be followed in such cases); 2 James D. Ghiardi & John J. Kirchner, Punitive Damages Law and Practice § 21.17 (Supp. 1989) (same).

n4 In Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ("Haslip"), Justice Scalia stated in his concurring opinion:

State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, e.g., Alaska Stat. Ann. § 09.17.020 (Supp. 1990) (punitive damages must be supported by "clear and convincing evidence"); Fla. Stat. § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages are limited to three times the amount of compensatory damages); Va. Code Ann. § 8.01-38.1 (Supp. 1990) (punitive damages limited to $ 350,000). It is through those means -- State by State, and, at the federal level, by Congress -- that the legal procedures affecting our citizens are improved.
Id. at 39 (Scalia, J., concurring); see also id. at 63-64 (O'Connor, J., dissenting) ("As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time."); id. at 42 ("the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change") (Kennedy, J., concurring in judgment). See generally Robert W. Pritchard, The Due Process Implications of Ohio's Punitive Damages Law, 19 U. Dayton L. Rev. 1207, 1223 (1994).

When this Court addresses state law its primary concern is the constitutionality, not the wisdom, of the law. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("We would not, of course, invalidate state law simply because we doubt its wisdom. . . ."). This Court "should hesitate to overturn long-established law on due process grounds without overwhelming evidence that the law is indeed unreasonable and unfair" and, in the case of state law on punitive damages, "such overwhelming evidence is not to be found" because "the present system satisfies due process." Robert E. Riggs, Constitutionalizing Punitive Damages: The Limits of Due Process, 52 Ohio St. L.J. 859, 915 (1991) ("Riggs, Constitutionalizing Punitive Damages").

Second, federal and state trial and appellate courts have considered dozens of challenges to punitive damage awards since Haslip and TXO were decided by this Court and every empirical measure demonstrates that they are fairly applying the substantive and procedural due process standards established by this Court through careful review (and remittitur where appropriate) of punitive damage awards. As detailed in Part B, infra, post-Haslip and TXO cases from many jurisdictions demonstrate that the federal and state trial and appellate courts are following this Court's mandate to ensure that (1) juries are permitted to consider only admissible evidence when determining whether defendants are guilty of fraud, malice, or oppression, the predicates to any punitive damages award; n5 (2) juries are properly instructed as to what factors must be considered before punitive damages may be awarded; n6 (3) trial courts are conducting careful post-verdict reviews of punitive damage awards and setting aside, or reducing by remittitur, those awards that are excessive and/or unsupported by the evidence; and (4) appellate courts are meticulously reviewing such awards to ensure that substantive and procedural due process has been provided.

n5 Most courts have adopted the criteria set forth in the Restatement (Second) of Torts § 908(2) (1979):

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See, e.g., Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 740 (3d Cir. 1991) (applying Pennsylvania law), cert. denied, U.S. , 112 S. Ct. 3034 (1992). For a state-by-state summary of types of wrongful conduct giving rise to liability for punitive damages, see R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories 18-26 (1988).

n6 For examples of state pattern jury instructions specifying when punitive damages may be awarded, see 1 L. Schlueter & K. Redden, Punitive Damages 204-39 (2d ed. 1989); see also Appendix D, infra.

Indeed, the Alabama Supreme Court's decision in this case presents but one example of the care and thoroughness being exercised by the lower courts in their post-verdict reviews of punitive damage awards. The court below analyzed the verdict under the very same standards held by this Court to comport with due process in Haslip and it determined that the jury had apparently improperly considered BMW's non-Alabama conduct in setting the amount of punitive damages. A-16a-17a. Accordingly, the court below reduced the award to reflect only BMW's Alabama conduct, as well as all of the other factors that this Court held in Haslip should be considered in a post-verdict review of a punitive damage award. A-17a-21a. Thus, the Alabama Supreme Court complied with the requirements of due process in this case.

Third, although the remitted punitive damages award was arguably large relative to the compensatory damages award in this case, it was not "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment. As the court below concluded, BMW engaged in a deliberate scheme of deception that had the potential to cause incalculable damage to future consumers of its automobiles. As the plurality opinion of this Court found in TXO, "the shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss . . . had petitioner succeeded in its illicit scheme." 113 S. Ct. at 2722. Moreover, a large punitive damages award against BMW was necessary to accomplish the objectives that courts have long recognized are the primary purposes of punitive damages. n7 The jury properly punished a large wealthy company which had engaged in deliberate and wide-spread wrongdoing by imposing a penalty that stung - a significant monetary penalty, not just a nominal cost of doing business. The punitive damages award also deterred future wrongdoing by compelling BMW to change its nondisclosure policy, A-20a, thereby providing all of its future consumers with important information about their investments in BMW cars. n8

n7 The purpose of punitive damages is to punish wrongdoers and deter similar wrongful conduct by other persons or entities. See, e.g., Wackenhut Applied Technologies Center, Inc. v. Sygnetron Protection Systems, Inc., 979 F.2d 980, 985 (4th Cir. 1992) (applying Virginia law) ("The purpose of punitive damages is to punish and deter.") (citation omitted); Adams v. Murakami, 54 Cal. 3d 105, 110, 284 Cal. Rptr. 318, 813 P.2d 1348, 1350 (1991) ("The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers.") (citation omitted). See also Gertz, 418 U.S. at 350 (characterizing punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); Restatement (Second)

of Torts § 908(2), comment a (1979) ("The purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."); Note, Tightening the Constitutional Noose Around Punitive Damages Challenges: TXO, What It Means, and Suggestions That Address Remaining Concerns, 68 S. Cal. L. Rev. 203, 223 (1994); Comment, Constitutional Law - Punitive Damages Award Not Violative of the Due Process Clause, 28 Suffolk U. L. Rev. 208, 210 (1994); Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1284-1304 (1993) (tracing punitive damages awards from 2000 B.C. to present).

n8 The plurality opinion in TXO made it clear that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." 113 S. Ct. at 2721-22 (emphasis in original).

Finally, NASCAT believes that the availability of punitive damages is an essential weapon in the continuing struggle that consumers, investors and small businesses must wage against fraudulent schemes and white-collar crime, which constantly threaten to cheat them of their hard-earned savings and opportunities. The continued availability of punitive damages in cases of this kind in the words of the West Virginia Supreme Court of Appeals, "give[s] individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." TXO Prod. Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870, 888 (1992), aff'd, TXO, U.S. , 113 S. Ct. 2711 (1993). Private citizens, investors and small businesses should not be deprived of one of their most effective weapons to combat fraudulent schemes and unfair business practices. Indisputably, the threat of punitive damages properly and effectively deters individual and corporate wrongdoers from engaging in wrongdoing, especially when such damages are measured by the actual or potential fruits of their schemes. Any rule of law that makes punitive damages less available concomitantly lessens the important social objectives of such awards. n9

n9 Professor Dorsey Ellis, one of the leading academic commentators on the subject of punitive damages, identifies seven objectives for punitive damages that he gleans from judicial opinions and related commentary: (1) punishment of the defendant; (2) specific deterrence (to prevent the defendant from repeating the offense); (3) general deterrence (to prevent others from committing similar offenses); (4) preservation of the peace; (5) inducement for private law enforcement; (6) compensation to victims for otherwise uncompensable losses; and (7) payment of the plaintiff's attorney's fees. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 3 (1982).

ARGUMENT

A. The States Are Responsibly Modifying Their Punitive Damage Laws And This Court Should Not Interfere With That Continuing Political Process

Over the past fifteen years, the elected representatives of the people have taken responsible steps to substantially modify their respective states' laws on punitive damages. Those modifications have taken various forms, including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials in which the trier of fact must determine defendant's liability for punitive damages before it assesses such damages; (4) authorizing only trial judges to assess punitive damages if a jury has determined that they are warranted; (5) requiring trial courts to exercise their power of remittitur to reduce excessive punitive

damage awards; and/or (6) requiring successful plaintiffs to share punitive damage awards with the state. See Appendices A-F, infra. These legislative reforms demonstrate that some of the arguments raised against the common-law system of awarding punitive damages have been persuasive, at least in some quarters; however, "it does not make a case that change is constitutionally required and may indeed be better evidence that the issue of punitive damages is a policy matter appropriately left to legislatures and, perhaps, to courts exercising their common law powers." Riggs, Constitutionalizing Punitive Damages, 52 Ohio St. L. J. at 876. n10 The states' legislative response to the so-called punitive damages "crisis" n11 may be categorized as follows:

Bifurcation: At least 11 states -- California, Connecticut, Georgia, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota and Ohio -- require by statute bifurcation of the liability and damages phases of trials in which punitive damages may be assessed, n12 while the Supreme Court of Tennessee has imposed the same requirement. n13

n10 These legislative reforms include every solution to the punitive damages "problem" ever suggested by any Justice of this Court, see Haslip, 499 U.S. at 41 (O'Connor, J., dissenting), as well as those advocated by commentators sympathetic to Petitioner and its amici. See David G. Owen, The Moral Foundations of Punitive Damages, 40 Ala. L. Rev. 705, 735-38 (1982); Malcolm Wheeler, A Proposal For Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala. L. Rev. 919, 947-60 (1982).

n11 A number of commentators have challenged the popular notion that awards of punitive damages are "skyrocketing." TXO, 113 S. Ct. at 2742 (O'Connor, J., dissenting); Haslip, 499 U.S. at 60 (O'Connor, J., dissenting); Browning-Ferris Indus., 492 U.S. at 282 (O'Connor, J., dissenting). The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of the Roscoe Pound Found. 1991); see also Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System -- And Why Not?, 140 U. Pa. L. Rev. 1147, 1256 (1992) (noting that while the mean (i.e., average) size of jury verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately); Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 13 (1990) (observing that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse"). In his comprehensive study, Professor Rustad found only 355 punitive damages awards in products liability cases between 1965 and 1990. See Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 30, 38 tbl. 3 (1992). Further, only 22% of the punitive damages awards in his study were completely affirmed on appeal. Id. at 57 tbl. 14. In addition, he found that the median punitive damages award of $ 625,000 was not significantly higher than the median compensatory damages award of $ 500,000. Id. at 46. See also Stephen Daniels & Joanne Martin, Jury Verdicts and the "Crisis" in Civil Justice, 11 Just. Sys. J. 321, 328-29, 340-42 tbl. 4, 347-48 (1986) (study of jury awards in 43 counties of ten states between 1981 and 1985 in cases involving automobile accidents, products liability, medical malpractice, street hazards and premises liability leads to conclusion that juries' punitive damages awards have not caused a "crisis" in the insurance industry).

n12 See Cal. Civ. Code § 3295(d) (1995); Conn. Gen. Stat. Ann. § 52-240(b) (1992); Ga. Code Ann. § 51-12-5.1(d)(1), (2) (1994); Kan. Code Civ. Proc. § 60-3701(a)-(b) (1994); Minn. Stat. Ann. § 549.20(4) (1994); Rev. Stat. Mo. § 510.263(1)-(3) (1994); Mont. Code Ann. § 27-1-221(7) (1994); Nev. Rev. Stat. § 42.005(3) (1993); N.J. Stat. Ann. § 2A:58C-5 (b), (d) (1993); N.D. Cent. Code Ann. § 32.03.02-11(2) (1993); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1994). These statutory provisions are summarized and/or quoted

in Appendix A, infra.

n13 See Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) ("In a trial where punitive damages are sought, the court, upon motion of defendant, shall bifurcate the trial. During the first phase, the factfinder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages. . . . During this phase, evidence of a defendant's financial affairs, financial condition, or net worth is not admissible. If the factfinder finds a defendant liable for punitive damages, the amount of such damages shall then be determined in an immediate, separate proceeding.").

Burdens of Proof: The legislatures of at least 21 states -- Alabama, Alaska, Arizona, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota and Utah -- have enacted statutes imposing higher standards of proof n14 than a mere preponderance of the evidence, n15 while the courts of five additional states -- Arizona, n16 Hawaii, n17 Maine, n18 Maryland n19 and Wisconsin n20 -- have adopted the same rule, even though in Haslip this Court rejected the argument that due process requires a heightened standard of proof before punitive damages may be awarded:

We have considered the arguments raised by [some of the parties] as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring, as many do, a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," as in the criminal context. We are not persuaded, however, that the Due Process Clause requires that much.

n14 The function of the standard of proof is to "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington v. Texas, 441 U.S. 418, 423 (1979). The "clear and convincing" standard of proof "is an important check against unwarranted imposition of punitive damages." Honda Motor Co. v. Oberg, U.S. , 114 S. Ct. 2331, 2341 (1994). The standard has been used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." Addington, 441 U.S. at 424 (holding due process requires clear and convincing standard of proof in civil commitment proceedings); see also In re Winship, 397 U.S. 358, 361-64 (1970) (due process requires higher standard of proof for criminal convictions because of important liberty interests and stigmatization at stake). According to one view, this rationale encompasses actions in which punitive damages may be awarded. See Haslip, 499 U.S. at 54 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake."); see also Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 994-95 (1989); Malcolm E. Wheeler, The Constitutional Case For Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 298 (1983).

n15 See Ala. Code § 6-11-20(a) (1994); Alaska Stat. Ann. § 09.17.020 (1992); Ariz. Rev. Stat. § 12-701A, B (1994); Cal. Civ. Code § 3294(a) (1995); Colo. Rev. Stat. § 13-25-127(2) (1994); Ga. Code Ann. § 51-12-5.1(b) (1994); Ind. Stat. Ann. § 34-4-34-2 (Burns 1994); Iowa Code Ann. § 668A.1(1) and (2) (1993); Kan. Civ. Proc. Code Ann. § 60-3701(c) (1994); Ky. Rev. Stat. § 411.184(2) (Michie 1994); Minn. Rev. Stat. Ann. § 549.20(1)(a) (1994); Miss. Code Ann. § 11-1-65(a) (1993); Mont. Code Ann. § 27-1-221(5) (1994); Nev. Rev. Stat. § 42.005(1) (1993); N.D. Cent. Code § 32-03.2-11(1), (5) (1993); Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1994); Okla. Stat. Ann. Tit. 23 § 9 (1995); Or. Rev. Stat. § 41.315, 30.925(1) (1994); S.C. Code Ann. § 15-33-135 (1993); S.D. Codified Laws

Ann. § 21-1-4.1 (1994); Utah Code Ann. § 78-18-1(1)(a) (1994). These statutory provisions are summarized and/or quoted in Appendix B, infra. But see Idaho Code § 6-1604 (1994) (codifying "preponderance of the evidence standard" for punitive damage claims).

n16 See Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675, 681 (1986) ("As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort, we believe it appropriate to impose a more stringent standard of proof.").

n17 See Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566, 571 (1989) ("[P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate. . . . A more stringent standard of proof will assure that punitive damages are properly awarded.").

n18 See Tuttle v. Raymond, 494 A.2d 1353, 1363, 58 A.L.R. 4th 859 (Me. 1985) ("The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.").

n19 In Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992), the Supreme Court of Maryland conducted a survey of other states' statutes and judicial decisions before adopting the clear and convincing evidence standard: "Use of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded. We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, in any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages." 601 A.2d at 657.

n20 See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 443 (1980).

499 U.S. at 23 n.11 (citations omitted). See also TXO, 113 S. Ct. at 2719. Thus, as to punitive damages claims, nearly half of the states have already imposed proof requirements beyond what this Court requires to satisfy due process. n21

n21 See also Campbell v. Bartlett, 975 F.2d 1569, 1577 (10th Cir. 1992) (refusing to set aside punitive damages verdict because the trial court "correctly applied New Mexico law requiring proof of punitive damages by a preponderance of the evidence" and "the United States Supreme Court has not held that due process requires a heightened standard of proof of punitive damages") (citations omitted); Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1099 (5th Cir. 1991) ("Texas law authorizes recovery of punitive damages upon proof that a preponderance of the evidence justifies the award. Celotex cannot establish that constitutional due process requires a higher standard of proof based only upon a policy preference expressed by the United States Supreme Court.") (citation omitted), cert. denied, 503 U.S. 1011 (1992); Galjour v. General Am. Tank Car Corp., 764 F. Supp. 1093, 1101 (E.D. La. 1991) (interpreting footnote 11 in Haslip decision as a holding that the "preponderance of the evidence" standard satisfies due process).

Evidentiary Limitations: At least nine states -- California, Colorado, Maryland, Missouri, Montana, Nevada, North Dakota, Oregon and Utah -- have enacted statutes precluding the introduction of evidence regarding a defendant's financial condition or net worth until the jury has determined that the defendant is liable for punitive damages. n22

n22 See Cal. Civ. Code § 3295(d) (1995); Colo. Rev. Stat. § 13-21-102(6) (1994); Md. Code

Ann. § 10-913(a) (1994); Rev. Stat. Mo. § 510.263(2), (3) (1994); Mont. Code Ann. § 27-1-221(7) (1994); Nev. Rev. Stat. § 42.005(4) (1993); N.D. Cent. Code Ann. § 32-03.2-11(2)-(3) (1993); Or. Rev. Stat. Ann. § 30.925(2) (1994); Utah Code Ann. § 78-18-1(2) (1994). These statutory provisions are summarized and/or quoted in Appendix C, infra. In addition, as noted above, in Hodges, 833 S.W. 2d at 901, the Supreme Court of Tennessee expressly stated that during the first (liability) phase of the required bifurcated trial, "evidence of a defendant's financial affairs, financial condition, or net worth is not admissible."

Jury Instructions: At least eight states -- Alabama, Colorado, Kentucky, Minnesota, Montana, New Jersey, North Dakota and Oregon -- have codified jury instructions governing awards of punitive damages. n23

n23 See Ala. Code § 6-11-20(b)(1)-(3), (5) (1994); Colo. Rev. Stat. § 13-21-102(1)(b) (1994); Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (Michie 1994); Minn. Stat. Ann. § 549.20(3) (1994); Mont. Code Ann. § 27-1-221(2)-(4) (1994); N.J. Stat. Ann. § 2A:58C-5(b) (1993); N.D. Cent. Code Ann. § 32-03.2-11(5) (1993); Or. Rev. Stat. Ann. § 30.925(3) (1994). These statutory provisions are summarized and/or quoted in Appendix D, infra.

Allocation of Damages to the State: Because punitive damages are not compensatory in nature and their primary purpose is to advance the public good through specific and general deterrence, at least 11 states -- Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Missouri, New York, Oregon, Tennessee and Utah -- allocate a portion of every punitive damages award to a state agency. n24

n24 See Colo. Rev. Stat. § 13-21-102(4) (1994); Fla. Stat. Ann. § 768.73(2)(a)(b) (1994); Ga. Code Ann. § 51-12-5.1(e)(2) (1994); Ill. Rev. Stat. Ch. 735, 5/2-1207 (1995); Iowa Code Ann. § 668A.1(2)(b) (1993); Kan. Civ. Proc. Code Ann. § 60-3402(e) (1994); Rev. Stat. Mo. § 537.675 (1994); N.Y. Civ. Proc. L. & R. § 8701(1) (1994); Or. Rev. Stat. § 18.540(1) (1992 Cum. Supp.); Tenn. Code Ann. § 39-13-216(e) (1994); Utah Code Ann. § 78-18-1(3) (1992). These statutory provisions are summarized and/or quoted in Appendix E, infra. See generally Comment, Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma, 21 Pepp. L. Rev. 857 (1994); Comment, The Feasibility of Full State Extraction of Punitive Damage Awards, 32 Duq. L. Rev. 301 (1994); Note, Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses, 80 Cornell L. Rev. 104 (1995).

Cap Statutes: At least 12 states -- Alabama, Colorado, Connecticut, Florida, Georgia, Kansas, Nevada, North Dakota, Oklahoma, Tennessee, Texas and Virginia -- have enacted so-called statutory "caps" which set maximum limits on the size of punitive damages awards. n25

n25 See Ala. Code § 6-11-21(1)-(3) (1994); Colo. Rev. Stat. § 13-21-102(1)(a) (1994); Conn. Gen. Stat. § 52-240b (1992); Fla. Stat. Ann. § 768.73(1)(a)-(b) (1994); Ga. Code Ann. § 51-12-5.1(g) (1994); Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2), (f) (1994); Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1993); N.D. Cent. Code Ann. § 32-03.2-11(4) (1993); Okla Stat. Ann. Tit. 23, § 9 (1995); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1995); Va. Code Ann. § 8.01-38.1 (1994). These statutory provisions are summarized and/or quoted in Appendix F, infra. See generally Comment, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303 (1991).

Remittitur: In Honda Motor, 114 S. Ct. at 2339-41, this Court held that due process requires the states to provide post-verdict judicial review of the amount of punitive damages awards. As this Court noted in that case, remittitur is available in every state except Oregon and the Court's decision in that case made that procedure applicable in that state as well. Several states have codified the trial court's authority and/or responsibility to carefully review punitive damages awards to determine whether remittitur is necessary. n26

n26 See Ala. Code § 6-11-23 (1994); Ark. Code Ann. § 16-64-124 (1994); Colo. Rev. Stat. § 13-21-102(1) (1994); Fla. Stat. Ann. § 768.74, 768.73(1) (1994); Ill. Rev. Stat. Ann. Ch. 735, 5/2 2-1207 (1995); Mont. Code Ann. § 27-1-221(7)(c) (1994). See generally 2 James D. Ghiardi & John J. Kircher, Punitive Damages: Law and Practice § 18.02 n.6 (Supp. 1989).

Altogether, these numerous legislative enactments demonstrate that the states are responsive to arguments concerning the incidence and amount of punitive damages awards and have taken appropriate steps, as part of the democratic process, to insure that defendants receive every applicable measure of procedural due process. The effectiveness of these procedures is demonstrated in the case at bar. See Section C, infra. Given this impressive record of achievement, this Court should feel no need to dictate to the states the precise manner in which they must address the procedural and substantive issues presented by punitive damages claims.

B. The Federal And State Courts Are Undertaking Meaningful Post-Verdict Review And Are Making Appropriate Reductions Of Punitive Damage Awards

The Due Process Clause of the Fourteenth Amendment requires state courts to use procedures that adequately ensure that punitive damage awards are not imposed arbitrarily. In Haslip, 499 U.S. at 20, this Court stressed that the availability of "meaningful and adequate review by the trial court," followed by review by an appellate court, satisfied the requirements of the Due Process Clause. In TXO, 113 S. Ct. at 2720, the plurality opinion held that because the "award was reviewed and upheld by the trial judge" and then affirmed on appeal by West Virginia's highest court, it was "entitled to a strong presumption of validity." This Court further observed that "there are persuasive reasons for suggesting that the presumption should be irrebuttable, see Haslip, 499 U.S. at 24-40 (Scalia, J., concurring in judgment), or virtually so, id. at 40-42 (Kennedy, J., concurring in judgment)." TXO, 113 S. Ct. at 2720. Most recently, in Honda Motor, 114 S. Ct. at 2339, this Court reaffirmed the constitutional necessity for post-verdict review to check the danger of "arbitrary deprivations of property."

After Honda Motor, every state now "affords post-verdict judicial review of the amount of a punitive damages award." Id. at 2338. One study reported that in the relatively rare cases in which punitive damages are awarded, the jury awards are frequently reduced in the post-verdict review conducted by the courts. See Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of Roscoe Pound Found. 1991). Post-Haslip decisions from many jurisdictions demonstrate the vigor with which the courts are providing meaningful post-verdict and appellate review, whether under applicable state law or Fed. R. Civ. P. 59. n27 The courts have carefully reviewed the punitive damages awards in tort cases of every stripe, n28 including actions for fraud, n29 tortious interference, n30 false endorsement, n31 personal injury n32 and wrongful death, n33 products liability, n34 and bad faith actions against insurers. n35

n27 In the words of this Court, "[i]n reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." Browning-Ferris Indus., 492 U.S. at 279.

n28 The Fourth Circuit has stated that "[i]t would appear that the Haslip decision has, at least, compelled most state courts which have subsequently faced the due process issue to reconsider the constitutionality of their schemes for assessing punitive damages." Johnson v. Hugo's Skateway, 974 F.2d 1408, 1417 (4th Cir. 1992) (applying Virginia law). In that case, the Fourth Circuit reversed a $ 175,000 punitive damages award because the jury had not been properly instructed. See also Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350, 354

(1991) (establishing eight-factor post-trial review of punitive damages awards in wake of Haslip); Alexander & Alexander v. B. Dixon Evander & Assocs., 88 Md. App. 672, 596 A.2d 687, 711-12 (Spec. App.) (establishing "proper guidance" for jury's consideration of punitive damages claims in wake of Haslip); cert. denied, 323 Md. 1, 590 A.2d 158, cert. denied, 323 Md. 2, 590 A.2d 159 (1991), cert. denied, 326 Md. 435, 605 A.2d 137 (1992); Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897, 908 (1991) (establishing "a new system for the review of punitive damages" as a result of Haslip).

n29 See Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259 (8th Cir.) (affirming jury's award of $ 2.5 million in actual damages and $ 2.7 million in punitive damages for defendant distributor's fraud counterclaim against manufacturer), cert. denied, U.S. , 115 S. Ct. 487 (1994), cert. denied, U.S. , 115 S. Ct. 1251 (1995); Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993) (applying Arkansas law) (affirming two punitive damages awards -- one for $ 4 million for fraud and one for $ 4 million for tortious interference with business relationship -- in distributor's lawsuit against oil company because state law "shock the conscience" standard and ten-part inquiry satisfied Haslip standards) cert. denied, U.S. , 114 S. Ct. 2120 (1994); Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc., 978 F.2d 1493, 1500-01 (8th Cir. 1992) ($ 1 million punitive damages award in favor of each of ten of seed stock company's distributors for company's breach of contract and fraud did not violate due process requirements where trial court carefully instructed jury on applicable law of four states -- Indiana, Iowa, Michigan and Ohio -- concerning nature and purpose of punitive damages and trial court also thoroughly reviewed damage awards under relevant state law standards), cert. denied, U.S. , 113 S. Ct. 3037 (1993); Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 814-15 (8th Cir. 1992) (applying Illinois law) (affirming $ 1 million punitive damages award in fraud action brought by corporate customer against commodity futures merchant); Braswell v. Conagra, Inc., 936 F.2d 1169, 1175-76 (11th Cir. 1991) (applying Alabama law) (affirming $ 9.1 million punitive damages award to 268 chicken growers in class action fraud claims against corporate buyer of broilers).

n30 See Benny M. Estes & Assoc., Inc. v. Time Ins. Co., 980 F.2d 1228, 1234-36 (8th Cir. 1992) (affirming punitive damages award of $ 1.7 million based upon insurance company's tortious interference with contracts between Arkansas agents and sub-agents); Lightning Lube v. Witco Corp., 802 F. Supp. 1180, 1199-1201 (D.N.J. 1992) (setting aside jury's $ 50 million punitive damages award for franchisees in fraud and tortious interference with contracts action against franchisor), aff'd, 4 F.3d 1153 (3d Cir. 1993); Fraidin v. Weitzman, 93 Md. App. 168, 611 A.2d 1046, 1063-71 (1992) (reversing $ 2 million punitive damages award in action for tortious interference with contract brought by discharged attorneys against former client's opponent), cert. denied, 329 Md. 109, 617 A.2d 1055 (1993).

n31 See Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1104-06 (9th Cir. 1992) (affirming $ 2 million punitive damages award in false endorsement action because it was supported by clear and convincing evidence, as required under California law), cert. denied, U.S. , 113 S. Ct. 1047 (1993).

n32 See Campbell v. Bartlett, 975 F.2d at 1575-77 (applying New Mexico law) (affirming $ 200,000 punitive damages award in drunk driving case); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 98-110 (4th Cir. 1991) (applying South Carolina law) (reversing $ 100,000 punitive damages award in auto accident case when state law denied defendant due process because lack of meaningful standards allowed jury to exercise unconstrained discretion in making its award); Rodebush by & Through Rodebush v. Oklahoma Nursing Homes, 867 P.2d 1241 (Okla. 1993) (in affirming award of $ 50,000 in actual damages and $ 1.2 million in punitive damages against nursing home whose employee intentionally struck a patient, court extensively analyzed Oklahoma's punitive damage procedures in light of Haslip and held that award of punitive damages under those procedures did not violate Due Process Clause); Wollersheim v. Church of Scientology, 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532, 536-47 (finding $ 24 million punitive damages award for intentional infliction of emotional injury in

former adherent's action against religious organization excessive and reversing judgment unless plaintiff accepted remittitur to $ 2 million), review granted, 10 Cal. Rptr. 2d 182, 832 P.2d 898 (1992).

n33 See Missouri Pac. R.R. Co. v. Lemon, 861 S.W.2d 501 (Tex. App. 1993) (affirming $ 2.2 million in actual damages but reducing exemplary damages from $ 10 to $ 8.9 million awarded against railroad for grossly negligent operation of a train that collided with a plaintiff's car), writ granted, 38 Tex. Sup. Ct. J. 274 (1995); General Motors Corp. v. Johnston, 592 So. 2d 1054, 1060-64 (Ala. 1992) ($ 15 million punitive damages award in wrongful death action held excessive and remittitur to $ 7.5 million ordered).

n34 See Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994) (applying standards set forth in Haslip and TXO in affirming award of $ 840,000 in compensatory damages and $ 6.5 million in punitive damages against maker of defective breast implants), cert. denied, U.S. , 115 S. Ct. 734 (1995); Burke v. Deere & Co., 6 F.3d 497, 511 (8th Cir. 1993) (applying Iowa law) (in farm worker's product liability action against combine manufacturer, jury awarded compensatory damages of $ 650,000 and punitive damages of $ 50 million; trial court remitted the compensatory award to $ 390,000 and the punitive award to $ 28 million; appellate court reversed punitive award holding that defendant's conduct was not sufficiently egregious), cert. denied, U.S. , 114 S. Ct. 1063 (1994); Dunn v. Hovic, 1 F.3d 1371 (3d Cir.) (after trial court had remitted a punitive damages award in asbestos product liability case from $ 25 million to $ 2 million, Court of Appeals further reduced punitive award to $ 1 million to take into consideration effect of successive punitive awards in asbestos litigation), cert. denied, U.S. , 114 S. Ct. 650 (1993); Mason v. Texaco, Inc., 948 F.2d 1546, 1559-61 (10th Cir. 1991) (applying Kansas law) (finding excessive a $ 25 million punitive damages award in benzene poisoning case and ordering a remittitur of award to $ 12.5 million), cert. denied, U.S. , 112 S. Ct. 1941 (1992).

n35 See Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1380-86 (5th Cir. 1991) (applying Mississippi law) (affirming $ 500,000 punitive damages award, in addition to compensatory damages of $ 1,000, following bench trial in insured's action against insurer for wrongful denial of claim); Pacific Group v. First State Ins. Co., 841 F. Supp. 922 (N.D. Cal. 1993) (granting a post-trial motion to vacate a $ 21 million punitive damages award in action for breach of an insurance contract and breach of the covenant of good faith and fair dealing by an insurance company's failure to defend or indemnify its insureds, where compensatory damages were $ 4.8 million); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994) (reversing award of $ 1 million in punitive damages in bad faith insurance litigation where actual damages were $ 101,000 because there was an inadequate showing of gross negligence, and articulating the standards that Texas courts must follow in awarding punitive damages in light of Haslip and TXO); Intercontinental Life Ins. Co. v. Lindblom, 598 So. 2d 886, 890-91 (Ala.) (reaffirming $ 1 million punitive damages award in bad faith case after reconsideration in light of Haslip), cert. denied, U.S. , 113 S. Ct. 200 (1992); Republic Ins. Co. v. Hires, 107 Nev. 317, 810 P.2d 790, 792-93 (1991) (reducing $ 22.5 million punitive damages award in insured's bad faith action against insurer to $ 5 million).

These cases unequivocally demonstrate that the federal and state courts are carefully scrutinizing all punitive damage awards in the wake of this Court's decisions in Haslip and TXO and, when appropriate, have substantially reduced excessive verdicts. Thus, the present system already weeds out insupportable punitive damages awards and there is simply no reason for this Court to impose additional standards in a field that has traditionally been the province of the states.

C. This Case Demonstrates That There Is No Need For Additional Procedural Or Substantive Limitations On Punitive Damage Awards

1. The Trial And Appellate Courts Adhered To The Procedural Standards Previously Upheld By

This Court

In Haslip, this Court conducted an in-depth analysis of the same procedures followed by the Alabama trial and appellate courts in this case and concluded that due process had not been violated in Haslip because the award was subject to the full panoply of procedural protection under Alabama law. 499 U.S. at 18-23. Accordingly, this Court held that a punitive damage award that was more than four times the amount of compensatory damages and more than 200 times the amount of plaintiff's out-of-pocket damages did not violate due process. Id. at 23. Judged by those same standards, the decision of the Alabama Supreme Court in this case clearly passes constitutional muster. n36

n36 After Haslip, the TXO Court approved procedures that were "far less detailed and restrictive than those upheld in Haslip." TXO, 113 S. Ct. at 2727 (Scalia, J. concurring in judgment). For example, in TXO the trial court judge did not articulate his reasons for upholding the verdict, id. at 2724, as the trial court in this case did.

Significantly, BMW concedes that the jury was properly instructed n37 and, after considering all of the evidence, the jury found that BMW's fraudulent nondisclosure had reduced the value of Respondent's car by $ 4,000 (or approximately 10% of its value). It awarded him $ 4,000 in compensatory damages and $ 4 million in punitive damages "based on a finding that the BMW defendants had been guilty of gross, malicious, intentional, and wanton fraud." A-4a.

n37 Alabama is one of the states that requires a plaintiff seeking punitive damages to prove by "clear and convincing evidence" that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." A-5a-6a (citing Ala. Code § 6-11-20 (1975)). The jury, trial court and appellate court each determined that Respondent had met this heightened burden.

After the jury verdict, the trial court utilized the same post-trial procedures for scrutinizing the punitive damage award upheld by this Court in Haslip. It conducted an excessiveness hearing and analyzed the verdict under the standards enunciated by the Alabama Supreme Court in Hammond v. Gadson, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989). A-4a. In its written statement of the reasons for denying BMW's motion for remittitur, the trial court noted that "the Court's conscience is not shocked by the amount of the verdict in this case." B-28a at P4. n38 Indeed, the trial court agreed with the jury's finding of liability: "The Court is of the opinion, from the evidence at trial and the post-judgment hearing, that these defendants were deliberately engaging in a scheme of fraud from which they derived monetary benefits." B-29a, at P5.

n38 Order on Motion for Judgment Notwithstanding the Verdict, New Trial or in the Alternative, Motion for Remittitur, October 8, 1992, attached as Appendix B to Petitioner's Brief (cited as "B- ").

The Alabama Supreme Court reviewed the verdict, again applying the Green Oil factors held by this Court to pass constitutional muster in Haslip. In its thorough opinion, the court below held that the jury's finding was amply supported by evidence that BMW had intentionally and wilfully suppressed the fact that the automobile had been repaired. A-7a. It noted that in view of the substantial diminution in value found by the jury, the 3% disclosure rule adopted by BMW "may not have been the proper yardstick by which to measure whether a disclosure should be made." A-7a, n.2. The court also observed that "this jury and another jury thought that the 'cost of repair' policy did not correspond with actual diminution in value." Id. at 11. The court further found that Respondent had demonstrated at trial that BMW's conduct was "reprehensible" because he had "satisfactorily proved that [BMW] engaged in a pattern and practice of knowingly failing to disclose damage to new cars, even though the damage affected their value, and that BMW NA followed this policy for several years." A-11a. The

Alabama Supreme Court also considered the punitive damage award in relation to BMW's financial position (id. at 12a), the costs of the litigation (id.), criminal sanctions (id. at 12a-13a), other civil actions (id. at 13a-18a), and whether the damages bore a reasonable relationship to the harm that was likely to occur from the defendant's conduct (id. at 15a-21a).

In a clear fulfillment of its duty under Haslip to make a meaningful review of the punitive damage award, the Alabama Supreme Court reduced the verdict by one-half. The court concluded that the jury had likely considered BMW's non-Alabama conduct in setting the amount of the punitive award, which the court believed would improperly punish extraterritorial conduct that had not been shown to be unlawful. A-16a-17a. The court then determined the appropriate amount of the punitive award without considering BMW's sales outside of Alabama.

The argument of BMW and its amici that BMW has been unconstitutionally punished for its extraterritorial conduct is expressly belied by the Alabama Supreme Court's decision: "when applying the reasonable relationship test to the amount of punitive damages to be awarded in this case, we do not consider those acts that occurred in other jurisdictions." A-19a (emphasis added). Instead, the court reached its conclusion that a $ 2 million punitive award was appropriate based on its analysis of: (1) whether BMW had acted in good faith (id., 17a-18a); (2) the fact that BMW had refused to change its policy of nondisclosure, even after lawsuits were filed and its dealers had requested a change in policy (id., 18a); (3) that BMW changed its policy only after the punitive damage award in this case (id.); (4) the potential gain to BMW from its illicit scheme (id.); (5) the number of times BMW had engaged in the wrongful conduct, without considering BMW's acts outside of Alabama (id. at 19a); and (6) a comparative analysis with punitive damages awards in Alabama and other jurisdictions (id.).

BMW argues that the court should have reversed the judgment with instructions either to grant a new trial or to apply the jury's (presumed) $ 4,000 per car formula to BMW's Alabama sales. Petitioner's Brief at 26. But BMW's request for a simple formula for calculating punitive damages is not mandated by the Due Process Clause and would not serve the objectives of punishment and deterrence, as explained below. Moreover, courts conducting post-verdict reviews of excessive punitive awards have traditionally given the plaintiff the option of accepting either a remittitur or a new trial, as the Alabama Supreme Court did here. It is appropriate for a court reviewing an excessive punitive damage award to "remit the portion of the verdict in excess of the maximum amount supportable by the evidence." Dunn v. Hovic, 1 F.3d at 1381 (quoting Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983)).

Thus, the Supreme Court of Alabama's review of the jury verdict and the trial court's discretion, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." Haslip, 499 U.S. at 22. In the words of the Fifth Circuit, Haslip "stand[s] for the general proposition that a punitive damage award by a properly instructed jury, where there is adequate post-verdict review, will not violate due process." Watson v. Shell Oil Co., 979 F.2d 1014, 1020 (5th Cir. 1992) (citing Haslip, 111 S. Ct. at 1044-45). As the plurality opinion in TXO noted, such an award is entitled to a "strong presumption of validity." 113 S. Ct. at 2720. Here, the jury was properly instructed and the appellate court conducted an adequate post-verdict review. The Due Process Clause requires nothing more.

2. The $ 2 Million Punitive Damage Award In This Case Is Not "Grossly Excessive"

BMW's claim that the punitive award is "grossly excessive" in violation of the Due Process Clause rests on the erroneous premise that the Alabama Supreme Court was obligated to provide a precise mathematical formula for calculating the award. n39 This Court, however, has steadfastly refused to proscribe any rigid mathematical formula governing punitive damage awards. In TXO, the plurality stated:

"We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."

n39 This assumes, of course, that there is a substantive component of the Due Process Clause that prohibits grossly excessive awards. But see TXO, 113 S. Ct. at 2727 (Scalia, J., concurring in judgment) ("To say (as I do) that 'procedural due process' requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct 'reasonableness' determination. . . ."). 113 S. Ct. at 2720 (quoting Haslip, 499 U.S. at 18).

The Alabama Supreme Court's decision in this case demonstrates once again why this Court should not, and indeed cannot, enunciate a "mathematical bright line." The decision below was the product of the full range of factors presented by this case. As the plurality observed in TXO, punitive damage awards "are the product of numerous, and sometimes intangible factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." 113 S. Ct. at 2720. We highlight below some of the factors warranting the punitive damages award that are most significant to consumers, who NASCAT's members often represent in cases challenging deceptive practices.

First, the punitive award is reasonable in relation to BMW's "reprehensible" conduct. A-11. BMW was found to have intentionally defrauded consumers by adopting a disclosure policy that disregarded the effect of its paint repairs on the value of cars it sold. Despite BMW's protestations that it is "a model of good corporate citizenship" who adopted the nondisclosure policy in good faith (Petitioner's Brief at 12), the fact-finders who heard the evidence obviously found that BMW had not acted in good faith. Indeed, in his post-verdict order the trial court judge expressed the opinion that BMW was "deliberately engaging in a scheme of fraud from which [it] derived monetary benefits." B-29a, at P5. Likewise, the Alabama Supreme Court determined that Respondent had proven by clear and convincing evidence that BMW "engaged in a pattern and practice of knowingly failing to disclose damage to new cars, even though the damage affected their value." A-11a. BMW plainly should be punished for this intentional wrongdoing.

BMW attempts to portray itself as a responsible corporate citizen who, when faced with conflicting state consumer protection laws governing the threshold level at which repairs to new vehicles must be disclosed, adopted the most restrictive standard (3%) as its official disclosure policy. But the jury and the trial court which heard the evidence found that BMW chose a policy in conscious disregard of the fact that certain repairs could significantly diminish the market value of its cars. Moreover, BMW's supposed survey of state law has not turned up a single state consumer protection statute that expressly immunizes a car manufacturer from common-law fraud liability for a deliberate failure to disclose facts having a material impact on the market value of their cars. The only state court to address this issue, the Alabama Supreme Court (after its decision in BMW), has held that such consumer protection laws do not abrogate common-law fraud. See Hines v. Riverside Chevrolet-Olds, 1994 Ala. LEXIS 438, at *10 n.2 (Sept. 2, 1994). n40

n40 It is noteworthy that BMW concedes that some states do require disclosure of repairs costing less than 3% of the manufacturer's suggested retail price (Petitioner's Brief at 39, n.25). This suggests that BMW's supposed survey of state law was either less than thorough or, at least, not periodically updated.

Second, the punitive damages award is reasonable in relation to the harm inflicted by BMW on consumers, even if one considers only the consumers in Alabama. BMW concealed repairs

that had a significant impact on the sizeable investments made by consumers in BMW cars. Although the monetary loss to each individual consumer was relatively small in actual dollars (about $ 4,000), it was relatively large as a percentage of the total value of each car (about 10%). If the punitive award were made strictly proportional to a single consumer's out-of-pocket loss, as BMW urges, it would frustrate two of the fundamental objectives of punitive damages: it would not meaningfully punish a large profitable company and it would nullify the deterrent effect of the award by showing that widespread consumer fraud will simply be slapped on the wrist. n41 Furthermore, as the court below observed, "[m]athematical formulas simply cannot fit the requirement of case-by-case justice that is the cornerstone of our jury system." A-20a. NASCAT submits that punitive damages are particularly appropriate where, as here, a defendant's wrongdoing has the potential to produce large profits for itself while inflicting relatively small losses on many consumers.

n41 As the Tenth Circuit recently noted, "high ratios [between punitive and actual damages] have been upheld where the record shows that the jury properly based its verdict on the purposes underlying punitive damages." Orjias v. Stevenson, 31 F.3d 995, 1014 (10th Cir.), cert. denied, _ U.S. _, 115 S.Ct. 511 (1994).

It is also important to note that Respondent and other consumers have been genuinely injured by BMW's conduct. BMW derides the 10% diminution in value suffered by Dr. Gore as "metaphysical harm" (Petitioner's Brief at 35, n.21) and "his (absurdly inflated) loss" (id. at 31, n.17). It is precisely this type of cavalier attitude toward the consumer that undoubtedly led the jury to award punitive damages in this case. There is nothing metaphysical about a consumer who pays 10% more for an expensive product than it is worth; nor is there anything metaphysical about a product that suffers a 10% depreciation in value due to undisclosed repairs made before it was purchased. The average consumer views a car, particularly the expensive luxury models sold by BMW, as a major investment and frequently finances the purchase with debt secured by the vehicle's value. The vehicle's market value after purchase and the rate of depreciation are thus important facts to every consumer. As the Alabama Supreme Court recently held, "the fact that [a new vehicle] was repainted to remedy a defect in the paint finish is a material fact, which significantly affects the fair market value of a car and whose importance is fairly commonly known among the public." Hines v. Riverside Chevrolet-Olds, 1994 Ala. LEXIS 438 at *24. It should come as no surprise that two juries concluded that BMW's paint repairs caused a tangible and measurable decline in the market value of its cars. n42 To this day, BMW continues to look at the damage issue with its own self-interested blinders: it narrowly focuses on the cost to it of the paint repairs as a percentage of the car's cost of sale, rather than the cost to the consumer caused by the resulting diminution in value.

n42 As the Alabama Supreme Court observed, a separate jury in a previous case against BMW also concluded that the paint repairs had caused an approximate 10% decline in value. A-7, n.2, A-11. The fact that two independent juries resolved this disputed factual issue in essentially the same manner refutes BMW's claim that Respondent's loss was "absurdly inflated."

Finally, the punitive damages award is reasonable in relation to the "magnitude of the potential harm that the defendant's conduct would have caused . . . to other victims that might have resulted if similar future behavior were not deterred." TXO, 113 S. Ct. at 2722. BMW's official nondisclosure policy, had it continued, would have defrauded numerous future consumers in Alabama. BMW changed that policy only after the punitive damages award in this case, in spite of previous lawsuits and, indeed, despite numerous requests from its own dealers. A-18a. The cost to the future potential consumers, who would have been deceived by the nondisclosure policy, is incalculable. As in TXO, the "shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss . . . had petitioner succeeded in its illicit scheme." Id.

BMW also argues that if the 1,000 other consumers who purchased BMW automobiles that had undergone undisclosed refinishing were able to recover punitive damages in the amount awarded to Dr. Gore, it would be excessive repetitive punishment. Petitioner's Brief at 46-47. The Court should not reach this issue because there have not yet been any punitive awards in other cases. If in the future BMW is subjected to excessive repetitive punitive awards, it can then raise a constitutional objection. But that hypothetical possibility does not justify a reduction in the only punitive award that has been made in this case. This Court has recognized that evidence of similar acts of misconduct have traditionally been considered in awarding punitive damages. TXO, 113 S. Ct. at 2722 n.28; see also Haslip, 499 U.S. at 21-22. Evidence of similar wrongdoing is particularly appropriate in consumer fraud cases, which typically involve widespread wrongdoing and small individual losses. If consumer fraud is going to be effectively punished and deterred, punitive damage awards must reflect not just the harm to the individual plaintiff, but the actual harm to all past consumers and the potential harm to future consumers.

In sum, when viewed from the perspective of both past and future potential consumers, the remitted punitive award in this case plainly does not "jar one's constitutional sensibilities." Haslip, 499 U.S. at 18. In TXO, this Court upheld a judgment of $ 19,000 in actual damages and $ 10 million in punitive damages. It found that the punitive award, which was over 526 times as large as actual damages, was not "grossly excessive." 113 S. Ct. at 2721-22. Here, BMW engaged in a deliberate nationwide pattern of deception affecting many past and potential future consumers and with a potential for inflicting incalculable loss. The due process challenge to the punitive award in this case can thus be disposed of with the simple observation suggested by Justice Scalia: "this is no worse than TXO." Id. at 2727 (Scalia, J. concurring in judgment).

CONCLUSION

For the reasons stated above, NASCAT respectfully submits that the decision of the court below should be affirmed.

May 26, 1995

Respectfully submitted,

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APPENDIX A

No. 94-896

Statutes Requiring Bifurcation of Liability and Damages Determinations In Punitive Damages Actions

California: Cal. Civ. Code § 3295(d) (1995) provides that the trial court "shall, on application

of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud." Evidence of profit and financial condition "shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud" and such evidence "shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

Connecticut: Conn. Gen. Stat. Ann. § 52-240(b) (1992) states that "[i]f the trier of fact determines that punitive damages should be awarded" in a products liability action, "the court shall determine the amount of such damages not to exceed the amount equal to twice the damages awarded to the plaintiff."

Georgia: Ga. Code Ann. § 51-12-5.1(d)(1)-(2) (1994) provides that "[i]n any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made." If it is found that punitive damages are to be awarded, "the trial shall immediately be recommended in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances. It shall then be the duty of the trier of fact to set the amount to be awarded. . . ."

Kansas: Kan. Code Civ. Proc. § 60-3701(a)-(b) (1994) ("In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded. . . . At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded. . . .").

Minnesota: Minn. Stat. Ann. § 549.20(4) (1994) ("In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.").

Missouri: Rev. Stat. Mo. § 510.263(1)-(3) (1994) ("All actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party. . . . If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant.").

Montana: Mont. Code Ann. § 27-1-221(7) (1994) ("When the jury returns a verdict finding a defendant liable for punitive damages, the amount of damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review. . . .").

Nevada: Nev. Rev. Stat. § 42.005(3) (1993) ("If punitive damages are claimed . . . the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed.").

New Jersey: N.J. Stat. Ann. § 2A:58C-5(b), (d) (1993) ("The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. . . . If the trier of fact determines that punitive damages should be

awarded, the trier of fact shall then determine the amount of those damages. . . .").

North Dakota: N.D. Cent. Code Ann. § 32.03.2-11(2) (1993) provides that "[i]f any party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues relating to exemplary damages."

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1994) provides that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

APPENDIX B

No. 94-896

Statutes Imposing Heightened Burdens of Proof in Punitive Damages Actions

Alabama: Ala. Code § 6-11-20(a) (1994) (punitive damages may not be awarded "other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff"); see also id., § 6-11-20(b)(4) (defining "clear and convincing evidence").

Alaska: Alaska Stat. Ann. § 09.17.020 (1992) ("Punitive damages may not be awarded in any action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence.").

Arizona: Ariz. Rev. Stat. § 12-701A and B (1994) provides that punitive damages are not available in product liability actions involving drug products unless "the plaintiff proves, by clear and convincing evidence, that the defendant, either before or after making the drug available for public use, knowingly, in violation of applicable [FDA] regulations, withheld from or misrepresented to the [FDA] information known to be material and relevant to the harm which plaintiff allegedly suffered."

California: Cal. Civ. Code § 3294(a) (1995) provides that "[i]n an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Colorado: Colo. Rev. Stat. § 13-25-127(2) (1994) requires proof beyond a reasonable doubt to support a punitive damages award.

Georgia: Ga. Code Ann. § 51-12-5.1(b) (1994) (plaintiff must show by "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences").

Indiana: Ind. Stat. Ann. § 34-4-34-2 (Burns 1994) ("Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.").

Iowa: Iowa Code Ann. § 668A.1(1)-(2) (1993) provides that punitive damages may not be awarded unless the fact finder determines "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights and safety of another."

Kansas: Kan. Civ. Proc. Code Ann. § 60-3701(c) (1994) ("plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the [bifurcated] trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice").

Kentucky: Ky. Rev. Stat. § 411.184(2) (Michie 1994) ("A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.").

Minnesota: Minn. Rev. Stat. Ann. § 549.20(1)(a) (1994) ("Punitive damages shall be allowed in civil action only upon clear and convincing evidence that the acts of the defendant show **deliberate disregard** for the rights or safety of others.").

Mississippi: Miss. Code Ann. § 11-1-65(a) (1993) ("Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.").

Montana: Mont. Code Ann. § 27-1-221(5) (1994) (specifying that "[a]ll elements of the claim for punitive damages must be proved by clear and convincing evidence" and defining "clear and convincing evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence").

Nevada: Nev. Rev. Stat. § 42.005(1) (1993) (it must be "proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied").

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11(1) & (5) (1993) (plaintiff must prove that "the defendant has been guilty by clear and convincing evidence of oppression, fraud, or malice, actual or presumed").

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1994) ("In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages.").

Oklahoma: 23 Okla. Stat. § 9 (1995) (punitive damages may be awarded only "if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed").

Oregon: Or. Rev. Stat. § 41.315 ("Except as otherwise provided by law, a claim for punitive damages shall be established by clear and convincing evidence."). See also id. § 30.925(1) (1994) ("In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.").

South Carolina: S.C. Code Ann. § 15-33-135 (1993) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

South Dakota: S.D. Codified Laws Ann. § 21-1-4.1 (1994) ("In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing

and based on clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.").

Utah: Utah Code Ann. § 78-18-1(1)(a) (1994) ("[P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.").

APPENDIX C

No. 94-896

Statutes Imposing Limitations On Admissible Evidence In Punitive Damages Actions

California: Cal. Civ. Code § 3295(d) (1995); see Appendix A, supra.

Colorado: Colo. Rev. Stat. § 13-21-102(6) (1994) ("In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.").

Maryland: Md. Code Ann. § 10-913(a) (1994) ("In any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.").

Missouri: Rev. Stat. Mo. § 510.263(2)-(3) (1994) ("Evidence of defendant's financial condition shall not be admissible in the first stage [of a bifurcated trial to determine the amount of compensatory damages] unless for a proper purpose other than the amount of punitive damages . . . Evidence of such defendant's net worth shall be admissible during the second stage [to determine the amount of punitive damages].").

Montana: Mont. Code Ann. § 27-1-221(7) (1994) provides that "[e]vidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages." If the jury determines that a defendant is liable for punitive damages, "[i]n the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered." Id.

Nevada: Nev. Rev. Stat. § 42.005(4) (1993) ("Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of . . . punitive damages to be assessed.").

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11(2)-(3) (1993) ("Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages . . . Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.").

Oregon: Or. Rev. Stat. Ann. § 30.925(2) (1994) ("During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover. . . .").

Utah: Utah Code Ann. § 78-18-1(2) (1994) ("Evidence of a party's wealth or financial condition shall be admisible only after a finding of liability for punitive damages has been made.").

APPENDIX D

No. 94-896

Statutes Codifying Jury Instructions Governing Consideration of Punitive Damages Awards

Alabama: Ala. Code § 6-11-20(b)(1)-(3), (5) (1994) (defining "fraud," "malice," "wantonness" and "oppression").

Colorado: Colo. Rev. Stat. § 13-21-102(1)(b) (1994) (defining "willful and wanton conduct").

Kentucky: Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (Michie 1994) (defining "oppression," "fraud" and "malice").

Minnesota: Minn. Stat. Ann. § 549.20(3) (1994) provides that any award of punitive damages "shall be measured by those factors which justly bear upon the purpose of punitive damages," including "the seriousness of hazard to the public arising from the defendant's misconduct," the "profitability of the misconduct to the defendant," the "duration of the misconduct and any concealment of it," the "degree of the defendant's awareness of the hazard and of its excessiveness," the "attitude and conduct of the defendant upon discovery of the misconduct," the "number and level of employees involved in causing or concealing the misconduct," the "financial condition of the defendant," and "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subjected."

Montana: Mont. Code Ann. § 27-1-221(2)-(4) (1994) (defining "actual malice" and "actual fraud" as prerequisites for punitive damages award). See id. 27-1-221(7)(b) (stating that when an award of punitive damages is made by the judge, he shall consider "the nature and reprehensibility of the defendant's wrongdoing; the intent of the defendant in committing the wrong; the profitability of the defendant's wrongdoing, if applicable; the amount of actual damages awarded by the jury; the defendant's net worth; previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act; potential or prior criminal sanctions against the defendant based upon the same wrongful act; and any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages."

New Jersey: For product liability actions, N.J. Stat. Ann. § 2A:58C-5(b)-(c) (1993) identifies the relevant factors to be considered by the trier of fact, including whether defendant acted with reckless disregard of the likelihood of serious harm, the duration of defendant's conduct, any concealment by the defendant, the profitability of the misconduct, and defendant's financial condition. These instructions were upheld against a constitutional challenge on due process grounds in Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297, 1304 (D.N.J. 1990).

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11(5) (1993) provides that the fact finder should consider: whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; the degree of reprehensibility of the defendant's conduct, the duration of that conduct; and mitigating circumstances such as the defendant's awareness of and any concealment of the conduct, the profitability to the defendant of the wrongful conduct and criminal sanctions imposed on the defendant for the same conduct.

Oregon: Or. Rev. Stat. Ann. § 30.925(3) (1994) provides that punitive damages shall be

awarded based on specified criteria, including the likelihood that serious harm would arise from defendant's conduct, defendant's awareness of that likelihood, the profitability of defendant's misconduct, the duration of the misconduct and any concealment of it, the financial condition of the defendant, and the deterrent effect of other punishment imposed on the defendant.

APPENDIX E

No. 94-896

Statutes Allocating Punitive Damages Between Plaintiffs And State Agencies

Colorado: Colo. Rev. Stat. § 13-21-102(4) (1994) specifies that "[o]ne-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund" with "[t]he remaining two-thirds of such damages collected shall be paid to the injured party." This statutory provision was declared unconstitutional in Kirk v. Denver Pub. Co., 818 P.2d 262, 266-73 (Colo. 1991), because it was deemed an impermissible "taking" of a property right with no reasonable nexus between the taking and any government services made available to the particular judgment creditor who is forced to make contribution to the state.

Florida: Fla. Stat. Ann. § 768.73(2)(a)-(b) (1994) allocates 35% of every punitive damages award to either the State's General Revenue Fund or its Public Medical Assistance Trust Fund. The constitutionality of this provision was upheld against a due process challenge in Gordon v. State, 585 So.2d 1033, 1035-38 (Fla. App. 3d Dist. 1991), aff'd, 608 So.2d 800 (Fla. 1992), because the court recognized the Florida legislature's rational basis for allocating to the public a portion of damages that are intended to promote public interests.

Georgia: Ga. Code Ann. § 51-12-5.1(e)(2) (1994) (75% of amounts awarded as punitive damages, "less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge," shall be paid into the State Treasury). This statutory provision was held constitutional in Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E. 2d 635 (1993), in which the court rejected "equal protection" and "taking" arguments under both the Georgia and United States Constitutions.

Illinois: Ill. Compiled Stat. ch. 735, 5/2-1207 (1995) allows the trial court to apportion punitive damages among plaintiff, plaintiff's attorney and the Illinois Department of Rehabilitation Services, based on the court's consideration of all relevant factors including whether any special duty was owed by the defendant to the plaintiff.

Iowa: Iowa Code Ann. § 668A.1(2)(b) (1993) (under certain circumstances, 75% of punitive damages award -- after payment of costs and fees -- are allocated to a civil reparations trust fund). A constitutional challenge based on a "taking" argument was rejected by the Supreme Court of Iowa because a plaintiff has no vested property right to punitive damages prior to entry of judgment. See Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., 473 N.W. 2d 612, 619 (Iowa 1991).

Kansas: Kan. Civ. Proc. Code Ann. § 60-3402(e) (1994) allocates one-half of punitive damages awards in medical malpractice cases to the State treasury.

Missouri: Rev. Stat. Mo. § 537.675 (1994) allocates 50% of punitive damage awards after payment of attorneys' fees to the Tort Victims Compensation Fund.

New York: N.Y. Civ. Proc. L. & R. § 8701(1) (1994) allocates 20% of every punitive damages award to the State.

Oregon: Or. Rev. Stat. § 18.540(1) (1994) allocates one-half of every punitive damages

award to the Criminal Injuries Compensation Account after deducting attorney's fees. In Honeywell v. Sterling Furniture Co., 310 Or. 206, 797 P.2d 1019, 210-12 (1990), the Supreme Court of Oregon held that a trial court's instructions containing a description of the statutory allocation scheme constituted reversible error.

Tennessee: Tenn. Code Ann. § 39-13-216(e) (1994) provides that in cases of assisted suicide, "[a]ny compensatory damages awarded shall be paid as provided by law, but exemplary damages shall be paid over to the department of revenue for deposit in the criminal injuries compensation fund."

Utah: Utah Code Ann. § 78-18-1(3) (1994) allocates one-half of any award in excess of $ 20,000 to the State Treasury.

APPENDIX F

No. 94-896

Statutes Imposing Caps on Punitive Damages Awards

Alabama: Ala. Code § 6-11-21(1)-(3) (1994) provides that an award of punitive damages "shall not exceed" $ 250,000, unless it is based upon a "pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff," conduct involving "actual malice other than fraud or bad faith," or libel, slander, or defamation.

Colorado: Colo. Rev. Stat. § 13-21-102(1)(a) (1994) provides that the amount of punitive damage awarded by the jury "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." The trial court may increase any award of punitive damages "to a sum not to exceed three times the amount of actual damages" if it is shown that the defendant "has continued the behavior or repeated the action which is the subject of the claim . . . in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case" or that the defendant "has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff. . . ." Id., § 13-21-102(3)(a)-(b).

Connecticut: Conn. Gen. Stat. § 52-240b (1992), which applies to product liability actions, specifies that "[i]f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff."

Florida: Fla. Stat. Ann. § 768.73(1)(a)-(b) (1994) provides that "the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded" unless "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances" of the case.

Georgia: Ga. Code Ann. § 51-12-5.1(g) (1994) provides that in product liability actions, "there shall be no limitation" regarding the amount of punitive damages, but only one award of punitive damages may be recovered in a Georgia state court for any act or omission arising from the product liability, regardless of the number of claims arising from the act or omission. It also provides that punitive damages awarded in other tort actions "shall be limited to a maximum of $ 250,000".

Kansas: Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2) and (f) (1994) provides that no award of punitive damages shall exceed the lesser of "[t]he annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual

income earned for any one of the five years immediately before the act for which such damages are awarded" or $ 5 million; however, if the court finds that "the profitability of the defendant's misconduct exceeds or is expected to exceed" that limitation, "the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1-1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct."

Nevada: Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1993) provides that an award of punitive damages may not exceed "[t]hree times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $ 100,000 or more" or "[t]hree hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $ 100,000."

N.D. Dakota: N.D. Cent. Code Ann. § 32-03.2-11(4) (1993) provides that "the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court."

Oklahoma: 23 Okla. Stat. § 9 (1995) (jury may award punitive damages "in an amount not exceeding the amount of actual damages awarded"). At the conclusion of all the evidence, if the trial court makes a finding outside of the presence of the jury that there is clear and convincing evidence that defendant is guilty of oppression, fraud, or malice, this limitation on punitive damages does not apply. See Massey v. Farmers Ins. Group, 1993 U.S. App. LEXIS 2191, at *21 (10th Cir. Feb. 9, 1993).

Texas: Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1995) ("exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or $ 200,000, whichever is greater"). The statutory limitation, however, does not apply to punitive damages "resulting from malice . . . or to an intentional tort." Id., § 41.008.

Virginia: Under Va. Code Ann. § 8.01-38.1 (1994), "the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact" and "[i]n no event shall the total amount awarded for punitive damages exceed $ 350,000." The statute specifies that the jury "shall not be advised of" this limitation; however, "if a jury returns a verdict for punitive damages in excess of the maximum amount specified . . . the judge shall reduce the award and enter judgment for such damages in the maximum amount provided" by the statute.

[Tort Reform Articles] [10]

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 1646/1514
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[Tort Reform Articles][11]

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OA/NARA#: 16416/1514
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[Tort Reform Articles] [13]

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[Tort Reform Articles] [14]

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Subject Files

Binder - Transportation Security Administration: Policy Memorandums

OA/NARA#: 1649/1517
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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Binder - Transportation Security Administration: Screening Checkpoint / Checked Baggage Screening Standard Operating Procedures

OA/NARA#: 1649/1617
9600

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Folder 2

Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Request White House Mission Designation for Secretary of State Travel - To: Joseph Hagin - From: Condoleezza Rice	3	01/16/2002	P1/b1;
002	Memorandum	Request White House Mission Designation for Secretary of State Travel - To: Joseph Hagin - From: Condoleezza Rice	5	01/09/2002	P1/b1;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Travel - Mission Designations

FRC ID:
9632

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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A. Closed by Executive Order 13526 governing access to national security information.
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b(1) National security classified information [(b)(1) of the FOIA]
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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

RESTRICTION
Presidential Records Act - [44 U.S.C. 2204(a)]

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Request White House Mission Designation for Secretary of State Travel - To: Joseph Hagin - From: Condoleezza Rice	3	01/16/2002	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
Travel - Mission Designations
FRC ID:
9632
OA Num.:
1824
NARA Num.:
1742

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Request White House Mission Designation for Secretary of State Travel - To: Joseph Hagin - From: Condoleezza Rice	5	01/09/2002	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Travel - Mission Designations

FRC ID:
9632

OA Num.:
1824

NARA Num.:
1742

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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P3 Release would violate a Federal statute [(a)(3) of the PRA]
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Records Not Subject to FOIA

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Source: All Sources : Federal Legal - U.S. : **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**
Terms: **("director" /5 "federal bureau of investigation") and ("attorney general")** (Edit Search)

28 USCS § 532

*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II. DEPARTMENT OF JUSTICE
CHAPTER 33. FEDERAL BUREAU OF INVESTIGATION

28 USCS § 532 (2000)

§ 532. **Director of the Federal Bureau of Investigation**

The **Attorney General** may appoint a **Director of the Federal Bureau of Investigation. The Director of the Federal Bureau of Investigation** is the head of the **Federal Bureau of Investigation.**

HISTORY:
(Sept. 6, 1966, P.L. 89-554, § 4(c), 80 Stat. 616.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:
The section is supplied for convenience and clarification and is based on section 3 of Executive Order No. 6166 of June 10, 1933, which provided for the transfer of the functions of the Bureau of Investigation together with the investigative functions of the Bureau of Prohibition to a "Division of Investigation in the Department of Justice, at the head of which shall be a Director of Investigation". The Division of Investigation was first designated as the "Federal Bureau of Investigation" by the Act of Mar. 22, 1935, ch. 39, title II, 49 Stat. 77, and has been so designated in statutes since that date. The title of "**Director of the Federal Bureau of Investigation**" was recognized by statute in the Act of June 5, 1936, ch. 529, 49 Stat. 1484, and has been used in statutes since that date.

Other provisions:
Confirmation and compensation of Director; term of service. Act June 19, 1968, P.L. 90-351, Title VI, § 1101, 82 Stat. 236; Oct. 15, 1976, P.L. 94-503, Title II, § 203, 90 Stat. 2427 provided:
"(a) Effective as of the day following the date on which the present incumbent in the office of **Director** ceases to serve as such, the **Director of the Federal Bureau of Investigation** shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate prescribed for level II of the Federal Executive Salary Schedule [5 USCS § 5313].
"(b) Effective with respect to any individual appointment by the President, by and with the advice and consent of the Senate, after June 1, 1973, the term of service of the **Director of the Federal Bureau of Investigation** shall be ten years. A **Director** may not serve more than one ten-year term. The provisions of subsections (a) through (c) of section 8335 of title 5, United States Code [5 USCS § 8335(a)-(c)], shall apply to any individual appointed under this section.".
FBI critical skills scholarship program. Act December 4, 1991, P.L. 102-183, Title V, § 501,

105 Stat. 1268, provides:

"(a) Study. The **Director of the Federal Bureau of Investigation** shall conduct a study relative to the establishment of an undergraduate training program with respect to employees of the Federal Bureau of Investigation that is similar in purpose, conditions, content, and administration to undergraduate training programs administered by the Central Intelligence Agency (under section 8 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403j)), the National Security Agency (under section 16 of the National Security Agency Act of 1959 (50 U.S.C. 402 (note)), and the Defense Intelligence Agency (under section 1608 of title 10, United States Code).

"(b) Implementation. Any program proposed under subsection (a) may be implemented only after the Department of Justice and the Office of Management and Budget review and approve the implementation of such program.

"(c) Availability of Funds. Any payment made by the **Director of the Federal Bureau of Investigation** to carry out any program proposed to be established under subsection (a) may be made in any fiscal year only to the extent that appropriated funds are available for that purpose.".

NOTES:

RESEARCH GUIDE

Am Jur:

7 Am Jur 2d, **Attorney General** § 46.

Source: All Sources : Federal Legal - U.S. : **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**

Terms: **("director" /5 "federal bureau of investigation") and ("attorney general")** (Edit Search)

View: Full

Date/Time: Friday, January 12, 2001 - 3:01 PM EST

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Kavanaugh, Brett

Subject Files

Western District of Washington

OA/NARA#: 2165/2076
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Counsel's Office, White House
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[White House Legal Issue Articles]

Subject Files

OA/NARA#: 2163/2074
9693

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Folder 9

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

White House Officials Testimony to Congress

OA/NARA#: 2180/2091
9800

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Folder 10

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

White House Policy - Use of Likeness

OA/NARA#: 2163/2074
9693

Box 63
Folder 11

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

White House Staff Manual
1997

OA/NARA#: 2162/2073
9692

Box 63
Folder 12

REV_00457767

DIRECTORY OF SERVICES

AGENCY & OFFICE DESCRIPTIONS

FORMS

LEGAL & ETHICAL REGULATIONS

ACRONYMS

WHITE HOUSE

STAFF MANUAL

1997

DIRECTORY OF SERVICES

AGENCY & OFFICE DESCRIPTIONS

FORMS

LEGAL & ETHICAL REGULATIONS

ACRONYMS

WHITE HOUSE

STAFF MANUAL

1997

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Binder - White House Staff Manual, February 2001

OA/NARA#: 2162/2013
9692

Box 64
Folder 1

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Binder - White House Staff Manual, July 2002

OA/NARA#: 2176/2087
9796

Box 64

Folder 2

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

White House Website and Emails, Heil/Zimmerman

Box 64
Folder 3

OA/NARA#: 21163/2014
9693

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[P2. P6/66 Folder 10]

15p

OA/NARA#: 341 / 237
9122

Box 64
Folder 4

Source: All Sources : News : By Individual Publication : N : **The New York Times**
Terms: **"susan webber wright"** (Edit Search)

The New York Times, April 13, 1999

♦ View Related Topics

April 13, 1999, Tuesday, Late Edition - Final

SECTION: Section A; Page 22; Column 1; Editorial Desk

LENGTH: 293 words

HEADLINE: The Messages From Little Rock

BODY:
Yesterday's decision by Federal District Judge **Susan Webber Wright** holding President Clinton in contempt of court was a fitting judicial response to what she termed his "false, misleading and evasive" testimony about his relationship with Monica Lewinsky in the Paula Jones sexual harassment case. The 32-page ruling puts into the legal and historical record that Mr. Clinton was untruthful and deliberately misleading, and assigns a legal sanction to uphold the rule of law.

In addition, the financial penalties -- calling for the President to reimburse the court $1,202 to cover the expenses incurred by the judge in traveling to Washington to preside over "his tainted deposition" and to pay Ms. Jones any expenses incurred because of Mr. Clinton's untruthful behavior -- are appropriately symbolic. The President would be wise not to challenge them. Judge Wright has signaled her desire to bring this matter to a close.

If the independent counsel, Kenneth Starr, is smart, he will follow Judge Wright's impulse and draw the same lesson from the jury verdict in Little Rock yesterday. The jury acquitted Susan McDougal on charges that she obstructed Mr. Starr's Whitewater investigation even though there was no question she had refused to testify before a grand jury and had disobeyed a court order to do so. Ms. McDougal won her case by putting the tactics of Mr. Starr and his deputies on trial.

The verdict should send a message to Mr. Starr that it is time to bring his inquiries to a close. He should renounce any plans to pursue a retrial of Ms. McDougal on two criminal contempt charges on which the jury deadlocked, and should expedite his final reports to the court. His investigation has reached a point of diminishing returns.

http://www.nytimes.com

LOAD-DATE: April 13, 1999

Source: All Sources : News : By Individual Publication : N : **The New York Times**
Terms: **"susan webber wright"** (Edit Search)
View: Full
Date/Time: Tuesday, February 27, 2001 - 7:50 PM EST

About LEXIS-NEXIS | Terms and Conditions

The New York Times, April 14, 1999

April 14, 1999, Wednesday, Late Edition - Final

SECTION: Section A; Page 25; Column 5; Editorial Desk

LENGTH: 698 words

HEADLINE: Liberties;
Contempt, She Says

BYLINE: By MAUREEN DOWD

BODY:
As though our President didn't have enough to worry about, with the confusion on Kosovo policy and the collapse of the China World Trade Organization deal, now he must finally face the music on being contumacious about his concupiscence.

After years of slipping and sliding around, Bill Clinton was finally pinioned by his former law student, Judge **Susan Webber Wright.**

In a scalding ruling that was far more gratifying than the partisan House impeachment hearings, and far more appropriate than a Congressional censure, Judge Wright plainly rebuked Mr. Clinton for what he was plainly guilty of: lying through his teeth. "Simply put," the judge said, citing Mr. Clinton for civil contempt in the Paula Jones lawsuit, the President's testimony was "intentionally false."

She upbraided him not on his tacky sexcapades with the pizza girl, but on his real offense, his lifelong habit of customizing, altering, evading or dribbling out the truth to maintain political viability. It is unappetizing when he does it in political venues; but in a legal venue, with the judge sitting right in front of him, it was literally and legally contemptible.

"It simply is not acceptable to employ deceptions and falsehoods in an attempt to obstruct the judicial process," she wrote, "understandable as his aggravation with the plaintiff's lawsuit may have been."

Since Hillary never gave us "closure" by braining the big boy with a frying pan, it was delicious to see another brainy lawyer ding him with a 32-page order and fine. The judge dryly mocked Mr. Clinton's tortured definition of his tryst.

"It appears," she wrote, "the President is asserting that Ms. Lewinsky could be having sex with him while, at the same time, he was not having sex with her."

The President and the prosecutor who have spent years locked in a warped embrace were still hopelessly entangled this week. On the same afternoon that Mr. Clinton got slapped by a Little Rock judge for obstructing justice, Ken Starr got slapped by a Little Rock jury for using an obstruction-of-justice charge to unfairly bludgeon the President and his old business partner.

After years of a runaway investigation and abusive tactics, Mr. Starr was finally pinioned by Susan McDougal. Mr. Starr's former prisoner -- who still has her own home page on the Web with that fetching picture in manacles and miniskirt -- showed once again that it is long past time for the special prosecutor to pack up and get out of town.

In the same Little Rock Federal courthouse where Judge Wright issued her ruling, Ms. McDougal had just triumphed with what her lawyer Mark Geragos called "a Ken Starr defense." The woman Mr. Starr let languish in solitary confinement -- she called herself a political prisoner -- turned the tables and put the prosecutor, or "the sleazy toad," as she likes to call him, on trial in her trial.

Her case was simple: Mr. Starr was out to get the President, so determined, in fact, that he was pressuring her to tell lies about the Clintons. Thus she did not need to answer the sleazy toad's questions.

"Clearly, the message here was that Ken Starr has run out his time," said a happy Mr. Geragos.

This whole farce is so over. But the now-comical characters keep rushing back onto the stage. This week, Susan, Bill, Ken, Web and Paula were all in the headlines.

Mr. Starr will be back before Congress testifying today at a hearing on whether the Independent Counsel Act should be renewed. He has long opposed the law on constitutional grounds, but has turned himself into the poster boy for its excesses. After spending four and a half years rooting around in the President's life, Mr. Starr is expected to tell us it's time for the law to expire.

In the immortal words that Monica spoke to her gal-pal Linda Tripp after Mr. Starr's agents swooped down on her, "Thanks a lot." Couldn't he have shared these insights about getting rid of himself $50 million ago?

Meanwhile, in this endless dance of the macabre, another Congressional committee evaluating whether to preserve or kill the special prosecutor law wants to hear from none other than Susan McDougal.

It should be so over. But it so isn't.

http://www.nytimes.com

LOAD-DATE: April 14, 1999

The New York Times, May 25, 2000

May 25, 2000, Thursday, Late Edition - Final

SECTION: Section A; Page 28; Column 1; Editorial Desk

LENGTH: 534 words

HEADLINE: Mr. Clinton's Disbarment Case

BODY:

In recommending that President Clinton be disbarred for providing false testimony in the Paula Jones sexual harassment case, a disciplinary committee of the Arkansas Supreme Court has called for the harshest sanction at its disposal. The Arkansas courts will now have to decide whether disbarment is the right penalty for the president's dishonesty, given all the circumstances, or whether some lesser penalty such as a public reprimand or suspension of his license to practice law is more appropriate. But there is no doubt that Mr. Clinton must be called to account for his legal misconduct and that this disbarment proceeding is the appropriate forum in which to hold him accountable.

The false testimony at the root of this matter came in 1998 during a deposition in the lawsuit by Paula Jones alleging that Mr. Clinton, while governor of Arkansas, had sexually harassed her. At one point Mr. Clinton, in attempting to deflect questions designed to show a pattern of bad behavior, denied having had sexual relations with Monica Lewinsky. The President contended then, and continues to maintain, that he did not technically lie because the activities he engaged in with Ms. Lewinsky did not fit the definition of sexual relations used in the trial. That argument was demolished by Judge **Susan Webber Wright,** who presided over the Paula Jones case. Cutting to the core issue, she found that the president had given "intentionally false" testimony under oath, fined him $90,000 and referred the matter to the disciplinary committee that has now recommended disbarment.

The president's supporters cite what they consider mitigating circumstances. They note that Judge Wright ultimately dismissed the Jones case and ruled that Mr. Clinton's disputed testimony was not germane, so it is hard to argue that his false testimony harmed anyone. They add that Mr. Clinton's testimony was not delivered as a lawyer but as a private defendant in a lawsuit that he considered politically motivated. They also argue that in Arkansas disbarment is typically reserved for far worse crimes, like stealing from a client. All these factors need to be considered when the case is assigned to an Arkansas court. Indeed, the president's advocates are right that some other lawyers caught lying under oath in Arkansas have received reprimands rather than being disbarred.

But the president and political allies like Senator Charles Schumer of New York demean the legal system when, without providing any evidence, they depict Mr. Clinton as a victim of political bias. Mr. Clinton's troubles did not originate in what Mr. Schumer called a "kangaroo court." The president's credentials as an attorney are under challenge because he decided, after careful planning, to testify falsely.

The Arkansas courts will now have to make an independent judgment on an appropriate punishment. In doing so, they should treat Mr. Clinton as they would any other lawyer caught

giving false testimony in similar circumstances. They should not punish the president for who he is, just to make a symbolic statement. Nor should they grant him special leniency. Mr. Clinton deserves equal justice under the law, no more, no less.

http://www.nytimes.com

LOAD-DATE: May 25, 2000

Source: All Sources : News : By Individual Publication : N : **The New York Times**
Terms: **"susan webber wright"** (Edit Search)
View: Full
Date/Time: Tuesday, February 27, 2001 - 7:45 PM EST

The Washington Post, July 31, 1999

The Washington Post

July 31, 1999, Saturday, Final Edition

SECTION: EDITORIAL; Pg. A20

LENGTH: 317 words

HEADLINE: The Price of Perjury

BODY:

NINETY THOUSAND dollars may not sound like a large sum to account for the damage that President Clinton's lies under oath did to our political system. But the sanction imposed on the president by Judge **Susan Webber Wright** makes a strong statement about the integrity of federal court proceedings. It is a statement made all the stronger by the fact that, unlike so many of the president's foes, Judge Wright always has done the minimum necessary to address the misconduct he perpetrated in her courtroom. Her fairness to him made it an unusually powerful rebuke when she found him in contempt of court this spring, and it makes her fixing of the price of that contempt on Thursday similarly resonant.

The actual sum -- which is supposed to compensate the Jones camp for expenses incurred as a result of his false statements in deposition -- is far less than Paula Jones's lawyers requested. Judge Wright's figure, in fact, is closer to that recommended by the president's lawyers than it is to the nearly $ 500,000 the Jones camp sought. The bulk of her opinion is devoted to explaining why their fee requests are excessive and involve legal expenses that can't reasonably be said to result from Mr. Clinton's false statements under oath.

All of which makes the figure on which she settled a very credible accounting of the damage Mr. Clinton did to justice in her courtroom. And while it does not begin to assess the larger damage he did by dragging the country through a months-long investigation and impeachment, that is not a figure that it is her place to estimate. Indeed, the larger damage is impossible to calculate in dollars. The purpose of this sanction is to reimburse the price of his perjury for that small part of the justice system for which Judge Wright is responsible: the case over which she presided. As such, it is a fitting close to the Paula Jones suit.

LOAD-DATE: July 31, 1999

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Binder - EP2, P6/66 JCIJ

OA/NARA#: 2176/2087
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Lansing State Journal June 4, 1999 Friday

June 4, 1999 Friday

SECTION: LOCAL; Pg. 1B

LENGTH: 468 words

HEADLINE: Court says DNR must obey zoning

BYLINE: Egan Paul

BODY:
Local government will have some say in state projects

By Paul Egan

In a decision that could affect future boat launches, nature trails and even state parks, the state Supreme Court has ruled that the Department of Natural Resources isn't exempt from local zoning laws.

The court's 5-2 decision said the DNR needs approval from Burt Township to develop a boat launch on Burt Lake in Cheboygan County.

Opinions differ on whether the decision is far-reaching. The "not in my back yard" syndrome could make the DNR unable to develop public areas that neighbors oppose, critics said Thursday.

The decision's effect "could well be to frustrate the DNR's attempt to carry out its legislatively directed mandate to provide harbors, channels and recreation facilities," Justice Michael Cavanagh said in a dissenting opinion.

Don Stypula, manager of environmental affairs for the **Michigan** Municipal League in Lansing, disagreed.

"This ruling does not have the effect of prohibiting or banning in any manner the DNR from coming in and developing public access sites," Stypula said Thursday. "It recognizes the authority of a local unit of government to have a say in the process."

In 1978, the Supreme Court ruled that the Department of Corrections was immune from local zoning laws when building prisons because state law gives the department complete jurisdiction over prisons.

Writing for the majority in the DNR decision, released Wednesday, **Justice Robert Young** said the DNR is different because it shares responsibility with local governments for developing waterfront properties.

All the other GOP nomi nees joined Young in the majority decision. The two Democratic nominees dissented.

The DNR has developed 740 boat launches around the state since 1939, spokesman Tim Roby said. Officials there and in other state departments were studying the ruling Thursday.

"Potentially, it could have a wider reach," said Chris De Witt, a spokesman for the Attorney General's office. "We're not totally convinced it's going to go beyond Burt Township."

Kevin Winters, corporate counsel for **Michigan** United Conservation Clubs, said the ruling could also potentially hurt the DNR's ability to convert unused rail lines to nature trails and develop state parks.

The Burt Lake boat launch is opposed by neighboring cottagers.

Bill Stehouwer, a salesman at Grand Pointe Marina in Dimondale, said there needs to be a balance between the rights of the boating public and those of lakefront owners.

"It's a two-edged sword," Stehouwer said. "I can understand the guy who lives on the water and the problem with the Jet Skis. It's a lake invasion."

The issue split **Michigan's** environmental groups, with the **Michigan** Environmental Council backing the township's position and the MUCC supporting the DNR.

LOAD-DATE: August 15, 2002

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 6:36 PM EDT

The Associated Press State & Local Wire January 18, 2000

The Associated Press State & Local Wire

January 18, 2000, Tuesday, BC cycle

SECTION: State and Regional; Political News

LENGTH: 417 words

HEADLINE: Some judges say Supreme Court proposal would dry up campaign funds

DATELINE: DETROIT

BODY:
Some judges are criticizing a state Supreme Court proposal that would prohibit them from accepting campaign contributions from lawyers they had appointed to cases within the last two years.

The proposed rule also would prohibit a judge from appointing an attorney if the attorney had donated to the judge's campaign in the last two years.

"They're trying to fix something that isn't broken," said Wayne County Circuit Judge Karen Fort Hood, presiding judge of the court's 31-member criminal division. "I haven't talked to a single judge or lawyer who is in favor of this proposal."

Ms. Hood and Wayne Circuit Chief Judge Michael Sapala said the proposal isn't needed in Wayne County, which overhauled its rules in 1998 to prevent judges from using appointments to reward supporters.

But Ann Arbor lawyer Douglas Mullkoff, president of the 300-member Criminal Defense Attorneys of **Michigan,** said change is needed.

"There's something unsavory about a system where lawyers contribute money to judges who then appoint the lawyers to represent indigent criminal defendants," Mullkoff told the Detroit Free Press. "It doesn't look right."

Supreme Court **Justice Robert Young** Jr. of Grosse Pointe Park prompted the court to propose the rule. Young said he became interested in the issue after Mullkoff raised it last summer. Young said some lawyers have told him they feel pressured to contribute to judges' campaigns for appointments.

He said he offered it merely to spark a debate and doesn't know whether the Supreme Court will adopt it after a 60-day comment period that starts this month, the paper reported Tuesday.

Although court rules prohibit judges' campaign committees from soliciting more than $100 from a lawyer for a reelection campaign, lawyers and others can give $500 to $3,400 to a candidate, depending upon the size of the judge's district. Political action committees can contribute $5,000 to $34,000, depending on the size of the district.

Courts use different methods for appointing lawyers. Many require lawyers to be selected from eligibility lists based on experience and qualifications. In some courts, such as Wayne County Circuit Court's criminal division, judges pick lawyers from the lists in any order.

In Oakland County Circuit Court, judges pick lawyers in any order for the most serious criminal cases, and court administrators pick lawyers for less serious cases in strict rotation order. Other courts go strictly by rotation.

LOAD-DATE: January 19, 2000

Detroit Free Press APRIL 15, 2000 Saturday METRO FINAL EDITION

Detroit Free Press
Found on Freep.com
Detroit Free Press

APRIL 15, 2000 Saturday METRO FINAL EDITION

SECTION: EDITORIAL; Pg. 10A

LENGTH: 613 words

HEADLINE: FROM OUR READERS

BODY:
CONSIDER THE COSTS OF POLITICS, JUSTICE

The media are heightening their scrutiny of the judiciary, the judicial process and individual judges. In part, I suspect, this is a result of a somewhat belated discovery that the workings of the judicial branch are important not only in a governmental sense, but also in a political sense. This scrutiny is perhaps a good thing, for both the judiciary and the larger society. We should not, however, assume that it will come without costs.

Judicial propriety: Ron Dzwonkowski, in his Jan. 27 column, "No war against state Supreme Court, just healthy debate," ruminated about a comment by **Michigan** Supreme Court **Justice Robert Young** that the newspaper was engaged in a "jihad" against the court. Dzwonkowski suggested that, because his newspaper has cases before the court, Young should seek a ruling on whether he can sit in judgment of the Free Press. The implication is that Dzwonkowski thinks there should be a healthy debate about the role of the courts, but that this debate should be essentially one-way. In other words, the media should be able to scrutinize and comment on the judiciary but individual judges should not respond, because to do so creates "an appearance of impropriety."

A healthy debate, however, must be a two-sided one. The first casualty of heightened scrutiny of the judiciary may therefore be the notion that the appearance standard of judicial propriety limits judges in what they can say to, or about, the media.

Judicial politics: Dzwonkowski expressed the desire that the debate he envisions will not be a "nasty partisan war." I commend his idealism, but I am not counting on it being fulfilled any time soon.

If the media have discovered that the judiciary is important politically, it should come as no surprise that the political parties have as well. I think it entirely probable that future judicial campaigns, particularly at the **Michigan** Supreme Court level, will be intensely partisan, highly expensive, quite nasty and not very short.

In the midst of such a partisan fistfight, the citizenry's faith in the judiciary may be

diminished. If our citizens reach the conclusion that the process of judging is simply politics by another name, then a second casualty may well be the public's belief that judges are objectively able to make informed and unbiased decisions.

Judicial elections: If judges come to be viewed as being, first and foremost, politicians, then I suspect there will shortly be a loud hue and cry to take politics out of the judicial selection process. The most extreme proposal is for gubernatorial appointment of judges. Such a process would simply shift the battleground and increase the stakes in gubernatorial elections. What we would lose would be the tradition of an elected judiciary that goes back to the Constitution of 1850.

I know from personal experience that campaigning for judicial office can be both a humbling and a learning experience. A third casualty, if in fact we move to an appointive judicial selection system, may therefore be a certain degree of humility and a certain capacity to learn on the part of our judges.

Thus, inexorably, there are unintended consequences that follow from well-intentioned acts. Perhaps we should pause to ponder the casualties that we may incur along the way as we depart from the core concept that judges are to remain above the political fray and are to maintain "an honor the most sensitive." Is it possible that the permanent costs of a fully politicized judiciary may outweigh the momentary thrill of the current heightened scrutiny?

Judge William Whitbeck
Michigan Court of Appeals
Lansing

GRAPHIC: Drawing Copyright, Art Parts

LOAD-DATE: January 29, 2002

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 6:16 PM EDT

Detroit Free Press MAY 17, 2000 Wednesday METRO FINAL EDITION

Detroit Free Press

Found on Freep.com

Detroit Free Press

MAY 17, 2000 Wednesday METRO FINAL EDITION

SECTION: EDITORIAL; Pg. 12A

LENGTH: 759 words

HEADLINE: A TELLING SILENCE SPEAKS VOLUMES ON BEHALF OF BROWN RULING

BYLINE: TREVOR W. COLEMAN

BODY:
BROWN vs. Board of Education, the seminal U.S. Supreme Court ruling of 46 years ago today that outlawed racial segregation in schools, is being argued again in this year's **Michigan** Supreme Court elections.

Specifically at issue is the view of that decision held by **Justice Robert Young** Jr., the court's only African American and one of three conservative Republican justices up for election in November. The fact that Young's civil rights views are being questioned underscores a perception that black conservatives have been complicit with white conservatives who are actively trying to undermine Brown's fundamental objective: the full integration of our society.

The **Michigan** Democratic Party slapped Young upside his head by distributing pamphlets at the NAACP Freedom Fund Dinner last month asserting that Young opposed the Brown decision, a sacred ruling to most African Americans.

Young's response was to threaten to sue state Democratic chairman Mark Brewer, a civil rights lawyer, suggesting the charge was libelous.

Young says he is not opposed to Brown and even has benefited from it. He just disagrees with its reasoning.

What's most interesting, however, is that even though he has made a great deal about this alleged "racist" insult -- even employing a public relations firm to dispute it -- not one civil rights organization, civil rights leader or even African-American legal group such as the National Bar Association or Wolverine Bar Association, had, as of Tuesday, come to Young's defense.

It calls to mind the complaint earlier this year from black Republican Alan Keyes that the "racist" media were not taking seriously his campaign for president, and preventing him from reaching a larger audience, particularly African Americans.

And anti-affirmative zealot Ward Connerly is complaining bitterly that his new book about his crusades against some of the civil rights victories held most sacred by American blacks has been placed in the African-Americans section of bookstores. Connerly, who is part black, calls it a form of literary apartheid.

The silence from civil rights organizations to all these complaints is deafening.

Of course some people will claim that because most civil rights groups are closely aligned with the Democratic Party, they are just being partisan against black Republicans, even those confronting racism.

But that is just not true. Whether it was Southern segregationists or Northern bigots, white conservatives have bitterly fought policies spawned by Brown, including school desegregation, affirmative action and minority voting rights. For the most part, however, black Republicans, though fiscally conservative, fought alongside black Democrats in tearing down those barriers Brown said were illegal.

Civil rights leaders point out that since the Reagan administration, however, there have been too few Republicans they could work with because the party has so aggressively embraced the anti-civil rights views of its right-wing leaders such as Jesse Helms, Trent Lott, Tom Delay, Strom Thurmond and Pete Wilson. They lament that the GOP has rejected the mainstream civil rights views of respected black Republicans such as Edward Brooke, the former senator from Massachusetts, William T. Coleman, Art Fletcher and even Colin Powell for the likes of Clarence Thomas, Walter Williams, Thomas Sowell, Connerly and Keyes.

None of them has any credibility on civil rights or any significant black constituency. They are resented by black Americans who are knowledgeable about their work. They see them as little more than mouthpieces for racist elements in the white legal, academic and political community who are out to overturn Brown and all its progeny.

U.S. Supreme Court Justice Clarence Thomas' name has become a slur within the black community. As the controversy over his appearance at the National Bar Association convention a couple of years ago indicates, Thomas' presence is barely tolerated by black lawyers. Even Rosa Parks has said he is a poor role model for black children.

The fact that Young could be so harshly attacked for his views on civil rights -- in his own house, so to speak -- and have no one come to his defense, speaks volumes about what leaders of the black community think of him.

It is that silence that should distress him, not the pamphlets.

TREVOR W. COLEMAN is a Free Press editorial writer. You can call him at 313-222-6456, or write him in care of the Free Press editorial page, or via e-mail at coleman@freepress.com.

GRAPHIC: Drawing MARGARET SCOTT, Special to the Free Press

LOAD-DATE: January 29, 2002

The Associated Press State & Local Wire May 20, 2000

The Associated Press State & Local Wire

May 20, 2000, Saturday, AM cycle

SECTION: State and Regional; Political News

LENGTH: 1176 words

HEADLINE: Judicial demeanor hides different side of Michael Cavanagh

BODY:
EDITOR'S NOTE: **Michigan** Supreme Court justices play key roles in helping to shape life in **Michigan** - but they're relatively unknown to many in the state. This year, though, a 5-2 Republican majority on the court is grabbing attention. And the justices and challengers are taking on higher profiles in increasingly expensive and contentious races. This is part of a series of Associated Press stories looking at the court and its seven justices.

By LISA SINGHANIA
Associated Press Writer

EAST LANSING, **Mich.** (AP) - Seated in front of a roaring fire and surrounded by family antiques, Michael Cavanagh looks every bit the part of a state Supreme Court justice, right down to his knit vest and glasses.

But beneath the sartorial and academic exterior of the longest-serving justice on the state's highest court lurks - the soul of a band roadie?

"The farther I am away from the spotlight, the better," Cavanagh says of the week he spent touring with a jazz band last summer. "In **Michigan,** I get recognized all the time. That's why being a roadie on tour with a jazz group in Germany is so appealing."

Thanks to televised court sessions, nearly two decades on the **Michigan** Supreme Court and a politically prominent bloodline, Cavanagh is one of the best known members of the state's legal community.

One of two Democrats on the seven-member court and younger brother of the late Detroit Mayor Jerome Cavanagh, the 59-year-old justice has been on the bench for all but seven years of his legal career.

Observers say his court has been characterized by fairness and careful deliberation.

"You would say that he's liberal in the sense he's certainly concerned with victims of accidents and fair trial rights for persons accused of a crime," says Wayne State law

professor Robert Sedler.

"On the other hand, when Dr. Kevorkian challenged the ban on assisted suicide in 1994, he took the position that there was no right to assisted suicide."

Charles Levin, an independent who retired from the Supreme Court four years ago, describes Cavanagh as someone who avoids making decisions along political lines.

"He's the kind of judge you'd want to decide your case, no matter what side you're on," Levin says.

The son of a factory worker and a teacher who had moved here from Canada, Cavanagh worked on Great Lakes freighters during the summer to help pay his tuition at the University of Detroit. He says he majored in political science because of an interest in liberal arts, rather than family history. But it was his brother Jerome and some of his brother's friends, all of whom were lawyers, who inspired him to go to law school.

"They were all pretty articulate, good-humored, sensible people who exhibited a lot of confidence," he recalls. "I thought that wouldn't be all bad."

So he attended night classes at the University of Detroit Law School while working during the day - first as an insurance claims adjuster, and then as an investigator for the Wayne County Friend of the Court.

After graduation in 1966 and a clerkship, he headed to Lansing, where he was appointed assistant city attorney and then city attorney for about two years. He spent four years at a private firm before winning a district judgeship and taking the bench in 1973, followed by a seat on the Court of Appeals in 1975.

In 1982, he was elected to the state Supreme Court, where his service has included a four-year term as chief justice.

One of the biggest changes since Cavanagh arrived at the high court has been in the cost of getting elected, something he has mixed feelings about. He raised $220,000 for his 1998 campaign, and worries about the influence of big money on the judicial process.

"But are political appointments any better?" he asks. "At least this way, there's a vote."

The court's makeup also has changed. After more than a decade of an equal number of Republican and Democratic nominees on the high court - with independent Levin holding the seventh seat - and two years where Democrats held a 4-3 edge, the GOP now holds a 5-2 majority.

Cavanagh is in the minority.

"It does get discouraging and it does take an adjustment, having been in the majority before," he says.

His time off the bench remains focused on his family, and he spends most weekends at home with his wife. It's not unusual for the couple's two adult daughters and son's family, including his only grandchild, to drop by for a meal.

When he's not fly fishing or bird hunting near Alpena with his nephews (his own children don't share his interest), the judge trades his black robes for an apron. One recent culinary endeavor was deep-frying the family's Thanksgiving turkey in the fryer that was a gift from his office.

"It was wonderful and really required quite a cooking technique," recalls his wife, Pat, who describes the judge as a "real homebody who likes to cook all weekend."

Church is also an important part of his life.

For the past several years, he's participated in the Red Mass, an annual event in which the legal profession asks for religious guidance in its work.

During Lent, Cavanagh tried to attend Mass daily. He also gave up drinking for the six weeks leading up to Easter, including St. Patrick's Day.

"St. Patrick had to suffer this year," he says with a laugh.

But Cavanagh says he's careful not to allow his personal beliefs guide his legal thinking.

In recent years, the court has come under increasing criticism from those who accuse it of having a pro-business, conservative agenda. Cavanagh says that belief stems from the perception that the court has deliberately revisited and overturned many of its prior opinions.

In a March opinion, Cavanagh questioned why the court's majority had, in his view, unnecessarily explained their decision to decline a case. He said he was concerned that the explanation might carry weight as a legal opinion.

His statement earned him a stern rebuke from **Justice Robert Young** Jr., who called Cavanagh's reasoning "perverse," saying the court veteran must have "an unstated motive for his latest offering."

Cavanagh isn't sure whether he will seek another term in 2006. Whatever he does, he knows the law will continue to be a big part of his life.

The jazz band he toured with last summer was founded by Hayes Kavanagh, a close friend and the son of Cavanagh's own mentor, the late former Supreme Court Justice Thomas Giles Kavanagh.

Then there's the Cavanagh legal tradition. He estimates nine of the 32 family members in his children's generation are lawyers, including nephew Mark, a state Court of Appeals judge.

His youngest daughter, Megan, graduates from law school this year. She plans to practice patent law, but wouldn't mind following in her dad's footsteps - and sharing a legacy she is very proud of.

"It's very premature to say whether I'll be a judge," the 28-year-old says. "When I talk to my dad about it, he says to worry about passing the bar, so we'll have to see.

"But he's definitely put that bug in me."

GRAPHIC: AP Photos LJ107-108 and AP Graphic **MICH**-SUPREME-Court (series

LOAD-DATE: May 21, 2000

The Detroit News June 12, 2000 Monday No dot Edition

June 12, 2000 Monday No dot Edition

SECTION: OPINION PAGE; Pg. 9A

LENGTH: 763 words

HEADLINE: Brewer's smear tactics mar race; for state Supreme Court

BYLINE: Jeffrey Hadden

BODY:
Michigan Democratic Party

Chairman Mark Brewer is a

defender of the Ku Klux Klan.

That statement is literally true. But

without context or elaboration, it

is grossly misleading and unfair.

It would qualify as a smear.

In fact, Brewer, acting as an

attorney for the American Civil

Liberties Union, six years ago

defended the First Amendment

right of some Klan members to

peacefully demonstrate on the

steps of the state capitol. For his

troubles on behalf of the

Constitution, Brewer was

attacked by members of his own

party when he ran for state chairman. This newspaper editorially defended his actions as an attorney.

But now, Brewer is engaged in a very similar ploy against **Michigan** Supreme Court **Justice Robert Young.** Young, along with two other Republican justices, is up for election this year. Brewer distributed a flyer at the annual National Association for the Advancement of Colored People dinner stating that Justice Young is "a staunch believer that Brown vs. Board of Education was wrong."

The U.S. Supreme Court in the 1954 Brown case ruled that racial segregation is unconstitutional. It is a landmark case, extremely important to the life of the nation and particularly to American blacks.

With the flyer, Brewer was attempting to leave the impression that Justice Young, a black, favors segregation. It is

one of the worst things that can be said about any candidate. And it is wrong.

Justice Young, in 1996, on the 100th anniversary of the Supreme Court case that Brown overturned, praised the Brown decision, but noted that the work of bringing equality to members of minority groups had yet to be completed. "Racism and discrimination continue to to be a potent element in our corporate communities as it is in the community at large," the justice said.

In other remarks to other audiences, Justice Young said the Brown decision, while it came to the right conclusion, could have relied more on the pure principle that segregation is simply morally wrong, rather than on sociological facts and figures. That is a perfectly intellectually respectable position. It is a well-known argument in legal and political science circles.

Hadley Arkes, a professor of jurisprudence at Amherst, wrote in 1981 that the Brown court came to the right conclusion but based it on what he termed the "contingent truths" of social science rather than the stronger foundation of moral truth. The problem, Arkes wrote, with "policies of racial segregation is that they rest on premises that must be inconsistent at their root with the concept of morals itself and the foundation of all legal rights."

That is hardly an endorsement of segregation from one of the leading critics of the reasoning, if not the result, of the Brown decision. To say that a professor or a lawyer cannot critically examine or rethink a major cornerstone of American law, even while supporting it, without being accused of racism, is to remove all scholarship, all serious discussion, all nuance, from public life.

And yet, this kind of smear tactic has been met with snickering complicity by some of this state's journalistic outriders of the Democratic Party. They know who they are.

There are good issues in the race for the Supreme Court. There has been a lot of criticism that this court is too friendly to prosecutors and business defendants. Of course, the flip side of that criticism is that the court could be said to be more friendly to victims of crime and to the people who provide **Michigan** workers with this state's historically low unemployment rate.

Indeed, while the **Michigan** court is being criticized, the president of the Ohio Chamber of Commerce, noting **Michigan** State Chamber ads in Ohio inviting businesses to move north and touting the **Michigan** court's rulings, laments such Ohio Supreme Court rulings as one overturning the Buckeye state's

tort reform. "Everyone in Ohio -- consumers and businesses alike -- pays the price" for such rulings, the Ohio chamber said.

Of course, a chamber of commerce has a particular interest to protect -- just like a union or a group of plaintiff's lawyers. Maybe **Michigan's** Supreme Court should be more open to the claims of plaintiffs or criminal case defendants.

If that's so, it's up to the Mark Brewers and other critics of the **Michigan** court to make that case and argue for their candidates.

The fact that they've resorted instead to smear tactics suggests they're worried they can't.

LOAD-DATE: November 17, 2002

Detroit Free Press JUNE 16, 2000 Friday METRO FINAL EDITION

Detroit Free Press
Found on Freep.com
Detroit Free Press

JUNE 16, 2000 Friday METRO FINAL EDITION

SECTION: NWS; Pg. 1B

LENGTH: 736 words

HEADLINE: HIGH COURT ADDRESSES GUARDIANS PROPOSED CHANGES TO HELP PROTECT STATE WARDS FROM FRAUD

BYLINE: WENDY WENDLAND-BOWYER FREE PRESS STAFF WRITER

BODY:
The **Michigan** Supreme Court has proposed a series of amendments to the state's guardianship rules that would strengthen the legal system and set up more safeguards for residents with guardians.

The public has until Sept. 1 to comment on the proposed changes, and hearings are expected this fall. Those pushing for guardianship changes say this is a good start.

"It is an improvement," said Priscilla Cheever, chairwoman of the Elder Law and Advocacy Section of the **Michigan** State Bar. "But I think it doesn't go far enough."

Last month the Free Press published a 3-day series that found guardianships are a growing industry with little state oversight and few places for families to turn when things go wrong. The Supreme Court introduced its proposal last month and has been publicizing it in the past week.

On Thursday, the court held a hearing in Lansing on a proposal that would prohibit judges from appointing an attorney to any case within two years of that attorney contributing to the judge's political campaign.

This change would affect all courts and has been cited as an issue in guardianships. In probate court, judges appoint guardians, conservators and personal representatives who handle estates. All appointees could benefit financially for years after an appointment.

At the hearing, Wayne County Circuit Judge Timothy Kenny, who presides in the criminal division, spoke against the appointment change. He said in criminal cases, judges have a good sense of who would be the best lawyer for the defendant.

But Supreme Court **Justices Robert Young** Jr., and Clifford Taylor said other large counties, such as Oakland and Kent, have third parties make such appointments, eliminating the

appearance of conflict of interest.

"This isn't a directive against your court," Young said to Kenny. "The value of the assignments in probate are more valuable to the lawyers."

Professional guardians and conservators are appointed to older adults with dementia, people with mental illnesses or developmental disabilities and others. The guardians, named by probate court judges when a person needs assistance and there is no one else to rely on, have sweeping control over their wards' lives.

Guardians decide where a person lives and make all medical decisions. Conservators control finances. Both bill their wards' accounts for their time and effort. Some charge as much as $200 an hour.

The state does not license professional guardians, nor does it require minimal training or background checks. The courts are not required to audit the financial reports conservators file. No one makes sure guardians visit.

The court's proposed changes include requiring conservators to tell all interested parties, such as family members, the selling price of a ward's house at least 14 days before the sale is final.

One of the criticisms of **Michigan's** system is that homes are sold at below-market rates and by the time family members learn of the sale, it's too late. Conservators are not required to provide comparable home sales or other proof that the price is fair. By proposing this change, the family would have time to collect information and bring it to a judge if needed.

Another proposed change would require that financial accounts be sent to interested parties and if there are none, the report would be sent to an appointed attorney -- a guardian ad litem -- for review and comment.

This change would ensure that wards who are alone have someone reviewing the financial accounts. However, this does not address another common criticism that guardians and guardians ad litem are often the same people, switching roles from case to case, making the likelihood of an independent review slim.

The court is also proposing that patient advocates be able to make health care decisions. One common criticism is that many people are appointed guardians to make a medical decision, but when they are better, they can't get rid of the guardian. This would help reduce such cases.

Contact WENDY WENDLAND-BOWYER at 313-223-4792.
TO BE HEARD

The Supreme Court is accepting written testimony on the proposals that would strengthen **Michigan's** guardianship system.

To learn more about these proposals, or to submit your comments, write to: **Michigan** Supreme Court Clerk, P.O. Box 30052, Lansing 48909.

When you write, be sure to say you are commenting on file number 99-63.

LOAD-DATE: January 29, 2002

The Associated Press State & Local Wire July 26, 2000

The Associated Press State & Local Wire

♦ View Related Topics

July 26, 2000, Wednesday, BC cycle

SECTION: State and Regional

LENGTH: 315 words

HEADLINE: Supreme Court rules against dairy farmers in stray voltage case

DATELINE: LANSING, **Mich.**

BODY:
A dairy farming couple from Barry County who sued Consumers Energy Co. over stray voltage they say hurt their herd will have to go through a new trial, the **Michigan** Supreme Court said in a decision released Wednesday.

Jurors were incorrectly instructed about electricity when considering the case filed by Kenneth and Diana Case, the high court ruled in a 4-2 decision. Justices Maura Corrigan did not participate in the ruling.

"The trial court instructed the jury that electricity is inherently dangerous and, therefore, that (Consumers Energy) was required to inspect and repair its electrical lines," the justices said in the ruling.

The Cases sued Consumers Energy - formerly Consumers Power - in 1993 after concluding that their herd's low milk production was due to stray voltage. Consumers Energy maintained that it was not negligent, stating that it didn't have to take action until after problems were reported.

After jurors ruled in favor of the Cases, Jackson-based Consumers Energy filed motions for a new trial. The Barry County Circuit Court denied that motion.

The Supreme Court ruled that a jury must determine the actions a utility should take to meet a standard of care in stray voltage cases.

"The instructions failed to present one of Consumers' primary defenses to the jury - that Consumers had no obligation to discover and repair unknown stray voltage problems," **Justice Robert Young** Jr. wrote in his decision for the four Republican justices.

Justices Michael Cavanagh and Marilyn Kelly, both Democrats, dissented the ruling, saying a new trial is not warranted because all the critical issues were presented and properly decided by the jury.

"Because of the inherently dangerous properties of electricity, these ground wires are provided, and must be reasonably maintained and inspected," Cavanagh wrote in his decision for the minority.

LOAD-DATE: July 27, 2000

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:51 PM EDT

*463 Mich. 1, *; 615 N.W.2d 17, **;*
*2000 Mich. LEXIS 1454, ****

KENNETH CASE and DIANA CASE, Plaintiffs-Appellees, v CONSUMERS POWER COMPANY, Defendant-Appellant.

No. 112707

SUPREME COURT OF MICHIGAN

463 Mich. 1; 615 N.W.2d 17; 2000 Mich. LEXIS 1454

March 8, 2000, Argued
July 26, 2000, Decided
July 26, 2000, Filed

SUBSEQUENT HISTORY: [*1]** As Corrected September 5, 2001.

PRIOR HISTORY: Barry Circuit Court, Patrick H. McCauley, J. Court of Appeals, DOCTOROFF and Fitzgerald, JJ., Corrigan, C.J. 230 Mich App 547 (1998) (Docket No. 191733).

DISPOSITION: Vacated and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant power company challenged judgment from Barry Circuit Court (Michigan), in favor of plaintiff dairy farmers in suit alleging liability of defendant for low **milk** production of plaintiffs' cows due to stray voltage.

OVERVIEW: Plaintiff dairy farmers alleged that defendant power company was responsible for low **milk** production as a result of stray electrical voltage. After jury trial, defendant appealed the verdict returned for plaintiffs. The court granted leave to address the proper standard of care applicable to providers of electricity in stray voltage cases. The court concluded that the general standard of care was always reasonable care, and it was for the jury to determine whether the defendant's conduct in a given case fell below that standard. The trial court instructed the jury that electricity was inherently dangerous; therefore, defendant was required to inspect and repair its electrical lines. Because the instruction imposed an obligation to inspect and repair, it was improper. Further, the court could not have concluded that the error was harmless. The court vacated the judgment for plaintiffs and remanded for a new trial. A jury had to determine the precise actions required to meet the reasonable care standard in stray-voltage cases.

OUTCOME: Judgment was reversed and remanded for new trial. Because a jury instruction imposed an obligation on defendant to inspect and repair, it was improper.

LexisNexis(TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Torts > Negligence > Duty > Duty Generally

HN1 The test to determine whether a duty was owed is not whether defendant should have anticipated a particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 An appellate court reviews claims of instructional error de novo. In doing so, the court examines the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. The court will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. Mich. Ct. R. 2.613 (A).

Torts > Negligence > Negligence Generally

HN3 To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. The disputed instruction in this case was intended to aid the jury in determining whether defendant breached its duty to plaintiffs to exercise reasonable care. This is the so-called general standard of care applicable in negligence cases. Ordinary care means the care that a reasonably careful person would use under the circumstances.

Torts > Negligence > Standards of Care > Reasonable Care

HN4 Ordinarily, it is for the jury to determine whether a defendant's conduct fell below the general standard of care. Stated another way, the jury usually decides the specific standard of care that should have been exercised by a defendant in a given case. However, the court sometimes decides the specific standard of care if it is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy.

Torts > Negligence > Standards of Care > Reasonable Care

HN5 Reasonable care under the circumstances represents a sliding scale. The more severe the potential injury, the more resources a reasonable person will expend to try and prevent that injury. Similarly, the greater the likelihood that a severe injury will result, the greater the lengths a reasonable person will go to prevent it. This principle is widely recognized.

Torts > Negligence > Standards of Care > Reasonable Care

HN6 There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs.

COUNSEL: Martin W. Hable, Lapeer, MI, for the plaintiffs-appellees.

Warner, Norcross & Judd, L.L.P. (by Roger M. Clark, William R. Jansen, and Lori L. Gibson), Grand Rapids, MI, and David A. Mikelonis and James E. Brunner, co-counsel, Jackson, MI, for the defendant-appellant.

Amicus Curiae: David VanderHaagen, Lansing, MI, for Michigan Farm Bureau.

JUDGES: BEFORE THE ENTIRE BENCH (except CORRIGAN, J.). Chief Justice Elizabeth A. Weaver, Justices Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman. WEAVER, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J. CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J.

OPINIONBY: Robert P. Young

OPINION:

[*3] [18]** YOUNG, J.

We granted leave in this case to address the proper standard of care applicable to providers of electricity in stray voltage cases. We conclude that the general standard of care is always "reasonable care," and it is for the jury to determine whether **[***2]** the defendant's conduct in a given case fell below that standard.

In this case, the trial court instructed the jury that electricity is inherently dangerous and, therefore, that defendant was required to inspect and repair its electrical lines. Because the instruction imposed an obligation to inspect and repair, it was improper. Further, we cannot conclude that the error in this case was harmless. Accordingly, we vacate the judgment for plaintiffs and remand for a new trial.

Facts and Procedural Background

Plaintiffs Kenneth and Diana Case were dairy farmers during the 1970's and 1980's. In 1986, plaintiffs sold their dairy cows in a government buyout program. According to plaintiffs, the sale was induced by financial stress, which was a result of low **milk** production. In 1993, plaintiffs bought a new herd and **[*4]** resumed dairy farming. Shortly after buying the new herd, plaintiffs concluded that their earlier **milk**-production problems were caused by stray voltage, and sued Consumers Power Company.

Stray voltage (technically referred to as neutral-to-earth voltage, or NEV) is an electrical phenomenon that can sometimes affect livestock, causing decreased **milk** production in dairy **[***3]** cows, among other problems. According to the parties, the voltage is so low that humans cannot detect it. n1 Stray voltage can have different **[**19]** causes, and stray voltage on a farm may be caused by a problem on the farm, a problem in Consumers' wires off the farm, or even a problem on another customer's property, such as a neighboring farm. n2 There is a procedure, sometimes referred to as "separating the neutrals," that, according to the parties, will eliminate all off-farm sources.

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n1 The parties agree that humans cannot detect the stray voltage at issue, but they use different terminology to explain that fact. While the parties have not specified the range of voltage involved, they generally refer to quantities of less than three volts.

n2 Indeed, Consumers argues that stray voltage exists even where there are no problems with the electrical system. Plaintiffs acknowledge that NEV is always present. However, they counter that if there were no problems with the system, the voltage would be so low that even cows would not be affected.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***4]**

In this case, plaintiffs alleged that stray voltage depressed **milk** production on their farm until the neutrals were separated, whereupon **milk** production returned to normal. Defendant responded that it was not negligent, and that plaintiffs' **milk**-production problems were not caused by stray voltage. After hearing evidence regarding stray voltage and the problems on plaintiffs' farm, a jury rendered an award for plaintiffs, although the jury also found plaintiffs **[*5]** partially at fault (fifty-five percent). Defendant filed motions for directed verdict, judgment notwithstanding the verdict, and a new trial, all of which the trial court denied. Defendant appealed, and the Court of Appeals affirmed. n3 We then granted defendant's application for leave to appeal. n4

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n3 230 Mich. App. 547; 584 N.W.2d 375 (1998). Chief Judge CORRIGAN concurred separately in the decision to affirm the trial court.

n4 461 Mich. 881, 603 N.W.2d 779 (1999).

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The only issue before this Court concerns a jury instruction **[***5]** regarding the standard of care owed by Consumers to plaintiffs. Over Consumers' objection, n5 the trial court instructed the jury as follows:

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n5 Plaintiffs dispute whether Consumers objected to the entirety of this instruction. After reviewing the record, we conclude that Consumers objected to the instruction as a whole, properly preserving this issue. MCR 2.516(C).

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It was the duty of the Defendant in connection with this occurrence to use ordinary care for the safety of the Plaintiffs' property.

It is well settled that electrical energy possesses inherently dangerous properties requiring expertise in dealing with its phenomena. Therefore Consumers Power Company has a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. Consumers Power Company, being engaged in the transmission of electricity, is bound to anticipate ordinary use of the area surrounding the lines and to . . . appropriately safeguard an attendant risk. *HN1*The test to determine **[***6]** whether a duty was owed is not whether Consumers Power Company should have anticipated a particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work or pleasure.

[*6] Standard of Review

*HN2*We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The

instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich. 46, 60; 559 N.W.2d 639 (1997). We will only **[**20]** reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Johnson v Corbet*, 423 Mich. 304; 377 N.W.2d 713 (1985). **[***7]**

Analysis

HN3 To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, n6 and (4) damages. *Schultz v **Consumers Power Co***, 443 Mich. 445, 449; 506 N.W.2d 175 (1993). The disputed instruction in this case was intended to aid the jury in determining whether defendant breached its duty to plaintiffs to exercise "reasonable care." n7 This is the so-called "general standard **[*7]** of care" applicable in negligence cases. See *Moning v Alfono*, 400 Mich. 425, 443; 254 N.W.2d 759 (1977). Ordinary care means the care that a reasonably careful person would use under the circumstances. See SJI2d 10.02; *Detroit & M R Co v Van Steinburg*, 17 Mich. 99, 118-119 (1868) ("Negligence . . . consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury").

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n6 As we explained in *Skinner v Square D Co*, 445 Mich. 153, 162-163; 516 N.W.2d 475 (1994), causation is comprised of two separate elements: (1) cause in fact, and (2) legal, or proximate, cause. **[***8]**

n7 We will use the terms "reasonable care" and "ordinary care" interchangeably.

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HN4 Ordinarily, it is for the jury to determine whether a defendant's conduct fell below the general standard of care. Stated another way, the jury usually decides the *specific* standard of care that should have been exercised by a defendant in a given case. *Moning*, 400 Mich. at 438. However, *the court* sometimes decides the specific standard of care if it is of the opinion "that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy . . . ." *Id.*

For example, in *Schultz*, *supra*, the plaintiff was electrocuted and died after an aluminum ladder he was using came too close to Consumers Power Company's 4,800 volt transmission lines. This Court recognized that "electricity possesses inherently dangerous properties" and that "electric utility companies possess expertise in dealing with electrical phenomena and delivering electricity." *Schultz*, 443 Mich. at 451. Accordingly, the *Schultz* Court held not only that electric utility companies owed a duty **[***9]** to exercise reasonable care in maintaining their wires, but that those companies are required to "reasonably inspect and repair wires and other instrumentalities in order to discover **[*8]** and remedy hazards and defects." 443 Mich. at 451. n8 The Court in *Schultz* cited a number of cases in support of its conclusion, all but one of which involved the dangers of unintended contact with high-voltage electricity. n9 In this case, the **[**21]** trial court concluded that it was bound to instruct the jury consistently with the standard articulated in *Schultz*, although it expressed some reservation about doing so. n10

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n8 Although the *Schultz* Court couched its analysis in terms of "duty" ("pursuant to its duty, a power company has an obligation to reasonably inspect and repair wires"), it is clear that the Court actually was deciding the specific standard of care required in order to avoid breaching the general standard of "reasonable care." Thus, in *Schultz*, the Court made the very mistake warned of in *Moning* by blurring the distinctions between duty and the general and specific standards of care. *Moning, supra* at 438. **[***10]**

n9 See *Laney v* ***Consumers Power Co***, 418 Mich. 180; 341 N.W.2d 106 (1983) (involving death by electrocution after contact with an electric power line); *Weissert v Escanaba*, 298 Mich. 443; 299 N.W. 139 (1941) (involving severe shock and serious burns after contact with an electric light wire); *Mueller v Citizens' Telephone Co*, 230 Mich. 173, 177; 203 N.W. 129 (1925) (involving a short circuit that started a fire); *Black v Public Service Electric & Gas Co*, 56 N.J. 63; 265 A.2d 129 (1970) (involving death by electrocution when a crane touched an uninsulated high voltage wire); *Aguirre v Los Angeles*, 46 Cal. 2d 841; 299 P.2d 862 (1956) (involving severe electric shock and burns after indirect contact with lines carrying over 4000 volts); *Vieths v Ripley*, 295 N.W.2d 659 (Minn, 1980) (involving injury after indirect contact with uninsulated, unmarked, high voltage power lines); *Miner v Long Island Lighting Co*, 40 N.Y.2d 372; 386 N.Y.S.2d 842; 353 N.E.2d 805 (1976) (involving severe injuries sustained after contact with a 7,620 volt uninsulated power line).

The only exception was a case involving a power outage on a chicken farm. *Rich Mountain Electric Cooperative v Revels*, 311 Ark. 1, 841 S.W.2d 151 (1992). That case did not involve a general duty to inspect and repair. Instead, it involved a duty to remedy known damages caused by a storm. **[***11]**

n10 The trial court voiced concern on a number of occasions, but the following quote is representative:

I guess I've said this before--though I was concerned about the ruling under the *Schultz* case and I personally as a judge believed as the trier of this case that a less stringent rule should apply in the stray voltage cases, but I believed it was my duty and I was bound to follow the rule set forth by the Supreme Court, that I was not in a position to overrule and/or distinguish the *Schultz* case.

In her Court of Appeals concurrence, Chief Judge Corrigan shared the trial court's concerns regarding the disputed instruction. 230 Mich. App. at 563-566. As further explained below, Chief Judge Corrigan was correct in noting that "the scope of the duty should vary with the nature of the risk." 230 Mich. App. at 566.

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[*9] The "duty" of inspection and repair imposed in *Schultz* was intended to protect against the likelihood of serious injury or death. 443 Mich. at 453-454. HN5 Clearly, "reasonable care under the circumstances" represents a sliding scale. The more severe the potential **[***12]** injury, the more resources a reasonable person will expend to try and prevent that injury. Similarly, the greater the likelihood that a severe injury will result, the greater the lengths a reasonable person will go to prevent it. This principle is widely recognized. n11

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n11 See *Dembicer v Pawtucket Cabinet & Builders Finish Co*, 58 R.I. 451, 455; 193 A. 622, 624 (1937) ("The greater the appreciable danger, the greater the degree of care necessary to constitute due or ordinary care"); *Wyrulec Co v Schutt*, 866 P.2d 756, 762 (Wyo, 1993) ("What constitutes ordinary care increases as the danger increases. The concept of ordinary care accommodates all circumstances so that the degree of care varies with the circumstances."); *Webb v Wisconsin So Gas Co*, 27 Wis. 2d 343, 350; 134 N.W.2d 407

(1965) ("The degree of effort, caution, or diligence required of a person to reach or attain the standard of ordinary care necessarily varies with the degree of hazard inherent under the circumstances").

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With this principle in mind, we think it beyond dispute that the dangers of high-voltage electricity (fire, electrocution, and death among them) are different in kind, and more severe, than the dangers of stray voltage. *Schultz* represents a very limited exception to the general rule that *the jury* determines the specific standard of care owed by a defendant in a particular case, and stray voltage simply does not qualify for that unusual treatment. Thus, we conclude that the obligation to inspect and repair that was articulated in *Schultz* is inapplicable in stray-voltage cases. Rather, we conclude that a jury must determine the **[*10]** precise actions required to meet the reasonable care standard in stray-voltage cases.

As the United States Supreme Court recognized long ago:

HN6 There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. **[***14]** What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is **[**22]** their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. *Grand Trunk R Co v Ives*, 144 U.S. 408, 417; 12 S. Ct. 679; 36 L. Ed. 485 (1892).

Plaintiffs argue that, even if the disputed instruction was erroneous, it was harmless. Indeed, as plaintiffs point out, most of the instructions read to the jury properly cited the ordinary care standard. However, the disputed instruction specifically required defendant to "inspect and repair" its lines to prevent stray voltage. The instruction thus took from the jury one of the crucial questions before it: in light of the level of danger and likelihood of injury posed by stray voltage, what actions was defendant required to take in order to prevent such injury? Put **[***15]** differently, the instructions failed to present one of Consumers' primary defenses to the jury--that Consumers had no obligation to discover and repair unknown stray voltage **[*11]** problems. The essence of Consumers' position was that it was acceptable to wait for problems to be reported before it had to take action. Under these circumstances, we must reverse the verdict and remand for a new trial. *Gapske v Hatch*, 347 Mich. 648, 657-659; 81 N.W.2d 337 (1957).

By our analysis we do not intend to suggest that ordinary care regarding stray voltage requires less than reasonable inspection and repair, or that it requires more than merely waiting for problems to be reported. Rather, we simply acknowledge that the jury must decide on the basis of the evidence before it exactly what actions defendant was required to take under the circumstances of this case.

For the reasons stated, we vacate the judgment for plaintiffs and remand for a new trial consistent with this opinion.

WEAVER, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J.

DISSENTBY: Michael F. Cavanagh

DISSENT: CAVANAGH, J. (*dissenting*).

I dissent. The majority adequately pinpoints the issue as being whether the **[***16]** trial court erroneously instructed the jury on the applicable standard of care in stray voltage cases. Slip op, p 1. However, I disagree with the majority's conclusion that "the obligation to inspect and repair that was articulated in *Schultz v* ***Consumers Power Co***, 443 Mich. 445, 449; 506 N.W.2d 175 (1993), is inapplicable in stray-voltage cases." Slip op, p 10. I further disagree that a remand for a new trial is warranted. All the critical issues in this case were presented to and properly decided by the jury. Therefore, I would affirm the decision of the Court of Appeals. **[*12]**

The disputed jury instructions in this case sprang from *Schultz*. In *Schultz*, a man was electrocuted while painting a house. He and his companion were moving a metal ladder toward the house when it came close to an uninsulated power line hanging near the house. The proximity of the ladder to the uninsulated wire created an arc of electricity that sent a current of electricity down the ladder and into the men. This Court held that, because of the special relationship between the decedent and the power provider, the power company had an affirmative duty to "reasonably inspect **[***17]** and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Id.* at 451. The special relationship arose out of the fact that electricity has inherently dangerous properties, and that special expertise is required to deal with electrical phenomena and the delivery of electricity. *Id.* n1

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n1 As *Schultz* explained:

Clearly, the relationship between the utility company and the decedent was sufficient to impose a duty under the circumstances. It is well established that those who undertake particular activities or enter into special relationships assume a distinctive duty to procure knowledge and experience regarding that activity, person, or thing. For example, a landlord must inspect a premises to keep it in a reasonably safe condition. *Samson v Saginaw Professional Bldg, Inc*, 393 Mich. 393; 224 N.W.2d 843 (1975) ; *Lipsitz v Schechter*, 377 Mich. 685; 142 N.W.2d 1 (1966); 2 Restatement Torts, 2d, § 360, p 250. Physicians must keep reasonably abreast of current advances in their field. *Koch v Gorrilla*, 552 F.2d 1170 (CA 6, 1977). Manufacturers must diligently inspect their products to discover lurking dangers. *Livesley v Continental Motors Corp*, 331 Mich. 434; 49 N.W.2d 365 (1951); 2 Restatement Torts, 2d, comment, § 395, pp 326-332. Lastly, a carrier owes to its passengers the duty of discovering all detectable defects. *Trent v Pontiac Transportation Co, Inc*, 281 Mich. 586; 275 N.W. 501 (1937).

Similarly, compelling reasons mandate that a company that maintains and employs energized power lines must exercise reasonable care to reduce potential hazards as far as practicable. First, electrical energy possesses inherently dangerous properties. Second, electric utility companies possess expertise in dealing with electrical phenomena and delivering electricity. Lastly, although a reasonable person can be charged with the knowledge of certain fundamental facts and laws of nature that are part of the universal human experience, such as the dangerous properties of electricity, *Koehler v Detroit Edison Co*, 383 Mich. 224, 231; 174 N.W.2d 827 (1970); Prosser & Keeton Torts (5th ed), § 32, pp 182-184; 3 Harper, James & Gray, Torts (2d ed), § 16.5, pp 405-408, it is well settled that electricity possesses inherently dangerous properties requiring expertise in dealing with its phenomena. Therefore, pursuant to its duty, a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. *Schultz* at 450-451.

----------End Footnotes---------- **[**23]** **[***18]** **[*13]**

The majority finds *Schultz* inapplicable to stray voltage cases partially on the basis that "the dangers of high-voltage electricity (fire, electrocution, and death among them) are different in kind, and more severe, than the dangers of stray voltage." Slip op, p 8. As such, the majority argues, stray voltage cases should not receive the "unusual treatment" accorded to cases involving high-voltage electricity. Slip op, p 10. Although I agree with the majority that the nature of the danger presented by stray voltage is different than the nature of the danger presented by high-voltage electricity, I disagree that a difference in the type of damage caused justifies a departure from the *Schultz* standard.

Stray voltage cases, like cases involving high-voltage electricity, involve harms caused by the properties of electricity. The appellant's own brief demonstrates this point. According to the appellant, "all utilities, Consumers included, operate grounded power distribution systems, principally for safety reasons." Electricity must always return to its source to complete its circuit. If the "hot" wire breaks, the current will flow down the nearest ground line into the **[*14]** earth, bypassing **[***19]** the break until it can reconnect with the neutral at some other point. The ground wire also provides a path to earth for excessive voltage surges from lightning strikes and other accidents.

Because of the inherently dangerous properties of electricity, these ground wires are provided, and must be reasonably maintained and inspected. But for the safety measure of the ground wires, events such as line breaks and lightning strikes would have catastrophic consequences. Therefore, maintaining and inspecting the neutral ground wires is inextricably bound with those properties of electricity causing fires and electrocution, even though, ordinarily, the neutral wires only carry neutral-to-earth voltage (NEV) that is beneath the level of human detection.

Regardless of whether the distribution of high currents of electricity through uninsulated wires in residential neighborhoods might cause death, while the low currents involved in stray voltage cases causes a lesser degree of harm, the level of harm caused does not alter the properties of the electricity itself. The distribution of electricity still requires special knowledge **[**24]** about how to direct and control a dangerous commodity. n2 For example, **[***20]** if a utility worker were injured while climbing up a utility pole, it might be appropriate to apply a different standard than in *Schultz* because the injury would be unrelated to the properties of electricity. Conversely, the properties of electricity itself give rise to stray voltage injuries. Here, the jury found that the Cases suffered the loss of an entire dairy herd and nearly two million dollars **[*15]** in damages because of defendant's negligence in dealing with the inherently dangerous properties of electricity. I cannot agree with the majority's attempt to distinguish *Schultz*. Rather, the trial court appropriately applied *Schultz* to this stray voltage action.

----------Footnotes----------

n2 See n 1.

----------End Footnotes----------

Schultz's requirement that providers of electricity "reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects" can fairly be applied in stray voltage cases. *Id.* at 451. While reasonable inspection might include detecting frayed wires or uninsulated wires in residential **[***21]** neighborhoods, reasonableness might not encompass detecting stray voltage. Similarly, power providers

could also argue that stray voltage is neither a hazard nor a defect. The questions of reasonableness, of what it means to "inspect and repair," and what constitutes "a hazard or defect" leave room for interpretation by a jury.

The defendant argues that its liability should be proportioned according to the degree of risk involved. While I agree with the majority that the concerns are different in stray voltage cases than in electrocution cases, I disagree that those differences render a *Schultz*-based jury instruction inadequate. Under the majority's approach, trial courts will be left to determine when electricity acquires "dangerous" properties. *Schultz*, on the other hand takes note of the fact that electricity has "inherently dangerous" properties, and allows the jury to determine when inspection and repair is reasonable. I would apply the *Schultz* test, and would uphold the jury's decision.

The defendant also asserts that it was unable to fully present its arguments. The majority agrees. Slip op, p 11. Even if I were to agree with the majority **[*16]** that *Schultz* creates **[***22]** too high a standard for stray voltage cases, I would disagree with the majority's harmlessness assessment. The defendant had a fair opportunity to present its arguments. As the majority acknowledges, the defendant's primary argument is that it need only act with reasonable care under the circumstances, and that it had no duty to inspect and repair its wires. Under the *Schultz* instructions given, the jury could have concluded that the stray voltage detection required an unreasonable level of inspecting and repairing, or that inspecting and repairing would not serve the purpose of remedying hazards and defects. Thus, the jury had the opportunity to conclude that the defendant was not required to inspect and repair its wires under the circumstances. I would affirm the decision of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

The Associated Press State & Local Wire July 27, 2000

The Associated Press State & Local Wire

July 27, 2000, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 598 words

HEADLINE: Supreme Court says newspaper had right to candidates' names

BYLINE: By AMY FRANKLIN, Associated Press Writer

DATELINE: LANSING, **Mich.**

BODY:
The Bay City Times had a right to receive the names of candidates applying for Bay City fire chief under the state's Freedom of Information Act, the **Michigan** Supreme Court has ruled.

In a 6-1 decision released Thursday, the court said the city could not legally refuse to disclose the names of finalists for the chief's spot. But the city manager did not violate the state's Open Meetings Act when he met with the candidates because he was not acting as a public body, the justices added.

The high court's decision upholds part of a Court of Appeals decision and reverses another part. The case now will be sent back to the trial court for another hearing.

"We are gratified that the **Michigan** Supreme Court agreed with the Court of Appeals that people are entitled to know the final choices for fire chief," said Scott Strattard, an attorney for The Bay City Times.

Mark Kolka, an attorney for the city, said he has not seen the court's decision and could not comment on it.

The case began with the 1996 retirement of the city's fire chief. According to the city's charter, the Bay City Commission appoints a new chief based on the recommendation of the city manager.

Bruce McCandless, who was then city manager, formed a five-member committee to winnow down the 34 applications received for the job. The committee recommended nine applicants, two of whom withdrew. The committee then interviewed the seven and recommended three finalists. All the committee's meetings and candidate interviews were conducted in private.

McCandless personally interviewed the final three candidates. On May 6, 1996, before McCandless made his recommendation to the city commission, then-Editor Paul Keep of The

Bay City Times requested the names, job titles, cities of residence and age of the seven candidates.

When the city refused, the newspaper filed a lawsuit saying the city was violating the Freedom of Information and Open Meetings acts. The city said that the request for information was flawed because it requested the information itself, rather than documents containing the information.

The Bay Circuit Court ruled that the information requested by the newspaper was exempt from disclosure and that the city manager and his committee were not subject to the state's Open Meetings Law.

The Court of Appeals reversed both rulings.

The Supreme Court agreed with the appeal court's ruling on the FOIA request but reversed the open meeting ruling, saying one person cannot be a public body according to the Legislature's definition.

"Perhaps the strongest common-sense basis for concluding that an individual was not contemplated by the Legislature as a 'public body' is to consider how odd a concept it would be to require an individual to 'deliberate' in an open meeting," the Supreme Court said in a decision written by **Justice Robert Young** Jr.

Dawn Phillips-Hertz, who represented the **Michigan** Press Association and The Associated Press as a friend of the court in the case, said she was disappointed that the court ruled the city manager was not a public body.

"The decision will undoubtedly have effects limiting public access to the decision-making process of city managers on the very important issue of selecting police chiefs and fire chiefs," she said.

However, the decision upholds the right of the public to get the candidates' applications, Phillips-Hertz said.

Justice Marilyn Kelly dissented from the majority's ruling about the Open Meetings Act, arguing that the language in the act permits an individual to be considered a public body.

LOAD-DATE: July 28, 2000

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:51 PM EDT

*463 Mich. 111, *; 614 N.W.2d 873, **;*
*2000 Mich. LEXIS 1458, ****

THE HERALD COMPANY, Plaintiff-Appellee, v CITY OF BAY CITY, et al, Defendants-Appellants.

No. 111709

SUPREME COURT OF MICHIGAN

463 Mich. 111; 614 N.W.2d 873; 2000 Mich. LEXIS 1458

April 4, 2000, Argued
July 27, 2000, Decided
July 27, 2000, Filed

SUBSEQUENT HISTORY: As Corrected September 5, 2001.

PRIOR HISTORY: [*1]** Bay Circuit Court, William J. Caprathe, J. Court of Appeals, FITZGERALD, P.J., and O'CONNELL and WHITBECK, JJ. 228 Mich. App. 268 (1998). (Docket No. 200187).

DISPOSITION: In regard to plaintiff's Freedom of Information Act claim, decision of Court of Appeals affirmed, and remanded for proceedings consistent with this opinion. Regarding plaintiff's Open Meetings Act claim, judgment of Court of Appeals reversed and trial court's grant of summary disposition for defendants reinstated.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants, city, city manager, and members of city manager's committee, appealed the judgment of the Court of Appeals (Michigan), which reversed the trial court's grant of summary disposition for defendants on both plaintiff's Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), and Open Meetings Act, Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.), claims.

OVERVIEW: The trial court granted summary disposition for defendants, city, city manager, and members of city manager's committee, on both plaintiff's Freedom of Information Act (FOIA), Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801 (1) et seq.), and Open Meetings Act (OMA), Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.), claims. The appellate court reversed the trial court's judgment on both claims, and defendants appealed. The state supreme court concluded that defendant city violated the FOIA when it refused to disclose public records concerning final candidates for the position of **fire chief,** because the requested records were not within any exemption under the FOIA. Thus, the appellate court's judgment was affirmed as to plaintiff's FOIA claim. However, defendant city manager was neither part of, nor acting as, a "public body" within the contemplation of the OMA, and thus, neither he nor his committee were subject to the OMA's requirements. Thus, the appellate court's judgment was reversed as to plaintiff's OMA claim.

OUTCOME: The judgment was affirmed as to plaintiff's Freedom of Information Act (FOIA) claim, because defendant city violated the FOIA by refusing to disclose public records concerning final candidates for the **fire chief** position. The judgment was reversed as to plaintiff's Open Meetings Act (OMA) claim, because neither defendant city manager nor his committee were subject to the OMA's requirements.

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Civil Procedure > Summary Judgment
Civil Procedure > Appeals > Standards of Review > De Novo Review
HN1 An appellate court reviews the grant or denial of summary disposition de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation
HN2 An appellate court reviews questions of statutory construction de novo as a question of law.

Governments > Legislation > Interpretation
HN3 Because a court's judicial role precludes imposing different policy choices than those selected by the legislature, the court's obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. The court must give the words of a statute their plain and ordinary meaning. Mich. Comp. Laws § 8.3a (Mich. Stat. Ann. § 2.212(1)).

Administrative Law > Governmental Information > Freedom of Information
HN4 Subsection 1(2) of the Freedom of Information Act (FOIA), Mich. Comp. Laws § 15.231(2) (Mich. Stat. Ann. § 4.1801(1)(2)), declares that it is the public policy of Michigan that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with the FOIA. The people shall be informed so that they may fully participate in the democratic process. Mich. Comp. Laws § 15.231(2) (Mich. Stat. Ann. § 4.1801(1)(2)). Consistent with this broadly declared legislative policy, the FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body.

Administrative Law > Governmental Information > Freedom of Information
HN5 See Mich. Comp. Laws § 15.233 (Mich. Stat. Ann. § 4.1801(3)).

Administrative Law > Governmental Information > Freedom of Information
HN6 Section 13 of the Freedom of Information Act (FOIA) provides several exemptions which, if applicable, permit a public body to deny a request for disclosure of public records. On its express terms, the FOIA is a prodisclosure statute, and the exemptions stated in § 13 of the FOIA are narrowly construed. The burden of proof rests on the party asserting the exemption.

Administrative Law > Governmental Information > Freedom of Information
HN7 The Freedom of Information Act (FOIA), Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), does not prevent disclosure of public records that are covered by the exemptions in § 13 of the FOIA. Rather, it requires the public body to disclose records unless they are exempt, in which case the FOIA authorizes nondisclosure at the agency's discretion.

Administrative Law > Governmental Information > Personal Information
Administrative Law > Governmental Information > Freedom of Information
HN8 See Mich. Comp. Laws § 15.243(1) (Mich. Stat. Ann. § 4.1801(13)(1)).

Administrative Law > Governmental Information > Freedom of Information
HN9 The Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), does not establish detailed requirements for a valid request. Instead, it merely requires that a request describe the public record sufficiently to enable the public body to find the public record. Mich. Comp. Laws § 15.233(1) (Mich. Stat. Ann. § 4.1801(3)(1)).

Administrative Law > Governmental Information > Freedom of Information
HN10 Consistent with the legislature's stated purpose that all persons are entitled to full and complete information regarding the affairs of government, the legislature does not impose detailed or technical requirements as a precondition for granting the public access to information. Instead, the legislature simply requires that any request be sufficiently descriptive to allow the public body to find public records containing the information sought. The court has no authority to impose requirements not found in the Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), and it would be odd indeed to ask a party who has no access to public records to attempt specifically to describe them.

Administrative Law > Governmental Information > Freedom of Information
HN11 Under the Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), a public body can satisfy a request for information in several different ways. It can allow the plaintiff access to the public records containing the information, it can allow the plaintiff to copy the public records containing the information, or it can provide the plaintiff with copies of the public records containing the information. Mich. Comp. Laws § 15.233(1) (Mich. Stat. Ann. § 4.1801(3)(1)).

Administrative Law > Governmental Information > Personal Information
Administrative Law > Governmental Information > Freedom of Information
HN12 For purposes of the Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life. A court evaluates this standard in terms of the customs, mores, or ordinary views of the community.

Administrative Law > Governmental Information > Personal Information
Administrative Law > Governmental Information > Freedom of Information
HN13 Even if requested information is contained in public documents that also reference embarrassing or intimate personal information (for example, medical data), the Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), imposes on a public body a duty to separate the exempt and nonexempt material and make the nonexempt material available for examination and copying. Mich. Comp. Laws § 15.244(1) (Mich. Stat. Ann. § 4.1801(14)(1)).

Administrative Law > Governmental Information > Personal Information
Administrative Law > Governmental Information > Freedom of Information
HN14 A court must balance the public interest in disclosure against the interest the legislature intended the personal information exemption to protect. The relevant

"public interest" to be weighed in this balance is the extent to which disclosure would serve the core purpose of the Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.), which is contributing significantly to public understanding of the operations or activities of the government.

Administrative Law > Governmental Information > Personal Information
Administrative Law > Governmental Information > Freedom of Information
HN15 Fulfilling a request for personal information concerning private citizens, where the request is entirely unrelated to any inquiry regarding the inner workings of government, would constitute a clearly unwarranted invasion of privacy. In short, when the information sought is embarrassing or intimate, and the relationship between the personal information to be disclosed and the operations of the government is slight, the weaker is the case that disclosure should be made under the Freedom of Information Act, Mich. Comp. Laws § 15.231 et seq. (Mich. Stat. Ann. § 4.1801(1) et seq.).

Administrative Law > Governmental Information > Public Meetings
HN16 See Mich. Comp. Laws § 15.263 (Mich. Stat. Ann. § 4.1800(13)).

Administrative Law > Governmental Information > Public Meetings
HN17 The Open Meetings Act (OMA), Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.), strictly limits "closed session" meetings of public bodies and expressly states that, except as otherwise provided, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to the OMA. Mich. Comp. Laws § 15.268(f) (Mich. Stat. Ann. § 4.1800(18)(f)).

Administrative Law > Governmental Information > Public Meetings
HN18 The Open Meetings Act, Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.), defines "public body" as any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement. Mich. Comp. Laws § 15.262(a) (Mich. Stat. Ann. § 4.1800(12)(a)).

Administrative Law > Governmental Information > Public Meetings
HN19 The definition of "public body" in the Open Meetings Act, Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.), contains two requirements. First, the entity at issue must be a state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council. Second, the entity must be empowered to exercise governmental or proprietary authority or perform a governmental or proprietary function, and that power must derive from state constitution, statute, charter, ordinance, resolution, or rule.

Administrative Law > Governmental Information > Public Meetings
HN20 As used in the Open Meetings Act (OMA), Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.), the term "public body" connotes a collective entity. The statutory terms used illustratively to define "public body"--legislative body and governing body--do not encompass individuals. A single individual is not commonly understood to be akin to a board, commission,

committee, subcommittee, authority, or council--the bodies specifically listed in the OMA by the legislature.

Administrative Law > Governmental Information > Public Meetings

HN21 An individual executive acting in his executive capacity is not a public body for the purposes of the Open Meetings Act, Mich. Comp. Laws § 15.261 et seq. (Mich. Stat. Ann. § 4.1800(11) et seq.).

COUNSEL: Braun, Kendrick, Finkbeiner, P.L.C. (by Scott C. Strattard), Saginaw, MI, for the plaintiff-appellee.

Allsopp, Kolka & Wackerly, P.C. (by Mark A. Kolka), Bay City, MI, for the defendants-appellants.

Amici Curiae: Law Offices of Dawn Phillips-Hertz (by Dawn Phillips-Hertz and Lisa Rycus Mikalonis), for Michigan Press Association and The Associated Press, Troy, MI, and Kasiborski, Ronayne & Flaska, P.C. (by John J. Ronayne, III), for The Michigan Association of Broadcasters, Detroit, MI.

Miller, Canfield, Paddock & Stone, P.L.C. (by Don M. Schmidt), Kalamazoo, MI, for Michigan Municipal League Legal Defense Fund.

Sommers, Schwartz, Silver & Schwartz, P.C. (by Patrick Burkett and C. F. Boyle, Jr.), Southfield, **[***2]** MI, for Public Corporation Law Section/State Bar of Michigan.

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by John H. Bauckham), Kalamazoo, MI, for Michigan Townships Association.

JUDGES: BEFORE THE ENTIRE BENCH. Chief Justice Elizabeth A. Weaver, Justices Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman. WEAVER, C.J., and CAVANAGH, TAYLOR, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J. KELLY, J. (concurring in part and dissenting in part).

OPINIONBY: Robert P. Young, Jr.

OPINION:

[*114] **[**875]** YOUNG, J.

We granted leave in this case to address the application of the Michigan Freedom of Information Act (FOIA) and the Michigan Open Meetings Act (OMA) in the context of the municipal hiring process. We conclude that Bay City violated the FOIA when it refused to disclose public records concerning final candidates for the position of Bay City **Fire Chief,** because the requested records were not within any **[*115]** exemption under the FOIA. We additionally conclude that the city manager in this case was neither part of, nor acting as, a "public body" within the contemplation of the OMA, and thus was not subject to its requirements. **[***3]** Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals and remand this matter to the trial court for proceedings consistent with this opinion.

I. Facts and Procedural Background

Plaintiff challenges the process used by defendant Bay City to select a new **fire chief.** The relevant facts are not in dispute.

In February 1996, the Bay City **Fire Chief** retired. The Bay City Charter prescribes that a new **fire chief** must be appointed by the Bay City Commission on the recommendation of the city manager. The city manager at that time, defendant Bruce McCandless, formed a committee to assist him in making his recommendation. The purpose of the committee was to aid McCandless in establishing hiring criteria, soliciting and screening applicants, and interviewing applicants, and to advise him on the selection of the most qualified candidate. **[**876]** The committee consisted of defendants Howard Asch, Thomas Rhine, Boyd Boettger, Bruce Wagner and Jacob Hutter. n1

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n1 Hutter was also a city commissioner.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***4]**

The five-member committee received thirty-four applications and recommended that nine of those applicants be considered for the **fire chief** position. Two of the nine recommended candidates withdrew their applications. The remaining seven applicants **[*116]** were interviewed by the committee, and the committee concluded that three of these candidates deserved further consideration. McCandless agreed with the committee's recommendation and personally interviewed the final three candidates. All of the committee's meetings and the interviews were conducted in private.

On May 6, 1996, before McCandless made a recommendation to the city commission, the editor of The **Bay City Times** n2 filed a Freedom of Information Act request for "the names, current job titles, cities of residence and age of the seven final candidates for the job of Bay City **fire chief** . . . ." In a letter dated May 13, 1996, the city denied plaintiff's request.

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n2 The **Bay City Times** is owned and operated by plaintiff The Herald Company.

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On May 16, 1996, McCandless **[***5]** sent a letter to the city commission recommending one candidate, Gary Mueller, for the **fire chief** position. At an open meeting on June 3, 1996, the city commission deliberated and voted to appoint Gary Mueller as the Bay City **Fire Chief.**

After the appointment, plaintiff filed suit alleging violations of the FOIA and the OMA. Plaintiff argued that the FOIA required the city to comply with plaintiff's request for information about the candidates who were interviewed, and that the OMA required McCandless and his committee to conduct interviews in open meetings.

The trial court eventually granted summary disposition for defendants on both the FOIA and OMA claims. The court held that plaintiff's FOIA request was defective and, alternatively, that the requested information **[*117]** was exempt from disclosure. As to the OMA, the trial court concluded that McCandless and his committee were not subject to its provisions, and thus that there was no violation. Plaintiff appealed the grant of summary disposition, and the Court of Appeals reversed on both counts. n3 We granted defendants' application for leave to appeal. n4

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n3 228 Mich. App. 268; 577 N.W.2d 696 (1998). **[***6]**

n4 461 Mich. 906, 603 N.W.2d 782 (1999).

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II. Standard of Review

The trial court granted summary disposition for defendants on the basis of its interpretation of the Freedom of Information Act, MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, and the Open Meetings Act, MCL 15.261 *et seq.*; MSA 4.1800(11) *et seq.* HN1 This Court reviews the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999). Similarly, HN2 we review questions of statutory construction de novo as a question of law. *Donajkowski v Alpena Power Co*, 460 Mich. 243, 248; 596 N.W.2d 574 (1999); *Mager v Dep't of State Police*, 460 Mich. 134, 143, n.14; 595 N.W.2d 142 (1999). HN3 Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. **[***7]** *People v McIntire*, 461 Mich. 147, 152-153; 599 N.W.2d 102 (1999). If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction **[*118]** is not permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 135; 545 N.W.2d 642 (1996). We must give the words of a statute their plain and ordinary meaning. MCL 8.3a; MSA 2.212(1); *Turner v Auto Club Ins* **[**877]** *Ass'n*, 448 Mich. 22, 27; 528 N.W.2d 681 (1995).

III. Freedom of Information Act Claim

A. HN4 Introduction

Subsection 1(2) of the FOIA declares that it is the public policy of this state that all persons . . . are entitled to *full and complete information regarding the affairs of government* and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2); MSA 4.1801(1)(2) (emphasis added).]

Consistent with this broadly declared legislative policy, the FOIA's **[***8]** specific provisions generally require the full disclosure of public records in the possession of a public body: n5

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n5 The FOIA provisions at issue were amended shortly after this dispute arose. These amendments are not substantive and they are not relevant to our analysis.

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HN5 (1) Upon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of a public record of a public body . . . .

(2) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities formaking memoranda or abstracts from its public records during the usual business hours. . . .

[*119] (3) This act does not require a public body to make a compilation, summary, or report of information . . . .

[4] This act does not require a public body to create a new public record, except as required in sections 5 and 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1), of an already existing public record. [MCL 15.233; MSA 4.1801(3).]

The FOIA HN6 **[***9]** provides, in § 13, several exemptions which, if applicable, permit a public body to deny a request for disclosure of public records. n6 On its express terms, the FOIA is a prodisclosure statute, and the exemptions stated in § 13 are narrowly construed. *Mager*, *supra* at 143; *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich. 285, 293; 565 N.W.2d 650 (1997); *Swickard v Wayne Co Medical Examiner*, 438 Mich. 536, 544; 475 N.W.2d 304 (1991). The burden of proof rests on the party asserting the exemption. *Bradley*, *supra* at 293; *Swickard*, *supra* at 544.

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n6 It is worth observing that HN7 the FOIA does not prevent disclosure of public records that are covered by § 13 exemptions. Rather, it requires the public body to disclose records unless they are exempt, in which case the FOIA authorizes *nondisclosure* at the agency's discretion. See *Mager*, *supra* at 138, n.8; *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich. 285, 293; 565 N.W.2d 650 (1997); *Tobin v Civil Service Comm*, 416 Mich. 661, 666-671; 331 N.W.2d 184 (1982).

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At issue in the instant case is the following FOIA exemption:

HN8 A public body may exempt from disclosure as a public record under this act:

(a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. [MCL 15.243(1); MSA 4.1801(13)(1).] **[*120]**

The trial court concluded that plaintiff's FOIA request was defective because it requested information rather than documents, and, alternatively, that the information requested was exempt from disclosure as "information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." **[**878]** The Court of Appeals disagreed on both counts, and reversed the grant of summary disposition for defendants. We conclude that the requested records were not exempt from disclosure, and therefore affirm the holding of the Court of Appeals.

B. Propriety of Plaintiff's HN9 Request

The FOIA does not establish detailed requirements for a valid request. Instead, it merely requires that a request "describe[] the public record sufficiently to enable the public body **[***11]** to find the public record." MCL 15.233(1); MSA 4.1801(3)(1). Defendants argue that plaintiff's request failed to meet this basic requirement. We disagree.

In this case, plaintiff requested "the names, current job titles, cities of residence and age of the seven final candidates for the job of Bay City **fire chief.**" The city admits that this description was sufficient to allow it to find documents containing the information, but argues that the request was flawed because it requested the information itself, rather than documents containing the information. n7 Also according to defendants, to satisfy plaintiff's

request, the city **[*121]** would have had to "create a new public record." Defendants' arguments are deeply flawed.

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n7 In response to questioning at oral argument, counsel for defendants acknowledged that the city "knew what [plaintiff was] looking for" and could have looked for documents that responded to plaintiff's request. We also note that, in its request, plaintiff specifically offered to provide further description, if necessary.

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We begin by reiterating that the Legislature entitled this statute the "Freedom of *Information* Act," and declared as the public policy of this state "that all persons . . . are entitled to full and complete *information* regarding the affairs of government . . . ." MCL 15.231(2); MSA 4.1801(1)(2) (emphasis added).

*HN10*Consistent with this stated purpose, the Legislature did not impose detailed or technical requirements as a precondition for granting the public access to information. Instead, the Legislature simply required that any request be sufficiently descriptive to allow the public body to find public records containing the information sought. In contrast, the city would have us read an additional requirement into the statute--that a request must describe the specific public records to be disclosed. We have no authority to impose requirements not found in the statute, and we note that it would be odd indeed to ask a party who has no access to public records to attempt specifically to describe them. Because the request in this case was sufficient to allow the city to find the requested information, the request was valid under MCL 15.233(1); **[***13]** MSA 4.1801(3)(1).

Defendants' related argument contends that plaintiff's request would have required the city to create a new public record--something the statute expressly states that the city is not required to do. MCL 15.233(4); MSA 4.1801(3)(4). Again, we disagree with defendants' construction of the FOIA. **[*122]**

Plaintiff's request did not specify or require the disclosure of any document, newly created or otherwise, from the city. It simply asked for information. *HN11*Under the FOIA, the city could have satisfied the request in several different ways. It could have allowed plaintiff access to the public records containing the information (such as the applicants' resumes or applications), it could have allowed plaintiff to copy the public records containing the information, or it could have provided plaintiff with copies of the public records containing the information. MCL 15.233(1); MSA 4.1801(3)(1). It is true that the request also could have been satisfied by the city's creation of a new public record, but plaintiff did not request creation of such a record, and the fact that the city had no obligation to create a record says nothing **[***14]** about its obligation to satisfy plaintiff's request in some other manner as required by the FOIA. n8

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n8 We find defendants' asserted construction of the FOIA to be disingenuous and contrary to a common-sense application of its express terms. Plaintiff's request made specific reference to the FOIA, including its statutory citation. Defendants acknowledge that the request clearly specified the information sought. Defendants do not dispute that most, if not all, the requested information was contained in public records in the city's possession.

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[879]** C. Privacy Exemption

Defendants also argue that the information plaintiff requested is exempt from disclosure as "information of a personal nature" pursuant to MCL 15.243(1); MSA 4.1801(13)(1). The trial court agreed, finding that public disclosure of the information would constitute a clearly unwarranted invasion of the applicants' privacy. The Court of Appeals disagreed, reasoning that **[*123]** the information disclosed is not "of a personal nature," **[***15]** and, alternatively, that "disclosure of the requested information would not constitute a clearly unwarranted invasion of privacy because nothing of a highly personal nature would be disclosed." 228 Mich. App. at 290.

This case requires us to decide whether the fact of application for a particular public job and information supplied therewith is "information of a personal nature" and, if so, whether the disclosure of such information would "constitute a clearly unwarranted invasion of an individual's privacy."

We begin by once again observing that this exception involves "'a highly subjective area of the law where the Legislature has provided little statutory guidance'. . . ." *Mager*, *supra* at 143, quoting *Swickard*, *supra* at 556. Bearing this in mind, we conclude that the information sought is not personal, and, moreover, that its revelation would not constitute a clearly unwarranted invasion of privacy.

1. "Personal Nature" of the Information

The text of the statute at issue reveals little about the Legislature's intended scope when it provided an exemption for "information of a personal nature." From this Court's numerous attempts to fashion **[***16]** a workable formulation for determining on a case-by-case basis whether requested information is "personal" within the Legislature's contemplation, the following standard has emerged:

"We conclude that HN12 information is of a personal nature if it reveals *intimate or embarrassing details of an individual's private life*. We evaluate this standard in terms of 'the **[*124]** "customs, mores, or ordinary views of the community" . . . .'" [*Mager*, *supra* at 142, quoting *Bradley*, *supra* at 294 (emphasis added).]

Applying this standard in *Bradley*, we determined that personnel records of public school teachers and administrators were not of a "personal nature":

Significantly, none of the documents contain information of an embarrassing, intimate, private, or confidential nature, such as medical records or information relating to the plaintiffs' private lives. Moreover, the appellants have not alleged specific private matters that would be revealed by the disclosure of their personnel records. Instead, the requested information consists solely of performance appraisals, disciplinary actions, and complaints relating to the plaintiffs' accomplishments in their public jobs. Because **[***17]** the requested information does not disclose intimate or embarrassing details of the plaintiffs' private lives, we hold that the requested records do not satisfy the personal-nature element of the privacy exemption. [455 Mich. at 295.]

More recently, in *Mager*, *supra*, we applied this same standard and reached the opposite conclusion because of the nature of the request at issue there. In *Mager*, the plaintiff requested that the State Police provide the names and addresses of persons who owned registered handguns. In determining that the fact of gun ownership was "information of a personal nature," we noted that "the ownership and use of firearms is a controversial subject," **[**880]** and that "[a] citizen's decision to purchase and maintain firearms is a personal decision of considerable importance." 460 Mich. at 143. Accordingly, we held that

"gun ownership is an intimate, or, for some persons, potentially embarrassing detail of one's personal life." 460 Mich. at 144. **[*125]**

In contrast to the fact of gun ownership, which--assessing the customs, mores or ordinary views of the community--certainly may be viewed as an intimate and potentially embarrassing aspect of one's **[***18]** private life, we conclude that the fact of application for a public job, or the typical background information one may disclose with such an application, is simply not "personal" within the contemplation of this exemption. Given the public nature of the position at issue, we think it difficult to conclude that the "customs," "mores," and "views" of the community contemplate that an application for such a position could be made without expectation of considerable public scrutiny. Certainly, defendants have failed to establish on this record why any of the information requested by plaintiff is the kind of intimate or embarrassing information that this FOIA exception protects.

Importantly, HN13 even if the requested information was contained in public documents that also referenced embarrassing or intimate personal information (for example, medical data), the FOIA imposes on the city a duty to "separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1); MSA 4.1801(14)(1); see also *Evening News Ass'n v City of Troy*, 417 Mich. 481, 503; 339 N.W.2d 421 (1983).

2. **[***19]** "Clearly Unwarranted Invasion" of Privacy Element

Although we have already concluded that the information sought was not characteristically "of a personal nature" and, therefore, that the privacy exemption does not apply, we will now briefly address the **[*126]** second step of the inquiry: whether disclosure would "constitute a clearly unwarranted invasion" of privacy.

We first note that the trial court committed an error of law when it proceeded directly to this inquiry without first determining whether the request sought information that was of a "personal nature." The trial court additionally erred when it concluded that, on these particular facts, disclosure of the requested information would have constituted a "clearly unwarranted invasion" of privacy. By providing that the invasion of privacy must be *clearly unwarranted*, the Legislature has unmistakably indicated that the intrusion must be more than slight, but a very significant one indeed.

In *Mager*, we determined that disclosure of the names and addresses of registered gun owners would constitute a clearly unwarranted invasion of the gun owners' privacy. Taking guidance from federal decisions concerning the federal FOIA, **[***20]** we noted that "HN14 'a court must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect.'" *Id* 460 Mich. at 145, quoting *United States Dep't of Defense v Federal Labor Relations Authority*, 510 U.S. 487, 495; 114 S. Ct. 1006; 127 L. Ed. 2d 325 (1994). We further held that the relevant "public interest" to be weighed in this balance "'is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government*.'" *Mager*, *supra* at 145, quoting *United States Dep't of Defense*, *supra* at 495 (emphasis in original).

On the basis of the foregoing, we held that HN15 fulfilling a request for personal information concerning private **[*127]** citizens, where the request was "entirely unrelated to any inquiry regarding the inner working of government," would constitute a clearly unwarranted invasion of privacy. *Mager*, **[**881]** 460 Mich. at 146. In short, when the information sought is embarrassing or intimate, and the relationship between the personal information to be disclosed and the operations **[***21]** of our government is slight, the weaker is the case that disclosure should be made under the FOIA.

In contrast to the highly personal information at issue in *Mager*, we conclude that disclosure of the information concerning the final candidates for **fire chief** in the instant case *would* serve the policy underlying the FOIA because disclosure would facilitate the public's access to information regarding the affairs of their city government. It can hardly be challenged that the citizens of Bay City had a valid interest in knowing the identities of the final candidates considered in contention for this high-level public position. Keeping in mind that defendants bear the burden of proof that an exemption applies, and balancing the public interest against the relatively circumscribed privacy interest protected by the FOIA exemption, we cannot conclude that the disclosure sought might result in a "clearly unwarranted invasion of an individual's privacy." n9

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n9 It has been suggested by the city that we should consider a provision of the OMA in deciding whether the information at issue is protected by the FOIA privacy exemption. As will be discussed in the second part of this opinion, the OMA generally requires that meetings of a public body be open to the public. However, the OMA contains an exception providing that a public body may meet in a closed session "to review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential." MCL 15.268(f); MSA 4.1800(18)(f). Because we hold that none of the candidate reviews and interviews in this case was conducted by a "public body," we need not determine whether application of this OMA provision would change our analysis.

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[*22] [*128]**

IV. Open Meetings Act Claim

A. HN16 Introduction

The OMA provides, in part:

(1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. . . .

(2) All decisions of a public body shall be made at a meeting open to the public.

(3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public . . . . [MCL 15.263; MSA 4.1800(13).] HN17

The statute strictly limits "closed session" meetings of public bodies and expressly states that, "except as otherwise provided . . ., all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act." MCL 15.268(f); MSA 4.1800(18)(f).

B. Analysis

Plaintiff argues that (1) the city manager in this case was a public body, (2) the city manager and city commission together formed a public body, and (3) in any event, the committee that established the hiring criteria, screened the initial applications, and conducted interviews before reducing the field to three applicants was a public body. The Court **[***23]** of Appeals agreed that the city manager may be a public body in his own right, and that he is certainly part of a public body when he acts in concert with the city commission. **[*129]**

We disagree with the analysis suggested by plaintiff and the Court of Appeals.

The threshold issue under the OMA is whether an entity is a "public body." HN18 The OMA defines "public body" as any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement. [MCL 15.262(a); MSA 4.1800(12)(a).] **[**882]**

HN19 The definition of "public body" in the OMA contains two requirements: First, the entity at issue must be a "state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council." Second, the entity must be "empowered . . . to exercise governmental or proprietary authority or perform a governmental **[***24]** or proprietary function," and that power must derive from "state constitution, statute, charter, ordinance, resolution, or rule . . . ."

HN20 As used in the OMA, the term "public *body*" connotes a collective entity. The statutory terms used illustratively to define "public body"--"legislative body" and "governing body"--do not encompass individuals. A single individual is not commonly understood to be akin to a "board," "commission," "committee," "subcommittee," "authority," or "council"--the bodies specifically listed in the act by the Legislature. n10 **[*130]** We draw additional comfort in our constructionof the OMA because the Legislature is certainly free to define, and has, in fact, defined elsewhere, the term "public body" in such a way as to encompass individuals. n11 However, it would be awkward, to say **[*131]** the least, to apply the **[**883]** OMA to an individual. Perhapsthe strongest common-sense basis for concluding that an individual was not contemplated by the Legislature as a "public body" is to consider how odd a concept it would be to require an individual to "deliberate" in an open meeting. MCL 15.263(3); MSA 4.1800(13)(3). Thus, we conclude that HN21 an individual executive **[***25]** acting in his executive capacity is not a public body for the purposes of the OMA. n12

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n10 This construction is further bolstered by the ordinary definition of "body." *The American Heritage Dictionary of the English Language* (New College ed), p 147, defines "body" as "[a] group of individuals regarded as an entity" and "[a] number of persons, concepts, or things regarded collectively; a group." *Webster's New Collegiate Dictionary* (7th ed), p 94, similarly defines the term as "a group of persons or things" and "a group of individuals organized for some purpose . . . (a legislative [body])." The dissent suggests that we have ignored the definition of "body" that refers to the *human* body. We find that proposition to be unworthy of further comment.

Justice Kelly also argues in her dissent that the city manager is an "authority" and thus a public body subject to the OMA. We acknowledge that "authority" is one of the illustrative entities listed in the OMA describing what constitutes a "public body." However, we disagree with Justice Kelly's conclusion that an individual may constitute an OMA "authority."

"Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*," which "stands for the principle that a word or phrase is given meaning by its context or setting." *Tyler v Livonia Public Schools*, 459 Mich. 382, 390-391; 590 N.W.2d 560 (1999). See also ***Wilmers v Gateway Transportation Co (On Remand)*, 227 Mich. App. 339, 352; 575 N.W.2d 796 (1998)** (Young, P.J., dissenting). Accordingly, the term "authority" must be viewed in light of the other terms employed in the OMA definition of "public body," which provide guidance regarding what "authority" means in this context. "In seeking meaning, words and clauses will not be

divorced from those which precede and those which follow." ***Sanchick v State Bd of Optometry*, 342 Mich. 555, 559; 70 N.W.2d 757 (1955).**

In the statutory definition of "public body," all designated bodies other than "authority" are necessarily multimember bodies. Thus, the principle of *noscitur a sociis* indicates that "authority" should likewise be interpreted in this context as referring only to a multimember body. [*26]**

n11 Indeed, the Legislature knows how to include individuals within the definition of "public body" when it intends to, as it did when it defined "public body" for purposes of the FOIA:

"Public body" means any of the following:

(i) *A state officer, employee*, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the *governor* or *lieutenant governor*, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(d); MSA 4.1801(2)(d) (emphasis added).]

Given this FOIA definition of "public body" that explicitly includes individuals, we cannot conclude, as does the dissent, that the Legislature intended to include single-member entities as public bodies within the meaning of the OMA, where the Legislature referenced only multimember entities. **[***27]**

n12 We note that an individual executive may be *part* of a public body as defined by the OMA. See, for example, *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk*, 139 Mich. App. 814; 362 N.W.2d 871 (1984), wherein a statute mandated that persons holding "executive" positions (the county clerk, the prosecutor, and a probate judge) collectively select a county treasurer. However, when, as here, the executive is performing functions exclusively vested in the solitary executive, as opposed to a legally mandated group, the executive is not a public body within the meaning of the OMA.

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The Court of Appeals observed that, under the Bay City Charter, the city commission shall appoint a **fire chief** "on the recommendation of the city manager." n13 **[*132]** According to the Court of Appeals, that provisionarguably "effectively delegates the function of selecting the **fire chief** to the city manager." n14 We disagree with the proposition that an individual executive making a recommendation to a deciding body constitutes a *delegation* of authority. The city commission did not **[***28]** delegate to the city manager the responsibility to make a recommendation; that authority is given directly to the city manager by the charter. Further, the fact that the charter requires the city commission to act only on the recommendation of the city manager in no way constitutes a delegation of the commission's

right to make the final determination regarding whether a recommended individual should be appointed to the position under the Bay City Charter. n15

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n13 The complete charter provision states:

The city commission shall appoint for such terms as it may establish the following officers: clerk, treasurer, comptroller, assessor, deputy assessor, attorney, and on the recommendation of the city manager, chief of police, **fire chief,** superintendent of electric light, superintendent of waterworks, engineer, street commissioner, superintendent of parks and superintendent of bridges.

n14 228 Mich. App. at 276.

n15 Even if true, this observation would establish, at best, that the city manager is empowered by the Bay City Charter to exercise governmental authority, satisfying the second requirement for a public body under the OMA. This arguable conclusion does not establish the first requirement--that the city manager was a legislative or governing body. In any event, we disagree with any construction of the city charter as *requiring* the city commission to appoint as **fire chief** a particular candidate who is recommended by the city manager. The only reasonable interpretation of the pertinent charter provision is that the city manager must recommend a candidate for **fire chief** who then may (or may not) be appointed by the city commission. The city commission retains the exclusive right to reject recommended candidates until the one it finds satisfactory is presented by the city manager.

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We see no merit to plaintiff's contention that the city manager and city commission together constitute a public body. Certainly the city commission constitutes a public body when it appoints a **fire chief,** but **[*133]** the city manager remains an individual executive. We see no basis in the OMA to combine for the purposes of this statute two separate entities where each entity is performing its own independent function as designatedin the city charter. The cases plaintiff relies on for this proposition are inapposite.

In *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk,* 139 Mich. App. 814; 362 N.W.2d 871 (1984), the Court held that a group formed as required by **[**884]** statute to select a new county treasurer was a public body for the purposes of the OMA. n16 The group consisted of the county clerk, the prosecutor, and a probate judge. After the county treasurer resigned, this statutorily prescribed group met in private and selected a new treasurer. The plaintiff then filed suit alleging that the group was a public body subject to the OMA. After the trial court dismissed the case, the Court of Appeals reversed and held that the group was a public body. *Id.* **[***30]** at 819.

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n16 The relevant statute, MCL 168.209(2); MSA 6.1209(2), as in effect at the time of the court's decision in *Menominee*, provided:

If the vacancy shall be in any other county office [other than county clerk or prosecuting attorney], either elective or appointive, the presiding or senior judge of probate, the county clerk and the prosecuting attorney shall appoint some suitable person to fill such vacancy.

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The group in *Menominee* was a collective body in the plainest sense, thus satisfying the first

requirement for a public body under the OMA. The fact that the three members held other positions was essentially irrelevant because, while on the committee, they were voting members of a group that was empowered by statute to exercise governmental authority. In the present case, the city manager was acting as a city **[*134]** manager, not as a commissioner or committee member.

Plaintiff also relies on our holding in *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich. 211; **[***31]** 507 N.W.2d 422 (1993), to support the proposition that the city manager, individually, constituted a public body. Like *Menominee*, *Booth* is not analogous to the present case. In *Booth*, the University of Michigan Board of Regents attempted to evade the requirements of the OMA during the process of selecting a new university president. The board took several evasive actions, including: (1) appointing itself as a presidential selection committee, (2) entrusting one regent with the authority to make "cuts" in the candidate list, (3) using a system of telephone calls and subquorum meetings to gather the opinions of all regents without convening a meeting of a quorum of the board, and (4) having small, subquorum groups of regents interview candidates. 444 Mich. at 216-219. This Court held that the board violated the OMA. The important distinguishing feature of *Booth* was that the board was clearly a "public body" that was subject to the OMA, and the various regents and subquorum groups had no independent authority to narrow the field, make a recommendation, or select a president. The board effectively sought to delegate its authority as a body subject to the OMA **[***32]** to various bodies of its own creation that it believed were not subject to the OMA, for the express purpose of avoiding the requirements of the OMA. n17

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n17 We note that, after our decision in *Booth*, this Court held that the OMA cannot constitutionally be applied to a public university in the context of a presidential search. *Federated Publications, Inc v Mich. State Univ Bd of Trustees*, 460 Mich. 75; 594 N.W.2d 491 (1999).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*135]** Thus, the decision in *Booth* precluded an attempt by a public body to evade the OMA (and thus circumvent legislative intent) by delegating its authority. In this case, the city manager was assigned the task ofrecommending a new **fire chief** directly by the city charter, and, therefore, he required no delegation of authority from the city commission in order to perform that function. Under these circumstances, the Legislature, by electing not to include individuals in the definition of public body in the OMA, has exempted the city manager from its requirements. **[***33]** n18

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n18 We do not quarrel with the conclusion in *Booth* that an individual member of a public body may, under certain circumstances, qualify as a "public body." The distinguishing factor is that, in *Booth*, there existed a public body in the first instance--the Board of Regents--that impermissibly attempted to delegate its authority as a *body* to subunits of its *individual* members. Here, no such delegation by a public body occurred. Similarly, in *Booth*, the Board of Regents purposely attempted to evade the requirements of the OMA. No such evasive activity occurred in the present case. Today's decision in no way dilutes *Booth*'s recognition that the purpose of the OMA cannot be evaded by arguing form over substance. *Booth*, *supra* at 226.

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Nor do we agree with the contention that the committee that was formed by the city manager was subject to the requirements of the OMA under the rationale in *Booth*. The city

manager may have delegated some of *his* authority to the committee he **[***34]** created and, were the city manager himself subject to the OMA, the committee he created might also have been subject to the OMA pursuant to *Booth*. Here, however, because the city manager was not subject to the OMA, *Booth* has no application. Because the city manager's committee in this case was not "empowered by state constitution, statute, charter, ordinance, resolution, or rule," it was not a public body for purposes of the **[*136]** OMA, and the committee's actions did not violate that statute. n19

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n19 We recognize that one member of the city manager's committee, Jacob Hutter, was a city commissioner. This does not affect our analysis. In sharp contrast to the facts of *Booth*, in which a public body attempted to delegate authority to an individual member of that body in an effort to avoid compliance with the OMA, Hutter--although a member of the public body that would ultimately determine who would be appointed **fire chief**--was not given any individual authority to make hiring decisions. Furthermore, the committee's duties--as specified by McCandless, not the city commission--were of a purely advisory nature. Thus, *Booth* on this score is also inapposite.

Finally, we acknowledge that the committee formed by the city manager was a multimember entity of the kind recognized in the OMA, and that the committee arguably "exercised governmental or proprietary authority or performed a governmental or proprietary function." However, the committee, as the creation of the city manager, did not derive its power from "state constitution, statute, charter, ordinance, resolution, or rule . . . ." Therefore, the committee does not meet the second requirement of the OMA's definition of "public body," and it was not subject to that act.

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V. Conclusion

For the reasons stated, in regard to plaintiff's Freedom of Information Act claim, we affirm the decision of the Court of Appeals, and we remand for proceedings consistent with this opinion. Regarding plaintiff's Open Meetings Act claim, we reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition for defendants.

WEAVER, C.J., and CAVANAGH, TAYLOR, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY: Marilyn Kelly (In Part)

DISSENTBY: Marilyn Kelly (In Part)

DISSENT: KELLY, J. (*concurring in part and dissenting in part*).

I agree with the majority's analysis and conclusion regarding the Freedom of Information Act (FOIA) n1 **[*137]** issue. However, I dissent from its analysis and conclusion regarding the Open Meetings Act (OMA). n2

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n1 MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*

n2 MCL 15.261 *et seq.*; MSA 4.1800(11) *et seq.*

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I. THE CITY MANAGER IS A "PUBLIC BODY"

The majority **[***36]** holds that a person in his individual capacity cannot be a "public body" as defined underthe OMA, distinguishing *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich. 211; 507 N.W.2d 422 (1993). Slip op, pp 18-28.

In *Booth*, the eight-member University of Michigan Board of Regents designated itself as the Presidential Selection Committee and embarked on the task of choosing a new university president. The committee made Regent Paul W. Brown chairman and also formed three advisory subcommittees. In all, five candidate-reduction decisions were made. *Id.* at 215. In the first, second, and fourth "cuts," the candidate field was reduced from 250 to 70, 70 to 30, and 12 to 5, respectively. Regent Brown made the reduction decisions, although in doing so he consulted with the other regents, either **[**886]** by telephone or, in the case of the fourth cut, in a closed session. 444 Mich. at 216-218.

This Court found that the OMA applied to the Presidential Selection Committee's procedures. It rejected the defendant's argument that the chairman did not act as a committee, that he was not a "public body," and was, thus, outside the purview of the OMA. This **[***37]** Court found that the board's argument elevated form over substance:

Delegating the task of choosing a public university president to a one-man committee, such as Regent Brown, **[*138]** would warrant the finding that this one-man task force was in fact a public body. . . . "We do not find the question of whether a multi-member panel or a single person presides to be dispositive. Such a distinction carries with it the potential for undermining the Open Meetings Act . . . ."

The selection of a public university president constitutes the exercise of governmental authority, regardless of whether such authority was exercised by Regent Brown, the nominating committee, the full board, or even subcommittees. Accordingly, this individual or these entities mustbe deemed "public bodies" within the scope of the OMA. [*Id.* at 226, quoting *Goode v Dep't of Social Services,* 143 Mich. App. 756, 759; 373 N.W.2d 210 (1985) (internal citation omitted).]

The majority notes that in *Booth*, the Board of Regents, clearly a "public body" subject to the OMA, sought to evade the OMA by delegating its authority to the chairman of the Presidential Selection Committee. In the **[***38]** present case, however, the city commission did not delegate its authority to the city manager. The city manager was empowered by the city charter to recommend someone for the **fire chief** position. The city manager remained an individual executive throughout the selection process, and there is "no basis in the OMA to combine . . . two separate entities where each entity is performing its own independent function as designated in the city charter." Slip op, p 24. Thus, the majority holds *Booth* inapposite.

The majority's attempt to distinguish *Booth* from the present case is unpersuasive. Although the *Booth* decision involved a delegation of power, it did not limit itself to situations where a delegation had taken place. Rather, the *Booth* Court was concerned that form not prevail over substance and that the OMA's legislative purpose "to promote a new era in governmental **[*139]** accountability" not be defeated. n3 *Booth,* 444 Mich. at 222.

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n3 "'Open government is believed to serve as both a light and disinfectant in exposing potential abuse and misuse of power. The deliberation of public policy in the public forum is an important check and balance on self-government.'" 444 Mich. at 223, quoting Osmon, *Sunshine or shadow: One state's decision*, 1977 Det Col L R 613, 617. The *Booth* Court also noted that, historically, the OMA has been interpreted as broadly applicable, while its exemptions are construed strictly. *Id.*

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Regardless of the validity of the grounds on which the majority distinguishes *Booth* from the present case, I would hold that the city manager was a public body for purposes of the OMA.

The OMA defines "public body" as:

[*A*]*ny* state or *local legislative or governing body, including* a board, commission, committee, subcommittee, *authority*, or council, *which is empowered by* state constitution, statute, *charter*, ordinance, resolution, or rule *to exercise governmental or proprietary authority or perform a governmental or proprietary function* . . . . [MCL 15.262(a); MSA 4.1800(12)(a) (emphasis added).]

The OMA does not define the term "authority" and, as the word has no unique meaning at law, it is appropriate to consult a lay dictionary for its definition. *People v Morey*, 461 Mich. 325, 330; 603 N.W.2d 250 (1999); *Horace v City of Pontiac*, 456 Mich. 744, 756; 575 N.W.2d 762 (1998); MCL 8.3a; MSA 2.212(1). The relevant definition of "authority" from *Random House Webster's College Dictionary*, p 92, **[**887]** is "a person or body of persons in whom **[***40]** authority is vested, as a governmental agency." Thus, the language of the OMA, itself, permits an individual to be considered a "public body." n4

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n4 While the majority recites the term "authority" in the OMA's definition of "public body," it omits to note the plain meaning and common usage of that term. Also, it consults a lay dictionary for a definition of the word "body," when the term "public body" is expressly defined in the statute itself. Slip op, p 20. Furthermore, the majority cites those definitions indicating a "body" is "a group," yet glosses over the definition stating that a "body" is "a person," e.g., some*body*, any*body*, what's a *body* to do?, a public *body*. *Id.* The majority is mistaken in interpreting me as including in the definition any reference to the human body. Slip op, p 20, n 10.

The majority argues that the doctrine of *noscitu a sociis* precludes individuals from the definition of authority, because the other specifically enumerated examples of a public body "are necessarily multimember bodies." Slip op, p 21, n 10. In response, I reiterate that in *Booth* this Court found that an individual could constitute a "committee." Other illustrative entities constituting public bodies under the OMA, besides an authority, are not uniformly multimember bodies. *Booth*, 444 Mich. at 226.

The Legislature states that a "public body" under the FOIA can be a state officer, employee, governor, or lieutenant governor. It does not so state in the OMA. The majority asserts that that omission reflects an intent to preclude individuals from its scope. Slip op, pp 21-22, n 11. I disagree. Determining legislative intent regarding the OMA by examining the FOIA violates several cardinal rules of statutory construction. A court must consider the object of the statute, together with the harm it is designed to remedy, and then apply a reasonable construction that best accomplishes its purpose. *People v Adair*, 452 Mich. 473, 479-480; 550 N.W.2d 505 (1996). Nothing should be read into a statute that is not within the manifest intention of the Legislature, as gathered from the act itself. *In re Ramsey*, 229 Mich. App. 310, 314; 581 N.W.2d 291 (1998). The fair and natural import of the terms employed, in

view of the subject matter of the law, should govern. *In re Wirsing*, 456 Mich. 467, 474; 573 N.W.2d 51 (1998). The broad, inclusive language employed in the OMA attests to its prodisclosure nature and its purpose to promote government accountability. *Booth*, 444 Mich. at 222-224 and 230. Thus, the exceptions to disclosure should be strictly construed. 444 Mich. at 223, n.13. And the term "authority" should be read, according to its plain meaning, to include individuals.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***41] [*140]**

II. BY MEANS OF HIS DECISIONS, THE CITY MANAGER EXERCISED GOVERNMENTAL AUTHORITY AND PERFORMED A GOVERNMENTAL FUNCTION

I also find that reduction of the candidate pool by the city manager through interviews was a "decision" that must be made at an open meeting by mandate of the OMA. n5 The majority does not refute *Booth*'s holdings (1) that decisions under the OMA encompass **[*141]** more than formal votes, (2) that "reduction decisions" must be made in public and are not protected by the "specific contents" exception of the OMA, n6 and (3) thatinterviews are **[**888]** "meetings" that must be held in public. n7 *Booth*, 444 Mich. at 230; slip op, pp 26-27.

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n5 "'Decision' means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.262(d); MSA 4.1800(12)(d).

n6

A public body may meet in a closed session only for the following purposes:

* * *

(f) To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. *However, except as otherwise provided in this subdivision, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act.* [MCL 15.268(f); MSA 4.1800(18) (emphasis added).]

After *Booth*, the Legislature amended the contents exception to the OMA so that it does not apply in the process of searching for and selecting a president of certain institutions. 1996 PA 464, § 1; MCL 15.268(f) and (j); MSA 4.1800(18)(f) and (j). **[***42]**

n7 "'Meeting' means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy." [MCL 15.262(b); MSA 4.1800(12)(b).]

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Finally, the city charter provides:

The city commission *shall* appoint . . . on the recommendation of the city manager . . . [the] **fire chief** . . . . [Bay City Charter, art VII, § 1 (emphasis added).]

This Court has consistently held that the word "shall" imposes a mandatory duty. See *State Hwy Comm v Vanderkloot*, 392 Mich. 159, 181; 220 N.W.2d 416 (1974). This language

compels the city commission to appoint a candidate that the manager recommends.

The majority states that the only reasonable interpretation of the charter's language permits the city commission to reject a candidate recommended by the city manager. However, the candidate who is ultimately **[*142]** appointed, if any, must have been recommended by the city manager. I agree. What is relevant, here, is that the city commission cannot appoint absent the separate prior action **[***43]** of the city manager. Both must act before a **fire chief** can be appointed.Therefore, the city manager is a public body in his own right and exercises governmental authority in conducting interviews and making reduction decisions. n8 The majority's finding that the actions of the city manager are not subject to the OMA allows any city to circumvent the act by adopting similar charter language. *Goode*, *supra* at 759.

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n8 In forming a committee to assist him in interviews and candidate reduction, the city manager delegated some of his authority. The authority delegated was derived from the city charter. Its exercise was subject to the OMA, which requires that the exercise of authority be done at a public meeting. The situation is directly analogous to the Board of Regents' delegation of its authority to Chairman Brown in *Booth. Booth*, 444 Mich. at 226.

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III. CONCLUSION

I would affirm the Court of Appeals holding that the defendants acted in violation of the OMA. As with the chairman in *Booth*, **[***44]** the city manager here is subject to the OMA. A contrary finding places form over substance and undermines the act. The city manager is a "public body" because that individual is an "authority." The city manager, in interviewing candidates and reducing the field of candidates made decisions, performed governmental functions, and exercised governmental authority. Under the city charter, the manager is one of two public bodies that, working together, determine who will be the Bay City **Fire Chief.** Therefore, the city manager's actions were subject to the OMA and should have been undertaken at a public meeting.

Detroit Free Press AUGUST 14, 2000 Monday METRO FINAL EDITION

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AUGUST 14, 2000 Monday METRO FINAL EDITION

SECTION: EDITORIAL; Pg. 8A

LENGTH: 340 words

HEADLINE: MIRANDA: **MICHIGAN** COURT RESTRICTS IMPORTANT RIGHTS

BODY:
Less than two months after the U.S. Supreme Court wrote an unexpectedly ringing endorsement of the Miranda warning, **Michigan's** Supreme Court is trying to circumvent it.

Any doubts that police had to read suspects their rights -- and have those rights understood -- should have been put to rest by the strong U.S. Supreme Court decision. Chief Justice William Rehnquist, a past critic of Miranda, thought upholding it was so important he chose to write the 7-2 decision himself. Further attempts to undermine Miranda should have ceased.

But the **Michigan** Supreme Court's conservative majority isn't easily cowed. Late last month, by a 5-2 vote, it overturned a state appeals court decision to throw out the confession of a man who stopped police and announced he'd murdered his mother seven years earlier.

The appeals court had rightly ruled that the man couldn't properly waive his Miranda rights because of his mental illness. The court said he was irrational and delusional when he confessed, and thus incapable of understanding what he was doing.

Miranda requires not just that police read suspects their rights when they're arrested. It requires that suspects who waive those rights do so knowingly and intelligently. The trial court that declared Mahir Ghanin Daoud incompetent to stand trial said he "believed that he had no need of any protective rights as God would be releasing him from jail."

The state Supreme Court majority, led by **Justice Robert Young** Jr., found that evidence unconvincing. Once suspects are read their rights, the justices reasoned, it doesn't matter if they grasp them or have a clue about the real-world consequences of abandoning the right to an attorney and confessing.

Such logic mocks the very premise of Miranda: that suspects are entitled to understand they don't need to incriminate themselves, especially without a lawyer present. More is required than a mere recitation of the warning.

Michigan's Supreme Court has set yet another standard -- for miserly interpretation of law.

*462 Mich. 621, *; 614 N.W.2d 152, **;*
*2000 Mich. LEXIS 1442, ****

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v **MAHIR GHANIN DAOUD,** Defendant-Appellee.

No. 113994

SUPREME COURT OF MICHIGAN

462 Mich. 621; 614 N.W.2d 152; 2000 Mich. LEXIS 1442

March 9, 2000, Argued
July 20, 2000, Decided
July 20, 2000, Filed

PRIOR HISTORY: **[***1]** Oakland Circuit Court, Barry L. Howard, J. Court of Appeals, FITZGERALD, P.J., and CAVANAGH and WHITBECK, JJ. (Docket No. 215615).

CASE SUMMARY

PROCEDURAL POSTURE: State appealed a Michigan Court of Appeals decision which upheld a trial court's decision to suppress criminal defendant's recorded statement, the third statement he made, in a case where defendant confessed to killing his mother nine years earlier and then contended he had not validly waived his Miranda rights.

OVERVIEW: Criminal defendant was charged with murder. He told police officers he had killed his mother. The officers gave him his Miranda warnings; defendant waived those rights. At a police station, he was advised of his Miranda rights again; he again waived his rights and repeated his statement. Officers from the city where the crime occurred interviewed him. Again, he was advised of his Miranda rights. He waived those rights a third time and gave a recorded statement. The trial court suppressed all the statements because it found defendant was delusional at the time of his police contact. The State appealed. The appellate court affirmed as to the recorded confession. The State appealed that decision. The court reversed. The court held the trial court erred in focusing on defendant's motivation for confessing. Instead, the court said defendant's voluntary confession should not have been suppressed because it was knowingly and freely given.

OUTCOME: Decision of the appellate court affirming the decision of the trial court suppressing criminal defendant's recorded statement reversed because the trial court erred in suppressing statement because it incorrectly focused on criminal defendant's motivation for confessing rather than on proper consideration of whether defendant could understand and waive his rights.

CORE TERMS: intelligent, confession, Fifth Amendment, self-incrimination, preponderance, prong, intelligent waiver, delusion, totality, warning, knowingly, compelled, delusional, confessing, waive, voluntariness, waiving, waived, burden of proof, spring, confess, interrogation, coercion, circumstances surrounding, comprehension, murder, jail, mental state, suppressing, confessed

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Criminal Law & Procedure > Arrests > Miranda Warnings

HN1 Miranda warnings require the police, before a custodial interrogation, to inform a suspect (1) that he has the right to remain silent, (2) that anything he says can and will be used against him in court, (3) that he has a right to the presence of an attorney during any questioning, and (4) that if he cannot afford an attorney one will be appointed for him.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver
Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally

HN2 Although engaging in de novo review of the entire record, an appellate court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of Miranda rights unless that ruling is found to be clearly erroneous. Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver
Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally

HN3 Although an appellate court reviews for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of Miranda rights, the meaning of "knowing and intelligent" is a question of law. An appellate court reviews questions of law de novo.

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning
Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Remain Silent
Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning

HN4 When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

HN5 A defendant may waive his Miranda rights, provided the waiver is made voluntarily, knowingly and intelligently.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver
Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning

HN6 The inquiry about whether Miranda rights have been waived is two-fold: First, the relinquishment of the right must have been voluntary in the sense it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court find a waiver. The "totality of the circumstances" approach requires an inquiry

into all circumstances surrounding the interrogation. This includes evaluation of the suspect's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Miranda rights, and the consequences of waiving those rights.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

HN7 Determining whether a defendant provided a knowing and intelligent waiver necessarily involves an inquiry into the suspect's level of understanding and this can only be done by examining the objective circumstances surrounding the waiver. The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Interrogation > Voluntariness

HN8 Whether a waiver of Miranda rights is voluntary depends on the absence of police coercion. The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

HN9 In contrast to the voluntary prong, determining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior. To knowingly waive Miranda rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

HN10 Lack of foresight is insufficient to render an otherwise proper waiver invalid. Rather, to establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Remain Silent > Self-Incrimination Privilege

HN11 The U.S. Const. amend. V privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion. Miranda protects defendants against government coercion leading them to surrender rights protected by U.S. Const. amend. V; it goes no further than that.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

HN12 To waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. The mental state that is necessary to validly waive Miranda rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer.

COUNSEL: Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, David G. Gorcyca, Prosecuting Attorney, Joyce F. Todd, Chief, Appellate Division, and Anica Letica, Assistant Prosecuting Attorney, Pontiac, MI, for the people.

Robyn B. Frankel, Bloomfield Hills, MI, for the defendant-appellee.

Amicus Curiae: Brian Mackie, President, John D. O'Hair, Prosecuting Attorney, and Timothy A. Baughman, Chief, Research, Training and Appeals Detroit, MI, for Prosecuting Attorneys Association of Michigan.

JUDGES: Chief Justice Elizabeth A. Weaver, Justices Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman. WEAVER, C.J., and TAYLOR, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J. CAVANAGH, J. dissenting. KELLY, J., concurred with CAVANAGH, J.

OPINIONBY: Robert P. Young, Jr.

OPINION: [*624] [153]** BEFORE THE ENTIRE COURT

YOUNG, J.

We consider in this case the trial court's decision to suppress defendant's voluntary confession on the ground that defendant did not "knowingly and intelligently" waive his *Miranda* **[***2]** n1 rights. We conclude **[*625]** that the trial court applied an erroneous legal **[**154]** standard in assessing the validity of defendant's *Miranda* waiver. Moreover, we conclude that the waiver was valid. Therefore, we reverse the trial court's decision suppressing defendant's confession.

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n1 *Miranda v Arizona*, 384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966). The now-familiar HN1 *Miranda* warnings require the police, before a custodial interrogation, to inform a suspect (1) that he has the right to remain silent, (2) that anything he says can and will be used against him in court, (3) that he has a right to the presence of an attorney during any questioning, and (4) that if he cannot afford an attorney one will be appointed for him. 384 U.S. at 469-473.

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I. Factual and Procedural Background

On May 21, 1994, defendant flagged down Detroit Police Officers Nevin Hughes and Linda Dickinson, who were on routine patrol in a marked vehicle, and blurted out that he had just confessed **[***3]** to a 911 operator that he had killed his mother, Teriza Daoud. As it turns out, in 1985, the victim's body had been discovered in a dumpster in Toledo, Ohio. The victim's body was "hog-tied" with electrical cord and burned. An autopsy report indicated that the victim died as a result of multiple blunt-force injuries to her head. The victim had also been exposed to some source of carbon monoxide before her death. Ironically, the case had remained unresolved until defendant's decision to approach the police nine years later.

In response to defendant's roadside outburst, Officers Hughes and Dickinson pulled their patrol car to the curb, approached defendant and advised him of his *Miranda* rights. Officer Dickinson testified at defendant's preliminary examination that defendant proceeded to waive his *Miranda* rights and tell the officers that he "took a lug wrench and he cut it in half and he hit his mother several times in the head and then he choked her and then he wrapped her up in a blanket, tied her up with some wire and he took her out to an area near a school in Troy." **[*626]**

The officers drove defendant to the Detroit Police Department's 9th Precinct station where defendant was **[***4]** advised of his *Miranda* rights a second time. Defendant again waived those rights and repeated what he had previously told the officers.

In response to defendant's statement that the murder took place in Troy, Officer Dickinson immediately notified the Troy Police Department. Troy Police Detective Mitch Lenczewski testified at the preliminary examination that he and Sergeant Mark Tuck n2 went down to the Detroit Police Department on May 21 and interviewed defendant. n3 Defendant was advised of and waived his *Miranda* rights a third time. Defendant then gave a taped confession in which he explained that he repeatedly struck his mother in the head and choked her to get her to stop screaming. After killing her, defendant wrapped his mother's body in blankets and placed it in the trunk of his uncle's car. He then drove the car to a nearby school, and parked it there. Defendant returned to his mother's house, took her car, and drove it to the Oakland Mall in Troy to make it look like she had been shopping there.

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n2 Sergeant Tuck was involved in the earlier investigation of Teriza Daoud's murder.
[*5]**

n3 The interview was conducted by Detective Lenczewski because defendant remembered Sergeant Tuck from the original investigation and refused to talk to him.

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After getting a ride from some "guys" at the mall, defendant returned to the school where he had left his uncle's car. Defendant bought a gasoline container, filled it, and drove to Toledo with the victim's body in the trunk. There, defendant threw his mother's body into a dumpster and set it afire. **[*627]** Defendant then returned to Michigan and, with apparent success, went about concealing his crime. Following the interview with Detective Lenczewski, defendant signed a waiver form and provided a written statement in which he again confessed to his mother's murder. All defendant's statements were admitted at the preliminary examination.

After defendant was bound over for trial on June 10, 1994, he filed a notice of intent to raise an insanity defense. Accordingly, the trial court ordered that defendant be examined by the Center for Forensic Psychiatry. Following a September 1994 competency hearing, the trial court determined that defendant was **[***6]** incompetent to stand trial and committed him to the Michigan **[**155]** Department of Mental Health for treatment. n4 Upon defendant's request, the trial court further ordered that defendant be examined "relating to the issue of competency to understand his constitutional and *Miranda* rights prior to making a statement to the police . . . ."

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n4 This decision was based on a report prepared by Dr. Jennifer Balay, an examiner for the Center for Forensic Psychiatry. That report indicated that defendant appeared delusional and that while defendant "had a superficial understanding of the fact that he had been arrested and charged with the murder of his mother," he was "completely unconcerned . . . believing that he would soon be released from jail because it was the Lord's will to do so." The report concluded that "defendant's disturbed mental state has rendered him unable to appreciate the nature and object of the proceedings against him and unable to rationally assist counsel in his own defense."

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Defendant was eventually **[***7]** examined by three experts, Drs. Robert Mogy, Charles Clark, and Thomas Grisso, all of whom submitted reports. *Walker* n5 hearings were held on September 25, 1996, and February 7, 1997, during which the trial court **[*628]** heard testimony from all three doctors pertaining to the validity of defendant's confession. The

doctors disagreed with respect to defendant's ability to understand his *Miranda* rights. Dr. Mogy believed that defendant was delusional in that he believed that God controlled the police and would set him free if he confessed and that this delusion made him unable to appreciate the fact that the police would use his statements against him. In contrast, Dr. Clark testified that there were no clear indications that defendant's confession was the product of any delusion or that defendant did not understand that the police would use his statement against him.

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n5 *People v Walker (On Rehearing)*, 374 Mich. 331; 132 N.W.2d 87 (1965).

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In light of the contradictory opinions rendered **[***8]** by Drs. Mogy and Clark, Dr. Grisso was hired to perform yet another examination. Dr. Grisso testified that defendant literally understood that the police intended to put him in jail; however, due to his religious "delusions and preoccupations," defendant was unable to use that information and "relate it to his own situation."

Relying on the testimony given by Drs. Mogy and Grisso, the trial court suppressed defendant's statements on the ground that defendant did not make a knowing and intelligent waiver of his *Miranda* rights. The trial court found that defendant was delusional at the time of his contact with police, in that he "believed that he had no need of any protective rights as God would be releasing him from jail as a reward for confessing to his mother's murder." The court reasoned that this delusion "prevented rational comprehension of the specific topic at issue--his right to counsel and his right against self-incrimination." **[*629]**

The prosecution sought leave to appeal from the Court of Appeals. That Court reversed the trial court's decision to the extent that it purported to suppress all defendant's statements. n6 The Court explained that defendant's initial statements **[***9]** made *before* he was transported to the police station were not the product of custodial interrogation and thus were outside the scope of *Miranda*. However, the Court left standing the trial court's decision suppressing defendant's later recorded confession.

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n6 Unpublished order, entered January 11, 1999 (Docket No. 215615).

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This Court granted the prosecution's application for leave to appeal. *People v Daoud*, 461 Mich. 873; 603 N.W.2d 267 (1999).

II. Standard of Review

In *People v Cheatham*, 453 Mich. 1, 30; 551 N.W.2d 355 (1996), this Court set forth the standards for our review of the trial court's decision in this case:

HN2 Although engaging in de novo review of the entire record, see *People v Walker (On Rehearing)*, 374 Mich. 331, 338; **[**156]** 132 N.W.2d 87 (1965), this Court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights "unless that ruling is found to be clearly erroneous." [*People v Burrell*, 417 Mich. 439, 448; **[***10]** 339 N.W.2d 403 (1983).] Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment.

HN3↑Although we review for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights, we agree with the prosecution that the meaning of "knowing and intelligent" is a question of law. We review questions **[*630]** of law de novo. *McDougall v Schanz*, 461 Mich. 15, 24; 597 N.W.2d 148 (1999).

III. Admissibility of Confessions: An Historical Perspective

The United States Supreme Court originally followed the common-law rule pertaining to the admission of confessions: that a confession was admissible as long as it was freely and voluntarily made. See *Hopt v Utah*, 110 U.S. 574, 584-585; 4 S. Ct. 202; 28 L. Ed. 262 (1884). n7 Then, in *Bram v United States*, 168 U.S. 532, 542; 18 S. Ct. 183; 42 L. Ed. 568 (1897), the Court for the first time found the voluntariness requirement to be grounded in the Fifth Amendment's command that no person "shall be compelled **[***11]** in any criminal case to be a witness against himself." However, the voluntariness requirement was limited to cases in *federal* court. In *Twining v New Jersey*, 211 U.S. 78, 114; 29 S. Ct. 14; 53 L. Ed. 97 (1908), the Court held that "exemption from compulsory self-incrimination *in the courts of the states* is not secured by any part of the Federal Constitution" (emphasis added).

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n7 The *Hopt* Court explained that a confession should be excluded if it was induced by threats or promises "which, operating upon the fears or hopes of the accused . . . deprive him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law." 110 U.S. at 585.

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Beginning with *Brown v Mississippi*, 297 U.S. 278; 56 S. Ct. 461; 80 L. Ed. 682 (1936), the Court introduced due process as a basis for excluding involuntary confessions in criminal proceedings occurring in state courts. n8 It was held that fundamental **[***12]** unfairness in **[*631]** violation of due process exists "when a coerced confession is used as a means of obtaining a verdict of guilt." *Lisenba v California*, 314 U.S. 219, 236-237; 62 S. Ct. 280; 86 L. Ed. 166 (1941). Under the Due Process Clauses of the Fifth and Fourteenth Amendments, the test for admissibility was the same as that under the Fifth Amendment's compelled self-incrimination provision, requiring "'that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.'" *Haynes v Washington*, 373 U.S. 503, 513; 83 S. Ct. 1336; 10 L. Ed. 2d 513 (1963), quoting *Wilson v United States*, 162 U.S. 613, 623; 16 S. Ct. 895; 40 L. Ed. 1090 (1896).

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n8 The Court relied on the Fourteenth Amendment's Due Process Clause essentially to avoid its holding in *Twining*.

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The Court eventually returned its focus to the privilege against self-incrimination. In *Malloy v Hogan*, 378 U.S. 1, 6; **[***13]** 84 S. Ct. 1489; 12 L. Ed. 2d 653 (1964), the Court overruled *Twining* and held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." n9 The Court **[**157]** acknowledged that the *Brown* Court "felt impelled, in light of *Twining*, to say that its conclusion did not involve the privilege against self-incrimination." *Id.* However, the Court reasoned that any distinction "was soon abandoned." 378 U.S. at 6-7. Thus, the *Malloy* Court concluded that **[*632]** today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions

since 1897, when, in *Bram v United States*, 168 U.S. 532; 18 S. Ct. 183; 42 L. Ed. 568 [1897] the Court held that "in criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against **[***14]** himself.'" *Id.*, 168 U.S. at 542; 18 S. Ct. at 187. Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." *Id.*, 168 U.S. at 542-543; 18 S. Ct. at 186-187; see also *Hardy v United States*, 186 U.S. 224, 229; 22 S. Ct. 889, 891; 46 L. Ed. 1137 [1902]; *Ziang Sung Wan v United States*, 266 U.S. 1, 14; 45 S. Ct. 1, 3; 69 L. Ed. 131 [1924]; *Smith v United States*, 348 U.S. 147, 150; 75 S. Ct. 194, 196; 99 L. Ed. 192 [1954]. In other words the person must not have been compelled to incriminate himself. [378 U.S. at 7.]

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n9 Const 1963, art 1, § 17 also affords a right to be free from compelled self-incrimination, providing that "no person shall be compelled in any criminal case to be a witness against himself . . . ." We noted in *Cheatham*, *supra* at 10, that "the wording of the Michigan Constitution granting protection from compelled self-incrimination is identical to the Fifth Amendment protection." As in *Cheatham*, however, there is no need in this case to consider the precise nature of the protection against self-incrimination provided by the Michigan Constitution because the trial court relied exclusively on the Fifth Amendment and defendant makes no argument that art 1, § 17 should be construed differently.

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IV. *Miranda v Arizona*

Against this backdrop, the Court in *Miranda* addressed what it believed to be the inherent coercion present in all custodial interrogations. Beginning with the premise that, because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant can truly be the product of his free choice," 384 U.S. at 458, the Court fashioned a set of "procedural safeguards" in order to "permit a full opportunity to exercise the privilege against self-incrimination": **[*633]** To summarize, we hold that ***HN4***when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right **[***16]** to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [384 U.S. at 467, 478-479.]

The Court further explained that "***HN5***the defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444.

In subsequent decisions, the Supreme Court elaborated on what is required for an effective waiver of the *Miranda* rights. In *Moran v Burbine*, 475 U.S. 412, 421; 106 S. Ct. 1135; 89 L. Ed. 2d 410 (1986), the Court explained that "***HN6***the inquiry has two distinct dimensions":

First, the relinquishment of the right must have been voluntary in the sense **[**158]** that

it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the **[***17]** *Miranda* rights have been waived. **[*634]** The "totality of the circumstances" approach referred to in *Moran* requires an inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the suspect's

age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his [*Miranda*] rights, and the consequences of waiving those rights. [*Fare v Michael C*, 442 U.S. 707, 725; 99 S. Ct. 2560; 61 L. Ed. 2d 197 (1979); see also *Cheatham*, *supra* at 27.]

We read *Fare* as setting forth an objective standard for determining whether *Miranda* rights are validly waived. See *United States v Yunis*, 273 U.S. App. D.C. 290, 302; 859 F.2d 953 (1988). While, as explained below, HN7 determining whether a defendant provided a knowing and intelligent waiver necessarily involves an inquiry into the suspect's level of understanding, this can only be done by examining the objective circumstances surrounding the waiver. n10 Finally, the prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. **[***18]** *Colorado v Connelly*, 479 U.S. 157, 168; 107 S. Ct. 515; 93 L. Ed. 2d 473 (1986). n11

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n10 Contrary to the dissent's assertion, we do not suggest that a suspect's subjective mental state plays no role in a determination whether there was a knowing and intelligent *Miranda* waiver. We merely recognize that the only conceivable basis for ascertaining a suspect's subjective understanding, other than by supernatural means, which we do not possess, is to examine the objective circumstances surrounding the waiver.

n11 The dissent questions our reliance on *Connelly* in setting forth the prosecution's burden of proof in this case. The dissent suggests that, because *Connelly* involved only the voluntary prong of the *Miranda* waiver, its statement of the burden of proof is not applicable in cases involving the question whether a *Miranda* waiver was knowing and intelligent. However, *Connelly* expressly stated that "whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained *in violation of our Miranda doctrine*, the State need prove waiver only by a preponderance of the evidence." *Connelly*, *supra* at 168 (emphasis added). This statement does not strike us as one of limited applicability. The lower federal courts certainly have not hesitated in applying a preponderance of the evidence standard when determining whether a *Miranda* waiver was knowing and intelligent. See, e.g., *United States v Palmer*, 203 F.3d 55, 60 (CA 1, 2000); *United States v Doe*, 60 F.3d 544, 546 (CA 9, 1995); *Wernert v Arn*, 819 F.2d 613, 616 (CA 6, 1987).

The dissent also suggests that a higher standard is mandated by the Supreme Court's assorted references to the prosecution's "heavy burden" in proving a waiver. Perhaps the dissent has overlooked the fact that the Supreme Court in *Connelly* acknowledged its prior decisions referring to the prosecution's "heavy burden" and still adopted a preponderance of the evidence standard. *Connelly*, 479 U.S. at 167-168.

As a final matter, we note that this Court also applied the preponderance of the evidence standard to the *Miranda* waiver's knowing and intelligent prong in *Cheatham*, *supra* at 27.

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A. Voluntary Prong of the *Miranda* Waiver

Determining whether a waiver of *Miranda* rights was voluntary involves the same inquiry as in the due process context. In *Connelly*, 479 U.S. at 169-170, the Supreme Court explained that there is "no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context." Thus, HN8 whether a waiver of *Miranda* rights **[**159]** is voluntary depends on the absence of police coercion. 479 U.S. at 170. The *Connelly* Court explained that "'the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception . . . .'" *Id.*, quoting *Moran, supra* at 421.

In the instant case, there is no question that defendant's decision to waive his *Miranda* rights, and, concomitantly, his decision to confess, was completely voluntary. Consequently, as in *Cheatham*, our **[*636]** task here is to determine whether defendant's waiver was also "knowing and intelligent."

B. Knowing and Intelligent Prong of the *Miranda* Waiver

HN9

In **[***20]** contrast to the voluntary prong, determining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior. See *United States v Bradshaw*, 290 U.S. App. D.C. 129, 132-134; 935 F.2d 295 (1991); *Derrick v Peterson*, 924 F.2d 813, 820-821 (CA 9, 1990). However, as we explained in *Cheatham*, *supra* at 28, "to knowingly waive *Miranda* rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." See also *Colorado v Spring*, 479 U.S. 564, 574; 107 S. Ct. 851; 93 L. Ed. 2d 954 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of [*Miranda* rights]"). n12 Thus, "HN10 lack of foresight is insufficient to render an otherwise proper waiver invalid." *Cheatham*, *supra* at 29. Rather, **[*637]**

to establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the **[***21]** right to the presence of counsel, and that the state could use what he said in a later trial against him. [*Id.*; see also *People v Garwood*, 205 Mich. App. 553, 558; 517 N.W.2d 843 (1994).]

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n12 The Court in *Spring* actually referred to waiver of "the Fifth Amendment privilege." *Id.* We assume that the Court misspoke because it is illogical to talk about a waiver of the right against compelled self-incrimination. As Professor Joseph Grano explains, the idea of a waiver of the Fifth Amendment privilege would only make sense if the Fifth Amendment conferred a substantive right of silence. However, the Fifth Amendment confers not a right of silence per se, but a right not to be compelled to answer questions. See Grano, Confessions, Truth, & the Law (Ann Arbor: University of Michigan Press, 1993), pp 141-142. Thus, the *Spring* Court must have been referring to waiver of the *Miranda* rights and *not* the Fifth Amendment privilege.

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We agree with the plurality in *Cheatham* **[***22]** that the requirement of a "knowing and intelligent" waiver of *Miranda* rights essentially forces courts to make "'sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State.'" 453 Mich. at 21-22 (Boyle, J.), quoting *Connelly*, *supra* at 167. n13 In light of the fact that the Fifth Amendment itself protects only against *compelled* self-incrimination, the requirement of a "knowing and

intelligent" waiver of *Miranda* rights is puzzling. n14 As The Ninth Circuit observed in *Derrick*, *supra* at 821: **[**160]**

The Court requires that there be improper state action under the Fourteenth Amendment before a confession can be suppressed, but requires no such state action in the *Miranda* context, even though the constitutional provision underlying the *Miranda* warning--the Fifth Amendment--is applied to the states through that same Fourteenth Amendment.

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n13 *Cheatham* was a majority opinion with the exception of part III, in which Justice Boyle, joined by Chief Justice Brickley and Justice Riley, discussed what she believed to be an inconsistency between the voluntary and knowing and intelligent prongs of the *Miranda* waiver analysis. **[***23]**

n14 As the Supreme Court recognized in *Connelly*, *supra* at 170, HN11"the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" The *Connelly* Court further emphasized: "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Id.*

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Before the Supreme Court's recent decision in *Dickerson v United States*, 530 U.S. 428; 120 S. Ct. 2326; 147 L. Ed. 2d 405; 2000 U.S. LEXIS 4305; 2000 WL 807223 (2000), this apparent incongruity was easily reconcilable, given that the Supreme Court itself had acknowledged in *at least fifteen* post-*Miranda* decisions that the *Miranda* warnings are not themselves rights protected by the Fifth Amendment, but instead are prophylactic rules designed to protect the Fifth Amendment right against self-incrimination. n15 In *Dickerson*, however, the Court abruptly changed course, holding that *Miranda* is a "constitutional decision" announcing a "constitutional **[***24]** rule." n16

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n15 See, e.g., *Davis v United States*, 512 U.S. 452, 458; 114 S. Ct. 2350; 129 L. Ed. 2d 362 (1994); *Withrow v Williams*, 507 U.S. 680, 690-692; 113 S. Ct. 1745; 123 L. Ed. 2d 407 (1993); *McNeil v Wisconsin*, 501 U.S. 171, 176; 111 S. Ct. 2204; 115 L. Ed. 2d 158 (1990); *Duckworth v Eagan*, 492 U.S. 195, 203; 109 S. Ct. 2875; 106 L. Ed. 2d 166 (1989); *Arizona v Roberson*, 486 U.S. 675, 681; 108 S. Ct. 2093; 100 L. Ed. 2d 704 (1988); *Connecticut v Barrett*, 479 U.S. 523, 528; 107 S. Ct. 828; 93 L. Ed. 2d 920 (1987); *Moran*, 475 U.S. at 424-425; *Oregon v Elstad*, 470 U.S. 298, 305; 105 S. Ct. 1285; 84 L. Ed. 2d 222 (1985); *New York v Quarles*, 467 U.S. 649, 654; 104 S. Ct. 2626; 81 L. Ed. 2d 550 (1984); *United States v Henry*, 447 U.S. 264, 274; 100 S. Ct. 2183; 65 L. Ed. 2d 115 (1980); *North Carolina v Butler*, 441 U.S. 369, 374; 99 S. Ct. 1755; 60 L. Ed. 2d 286 (1979); *Brown v Illinois*, 422 U.S. 590, 600; 95 S. Ct. 2254; 45 L. Ed. 2d 416 (1975); *Michigan v Tucker*, 417 U.S. 433, 444; 94 S. Ct. 2357; 41 L. Ed. 2d 182 (1974); *Michigan v Payne*, 412 U.S. 47, 53; 93 S. Ct. 1966; 36 L. Ed. 2d 736 (1973). **[***25]**

n16 In support of its conclusion regarding *Miranda*'s "constitutional basis," the Court first observed that it had "consistently applied *Miranda*'s rule to prosecutions arising in state courts," which action could only be justified if the *Miranda* warnings were required by the United States Constitution. *Id.* at 120 S. Ct. 2333; 2000 U.S. LEXIS 4305, *20; 2000 WL 807223, *7.

Second, the Court noted that *Miranda* itself "is replete with statements indicating that the majority thought it was announcing a constitutional rule." *Id.* Finally, the Court found support

for its conclusion that "*Miranda* is constitutionally based" in *Miranda*'s "invitation for legislative action to protect the constitutional right against coerced self-incrimination." *Id.* at 120 S. Ct. 2334; 2000 U.S. LEXIS 4305, *24; 2000 WL 807223, *8.

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Although the Supreme Court has now decided that the *Miranda* rights are constitutionally mandated, the **[*639]** Court has yet to address the apparent inconsistency between the voluntary and knowing and intelligent prongs of the *Miranda* waiver analysis. Until it does so, our duty is to accept and attempt to apply *Miranda* and its progeny, including **[***26]** the requirement of a "knowing and intelligent" waiver of the *Miranda* rights. Like the *Derrick* court, "we . . . are obligated to bifurcate the *Miranda* waiver analysis into an inspection of (1) whether the waiver was 'voluntary' and (2) whether the waiver was 'knowing' and 'intelligent.'" *Derrick*, *supra* at 821; see also *Cheatham*, *supra* at 26 (Boyle, J.).

V. Application

Cheatham represents our most recent attempt to apply the knowing and intelligent prong of the *Miranda* waiver. The trial court, in its opinion suppressing defendant's confession, interpreted our decision in *Cheatham* as requiring that a suspect be able to "apply [his *Miranda* rights] to himself and understand his relationship with the police." As a result, the trial court reasoned that defendant's delusional belief that "God would be releasing him from jail as a reward for confessing to his mother's murder" prevented him from making a knowing and intelligent decision to waive his *Miranda* rights. We conclude that the trial court erred as a matter of law because it misread *Cheatham* and, consequently, focused on *why* defendant was confessing rather than considering **[***27]** whether **[**161]** defendant could in fact understand and waive his *Miranda* rights.

Our conclusion in this regard is supported not only by the trial court's written opinion focusing on defendant's purported delusions, but by the court's **[*640]** comments during defendant's *Walker* hearings. At one point during Dr. Mogy's testimony, the trial court commented that "the only issue is [defendant's] *motivation* to make the statement." The court even suggested that only someone who was delusional would come forward and admit to a murder after nine years. n17 Although defendant may have believed that he would not go to jail, such a belief has nothing to do with whether defendant was able to understand "'that he need say nothing at all and that he might then consult with a lawyer if he so desired.'" *Cheatham*, *supra* at 29, quoting *United States v Hall*, 396 F.2d 841, 846 (CA 4, 1968). In this regard, we agree with the following statement by the Supreme Court of Illinois:

HN12 To waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. The mental state that is necessary to validly waive **[***28]** *Miranda* rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that **[*641]** one can stand mute and request a lawyer. [*In re W.C.*, 167 Ill. 2d 307, 328; 212 Ill. Dec. 563; 657 N.E.2d 908 (1995).]

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n17 We reject the notion that **confessing to a crime is inherently irrational. One can easily imagine circumstances in which a person would decide to confess for reasons of morality and conscience. Indeed, as Professor Grano has pointed out, there are many situations in which a guilty person with any basic sense of morality would voluntarily come forward:**

To take the easiest case, few would dispute that a guilty individual has a moral

obligation to confess when his confession is necessary to prevent an innocent person from being convicted for a crime. Similarly, even aside from the possibility of erroneous conviction, a person has a moral obligation to admit that he has falsely accused another, for only by so confessing can the person hope to remove the harm wrongly caused to the other's good name. [Grano, n 12 *supra* at 41.]

In sum, there are countless reasons why a "rational" person might decide to confess past criminal activity.

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Because the trial court applied the wrong legal standard in determining defendant's ability to make a knowing and intelligent waiver of his *Miranda* rights, we reverse the trial court's decision suppressing defendant's confession. Viewing the objective circumstances surrounding defendant's waiver, the waiver was clearly knowing and intelligent. Detective Lenczewski gave undisputed testimony that, while advising defendant of his *Miranda* rights, he had defendant read along from a department-issued card. Detective Lenczewski further testified that he stopped after each warning, asked defendant if he understood, and continued after defendant stated that he in fact understood. The exchange ended with defendant's direction to "get on with it." Such a remark clearly evidences defendant's awareness of the events that were transpiring. Defendant eventually waived his rights and proceeded to give a detailed confession. n18

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n18 Actually, including his initial contact with Detroit Police Officers Hughes and Dickinson, defendant had been read his *Miranda* rights *three* times. Each time defendant waived his rights and made a statement. Defendant also signed a waiver form and provided a written statement.

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Turning to the opinions proffered by the various expert witnesses, although Dr. Clark admitted that it was possible that defendant was suffering from a delusion that affected his ability to understand his actions, he believed such a notion to be "quite speculative." Dr. Clark found no objective evidence that defendant was not capable of understanding his *Miranda* rights. Indeed, Dr. Clark believed that it would be a "mystery" why defendant would tell the police what he did if defendant **[**162]** did not understand to **[*642]** what use the police would put his statements. Dr. Clark placed particular emphasis on a remark defendant made at his arraignment--that the court should "go ahead and send me to jail"--because that statement was made relatively close in time to his confession. n19

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n19 Dr. Clark explained that "the more contemporaneous the information is you're looking at, the more [it] goes to the question to what his state of mind was at the time [of the confession]."

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Dr. Grisso testified that, while defendant's delusion **[***31]** prevented him from appreciating the consequences of his actions, he clearly had a "straight forward understanding . . . of what the *Miranda* warnings are saying." With regard to defendant's understanding of the role of the police, Dr. Grisso testified that defendant would "understand that the police intended to jail him." In his report submitted to the court, Dr. Grisso explained that defendant knew what the police were supposed to do but, because of his mental illness,

"did not believe that [] it would happen."

As stated, a knowing and intelligent waiver of the *Miranda* rights does not require that a suspect "understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *Cheatham, supra* at 28. Rather, a very basic understanding is all that is necessary for a valid waiver.

The Supreme Court has made clear that a defendant need not have a wise or shrewd basis for waiving *Miranda* rights for the waiver to be valid. In *Connecticut v Barrett*, 479 U.S. 523, 525-526; 107 S. Ct. 828; 93 L. Ed. 2d 920 (1987), the Court considered a case in which a defendant [*32] orally confessed to a crime, but refused to make a written statement without the presence [*643] of counsel. In the course of concluding that *Miranda* did not require suppression of the defendant's oral statements, the Court stated that "the fact that some might find [the defendant's] decision [to confess] illogical is irrelevant, for we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'" *Id.* at 530 (citation omitted). Similarly, in *Spring, supra*, the Court considered a case in which the police interrogated the defendant without telling him all the crimes at which the interrogation was aimed. In concluding that this lack of information did not affect the validity of the defendant's waiver of his *Miranda* rights, the Court held that "the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature." 479 U.S. at 577.**

Thus, it is clear that the United States Supreme Court does not equate a "knowing and intelligent" waiver of *Miranda* rights with a wise or lawyer-inspired decision to waive those [*33] rights. n20 A trial court's determination of whether a waiver of *Miranda* rights is "knowing and intelligent" should *not* involve any determination whether the decision to waive those rights is actually a wise decision in terms of the defendant's self-interest. Rather, the *only* inquiry with regard to a "knowing and intelligent" waiver of *Miranda* rights is, as stated, whether the defendant understood "that he did not have to speak, that he had the right to the presence of counsel, and that the [*644] state could use what he said in a later trial against him." *Cheatham, supra* at 29.**

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n20 We agree with Professor Grano that "*Miranda*'s justification for recognizing a right to counsel has nothing to do with helping the defendant to make strategically wise decisions." Grano, n 12 *supra* at 170.

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Here, even Dr. Mogy, who testified at length about defendant's supposed belief that "God was going to free him," acknowledged that defendant "did, at some point, seem to be aware that he could go to **[***34]** jail **[**163]** for making these statements." Dr. Mogy's basic position was that defendant simply ignored the consequences of confessing because of his delusions, not that defendant could not understand those consequences. Indeed, Dr. Mogy acknowledged that defendant could understand the literal aspects of his *Miranda* rights.

In its opinion, the trial court expressly found "the testimony and reports of Dr. Mogy and Dr. Grisso to accurately reflect the nature of defendant's mental state" at the time that defendant waived his *Miranda* rights. The trial court also noted that "Dr. Grisso testified that while *defendant did have an intellectual understanding of the rights* he was read, his delusions prevented him from appreciating those rights as they applied to his own situation" (emphasis added). Finally, the trial court stated that "this case presents a

defendant with the intellectual capability of understanding the rights which [were] read to him." Thus, it is plain that the trial court found that defendant understood his *Miranda* rights. That should have ended the trial court's inquiry because a basic understanding is all that is required for a knowing and intelligent waiver of **[***35]** *Miranda* rights. The trial court erred in suppressing defendant's confession. n21

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n21 The dissent maintains that our analysis confuses separate legal and factual issues. To the contrary, we merely hold that the trial court erred as a matter of law in focusing on defendant's motivation for confessing. Given the trial court's unique position as factfinder, we might ordinarily remand a case for reconsideration under these circumstances. However, because the trial court's own factual findings (as well as the objective circumstances surrounding defendant's *Miranda* waiver that the trial court ignored) support our conclusion that defendant's waiver was knowing and intelligent, there simply is no need for a remand here.

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VI. Conclusion

For the reasons stated, the trial court erred as a matter of law in concluding that defendant's claimed delusional belief that God would set him free prevented him from knowingly and intelligently waiving his *Miranda* rights. Moreover, as in *Cheatham, supra* at 31, **[***36]** there is no evidence that, "'at the time the warnings were given and during the subsequent questioning, Defendant manifested expressly or by implication from [his] words and actions any lack of comprehension of what was said to [him] or of what was occurring'" (citation omitted). n22 Accordingly, we reverse the trial court's decision suppressing defendant's confession.

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n22 According to the dissent, one of the "primary problems" with our analysis is that we "assume[] that cases involving mentally ill defendants may be easily analogized to cases involving persons with low intelligent quotas." Slip op at 11. However, other than this conclusory allegation, the dissent fails to explain exactly what "analogy" our opinion draws between this case and *Cheatham*. We have never suggested that mental illness is the same as having a low I.Q. We merely recognize the obvious: both conditions could conceivably affect a suspect's ability to provide a knowing and intelligent *Miranda* waiver. However, our conclusion here is that there is no objective evidence that defendant's mental illness prevented him understanding his *Miranda* rights.

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WEAVER, C.J., and TAYLOR, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

DISSENTBY: Michael F. Cavanagh

DISSENT:

CAVANAGH, J. (*dissenting*).

I dissent. The majority, under the guise of applying well-established rules of law, creates an unduly restrictive rule for examining waiver of the Fifth Amendment privilege against self-incrimination **[*646]** as protected by *Miranda v Arizona*, 384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966). n1 The question presented on appeal **[**164]** is much more

complex than the majority implies. I would hold that the trial court did not clearly err in its determinations that the defendant was delusional at the time he confessed and that he was unable to understand the actual consequences that could arise as a result of his confession. I would further affirm the legal conclusions drawn below because the prosecution did not carry its burden of proving that the defendant knowingly and intelligently waived his constitutionally protected rights under the totality of the circumstances.

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n1 I expressly disagree with the majority's editorialism that in light of the fact that the Fifth Amendment itself protects only against compelled self-incrimination, the requirement of a "knowing and intelligent" waiver of *Miranda* rights is puzzling. [Slip op at 16.]

I further disagree with the dicta following the majority's conclusion. *Id.* As I pointed out in *People v Cheatham*, 453 Mich. 1, 30, 57; 551 N.W.2d 355 (1996), the overarching consideration in *Miranda*-waiver cases is not deterrence, but rather the protection and vindication of constitutional rights. See also *Dickerson v United States*, 530 U.S. 428; 120 S. Ct. 2326; 147 L. Ed. 2d 405; 2000 U.S. LEXIS 4305; 2000 WL 807223 (2000).

I am not puzzled by the Supreme Court's bifurcation of the *Miranda*-waiver analysis, because the voluntariness prong protects aspects of the defendant's rights distinct from the aspects protected by the knowing and intelligent prong. The voluntariness prong of *Miranda* seeks to protect defendants against the compulsion envisioned by the Fifth Amendment. *Moran v Burbine*, 475 U.S. 412, 421; 106 S. Ct. 1135; 89 L. Ed. 2d 410 (1986). The knowing and intelligent prong ensures that a suspect understands the substantive protections of the Fifth Amendment as incorporated into the Fourteenth Amendment. *Id.* For these reasons, I do not share the majority's hesitation to follow case law requiring that a defendant be able to understand his rights as a prerequisite to waiving them.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*647]** **[***38]**

I

A. Standard of Review

I agree with the majority that "we review for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights . . . ." Slip op at 7, citing *People v Cheatham*, 453 Mich. 1, 30; 551 N.W.2d 355 (1996). I further agree that questions of law are reviewed de novo. Slip op at 7. Yet, the majority opinion is incomplete to the extent that it: (1) fails to fully explore the burden of proof that must be borne by the prosecution, and (2) fails to distinguish the factual issues from the legal issues in this case.

B. Prosecutorial Burden

The majority announces that "the prosecution has the burden of establishing a valid waiver by a preponderance of the evidence." Slip op at 13. Although I am willing to proceed under the assumption that the burden of proof is by a preponderance of the evidence because the prosecution failed to prove its case even by a preponderance, I do not believe that the applicable burden is as clearly established as the majority implies.

The preponderance test employed by the majority springs from *Colorado v Connelly*, 479 U.S. 157, 168; **[***39]** 107 S. Ct. 515; 93 L. Ed. 2d 473 (1986), a United States Supreme Court case discussing the voluntary waiver of constitutional rights protected by *Miranda*. Traditionally, constitutional waiver cases place a "heavy" burden on the prosecution. *Johnson v Zerbst*, 304 U.S. 458, 464; 58 S. Ct. 1019; 82 L. Ed. 1461 (1938); see, also, *Colorado v Spring*, 479 U.S. 564, 581; 107 S. Ct. 851; 93 **[*648]** L. Ed. 2d 954 (1987) (Marshall, J.,

dissenting), and *Connecticut v Barrett*, 479 U.S. 523, 531; 107 S. Ct. 828; 93 L. Ed. 2d 920 (1987) (Brennan, J., concurring). Our Supreme Court has also recognized that, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights, and that we 'do not presume acquiescence in the loss of fundamental rights.'" Johnson at 464.

To date, the United States Supreme Court has never expressly declared that a preponderance standard should be applied in knowing and intelligent waiver cases. In *Connelly* itself, Justice Brennan's dissent reiterated the fact that Connelly was a voluntariness **[***40]** case, *Connelly* at 187-188, and explained why the imposition of a preponderance standard was undesirable: **[**165]**

In holding that the government need only prove the voluntariness of the waiver of *Miranda* rights by a preponderance of the evidence, the Court ignores the explicit command of *Miranda*: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set high standards of proof for the waiver of constitutional rights, and we re-assert these standards as applied to in-custody interrogation." . . . In recognition of the importance of the Due Process Clause and the Fifth Amendment, we always have characterized the State's burden of proof on a *Miranda* waiver as "great" and "heavy." [479 U.S. at 184-185.]

Although *Connelly's* imposition of the preponderance standard arguably extends to knowing and intelligent waiver cases, the proposition is certainly open to debate. In announcing the preponderance standard **[*649]** in *Connelly*, **[***41]** the Supreme Court examined cases involving the exclusion of evidence, and built upon other cases examining voluntary waiver. *Connelly* at 167-169. The United States Supreme Court's recent recognition that Miranda was a constitutional decision, n2 lends some support that *Connelly's* rationale should not be extended to knowing and intelligent cases.

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n2 See *Dickerson,* n 1 *supra* at 120 S. Ct. 2334, n 4; 2000 WL 807223 *7, n 4.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The majority is correct that the Supreme Court stated that "whenever the state bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the state need prove waiver only by preponderance of the evidence." *Connelly* at 168. The entirety of the Supreme Court's statement was as follows, however, "We now reaffirm our holding in Lego: Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* **[***42]** doctrine, the State need prove waiver only by a preponderance of the evidence." *Connelly* at 168, referring to *Lego v Twomey*, 404 U.S. 477; 92 S. Ct. 619; 30 L. Ed. 2d 618 (1972). In *Lego*, the inquiry focused solely on voluntariness. There, the Supreme Court held: "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake." *Id.* at 489.

[*650]

C. Factual Issues v Legal Issues

Although the majority recognizes that the trial court's findings of fact must be reviewed for clear error, nowhere does the majority apply the standard it announces. Instead, the opinion proceeds with an open-ended analysis after concluding that "the meaning of 'knowing and

intelligent' is a question of law." Slip op at 8. After broadly categorizing the entire discussion as a legal issue, the majority then conducts an independent review of the trial court's factual findings. See slip op at 18-25.

Given the broad range of issues that may **[***43]** be considered factual, I am not prepared to summarily conclude that all questions remotely related to the knowing and intelligent inquiry are legal in nature. Rather, it is incumbent upon us to laboriously separate the factual issues from those issues that are purely legal, and to separate legal conclusions from factual inferences.

1. Factual Issues

In the present case, the trial judge weighed the credibility of the competing witnesses and found "the testimony and reports of Dr. Mogy and Dr. Grisso to accurately reflect the nature of Defendant's mental state at the time," and that **[**166]** "there is no question that Defendant, at the time of his arrest, was psychotic." The trial court also expressly stated:

The nature and subject matter of Defendant's delusions prevented rational comprehension of the specific topic at issue--his right to counsel and his right against self-incrimination. His delusional process required self-incrimination to effectuate freedom. **[*651]**

As previously noted, in *Miranda*-waiver cases, findings of fact made by the trial judge are entitled to deference unless clearly erroneous. In order to overturn a trial judge's findings as clearly erroneous, we must be left **[***44]** with the "definite and firm conviction that the trial court made a mistake." *People v Burrell*, 417 Mich. 439, 449; 339 N.W.2d 403 (1983). I am left with no such conviction in this case. Clearly, the trial judge weighed the competing testimony, considered the credibility of the expert witnesses, and made a reasoned interpretation after thorough deliberation. Nothing in the record convinces me that the trial court made a mistake. I would, therefore, hold that the trial judge's factual findings were not clearly erroneous.

2. Legal Issues and Premises

Because the trial judge's findings were not clearly erroneous, the key legal question in this case is whether the defendant could knowingly and intelligently waive his rights despite the delusion causing him to believe that God would set him free as a reward for confessing. As stated previously, questions of law are reviewed de novo. Yet, the concept of de novo review does not relieve this Court of its duty to operate within the constitutional parameters.

It is well settled that our examination of *Miranda*-based knowing and intelligent waiver cases must proceed with a consideration of the totality **[***45]** of the circumstances. See *Moran v Burbine*, 475 U.S. 412, 421; 106 S. Ct. 1135; 89 L. Ed. 2d 410 (1986). The United States Supreme Court has expressly stated: **[*652]**

The determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. [*Fare v Michael C*, 442 U.S. 707, 724-725; 99 S. Ct. 2560; 61 L. Ed. 2d 197 (1979).]

In *Fare*, the Supreme Court examined whether a juvenile defendant waived his Fifth Amendment rights as protected by *Miranda* even though he asked to see his probation officer. In holding that the waiver determination must be made pursuant to a totality of the circumstances inquiry, the Supreme Court stated:

There is no reason to assume that such courts ----especially juvenile courts, with their

special expertise in this area ----will be unable to apply the totality-of-the circumstances analysis **[***46]** so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. [*Id.* at 725.]

The Supreme Court then went on to apply the totality of the circumstances test, and concluded that "no special factors indicate that respondent was unable to understand the nature of his actions" and that "there is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be." *Id.* at 726. **[*653]**

The majority summarily cites *Fare* for the proposition that courts should examine **[**167]** *Miranda* waivers objectively. Although the totality of the circumstances test has an objective component, I believe that *Fare* clearly explained that courts have the flexibility to consider special factors that may affect waiver. Mental **[***47]** illness fits naturally within the totality of the circumstances test, and it may be a factor tending to indicate that the defendant cannot "understand the rights he [is] waiving, or what the consequences of that waiver would be." *Id.*

D. Application

In the present case, the prosecution argues only: (1) that the trial court clearly erred in its factual findings, and (2) that the law does not require that the defendant be able to comprehend how *Miranda* applies to his own situation. As stated previously, I am unconvinced that the trial judge clearly erred. Similarly, I believe that the prosecutor has proceeded under a flawed legal interpretation of *Miranda*. The prosecution has offered nothing to persuade me that mental illness should not be factored into the totality of the circumstances equation. Thus, the prosecutor's case must fail, even by a preponderance of the evidence.

II

Nothing in the majority opinion persuades me that only a literal understanding of *Miranda* is required. Not only does the majority build its case upon a shaky foundation, but it supports its substantive legal arguments with premises that are only tangentially **[*654]** relevant. I see two **[***48]** primary problems with the analysis offered by the majority: (1) it quotes case law only selectively, and (2) it assumes that cases involving mentally ill defendants may be easily analogized to cases involving persons with low intelligence quotas.

A. What the Case Law Says But the Majority Does Not

The majority begins its knowing and intelligent waiver analysis by stating that, though determining whether a suspect's waiver was knowing and intelligent requires a degree of subjective inquiry, n3 suspects need not understand the consequences of waiver. Slip op at 15-16. Yet the quotations the majority selects are taken from opinions that leave open the possibility that the defendant's level of comprehension about the consequences of waiver will be relevant. None of the authority cited by the majority holds that a waiver will be valid per se if the defendant is able to literally comprehend *Miranda*, even though that defendant may be unable to apply the literal meaning of *Miranda* to his own situation.

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n3 Curiously, the majority levies the charge that I somehow interpret the majority opinion as

suggesting "that a suspect's subjective mental state plays no role in a determination whether there was a knowing and intelligent *Miranda* waiver." Slip op at 13, n 10. Obviously, that is not the case.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***49]

The majority erroneously concludes that the trial court misapplied *Cheatham* by requiring that the defendant be able to understand how his *Miranda* rights applied to his situation. The majority quotes *Cheatham* for the proposition that, "'to knowingly waive *Miranda* rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly **[*655]** explained to him.'" Slip op at 15, quoting *Cheatham* at 28. However, when the aforementioned quotation is taken in the context of the entire *Cheatham* opinion, the quotation does not so easily support the majority's holding.

As a preliminary matter, it is important to note that the *Cheatham* Court did not hold that courts need not ever determine whether a defendant understood the consequences of his actions. Rather, *Cheatham* held only that defendant Cheatham sufficiently understood his rights, and that he had the capacity to provide a valid waiver. 453 Mich. at 27. Unlike the present case, *Cheatham* focused on the **[**168]** defendant's intellectual capacity, and the analysis of that intellectual capacity was implicitly tied to the defendant's understanding of **[***50]** his own circumstances. The *Cheatham* excerpt quoted by the majority was taken from the middle of *Cheatham's* totality of the circumstances analysis. When read in context, it is apparent that the Court was examining both whether the defendant literally understood the *Miranda* warnings, as well as whether he understood the meanings of the words as applied to his own situation.

Similarly, the majority's citation of *Colorado v Spring, supra,* provides little support for the proposition that the defendant must only possess a literal understanding of the *Miranda* warnings in order to provide a knowing and intelligent waiver. While the *Spring* Court explicitly stated that "the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege," 479 U.S. at 574, it also stated, "In this case there is no allegation that Spring failed to understand the basic privilege guaranteed by **[*656]** the Fifth Amendment. Nor is there any allegation that he misunderstood the consequences of speaking freely to the law enforcement officials." 479 U.S. at 575. Thus, *Spring* **[***51]** implicitly recognizes that, if a defendant does misunderstand the consequences of speaking freely to law enforcement officials, then his *Miranda* waiver could be considered invalid under the knowing and intelligent prong. A conclusion that a defendant need not understand every consequence of confessing is different than a conclusion that the defendant must understand the most basic consequences of confessing. This case presents exactly the type of situation envisioned but not presented in *Spring* ----the defendant misunderstood the consequences of speaking freely to the police. He lacked a basic comprehension of what could actually occur if he waived his rights.

The trial court's analysis comports with Supreme Court observations that a defendant must possess at least a basic understanding of his rights under the totality of the circumstances. See, e.g., *Moran* at 421. Although the defendant may have been able to understand what it means to be silent, to have a lawyer present, and to have his statements used against him, his decision to confess was directly tied to his delusion that God would control the police and set him free. It is, therefore, questionable whether the defendant **[***52]** ever truly comprehended the actual meaning of the *Miranda* warnings.

As I wrote in *Cheatham*, "the ultimate focus for purposes of the knowing and intelligent prong remains on the level of the suspect's comprehension." 453 Mich. at 56. I further agree with Justice Mallett's *Cheatham* assessment that "the validity of a waiver **[*657]** does not depend on a verbatim recitation of the *Miranda* litany, but rather depends on an actual

understanding on the part of the individual of his *Miranda* rights and the consequences of waiving them." 453 Mich. at 59. Even the *Cheatham* lead opinion recognized that the knowing and intelligent prong of *Miranda* focuses "on the knowledge of the accused irrespective of improper police behavior," 453 Mich. at 18, and that courts must evaluate whether the defendant has the capacity to understand the warnings given to him under all the circumstances. 453 Mich. at 27.

B. What the Majority Says But the Case Law Does Not

The majority secondarily finds support for its holding from the proposition that "a defendant need not have a wise or shrewd basis for waiving *Miranda* rights for the waiver to be valid." Slip op at 22. The majority accurately **[***53]** points to precedent providing that the defendant cannot successfully challenge a waiver as invalid on the basis that he failed to realize that his decision was imprudent. Slip op at 22-24. n4 **[**169]** However, I fail to see how wisdom is relevant to this defendant's confession. This case differs from the cases offered in support of the majority opinion in that the defendant's waiver defense springs not from a lack of wisdom, but from an inability to fully understand that the dictionary meaning of the *Miranda* warning would actually apply to his own circumstances. The trial court held that his delusions about the consequences of his actions brought about his confession. No **[*658]** amount of information or wisdom would have altered the delusion compelling the defendant to confess. Even a fully informed person or a person with a genius level intelligence quotient can suffer from a delusional perception of reality. Mental illness and shrewdness are simply not equivalent concepts.

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n4 Citing *Cheatham, Spring,* and *Connecticut v Barrett,* 479 U.S. at 525-526.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***54]**

III

The prosecutor has failed to carry its burden that this defendant provided a knowing and intelligent waiver. Similarly, the majority has failed to persuade me that its conclusions are supportable. I am not prepared to sign an opinion that narrows *Miranda's* knowing and intelligent prong to the point of near extinction, especially when the opinion only pretends to hide behind well-established principles.

I would hold that the totality of the circumstances test allows a determination whether an individual defendant's mental illness precludes him from knowingly and intelligently waiving his rights. Here, the defendant's delusional episodes vitiated his ability to knowingly and intelligently waive his rights. I would, therefore, affirm the decision of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

The Detroit News October 5, 2000 Thursday No dot Edition

October 5, 2000 Thursday No dot Edition

SECTION: OPINION PAGE; Pg. 15A

LENGTH: 511 words

HEADLINE: State's high court justices do make law

BYLINE: N. O. Stockmeyer, Jr.

BODY:
What do the justices of the **Michigan** Supreme Court do all day? Campaign literature on behalf of the three members of the court running for election this fall might lead voters to assume that justices spend the majority of their working hours enforcing legislation. And avoiding making law.

In the GOP newsletter "Victory Line," Justice Clifford Taylor describes his view of the court's role as follows: "The court tries to enforce the law and not meddle with the Legislature's job."

Justice Steven Markman says "our job is to uphold the law, not change it." And **Justice Robert Young** "believes that the judicial branch should interpret the law and not make the law."

This emphasis on legislation as the source of our law overlooks the fact that **Michigan,** like almost all states but Louisiana (a "code" state), is a common-law jurisdiction. And in a common-law jurisdiction, the members of the state's highest court have the authority, and indeed the duty, to "make law." The fact is, they do it all the time.

What is meant by "common law?" The common law, which we inherited from England, is simply the accumulation of judicial precedent based on the inherent power of the courts to declare law where no statute or constitutional provision controls. The common law of a jurisdiction develops on a case-by-case basis, with legal issues decided as particular legal problems arise.

U.S. District Court Judge Avern Cohn was on the mark in stating recently in a lecture at the University of **Michigan** Law School that "the vast majority of the law that governs us is the common law, judge-made law." And that's a good thing.

We should all be thankful that for the most part our conduct is governed by, and our legal rights and remedies flow from, the common law rather than legislation. Legislators are good at passing laws but poor a t updating or repealing them as conditions change. They're more interested in planting seeds than cultivating the garden.

We're all familiar with periodic news stories about hopelessly outdated laws that are still on

the statute books. Even the conservative Mackinac Center for Public Policy in Midland has criticized the Legislature for failing to repeal outdated laws that are "often silly and sometimes destructive."

In contrast, because it evolves, the common law is self-cleansing. A recent Detroit News editorial called the process "pruning precedents."

Brown v. Board of Education and Roe v. Wade, although constitution-based, are very much in the common law tradition. They represent judge-made law, and would so even if they had been decided the other way.

So judging involves much more than enforcing the will of the Legislature. Judges, particularly at the **Michigan** Supreme Court level, make law continuously as they tend the garden of the common law, advancing or retarding its growth.

Voters this November need to know more about the candidates for our Supreme Court than whether they will strictly interpret legislation. They need to ask in what direction will the candidates take **Michigan's** common law.

LOAD-DATE: November 17, 2002

The Associated Press State & Local Wire October 21, 2000

The Associated Press State & Local Wire

October 21, 2000, Saturday, BC cycle

SECTION: State and Regional; Political News

LENGTH: 1840 words

HEADLINE: Candidates discuss Supreme Court election issues

BYLINE: By The Associated Press

BODY:
The Associated Press asked Republican Supreme Court nominees Stephen Markman, Clifford Taylor and Robert Young Jr. and Democratic nominees E. Thomas Fitzgerald, Marietta Robinson and Edward Thomas their views on eight questions relating to the election. Here are their replies, with candidates in alphabetical order.

Libertarian nominees Jerry J. Kaufman, David H. Raaflaub and Robert W. Roddis also are running.

QUESTION: What is your take on how the Supreme Court races have gone this year?

-Court of Appeals Judge E. Thomas Fitzgerald: "The nastiness of the campaign, it has no place in a judicial race. I'm appalled by it. ... It just tears down the system from the top down.""

-Supreme Court Justice Stephen Markman: "The members of this court have been accused of ... being corrupt and politicizing the court. ... It's doing great potential damage to the court, and great potential damage to the whole judicial system in **Michigan.**"

-Attorney Marietta Robinson: "None of us who are running fall into any other category than being extremely well-respected in our professions. ... I didn't expect the outright lies. I expected stretches and I expected half-truths. ... I think it's only going to get worse."

-Supreme Court Justice Clifford Taylor: "The thing that is distinguishing about this race is the huge number of lies that are being told about the court. The opponents and the opponents' supporters - particularly the rich personal injury lawyers - will say and do anything to get elected."

-Wayne County Circuit Court Judge Edward Thomas: "I've been kind of intrigued by the nastiness of the (**Michigan** Republican Party) ads. ... Those ads are extremely deceptive, misleading, untruthful and they border on slanderous."

-Supreme Court **Justice Robert Young** Jr.: "I find this a shockingly vulgar and ugly campaign that's doing a disservice to the public rather than educating the public to the very major philosophical differences between me and my opponents."

QUESTION: Should the current system of electing Supreme Court justices be kept or changed?

-Fitzgerald: Kept. "I don't think the people will ever give up their right to elect their judges. What I'd like to see is a change in campaign finance. I'd like to see a state checkoff on the state income tax form rather than (Supreme Court candidates) raising money."

-Markman: Changed. He favors letting governors appoint justices from a list prepared by an independent legal group, with confirmation by the state Senate and nonpartisan elections for those who want to retain their seats. "That would be one reform I think would be pretty successful."

-Robinson: Changed. She favors letting governors appoint justices from a list prepared by an independent legal group, with confirmation by the state Senate and nonpartisan elections for those who want to retain their seats. "We have the worst of both worlds in **Michigan** right now because the appointments that are made by Governor Engler have no protective measures built in."

-Taylor: Changed. He favors letting governors appoint justices to a single 14-year term, with confirmation by the state Senate. "People have a pretty good idea of what kind of people their local judges are and what kind of a job they've done. That's generally missing at the appellate level."

-Thomas: Kept. "Until something comes along that can meet constitutional scrutiny, things are just going to have to stay the way they are. I don't see ... where there could be an appointive system that would realize the needs of impartiality and engender trust both among the legal profession ... (and) community."

-Young: Changed. He favors letting governors appoint justices to a single 14-year term, with confirmation by the state Senate. "I've been driven to the conclusion that contested races are pretty damaging to the integrity of the judicial system."

QUESTION: Should Supreme Court candidates, now listed on the ballot as nonpartisan, be listed with the name of the party that nominated them?

-Fitzgerald: Yes. He favors either listing the name of the nominating party, or nominating Supreme Court candidates by having them collect petition signatures. "It doesn't make much sense the way we're doing it."

-Markman: "I oppose that. That would just give further weight to the argument that judges

are just doing partisan politics by another name. I would rather not do anything that would give that a partisan coloration."

-Robinson: Yes. "Certainly they should be if we're going to continue this system we have where the parties nominate you."

-Taylor: No. "It conveys to people that you get a Republican court or a Democratic court. ... If you start to list us by political parties, you encourage that thinking."

-Thomas: "No. I've been a judge for almost 22 years now and I pride myself ... that I am nonpartisan. If we list ourselves on the ballot as Republicans and Democrats, the whole idea of impartiality goes out the window."

-Young: Yes. "If we're going to have a full-bore contested election, I think party might be a good proxy for people to understand who they are voting for." Without some clue, he says it's like people who need brain surgery being asked to pick their neurosurgeon based on 30-second ads.

QUESTION: Should Supreme Court justices continue to have "incumbent" listed after their names on the ballot?

-Fitzgerald: Yes. He notes that all judicial incumbents have "incumbent" after their name. "When I run for the Court of Appeals I like it. When I'm running as the (Supreme Court) challenger, I don't like it."

-Markman: Yes. "I would just keep the status quo. I don't think the system is worth changing just for that single change."

-Robinson: No. "I think it would be a wise change. I don't see any benefit to the people of the state of **Michigan** in having the incumbency designation."

-Taylor: Yes. "It has tended to make these jobs attractive to good practitioners who don't want to engage in the hurdy-gurdy of the political process. It gives them a little step up."

-Thomas: Yes. "It would benefit me if he (opponent Stephen Markman) didn't have incumbent on the ballot. As a circuit judge running, it's a benefit to have it in front of my name."

-Young: Yes. "Since the public has virtually no idea what we do and who we are, especially at the appellate levels, ... (designating the incumbent) gives some information to the public."

QUESTION: Should Supreme Court candidates give voters a clearer idea of their judicial philosophy and beliefs before the election?

-Fitzgerald: Yes. "I think the voters deserve to know. But we have the canons of ethics and we should not prejudge anything. My attitude is a judge shouldn't be pro-anything."

-Markman: "Absolutely. ... The public is entitled to know what kind of philosophical point of

view he'll bring to bear in making his decisions."

-Robinson: Yes. "They (the canons of ethics) are pretty loose in terms of letting us discuss issues."

-Taylor: Yes. "I have spent the better part of three years giving speeches around the state on my judicial philosophy."

-Thomas: "As much as we can, yes, but when it comes to specific issues where there may be a lawsuit that comes before the court, it would not be appropriate."

-Young: "Absolutely. ... We can't speak to the issues of the day, because they might come before us. That (judicial philosophy) is the only thing basically we can talk about."

QUESTION: Should it matter what a Supreme Court candidate's personal views are on issues such as abortion or tort reform?

-Fitzgerald: No. "A judge should be completely fair and impartial. When you start going one way or the other with your innermost feelings, you're doing wrong by those who have gone before you."

-Markman: "No. A judge is obligated to abide by the law. ... Any good justice is sometimes going to be making decisions that involve the interpretation of statutes that he or she disagrees with."

-Robinson: No. "I don't think it should, because I think if a justice is doing what he or she should be doing as a justice, his or her personal views shouldn't matter."

-Taylor: No. "It shouldn't matter under my view of a judge because when tort reform came before a court, the only question a judge should have is, 'Is the law constitutional?"'

-Thomas: No. "Personal beliefs should not come into play when you make decisions, or personal prejudices or biases. None of those should come into play when you make decisions."

-Young: No. "When the Legislature has made the primary policy choice, my personal views on that are irrelevant. My job is to enforce ... what the Legislature's policy is."

QUESTION: Should outside groups be allowed to run campaign ads on behalf of Supreme Court candidates?

-Fitzgerald: Yes, because it's required under the First Amendment. But he would prefer that outside groups stay out of judicial races. "Personally, I would like to have every candidate responsible for his own publicity and whatever."

-Markman: Yes. "Under the First Amendment, it's hard to do anything about those kind of (outside) campaigns. ... It's a very difficult situation when a candidate is defined less by his own campaign than by the campaigns of outside organizations."

-Robinson: No. She would support some kind of change. "If there's any place in our system where we should have a complete change in campaign laws," it is in the court races.

-Taylor: Yes. "The most important part of the First Amendment is political speech. It may be fractious and at times off target, but we have a great freedom to speak our minds."

-Thomas: "Because of the First Amendment, I have to say yes. I prefer that they not get involved to the extend that some of them have gotten involved this time, very visibly."

-Young: Yes. "They have a constitutional right to do so. I would prefer that all those who support my opponents not do so ... (but) that's a very important part of a robust democracy."

QUESTION: Should lawyers be allowed to contribute to **Michigan** Supreme Court candidates?

-Fitzgerald: "Certainly. It's a First Amendment right. ... (But) I don't even want to know who gives me money and who doesn't. It gives ... the appearance of impropriety."

-Markman: Yes. "Lawyers ought to be able to contribute in the same way as any other members of the public. But I do think there's a problem in the huge amounts of money that are being introduced into judicial campaigns. They lend an appearance of impropriety."

-Robinson: Yes. "If you're going to have campaigns to which the public contributes, I don't know how you do it without lawyers involved."

-Taylor: "Surely. They have a First Amendment right to do so."

-Thomas: Yes. "It's for First Amendment reasons. Lawyers know who the judges are better than anybody."

-Young: "Absolutely. ... The United States Supreme Court has recognized that being able to contribute to a campaign is part of" rights held by all citizens.

GRAPHIC: AP Photos

LOAD-DATE: October 22, 2000

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:31 PM EDT

Counsel's Office, White House

Kavanaugh, Brett

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The Associated Press State & Local Wire November 1, 2000

The Associated Press State & Local Wire

♦ View Related Topics

November 1, 2000, Wednesday, BC cycle

SECTION: State and Regional; Political News

LENGTH: 192 words

BYLINE: By The Associated Press

BODY:
The six major party candidates for the **Michigan** Supreme Court have raised about $5.6 million in their race for three seats on the court. Here's what the candidates reported they've raised and spent through Oct. 22. Taylor and Robinson are running for an eight-year term while Markman and Thomas are running for a four-year term and Young and Fitzgerald are running for a two-year term.

Justice Clifford Taylor (Republican)

-Raised: $1,157,279

-Spent: $1,043,467

-On hand: $113,812

Detroit attorney Marietta Robinson (Democrat)

-Raised: $988,592

-Spent: $954,031

-On hand: $34,561

Justice Stephen Markman (Republican)

-Raised: $1,083,823

-Spent: $976,228

-On hand: $107,595

Wayne County Circuit Court Judge Edward Thomas (Democrat)

-Raised: $701,292

-Spent: $634,682

-On hand: $66,610

Justice Robert Young Jr. (Republican)

-Raised: $1,117,911

-Spent: $1,011,385

-On hand: $106,526

Appeals Court Judge E. Thomas Fitzgerald (Democrat)

-Raised: $567,012

-Spent: $506,315

-On hand: $60,697

LOAD-DATE: November 2, 2000

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:22 PM EDT

The National Law Journal, November 6, 2000

November 6, 2000

SECTION: ELECTION 2000; State by State; Pg. A8

LENGTH: 382 words

HEADLINE: Dems attack GOP high court justices;
MICHIGAN

BYLINE: M. L. ELRICK

HIGHLIGHT:
Judicial races are attracting more money than ever, as trial lawyers, unions and business groups try to elect friendly judges to state courts.

BODY:
EVEN TREES have taken sides in the state Supreme Court race here, possibly the most expensive and contentious in **Michigan** history.

Backers of three Democratic challengers ran TV spots accusing three Republican incumbents of being anti-family for ruling in favor of businesses. Cartoon trees alongside a yellow brick road chanted, "Markman and Taylor and Young, oh my!" They alleged that justices Stephen Markman, Clifford Taylor and Robert Young Jr. had taken hundreds of thousands of dollars from businesses, ruling in their favor 82% of the time.

Not to be outdone, the state Chamber of Commerce, using a *Detroit Free Press* analysis that found the Democrats' ad misleading, spent $ 200,000 on commercials showing a man in a tree costume apologizing for the other trees.

In another instance in the nominally nonpartisan race, the state Democratic Party suggested that Justice Young might have dissented in *Brown v. Board of Education,* which overturned school segregation. Justice Young threatened to sue, calling the allegation "an attempt to create an ugly, racist campaign to impugn me as **Michigan's** only sitting African-American justice."

The Republican candidates have raised a reported $ 1.57 million, slightly less than the $ 1.6 million the Democrats have collected. The challengers are attorney Marietta Robinson. Court of Appeals Judge Thomas Fitzgerald and Circuit Court Judge Edward Thomas.

Businesses and the state Chamber have poured money into the race. So have trial lawyers, notably the firm Sommers, Schwartz, Silver and Schwartz, which gave $ 225,000-plus to the Democrats.

Governor John Engler's appointments of the three justices gave the GOP a majority for the

first time in 40 years. The court's 5-2 Republican majority is regarded as highly conservative, but what's at stake lies beyond the courtroom. Re-apportionment is on the next Legislature's agenda. The party in the minority after the elections will almost certainly ask the high court to review whatever plan the majority passes. One lawmaker calls the Supreme Court campaign "a battle for the future of the Legislature."

Hand-wringing over the campaign has included the candidates and a former justice, who complain that the politicization is undermining the court's stature.

GRAPHIC: Photo, **Justice Robert Young** Jr.: When Democrats attacked him, he called it a racist ploy and threatened to file a lawsuit. AP/WIDE WORLD PHOTOS

LOAD-DATE: November 7, 2000

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:19 PM EDT

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)

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The Associated Press State & Local Wire November 8, 2000

The Associated Press State & Local Wire

◆ View Related Topics

November 8, 2000, Wednesday, BC cycle

SECTION: Political News

LENGTH: 467 words

HEADLINE: Incumbents triumph in court race

BYLINE: By MALCOLM JOHNSON, Associated Press Writer

DATELINE: LANSING, **Mich.**

BODY:
An unusually bitter fight for control of the **Michigan** Supreme Court ended with three Republican justices winning re-election.

And while GOP officials exulted at the outcome Wednesday, critics said the election results showed how hard it is to defeat an incumbent justice.

"It continues a conservative majority on the Supreme Court - very, very important in spite of the most fierce assault on the Supreme Court that we've seen in **Michigan** history," said state Republican Chairman Rusty Hills.

"I think our vision, our view of what the Supreme Court should be, is one the majority of people in the state agree with," said **Justice Robert Young** of Grosse Pointe Park. He defeated Democrat E. Thomas Fitzgerald, 52 percent to 38 percent, for a two-year term.

"They want a court that will go back to its role of interpreting the law rather than making it up," Young said. "I wasn't sure what to expect. I hoped the voters would sort through the horrible ads, hideous, vile ads."

As Young won, fellow incumbents Clifford W. Taylor of East Lansing defeated Marietta Robinson 54 percent to 39 percent, for an eight-year term; and Stephen Markman of Mason defeated Edward Thomas, 56 percent to 37 percent, for a four-year term. All the results were with 99 percent of the vote recorded.

The trio of Republican victories meant the slate of conservative justices prevailed against three challengers who portrayed them as supporters of big business and insurance interests.

"I think (the three won) because this is an excellent court," Taylor said. "The kinds of things they said about us, which were lies, were seen as that.

"My hope is that inasmuch they were unsuccessful in their campaign of distortion, misrepresentation and lies, it won't happen again."

Others, however, said the incumbency designation, which appears on the ballot with a justice's name, makes it difficult to unseat an incumbent.

"I think the designation did what it has done" in the past, said Michael Shore, adviser to Fitzgerald. "It makes it difficult to knock off an incumbent.

"I wouldn't take it as an affirmation of their philosophy or service."

Gary Fralick, director of communications for the **Michigan** Trial Lawyers Association, which opposed the GOP incumbents, said both money and the incumbency designation were responsible for the outcomes.

"It proves the power of money," he said. "Clearly the Democratic candidates got outspent. It proves how hard it is to break through with voters."

Bill Ballenger, editor of Inside **Michigan** Politics, said there is no doubt the incumbency designation can be crucial.

"This election proves it is," he said. He said Democrats tried to turn the incumbency label against the three justices by criticizing their rulings, and "It didn't work."

LOAD-DATE: November 9, 2000

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:17 PM EDT

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)

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The Detroit News December 15, 2000 Friday No dot Edition

December 15, 2000 Friday No dot Edition

SECTION: METRO; Chmura; Pg. 5C

LENGTH: 439 words

HEADLINE: Judge appeals his 90-day suspension

BYLINE: Mike Wowk

BODY:
WARREN -- A recommended 90-day suspension without pay for district Judge John Chmura for allegedly racist campaign ads may be too excessive, according to several state Supreme Court Justices.Justices heard oral arguments Thursday in Lansing on a petition by Chmura to reject that recommendation by the **Michigan** Judicial Tenure Commission.

It is the second time the tenure commission has tried to suspend Chmura for misconduct over the literature from his 1996 campaign for 37th District Court in Warren.

One of those ads depicted former Detroit Mayor Coleman A. Young as a Robin Hood carrying taxpayers' money from Warren to Detroit. The ad which discussed a state revenue sharing plan for Detroit said Coleman Young "stole money from Warren taxpayers." Chmura claimed a lawsuit he filed had stopped the money transfer.

The high court's only African American member, **Justice Robert Young,** on Thursday described the ad as "political hyperbole."

"No one over the age of 10 would infer that Coleman Young actually stole money from Warren," **Justice Robert Young** said.

The court took no action Thursday, but will issue a written opinion on the matter in coming months.

Court rules provide that either party can request "re-argument" of any cases orally argued but not decided by July 31, 2001, said Corbin Davis, state Supreme Court clerk.

"They can make us hear it again," Davis said. "(But) we have a very good track record, so it's fairly certain that we will have this decision (before July 31)."

The Supreme Court, in April, threw out the tenure commission's first recommendation to suspend Chmura, but the commission again recommended suspension this past summer. Chmura objected and took it to the high court.

Justice Clifford Taylor attacked a tenure commission finding that the ad -- while factually accurate -- left a false impression with voters.

"We are being asked to plow new ground here," Taylor said. "If I can haul any newspaper into court (for libel) because an article left a false impression, there wouldn't be any newspapers left. All political discourse is conducted in a contentious fashion."

Brian Einhorn, Chmura's lawyer, said the ad, while "distasteful," is not judicial misconduct. He contended that the tenure commission was out to get Chmura. That was denied by Thomas Prowse, the tenure commission's lawyer.

"This impacts the future of judicial campaigns in this state," Prowse said. "The Judicial Tenure Commission takes the view that the decision (to recommend suspension) was necessary if you look at the photos, at the captions and you try to determine what the ad is trying to say."

LOAD-DATE: November 17, 2002

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)

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Lansing State Journal January 17, 2001 Wednesday

January 17, 2001 Wednesday

SECTION: LOCAL; Pg. 1B

LENGTH: 617 words

HEADLINE: Top court probes rain tax refund

BYLINE: Gantert Tom

BODY:
Returning illegal tax to residents not part of lawsuit, some say

By Tom Gantert

Michigan's Supreme Court questioned Tuesday whether Lansing taxpayers should be refunded their share of $13.8 million in the city's illegal rain tax.

' The state's highest court heard arguments - for the second time - in the case of Bolt v. Lansing. In 1998, it ruled Lansing's rain tax was an illegal tax because it wasn't put to a public vote. At the heart of Tuesday's hearing: Should residents get their money back?

A decision is expected in three to six months.

Lansing residents paid the tax for three years, with most residential property owners paying $26 to $120 a year.

A lawyer for resident Alexander Bolt argued that because the Supreme Court ruled the tax illegal it should enforce its 1998 ruling by making the city pay back the tax. The city's attorney said the court already gave Bolt what his lawsuit asked for: an end to the tax.' Bolt sued the city on 1996 to stop the rain tax imposed to pay for a 30-year, $176 million sewer separation project. Lansing is separating storm drains from sewer lines so untreated water doesn't go into the Grand River.

Justices grilled each attorney for about 30 minutes. The court repeatedly asked one of Bolt's attorneys, Frederick Baker, about what the justices perceived as holes in Bolt's case. **Justice Robert Young** Jr. said Bolt never specifically asked for a refund. And Bolt's lawsuit didn't ask that he represent all residents who paid the tax, Chief Justice Maura Corrigan said.' "He didn't ask for relief for the entire city of Lansing," she said. "How do we deal with that? ... That's a huge hole in the lawsuit."

Baker said the case would have been easier to argue had it been a class-action suit but he wasn't involved with the case when it was originally filed.' "When it was brought, a refund was not the issue," Baker said. "It was to stop the tax. This was filed before any taxes were due."

Baker focused Tuesday on the high court's ruling that the city's rain tax was an illegal tax.

"Our argument was to correct the illegal tax. You must refund it," Baker said. "Without a refund, it has not been enforced.'" Justice Elizabeth Weaver said Lansing should refund the money.

"The issue is: Why isn't the city doing what should so obviously be done?" she asked. "This is the city of Lansing. The opinion is clear. It took the money. It made them pay. It is unconstitutional. Now the city should be paying it back."

Samuel McKim, a Detroit lawyer hired by the city, argued that Bolt's lawsuit made no mention of refunds.

"He got what he asked for," McKim said. "There should be no other remedy.'" McKim said Bolt wasn't qualified to represent all Lansing residents who paid the illegal tax because it wasn't a class- action suit.

"You have to comply with the court rules," McKim said.

Lawyer Jeffrey Zoeller filed the lawsuit for Bolt. He said it was a "super technicality" that the complaint didn't specifically ask for a refund.

He said their brief to the Supreme Court in this case asked that it be changed to request money back.

Zoeller said no more lawsuits can be brought against the city because the refund issue has a one-year statute of limitations.

But even if the court rules against Bolt, the refund issue could still be debated in court.

Lansing attorney John Kane filed a class-action suit March 15, 1999, on behalf of four commercial and industrial businesses. The suit asks for refunds of the illegal tax. Kane said the suit doesn't include residents.

Kane is waiting for the Supreme Court's decision to de termine how to proceed.

Contact Tom Gantert at 377-1068 or tgantert@lsj.com.

LOAD-DATE: August 15, 2002

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)

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The Detroit News March 9, 2001 Friday Two dot Edition

March 9, 2001 Friday Two dot Edition

SECTION: NATION WORLD; Pg. 4A

LENGTH: 368 words

HEADLINE: GOP narrows U.S. Atty. search;
Six finalists picked but new round of interviews planned

BYLINE: David Shepardson

BODY:
DETROIT -- **Michigan** Republicans have settled on six finalists for U.S. attorney for the eastern half of the state, but they will hold a new round of interviews later this month.

The six finalists are state Appeals Court Judge Jeffrey Collins; former assistant U.S. attorney Mike Lavoie; assistant Wayne County prosecutor Mike Cox; assistant U.S. attorney Keith Corbett; General Motors attorney Stephen Murphy; and Southfield attorney Robert E. Forrest.

The six will be interviewed at the end of March by U.S. Rep. Joe Knoellenberg.

The **Michigan** GOP House members and Gov. John Engler will then recommend three finalists to the Justice Department. A presidential appointment isn't expected until April.

The search has drawn intense interest among the state's legal community and in top Republican circles. "We have a very strong group of candidates," said Rodger Young, the Southfield lawyer who headed the GOP lawyers' committee that ranked the applicants.

Many of the candidates have strong ties to the delegation and the governor. Cox is the chairman of Knoellenberg's congressional district campaign committee. Corbett is said to be favored by state Supreme Court Chief Justice Maura Corrigan. She declined to comment on Thursday.

Collins is still seen as the front-runner with the backing of Engler, while Lavoie was the top pick of the GOP lawyers' committee, with Collins and Forrest close behind.

Both Lavoie and Murphy also have strong Oakland County support.

Two **Michigan** Supreme Court justices also are being quietly touted for possible federal appointments. **Justices Robert Young** and Stephen Markman have met in Washington with members of the Bush administration.

On Thursday, Young acknowledged meeting with members of the Bush administration, but he insisted it was just a meeting of friends. "I'm not a candidate for any federal office at this point," he said.

Three finalists, too, were named for the U.S. Attorney in western **Michigan.** They are Margaret-Mary Chiara, director of planning and special projects for the **Michigan** Supreme Court; Manistee County friend of the court director Dennis Swain; and Grand Rapids attorney James Redford, a former assistant U.S. attorney.

LOAD-DATE: November 15, 2002

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:14 PM EDT

The Detroit News July 1, 2001 Sunday Two dot Edition

July 1, 2001 Sunday Two dot Edition

SECTION: FRONT; Pg. 1A

LENGTH: 947 words

HEADLINE: Gun-law ruling dilutes voter clout;
Ballot-proofing tactic worries law experts as concealed weapons restrictions relax today

BYLINE: Charlie Cain, and Mark Hornbeck

BODY:
LANSING -- The **Michigan** Supreme Court's decision to block a statewide vote on the new concealed weapons permit law leaves three dissenting justices and others worried about a broad, lasting impact. Citizens' right to petition for a referendum may be undermined forever, they warn.

The sharply split court ruled 4-3 Friday that the new concealed weapon law was exempt from a referendum challenge because a $1-million appropriation to the State Police for gun safety training and trigger locks was attached.

The law takes effect today, letting any qualified applicant get a permit to carry a handgun.

Supreme Court Justice Michael Cavanagh is among those who believe the ruling threatens the right of the people to rein in the Legislature. The ruling brought the "disembowelment of the public's constitutionally guaranteed right to referendum," said his stinging dissent.

"By holding that the money inserted ... circumvents the people's reserved referendum power, the majority holds that the referendum power exists at the Legislature's pleasure. Whenever the Legislature wants to avoid the people's checks on its power, it need only insert some money into a bill."

When the Senate tacked the $1-million spending item onto the concealed weapons bill last year, the tactic bothered veteran Sen. Harry Gast, a Republican from St. Joseph.

"It was intended to make it bulletproof and ballot-proof. As chair of the committee, I took offense to putting an appropriations in the bill because you didn't need it to carry out the intent of the act," recalled Gast, 80, who has led the Senate Appropriations Committee for 16 years. "I didn't sleep for a night or two after."

Gast and other critics saw the move as a blatant attempt to sidestep the public's ability to force a voter review of new laws.

Lawyer Mary Ellen Gurewitz, who has represented the Democratic Party in previous ballot question cases, said: "The idea that the people would reserve the right of referendum and

then give the Legislature the right to take it away is just nonsense. But that's precisely what this court said in its bizarre interpretation."

At Wayne State University, constitutional law professor Robert Sedler said the ruling is "a serious interference with **Michigan's** constitutional commitment to direct democracy."

Michigan joins 32 states

But others welcomed the decision, which let **Michigan** join 32 other states with "shall issue" concealed weapons permit laws.

"The **Michigan** Constitution is very clear: Appropriations bills are not subject to referendum," said Gov. John Engler. "The Supreme Court's decision reflects this."

Supreme Court **Justice Robert Young** notes that this isn't the end of the road for citizens objecting to the law, which most agree will result in tens of thousands of additional gun permits being issued. Opponents can still challenge it by initiative, which requires them to go out again and collect 242,169 petition signatures from registered voters to prompt a vote in November 2002.

Meanwhile, the law will remain in effect -- while it would have been suspended if a referendum vote were pending. Moreover, the referendum needed only 151,000 signatures to get on the ballot.

"The dissent makes the emotionally appealing argument: Why not just let the people decide?" Young said in his concurring opinion. "Simply answered, the people's ability to decide by the referendum process is not infinite. Rather it is circumscribed by the limitations placed in the **Michigan** Constitution."

Leaders of People Who Care About Kids, the coalition that opposes the gun law, vowed Saturday that it will seek an initiative.

"We have 3,800 volunteers who helped us the first time and I can guarantee we will collect the signatures to put this on the ballot in 2002," said David Fink, a West Bloomfield attorney who is the group's Oakland County coordinator.

Call for referendum limits

Peter Ellsworth, a lawyer for gun rights advocates, echoed Justice Young's sentiments about limits on the right of referendum.

"The referendum power is an extraordinary power with serious ramifications, because with the referendum, the law is suspended," he said.

"The court shouldn't err on the side of making it broader. If we give the right to referendum too wide a slot, we open it up to abuse. It's too easy to say people should have a right to vote on everything."

Lawmakers approved the new concealed weapons permit bill last December, arguing that leaving permit approval to the discretion of county gun boards resulted in uneven policies.

Opponents of the gun bill collected 230,000 valid signatures in the first few months of this year to block the July 1 effective date of the law and place a referendum on next year's ballot. The State Board of Canvassers certified the petitions in May.

But gun rights advocates sued, saying the State Police appropriation made the law

referendum-proof. The Court of Appeals disagreed on May 16, citing the "overarching right to referendum," and adding that the $1-million spending item was not related to the "core function" of the State Police.

The legal battle ended Friday with the Supreme Court ruling.

Sen. Gast, an NRA member, got a permit to carry a concealed weapon when he got seven death threats after drafting the state's drug forfeiture and seizure law. But he says he doesn't carry a weapon.

"I'm not necessarily of the idea that in the future every bill that might face a referendum will have an appropriations stuck onto it to make it referendum-proof," he added. "I've been here 31 years and this is the first time I have ever seen it done. If they do, why we'll cross that bridge when we come to it."

LOAD-DATE: November 15, 2002

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
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Date/Time: Wednesday, June 4, 2003 - 5:13 PM EDT

The Detroit News July 1, 2001 Sunday No dot Edition

July 1, 2001 Sunday No dot Edition

SECTION: METRO; Laura BermanLaura Berman; Pg. 1B

LENGTH: 426 words

HEADLINE: Putting guns in the hands of even the good folks a bad idea

BYLINE: Laura Berman

BODY:
Happy Independence Day. You can't legally buy exploding fireworks in this state -- too dangerous -- but you now can pack a pistol while waiting in the school carpool line.

And when I say you, I mean any law-abiding, 21-and-over resident who takes a safety course and doesn't admit to being mentally ill.

That is you, isn't it?

If you want a handgun of your own, you no longer have to explain to a county gun board why you need one. Just because is good enough. And feel free to carry it to the airport, the supermarket and the school carpool line.

Lawmakers expressly included a school grounds provision, so parents don't have to disarm themselves before dropping off their kids or picking them up. Considerate, huh?

The Legislature's wacky idea of a Christmas present -- more handguns for more people -- goes into effect today.

On Friday, the state Supreme Court in effect threw out 267,000 petition signatures that would have placed the concealed weapons law on November's ballot and given voters the right to decide.

The slim 4-3 majority rejected arguments that the Legislature's deliberate effort to make the CCW bill "referendum-proof," as legislators openly boasted while crafting the final bill, was a kind of deception. They ruled that a constitutional provision barring referenda on appropriations bills applies in this case.

With this ruling, the court not only unleashes the new law but also creates a foolproof road map for legislators to write more voter-proof laws.

Power to the people? Definitely not. Or as **Justice Robert Young** explains in his concurring opinion: "The people's ability to decide by the referendum process is not infinite."

No kidding.

For now, **Michigan** joins 32 other states with "shall issue" laws that make a hidden firearm a standard accessory, like underwear. I wonder if the Founding Fathers understood -- back in pre-Glock-to-go times -- that democracy would one day mean a handgun in every pocket and purse.

Or that freedom means good guys carrying guns, because you just never know when you're going to run into a bad guy.

For the law's opponents, it's back to the drawing board: A new petition drive to raise 217,000 signatures for a 2002 initiative that is likely to ask voters to approve another, more restrictive law.

But the CCW law can't be stopped or repealed by voters. So the process gets more complicated.

Still, as Young also said in his opinion: "The traditional means of voter sanction remain recall and the ballot box."

Brave words. Justice Young is up for re-election in 2002.

LOAD-DATE: November 15, 2002

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
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Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)

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The Associated Press State & Local Wire July 3, 2001

The Associated Press State & Local Wire

July 3, 2001, Tuesday, BC cycle

SECTION: State and Regional

LENGTH: 358 words

HEADLINE: Supreme Court turns down prisoner's lawsuit

BYLINE: By DEE-ANN DURBIN, Associated Press Writer

DATELINE: LANSING, **Mich.**

BODY:
In a case that could limit prisoner lawsuits, the **Michigan** Supreme Court has ruled that an inmate who slipped and fell in the shower of the Genesee County Jail can't hold the county liable for his injuries.

In a 4-2 decision released Tuesday, the Supreme Court said Chester Brown could not sue because of governmental immunity laws.

Those laws state that governments are immune from liability unless an accident occurs in a building that is open to the public. Plaintiffs also must prove that a dangerous condition existed in the building.

Brown argued that the jail is a public building, and that the county should have known about a drainage problem that let water collect on the floor. Two courts initially sided with the jail, pointing out that the shower wasn't open to the public.

But the **Michigan** Court of Appeals overturned those rulings in 1998, saying the jail itself is open for use by members of the public.

The Supreme Court overturned that appeals court decision. In her opinion for the majority, Chief Justice Maura Corrigan said the jail is a public building, but Brown shouldn't be considered a member of the public.

"Unlike a person who enters a jail to meet with an inmate, make a delivery, or apply for a job, an inmate does not visit a jail as a potential invitee," she wrote. "Instead, inmates are legally compelled to be there. Inmates thus are not within the class of persons the Legislature intended to protect."

Concurring in Corrigan's opinion were **Justices Robert Young,** Elizabeth Weaver and Stephen Markman.

In a dissenting opinion, Justice Michael Cavanagh said the decision was another case of the

GOP-dominated court overturning precedent. He quoted from a 1971 Supreme Court decision in which the court said a prisoner "is a member of the community whether in or out of jail."

"The plurality completely ignores the fact that this court has historically permitted suits arising out of prisoner injuries to be brought under the public building exception," Cavanagh wrote.

Justice Marilyn Kelly agreed with Cavanaugh's dissent. Justice Clifford Taylor didn't participate in the decision.

LOAD-DATE: July 4, 2001

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:12 PM EDT

National Review July 22, 2001

National Review

July 22, 2001

SECTION: National Review Online; Guest Comment

LENGTH: 884 words

HEADLINE: People, Not Judges, Make Laws

BYLINE: By Michael K. Barnhart & Diane Katz; Mr. Barnhart is a public-affairs consultant and instructor of political science. Ms. Katz is an editorial writer for The Detroit News.

BODY:
Michigan became ground zero in the gun wars this month after the state supreme court ruled that the people, not judges or bureaucrats, should settle a contentious policy dispute over concealed-weapon permits. In so doing, the justices have restored to citizens a much-needed measure of civic responsibility and set a fine example for other states to follow.

That judicial restraint is headline-grabbing news is all too telling. The conceptual interpretation of statute has become so systematic that we are simply amazed when judges defer their will to a plain reading of the law. ("Astounded" by the decision, for example, one local scribe griped in the capitol newspaper that citizens ought not be allowed to elect conservative judges.)

But in seven straightforward paragraphs, the **Michigan** supreme court refused to contort the state's constitution to appease the antigun lobby. As a result, a true reading of public sentiment on the querulous issue of concealed weapons is now possible - just as the framers intended.

The case involves **Michigan** Public Act 381, which requires county gun boards as of July 1 to issue a permit to carry a concealed weapon to any law-abiding citizen at least 21 years of age with no history of mental illness. Applicants must first complete a gun-safety course, and weapons are banned from schools, churches, malls and public accommodations where alcohol is served.

The **Michigan** legislature isn't brimming with gun nuts. Such "shall issue" statutes are becoming increasingly popular nationwide as citizens successfully challenge the political cronyism that long has corrupted the permit process.

Michigan lawmakers, in crafting PA 381, anticipated trouble from gun-control groups like "Million Moms March" and "People Who Care About Kids." Consequently, they invoked a provision in the state Constitution that prohibits a voter referendum on any act featuring an appropriation to a state institution (the general purpose of which is to prevent delay and uncertainty from clouding the state's financial obligations.) In this case, the shall-issue measure appropriated $1 million to the **Michigan** State Police to create and maintain a database of permit applicants as well as to distribute safety devices.

The tactic, while crafty, did not rob opponents of a political remedy. They were free, and remain so, to overturn the law through the largely unrestricted voter initiative process. Or they can target pro-gun legislators at the ballot box.

But predictably outraged, the "Moms" and their kid-caring allies launched a petition drive to delay implementation of the new law subject to a referendum next year. And despite the unambiguous constitutional language against just such a move, the Board of State Canvassers on May 21 declared the petitions sufficient.

The **Michigan** Court of Appeals likewise opted to ignore the state constitution and the will of the people as expressed through their elected representatives. "(E)ven if we were to conclude that the statutory expenditures constituted appropriations for state institutions as contemplated by (the constitution), we would nevertheless hold that the overarching right of the people to their 'direct legislative voice' ... requires that PA381 be subject to referendum."

But in a stunning rebuke to this judicial arrogance, the state supreme court last week overturned the lower court. Said Justice Stephen Markman: "(T)he court of Appeals has, without warrant, substituted its own judgment concerning how the constitution ought to read in place of the judgment of those who actually proposed and ratified the constitution. ... I would respectfully suggest that the "overarching right of the people" is to have the constitution that they have ratified given respect and accorded its proper meaning."

To do otherwise, advised **Justice Robert Young,** would make the constitution "no more than a Rorschach exercise in which judges project and impose their personal views of what the constitution should have said."

On July 1, then, gun owners by the thousands formed long lines before daybreak outside county offices to submit concealed carry applications.

Fair-minded people may disagree on the wisdom of "shall-issue" laws. (Data indicate, however, that states with liberal CCW permitting enjoy lower crime rates.) But there's no disputing that judicial activism undermines the most fundamental principles of American democracy. By refusing to indulge in such a power grab, the **Michigan** supreme court has performed a valuable service for both gun owners and their most ardent foes.

Making policy from the bench effectively neutralizes citizens' civic participation. Whereas a ballot initiative promises not only to engage citizens in the policy debate but to respect their right to determine the outcome as well - an essential exercise for the continued health of the republic.

Antigun groups may ultimately succeed in overturning Public Act 381. But they'll have to convince a majority of **Michigan** voters - not just a handful of judges - on the merits of their ideas, not just the strength of their political influence. To have circumvented the role of citizens by judicial edict would have proved far more dangerous to self-government than any gun concealed in anybody's pocket or purse.

LOAD-DATE: July 24, 2001

*464 Mich. 359, *; 630 N.W.2d 297, **;*
*2001 Mich. LEXIS 1144, ****

MICHIGAN UNITED CONSERVATION CLUBS, MICHIGAN COALITION FOR RESPONSIBLE GUN OWNERS, ROSS DYKMAN, DAVID K. FELBECK, and CORRIE WILLIAMS, Plaintiffs-Appellants, v SECRETARY OF STATE and STATE BOARD OF CANVASSERS, Defendants-Appellees, and PEOPLE WHO CARE ABOUT KIDS, Intervening Defendant-Appellee.

No. 119274

SUPREME COURT OF MICHIGAN

464 Mich. 359; 630 N.W.2d 297; 2001 Mich. LEXIS 1144

June 13, 2001, Argued
June 29, 2001, Decided
June 29, 2001, Filed

PRIOR HISTORY: [*1]** Court of Appeals, MCDONALD, P.J., and O'CONNELL and METER, JJ. (Docket No. 233331). Supreme Court remanded. 463 Mich 1007 (2001). On remand, 246 Mich App.

CASE SUMMARY

PROCEDURAL POSTURE: The instant court granted plaintiffs application for leave to appeal from a decision of the Michigan Court of Appeals denying plaintiffs' request for a writ of mandamus. Plaintiffs sought to prevent governmental defendants from proceeding with a canvass of petitions on a referendum on a new law, 2000 Mich. Pub. Acts 381 (codified at Mich. Comp. Laws § 28.421 et seq.), which modified the standards for issuance of a concealed weapons permit.

OVERVIEW: The issue in this case was whether § 28.421 et seq., was exempt from the power of referendum under the Michigan Constitution. The instant court found that: (1) the power of referendum did not extend to acts making appropriations for state institutions; (2) section 28.421 et seq., provided that one million dollars was to be appropriated from the general fund to the Department of State Police; (3) an appropriation of one million dollars was an "appropriation," and the Department of State Police was a "state institution;" and (4) the power of referendum did not extend to § 28.421 et seq. Accordingly, consistent with Mich. Const. art. II, § 9 (1963), and an unbroken line of decisions of the instant court interpreting this constitutional provision, the instant court reversed the appellate court's decision, and it granted plaintiffs the relief sought in their complaint for mandamus. The instant court vacated the declaration of the sufficiency of the petition for referendum on § 28.421 et seq., and it held that § 28.421 et seq., was not subject to referendum.

OUTCOME: Decision of the appellate court was reversed, and the relief sought by plaintiffs in their complaint for mandamus was granted.

CORE TERMS: appropriation, referendum, referral, framers, common understanding, state

institution, referendum power, ratified, referendum process, power of referendum, initiative, concealed weapons, gas tax, motive, immediate effect, overarching, embarrassment, colleague, plain meaning, intervening, reserved, budget, governor, constitutional convention, constitutional provision, subject to referendum, generous, initiative process, expenditure, ratifiers

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Governments > State & Territorial Governments > Elections

HN1 The power of referendum in the Michigan Constitution does not extend to acts making appropriations for state institutions. Mich. Const. art. II, § 9 (1963).

Governments > State & Territorial Governments > Finance

HN2 2000 Mich. Pub. Acts 381 (codified at Mich. Comp. Laws § 28.421 et seq.) states that one million dollars is appropriated from the general fund to the Department of State Police. Mich. Comp. Laws § 28.425w(1).

Governments > State & Territorial Governments > Finance

HN3 An appropriation of one million dollars is an "appropriation," and the Department of State Police is a "state institution."

Governments > State & Territorial Governments > Elections

HN4 The power of referendum in the Michigan Constitution does not extend to 2000 Mich. Pub. Acts 381 (codified at Mich. Comp. Laws § 28.421 et seq.).

COUNSEL: Dickinson, Wright, P.L.L.C. (by Peter H. Ellsworth, Jeffery V. Stuckey, and Scott R. Knapp) Lansing, MI, for plaintiffs-appellants.

Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, and Gary P. Gordon and Katherine C. Galvin, Assistant Attorneys General Lansing, MI, for defendants-appellees.

Timothy A. Baughman, Royal Oak, MI, for intervening defendant.

Amici Curiae: Mika, Meyers, Beckett & Jones, P.L.C. (by Michael A. Zagaroli and Elizabeth K. Bransdorfer) Grand Rapids, MI, for Michigan Association of Chiefs of Police.

Dykema, Gossett, P.L.L.C. (by Richard D. McLellan, Sandra M. Cotter) Lansing, MI, for Michigan State Senator Hoffman and Michigan State Representatives Richner and DeVuyst.

JUDGES: Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and YOUNG, and MARKMAN, JJ., concurred with TAYLOR, J. CORRIGAN, C.J. (concurring). YOUNG, J. (concurring). **[***2]** MARKMAN, J. (concurring). CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J. WEAVER, J. (dissenting). KELLY, J. (dissenting).

OPINIONBY: Clifford W. Taylor

OPINION: BEFORE **[*365]** THE **[**298]** ENTIRE BENCH

TAYLOR, J.

The issue here is whether 2000 **Public Act 381** is exempt from the power of referendum of

the Michigan Constitution. Having granted leave to appeal and heard oral argument, this Court finds as follows:

(1) HN1 The power of referendum of the Michigan Constitution "does not extend to acts making appropriations for state institutions . . . ." Const 1963, art 2, § 9.

[*366] (2) HN2 2000 PA 381 states that "one million dollars is appropriated from the general fund to the department of state police . . . ." MCL 28.425w(1) .

(3) HN3 An appropriation of $ 1,000,000 is an "appropriation," and the Department of State Police is a "state institution."

(4) **[***3]** Therefore, HN4 the power of referendum of the Michigan Constitution does not extend to 2000 PA 381.

Accordingly, consistent with Const 1963, art 2, § 9 and an unbroken line of decisions of this Court interpreting that provision, n1 the Court of Appeals is reversed, and the relief sought in the complaint for mandamus is granted. The May 21, 2001 declaration by the Board of State Canvassers of the sufficiency of the petition for referendum on 2000 PA 381 is vacated and defendant Secretary of State and the Board of State Canvassers are directed that 2000 PA 381 is not subject to referendum for the reasons set forth herein.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 *Co* *County Road Ass'n of Michigan v Board of State Canvassers*, 407 Mich. 101; 282 N.W.2d 774 (1979); *Co* *Boards of County Road Comm'rs v Board of State Canvassers*, 391 Mich. 666; 218 N.W.2d 144 (1974); *Good Roads Federation v State Bd of Canvassers*, 333 Mich. 352; 53 N.W.2d 481 (1952); *Moreton v Secretary of State*, 240 Mich. 584; 216 N.W. 450 (1927); *Detroit Automobile Club v Secretary of State*, 230 Mich. 623; 203 N.W. 529 (1925).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***4]**

Pursuant to MCR 7.317(C)(4), the clerk is directed to issue the judgment order in this case forthwith.

CORRIGAN, C.J., and YOUNG, and MARKMAN, JJ., concurred with TAYLOR, J.

CONCURBY: Maura D. Corrigan; Stephen J. Markman; Robert P. Young, Jr.

CONCUR: CORRIGAN, C.J. (*concurring*).

I concur in the result and reasoning of the majority opinion. I write to emphasize that the intervening defendant retains a direct remedy, the initiative **[*367]** process. Under our state constitution, this remedy is available even when the Legislature has made an appropriation to a state institution.

I also wish to emphasize that the Legislature's subjective motivation for making a $ 1,000,000 appropriation in 2000 PA 381 --assuming one can be accurately identified n1 --is irrelevant. Intervening defendant contends that despite the appropriation in 2000 PA 381 and the plain language of Const 1963, art 2, § 9, the act is subject to the referendum process because the "purpose" of the appropriation, as purportedly revealed by the legislative history, was to evade a referendum. This argument is misplaced. This Court **[**299]** has repeatedly held that courts must not be concerned **[***5]** with the alleged motives of a legislative body in enacting a law, but only with the end result--the actual language of the

legislation. See *Kuhn v Dep't of Treasury*, 384 Mich. 378, 383-384; 183 N.W.2d 796 (1971); C F *Smith Co v Fitzgerald*, 270 Mich. 659, 681; 259 N.W. 352 (1935); *People v Gibbs*, 186 Mich. 127, 134-135; 152 N.W. 1053 (1915).

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n1 The parties and amicus curiae have asserted contradictory positions regarding the legislative motive for the appropriation in 2000 PA 381. It is a dubious proposition to suggest that a legislative body comprised of individual persons can have a single motivation for enacting any piece of legislation. Even assuming that such a motive could be ascertained, there is no testimonial record in this original action. Accordingly, we have no means by which to decide these disputed claims regarding legislative motivation.

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Our cases follow Justice Cooley's powerful exposition of **[***6]** this doctrine in his seminal work on constitutional law. It is as persuasive to us as it was to our predecessors:

> The validity of legislation can never be made to depend on the motives which have secured its adoption, whether **[*368]** these be public or personal, honest or corrupt. There is ample reason for this in the fact that the people have set no authority over the legislators with jurisdiction to inquire into their conduct, and to judge what have been their purposes in the pretended discharge of the legislative trust. This is a jurisdiction which they have reserved to themselves exclusively, and they have appointed frequent elections as the occasions and the means for bringing these agents to account. A further reason is, that to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment. Therefore the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station. They will also assume that the legislature **[***7]** had before it any evidence necessary to enable it to take the action it did take. [Cooley, Constitutional Law, pp 154-155.]

YOUNG, J. (*concurring*).

I join and fully concur in the admirably concise majority opinion. I write separately to provide the rationale and analysis for my conclusion that 2000 PA 381 is exempt from the referendum power of art 2, § 9 of our 1963 state constitution and why I take exception to the constitutional exegesis offered by my dissenting colleagues.

I. THE QUESTION BEFORE THE COURT

There is no gainsaying that 2000 PA 381 has become the focus of a heated debate among various segments of Michigan's citizens; Justice Cavanagh's dissent is generous in providing his own extensive personal views on the public controversy surrounding 2000 PA 381. However important, this political issue-the merits or demerits of the underlying act-is *not* **[*369]** before this Court. The sole question we are to decide in this case is a legal one: Is 2000 PA 381 subject to the referral process under the provisions of art 2, § 9? If it is, 2000 PA 381 will not become effective until the next general **[***8]** election-if a majority of the voters then approve it. Const 1963, art 2, § 9; MCL 168.477(2) . If the stated limitation on the people's referral power contained in art 2, § 9 applies, the act is not subject to the

referendum process at all.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 2000, the Legislature enacted 2000 PA 381, MCL 28.421 *et seq.*, which modifies the standards for the issuance of concealed weapons permits. The effective date of the law is July 1, 2001.

Intervening defendant is a group that filed with defendants Secretary of State and Board of State Canvassers a petition, signed by approximately 260,000 Michigan voters, n1 requesting a referendum on the **[**300]** new law. Although the Board of Canvassers initially, by a two-to-two vote, declined to certify the petition on the basis that the law may not be subject to referendum, on May 21, 2001, the board certified the petition. Approximately 230,000 valid signatures supported **[*370]** the petition (80,000 more than the number required). n2

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n1 According to a letter written by Christopher Thomas, Director of Elections for the Department of State, an effective referendum petition requires 151,136 valid signatures (comprising five percent of voters in the last gubernatorial election). Approximately 260,000 signatures appear on the petition filed by defendants. Once the Board of Elections has declared the sufficiency of a referendum petition, the effectiveness of the law that is the subject of the petition is suspended until a vote at the next general election, November 2002 in this case. Const 1963, art 2, § 9; MCL 168.477(2) . **[***9]**

n2 On May 16, 2001, intervening defendant filed its own mandamus action, asking the Court of Appeals to require the Board of Canvassers to certify the petition. However, the Court of Appeals opinion in the instant case was issued on the same day, just before the filing of intervening defendant's complaint. After the Board of Canvassers met for a second time and voted to certify the petition, the parties informed the Court of Appeals that the second mandamus action was moot.

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On March 23, 2001, plaintiffs-two organizations that lobbied for the law and three individuals who want to apply for concealed weapons permits-filed a complaint for mandamus in the Court of Appeals, seeking to prevent the Board of State Canvassers from proceeding with the canvass of the petitions. Plaintiffs argued that 2000 PA 381 is not subject to referendum because it contains an appropriation to a state institution, the Department of State Police, and the Michigan Constitution provides that "the power of referendum does not extend to acts making appropriations for state institutions . . . ." Const 1963, art **[***10]** 2, § 9.

As stated, plaintiffs contended that two provisions in 2000 PA 381 make appropriations for a state institution within the meaning of art 9, § 2. The first, § 5v of the act, (1) creates a concealed weapon enforcement fund in the state treasury, (2) allows the state treasurer to receive money or other assets from any source for deposit into the fund and to direct the investment of the fund, (3) provides that money in the fund at the close of the fiscal year shall remain in the fund and not lapse to the general fund, and (4) directs the Department of State Police to expend money from the enforcement fund only to provide training to law enforcement personnel in connection **[*371]** with the act. n3 The second, § 5w(1) of the act, provides that "one million dollars is appropriated from the general fund to the department of state police for the fiscal year ending September 30, 2001" for such activities as distributing free safety devices to the public and creating and maintaining a database of individuals applying for a concealed weapons license. n4

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n3 MCL 28.425v . **[***11]**

n4 MCL 28.425w(1) provides:

One million dollars is appropriated from the general fund to the department of state police for the fiscal year ending September 30, 2001 for all of the following:

(a) Distributing trigger locks or other safety devices for firearms to the public free of charge.

(b) Providing concealed pistol application kits to county sheriffs, local police agencies, and county clerks for distribution under section 5.

(c) The fingerprint analysis and comparison reports required under section 5b(11).

(d) Photographs required under section 5c.

(e) Creating and maintaining the database required under section 5e.

(f) Creating and maintaining a database of firearms that have been reported lost or stolen. . .

(g) Grants to county concealed weapon licensing boards for expenditure only to implement this act.

(h) Training under section 5v(4).

(i) Creating and distributing the reporting forms required under section 5m.

(j) A public safety campaign regarding the requirements of this act.

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[301]** Plaintiffs further argued that defendants Secretary of **[***12]** State and the Board of Canvassers had a threshold duty to determine whether the petition on its face meets the constitutional prerequisites for acceptance and canvassing, and that, until this determination was made, canvassing should cease.

[*372] In an order dated April 9, 2001, the Court of Appeals granted People Who Care About Kids permission to intervene and accepted the amicus curiae brief of the Michigan Association of Chiefs of Police. The panel then dismissed plaintiffs' complaint for mandamus, holding-on a ground not raised by the parties-that

> the matter is not ripe for this Court's consideration. The Board of State Canvassers has not completed its canvass of the referendum petitions. MCL 168.479 n5

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n5 MCL 168.479 provides:

> any person or persons, feeling themselves aggrieved by any determination made

by said board, may have such determination reviewed by mandamus, certiorari, or other appropriate remedy in the supreme court.

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On plaintiffs' application for leave to appeal, this Court remanded the matter to the Court of Appeals for plenary consideration of the complaint for mandamus. n6 463 Mich. 1007, 1008-1009, 625 N.W.2d 377 (2001).

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n6 We stated in our remand order that this controversy is ripe for review because it is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance. . . . All of the information necessary to resolve this controversy, i.e., whether 2000 PA 381 constitutes a law which is excepted from the referendum process under Const 1963, art 2, § 9, is presently available.

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On remand, the Court of Appeals denied plaintiffs' request for mandamus, holding that " 2000 PA 381 is not an act making appropriations for state institutions as contemplated by Const 1963, art 2, § 9," and that it therefore was subject to referendum. **[***14]** 246 Mich. App. 82; 630 N.W.2d 376 (2001).

[*373] We granted plaintiffs' application for leave to appeal from the decision of the Court of Appeals. 464 Mich. 855 (2001). n7

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n7 We indicated in our grant order that the only issue for our consideration was "whether 2000 PA 381 is an act making an appropriation for a state institution for the purposes of Const 1963, art 2, § 9."

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III. CONTROLLING RULES OF CONSTITUTIONAL CONSTRUCTION

Of preeminent importance in addressing the matter at hand is an understanding of the particularized rules of textual construction that apply to constitutional provisions. "Each provision of a State Constitution is the direct word of the people of the State, not that of the scriveners thereof," *Lockwood v Nims*, 357 Mich. 517, 565; 98 N.W.2d 753 (1959) (BLACK, J., concurring), and therefore "we must never forget that it is a Constitution we are expounding," *id.*, quoting *McCulloch v Maryland*, 17 U.S. (4 Wheat) 316, 407; **[***15]** 4 L. Ed. 579 (1819).

Our primary goal in construing a constitutional provision-in marked contrast to a statute or other texts-is to give effect to the *intent of the people* of the state of Michigan who ratified the constitution, by applying the rule of "common understanding." Recently, in *People v Bulger*, 462 Mich. 495, 507; 614 N.W.2d 103 (2000), we **[**302]** explained the rule of common understanding:

In construing our constitution, this Court's object is to give effect to the intent of

> the people adopting it. . . . "Hence, the primary source for ascertaining its meaning is *to examine its plain meaning as understood by its ratifiers* at the time of its adoption." [Citations omitted; emphasis supplied.] **[*374]**

I agree with Justice Cavanagh's reliance on Justice COOLEY's explanation of the rule of "common understanding":

> A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* "For as the Constitution does not derive its force from the convention which framed, but from the people **[***16]** who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed." *[Federated Publications, Inc v Michigan State Univ Bd of Trustees*, 460 Mich. 75, 85; 594 N.W.2d 491 (1999), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81 (emphasis added).]

See also *American Axle & Mfg, Inc v Hamtramck*, 461 Mich. 352, 362; 604 N.W.2d 330 (2000); *State Highway Commission v Vanderkloot*, 392 Mich. 159, 179; 220 N.W.2d 416 (1974); *Traverse City Sch Dist v Attorney General*, 384 Mich. 390, 405; 185 N.W.2d 9 (1971) ; *Michigan Farm Bureau v Secretary of State*, 379 Mich. 387, 391; 151 N.W.2d 797 (1967); *Lockwood*, 357 Mich. at 569.

As expounded by Justice COOLEY and this Court, the "common understanding" principle **[***17]** of construction is essentially a search for the original meaning attributed to the words of the constitution by those who ratified it. This rule of construction acknowledges the possibility that a provision of the constitution may rationally bear multiple meanings, but the rule is concerned with ascertaining and giving effect only to the construction, consistent with the language, that the **[*375]** ratifiers intended. Thus, our task is not to impose on the constitutional text at issue here the meaning we as judges would prefer, or even the meaning the people of Michigan today would prefer, but to search for contextual clues about what meaning the people who ratified the text *in 1963* gave to it.

Our analysis, of course, must begin with an examination of the precise language used in art 2, § 9 of our 1963 Constitution. See *American Axle*, 461 Mich. at 362. Art 2, § 9 provides, in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature **[***18]** may enact under this constitution. *The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds* and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at **[**303]** which a governor was elected shall be required.
>
> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon

at the next general election. [Emphasis supplied.]

As is apparent from the text of art 2, § 9, the people's right of referral is expressly limited. The limitation relevant here is the first: There is no right of referral for "acts making appropriations for state institutions." There is no dispute here that the Department of State Police is a "state institution" within the **[***19]** **[*376]** meaning of art 2, § 9. Nor is there any dispute that 2000 PA 381 allocated" one million dollars of public funds to the state police for responsibilities that the act requires the state police to perform. The contested issue is whether the million-dollar allocation made in 2000 PA 381 constitutes an "appropriation" within the meaning of art 2, § 9.

IV. APPLICATION

A. WAS THE COMMON UNDERSTANDING OF THE ARTICLE 2, SECTION 9 LIMITATION ON THE RIGHT OF REFERRAL AT THE TIME OF RATIFICATION DIFFERENT FROM THE PLAIN MEANING OF THE LANGUAGE?

The majority construes the language of art 2, § 9 in a plain and natural manner. Thus, it concludes that 2000 PA 381 is an act making an appropriation to a state institution and is thus exempt from the referral power. To read the limiting language of art 2, § 9 in any other manner would incorporate into that constitutional provision a meaning that is not apparent on its face. Accordingly, unless we are able to determine that this provision had some other particularized meaning in the collective mind of the 1963 electorate, we must give the effect to the natural meaning of the language used in the **[***20]** constitution.

Justice Cavanagh asserts that the common understanding of art 2, § 9 is different from the plain meaning given to this constitutional provision by the majority. Those who suggest that the meaning to be given a provision of our constitution varies from a natural reading of the constitutional text bear the burden of providing the evidence that the ratifiers subscribed to such an alternative construction. Otherwise, the constitution becomes no more than a **[*377]** Rorschach n8 exercise in which judges project and impose their personal views of what the constitution *should have said.* n9

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n8 A Rorschach test is a personality and intelligence test that requires a subject to "interpret" inkblots. Webster's New Collegiate Dictionary, 1977, p 1006.

n9 The difference between my approach and that of the dissents is that I believe I have an obligation to establish from available historical evidence whether the "common understanding" diverged from the plain meaning of the language in the constitution. Because the dissents offer no such proofs, and presumably believe them to be unnecessary, it appears that the dissents believe that they can "intuit" the common understanding they prefer. Given their intuited conclusion about the people's understanding, the dissents ignore the art 2, § 9 limitation on the power of referral. Justice Cavanagh's dissent concludes that the limitation, if given effect, could not have been intended by the people because it causes a "constitutional invalidity." Slip op p 9. This is pure tautological reasoning. A constitutional provision that contains its own limitation cannot be "invalidated" when one gives the limitation its natural import.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[***21]**

Interestingly, no one-not the dissents, the parties, or even the amici curiae-has attempted to provide a scintilla of historically based evidence that provides support for the belief that in 1963 the people of this state understood the limiting language of **[**304]** art 2, § 9 to mean something other than what it naturally and plainly says. The reason for this omission is

simple: There is not much historical background on the provision to report in the first instance. Moreover, that which exists fails to demonstrate that the people attributed a meaning other than the construction the majority gives to art 2, § 9.

Within the limited time constraints occasioned by the exigencies of having to decide this case by the July 1, 2001, effective date of 2000 PA 381, we have searched for evidence that the common understanding is that proposed by Justice Cavanagh. We have found no such historical evidence in the record of the constitutional convention, at the time of our constitution's **[*378]** ratification, or in contemporaneous news articles that provide support for the dissent's asserted "special" common understanding of art 2, § 9.

Indeed, one might expect that the **[***22]** framers of our 1963 Constitution-the participants of the constitutional convention that drafted the constitutional text that was eventually ratified-would have provided some gloss on or construction of the intended meaning of the art 2, § 9 limitation on the right of referral. In point of fact, the framers provided none.

Surprisingly, during the entire constitutional convention, excepting references to the convention's successive procedural approvals of the provision at issue, the framers never discussed the substance of art 2, § 9. n10 Especially important, nothing in the convention record has any bearing on what the framers, much less the public, "commonly understood" about the limitation on the referral power created by the constitutional language selected-"acts making appropriations for state institutions."

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n10 See 1 Official Record, Constitutional Convention 1961, p 758; 2 Official Record, Constitutional Convention 1961, pp 2390-2392, 2418, 2779, 2927-2928,

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Particularly noteworthy in this regard is the **[***23]** "Address to the People" accompanying Const 1963, art 2, § 9. The address, officially approved by the members of the constitutional convention, provides the text of each provision of the proposed constitution the people ratified in 1963 and a commentary, written in simple language, explaining the import of each provision and any changes the proposed constitution made to comparable provision of the 1908 constitution. That address was widely distributed to **[*379]** the public before the ratification vote. n11 The address was intended as a vehicle to educate the public about the proposed constitution.

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n11 Because the "Address to the People," or "Convention Comments," constitutes an authoritative description of what the framers thought the proposed constitution provided, this document is a valuable tool in determining whether a possible "common understanding" diverges from the plain meaning of the actual words of our constitution. See *Regents of the Univ of Mich. v Michigan*, 395 Mich. 52, 60; 235 N.W.2d 1 (1975) ("the reliability of the 'Address to the People' . . . lies in the fact that it was approved by the general convention . . . as an explanation of the proposed constitution. The 'Address' also was widely disseminated prior to adoption of the constitution by vote of the people").

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Significantly, in the "Address to the People" accompanying Const 1963, art 2, § 9, the framers advise the people that this provision constitutes only a "revision" of Const 1908, art 5, § 1, and that the revision "eliminates much language of a purely statutory character." 2

Official Record, p 3367. The address also notes that the revision "specifically reserves the initiative and referendum powers to the people [and] *limits them* as noted . . . ." n12 **[**305]** *Id.* (emphasis added). There is no further reference to the art 2, § 9 "limits" on the power of referral or any explanation regarding how those limitations were expected to function in practice.

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n12 Equally of interest is the actual language of the two limitations of art 2, § 9 on the power of referral. The first precludes referrals concerning "acts making appropriations to state institutions" while the second precludes referrals concerning acts addressing "deficiencies in state funds." Other than the meaning suggested by the words of the clause itself, we have no greater understanding of what the framers, much less the people, understood the second limitation to mean than we do of the first.

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Thus, the 1963 constitutional record provides no basis for concluding that the people were led to believe (or actually entertained the notion) that the art 2, § 9 limitation on the right of referral-"acts making appropriations for state institutions"-meant or was intended to mean anything other than what it **[*380]** plainly says. Similarly, I have been unable to locate (and no one has provided to the Court) any contemporaneous news articles or other documents circulated in the public domain that suggest that the public in 1963 had a specific or "common" understanding of art 2, § 9 that diverged from the natural and plain meaning of its text. [n13]

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n13 While in 1963 the question of government by plebiscite-direct action by the citizens through initiative and referendum as opposed to indirect action through their elected representatives-was a commonplace fact of American political life, in 1913, this was still a startlingly radical proposition and one rarely embodied in state constitutions of the era. In 1913, only a dozen or so states recognized a popular right of referendum and initiative. *Detroit Free Press,* March 22, 1913.

The public record concerning the 1913 amendment that incorporated the precursor of art 2, § 9 into the 1908 constitution also fails to establish that the people then understood the "acts making appropriations" limitation to mean something other than what the language plainly suggests. We have been unable to locate from any source the actual 1913 amendment ballot language approved. Neither the *Detroit Free Press* nor *The Detroit News Tribune* did more than respectively advocate the rejection or adoption of the amendment. See, e.g., *Detroit Free Press*, March 22, 1913; *The Detroit News Tribune*, March 18, 1913. We have found no historical basis even for a "vicarious" common understanding of the kind asserted by Justice Cavanagh grounded in the ratification of the 1913 amendment.

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The absence of any evidence from the 1963 constitutional convention record or other contemporaneous articles in the public domain suggesting support for some kind of special "common understanding" about art 2, § 9 consistent with the dissents' view (or any other) ought to be conclusive. In the absence of evidence on this point, this Court should accord the language in question its natural, plain meaning.

B. JUSTICE CAVANAGH'S ASSERTED "COMMON UNDERSTANDING" THAT "APPROPRIATIONS" MEANS "GENERAL APPROPRIATIONS" IS ALSO AT VARIANCE WITH THE STRUCTURE OF THE CONSTITUTION

Lacking any evidence that the citizens believed they were ratifying a provision that meant something quite **[*381]** different from that of the plain language of art 2, § 9, Justice Cavanagh nevertheless *presumes* that this must have been the case. He is able to so conclude because he is convinced that the natural construction the majority gives to art 2, § 9 produces an "absurd result": n14

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n14 In a different context in which this Court was construing a statute, we rejected the "absurd result" mode of construction. *People v McIntire*, 461 Mich. 147, 155-160; 599 N.W.2d 102 (1999).

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> I am confident that the constitutional right of referendum, in this narrow context, should not be taken away by so transparent an artifice. Justice COOLEY's "great mass of the people" would, if asked, surely suppose that "acts making appropriations for state institutions," **[**306]** which deny the people's reserved power of referendum, are general appropriations bills containing substantial grants to state agencies. Those grants would have to ensure the viability of the agencies, or, as the Court of Appeals put it, support the agencies' "core functions." 246 Mich. App. ___; ___ N.W.2d ___ (2001). The people of Michigan, I am certain, never intended to authorize the 2000 lame duck Legislature's legerdemain. [Slip op at 9.][n15]

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n15 Justice Cavanagh also suggests that acts making grants that "ensure the viability of [state] agencies" or grants that "support the agencies' 'core' functions" would also preclude a referendum. Of course, Const 1963, art 2, § 9 contains no textual support for either of the two tests.

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I believe that Justice Cavanagh's presumption is unfounded because (1) it is not grounded in an assessment of what the voters *in 1963* understood art 2, § 9 to mean, and (2) it does not give sufficient weight or meaning to the expressly stated competing language and values embodied in our constitution or the differences between the power of initiative and referral.

[*382] In this regard, it is important to consider the relationship between the constitutional power accorded to the Legislature, Const 1963, art 4, § 1, and the specific means chosen in the initiative and referendum provisions that check the power of the Legislature. n16 Without question, art 4, § 1 gives the Legislature plenary power to enact laws for the benefit of Michigan citizens. Equally clearly, art 2, § 9 provides a means for citizens directly to challenge Legislative action or inaction. I believe that it is a matter of constitutional significance that the *initiative* power contains no limitation (save procedural requirements such as those concerning when the initiative process can be commenced and the number of people who must support it), but that the *referendum* power is expressly limited **[***29]** by two substantive restrictions-an exception to the power of referral for acts "making appropriations for state institutions," and an exception for those acts enacted to "meet deficiencies in state funds." n17

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n16 "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1.

n17 As noted, the current provision carries forward the language of Const 1908, art 5, § 1, that the referendum power does not extend to "acts making appropriations for state institutions and to meet deficiencies in state funds." Art 2, § 9 uses the disjunctive "or" between the two categories of nonreferable items, as opposed to the conjunctive "and" in the art 5, § 1 version of the provision in the 1908 constitution. We need not speculate about the possible meaning of this word change, because our only concern in this matter is with respect to the first limitation category.

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Stated otherwise (leaving aside momentarily the question of what the people understood in 1963 **[***30]** the art 2, § 9 term "appropriations" meant), it appears unchallenged that "acts making appropriations" are *always* subject to nullification by initiative, but such acts are *exempted* from the referral power. Because **[*383]** exercise of both the referral and initiative powers may result in the nullification of a law enacted by the Legislature, one may well ask: Why, when the people enacted two provisions that are clearly intended as checks on the constitutional power of the Legislature, would the people substantially limit their power of referral, but not their power of initiative? Based upon the structure of these provisions, the answer appears obvious that the people feared more the circumstance of preventing acts involving "appropriations" from becoming law (the referral power) than they feared a nullification vote on the very same bill *after* it became **[**307]** effective. Otherwise they would not have imposed an exception to their power of referral.

Justice Cavanagh asserts that the "appropriations" limitation on the people's referral power could only have been intended to mean "general appropriations bills containing substantial grants to state agencies." Slip **[***31]** op at 9. I question why that conclusion is justified, particularly given that even the dissent notes the framers' drafting precision concerning matters involving the *general budget*. See slip op, pp 7-8. I wholeheartedly agree with Justice Cavanagh that the framers intended to improve and increase legislative accountability for legislative *general budgeting* processes and were very precise in their draftsmanship to accomplish this goal. See, e.g., Const 1963, art 4, § 31 (general appropriation bills, priority, statement of estimated revenue). n18 Justice Cavanagh assumes, **[*384]** without providing support, that the people believed that only general appropriation acts were referenced in art 2, § 9.

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n18 Const 1963, art 4, § 31 provides:

The general appropriation bills for the succeeding fiscal period covering items set forth in the budget shall be passed or rejected in either house of the legislature before that house passes any appropriation bill for items not in the budget except bills supplementing appropriations for the current fiscal year's operation. Any bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill. One of the general appropriation bills as passed by the legislature shall contain an itemized statement of estimated revenue by major source in each operating fund for the ensuing fiscal period, the total of which shall not be less than the total of all appropriations made from each fund in the general appropriation bills as passed.

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Concerning art 4, § 31, in the Address to the People the framers advised:

> This is a new section designed to accomplish two major purposes:
>
> 1. To focus legislative attention on the general appropriation bill or bills to the exclusion of any other appropriation bills, except those supplementing appropriations for the current year's operation.
>
> 2. To require the legislature (as well as the governor by a subsequent provision) to set forth by major item its own best estimates of revenue.
>
> The legislature frequently differs from executive estimates of revenue. It is proper to require that such differences as exist be specifically set forth for public understanding and future judgment as to the validity of each. [2 Official Record, p 3375.]

Thus, the people were specifically advised in 1963 that the focus of this provision was to ensure accountability for the making of the entire state budget. A reciprocal provision applicable to the Governor, art 5, § 18, n19 was also added in 1963. These **[*385] [**308]** were entirely new provisions added to the 1963 constitution whereas the language of art 2, § 9 was carried forward from the 1913 amendment to the 1908 constitution. **[***33]** The 1908 constitution had no provisions comparable to art 4, § 31 and art 5, § 18.

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n19 Const 1963, art 5, § 18 provides:

The governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state. Proposed expenditures from any fund shall not exceed the estimated revenue thereof. On the same date, the governor shall submit to the legislature general appropriation bills to embody the proposed expenditures and any necessary bill or bills to provide new or additional revenues to meet proposed expenditures. The amount of any surplus created or deficit incurred in any fund during the last preceding fiscal period shall be entered as an item in the budget and in one of the appropriation bills. The governor may submit amendments to appropriation bills to be offered in either house during consideration of the bill by that house, and shall submit bills to meet deficiencies in current appropriations.

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The point is that, contrary to Justice Cavanagh's suggestion, none of these *general budget* provisions added in 1963 were connected by the framers to the older language of art 2, § 9. More important for our purpose of discerning whether there was a "special" common understanding of art 2, § 9 as the dissent supposes, it is noteworthy that *the framers clearly never communicated to the people* that the new general budget provisions had any bearing on other legislative acts, such as 2000 PA 381, that merely made an appropriation of public funds to a state institution. In short, the general budget provisions of the 1963 constitution do not appear to be related to other kinds of bills that simply "appropriate" for purposes other than the general budget process. n20

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n20 The constitution also explicitly recognizes a nonbudgetary form of appropriation acts,

those that appropriate public money for local or private purposes. See art 4, § 30. The point is, the constitution does not purport, as intimated by the dissent, to limit or define legislation that makes an appropriation as only those acts that concern general appropriations.

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[*386] Most important to my conclusion that Justice Cavanagh is simply wrong in supposing that art 2, § 9 refers to *general appropriation bills* is the fact that art 4, § 31 provides a definition of "appropriation bill," n21 and only this category of bills is tied to the annual budget process. Thus, had the framers intended that the art 2, § 9 "appropriations" limitation on the right of referral mean "a general appropriations bill" as urged by the dissent, then I believe that the framers would have done two things that they clearly did not do. First, I think the framers would have used in art 2, § 9 the art 4, § 31 definition of "appropriation bill." Second, I believe the framers would have advised the public in the Address to the People of the relationship between the newly added general budget provisions (including the definition of appropriation bill) and the older language of art 2, § 9 limiting the power of referendum.

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n21 "Any bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill." Art 4, § 31.

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When it is so apparent throughout the 1963 constitution that the framers sought to clarify the budget-related appropriations process, I think that the above-noted omissions underscore that the kind of "appropriations" referenced in art 2, § 9 have nothing to do with those referenced in art 4. Further, there is no evidence of which we are aware that in 1963 the people had a contrary "common understanding."

Moreover, greater assurance that there was no "common understanding" contrary to the plain language of art 2, § 9 is derived from the controversy that culminated in this Court's split decision in *Todd v Hull*, 288 Mich. 521; 285 N.W. 46 (1939). In *Todd*, this **[*387]** Court was called upon to determine whether 1939 PA 3 n22 was properly given immediate effect pursuant to Const 1908, art 5, § 21, n23 notwithstanding **[**309]** that, by giving the act immediate effect, the Legislature had encroached upon Const 1908, art 5, § 1 (the precursor of Const 1963, art 2, § 9. Four members of the *Todd* Court agreed, with little explanation, with the plaintiffs' assertion that 1939 PA 3 was not in the category of "acts making **[***37]** appropriations" within the meaning of art 5, § 21. However, four other justices observed that

> there is no question but that the act makes an appropriation. An act making an appropriation as used in the Constitution is a legislative act which sets apart or assigns to a particular purpose or use a sum of money out of what may **[*388]** be in the treasury of the State for a specific purpose and objects,-an act authorizing the expenditure of public funds for a public purpose. [*Todd* 288 Mich. at 531.]

Regarding the referral question, these four justices additionally opined that

> the claim that plaintiffs are entitled to a referendum is effectually disposed of by

the language of the Constitution itself because if the legislature had a right to give the act in question immediate effect, then it negatived the idea of a referendum. [*Todd*, 288 Mich. at 535.]

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n22 1939 PA 3 abolished the Michigan Public Utilities Commission, created the Michigan Public Service Commission, and appropriated $ 10,000 from the general fund for the purpose of setting up the MPSC. **[***38]**

n23 That provision of our 1908 constitution-which contained language identical to that appearing in the 1908 version of art 2, § 9-provided that the legislature may give immediate effect to *acts making appropriations* and acts immediately necessary for the preservation of the public peace, health or safety . . . . [Const 1908, art 5, § 21 (emphasis supplied).]

Compare this "immediate effect" provision language with that of Const 1908, art 5, § 1 (the predecessor to Const 1963, art 2, § 9):

The people reserve to themselves the power to . . . approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds.

* * *

The second power reserved to the people is the referendum. No act passed by the legislature shall go into effect until 90 days after the final adjournment of the session of the legislature which passed such act, except such *acts making appropriations and such acts immediately necessary for the preservation of the public peace, health or safety*, as have been given immediate effect by action of the legislature. [Emphasis supplied.]

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The significance of *Todd* is not that it conclusively construed the same language at issue in this case. The fact is, *Todd*-a split decision-has no precedential value. *Todd* is nevertheless highly relevant because it involves a claim, similar to the one made here, that the Legislature's inclusion of an appropriation in 1939 PA 3 was a "mere subterfuge," *Todd* at 531, to place it within the category of acts that could be given immediate effect and thus be immune to referendum.

Todd demonstrates that the people were aware in 1963 that the Legislature had exercised what it believed to be its appropriation prerogative in such a fashion as to diminish the people's right of referral. Notwithstanding, the people did not seek to change the constitutional referral language to preclude the Legislature from capriciously exercising its power of appropriation.

V. CONCLUSION

Determining the people's "common understanding" of a relatively obscure constitutional provision ratified **[*389]** nearly forty years ago is admittedly a challenging deductive enterprise-one that must be grounded in the available evidence. Above all, it is not a psychic exercise. On the basis **[***40]** of the evidence we have independently sought, I conclude that there is no reliable evidence that the people commonly understood anything other than what art 2, § 9 plainly says: that the people's power of referral is precluded concerning any **[**310]** act that makes an appropriation for a state institution. Accordingly, 2000 PA 381

falls within the category of "acts making appropriations for state institutions" and is thus not amenable to the people's right of referral under art 2, § 9.

The majority's decision today will undoubtedly disappoint those who passionately believe that 2000 PA 381 represents bad public policy. While it will be of no consolation, it bears restating that the serious underlying political question is *not* before the Court.

In the current charged political environment, the dissent makes an emotionally appealing argument: Why not just let the people decide? Simply answered, the people's ability to decide by the referendum process is not infinite; rather, it is circumscribed by the limitations placed in the Michigan Constitution. While perhaps less satisfying to those who oppose 2000 PA 381, our answer is that the **[***41]** people are still free to directly challenge the propriety of the legislation by initiative. Const 1963, art 2, § 9; MCL 168.471 , 168.472. Additionally, if the people believe that the Legislature has abused its powers by capriciously precluding their power of referral, the traditional means of voter sanction remain recall and the ballot box. However, the limitations imposed in art 2, § 9 on the people's **[*390]** right of referral preclude that they do so by means of referendum.

Finally, while it may be attractive to some, I believe that the dissenter's approach is not only at odds with the constitution, but destroys the Legislature's direct accountability to the people for its acts by interposing the judiciary as an arbiter of essentially political questions that are fundamentally legislative in character. Consider Justice Cavanagh's tests of what he believes constitutes "appropriations" that do preclude referrals under art 2, § 9: (1) grants that "ensure the viability of [state] agencies"; or (2) grants that "support the agencies' 'core functions." (Slip op p 9.) Exactly how large an "appropriation" constitutes one sufficient to ensure the "viability" **[***42]** of a state agency or, for that matter, its "core function"? What *is* a state agency's "core" function, what constitutes its "viability," and who gets to decide these questions-the Board of Canvassers, the Secretary of State, the courts? The dissenters are eager to have the courts decide these questions. Perhaps there are members of the public who believe that the courts are competent to address these issues. I submit that these are Delphic questions that neither a judge nor the judicial system itself is best equipped to answer. More to the point, the tests the dissenters urge to assess whether an act making an appropriation is nonetheless amenable to referral *despite* the express constitutional limitation are simply ones made up from whole cloth and which have no basis in the text of our constitution. The judiciary is not authorized to create ways of evading the terms of our constitution; nor should the courts manufacture tests that amount to no more than providing a means of promoting sitting judges' personal preferences **[*391]** to accomplish such goals. Neither is a judicial function, and the public should never be confused on this issue. Our courts must refrain from engaging **[***43]** in such endeavors because they are beyond our constitutional authority and competence.

MARKMAN, J. (*concurring*).

The issue before this Court is whether it will act as a court of law and read the constitution in accord with its plain language, or whether it will effect what many, perhaps even most, in this state view as a "good" thing. The majority opinion, in which I fully join, sets forth its analysis simply and straightforwardly. It does so **[**311]** because the constitutional issue before us is simple and straightforward. I offer this concurrence only to emphasize the extremely important points of disagreement between the majority opinion, and the opinions of the Court of Appeals and my dissenting colleagues.

I. COURT OF APPEALS

Concerning the opinion of the Court of Appeals in this matter, I offer the following thoughts:

(1) The Michigan Constitution excepts from the referendum process "acts making

appropriations for state institutions." It may well have been preferable for the constitution instead to have excepted from the referendum process: (a) merely acts that are necessary in order for the state to "exercise its various functions free from financial embarrassment"; **[***44]** (b) merely acts appropriating monies without which state agencies "would cease to function," or without which their "continued existence" would be in jeopardy; or (c) merely acts that pertain to the "core functions," or that are not "peripheral to the core purpose," of state **[*392]** agencies. n1 However, the constitution did none of these. Rather, it excepted from the referendum process "acts making appropriations for state institutions." In reading into the constitution these alternative limitations upon the referendum process, the Court of Appeals has, without warrant, substituted its own judgment concerning how the constitution *ought* to read in place of the judgment of those who actually proposed and ratified the constitution.

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n1 The Court of Appeals asserts that these alternative formulations, each of which it has incorporated in its opinion, were set forth by this Court in *Detroit Auto Club v Secretary of State*, 230 Mich. 623; 203 N.W. 529 (1925), in the course of our interpreting the predecessor version of the current Michigan Constitution. However, such language, to the extent that it can be discerned at all in *Detroit Auto Club*, was set forth in the altogether different context of determining whether the state highway department was or was not a "state institution." It was not done in the context of determining whether an enactment of the Legislature was an "act[] making appropriations." Furthermore, this Court in 1925, as in 2001, could not alter the language of the constitution, and it did not purport to do so.

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(2) In particular, the Court of Appeals has, without warrant, substituted its own judgment for that of "We, the people of the State of Michigan" who "have ordained and established *this* constitution." n2 "This" constitution is one that, for better or worse, excepts from the referendum process "acts making appropriations for state institutions." It is not one that excepts from the referendum process a greater or a lesser range of legislative acts, depending upon the personal preferences of individual judges or the political imperatives of the moment.

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n2 Const 1963, Preamble (emphasis added).

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(3) In a truly remarkable statement, the Court of Appeals asserts:

> **[*393]** Even if we were to conclude that the statutory expenditures constituted appropriations for state institutions as contemplated by [the constitution], we would nevertheless hold that the overarching right of the people to their 'direct legislative voice' . . . requires that 2000 PA 381 be subject to referendum.

I would **[***46]** respectfully suggest that the "overarching right of the people" is to have the constitution that they have ratified given respect and accorded its proper meaning. The fundamental flaw in the Court of Appeals statement is evident in its very assertion. Who is to say, for example, that this particular "overarching right," "the right to a direct legislative voice," is *more* "overarching" than the right of the people to have the legislative judgment of their **[**312]** elected representatives given effect over the objections of five percent of the

electorate? In truth, in a system of constitutional government, we examine the language of the constitution itself to determine which rights are "overarching." Whether the referendum process or the legislative judgment should prevail in a particular case does not depend upon which right or which value is perceived to be more "overarching" by a judge, but rather upon which result is required by the terms of the constitution itself. There is, in fact, an "overarching right" to a referendum, but only in accordance with the standards of the constitution; otherwise, there is an "overarching right" to have public policy determined by a majority **[***47]** of the people's democratically elected representatives.

(4) It is hard to imagine a single statement more fundamentally at odds with the *genuinely* "overarching right" of the people to responsible constitutional government than that of the Court of Appeals. I repeat it, for it evidences a profound misunderstanding **[*394]** about the proper role of the judiciary that demands response:

> Even if we were to conclude that the statutory expenditures constituted appropriations for state institutions as contemplated by [the constitution], we would nevertheless hold that the overarching right of the people to their 'direct legislative voice' . . . requires that 2000 PA 381 be subject to referendum.

What this apparently means is that, "even if we were to conclude" that the constitution stated one thing, the Court of Appeals panel would *still* abide by its own views in holding that the constitution meant a different thing. Thus, it could be that "even if we were to conclude" that the constitution prohibited prior restraints on the press, we would "nevertheless hold" that the "overarching right" of persons to a fair trial requires that newspapers not write irresponsibly **[***48]** about high-profile criminal cases. Or it could be that, "even if we were to conclude" that the constitution prohibited denying criminal defendants a right to a jury trial, we would "nevertheless hold" that the "overarching right" of judicial efficiency requires that exceptions sometimes be made to this requirement. In other words, no matter what the actual language of the constitution, the Court of Appeals panel will, in effect, create a "higher" constitutional law whose requirements will supersede those of the constitution ratified by "we, the people." This is not law; it is a prescription for judicial domination.

II. JUSTICE CAVANAGH'S DISSENT

Concerning the dissent of Justice Cavanagh in this matter, I offer the following thoughts:

[*395] (1) In addition to the various standards fashioned by the Court of Appeals in replacing those set forth by the Michigan Constitution, the dissent adds the standard of "great public significance." Apparently, the greater the "public significance" of a law, the more essential it is that a referendum be allowed to proceed, notwithstanding the language of the constitution. For what it is worth, I am in complete agreement that 2000 PA 381 **[***49]** is a matter of "great public significance" and can easily appreciate why its opponents wish to make it the subject of a referendum. Nevertheless, it can be assumed that any measure that becomes the focus of a serious referendum effort will be a matter of "great public significance" and, in any event, the constitution does not make distinctions between those legislative enactments that some justices may view as of "great public significance" and those that are viewed as of lesser significance. **[**313]**

(2) Equally irrelevant to this Court's constitutional analysis are the dissent's various references to the "lame- duck" character of the Legislature n3; the fact that "firearms advocates and persons interested in hunting" are "pitted" against a "coalition of law enforcement, religious, and educational interest"; and the fact that some individual members of the Legislature view their colleagues as having improper motives in attaching an appropriations provision to 2000 PA 381.

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n3 The dissent describes the majority as "granting the lame-duck legislative majority the prize it apparently sought . . . ." However, as the dissent well appreciates, judges are not in the business of "granting prizes" to either side of a controversy; rather, they are in the business of interpreting the language of the law and letting the chips fall where they may.

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[*396] (3) The dissent chastises the majority for having "neglected to recite" certain facts in its opinion. With all due respect, the majority has done no such thing. It has merely neglected to "recite" facts that are wholly irrelevant to its legal analysis, as is typically the case in our opinions. The majority, for example, views it as irrelevant for purposes of its legal analysis that the law under consideration is of "great public significance," or, in particular, that the law relates to a highly divisive political controversy. Rather, the constitution means exactly the same thing whether the law at issue pertains to firearms, to farming irrigation, or to any other conceivable subject matter. Therefore, reciting the details or the political or legislative history of the statute before us, beyond identifying the appropriations that it makes, would add nothing to the constitutional analysis. Furthermore, contrary to what would have been the case if the dissent's position had prevailed, "future litigants," concerning whom the dissent expresses such concern, will henceforth be apprised of the unvarying meaning of the constitution, and will not be required to count noses about **[***51]** how many justices view the law at issue in *their* future case as being of "great public significance," or whether the appropriations made in *their* future case involve a "core function" or are essential to the "continued existence" of some state agency.

(4) The dissent describes the majority's constitutional analysis as one that "focuses narrowly on the superficially straightforward question," as being "legalistic," as being "pinched," and as being "overly literal." Such descriptions are typical of those uttered when a judge is frustrated in his ability to reach a particular result by the actual language of the law. **[*397]** Contrary to the dissent, the majority does not interpret the constitution "literally" or "legalistically." There is simply no reasonable alternative interpretation to the words "acts making appropriations for state institutions." Again, it may well be that the dissent's formulation of the right of referendum is preferable to that of the constitution. However, such a determination is not for this Court to make- no matter how "publically significant" a law. As Chief Justice Marshall recognized in *Marbury v Madison*, nearly two centuries ago, it is the **[***52]** responsibility of the judiciary to say what the law "is," not what it believes that it "ought" to be. n4

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n4 *Marbury v Madison*, 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803).

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(5) The dissent's reference to Justice Cooley's rules of constitutional interpretation is apt, but misses the point. Constitutional interpretation varies from statutory interpretation principally because constitutional language tends to be more concise, and to relate to broader expressions of principle, than does statutory language. The language of constitutions, therefore, **[**314]** also tends to be more susceptible to multiple interpretations than does the more precise and more thorough language of statutes. Justice Cooley's rules make clear how, in a constitutional context, broad language and general words are to be given reasonable meaning. When, however, constitutional language *is* straightforward, such as the eligibility requirements for a member of Congress, n5 or the procedural requirements of the legislative **[***53]** process, n6 we accord such language its plain and ordinary meaning.

[*398] "Reasonable minds, the great mass of the people themselves" tend to accord words such plain and ordinary meanings. Contrary to the dissent, Justice Cooley did not assert, in effect, that "apple" can mean "orange," if a group of citizens could be found who understood it in this sense. Rather, what he asserted was that *ambiguous* terms, those fairly susceptible to multiple understandings, should be assessed by his rules. The "common understanding" of most words is that they possess their plain and ordinary meanings. n7

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n5 *Powell v McCormack*, 395 U.S. 486; 89 S. Ct. 1944; 23 L. Ed. 2d 491 (1969).

n6 *Clinton v New York City*, 524 U.S. 417; 118 S. Ct. 2091; 141 L. Ed. 2d 393 (1998).

n7 The dissent's "generous" reading of the constitution is only "generous" if one starts with the point of view that a referendum should proceed on the law in controversy. If, on the other hand, one wishes to have the law take normal effect, without awaiting the next general election, then perhaps the dissent's reading might be characterized by some as somewhat less "generous." Although, in my judgment, the constitution should be interpreted "faithfully," rather than "generously" or "non-generously," it is difficult for me to understand how *any* interpretation can be drawn from the language of the referendum clause, no matter how "generous," that leads to the conclusion reached by the dissent. It is unclear whether the dissent believes that the majority has misconstrued "acts" or "making" or "appropriations" or "for" or "state" or "institutions," or how such words have been misconstrued. In other words, exactly which interpretation of which word by the majority is most "dark" or most "abstruse," in the dissent's judgment?

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(6) It should be noted that the dissent does not ultimately rest its interpretation upon any specific language or phrase contained in the constitution, since it cannot do so. Instead, it relies upon such amorphous concepts as "the overall approach" to legislation taken by the constitution's framers and the people who ratified it. But, rather than taking the framers and ratifiers of the constitution at face value and assuming that they intended what they plainly wrote, the dissent manages creatively to conclude that the framers and ratifiers meant something other than what they wrote. On what basis does it reach **[*399]** such a conclusion? Does the dissent identify convincing statements in support of that proposition by the framers? Does the dissent point to evidence that "we, the People" were misled into believing that "acts" or "appropriations" really did not mean "acts" or "appropriations?" Does the dissent offer new historical information that the ratifiers understood that *Detroit Auto Club,* and other earlier decisions of this Court, were being reversed by the Constitution of 1963? No, there is no argument of this kind. n8 All that we are left with is that the dissent believes **[***55]** that the **[**315]** drafters of the constitution, and "We, the People" who ratified it, *should have* adopted the referendum provision that it prefers. n9

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n8 In lieu, the dissent asserts that the "great mass of the people" would, if asked, "surely suppose" that the language of the referendum clause did not mean what the majority understands. I do not know whether the dissent is right or wrong in this proposition, for it sets forth no evidence in this regard and I am aware of no such evidence. However, at the very least, the dissent is obligated to demonstrate in regard to its assertion: (a) why it should be assumed that the "great mass of the people" did not understand that their words would be taken seriously and accorded their common understanding; and (b) why a substantial majority of the people's representatives in the Legislature, the overwhelming number of whom had just been reelected and who had been fully apprised by opponents of 2000 PA 381 of the latter's views on the impropriety of attaching an appropriations provision

to this measure, cannot be assumed to have been representing the actual sentiments of the "great mass of the people." **[***56]**

n9 The dissent is harsh in its characterization of the Legislature's "legerdemain" in attaching an appropriations provision to 2000 PA 381. Possibly, this is a deserved characterization. But, any such skills in this regard by the Legislature can hardly compare to the "legerdemain" (or, indeed, the alchemy) on the part of the dissent in transforming an otherwise clear and straightforward statement of law into something of altogether different meaning.

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III. JUSTICE WEAVER'S DISSENT

Concerning the dissent of Justice Weaver in this matter, I offer the following thoughts:

[*400] (1) The dissent asserts that *Detroit Auto Club* stands for the proposition that only appropriations that "enable the state to exercise its various functions free from financial embarrassment," or without which state agencies would "cease to function," are excepted from the referendum process. However, *Detroit Auto Club*, does not say this at all; rather, it merely stands for the proposition that the Michigan Highway Department is a "state institution." It does not even purport to address the issue **[***57]** of what constitutes "acts making appropriations." Of course, even if the decision *had* said what the dissent asserts, no decision of this Court can permanently transform the plain language of the constitution.

(2) The dissent asserts that "the majority fails to recognize the importance of the referendum, and this Court's responsibility to protect the people's power of the referendum, derived from the constitution . . . ." However, a better characterization of this Court's "responsibility," in my judgment, is that we have a responsibility to protect the people's power of referendum as set forth by the constitution, *and* we have a responsibility to protect the people's power of representative self-government as set forth by the constitution. Indeed, the principal "responsibility" of this Court is to read the language of the constitution faithfully. If the people wish to modify their constitution, they may do so under the terms of article 12, and the majority will attempt to interpret the modified constitution faithfully. But the majority will not act as a continuing constitutional convention and dilute the people's right to have their supreme law mean what it says.

[*401] **[***58]** IV. JUSTICE KELLY'S DISSENT

Concerning the dissent of Justice Kelly in this matter, I offer the following thoughts:

(1) The dissent contends that the majority "ignores" the meaning of the word "for" as used in the constitutional provision "acts making appropriations for state institutions." I respectfully disagree. The relevant meaning of "for" in the instant context is "intended to belong to." n10 Clearly, in this case, the appropriation was "intended to belong to" the Department of State Police. Demonstrating that no word is too straightforward not to be transmuted beyond recognition, the dissent manages to conclude that what the framers and the people meant by using the word "for" was that only "appropriations aimed at satisfying the purpose or reason for which a state institution exists" are excepted from the referendum process. The premise of this **[**316]** interpretation appears to be that there is a meaningful distinction between an agency *qua* agency, and the functions that are performed by such agency, i.e., that there is some disembodied assemblage of functions that are carried out by an agency that define its "essence" or "core" as distinct from the total array of **[***59]** functions that it is charged by the law with carrying out. This is plainly without any basis. If the Legislature determined tomorrow that the Department of State Police should, in addition to its current responsibilities, be assigned new responsibilities now belonging to the Department of

Corrections, monies appropriated for such new responsibilities would be every bit as much "for" the Department of **[*402]** State Police as monies appropriated "for" its current responsibilities. I am aware of no textual or other basis for understanding "for" to mean anything at all different in these circumstances.

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n10 Random House Webster's College Dictionary (1991) at 519.

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(2) The dissent accurately asserts that "we start by examining the provision's plain meaning as understood by its ratifiers at the time of its adoption." I agree with that statement and I believe that this is exactly what the majority has done. The dissent has failed to produce a scintilla of evidence to demonstrate that the people of this state in 1963 **[***60]** understood the language "acts making appropriations for state institutions" to mean anything other than what it plainly says.

(3) Because the dissent is unable to produce evidence to contradict the idea that the people intended their constitution to mean what its words convey, in the end, it also relies upon such amorphous concepts as "the fundamental purpose of the general power of referendum" to justify its interpretation of the law. However, there is no "general power" of referendum in Michigan, but only a specific power of referendum as defined by the constitution. And whatever "fundamental purpose" can be discerned to the referendum power, such a purpose must be subordinate to the "fundamental purpose" of a constitution itself, which is that it establishes the ground rules for a system of self-government, and its words, where plain, must be taken seriously.

V. FINAL QUERY FOR THE DISSENTERS

Finally, I would address the following question to each of my dissenting colleagues: Had those who proposed **[*403]** and ratified our constitution truly intended to limit the referendum power as the majority interprets it, how should they, how could they, have fashioned it any more clearly **[***61]** than they did in article 2, § 9? That is, what words should they have used that they did not? n11

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n11 In this regard, I can recall the member of Congress who, in frustration over a judicial interpretation of a statute that, in his opinion, ignored its plain language, reintroduced the identical statute, but appended at its conclusion, "and we mean it this time!"

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VI. CONCLUSION

I respectfully believe that the Court of Appeals and my dissenting colleagues, by transforming the plain meaning of the words of the constitution, would engage the judiciary in an exercise far beyond its competence and authority. While I can certainly understand the frustrations of those who disapprove of the substance of 2000 PA 381, such frustrations should not be viewed as a justification for giving a meaning to the constitution that is so irreconcilable with its language. n12

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n12 In light of the confusion generated, let me make clear, for what it is worth, that I, as a

part of the citizenry of Michigan, would also prefer a broader referendum clause in our constitution, one less susceptible to avoidance by appropriations of the type contained in 2000 PA 381. However, until such a referendum clause is adopted by the prescribed constitutional process, see Const 1963, art 12, I will continue to interpret, as best as I can, the referendum clause that has actually been ratified by the people. Furthermore, let me make clear that I am not oblivious to the debate over the motives of the Legislature in attaching the instant appropriations to 2000 PA 381. However, for the reasons set forth in Chief Justice Corrigan's concurring opinion, I simply do not believe that such motives are relevant to our constitutional analysis.

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DISSENTBY: Michael F. Cavanagh; Elizabeth A. Weaver; Marilyn Kelly

DISSENT: [317]** CAVANAGH, J. (*dissenting*).

This case presents issues involving the Legislature's constitutional authority and the authority of the people of Michigan--expressly **[*404]** reserved in our 1963 constitution--to vote on matters of great public significance. The statute in this case affects just such an issue of great public significance, involving the delicate balance between the free exercise of Second Amendment rights and the fundamental obligation of government to protect its citizens' physical safety. Understandably, this case has energized opposing groups of citizens to a degree rarely seen in public debate. n1

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n1 The many concerned citizens on both sides defy easy description. To oversimplify, the background dispute over the place of weapons in our society pits firearm advocates and persons interested in hunting against a coalition of law enforcement, religious, and educational interests.

In his concurrence, Justice YOUNG characterizes my observations as a "generous" statement of my own "extensive personal views" of the "political issue" underlying this case. Slip op at 2 (YOUNG, J., concurring). While he is certainly correct that this "political issue" is not before the Court, his conclusion that I have somehow aired my views of the matter is baffling. This dissent merely states that the underlying matter, which led to the referendum drive, is significant and that thoughtful people may disagree about it. If that is a "generous" statement of my "extensive personal views," then apparently Justice YOUNG is equally copious about the matter, see *id.*, and one can only wonder what Justice YOUNG would conclude about Justice MARKMAN's generosity. See slip op at 6-7 (MARKMAN, J., concurring) ("For what it is worth, I am in complete agreement that 2000 PA 381 is a matter of 'great public significance' and can easily appreciate why its opponents wish to make it the subject of a referendum").

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Similarly, this case has energized this Court, prompting each justice to offer an opinion. I join in and agree with the reasoning offered in the dissenting opinions by Justice KELLY and Justice WEAVER. However, I offer this opinion to address my specific concerns with the majority's decision.

The facts, which the actual majority opinion has neglected to recite to either explain its opinion or to serve future litigants as precedent, and which appear only in the seriatim concurrences, are not in dispute. For many years, Michigan has restricted citizens' **[*405]** rights to carry concealed weapons. To obtain a permit to carry a concealed weapon from a county concealed weapons board, a person has needed to demonstrate "proper reasons" to

carry a concealed weapon. See MCL 28.426 , repealed by 2000 PA 381. Under the former system, the popular perception was that the permits were difficult to obtain.

Proposed legislation to change this system was introduced in the 90th Legislature, but it had few prospects for approval. However, a legislative majority discovered new prospects after the November 2000 election, when the Legislature reconvened to conduct **[***64]** its biennial "lame duck" session. n2 In 2000 PA 381, the Legislature adopted what is popularly known as "shall **[**318]** issue" legislation, providing that county boards must issue concealed weapons permits to applicants when certain unremarkable conditions are met. See MCL 28.425b(7) .

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n2 Because of its timing, the lame duck session is understood to be a period of diminished public accountability. See, e.g., Farber & Frickey, *Public choice revisited,* 96 Mich. L R 1715, 1729 (1998).

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Despite the timing of its passage, this profound change in Michigan law did not go unnoticed. Opposition quickly formed, but to no immediate avail. However, opponents of the new law realized the great public interest in this measure, and the likelihood that Michigan citizens on both sides of the issue would want to make their views known. Therefore, opponents began publicly to discuss invoking the referendum process that the people of Michigan reserved for themselves in Const **[***65]** 1963, art 2, § 9.

In that constitutional provision, the people kept the right to vote on laws enacted by the Legislature. The people of Michigan have long reserved this right, first **[*406]** providing for it in Michigan's 1908 Constitution. See Const 1908, art 5, § 1. Recent examples of the people exercising this right occurred with the controversial legislation discussed in *Doe v Dep't of Social Services,* 439 Mich. 650, 658; 487 N.W.2d 166 (1992), and with the measures discussed in *Bingo Coalition for Charity--Not Politics v Bd of State Canvassers,* 215 Mich. App. 405; 546 N.W.2d 637 (1996).

The referendum power is not unlimited, however. The framers of the Constitution--and the people of Michigan when they ratified the constitution--wisely limited the referendum power so that it would not "extend to acts making appropriations for state institutions . . .," Const 1963, art 2, § 9. For obvious reasons, the state's fulfillment of its financial obligations cannot be subject to the delay and uncertainty inherent in the referendum process. Indeed, as this Court has stated, the limitation is designed to "enable the State **[***66]** to exercise its various functions free from financial embarrassment." *Detroit Auto Club v Secretary of State,* 230 Mich. 623, 625; 203 N.W. 529 (1925).

The concealed weapons legislation that is the subject of this suit acquired, late in the enactment process, some language that provided for a $ 1 million grant to the Michigan State Police. See MCL 28.425w . Intervening defendant People Who Care About Kids seeks to establish that the monetary provision of 2000 PA 381 will have no effect on the state's ability to function normally, and is not necessary to save the state from financial embarrassment. Rather, intervening defendant suggests that the monetary provision of the act was added specifically to evade the people's right to review the wisdom of the concealed weapons **[*407]** provisions in that act. n3 That is, intervening defendant states that although 2000 PA 381 will fundamentally change Michigan law governing concealed weapons permits, a legislative majority acted with the specific intent to deny **[**319]** Michigan citizens their right to decide whether most people should be legally allowed **[***67]** to carry concealed firearms.

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n3 Various Michigan legislators would agree with intervening defendant. For example, protesting the new law, Senator Byrum stated that "we know that the only reason there was an appropriation . . . was to block the referendum, block the people's right to disagree with the action of their Legislature," 2000 Journal of the Senate 2125, and Senator Gast said that the appropriation "was put in to make it bulletproof and ballot-proof, and I think it's kind of deceptive." White, *Lawyers, guns and money: weapons petitions go to court,* Grand Rapids Press, June 10, 2001, at A18. Similarly, Representative Wojno stated that "the reason that the proponents of this legislation added this appropriation . . . is inappropriate and insidious. They apparently believe that in doing so they can circumvent Article II, Section 9 of the Michigan Constitution, and silence the voices of the majority of the people of this State," while Representative Jellema added that the eleventh- hour addition of the appropriation "further diminishes the right of voters to express their views on this very important issue." 2000 Journal of the House 2682, 2683.

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In answering this argument, the majority focuses narrowly on the superficially straightforward question whether 2000 PA 381 fits within the phrase "acts making appropriations for state institutions." Slip op at 2. As the reader has seen, the majority has no problem answering that question affirmatively, granting the lame-duck legislative majority the prize it apparently sought: freedom to change the concealed weapons law without public review through the referendum process.

Despite the legalistic temptation to focus on the seemingly literal language of a single phrase in a single sentence, the pertinent sentence here is but one sentence in our state Constitution. Constitutional analysis must not be overly literal; it is an undertaking **[*408]** that must be approached in an entirely different light. Long ago, Michigan's great constitutional scholar Justice COOLEY set forth for his many successors on this Court the primary rule of constitutional interpretation, the rule of "common understanding," described in his treatise *Constitutional Limitations,* p 81, to which this Court has turned so frequently. This Court gave a fully developed explanation of the rule in **[***69]** *Traverse City Sch Dist v Attorney Gen,* 384 Mich. 390, 405-406; 185 N.W.2d 9 (1971):

> This case requires the construction of a constitution, where the technical rules of statutory construction do not apply. *McCulloch v Maryland,* 17 U.S. (4 Wheat) 316, 407; 4 L. Ed. 579 (1819).
>
> The primary rule is the rule of "common understanding" described by Justice Cooley:
>
> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed it, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abtruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' (Cooley's Const Lim 81.) (Emphasis added.)"
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> * * *
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> A second rule is that to clarify meaning, the circumstances **[***70]** surrounding the adoption of a constitutional provision and the purpose sought to

be accomplished may be considered. On this point this Court has said the following:

"In construing constitutional provisions where the meaning may be questioned, the court should have regard to the **[*409]** circumstances leading to their adoption and the purpose sought to be accomplished. *Kearney v Board of State Auditors,* [189 Mich. 666, 673; 155 N.W. 510 (1915)]. "

A third rule is that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. Chief Justice Marshall pursued this thought fully in *Marbury v Madison,* [5 U.S. (1 Cranch) 137, 175; 2 L. Ed. 60 (1803)], which we quote in part:

"If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction . . . ."

These are the principles we must apply when interpreting our state constitution. **[**320]**

The first and second principles stated in *Traverse City Sch Dist* greatly help in answering the question presented in this case. Under those rules, we are **[***71]** to set aside the "technical rules of statutory construction" and the quest for "dark or abtruse meaning" in favor of the interpretation that "reasonable minds, the great mass of the people themselves," would give the state constitution. Without question, that exercise must be carried out in light of the whole document. Further, it must involve a generous reading of the people's will, freed of a lawyer's instinct toward pinched constructions of narrow phrases.

When considered as a whole, the constitution provides various explanations of, and restrictions on, the legislative process. A broad examination of the provisions of article 4 evidences that the framers and the people placed an extremely high value on the integrity and accountability of this process. There, the Constitution prohibits the Legislature from playing deceptive games in the course of enacting legislation, n4 **[*410]** and further seeks to assure that legislation is given meaningful consideration before it is adopted. n5 Article 4 also notes the special nature of appropriations bills. n6 Finally, the reserved role of the people is noted in article 4, n7 as well as in other provisions of the Constitution. See Const **[***72]** 1963, art 2, § 9; art 12, § 2.

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n4 Const 1963, art 4, §§ 24 and 25, provides this protection, stating:

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re- enacted and published at length.

n5 Const 1963, art 4, § 26, provides this assurance, stating:

No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house. On the final passage of bills, the votes and names of members voting thereon shall be entered in the journal.

n6 This is Const 1963, art 4, § 31, which provides:

> The general appropriation bills for the succeeding fiscal period covering items set forth in the budget shall be passed or rejected in either house of the legislature before that house passes any appropriation bill for items not in the budget except bills supplementing appropriations for the current fiscal year's operation. Any bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill. One of the general appropriation bills as passed by the legislature shall contain an itemized statement of estimated revenue by major source in each operating fund for the ensuing fiscal period, the total of which shall not be less than the total of all appropriations made from each fund in the general appropriation bills as passed. **[***73]

n7 Article 4, concerning the legislative branch, notes the people's power:

Any bill passed by the legislature and approved by the governor, except a bill appropriating money, may provide that it will not become law unless approved by a majority of the electors voting thereon. [Const 1963, art 4, § 34.]

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[*411] In light of these provisions and the overall approach to legislation taken by the constitution's framers and the people who ratified it, I am convinced that the Court of Appeals correctly decided this case. I am confident that the constitutional right of referendum, in this narrow context, should not be taken away by so transparent an artifice. Justice COOLEY's "great mass of the people" would, if asked, surely suppose that "acts making appropriations **[**321]** for state institutions," which deny the people's reserved power of referendum, are general appropriations bills containing substantial grants to state agencies. Those grants would have to ensure the viability of the agencies or, as the Court of Appeals put it, support the agencies' "core functions." 246 Mich. App. 82; **[***74]** 630 N.W.2d 376 (2001). The people of Michigan, I am certain, never intended to authorize the 2000 lame duck Legislature's legerdemain.

Additionally, the third principle stated in *Traverse City Sch Dist* provides further support for this conclusion. That principle is that when possible, we must prefer an interpretation that does not create a constitutional invalidity over an interpretation that does. n8 **[*412]** The referendum power, of course, is the people's reserved check on the Legislature. In *Kuhn v Dep't of Treasury*, 384 Mich. 378, 385 n.10; 183 N.W.2d 796 (1971), this Court, ironically, referred to the referendum power as a "gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands." However, with its decision in this case, the majority removes the people's check, taking the gun from behind the door and handing it to the Legislature. By holding that the money inserted into 2000 PA 381 circumvents the people's reserved referendum power, the majority holds that the referendum power exists at the Legislature's pleasure. Whenever the Legislature wants to avoid **[***75]** the people's check on its power, it need only insert some money into a bill, apparently even a de minimis amount, to get around that power. The people's check on the Legislature will thus become invalid because the people will only have the "gun-behind-the-door" when the Legislature gives it to them. Such an interpretation is certainly at odds with this Court's commitment to liberally construe constitutional provisions **[*413]** reserving for the people a direct legislative voice, see *Kuhn*, 384 Mich. at 385, but further leaves the people's reserved referendum power, in a word, useless.

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n8 The Court cited *Marbury v Madison* in support of this principle. See Traverse City Sch Dist, 384 Mich. at 406. Although *Marbury* is sometimes cited for the proposition that the construction of a statute that creates a constitutional invalidity is disfavored, see, e.g., Council of Orgs & Others for Ed About Parochiaid v Governor, 455 Mich. 557, 570; 566 N.W.2d 208 (1997), in the passage this Court cited, Chief Justice Marshall actually was addressing invalidating constitutional provisions. *Council of Orgs*, as well as Traverse City Sch Dist, 384 Mich. at 406, and House Speaker v Governor, 443 Mich. 560, 585; 506 N.W.2d 190 (1993), quoted this passage from *Marbury*:

If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning. [*Id* 5 U.S. at 175.]

The "clause" referenced, though, was a clause of the United States Constitution, as illustrated by the United States Supreme Court's language preceding the quoted passage:

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is admissible, unless the words require it. [*Id* 5 U.S. at 174.]

Marbury then discussed how US Const, art 3, § 2, P 2 provided for the Supreme Court's jurisdiction, and how no construction of any clause in that section that rendered any other clause inoperative would be favored. See Marbury, 5 U.S. at 175-180. *Traverse City Sch Dist* also dealt with giving meaning to the language of the constitution, not saving a statute from constitutional invalidity. See Traverse City Sch Dist, 384 Mich. at 412-413. Likewise, in this case we must give meaning to, and not invalidate, the people's reserved referendum power.

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In its short opinion, the majority cites "an unbroken line of decisions of this Court interpreting [the referendum power]." Slip op at 2. The line is unbroken because it reflects this Court's dual commitments **[**322]** to the people's right to vote on matters of great public significance and to the taxpayers' right to a state government that maintains responsible and functional taxation and appropriation policies. At times, the latter commitment has required that we give effect to the constitutional insulation against referring appropriations measures and related financial enactments. Never, though, has the "unbroken line" veered in the direction approved in this case.

Also, I find it as inevitable as night following day that the concurrences would characterize the lengthy, thoughtful majority opinion as "admirably concise," slip op at 1 (YOUNG, J., concurring), and as setting "forth its analysis simply and straightforwardly" and doing so because "the constitutional issue before us is simple and straightforward." Slip op at 1- 2 (MARKMAN, J., concurring). Yet, as self-evident as the majority believes its result to be, the orchestrated, explanatory concurrences appeared following **[***77]** this dissent. In my view, these serial apologias do nothing to alter the majority's disembowelment of the public's constitutionally guaranteed right to referendum.

So, despite the constitutional structure and the people's desire for a check on the Legislature, the majority concludes that the Legislature can decide when the people will have that check. I reiterate that reasonable **[*414]** minds may differ about the underlying substance of this case. Some say public safety and ordinary social intercourse will be disturbed by a radical switch in state concealed weapons policy, while others say that public safety will be enhanced when responsible citizens can carry weapons. I say, and do not believe reasonable minds can dispute, that the constitution says that the people must be allowed to vote.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*).

I respectfully dissent from the majority's holding that 2000 **Public Act 381** is exempt from the power of referendum of the Michigan Constitution.

Art 2, § 9 of the 1963 Michigan Constitution states that "the power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies **[***78]** in state funds . . . ." This language was taken almost verbatim n1 from the 1908 Michigan Constitution, art 5, § 1 (amendment of 1913), which read:

> The legislative power of the state of Michigan is vested in a senate and house of representatives; but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the Legislature; and to approve or reject at the polls any act passed by the Legislature, except *acts making appropriations for state institutions and to meet deficiencies in state funds*." [Emphasis added.] **[*415]**

The sole interpretation of the "acts making appropriations for state institutions" language of art 5, § 1 of the 1908 Constitution is found in the 1925 Michigan Supreme Court case, *Detroit Automobile Club v Secretary of State*, 230 Mich. 623; 203 N.W. 529 (1925).

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n1 In 1974 this Court held that "The referendary provision and exceptions of the 1908 Constitution were retained in the 1963 Constitution as art 2, § 9 *without change in the pertinent language*." *Boards of County Road Comm'rs v Board of State Canvassers*, 391 Mich. 666, 674-675; 218 N.W.2d 144 (1974) (emphasis added).

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In *Detroit Automobile Club,* plaintiffs sought a writ of mandamus to compel the **[**323]** defendant to refrain from immediately enforcing 1925 PA 2 in order to allow a referendum on the law. The act at issue in *Detroit Automobile Club* appropriated money for the use of the Highway Department in constructing and maintaining the highways of the state. To determine whether the Legislature had the power to give the act immediate effect, and thus preclude a referendum, *Detroit Automobile Club* addressed the meaning of art 5, § 21 n2 and art 5, § 1.

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n2 Art 5, § 21 provided in pertinent part:

No act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a 2/3 vote of the members of each elected house.

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Detroit Automobile Club first addressed **[***80]** whether the Highway Department was a state institution within the meaning of art 5, § 1. Ultimately, the Court held that the Highway Department was a state institution within the meaning of the constitution. *Detroit Automobile*

Club, 230 Mich. at 626. In order to reach this holding, the Court ruled:

> The question is not solely whether the highway department may be correctly termed a state institution, but rather whether, in view of the functions which it exercises, it comes within the meaning of that term as used in the Constitution. **[*416]** *It is not difficult to determine what the framers of the Constitution had in mind. It is clear that, by permitting immediate effect to be given to appropriation acts for state institutions, it was their purpose to enable the state to exercise its various functions free from financial embarrassment.* The highway department exercises state functions. It was created by the Legislature for that purpose. It must have money to carry on its activities. *Without the money appropriated by this act for its immediate use, it would cease to function. The constitutional purpose was to prevent such a contingency.* [*Id.,* pp 625-626 **[***81]** (emphasis added).]

The Court viewed the purpose of the Legislature's power to give an act of appropriation immediate effect as one necessary to permit the "state to exercise its various functions free from financial embarrassment" and to allow for state institutions to carry on state functions. *Id.* To that Court, this purpose of the framers was "not difficult to determine . . . ." *Id. Detroit Automobile Club* recognized the necessity of immediacy *under these circumstances* and it is *under these circumstances* that *Detroit Automobile Club* determined that an act was not subject to the people's referendum power.

This Court reaffirmed its articulation of the purpose of the constitutional provision in *Moreton v Secretary of State,* 240 Mich. 584, 592; 216 N.W. 450 (1927), where it declined to interpret the provision in a way which would "defeat the constitutional purpose, which is to save the State from financial embarrassment in exercising any of its State functions." Further, this Court has cited *Detroit Automobile Club's* interpretation of this language without question or criticism in *County Road Ass'n of Michigan v Board of State Canvassers,* 407 Mich. 101, 112-113; **[***82]** 282 N.W.2d 774 (1979), and *Michigan Good Roads Fed v Bd* **[*417]** *of State Canvassers,* 333 Mich. 352, 356-357; 53 N.W.2d 481 (1952). n3

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n3 The 1939 decision in *Todd v Hull,* 288 Mich. 521; 285 N.W. 46 (1939), did briefly discuss art 5, § 1 of the 1908 Constitution (the predecessor to Const 1963, art 2, § 9), although *Todd's* primary focus was on whether 1939 PA 3 was immediately necessary for the preservation of the public peace, health, or safety within the contemplation of art 5, § 21, of the 1908 Constitution. Moreover, this case was a four to four split decision, and has no precedential effect.

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When the framers of the 1963 Constitution included the language on "acts making appropriations for state institutions," and the people approved it, it was with the knowledge of how this Court had previously interpreted this same language in *Detroit Automobile Club.* It is a well- established rule of constitutional **[***83]** construction that "the framers of a Constitution are presumed to have a knowledge of existing laws,...and to act in reference to that knowledge . . . ." *People v May,* 3 Mich. 598, 610 (1855). See also, *Detroit v Chapin,* 108 Mich. 136, 142; 66 N.W. 587 (1895); *Richardson v Secretary of State,* 381 Mich. 304, 311-313; 160 N.W.2d 883 (1968); *Boards of County Road Comm'rs v Board of State Canvassers,* 391 Mich. 666, 675; 218 N.W.2d 144 (1974). n4 Indeed, in reviewing "the construction placed by this Court on this exception to the right of referendum in the 1925

Detroit Automobile Club, 1927 *Moreton*, and 1952 *Good Roads* cases," this Court noted:

> The delegates to the 1961 Constitutional Convention are presumed to have known and to have understood the meaning ascribed in these earlier decisions to the language of the **[*418]** 1908 Constitution. This language was retained by them in the 1963 Constitution without modification in response to the earlier decisions. Under well-established principles, it is not open to us to place a new construction on this language. [*Bds of Co Rd Comm's*, 391 Mich. at 676.] **[***84]**

----------Footnotes----------

n4 Notably, in *Advisory Opinion re Constitutionality of 1973 PA 1 and 2*, 390 Mich. 166, 176-177; 211 N.W.2d 28 (1973), we stated that a judicially created exception to a constitutional limitation of state indebtedness survived the ratification of the 1963 Constitution because, "whatever the logic," the people were "presumably aware of the exception and did not eliminate it."

----------End Footnotes----------

Because the reasoning in *Detroit Automobile Club* was the sole and uncontradicted interpretation of "acts making appropriations for state institutions," I believe that its reasoning is the best evidence of the framers understanding of this language and perhaps the explanation why there is so little discussion of its meaning in the record of the convention.

Applying *Detroit Auto Club* to the facts of this case, the money appropriated in 2001 PA 381 is not necessary for the State Police to "exercise its various functions free from financial embarrassment," but rather is necessary only **[***85]** to implement the act itself. *Detroit Automobile Club*, 230 Mich. at 625-626. The State Police would not cease to function without the appropriation. The effect of referendum on 2001 PA 381 on the functioning of the State Police stands in contrast to the concerns of the Court in the "gas tax cases." *Moreton, supra; Moreton, supra; Good Roads, supra;* and *Co Rd Ass'n of Michigan, supra.* In the "gas tax cases," the Court concluded that the building of good roads is an important state function. Further, the Court concluded the appropriations at issue in the "gas tax cases" were made to "enable it to function in that regard, and, being made for that purpose, . . . are not subject to referendum." *Moreton*, 240 Mich. at 592. n5

----------Footnotes----------

n5 Thus, I agree with Justice Kelly that the gas tax cases do not support the majority conclusion, but, rather, are consistent with my position and that of my dissenting colleagues. See slip op at 6-7.

----------End Footnotes---------- **[***86]**

[*419] Further, I believe that the majority fails to recognize the importance of the referendum, and this Court's responsibility to protect the people's power of the referendum, **[**325]** as derived from the constitution and as outlined in *Michigan Farm Bureau v Hare*, 379 Mich. 387, 393;

> 151 N.W.2d 797 (1967):
>
> There is nevertheless an overriding rule of constitutional construction which

> requires that the commonly understood referral process, forming as it does a specific power the people themselves have expressly reserved, be saved if possible as against conceivable if not likely evasion or parry by the legislature. The rule is, in substance, that no court should construe a clause or section of a constitution as to impede or defeat its generally understood ends when another construction thereof, equally concordant with the words and sense of that clause or section, will guard and enforce these ends.

Given the prior, uncontradicted, and equally concordant construction in *Detroit Automobile Club*, I believe we are precluded in this case from applying the constitutional provision in a way that would take the power of the referendum **[***87]** away from the people and give it to the Legislature. n6

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n6 Such considerations are relevant even though this Court has recently rejected the "absurd result" mode of statutory construction. *People v McIntire*, 461 Mich. 147, 155-160; 599 N.W.2d 102 (1999). *McIntire* concerned a matter of *statutory* construction. We have long recognized that "construction of a constitution is a special situation where technical rules of statutory construction do not apply." *Highway Comm v Vanderkloot*, 392 Mich. 159, 179; 220 N.W.2d 416 (1974).

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Under the majority's opinion, if the Legislature were to drop the six zeros on the appropriation in 2000 PA 381, leaving an appropriation of $ 1 to the State Police, the act would nevertheless remain referendum-proof. I cannot believe that this outcome is the interpretation that "reasonable minds, the great **[*420]** mass of the people themselves, would give it." *Traverse City Sch Dist v Attorney General*, 384 Mich. 390, 405; **[***88]** 185 N.W.2d 9 (1971), quoting Cooley's Const Lim 81. I agree with Justice Cavanagh that by determining that the inclusion of a monetary provision in 2000 PA 381 circumvents the people's reserved referendum power, the majority effectively holds "that the referendum power exists at the Legislature's pleasure." Slip op at 11.

Finally, it is essential to recognize that the issue before us is one of constitutional interpretation. My opinion on the issue of constitutional law in this case does not address and should not be read to reflect one way or the other a position on the merits of the concealed weapons act passed by the Legislature.

I would affirm the result of the Court of Appeals.

KELLY, J. (*dissenting*).

I agree with my two dissenting colleagues that 2000 PA 381 (Act 381) does not constitute an act "making appropriations for state institutions" within the meaning of Const 1963, art 2, § 9. Thus, I would affirm the decision of the Court of Appeals and hold the act subject to referendum. I write separately, however, to make several points.

I. The Constitutional Meaning of "Acts Making Appropriations For State Institutions"

In Const **[***89]** 1963, art 2, § 9, the people reserved the power of referendum. They limited it, saying it "does not extend to acts making appropriations for state institutions . . . ." The question in the present case is whether a referendum of Act 381 is possible, because the act makes "appropriations for state institutions."

When construing provisions of our constitution, this Court uses the rule of "common **[**326]** understanding." **[*421]** See *American Axle & Mfg, Inc v Hamtramck*, 461 Mich. 352, 362; 604 N.W.2d 330 (2000); *Federated Publications, Inc v Michigan State Univ Bd of Trustees*, 460 Mich. 75, 84; 594 N.W.2d 491 (1999). The rule requires "ascertaining as best the Court may the general understanding and therefore the uppermost or dominant purpose of the people when they approved the provision or provisions . . . ." *Michigan Farm Bureau v Secretary of State*, 379 Mich. 387, 390-391; 151 N.W.2d 797 (1967); *Traverse City Sch Dist v Attorney Gen*, 384 Mich. 390, 405-406; 185 N.W.2d 9 (1971).

We start by examining the provision's plain meaning as understood by its ratifiers **[***90]** at the time of its adoption. See *American Axle & Mfg, Inc*, 461 Mich. at 362. Article 2, § 9 provides:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

In deciding this case, the majority makes much of the fact that Act 381 allocates $ 1,000,000 "to the department of state police . . . ." Slip op at 2. It concludes that **[***91]** the $ 1,000,000 is an "appropriation" and **[*422]** that the Department of State Police is a "state institution." See slip op at 2. Thus, it reasons, the power of referendum does not extend to Act 381. I disagree.

The majority's error, in my view, arises in part because it fails to examine carefully the meaning of the phrase "acts making appropriations for state institutions." In particular, it ignores the use of the word "for" in that phrase. In essence, it interprets art 2, § 9 to exempt from referendum any act that makes an appropriation "to" a state institution. This interpretation not only lacks support from the plain language of the article, it fails to appreciate the critical difference between the meanings of "to" n1 and "for."

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n1 "To" is defined, inter alia, as "used for expressing destination or appointed end." Random House Webster's College Dictionary, p 1401 (1995).

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I would interpret art 2, § 9 to give effect to the words contained in it. The provision indicates that an act making an appropriation **[***92]** is exempt from referendum only if the appropriation is made "for" state institutions. The dictionary definition of "for," in pertinent part, is "suiting the purposes or needs of," "with the object or purpose of." n2 "Purpose" is defined as "the reason for which something exists." n3 Thus, a reasonable interpretation of art 2, § 9 is that legislation that contains an appropriation aimed at satisfying the purpose **[**327]** or reason for which a state institution exists is referendum-proof. Unless the appropriation is intended to support the core function of a state institution, it does not prevent the people from voting on the legislation in referendum.

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n2 *Id.* at 519. My use of the word "for" is not as Justice Markman asserts, "transmuted beyond recognition." The meaning is straight out of the dictionary.

n3 *Id.* at 1096.

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[*423] I would adopt this as the most reasonable interpretation of art 2, § 9. n4 Applying it to this case, I would conclude that Act 381 does not make an appropriation for **[***93]** a state institution." Of the $ 1,000,000 that it allocates to the Department of State Police not a penny serves the central function for which the department exists. Instead, the appropriation implements the specific substantive provisions of the act. n5 None of items funded relates to a core function of the state police department. n6 Thus, giving the words of art 2, § 9 and of Act 381 their plain meaning, the Act does not make appropriations "for state institutions" within the meaning of the constitution. n7

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n4 In his concurring opinion, Justice Markman makes a "final query for the dissenters": How could those who ratified the constitution have fashioned the words of art 2, § 9 more clearly? My response is that no wording change is needed. Art 2, § 9 means what it says. However, it would have to be reworded to accurately convey the meaning that Justice Markman and the majority give it. It would have to be changed to read: The power of referendum "does not extend to acts making appropriations *to* state institutions . . . ."

n5 Act 381 directs that the $ 1,000,000 be used, inter alia, to distribute trigger locks, provide permit application kits, take photographs of applicants, conduct a public safety campaign regarding Act 381's requirements, and conduct fingerprint analysis and comparison reports required under the Act. **[***94]**

n6 Although Justice Young opines that the judiciary is ill- equipped to resolve what a state institution's "core function" is, see slip op at 32, I have every confidence in the judiciary's capabilities in this regard.

n7 Justice Markman creates a hypothetical example whereby the Legislature enacts a law that assigns to the Department of State Police responsibilities belonging to the Department of Corrections, and then allocates money to that end. See Justice Markman's slip op at 16. I find his hypothetical example inapplicable. Act 381 does not transfer functions belonging to any other agency.

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My interpretation is consistent with this Court's mandate that the right of referendum should be liberally construed. See, e.g., *Kuhn v Dep't of Treasury*, 384 Mich. 378, 385; 183 N.W.2d 796 (1971). Furthermore, **[*424]** it prevents the Legislature from easily circumventing the people's constitutional referendum power. With that end in mind, I agree with the views expressed by the Arizona Supreme Court in *Warner v Secretary of State*: n8

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n8 93 93 39 Ariz 203, 215-216; 4 P.2d 1000 (1931).

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To hold that an act may not be referred because incidentally it provides the funds to accomplish the ends it seeks would have the effect of practically nullifying the referendum provision of the Constitution, because many of the measures passed carry appropriations of this character, and it would be an easy matter to include such a provision in others and bring about the same result.

II. The Majority's Unprecedented Interpretation of Art 2, § 9: A Departure From Decisions In The "Gas Tax" Cases n9

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n9 *Detroit Automobile Club v Secretary of State*, 230 Mich. 623; 203 N.W. 529 (1925); *Moreton v Secretary of State*, 240 Mich. 584, 592; 216 N.W. 450 (1927); *Good Roads Federation v Board of State Canvassers*, 333 Mich. 352, 360; 53 N.W.2d 481 (1952); *County Road Comm'rs v Board of State Canvassers*, 391 Mich. 666; 218 N.W.2d 144 (1974); *County Road Ass'n of Michigan v Board of State Canvassers*, 407 Mich. 101, 116-118; 282 N.W.2d 774 (1979).

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The majority asserts that its conclusion, that Act 381 makes appropriations for **[**328]** state institutions, is consistent with "an unbroken line of decisions from this Court" in the gas tax cases. See slip op at 2. Upon close inspection, one finds the assertion untrue. Rather, as will be seen, it is my interpretation, and that of my two dissenting colleagues, that is consistent with the gas tax cases.

To be sure, the gas tax cases are "unbroken" in the sense that all constitute proclamations from this Court that the challenged gas tax was nonreferable, **[*425]** meaning that it could not be subject to a referendum vote. Notwithstanding, they do not support the majority's conclusion.

In the earliest gas tax case, this Court stated that the appropriation exception in our constitution was intended to allow the state to exercise its various core functions free from financial embarrassment. See *Detroit Automobile Club v Secretary of State*, 230 Mich. 623, 625; 203 N.W. 529 (1925). We explained:

> It is clear that, *by permitting immediate effect to be given to appropriation acts for state institutions, it was their purpose to enable the state to* **[***97]** *exercise its various functions free from financial embarrassment.* The highway department exercises state functions. It was created by the Legislature for that purpose. It must have money to carry on its activities. *Without the money appropriated by this act for its immediate use, it would cease to function. The constitutional purpose was to prevent such a contingency.* [230 Mich. at 625-626 (emphasis added).][n10]

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n10 In *Detroit Automobile Club*, the issue was whether 1925 PA 1 was subject to referendum under Const 1908, Art 5, § 1, amendment of 1913 (the predecessor to Const 1963, art 2, § 9), i.e., whether it made an appropriation "for [a] state institution[]." In his concurring opinion in this case, Justice Markman accurately notes that the portion of *Detroit Automobile Club* quoted above is taken from this Court's discussion regarding the meaning of the term

"state institution." Nevertheless, it is clear that that discussion contained, also, an interpretation of the entire referendum exception provision. For this reason, I find the Court's discussion in *Detroit Automobile Club* useful here.

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This interpretation was reiterated in the second gas tax case. See *Moreton v Secretary of State*, 240 Mich. 584, 592; 216 N.W. 450 (1927). *Moreton* stated that an act that contained appropriations to enable state agencies "to function" was nonreferable. *Detroit Automobile Club* and *Moreton* contain the most thorough discussion of this Court's interpretation of the **[*426]** appropriation exception to the referendum power. n11 These cases demonstrate that the appropriation exception within art 2, § 9, was prompted by a fear of financial embarrassment. That could occur if, by referendum petition, an appropriation for a state institution were suspended pending a vote on a legislative act. See *Moreton*, 240 Mich. at 592; *Detroit Automobile Club*, 230 Mich. at 625.

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n11 In two of the three later gas tax cases, this Court merely quoted or cited, then followed, our interpretation in *Detroit Automobile Club* of the appropriation exception to the power of referendum. See *Michigan Good Rds Federation*, 333 Mich. at 356-357; *County Road Assoc*, 407 Mich. at 112-113. In the other gas tax case, this Court merely cited our holding in *Detroit Automobile Club*. See *Co Rd Comm'rs*, 391 Mich. at 672.

In *Todd v Hull*, 288 Mich. 521, 523-524; 285 N.W. 46 (1939), we discussed the predecessor to art 2, § 9 (Const 1908, art 5, § 1). However, *Todd* was a four to four decision and, therefore, has no precedential effect.

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The majority's interpretation of art 2, § 9, impliedly rejects this Court's "core function" interpretation of the phrase in our constitution exempting from referendum "acts making appropriations for state **[**329]** institutions." n12 Therefore, its decision is not consistent with our prior decisions, at all. In fact, it seriously departs from them.

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n12 Two of the concurring opinions do so, as well. See Justice Markman's slip op at 2-3; Justice Young's slip op at 12-29.

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Given that *Detroit Automobile Club* represents the only substantive interpretation by this Court of "acts making appropriations for state institutions," I agree with Justice Weaver that we should follow it. Doing so further supports the conclusion I have articulated: art 2, § 9 was intended to exempt from referendum only those acts containing grants that ensure the viability of state agency recipients, or as the Court of Appeals said, that support the agencies' "core functions." 246 Mich. App. 82; 630 N.W.2d 376 (2001). **[***100]**

[*427] This interpretation renders the referendum exception consistent with the fundamental purpose of the general power of referendum. If the appropriation provision in an act is essential to a core purpose of a state institution, the act may not be referred. The risk is too great that the delay caused by a referendum vote would embarrass government and be detrimental to the public. On the other hand, where the appropriation provision is for a lesser function, not essential to the purpose of the department, the embarrassment problem does not arise. In the latter case, the people's right to decide policy issues for themselves, which

is the core purpose for which the people reserved the referendum power, should survive.

III. Court Consideration of the Legislature's Motives

In one of the three concurring opinions joining the majority, my colleague "emphasizes" that the Legislature's subjective motivation for making a $ 1,000,000 appropriation in Act 381 "is irrelevant." Chief Justice Corrigan's slip op at 2. In my view, this is an unfortunate exaggeration.

I acknowledge that, as a general rule, courts do not inquire into the motives of the Legislature in passing legislation. **[***101]** See *Young v Ann Arbor*, 267 Mich. 241, 243; 255 N.W. 579 (1934). However, "courts are not supposed to be blinded bats." *Todd v Hull*, 288 Mich. 521, 543; 285 N.W. 46 (1939) (opinion of Bushnell, J.), quoting *State ex rel Pollock v Becker*, 289 Mo. 660, 233 S.W. 641, 646 (1921). n13 **[*428]** Hence, I would not be so quick to eliminate categorically the possibility that this Court may consider, where pertinent, relevant, and ascertainable, the Legislature's motives in enacting a statute.

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n13 The instant case brings to mind the ancient quotation that "the voice is Jacob's voice but the hands are the hands of Esau." *Todd*, 288 Mich. at 543, (opinion of Bushnell, J.).

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IV. Referendum v Initiative

I find objectionable, also, the palliation offered by two of my colleagues in the majority that the intervening defendant retains the direct remedy of the initiative process. Chief Justice Corrigan's slip op at 1; Justice Young's **[***102]** slip op at 31. Although I agree that the initiative process is available here, I find their observation misplaced.

First, any alternative remedy that exists is irrelevant to the issue before us: whether Act 381 constitutes an act "making appropriations for state institutions" within the meaning of art 2, § 9. Moreover, there are real and heightened practical difficulties associated with pursuing an initiative process, as compared with referendum. Not only does the initiative process require far more petition signatures than the referendum process, it also involves much **[**330]** more complicated procedures. Const 1963, art 2, § 9.

Also, this case presents the exact situation for which the referendum power was created. The power exists to permit citizens to suspend or annul laws passed by the Legislature until the people can vote on the merits of the law. See *Alabam's Freight Co. v Hunt*, 29 Ariz. 419, 424; 242 P. 658 (1926); see also Const 1963, art 2, § 9. Thus, if Act 381 is referable, it would not become effective until the people voted it should be the law of this state. Const 1963, art 2, § 9.

[*429] The power of initiative, on the other **[***103]** hand, is intended to protect against a Legislature that fails to act. n14 It does not suspend the effective date of a law passed by the Legislature. Const 1963, art 2, § 9. Therefore, even if a successful initiative drive were pursued, the people would not vote on the law until at least November 2002. By then, Act 381 would have been operative for over sixteen months and potentially thousands of additional concealed weapons would be carried by thousands more Michiganians. Thus, from intervening defendant's perspective, the availability of the initiative process is an unsatisfactory remedy. n15

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n14 See Comment, *Interpretation of initiatives by reference to similar statutes: Canons of construction do not adequately measure voter intent*, 34 Santa Clara L R 945, 973 (1994), legislative inaction is the reason the initiative process was established."

n15 I note, also, that the issue in the instant case is one of constitutional interpretation. Accordingly, my opinion here addresses an issue of constitutional law. It does not address and ought not be construed to address the merits of Act 381.

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V. Conclusion

For these reasons, and for the reasons given by my two dissenting colleagues, I believe that Act 381 does not constitute "acts making appropriations for state institutions" within the meaning of art 2, § 9. Accordingly, I would affirm the decision of the Court of Appeals.

Entertainment Law Reporter, November, 2001

November, 2001

SECTION: RECENT CASES; Vol. 23, No. 6

LENGTH: 533 words

HEADLINE: Amphitheater owner was not liable to spectators injured by rowdy patrons during music concerts, because it satisfied its duty of care by having police present at concerts

BODY:
Pine Knob Music Theater, an outdoor amphitheater in **Michigan,** was not liable for injuries suffered by spectators at two separate rock concerts caused by the rowdy behavior of other concert patrons. The **Michigan** Supreme Court has so held, in a five-to-two decision that turned on the fact that Pine Knob already had police present at the two concerts, even before the injuries occurred.

Pine Knob is an outdoor theater that offers seating on a grass-covered hill. For unexplained reasons, patrons at a 1994 concert featuring Suicidal Tendencies, Danzig and Metallica tore up and threw sod, injuring fellow concertgoer Stephen Lowry. A similar sod-throwing incident occurred at a 1995 concert featuring Bush and the Ramones, resulting in injuries to Molly MacDonald. Lowry and MacDonald filed separate tort actions against Pine Knob, both of which were dismissed in response to Pine Knob's motions for summary judgment. Pine Knob's victory in Lowry's case was affirmed on appeal, but MacDonald won a reversal. The Supreme Court then agreed to hear the two cases, and has ruled in favor of Pine Knob in both.

The rowdy behavior that injured Lowry and MacDonald was not unique in Pine Knob's history. Similar sod-throwing incidents had occurred there during a 1991 Lollapalooza concert. Perhaps for that reason, Pine Knob had arranged to have police officers at the 1994 and 1995 concerts; and the police were present even before Lowry and MacDonald were injured. This turned out to be critical to Pine Knob's eventual victory.

In an opinion by **Justice Robert Young,** on behalf of the five-justice majority, the **Michigan** Supreme Court held that amphitheater owners (and other merchants) have a duty to use reasonable care to protect invitees from the foreseeable criminal acts of others. This duty, however, is triggered by "specific acts occurring on the premises" - that is by "an ongoing situation that is taking place on the premises." The Supreme Court held that "there is no obligation to otherwise anticipate the criminal acts of third parties."

Equally important, the Supreme Court held that all a merchant must do to satisfy this duty is to "reasonably expedite the involvement of the police." Merchants are not required to provide security guards or resort to self help in order to deter or quell disturbances.

Since Pine Knob had arranged for police to be present at the concerts where Lowry and MacDonald were injured, it had satisfied its duty to "expedite the involvement of the police." And for that reason, Pine Knob was not liable for their injuries.

Justice Michael Cavanagh dissented in an opinion joined by Justice Marilyn Kelly.

MacDonald was represented by Richard E. Shaw of Lopatin Miller Freedman Bluestone Herskovic & Domol in Southfield. Lowry was represented by Marc S. Morse in Farmington Hills. Pine Knob was represented by Kathleen McCree Lewis of Dykema Gossett in Detroit in the MacDonald case, and by Janet Callahan Barnes of Secrest Wardle Lynch Hampton Truex & Morley in Farmington Hills in the Lowry case.

MacDonald v. PKT, Inc., 628 N.W.2d 33, 2001 **Mich.**LEXIS 1187 (**Mich.** 2001)

LOAD-DATE: November 14, 2001

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*464 Mich. 322, *; 628 N.W.2d 33, **;*
*2001 Mich. LEXIS 1187, ****

MOLLY MACDONALD, Plaintiff-Appellee, v PKT, INC, known as **PINE KNOB MUSIC THEATER,** and ARENA ASSOCIATES, jointly and severally, Defendants-Appellants, and CAPITAL CITIES/ABC, INC, Defendant. STEPHEN L. LOWRY, Plaintiff-Appellant, v CELLAR DOOR PRODUCTIONS OF MICHIGAN, INC, a Michigan corporation, and ARENA ASSOCIATES INC, d/b/a **PINE KNOB MUSIC THEATER,** jointly and severally, Defendants-Appellees.

No. 114039, No. 115322

SUPREME COURT OF MICHIGAN

464 Mich. 322; 628 N.W.2d 33; 2001 Mich. LEXIS 1187

October 11, 2000, Argued
June 26, 2001, Decided
June 26, 2001, Filed

SUBSEQUENT HISTORY: [*1]** Updated Copy 10/16/01.

PRIOR HISTORY: Oakland Circuit Court, Jessica R. Cooper, J., (MacDonald) Court of Appeals, DOCTOROFF, P.J., and SAWYER and FITZGERALD, JJ. 233 Mich App 395 (1999) (Docket No. 204703). Pine Knob appeals. (Lowry) Oakland Circuit Court, Deborah G. Tyner, J., Court of Appeals, GAGE and ZAHRA, JJ. and MURPHY, P.J. (Docket No. 206875).

CASE SUMMARY

PROCEDURAL POSTURE: Two premises liability suits were filed against defendant theater. In one, summary disposition was granted for defendant and the Court of Appeals, Michigan, reversed. In the second, which also alleged a violation of the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws § 37.1101 et seq., summary disposition was granted for defendant and the Court of Appeals affirmed. On appeal, the two cases were consolidated.

OVERVIEW: Plaintiff concert goers sought recovery for injuries they suffered when fellow concert goers at an outdoor amphitheater that offered seating on a grass-covered hill began pulling up and throwing pieces of sod. The appellate court granted leave to address the duty of premises owners concerning the criminal acts of third parties. Upon review, the state supreme court reaffirmed that as a merchant, defendant had a duty to respond reasonably to situations occurring on the premises that posed a risk of imminent and foreseeable harm to identifiable invitees. The court limited the duty to reasonably expediting the involvement of the police and held that there was no duty to otherwise anticipate and prevent the criminal acts of third parties. Further, there was no duty to provide security personnel or otherwise resort to self help in order to deter or quell such occurrences.

OUTCOME: In the first suit, the court of appeals' order reversing summary disposition was reversed. In the second suit, the decision granting summary disposition for

defendant was affirmed on both claims.

CORE TERMS: merchant, duty, invitee, sod, throwing, patron, criminal acts, foreseeable, concert, third parties, identifiable, occurrence, random, foreseeability, anticipate, premises liability, duty to protect, band, spontaneous, restatement, occurring, criminal act, dog, public policy, endangered, reason to know, humane society, prior similar, foresee, crowd

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Civil Procedure > Summary Judgment > Summary Judgment Standard
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 The appellate court reviews de novo a trial court's decision to grant or deny summary disposition. A motion for summary disposition under Mich. Ct. R. 2.116 (C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery.

Civil Procedure > Summary Judgment > Summary Judgment Standard

HN2 A motion for summary disposition pursuant to Mich. Ct. R. 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law.

Torts > Real Property Torts > General Premises Liability

HN3 Merchants do not have a duty to protect their invitees from unreasonable risks that are unforeseeable. Accordingly, a duty arises only on behalf of those invitees that are readily identifiable as foreseeably endangered. The measures taken must be reasonable.

Torts > Real Property Torts > General Premises Liability

HN4 A merchant has no obligation generally to anticipate and prevent criminal acts against its invitees.

Torts > Real Property Torts > General Premises Liability

HN5 A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, courts should not expect invitors to assume that others will disobey the law. A merchant can assume that patrons will obey the criminal law. This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.

Torts > Real Property Torts > General Premises Liability

HN6 As a matter of law, fulfilling the duty to respond to criminal acts committed against victims on the premises requires only that a merchant make reasonable efforts to contact the police.

Torts > Real Property Torts > General Premises Liability

HN7 A merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties. Such a duty is vested in the government alone, and that to shift the burden to the private sector would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy.

Torts > Real Property Torts > General Premises Liability

HN8 To require defendant to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require defendant to provide a safer environment on its premises than its invitees would encounter in the community at large. Defendant simply does not have that degree of control and is not an insurer of the safety of its invitees.

Torts > Real Property Torts > General Premises Liability

HN9 The duty to provide police protection is vested in the government. To require a merchant to do more than take reasonable efforts to expedite the involvement of the police, would essentially result in the duty to provide police protection, a concept that is rejected. Merchants do not have effective control over situations involving spontaneous and sudden incidents of criminal activity. On the contrary, control is precisely what has been lost in such a situation. Thus, to impose an obligation on the merchant to do more than take reasonable efforts to contact the police is at odds with the public policy principles.

Torts > Real Property Torts > General Premises Liability

HN10 Even where a merchant voluntarily takes safety precautions in an effort to prevent criminal activity, suit may not be maintained on the theory that the safety measures are less effective than they could or should have been. Consequently, in any case in which a factfinder, be it the trial court or a jury, will be assessing the reasonableness of the measures taken by a merchant in responding to an occurrence on the premises, a plaintiff may not present evidence concerning the presence or absence of security personnel, or the failure to otherwise resort to self-help, as a basis for establishing a breach of the merchant's duty. A jury thus must be specifically instructed accordingly.

Torts > Real Property Torts > General Premises Liability

HN11 Merchants have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. A merchant is not obligated to do anything more than reasonably expedite the involvement of the police. A merchant is not required to provide security guards or otherwise resort to self help in order to deter or quell such occurrences.

Torts > Real Property Torts > General Premises Liability

HN12 A merchant should not be expected to anticipate any type of criminal activity, whether random or otherwise, before there is some specific activity on the premises creating a foreseeable risk of imminent harm to an identifiable invitee. The merchant then must make efforts to notify those deputized to deal with such circumstances: the police.

Torts > Real Property Torts > General Premises Liability

HN13 Merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. The duty to respond is limited to reasonably expediting the involvement of the police, and that there is no duty to otherwise anticipate the criminal acts of

third parties. Merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences.

COUNSEL: Lopatin, Miller, Freedman, Bluestone, Herskovic & Domol (by Richard E. Shaw), Southfield, MI, for plaintiff-appellee in MacDonald.

Marc S. Morse, Farmington Hills, MI, for plaintiff-appellant in Lowry.

Dykema Gossett, P.L.L.C. (by Kathleen McCree Lewis, Kevin P. Fularczyk, and Katherine M. White), Detroit, MI, for defendants-appellants in MacDonald.

Secrest, Wardle, Lynch, Hampton, Truex & Morley (by Janet Callahan Barnes), Farmington Hills, MI, for defendants-appellees in Lowry.

Amicus Curiae: Kirk, Huth & Davis, P.C. (by Robert S. Huth, Jr.), Mt. Clemens, MI, and Madden & Patton, L.L.C. (by Turner D. Madden), Washington, D.C., for International Assembly of Managers.

JUDGES: BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn **[***2]** Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. YOUNG, J., CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J. CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J.

OPINIONBY: YOUNG

OPINION: [34] [*325]**

YOUNG, J.

I. INTRODUCTION

In these consolidated premises liability cases, plaintiffs seek to recover for injuries they suffered when fellow concert goers at the **Pine Knob Music Theater** (Pine Knob), an outdoor amphitheater that offered seating on a grass-covered hill, began pulling up and throwing pieces of sod. We granted leave to address the duty of premises owners concerning the criminal acts of third parties.

Under *Mason v Royal Dequindre, Inc*, 455 Mich. 391; 566 N.W.2d 199 (1997), merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable **[*326]** harm to identifiable invitees. We hold today that the duty to respond is **[**35]** limited to reasonably expediting the involvement of the police and that there is no duty to otherwise anticipate and prevent the criminal acts of third parties. Finally, consistent with *Williams v Cunningham Drug Stores, Inc*, 429 Mich. 495; **[***3]** 418 N.W.2d 381 (1988), and *Scott v Harper Recreation, Inc*, 444 Mich. 441; 506 N.W.2d 857 (1993), we reaffirm that merchants are not required to provide security personnel or otherwise resort to self help in order to deter or quell such occurrences.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *MACDONALD*

In *MacDonald*, plaintiff Molly MacDonald attended a concert on May 4, 1995, at Pine Knob at which several bands were performing. Pine Knob offers seating on a grass-covered hill, as well as seating in a pavilion. Plaintiff received the tickets to the concert as part of a

promotional giveaway by a local radio station sponsoring the concert. When plaintiff arrived at Pine Knob, she and a friend found a spot to sit on the hill. While a band called Bush was performing, some patrons began pulling up sod and throwing it.

Before the concert, the event coordinator had asked the bands to stop performing in the event that the audience members began throwing sod, and announce that the sod throwing must stop. There were also flyers posted in the dressing rooms of the bands requesting the bands to make an announcement **[***4]** to the audience to stop throwing sod. Pursuant to that request, the band finished the song and stopped performing, making an announcement that **[*327]** unless the sod throwing stopped, the concert would not continue. The crowd complied with the band's request, and several individuals were ejected from Pine Knob for throwing sod.

While the next band, the Ramones, was performing, the sod throwing resumed. After that band refused to make an announcement to stop throwing sod, the event coordinator turned on the house lights. When the sod throwing continued, the band made an additional announcement demanding that it stop. Once again, several individuals who were involved in throwing sod were ejected from the theater. During the second incident of sod throwing, plaintiff fractured her ankle when she fell while attempting to avoid being struck by a piece of sod. Discovery materials indicated that there had been two sod-throwing incidents at previous concerts at Pine Knob, one incident in 1991, at a Lollapalooza concert, and another incident in 1994, at a Metallica concert. n1

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n1 The 1994 sod-throwing incident resulted in the lawsuit at issue in *Lowry*.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***5]**

Plaintiff filed a complaint against, among others, PKT, Inc., also known as **Pine Knob Music Theater** and Arena Associates. n2 Plaintiff alleged that Pine Knob was negligent in failing to provide proper security, failing to stop the performance when it should have known that continuing the performance would incite the crowd, failing to screen the crowd to eliminate intoxicated individuals, and by selling alcoholic beverages. Pine Knob moved for summary disposition, **[*328]** arguing that it did not have a duty to protect plaintiff from the criminal acts of third parties. Meanwhile, plaintiff moved to amend her complaint to add certain theories including design defect, nuisance, and third-party beneficiary claims and to more specifically set forth her negligence claim.

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n2 Although not fully explained by the parties, apparently **Pine Knob Music Theater** and Arena Associates is one entity. Capital Cities/ABC, Inc., the owner of the radio station that sponsored the concert, was dismissed as a party defendant from the case early on and is not a party to this appeal.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***6]** **[**36]**

The trial court granted summary disposition for Pine Knob pursuant to MCR 2.116(C)(8) and (10), but the Court of Appeals reversed. n3 The Court of Appeals held that the trial court erred in granting summary disposition in favor of Pine Knob because there were fact questions for the jury regarding whether the sod throwing incident created a foreseeable risk of harm and whether the security measures taken by Pine Knob were reasonable. The Court of Appeals reasoned that plaintiff submitted evidence that there had been incidents of sod throwing at previous concerts, that Pine Knob was aware of those instances, and that it had formulated policies to deal with sod throwing incidents before the concert. Regarding the

question whether security measures taken by Pine Knob were reasonable, the Court of Appeals stated that plaintiff presented evidence sufficient to survive summary disposition by submitting the affidavit of an expert witness who stated that Pine Knob was negligent by (1) failing to have adequately trained security personnel properly positioned at the concert, n4 (2) failing to summon the police to eject or arrest those throwing sod, (3) failing to have a clear, written policy regarding **[***7]** the sod throwing, (4) allowing the concert **[*329]** to continue after the first incident, and (5) serving alcohol.

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n3 233 Mich. App. 395; 593 N.W.2d 176 (1999).

n4 Approximately forty security officers and eleven officers from the Oakland County Sheriff's Department were working at the concert.

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Finally, the Court of Appeals held that the trial court abused its discretion in denying plaintiff's motion to amend her complaint pursuant to MCR 2.116(I)(5). The Court of Appeals stated that the proposed claims were legally sufficient and were justified by the evidence. This Court granted Pine Knob's application for leave to appeal. n5

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n5 461 Mich. 992 (2000).

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B. *LOWRY*

In *Lowry*, plaintiff and a friend attended a Suicidal Tendencies/Danzig/Metallica concert at Pine Knob on June 22, 1994. Plaintiff **[***8]** suffers from multiple sclerosis and uses the aid of two canes or a wheelchair. Plaintiff was seated in the handicapped section at Pine Knob, which is located at the rear of the pavilion immediately adjacent to the grass seating. During the performance of Danzig, patrons seated on the lawn of Pine Knob began throwing sod. Plaintiff was allegedly struck with sod on the head and shoulders. Within a few minutes, the band stopped performing and an announcement was made requiring individuals to stop or the concert would not continue. Alcohol sales were cut off. Deposition testimony indicated that the sod throwing stopped within ten to fifteen minutes and numerous individuals were ejected from Pine Knob. n6

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n6 Approximately seventy crowd control personnel, as well as officers from the Oakland County Sheriff's Department, were present at the concert.

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Plaintiff brought a negligence action against Pine Knob, as well as Cellar Door Productions of Michigan, **[*330]** Inc., the producer of the concert, alleging that defendants failed **[***9]** to protect plaintiff from the foreseeable dangers of sod throwing by patrons. Plaintiff also alleged that defendants violated his rights under the Michigan Handicapper's Civil Rights Act (MHCRA), (now: Persons With Disabilities Civil Rights Act), MCL 37.1101 *et seq.*, by failing to adequately accommodate his disability.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing

[37]** that they owed no duty to protect plaintiff from the criminal acts of third parties, and that plaintiff's handicap was fully accommodated. With regard to plaintiff's premises liability claim, the trial court granted summary disposition for defendants on the ground that the sod throwing was unforeseeable and that defendants took reasonable measures to protect their patrons. The trial court also granted summary disposition for defendants on plaintiff's handicapper discrimination claim, holding that defendants provided plaintiff with full and equal utilization of the facilities.

The Court of Appeals affirmed in an unpublished per curiam decision. n7 As an initial matter, the Court of Appeals noted that both the parties and the trial court had failed to recognize **[***10]** that because Cellar Door was not the owner of the premises, it could not have been negligent under a premises liability theory. n8 By implication, the Court also held that Cellar Door could not have violated plaintiff's rights under the MHCRA. With regard to Pine Knob, the Court of **[*331]** Appeals held that it owed no duty to protect plaintiff because it was unforeseeable as a matter of law that the crowd would throw sod at plaintiff during the concert. In that respect, the Court of Appeals found that the instant case was factually distinguishable from *MacDonald* because (1) unlike *MacDonald*, in the instant case there was no evidence whatsoever that defendants had formulated a specific policy to deal with sod throwing incidents, (2) the sod throwing incident in this case occurred before the incident in *MacDonald,* and (3) in *MacDonald*, the plaintiff was injured during the *second* occurrence of sod throwing during the same concert, whereas in this case, there were no incidents of sod throwing during the prior evening's performance that involved the same bands. The Court of Appeals also held that Pine Knob fully accommodated plaintiff's disability.

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n7 Issued June 8, 1999 (Docket No. 206875). **[***11]**

n8 Plaintiff does not challenge this aspect of the Court of Appeals decision. Accordingly, we deem plaintiff to have abandoned his claims against Cellar Door.

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One panel member dissented in part, arguing that "although plaintiff did not present evidence regarding the number of previous sod throwing incidents or the dates and circumstances surrounding those previous occurrences, plaintiff nonetheless established the existence of a genuine issue of material fact with respect to whether the sod throwing incident at issue in this case was foreseeable." The dissent further suggested that the reasonableness of Pine Knob's conduct with respect to protecting the patrons with disabilities from injuries should have been submitted to a jury.

This Court granted plaintiff's application for leave to appeal. n9

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n9 461 Mich. 992 (2000).

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[*332] III. STANDARD OF REVIEW

HN1 **[***12]** We review de novo a trial court's decision to grant or deny summary disposition. *The Herald Co v Bay City*, 463 Mich. 111, 117; 614 N.W.2d 873 (2000). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. *Wade v Dep't of Corrections*, 439 Mich. 158, 162; 483 N.W.2d 26 (1992). The motion should be granted only when the claim is so clearly

unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* at 163.

HN2 A motion for summary disposition pursuant to MCR 2.116 (C)(10) tests the factual **[**38]** support of a claim. Smith v Globe Life Ins Co, 460 Mich. 446, 454; 597 N.W.2d 28 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *Id.* at 454-455, quoting Quinto v Cross & Peters Co, 451 Mich. 358, 362-363; 547 N.W.2d 314 (1996). **[***13]**

IV. THE DUTIES OF A MERCHANT

We recognized in *Mason* the general rule that HN3 merchants "do not have a duty to protect their invitees from unreasonable risks that are unforeseeable." 455 Mich. at 398. Accordingly, we held that a duty arises only on behalf of those invitees that are "'readily identifiable as [being] foreseeably endangered.'" *Id.*, quoting Murdock v Higgins, 454 Mich. 46, 58; 559 N.W.2d 639 (1997). We further held that the measures taken must be reasonable. *Mason* at 405. In the **[*333]** instant cases, we are called upon to further clarify the duty that we articulated in *Mason*.

Mason and its companion case, *Goodman v Fortner*, both involved altercations that began in bars. In *Mason*, one of the plaintiff's friends, Dan Kanka, was involved in an altercation with another man, Thomas Geoffrey. The plaintiff was in a different area of the bar when the fight began, and only witnessed its conclusion. The bar's bouncers immediately ejected Geoffrey and, in an attempt to avoid more conflict, instructed Kanka to remain until Geoffrey **[***14]** left the premises. When the plaintiff left the bar some time later, Geoffrey assaulted him in the parking lot, breaking his nose and jaw. 455 Mich. at 393-394. We upheld the dismissal of the plaintiff's resulting premises liability claim on the ground that, because the plaintiff was not near the area where the initial fight occurred (and the defendant had no knowledge that the plaintiff was associated with either Kanka or Geoffrey), the defendant had no reason to believe that the plaintiff was in danger. Even viewed in a light most favorable to the plaintiff, we held that the facts did not support a finding that the attack on the plaintiff was foreseeable. 455 Mich. at 404.

In *Goodman*, the plaintiff's girlfriend, Theresa Woods, was involved in a bar room scuffle with the plaintiff's former girlfriend and mother of his child, Joslynn Lewis. The fight continued in the parking lot and then moved back inside the bar, with two of Lewis' relatives joining the fray. Despite repeated requests that they call the police, the bar's bouncers refused, although they did remove Lewis and her group from the bar. When the plaintiff and Woods attempted to leave the bar, Lewis and her friends **[*334]** were waiting **[***15]** out in the parking lot, yelling at the plaintiff and threatening to kill him. There was evidence that the bouncers standing at the door could undoubtedly hear the commotion. One of Lewis' friends eventually shot the plaintiff in the chest. 455 Mich. at 395-396. We upheld a jury verdict in the plaintiff's favor on the ground that a reasonable jury could find that the harm to the plaintiff was foreseeable. We also held that a reasonable jury could find that the defendant did not take reasonable steps to prevent the plaintiff's injury. 455 Mich. at 404-405.

As we made clear in *Williams* and *Scott*, HN4 a merchant has no obligation generally to anticipate and prevent criminal acts against its invitees. Indeed, as the Court of Appeals panel in *Lowry* correctly noted, we have never recognized as "foreseeable" a criminal act that did not, as in *Goodman*, arise from a situation occurring on the premises under circumstances that would cause a person to recognize **[**39]** a risk of imminent and foreseeable harm to an identifiable invitee. Consequently, a merchant's only duty is to *respond* reasonably **[***16]** to such a situation. To hold otherwise would mean that merchants have an obligation to provide what amounts to police protection, a proposition

that we soundly rejected in both *Williams* and *Scott*. n10 To the extent that, in *Goodman*, we relied upon evidence of previous shootings at the bar in assessing whether a reasonable jury could find that the *Goodman* plaintiff's injury was foreseeable, we **[*335]** now disavow that analysis as being flatly inconsistent with *Williams* and *Scott*.

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n10 *Mason* cited § 344 of 2 Restatement of Torts, 2nd, and comment f to § 344, which indicate that a merchant has a duty to take precautions against the criminal conduct of third persons that may be reasonably anticipated. We overrule that portion of *Mason* as conflicting with *Williams* and *Scott*.

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HN5 A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter **[***17]** of public policy, we should not expect invitors to assume that others will disobey the law. A merchant can assume that patrons will obey the criminal law. See *People v Stone*, 463 Mich. 558, 565; 621 N.W.2d 702 (2001), citing Prosser & Keeton, Torts (5th ed) § 33, p 201; *Robinson v Detroit*, 462 Mich. 439, 457; 613 N.W.2d 307 (2000); *Buczkowski v McKay*, 441 Mich. 96, 108, n 16; 490 N.W.2d 330 (1992); *Placek v Sterling Hts*, 405 Mich. 638, 673, n 18; 275 N.W.2d 511 (1979). This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.

Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately **[***18]** unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties.

[*336] Having established that a merchant's duty is to respond reasonably to criminal acts occurring on the premises, the next question is what is a reasonable response? Ordinarily, this would be a question for the factfinder. However, in cases in which overriding public policy concerns arise, this Court may determine what constitutes reasonable care. See *Williams, supra* at 501, citing *Moning v Alfono*, 400 Mich. 425, 438; 254 N.W.2d 759 (1977). Because such overriding public policy concerns exist in the instant cases, the question of reasonable care is one that we will determine as a matter of law. *Williams, supra* at 501. We now make clear that, HN6 as a matter of law, fulfilling **[***19]** the duty to respond requires only that a merchant make reasonable efforts to contact the police. We believe this limitation is consistent with the public policy concerns discussed in *Williams*.

In *Williams, supra*, the plaintiff was shopping in the defendant's store when an armed robbery occurred. As the plaintiff, a store patron, attempted to flee, the robber shot him. The plaintiff sued the defendant store, alleging that it breached its **[**40]** duty to exercise reasonable care in part by not providing armed and visible security guards for the security of the store's patrons. 429 Mich. at 497. This Court held that HN7 a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties. 429 Mich. at 501. We reasoned that such a duty is vested in the government alone, and that to shift the burden to the private sector "would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy." 429 Mich. at 503-504. We further explained **[***20]** that **[*337]**

HN8 to require defendant to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require defendant to provide a safer environment on its premises than its invitees would encounter in the community at large. Defendant simply does not have that degree of control and is not an insurer of the safety of its invitees. [

429 Mich. at 502.

The rationale of this Court in *Williams* for not requiring merchants to provide security guards to protect invitees from the criminal acts of third parties is the same rationale for not imposing on merchants any greater obligation than to reasonably expedite the involvement of the police. That is, HN9 the duty to provide police protection is vested in the government. *Williams*, 429 Mich. at 501. To require a merchant to do more than take reasonable efforts to expedite the involvement of the police, would essentially result in the duty to provide police **[***21]** protection, a concept that was rejected in *Williams*. n11 Merchants do not have effective control over situations involving spontaneous and sudden incidents of criminal activity. On the contrary, control is precisely what has been lost in such a situation. n12 Thus, to impose an obligation on the merchant to do more than take reasonable efforts to contact the police is at odds with the public policy principles of *Williams*.

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n11 A merchant may voluntarily do more than reasonably attempt to notify the police. However, we hold today, that a merchant is under no legal obligation to do so.

n12 In most instances, other than merely being the owner of the business being victimized, the merchant and invitee will be situated in roughly the *same* position in terms of their vulnerability to the violent criminal predator.

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In *Scott, supra* at 452, we expanded on this theme by holding that, HN10 even **[***22]** where a merchant voluntarily **[*338]** takes safety precautions in an effort to prevent criminal activity, "suit may not be maintained on the theory that the safety measures are less effective than they could or should have been." Consequently, in any case in which a factfinder, be it the trial court or a jury, will be assessing the reasonableness of the measures taken by a merchant in responding to an occurrence on the premises, a plaintiff may not present evidence concerning the presence or absence of security personnel, or the failure to otherwise resort to self-help, as a basis for establishing a breach of the merchant's duty. A jury thus must be specifically instructed in accordance with the principles of *Williams* and *Scott* as we have outlined them here.

To summarize, under *Mason*, HN11 generally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." 455 Mich. at 405. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an **[**41]** identifiable invitee. **[***23]** Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. See 455 Mich. at 404-405. While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. Consistent with *Williams*, a merchant is not obligated to do anything more than reasonably expedite the involvement of the police. We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self help in order to deter or quell such occurrences. *Williams, supra.*

[*339] V. APPLICATION

A. *MACDONALD*

The Court of Appeals in *MacDonald* held that plaintiff presented sufficient evidence to create a genuine issue of material fact concerning whether the harm to her was foreseeable. We agree that plaintiff created a jury-submissible issue concerning whether she was readily identifiable as being foreseeably endangered once the sod throwing began. However, we reject the Court of Appeals reliance on incidents previous to the day in question as a **[***24]** basis for concluding that sod throwing was "foreseeable" in this instance. The *Mason* duty, as clarified here, is not based upon the general question whether a criminal act was foreseeable, but, rather, once a disturbance occurs on the premises, whether a reasonable person would recognize a risk of imminent harm to an identifiable invitee. As stated, a merchant has no obligation to anticipate the criminal acts of third parties.

The Court of Appeals also held that a genuine issue of material fact exists concerning whether Pine Knob took reasonable measures in response to the sod throwing. We disagree. Because Pine Knob already had the police present at the concert, Pine Knob fully discharged its duty to respond. Thus, we reverse the Court of Appeals decision denying Pine Knob's motion for summary disposition and reinstate the trial court's decision to grant summary disposition for Pine Knob pursuant to MCR 2.116(C)(8) and (10).

We also reverse the Court of Appeals decision that the trial court abused its discretion in denying plaintiff's motion to amend her complaint to add certain theories including design defect, nuisance, and third-party **[*340]** beneficiary claims and to more specifically **[***25]** set forth her negligence claim. We conclude that plaintiff's amendment would have been futile.

B. *LOWRY*

In contrast with *MacDonald*, the Court of Appeals panel in *Lowry* relied solely on the *absence* of evidence concerning previous incidents of sod throwing to uphold the trial court's decision granting summary disposition for Pine Knob. This too was error. Whether Pine Knob could have anticipated that sod throwing would be a problem does not answer the legally relevant question whether plaintiff Lowry was foreseeably endangered once sod throwing began on the day of plaintiff's attendance. However, in accordance with this opinion, because Pine Knob already had the police at the concert, we hold that Pine Knob had no further obligation. Pine Knob discharged its duty to respond by having police present once the sod throwing began. Thus, we affirm the Court of Appeals affirmance of the trial court's decision to grant summary disposition in favor of Pine Knob. We also affirm the Court of Appeals decision to uphold summary disposition in Pine Knob's favor on plaintiff's handicapper discrimination claim. We **[**42]** agree that Pine Knob fully accommodated plaintiff's disability. **[***26]**

VI. RESPONSE TO THE DISSENT

The dissent accuses us of "uprooting the entire basis for imposing a duty on merchants to protect their invitees that we expressed in *Mason* . . . ." Slip op, pp 4-5. We disagree.

[*341] The principal difference between the dissent and the majority lies in our respective attempts to reconcile our several premises liability cases and the policies that undergird them. The dissent seeks in effect to limit or ignore the holdings of *Williams* and *Scott*. The majority refuses to do so.

In its effort to explain away the tort duty policy choices this Court adopted in *Williams* and *Scott*, the dissent reads into *Mason* rationales and holdings the dissent would have liked

Mason to have adopted but which that opinion plainly did not embrace.

We believe that the actual policy rationales of *Williams* and *Scott* must be reconciled with the merchant's duty set forth in *Mason.* In reconciling these cases, we seek to establish a clear rule. We reject the premises liability rule that the dissent proposes because (1) it provides little guidance to any premises owner concerning its obligations under law and (2) despite its claims to the contrary, **[***27]** the dissent's rule would unfairly expose merchants in high-crime areas to excessive tort liability and increase the pressure on commercial enterprises to remove themselves from our troubled urban and high-crime communities. *Mason* undeniably cites 2 Restatement Torts, 2d, § 344, and comment f. n13 However, in quoting **[*342]** that section and comment of the restatement, the *Mason* majority did *not* "recognize" the imposition of a duty on a merchant to protect its invitees from criminal conduct of third parties as being "contingent upon whether the character of his business, or past experience . . . gives the merchant knowledge or reason to know that those acts may occur again." Slip op, p 4. Other than in the text of the restatement, the "character of the merchant's business" is not even discussed in *Mason*. Nor did we "implicitly note" in *Mason* that a careful consideration of the facts in each case, namely, the nature of the harm, etc., is essential in **[**43]** determining whether a § 344 analysis is justified. Thus, the dissent ingeniously injects concepts into *Mason* that clearly were not adopted by the *Mason* court.

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n13 The dissent cannot seriously suggest that the mere quotation of comment f of the Restatement in *Mason* constituted an adoption of it. Comment f explicitly provided that a premises owner's duty encompasses the responsibility to "provide a reasonably sufficient number of servants to afford a reasonable protection" against the criminal acts of third parties. This proposition was flatly rejected in both *Williams* and *Scott*. See *Williams* at 502-503 and *Scott, supra*. Nevertheless, "this Court is not, nor is any other court, bound to follow any of the rules set out in the Restatement." *Rowe v Montgomery Ward*, 437 Mich. 627, 652; 473 N.W.2d 268 (1991). "The application of a common-law rule to a particular set of facts does not turn on whether those facts can be characterized in the language of the Restatement." *Smith v Allendale Mut Ins Co*, 410 Mich. 685, 712-713; 303 N.W.2d 702 (1981). While the drafters of the Restatements "may sometimes strive to choose 'the better rule' or to predict or shape the development of the law, its influence *depends upon its persuasiveness*." *Id.* at 713 (emphasis added).

Even where a particular Restatement section has received specific judicial endorsement, cases where that section is invoked *must be decided by reference to the policies and precedents underlying the rule restated*. Textual analysis of the Restatement is useful only to the extent that it illuminates these fundamental considerations. [*Id.* (emphasis added).]

Further, our rejection of § 344, and comment f, is consistent with the overriding public policy concerns discussed in this opinion.

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The dissent attempts to distinguish *Williams* from *Mason* and the instant cases by explaining that *Williams* involved "random crime" "*unrelated* to the character of the merchant's business", slip op, p 8, and asserting that the sod-throwing incidents in these cases were "related" to Pine Knob's business because the nature of the harm was created by the **[*343]** "character" of its business. We do not agree with the dissent's focus on the "randomness" or spontaneity of a criminal act as being a relevant factor in determining whether an occurrence was foreseeable. The key inquiry is not whether the criminal act was "random," but rather whether, as stated in *Mason*, the merchant has reason to recognize a risk of imminent harm to an identifiable invitee. In *Williams*, the merchant had no reason to expect the criminal attack. In *Mason*, we distinguished *Williams* and *Scott* by explaining that

in *Williams* and *Scott* "the merchants had had no previous contact with the assailants and could not have determined that the plaintiffs were in danger." *Mason, supra* at 402. The rule set forth in this opinion is thus consistent with *Mason* as well as **[***29]** *Williams* and *Scott*: HN12 A merchant should not be expected to anticipate *any* type of criminal activity, whether "random" or otherwise, *before* there is some specific activity on the premises creating a foreseeable risk of imminent harm to an identifiable invitee. n14 The merchant then must make efforts to notify those deputized to deal with such circumstances: the police.

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n14 *Mason* distinguished *Williams* by analyzing the merchant's ability to foresee *imminent* harm, i.e., awareness of a situation. However, as articulated in this opinion, we would not go so far as to consider specific prior incidents, as that would conflict with the general proposition in *Williams* and *Scott* that merchants are "ordinarily" not legally responsible to patrons and others on their premises for the criminal acts of third parties, as well as the premise that a merchant can assume that others will obey the criminal law until they actually do otherwise. See slip op, pp 11-13.

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Moreover, none should be mistaken that the test of "relatedness" proposed by the dissent would apply, if not now, then very soon, to virtually *all* criminal acts in commercial establishments. It cannot be questioned that there can always be, given crime's unfortunate **[*344]** pervasiveness, a plausible argument that the criminal being drawn to the business enterprise at all makes it "related" in such a way as to trigger liability. n15 Surely after one crime has occurred on the premises, or even in a similar business, with the criminal having been arguably drawn to that business, the "relatedness" test will be met. Indeed, probably even more attenuated linkages (the crime rate in the area comes to mind) will suffice, as the law develops, to establish "relatedness." This will all mean, and it was this the *Williams* and *Scott* courts understood, that urban merchants will be exposed to crippling tort liability.

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n15 The "relatedness" test proposed by the dissent states:

If the nature of the harm is random and spontaneous, and thus unrelated to the character of the merchant's business, the merchant cannot be expected to foresee its occurrence, and reference to prior similar occurrences is not justified. If the nature of the harm was created by the character of the merchant's business, reference to prior similar occurrences is justified because a merchant can be expected to foresee such harm happening again, in light of his prior experience with such acts. Slip op, p 8.

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Thus, the dissent's rule would have its most pernicious and devastating effect on **[**44]** the many commercial businesses that are located in Michigan's urban and high-crime areas. Avoiding this kind of adverse effect was one of the Court's primary concerns when it adopted the *Williams* and *Scott* principles. *n16* It simply **[*345]** cannot be gainsaid that businesses in urban and high-crime areas do foresee that criminals may attack their establishments--opportunistically or with premeditation. Indeed, the fact that many businesses in our urban and high-crime areas erect barriers to protect their employees is ample proof that they *actually* anticipate crime occurring in their establishments. Plainly stated, their precautions give proof that they understand that criminal acts in their establishments are not "random" as the dissent would understand it, but rather are foreseeable risks related to the business.

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n16 Imposing liability on the business owner, poses the threat that businesses may move away from high crime areas. See Homant & Kennedy, *Landholder Responsibility for Third Party Crimes in Michigan: An Analysis of Underlying Legal Values*, 27 U Tol L Rev 115, 147 (1995). See also *McNeal v Henry*, 82 Mich. App. 88, 90, n 1; 266 N.W.2d 469 (1978), stating:

In the majority of urban communities, both large and small businesses could not bear the heavy insurance burden which would be required to protect against this extraordinary kind of liability. Some of our big cities have more than their share of destructive and violent persons, young and old, who roam through downtown department stores and other small retail businesses stealing and physically abusing legitimate patrons. Guards are placed in the stores but those activities continue. We fear that to hold businessmen liable for the clearly unforeseeable third-party torts and crimes incident to these activities would eventually drive them out of business.

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For these policy reasons, we, as the courts before us, decline to adopt the dissent's proposed rule.

VII. CONCLUSION

Consistent with our decisions in *Williams*, *Scott*, and *Mason*, we conclude that ***HN13*** merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. We hold that the duty to respond is limited to reasonably expediting the involvement of the police, and that there is no duty to otherwise anticipate the criminal acts of third parties. Finally, we reaffirm that merchants are not required to provide security personnel or otherwise **[*346]** resort to self-help in order to deter or quell such occurrences.

In *MacDonald*, we reverse the Court of Appeals decision denying summary disposition. In *Lowry*, the decision of the Court of Appeals to grant summary disposition for Pine Knob is affirmed.

CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

DISSENTBY: CAVANAGH; KELLY

DISSENT: CAVANAGH, J. (*dissenting*).

The majority holds that under *Mason v Royal Dequindre, Inc*, 455 Mich. 391; **[***33]** 566 N.W.2d 199 (1997), a merchant has a duty to "respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees," and the duty to respond entails nothing more than the merchant's attempt to contact the police. Slip op at 2. This artful formulation of the *Mason* duty removes any inquiry into prior similar occurrences as part of the foreseeability analysis, reducing the foreseeability question to whether a merchant should have known that an ongoing occurrence on the premises could have harmed an identifiable invitee. Because the majority created this formulation of the *Mason* duty with **[**45]** brazen disregard for the principles that created it, I respectfully dissent.

I

In *Mason*, we had to determine whether merchants have a common-law duty to protect their

patrons from criminal acts of third parties. To resolve this question, we examined the rationale behind imposing a duty on a person to protect another person endangered **[*347]** by a third party's conduct. Generally, a person has no duty to protect another person endangered by a third party's conduct unless there is a special relationship between those **[***34]** persons. The reason for this exception to the general no-duty rule when a special relationship is present is based on control. As we explained, "In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Mason* at 398. Thus, while merchants are not insurer's of their invitees' safety, we recognized that courts will impose a duty on a merchant to protect its invitees, like the duty imposed when a special relationship is present, when they are "readily identifiable as [being] foreseeably endangered." *Id.* at 398, quoting *Murdock v Higgins*, 454 Mich. 46, 58; 559 N.W.2d 639 (1997).

After exploring the basis for imposing a duty on a merchant to protect its invitees, we explained that these same principles are embodied in 2 Restatement Torts, 2d, § 344, pp 224-225, and comment f to § 344, pp 225-226. The Restatement further explains how control and foreseeability govern a landowner's liability to its invitees. Section 344 provides:

> A possessor of land **[***35]** who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> **[*348]** (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f to § 344 states:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless **[***36]** or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

In quoting § 344 and comment f, we recognized that the imposition of a duty on a merchant to protect its invitees from criminal conduct of third parties is contingent upon whether the character of his business, or past experience either in general or at a specific time, gives the merchant knowledge or reason to know that those acts may occur again. As noted in the quoted sections of the Restatement, **[**46]** this analysis includes a consideration of whether such acts had occurred in the past.

Following these premises liability principles, we held that "merchants can be liable in tort for failing to take reasonable measures to protect their invitees from harm caused by the

criminal acts of third parties. The harm must be foreseeable to an identifiable invitee and preventable by the exercise of reasonable care." 455 Mich. at 393. Clearly, our holding in *Mason* was **[*349]** premised on tort principles that require a look into the character of the merchant's **[***37]** business and prior similar occurrences to determine whether the harm is foreseeable.

The majority introduces a version of the *Mason* duty that ignores the basis of our holding in *Mason* and instead holds that under *Mason*, a merchant has a duty to respond to ongoing frays on the premises, and the duty is only to make an effort to contact the police. This formulation essentially uproots the entire basis for imposing a duty on merchants to protect their invitees that we expressed in *Mason* by extinguishing the consideration of the character of the merchant's business and prior similar occurrences when deciding if the harm was foreseeable. Instead, the majority limits the foreseeability question to whether this particular fray would have harmed this particular plaintiff, without citing any legal support for its decision to alter the duty.

In reformulating the *Mason* duty, the majority overrules *Mason* to the extent that it relied on § 344 and comment f of the Restatement which clearly refutes the majority's clarified version of the *Mason* duty. Slip op at 13, n 10. The reason the majority states for overruling this part of *Mason* is that § 344 and comment f **[***38]** are contrary to our holding in *Williams v Cunningham Drug Stores, Inc*, 429 Mich. 495; 418 N.W.2d 381 (1988). In *Williams*, we stated that merchants are not ordinarily responsible for criminal acts of third parties because it is against public policy to require a merchant to anticipate crime in the community that may harm its invitees. The majority claims that the only way to reconcile *Williams* with the *Mason* holding that a merchant may be liable when the criminal act that harmed its invitee was foreseeable is to say **[*350]** that a merchant only has a duty to "respond reasonably to such a situation." Slip op at 12-13. Furthermore, the majority concludes that the duty entails only making an effort to contact the police because *Williams* prevents the imposition of any further act. The majority fails to recognize, however, that a new formulation of the *Mason* duty is not necessary in light of *Williams* because we distinguished *Williams* when we decided *Mason*.

According to the majority, *Williams* closed the door to applying § 344 when deciding whether a merchant has a duty to protect its invitees from criminal acts because merchants **[***39]** cannot anticipate crime. A close reading of *Williams*, however, reveals that is not true. In *Williams*, we recognized § 344, but refused to apply it to the facts because the nature of the harm, random crime in the community unrelated to the merchant's business, presented the merchant with no degree of control over its prevention. *Williams* at 501, n 15. Thus, contrary to the majority's assertion, we recognized in *Williams* that application of § 344 depends on the facts of a case, i.e., the nature of the harm and degree of control a merchant had in each case.

In *Mason,* we discussed the *Williams'* decision and cited Justice Levin's dissent in *Alexander v American Multi-Cinema*, 450 Mich. 877; 540 N.W.2d 674 (1995), as **[**47]** support for distinguishing the *Williams* holding. *Mason* at 401-402, n 5. In *Alexander,* a theater patron was injured in a scuffle with another patron who was standing in line for a late night show. Justice Levin dissented from the majority's decision to deny leave, stating that he would grant leave to discuss a merchant's duty to protect its invitees from the criminal acts of third parties. Quoting § 344, Justice **[***40]** Levin **[*351]** explained that, although no invitor is automatically liable for criminal acts of third parties on the invitor's property, an invitor has a duty to act reasonably to protect invitees from *foreseeable* hazards. *Alexander* at 879-880. Distinguishing *Williams* on its facts, Justice Levin explained that the merchant in *Williams* was not faced with a foreseeable altercation because the merchant had no control over the random, spontaneous nature of the harm. Thus, *Williams* addressed "the random assault bearing no relation to the merchant's business, and did not address the merchant's liability for risks created by the merchant's business." *Id.* at 882. Noting that this distinction is

relevant, Justice Levin stated that although we have held that "a merchant is not *ordinarily* required to protect customers from the criminal acts of third persons, . . . if one assumes that a *situation created by the defendant* will be classified as *extraordinary*, the distinction then becomes relevant." *Id.* at 881 (emphasis added). Thus, if the merchant created the situation that led to the harm, the situation can be treated as extraordinary and a merchant can be liable **[***41]** for the criminal acts that harmed its patrons, if the acts were foreseeable. Justice Levin noted that the facts in *Alexander* created such an extraordinary situation because the scuffle between the patrons waiting in line "was foreseeable in light of the owner's considerable experience with crowd control in general, and handling and organizing the pretheater crowd in particular." *Id.*

Contrary to the majority's assertion that the *Mason* holding is inconsistent with *Williams*, in *Mason* we recognized Justice Levin's dissent in *Alexander* as the method to distinguish the *Williams* holding and created a duty based on § 344 that essentially focused on **[*352]** the nature of the harm, the foreseeability of the harm, and the control a merchant has over the harm. We implicitly noted that a careful consideration of the facts in each case is essential to determine whether a § 344 analysis is justified. If the nature of the harm is random and spontaneous, and thus unrelated to the character of the merchant's business, the merchant cannot be expected to foresee its occurrence, and reference to prior similar occurrences is not justified. If the nature of the harm was created by **[***42]** the character of the merchant's business, reference to prior similar occurrences is justified because a merchant can be expected to foresee such harm happening again, in light of his prior experience with such acts. Accordingly, we concluded that "merchants have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." *Mason* at 405. Our decision in *Mason* was therefore clearly based on a careful consideration of the common-law tort principles of control and foreseeability, as articulated in § 344, and how they coexist with the holding in *Williams*. Thus, clarification of the *Mason* duty is not necessary, as that decision clearly acknowledged how the control and foreseeability origins of § 344 may apply to certain factual scenarios without violating our holding in *Williams*.

II

As the preceding discussion illustrates, premises liability law contains many nuances **[**48]** that, without complete consideration, may appear inconsistent. The majority has seized on this apparent, but vacuous, inconsistency and held that a clarification is necessary in this area of law. However, read closely, the **[*353]** principles have distinguishing **[***43]** characteristics that allow them to exist without conflict in three separate categories.

(1) Traditional Premises Liability

Traditionally, a merchant has had a duty to protect its invitees from defects or dangerous conditions on the land of which the merchant knew or had reason to know.

(2) Hybrid Premises Liability

Under hybrid premises liability, a merchant has a duty to protect its invitees from activities involving actors on the premises of which a merchant knew or had reason to know. The tricky part, however, is when the activity consists of criminal acts by third parties. If the activity on the land is a criminal act, it must be determined whether the character of the merchant's business and the nature of the act are of a sort that a merchant could be expected to anticipate. If the nature of the criminal act is random, spontaneous, and thus unrelated to the merchant's business and the invitee's purpose for being there, the situation falls into category three, discussed below. If, however, the nature of the criminal act is not random or spontaneous, and is related to the merchant's business and the invitee's purpose on the premises, as explained in *Mason* and Justice Levin's **[***44]** dissenting opinion in

Alexander, we resort to the control and foreseeability origins of § 344 to determine whether the merchant has a duty. See Prosser & Keeton, Torts (5th ed), § 61, p 428 (stating that a possessor of land is required to take action when he has reason to **[*354]** believe, from what he has observed or from past experience, that the conduct of others on the land will be dangerous to other invitees, but not when the landowner cannot anticipate the harm).

(3) The Exception To Hybrid Liability

The exception to hybrid liability is when there is a criminal act by third parties on the premises, but the act is random and spontaneous, having no relation to the merchant's business other than that it is a business, the merchant has no duty. In the exception situation, the random, spontaneous nature of the act removes any degree of control a merchant has over the act occurring, thus making any application of the control and foreseeability origins of § 344 improper. See, e.g., *Williams.*

III

The facts of these cases must be examined to determine which of the three premises liability categories governs. Because the harm did not result from a physical defect on the premises, **[***45]** the act does not fall within the traditional premises liability category. Rather, the harm resulted from activity on the land, potentially criminal in nature, which requires us to decide whether the nature of the act qualifies it as a hybrid or exception situation. The character of defendant Pine Knob's business created the risk of harm to its invitees, by subjecting its patrons to view concerts in a venue where sod throwing had previously occurred. The sod throwing in these cases was, therefore, not random or spontaneous, was related to the invitee's purpose on the premises, qualifying these **[*355]** cases under the hybrid category, and thus justifies applying the control and foreseeability origins of § 344.

Pine Knob charges its patrons to enter its forum to watch concerts, where part of the seating area for patrons is a sod-covered hill. Once the patron sets foot inside the venue, he has entrusted himself to the control and protection of Pine Knob, and his ability to protect himself from activities **[**49]** that may occur on the premises diminishes. Thus, contrary to the majority's claim, Pine Knob has better control over the activities of patrons it has chosen to host than the patrons themselves. **[***46]** The potentially criminal activity in these cases that occurred in this controlled environment was patrons ripping up sod from the hill and throwing it. The question becomes whether this act arose from the character of Pine Knob's business, or was random or spontaneous. The majority has manipulated the class of activity at issue in this case, sod throwing, to be strictly criminal. In so doing, the majority ignores the fact that this activity, albeit potentially criminal, n1 only occurred because of the nature of Pine Knob's business. In other words, a patron at Pine Knob would not be subjected to injury from such a concert activity like sod throwing if he were not present on Pine Knob's premises; it is unique to Pine Knob's business. Because Pine Knob charged a fee for entry, subjected its patrons to seating on sod-covered ground, sod-throwing acts had occurred before, n2 and the harm suffered was a result of plaintiffs' purpose on the **[*356]** premises and the nature of Pine Knob's business, to watch concerts at such a venue, I would find this an "extraordinary" situation, unlike that in *Williams.* These factors justify imposing a duty on Pine Knob. Pine Knob not only created the risk of **[***47]** harm to its invitees, but it had reason to know that such sod throwing may occur again, on the basis of its prior experience with such activity. This act is therefore unlike the random, spontaneous criminal act that occurred in *Williams,* which had nothing to do with the nature of the store owner's business, and the concerns of applying the control and foreseeability concepts do not arise. It thus becomes clear that the majority's overstated concern for subjecting merchants in high crime areas to increased liability is misplaced. Random crimes in the community are unique to the community, not to the businesses present in that community. Hence, the initial analysis, as proposed by Justice Levin and further explained in § 344, focuses on whether the act that injured the patron is unique to the merchant's business, not the location of the merchant's

business. If the act is unique to the merchant's business, only then is it justifiable to say that the merchant has control over such acts and, thus, can foresee such future occurrences. Thus, retaining the control and foreseeability origins of § 344 in this situation does not vitiate the *Williams* holding, and Pine Knob should be **[***48]** held liable if a jury finds that the sod throwing was a foreseeable act and Pine Knob failed to take reasonable measures to protect its invitees from such foreseeable harm.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The record indicates that some 100 sod-throwing patrons were ejected from the premises, pursuant to Pine Knob's policy.

n2 In *Lowry*, the sod throwing occurred once before at the same festival-type music concert, and in *MacDonald* it occurred twice in one night.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*357] IV

Today the majority embarks on the unnecessary journey of clarifying the duty a merchant has to protect its invitees from criminal acts of third parties, as discussed in *Mason*. This clarification takes premises liability into an unfounded direction with far-reaching consequences. n3 By eradicating **[**50]** the two profound tenets behind the *Mason* duty, control and foreseeability, the majority has created an unprecedented formulation of the duty providing that if the act that caused the harm could be charged as criminal, the merchant can never be liable if it attempts **[***49]** to contact the police. Such a conclusion ignores an entire category of criminal acts that arise solely because of the character of the merchant's business and the invitee's purpose on **[*358]** the premises. Because this was clearly not intended when we created the *Mason* duty, I dissent.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 The following hypothetical example illustrates the fundamental problems with the majority's reformulation.

Defendant humane society allows persons interested in adopting animals to observe the animals through cages. There is a separate "dog wing" in which all the dogs are kept in individual cages. Patrons on the premises interested in adopting a dog are allowed access to the dog wing. A patron who is visiting the dog wing gets increasingly passionate about the dogs being cooped up and breaks open each cage, setting the dogs free. The dogs become scared and attack a family who was there adopting their new pet. Unfortunately, one of the children is severely injured. The humane society is familiar with this "passionate patron" syndrome, and it in fact occurred the previous day, killing a patron. Luckily for the humane society, under the majority's clarified *Mason* duty, this previous attack will not be considered, regardless of the number of times the attacks have happened, the humane society's experience with controlling the animals on its premises, and the experience the humane society has with the harm caused by "passionate patrons." Rather, in the midst of watching the dogs viciously attacking patrons, all the humane society must do to avoid liability to the injured patrons is to make the effort to call the police. Thus, even though the character of the business created the risk of harm, the humane society had past experience with such mishaps, and the degree of control the humane society has over its patrons was great, there is no duty to protect. I cannot agree that this is a proper formulation of the duty.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***50]**

In accordance with the original, unclarified *Mason* duty, in both of the instant cases I would

deny summary disposition so that a jury may determine (1) whether the sod throwing was foreseeable, (2) whether the plaintiffs were identifiable invitees, and (3) whether defendant Pine Knob took reasonable measures to protect its invitees from the harm.

KELLY, J., concurred with CAVANAGH, J.

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Terms: **justice robert young and michigan** (Edit Search)

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Detroit Free Press January 23, 2002 Wednesday METRO FINAL EDITION

Detroit Free Press
Found on Freep.com
Detroit Free Press

January 23, 2002 Wednesday METRO FINAL EDITION

SECTION: EDITORIAL; Pg. 8A

LENGTH: 56 words

HEADLINE: P.S.

BODY:
STATE SUPREME COURT **JUSTICE Robert Young,** who lamented the level of discourse in his last campaign, described **Michigan** Attorney General Jennifer Granholm as "Tinkerbell" in a recent speech to fellow Republicans. That certainly bodes well for the Granholm assistants who will be arguing cases in front of Young and colleagues today.

NOTES: IN OUR OPINION

LOAD-DATE: January 23, 2002

Source: News & Business > News > **News Group File, All**
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:10 PM EDT

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)

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The Associated Press State & Local Wire March 13, 2002

The Associated Press State & Local Wire

March 13, 2002, Wednesday, BC cycle

SECTION: State and Regional

LENGTH: 519 words

HEADLINE: Supreme Court considers whether police files should be open to public

BYLINE: By DEE-ANN DURBIN, Associated Press Writer

DATELINE: LANSING, **Mich.**

BODY:
The **Michigan** Supreme Court heard arguments Wednesday in a case that will determine whether internal police personnel files should be open to the public.

The Lansing State Journal is suing the city of Lansing because it refused to turn over files about the investigations of its own officers.

The case stems from the 1996 death of Edward Swans in a Lansing jail cell. A group called March for Justice formed, calling for reforms in the Lansing police department. Voters turned down a 1996 measure to create a police review board made up of citizens, but the city did hire an internal investigator to quell dissent. In 1998, a jury awarded $13 million to Swans' family.

The Lansing State Journal said those incidents led to public mistrust of the police department. Citing the Freedom of Information Act, the newspaper requested all internal investigation files from 1997.

The city refused to hand over the documents, saying the need to keep the files confidential outweighed the public's right to know about the investigations. The newspaper sued.

On Wednesday, attorneys for the city and police groups said if investigative documents are widely released, fewer people will be willing to come forward and report problems.

"Is the law of **Michigan** going to be... that citizens are going to be allowed to muck around in internal files and see what's in there?" said Steven Lett, an attorney for the Fraternal Order of Police. "A confidential informant could be in those files."

Justice Stephen Markman said the newspaper should consider that argument.

"The very fact of getting this evidence might affect your ability to get this evidence in the future," he said.

Charles Barbieri, the Lansing State Journal's attorney, responded that opening the documents to the public might make officers less likely to abuse their authority.

"Policemen do make mistakes," he said. "Because of that fact, we cannot have an internal affairs process free of all public scrutiny."

Justice Robert Young Jr. appeared incredulous at one point about the city's attempts to keep the documents confidential.

"I can't imagine many of these not having to do with members of the public," he said.

An Ingham County Court ruled that the city should release files on citizen-initiated complaints. But it said the city did not have to release files on complaints that initiated within the department. The court said that would properly balance the needs of the department and the public.

But in 2000, the **Michigan** Court of Appeals ruled against the lower court, saying the city should release both kinds of files.

"The citizens have a strong interest in knowing if department-initiated complaints are pursued with more or less vigor than those initiated by citizens," the Court of Appeals wrote.

The city appealed to the Supreme Court. Meanwhile, it did turn over its citizen-initiated files to the newspaper. The newspaper is asking the Supreme Court to force the city to turn over around 100 department-initiated files.

The Supreme Court is expected to decide the case before the end of the year.

LOAD-DATE: March 14, 2002

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Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:09 PM EDT

Sexual Harassment Litigation Reporter September 2002

Sexual Harassment Litigation Reporter

September 2002

SECTION: Vol. 8; No. 8; Pg. 6

LENGTH: 874 words

CASE: Sexual Orientation: Mack v. City of Detroit

HEADLINE: Officer's Sexual Orientation Suit Against City Out; Gender Bias Claim Reinstated

BODY:
A Detroit police officer cannot bring a sexual orientation discrimination suit against the city because allowing such an action would violate the Governmental Tort Liability Act, a sharply divided **Michigan** Supreme Court has decided. Mack v. City of Detroit et al., No. 118468, 2002 WL 1764044 (**Mich.**, July 31, 2002).

The majority also said the suit should have been dismiss ed at the trial level because the plaintiff failed to plead a recognized claim in avoidance of governmental immunity. The high court concluded that, because governmental im munity is a characteristic of government, it was necessary for the plaintiff to plead her case in that way.

Two lengthy dissents were filed. Justice Michael Cavanag h said the majority engaged in serious overreaching by making the issue of the Governmental Tort Liability Act dispositive without giving the parties a chance to argue and brief the issue. He went on to state that, in his opinion, the GTLA does not nullify private actions created by the city in its charter. He also faulted the majority for requiring a plaintiff to plead in avoidance of immunity, rather than adhering to the principle that governmental immunity is an affirmative defense, which would keep the burden on the government to assert the defense.

The other dissenting justice, Elizabeth Weaver, also raised the issue of the majority's decision to overrule settled precedent by ruling that governmental immunity cannot be waived because it is a characteristic of government without giving the parties in the suit the opportunity to address the matter. She also said the majority improperly shifted the focus of the analysis from the question of whether a charter-created cause of action for sexual orientation conflicted with the state Civil Rights Act to the GTLA.

Plaintiff Linda Mack, a lesbian, was hired as a police officer by the city of Detroit in 1974 and gradually worked her way up the departmental ladder to become acting inspector of the sex crimes unit. She claims that, while working in that position, she was repeatedly propositioned by male supervisors. She reported the misconduct to her superiors. Mack says that, in addition to failing to investigate her complaints because of her sexual orientation, the department began a campaign of harassment by giving her administrative work to do and by restricting her time off.

She filed suit against the city, alleging violations of Section 2 of the city charter's declaration of rights through discriminating against her on the basis of gender and sexual orientation.

The trial court granted the city's motion for summary disposition, and the appeals court reversed in a 2--1 decision.

A majority of the **Michigan** Supreme Court reversed the court of appeals in a ruling by **Justice Robert Young.**

First, the court determined that the city charter could not create a private right of action for sexual orientation discrimination because doing so would violate the state governmental immunity law. None of the exceptions to i mmunity outlined in the GTLA can be interpreted to allow a suit for sexual orientation discrimination, Justice Young said. There is no statute that grants an immunity exception for sexual orientation discrimination, and the state Civil Rights Act neither provides a cause of action for sexual orientation nor grants municipalities the authority to create one, according to Justice Young.

Next, the court emphasized that governmental immunity cannot be characterized as an affirmative defense and, therefore, a plaintiff must plead and prove facts in avoidance of immunity. The majority concluded that the decision in the leading case on immunity, McCummings v. Hurley Medical Center, 433 **Mich.** 404; 446 N.W.2d 114 (**Mich.**, 1989), must be overruled. In McCummings, the court held that governmental immunity is an affirmative defense.

Turning to Mack's complaint, the majority concluded that all of her claims involve decisions directly related to the Police Department's discharge of governmental functions. However, because her sexual orientation discrimination claim did not fall within one of the statutory exceptions to governmental immunity, Mack could not sue the city.

In response to the dissenters' assertion that the issue of the city charter being preempted by the GTLA was not briefed or raised by the parties, Justice Young said "the issue was squarely before the parties," and that questioning by several justices during oral argument specifically raised the issue.

In addition, the court dismissed the arguments of Justice Cavanagh.

" T his stout defense of stare decisis is his standard argument when unhappy with the result of an opinion," the majority said.

The high court reversed the appeals court's decision and reinstated the trial court's order of summary disposition in favor of the city. Because the city did not appeal the court of appeals' decision on the gender discrimination claim, the supreme court remanded that issue to the appeals court for reconsideration in light of the instant opinion.

Mack is represented by Peter Macuga and David Dubin of Macuga & Liddle in Detroit.

Counsel for Detroit are city attorneys Daryl Adams and Valerie Osamuede.

LOAD-DATE: October 11, 2002

Battle Creek Enquirer (Battle Creek, MI) September 24, 2002 Tuesday

September 24, 2002 Tuesday

SECTION: LOCAL; Pg. 3A

LENGTH: 670 words

HEADLINE: Supreme court justice visits elementary students

BYLINE: Trace Christenson, Staff

BODY:
Trace Christenson

The Enquirer

The kids were not interested in weighty legal opinions from a Justice of the **Michigan** Supreme Court.

"Why do you wear a bow tie?"

"Is your job kind of boring?"

"Do you have any pets?"

For 45 minutes Monday, **Michigan** Supreme Court **Justice Robert Young** answered the questions on the minds of nearly 80 fourth- and fifth-graders at Coburn Elementary School in Battle Creek.

Standing in front of the school fireplace facing students seated on the floor, Young, 51, of Detroit, a justice since 1999, explained the function of the court, listed his background and answered those questions.

Oh, and he wears a bow tie because "It doesn't fall in my soup," and thinks his job "is exciting. We hear the hardest cases there are in **Michigan.**" He has a poodle for a pet.

Young is one of two incumbents and a total of eight candidates seeking election to two eight-year terms on the 7-member court in the November election.

"The kids had a wonderful time," Coburn Principal Roxie Perry said. "And I think he enjoyed it even more. He was so relaxed and personable with the kids."

Perry said Young's appearance was organized by social studies teacher Jane Norlander, who used her mother, Calhoun County Clerk/Register Anne Norlander, as a connection to Young.

The justice tried to stump the children with questions on the number of supreme courts in

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Battle Creek Enquirer (Battle Creek, MI) September 28, 2002 Saturday

September 28, 2002 Saturday

SECTION: LOCAL; Pg. 3A

LENGTH: 525 words

HEADLINE: CAPITOL CONNECTION

BYLINE: Staff

BODY:
The push from the bottom of the ticket

It's hard enough for candidates in high-profile campaigns to advertise themselves and persuade voters to support them.

It's even harder for obscure candidates running for offices that many Michiganians don't even know are elected positions, such as the state Court of Appeals and the **Michigan** State University Board of Trustees.

Nonetheless, those lesser-known politicians - whose names will appear way down on the ballot on Nov. 5 - are taking their campaigns across the state. Several of them stopped in Battle Creek in the past two weeks with hopes of news coverage and the chance to meet voters.

Compared with the top-of-the-ticket candidates, those at the bottom don't have huge war chests. They don't run television ads and they generally don't get much media play. In a sense, their campaigns are like old-fashioned politics, where contestants counted less on advertising and debates and more on recognition and luck.

Regardless of the arguments over straight-party voting and appointment-versus-election, the unseen campaign is a frustrating reality for some.

"It's a name game," said Joanne Emmons, a term-limited state senator from Big Rapids and candidate for the MSU board.

Emmons, a Republican, is one of eight candidates running for two spots. She expects people in the Big Rapids area will support her, but is unsure who else will recognize her name on the ballot. For the campaign, she has teamed with Frankfort Republican Donald Nugent, the current chairman of the board who's running for re-election.

Beyond that, she visits editorial boards and passes out fliers at Spartan tailgate parties.

"My husband and I decided we were going to have fun with this campaign. I think you've got to have fun while you're doing it," Emmons said.

Campaigns are even tougher for judicial candidates, who tread on dangerous ground if they make known their personal and political beliefs. Unlike most other politicians who are elected for their subjectivity, judges are elected for their objectivity.

Justice Robert Young of Detroit, who's seeking re-election to the **Michigan** Supreme Court, is one of seven candidates for two seats on the state's highest bench.

Although society increasingly relies on courts to create law, Young said, judges must use a "traditionalist" approach in their jobs and their campaigns. Policy debate is for the Legislature, where public participation is invited, unlike the courtroom, where judges make decisions with no public input, he said.

"Whatever you think of the horror of sausage-making in the Legislature, it's a better way to make policy than the savants in the black robes," Young said.

As one of three candidates for two spots in a **Michigan** Court of Appeals district, Judge Chris Murray of Grosse Pointe Farms has a good shot at re-election. Still, he said, the campaign trail is a bumpy road.

"It's hard. No one really cares about the Court of Appeals," said Murray, who speaks to civic groups and on radio shows when he can.

Eric J. Greene covers politics and legislative issues. He can be reached at 966-0687 or egreene@battlecr.gannett.com

LOAD-DATE: October 13, 2002

Source: News & Business > News > **News Group File, All** ⓘ
Terms: **justice robert young and michigan** (Edit Search)
View: Full
Date/Time: Wednesday, June 4, 2003 - 5:04 PM EDT

*467 Mich. 186, *; 649 N.W.2d 47, **;*
*2002 Mich. LEXIS 1422, ****

LINDA MACK, Plaintiff-Appellee, v THE CITY OF DETROIT, a Michigan Municipal Corporation, Defendant-Appellant.

No. 118468

SUPREME COURT OF MICHIGAN

467 Mich. 186; 649 N.W.2d 47; 2002 Mich. LEXIS 1422

January 23, 2002, Argued
July 31, 2002, Decided
July 31, 2002, Filed

PRIOR HISTORY: **[***1]** Wayne Circuit Court, John A. Murphy, J. Court of Appeals, HOOD, P.J., and CAVANAGH, J. (SAWYER, J., dissenting), 243 Mich App 132 (2000) (Docket No. 214448).

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee employee filed an action and alleged that she was discriminated against in her employment as a police officer on the basis of her sex and sexual orientation. Appellant city sought relief after the Michigan Court of Appeals reversed the trial court's summary disposition in favor of the city.

OVERVIEW: The employee alleged that she was repeatedly propositioned by male supervisors for sex and that she rebuffed the unwelcome advances, in part because she is a lesbian. She also complained that the police department gave her an afternoon desk job, prohibited her from participating in any investigative work, and restricted her vacation time. The employee alleged that the city charter's declaration of rights precluded discriminating on the basis of sex and sexual orientation. The state supreme court held that regardless of whether the charter provided a private cause of action against the city for sexual orientation discrimination, such a cause of action would contravene the Governmental Tort Liability Act, Mich. Comp. Laws Serv. § 691.1407. Further, as the employee failed to plead a recognized claim in avoidance of governmental immunity, her sexual orientation discrimination claim should have been dismissed. Governmental immunity was a characteristic of government and the employee was required to plead her case in avoidance of immunity. To the extent that it held otherwise, McCummings v. Hurley Medical Ctr., 433 Mich. 404, 446 N.W.2d 114 (1989) was overruled.

OUTCOME: The decision of the court of appeals on the claim for discrimination on sexual orientation was reversed, and the grant of summary disposition entered by the trial court in favor of the city was reinstated. The matter was remanded to the court of appeals for its consideration of the sexual discrimination claim.

CORE TERMS: governmental immunity, charter, cause of action, immunity, sexual orientation, plead, avoidance, briefing, tort liability, declaration of rights, affirmative defense,

overruling, governmental agency, municipality, briefed, governmental function, overrule, sex, sovereign, ordinance, drafters, stare decisis, clarify, immune, Civil Rights Act, civil rights, discrimination claim, adversarial, state law, nongovernmental

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Constitutional Law > Equal Protection > Gender & Sex
Constitutional Law > Equal Protection > Scope of Protection

HN1 The city of Detroit has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation.

Civil Procedure > Summary Judgment > Summary Judgment Standard
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 An appellate court reviews questions of law de novo. An appellate court also reviews a trial court's decision to grant or deny a motion for summary disposition de novo. When a motion for summary disposition is brought under Mich. Ct. R. 2.116(C)(8), the court tests the legal sufficiency of the complaint on the basis of the pleadings alone.

Governments > Local Governments > Charters

HN3 See Mich. Const. art. 7, § 22.

Governments > Local Governments > Charters

HN4 Although Mich. Const. art. 7, § 22 grants broad authority to municipalities, it clearly subjects their authority to constitutional and statutory limitations.

Governments > Local Governments > Charters

HN5 See Mich. Comp. Laws Serv. § 117.36.

Governments > Local Governments > Claims By & Against

HN6 In the governmental tort liability act (GTLA), the legislature has expressly stated that except as otherwise provided in this act, a governmental agency is immune from tort liability if it is engaged in the exercise or discharge of a governmental function. Mich. Comp. Laws Serv. § 691.1407(1). Accordingly, a governmental agency is immune unless the legislature has pulled back the veil of immunity and allowed suit by citizens against the government. The GTLA allows suit against a governmental agency in only five areas. However, there are other areas outside the GTLA where the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act. Further, municipalities may be liable pursuant to 42 U.S.C. S. § 1983.

Governments > Local Governments > Claims By & Against

HN7 None of the exceptions where a suit is allowed against the government can be read to allow suit for sexual orientation discrimination. Likewise, no statute grants governmental agencies the authority to create an immunity exception for sexual orientation discrimination or waive immunity in the area of civil rights. Notably, the Civil Rights Act (CRA), Mich. Comp. Laws Serv. § 37.2101 et seq., which makes a municipality liable for specific civil rights violations, neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one. Civil Rights Act (CRA), Mich. Comp. Laws Serv. § 37.2101 et seq. Moreover, the CRA limits complaints to causes of action for violations of the act

itself.

Governments > Local Governments > Claims By & Against
Constitutional Law > Civil Rights Enforcement > Immunity > Local Governments
HN8 See Mich. Comp. Laws Serv. § 37.2801(1).

Governments > Local Governments > Claims By & Against
HN9 Without some express legislative authorization, the city cannot create a cause of action against itself in contravention of the broad scope of governmental immunity established by the Government Tort Liability Act. No such legislative act has recognized sexual orientation discrimination claims.

Governments > Local Governments > Claims By & Against
HN10 A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Mich. Comp. Laws Serv. § 691.1407(1).

Governments > Local Governments > Claims By & Against
HN11 A plaintiff must plead her case in avoidance of immunity. To the extent that it holds otherwise, McCummings v Hurley Medical Ctr, 433 Mich. 404; 446 N.W.2d 114 (1989), is overruled.

Governments > Local Governments > Claims By & Against
HN12 To plead a cause of action against the state or its agencies, the plaintiff must plead and prove facts in avoidance of immunity.

Governments > Local Governments > Claims By & Against
HN13 The state's failure to plead sovereign immunity will not constitute a waiver because failure to plead the defense of sovereign immunity cannot create a cause of action where none existed before.

Governments > Local Governments > Claims By & Against
HN14 Unlike a claim of individual immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability. A plaintiff therefore bears the burden of pleading facts in the complaint which show that the action is not barred by the governmental immunity act.

Governments > Local Governments > Claims By & Against
HN15 Mich. Comp. Laws Serv. § 691.1407(1) states, except as otherwise provided in this act, a governmental agency is immune from tort liability if it is engaged in the exercise or discharge of a governmental function. Thus, by its terms, the Government Tort Liability Act provides that unless one of the five statutory exceptions applies, a governmental agency is protected by immunity. The presumption is, therefore, that a governmental agency is immune and can only be subject to suit if a plaintiff's case falls within a statutory exception. As such, it is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions.

Governments > Courts > Judicial Precedents
HN16 Stare decisis, however, is not meant to be mechanically applied to prevent an appellate court from overruling earlier erroneous decisions. Rather, stare decisis is a "principle of policy" not "an inexorable command," and an appellate court is not

constrained to follow precedent when governing decisions are badly reasoned.

Governments > Local Governments > Claims By & Against

HN17 A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function.

Governments > Local Governments > Claims By & Against

HN18 Governmental immunity protects the conduct of governmental agencies, which include two types of actors: the state and political subdivisions. Mich. Comp. Laws Serv. § 691.1401(d). A city police department, as a political subdivision, Mich. Comp. Laws Serv. § 691.1401(b), is a "governmental agency" for purposes of governmental immunity. Mich. Comp. Laws Serv. § 691.1401(d). As such, absent the applicability of a statutory exception, it is immune from tort liability if the tort claims arise from the department's exercise or discharge of a governmental function. Mich. Comp. Laws Serv. § 691.1407(1). "Governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Mich. Comp. Laws Serv. § 691.1401(f). It is well established in Michigan that the management, operation, and control of a police department is a governmental function.

Civil Procedure > Appeals > Reviewability

HN19 Addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle.

COUNSEL: Macuga & Liddle, P.C. (by Peter W. Macuga, II, and David R. Dubin) [Detroit, MI], for the plaintiff-appellee.

City of Detroit Law Department (by Daryl Adams and Valerie A. Colbert-Osamuede) [Detroit, MI], for the defendant-appellant.

JUDGES: BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J., CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J. WEAVER, J. (dissenting). KELLY, J., concurred with WEAVER, J.

OPINIONBY: Robert P. Young, Jr.

OPINION: [49] [*189]**

YOUNG, J.

Plaintiff alleges in this action that she was discriminated against in her employment as a Detroit police officer on the basis of her sex and sexual orientation in violation of the declaration of rights contained in the Charter of the city of Detroit. Plaintiff further contends that the charter creates a private cause of action allowing **[***2]** recovery for violation of the rights set forth in it. Assuming the charter provides no explicit private right of recovery, plaintiff alternatively urges this Court to create, as a cumulative remedy available under the charter, such a cause of action.

We hold that regardless of whether the charter provides a private cause of action against the city for **[*190]** sexual orientation discrimination, such a cause of action would contravene

the governmental tort liability act (GTLA), MCL 691.1407. Accordingly, we do not accept plaintiff's **[**50]** invitation to recognize such a cause of action.

Further, because the plaintiff failed to plead a recognized claim in avoidance of governmental immunity, her sexual orientation discrimination claim should have been dismissed. Governmental immunity is a characteristic of government and thus a plaintiff must plead her case in avoidance of immunity. To the extent that it holds otherwise, *McCummings v Hurley Medical Ctr,* 433 Mich. 404; 446 N.W.2d 114 (1989), is overruled.

Accordingly, we reverse the Court of Appeals decision, reinstate the trial court's order of summary disposition in favor of the city of Detroit **[***3]** regarding the sexual orientation claim, and remand the case to the Court of Appeals for reconsideration of the sex discrimination claim in light of this opinion. n1

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n1 The city appealed the Court of Appeals holding that the courts could recognize a private cause of action for sexual orientation discrimination under the city charter, but not the court's resolution of plaintiff's sex discrimination claim. For this reason, we remand the case to that Court for reconsideration of plaintiff's charter-based sex discrimination claim in light of this opinion.

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I. Facts and Procedural History

In 1974, plaintiff was hired by the city as a police officer. During the course of her employment, she attained the status of lieutenant and held the positions of acting inspector, acting command lieutenant, acting administrative lieutenant, and acting inspector of the sex crimes unit. The claims before the Court **[*191]** arose during plaintiff's tenure with the sex crimes unit.

Plaintiff alleges that, while working in the sex crimes **[***4]** unit, she was repeatedly propositioned by male supervisors for sex and that she rebuffed the unwelcome advances, in part because she is a lesbian. Plaintiff complained to her superiors, who allegedly refused to take any action because of her sexual orientation. Plaintiff also claims that she endured further discrimination and harassment as a result of her sexual orientation. Specifically, she complains that the police department gave her an afternoon desk job answering phones, prohibited her from participating in any investigative work, and restricted her from taking more than two weekends off a month. She has since retired from the police force.

Plaintiff filed suit, alleging intentional infliction of emotional distress and violations of the charter of the city of Detroit. Regarding the latter claims, plaintiff maintained that the city violated § 2 of the charter's declaration of rights by discriminating on the basis of sex and sexual orientation. n2 The city moved for summary disposition, asserting that plaintiff failed to state a claim upon which relief can be granted, MCR 2.116(C)(8). Specifically, the city argued that plaintiff's tort claims were barred by governmental immunity **[***5]** and that the city charter did not give plaintiff a **[*192]** private cause of action. The trial court agreed with the city and granted its motion for summary disposition. Plaintiff appealed, arguing that the violation of the rights guaranteed by the city charter created a private cause of action. n3

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n2 Section 2 provides:

HN1 The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation.

n3 Plaintiff elected not to appeal the trial court's ruling dismissing the intentional infliction of emotional distress claim. Therefore, those claims are not before this Court.

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In a two-to-one decision, the Court of Appeals reversed, holding that plaintiff **[**51]** had a private cause of action for sex and sexual orientation discrimination. The majority **[***6]** reasoned that there is an express civil right to be free from employment discrimination based on one's sex arising under the Civil Rights Act, MCL 37.2101 *et seq.*, and that the city extended that protection to its charter. n4 Relying on *Pompey v General Motors,* 385 Mich. 537; 189 N.W.2d 243 (1971), the majority concluded that equal opportunity in the pursuit of employment was a protected right, and because the city extended that protection to include sexual orientation discrimination, the courts could recognize, as a cumulative remedy, a civil action for such a claim.

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n4 243 Mich. App. 132; 620 N.W.2d 670 (2000).

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The dissent opined that it was not clear that a city had authority to create a cause of action and questioned whether *Pompey* should be extended to rights created by city charters.

The city appealed the Court of Appeals holding that the judiciary could recognize a private cause of action for sexual orientation discrimination. **[***7]** We granted leave to appeal. 464 Mich. 874, 630 N.W.2d 624 (2001).

[*193] II. Standard of Review

The issues presented are whether the city charter may create a cause of action against the city for sexual orientation discrimination in the face of state governmental immunity law and whether governmental immunity is an affirmative defense or a characteristic of government so that a plaintiff must plead in avoidance of it. These are HN2 questions of law that the Court reviews de novo. *Burt Twp v Dep't of Natural Resources,* 459 Mich. 659, 662-663; 593 N.W.2d 534 (1999). We also review a trial court's decision to grant or deny a motion for summary disposition de novo. *Beaudrie v Henderson,* 465 Mich. 124, 129; 631 N.W.2d 308 (2001). Because this is a motion for summary disposition brought under MCR 2.116(C)(8), we test the legal sufficiency of the complaint on the basis of the pleadings alone. *Id.*

III. Discussion

A. Governmental Immunity

Plaintiff contends that the charter expressly creates a private cause of action for sexual orientation discrimination. n5 However, whether the charter attempted to create a private cause of **[***8]** action for sexual orientation **[*194]** discrimination is an irrelevant inquiry because we hold that the charter *could not* create a cause of action against the city without contravening state governmental immunity law. n6

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n5 In the alternative, plaintiff urges this Court to extend the holding in *Pompey* to recognize a cumulative remedy for sexual orientation discrimination under the charter. We decline to do so. Rather, we conclude that *Pompey* is inapplicable to the case before us. *Pompey* contemplated a cumulative remedy for discrimination in *private* employment, whereas plaintiff in this case seeks to impose liability on a *municipality*. Accordingly, unlike the Court in *Pompey*, we must address whether governmental immunity precludes the Court from recognizing a private cause of action for a municipality's tortious conduct except as expressly authorized by the Legislature.

n6 Justice CAVANAGH's assertion that whether the charter creates a cause of action is a relevant inquiry because its answer affects causes of actions against nongovernmental entities ignores the fact that our opinion pertains only to actions against governmental entities. Because we are only addressing the creation of a cause of action against *a governmental entity*, whether the charter does or does not create such an action is ultimately irrelevant because the GTLA does not permit such an action. Our opinion does not address, as Justice CAVANAGH curiously alleges, whether a city can create a cause of action against *nongovernmental entities*.

We also point out that discrimination claims have always been characterized as a species of statutory tort. *Donajkowski v Alpena Power Co*, 460 Mich. 243, 247; 596 N.W.2d 574 (1999). Consequently, Justice CAVANAGH's suggestion that a charter discrimination claim might not fall within the ambit of the GTLA is without foundation.

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Const 1963, art 7, § 22 governs the authority of a city to enact a charter:

HN3 Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]

Thus, HN4 although art 7, § 22 grants broad authority to municipalities, it clearly subjects their authority to constitutional and statutory limitations. n7

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n7 This constitutional limitation on a municipality's authority is repeated in the Home Rule City Act, most emphatically in MCL 117.36, which states:

HN5 No provisions of any city charter shall conflict with or contravene the provisions of any general law of the state.

See also MCL 117.4j(3), which governs permissible charter provisions:

[Each city may in its charter provide] for the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns *subject to the constitution and general laws of this state*.

[Emphasis added.]

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One such statutory limitation involves governmental immunity. HN6 In the governmental tort liability act (GTLA), the Legislature expressly stated that "except as otherwise provided in this act, a governmental agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Accordingly, a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government. The GTLA allows suit against a governmental agency in only five areas. n8 However, there are other areas outside the GTLA where the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act. n9 Further, municipalities may be liable pursuant to 42 USC 1983. *Monell v New York City DSS*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

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n8 The five statutory exceptions to governmental immunity are the "highway exception," MCL 691.1402, the "motor vehicle exception," MCL 691.1405, the "public building exception," MCL 691.1406, the "proprietary function exception," MCL 691.1413, and the "governmental hospital exception," MCL 691.1407(4). **[***11]**

n9 MCL 37.2103(g) and 37.2202(a); see *Manning v Hazel Park*, 202 Mich. App. 685, 699; 509 N.W.2d 874 (1993) (governmental immunity is not a defense to a claim brought under the Civil Rights Act).

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[*196] However, HN7 none of the exceptions where a suit is allowed against the government can be read to allow suit for sexual orientation discrimination. Likewise, no statute grants governmental agencies the authority to create an immunity exception for sexual orientation discrimination or waive immunity in the area of civil rights. Notably, the CRA, which makes a **[**53]** municipality liable for specific civil rights violations, neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one. MCL 37.2101 *et seq. n10 Moreover, the CRA limits complaints to causes of action for violations of the act itself:*

HN8 *A person alleging a violation of this act* may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1) (emphasis **[***12]** added).] n11

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n10 Indeed, as this Court has consistently held since its seminal case, *Ross*, exceptions to governmental immunity are narrowly construed. See, e.g., *Haliw v Sterling Heights*, 464 Mich. 297, 303; 627 N.W.2d 581 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 149; 615 N.W.2d 702 (2000); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich. 567, 618; 363 N.W.2d 641 (1984). Consequently, because the CRA does not recognize sexual orientation discrimination, that act cannot be construed as providing a basis for governmental agencies to create such a cause of action.

n11 We make no determination regarding the validity of the city's attempt in its charter to provide a cause of action for sex discrimination, a protection similarly provided by the CRA. That claim is not before us. However, in keeping with this opinion, we note that, at least in regard to governmental immunity, a city may not alter in any respect its liability excepted from governmental immunity by the Legislature without express authority to do so.

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In sum, HN9 without some express legislative authorization, the city *cannot* create a cause of action against itself in contravention of the broad scope of governmental immunity established by the GTLA. No such legislative act has recognized sexual orientation discrimination **[*197]** claims. Accordingly, this Court declines to circumvent the limitations placed on a municipality by the Legislature and recognize a cause of action against the city for sexual orientation discrimination. n12

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n12 To be certain, we emphasize that our opinion does *not* address whether a city can create rights, protect against discrimination, or create a cause of action against a nongovernmental entity. Preemption of civil rights, by either the constitution or the Civil Rights Act, is not addressed by our opinion. Rather, our analysis concerns only governmental immunity and the city's lack of authority *to create a cause of action against a governmental entity* in light of state governmental immunity law. Accordingly, should there be any question concerning the scope of our holding, we hold that any attempt by the city to create a cause of action against itself in its charter for sexual orientation discrimination is preempted by the governmental tort liability act. We have not addressed whether the CRA preempts a city from creating additional civil rights or protecting them through means other than the creation of a private cause of action, nor have we addressed whether a city can create a cause of action against a nongovernmental defendant. Those questions are not before us.

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B. A City Cannot Waive Governmental Immunity

Because the city abandoned its assertion of governmental immunity to this Court and the law regarding the nature of governmental immunity has been misguided for some time, we will address the viability of plaintiff's complaint here as it pertains to governmental immunity. n13

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n13 We note that the city raised governmental immunity as a defense in the trial court, but failed to argue this issue in the Court of Appeals or in this Court. In light of our holding that governmental immunity is not an affirmative defense, but a characteristic of government, failure to assert its immunity on appeal does not preclude the Court from considering it now.

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1. The Nature of Governmental Immunity

HN10 A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise **[*198]** or discharge of a governmental function. MCL 691.1407(1). This Court has taken steps to clarify the origin and history of **[**54]** governmental immunity, most **[***15]** recently in *Pohutski v Allen Park*, 465 Mich. 675; 641 N.W.2d 219 (2002). See also *Ross v Consumers Power (On Rehearing)*, 420 Mich. 567; 363 N.W.2d 641 (1984). The Court does not need to reiterate that history today, but we take this opportunity to clarify that governmental immunity is a characteristic of government. *Canon v Thumudo*, 430 Mich. 326; 422 N.W.2d 688 (1988); *Hyde v Univ of Michigan Regents*, 426 Mich. 223; 393 N.W.2d 847 (1986); *McCann v Michigan*, 398 Mich. 65, 247 N.W.2d 521 (1976); *Markis v Grosse Pointe Park*, 180 Mich. App. 545; 448 N.W.2d 352 (1989); *Ross*, 420 Mich. at 621

n.34; *Galli v Kirkeby*, 398 Mich. 527, 532, 540-541; 248 N.W.2d 149 (1976). As such, HN11 plaintiff must plead her case in avoidance of immunity. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492, 499; 638 N.W.2d 396 (2002); *Haliw v Sterling Heights*, 464 Mich. 297, 304; 627 N.W.2d 581 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 172, n 29; 615 N.W.2d 702 (2000); **[***16]** Ross, 420 Mich. at 621, n 34. To the extent that it holds otherwise, *McCummings v Hurley Medical Ctr*, 433 Mich. 404; 446 N.W.2d 114 (1989), is overruled.

Until 1989, it was well established in Michigan that governmental immunity was a characteristic of government. See, e.g., *Hyde* n14 and *Canon.* n15 In *McCann*, **[*199]** Justice RYAN stated that a plaintiff must plead facts in avoidance of immunity, reasoning:

At first impression, it may appear appropriate to characterize governmental immunity as an affirmative defense. However, a careful analysis of the doctrine as construed by this Court indicates that, HN12 to plead a cause of action against the state or its agencies, the plaintiff must plead and prove facts in avoidance of immunity. In *McNair v State Highway Dep't*, 305 Mich. 181, 187; 9 N.W.2d 52 (1943), for instance, we held that HN13 the state's failure to plead sovereign immunity will not constitute a waiver because "failure to plead the defense of sovereign immunity cannot create a cause of action where none existed before." In *Penix v City of St Johns*, 354 Mich. 259; 92 N.W.2d 332 (1958), **[***17]** we held that a complaint which contained no averment that the defendant was engaging in a proprietary function, and which in fact alleged activity to which governmental immunity applied, stated no cause of action against the municipality. Thus, although we have on occasion referred to governmental immunity as a defense, see [*McNair*]; *Martinson v Alpena*, 328 Mich. 595, 599; 44 N.W.2d 148 (1950), our past treatment of the doctrine indicates that its inapplicability is an element of a plaintiff's case against the state. [McCann, 398 Mich. at 77, n 1 (opinion of RYAN, J.).]

This reasoning was reiterated nearly ten years later in *Ross*:

In [*Galli*], four members of this Court held that plaintiffs must plead facts in their complaint in avoidance of immunity, i.e., they must allege facts which would justify a finding that the **[**55]** alleged tort does not fall within the concept of sovereign or governmental immunity. This may be accomplished by stating a claim which fits within one of the statutory exceptions or pleading facts which demonstrate that the tort occurred during the exercise or discharge **[***18]** of a non-governmental or proprietary function. See [McCann, 398 Mich. at 77]. Sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability upon the govern **[*200]** mental agency. Galli, 398 Mich. at 541 n.5; McCann, 398 Mich. at 77 n.1. [Ross, 420 Mich. at 621 n.34.]

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n14 "Unlike other claims of immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability." 426 Mich. at 261, n 35 (citations omitted).

n15 HN14 "Unlike a claim of individual immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability. A plaintiff therefore bears the burden of pleading facts in the complaint which show that the action is not barred by the governmental immunity act." 430 Mich. at 344, n 10.

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However, in *McCummings,* this Court departed from years of precedent **[***19]** and

concluded that governmental immunity is an affirmative defense rather than a characteristic of government. The *McCummings* Court reasoned:

The pronouncements in *Hyde* and *Canon* clearly do not square with the statement in *Ross* that "sovereign and governmental immunity from tort liability exist only when governmental agencies are 'engaged in the exercise or discharge of a governmental function.'" If it takes a legislative decree for immunity to exist, and then only under circumstances defined by the Legislature, how can it be said that sovereign or governmental immunity is a "characteristic of government?"

We are persuaded that the reasoning in *Ross* is correct, i.e., that immunity from tort liability exists only in cases where the governmental agency was engaged in the exercise or discharge of a governmental function. The question whether a governmental agency was engaged in a governmental function when performing the act complained of is a question best known to the agency and best asserted by it. It naturally follows that plaintiffs need not plead facts in avoidance of immunity, but that it is incumbent on the agency to assert its immunity as an affirmative **[***20]** defense. The fact that the source of the immunity is a legislative act makes the contention of immunity no less a matter for assertion as an affirmative defense.

We are also persuaded that there is no sound basis for requiring individuals, but not agencies, to assert governmental immunity as an affirmative defense. The source of the immunity from tort liability is the same. MCL 691.1407. Nor do we perceive any basis for treating the alleged immunity of a governmental agency any differently, for pleading purposes, from any other type of immunity granted by law. **[*201]** Immunity must be [pleaded] as an affirmative defense. [433 Mich. at 410-411.] n16

See also *Scheurman v Dep't of Trans*, 434 Mich. 619; 456 N.W.2d 66 (1990); *Tryc v Michigan Veterans' Fund*, 451 Mich. 129; 545 N.W.2d 642 (1996).

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n16 The *McCummings* Court also amended MCR 2.111(F)(3) to reflect its holding. 433 Mich. at 412.

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We conclude that *McCummings* was wrongly **[***21]** decided and, returning to our prior precedent, overrule *McCummings*' conclusion that governmental immunity is an affirmative defense. HN15 MCL 691.1407(1) states, "except as otherwise provided in this act, a governmental agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function." Thus, by its terms, the GTLA provides that unless one of the five statutory **[**56]** exceptions applies, a governmental agency *is* protected by immunity. The presumption is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiff's case falls within a statutory exception. As such, it is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions.

In addition to the textual support for this conclusion in the language of the GTLA, we note that the *McCummings* Court relied on a substantively flawed analysis in reaching the contrary opinion. First, the *McCummings* Court's reliance on *Ross* to support its conclusion that governmental immunity is an affirmative defense is perplexing, given that *Ross* **[***22]** itself described governmental immunity as a characteristic of government. 420 Mich. at 621, n 34. Second, in support of its analysis the *McCummings* Court asked, "If it takes a legislative decree for immunity to exist, and then **[*202]** only under circumstances defined

by the Legislature, how can it be said that sovereign or governmental immunity is a 'characteristic of government?'" 433 Mich. at 410-411.

In response, we merely observe that, historically, Michigan recognized at common law governmental immunity for all levels of government until *this Court* chose to abrogate governmental immunity for municipalities in 1961. *Williams v Detroit*, 364 Mich. 231; 111 N.W.2d 1 (1961). In response to *Williams* and the possibility that this Court would further erode the remaining common-law governmental immunity for counties, townships, and villages, the Legislature enacted the Governmental Immunity Act of 1964 (GIA), thereby *reinstituting* governmental immunity protection for municipalities and preserving sovereign immunity for the state. In effect, the GIA restored the *Williams* status quo ante. *Pohutski, supra* at 682. Thus, contrary to **[***23]** *McCummings*, it did not take a legislative decree to *create* governmental immunity, but a legislative act to *preserve* the doctrine that this Court had historically recognized as a characteristic of government. The *McCummings* suggestion that governmental immunity could not be a characteristic of government because it was created by legislation misapprehends the history of the Court's actions and the legislative response. We believe that once the sequence of the judicial and legislative events is grasped, the analytical flaw at the root of *McCummings* is apparent. n17 **[*203]**

For these reasons, n18 we overrule *McCummings* n19 to this extent and return **[**57]** to the longstanding principle extant before *McCummings* that, governmental immunity being a characteristic of government, a party suing a unit of government must plead in avoidance of governmental immunity. n20

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n17 More important, notwithstanding that governmental immunity is now established by a legislative act rather than the common law, we hold that the Legislature is within its inherent constitutional authority to structure governmental immunity solely as it deems appropriate. Where the Legislature has afforded municipalities the protection of governmental immunity and done so in a comprehensive fashion as it has done in the GTLA, the governmental immunity as set forth in the GTLA is a *characteristic* of government. **[***24]**

n18 We note that requiring the plaintiff to bear the burden of pleading in avoidance of governmental immunity is also consistent with a central purpose of governmental immunity, that is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.

n19 In overruling *McCummings*, the Court is mindful of the doctrine of stare decisis. ***HN16*** Stare decisis, however, is not meant to be mechanically applied to prevent the Court from overruling earlier erroneous decisions. *Robinson v Detroit*, 462 Mich. 439, 463; 613 N.W.2d 307 (2000). Rather, stare decisis is a "principle of policy" not "an inexorable command," and the Court is not constrained to follow precedent when governing decisions are badly reasoned. 462 Mich. at 464. We conclude that it is appropriate to overrule *McCummings* despite stare decisis because that case was both badly reasoned and inconsistent with a more intrinsically sound prior doctrine and the actual text of the GTLA.

n20 We apply this holding to plaintiff's sexual orientation claim, but remand to the Court of Appeals for reconsideration of plaintiff's other claims, as indicated previously. See n 1. With the exception of her sexual orientation discrimination claim against the city, which is disposed of in this opinion, plaintiff shall be allowed to amend her complaint to attempt to plead in avoidance of governmental immunity in regard to her other claims.

As to all other cases pending that involve governmental immunity, plaintiffs shall be allowed to amend their complaints in order to plead in avoidance of governmental immunity. If a case is pending on appeal and governmental immunity is a controlling issue, the Court of Appeals

may remand to allow amendment. As MCR 2.111(F)(3) encompasses other species of "immunity granted by law," but does not explicitly refer to governmental immunity, it is not necessary to amend the court rule because of our holding.

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2. Plaintiff's Complaint

HN17 A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function. McCann, 398 Mich. at 77. Plaintiff did neither in this case.

HN18 Governmental immunity protects the conduct of governmental agencies, which include two types of actors: the state and political subdivisions. MCL 691.1401(d). The Detroit Police Department, as a political subdivision, MCL 691.1401(b), is a "governmental agency" for purposes of governmental immunity. MCL 691.1401(d). As such, absent the applicability of a statutory exception, it is immune from tort liability if the tort claims arise from the department's exercise or discharge of a governmental function. MCL 691.1407(1). "'Governmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). **[***26]** It is well established in Michigan that the management, operation, and control of a police department is a governmental function. *Moore v Detroit*, 128 Mich. App. 491, 496-497; 340 N.W.2d 640 (1983); *Graves v Wayne Co*, 124 Mich. App. 36, 40-41; 333 N.W.2d 740 (1983).

Plaintiff's claims regarding the police department all involve decisions that are part and parcel of the department's discharge of governmental functions. The decisions at issue in this case are job reassignment, distribution of vacation time, and determining the extent to which department officers are involved **[*205]** in investigations. These are ordinary day-to-day decisions that the police department makes in the course of discharging its governmental function. As such, the police department's conduct is within the scope of § 7. Thus, plaintiff's claim is barred unless it falls within one of the statutory exceptions. As discussed above, plaintiff's sexual orientation discrimination claim falls under no immunity exception.

Further, plaintiff's complaint makes no mention of governmental immunity with respect to any of her claims. In fact, it was not until the city **[***27]** moved for summary disposition that plaintiff claimed that her **[**58]** action was not barred by governmental immunity. Even then, however, plaintiff's responsive pleading went only to her intentional infliction of emotional distress claim, which she abandoned by failing to raise it in the Court of Appeals.

Because plaintiff failed to state a claim that fits within a statutory exception or plead facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function, we conclude that plaintiff did not plead and could not plead in avoidance of governmental immunity and that her sexual orientation discrimination claim should have been dismissed on the city's motion for summary disposition.

IV. The Dissents

Justices Weaver and Cavanagh criticize our opinion primarily on the ground that our decision is allegedly reached without the benefit of briefing or argument. This argument camouflages their reluctance to address the core legal questions at hand. **[*206]**

First, concerning *McCummings*, additional briefing would not assist this Court in addressing this question of law. All the relevant argument is embodied in the years of case **[***28]**

law on the nature of governmental immunity. Of that case law, *McCummings* is an aberration; its doctrine stands alone in our jurisprudential history in holding that governmental immunity is an affirmative defense and not a characteristic of government. In this case, we addressed which was aberrational: *McCummings* or the remaining eighty years of case law. We have concluded that *McCummings* was the aberration.

Regarding the dissenters' assertion that the issue of the charter being preempted by the GTLA was not briefed or raised by the parties, we note that the issue was squarely in front of the parties. The central question in this case was whether the charter's purported creation of a cause of action for sexual orientation discrimination is preempted by state law. The governmental tort liability act is a state law. If the charter creates a cause of action for sexual orientation discrimination, then it conflicts with the state law of governmental immunity. Questioning by several members of this Court at oral argument specifically raised the governmental immunity issue. n21 We absolutely **[*207]** oppose the dissenters' apparent position that although a controlling legal issue is squarely **[***29]** before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits **[**59]** this Court's ability to probe for and provide the correct solution. Such an approach would seriously curtail the ability of this Court to function effectively and, interestingly, given the dissenters' position, actually make oral argument a moot practice.

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n21

Justice TAYLOR: . . . I've got a question which is on a little different track. *Pompey* and *Holmes* in their most elementary reading give private causes of action for civil rights problems. They, however, give that cause of action to one citizen against another. One of the old really venerable principles of law is of course that the government can only be sued when it allows itself to be sued. Why is it not the case that *Pompey* and *Holmes* could be left entirely intact and a court hold that whatever they said, they never abrogated the immunity that a government has that it can only eliminate expressly, that is the ability to not be sued. Said better, why wouldn't it be a sensible thing for a court to hold that whatever *Pompey* and *Holmes* said, they never gave authority to sue a city or any other kind of government, and there is nowhere in the statutes or the constitution where governmental immunity in this regard has been abrogated. And we always have to read our law, I think, our case law is that we always tilt in the direction of immunity.

* * *

Justice YOUNG: Why do you read this provision [CRA] as abrogating governmental immunity? . . . .

* * *

Justice MARKMAN: But Justice TAYLOR's question as I understand is a more generic question . . . It's whether the municipality can create any cause of action that will burden the sovereign to a greater extent.

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To be certain, we emphasize that, contrary to Justice CAVANAGH's allegation, we have not disregarded "the foundational principles of our adversarial system of adjudication." *Post* at 1. Rather, HN19 addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle. See *Legal Services Corp v Velazquez*, 531 U.S. 533, 549-558; 149 L. Ed. 2d 63; 121 S. Ct. 1043 (2001) (majority and dissent both

stating that whether to address an issue not briefed or contested by the parties is left to discretion of the Court); *Seattle* **[*208]** *v McCready*, 123 Wn.2d 260, 269; 868 P.2d 134 (1994) (indicating that the court "is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent"). In fact, all three dissenters recently signed or concurred in an opinion where this Court decided an issue not raised or briefed by any party. *Federated Publications, Inc v Lansing*, 467 Mich. 98, 649 N.W.2d 383, 2002 Mich. LEXIS 1282 (2002) (resolving a standard of review issue). Accordingly, we find no merit **[***31]** in the dissents' criticism of our opinion on the ground that the parties did not brief the issue themselves and interpret their dissenting statements as an indication of their reluctance to address the core legal questions before us.

In his dissent, Justice CAVANAGH has fired his standard shot: this Court overrules cases capriciously. Now he has added a fusillade, suggesting that the majority "tees up" issues it wants the parties to brief, and somewhat inconsistently, that the majority decides matters *without* briefing by the parties. While we recognize that following the law as enacted by our Legislature is sometimes at odds with our dissenting colleague's personal policy preferences, our constitutional duty demands that we follow the rule of law. While Justice CAVANAGH chooses to characterize his policy frustrations as the majority's judicial disobedience, neither the law, this Court's history, nor Justice CAVANAGH's own judicial history supports his characterization.

On the so-called briefing issue, we think Justice CAVANAGH wants it both ways. In this case, where the controlling legal issue was discovered after the parties had submitted their briefs, Justice CAVANAGH complains. **[***32]** **[*209]** In other cases, when the Court has believed there might be a controlling issue on which it wanted the benefit of the parties' briefing, Justice CAVANAGH also complains. See, e.g., *Robinson v Detroit*, 462 Mich. 439; 613 N.W.2d 307 (2000) (a case cited in his footnote 9), wherein Justice CAVANAGH dissented, criticizing the majority for flagging in its grant order a legal issue the Court specifically wanted briefed by the parties. 461 Mich. 1201; 597 N.W.2d 837. n22

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n22 For example, Justice CAVANAGH cites *People v Hardiman*, 465 Mich. 902; 638 N.W.2d 744 (2001), as an example of this Court asking the parties if a precedent should be overruled, *People v Atley*, 392 Mich. 298; 220 N.W.2d 465 (1974). We note that Justice CAVANAGH agreed that *Atley* should be overruled in his partial concurrence in *Hardiman*. 466 Mich. 417, 432, 646 N.W.2d 158 (2002).

Similarly, Justice CAVANAGH criticizes this Court for asking the parties to brief whether the federal subjective entrapment test should be adopted in Michigan in our grant order in *People v Johnson*, 466 Mich. 491, 647 N.W.2d 480, 2002 Mich. LEXIS 1226 (2002), leave to appeal, 465 Mich. 911 (2001). However, when Justice CAVANAGH was in the majority, the Court asked the parties to do the very same thing in *People v Jamieson*, 436 Mich. 61; 461 N.W.2d 884 (1990). 433 Mich. 1226, 456 N.W.2d 390 (1989).

Finally, we note that in regard to the majority deciding issues not briefed by the parties, Justice CAVANAGH recently authored the opinion in *Stanton v Battle Creek*, 466 Mich. 611, 647 N.W.2d 508, 2002 Mich. LEXIS 1242 (2002), in which this Court decided an issue that was never briefed by the parties. That is, applying the common meaning of "motor vehicle" to determine whether the term encompasses a forklift.

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[60]** Apart from Justice CAVANAGH's desire to have it both ways on the issue of party "briefing," no one can seriously question the right of this Court to set forth the law as clearly

as it can, irrespective whether the parties assist the Court in fulfilling its constitutional function. The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions.

Concerning Justice CAVANAGH's habitual assertion that *this* Court casually disregards stare decisis, we **[*210]** note that Justice CAVANAGH himself is no stranger to overruling precedent. See, e.g., *DiFranco v Pickard*, 427 Mich. 32, 398 N.W.2d 896 (1986), overruling *Cassidy v McGovern*, 415 Mich. 483; 330 N.W.2d 22 (1982); *AFSCME v Highland Park Bd of Ed*, 457 Mich. 74; 577 N.W.2d 79 (1998), overruling *Ensley v Associated Terminals, Inc*, 304 Mich. 522; 8 N.W.2d 161 (1943); *Haske v Transport Leasing, Inc*, 455 Mich. 628, 652; 566 N.W.2d 896 (1997), overruling *Rea v Regency Olds/Mazda/Volvo*, 450 Mich. 1201; 536 N.W.2d 542 (1995) **[***34]** ; *W T Andrew Co v Mid-State* Surety, 450 Mich. 655; 545 N.W.2d 351 (1996), overruling *Weinberg v Univ of Michigan Regents*, 97 Mich. 246; 56 N.W. 605 (1893); *People v Kevorkian*, 447 Mich. 436; 527 N.W.2d 714 (1994), overruling *People v Roberts*, 211 Mich. 187; 178 N.W. 690 (1920); *In re Hatcher*, 443 Mich. 426; 505 N.W.2d 834 (1993), overruling *Fritts v Krugh*, 354 Mich. 97; 92 N.W.2d 604 (1958); *Mead v Batchlor*, 435 Mich. 480; 460 N.W.2d 493 (1990), overruling (to the extent inconsistent) *Sword v Sword*, 399 Mich. 367; 249 N.W.2d 88 (1976); *Albro v Allen*, 434 Mich. 271; 454 N.W.2d 85 (1990), overruling unidentified prior Supreme Court cases; *Schwartz v Flint*, 426 Mich. 295; 395 N.W.2d 678 (1986), overruling *Ed Zaagman, Inc v Kentwood*, 406 Mich. 137; 277 N.W.2d 475 (1979); *McMillan v State Hwy Comm*, 426 Mich. 46; 393 N.W.2d 332 (1986), **[***35]** overruling *Cramer v Detroit Edison Co*, 296 Mich. 662; 296 N.W. 831 (1941), and *Dawson v Postal Telegraph-Cable Co*, 265 Mich. 139; 251 N.W. 352 (1933).

More important, we emphasize that this stout defense of stare decisis by Justices CAVANAGH and KELLY is their standard argument when they are unhappy with the result of an opinion. See *Sington v* **[*211]** *Chrysler Corp*, 467 Mich. 144, 648 N.W.2d 624, 2002 Mich. LEXIS 1423 (KELLY, J., dissenting). Their charge is that the new composition of this Court is the explanatory variable for a deteriorating respect for precedent. *Sington* provides the latest example of their argument, but it also demonstrates how statistically insignificant are the occasions when this Court (as opposed to its pre-1999 predecessor) has overturned its prior cases.

In *Sington*, Justice KELLY states that, in the five years from 1993 to 1997, twelve cases were overturned by this Court whereas in the four and a half years from 1998 to July, 2002, twenty-two cases were overturned. During the 1993 to 1997 period, the Court overruled precedent at a rate of about one-twelfth of one percent (12 of 13,682 cases disposed of), while **[***36]** during the 1998 to 2002 period, the Court overruled precedent at about a rate of one-fifth of one percent (22 of 11,190). The **[**61]** contrast is one-twelfth of one percent in the Court's "good ole days" versus one-fifth of one percent in the new world of the current Court, even counting against the current Court the six cases decided in 1998 before this majority came into existence. Viewed in this context, no neutral commentator would conclude that the majority has a complete disregard for stare decisis, but that the dissenters are strict adherents. In other words, Justice KELLY and Justice CAVANAGH's records do not reflect a previous hard line adherence to stare decisis and their dissatisfaction is not with our alleged lack of adherence to stare decisis, but in their inability to reach the policy choice they prefer given the majority's commitment to follow the laws enacted by our Legislature.

I think it is fair to say that the cases Justice CAVANAGH cites in footnote 9 more probably reveal his **[*212]** desire that *this* Court never address a controlling legal issue. Yet, we welcome Justice CAVANAGH's newly announced repudiation of "judicial activism in any form." We question whether his new judicial **[***37]** philosophy includes the obligation to respect and follow the law, even where it is inconvenient to one's policy preferences or even when the parties fail to bring the controlling law to the Court's attention.

V. Conclusion

We hold that regardless whether the charter attempted to create a private cause of action against the city for sexual orientation discrimination, it could not do so without contravening governmental immunity law. Accordingly, this Court is without authority to act on plaintiff's request to recognize such a cause of action.

In addition, we hold that, governmental immunity being a characteristic of government, a party suing a unit of government must plead in avoidance of governmental immunity. We overrule *McCummings* to the extent it holds otherwise.

Plaintiff did not plead in avoidance of governmental immunity in her complaint. Accordingly, the Court of Appeals holding is reversed, and the trial court's order for summary disposition in favor of defendant is reinstated with regard to the sexual orientation discrimination claim. Because the city did not appeal the Court of Appeals resolution of the sex discrimination claim, we remand that issue to the Court **[***38]** of Appeals for reconsideration in light of this opinion.

CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J.

KELLY, J., concurred with WEAVER, J.

DISSENTBY: Michael F. Cavanagh; Elizabeth A. Weaver

DISSENT: [*213]

CAVANAGH, J. (*dissenting*).

I respectfully disagree with the majority's conclusion that a cause of action created by defendant's city charter and brought against the city of Detroit would contravene the governmental tort liability act (GTLA), MCL 691.1407. I further object to the majority's assertion that plaintiff must plead in avoidance of governmental immunity.

In reaching its holding, the majority disregards the foundational principles of our adversarial system of adjudication. As protectors of justice, we refrain from deciding issues without giving each party a full and fair opportunity to be heard. But not for this concern, the judicially created doctrine of standing would be discarded, as it ensures "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination . . . ." *Baker v Carr*, 369 U.S. 186, 204; 7 L. Ed. 2d 663; 82 S. Ct. 691; (1962) **[***39]** (Brennan, J.). However, the majority has disregarded such considerations, misconstruing the proper scope of its authority, by making dispositive an issue never argued **[**62]** or briefed by the parties. Neither of the parties has had the benefit of sharing with this Court their thoughts on the effect of the tort immunity act on this case, though the implications of the majority's holding are vast. Never before have I witnessed such overreaching conduct from members of this Court.

I. THE GTLA DOES NOT NULLIFY PRIVATE ACTIONS CREATED BY A CITY

In the majority's haste to apply the GTLA, it fails to adequately consider several foundational issues. First, the majority neglects to properly address a dispositive preliminary issue: is an action alleging a violation of a city charter a tort? Neither plaintiff nor defendant **[*214]** considered this claim a tort. Further, because a charter is a city's "constitution," *Bivens v Grand Rapids*, 443 Mich. 391, 401; 505 N.W.2d 239; (1993), this action does not resemble our typical understanding of a tort. It is far from clear that the Legislature intended that the GTLA preclude such actions, and the majority's reference to *Donajkowski v Alpena Power Co*, 460 Mich. 243, 247; 596 N.W.2d 574 (1999), **[***40]** which proclaimed in the most cursory fashion that a statutory violation sounds in tort, does not aid in this determination. At

the very least, briefing and argument on this issue could have clarified the nature of the debate.

Moreover, the majority's claim that the scope of the GTLA nullifies any attempt by a city to create a cause of action that could be brought against a governmental agency ignores the fact that the tort immunity act does not bar gross negligence claims against government officers, MCL 691.1407(2), nor does it prohibit actions brought against government entities for injuries arising out of actions not related to the discharge of a "government function." MCL 691.1407(1). Thus, even if one concludes that plaintiff's claim against the city properly sounds in negligence, a cause of action created by the Detroit charter could be brought under the theory of gross negligence against government officers or against the city when not engaged in a government function. Therefore, the majority errs in concluding that *any* action created by a city's charter that could be brought against **[***41]** a governmental entity would violate the GTLA.

II. THE CHARTER CREATES A CAUSE OF ACTION

Having demonstrated why the issue is not "irrelevant," in spite of the majority's assertions otherwise, I **[*215]** believe it is necessary to clarify that the plain language of the charter creates a cause of action. n1

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n1 See *Detroit v Walker*, 445 Mich. 682, 691; 520 N.W.2d 135 (1994) ("The prevailing rules regarding statutory construction are well established and extend to the construction of home rule charters.")

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The Detroit citizenry clearly has the right to be free from discrimination on the basis of, inter alia, sexual orientation:

The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation. [Charter, **[***42]** Declaration of Rights, § 2.]

Defendant city of Detroit, however, claims the plain language of the charter prescribes an exclusive administrative remedy for this broadly pronounced right, prohibiting enforcement by its citizenry:

[63]** The city may enforce this declaration of rights and other rights retained by the people. [*Id.* at § 8.]

Defendant's cursory assertion that this provision prohibits individual enforcement of the rights granted in the charter results from an erroneous interpretation of the plain language of the text. n2 Certainly this provision grants the city the authority to enforce the rights proclaimed in the charter. However, this grant of authority is not exclusive. The drafters gave the city the power to enforce the declaration of rights *and* other rights retained by the people. If one accepts **[*216]** defendant's claim that this text gives the city the exclusive authority to enforce the declaration of rights, the drafters also would have granted to the city the exclusive authority to enforce "other rights retained by the people." In other words, with the adoption of the charter *as constructed by defendant*, the people of Detroit purportedly stripped themselves **[***43]** of their ability to bring civil actions to enforce *any* "other right." Even if the city had the authority to enforce these rights, the text simply does not

support such an unprecedented grant of authority.

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n2 This Court has certainly consistently eschewed any deviation from our "textualist" approach.

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Further, the drafters used "may," not "shall," in this provision. "May" suggests that one "is permitted to" or has discretion. Black's Law Dictionary (7th ed). If the drafters had intended to grant the city the exclusive authority to enforce the charter, they certainly would have used "shall," mandating such action. *Id.* ("shall" implies a duty or requirement). Moreover, the citizens of Detroit surely did not intend to grant the city the discretionary *and* exclusive power to enforce both the rights under the charter and all others retained by the people. Thus, by use of the permissive and discretionary term, the drafters indicated an intention to permit enforcement mechanisms beyond those powers granted **[***44]** to the city. Any other interpretation ignores the text of the charter.

Reference to the city's ordinances supports this interpretation of the charter. n3 In 1988, the city deliberately clarified that those who experienced discrimination on the basis of AIDS and conditions related to AIDS **[*217]** could bring a civil action to enforce their rights granted by the city. Chapter 27, article 7 prohibits such discrimination in the employment, housing, business, and educational arenas. See generally, §§ 27-7-1 to 27-7-90. In particular, the charter prohibits discrimination in the provision of *public* facilities or services. Section 27-7-7. The enforcement provision includes the following subsection:

Any aggrieved person may enforce the provisions of this article by means of a civil action. [Section 27-7-10(a).]

Clearly, the city intended to create a civil cause of action for the victims of such discriminatory practices. Assuming drafters of the ordinance did not intend to contravene the charter, which we must, we may only conclude that the authority granted to the city in the declaration of rights, § 8, did *not* give the city the sole right to enforce the charter.

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n3 *Brady v Detroit*, 353 Mich. 243, 248; 91 N.W.2d 257 (1958) ("Provisions pertaining to a given subject matter must be construed together, and if possible harmonized. It may not be assumed that the adoption of conflicting provisions was intended.")

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Although defendant correctly referenced ordinance 27-7-10, it draws the wrong conclusion. As noted, article 7 of chapter 27 was enacted in 1988. Detroit Ordinance § 24-88, July 14, 1988; see also Detroit Ordinance § 33-88, September 21, **[**64]** 1988. In contrast, the enabling ordinances at issue here were enacted in 1979. Detroit Ordinance § 303-H, January 24, 1979. It is entirely reasonable to conclude that the city simply intended to clarify that a private cause of action could be had under the charter when enacting § 27-7-10, as had been authorized implicitly by the charter.

The inclusion of § 27-2-10 was particularly appropriate because of the circuit courts' treatment of similar claims. In this case, for example, the court noted that this issue had arisen in the past. Without direction from the Court of Appeals, the trial court refused **[*218]** to recognize a cause of action. Certainly an ordinance or charter amendment that made clear that a cause of action existed for a violation of any right provided by the charter

would have made this exercise even simpler. However, its absence cannot force the conclusion that an action *only* for AIDS-related discrimination was intended. In this age **[***46]** of the overly rhetorical and often vacuous concern over "special rights," it is unreasonable to presume the charter permits individual actions for AIDS-related discrimination, but not for the other forms of discrimination enumerated in the declaration of rights, § 2. Therefore, though we often rely on the maxim that the inclusion of one term implies the exclusion of another, that inference loses force where the circumstances indicate otherwise. n4 In this case, the circumstances suggest the opposite, i.e., that the express provision of a cause of action for AIDS-related discrimination only *clarifies* that the charter permitted such actions for all violations.

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n4 See *Luttrell v Dep't of Corrections*, 421 Mich. 93, 102; 365 N.W.2d 74 (1984) (holding that "the effect of the rule '*expressio unius est exclusio alterius*,' while a valid maxim, [may be] so much at odds with the other [rules of construction] that reason dictates it [may be] inapplicable").

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Additional support **[***47]** for this conclusion can be found in the drafters' decision to include two provisions that suggest that Detroit's citizens retained the right to sue for violations of the charter. The declaration of rights clearly states:

The enumeration of certain rights in this Charter shall not be construed to deny or disparage others retained by the people. [Declaration of Rights, § 7.]

In that same vein, the charter's chapter on human rights ends with the following proclamation: **[*219]**

This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal. [Section 7-1007.]

This evidence indicates an intention to create a scheme whereby the administrative remedies supplement an individual's ability to bring a private cause of action. n5 In light of this analysis, a rational interpreter must conclude that neither the drafters nor the citizenry intended to grant the city exclusive, discretionary authority to remedy violations of the rights granted in the charter. Therefore, I would hold that the charter does, in fact, create a damages action for discrimination based on sexual orientation.

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n5 The charter's preamble provides additional support for the conclusion that the charter created both rights and remedies to which the city itself must adhere:

We, the people of Detroit, do ordain and establish this Charter for the governance of our city, as it addresses the programs, services and needs of our citizens; . . . *pledging that all our officials, elected and appointed, will be held accountable to fulfill the intent of this Charter* . . . . [Emphasis added.]

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[65] [***48]**

III. IMMUNITY AS AN AFFIRMATIVE DEFENSE

The majority has opportunistically seized on the circumstances presented in this case to overrule decades of sound precedent and unsettle an area of law that had finally achieved some stability. In proclaiming that plaintiff must plead in avoidance of immunity, the majority ignores not only the value of precedent, but also the sound principles on which *McCummings v Hurley Medical Ctr,* 433 Mich. 404; 446 N.W.2d 114 (1989), was based. In *McCummings*, the Court held that the entity claiming immunity must **[*220]** affirmatively plead the defense. This unanimous pronouncement was based, in part, on the doctrine's statutory foundation. No longer could we solely rely on the doctrine's common-law history to determine the parameters of the defense. n6 Therefore, though the judiciary traditionally considered sovereignty a "characteristic" of government, this understanding was no longer dispositive of procedural or substantive issues once the Legislature codified the doctrine. This view is no less relevant today, and the majority's attempt to proclaim otherwise by once again relying on outdated jargon adds little to our understanding **[***49]** of governmental immunity.

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n6 See Const 1963, art 3, sec 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.")

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Having identified a flaw in the majority's deceptively useful rationale (i.e., because the Court has declared immunity a "characteristic" in the past, it is not an affirmative defense), we must now turn to its substantive conclusions. Does the governmental immunity *statute* require that plaintiffs plead in avoidance of immunity? MCL 691.1407(1). provides:

Except as otherwise provided in this act, a government agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function.

Although this section makes clear that governmental entities may claim immunity when performing a governmental function, it does not, as the majority claims, create a textual presumption in favor of the government. Rather, the statute identifies **[***50]** the scope of immunity. The procedural duty to plead is simply **[*221]** not mentioned, and as such, the text-as it pertains to pleading-is silent.

Building on this Court's pronouncement in *Ross v Consumers Power (On Rehearing),* 420 Mich. 567; 363 N.W.2d 641 (1984), which clarified that the Legislature intended that immunity from tort liability exist only when an entity was engaged in a governmental function, the *McCummings* Court arrived at the most logical conclusion, i.e., that "the question whether a governmental agency was engaged in a governmental function when performing the act complained of is a question best known to the agency and best asserted by it." 433 Mich. at 411. n7 Furthermore, the *McCummings* Court correctly noted that no valid reason to exempt agencies from the pleading burden placed upon individuals could be discerned. The source of immunity for both government bodies and individuals is grounded in § 1407. Because the text makes no distinction in this regard, a prudent observer will agree that the majority's reversal is based on its own policy considerations, **[**66]** which ignore both the intent of the Legislature and the judicially sound doctrine **[***51]** of stare decisis. This is particularly true because, though the Legislature revised the GTLA after *McCummings* in 1986, 1996, and 1999, it failed to amend the statute to alter the rule that placed the burden of pleading on the government. Unfortunately, the majority dismisses this legislative acquiescence, an indicator of its intent.

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n7 The Court in *Ross* undertook an almost impossible task, clarifying more than a century's

worth of judicial and legislative commentary on governmental immunity. It did not, however, examine on which party the burden of pleading should fall. Any reference to that burden in *Ross* does not, contrary to the majority's assertions, diminish the foundation on which the Court in *McCummings* relied.

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[*222] In sum, the fact remains that governmental immunity is a *defense* to liability. Although the majority erroneously declares that plaintiff must plead in avoidance of the doctrine, the government continues to bear the onus of proof. If a trial court finds the parties have equally **[***52]** carried the burden of production concerning the applicability of the doctrine, the court must find for the plaintiff. Any indication to the contrary in the majority's opinion may only be referenced as dicta, as the issue this case presents is limited to the sufficiency of the pleadings.

Shockingly, without the issue being contemplated, let alone raised by the parties, the majority concludes that plaintiff's claim should have been dismissed for its failure to plead in avoidance of government immunity. Slip op at 2, 21-22, 26. However, our precedent and court rules had expressly placed this burden on the government. I object to the majority's application of its holding, which placed the burden of prescience on plaintiff.

IV. PRINCIPLES OF THE ADVERSARY SYSTEM

The majority's disingenuous response to the dissenting opinions requires clarification. The majority claims that any briefing on the propriety of the rule in *McCummings* would be a waste of time because "additional briefing would not assist this Court in addressing this question of law." Slip op at 22. This comment flies in the face of the foundations of our adversarial system, in which the parties frame the issues and **[***53]** arguments for a (presumably) passive tribunal. The adversarial system ensures the best presentation of arguments and theories because each party is motivated to succeed. Moreover, the adversarial **[*223]** system attempts to ensure that an active judge refrain from allowing a preliminary understanding of the issues to improperly influence the final decision. This allows the judiciary to keep an open mind until the proofs and arguments have been adequately submitted. n8 In spite of these underlying concerns, the majority today claims that the benefits of full briefing are simply a formality that can be discarded without care. The majority fails to comprehend how the skilled advocates in this case could have added anything insightful in the debate over the proper interpretation of a century's worth of precedent. Whatever its motivation, the majority undermines the foundations of our adversarial system.

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n8 See Hazard, *Ethics in the Practice of Law, pp 120-123, 126-129, 131-135, cited in Tidmarsh & Trangsrud, Complex Litigation and the Adversary System*, (New York: Foundation Press, 1988).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***54]**

The majority also implies that the "central question in this case was whether the charter's purported creation of a cause of action for sexual orientation discrimination is preempted" by the GTLA. Slip op at 23. However, the extent of the parties' preemption briefing focused solely on the relevance of the Civil Rights Act vis-a-vis the charter--created cause of action. Moreover, the questions by this Court during oral argument do not substitute for proper briefing, but only illustrate how the Court pursues its own end in a fashion unanticipated by the parties.

[67]** While occasionally a court may find it necessary to resolve an issue not briefed by the parties, the frequency with which the majority undertakes such **[*224]** activist endeavors demonstrates its desire to arrive at *its* destination. n9

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n9 The majority frequently engages in at least three distinct types of activist behavior: overruling precedent; in grants of leave, directing parties to address issues not initially raised or briefed by the parties in their application for leave to appeal; and, as in this case, holding dispositive issues neither raised nor argued before this Court.

To review instances where this majority has overruled precedent, see, e.g., *People v Cornell*, 466 Mich. 335; 646 N.W.2d 127 (2002); *Koontz v Ameritech Svcs, Inc*, 466 Mich. 304; 645 N.W.2d 34 (2002); *Robertson v DaimlerChrysler Corp*, 465 Mich. 732; 641 N.W.2d 567 (2002); *Pohutski v City of Allen Park*, 465 Mich. 675; 641 N.W.2d 219 (2002); *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492; 638 N.W.2d 396 (2002); *Brown v Genesee Co Bd of Cmmr's*, 464 Mich. 430; 628 N.W.2d 471 (2001); *People v Glass*, 464 Mich. 266; 627 N.W.2d 261 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143; 615 N.W.2d 702 (2000); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich. 691; 614 N.W.2d 607 (2000); *Stitt v Holland Abundant Life Fellowship*, 462 Mich. 591; 614 N.W.2d 88 (2000); *Robinson v Detroit*, 462 Mich. 439; 613 N.W.2d 307 (2000); *People v Kazmierczak*, 461 Mich. 411; 605 N.W.2d 667 (2000); *McDougall v Schanz*, 461 Mich. 15; 597 N.W.2d 148 (1999); *People v Lukity*, 460 Mich. 484; 596 N.W.2d 607 (1999); *Ritchie-Gamester v Berkley*, 461 Mich. 73; 597 N.W.2d 517 (1999) .

For examples of grant orders which directed the parties' to address issues the majority found relevant, see *People v Glass*, 461 Mich. 1005; 610 N.W.2d 872 (2000) (directing the parties to address whether the prosecutor's actions removed the taint of alleged racial discrimination in the grand jury selection process, whether MCR 6.112 conflicted with MCL 767.29, and whether the Court properly exercised its authority over criminal procedure). See also *People v Hardiman*, 465 Mich. 902; 638 N.W.2d 744 (2001) (directing the parties to brief whether "the inference upon inference rule of *People v Atley*, 392 Mich. 298, 220 N.W.2d 465 (1974), was violated under the facts . . . and whether that decision should be overruled"); *People v Johnson*, 465 Mich. 911; 638 N.W.2d 747 (2001) (directing the parties to brief whether this Court should adopt the federal subjective entrapment defense); *People v Reese*, 465 Mich. 851; 631 N.W.2d 343 (2001) (directing the parties to "specifically address whether MCL 768.32 prevents this Court from adopting the federal model for necessarily lesser included offense instructions and, if it does, whether such prohibition violates Const 1963, art 6, § 5. In all other respects, leave to appeal is denied."); *People v Lett*, 463 Mich. 938, 620 N.W.2d 855 (2000) (rejecting the prosecutor's concession concerning the constitutional nature of the error and directing the parties to address whether the trial court's declaration of a mistrial was based on manifest necessity; further ordering the parties to address six additional issues, including whether the defendant's claim was forfeited or waived and the extent to which the law might be clarified concerning presence of manifest necessity).

I thank the majority for pointing out that I object both when the parties have not had an opportunity to argue or brief an issue, *and* when the majority has forced the disposition of an issue not raised by either party. To clarify, it's not that I wish to have "it both ways," but that I object to judicial activism in any form.

Further, the majority accurately documents that, *throughout my twenty-year tenure* on this Court, I have, on occasion, found it necessary to overrule precedent or request briefing on an issue. The majority also clarifies that policy considerations may influence one's understanding of the appropriate method by which to apply or interpret the law. With this I do not disagree. Neither the majority nor I can escape the fact that, as judges, we are not computers, but human beings, doing our best to apply the law in an unbiased fashion, in accord with our

constitutional mandate and within the strictures of the adversary system. Whether in the majority or the dissent, every justice must recognize and appropriately set aside such considerations in the execution of their duties under the law.

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V. CONCLUSION

Because a majority of this Court erroneously refuses to recognize that the charter creates a cause of action and that plaintiff need not plead in avoidance of immunity, **[**68]** there is no need to thoroughly analyze the remaining issues. Suffice it to say, I would hold that a municipality has the power, on the basis of the police powers inherent in its home rule authority, to protect its citizens from discrimination. No state law preempts this protection, and governmental immunity does not bar an action based not on a theory of tort liability, but on a violation of the organic law of a city granting its citizens fundamental rights. Therefore, for the reasons noted, I would affirm the judgment of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*)

I dissent from the majority decision.

The majority has decided important issues involving governmental immunity that were not raised or briefed by the parties and that are very significant to **[*226]** the people of Detroit and all the people of Michigan. The majority should have insured that it had briefing and heard argument on these issues before deciding them.

A

Without the benefit **[***56]** of briefing or argument, the majority overrules settled precedent n1 to hold that governmental immunity cannot be waived because it is a characteristic of government. In *McCummings v Hurley Medical Ctr,* 433 Mich. 404, 411; 446 N.W.2d 114 (1989) , this Court held that governmental immunity must be pleaded as an affirmative defense. The majority overrules *McCummings* and holds that immunity is an unwaivable characteristic of government. The parties did not raise or address in any court whether governmental immunity is a characteristic of government or an affirmative defense. n2

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n1 The majority's assertion that *McCummings* is an "aberration" is their view. However, it was signed by six justices with Justice Griffin concurring separately and has been the law for fourteen years. See, e.g. *Scheurman v Dep't of Trans,* 434 Mich. 619; 456 N.W.2d 66 (1990), and *Tryc v Michigan Veterans' Fund,* 451 Mich. 129; 545 N.W.2d 642 (1996).

n2 Although the city raised governmental immunity as an affirmative defense at the trial court level, the city never specifically addressed immunity relative to plaintiff's charter-based claim of sexual orientation discrimination at any level. The only briefing regarding immunity in the trial court was in response to plaintiff's intentional infliction of emotional distress claim. Plaintiff abandoned that claim in the trial court and thereafter, the city abandoned its immunity claim.

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While the general concept of governmental immunity was alluded to in questioning during

oral argument before this Court, the questioning did not reference the concept of immunity as a characteristic of government and did not foreshadow an intent to reconsider *McCummings*. The majority's decision to **[*227]** reach out and overrule a case that was not raised, briefed, or argued is certainly efficient. However, the majority's efficiency in this case forsakes procedural fairness. It is worth emphasis that the majority can only conclude that the city has not waived governmental immunity by overruling *McCummings.*

I decline the majority's invitation to take a position without briefing and argument on whether governmental immunity is a characteristic of government, an affirmative defense, or some other judicially determined hybrid. These characterizations have significant procedural consequences. It is the role of the Court to respond to issues properly before it and to seek additional briefing and argument on significant matters that may have been overlooked by the parties. This is especially true where the issues are of great importance, such as **[**69]** the issues not briefed or argued in this **[***58]** case, which seriously affect the settled law of this state.

The majority's decision to address and resolve this issue without briefing or argument is inappropriate. Before deciding this significant change in the law of governmental immunity, the Court should have had briefing and argument.

B

The question whether a charter-created cause of action for sexual orientation discrimination conflicts with the governmental tort liability act (GTLA), MCL 691.1407, a question that the majority concludes decides this case, was not briefed or argued by the **[*228]** parties at any level. n3 It is not possible to agree with the majority contention that this specific question was "squarely in front of the parties" when neither party addressed it at any level. *Ante* at 24. The conflict analysis of the parties and the courts below addressed whether a charter-created cause of action for sexual orientation discrimination conflicted with the Civil Rights Act (CRA). Furthermore, the city only characterized the question of conflict with CRA as one premised on the law of preemption in its brief to this Court. It is again worthy of note that it is only the majority's overruling **[***59]** of *McCummings* that allows the majority to shift the focus of the conflict analysis from the CRA to the GTLA.

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n3 The Michigan Constitution and the Home Rule City Act require that home rule city charters not conflict with state law.

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C

Although the majority asserts that whether the electors of Detroit intended to create a cause of action to vindicate the charter-created civil right to be free from sexual orientation discrimination is an "irrelevant" inquiry, the intent of the electors, as expressed in the charter is noteworthy. n4 After all, the issue presented at the outset of this case was whether the charter language created a cause of action to vindicate the charter's declaration of rights.

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n4 Further, it should be of interest to the people of Detroit that the city's position in this litigation seeks to disclaim individual rights that its electors deemed worthy of charter protection.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***60]**

The charter's declaration of rights provides:

The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of **[*229]** opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation. [Section 2.]

The language of § 2 is not ambiguous. It, as would be commonly understood by the ratifiers, secures a set of rights to each person of Detroit. Furthermore, § 8 of the declaration of rights provides:

The city may enforce this Declaration of Rights and other rights retained by the people.

While it can be argued that the permissive "may" of § 8 tempers *the city's* otherwise "affirmative duty" under § 2 to "insure the equality of opportunity for all persons," it is by no means clear that, pursuant to § 8, the ratifiers intended to diminish the individual rights declared in § 2. More importantly, the unambiguous language of the charter demonstrates that the charter ratifiers, the electors of Detroit, intended that the people of Detroit have the opportunity **[***61]** to seek enforcement of their charter-based **[**70]** rights in the proper court or tribunal. Art 7, ch 10, § 7-1007 provides:

This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal.

By these words the ratifiers of the charter would have expected that individuals could also vindicate their charter-declared rights in the proper court or tribunal. n5 **[*230]** In other words, it was the express intent of the electors of Detroit to raise the veil of immunity within the city limits with respect to the civil rights declared in the charter's declaration of rights.

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n5 As reiterated by the United States Supreme Court in *Davis v Passman*, 442 U.S. 228, 242; 60 L. Ed. 2d 846; 99 S. Ct. 2264 (1979), "'The very essence of civil liberty,' wrote Mr. Chief Justice Marshall in *Marbury v Madison*, 5 U.S. [1 Cranch] 137, 163; 2 L. Ed. 60 (1803), 'certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'"

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***62]**

The fact that the majority's decision leaves a charter-based right with no remedy n6 accentuates the inappropriateness of the majority's decision to dispose of this case on the basis of issues that were not raised, not briefed, and not argued by the parties.

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n6 Section 8 of the charter declares that the city "may" enforce the declaration of rights, not that it "must" enforce those rights. If the city opts not to enforce the declaration of rights, as it may so choose to do under § 8, the individual Detroiter would have a right with no remedy.

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1 of 51 DOCUMENTS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JERRY CLAY, Defendant-Appellee.

No. 120024

SUPREME COURT OF MICHIGAN

2003 Mich. LEXIS 980

December 11, 2002, Argued

May 30, 2003, Decided

May 30, 2003, Filed

PRIOR HISTORY:
[*1] Kent Circuit Court, H. David Soet, J. Court of Appeals, NEFF, P.J., and SMOLENSKI and ROBERSON, JJ. (Docket No. 183102). Court of Appeals, REILLY, P.J., and MACKENZIE and ZAHRA, JJ. (Docket No. 183101). Court of Appeals, HOOD, P.J., and FITZGERALD, J., (HOLBROOK, JR., J., dissenting). 239 Mich. App. 365 (2000). Supreme Court. 463 Mich. 971 (2001). Court of Appeals. 247 Mich. App. 322 (2001).

People v. Clay, 247 Mich. App. 322, 636 N.W.2d 303, 2001 Mich. App. LEXIS 174 (2001).

DISPOSITION:
Court of Appeals' decision reversed.

COUNSEL:
Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, William A. Forsyth, Prosecuting Attorney, and Timothy K. McMorrow, Chief Appellate Attorney, Grand Rapids, MI, for the people.

State Appellate Defender (by Fred E. Bell), Lansing, MI, for the defendant-appellee.

Amicus Curiae: David Morse, President, Michael E. Duggan, Prosecuting Attorney, and Janice M. Joyce Bartee, Principal Appellate Attorney, Detroit, MI, for the Prosecuting Attorneys Association of Michigan.

JUDGES:
Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CAVANAGH, J., concurs in the result only. KELLY, J. (dissenting).

OPINIONBY:
Robert P. Young, Jr.

OPINION:

BEFORE [*2] THE ENTIRE BENCH

AFTER REMAND

YOUNG, J.

The Court of Appeals reversed the trial court's denial of defendant's motion for relief from judgment on the ground that defendant was not "lawfully imprisoned" as contemplated by MCL 750.197c. We reverse.

I. Background

Defendant was stopped by the police for allegedly trespassing, failing to obey a police officer, and assisting in a traffic violation. After the stop, the police discovered that defendant was carrying a concealed weapon without a permit in violation of MCL 750.227. As a result, defendant was placed under arrest and taken to the county jail.

While at the county jail, defendant assaulted a law enforcement officer. Consequently, defendant was charged with assaulting a corrections officer, MCL 750.197c, and being an habitual offender, fourth offense, MCL 769.12. Defendant was convicted of these offenses at trial and his convictions were affirmed by the Court of Appeals. n1 Defendant's application for leave to appeal was denied by this Court. n2

n1 Unpublished opinion per curiam, issued January 21, 1997 (Docket No. 183102). [*3]

n2 456 Mich. 888 (1997) (Docket No. 108578).

In separate proceedings, defendant was convicted of unlawfully carrying a concealed weapon, MCL 750.227, and being an habitual offender, fourth offense, MCL 769.12, for the events that had led to his arrest and imprisonment in the first place. However, these convictions were reversed by the Court of Appeals n3 because there was insufficient probable cause to initially stop defendant for trespassing, failing to obey a police officer, or assisting in a traffic violation. Accordingly, the Court of Appeals held that evidence of the concealed weapon subsequently discovered should have been suppressed under the exclusionary rule. Plaintiff's application for leave to appeal was denied by this Court. n4

n3 Unpublished opinion per curiam, issued April 11, 1997 (Docket No. 183101).

n4 456 Mich. 876 (1997) (Docket No. 109947).

[*4]

Armed with the reversal of his concealed-weapon conviction, defendant filed a motion for relief from judgment for his conviction of assaulting a corrections officer under MCL 750.197c. Defendant argued that § 197c requires one to be "lawfully imprisoned" and that the reversal of the concealed-weapon conviction because of the unconstitutional initial stop and subsequent search meant that defendant had not been "lawfully imprisoned" at the time he struck the officer in the county jail. The trial court denied the motion on alternate bases. First, the trial court held that the arrest was valid for purposes of § 197c because an outstanding bench warrant for defendant's arrest existed at the time of his detention. n5 Second, the trial court reasoned that a subsequent finding that there was insufficient probable cause to arrest does not render an arrest unlawful for purposes of § 197c.

n5 Given our disposition of this case, we need not address the prosecution's appellate argument regarding the propriety of the trial court's bench warrant rationale.

[*5]

The Court of Appeals affirmed, but on different grounds from the trial court. n6 The Court of Appeals majority held that the text of § 197c does not necessarily require a defendant to be "lawfully imprisoned." The dissenting judge, on the other hand, read the statute such that the phrases "lawfully imprisoned" in the statute collectively applied to all the subclassifications listed in the statute.

n6 **239 Mich. App. 365, 369; 608 N.W.2d 76 (2000).**

After this Court granted defendant leave to appeal in order to consider whether the Court of Appeals majority properly interpreted the requirements of § 197c, n7 the prosecution conceded that the Court of Appeals dissent correctly construed the statute. That is, § 197c requires under all circumstances that the defendant be "lawfully imprisoned" in order to be convicted of violating the statute. We concurred with the prosecution's concession that the Court of Appeals dissent correctly stated the requirements of § 197c and, in a summary [*6] disposition order, reversed the judgment of the Court of Appeals and remanded the case to that Court to decide whether the defendant's imprisonment was, in fact, lawful. n8

n7 **463 Mich. 906 (2000).**

n8 **463 Mich. 971 (2001).**

On remand, the Court of Appeals reversed the trial court's denial of defendant's motion for relief from judgment, adopting the reasoning of the previous dissenting opinion that defendant was not lawfully imprisoned. n9 The Court wrote:

n9 **247 Mich. App. 322, 323-324; 636 N.W.2d 303 (2001).**

The prosecution argues that defendant's incarceration was lawful because he had committed the crime of carrying a concealed weapon and there was an outstanding bench warrant for defendant's arrest when he was stopped. However, there is no evidence that police [*7] were aware of either fact at the time of the stop. The fact that the search of defendant's person led to evidence is irrelevant. A search, in law, is good or bad at the time of commencement, and its character does not change on the basis of its success. *People v LoCicero (After Remand)*, 453 Mich. 496, 501; 556 N.W.2d 498 (1996). [247 Mich. App. 322, 324; 636 N.W.2d 303 (2001).]

We granted the prosecution leave to appeal. n10

n10 **466 Mich. 859 (2002).**

II. Standard of Review

At issue is the proper interpretation of MCL 750.197c. We review de novo questions of statutory interpretation. *People v Thousand*, 465 Mich. 149, 156; 631 N.W.2d 694 (2001).

III. Analysis

At the time of the alleged offense, n11 MCL 750.197c provided:

A person *lawfully* imprisoned in a jail, other place of confinement established by law for any term, or *lawfully* [*8] imprisoned for any purpose at any other place, including but not limited to hospitals and other health care facilities or awaiting examination, trial, arraignment, sentence, or after sentence awaiting or during transfer to or from a prison, for a crime or offense, or charged with a crime or offense who, without being discharged from the place of confinement, or other *lawful* imprisonment by due process of law, through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement or other custodian knowing the person to be an employee or custodian or breaks the place of confinement and escapes, or breaks the place of confinement although an escape is not actually made, is guilty of a felony. [Emphasis added.]

n11 **1998 PA 510** inserted a subsection 2 to include public and private youth correctional facilities in the definition of "place of confinement" and independent contractors in the definition of "employee." These later amendments do not appear to alter our analysis of the legal issue before us.

[*9]

The issue presented is whether the reversal of defendant's conviction of the concealed-weapon offense, effectuated by an application of the exclusionary rule, means that defendant was not "lawfully imprisoned" as contemplated by MCL 750.197c.

To say that an action is "lawful" is to say that it is authorized by law. Black's Law Dictionary (6th ed), p 885. In this case, defendant committed, in an officer's presence, the felony of carrying a concealed weapon without a permit. Consequently, defendant was detained pursuant to MCL 764.15(1), which provides:

A peace officer, without a warrant, may arrest a person in any of the following situations:

(a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.

As a result, by the authority granted to him by MCL 764.15(1)(a), the police officer was authorized to imprison defendant. Accordingly, defendant's imprisonment was "lawful" as contemplated by MCL 750.197c.

Defendant advances, nevertheless, that the subsequent suppression of the evidence of the concealed weapon because of the application of the [*10] exclusionary rule causes the police officer's conduct to be retroactively considered "unlawful." We disagree. Simply put, for purposes of MCL 750.197c, a subsequent determination concerning a defendant's prosecution cannot and does not serve to retroactively render "unlawful" the actions of a law enforcement officer where those actions are authorized by law.

Rather, for the purposes of MCL 750.197c, an imprisonment cannot be *un*lawful where a law enforcement officer has been given the authority under law to imprison the individual. Because defendant was detained pursuant to the officer's legal authority under MCL 764.15(1)(a), he was "lawfully imprisoned" under MCL 750.197c. n12

n12 To be certain, we note that in concluding in this case (Docket No. 120024) that defendant was lawfully imprisoned as contemplated by MCL 750.197c because of the authority vested in the law enforcement officer by MCL 764.15(1), we are not reconsidering whether in defendant's other case (Docket No. 109947), concerning the

underlying charge of unlawfully carrying a concealed weapon, MCL 750.227, the law enforcement officer had probable cause to stop or search defendant or whether the seized evidence should have been suppressed. We already denied leave to appeal in that case, 456 Mich. 876 (1997), and regardless, as our analysis above indicates, those issues are not relevant to the issue before us. Accordingly, to the extent that the dissent suggests that an exclusionary rule analysis is relevant to the issue presented, we disagree.

In addition, we find curious the dissent's conclusion that under MCL 764.15(1) and MCL 750.197c an arrest is lawful but an imprisonment following such a lawful arrest is not. Such an interpretation would lead to a mandatory "catch and release" system of law enforcement, whereby criminals may be lawfully "arrested," but not lawfully "imprisoned" until a defendant has the opportunity to have any suppression motions adjudicated. The statutes at issue simply do not permit such an interpretation.

Further, we fail to find any logic in the dissent's position that statutorily permitting police officers to arrest and hold an individual seen committing a crime under MCL 764.15(1), before a determination of the constitutionality of such an arrest through subsequent judicial process, somehow "sanctions, even encourages, illegal conduct by police officers." *Post* at 1. Under this "encouraged behavior theory," one must accept that police officers will seek to arrest individuals with the hope that these arrested individuals later assault a police officer while being held, causing significant injury to the police officer, so that the defendant will then be subjected to greater punishment for the assault.

[*11]

Conclusion

For these reasons, we reverse the judgment of the Court of Appeals and reinstate the trial court's denial of defendant's motion for relief from judgment.

Robert P. Young, Jr.

Maura D. Corrigan

Elizabeth A. Weaver

Clifford W. Taylor

Stephen J. Markman

CONCURBY:
Michael F. Cavanagh

CONCUR:

CAVANAGH, J.

I concur in the result only.

Michael F. Cavanagh

DISSENTBY:
Marilyn Kelly

DISSENT:

KELLY, J. (*dissenting*).

I respectfully disagree with the majority's conclusion. I believe that a defendant who has been illegally stopped cannot be "lawfully imprisoned" within the meaning of MCL 750.197c. The majority's conclusion to the contrary has no basis in the law. Moreover, it circumvents constitutional protections and sanctions, even encourages, illegal conduct by police officers.

The majority's reasoning is that police officers may arrest a suspect if they observe him committing a felony, although their observation was possible only because of their own illegal activity. Thus, applied to this case, the majority holds that a later determination that the officers' initial stop of defendant's vehicle [*12] was illegal will not render unlawful the imprisonment that followed the stop.

I think the decision is ill-advised. First, this case implicates the exclusionary rule that the United States Supreme Court fashioned to deter illegal police conduct. *Mapp v Ohio*, 367 U.S. 643; 81 S. Ct. 1684; 6 L. Ed. 2d 1081; 86 Ohio Law Abs. 513 (1961); *Terry v Ohio*, 392 U.S. 1; 88 S. Ct. 1868; 20 L. Ed. 2d 889 (1968). The protection of the rule is vitiated by a holding that the imprisonment of a suspect can be "lawful," even if the initial stop were constitutionally impermissible.

Under the majority's decision, the police could seize a suspect with neither probable cause nor reasonable suspicion, literally for no legally sanctioned reason, hoping to find evidence of a felony. If they found such evidence and imprisoned the suspect, the imprisonment would be "lawful." Surely the same rationale that renders the fruit of the poisonous tree inadmissible renders the

imprisonment arising from an unconstitutional seizure unlawful.

This is a case where defendant's stop was illegal, lacking probable cause. As a result, the search that revealed [*13] the concealed weapon was also illegal. However, the majority finds that the imprisonment that was based on the search was legal. It makes this finding because MCL 764.15(1) gives an officer the right to arrest a person who commits a felony in the officer's presence. In so ruling, the majority not only discards from consideration the fact that the officer's presence in this case was illegal, it equates lawful arrest with lawful imprisonment.

MCL 764.15(1) makes the arrest lawful. However, MCL 750.197c, the statute in question, refers not to "lawful arrest," but to "lawful imprisonment." The police have the legal right to arrest an illegally stopped suspect, for example, to prevent the furtherance of a felony. But there is no legal basis for a finding that either the evidence seized or the imprisonment of that suspect is "lawful." The rationale underlying the exclusionary rule would dictate the opposite result.

If the imprisonment were lawful, then could not the police (1) illegally break into someone's home and search it, (2) without a warrant or permission, (3) allege that the owner possessed some kind [*14] of contraband, (4) imprison him, and (5) if the owner, feeling wronged, escaped confinement, charge and convict him of prison escape under MCL 750.197c because he was "lawfully imprisoned" when he escaped?

The Legislature has used no language in MCL 750.197c from which one can conclude that it intended such an outrageous result. Rather, it took pains to specify that, for the statute to apply, the imprisonment must be lawful. The majority's only authority shows that it was lawful to arrest, not that it was lawful to imprison.

The case before us on appeal is not one in which a straightforward application of criminal law as written allows defendant to escape the consequences of his criminal behavior. The prosecutor could have charged defendant with, and presumably seen him convicted of and sentenced for, assault and battery, MCL 750.81, and resisting or obstructing an officer, MCL 750.479. These offenses constitute a ninety-day misdemeanor and a two-year felony, respectively. It is apparent that, here, the prosecutor seeks an extension of the law for the purpose of charging defendant [*15] with a more serious crime, a four-year felony under MCL 750.197c.

I believe that a holding that one may be "lawfully" imprisoned under MCL 750.197c after an illegal stop lacks legal authority. Morever, it constitutes a flagrant disregard for the protections of our constitution. If a constitutional violation can be so easily sanitized after the fact, there will be less incentive for police to observe constitutional protections. For those reasons, I would affirm the decision of the Court of Appeals.

Marilyn Kelly

2 of 51 DOCUMENTS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TERRY LYNN KATT, Defendant-Appellant.

No. 120515

SUPREME COURT OF MICHIGAN

2003 Mich. LEXIS 983

December 10, 2002, Argued

May 30, 2003, Decided

May 30, 2003, Filed

PRIOR HISTORY:
[*1] Berrien Circuit Court, Paul L. Maloney, J., Court of Appeals, GAGE, P.J., and JANSEN and O'CONNELL, JJ. 248 Mich. App. 282 (2001).

People v. Katt, 248 Mich. App. 282, 639 N.W.2d 815, 2001 Mich. App. LEXIS 220 (2001).

DISPOSITION:
Court of Appeals' decision affirmed.

COUNSEL:
Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, James Cherry, Prosecuting Attorney, and Aaron J. Mead, Assistant Prosecuting Attorney, St. Joseph, MI, for the people.

State Appellate Defender (by P. E. Barnett, Valerie R. Newman, and Jacqueline J. McCann), Detroit, MI, for the defendant-appellant.

Amicus Curiae: David L. Morse, President, William A. Forsyth, Kent County Prosecuting Attorney, and Timothy K. McMorrow, Chief Appellate Attorney, Grand Rapids, MI, for the Prosecuting Attorneys Association of Michigan.

JUDGES:
Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. YOUNG, J. (dissenting).

OPINIONBY:
Marilyn Kelly

OPINION:

BEFORE THE ENTIRE BENCH

KELLY, J.

The issue in this case is whether the trial court properly admitted under MRE 803(24) the victim's hearsay statement made to a social worker that defendant sexually abused her. The statement did not qualify for admission under MRE 803A, the tender-years [*2] rule.

We conclude that the trial court properly admitted the statement. MRE 803(24) permits the admission of hearsay statements that narrowly miss the categorical exceptions of MRE 803, but satisfy the requirements of MRE 803(24), under circumstances such as those present in this case. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted defendant of three counts of first-degree criminal sexual conduct, sexual penetration of a victim under thirteen years of age (CSC I). MCL 750.520b(1)(a). The Court of Appeals affirmed the convictions.

A. THE TRIAL COURT

In the trial court, the prosecution charged defendant with the sexual assaults of a seven-year-old boy (DD) and his five-year-old sister (AD) in the autumn of 1998. Defendant lived in a home with the children, their mother, her ex-husband, and another individual.

Before trial, the prosecutor moved to admit the testimony of Angela Bowman, a child-protective-services specialist with the Family Independence Agency (FIA). During the hearing, Bowman testified that she had visited DD at his elementary school after the FIA received an anonymous [*3] report that the children's mother was physically abusing them.

In the course of their conversation, Bowman asked DD to name the members of his household. He named defendant as a relative and spontaneously told Bowman that defendant was doing "nasty stuff" to him.

Bowman further testified that, when she asked DD what he meant by nasty stuff, he was initially guarded, but, then, made the following statement:

[Defendant] would come into his room, which [DD] shared with his sister [AD] and dis---totally disrobed, and take off his clothes, which would be a shirt, an underwear---some underwear or pajamas bottoms, if he were wearing them, and get on top of [DD]. And I ask---I asked him to describe now---at the time, because I wasn't prepared for this interview, I didn't have any anatomically correct dolls or anything, so I ask him to show---to demonstrate to the best of his ability what he was describing.

Bowman related the details of this and numerous other specific instances of defendant's abuse as DD had revealed them to her.

The prosecution conceded that DD's statement to Bowman was not admissible under the tender-years exception to the hearsay rule, MRE 803A, because [*4] it was his second statement about the abuse. Defendant argued that MRE 803A "covers the field," meaning that, if a statement falls in the category of a tender-years statement and is inadmissible under MRE 803A, it cannot be admitted under MRE 803(24).

The trial court rejected defendant's argument and admitted the evidence under MRE 803(24). In ruling that DD's statements satisfied the requirements of MRE 803(24), the court stated:

In the Court's opinion there are several indicia of trustworthiness in the statements given by [DD] to Miss Bowman. First is the spontaneity of [DD's] first statements to Miss Bowman. Recall---The Court's [sic] heard the testimony, that Miss Bowman was not there to talk about sexual abuse, she was there to talk about physical abuse. I would also note that as far as this Court's record is concerned [DD and AD's mother] did not know that her child was going to be interviewed on October 27. Accordingly, there doesn't appear to be anything on the record here which would establish that somehow [DD] was prepped by somebody to mouth sentences to Miss Bowman that were not true. Miss Bowman first inquired of [DD] about physical abuse. Then, [DD, [*5]] and in this Court's opinion this is important, not in response to any questioning by Miss Bowman regarding sexual abuse, spontaneously spoke about abuse---sexual abuse by the defendant. It's clear that [DD] spoke from his personal knowledge. And, as her duty as a protective service worker, Miss Bowman inquired further. Now, Miss Bowman's qualifications to interview children were obvious from the record. She is aware of how to . . . interview children. She testified that she avoided leading questions and avoided

other pitfalls of questioning young children. And the Court finds that she was totally aware how to get truthful information from [DD]. The Court finds that the record and the dynamics of this exchange between Miss Bowman and [DD] provided a form [sic] that an accurate statement would be uttered by [DD]. The Court finds no plan of falsification by [DD] under the circumstances in the record that I have before me, and no---and I do find a lack of motive to fabricate on the child's part. The Court also notes that Miss Bowman testified, and I believe her testimony, she had no preconceived notion that anything of a sexual nature occurred when she walked into [*6] the room on October 27, [19]97. Indeed, as I've stated before, she was there to talk about physical abuse.

* * *

Accordingly, the Court finds---from the totality of the circumstances here, I find the required trustworthiness guarantees that [MRE] 803(24) requires.

B. THE COURT OF APPEALS

On appeal, defendant again contended that DD's statement to Bowman was not admissible under MRE 803(24). He urged that the Court adopt what has been dubbed the "near-miss" theory, which "maintains that a hearsay statement that is close to, but that does not fit precisely into, a recognized hearsay exception is not admissible under [the residual hearsay exception.]" *United States v Deeb*, 13 F.3d 1532, 1536 (CA 11, 1994).

The Court of Appeals rejected the near miss-theory and defendant's narrow interpretation of MRE 803(24) and, instead, adopted the approach taken by the United States Court of Appeals for the Eighth Circuit in *United States v Earles*, 113 F.3d 796 (CA 8, 1997):

The meaning of the catch-all's "specifically covered" language has caused considerable debate. See, e.g., *McKethan v United States*, 439 U.S. 936; 99 S. Ct. 333; [*7] 58 L. Ed. 2d 333 (1978) (Justices Stewart and Marshall dissenting from the Court's denial of writs of certiorari and contending that the Court should resolve the circuit split on this issue[.]). However, the majority of circuit courts have held that the phrase "specifically covered" means only that if a statement is *admissible* under one of the prior exceptions, such prior subsection should be relied upon instead of [the residual hearsay exception]. If, on the other hand, the statement is *inadmissible* under the other exceptions, these courts allow the testimony to be considered for admission under [the residual hearsay exception]. [248 Mich. App. 282, 292; 639 N.W.2d 815 (2001), quoting *Earles*, *supra* at 800 (emphasis in 248 Mich. App. 282 at 292).]

Defendant next argued that DD's statement did not meet two of the requirements of MRE 803(24). Specifically, (1) the evidence did not possess "equivalent circumstantial guarantees of trustworthiness" and (2) it was not more probative than DD's first statement about the abuse, which was made to his mother before the Bowman interview.

The Court of Appeals rejected the first [*8] challenge, stating that it agreed with the trial court's "thorough and well-reasoned assessment that DD's statement implicating defendant in these crimes contained ample 'circumstantial guarantees of trustworthiness' as required by MRE 803(24)." 248 Mich. App. at 297. Regarding DD's statements to his mother, the panel found that there is no indication in the record that either DD or AD recounted the circumstances of the assaults with the same detail. Nor is there any indication that their alleged statements to their mother contained particularized guarantees of trustworthiness similar to those regarding the statement given to Bowman. Indeed, when defense counsel inquired of the mother during trial regarding her knowledge of the alleged sexual abuse, she indicated only that AD had told the children's uncle about the abuse, who in turn told the mother . . . ." [248 Mich. App. at 299-300.]

Accordingly, the Court of Appeals affirmed the trial court's admission of the evidence.

II. STANDARD OF REVIEW

The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion. *People v Lukity*, 460 Mich. 484, 488; [*9] 596 N.W.2d 607 (1999). However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. *Id.*; *People v Starr*, 457 Mich. 490, 494; 577 N.W.2d 673 (1998). Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

III. ANALYSIS

The Michigan Rules of Evidence contain two residual exceptions: MRE 803(24) and MRE 804(b)(7). MRE 803(24), the exception at issue here, provides:

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement [*10] into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Thus, evidence offered under MRE 803(24) must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. Also, the offering party must give advance notice of intent to introduce the evidence.

MRE 803(24) is nearly identical to FRE 807. n1 "The Michigan Rules of Evidence were based on the Federal Rules of Evidence." *People v Kreiner*, 415 Mich. 372, 378; 329 N.W.2d 716 (1982). As a result, Michigan courts have referred to federal cases interpreting rules of evidence [*11] when there is a dearth of related Michigan case law. See, e.g., *People v VanderVliet*, 444 Mich. 52, 60 n 7; 508 N.W.2d 114 (1993); *People v Welch*, 226 Mich. App. 461, 466; 574 N.W.2d 682 (1997).

----------Footnotes----------

n1 FRE 803(24) contained one of the Federal Rules' residual exceptions until 1997. At that time, FRE 803(24) was combined with FRE 804(b)(5) and moved to FRE 807. FRE 807 provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

----------End Footnotes---------- [*12]

Given that Michigan did not adopt residual exceptions to its rules of evidence until 1996, there is little case law interpreting them. Before this case, no Michigan court had considered whether evidence that is similar to a categorical hearsay exception could still be admitted under one of the residual exceptions. Therefore, it is appropriate to consider the federal courts' discussions of the issue.

A. THE RESIDUAL EXCEPTIONS AND THEIR APPLICATION

IN "NEAR MISS" SITUATIONS

The residual exceptions are designed to be used as safety valves in the hearsay rules. They will allow evidence to be admitted that is not "specifically covered" by any of the categorical hearsay exceptions under circumstances dictated by the rules. Differing interpretations of the words "specifically covered" have sparked the current debate over the admissibility of evidence that is factually similar to a categorical hearsay exception, but not admissible under it. n2

----------Footnotes----------

n2 There is no doubt, of course, that statements completely alien to any of the categorical exceptions may be candidates for admission under the residual exceptions.

----------End Footnotes----------

[*13]

1. THE NEAR-MISS THEORY

"The Near Miss theory . . . states that a piece of hearsay evidence may be offered only under the exception that most nearly describes it. If it is excluded under that exception, it may not be offered under the residual exceptions." *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 302 (CA 3, 1983), rev'd on other grounds *Matsushita Electric Industrial Co, Ltd v Zenith Radio Corp,* 475 U.S. 574, 580; 106 S. Ct. 1348; 89 L. Ed. 2d 538 (1986). Judge Easterbrook gave a concise statement of the rationale behind the near-miss theory in his concurring opinion in *United States v Dent*, 984 F.2d 1453, 1465-1466 (CA 7, 1993):

[The residual exception] reads more naturally if we understand the introductory clause to mean that evidence of a kind specifically addressed ("covered") by one of the [categorical exceptions] must satisfy the conditions laid down for its admission, and that other kinds of evidence not covered (because the drafters could not be exhaustive) are admissible if the evidence is approximately as reliable as evidence that would be admissible under [*14] the [categorical exceptions].

The United States District Court for the Eastern District of Pennsylvania described another basis for the theory in *Zenith Radio Corp v Matsushita Electric Industrial Co, Ltd,* 505 F. Supp. 1190 (ED Penn, 1980):

The [near-miss theory] is also supported by a basic principle of statutory construction, which we find equally applicable to the Federal Rules of Evidence: that the specific controls the general. As the Supreme Court stated in *Radzanower v Touche Ross & Co*, 426 U.S. 148, 153, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976):

"It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' *Morton v Mancari*, 417 U.S. 535, 550-551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974)." [Citations omitted.]

In conformity with this rule we conclude that the residual exceptions cannot be invoked when there is a specific exception [*15] which sets forth conditions governing the admissibility of a clearly defined category of hearsay evidence. [*Zenith, supra* at 1263 n 91 (discussing former FRE 803[24] before the adoption of FRE 807).]

Thus, the near-miss theory is based on a broad reading of the term "specifically covered." Evidence is "specifically covered" if there is a categorical hearsay exception dealing with the same subject matter or type of evidence. Accordingly, under the near-miss theory, a party could never use a residual exception to admit evidence that was inadmissible under, but related to, a categorical exception.

For example, a strict application of this theory would preclude admission of a business document unless it met the requirements of MRE 803(6). The residual exception would not be available for it under any circumstances.

Although the near-miss theory would simplify the resolution of disputes regarding the admission of hearsay, few courts in the nation have adopted it. Those that have done so have softened the rule. n3 Even the *Zenith* court declined to hold that the residual exception could never be used to admit evidence that fell within a categorical exception, but [*16] was inadmissible under it:

Some of the . . . specific hearsay exceptions similarly apply to a clearly defined category of evidence, and we would follow the "near miss" doctrine with respect to them . . . if the evidence before us were within those categories. E.g., Rule 803(18) (learned treatises); Rule 803(22) (judgment of previous conviction.)

----------Footnotes----------

n3 See *United States v Mejia-Velez*, 855 F. Supp. 607, 617-618 (ED NY, 1994) (holding that defendant could not use the residual exception to admit hearsay statements from an available declarant when the covered exception required unavailability); *In re Fill,* 68 BR 923, 931 (SD NY, 1987) (holding that "highly unusual cases" may be exempted from the near-miss theory).

----------End Footnotes----------

However, most of the hearsay exceptions which plaintiffs invoke are not of this type. They do not apply to a clearly defined category of evidence, as the former testimony exception does. Instead, they apply to a relatively amorphous category of evidence which is delimited [*17] solely by the requirements set forth in the rule itself. For instance, the business records exception applies to any "memorandum, report, record, or data compilation, in any form" which satisfies certain additional requirements. . . . *We do not see how the "near miss" doctrine which defendants urge could practically be applied to those rules, without negating the residual exceptions altogether, a result which is plainly contrary to the intent of Congress.* [*Id.* at 1264 (emphasis added), accord *Acme Printing Ink Co v Menard, Inc*, 812 F. Supp. 1498, 1527 (ED Wis, 1992).]

2. REJECTING THE NEAR-MISS THEORY

The great majority of courts have rejected the near-miss theory by interpreting the residual exception to omit as "specifically covered" *only those hearsay statements admissible under a categorical exception.* A statement not admissible under the categorical exceptions would not be "specifically covered" by those exceptions, and thus could be a candidate for admissibility under the residual exceptions.

In *United States v Clarke,* n4 the United States Court of Appeals for the Fourth Circuit explained the rationale for rejecting the near-miss [*18] theory.

----------Footnotes----------

n4 2 F.3d 81 (CA 4, 1993).

----------End Footnotes----------

Appellant asks us to construe "not specifically covered" narrowly, limiting [the residual exceptions] to cases in no way touched by one of the [categorical] exceptions. According to appellant, admitting testimony that was a "near miss" under 804(B)(1) would undermine the protections of the evidentiary rules, as well as violate the Sixth Amendment's Confrontation Clause.

We disagree. Appellant's view of "not specifically covered" would effectively render [the residual exception] a nullity. The plain meaning, and the purpose, of [the residual exception] do not permit such a narrow reading. *We believe that "specifically covered" means exactly what it says: if a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not "specifically covered." United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989). This reading is consistent with the purposes of [the residual exception]. That [*19] rule rejects formal categories in favor of a functional inquiry into trustworthiness, thus permitting the admission of statements that fail the strict requirements of the prior exceptions, but are nonetheless shown to be reliable. If we were to adopt appellant's reading of the rule, we would deprive the jury of probative evidence relevant to the jury's truth-seeking role.

* * *

To adopt the "near miss" theory would create an odd situation where testimony that was equally trustworthy would be distinguishable based merely on its proximity to a specified exception. For instance, in *United States v Ellis*, 951 F.2d 580 (4th Cir. 1991), this circuit approved the admission of the statement made by a later-deceased witness pursuant to a plea agreement under 804(b)(5), even though that statement was very different from any of the specified exceptions. Given our holding in *Ellis*, it would contradict common sense to exclude equally reliable testimony here simply because it fell closer to one of the specified exceptions. We thus reject the "near miss" theory of interpreting

Fed. R. Evid. 803(24) and 804(b)(5). [*Clarke*, 2 F.3d at 83-84 (emphasis added) (discussing [*20] the former residual exceptions before the adoption of FRE 807).]

The United States Court of Appeals for the Sixth Circuit followed suit in *United States v Laster*, n5 stating:

Although some courts have held that if proffered evidence fails to meet the requirements of the Fed. R. Evid. 803 hearsay exception, it cannot qualify for admission under the residual exception, the court declines to adopt this narrow interpretation of Fed. R. Evid. 807 as suggested by defendants. Rather, this court interprets Fed. R. Evid. 807, along with the majority of circuits, to mean that "if a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception." 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 807.03(4) (2d ed. 2000). We endorse the reasoning in *United States v Earles*, 113 F.3d 796 (8th Cir, 1997), which held that "the phrase 'specifically covered' [by a hearsay exception] means only that if a statement is admissible under one of the [residual] exceptions, such [] subsection should be relied upon" instead of the residual exception. *Id.* at 800 (emphasis [*21] in original). Therefore, the analysis of a hearsay statement should not end when a statement fails to qualify as a prior inconsistent statement, but should be evaluated under the residual hearsay exception. [*Laster*, 258 F.3d 525.]

In this case, the Court of Appeals followed the weight of the authority and rejected the near-miss theory. Because we agree that the language of the rule does not support the near-miss theory, we affirm the judgment of the Court of Appeals.

----------Footnotes----------

n5 258 F.3d 525 (CA 6, 2001).

----------End Footnotes----------

3. OUR APPROACH TO THE RESIDUAL EXCEPTION

We agree with the majority of the federal courts and conclude that a hearsay statement is "specifically covered" by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adopt the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24).

In our view, the arguments in favor of the near-miss theory are unpersuasive [*22] and do not conform to the language of the rule. *Random House Webster's College Dictionary* (1995) defines "cover" as "8. to deal with or provide for; address: *The rules cover working conditions.*" (Emphasis in original.) Therefore, a rule concerning the same subject matter as a piece of evidence, or from a similar source, arguably could be said to "cover" that evidence.

If the rule applied to all evidence not "covered" by other exceptions, the near-miss theory would be more persuasive. n6 However, the rule modifies the term "covered" with the adjective "specifically." Hence, more than simple "coverage" is required. Black's Law Dictionary (7th ed) defines "specific" as "1. Of, relating to, or designating a particular or defined thing; explicit . . . . 2. Of or relating to a particular named thing . . . . 3. *Conformable to specific requirements* . . . ." (Emphasis added.)

----------Footnotes----------

n6 We do not hold, however, that similarity in subject matter or scope leads to the conclusion that a particular exception "covers" evidence; we simply note that the near-miss theory would be more persuasive if the residual exception used the term "covered" alone rather than "specifically covered." In fact, we note that at least one commentator has stated that a statement is *not* "covered" by an exception if it is not admissible under that exception:

Judge Easterbrook's literalism, while ingenious, assumes both an unconvincing clarity and a peculiar meaning of "covered." n156 His complaint that the authors of the rule did not use the term "admissible" ignores the fact that hearsay exceptions do not make evidence admissible. It may be inadmissible under other rules (such as relevancy rules), acts of Congress, or the Constitution.

n156 The Webster's dictionary lists 23 meanings of the term "cover," including "to have width or scope enough to include or embrace." Webster's Third New International Dictionary, 524 (1986). It does not mean "is somewhat similar to," which seems to be the meaning ascribed by Judge Easterbrook to the rule's "specifically covered" language.

[Robinson, *From Fat Tony and Matty the Horse to the sad case of A.T.: Defensive and offensive use of hearsay evidence in criminal cases*, 32 Hous L R 895, 917 (1995).]

Moreover, although not deciding the meaning of "covered" in the rule, we note that "specifically covered" must mean more than "covered," no matter what meaning is given to the latter term.

----------End Footnotes---------- [*23]

Reading the words "specifically covered" together and giving each its normally understood meaning, we conclude that to be "specifically covered" requires *more* than to be "covered." Since "specific" can mean "conformable to specific requirements" and "cover" can mean "addressing" or "dealing with," we understand that a statement is only "specifically covered" by a categorical exception when it is *conformable to all the requirements of that categorical exception. n7* To hold otherwise would read "specifically" out of the rule. n8

----------Footnotes----------

n7 The dissent notes that the drafters of the rule used the phrase "specifically covered" rather than "specifically admissible." In our view, this terminology merely reflects that a statement satisfying all requirements of a categorical exception and, thus, admissible under that exception may still be inadmissible for other reasons. For example, a statement that would be admissible under the excited-utterance exception may nonetheless be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. See MRE 403. This is why MRE 803 begins, "The following are *not excluded* by the hearsay rule," rather than, "The following *are admissible*. (Emphasis added.) See also n 6. Notably, the dissent does not provide an alternate construction of the residual exception to support the near-miss theory, but relies on the history surrounding the Congressional enactment of the rules. [*24]

n8 Accord Fenner, The residual exception to the hearsay rule: The complete treatment, 33 Creighton L R 265, 274-275 (2000):

Specific is defined as "a: constituting or falling into a specifiable category b: sharing or being those properties of something that allow it to be referred to a particular category." [Merriam-Webster's Collegiate Dictionary CD-ROM (Zane Pub. Co. 1996).] "Specifically covered" by one of those exceptions in 803 or 804, then, seems to mean falling within one of those exceptions. It does not seem to mean falling outside the exception. No matter how close it came, a miss is still a miss. This seems to be the plain meaning of the rule, as written.

That is, each exception has certain foundational elements, and if there is sufficient evidence of each foundational element for any one exception then the statement is "specifically covered" by the exception. It is specifically covered by this exception whether it fits under any other exception or not. And, if one of the foundational elements is missing, then it is not "specifically covered" by this exception--no matter how close it comes. In fact, in this latter situation, the statement is specifically not covered by the barely missed exception.

----------End Footnotes---------- [*25]

We also disagree with the *Zenith* court that interpreting the residual exceptions in this manner will "nullify" the categorical exceptions. Indeed, by their own language the residual exceptions cannot apply to statements admissible under the other exceptions. Moreover, the requirements of the exceptions are stringent and will rarely be met, alleviating concerns that the residual exceptions will "swallow" the categorical exceptions through overuse.

We stress that this interpretation of the residual exceptions does not subvert the purpose of the hearsay rules. Each of the categorical exceptions requires a quantum of trustworthiness and each reflects instances in which courts have historically recognized that the required trustworthiness is present. n9 The residual exceptions require *equivalent* guarantees of trustworthiness. Thus, if a near-miss statement is deficient in one or more requirements of a categorical

exception, those deficiencies must be made up by alternate indicia of trustworthiness. To be admitted, residual hearsay must reach the same quantum of reliability as categorical hearsay; simply it must do so in different ways. n10

----------Footnotes----------

n9 The dissent and proponents of the near-miss theory treat the recognized exceptions like hermetically sealed, insular categories. However, many of the exceptions overlap. A present-sense impression under MRE 803(1) could also be an excited utterance under MRE 803(2). Does a statement that "nearly missed" being a present-sense impression, but was admitted as an excited utterance, undermine the hearsay rules? *No*, because the statement still had equivalent guarantees of trustworthiness.

Moreover, the overlap among the categorical exceptions further undermines the near-miss theory because one could *always* argue that a statement is generally addressed by one of the categorical exceptions. For example, under the near-miss theory, nearly any explanation or description could be "specifically covered" by the present-sense impression exception. [*26]

n10 We fail to understand why achieving *equivalent* guarantees of trustworthiness through alternate means makes a residual hearsay statement less reliable than a statement that satisfies a categorical exception. The categorical exceptions provide prescribed ways to assess hearsay; we do not accept that they are the *only* ways in which that assessment can be made.

----------End Footnotes----------

Thus, we affirm that the residual exceptions may be used to admit statements that are similar to, but not admissible under, the categorical hearsay exceptions. Next, we turn our attention to the requirements of the residual exceptions themselves. We focus on MRE 803(24), the applicable exception in this case.

The language of MRE 803(24) provides substantial guidance in determining the proper method of analysis. As we noted above, the rule contains four elements. To be admitted under MRE 803(24), a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, [*27] and (4) serve the interests of justice by its admission.

The first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions. As the United States Court of Appeals for the Fourth Circuit noted in *Clarke*, "the inquiry into trustworthiness aligns with the inquiry demanded by the Confrontation Clause, which requires courts to examine the 'totality of the circumstances that surround the making of the statement' for 'particularized guarantees of trustworthiness.'" *Clarke, supra* at 84. Thus, courts should consider the "totality of the circumstances" surrounding each statement to determine whether equivalent guarantees of trustworthiness exist.

There is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness. n11 However, the Confrontation Clause forbids the use of corroborative evidence to determine the trustworthiness of statements offered under the residual exception in criminal cases if the declarant does not testify at trial. *Idaho v Wright*, 497 U.S. 805, 823; 110 S. Ct. 3139; 111 L. Ed. 2d 638 (1990). [*28] n12 Beyond this limitation, courts should consider all factors that add to or detract from the statement's reliability.

----------Footnotes----------

n11 In discussing the trustworthiness requirement, the Federal Rules of Evidence Manual states:

There are certain standard factors all courts consider in evaluating the trustworthiness of a declarant's statement under the residual exception. These include:

(1) The relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante should be considered more reliable than a statement to a total stranger.

(2) The capacity of the declarant at the time of the statement. For instance, if the declarant [were] drunk or on drugs at the time, that would cut against a finding of trustworthiness . . . .

(3) The personal truthfulness of the declarant. If the declarant is an untruthful person, this cuts against admissibility, while an unimpeachable character for veracity cuts in favor of admitting the statement. The government cannot seriously argue that the trust due an isolated statement should not be colored by compelling evidence of the lack of credibility of its source: although a checkout aisle tabloid might contain unvarnished truth, even a devotee would do well to view its claims with a measure of skepticism.

(4) Whether the declarant appeared to carefully consider his statement.

(5) Whether the declarant recanted or repudiated the statement after it was made.

(6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement.

(7) Whether the behavior of the declarant was consistent with the content of the statement.

(8) Whether the declarant had personal knowledge of the event or condition described.

(9) Whether the declarant's memory might have been impaired due to the lapse of time between the event and the statement.

(10) Whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

(11) Whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.

(12) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement.

(13) Whether the declarant was cross-examined by one who had interests similar to those of the party against whom the statement is offered.

(14) Whether the statement was given voluntarily or instead pursuant to a grant of immunity.

(15) Whether the declarant was a disinterested bystander or rather an interested party. [Federal Rules of Evidence Manual (Matthew Bender & Co Inc, 2002), § 807.02(4) (citations omitted).]

The list is not intended to be all-inclusive, but to provide general guidelines. [*29]

n12 If the declarant does testify at trial and is subject to cross-examination, corroborative evidence *may* be used to determine the trustworthiness of statements in criminal cases. The reason is that the Confrontation Clause is not implicated. *United States v Owens*, 484 U.S. 554, 560; 108 S. Ct. 838; 98 L. Ed. 2d 951 (1988); *United States v NB*, 59 F.3d 771 (CA 8, 1995). Similarly, in civil cases, corroborative evidence is always appropriate. *Larez v Los Angeles*, 946 F.2d 630, 643 n 6 (CA 9, 1991).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The second requirement is self-explanatory. To be admissible under the residual exceptions, the proffered statements must be directly relevant to a material fact in the case. A material fact is "[a] fact that is significant or essential to the issue or matter at hand." Black's Law Dictionary (7th ed).

The third requirement is that the proffered statement be the most probative evidence reasonably available to prove its point. It "essentially creates a 'best evidence' requirement." *Larez, supra* at 644. [*30] This is a high bar and will effectively limit use of the residual exception to exceptional circumstances. For instance, nonhearsay evidence on a material fact will nearly always have more probative value than hearsay statements, because nonhearsay derives from firsthand knowledge. Thus, the residual exception normally will not be available if there is nonhearsay evidence on point.

The final requirement is that admission of the proffered statement conforms to the "rules [of evidence] and serve the interests of justice." Accordingly, a court may refuse to admit a statement into evidence, even though the first three requirements of the exception have been met. This may occur if the court determines that the purpose of the rules and the interests of justice will not be well served by the statement's admission. n13

----------Footnotes----------

n13 If a statement is otherwise admissible under the residual exceptions, the interest-of-justice requirement will not preclude its admission for the sole reason that it is hearsay. If this were the case, the residual exceptions would be rendered useless.

----------End Footnotes---------- [*31]

Finally, we note that the facts of each case determine the answers to questions about the admissibility of evidence. Here, the trial court did an exemplary job of making clear and concise findings on the record. In order to facilitate review in the future, we ask that courts faced with MRE 803(24) questions of the type presented here make similarly explicit supportive findings on the record.

B. THE LOWER COURTS CORRECTLY APPLIED

MRE 803(24) IN THIS CASE

We now turn to the facts of this case. In order to invoke MRE 803(24), the proffered statement must "not [be] specifically covered by any of the foregoing exceptions" of MRE 803. MRE 803(24). As described above, we interpret "specifically covered" to mean "admissible." Defendant does not assert that DD's statement would be admissible under any of the MRE 803 categorical exceptions. Therefore, the statement is a proper candidate for admissibility under MRE 803(24). n14

----------Footnotes----------

n14 Because we interpret "specifically covered" by an exception to mean admissible under that exception, we are not troubled by the proximity of DD's statement to MRE 803A. The statement is not admissible under 803A and is thus not "specifically covered" by 803A. The fact that 803A, which relates to the same subject matter as the proffered statement in this case, is not a "foregoing" exception of MRE 803(24) is thus irrelevant. *None* of the categorical hearsay exceptions "specifically covers" DD's statement.

----------End Footnotes---------- [*32]

With respect to the rule's requirements, there is no dispute that the prosecution gave proper notice to defendant of its intent to submit DD's hearsay statements under MRE 803(24). Moreover, it cannot be disputed that DD's statements described the material facts of defendant's abusive acts.

The trial court made extensive findings on the record regarding DD's statement to Ms. Bowman and detailed the manner in which it satisfied each element of MRE 803(24). The court particularly elaborated on its findings regarding the trustworthiness of the statement, noting several times that its spontaneity and the fact it was unanticipated made it particularly reliable.

The trial court also noted that the timing of the statement negated any motive to fabricate. No investigation had begun when the statement was made, and no one knew that Ms. Bowman was to interview DD that day. Additionally, DD spoke from firsthand knowledge and in terms appropriate for a child of his age. Under the "totality" of these circumstances, the court concluded that the statement had circumstantial guarantees of trustworthiness equivalent to any of the categorical exceptions.

The trial court next found that DD's statement [*33] was the most probative evidence available concerning the actual abuse. DD did not anticipate the interview, and Ms. Bowman did not intentionally elicit incriminating information about someone other than the mother. Ms. Bowman also possessed the training to make a proper assessment of DD's credibility at the time.

Defendant argues before this Court that DD's first corroborative statement, made to his mother, was more probative than his statement to Ms. Bowman. However, the record contains no information about what DD said to his mother. All that is known is that both parties stipulated at trial that DD's mother had asked him some questions about defendant's

abuse *before* DD spoke to Ms. Bowman. n15 It is not possible to compare the value of a statement of known content with a statement of unknown content.

----------Footnotes----------

n15 The prosecution also contends that DD's mother prompted this statement by repeatedly asking questions and that defendant discovered this fact at trial through cross-examination. As a result, the prosecution argues that DD's first statement would not have been admissible under MRE 803A in any event because the statement was not spontaneous.

----------End Footnotes---------- [*34]

Moreover, the statement made to Ms. Bowman is more probative than DD's testimony at trial for the same reasons that underscore the tender-years rule. As time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks. It is for that reason that the tender-years rule prefers a child's first statement over later statements. By analogy, the child's second statement is preferable to still later statements. Similarly, if DD's mother had a motive to induce her son to lie, she would have had much more opportunity to influence him before trial than before the Bowman interview. n16

----------Footnotes----------

n16 The prosecution also contests defendant's assertions that DD's mother "coached" DD by noting that, after the Bowman interview, DD's mother told Bowman she did not believe DD's story.

----------End Footnotes----------

In aggregate, the trial court found that these circumstances justified the admission of DD's statement under MRE 803(24). The spontaneity of the interview, lack of motive to lie, and Ms. Bowman's [*35] interviewing methods combine to give the statement circumstantial guarantees of trustworthiness equivalent to the categorical exceptions. The unavailability of DD's first statement, the timing of the interview, and Ms. Bowman's careful conduct in eliciting information make this statement the most probative evidence of defendant's abusive acts. Having found that DD's statement met the first three requirements of MRE 803(24), the court concluded that admission would not endanger the interests of justice and ruled the statement admissible.

We agree with the Court of Appeals and hold that (1) the trial court properly analyzed DD's statement under MRE 803(24), and (2) there was sufficient evidence to support the trial court's findings. Consequently, we conclude that the trial court did not abuse its discretion in admitting the statement under MRE 803(24), even though the statement was not admissible under MRE 803A.

IV. CONCLUSION

The trial court properly admitted DD's statement to Ms. Bowman under MRE 803(24), although it did not qualify for admission under MRE 803A. All the elements of MRE 803(24) were satisfied. Accordingly, there was no abuse of discretion and we affirm the decision [*36] of the Court of Appeals.

Marilyn Kelly

Maura D. Corrigan

Elizabeth A. Weaver

Stephen J. Markman

DISSENTBY:
Robert P. Young, Jr.

DISSENT:

YOUNG, J. (*dissenting*).

I disagree that evidence failing admissibility under one of the enumerated exceptions can nevertheless be admitted under the catch-all exception, MRE 803(24). Because the majority concludes otherwise, I respectfully dissent. I fully acknowledge that I advocate a minority position; however, I believe that this position best comports with the text of the residual hearsay exception as well as our time-honored prohibition against the admission of hearsay evidence.

The rule against the admissibility of hearsay is a venerable doctrine deeply rooted in our common law. The principle has been called "a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure." n1

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n1 5 Wigmore, Evidence (Chadbourn rev, 1974), § 1364, p 28. According to Wigmore, the prohibition against hearsay became entrenched in the common law between 1675 and 1690. *Id.* at 18.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*37]

Traditionally, witnesses were required to be present at trial, be placed under oath, and be subject to cross-examination in order to testify. Under those circumstances, a witness's credibility, memory, perception, and narration could be evaluated by the trier of fact. 2 McCormick, Evidence (5th ed), Hearsay Rule, § 245, p 93. The rule against hearsay is designed to maintain the integrity of witness testimony. n2

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 "Hearsay testimony is from the very nature of it attended with all such doubts and difficulties and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.'" McCormick, *supra*, quoting *Coleman v Southwick*, 9 Johns 45, 50 (NY, 1812).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Over the years, a number of exceptions [*38] to the general rule prohibiting the admission of hearsay have been developed. Generally, the exceptions rest on the conclusion that the circumstances of the making of particular statement provide circumstantial guarantees of trustworthiness. These guarantees are found because the circumstances surrounding the making of the statement minimize or negate the hearsay dangers, such as insincerity or failure of memory.

In this case, the hearsay testimony at issue is specifically covered by MRE 803A, but cannot be admitted under that exception because, as the state concedes, the evidence was not the first corroborative statement regarding the incident. Accordingly, under the plain language of MRE 803(24), the evidence is "specifically covered" by MRE 803A and *cannot* be admitted under MRE 803(24). n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 MRE 803(24) provides:

Other Exceptions. A statement not *specifically covered* by one of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. [Emphasis added.]

----------End Footnotes---------- [*39]

The approach advanced by the majority subverts our historical prohibition against the admission of hearsay evidence. In the majority view, evidence that is clearly inadmissible under one of the enumerated hearsay exceptions gets a second chance at admissibility under the residual exception if, among other factors, "the interests of justice", MRE 803(24)(C), would be served by its admission. The criterion, particularly when coupled with the deferential abuse of discretion standard for appellate review, n4 essentially renders the general prohibition against hearsay, and the development of what hearsay is excepted and not excepted, hollow and meaningless. n5

----------Footnotes----------

n4 We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich. 490, 494; 577 N.W.2d 673 (1998); *People v Bahoda*, 448 Mich. 261, 289; 531 N.W.2d 659 (1995).

n5 "The residuals are a 'Trojan Horse' that has been set upon the judiciary to wreak havoc and to emasculate the rule against hearsay. Advocates for the exception, like the fated inhabitants of ancient Troy, erroneously believed that the exceptions could be adequately controlled by adding strict requirements for admission." Beaver, *The residual hearsay exception reconsidered,* 20 Fla St U L R 787, 794-795 (1993).

----------End Footnotes---------- [*40]

Against the nearly four hundred-year-old historical development of our hearsay rules, it is clear that the drafters of the rules did not intend a wholesale trampling of the enumerated hearsay exceptions when the federal residual hearsay exceptions were enacted. n6 The advisory committee noted that the residual exceptions "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating *new and presently unanticipated situations* which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." n7

----------Footnotes----------

n6 Originally, the federal residual hearsay exceptions were found at FRE 803(24) and FRE 804(b)(5). In 1997, the two rules were combined and transferred to FRE 807.

n7 Advisory committee note on FRE 803(24), 56 F.R.D. 183, 320 (1973) (emphasis added).

----------End Footnotes----------

In this case, DD's statement to Angela Bowman was not a "*new and presently unanticipated situation.*" In fact, evidence of second and subsequent corroborative statements are specifically [*41] contemplated and explicitly rejected by the clear language of MRE 803(A)--"if the declarant made more than one corroborative statement about the incident, *only the first is admissible* under this rule." (Emphasis added.)

When construing a court rule, which includes a rule of evidence, this Court applies the legal principles that govern the construction of statutes. *McAuley v Gen Motors Corp*, 457 Mich. 513, 518; 578 N.W.2d 282 (1998). Accordingly, we begin with the plain language of the rule. When the language of the rule is unambiguous, we enforce the meaning expressed, without further judicial construction or interpretation. *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 135; 545 N.W.2d 642 (1996).

The majority treats the residual hearsay exception as if it read "A statement not specifically *admissible* under any of the foregoing exceptions" n8 rather than "specifically covered." Clearly, the plain language of the rule does not support such a reading.

----------Footnotes----------

n8 See also *United States v Dent*, 984 F.2d 1453, in which, in his concurring opinion, Judge Easterbrook noted that *United States v Boulahanis*, 677 F.2d 586 (CA 7, 1982), treated the residual exception as if it began "'A statement not specifically *admissible under* any of the foregoing exceptions . . . '. Evidence that flunks an express condition of a rule can come in anyway."

----------End Footnotes---------- [*42]

This Court made deliberate choices in deciding what varieties of hearsay would be admissible and reflected those choices in the words of the hearsay exceptions. The line-drawing efforts reflected in the enumerated hearsay exceptions are rendered purposeless if hearsay that does not meet the textual requirements of a specific hearsay exception is alternatively admitted under the residual exception. n9

----------Footnotes----------

n9 See Jonakait, *Text, texts, or ad hoc determinations: Interpretation of the Federal Rules of Evidence*, 71 Ind L J 551 (1996), who favors a textualist approach to the residual hearsay exception.

----------End Footnotes----------

I believe that the trial court erred in allowing the hearsay testimony to be admitted into evidence. Furthermore, I do not believe that the error was harmless. The testimony of the children at trial was at times vague and inconsistent, and the physical examination of the children was inconclusive.

While the alternative construction proffered by my colleagues in the majority is a principled one, I believe [*43] my construction best harmonizes with the actual text of the evidentiary rule as well as our general and historical prohibition against the admission of hearsay evidence. The clear language of the residual hearsay exception precludes admissibility where the evidence does not meet the specific textual requirements of an enumerated hearsay exception.

I urge this Court to consider repealing MRE 803(24) and MRE 804(b)(5).

Robert P. Young, Jr.

Michael F. Cavanagh

Clifford W. Taylor

3 of 51 DOCUMENTS

RONALD G. SWEATT, Plaintiff-Appellee, v DEPARTMENT OF CORRECTIONS, Defendant-Appellant.

No. 120220

SUPREME COURT OF MICHIGAN

661 N.W.2d 201; 2003 Mich. LEXIS 919

November 20, 2002, Argued

May 13, 2003, Decided

May 13, 2003, Filed

PRIOR HISTORY:
[*1] Worker's Compensation Appellate Commission affirmed the magistrate's decision. Court of Appeals, NEFF, J. (WHITE, J., concurring) (GRIFFIN, P.J., dissenting). 247 Mich App 555; 637 N.W.2d 811 (2001). Sweatt v. Dep't of Corr., 247 Mich. App. 555, 637 N.W.2d 811, 2001 Mich. App. LEXIS 194 (2001)

DISPOSITION:
Reversed and remanded.

COUNSEL:
Kelman, Loria, Will, Harvey, & Thompson (by James P. Harvey) Detroit, MI, for the plaintiff-appellee.

Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, Ray W. Cardew, Jr., Assistant Attorney General, and Gerald M. Marcinkoski, Special Assistant Attorney General, Birmingham, MI, for the defendant-appellant.

Amicus Curiae: Libner, VanLeuven, Evans, Portenga & Slater, P.C. (by John A. Braden), Muskegon, MI, in support of the plaintiff.

JUDGES:
Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. YOUNG, Jr. concurs in the result only. CAVANAGH, J. (dissenting).

OPINIONBY:
Stephen J. Markman

OPINION:

BEFORE THE ENTIRE BENCH

MARKMAN, J.

We granted leave to appeal in this case to consider whether defendant must pay plaintiff differential worker's compensation benefits, i.e., partial-disability benefits, under s ubsection 361(1) of the Worker's Disability Compensation [*2] Act (WDCA), MCL 418.101 *et seq.*, where defendant, by law, cannot rehire plaintiff because of plaintiff's "commission of a crime." The worker's compensation magistrate concluded that the fact that plaintiff is no longer able to work for defendant as a result of plaintiff's "commission of a crime" does not relieve defendant of its responsibility to pay plaintiff differential benefits. The Worker's Compensation Appellate Commission (WCAC) and the Court of Appeals affirmed. In our judgment, although defendant must pay a percentage of the difference between what plaintiff was earning while working for defendant and what plaintiff was earning at the time of the hearing (plaintiff's loss of wage-earning capacity) to the extent that this difference is attributable to plaintiff's work-related injury, defendant is not required to pay a percentage of the difference that is attributable to plaintiff's "commission of a crime."

We conclude that the language of MCL 418.361(1) makes clear that the Legislature intended that employees no longer be able to receive worker's compensation benefits for a loss of wage-earning capacity that is attributable [*3] to an employee's "imprisonment or commission of a crime." n1 The dissent fails, in our judgement, to give effect to this intent, and would allow benefits to be paid to employees because of a loss of wage-earning capacity attributable to "imprisonment or commission of a crime." We reverse the judgment of the Court of Appeals and remand this case to the magistrate to determine to what extent, if any, plaintiff's loss of wage-earning capacity is attributable to his work-related injury and to what extent, if any, plaintiff's loss of wage-earning capacity is attributable to his "commission of a crime."

n1 Before the amendment of this statute in 1985, an employer was obligated to pay an imprisoned employee benefits. *Sims v R D Brooks, Inc*, 389 Mich. 91, 93; 204 N.W.2d 139 (1973). Manifestly, in our judgment, it was the intent of the Legislature in 1985 to alter this situation. Yet, the dissent appears unwilling to permit this legislative judgment to prevail.

I. FACTS AND PROCEDURAL [*4] HISTORY

In 1986, plaintiff began working for defendant as a corrections officer. In 1989, plaintiff injured his knee when he intervened in a fight between prisoners. Defendant voluntarily paid worker's compensation benefits to plaintiff because it had a policy of not rehiring anybody who was not one hundred percent fit for duty. n2 In 1995, plaintiff was convicted of delivery of heroin, a felony, and, as a result, was imprisoned. Once plaintiff was convicted and imprisoned, defendant stopped paying benefits to plaintiff. Also in 1995, defendant discontinued its policy of not rehiring anybody who was not one hundred percent fit for duty and began offering favored work to which plaintiff would have been eligible if he were not imprisoned. Defendant took part in a work-release program while he was imprisoned.

n2 In other words, defendant had a policy of not offering favored work.

In 1996, MCL 791.205a became effective, which forbids defendant from hiring and subsequently employing persons [*5] who have been convicted of a felony. Also in 1996, plaintiff was paroled. It is undisputed that plaintiff continues to have a work-related injury. In 1998, plaintiff began working for Pressure Vessel, Inc., earning less than he had while working for defendant.

Plaintiff petitioned for differential worker's compensation benefits. Defendant denied plaintiff's request on the basis that it was not required to pay plaintiff differential benefits because plaintiff was convicted of a felony and MCL 791.205a(1) precludes the department from hiring someone convicted of a felony and MCL 418.361(1) relieves it of its responsibility to pay differential benefits to an employee who is unable to work for defendant because of the "commission of a crime."

The magistrate concluded that defendant is required to pay plaintiff differential benefits and the fact that defendant is precluded from rehiring plaintiff does not at all relieve defendant of this requirement. In a four-to-three decision, the WCAC affirmed. The majority concluded that, in order for it to be relieved of its responsibility to pay plaintiff differential benefits, the department [*6] must prove, and it had not, that, were it not for the statutory prohibition on hiring an ex-felon, it would have made an offer of reasonable employment to plaintiff. n3 The dissenting commissioners disagreed, stating that the majority erred in placing "an artificially-created burden on defendant to prove it would have done the very thing the ex-felon statute prohibits defendant from doing, namely, offering employment to an ex-felon ...."

n3 The WCAC first remanded to the magistrate for the magistrate to determine whether "defendant Department of Corrections would have made an offer of reasonable employment to plaintiff were it not for the statutory prohibition against employment of any individual who had been convicted of a felony." On remand, the magistrate found that "there would not have been an offer of reasonable employment to plaintiff were it not for the statutory prohibition. To find otherwise would be pure speculation, something not permitted under Michigan law." The WCAC concluded that this finding was "supported by competent, material, and substantial evidence on the whole record."

[*7]

In a divided opinion, the Court of Appeals affirmed. While the concurring opinion author concluded that the WCAC reached the right result for the right reasons, the lead opinion writer concluded that the WCAC reached

the right result for the wrong reasons. Specifically, the lead opinion writer concluded that defendant was not relieved of its responsibility for paying plaintiff differential benefits because plaintiff was not "unable to perform or obtain work" as the result of the "commission of a crime," MCL 418.361(1), as evidenced by the fact that plaintiff was working at the time of the hearing. The dissenting judge, on the other hand, concluded that because plaintiff was unable to work for defendant because of the "commission of a crime," defendant was relieved of its responsibility to pay plaintiff any differential benefits.

II. STANDARD OF REVIEW

Whether defendant must pay differential benefits to plaintiff under MCL 418.361(1) is a question of statutory interpretation. Questions of statutory interpretation are questions of law that are reviewed de novo by this Court. *Robertson v DaimlerChrysler Corp*, 465 Mich. 732, 739; [*8] 641 N.W.2d 567 (2002).

III. ANALYSIS

That defendant cannot employ plaintiff because of his "commission of a crime" is undisputed. MCL 791.205a(1) provides:

Beginning on the effective date of this section, an individual who has been convicted of a felony, or who is subject to any pending felony charges, shall not be employed or appointed to a position in the department [of corrections].

Plaintiff has been convicted of a felony; thus, defendant cannot reemploy plaintiff. A part of the Worker's Disability Compensation Act (WDCA), MCL 418.361(1), provides:

While the incapacity for work resulting from a personal injury is *partial*, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the *difference* between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is *able to earn after the personal injury*, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. [*9] *However*, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is *unable to obtain or perform work because of imprisonment or commission of a crime.* [Emphasis added.]

This provision is known as the differential worker's compensation or partial-disability provision. Under this provision, an employer must pay an employee a percentage of the difference between what the employee was earning while working for the employer before the employee was injured and what the employee is able to earn after the work-related injury. However, the employer is not liable to the employee to the extent that "the employee is unable to obtain or perform work because of imprisonment or commission of a crime."

Defendant argues that it does not have to pay plaintiff anything because plaintiff is "unable to obtain or perform work" with defendant because of plaintiff's "commission of a crime." Plaintiff, on the other hand, argues that defendant must pay plaintiff the total difference between what plaintiff was earning while working for defendant and what plaintiff was earning at the time of the hearing because plaintiff [*10] was not "unable to obtain or perform work" as evidenced by the fact that plaintiff was, in fact, working at the time of the hearing.

The language "unable to obtain or perform work" does not stand alone, and thus it cannot be read in a vacuum. Instead, "it exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich. 505, 516; 322 N.W.2d 702 (1982). n4 When interpreting a statute, we must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley Foods Co v Ward*, 460 Mich. 230, 237; 596 N.W.2d 119 (1999) (citation omitted). "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: 'it is known from its associates,' see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle [of interpretation] that a word or phrase is given meaning by its context or setting." *Tyler v Livonia Pub Schools,* 459 Mich. 382, 390-391; [*11] 590 N.W.2d 560 (1999). Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. *McCarthy v Bronson*, 500 U.S. 136; 111 S. Ct. 1737; 114 L. Ed. 2d 194 (1991); *Mastro Plastics Corp v Nat'l Labor Relations Bd*, 350 U.S. 270; 76 S. Ct. 349; 100 L. Ed. 309 (1956); *Hagen v Dep't of Ed*, 431 Mich. 118, 130-131; 427 N.W.2d 879 (1988); *Fowler v Bd of Registration in Chiropody*, 374 Mich. 254, 257-258; 132 N.W.2d 82 (1965). n5 Therefore, "[a] statute must be read in its entirety ...." *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich. 658, 671; 425 N.W.2d 80 (1988).

n4 "Words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *Gen Motors Corp v Erves (On Rehearing)*, 399 Mich. 241, 255; 249 N.W.2d 41 (1976)(opinion by COLEMAN, J.). [*12]

n5 In *McCarthy, supra* at 139, the United States Supreme Court stated:

We do not quarrel with petitioner's claim that the most natural reading of the phrase "challenging conditions of confinement," when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context. "In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." [Citation omitted.]

Similarly, in *Mastro Plastics, supra* at 285, the United States Supreme Court stated:

If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." [Citation omitted.]

When the statutory provision that is at issue here is read in its entirety, [*13] and, in particular, when the language "unable to obtain or perform work" is read in context, it becomes clear that neither defendant nor plaintiff (nor the dissent, which is in agreement with plaintiff) is entirely correct in its construction of MCL 418.361(1). The first sentence of this provision states that "while the incapacity for work resulting from a personal injury is partial, the employer shall pay ...." Thus, it is clear that this provision applies *only* to employees who suffer from a partial incapacity for work. If an employee has a partial *incapacity* for work, that employee must necessarily have a partial *capacity* for work. Accordingly, this provision only applies to employees who are able to work in *some* capacity.

MCL 418.361(1) further provides that employers must pay such employees "80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is *able to earn after the personal injury* ...." (Emphasis added.) From this language it becomes even more clear that this provision applies [*14] only to employees who are able to work in *some* capacity. The phrase means that employers must pay employees a percentage of the difference between what they earned before the injury and what they are able to earn after the injury. Accordingly, this provision only applies to employees who are injured, but who, nevertheless, are able to work in *some* capacity.

MCL 418.361(1) first states that an employer must pay an employee a percentage of the difference between what the employee earned before the injury and what the employee is able to earn after the injury. It then states, "However, an employer shall not be liable for compensation under ... this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime." Accordingly, this provision first creates a liability, and then creates an exception to this liability. The dissent contends that this exception applies only to unemployed employees, and that it does not apply to employed employees. However, if that were the case, this exception would never apply to *any* partially disabled employees, and thus it would be rendered [*15] nugatory with regard to these employees. n6 That is, if this exception were construed, as the dissent construes it, to only exclude unemployed employees, this exception will be rendered meaningless regarding partially disabled employees because employers are not liable to unemployed, partially disabled employees under *this* provision in the first place. Why would the Legislature create a liability that only extends to employed employees and then create an exception to this liability that only extends to unemployed employees? It simply would not make any sense to exempt unemployed employees from liability where employers are not liable to unemployed employees under this provision to begin with.

n6 This exception applies to both partial disabilities and total disabilities. "An employer shall not be liable for compensation under section 351 ... or this subsection ...." MCL 418.361(1). "Section 351" is the section pertaining to total disabilities and "this subsection" is the subsection pertaining to partial disabilities. However, under the approach of the dissent, this exception would only apply to total disabilities; it would never apply to partial disabilities. That this exception is to be applied to partial disabilities is obvious. First, the exception is found in the partial-disabilities provision. Second, this provision

specifically states, "an employer shall not be liable for compensation under ... this subsection [i.e., the partial-disabilities subsection] ...." MCL 418.361(1). In sum, contrary to the dissent's assertion, we recognize that the dissent's approach would not render this exception nugatory with respect to *total* disabilities; however, the dissent's approach *would* render this exception nugatory with respect to partial disabilities, although it is manifestly obvious that the Legislature intended this exception to apply to the latter as well.

The dissent attempts to accord this exception some meaning with respect to partial disabilities by observing that it would apply where an employee who is partially disabled because of a work-related injury becomes totally disabled *because of* his own "commission of a crime." The dissent concludes that "the employer would not be liable for benefits to this employee under the exception." *Post* at 11. The dissent posits a hypothetical example in which a partially disabled robber becomes fully disabled as a result of slipping and falling during the course of the robbery. However, the dissent itself concludes that the exception would only apply to the totally disabled, not the partially disabled, employee. As explained above, we recognize that the dissent's approach *would* give meaning to this exception with regard to totally disabled employees. However, our quarrel with the dissent's approach is that it fails to accord any meaning to the exception with regard to partially disabled employees. The dissent somehow draws from its hypothetical example, in which it concludes that the exception is applicable to a totally disabled employee, that meaning has also been given to the exception in the context of a partially disabled employee. Further, we do not agree with the dissent that the employer in its hypothetical example would necessarily escape all liability. Rather, the employer of the dissent's "partially disabled robber" would remain liable for the employee's loss of wage-earning capacity that is attributable to the employee's work-related injury, but the employer would not be liable for the employee's loss of wage-earning capacity that is attributable to the employee's "commission of a crime." According to the dissent, on the other hand, an unemployed, totally disabled employee is not entitled to any benefits regardless of whether the employee still suffers from a loss of wage-earning capacity that is attributable to the work-related injury because that employee is unable to work because of the "commission of a crime."

[*16]

It is well established that this Court should avoid construing a statute in such a way that renders any part of it nugatory. *Omelenchuk v City of Warren*, 466 Mich. 524, 528; 647 N.W.2d 493 (2002). "It is our duty to read the statute as a whole and to avoid a construction which renders meaningless provisions that clearly were to have effect." *Apportionment of Wayne Co Bd of Comm'rs-1982*, 413 Mich. 224, 259-260; 321 N.W.2d 615 (1982).

A reading of this statute in its entirety evidences an intent to obligate employers to provide employees with partial-disability benefits when an employee is still able to work, but is unable to earn as much money as before the work-related injury. Accordingly, as explained above, this provision only addresses those situations in which the employee still has a wage-earning capacity, but a reduced wage-earning capacity. That is, it only addresses those situations in which the employee is employed, but earning less money than before the work-related injury.

In this context, it becomes quite clear that the language "unable to obtain or perform work" is referring to a loss of wage-earning capacity, [*17] rather than the inability to work at all. Therefore, employers must compensate employees for a loss of wage-earning capacity that resulted from a work-related injury. However, the statute provides an exception to this obligation when the reason that the employee is unable to earn as much money is attributable, not to the work-related injury, but to the employee's "imprisonment or commission of a crime." n7 Accordingly, if the difference in pay is because of "imprisonment or commission of a crime," the employee is not entitled to differential benefits. If the difference in pay is a result, not of "imprisonment or commission of a crime," but of a work-related injury, the employee is entitled to benefits. n8

n7 Defendant suggests, and the dissenting Court of Appeals judge agreed, that this exception to an employer's obligation to pay partial-disability benefits applies whenever the employee is "unable to obtain or perform work" for that particular employer. In other words, defendant contends that this exception is employer-specific. However, there is no indication in the statute itself to suggest that this exception is employer-specific. Therefore, we conclude that **this provision** is not employer-

specific, and thus that defendant's interpretation of this provision is mistaken.

Further, we agree with the dissenting worker's compensation commissioners that the WCAC majority placed "an artificially-created burden on defendant to prove it would have done the very thing the ex-felon statute prohibits defendant from doing, namely, offering employment to an ex-felon ...." To require defendant to prove that it would have hired plaintiff *if* it were not for his "commission of a crime" is an impossible burden. In this case, plaintiff's "commission of a crime" bars defendant from offering plaintiff a position, and thus whether defendant would have offered plaintiff such a position if defendant was not so barred is simply not possible to know because once defendant determined that it could not rehire plaintiff because of his commission of a felony, the employment inquiry stopped. The WCAC's approach, however, would require the inquiry to continue. That is, it would require defendant to make a needless determination, i.e., whether it would have hired plaintiff if plaintiff had not committed this felony. The statute does not require that futile inquiry, and thus the WCAC erred in requiring it. The dissent criticizes us for "merely recharacterizing the question posed to the magistrate by the WCAC on remand." *Post* at 9. We do not agree with this portrayal of our position. We are not remanding this case to the magistrate to determine whether defendant proved that it would have hired plaintiff had it not been for his "commission of a crime." Instead, we are remanding to determine what portion of plaintiff's loss of wage-earning capacity is fairly attributable to his work-related injury or to his "commission of a crime." [*18]

n8 Note that it could be possible for the reduction in pay to be partly because of an "imprisonment or commission of a crime" and partly because of a work-related injury. In such a situation, as may well be the case here, the employer would be liable for the reduction in pay attributable to the work-related injury. The employer would not be liable for the reduction in pay attributable to the "imprisonment or commission of a crime."

This interpretation is not only in accord with the language of MCL 418.361(1), but it better comports with other provisions of the WDCA and decisions of this Court. Under the WDCA, MCL 418.101 *et seq.*, injured employees are not entitled to benefits if the injury is "by reason of his intentional and wilful misconduct," MCL 418.305; the "injury [is] incurred in the pursuit of an activity the major purpose of which is social or recreational," MCL 418.301(3); the employee unjustifiably refuses to rehabilitate himself, MCL 418.319(1); the [*19] employee refuses without good and reasonable cause a bona fide offer of reasonable employment, MCL 418.301(5)(a); the employee unreasonably refuses surgery, *Kricinovich v American Car & Foundry Co*, 192 Mich. 687, 690; 159 NW 362 (1916); or the employee refuses to undertake exercises designed to hasten recovery, *Bower v Whitehall Leather Co*, 412 Mich. 172, 184; 312 N.W.2d 640 (1981), citing *Brown v Premier Mfg Co*, 77 Mich. App. 573, 578-579; 259 N.W.2d 143 (1977). These propositions adhere because there must be a linkage between the disabling work-related injury and the reduction in pay. *Sington v Chrysler Corp*, 467 Mich. 144, 155; 648 N.W.2d 624 (2002). n9

n9 "The WCAC should consider whether *the injury has actually resulted in a loss of wage earning capacity* in work suitable to the employee's training and qualifications in the ordinary job market." *Id.* at 158 (emphasis added).

[*20]

In this case, there would be no such linkage if plaintiff's pay were reduced, not because of his work-related injury, but because of his commission of a felony. After plaintiff committed this felony, defendant, as a matter of law, could not reemploy plaintiff, and thus plaintiff began working somewhere else where he was unable to earn as much money as he had earned while working for defendant. Therefore, it is at least arguably because of his "commission of a crime" that plaintiff is earning less money, not because of the work-related injury. Worker's compensation was not designed to compensate employees whose unemployment is not attributable to a work-related injury, but rather to some nonemployment-related reason such as the "commission of a crime." As the writer of the lead Court of Appeals opinion recognized, "The purpose of the worker's compensation act is to compensate a claimant for lost earning capacity caused by a work-related injury ...." 247 Mich. App. 555, 566; 637 N.W.2d 811 (2001). n10 In this case, the lost earning capacity was arguably caused, not by a work-related injury, but by the commission of a felony. n11

n10 In our judgment, the construction of MCL 791.205a(1) set forth in this opinion is more in accord with this purpose than the dissent's construction. Under our construction, while employers will not be able to escape liability for an employee's loss of wage-earning capacity that is attributable to the employee's work-related injury, the employer will not be held liable for an employee's loss of wage-earning capacity that is attributable to the employee's "imprisonment or commission of a crime." Under the dissent's approach, although the employer will not be able to escape liability for an employee's work-related injury, the employer will *also* be held liable for an employee's loss of wage-earning capacity that is attributable to the employee's "imprisonment or commission of a crime." That is, what divides these opinions is the eligibility of employees for worker's compensation benefits related to their own "imprisonment or commission of a crime." This opinion interprets the statute in accordance with the manifest intent of the Legislature to deny such benefits to employees, while the dissent would allow such benefits. Notwithstanding that employees were entitled to such benefits before the 1985 worker's compensation amendments and that the Legislature clearly intended that the situation be altered, the dissent refuses to give effect to the Legislature's intent that employers will not be liable for an employee's loss of wage-earning capacity that is attributable to "imprisonment or commission of a crime." Apparently, there is little that the people of Michigan can do through their Legislature to disallow such benefits in light of the dissent's determination that they be maintained. [*21]

n11 The dissent states: "Although [plaintiff was] earning less than he had earned while he worked for defendant *because of* the physical limitations caused by his work-related injury, plaintiff was working." *Post* at 3 (emphasis added). If it is true that plaintiff is earning less because of his work-related injury, we would agree with the dissent that defendant must pay plaintiff a percentage of this difference. However, if plaintiff is earning less because of his "commission of a crime," defendant is not obligated to pay plaintiff a percentage of this difference. That is, we agree with the dissent that "defendant must still pay benefits to plaintiff as compensation for his loss of wage-earning capacity attributable to plaintiff's work-related injury," assuming that some or all of plaintiff's loss of wage-earning capacity is attributable to plaintiff's work-related injury. *Post* at 5. Accordingly, this case must be remanded to the magistrate to determine to what extent, if any, plaintiff's loss of wage-earning capacity is attributable to his work-related injury and to what extent, if any, plaintiff's loss of wage-earning capacity is attributable to his "commission of a crime."

The dissent criticizes us for "providing the magistrate with absolutely no guidance for making this determination." *Post* at 9. However, we are not asking the magistrate to do anything other than what magistrates have been required to do since the enactment of the WDCA, that is, to determine whether, and to what extent, there is a linkage between plaintiff's work-related injury and his loss of wage-earning capacity. See *Sington, supra* at 155. To the extent that there *is* such a linkage, plaintiff is entitled to benefits. However, to the extent that plaintiff's loss of wage-earning capacity is attributable, not to his work-related injury, but to his "commission of a crime," plaintiff is not entitled to benefits.

The dissent repeatedly states that "the magistrate has already determined that plaintiff's work-related injury ... is the only thing preventing plaintiff from returning to other types of work." *Post* at 7. However, that is not the test to be applied to determine eligibility for worker's compensation benefits. As this Court recently explained in *Sington, supra* at 158, the test is not whether plaintiff suffers from a work-related injury that prevents him from returning to other types of work; rather, the test is whether plaintiff suffers from a work-related injury that results in a loss of wage-earning capacity. Accordingly, the magistrate must now determine why plaintiff is suffering a loss of wage-earning capacity. Is it because of his work-related injury? That is, would plaintiff not be suffering a loss of wage-earning capacity if he were not injured? Or, is it because of his "commission of a crime?" That is, would plaintiff not be suffering a loss of wage-earning capacity if he had not been convicted of a felony and subsequently incarcerated? The dissent states that because "findings of disability and wage-earning capacity have been established and are not disputed" there is no need to remand this case to the magistrate. *Post* at 10. However, although the plaintiff has indeed suffered a work-related injury, as well as a loss of wage-earning capacity, what has not yet been established, in our judgment, is whether plaintiff's work-related

injury *caused* his loss of wage-earning capacity. See 22 n 13.

[*22]

Reading this provision as the dissent does would anomalously require employers to pay employees partial-disability benefits because the employees are imprisoned or have committed a crime, where such employers would not have to pay partial-disability benefits if the employees were not imprisoned or had not committed a crime. In other words, employers would be required to pay benefits to employees solely because they are imprisoned or because they committed a crime. For example, if an employee is injured, but this injury does not affect his ability to earn the same amount of money as he did before he was injured, that employee would not be entitled to partial-disability benefits. However, under the dissent's reading of MCL 791.205a(1), if the employee were *then* imprisoned, yet able to "obtain and perform work," but not earn as much money, he would be entitled to partial-disability benefits. n12 As we have already observed, the purpose of the WDCA is to compensate employees for work-related injuries. It is not intended to compensate employees for committing crimes and becoming imprisoned.

n12 In the present case, plaintiff was able to "obtain and perform work" while he was imprisoned through a work-release program. Although plaintiff does not seek partial-disability benefits for the time that he was imprisoned, under the dissent's analysis, plaintiff would certainly be entitled to such benefits. As Judge Griffin in dissent stated in response to the lead opinion, which, like the dissent here, concluded that the exception only applies to unemployed employees:

> The parties, magistrate, WCAC majority, WCAC dissenters, my colleagues, and I all agree that subsection 361(1) operates to exclude defendant from liability for worker's compensation benefits for the period that plaintiff was imprisoned. However, if the "test" proposed by the lead opinion for subsection 361(1) were applied to the present circumstances, plaintiff would also be entitled to worker's compensation benefits during his period of imprisonment. This is because plaintiff was able to obtain and perform work during his imprisonment and thus "plaintiff is not unable to obtain or perform work for that reason." (Opinion by Neff, J., *ante* at [565].) Judge Neff's construction of § 361 and its test for application fails because its results, as applied to plaintiff, are simply illogical. [247 Mich. App. at 577 (citation omitted).]

[*23]

The dissent accuses us of "ignoring the plain language of the statute" and of not respecting the Legislature's choice of words in MCL 418.361(1). *Post* at 8. Yet, it is the dissent's interpretation that gives absolutely no meaning to the entire last sentence of this provision in which these words are contained. That is, while the dissent purports to define this sentence, it does so by defining it into meaninglessness. It gives meaning to discrete words within this sentence at the cost of giving coherent meaning to the sentence itself. The dissent would award worker's compensation benefits under MCL 418.361(1) as if the last sentence of this provision were absent. We would address the following questions to the dissent: What meaning does the dissent give to this sentence? And if, as we suggest, the dissent gives it *no* meaning, how can this conceivably comport with the intention of the Legislature? Under the dissent's interpretation, it is as if, when the Legislature enacted this provision, it decided that the last sentence should have no meaning or that the Legislature should appear to be saying something while saying nothing. [*24] We do not believe that we can presume such folly and, instead, that we must give the most reasonable meaning possible to the words of the Legislature.

IV. CONCLUSION

The WDCA, MCL 418.361(1), provides that an employer is liable to an employee for a percentage of the employee's loss of wage-earning capacity, except when this loss of wage-earning capacity is because of the "commission of a crime." Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the magistrate to determine to what extent, if any, plaintiff's loss of wage-earning capacity is because of a work-related injury, and, to what extent, if any, plaintiff's loss of wage-earning capacity is because of the "commission of a crime." n13

n13 The dissent repeatedly states that the magistrate has already determined that plaintiff is disabled. However, the magistrate originally found plaintiff to be disabled as defined in *Haske v Transport Leasing, Inc*, 455 Mich. 628, 634; 566 N.W.2d 896 (1997). This Court has since overruled *Haske*. See *Sington, supra* at 161. Accordingly, on remand, the magistrate is to determine whether plaintiff is disabled as defined in *Sington, supra* at 158. That is, if the magistrate

determines that plaintiff's loss of wage-earning capacity is wholly attributable to his "commission of a crime," the magistrate must conclude that plaintiff is not disabled because, under *Sington*, *supra* at 158, there must be a link between the work-related injury and the loss of wage-earning capacity. If the magistrate, however, determines that plaintiff's loss of wage-earning capacity is wholly attributable to his work-related injury, the magistrate must conclude that plaintiff is disabled and entitled to benefits. Finally, if the magistrate determines that plaintiff's loss of wage-earning capacity is partly attributable to his work-related injury and partly attributable to his "commission of a crime," the magistrate must conclude that plaintiff is disabled and entitled to benefits for the portion of his loss of wage-earning capacity that is attributable to his work-related injury, but is not entitled to benefits for the portion of his loss of wage-earning capacity that is attributable to his "commission of a crime."

The dissent states that it is inappropriate to remand this case for a redetermination of disability under *Sington* because defendant has never contested plaintiff's disability. *Post* at 4 n 2. Although defendant has not specifically contested plaintiff's disability, defendant has specifically contested its duty to pay plaintiff differential benefits in light of plaintiff's "commission of a crime." As explained above, if plaintiff's loss of wage-earning capacity is wholly attributable to his "commission of a crime," plaintiff is not disabled under *Sington*. In other words, whether defendant must pay plaintiff differential benefits in light of plaintiff's "commission of a crime," and whether plaintiff is disabled, are two interrelated questions that must be addressed on remand.

[*25]

Stephen J. Markman

Maura D. Corrigan

Clifford W. Taylor

CONCURBY:
Robert P. Young, Jr.

CONCUR:

YOUNG, J.

I concur in the result only.

Robert P. Young, Jr.

DISSENTBY:
Michael F. Cavanagh

DISSENT:

CAVANAGH, J. (*dissenting*).

I respectfully disagree with the majority's construction of MCL 418.361(1). While plaintiff is unable to work for defendant because of his commission of a crime, plaintiff is not unable to work. Because I would affirm the decisions of the Court of Appeals and Worker's Compensation Appellate Commission (WCAC) reinstating plaintiff's benefits, I must dissent.

I. Plaintiff is not "unable to perform or obtain work."

In this case, we are called upon to determine whether MCL 418.361(1) and MCL 791.205a operate in conjunction to relieve defendant of liability for any payment to plaintiff because of his commission of a crime.

MCL 418.361(1) provides:

While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured [*26] employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

MCL 791.205a forbids defendant from hiring and subsequently employing persons who, inter alia, have been convicted of a felony or who were subject to pending felony charges. Defendant would have this Court conclude that because defendant is forbidden from reemploying plaintiff, plaintiff is unable to work because of his commission of a crime. I would conclude that the statutes, when read together, do not relieve defendant of liability.

When plaintiff was released from prison and sought reinstatement of his benefits, he was able to work and had been working within his limitations while he was incarcerated [*27] and on parole. In fact, plaintiff was

employed at the time of trial. Defendant would have us believe that because plaintiff was unable to work for defendant because of his commission of a crime, defendant is relieved from paying benefits. However, this requires us to read into subsection 361(1) that the employee must be unable to work *for this particular employer*. I cannot do so. Subsection 361(1) is not employer-specific. The statute provides that if the employee is unable to work for stated reasons, the employer is relieved from paying benefits. In this case, it cannot be stressed enough that plaintiff was able to work. Although earning less than he had earned while he worked for defendant because of the physical limitations caused by his work-related injury, plaintiff was working.

The magistrate correctly decided this case when it was first before her. She recognized that there is no case law authorizing defendant to terminate plaintiff's benefits just because plaintiff is no longer able to work *for defendant*. Further, the only thing preventing plaintiff from engaging in other types of work is his disability, which was incurred as a result of his employment with defendant. [*28] n1 The statute simply cannot be read as authorizing defendant to terminate benefits.

> n1 See the magistrate's November 18, 1998, opinion, page 6, where the magistrate stated: "Furthermore, there is nothing to prevent plaintiff from returning to other types of work except his disability which was incurred as a result of his employment with defendant."

The magistrate found as a fact, and plaintiff and defendant both agreed, that plaintiff continues to suffer a disability that inhibits his ability to earn wages as a result of the knee injury he sustained in the course of his employment with defendant. n2

> n2 The majority's suggestion that this case should be remanded for a redetermination of disability under *Sington v Chrysler Corp*, 467 Mich. 144; 648 N.W.2d 624 (2002), is inappropriate. While *Sington* provides the current standard for disability determinations, defendant never contested plaintiff's disability. In fact, defendant willingly paid benefits from the date of plaintiff's injury until plaintiff's incarceration. Defendant's obligation to pay benefits has only been contested under MCL 418.361(1) in light of MCL 791.205a. Therefore, redetermination of disability under the *Sington* standard is unnecessary and inappropriate. The only issue in this case is whether defendant is relieved of its obligation to pay benefits because of plaintiff's commission of a crime.

[*29]

The magistrate's initial decision is in line with the purpose of the Worker's Disability Compensation Act, MCL 418.101 *et seq*. This Court has consistently construed the WDCA liberally to grant rather than deny benefits. *Simkins v Gen Motors (After Remand)*, 453 Mich. 703, 710-711; 556 N.W.2d 839 (1996) (citing *Bower v Whitehall Leather Co*, 412 Mich. 172, 191; 312 N.W.2d 640 [1981]); see also *DiBenedetto v West Shore Hosp*, 461 Mich. 394, 402-403; 605 N.W.2d 300 (2000).

"The primary purpose of the worker's compensation act is to provide benefits to the victims of work-related injuries ...." *Simkins* at 711. The worker's compensation scheme is a compromise of sorts. An employee who suffers an injury arising out of and in the course of his employment is eligible for worker's compensation benefits regardless of whether the employer was at fault. In return, the employer is immunized from tort liability because worker's compensation is the "exclusive remedy" for a qualifying work-related injury. *Id.* See MCL 418.131.

In this case, it [*30] is undisputed that plaintiff suffered a partially disabling knee injury in the course of his employment with defendant. While it is clear that plaintiff is unable to work *for defendant* pursuant to MCL 791.205a, because of plaintiff's commission of a crime, plaintiff is not unable to work for another employer. Defendant must still pay benefits to plaintiff as compensation for his loss of wage-earning capacity attributable to plaintiff's work-related injury.

The reasonable-employment statute is helpful to this analysis. Reasonable employment is defined in MCL 418.301(9) as work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training.

MCL 418.301(5) provides that when disability is established, n3 weekly wage-loss benefits are determined in part as follows:

(a) If an employee receives a bona fide offer of reasonable employment from [*31] the previous employer, *another employer*, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have

voluntarily removed himself or herself from the work force and is no longer entitled to any wage-loss benefits under this act during the period of such refusal. [Emphasis added.]

n3 Disability was established by the magistrate, and defendant does not challenge this.

While subsection 301(5)(a) focuses on an employee's refusal of reasonable employment, it provides three methods by which an employee can receive an offer of reasonable employment --his previous employer, another employer, or the Michigan Employment Security Commission. In this case, the previous employer, defendant, could not offer plaintiff reasonable employment because of MCL 791.205a. However, two avenues remain by which the employee can receive an offer of reasonable employmentanother employer or the Michigan [*32] Employment Security Commission. Defendant's argument ignores these remaining two avenues. Plaintiff was offered reasonable employment by Elco, which involved making air conditioners for automobiles. Plaintiff obviously accepted this reasonable employment, because he was employed there on the date of trial. That the employment was "reasonable," i.e., within plaintiff's physical limitations, is established by plaintiff's testimony that the parts he worked with were "quite light" and he could "handle it pretty good."

Again, it must follow that because plaintiff was engaged in reasonable employment, he was not unable to work. Therefore, defendant is not relieved from paying worker's compensation benefits to plaintiff.

The majority criticizes my approach as suggesting that an employer will also be held liable for an employee's inability to work that is attributable to the employee's "imprisonment or commission of a crime." *Ante* at 17 n 10. This is not true. In this case, plaintiff is working, thus he is not "unable to work" because of his commission of a crime. Additionally, the magistrate has already determined that plaintiff's work-related injury, *not* plaintiff's commission [*33] of a crime, is the only thing preventing plaintiff from returning to other types of work. This will not be true in every case, but it has been established in this case. Because it has already been established that the exception to an employer's liability contained in MCL 418.361(1) does not apply in this case, the decisions of the Court of Appeals and WCAC reinstating plaintiff's benefits must be affirmed.

II. The majority's "loss of wage-earning capacity" analysis and remand direction is flawed.

The majority holds that defendant must pay only the difference in wages between what plaintiff earned while working for defendant and what plaintiff was earning at the time of trial to the extent that the difference is caused by plaintiff's injury, not by plaintiff's commission of a crime. The majority remands this case to the magistrate to make this determination. I respectfully disagree. As I have previously pointed out, the magistrate already found that there is nothing to prevent plaintiff from returning to other types of work except his disability, which was incurred as a result of his employment with defendant. Additionally, such a holding ignores the [*34] plain language of the statute.

MCL 418.361(1) specifically states that "an employer shall not be liable for compensation ... for such periods of time that the employee is *unable to obtain or perform work* because of imprisonment or commission of a crime." (Emphasis added.) The majority believes that the language "unable to obtain or perform work" refers to "a loss of wage-earning capacity, rather than the inability to work at all." *Ante* at 13-14.

I do not believe that the language of the statute can be construed in that manner. The Legislature's choice of the words "unable to obtain or perform work" must be respected. We can assume that the Legislature intended the phrase to mean exactly what it says--"unable to obtain or perform work," not "loss of wage-earning capacity." The plain language of the statute simply does not support the majority's reading, or rewording, of the statute.

There is also a flaw in the majority's remand directing the magistrate to determine to what extent plaintiff's loss of wage-earning capacity is attributable to his work-related injury and to what extent plaintiff's loss of wage-earning capacity is attributable to plaintiff's [*35] "commission of a crime." The majority provides the magistrate with absolutely no guidance for making this determination. In essence, the majority merely recharacterizes the question posed to the magistrate by the WCAC on remand.

After the magistrate issued her first opinion, the WCAC remanded the case to the magistrate for a determination whether defendant would have offered reasonable employment to plaintiff were it not for the statutory prohibition. On remand, the magistrate concluded that there would not have been an offer of reasonable employment because to find otherwise would be pure speculation. The WCAC then held that the "mere fact" that this defendant cannot hire plaintiff because of the statutory prohibition does not automatically entitle defendant to relief from payment pursuant to MCL 418.361(1). The linkage of the two statutory provisions requires a critical additional "finding of fact," which was

the purpose of the WCAC's remand to the magistrate. The critical additional finding was whether defendant would have offered reasonable employment to plaintiff. Because this is a question of fact and because the magistrate found that defendant could [*36] not prove that it would have offered reasonable employment to plaintiff, the WCAC affirmed the magistrate's award of benefits to plaintiff.

The majority criticizes the WCAC majority for placing "'an artificially-created burden on defendant to prove it would have done the very thing the ex-felon statute prohibits defendant from doing, namely, offering employment to an ex-felon ....'" *Ante* at 14 n 7 (quoting the dissenting worker's compensation commissioners).

However, I would ask the majority: What is the magistrate to consider on remand? Findings of disability and wage-earning capacity have been established and are not disputed. The majority correctly holds that the exception in MCL 418.361(1) is not employer-specific, i.e., it cannot be read as excluding an employee who is unable to work *for this employer*. Because the magistrate has already determined that there is nothing to prevent plaintiff from returning to other types of work except his work-related disability, I am at a loss to discover what the magistrate is to consider on remand to determine what loss of wage-earning capacity is attributable to the injury and what loss of wage-earning [*37] capacity is attributable to plaintiff's commission of a crime. Obviously, plaintiff is unable to work for defendant, *this employer*, because of his commission of a crime. Because we cannot read the statute as employer-specific and because plaintiff is able to work only in a limited capacity because of his work-related injury, I cannot fathom any way for the magistrate to determine that any portion of plaintiff's loss of wage-earning capacity is attributable to anything other than plaintiff's work-related injury, which she has already determined.

III. My construction would not render the crime exception "nugatory."

The majority mistakenly asserts that my construction of the statute would render the exception nugatory. There are circumstances where an employee truly would be unable to work because of his commission of a crime or imprisonment. For example, if an employee has a work-related knee injury that renders him partially disabled, he is entitled to worker's compensation benefits. If this employee robs a gas station and trips on his way out, aggravating his work-related injury to the point where he can no longer perform work, this employee is unable to perform work because [*38] of his commission of a crime. Thus, the employer would not be liable for benefits to this employee under the exception. In this case, plaintiff was unable to work for defendant because of MCL 791.205a; plaintiff was not unable to obtain or perform work because of his commission of a crime per MCL 418.361(1). Therefore, plaintiff is entitled to reinstatement of his benefits.

The majority also supports its assertion that my construction of the statute would render the exception nugatory by stating that "to only exclude unemployed employees, this exception will be rendered meaningless regarding partially disabled employees because employers are not liable to unemployed, partially disabled employees under *this* provision in the first place." *Ante* at 12. This assertion is clearly mistaken because, while the exception may be found in MCL 418.361, which is the partial-disability statute, the statute expressly states that it applies to MCL 418.351 as well, which is the total-disability statute. Any claimant who is "totally" or "totally and permanently" disabled is not likely to [*39] be employed. Thus, the statute expressly applies to claimants who are unemployed.

IV. Conclusion

I would hold that when a plaintiff is not unable to work because he committed a crime, or stated differently, able to work even though he committed a crime, pursuant to MCL 418.361(1), a defendant is not relieved of its responsibility to pay benefits. MCL 418.361(1) is not employer-specific; it cannot be read to provide that an employee must be unable to work for a particular employer. While plaintiff in this case is barred from working for defendant by MCL 791.205a, plaintiff is able to work. Thus, I would affirm the decisions of the Court of Appeals and the WCAC reinstating plaintiff's benefits.

Michael F. Cavanagh

Elizabeth A. Weaver

Marilyn Kelly

In re CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT; KENNETH HENES SPECIAL PROJECTS PROCUREMENT, MARKETING AND CONSULTING CORPORATION, Plaintiff, v CONTINENTAL BIOMASS INDUSTRIES, INC. Defendant.

No. 120110

SUPREME COURT OF MICHIGAN

659 N.W.2d 597; 2003 Mich. LEXIS 772

November 20, 2002, Argued

April 23, 2003, Decided

April 23, 2003, Filed

PRIOR HISTORY:
[**1] United States District Court for the Eastern District of Michigan, Southern Division, Gerald E. Rosen, J. United States Court of Appeals for the Sixth Circuit, Keith, Kennedy, and Batchelder, JJ. Kenneth Henes Special Projects Procurement v. Continental Biomass Indus., 86 F. Supp. 2d 721, 2000 U.S. Dist. LEXIS 1499 (E.D. Mich., 2000)

DISPOSITION:
Certified questions were answered.

COUNSEL:
Randall J. Gillary, P.C. (by Randall J. Gillary and Kevin P. Albus) Troy, MI, for the plaintiff.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by J. Mark Cooney) Southfield, MI, for the defendant.

JUDGES:
Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CAVANAGH, J. (concurring), Marilyn Kelly. WEAVER, J. (concurring).

OPINIONBY:
YOUNG

OPINION:

[*598] BEFORE THE ENTIRE BENCH

YOUNG, J.

Plaintiff filed suit against Continental Biomass Industries, Inc., to recover unpaid sales commissions and penalty damages pursuant to the Michigan sales representative commission act (SRCA), MCL 600.2961. Pursuant to MCR 7.305(B), n1 the United States Court of Appeals for the Sixth Circuit has certified the following question to this Court:

What standard is appropriate in evaluating the mental state required for double damages under the [**2] Michigan Sales Representative Commission Act?

We have accepted the certification and hold that the plain language of the statute requires only that the principal purposefully fail to pay a commission when due. The [*599] statute does not require evidence of bad faith before double damages, as provided in the statute, may be imposed.

n1 MCR 7.305(B)(1) provides: "When a federal court ... considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court

precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court."

I. FACTS AND PROCEEDINGS

Continental Biomass Industries (CBI) is a New Hampshire corporation that manufactures equipment used in wood waste processing. For several years, Kenneth Henes served as CBI's sales representative, with an exclusive sales territory that encompassed Michigan, Ohio, Indiana, Illinois, and Wisconsin.

After plaintiff's services were terminated in May 1998, he sought unpaid commissions on four sales. CBI refused [**3] to pay because it did not believe that plaintiff was entitled to the commissions under the terms of the contract.

The case was tried before a jury in federal court. The defendant requested a jury instruction regarding the level of intent required for the double-damages provision contained in the act. Specifically, defendant wanted the jury to be instructed that "intentional failure to pay means that defendant knew a commission was due the plaintiff and chose not to pay it."

The trial court refused to give the requested jury instruction. Instead, the trial court followed the language of the statute, instructing the jury that if it found that a commission was owed, it must then decide if defendant intentionally failed to pay the commission when due.

On a special verdict form, the jury found that defendant owed all four commissions and that it intentionally failed to pay three of the four commissions when due.

Defendant filed a postjudgment motion for a new trial and amendment of the judgment. Defendant claimed that the jury instruction given by the trial court was insufficient because it did not define the term "intentionally" for the jury. The trial court denied the motion, stating [**4] that the SRCA was intended to be compensatory and not punitive. n2

n2 In making this ruling, the trial court relied on *M & C Corp v Erwin Behr GmbH & Co, KG*, 87 F.3d 844 (CA 6, 1996).

While defendant's appeal was pending in the United States Court of Appeals for the Sixth Circuit, this Court released *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich. 578; 624 N.W.2d 180 (2001). In *Lynch*, which addressed the retroactivity of the SRCA, the opinion stated that "the SRCA clearly serves a punitive and deterrent purpose," *id.* at 586, and that the act was "indisputably punitive, not compensatory." *Id.* 463 Mich. 578 at n 4. These statements arguably conflict with the trial court's conclusion regarding the nature of the statute.

The Sixth Circuit heard oral argument in the present case in August 2001. In the certified question request, the panel observed that the *Lynch* opinion did not indicate "what specific intent standard applies," and that the "appeal turns [**5] on what level of intent is needed to invoke the double-damages provision ...."

II. THE STATUTE

The relevant statutory language at issue, MCL 600.2961(5), states:

A principal who fails to comply with this section is liable to the sales representative for both of the following:

(a) Actual damages caused by the failure to pay the commission when due.

(b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due [*600] but not paid as required by this section or $ 100,000, whichever is less.

A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich. 59, 65; 503 N.W.2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich. 230; 596 N.W.2d 119 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is [**6] no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich. 22, 27; 528 N.W.2d 681 (1995).

The clear language of the statute evinces no textual intent to create a good faith defense to the double-damages provision. Grammatically, the word "intentionally" modifies the phrase "failed to pay." The word "intentionally" is not defined in the statute. Where the Legislature has not expressly defined the common terms used in a statute, this Court may turn to dictionary definitions "to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings." *People v Morey*, 461 Mich. 325, 330; 603 N.W.2d 250 (1999).

Random House Webster's College Dictionary (1991) defines "intentional" as "done with intention or on

purpose; intended ...." Nothing in the generally accepted meaning of the word leads to the inference that a good faith belief on the part of the principal precludes recovery under MCL 600.2961(5)(b). n3 See, generally, Gillary [**7] & Albus, *Michigan's sales representative act revisited--again--or, does "intentionally" mean "in bad faith"?*, 2001 L R MSU-DCL 965. Therefore, under the clear language of the statute, if a principal deliberately fails to pay a commission when due, it is liable for double damages under the statute, even if the principal did not believe, reasonably or otherwise, that the commission was owed. There is no textual indication that a principal's good faith belief is relevant in making the determination that double damages are payable under the statute. n4

n3 Defendant claims that the word "intentional" is a legal term of art, and not susceptible to the use of a lay dictionary. As used in the statute under consideration, we disagree. However, we note that the legal definition of "intentionally" provides defendant no relief. Black's Law Dictionary (6th ed) defines "intentionally" as "to do something purposefully, and not accidentally."

n4 Some states that have passed similar acts have required a higher level of intentionality before additional damages are assessed. See Cal Civil Code 1738.15 ("willfully fails to pay commissions"); Ind Code 24-4-7-5(b) ("in bad faith fails to comply"); Mass Gen Laws Ann ch 104, § 9 ("wilfully or knowingly fails to comply"); Pa Consol Stat tit 43, § 1475(a) ("willfully fails to comply"); Tenn Code Ann 47-50-114(d) ("acting in bad faith, fails to comply").

[**8]

III. May the Legislative History of the SRCA trump the statutory language?

Notwithstanding that the language of the statute does not require "bad faith" as a precondition to recovering double damages, defendant asserts that such a construction must be imposed by the courts. Defendant relies upon the legislative history of the statute in support of its position. n5

n5 This Court has recognized the benefit of using legislative history when a statute is ambiguous and construction of an ambiguous provision becomes necessary. *Stajos v City of Lansing*, 221 Mich. App. 223; 561 N.W.2d 116 (1997); *People v Hall*, 391 Mich. 175; 215 N.W.2d 166 (1974); *Liquor Control Comm v Fraternal Order of Eagles, Aerie No 629*, 286 Mich. 32; 281 NW 427 (1938). However, we take this opportunity to emphasize that not all legislative history is of equal value, a fact that results in varying degrees of quality and utility of legislative history.

Clearly of the highest quality is legislative history that relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent with respect to an ambiguous statutory provision. Examples of legitimate legislative history include actions of the Legislature intended to repudiate the judicial construction of a statute, see, e.g., *Detroit v Walker*, 445 Mich. 682, 697; 520 N.W.2d 135 (1994), or actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted. See, e.g., *Miles ex rel Kamferbeek v Fortney*, 223 Mich. 552, 558; 194 NW 605 (1923). From the former, a court may be able to draw reasonable inferences about the Legislature's intent, even when the Legislature has failed to unambiguously express that intent. From the latter, by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.

Of considerably diminished quality as legislative history are forms that do not involve an act of the Legislature. "Legislative analyses" created within the legislative branch have occasionally been utilized by Michigan courts. These staff analyses are entitled to little judicial consideration in resolving ambiguous statutory provisions because: (1) such analyses are not an official form of legislative record in Michigan, (2) such analyses do not purport to represent the views of legislators, individually or collectively, but merely to set forth the views of professional staff offices situated within the legislative branch, and (3) such analyses are produced outside the boundaries of the legislative process as defined in the Michigan Constitution, and which is a prerequisite for the enactment of a law. Const 1963, art 4, § § 26 & 33. In no way can a "legislative analysis" be said to officially summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process, the members of the House and the Senate and the Governor. For that reason, legislative analyses should be accorded

very little significance by courts when construing a statute.

Finally, it bears repeating that resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist.

[**9]

[*601] In 1991, our Legislature passed Senate Bill 36, which was based on model language drafted by the Bureau of Wholesale Representatives. The language of the bill passed was the same as MCL 600.2961, except that it did not include the word "intentionally." Governor John Engler vetoed the bill on July 15, 1991. The veto message stated in part: "Second, I oppose the use of exemplary damages in contract actions absent broad public policy considerations and particularly in this case where exemplary damages would be assessed without consideration of the underlying factors resulting in breach of contract."

In response to the Governor's veto, the Legislature added the word "intentionally." With that addition, the Governor signed the bill into law. 1992 PA 125. It does appear that the Governor vetoed the original bill in part out of a concern for the inappropriateness of awarding extracontractual damages on the basis of a mere breach of contract. The fact remains that the final bill enacted and signed into law did not cure the problem the Governor raised in his veto message.

Defendant's argument that the statute should be construed to include a good [**10] faith defense must fail because it violates a prime tenet of statutory construction: Michigan courts are bound to apply the unambiguous language actually used in a statute. *Danse Corp v Madison Hts*, 466 Mich. 175, 182; 644 N.W.2d 721 (2002). Because the statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute. "'We do not resort to legislative history to cloud a statutory text that [*602] is clear.'" *Chmielewski v Xermac, Inc*, 457 Mich. 593, 608; 580 N.W.2d 817 (1998), quoting *Gilday v Mecosta Co*, 124 F.3d 760, 767 (CA 6, 1997), quoting *Ratzlaf v United States*, 510 U.S. 135, 147-148; 114 S. Ct. 655; 126 L. Ed. 2d 615 (1994). See also *Luttrell v Dep't of Corrections*, 421 Mich. 93, 101; 365 N.W.2d 74 (1984).

IV. THE NATURE OF THE SRCA

In *Lynch*, the opinion stated that "the SRCA clearly serves a punitive and deterrent purpose," 463 Mich. 586, and that the act was "indisputably punitive, not compensatory," *id.* at n 4. These statements were made in response to the [**11] plaintiff's argument that the statute was remedial and should be applied retroactively under the "exception" to the general rule of prospective application.

Defendant maintains that under Michigan case law, punitive damages are not available absent a showing of malicious or willful misconduct. In support of this argument, defendant cites *Peisner v Detroit Free Press*, 421 Mich. 125; 364 N.W.2d 600 (1984).

In *Peisner*, the Court considered whether exemplary and punitive damages under the Michigan libel statute, MCL 600.2911(2)(b), resulted in plaintiff being compensated twice for the same injury. n6 In resolving this question, the Court stated that "exemplary and punitive damages for libel cannot be awarded in the absence of a finding that the defendant acted with common-law malice--in the sense of ill will or bad faith--in publishing the libel." *Id.* at 136.

n6 The statutory language at the time provided:

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. The retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel.

[**12]

There are distinct differences between the language of the libel statute and that of the SRCA. The libel statute does not identify any particular mental state surrounding the libel before liability for exemplary or punitive damages attaches, whereas the SRCA expressly predicates liability on an intentional failure to pay. In addition, the libel statute explicitly permits the consideration of the "good faith of the defendant," MCL 600.2911(2)(b), whereas the SRCA is conspicuously silent on the subject. n7 The textual difference between the statutes militates against the application of the *Peisner* holding to the facts of this case.

n7 The *Peisner* Court also relied on the now disfavored doctrine of legislative acquiescence in

holding that "exemplary and punitive" damages are compensatory in nature for purposes of the libel statute. 421 Mich. 133. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492; 638 N.W.2d 396 (2002); *Donajkowski v Alpena Power Co*, 460 Mich. 243; 596 N.W.2d 574 (1999); *People v Borchard-Ruhland*, 460 Mich. 278; 597 N.W.2d 1 (1999).

[**13]

The double-damages provision of the SRCA is irrefutably punitive rather than compensatory in the sense that it provides for an award of damages above and beyond that necessary to make plaintiff whole under the contract. However, that conclusion is not controlling or even relevant to the proper construction of this unambiguous statute. The clear and unambiguous language of the statute penalizes *intentional failure to pay*, without regard to the motivation of the principal. Under the language of the statute, it [*603] appears that the only cognizable defense to a double-damages claim is if the failure to pay the commission were based on inadvertence or oversight. The Legislature is certainly within its power to award "punitive-type" damages for such actions if it chooses to do so. The imposition of a contrary judicial gloss is inappropriate where the Legislature has clearly expressed its intentions in the words of the statute. *Nawrocki v Macomb Co Road Comm*, 463 Mich. 143, 150; 615 N.W.2d 702 (2000); *Chmielewski*, supra at 606; *People v Gilbert* 414 Mich. 191; 324 N.W.2d 834 (1982).

V. CONCLUSION

For the foregoing [**14] reasons, we conclude that the plain language of the double-damages provision of the statute requires only that the principal purposefully fail to pay a commission when the commission becomes due. Having answered the certified question, we return the matter to the United States Court of Appeals for the Sixth Circuit for further proceedings as deemed appropriate.

Robert P. Young, Jr.

Maura D. Corrigan

Clifford W. Taylor

Stephen J. Markman

CONCURBY:
CAVANAGH; WEAVER

CONCUR:

CAVANAGH, J. (*concurring*).

The majority holds that the plain language of the Michigan sales representative commission act (SRCA), MCL 600.2961, requires only that the principal purposefully fail to pay the commission when due before liability for an intentional failure to pay would arise. Although I agree with its result, I write separately to express my concern with the majority's narrow textualist approach to statutory interpretation.

LEGISLATIVE HISTORY

Though I agree that nothing need be gleaned from the history in this case, I disagree with the majority's assertion that legislative history is wholly irrelevant when a statute lacks "ambiguity." Of course, statutory interpretation [**15] must always begin with the text. However, statutes subject to different reasonable interpretations are often held to be clear and unambiguous on the basis of definitions selected by this Court and provided by Webster's Dictionary. Contrary to the perspective of some of my colleagues, that type of analysis can, at times, prove unhelpful. Instead, it is often useful to consider legislative history because even those statutes lacking clearly contradictory language are often subject to different--yet reasonable--interpretations. n1 In this case, for example, the United States Court of Appeals for the Sixth Circuit found the term sufficiently ambiguous to warrant certification to this Court. Because a majority of this Court rarely finds a statute ambiguous, legislative history is seldom utilized, though many times it would be useful.

n1 "Reading the legislative history puts the judge better in touch with the values, vocabulary, and policy choices of the authors of the statute--just as The Federalist does for the framers of the Constitution." Eskridge, *Textualism, The unknown ideal?* 96 Mich. L R 1509 (1998).

[**16]

PURPOSE

In addition, I am troubled by the majority's failure to clarify that any other interpretation of the statute would render the punitive measure almost meaningless and clearly contrary to the statute's purpose. "The Court may depart from strict construction principles when a literal reading of the statute will produce absurd or illogical results, and this Court should attempt to give effect to all relevant statutory provisions." *DiBenedetto v West Shore Hosp*, 461 Mich. 394, 408; 605 N.W.2d 300 (2000) (Cavanagh, J., dissenting); see also 1 Blackstone, Commentaries 61 ("The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the [*604] reason

and spirit of it ... for when this reason ceases, the law itself ought likewise to cease with it."). I understand that some members of the majority disapprove of this doctrine, but it is most applicable. If an insurance company were exempt from punitive damages simply because it asserted a "reasonable" argument concerning a disputed commission, the statute would create no incentive to pay commissions owed to insurance sales agents.

For these reasons, [**17] I concur in the result only.

Michael F. Cavanagh

Marilyn Kelly

WEAVER, J. *(concurring).*

I concur with the result reached by the majority. I write separately to state as I did in my dissent to the proposed amendment of MCR 7.305 that this Court lacks the constitutional authority to hear questions certified from federal courts and that, therefore, MCR 7.305(B) represents an unconstitutional expansion of judicial power. 462 Mich. 1208 (2000), see also *In re Certified Question (Wayne Co v Philip Morris, Inc)*, 622 N.W.2d 518 (2001).

Elizabeth A. Weaver

5 of 51 DOCUMENTS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOHN JILTS McGUFFEY, III, Defendant-Appellant.

SC: 121866

SUPREME COURT OF MICHIGAN

657 N.W.2d 120; 2003 Mich. LEXIS 417

March 5, 2003, Decided

PRIOR HISTORY:
[**1] COA: 227957. Muskegon CC: 00-044254-FC. People v. McGuffey, 251 Mich. App. 155, 649 N.W.2d 801, 2002 Mich. App. LEXIS 652 (2002)

JUDGES:
Young, Jr., J., dissents.

OPINION:

[*120] On order of the Court, the application for leave to appeal from the April 30, 2002 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motions for immediate consideration are GRANTED. The motions for peremptory reversal and bond pending appeal are DENIED as moot.

DISSENTBY:
Young

DISSENT:

Young, Jr., J., dissents and states as follows:

The question posed by this appeal is whether a conflict between MCR 6.429(C), which generally precludes a party from raising on appeal certain sentencing issues unless they were raised at or before sentencing, and MCL 769.34(10), which allows such issues to be raised for the first time on appeal, must be resolved in favor of the court rule or the statute.

The Court of Appeals panel held that the court rule prevailed over the statute. The panel so concluded because it "believed that the issue of when a guidelines scoring issue must be brought to the trial court's attention falls squarely within the 'practice and procedure' aspect of our legal system. [**2] " 251 Mich. App. 155, 164; 649 N.W.2d 801 (2002). However, the panel did not explain in other than conclusory terms its analysis under *McDougall v Schanz*, 461 Mich. 15, 597 N.W.2d 148 (1999).

McDougall requires a court, in addressing a conflict between a court rule and a statute, to determine whether the statute constitutes a legislatively declared principle of public policy having as its basis something other than court administration. At the time it enacted MCL 769.34(10), the Legislature had before it the more restrictive court rule. Notwithstanding, the Legislature chose to broaden a party's right to challenge guidelines computations beyond those allowed under the court rule. It is not beyond question that the Legislature, in addressing the concept of issue forfeiture and expanding appellate rights within the legislative guidelines scheme, had in mind policy considerations other than simple judicial economy. Thus, I would direct the Court of Appeals on [*121] remand to consider whether any clear legislative policy reflecting considerations other than dispatch of litigation can be identified with respect to the Legislature's choice to provide [**3] additional opportunities for appellate relief under the legislative sentencing guidelines.

6 of 51 DOCUMENTS

SCOTT LAMP and MICHELLE LAMP, Plaintiffs-Appellees, v FRED REYNOLDS and LINDA REYNOLDS d/b/a BAJA ACRES, M.C., Defendants-Appellants.

SC: 121049

SUPREME COURT OF MICHIGAN

467 Mich. 936; 654 N.W.2d 916; 2003 Mich. LEXIS 4

January 8, 2003, Decided

PRIOR HISTORY:
[***1] COA: 223346. Tuscola CC: 97-015696-NO. *Lamp v. Reynolds*, 249 Mich. App. 591, 645 N.W.2d 311, 2002 Mich. App. LEXIS 123 (2002).

DISPOSITION:
Leave to appeal denied.

JUDGES:
Young, Jr., J., dissents. Taylor, J., joins in the statement of Young, Jr., J.

OPINION:

[**916]

On order of the Court, the application for leave to appeal from the February 5, 2002 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

DISSENTBY:
Young, Jr.

DISSENT:

[*936] Young, Jr., J., dissents and states as follows:

I would remand this matter to the trial court for application of the correct legal standard for determining comparative fault.

Plaintiff was injured during a race on defendants' motocross racetrack when he steered his bike off the racetrack and [**917] struck a tree stump that was concealed by tall weeds. The trial court found that defendants' failure to remove the tree stump constituted wilful and wanton misconduct. The trial court determined, as a matter of law, that the defense of comparative negligence was unavailable in a claim based on wilful and wanton misconduct; however, the trial court noted that, had the defense been available, the court would have reduced plaintiff's damages award by 25 percent to reflect his comparative negligence in leaving the [***2] racetrack. The Court of Appeals clarified that under our statutory scheme, comparative fault is relevant irrespective of whether the defendant's conduct was wilful and wanton. The panel nevertheless affirmed the trial court's judgment on the ground that defendants had failed to prove that plaintiff's conduct was causally related to his damages.

I fully agree with the Court of Appeals' analysis of the relevant statutes and with its conclusion that the trial court erred to the extent that it determined that comparative fault could not be assessed against plaintiff's damages award because defendants' conduct was wilful and wanton. As the panel correctly held, Michigan's comparative fault statutes, particularly MCL 600.2957, 600.2959, and 600.6304, require allocation of liability among all persons--including the plaintiff--whose conduct was a proximate cause of the plaintiff's damages, regardless of whether the defendant's own conduct constituted wilful and wanton misconduct.

Nevertheless, I would vacate that portion of the Court of Appeals' opinion in which the panel applied the statutory framework to the [***3] facts of the case. The trial court found, as a matter of fact, that plaintiff was 25 percent at fault in causing the accident. An appellate court is not to substitute its own judgment for that of the trial court unless it finds that the trial court's factual findings are clearly erroneous. See MCR 2.613(C); *Morris v Clawson Tank Co*, 459 Mich. 256, 275, 587 N.W.2d 253 (1998). Rather than applying the

appropriate, deferential standard of review to the trial court's factual findings, the Court of Appeals panel actually undertook a de novo review of the evidence and determined that plaintiff's conduct was neither a cause in fact nor a proximate cause of his injuries.

[*937] As a matter of administrative control, this Court must take notice and act when the Court of Appeals so obviously improperly functions as a trier of fact. Accordingly, I dissent from the order denying leave to appeal, and I would instead remand this matter to the trial court for application of the appropriate statutory standard.

Taylor, J., joins in the statement of Young, Jr., J.

7 of 51 DOCUMENTS

LINDA MACK, Plaintiff-Appellee, v CITY OF DETROIT, Defendant-Appellant.

SC: 118468

SUPREME COURT OF MICHIGAN

467 Mich. 1212; 654 N.W.2d 563; 2002 Mich. LEXIS 2045

November 19, 2002, Decided

PRIOR HISTORY:
[**1] COA: 214448. Wayne CC: 98-803967-CZ.

Mack v. City of Detroit, 467 Mich. 186, 649 N.W.2d 47, 2002 Mich. LEXIS 1422 (2002).

DISPOSITION:
Rehearing denied.

JUDGES:
Corrigan, C.J. (concurring). Young, J. (concurring). CAVANAGH, J. (dissenting). WEAVER, J. (dissenting). Kelly, J., would grant rehearing.

OPINION:

[*563]

In this cause a motion for rehearing is considered and it is DENIED.

Kelly, J., would grant rehearing.

CONCURBY:
Corrigan; Young

CONCUR:

Corrigan, C.J. (*concurring*). I concur in the order denying plaintiff's motion for rehearing. I write separately to address Justice CAVANAGH's comparison of this case to my concurring statement in *Haji v Prevention Ins Agency, Inc*, 196 Mich. App. 84, 88-90, 492 N.W.2d 460 (1992). The concerns surrounding the questionable procedure that the trial court employed in *Haji* are not present here.

In *Haji,* on the date set for trial, the trial court sua sponte raised issues never previously identified or argued in the pleadings or in the defendants' motion for summary disposition. *Id.* at 85-86, 88. The court invited argument on the issues at that time, with no opportunity whatsoever for preparation. The court then granted summary disposition for the defendants on the issues that the trial court itself had raised. *Id.* at 85-87, 89. [**2] n1 In my concurrence, I deemed the trial judge's injection and decision "unjustified." I disagreed with the trial court's procedure because the plaintiff was sandbagged by the court. He had no advance notice, opportunity to prepare, or respond. *Id.* at 90.

> n1 Although the Court of Appeals majority found the procedure "questionable," it declined to address the "procedural irregularities" because it determined that the trial court's conclusions on the merits were erroneous. *Haji, supra* at 87.

Unlike *Haji,* this Court decided the very issue presented, i.e, whether the city of Detroit's charter provided plaintiff a private cause of action against the city on the basis of sexual orientation discrimination. Our research led to the conclusion that, regardless of whether the charter attempted to create such a cause of action, the governmental tort liability act (GTLA), MCL 691.1407, precluded the cause of action.

This Court did not inject a novel [**3] *issue.* We addressed the issue raised on appeal and reached a conclusion on the basis of thorough legal research. While members of this Court addressed the potential impact of the GTLA on this case at oral argument, we are not obligated to provide parties with advance notice of our decision before issuing an opinion. We were not required to advise plaintiff that the GTLA precluded her alleged cause of action and to afford her another opportunity to

present argument. Such an unprecedented procedure would hinder our ability to decide cases promptly. It would add another step to the appellate process by giving parties yet another "bite at the apple."

Moreover, this Court is not constrained to simply adopt the reasoning advanced by one of the parties. If our research leads to a different line of reasoning that correctly resolves the issues presented, we are not obliged to reject the correct view merely because neither party has proposed it. As long as we address the particular issue presented, the theories that our research uncovers in an attempt to decide the issue are properly before this Court. [*564]

Young, J. (*concurring*).

I concur with the denial of plaintiff's motion for [**4] rehearing. I write separately to address the concerns raised by Justice CAVANAGH in his dissenting statement.

In our opinion, 467 Mich. 186; 649 N.W.2d 47 (2002), plaintiff lost part of her appeal because there is no cause of action against a governmental entity for discrimination based on sexual orientation. Justice CAVANAGH's due process arguments fail to consider that if we remanded plaintiff's sexual orientation discrimination claim, no possible amendment would have been successful because the underlying right she sought to vindicate could not be secured under state law. Thus, a remand on that claim would have caused her to engage in a futile exercise. n1

> n1 I note that plaintiff was allowed to amend her complaint on remand to plead in avoidance of governmental immunity concerning her sex discrimination claim because sex discrimination is a cause of action recognized under state law. 467 Mich. 203, n 20.

That the plaintiff has no cause of action for sexual orientation discrimination is the [**5] fundamental fact that distinguishes this case from the case Justice CAVANAGH relies on for his due process criticism, *Brinkerhoff-Faris Trust & Sav Co v Hill,* 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930). *Brinkerhoff* stands for the proposition that a court cannot change a procedural rule so as to deprive a plaintiff of an otherwise valid cause of action without offending due process. However, this due process principle presupposes that the plaintiff has a *valid* claim. Here, plaintiff has no valid claim for sexual orientation discrimination. Thus, the predicate for *Brinkerhoff* to apply, that the plaintiff have a valid cause of action that a retroactive change in procedural law now makes impossible to bring, is missing. Accordingly, *Brinkerhoff* is not germane to the situation before us in *Mack.*

Justice CAVANAGH also objects to the Court advancing legal theories not raised by the parties. I am mindful of the important role the adversarial process plays in our judicial system, particularly regarding the identification of disputed issues. Yet, the adversarial process *aids* a court's legal resolution, it does not dictate it. Where the adversarial [**6] process fails to provide valuable assistance, a court's duty to correctly expound the law is not excused. Our case law clearly points this out:

> It is well established that a court is not bound by the parties' stipulations of law. See, e.g., *Rice v Ruddiman,* 10 Mich. 125, 138 (1862), and *Bradway v Miller,* 200 Mich. 648, 655; 167 N.W. 15 (1918). It is within the inherent power of a court, as the judicial body, to determine the applicable law in each case. To hold otherwise could lead to absurd results; for example, parties could force a court to apply laws that were in direct contravention to the laws of this state. It would also allow the parties to stipulate to laws that were obsolete, overruled, or unconstitutional. On the appellate level, this would result in a tremendous waste of judicial resources, since such case law would have no precedential value. [*In re Finlay Estate,* 430 Mich. 590, 595-596, 424 N.W.2d 272 (1988)] n2.

Just as parties cannot place the law beyond the reach of the Court by stipulation, they cannot avoid the application of controlling law by failing to address it.

> n2 *Finlay* was authored by Justice ARCHER and joined by Chief Justice RILEY and Justices BRICKLEY, CAVANAGH, BOYLE, and GRIFFIN. Justice LEVIN dissented on other grounds.

[**7] [*565]

Simply put, the issue of preemption by state law was squarely before this Court in *Mack* and the specific preemptive effect of governmental immunity was raised by the Court at oral argument. However, plaintiff failed adequately to explain to this Court why the governmental tort liability act did not prohibit the city's alleged creation of a cause of action for sexual orientation discrimination at either oral argument or, more tellingly, even in plaintiff's motion for rehearing. Plaintiff's adversarial shortcomings do not prevent this Court from following the law.

Further, I wish to point out how unusual is Justice CAVANAGH's assertion that our sua sponte raising and deciding the *McCummings v Hurley Medical Ctr*, 433 Mich. 404, 446 N.W.2d 114 (1989), issue somehow runs afoul of some established "rule." If such a "rule" exists, it certainly is not one that the United States Supreme Court observes. I simply note by way of example that the United States Supreme Court has sua sponte raised and decided issues neither raised nor briefed by the parties on many occasions and in some of the most important cases it has decided. See, for example, *Erie R Co v Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), [**8] and *Mapp v Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; 86 Ohio Law Abs. 513 (1961). In fact, that Court recently addressed an issue that was not briefed by the parties and was raised only indirectly at oral argument by the Court, notwithstanding a dissent critical of the Court's doing so. See *Kolstad v American Dental Ass'n*, 527 U.S. 526, 540, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999) (citing cases where the Court had previously done so, Justice O'Connor wrote for the majority that "the Court has not always confined itself to the set of issues addressed by the parties"). Likewise, this entire Court recently decided an issue not raised or briefed by the parties. See *Federated Publications, Inc v Lansing*, 467 Mich. 98 (2002). As suggested above, the highest court's duty is to the law itself, not fidelity to the parties' vision (or lack thereof) of the law.

Justice CAVANAGH's assertion that this Court deprived plaintiff of a due process right by finding that she was required to plead in avoidance of governmental immunity ignores the precedent set by this Court. A point we did not make in *Mack*, but could have, is that a review of Michigan law [**9] before *Mack* would hardly suggest that plaintiff need not plead in avoidance of governmental immunity. As stated in *Mack*, the *McCummings* holding was an aberration in Michigan and largely ignored by Michigan courts after it was decided. Opinions from this Court post-*McCummings* support this conclusion and refute any contention that governmental immunity was established solely as an affirmative defense. This truth is evident, in part, because the *Mack* decision was foreshadowed in several recent cases that all stated that a plaintiff must plead in avoidance of governmental immunity. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492, 499, 638 N.W.2d 396 (2002) ("A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity.") (quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 183, 615 N.W.2d 702 (2000)); *Haliw v Sterling Heights*, 464 Mich. 297, 304, 627 N.W.2d 581 [2001]) ("First, it must be determined whether the plaintiff has pleaded a cause of action in avoidance of governmental immunity. [**10] "). In fact, although he criticizes the fact that we overruled *McCummings* in *Mack*, Justice CAVANAGH himself subscribed to the *Mack* postulate post-*McCummings*:

> The governmental tort liability act, MCL 691.1407; MSA 3.996(107), [*566] waives the state's immunity from liability in certain limited areas. However, *in order to successfully bring suit against an agency of the state, one has to plead in avoidance of governmental immunity and* prove an underlying cause of action. See *Canon v Thumudo*, 430 Mich. 326; 422 N.W.2d 688 (1988). [*Klinke v Mitsubishi Motors Corp*, 458 Mich. 582, 615, n 19, 581 N.W.2d 272 (1998) (KELLY, J., dissenting and CAVANAGH, J., concurring with Justice KELLY) (emphasis added)]. n3

In light of these recent opinions by this Court, it is doubtful that plaintiff had no notice of the appropriate procedural rule.

> n3 Every member of this Court has, since *McCummings*, signed an opinion that repudiated its holding.

[**11]

Finally, Justice CAVANAGH's claim that the acts plaintiff complained of were ultra vires, and thus outside governmental immunity, is simply incorrect. The actions plaintiff challenged--"job reassignment, distribution of vacation time, and determining the extent to which department officers are involved with investigations--- are quintessential governmental functions as they are inherent in running a police department. 467 Mich. at 204. The fact that the motivation to do one of these acts may have been the product of discriminatory animus does not convert the act itself into an ultra vires one.

For these reasons, I am unpersuaded by the arguments by plaintiff and Justice CAVANAGH and concur with the denial of the motion for rehearing.

DISSENTBY:
CAVANAGH; WEAVER

DISSENT:

CAVANAGH, J. (*dissenting*).

I respectfully dissent from the majority's refusal to grant rehearing. The Court's opinion in *Mack v City of Detroit*, 467 Mich. 186, 649 N.W.2d 47 (2002), violated plaintiff's right to due process guaranteed by US Const, Am XIV. The opinion was issued without affording plaintiff any opportunity to brief or argue a dispositive

issue, i.e., which party carries the [**12] burden of pleading sovereign immunity, raised for the first time by this Court on issuance of the opinion. Neither was the plaintiff afforded any opportunity to brief or have a fair chance to respond to a second dispositive issue, i.e., the applicability of the government tort liability act. MCL 691.1407.

This Court violated plaintiff's right to procedural due process by denying her an opportunity to argue the merits of her claim on the basis of the Court's overruling *McCummings v Hurley Medical Center,* 433 Mich. 404, 446 N.W.2d 114 (1989). In *McCummings*, the Court clarified that a defendant bore the burden of pleading governmental immunity as an affirmative defense. The Court also amended MCR 2.111(F)(3) n1 to clarify this rule by a separate order set forth in the opinion.

n1 MCR 2.111(F)(3) provides:

> Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting:
>
> a. an affirmative defense, such as ... immunity granted by law ....

[**13]

> The amendment ... [was] intended to make clear that a governmental agency ... which seeks to invoke the immunity from tort liability ... must raise that immunity as an affirmative defense pursuant to amended MCR 2.111(F)(3). [*McCummings* 433 Mich. at 412.]

Relying on this express statement of law, and in response to defendant's absolute failure to raise the defense, plaintiff did not plead in avoidance of immunity. [*567]

In apparent recognition of the injustice that retroactive application of the new rule would cause to plaintiffs with pending governmental immunity claims, the Court clarified that the Court of Appeals may permit amendment by plaintiffs with pending claims. *Mack* 467 Mich. at 203, n 20. To avoid a manifestly unfair result, that same discretion should be applied to plaintiff's claim against the city of Detroit. Otherwise, the Court's refusal to grant the motion for rehearing violates procedural due process guarantees as defined in *Brinkerhoff-Faris Trust & Sav Co v Hill,* 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930). In *Brinkerhoff*, the United States Supreme Court held that the Missouri Supreme Court denied the plaintiff's due process rights by [**14] refusing to hear its equal protection claim on the ground that the plaintiff was guilty of laches for failure to bring the action in the tribunal below, the state tax commission, where the Missouri Court had previously held six years earlier that no equitable action could be had in that particular tribunal. The United States Supreme Court noted:

> No one doubted the authority of the *Laclede* case [limiting the tax tribunal's jurisdiction] until it was expressly overruled in the case at bar. ... The possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion .... Then it was too late for the plaintiff to avail itself of the newly found remedy. [*Id.* 281 U.S. at 677.]

The plaintiff in *Brinkerhoff* had filed a motion for rehearing, and the Supreme Court held that the state court's refusal to grant the rehearing "transgressed the due process clause of the Fourteenth Amendment." *Id.* 281 U.S. at 677-678. Similarly, if the Court denies this motion for rehearing, plaintiff will have been denied an opportunity to litigate her claim or, as stated by the Supreme Court, she will have [**15] been deprived of her property (the claimed invasion of her right to be free from discrimination because of her sexual orientation) without affording her any opportunity to be heard.

This respect for a party's right to fair procedures in the judicial process has been expressly recognized by members of this Court. In *Haji v Prevention Ins Agency, Inc*, 196 Mich. App. 84, 492 N.W.2d 460 (1992), the plaintiff claimed damages against his employer for failing to procure worker's compensation insurance for him and for failing to notify him of such failure. The opinion per curiam related the following:

> On the day set for trial, the trial court suggested tying up some "loose ends," and invited argument regarding whether there had been consideration for the alleged oral contract between the parties. The court appears to have raised this issue spontaneously, because it does not appear in the pleadings and there was no motion pending before the court. ... After hearing comments of counsel on that issue and others raised by the court, the court ruled [in favor of defendant]. The procedure followed in this case was, at best, questionable. We do not address the procedural irregularities, [**16] however, because each of the court's conclusions on the merits was erroneous, and we reverse on that ground. [*Id.* at 86-87.]

In spite of the Court's ruling on other grounds, Judge Corrigan submitted the following concurring statement:

> I write separately to emphasize my concern about the procedural injustice manifest in this record. The circuit judge committed a procedural error of the most

basic sort when it dismissed, on his own motion, on the date set for [*568] trial, plaintiff's contract and negligence claims without prior notice to plaintiff or a fair opportunity to be heard.

The judge had heard and denied defendants' motion for summary disposition nearly a year earlier. On the date set for trial, the trial judge unilaterally reopened consideration of summary disposition, introduced new legal theories, and then heard argument on two questions: whether plaintiff furnished consideration for the alleged oral contract and whether the defendants owed a duty to the plaintiff upon which a negligence claim could be based. Neither issue had been raised in defendants' earlier motion for summary disposition. *After hearing argument on the subject, for which plaintiff* [**17] *had no fair opportunity to prepare, the court granted summary disposition to defendants on the basis of the court's newly identified theories.*

***

I conclude that the trial court's behavior--its disposition sua sponte of issues never before contemplated--was unjustified, whatever the pressures of the court's busy docket. When any court contemplates sua sponte summary disposition against a party, that party is entitled to unequivocal notice of the court's intention and a fair chance to prepare a response. In my view, a court that fails to afford that constitutionally rooted courtesy has no authority to grant summary disposition. [*Id.* at 88-90 (emphasis added).]

Applying these principles to this case, it is clear the Court had no authority to rule against plaintiff without affording her notice or an opportunity to prepare and respond to the Court's sua sponte rulings. Like the plaintiff in *Haji*, the plaintiff here had only the briefest chance at oral argument to respond to Justice Young's and Justice Taylor's thoughts on the GTLA. Even more troublesome is the Court's reversal of *McCummings,* which it applied to plaintiff without even affording [**18] her an opportunity to address the issue at oral argument. Plaintiff followed all controlling precedent and applicable court rules, yet was denied an opportunity to proceed to the merits of her claim on the basis of a procedural bar imposed by the Court in arguable violation of a "constitutionally rooted courtesy." *Id.* In sum, I write simply to clarify that this denial of rehearing by the Court violates plaintiff's due process rights. n2

n2 Chief Justice Corrigan claims that this Court in *Mack* decided "the very issue presented, i.e., whether the city of Detroit's charter provided plaintiff a private cause of action against the city on the basis of sexual orientation discrimination," but that the trial court in *Haji* did not. *Ante* at ___. However, the purported distinction between *Mack* and *Haji* is illusory; this Court "sandbagged" plaintiff for the same reasons identified by the Chief Justice in *Haji.* It is accurate to state that the trial court in *Haji* also decided the very issue presented, i.e., whether the court should grant the defendant's motion for summary disposition. Broadly defining the issue in *Mack* simply cannot protect the Court's action from a label it has earned, i.e, the Court's actions are procedurally unjust.

[**19]

Furthermore, in the motion for rehearing, plaintiff claims that the GTLA does not protect a municipality from an ultra vires act. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich. 567, 591, 363 N.W.2d 641 (1984) ("All governmental agencies [state and local] are immune from tort liability for injuries arising out of the exercise of a non-proprietary, government function. 'Governmental function' is defined as any activity which is expressly ... mandated or authorized by constitution, statute, or *other law.* [MCL 691.1401(f).] [*569] *An agency's ultra vires activities are therefore not entitled to immunity.*"). Discrimination on the basis of sexual orientation is not lawful in Detroit and, thus, was not a governmental function. The city did not waive immunity as the Court in *Mack* suggests; the GTLA simply does not extend to unlawful conduct. In the absence of any statutory or constitutional conflict invalidating the right to be free from sexual orientation discrimination, the cause of action arising out of that right is a vested right; the Court deprived her of that property in violation of her substantive right to due process. [**20]

This argument is not without merit. Granting plaintiff the opportunity to plead in avoidance of immunity and argue the substantive issues would remedy any procedural due process violation. n3 Further, because the GTLA does not grant defendant immunity from unlawful actions prohibited by the charter, rehearing would provide the Court with the opportunity to correct its error in *Mack.* Therefore, I would grant the motion for rehearing.

n3 Justice Young now claims that providing the plaintiff an opportunity to argue her substantive claim would simply be a waste of time "because the underlying right she sought to vindicate could not be lawfully secured under state law." *Ante* at ___, n 1. This circular contention ignores the fact that plaintiff was completely denied an opportunity to fulfill the newly mandated procedural obligation to plead in

avoidance of immunity, i.e, to argue why the GTLA does not apply. It is this newly imposed procedural change that violates plaintiff's due process rights.

Further, Justice Young's reference to *In re Finlay Estates,* 430 Mich. 590, 595-596, 424 N.W.2d 272 (1988), is inapposite because, unlike the Court in *Finlay,* which had the benefit of the parties' unanimous stipulation to an issue of law, this Court had no similar presentation from the parties; the majority has literally and constructively denied plaintiff the opportunity to argue the dispositive issues by imposing a procedural bar that is in direct conflict with our Court rules and precedent. Finally, reference to obiter dictum that laid the foundation for the Court's reversal in *Mack* does not justify this Court's violation of plaintiff's due process rights.

For further clarification concerning the erroneous assumptions in Justice Young's concurring statement, I direct the reader to my dissent in *Mack.* More thoroughly addressing the issues here would be repetitive.

[**21]

WEAVER, J. (*dissenting*)

I dissent from the denial and would grant plaintiff's motion for rehearing.

I do not agree that every member of the Court since *McCummings v Hurley Medical Center*, 433 Mich. 404, 446 N.W.2d 114 (1989), was decided has "signed an opinion that repudiated [*McCummings'*] holding" that governmental immunity must be pleaded as an affirmative defense or waived. *Ante* at ___, n 5 (YOUNG, J., concurring). For this proposition, a concurrence to the denial of rehearing cites three opinions involving the highway exception to governmental immunity and one footnote in a dissenting opinion. However, a review of these opinions demonstrates that the issue whether governmental immunity is an unwaivable characteristic of government of which plaintiff must plead in avoidance or an affirmative defense was not raised or addressed. n1 This is because, unlike the city of Detroit in the case now before us on a motion for rehearing, the defendants in the cases cited by the concurrence did raise and pursue on appeal [*570] governmental immunity as an affirmative defense. *McCummings'* holding that the defense could be waived simply was not questioned [**22] in those cases. See, e.g., *Haliw v Sterling Heights*, 464 Mich. 297, 627 N.W.2d 581 (2001), *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492, 638 N.W.2d 396 (2002), and *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 615 N.W.2d 702 (2000). n2 Thus, I cannot agree that the majority's decisions to raise the issue of governmental immunity and to overrule *McCummings* was fairly "foreshadowed" by these opinions in such a manner that plaintiff was on notice of the "appropriate procedural rule."

n1 Further *Klinke v Mitsubishi Motors Corp,* 458 Mich. 582, 581 N.W.2d 272 (1998), did not involve governmental immunity, and the cited dissenting opinion, Justice KELLY footnote, *Klinke,* p 615, n 19, referenced *Canon v Thumudo*, 430 Mich. 326, 422 N.W.2d 688 (1988), a case that predated *McCummings* and that *McCummings* expressly overruled. Thus, this footnote from a dissenting opinion offers little support to the suggestion that the dissents' signatories "repudiated" *McCummings.*

n2 In the case consolidated with *Nawrocki, Evens v Shiawassee Co Rd Comm*'rs, the plaintiff attempted to plead in avoidance of immunity pursuant to the highway exception to governmental immunity, but this Court held that the exception did not impose the specific duty alleged in that case. Nowhere did the opinion address whether governmental immunity was an unwaivable characteristic of government.

[**23]

In response to other points addressed regarding this motion for rehearing, I offer the following portions from my dissenting opinion, 467 Mich. 225-230 (2002), in support of plaintiff's rehearing request:

The majority has decided important issues involving governmental immunity that were not raised or briefed by the parties and that are very significant to the people of Detroit and all the people of Michigan. The majority should have insured that it had briefing and heard argument on these issues before deciding them.

A

Without the benefit of briefing or argument, the majority overrules settled precedent n3 to hold that governmental immunity cannot be waived because it is a characteristic of government. In *McCummings* ..., this Court held that governmental immunity must be pleaded as an affirmative defense. The majority overrules *McCummings* and holds that immunity is an unwaivable characteristic of government. The parties did not raise or address in any court whether governmental immunity is a

characteristic of government or an affirmative defense. n4

n3 The majority's assertion that *McCummings* is an "aberration" is their view. However, it was signed by six justices with Justice Griffin concurring separately and has been the law for fourteen years. See, e.g., *Scheurman v Dep't of Trans*, 434 Mich. 619; 456 N.W.2d 66; 434 Mich. 619; 456 N.W.2d 66 (1990), and *Tryc v Michigan Veterans' Facility*, 451 Mich. 129; 545 N.W.2d 642; 451 Mich. 129; 545 N.W.2d 642 (1996). [**24]

n4 Although the city raised governmental immunity as an affirmative defense at the trial court level, the city never specifically addressed immunity relative to plaintiff's charter-based claim of sexual orientation discrimination at any level. The only briefing regarding immunity in the trial court was in response to plaintiff's intentional infliction of emotional distress claim. Plaintiff abandoned that claim in the trial court and thereafter, the city abandoned its immunity claim.

While the general concept of governmental immunity was alluded to in questioning during oral argument before this Court, the questioning did not reference the concept of immunity as a characteristic of government and did not foreshadow an intent to reconsider *McCummings*. The majority's decision to reach out and overrule a case that was not raised, briefed, or argued is certainly efficient. However, the majority's efficiency in this case forsakes procedural fairness. It is worth emphasis that the majority can only conclude that the city has not waived governmental immunity by overruling *McCummings*. [*571]

I decline [**25] the majority's invitation to take a position without briefing and argument on whether governmental immunity is a characteristic of government, an affirmative defense, or some other judicially determined hybrid. These characterizations have significant procedural consequences. It is the role of the Court to respond to issues properly before it and to seek additional briefing and argument on significant matters that may have been overlooked by the parties. This is especially true where the issues are of great importance, such as the issues not briefed or argued in this case, which seriously affect the settled law of this state.

The majority's decision to address and resolve this issue without briefing or argument is inappropriate. Before deciding this significant change in the law of governmental immunity, the Court should have had briefing and argument.

B

The question whether a charter-created cause of action for sexual orientation discrimination conflicts with the governmental tort liability act (GTLA), MCL 691.1407, a question that the majority concludes decides this case, was not briefed or argued by the parties at any level. n5 It is not possible to [**26] agree with the majority contention that this specific question was "squarely in front of the parties" when neither party addressed it at any level. ... The conflict analysis of the parties and the courts below addressed whether a charter-created cause of action for sexual orientation discrimination conflicted with the Civil Rights Act (CRA). Furthermore, the city only characterized the question of conflict with CRA as one premised on the law of preemption in its brief to this Court. It is again worthy of note that it is only the majority's overruling of *McCummings* that allows the majority to shift the focus of the conflict analysis from the CRA to the GTLA.

n5 The Michigan Constitution and the Home Rule City Act require that home rule city charters not conflict with state law.

C

Although the majority asserts that whether the electors of Detroit intended to create a cause of action to vindicate the charter-created civil right to be free from sexual orientation discrimination is an "irrelevant" inquiry, [**27] the intent of the electors, as expressed in the charter is noteworthy. n6 After all, the issue presented at the outset of this case was whether the charter language created a cause of action to vindicate the charter's declaration of rights.

n6 Further, it should be of interest to the people of Detroit that the city's position in this litigation seeks to disclaim individual rights that its electors deemed worthy of charter protection.

The charter's declaration of rights provides:

"The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of

race, color, creed, national origin, age, handicap, sex, or sexual orientation." [Section 2.]

The language of § 2 is not ambiguous. It, as would be commonly understood by the ratifiers, secures a set of rights to each person of Detroit. Furthermore, § 8 of [**28] the declaration of rights provides:

"The city may enforce this Declaration of Rights and other rights retained by the people." [*572]

While it can be argued that the permissive "may" of § 8 tempers *the city's* otherwise "affirmative duty" under § 2 to "insure the equality of opportunity for all persons," it is by no means clear that, pursuant to § 8, the ratifiers intended to diminish the individual rights declared in § 2. More importantly, the unambiguous language of the charter demonstrates that the charter ratifiers, the electors of Detroit, intended that the people of Detroit have the opportunity to seek enforcement of their charter-based rights in the proper court or tribunal. Art 7, ch 10, § 7-1007 provides:

"This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal."

By these words the ratifiers of the charter would have expected that individuals could also vindicate their charter-declared rights in the proper court or tribunal. n7 In other words, it was the express intent of the electors of Detroit to raise the veil of immunity within the city limits with respect to the civil [**29] rights declared in the charter's declaration of rights.

n7 As reiterated by the United States Supreme Court in *Davis v Passman*, 442 U.S. 228, 242; 60 L. Ed. 2d 846; 99 S. Ct. 2264 (1979), "'The very essence of civil liberty,' wrote Mr. Chief Justice Marshall in ;*Marbury v Madison*, 5 U.S. [1 Cranch] 137, 1635 U.S. 137; 2 L. Ed. 60 (1803), 'certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'"

The fact that the majority's decision leaves a charter-based right with no remedy n8 accentuates the inappropriateness of the majority's decision to dispose of this case on the basis of issues that were not raised, not briefed, and not argued by the parties.

n8 Section 8 of the charter declares that the city "may" enforce the declaration of rights, not that it "must" enforce those rights. If the city opts not to enforce the declaration of rights, as it may so choose to do under § 8, the individual Detroiter would have a right with no remedy.

[**30]

JAMES A. CALLAHAN, Plaintiff-Appellant, v BOARD OF STATE CANVASSERS, MICHIGAN SECRETARY OF STATE, MARY LOU PARKS, and MARGARET ANN VAN HOUTEN, Defendants-Appellees.

SC: 122052

SUPREME COURT OF MICHIGAN

467 Mich. 864; 650 N.W.2d 656; 2002 Mich. LEXIS 1464

September 3, 2002, Decided

PRIOR HISTORY:
[**1] COA: 242154.

JUDGES:
Weaver, J., concurs in the result. Young, J., concurring. Cavanagh, J., would remand the case to the Board of Canvassers for a hearing on whether enough of the signatures gathered on February 28, 2002, were signed in the plaintiff's presence so as to qualify plaintiff for placement on the ballot.

OPINION:

[*656]

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal from the July 12, 2002, decision of the Court of Appeals is considered, and, pursuant to MCR 7.302(F)(1), we REVERSE the decision of the Board of Canvassers, which considered the second complaint challenging the validity of the nominating petitions in this case. Pursuant to MCL 168.552(8):

"A complaint respecting the validity and genuineness of signatures on a petition shall not be acted upon ... unless the complaint is received by the board of state canvassers within 7 days after the deadline for the filing of the nominating petitions."

Because the second complaint was filed after the deadline for its consideration, it was error for the Board of Canvassers to consider the complaint challenging the validity of the nominating signatures. [**2] Accordingly, the Board improperly refused to place the plaintiff's name on the November 2002 ballot.

Weaver, J., concurs in the result.

CONCURBY:
Young

CONCUR:

Young, J., concurring:

I concur with the order reversing the decision of the Board of Canvassers. While I do not disagree with the Board's conclusion that plaintiff violated the law in collecting his petition signatures and gave incredible testimony, I conclude that the Board was without authority to entertain the second complaint because the complaint was filed outside the 7-day period contained in the statute. According to the plain language of the statute, a late complaint "shall not be acted upon."

The anomaly is that the untimely, but meritorious, complaint cannot be considered under the statute and plaintiff will appear on the ballot as a judicial candidate - despite the fact that he managed to convince the Board (at the hearing it should not have held) that he was untruthful in testifying that his certified petitions were collected in conformity with law. While I share the dissent's frustration that the delay in filing the complaint at issue was attributable to the Secretary of State, I part company with the dissent's effort [**3] to ignore the statute on the ground of "fairness". By operation of law, plaintiff appears to have avoided the consequences of his unlawful collection of petition signatures. This may be one of those occasions where the voters themselves, rather than a court, will have to determine whether plaintiff is worthy of the office he seeks. Our citizens are capable of making such a decision and our Democracy can survive with less than universal judicial intervention and supervision.

As stated, the dissent prefers to remand on the basis of "fairness" to allow plaintiff a *second* opportunity to make his case that he actually observed those who signed his petition as required by law. I start with the basic proposition that "regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, [*657] legislative decree." *Stokes v Millen Roofing* Co, 466 Mich. 660, 672, 649 N.W.2d 371 (2002) (citation omitted). Consequently, neither the Board nor this Court have the equitable power to ignore the statute's directive that a late complaint "shall not be acted upon."

Even if [**4] such equitable power *did* exist, the following points would be worth considering. First, there is absolutely no basis for a remand under these circumstances because no one, including the dissent, has identified an error in the Board's factual determinations. The Board has already found that plaintiff's testimony concerning how he collected the signatures was *not* credible. One of the Board members made the following statement: "I question, severely question, the lack of forthrightness to which you brought your testimony to this board. Had you indicated to us that you saw some of the signatures but not all of the signatures, I would have believed you and I probably would have moved to certify you." Notwithstanding this statement by a Board member, the dissent believes plaintiff deserves *another* opportunity to prove that he did see "some of the signatures."

No reviewing court, much less this Court, has stated or concluded that the Board's credibility determination was erroneous. Consequently, I see no legal basis for countermanding the core credibility decision of the Board and giving plaintiff a second opportunity to "*re*-persuade" the Board of his credibility and argue [**5] a theory that was not advanced at the first hearing. The dissent also faults the Board of Canvassers because it made no finding as to whether plaintiff could identify individual signatures that were gathered in his presence. However, the dissent ignores the strategy utilized by plaintiff at the hearing, wherein plaintiff claimed that *all* of the signatures were gathered in his presence. Furthermore, the member's statement quoted above suggests that the issue was squarely before the Board. In short, on the basis of "fairness" the dissent wishes to give plaintiff a second hearing without a stated justification that we require of any other lower tribunal. Equity, even if it were available in this context, should not be compelled to chase and give aid to one so lacking in credibility as plaintiff. But for the statutory bar on the late complaint, I would affirm the determination of the Board to bar plaintiff from the ballot.

Kelly, J., dissenting:

The majority reverses the determination of the Board of State Canvassers because the Board permitted a challenge to nominating petitions made after the deadline set forth in MCL 168.552(8). I disagree with the majority's [**6] decision.

As Justice Young acknowledges, an error by the Secretary of State staff made it impossible for anyone to object within the statutory timetable to certain of the petition sheets. In such situations, a court should require the Board to hear a challenge to those petitions. Because the Board should have been required to hear this challenge, its decision to do so on its own initiative cannot constitute reversible error. n1

n1 I disagree with Justice Young's position that equity does not lie here. Our system of justice is not so inflexible as to prevent the Board from entertaining a challenge under the circumstances that existed in this case. One may distinguish *Stokes v Millen Roofing Co*, 466 Mich. 660, 649 N.W.2d 371 (2002), in that it was a case where the affected party flaunted the statute, then sought relief from the courts. In this case, the affected party tried to but was unable to comply with the statute because the administrative body in control rendered compliance impossible. Our case law recognizes that "there may be an extraordinary case which justifies the exercise of equity jurisdiction in contravention of a statute." *Wikman v City of Novi*, 413 Mich. 617, 648, 322 N.W.2d 103 (1982). Practical experience and common sense tell us that this is such a case.

[**7] [*658]

Instead of reversing the Board's determination to exclude plaintiff from the ballot, I would remand for reconsideration. The Board found that plaintiff collected 6,196 valid signatures. Plaintiff needed 6,200 to qualify as a candidate. I believe that the Board was correct in invalidating signatures obtained outside the immediate presence of the plaintiff, the person circulating the petitions. However, some of the 121 signatures at issue here may have been affixed in plaintiff's immediate presence. Justice Young misconstrues the reason for my decision to remand. I would not remand to challenge any of the Board's determinations. Instead, my remand would be directed at the absence of certain factual determinations.

At the hearing before the Board, plaintiff argued that the rejected signatures were obtained in his presence, as required. He stated that he witnessed all 121 of the

signatories sign his petitions, although he was moving about the room when they signed. The Board correctly found this argument incredible. It made no finding, however, as to whether, while in the room, plaintiff was in the immediate presence of at least four of the signatories when they signed. The member's [**8] statement quoted in the concurrence leaves no doubt that the Board did not consider that question. Instead, it made the blanket assumption that, since not all 121 signatures were affixed in plaintiff's immediate presence, none of them was.

Therefore, in fairness, I would give plaintiff the opportunity at least to make a showing that four or more of the signatures at issue were affixed in his immediate presence. I consider this a more measured resolution of the matter than doing "rogue equity" by holding the challengers rigidly to the rules while overlooking plaintiff's failure to offer the required proofs.

Cavanagh, J., would remand the case to the Board of Canvassers for a hearing on whether enough of the signatures gathered on February 28, 2002, were signed in the plaintiff's presence so as to qualify plaintiff for placement on the ballot.

In Re HON. WARFIELD MOORE, Judge of the Third Circuit Court, Detroit, Michigan.

SC: 122005

SUPREME COURT OF MICHIGAN

650 N.W.2d 323; 2002 Mich. LEXIS 1482

August 19, 2002, Decided

PRIOR HISTORY:
[**1] JTC: Formal Complaint No. 69.

DISPOSITION:
Petition for the appointment of a master is GRANTED.

JUDGES:
Weaver, J., concurs. Young, J., concurs. Corrigan, C.J., joins in the concurring statement of Justice Young. Markman, J., dissents.

OPINION:

[*323]

On order of the Court, the petition for the appointment of a master is considered, and it is GRANTED. The Honorable Karl V. Fink, Retired Judge of Washtenaw Circuit Court, is designated as master to consider Formal Complaint No 69.

CONCURBY:
Weaver; Young

CONCUR:

Weaver, J., concurs and states as follows:

I concur in the order because under MCR 9.210(B) this Court is apparently required to appoint a master upon request by the Judicial Tenure Commission. However, this case draws the validity of the rule into question. In proceedings related to Formal Complaint No. 58, the commission filed in October 2000 a recommendation for discipline. The recommendation pertained to eight separate cases over which the respondent judge had presided. Examining these examples of his performance, we found a "pattern" of intemperate behavior. We suspended him for six months without pay and challenged him to improve the manner in which he conducted himself. *In re Moore*, 464 Mich. 98, 626 N.W.2d 374 (2001). In issuing that [**2] sanction, we recognized that "the purpose of judicial discipline is not to punish but to maintain the integrity of the judicial process." *Id.* at 118. Presumably that would be accomplished if Judge Moore's deportment on the bench after imposition of the last sanction conformed in every way with the canons of judicial ethics. Now, without an indication that Judge Moore's conduct has been less than proper since the sanction, we are asked to appoint a master to examine allegations of misconduct similar to those for which Judge Moore was sanctioned and occurring before the sanction. Common sense and discretion suggest that appointment of a master is not appropriate under the information before us.

Whether or not this Court appoints a master does not inhibit or prohibit the Judicial Tenure Commission from investigating and proceeding with its constitutional authority and responsibility. The commission is still permitted to proceed with its own hearing, MCR 9.210(A), MCR 9.211, and may still present this Court with a recommendation, which this Court may accept, reject, or modify. n1

n1 On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire, or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of the justice. [Const 1963, art 6, § 30.]

[**3]

The Court should hold public hearings to consider whether to exercise its rulemaking authority n2 and amend MCR 9.210(B). It should examine whether this Court should be bound to appoint a master in every instance that one is requested by the Judicial Tenure Commission, and whether the current time limits are appropriate. n3

n2 Const 1963, art 6, § 30, which establishes the judicial tenure commission, provides "the supreme court shall make rules implementing [§ 30] and providing for confidentiality and privilege of proceedings."

n3 Note that MCR 9.210(B)'s current requirement of appointing a master within fourteen days has not been followed in this case.

[*324]

Young, J., concurs and states as follows:

Because I read MCR 9.210(B) as requiring that this Court appoint a master upon request of the Judicial Tenure Commission, I concur in the order. However, I also believe that the statements of Justices Weaver and Markman raise very important questions that merit serious consideration by the Judicial Tenure [**4] Commission.

Corrigan, C.J., joins in the concurring statement of Justice Young.

DISSENTBY:
Markman

DISSENT:

Markman, J., dissents and states as follows:

I respectfully choose not to grant the request of the Judicial Tenure Commission (JTC) to appoint a master to investigate certain allegations of misconduct against Judge Warfield Moore. n1 Instead, I would direct the JTC to explain why Judge Moore should now be faced with discipline for alleged misconduct predating this Court's earlier discipline of him and, with one exception, even predating the earlier JTC recommendation for discipline. In my judgment, the allegations here are entirely cumulative of the allegations set forth by the JTC in its recommendation in October 2000 that resulted in a six-month suspension without pay in May 2001. *In re Moore*, 464 Mich. 98, 626 N.W.2d 374 (2001).

n1 In my judgment, MCR 9.210(B) is internally inconsistent in its description of this Court's authority with regard to the appointment of masters. Although the second sentence in this provision appears to require such appointment when sought by the JTC, the first sentence expressly references a "*request*... to appoint a master." The use of the emphasized term does not usually connote a matter over which the requestee, i.e., this Court, lacks any judgment or discretion. If, however, the majority construes MCR 9.210(B) as so depriving this Court, and views us as being obligated to grant any JTC request for the appointment of a master, then I would favor a change in this rule. I view this Court's relationship with the JTC under MCR 9.210(B) as something other than a ministerial one in which we automatically appoint masters at its "request." In this regard, I note the opening words from one previous order of this Court granting a JTC request for the appointment of a master: "Disposition: Request for the appointment of a master is *considered* and it is granted." *In re Gehrke*, 451 Mich. 874; 549 N.W.2d 565 (1996) (emphasis added).

[**5]

This Court's previous discipline of Judge Moore, in which I joined, was predicated upon findings of misconduct by Judge Moore occurring in the course of eight separate trials. We concluded that Judge Moore's conduct demonstrated a "pattern of persistent interference in and frequent interruption of the trial of cases; impatient, discourteous, critical, and sometimes severe attitudes toward jurors, witnesses, counsel, and others in the courtroom; and use of a controversial tone and manner in addressing litigants, jurors, witnesses, and counsel." *Id.* at 132-133. We further concluded that, "while the incidents vary in severity and some may ostensibly seem innocuous," judicial misconduct may be proven by such incidents where they produce a "pattern of hostile conduct unbecoming a member of the judiciary." *Id.* at 132. The present allegations of misconduct raised by the JTC are clearly a part of the same "pattern" of misconduct by Judge Moore. Such allegations involve exactly the same type of courtroom misconduct as in the recommendation of October 2000, and such allegations undoubtedly would have been joined in this recommendation had the JTC been aware of them at the time. Had [**6] the latter occurred, proof of the same type of misconduct by Judge Moore in nine, rather than eight, trials, would almost certainly have

resulted in the same discipline [*325] of a six-month suspension by this Court, at least in my judgment. n2

n2 Indeed, in this regard, it is important to understand that this Court identified *forty-six* specific instances of misconduct on Judge Moore's part occurring in the course of the eight trials we examined. *Id.* at 100-115, 125-128. It is inconceivable to me that any member of this Court could have viewed these forty-six instances of misconduct, and only these forty-six instances, as the totality of Judge Moore's misconduct, rather than as evidence of a larger "pattern" of misconduct on his part. Indeed, the JTC itself concluded in its earlier recommendation of discipline:

(a) Respondent's misconduct is not an isolated instance. It represents a pattern of misconduct continuing throughout Respondent's career and resulting in admonitions, public censure, and repeated criticisms and reversals by reviewing courts. ...

***(h) There have been many prior complaints regarding Respondent as reflected in prior disciplinary proceedings and appellate criticism detailed above. [*Id.* at 119-120.]

Further, as this Court stated in *Moore*:

The November 1999 agreement between the examiner and Judge Moore limited the misconduct allegations to the eight criminal cases discussed in parts 1(A)-(H) of this opinion. The commission's findings of fact and conclusions of law were limited to the eight cases in the complaint as the agreement provided. This Court's review of the commission's findings of fact and ultimate finding of misconduct involves only the events in these eight cases and not the past behavior of Judge Moore discussed in part III of this opinion. However, the commission did not err in considering Judge Moore's past behavior in its sanction determination. His past behavior is relevant. Moreover, the agreement did not prohibit consideration of that behavior for that purpose. [*Id.* at 117, n 16.]

It is hardly remarkable, or beyond this Court's anticipation, that the JTC now is able to identify additional instances of alleged misconduct on Judge Moore's part that preceded the JTC's earlier recommendation and this Court's earlier discipline. Were such allegations of a different kind from the earlier ones, or even of a different magnitude, were these allegations not so clearly a part of the exact [*326] same "pattern" of misconduct that justified this Court's discipline of Judge Moore, I would view the JTC's request far differently.

[**7]

Concerning the JTC's sole allegation of misconduct by Judge Moore arising after the recommendation of October 2000 (but before this Court's discipline)---consisting of a very brief exchange between Judge Moore and an attorney who was moving his disqualification (which motion was granted)---I view this, at worst, as more of the same, part of the same "pattern" of misconduct by Judge Moore that served as the basis for his discipline. Even assuming that such alleged misconduct cannot be seen as part of the same "pattern," I hardly see a need to appoint a master to investigate what amounted to an estimated one-minute courtroom exchange. If the JTC deems this exchange worthy of investigation, I am confident that it can carry out such investigation without having to employ the financial and other resources of a master. n3

n3 Even after this Court appointed a master in connection with Judge Moore in response to the previous JTC request for a master, the JTC conducted its hearings before the full nine-member commission rather than before the master. *Id.* at 99. This, despite the fact that the previous request involved far more numerous allegations of misconduct than are involved in the present request. Thus, by not granting the JTC's request to appoint a master here, this Court would hardly be standing in the way of a JTC investigation if the JTC remained determined to proceed in this direction.

[**8]

I recognize that "double jeopardy" is inapposite in the judicial discipline context, and that there is no doctrine of "res judicata" that bars the present JTC request. However, I believe that it is fundamentally unfair that Judge Moore should have to face discipline once again for misconduct that predated this Court's previous discipline, and that was clearly a part of the same "pattern" of misconduct underlying that discipline.

I choose to exercise the judgment to which I believe members of this Court are entitled under MCR 9.210(B) to deny at this time the request of the JTC to impose what appears to be a second discipline on Judge Moore for the same misconduct. He has already been disciplined

once, quite severely and quite properly, for a "pattern" of misconduct. He should not now again be faced with discipline for conduct that is unquestionably a part of this same "pattern," and that predated his discipline by this Court. Rather, now that his six-month suspension without pay has been served, he is entitled to a fresh start. n4

n4 Absent any further explanation by the majority, it is unclear to me (and presumably will be to the JTC as well) whether the majority's position is predicated upon its disagreement with my view that the proposed investigation by a master is a dubious use of public resources, and unfair to Judge Moore, or whether it views justices as lacking judgment or discretion in the appointment of a master under MCR 9.210(B). Finally, I concur with Justice Weaver's separate statement that it is difficult to understand how the traditional objectives of judicial discipline would be promoted by granting the present request of the JTC.

[**9]

10 of 51 DOCUMENTS

DAVID J. KIRCHER, Plaintiff-Appellant, v RONALD A. STEINBERG, Defendant-Appellee.

SC: 120786

SUPREME COURT OF MICHIGAN

467 Mich. 858; 648 N.W.2d 647; 2002 Mich. LEXIS 1428

August 1, 2002, Decided

PRIOR HISTORY:
[*1] COA: 224781. Oakland CC: 99-014959-NZ.

JUDGES:
Corrigan, C.J., joins in the statement of Young, Jr., J. Young, Jr., J., dissents. Corrigan, C.J., joins in the statement of Young, Jr., J.

OPINION:

On order of the Court, the delayed application for leave to appeal from the November 20, 2001 decision of the Court of Appeals is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND the matter to the Court of Appeals for explication of the reasons for awarding sanctions for a vexatious appeal.

We retain jurisdiction.

DISSENTBY:
Young, Jr.

DISSENT:

Young, Jr., J., dissents and states as follows:

I dissent from the majority's order remanding to the Court of Appeals for articulation of the reasons for imposing sanctions. I would deny leave to appeal because the decision to award sanctions was based on manifestly obvious reasons. To recapitulate plaintiff's claim is to recognize its utter frivolousness.

After a default judgment was entered against him in a preceding civil lawsuit, plaintiff brought the instant claims of abuse of process and "due process violations" against the opposing counsel in the prior action, based on counsel's conduct in obtaining an order permitting [*2] substituted service in that action. The trial court granted defendant's motion for summary judgment, correctly observing that there was "absolutely no cause of action [against the] attorney as a third party." On plaintiff's appeal, the Court of Appeals affirmed and granted defendant's motion for fees pursuant to MCR 7.211, 7.216 against plaintiff for filing a vexatious appeal.

As stated, plaintiff's complaint lacks merit and is frivolous on its face. Therefore, in my view, it is consummately absurd to remand a matter so obvious to the Court of Appeals for an articulation of the fact that plaintiff's claim and appeal were frivolous. If this appeal is not one in which sanctions are appropriately awarded, I simply cannot imagine what kind of case would justify such an award.

Corrigan, C.J., joins in the statement of Young, Jr., J.

11 of 51 DOCUMENTS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARCEL R. RIDDLE, Defendant-Appellant.

No. 118181

SUPREME COURT OF MICHIGAN

467 Mich. 116; 649 N.W.2d 30; 2002 Mich. LEXIS 1421

April 9, 2002, Argued

July 31, 2002, Decided

July 31, 2002, Filed

PRIOR HISTORY:
[***1] Wayne Circuit Court, Sean F. Cox, J. Court of Appeals, GRIBBS, P.J., and HOEKSTRA and MARKEY, JJ., (Docket No. 212111).

DISPOSITION:
Decision of the Court of Appeals vacated in part and defendant's convictions affirmed.

COUNSEL:
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Michael E. Duggan, Prosecuting Attorney, and Timothy A. Baughman, Chief, Research, Training and Appeals [Detroit, MI], for the people.

State Appellate Defender (by Douglas W. Baker) [Detroit, MI], for the defendant-appellant.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J. CAVANAGH and KELLY, JJ., concurred in the result only.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[**34] [*118]

YOUNG, J.

We granted leave in this case to consider whether defendant is entitled to the reversal of his convictions of second-degree murder n1 and possession of a firearm during the commission of a felony (felony-firearm) n2 on the ground that the trial court denied his request for a jury instruction that he was [***2] not required to retreat before exercising deadly force in self-defense while in his yard. We affirm.

n1 MCL 750.317.

n2 MCL 750.227b.

I. INTRODUCTION

The prosecution contends that Michigan law generally imposes a "duty to retreat" upon a person who would exercise deadly force in self-defense, and that the so-called "castle doctrine"-providing an exception to this duty to retreat when a person is attacked within his dwelling-does not extend to the area outside the dwelling. Defendant, on the other hand, contends that the castle doctrine should be extended to the curtilage and that he was not required to retreat when he was assaulted in his backyard.

Because Michigan's case law has become somewhat confused with respect to the concepts of retreat and the castle doctrine, we take this opportunity to clarify these principles as they apply to a claim of self-defense. We reaffirm today the following, according to the common-law principles that existed in [***3] Michigan when our murder statute was codified.

[*119] As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. n3 The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. n4

n3 See ***People v Heflin***, 434 Mich. 482, 502-503; 456 N.W.2d 10 (1990) (opinion by RILEY, C.J.); *People v Lennon*, 71 Mich. 298, 300-301; 38 N.W. 871 (1888).

n4 *Pond v People*, 8 Mich. 150, 176 (1860); *People v Doe*, 1 Mich. 451, 455-456 (1850).

[**35] There are, however, three intertwined concepts that provide further guidance in [***4] applying this general rule in certain fact-specific situations. First, a person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon. n5 In these circumstances, as long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor's failure to retreat is never a consideration when determining if the necessity element of self-defense is satisfied; instead, he may stand his ground and meet force with force. n6 That is, where it is uncontested that the defendant was the victim of a sudden and violent attack, the Court should not instruct the jury to consider [*120] whether retreat was safe, reasonable, or even possible, because, in such circumstances, the law does not require that the defendant engage in such considerations. n7

n5 *Doe,* 1 Mich. at 455-456; *People v Macard*, 73 Mich. 15, 21-22; 40 N.W. 784 (1888).

n6 *People v Kuehn*, 93 Mich. 619, 621-622; 53 N.W. 721 (1892); Macard, 73 Mich. at 21-22; *Brownell v People*, 38 Mich. 732, 738 (1878); *People v Lilly*, 38 Mich. 270, 276 (1878); *Patten v People*, 18 Mich. 314, 330-331 (1869). [***5]

n7 See *Beard v United States*, 158 U.S. 550, 564; 39 L. Ed. 1086; 15 S. Ct. 962 (1895), stating that the victim of a sudden and violent attack is "not obliged to retreat, nor to consider whether he could safely retreat ...."

Where, on the other hand, a factual issue has been presented for the jury's resolution concerning the circumstances under which the defendant used deadly force--as is true in the case at bar--the jury should be instructed concerning all relevant principles for which evidentiary support exists.

Second, Michigan law imposes an *affirmative obligation to retreat* upon a nonaggressor n8 only in one narrow set of circumstances: A participant in voluntary mutual combat will not be justified in taking the life of another until he is deemed to have retreated as far as safely possible. n9 One who is involved in a physical altercation in which he is a willing participant-referred to at common law as a "sudden affray" or a "chance medley"-is *required* to take advantage of any reasonable and safe avenue of retreat before [*6] using deadly force against his adversary, should the altercation escalate into a deadly encounter.**

n8 We are not concerned in this case with the use of deadly force by one who is an initial aggressor (i.e., one who is the first to use deadly force against the other), as such a person is generally not entitled to use deadly force in self-defense. See *Heflin*, 434 Mich. at 502-503; *People v Townes*, 391 Mich. 578; 218 N.W.2d 136 (1974); Perkins & Boyce, Criminal Law (3d ed), pp 1121, 1129-1133. The principles articulated in this opinion apply solely to those who are otherwise privileged to exercise deadly force in self-defense.

n9 See *People v Lenkevich*, 394 Mich. 117, 120-121; 229 N.W.2d 298 (1975); *Pond,* 8 Mich. at 174-175.

Third, regardless of the circumstances, one who is attacked in his dwelling is *never* required to retreat

where it is otherwise necessary to exercise deadly force in self-defense. When a [***7] person is in his "castle," [*121] there is no safer place to retreat; the obligation to retreat that would otherwise exist in such circumstances is no longer present, and the homicide will be deemed justifiable. This is true even where one is a voluntary participant in mutual combat. n10 Because there is no indication that this "castle doctrine" extended to outlying areas within the curtilage of the home at the time of the [**36] codification of our murder statute, however, we decline defendant's invitation to extend the doctrine in this manner; we hold instead that the doctrine is limited in application to the home and its attached appurtenances. n11

n10 See *Pond, supra* at 176.

n11 We specifically do not address whether a person may exercise deadly force in defense of his habitation, and our holding should not be misconstrued to sanction such use of force as it pertains to the defense of one's habitation. Rather, we hold only that a person is not obligated to retreat in his dwelling or its attached appurtenances before exercising deadly force in self-defense if he honestly and reasonably believes that he is in imminent danger of death or serious bodily harm. See n 3.

[***8]

II. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of August 15, 1997, defendant and two friends, Robin Carter and James Billingsley, convened at defendant's home. The three men were in the backyard just outside defendant's house, in the driveway near a detached garage, when defendant shot Carter in the legs eleven times with an automatic carbine rifle. After shooting Carter, defendant immediately drove to the Detroit River, where he disposed of the rifle. Carter, who did not have a weapon in his possession, was resuscitated at the scene but died as a result of the gunshot wounds three days later.

Although the facts in the preceding recitation are undisputed, at defendant's trial on charges of first-degree [*122] murder n12 and felony-firearm the prosecution and the defense presented different versions of the events leading to the shooting. Billingsley testified for the prosecution that after Carter made a disparaging comment about defendant's fiancee, defendant went into the house, came back outside armed with a rifle, and began firing at Carter. Billingsley stated that Carter was not armed and did not approach defendant when he came out of the house with the weapon. Defendant, [***9] on the other hand, testified that he intervened in an argument between Carter and Billingsley and that he told Carter, whom he considered to be "the more aggressive one," to leave. Seeing a "dark object" in Carter's hand and believing it to be a gun, defendant immediately reached for his rifle, which he testified was in his detached garage. Defendant stated that he aimed the rifle at Carter's legs and pulled the trigger, intending only to scare him.

n12 MCL 750.316.

Defendant requested that the jury be instructed, pursuant to CJI2d 7.17, that there is no duty to retreat in one's own home before exercising self-defense. n13 The prosecution objected, contending that the instruction was not appropriate because the shooting took place outside the home, in the curtilage. Although defendant attempted to withdraw his request for CJI2d 7.17, the trial court proceeded to [*123] rule that the instruction was not appropriate under the circumstances of the case. n14 The trial court instead instructed the [***10] jury, in accordance with CJI2d 7.16, as follows:

By law, a person must avoid using deadly force if he can safely do so. If the defendant could have safely retreated but did not do so, you can consider [**37] that fact along with all the other circumstances when you decide whether he went farther in protecting himself than he should have.

However, if the defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an [imminent] threat of death or serious injury, the law does not require him to retreat. He may stand his ground and use the amount of force he believes necessary to protect himself. n15

The jury returned a verdict of guilty of the lesser offense of second-degree murder and guilty as charged of felony-firearm. In his appeal before the Court of Appeals, defendant argued that the trial court improperly denied his request for a "no duty to retreat" instruction. The Court of Appeals panel examined this Court's decisions in *Pond v People*, 8

Mich. 150 (1860), and *People v Lilly*, 38 Mich. 270 (1878), and held that defendant had a duty to retreat if safely possible before exercising deadly [***11] **force to repel an attack unless he was inside his dwelling or an inhabited outbuilding within the curtilage. Because the shooting occurred within the curtilage but not in an inhabited outbuilding, the panel opined, the trial** [*124] **court properly refused to instruct the jury that defendant had no duty to retreat. Unpublished opinion per curiam, issued October 13, 2000 (Docket No. 212111).**

n13 **CJI2d 7.17 provides:**

> **If a person [assaulted the defendant in the defendant's own home / forcibly entered the defendant's home], the defendant did not have to try to retreat or get away. Under those circumstances, the defendant could stand [his] ground and resist the [attack / intrusion] with as much force as [he] honestly and reasonably believed necessary at the time to protect [himself].**

n14 **We assume, therefore, for purposes of this opinion that defendant's claim of error was properly preserved, despite counsel's offer to withdraw the request for CJI2d 7.17.**

n15 **The jury was also given the general self-defense standard jury instruction, CJI2d 7.15.**

[***12]

We granted leave to appeal, limited to the issue whether the trial court committed error requiring reversal in denying defendant's request to instruct the jury concerning the lack of a duty to retreat. 465 Mich. 884, 636 N.W.2d 137 (2001). Because we conclude that the trial court did not err, we affirm defendant's convictions.

III. STANDARD OF REVIEW

We are required in this case to determine under what circumstances a defendant must retreat before exercising deadly force in self-defense. This presents a question of law, which we review de novo. *People v Hamilton*, 465 Mich. 526, 529; 638 N.W.2d 92 (2002); *People v Layher*, 464 Mich. 756, 761; 631 N.W.2d 281 (2001).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich. 466, 472; 620 N.W.2d 13 (2000); *People v Mills*, 450 Mich. 61, 80-81; 537 N.W.2d 909 (1995). When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. *Rodriguez*, 463 Mich. at 472-473; [***13] **Mills, 450 Mich. at 81. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. MCL 769.26; *Rodriguez*, 463 Mich. at 473-474;** *People v Lukity*, 460 Mich. 484, 493-494; 596 N.W.2d 607 (1999) . The defendant's conviction will not be reversed unless, after examining [*125] the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative. MCL 769.26; Rodriguez, 463 Mich. at 474; Lukity, 460 Mich. at 495-496.

IV. ANALYSIS

A. PRINCIPLES OF CONSTRUCTION

Because Michigan's homicide statutes proscribe "murder" without providing [**38] a particularized definition of the elements of that offense or its recognized defenses, n16 we are required to look to the common law at the time of codification for guidance. See Const 1963, art 3, § 7; n17 *People v Couch*, 436 Mich. 414, 418-421; 461 N.W.2d 683 (1990). [***14] Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions. See *Couch*, 436 Mich. at 419, quoting *Morissette v United States*, 342 U.S. 246, 263; 96 L. Ed. 288; 72 S. Ct. 240 (1952) :

> "Where [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning [*126] its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

The criminal law, as defined at common law and codified by legislation, "should not be tampered with except by legislation," and this rule applies with equal force to common-law terms encompassed in the defenses to common-law crimes. *In Re Lamphere*, 61 Mich. 105, 109; 27 N.W. 882 (1886). Therefore, because our Legislature has [***15] not acted to change the law of self-defense since it enacted the first Penal Code in 1846, we are proscribed from expanding or contracting the

defense as it existed at common law. n18 We therefore apply the common law as it was understood when the crime of murder was codified to clarify the concepts of retreat and the castle doctrine.

n16 The Legislature has bifurcated all murder offenses into first-degree murder, MCL 750.316, and second-degree murder, MCL 750.317. The statutory description of these offenses has changed little since the first Penal Code was enacted in 1846. See *People v Couch*, 436 Mich. 414, 418-421; 461 N.W.2d 683 (1990) (opinion by BOYLE, J.).

n17 "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

n18 Thus, although we are certainly not oblivious to various policy concerns that might otherwise affect our analysis were we not constrained to apply MCL 750.317 to the facts of the case before us, we leave the task of rendering such policy judgments to the Legislature.

[***16]

B. SELF-DEFENSE AND RETREAT

1. GENERALLY APPLICABLE RULES

At common law, a claim of self-defense, which "is founded upon necessity, real or apparent," may be raised by a nonaggressor as a legal justification for an otherwise intentional homicide. 40 Am Jur 2d, Homicide, § 138, p 609. When a defendant accused of homicide claims self-defense,

the question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, [*127] honestly believe that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger? [*People v Lennon*, 71 Mich. 298, 300-301; 38 N.W. 871 (1888).]

Thus, the killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself. [**39] See *People v Daniels*, 192 Mich. App. 658, 672; 482 N.W.2d 176 (1991).

We reaffirm today that the touchstone [***17] of *any* claim of self-defense, as a justification for homicide, is *necessity*. An accused's conduct in failing to retreat, or to otherwise avoid the intended harm, may in some circumstances-other than those in which the accused is the victim of a sudden, violent attack-indicate a lack of reasonableness or necessity in resorting to deadly force in self-defense. For example, where a defendant "invites trouble" or meets non-imminent force with deadly force, his failure to pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense. n19

n19 See *People v Walters*, 223 Mich. 676, 682-683; 194 N.W. 538 (1923) (jury was properly instructed that killing was not justifiable if the defendant "renewed the affray" after the deceased abandoned it); *People v Meert*, 157 Mich. 93, 95, 100-101; 121 N.W. 318 (1909) (opining that the defendant, who carried a revolver to a saloon because he "was expecting" that he would encounter his victim there, did not act reasonably when he walked up to the victim and shot him because "ready means of escape were at hand ... and no danger was to be apprehended"); *People v Robinson*, 152 Mich. 41, 47; 115 N.W. 997 (1908) (instruction that the defendant, who assaulted a man in a barroom, had a duty to "retire" if he could safely do so unless he was attacked with a deadly weapon or was in the defense of property or others did not constitute error requiring reversal because the defendant was in a place of perfect safety when he assaulted the victim).

[***18]

[*128] However, as Judge Cardozo cautioned in *People v Tomlins*, 213 N.Y. 240, 245; 107 N.E. 496; 32 N.Y. Cr. 256 (1914), "general statements to the effect that one who is attacked should withdraw, must be read in the light of the facts that led up to them." Thus, the generally applicable element of necessity contemplates three reticulate rules that are applicable in certain specific factual scenarios.

2. THREE DEPARTURES FROM THE GENERAL RULE OF NECESSITY

a. NO DUTY TO RETREAT FROM SUDDEN, VIOLENT ATTACK

Although Michigan's common law that was codified imposes a duty to avoid using deadly force, it is clear that retreat is never required in circumstances similar to those delineated in *Beard v United States*, 158 U.S. 550; 15 S. Ct. 962; 39 L. Ed. 1086 (1895) , n20 the classic American "no duty to retreat" case: when a person is violently attacked and it does not reasonably appear that it would be safe to retreat.

n20

> [If a] defendant ... had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, *he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon*, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury. [Beard, 158 U.S. at 564 (emphasis supplied).]

[***19]

The statement of the governing principles of self-defense as set forth in ***People v Doe*, 1 Mich. 451, 456-457** [*129] **(1850), is indicative of the common-law rules that were in place when the Legislature enacted Michigan's murder statutes just four years earlier. These principles remain apropos today and have not been modified since their implicit codification more than 150 years ago:**

> ***First.* That a man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm,** [**40] **may lawfully kill the assailant, *provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm; such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.* n21**
>
> ***Secondly.* When the attack upon him is so *sudden, fierce and violent*, that a retreat would not diminish, but increase his danger, *he may instantly kill his adversary without retreating at all.***
>
> ***Thirdly.* When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or** [***20] **commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. [Emphasis supplied.]**

n21 **Thus, where a threatened attack is not *imminent*, the person being threatened may not lawfully exercise deadly force in self-defense.**

The rules of self-defense as provided in *Doe* state the obvious: If it is possible to safely avoid an attack then it is not *necessary*, and therefore not permissible, to exercise deadly force against the attacker. However, one is never obliged to *retreat* from a sudden, fierce, and violent attack, because under such circumstances a reasonable person would, as a rule, find it necessary to use force against force without retreating. The violent and sudden attack removes the [*130] **ability to retreat. n22 Where immediate danger to life or great bodily harm is threatened upon the innocent victim, he "cannot be required when hard pressed, to draw very fine distinctions concerning the extent of the** [***21] **injury that an infuriated and reckless assailant may probably inflict." *People v Brownell*, 38 Mich. 732, 738 (1878).** As Justice Holmes reasoned in *Brown v United States*, 256 U.S. 335, 343; 65 L. Ed. 961; 41 S. Ct. 501 (1921), "detached reflection cannot be demanded in the face of an uplifted knife." There, Justice Holmes concluded that "it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety ..." *Id.*, citing *Rowe v United States*, 164 U.S. 546, 558; 41 L. Ed. 547; 17 S. Ct. 172 (1896). n23

n22 To hold that an innocent person has a duty to retreat in the face of a violent assault would be tantamount to holding such a person "responsible for having brought ... necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so[.]" *Erwin v State*, 29 Ohio St. 186, 199 (1876). Indeed, the possibility of safe retreat cannot serve as a factor in determining the gravity or mortality of the peril. To so hold would be to require that the assailed "avoid the necessity by retreating before his assailant." *Palmer v State*, 9 Wyo. 40; 59 P. 793 (1900). [***22]

n23 Similarly, Wharton stated: "A man can only kill in self-defense from necessity, whether he has a right to stand his ground, or it is his duty to retreat; but in the one case he can have that necessity determined in view of the fact that he has a right to stand his ground, and on the other hand [where he is involved in the sudden affray] he must show, as one feature of the necessity, that he has retreated to the wall." Wharton, Homicide (3d ed), § 298, p 478.

In *People v Macard*, 73 Mich. 15; 40 N.W. 784 (1888), this Court reaffirmed that Michigan never recognized at common law an obligation to retreat from a sudden and violent attack before codification. In *Macard*, the defendant and his neighbor had a history of mutual animosity. The defendant was standing in or near a [*131] public road in front of his home when his neighbor began advancing toward him from across the street, carrying a gun and making threats. When the neighbor continued to advance despite the defendant's warning that he stop, the defendant shot [**41] him. At his trial for murder, the defendant [***23] asserted self-defense and argued that retreating would have exposed him to greater danger. This Court reversed the defendant's conviction of manslaughter and granted him a new trial on the basis that the trial court erred in instructing the jury that the defendant was justified in shooting "'if there was no reasonable opportunity or means of avoiding what the [defendant] anticipated as an assault with this deadly weapon":

Go which way [the defendant] would, he would only the more surely expose himself to the deadly aim of his antagonist. In such case, about the only question for the jury to determine was, did the [defendant] in good faith believe this to be his true situation? If he did, the jury should have been told [he] was fully justified. ... To hold otherwise would be to destroy the right of self-defense. *It was not necessary for the [defendant], if without fault, on being suddenly assaulted by the use of a deadly weapon upon the public highway or upon his own premises, to retreat before using his weapon.* An instant of delay might have been at the expense of his life, and the law requires no man to run such risks. [73 Mich. at 21-22 (emphasis supplied).]

b. [***24] THE DUTY TO RETREAT: SUDDEN AFFRAY OR CHANCE MEDLEY

Michigan law imposes an *affirmative obligation* to retreat, where safely possible, in one narrow set of circumstances: where a defendant-who is not in his "castle"- is voluntarily engaged in mutual, nondeadly [*132] combat that escalates into sudden deadly violence. This represents the *only* type of situation in which the English common law imposed upon a defender an affirmative duty to "retreat to the wall," Pond, 8 Mich. at 174-175; *Erwin, supra* at 195; Perkins & Boyce, Criminal Law (3d ed), pp 1121-1123, 1126, and it is apparent from our case law that Michigan adhered to this rule at the time of the codification of our murder statute.

As explained by Professors Perkins and Boyce, by reference to Foster, Crown Law (1762), the use of deadly force in self-defense at English common law was considered in light of the different positions of the parties involved. The first scenario involved a defendant who was without fault:

One, entirely free from fault, is the victim of an assault which was murderous from the beginning. He is under no obligation to retreat ... but may stand his ground, and *if he reasonably* [***25] *believes it necessary to use deadly force to save himself from death or great bodily harm, he is privileged to do so.* [Perkins & Boyce, *supra* at 1121 (emphasis supplied).]

Thus, at common law the innocent victim of a murderous assault had no affirmative duty to retreat; instead, if he reasonably believed that it was necessary under the circumstances to exercise deadly force, he could kill his assailant in self-defense. This rule is consistent with the generally applicable rules of self-defense as codified in Michigan's murder statutes, as discussed above. See ***Macard*, 73 Mich. at 21-22; Lennon, 71 Mich. at 300-301; Brownell, 38 Mich. at 738; Pond, 8 Mich. at 177-178.**

However, an affirmative obligation to retreat applied to a voluntary participant in mutual combat:

[*133] **One who was the aggressor in a chance-medley (an ordinary fist fight, or other nondeadly encounter), or who culpably entered into such an engagement, finds that his adversary has suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force. *This ... is the only type of*** [**42] ***situation which requires "retreat to the wall."* Such a defender,** [***26] **not being entirely free from fault, must not resort to deadly force if there is any other reasonable method of saving himself. Hence if a reasonable avenue of escape is available to him he must take it *unless he is in his "castle"* at the time. [Perkins & Boyce, *supra* at 1121 (emphasis supplied).]**

Thus, the original concept of a "'duty to retreat to the wall' applied not to the innocent victim of a murderous assault, but only to the culpable participant of a chance-medley." Perkins & Boyce,

supra at 1225. n24 This principle was recognized by this Court in *Pond*, 8 Mich. at 175-176:

In [cases in which a defensive homicide occurred in a sudden affray], the original assault not being with a felonious intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused unless the slayer does all which is reasonably in his power to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape.

Accordingly, we [***27] conclude that at the time of the codification of our first murder statute in 1846, the common-law rule in Michigan recognized only one [*134] instance in which an affirmative, specific duty to retreat applied, namely, when the defendant was the voluntary participant in mutual combat. n25

n24 It appears clear enough to us that "courts which adopted [a] 'no-retreat rule' [were] frequently under the false impression that this required departure from the English common law." Perkins & Boyce, *supra* at 1137.

n25 Perkins refers to a third situation that is not relevant to the matter at hand: "One who starts an encounter with a murderous assault upon another, or who willingly engages in mutual combat with malice aforethought ... has forfeited all right of self-defense during that contest." Perkins & Boyce, *supra* at 1121. That is consistent with the Michigan rule that one who is an aggressor may not avail himself of the defense. See *Heflin, supra* at 509. See also n 8.

c. THE "CASTLE" [***28] DOCTRINE

i. RETREAT IS NOT A FACTOR IN ONE'S DWELLING

It is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling:

Regardless of any general theory to retreat as far as practicable before one can justify turning upon his assailant and taking life in self-defense, the law imposes no duty to retreat upon one who, free from fault in bringing on a difficulty, is attacked at or in his or her own dwelling or home. Upon the theory that a man's house is his castle, *and that he has a right to protect it and those within it from intrusion or attack*, the rule is practically universal that when a person is attacked in his own dwelling he may stand at bay and turn on and kill his assailant if this is apparently necessary to save his own life or to protect himself from great bodily harm. [40 Am Jur 2d, § 167, p 636.]

The rule has been defended as arising from "'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.'" *People v Godsey*, 54 Mich. App. 316, 319; 220 N.W.2d 801 (1974) [***29] (citations omitted). Moreover, in a very real sense a person's [*135] dwelling is his primary place of refuge. Where a person is in his "castle," there is simply *no safer place* to retreat.

[**43]

ii. THE REACH OF THE CASTLE DOCTRINE

Defendant, who was outside his home in the driveway or yard between the home and a detached garage at the time of the homicide, contends that he was wholly excused from any obligation to retreat because he was in his "castle." We disagree and hold that the castle doctrine, as it applied in this state and as was codified in our murder statute in 1846, applies solely to the dwelling and its attached appurtenances. Although many courts have extended the castle exception to other areas, n26 we conclude that there is simply no basis in the case law of this state, contemporaneous with the enactment of our initial murder statute, to justify extending the rule in this manner.

n26 The majority of jurisdictions employing the castle doctrine have extended the doctrine to the curtilage surrounding the home. See Dressler, Understanding Criminal Law (3d ed), § 18.02[C][3], p 228. The doctrine has also been extended in several jurisdictions to numerous areas away from the dwelling: cars, businesses, and homes owned by third parties, to name a few. Because the Legislature codified the common-law rules as they existed in 1846, this Court has no authority to act on different policy determinations concerning the expansion of the castle doctrine. Thus, we leave it to the Legislature to decide whether there are other places in which a defendant's failure to retreat

cannot be considered as a factor in determining whether it was necessary for him to exercise deadly force in self-defense. We note that many states have legislatively addressed the self-defense and retreat issues that are presented in this case. See, e.g., Model Penal Code, § 3.04; Ala Code, § 13A-3-23 (1982); Conn Gen Stat, § 53a-19.

[***30]

It is unknown whether the English common law applied the castle doctrine-which, as we have noted, was relevant only to the voluntary participant in a nondeadly encounter-to areas beyond the dwelling. [*136] As noted by Professors Perkins and Boyce, "the scope of [the] special privilege granted to one so far at fault might have been limited to the actual building [but this] is mere speculation." *Id.* at 1134-1135. Because the only indication we have of the castle doctrine as it applied in Michigan at the time of the codification of our murder statute is that it applied "*in the dwelling*," *Pond,* 8 Mich. at 176 (emphasis supplied), we lack the authority to now extend this rule to areas beyond "the dwelling" itself.

Defendant contends that this Court's statements in *Pond* indicate that Michigan's common law extended the castle doctrine to the curtilage surrounding the home. However, we agree with the prosecution's contention that *Pond* did not in any way purport to extend the self-defense castle exception to the curtilage area surrounding the dwelling. n27 With respect to [**44] self-defense, this Court explained in *Pond* that

[*137] the danger resisted must be to life, [***31] or of serious bodily harm of a permanent character; and it *must be unavoidable by other means*. Of course, we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time.

A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary *to repel the assailant from his house, or to prevent his forcible entry*, even to the taking of life. But here, as in the other cases, he must not take life if he can otherwise arrest or repel the assailant. [Emphasis supplied.]

This statement of the castle rule, taken from a case issued quite contemporaneously with the enactment of our murder statute, provides no basis from which to conclude that the rule applied anywhere but "in [the] dwelling," that is, an inhabited building and its attached appurtenances. n28

n27 The *Pond* Court held that, for the purpose of the defendant's claim that he killed the victim in resisting a violent and forcible felony upon a dwelling, an outlying net- house was "a dwelling or part of the dwelling" of the defendant because it was near the dwelling house and was used as a permanent dormitory for his servants. 8 Mich. at 181-182; see also 8 Mich. at 164-167. Because this Court considered the net-house to be a dwelling not for the purpose of the self-defense castle doctrine but instead for the purpose of a completely different defense, this holding is not relevant to our inquiry. Moreover, whether this outlying *building* would have been considered a "dwelling" for the purpose of self-defense is not an inquiry that aids us in determining whether the castle doctrine applies to open areas within the curtilage. Because the Court of Appeals cited *Pond* for the proposition that the self-defense castle exception-providing that no person is required to retreat within his dwelling before exercising self-defense-extends to "inhabited outbuildings," we wish simply to point out that (1) *Pond* does not stand for this proposition and (2) as the case at bar does not involve an inhabited *outbuilding*, we need express no opinion concerning whether the castle doctrine would apply to such a building. [***32]

n28 Contemporaneous dictionary definitions wholly support our conclusion. See, e.g., Worcester, *Dictionary of the English Language* (Brewer and Tileston, 1864), defining "dwelling" as "habitation; place of residence; residence; abode; dwelling-place"; *Webster's American Dictionary of the English Language* (1828) (accord); *The Oxford English Dictionary* (1989), providing examples of the usage of the word "dwelling" from the years 1340 through 1863 as meaning "[a] place of residence; a dwelling-place, habitation, house."

Pond, therefore, does not allow us to conclude that the castle doctrine, so far as it was a part of the common law of this state when our murder statute was enacted, extended to the curtilage surrounding the dwelling. Instead, by providing essentially the sole indication, contemporaneous with the enactment of

the murder statute, concerning whether and to what extent any duty to retreat existed in our common law, *Pond* establishes that the castle doctrine applies in this State only to a residence. Thus, for example, while the castle doctrine applies to all areas [***33] of a [*138] dwelling-be it a room within the building, a basement or attic, or an attached appurtenance such as a garage, porch or deck-it does *not* apply to open areas in the curtilage that are not a part of a dwelling.

Defendant additionally argues that *Lilly* provides a basis for extending the castle exception to the curtilage. In *Lilly*, the defendant was attacked at night on his property in a passageway between his house and a new house that he was constructing. The defendant stabbed and killed the attacker, a farmhand whom he had recently discharged and who had earlier that day threatened the defendant with extreme personal violence. At the defendant's trial for murder, the trial court instructed the jury as follows:

"If you find that ... [the defendant] could have saved himself from all serious harm by retreating or calling for assistance, and the defendant so knew or believed, but that he did not do so; but stood his ground and resisted [the farmhand], and in such resistance killed [him], such killing would not be justifiable or excusable.

"If [the defendant] believed that [the farmhand] came to his premises on the evening of the homicide with the intention [***34] of seeking a combat with him, and that he sought him for that purpose and the defendant so knew, then it was [the defendant's] duty to have avoided [him], and to have avoided such combat by all reasonable means within his power, and if he chose to stand up and resist the assault when he might have avoided it, ... such killing would not be justifiable." [38 Mich. at 275.]

[**45] This Court set aside the defendant's conviction for manslaughter and ordered a new trial, holding that the jury instructions improperly suggested to the jury that the facts would warrant findings that were not supported by the evidence, "especially that defendant did not make reasonable efforts to avoid deceased [*139] and avert his attack." *Id.* Furthermore, this Court held, the instructions were improper because they indicated to the jury ... [that] it was incumbent upon [the defendant] to fly from his habitation where his wife and children were, in order to escape danger instead of resisting the aggressor. Such is not the law. The jury should have been instructed in effect that if they were satisfied that [the defendant] being at his own house had reason to believe and did believe from [the farmhand's] [***35] previous and present language, manner and actions, and what had already taken place, that it was necessary to inflict the wounds he did inflict ... to save his own life or to protect himself from danger of great bodily harm, he was excused.

... The charge was inconsistent with the view here explained, and it conveyed the idea that if help was within call and that defendant so believed, then his act was not lawful self-defense. [38 Mich. at 275-276.]

We do not agree with defendant's assertion that *Lilly* abrogates the necessity element of self-defense where the accused kills an assailant within the curtilage of his dwelling. Instead, *Lilly* reaffirms that the fundamental inquiry with respect to a claim of self-defense is whether the defendant reasonably believed that it was *necessary* to utilize deadly force against his aggressor. *Lilly* further establishes that the defendant was not required to leave his premises-thereby subjecting his wife and children to danger in his absence-or to seek aid from third parties. *Lilly* simply did not involve the castle exception. In short, there is no basis in our case law for supposing that Michigan ever recognized an extension [***36] of the doctrine beyond the inhabited "dwelling" itself at the time the common-law rules were codified. Instead, we adhere to this Court's formulation of the doctrine in Pond, 8 Mich. at 176, that "[a] man is not ... obliged to [*140] retreat if assaulted *in his dwelling*" (emphasis supplied). Thus, the castle doctrine is relevant only to acts of self-defense that take place in the dwelling; the doctrine has no application to "a conflict outside the home." *People v Stallworth*, 364 Mich. 528, 535; 111 N.W.2d 742 (1961) . n29

n29 Accordingly, in *Stallworth*, this Court held that the jury's rejection of the defendant's claim of self-defense, resulting in a verdict of guilty of manslaughter, was not against the great weight of the evidence where there was testimony that the killing took place on the sidewalk outside the defendant's dwelling: This testimony portrayed "a conflict *outside the home* where it would have been possible for the jury to conclude that defendant *might have retreated* to avoid further trouble." *Id.* at 535 (emphasis supplied).

[***37]

C. APPLICATION

In this case, defendant requested that the jury be instructed in accordance with CJI2d 7.17, which is titled "No Duty to Retreat While in Own Dwelling" and which provides that a person assaulted in his own home does "not have to try to retreat or get away," but may "stand his ground and resist the attack." The trial court denied defendant's request and instead instructed the jury in accordance with CJI2d 7.16, which is titled "Duty to Retreat to Avoid Using Deadly Force." We hold that defendant was not entitled to the requested instruction. Defendant was not in his dwelling or an attached appurtenance when he killed Carter. He was outside his home in the yard. [**46]

Nevertheless, as we have explained, defendant was entitled to an instruction that adequately conveyed to the jury that he was not required to retreat if it was *necessary* for him to exercise deadly force under the circumstances as they reasonably appeared to him. While we suggest that CJI2d 7.16 be revised to further [*141] comport with the principles expressed in this opinion, the language of the instruction accurately conveyed to defendant's jury that the baseline inquiry is *necessity*:

By law, a person [***38] must avoid using deadly force if he can safely do so. If the defendant could have safely retreated but did not do so, you can consider that fact along with all the other circumstances when you decide whether he went farther in protecting himself than he should have.

However, *if the defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an [imminent] threat of death or serious injury, the law does not require him to retreat.* He may stand his ground and use the amount of force he believes necessary to protect himself.

This instruction was properly given under the circumstances of this case. Pursuant to this instruction, the jury was permitted only to consider whether defendant could have *safely* retreated under the circumstances as they reasonably appeared to him. The second portion of this instruction further emphasized that there is never a duty to retreat if the accused reasonably and honestly believes that he is in imminent harm and that it is necessary to exercise deadly force. n30 Moreover, the jury was given a comprehensive [*142] general self-defense instruction (CJI2d 7.15) that further explained the relevant [***39] principles and additionally permitted the jury to "consider how the excitement of the moment affected the choice the defendant made" in exercising deadly force.

n30 There might be circumstances in which an instruction permitting the jury to consider a defendant's failure to retreat would be improper; for instance, if the defendant was inside his dwelling when he was attacked or if the undisputed evidence established that he was suddenly and violently attacked. See, e.g., Macard, 73 Mich. at 20. In such a case there would be no basis for an instruction allowing the defendant's failure to retreat to be considered in determining whether he acted in lawful self-defense. In the instant case, the parties disputed whether defendant had any reason whatsoever to believe that he was in danger. Thus, it was properly within the province of the jury to determine whether defendant honestly and reasonably believed that it was necessary to exercise deadly force.

V. CONCLUSION

We hold that the cardinal rule, applicable [***40] to *all* claims of self-defense, is that the killing of another person is justifiable homicide if, under all the circumstances, the defendant honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. As part and parcel of the "necessity" requirement that inheres in every claim of lawful self-defense, evidence that a defendant could have safely avoided using deadly force is normally relevant in determining whether it was *reasonably necessary* for him to kill his assailant. However, (1) one who is without fault is *never* obligated to retreat from a sudden, violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative "duty to retreat" only upon one who is at fault in voluntarily participating in mutual nondeadly combat; and (3) the "castle doctrine" permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long [**47] as it is otherwise reasonably necessary to exercise deadly force.

Defendant [***41] was not entitled to a "castle exception" instruction in this case because he was in his yard and not in his dwelling when he used deadly force. However, defendant was entitled to an instruction [*143] that adequately conveyed to the jury that, although he was required to avoid using deadly force if possible, he had no obligation to

retreat if he honestly and reasonably believed that he was in imminent danger of great bodily harm or death and that it was necessary to use deadly force in self-defense. The standard jury instruction that was given adequately imparted these principles. Accordingly, we vacate the decision of the Court of Appeals in part and affirm defendant's convictions for the reasons expressed in this opinion.

CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

CAVANAGH and KELLY, JJ., concurred in the result only. T

12 of 51 DOCUMENTS

LINDA MACK, Plaintiff-Appellee, v THE CITY OF DETROIT, a Michigan Municipal Corporation, Defendant-Appellant.

No. 118468

SUPREME COURT OF MICHIGAN

467 Mich. 186; 649 N.W.2d 47; 2002 Mich. LEXIS 1422

January 23, 2002, Argued

July 31, 2002, Decided

July 31, 2002, Filed

PRIOR HISTORY:
[***1] Wayne Circuit Court, John A. Murphy, J. Court of Appeals, HOOD, P.J., and CAVANAGH, J. (SAWYER, J., dissenting), 243 Mich App 132 (2000) (Docket No. 214448).

DISPOSITION:
Reversed and remanded.

COUNSEL:
Macuga & Liddle, P.C. (by Peter W. Macuga, II, and David R. Dubin) [Detroit, MI], for the plaintiff-appellee.

City of Detroit Law Department (by Daryl Adams and Valerie A. Colbert-Osamuede) [Detroit, MI], for the defendant-appellant.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J., CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J. WEAVER, J. (dissenting). KELLY, J., concurred with WEAVER, J.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[**49] [*189]

YOUNG, J.

Plaintiff alleges in this action that she was discriminated against in her employment as a Detroit police officer on the basis of her sex and sexual orientation in violation of the declaration of rights contained in the Charter of the city of Detroit. Plaintiff further contends that the charter creates a private cause of action allowing [***2] recovery for violation of the rights set forth in it. Assuming the charter provides no explicit private right of recovery, plaintiff alternatively urges this Court to create, as a cumulative remedy available under the charter, such a cause of action.

We hold that regardless of whether the charter provides a private cause of action against the city for [*190] sexual orientation discrimination, such a cause of action would contravene the governmental tort liability act (GTLA), MCL 691.1407. Accordingly, we do not accept plaintiff's [**50] invitation to recognize such a cause of action.

Further, because the plaintiff failed to plead a recognized claim in avoidance of governmental immunity, her sexual orientation discrimination claim should have been dismissed. Governmental immunity is a characteristic of government and thus a plaintiff must plead her case in avoidance of immunity. To the extent that it holds otherwise, *McCummings v Hurley Medical Ctr,* 433 Mich. 404; 446 N.W.2d 114 (1989), is overruled.

Accordingly, we reverse the Court of Appeals decision, reinstate the trial court's order of summary disposition in favor of the city of Detroit [***3] regarding the sexual orientation claim, and remand the case to the Court of Appeals for reconsideration of the sex discrimination claim in light of this opinion. n1

n1 The city appealed the Court of Appeals holding that the courts could recognize a private cause of action for sexual orientation discrimination under the city charter, but not the court's resolution of plaintiff's sex discrimination claim. For this reason, we remand the case to that Court for reconsideration of plaintiff's charter-based sex discrimination claim in light of this opinion.

I. Facts and Procedural History

In 1974, plaintiff was hired by the city as a police officer. During the course of her employment, she attained the status of lieutenant and held the positions of acting inspector, acting command lieutenant, acting administrative lieutenant, and acting inspector of the sex crimes unit. The claims before the Court [*191] arose during plaintiff's tenure with the sex crimes unit.

Plaintiff alleges that, while working in the sex crimes [***4] unit, she was repeatedly propositioned by male supervisors for sex and that she rebuffed the unwelcome advances, in part because she is a lesbian. Plaintiff complained to her superiors, who allegedly refused to take any action because of her sexual orientation. Plaintiff also claims that she endured further discrimination and harassment as a result of her sexual orientation. Specifically, she complains that the police department gave her an afternoon desk job answering phones, prohibited her from participating in any investigative work, and restricted her from taking more than two weekends off a month. She has since retired from the police force.

Plaintiff filed suit, alleging intentional infliction of emotional distress and violations of the charter of the city of Detroit. Regarding the latter claims, plaintiff maintained that the city violated § 2 of the charter's declaration of rights by discriminating on the basis of sex and sexual orientation. n2 The city moved for summary disposition, asserting that plaintiff failed to state a claim upon which relief can be granted, MCR 2.116(C)(8). Specifically, the city argued that plaintiff's tort claims were barred by governmental immunity [***5] and that the city charter did not give plaintiff a [*192] private cause of action. The trial court agreed with the city and granted its motion for summary disposition. Plaintiff appealed, arguing that the violation of the rights guaranteed by the city charter created a private cause of action. n3

n2 Section 2 provides:

The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation.

n3 Plaintiff elected not to appeal the trial court's ruling dismissing the intentional infliction of emotional distress claim. Therefore, those claims are not before this Court.

In a two-to-one decision, the Court of Appeals reversed, holding that plaintiff [**51] had a private cause of action for sex and sexual orientation discrimination. The majority [***6] reasoned that there is an express civil right to be free from employment discrimination based on one's sex arising under the Civil Rights Act, MCL 37.2101 *et seq.*, and that the city extended that protection to its charter. n4 Relying on *Pompey v General Motors,* 385 Mich. 537; 189 N.W.2d 243 (1971), the majority concluded that equal opportunity in the pursuit of employment was a protected right, and because the city extended that protection to include sexual orientation discrimination, the courts could recognize, as a cumulative remedy, a civil action for such a claim.

n4 243 Mich. App. 132; 620 N.W.2d 670 (2000).

The dissent opined that it was not clear that a city had authority to create a cause of action and questioned whether *Pompey* should be extended to rights created by city charters.

The city appealed the Court of Appeals holding that the judiciary could recognize a private cause of action for sexual orientation discrimination. [***7] We granted leave to appeal. 464 Mich. 874, 630 N.W.2d 624 (2001).

[*193] II. Standard of Review

The issues presented are whether the city charter may create a cause of action against the city for sexual orientation discrimination in the face of state governmental immunity law and whether governmental immunity is an affirmative defense or a characteristic of government so that a plaintiff must plead in avoidance of it. These are questions of law that the Court reviews de novo. *Burt Twp v Dep't of Natural Resources*, 459 Mich. 659, 662-663; 593 N.W.2d 534 (1999). We also review a trial court's decision to grant or deny a motion for summary disposition de novo. *Beaudrie v Henderson*, 465 Mich. 124, 129; 631 N.W.2d 308 (2001). Because this is a motion for summary disposition brought under MCR 2.116(C)(8), we test the legal sufficiency of the complaint on the basis of the pleadings alone. *Id.*

III. Discussion

A. Governmental Immunity

Plaintiff contends that the charter expressly creates a private cause of action for sexual orientation discrimination. n5 However, whether the charter attempted to create a private cause of [***8] action for sexual orientation [*194] discrimination is an irrelevant inquiry because we hold that the charter *could not* create a cause of action against the city without contravening state governmental immunity law. n6

n5 In the alternative, plaintiff urges this Court to extend the holding in *Pompey* to recognize a cumulative remedy for sexual orientation discrimination under the charter. We decline to do so. Rather, we conclude that *Pompey* is inapplicable to the case before us. *Pompey* contemplated a cumulative remedy for discrimination in *private* employment, whereas plaintiff in this case seeks to impose liability on a *municipality*. Accordingly, unlike the Court in *Pompey*, we must address whether governmental immunity precludes the Court from recognizing a private cause of action for a municipality's tortious conduct except as expressly authorized by the Legislature.

n6 Justice CAVANAGH's assertion that whether the charter creates a cause of action is a relevant inquiry because its answer affects causes of actions against nongovernmental entities ignores the fact that our opinion pertains only to actions against governmental entities. Because we are only addressing the creation of a cause of action against *a governmental entity*, whether the charter does or does not create such an action is ultimately irrelevant because the GTLA does not permit such an action. Our opinion does not address, as Justice CAVANAGH curiously alleges, whether a city can create a cause of action against *nongovernmental entities*.

We also point out that discrimination claims have always been characterized as a species of statutory tort. *Donajkowski v Alpena Power Co*, 460 Mich. 243, 247; 596 N.W.2d 574 (1999). Consequently, Justice CAVANAGH's suggestion that a charter discrimination claim might not fall within the ambit of the GTLA is without foundation.

[***9] [**52]

Const 1963, art 7, § 22 governs the authority of a city to enact a charter:

Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]

Thus, although art 7, § 22 grants broad authority to municipalities, it clearly subjects their authority to constitutional and statutory limitations. n7

n7 This constitutional limitation on a municipality's authority is repeated in the Home Rule City Act, most emphatically in MCL 117.36, which states:

No provisions of any city charter shall conflict with or contravene the provisions of any general law of the state.

See also MCL 117.4j(3), which governs permissible charter provisions:

[Each city may in its charter provide] for the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants

and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns *subject to the constitution and general laws of this state.* [Emphasis added.]

[***10] [*195]

One such statutory limitation involves governmental immunity. In the governmental tort liability act (GTLA), the Legislature expressly stated that "except as otherwise provided in this act, a governmental agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Accordingly, a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government. The GTLA allows suit against a governmental agency in only five areas. n8 However, there are other areas outside the GTLA where the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act. n9 Further, municipalities may be liable pursuant to 42 USC 1983. *Monell v New York City DSS*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

n8 The five statutory exceptions to governmental immunity are the "highway exception," MCL 691.1402, the "motor vehicle exception," MCL 691.1405, the "public building exception," MCL 691.1406, the "proprietary function exception," MCL 691.1413, and the "governmental hospital exception," MCL 691.1407(4). [***11]

n9 MCL 37.2103(g) and 37.2202(a); see *Manning v Hazel Park*, 202 Mich. App. 685, 699; 509 N.W.2d 874 (1993) (governmental immunity is not a defense to a claim brought under the Civil Rights Act).

[*196] However, none of the exceptions where a suit is allowed against the government can be read to allow suit for sexual orientation discrimination. Likewise, no statute grants governmental agencies the authority to create an immunity exception for sexual orientation discrimination or waive immunity in the area of civil rights. Notably, the CRA, which makes a [**53] municipality liable for specific civil rights violations, neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one. MCL 37.2101 *et seq. n10 Moreover, the CRA limits complaints to causes of action for violations of the act itself:*

A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1) (emphasis [***12] added).] n11

n10 Indeed, as this Court has consistently held since its seminal case, *Ross*, exceptions to governmental immunity are narrowly construed. See, e.g., *Haliw v Sterling Heights*, 464 Mich. 297, 303; 627 N.W.2d 581 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 149; 615 N.W.2d 702 (2000); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich. 567, 618; 363 N.W.2d 641 (1984). Consequently, because the CRA does not recognize sexual orientation discrimination, that act cannot be construed as providing a basis for governmental agencies to create such a cause of action.

n11 We make no determination regarding the validity of the city's attempt in its charter to provide a cause of action for sex discrimination, a protection similarly provided by the CRA. That claim is not before us. However, in keeping with this opinion, we note that, at least in regard to governmental immunity, a city may not alter in any respect its liability excepted from governmental immunity by the Legislature without express authority to do so.

[***13]

In sum, without some express legislative authorization, the city *cannot* create a cause of action against itself in contravention of the broad scope of governmental immunity established by the GTLA. No such legislative act has recognized sexual orientation discrimination [*197] claims. Accordingly, this Court declines to circumvent the limitations placed on a municipality by the Legislature and recognize a cause of action against the city for sexual orientation discrimination. n12

n12 To be certain, we emphasize that our opinion does *not* address whether a city can create rights, protect against discrimination, or create a cause of action against a nongovernmental entity. Preemption of civil rights, by either the constitution or the Civil Rights Act, is not addressed by our opinion. Rather, our analysis concerns only governmental immunity and the city's lack of authority *to create a cause of action against a governmental entity* in light of state governmental immunity law.

> Accordingly, should there be any question concerning the scope of our holding, we hold that any attempt by the city to create a cause of action against itself in its charter for sexual orientation discrimination is preempted by the governmental tort liability act. We have not addressed whether the CRA preempts a city from creating additional civil rights or protecting them through means other than the creation of a private cause of action, nor have we addressed whether a city can create a cause of action against a nongovernmental defendant. Those questions are not before us.

[***14]

B. A City Cannot Waive Governmental Immunity

Because the city abandoned its assertion of governmental immunity to this Court and the law regarding the nature of governmental immunity has been misguided for some time, we will address the viability of plaintiff's complaint here as it pertains to governmental immunity. n13

> n13 We note that the city raised governmental immunity as a defense in the trial court, but failed to argue this issue in the Court of Appeals or in this Court. In light of our holding that governmental immunity is not an affirmative defense, but a characteristic of government, failure to assert its immunity on appeal does not preclude the Court from considering it now.

1. The Nature of Governmental Immunity

A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise [*198] or discharge of a governmental function. MCL 691.1407(1). This Court has taken steps to clarify the origin and history of [**54] governmental immunity, most [***15] recently in *Pohutski v Allen Park*, 465 Mich. 675; 641 N.W.2d 219 (2002). See also *Ross v Consumers Power (On Rehearing)*, 420 Mich. 567; 363 N.W.2d 641 (1984). The Court does not need to reiterate that history today, but we take this opportunity to clarify that governmental immunity is a characteristic of government. *Canon v Thumudo,* 430 Mich. 326; 422 N.W.2d 688 (1988); *Hyde v Univ of Michigan Regents*, 426 Mich. 223; 393 N.W.2d 847 (1986); *McCann v Michigan*, 398 Mich. 65, 247 N.W.2d 521 (1976); *Markis v Grosse Pointe Park*, 180 Mich. App. 545; 448 N.W.2d 352 (1989); *Ross,* 420 Mich. at 621 n.34; *Galli v Kirkeby,* 398 Mich. 527, 532, 540-541; 248 N.W.2d 149 (1976). As such, plaintiff must plead her case in avoidance of immunity. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492, 499; 638 N.W.2d 396 (2002); *Haliw v Sterling Heights*, 464 Mich. 297, 304; 627 N.W.2d 581 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 172, n 29; 615 N.W.2d 702 (2000); [***16] Ross, 420 Mich. at 621, n 34. To the extent that it holds otherwise, *McCummings v Hurley Medical Ctr*, 433 Mich. 404; 446 N.W.2d 114 (1989), is overruled.

Until 1989, it was well established in Michigan that governmental immunity was a characteristic of government. See, e.g., *Hyde* n14 and *Canon.* n15 In *McCann*, [*199] Justice RYAN stated that a plaintiff must plead facts in avoidance of immunity, reasoning:

> At first impression, it may appear appropriate to characterize governmental immunity as an affirmative defense. However, a careful analysis of the doctrine as construed by this Court indicates that, to plead a cause of action against the state or its agencies, the plaintiff must plead and prove facts in avoidance of immunity. In *McNair v State Highway Dep't*, 305 Mich. 181, 187; 9 N.W.2d 52 (1943), for instance, we held that the state's failure to plead sovereign immunity will not constitute a waiver because "failure to plead the defense of sovereign immunity cannot create a cause of action where none existed before." In *Penix v City of St Johns*, 354 Mich. 259; 92 N.W.2d 332 (1958), [***17] we held that a complaint which contained no averment that the defendant was engaging in a proprietary function, and which in fact alleged activity to which governmental immunity applied, stated no cause of action against the municipality. Thus, although we have on occasion referred to governmental immunity as a defense, see [*McNair*]; *Martinson v Alpena*, 328 Mich. 595, 599; 44 N.W.2d 148 (1950), our past treatment of the doctrine indicates that its inapplicability is an element of a plaintiff's case against the state. [McCann, 398 Mich. at 77, n 1 (opinion of RYAN, J.).]

This reasoning was reiterated nearly ten years later in *Ross*:

> In [*Galli*], four members of this Court held that plaintiffs must plead facts in their complaint in avoidance of immunity, i.e., they must allege facts which would justify a finding that the [**55] alleged tort does not fall within the concept of sovereign or governmental immunity. This may be accomplished by stating a claim which fits within one of the statutory exceptions or pleading facts which demonstrate that the tort occurred during the exercise or discharge [***18] of a non-governmental or proprietary function. See [McCann, 398 Mich. at 77]. Sovereign and governmental immunity are not affirmative defenses, but characteristics of

government which prevent imposition of tort liability upon the govern [*200] mental agency. Galli, 398 Mich. at 541 n.5; McCann, 398 Mich. at 77 n.1. [Ross, 420 Mich. at 621 n.34.]

> n14 "Unlike other claims of immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability." 426 Mich. at 261, n 35 (citations omitted).
>
> n15 "Unlike a claim of individual immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability. A plaintiff therefore bears the burden of pleading facts in the complaint which show that the action is not barred by the governmental immunity act." 430 Mich. at 344, n 10.

However, in *McCummings,* this Court departed from years of precedent [***19] and concluded that governmental immunity is an affirmative defense rather than a characteristic of government. The *McCummings* Court reasoned:

The pronouncements in *Hyde* and *Canon* clearly do not square with the statement in *Ross* that "sovereign and governmental immunity from tort liability exist only when governmental agencies are 'engaged in the exercise or discharge of a governmental function.'" If it takes a legislative decree for immunity to exist, and then only under circumstances defined by the Legislature, how can it be said that sovereign or governmental immunity is a "characteristic of government?"

We are persuaded that the reasoning in *Ross* is correct, i.e., that immunity from tort liability exists only in cases where the governmental agency was engaged in the exercise or discharge of a governmental function. The question whether a governmental agency was engaged in a governmental function when performing the act complained of is a question best known to the agency and best asserted by it. It naturally follows that plaintiffs need not plead facts in avoidance of immunity, but that it is incumbent on the agency to assert its immunity as an affirmative [***20] defense. The fact that the source of the immunity is a legislative act makes the contention of immunity no less a matter for assertion as an affirmative defense.

We are also persuaded that there is no sound basis for requiring individuals, but not agencies, to assert governmental immunity as an affirmative defense. The source of the immunity from tort liability is the same. MCL 691.1407. Nor do we perceive any basis for treating the alleged immunity of a governmental agency any differently, for pleading purposes, from any other type of immunity granted by law. [*201] Immunity must be [pleaded] as an affirmative defense. [433 Mich. at 410-411.] n16

See also *Scheurman v Dep't of Trans*, 434 Mich. 619; 456 N.W.2d 66 (1990); *Tryc v Michigan Veterans' Fund*, 451 Mich. 129; 545 N.W.2d 642 (1996).

> n16 The *McCummings* Court also amended MCR 2.111(F)(3) to reflect its holding. 433 Mich. at 412.

We conclude that *McCummings* was wrongly [***21] decided and, returning to our prior precedent, overrule *McCummings'* conclusion that governmental immunity is an affirmative defense. MCL 691.1407(1) states, "except as otherwise provided in this act, a governmental agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function." Thus, by its terms, the GTLA provides that unless one of the five statutory [**56] exceptions applies, a governmental agency *is* protected by immunity. The presumption is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiff's case falls within a statutory exception. As such, it is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions.

In addition to the textual support for this conclusion in the language of the GTLA, we note that the *McCummings* Court relied on a substantively flawed analysis in reaching the contrary opinion. First, the *McCummings* Court's reliance on *Ross* to support its conclusion that governmental immunity is an affirmative defense is perplexing, given that *Ross* [***22] itself described governmental immunity as a characteristic of government. 420 Mich. at 621, n 34. Second, in support of its analysis the *McCummings* Court asked, "If it takes a legislative decree for immunity to exist, and then [*202] only under circumstances defined by the Legislature, how can it be said that sovereign or governmental immunity is a 'characteristic of government?'" 433 Mich. at 410-411.

In response, we merely observe that, historically, Michigan recognized at common law governmental immunity for all levels of government until *this Court* chose to abrogate governmental immunity for

municipalities in 1961. *Williams v Detroit*, 364 Mich. 231; 111 N.W.2d 1 (1961). In response to *Williams* and the possibility that this Court would further erode the remaining common-law governmental immunity for counties, townships, and villages, the Legislature enacted the Governmental Immunity Act of 1964 (GIA), thereby *reinstituting* governmental immunity protection for municipalities and preserving sovereign immunity for the state. In effect, the GIA restored the *Williams* status quo ante. *Pohutski, supra* at 682. Thus, contrary to [***23] *McCummings*, it did not take a legislative decree to *create* governmental immunity, but a legislative act to *preserve* the doctrine that this Court had historically recognized as a characteristic of government. The *McCummings* suggestion that governmental immunity could not be a characteristic of government because it was created by legislation misapprehends the history of the Court's actions and the legislative response. We believe that once the sequence of the judicial and legislative events is grasped, the analytical flaw at the root of *McCummings* is apparent. n17 [*203]

For these reasons, n18 we overrule *McCummings* n19 to this extent and return [**57] to the longstanding principle extant before *McCummings* that, governmental immunity being a characteristic of government, a party suing a unit of government must plead in avoidance of governmental immunity. n20

n17 More important, notwithstanding that governmental immunity is now established by a legislative act rather than the common law, we hold that the Legislature is within its inherent constitutional authority to structure governmental immunity solely as it deems appropriate. Where the Legislature has afforded municipalities the protection of governmental immunity and done so in a comprehensive fashion as it has done in the GTLA, the governmental immunity as set forth in the GTLA is a *characteristic* of government. [***24]

n18 We note that requiring the plaintiff to bear the burden of pleading in avoidance of governmental immunity is also consistent with a central purpose of governmental immunity, that is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.

n19 In overruling *McCummings*, the Court is mindful of the doctrine of stare decisis. Stare decisis, however, is not meant to be mechanically applied to prevent the Court from overruling earlier erroneous decisions. *Robinson v Detroit*, 462 Mich. 439, 463; 613 N.W.2d 307 (2000). Rather, stare decisis is a "principle of policy" not "an inexorable command," and the Court is not constrained to follow precedent when governing decisions are badly reasoned. 462 Mich. at 464. We conclude that it is appropriate to overrule *McCummings* despite stare decisis because that case was both badly reasoned and inconsistent with a more intrinsically sound prior doctrine and the actual text of the GTLA.

n20 We apply this holding to plaintiff's sexual orientation claim, but remand to the Court of Appeals for reconsideration of plaintiff's other claims, as indicated previously. See n 1. With the exception of her sexual orientation discrimination claim against the city, which is disposed of in this opinion, plaintiff shall be allowed to amend her complaint to attempt to plead in avoidance of governmental immunity in regard to her other claims.

As to all other cases pending that involve governmental immunity, plaintiffs shall be allowed to amend their complaints in order to plead in avoidance of governmental immunity. If a case is pending on appeal and governmental immunity is a controlling issue, the Court of Appeals may remand to allow amendment. As MCR 2.111(F)(3) encompasses other species of "immunity granted by law," but does not explicitly refer to governmental immunity, it is not necessary to amend the court rule because of our holding.

[***25] [*204]

2. Plaintiff's Complaint

A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function. McCann, 398 Mich. at 77. Plaintiff did neither in this case.

Governmental immunity protects the conduct of governmental agencies, which include two types of actors: the state and political subdivisions. MCL 691.1401(d). The Detroit Police Department, as a political subdivision, MCL 691.1401(b), is a "governmental agency" for purposes of governmental immunity. MCL 691.1401(d). As such, absent the applicability of a statutory exception, it is immune from tort liability if the tort claims arise from the department's exercise or discharge of a governmental function. MCL

691.1407(1). "'Governmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). [***26] It is well established in Michigan that the management, operation, and control of a police department is a governmental function. *Moore v Detroit*, 128 Mich. App. 491, 496-497; 340 N.W.2d 640 (1983); *Graves v Wayne Co*, 124 Mich. App. 36, 40-41; 333 N.W.2d 740 (1983).

Plaintiff's claims regarding the police department all involve decisions that are part and parcel of the department's discharge of governmental functions. The decisions at issue in this case are job reassignment, distribution of vacation time, and determining the extent to which department officers are involved [*205] in investigations. These are ordinary day-to-day decisions that the police department makes in the course of discharging its governmental function. As such, the police department's conduct is within the scope of § 7. Thus, plaintiff's claim is barred unless it falls within one of the statutory exceptions. As discussed above, plaintiff's sexual orientation discrimination claim falls under no immunity exception.

Further, plaintiff's complaint makes no mention of governmental immunity with respect to any of her claims. In fact, it was not until the city [***27] moved for summary disposition that plaintiff claimed that her [**58] action was not barred by governmental immunity. Even then, however, plaintiff's responsive pleading went only to her intentional infliction of emotional distress claim, which she abandoned by failing to raise it in the Court of Appeals.

Because plaintiff failed to state a claim that fits within a statutory exception or plead facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function, we conclude that plaintiff did not plead and could not plead in avoidance of governmental immunity and that her sexual orientation discrimination claim should have been dismissed on the city's motion for summary disposition.

IV. The Dissents

Justices Weaver and Cavanagh criticize our opinion primarily on the ground that our decision is allegedly reached without the benefit of briefing or argument. This argument camouflages their reluctance to address the core legal questions at hand. [*206]

First, concerning *McCummings*, additional briefing would not assist this Court in addressing this question of law. All the relevant argument is embodied in the years of case [***28] law on the nature of governmental immunity. Of that case law, *McCummings* is an aberration; its doctrine stands alone in our jurisprudential history in holding that governmental immunity is an affirmative defense and not a characteristic of government. In this case, we addressed which was aberrational: *McCummings* or the remaining eighty years of case law. We have concluded that *McCummings* was the aberration.

Regarding the dissenters' assertion that the issue of the charter being preempted by the GTLA was not briefed or raised by the parties, we note that the issue was squarely in front of the parties. The central question in this case was whether the charter's purported creation of a cause of action for sexual orientation discrimination is preempted by state law. The governmental tort liability act is a state law. If the charter creates a cause of action for sexual orientation discrimination, then it conflicts with the state law of governmental immunity. Questioning by several members of this Court at oral argument specifically raised the governmental immunity issue. n21 We absolutely [*207] oppose the dissenters' apparent position that although a controlling legal issue is squarely [***29] before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits [**59] this Court's ability to probe for and provide the correct solution. Such an approach would seriously curtail the ability of this Court to function effectively and, interestingly, given the dissenters' position, actually make oral argument a moot practice.

n21

Justice TAYLOR: ... I've got a question which is on a little different track. *Pompey* and *Holmes* in their most elementary reading give private causes of action for civil rights problems. They, however, give that cause of action to one citizen against another. One of the old really venerable principles of law is of course that the government can only be sued when it allows itself to be sued. Why is it not the case that *Pompey* and *Holmes* could be left entirely intact and a court hold that whatever they said, they never abrogated the immunity that a government has that it can only eliminate expressly, that is the ability to not be sued. Said better, why wouldn't it be a sensible thing for a court to hold that whatever *Pompey* and *Holmes* said, they never gave authority to sue a city or any other kind of government, and there is nowhere in the statutes or the constitution where governmental immunity in this regard has been abrogated, And we always have to read our

law, I think, our case law is that we always tilt in the direction of immunity.

***Justice YOUNG: Why do you read this provision [CRA] as abrogating governmental immunity? ....

***Justice MARKMAN: But Justice TAYLOR's question as I understand is a more generic question ... It's whether the municipality can create any cause of action that will burden the sovereign to a greater extent.

[***30]

To be certain, we emphasize that, contrary to Justice CAVANAGH's allegation, we have not disregarded "the foundational principles of our adversarial system of adjudication." *Post* at 1. Rather, addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle. See *Legal Services Corp v Velazquez*, 531 U.S. 533, 549-558; 149 L. Ed. 2d 63; 121 S. Ct. 1043 (2001) (majority and dissent both stating that whether to address an issue not briefed or contested by the parties is left to discretion of the Court); *Seattle* [*208] *v McCready*, 123 Wn.2d 260, 269; 868 P.2d 134 (1994) (indicating that the court "is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent"). In fact, all three dissenters recently signed or concurred in an opinion where this Court decided an issue not raised or briefed by any party. *Federated Publications, Inc v Lansing*, 467 Mich. 98, 649 N.W.2d 383, 2002 Mich. LEXIS 1282 (2002) (resolving a standard of review issue). Accordingly, we find no merit [***31] in the dissents' criticism of our opinion on the ground that the parties did not brief the issue themselves and interpret their dissenting statements as an indication of their reluctance to address the core legal questions before us.

In his dissent, Justice CAVANAGH has fired his standard shot: this Court overrules cases capriciously. Now he has added a fusillade, suggesting that the majority "tees up" issues it wants the parties to brief, and somewhat inconsistently, that the majority decides matters *without* briefing by the parties. While we recognize that following the law as enacted by our Legislature is sometimes at odds with our dissenting colleague's personal policy preferences, our constitutional duty demands that we follow the rule of law. While Justice CAVANAGH chooses to characterize his policy frustrations as the majority's judicial disobedience, neither the law, this Court's history, nor Justice CAVANAGH's own judicial history supports his characterization.

On the so-called briefing issue, we think Justice CAVANAGH wants it both ways. In this case, where the controlling legal issue was discovered after the parties had submitted their briefs, Justice CAVANAGH complains. [***32] [*209] In other cases, when the Court has believed there might be a controlling issue on which it wanted the benefit of the parties' briefing, Justice CAVANAGH also complains. See, e.g., *Robinson v Detroit*, 462 Mich. 439; 613 N.W.2d 307 (2000) (a case cited in his footnote 9), wherein Justice CAVANAGH dissented, criticizing the majority for flagging in its grant order a legal issue the Court specifically wanted briefed by the parties. 461 Mich. 1201; 597 N.W.2d 837. n22

n22 For example, Justice CAVANAGH cites *People v Hardiman*, 465 Mich. 902; 638 N.W.2d 744 (2001), as an example of this Court asking the parties if a precedent should be overruled, *People v Atley*, 392 Mich. 298; 220 N.W.2d 465 (1974). We note that Justice CAVANAGH agreed that *Atley* should be overruled in his partial concurrence in *Hardiman*. 466 Mich. 417, 432, 646 N.W.2d 158 (2002).

Similarly, Justice CAVANAGH criticizes this Court for asking the parties to brief whether the federal subjective entrapment test should be adopted in Michigan in our grant order in *People v Johnson*, 466 Mich. 491, 647 N.W.2d 480, 2002 Mich. LEXIS 1226 (2002), leave to appeal, 465 Mich. 911 (2001). However, when Justice CAVANAGH was in the majority, the Court asked the parties to do the very same thing in *People v Jamieson*, 436 Mich. 61; 461 N.W.2d 884 (1990). 433 Mich. 1226, 456 N.W.2d 390 (1989).

Finally, we note that in regard to the majority deciding issues not briefed by the parties, Justice CAVANAGH recently authored the opinion in *Stanton v Battle Creek*, 466 Mich. 611, 647 N.W.2d 508, 2002 Mich. LEXIS 1242 (2002), in which this Court decided an issue that was never briefed by the parties. That is, applying the common meaning of "motor vehicle" to determine whether the term encompasses a forklift.

[***33]

[**60] Apart from Justice CAVANAGH's desire to have it both ways on the issue of party "briefing," no one can seriously question the right of this Court to set forth the law as clearly as it can, irrespective whether the

parties assist the Court in fulfilling its constitutional function. The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions.

Concerning Justice CAVANAGH's habitual assertion that *this* Court casually disregards stare decisis, we [*210] note that Justice CAVANAGH himself is no stranger to overruling precedent. See, e.g., *DiFranco v Pickard*, 427 Mich. 32, 398 N.W.2d 896 (1986), overruling *Cassidy v McGovern*, 415 Mich. 483; 330 N.W.2d 22 (1982); *AFSCME v Highland Park Bd of Ed*, 457 Mich. 74; 577 N.W.2d 79 (1998), overruling *Ensley v Associated Terminals, Inc*, 304 Mich. 522; 8 N.W.2d 161 (1943); *Haske v Transport Leasing, Inc*, 455 Mich. 628, 652; 566 N.W.2d 896 (1997), overruling *Rea v Regency Olds/Mazda/Volvo*, 450 Mich. 1201; 536 N.W.2d 542 (1995) [***34] ; *W T Andrew Co v Mid-State* Surety, 450 Mich. 655; 545 N.W.2d 351 (1996), overruling *Weinberg v Univ of Michigan Regents*, 97 Mich. 246; 56 N.W. 605 (1893); *People v Kevorkian*, 447 Mich. 436; 527 N.W.2d 714 (1994), overruling *People v Roberts*, 211 Mich. 187; 178 N.W. 690 (1920); *In re Hatcher*, 443 Mich. 426; 505 N.W.2d 834 (1993), overruling *Fritts v Krugh*, 354 Mich. 97; 92 N.W.2d 604 (1958); *Mead v Batchlor*, 435 Mich. 480; 460 N.W.2d 493 (1990), overruling (to the extent inconsistent) *Sword v Sword*, 399 Mich. 367; 249 N.W.2d 88 (1976); *Albro v Allen*, 434 Mich. 271; 454 N.W.2d 85 (1990), overruling unidentified prior Supreme Court cases; *Schwartz v Flint*, 426 Mich. 295; 395 N.W.2d 678 (1986), overruling *Ed Zaagman, Inc v Kentwood*, 406 Mich. 137; 277 N.W.2d 475 (1979); *McMillan v State Hwy Comm*, 426 Mich. 46; 393 N.W.2d 332 (1986), [***35] overruling *Cramer v Detroit Edison Co*, 296 Mich. 662; 296 N.W. 831 (1941), and *Dawson v Postal Telegraph-Cable Co*, 265 Mich. 139; 251 N.W. 352 (1933).

More important, we emphasize that this stout defense of stare decisis by Justices CAVANAGH and KELLY is their standard argument when they are unhappy with the result of an opinion. See *Sington v* [*211] *Chrysler Corp*, 467 Mich. 144, 648 N.W.2d 624, 2002 Mich. LEXIS 1423 (KELLY, J., dissenting). Their charge is that the new composition of this Court is the explanatory variable for a deteriorating respect for precedent. *Sington* provides the latest example of their argument, but it also demonstrates how statistically insignificant are the occasions when this Court (as opposed to its pre-1999 predecessor) has overturned its prior cases.

In *Sington*, Justice KELLY states that, in the five years from 1993 to 1997, twelve cases were overturned by this Court whereas in the four and a half years from 1998 to July, 2002, twenty-two cases were overturned. During the 1993 to 1997 period, the Court overruled precedent at a rate of about one-twelfth of one percent (12 of 13,682 cases disposed of), while [***36] during the 1998 to 2002 period, the Court overruled precedent at about a rate of one-fifth of one percent (22 of 11,190). The [**61] contrast is one-twelfth of one percent in the Court's "good ole days" versus one-fifth of one percent in the new world of the current Court, even counting against the current Court the six cases decided in 1998 before this majority came into existence. Viewed in this context, no neutral commentator would conclude that the majority has a complete disregard for stare decisis, but that the dissenters are strict adherents. In other words, Justice KELLY and Justice CAVANAGH's records do not reflect a previous hard line adherence to stare decisis and their dissatisfaction is not with our alleged lack of adherence to stare decisis, but in their inability to reach the policy choice they prefer given the majority's commitment to follow the laws enacted by our Legislature.

I think it is fair to say that the cases Justice CAVANAGH cites in footnote 9 more probably reveal his [*212] desire that *this* Court never address a controlling legal issue. Yet, we welcome Justice CAVANAGH's newly announced repudiation of "judicial activism in any form." We question whether his new judicial [***37] philosophy includes the obligation to respect and follow the law, even where it is inconvenient to one's policy preferences or even when the parties fail to bring the controlling law to the Court's attention.

V. Conclusion

We hold that regardless whether the charter attempted to create a private cause of action against the city for sexual orientation discrimination, it could not do so without contravening governmental immunity law. Accordingly, this Court is without authority to act on plaintiff's request to recognize such a cause of action.

In addition, we hold that, governmental immunity being a characteristic of government, a party suing a unit of government must plead in avoidance of governmental immunity. We overrule *McCummings* to the extent it holds otherwise.

Plaintiff did not plead in avoidance of governmental immunity in her complaint. Accordingly, the Court of Appeals holding is reversed, and the trial court's order for summary disposition in favor of defendant is reinstated with regard to the sexual orientation discrimination claim. Because the city did not appeal the Court of Appeals resolution of the sex discrimination claim, we remand that issue to the Court [***38] of Appeals for reconsideration in light of this opinion.

CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J.

KELLY, J., concurred with WEAVER, J.

DISSENTBY:
Michael F. Cavanagh; Elizabeth A. Weaver

DISSENT:

[*213]

CAVANAGH, J. (*dissenting*).

I respectfully disagree with the majority's conclusion that a cause of action created by defendant's city charter and brought against the city of Detroit would contravene the governmental tort liability act (GTLA), MCL 691.1407. I further object to the majority's assertion that plaintiff must plead in avoidance of governmental immunity.

In reaching its holding, the majority disregards the foundational principles of our adversarial system of adjudication. As protectors of justice, we refrain from deciding issues without giving each party a full and fair opportunity to be heard. But not for this concern, the judicially created doctrine of standing would be discarded, as it ensures "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination ...." *Baker v Carr,* 369 U.S. 186, 204; 7 L. Ed. 2d 663; 82 S. Ct. 691; (1962) [***39] (Brennan, J.). However, the majority has disregarded such considerations, misconstruing the proper scope of its authority, by making dispositive an issue never argued [**62] or briefed by the parties. Neither of the parties has had the benefit of sharing with this Court their thoughts on the effect of the tort immunity act on this case, though the implications of the majority's holding are vast. Never before have I witnessed such overreaching conduct from members of this Court.

I. THE GTLA DOES NOT NULLIFY PRIVATE ACTIONS CREATED BY A CITY

In the majority's haste to apply the GTLA, it fails to adequately consider several foundational issues. First, the majority neglects to properly address a dispositive preliminary issue: is an action alleging a violation of a city charter a tort? Neither plaintiff nor defendant [*214] considered this claim a tort. Further, because a charter is a city's "constitution," *Bivens v Grand Rapids,* 443 Mich. 391, 401; 505 N.W.2d 239; (1993), this action does not resemble our typical understanding of a tort. It is far from clear that the Legislature intended that the GTLA preclude such actions, and the majority's reference to *Donajkowski v Alpena Power Co,* 460 Mich. 243, 247; 596 N.W.2d 574 (1999), [***40] which proclaimed in the most cursory fashion that a statutory violation sounds in tort, does not aid in this determination. At the very least, briefing and argument on this issue could have clarified the nature of the debate.

Moreover, the majority's claim that the scope of the GTLA nullifies any attempt by a city to create a cause of action that could be brought against a governmental agency ignores the fact that the tort immunity act does not bar gross negligence claims against government officers, MCL 691.1407(2), nor does it prohibit actions brought against government entities for injuries arising out of actions not related to the discharge of a "government function." MCL 691.1407(1). Thus, even if one concludes that plaintiff's claim against the city properly sounds in negligence, a cause of action created by the Detroit charter could be brought under the theory of gross negligence against government officers or against the city when not engaged in a government function. Therefore, the majority errs in concluding that *any* action created by a city's charter that could be brought against [***41] a governmental entity would violate the GTLA.

II. THE CHARTER CREATES A CAUSE OF ACTION

Having demonstrated why the issue is not "irrelevant," in spite of the majority's assertions otherwise, I [*215] believe it is necessary to clarify that the plain language of the charter creates a cause of action. n1

> n1 See *Detroit v Walker,* 445 Mich. 682, 691; 520 N.W.2d 135 (1994) ("The prevailing rules regarding statutory construction are well established and extend to the construction of home rule charters.")

The Detroit citizenry clearly has the right to be free from discrimination on the basis of, inter alia, sexual orientation:

> The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation. [Charter, [***42] Declaration of Rights, § 2.]

Defendant city of Detroit, however, claims the plain language of the charter prescribes an exclusive administrative remedy for this broadly pronounced right, prohibiting enforcement by its citizenry:

[**63] The city may enforce this declaration of rights and other rights retained by the people. [*Id.* at § 8.]

Defendant's cursory assertion that this provision prohibits individual enforcement of the rights granted in the charter results from an erroneous interpretation of the plain language of the text. n2 Certainly this provision grants the city the authority to enforce the rights proclaimed in the charter. However, this grant of authority is not exclusive. The drafters gave the city the power to enforce the declaration of rights *and* other rights retained by the people. If one accepts [*216] defendant's claim that this text gives the city the exclusive authority to enforce the declaration of rights, the drafters also would have granted to the city the exclusive authority to enforce "other rights retained by the people." In other words, with the adoption of the charter *as constructed by defendant*, the people of Detroit purportedly stripped themselves [***43] of their ability to bring civil actions to enforce *any* "other right." Even if the city had the authority to enforce these rights, the text simply does not support such an unprecedented grant of authority.

n2 This Court has certainly consistently eschewed any deviation from our "textualist" approach.

Further, the drafters used "may," not "shall," in this provision. "May" suggests that one "is permitted to" or has discretion. Black's Law Dictionary (7th ed). If the drafters had intended to grant the city the exclusive authority to enforce the charter, they certainly would have used "shall," mandating such action. *Id.* ("shall" implies a duty or requirement). Moreover, the citizens of Detroit surely did not intend to grant the city the discretionary *and* exclusive power to enforce both the rights under the charter and all others retained by the people. Thus, by use of the permissive and discretionary term, the drafters indicated an intention to permit enforcement mechanisms beyond those powers granted [***44] to the city. Any other interpretation ignores the text of the charter.

Reference to the city's ordinances supports this interpretation of the charter. n3 In 1988, the city deliberately clarified that those who experienced discrimination on the basis of AIDS and conditions related to AIDS [*217] could bring a civil action to enforce their rights granted by the city. Chapter 27, article 7 prohibits such discrimination in the employment, housing, business, and educational arenas. See generally, § § 27-7-1 to 27-7-90. In particular, the charter prohibits discrimination in the provision of *public* facilities or services. Section 27-7-7. The enforcement provision includes the following subsection:

Any aggrieved person may enforce the provisions of this article by means of a civil action. [Section 27-7-10(a).]

Clearly, the city intended to create a civil cause of action for the victims of such discriminatory practices. Assuming drafters of the ordinance did not intend to contravene the charter, which we must, we may only conclude that the authority granted to the city in the declaration of rights, § 8, did *not* give the city the sole right to enforce the charter.

n3 *Brady v Detroit*, 353 Mich. 243, 248; 91 N.W.2d 257 (1958) ("Provisions pertaining to a given subject matter must be construed together, and if possible harmonized. It may not be assumed that the adoption of conflicting provisions was intended.")

[***45]

Although defendant correctly referenced ordinance 27-7-10, it draws the wrong conclusion. As noted, article 7 of chapter 27 was enacted in 1988. Detroit Ordinance § 24-88, July 14, 1988; see also Detroit Ordinance § 33-88, September 21, [**64] 1988. In contrast, the enabling ordinances at issue here were enacted in 1979. Detroit Ordinance § 303-H, January 24, 1979. It is entirely reasonable to conclude that the city simply intended to clarify that a private cause of action could be had under the charter when enacting § 27-7-10, as had been authorized implicitly by the charter.

The inclusion of § 27-2-10 was particularly appropriate because of the circuit courts' treatment of similar claims. In this case, for example, the court noted that this issue had arisen in the past. Without direction from the Court of Appeals, the trial court refused [*218] to recognize a cause of action. Certainly an ordinance or charter amendment that made clear that a cause of action existed for a violation of any right provided by the charter would have made this exercise even simpler. However, its absence cannot force the conclusion that an action *only* for AIDS-related discrimination was intended. In this age [***46] of the overly rhetorical and

often vacuous concern over "special rights," it is unreasonable to presume the charter permits individual actions for AIDS-related discrimination, but not for the other forms of discrimination enumerated in the declaration of rights, § 2. Therefore, though we often rely on the maxim that the inclusion of one term implies the exclusion of another, that inference loses force where the circumstances indicate otherwise. n4 In this case, the circumstances suggest the opposite, i.e., that the express provision of a cause of action for AIDS-related discrimination only *clarifies* that the charter permitted such actions for all violations.

n4 See *Luttrell v Dep't of Corrections,* 421 Mich. 93, 102; 365 N.W.2d 74 (1984) (holding that "the effect of the rule '*expressio unius est exclusio alterius*,' while a valid maxim, [may be] so much at odds with the other [rules of construction] that reason dictates it [may be] inapplicable").

Additional support [***47] for this conclusion can be found in the drafters' decision to include two provisions that suggest that Detroit's citizens retained the right to sue for violations of the charter. The declaration of rights clearly states:

The enumeration of certain rights in this Charter shall not be construed to deny or disparage others retained by the people. [Declaration of Rights, § 7.]

In that same vein, the charter's chapter on human rights ends with the following proclamation: [*219]

This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal. [Section 7-1007.]

This evidence indicates an intention to create a scheme whereby the administrative remedies supplement an individual's ability to bring a private cause of action. n5 In light of this analysis, a rational interpreter must conclude that neither the drafters nor the citizenry intended to grant the city exclusive, discretionary authority to remedy violations of the rights granted in the charter. Therefore, I would hold that the charter does, in fact, create a damages action for discrimination based on sexual orientation.

n5 The charter's preamble provides additional support for the conclusion that the charter created both rights and remedies to which the city itself must adhere:

We, the people of Detroit, do ordain and establish this Charter for the governance of our city, as it addresses the programs, services and needs of our citizens; ... *pledging that all our officials, elected and appointed, will be held accountable to fulfill the intent of this Charter* .... [Emphasis added.]

[**65] [***48]

III. IMMUNITY AS AN AFFIRMATIVE DEFENSE

The majority has opportunistically seized on the circumstances presented in this case to overrule decades of sound precedent and unsettle an area of law that had finally achieved some stability. In proclaiming that plaintiff must plead in avoidance of immunity, the majority ignores not only the value of precedent, but also the sound principles on which *McCummings v Hurley Medical Ctr,* 433 Mich. 404; 446 N.W.2d 114 (1989), was based. In *McCummings*, the Court held that the entity claiming immunity must [*220] affirmatively plead the defense. This unanimous pronouncement was based, in part, on the doctrine's statutory foundation. No longer could we solely rely on the doctrine's common-law history to determine the parameters of the defense. n6 Therefore, though the judiciary traditionally considered sovereignty a "characteristic" of government, this understanding was no longer dispositive of procedural or substantive issues once the Legislature codified the doctrine. This view is no less relevant today, and the majority's attempt to proclaim otherwise by once again relying on outdated jargon adds little to our understanding [***49] of governmental immunity.

n6 See Const 1963, art 3, sec 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.")

Having identified a flaw in the majority's deceptively useful rationale (i.e., because the Court has declared immunity a "characteristic" in the past, it is not an affirmative defense), we must now turn to its substantive conclusions. Does the governmental immunity *statute* require that plaintiffs plead in avoidance of immunity? MCL 691.1407(1). provides:

Except as otherwise provided in this act, a government agency is immune from tort liability if [it] is engaged in the exercise or discharge of a governmental function.

Although this section makes clear that governmental entities may claim immunity when performing a governmental function, it does not, as the majority claims, create a textual presumption in favor of the government. Rather, the statute identifies [***50] the scope of immunity. The procedural duty to plead is simply [*221] not mentioned, and as such, the text-as it pertains to pleading-is silent.

Building on this Court's pronouncement in *Ross v Consumers Power (On Rehearing)*, 420 Mich. 567; 363 N.W.2d 641 (1984), which clarified that the Legislature intended that immunity from tort liability exist only when an entity was engaged in a governmental function, the *McCummings* Court arrived at the most logical conclusion, i.e., that "the question whether a governmental agency was engaged in a governmental function when performing the act complained of is a question best known to the agency and best asserted by it." 433 Mich. at 411. n7 Furthermore, the *McCummings* Court correctly noted that no valid reason to exempt agencies from the pleading burden placed upon individuals could be discerned. The source of immunity for both government bodies and individuals is grounded in § 1407. Because the text makes no distinction in this regard, a prudent observer will agree that the majority's reversal is based on its own policy considerations, [**66] which ignore both the intent of the Legislature and the judicially sound doctrine [***51] of stare decisis. This is particularly true because, though the Legislature revised the GTLA after *McCummings* in 1986, 1996, and 1999, it failed to amend the statute to alter the rule that placed the burden of pleading on the government. Unfortunately, the majority dismisses this legislative acquiescence, an indicator of its intent.

n7 The Court in *Ross* undertook an almost impossible task, clarifying more than a century's worth of judicial and legislative commentary on governmental immunity. It did not, however, examine on which party the burden of pleading should fall. Any reference to that burden in *Ross* does not, contrary to the majority's assertions, diminish the foundation on which the Court in *McCummings* relied.

[*222] In sum, the fact remains that governmental immunity is a *defense* to liability. Although the majority erroneously declares that plaintiff must plead in avoidance of the doctrine, the government continues to bear the onus of proof. If a trial court finds the parties have equally [***52] carried the burden of production concerning the applicability of the doctrine, the court must find for the plaintiff. Any indication to the contrary in the majority's opinion may only be referenced as dicta, as the issue this case presents is limited to the sufficiency of the pleadings.

Shockingly, without the issue being contemplated, let alone raised by the parties, the majority concludes that plaintiff's claim should have been dismissed for its failure to plead in avoidance of government immunity. Slip op at 2, 21-22, 26. However, our precedent and court rules had expressly placed this burden on the government. I object to the majority's application of its holding, which placed the burden of prescience on plaintiff.

IV. PRINCIPLES OF THE ADVERSARY SYSTEM

The majority's disingenuous response to the dissenting opinions requires clarification. The majority claims that any briefing on the propriety of the rule in *McCummings* would be a waste of time because "additional briefing would not assist this Court in addressing this question of law." Slip op at 22. This comment flies in the face of the foundations of our adversarial system, in which the parties frame the issues and [***53] arguments for a (presumably) passive tribunal. The adversarial system ensures the best presentation of arguments and theories because each party is motivated to succeed. Moreover, the adversarial [*223] system attempts to ensure that an active judge refrain from allowing a preliminary understanding of the issues to improperly influence the final decision. This allows the judiciary to keep an open mind until the proofs and arguments have been adequately submitted. n8 In spite of these underlying concerns, the majority today claims that the benefits of full briefing are simply a formality that can be discarded without care. The majority fails to comprehend how the skilled advocates in this case could have added anything insightful in the debate over the proper interpretation of a century's worth of precedent. Whatever its motivation, the majority undermines the foundations of our adversarial system.

n8 See Hazard, *Ethics in the Practice of Law, pp 120-123, 126-129, 131-135, cited in Tidmarsh & Trangsrud, Complex Litigation and the Adversary System*, (New York: Foundation Press, 1988).

[***54]

The majority also implies that the "central question in this case was whether the charter's purported creation of a cause of action for sexual orientation discrimination is preempted" by the GTLA. Slip op at 23. However, the extent of the parties' preemption briefing focused solely on the relevance of the Civil Rights Act vis-a-vis the charter--created cause of action. Moreover, the questions by this Court during oral argument do not substitute for proper briefing, but only illustrate how the Court pursues its own end in a fashion unanticipated by the parties.

[**67] While occasionally a court may find it necessary to resolve an issue not briefed by the parties, the frequency with which the majority undertakes such [*224] activist endeavors demonstrates its desire to arrive at *its* destination. n9

n9 The majority frequently engages in at least three distinct types of activist behavior: overruling precedent; in grants of leave, directing parties to address issues not initially raised or briefed by the parties in their application for leave to appeal; and, as in this case, holding dispositive issues neither raised nor argued before this Court.

To review instances where this majority has overruled precedent, see, e.g., *People v Cornell*, 466 Mich. 335; 646 N.W.2d 127 (2002); *Koontz v Ameritech Svcs, Inc*, 466 Mich. 304; 645 N.W.2d 34 (2002); *Robertson v DaimlerChrysler Corp*, 465 Mich. 732; 641 N.W.2d 567 (2002); *Pohutski v City of Allen Park*, 465 Mich. 675; 641 N.W.2d 219 (2002); *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich. 492; 638 N.W.2d 396 (2002); *Brown v Genesee Co Bd of Cmmr's*, 464 Mich. 430; 628 N.W.2d 471 (2001); *People v Glass*, 464 Mich. 266; 627 N.W.2d 261 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143; 615 N.W.2d 702 (2000); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich. 691; 614 N.W.2d 607 (2000); *Stitt v Holland Abundant Life Fellowship*, 462 Mich. 591; 614 N.W.2d 88 (2000); *Robinson v Detroit*, 462 Mich. 439; 613 N.W.2d 307 (2000); *People v Kazmierczak*, 461 Mich. 411; 605 N.W.2d 667 (2000); *McDougall v Schanz*, 461 Mich. 15; 597 N.W.2d 148 (1999); *People v Lukity*, 460 Mich. 484; 596 N.W.2d 607 (1999); *Ritchie-Gamester v Berkley*, 461 Mich. 73; 597 N.W.2d 517 (1999).

For examples of grant orders which directed the parties' to address issues the majority found relevant, see *People v Glass*, 461 Mich. 1005; 610 N.W.2d 872 (2000) (directing the parties to address whether the prosecutor's actions removed the taint of alleged racial discrimination in the grand jury selection process, whether MCR 6.112 conflicted with MCL 767.29, and whether the Court properly exercised its authority over criminal procedure). See also *People v Hardiman*, 465 Mich. 902; 638 N.W.2d 744 (2001) (directing the parties to brief whether "the inference upon inference rule of *People v Atley*, 392 Mich. 298, 220 N.W.2d 465 (1974), was violated under the facts ... and whether that decision should be overruled"); *People v Johnson*, 465 Mich. 911; 638 N.W.2d 747 (2001) (directing the parties to brief whether this Court should adopt the federal subjective entrapment defense); *People v Reese*, 465 Mich. 851; 631 N.W.2d 343 (2001) (directing the parties to "specifically address whether MCL 768.32 prevents this Court from adopting the federal model for necessarily lesser included offense instructions and, if it does, whether such prohibition violates Const 1963, art 6, § 5. In all other respects, leave to appeal is denied."); *People v Lett*, 463 Mich. 938, 620 N.W.2d 855 (2000) (rejecting the prosecutor's concession concerning the constitutional nature of the error and directing the parties to address whether the trial court's declaration of a mistrial was based on manifest necessity; further ordering the parties to address six additional issues, including whether the defendant's claim was forfeited or waived and the extent to which the law might be clarified concerning presence of manifest necessity).

I thank the majority for pointing out that I object both when the parties have not had an opportunity to argue or brief an issue, *and* when the majority has forced the disposition of an issue not raised by either party. To clarify, it's not that I wish to have "it both ways," but that I object to judicial activism in any form.

Further, the majority accurately documents that, *throughout my twenty-year tenure* on this Court, I have, on occasion, found it necessary to overrule precedent or request briefing on an issue. The majority also clarifies that policy considerations may influence one's understanding of the appropriate method by which to apply or interpret the law. With this I do not disagree. Neither the majority nor I can escape the fact that, as judges, we are not computers, but human beings, doing our best to apply the law in an unbiased fashion, in accord with our constitutional mandate and within the strictures

of the adversary system. Whether in the majority or the dissent, every justice must recognize and appropriately set aside such considerations in the execution of their duties under the law.

[***55] [*225]

V. CONCLUSION

Because a majority of this Court erroneously refuses to recognize that the charter creates a cause of action and that plaintiff need not plead in avoidance of immunity, [**68] there is no need to thoroughly analyze the remaining issues. Suffice it to say, I would hold that a municipality has the power, on the basis of the police powers inherent in its home rule authority, to protect its citizens from discrimination. No state law preempts this protection, and governmental immunity does not bar an action based not on a theory of tort liability, but on a violation of the organic law of a city granting its citizens fundamental rights. Therefore, for the reasons noted, I would affirm the judgment of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*)

I dissent from the majority decision.

The majority has decided important issues involving governmental immunity that were not raised or briefed by the parties and that are very significant to [*226] the people of Detroit and all the people of Michigan. The majority should have insured that it had briefing and heard argument on these issues before deciding them.

A

Without the benefit [***56] of briefing or argument, the majority overrules settled precedent n1 to hold that governmental immunity cannot be waived because it is a characteristic of government. In *McCummings v Hurley Medical Ctr,* 433 Mich. 404, 411; 446 N.W.2d 114 (1989) , this Court held that governmental immunity must be pleaded as an affirmative defense. The majority overrules *McCummings* and holds that immunity is an unwaivable characteristic of government. The parties did not raise or address in any court whether governmental immunity is a characteristic of government or an affirmative defense. n2

n1 The majority's assertion that *McCummings* is an "aberration" is their view. However, it was signed by six justices with Justice Griffin concurring separately and has been the law for fourteen years. See, e.g. *Scheurman v Dep't of Trans*, 434 Mich. 619; 456 N.W.2d 66 (1990), and *Tryc v Michigan Veterans' Fund*, 451 Mich. 129; 545 N.W.2d 642 (1996).

n2 Although the city raised governmental immunity as an affirmative defense at the trial court level, the city never specifically addressed immunity relative to plaintiff's charter-based claim of sexual orientation discrimination at any level. The only briefing regarding immunity in the trial court was in response to plaintiff's intentional infliction of emotional distress claim. Plaintiff abandoned that claim in the trial court and thereafter, the city abandoned its immunity claim.

[***57]

While the general concept of governmental immunity was alluded to in questioning during oral argument before this Court, the questioning did not reference the concept of immunity as a characteristic of government and did not foreshadow an intent to reconsider *McCummings*. The majority's decision to [*227] reach out and overrule a case that was not raised, briefed, or argued is certainly efficient. However, the majority's efficiency in this case forsakes procedural fairness. It is worth emphasis that the majority can only conclude that the city has not waived governmental immunity by overruling *McCummings*.

I decline the majority's invitation to take a position without briefing and argument on whether governmental immunity is a characteristic of government, an affirmative defense, or some other judicially determined hybrid. These characterizations have significant procedural consequences. It is the role of the Court to respond to issues properly before it and to seek additional briefing and argument on significant matters that may have been overlooked by the parties. This is especially true where the issues are of great importance, such as [**69] the issues not briefed or argued in this [***58] case, which seriously affect the settled law of this state.

The majority's decision to address and resolve this issue without briefing or argument is inappropriate. Before deciding this significant change in the law of governmental immunity, the Court should have had briefing and argument.

B

The question whether a charter-created cause of action for sexual orientation discrimination conflicts with the governmental tort liability act (GTLA), MCL 691.1407, a question that the majority concludes decides this case, was not briefed or argued by the [*228] parties at any level. n3 It is not possible to agree with the majority contention that this specific question was "squarely in front of the parties" when neither party addressed it at any level. *Ante* at 24. The conflict analysis of the parties and the courts below addressed whether a charter-created cause of action for sexual orientation discrimination conflicted with the Civil Rights Act (CRA). Furthermore, the city only characterized the question of conflict with CRA as one premised on the law of preemption in its brief to this Court. It is again worthy of note that it is only the majority's overruling [***59] of *McCummings* that allows the majority to shift the focus of the conflict analysis from the CRA to the GTLA.

n3 The Michigan Constitution and the Home Rule City Act require that home rule city charters not conflict with state law.

C

Although the majority asserts that whether the electors of Detroit intended to create a cause of action to vindicate the charter-created civil right to be free from sexual orientation discrimination is an "irrelevant" inquiry, the intent of the electors, as expressed in the charter is noteworthy. n4 After all, the issue presented at the outset of this case was whether the charter language created a cause of action to vindicate the charter's declaration of rights.

n4 Further, it should be of interest to the people of Detroit that the city's position in this litigation seeks to disclaim individual rights that its electors deemed worthy of charter protection.

[***60]

The charter's declaration of rights provides:

The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of [*229] opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation. [Section 2.]

The language of § 2 is not ambiguous. It, as would be commonly understood by the ratifiers, secures a set of rights to each person of Detroit. Furthermore, § 8 of the declaration of rights provides:

The city may enforce this Declaration of Rights and other rights retained by the people.

While it can be argued that the permissive "may" of § 8 tempers *the city's* otherwise "affirmative duty" under § 2 to "insure the equality of opportunity for all persons," it is by no means clear that, pursuant to § 8, the ratifiers intended to diminish the individual rights declared in § 2. More importantly, the unambiguous language of the charter demonstrates that the charter ratifiers, the electors of Detroit, intended that the people of Detroit have the opportunity [***61] to seek enforcement of their charter-based [**70] rights in the proper court or tribunal. Art 7, ch 10, § 7-1007 provides:

This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal.

By these words the ratifiers of the charter would have expected that individuals could also vindicate their charter-declared rights in the proper court or tribunal. n5 [*230] In other words, it was the express intent of the electors of Detroit to raise the veil of immunity within the city limits with respect to the civil rights declared in the charter's declaration of rights.

n5 As reiterated by the United States Supreme Court in *Davis v Passman*, 442 U.S. 228, 242; 60 L. Ed. 2d 846; 99 S. Ct. 2264 (1979), "'The very essence of civil liberty,' wrote Mr. Chief Justice Marshall in *Marbury v Madison*, 5 U.S. [1 Cranch] 137, 163; 2 L. Ed. 60 (1803), 'certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'"

[***62]

The fact that the majority's decision leaves a charter-based right with no remedy n6 accentuates the inappropriateness of the majority's decision to dispose of this case on the basis of issues that were not raised, not briefed, and not argued by the parties.

n6 Section 8 of the charter declares that the city "may" enforce the declaration of rights, not

that it "must" enforce those rights. If the city opts not to enforce the declaration of rights, as it may so choose to do under § 8, the individual Detroiter would have a right with no remedy.

13 of 51 DOCUMENTS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JESSIE B. JOHNSON, Defendant-Appellee.

No. 118351

SUPREME COURT OF MICHIGAN

466 Mich. 491; 647 N.W.2d 480; 2002 Mich. LEXIS 1226

April 9, 2002, Argued

July 9, 2002, Decided

July 9, 2002, Filed

PRIOR HISTORY:
[***1] Oakland Circuit Court, Samuel C. Gardner, J. Court of Appeals, YOUNG, P.J., and O'CONNELL and NYKAMP, JJ., 223 Mich. App. 170; 566 N.W.2d 28 (1997). On remand, Oakland Circuit Court, David F. Breck, J. Court of Appeals, D.E. HOLBROOK, JR., and MCDONALD, JJ. (WILDER, P.J., dissenting) (Docket No. 219499).

DISPOSITION:
Reversed the Court of Appeals decision, reversed the trial court's order and remanded to the trial court.

COUNSEL:
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, David L. Gorcyca, Prosecuting Attorney, Joyce F. Todd, Chief, Appellate Division, and Robert C. Williams, Assistant Prosecuting Attorney, Pontiac, MI, for the people.
Robyn B. Frankel, Bloomfield Hills, MI, for the defendant-appellee.
Amici Curiae: Joseph K. Sheeran, President, Michael E. Duggan, Prosecuting Attorney, and Jeffrey Caminsky, Principal Attorney, Appeals Detroit, MI, for the Prosecuting Attorneys Association of Michigan.
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, David G. Gorcyca, Prosecuting Attorney, and William E. Molner, Assistant Attorney General, Lansing, MI, for the Prosecuting Attorneys Appellate Service.

JUDGES:
[***2] BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J. CAVANAGH, J. dissenting. KELLY, J., concurred with CAVANAGH, J. WEAVER, J. concurring.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[*493] [**483] YOUNG, J.

This case involves the defense of entrapment. The circuit court found that defendant was entrapped by the police and dismissed two charges of possession with intent to deliver more than 225, but less than 650, grams of cocaine. MCL 333.7401(2)(a)(ii) . The Court of Appeals affirmed in a split decision. n1 We conclude that the lower courts clearly erred in finding that defendant was entrapped under Michigan's current entrapment test. *People v Juillet*, 439 Mich. 34, 56-57; 475 N.W.2d 786 (1991) (opinion by BRICKLEY, J.); *People v Jamieson*, 436 Mich. 61, 80; 461 N.W.2d 884 (1990) (opinion by BRICKLEY, J.). Accordingly, we reverse the Court of Appeals decision, reverse the trial court's order granting defendant's motion to dismiss the charges, and [*494] remand to the trial court for further proceedings consistent with this opinion.

n1 **Unpublished opinion per curiam, issued December 19, 2000 (Docket No. 219499).**

[***3]

I. Facts and Proceedings

Defendant was a police officer in the city of Pontiac. He also owned a house in the city of Pontiac that he rented out as a residence.

Defendant became the subject of a criminal investigation after one of defendant's former tenants turned informant and reported to the Pontiac police department that defendant was instrumental in operating his rented house as a drug den. The informant indicated that he sold crack cocaine from defendant's house with defendant's full knowledge and consent. Further, according to the informant, defendant arranged, oversaw, and protected the drug-selling operation. In exchange, defendant received a substantial portion of the profits from the drug sales.

The Pontiac police called in the state police for assistance in their investigation of defendant. An undercover officer from the state police department, Lieutenant Sykes, was introduced by the informant to defendant as a major drug dealer in Detroit and Mount Clemens who wished to expand his operations into Pontiac. Defendant agreed to meet with Sykes, but not pursuant to any police investigation he was conducting himself. Defendant was propositioned by Sykes to serve [***4] as protection and security from "rip-offs" and police raids for Sykes' drug operations, as well as to identify potential locations for drug dens in Pontiac. Defendant was to be compensated for his services. Defendant agreed to participate only after he determined that Sykes was not an undercover [*495] officer known to defendant's fellow Pontiac officers. Defendant made no attempt to arrest Sykes or report his illegal activities for further investigation.

At Sykes' request, defendant agreed to accompany Sykes to a mall on February 7, 1992, to assist him in purchasing drugs from a supplier. The supplier was in reality another undercover state police officer.

Defendant and Sykes arrived at the mall parking lot in different vehicles. After some preliminary discussions, Sykes drove over to the undercover officer to make the staged drug deal, while defendant walked. Armed with a gun in his pocket, defendant stood one and a half car lengths from the passenger side of the second undercover officer's vehicle. After the transaction began, Sykes directed defendant to come to the driver's side of the undercover officer's vehicle. Sykes then handed defendant the package of drugs received from the supplier [***5] in the staged drug deal. Defendant took the package and returned to Sykes' [**484] vehicle and waited for Sykes. At that time, defendant expressed some confusion regarding the exact procedures he was to follow, stating that he needed to know what to do "from A to Z." Sykes testified, and audiotapes of the February 7, 1992, drug deal confirm, that Sykes wanted defendant to take the drugs back to his car, check them, ensure that the package was correct, and notify Sykes of any problems. Sykes stated that in order for defendant to fulfill his duty to protect against "rip-offs," defendant would be required to hold and examine the drugs purchased. Sykes explained that he could not watch the supplier and the package at the same time. After this conversation, while defendant and Sykes weighed the cocaine, defendant indicated that as a result of their [*496] discussion he had a better understanding of what Sykes wanted him to do. Defendant did not express his unwillingness to perform the duties explained by Sykes. Sykes then paid defendant $ 1,000 for his assistance.

Sometime after this first drug deal, Sykes asked defendant if he wished to participate in future drug deals and told him that it was okay [***6] if he no longer wanted to participate. Defendant indicated that he wanted to be included in future transactions. As a result, a second, similarly staged drug deal occurred on March 4, 1992, immediately after which defendant was arrested.

Defendant was charged with two counts of possession with intent to deliver more than 225, but less than 650, grams of cocaine. Defendant initially entered a *Cobbs* n2 plea with a visiting judge for two consecutive sentences of five to thirty years, sentences that were substantially less than the mandatory statutory minimum of twenty years for each offense. However, these sentences were reversed as being unsupported by substantial and compelling reasons required to depart from the mandatory statutory minimum. 223 Mich. App. 170, 175, 566 N.W.2d 28 (1997).

n2 ***People v Cobbs*, 443 Mich. 276; 505 N.W.2d 208(1993).**

When the case returned to the trial court, defendant withdrew his guilty pleas and moved to dismiss the [***7] charges on the basis of an entrapment theory. The trial court granted defendant's motion to dismiss, reasoning that Sykes had changed defendant's duty during the first transaction from one of protection to one [*497] of actual drug possession, thus entrapping defendant into the drug possessions.

As indicated, the Court of Appeals affirmed in a split decision. The majority wrote that "because many of

the factors indicative of entrapment existed in this case, we hold that defendant has met his burden of proving that the police conduct would have induced an otherwise law-abiding person in similar circumstances as defendant to commit the offenses charged." Slip op at 3. It also concluded that "Sykes' conduct in this case was so reprehensible as to constitute entrapment." *Id.*

The dissenting judge argued that defendant was not entrapped because "defendant willingly participated in the proposed criminal enterprise" and the police did nothing more than provide defendant with an opportunity to commit the crime. Slip op at 1. Further, the dissenter disagreed with the majority's alternative conclusion that Sykes's conduct was so reprehensible as to establish entrapment.

This Court initially held [***8] plaintiff's application in abeyance pending our consideration of ***People v Maffett*, 464 Mich. 878; 633 N.W.2d 339 (2001),** in which we ultimately denied leave to appeal. We then granted leave to appeal in this case, directing the parties to include among the issues [**485] to be briefed whether this Court should adopt the federal subjective entrapment test, and invited amicus curiae briefing. **465 Mich. 912 (2001).**

II. Standard of Review

A trial court's finding of entrapment is reviewed for clear error. ***Jamieson, supra* at 80.** Clear error exists [*498] if the reviewing court is left with a definite and firm conviction that a mistake has been made. ***People v Kurylczyk*, 443 Mich. 289, 303; 505 N.W.2d 528 (1993)** (opinion by GRIFFIN, J.). A defendant has the burden of establishing by a preponderance of the evidence that he was entrapped. ***People v D'Angelo*, 401 Mich. 167, 182; 257 N.W.2d 655 (1977).**

III. Analysis

Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce [***9] a law- abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *Juillet, supra;* ***People v Ealy*, 222 Mich. App. 508, 510; 564 N.W.2d 168 (1997).** However, where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist. ***People v Butler*, 444 Mich. 965, 966, 512 N.W.2d 583 (1994).**

A. Inducing Criminal Conduct

When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding [*499] citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, [***10] (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. ***Juillet, supra* at 56-57.**

In holding that defendant was entrapped, the Court of Appeals found that defendant had not previously committed the possession with intent to deliver offenses charged, the procedures employed by the government escalated defendant's conduct to the charged offense, and the offer of consideration was excessive. On the basis of these three factors, it held that "because many of the factors indicative of entrapment existed," the defendant "met his burden of proving that the police conduct would have induced an otherwise law-abiding person in similar circumstances as defendant to commit the offenses charged." Slip op at 3. We respectfully disagree.

First, while the Court of Appeals noted that defendant had "merely owned" a crack house and that no evidence existed that defendant [***11] was a drug dealer or even a drug user, it ignored ample evidence presented that defendant had in fact previously committed the offense of possession with intent to deliver. To be convicted of the charge of possession with intent to deliver, the defendant must have knowingly possessed a controlled substance, intended to deliver [*500] that substance [**486] to someone else, and the substance possessed must have actually been cocaine and defendant must have known it was cocaine. ***People v Crawford*, 458 Mich. 376, 389; 582 N.W.2d 785 (1998).** Actual physical possession is unnecessary for a conviction of possession with intent to deliver; constructive possession will suffice. ***People v Konrad*, 449 Mich. 263, 271; 536 N.W.2d 517 (1995)** . Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband. ***People v Wolfe*, 440 Mich. 508, 521; 489 N.W.2d 748 (1992)** . Possession is attributed not only to those who physically possess the drugs, but also to those who control its disposition. ***Konrad, supra* at 271-272.** In addition, possession [***12] may be either joint or exclusive. ***People v Hill*, 433 Mich. 464, 470; 446 N.W.2d 140 (1989).**

Defendant owned a home that he rented to tenants who operated it as a drug house. Despite being a police officer in the jurisdiction in which the house was located, defendant knew and consented to the house being used for drug sales. Further, defendant provided protection for the operation and received a portion of the profits from the drug sales, specifically $ 200 for each quarter ounce of drugs sold from the house.

The dissent suggests that in determining that defendant had engaged in drug activities, our opinion "strips the deference that is due credibility determinations made by lower courts ...." *Post* at 8. The dissent is mistaken. Our conclusion that defendant previously possessed cocaine is one that we make as a matter of law. What the dissent concedes, that "the record supports the Court of Appeals conclusion that [*501] defendant did nothing more than own a crack house and accept money to keep silent," *is* possession. *Post* at 4. Further, unlike the dissent, we do not limit our review of whether the lower courts clearly erred to the hearing testimony, [***13] but rather review the entire record. While the hearing testimony arguably lends itself to different conclusions, the audio tapes admitted into the record do not. While the dissent only cites an officer's hearing testimony regarding corroboration, the undercover audio recordings of defendant's conversation undisputedly establish that defendant played a role in the drug operation:

[*Informant*]: So I can take the hundred and invest it or what?

[*Defendant*]: Alright, man, I'm gonna give you one more shot.

[*Informant*]: Okay, dig, the same arrangement, the two off every quarter?

[*Defendant*]: Yeah.

As far as corroboration of defendant's past participation in drug activities, this first taped telephone conversation between the informant and defendant is clear evidence that defendant previously received $ 200 for every quarter ounce of cocaine sold by the informant at the house and that defendant wished and agreed to continue this arrangement.

Under these circumstances, it is clear these alleged previous actions by defendant could serve as the foundation for a conviction for possession with intent to deliver under a constructive possession theory. Defendant had a [***14] duty to arrest the informant, yet not only did he permit the informant to sell drugs, he accepted money to provide protection for the operation. [*502] Without such protection, drugs would not have been sold from the house. Accordingly, defendant controlled the disposition of drugs at the house he owned and shared in the profits in so doing. For these reasons, we find clear error in the lower court's deduction that there was insufficient evidence to surmise that defendant [**487] had not previously committed the offense of possession with intent to deliver cocaine. Further, we agree with the dissenting judge in the Court of Appeals that defendant's prior actions, at the very least, are sufficient to establish the charge of possession with intent to deliver cocaine as an aider and abettor. See ***People v Sammons*, 191 Mich. App. 351, 371-372; 478 N.W.2d 901 (1991).**

Second, contrary to the Court of Appeals majority, we are not convinced that the procedures employed by the police escalated defendant's criminal culpability. The Court of Appeals majority wrote:

The procedures employed by the police escalated defendant's conduct from merely owning a drug house to possession [***15] with intent to deliver cocaine. Sykes initially "hired" defendant to protect against arrest and theft and to inform Sykes of any potential drug raids. At the first staged drug buy, however, Sykes called defendant over and handed defendant the package of cocaine. It was only after the first transaction that defendant was informed that he was expected to handle the drugs, check them, and ensure that the package was "right." This active involvement was not contemplated prior to the buy. Sykes' actions, therefore, served to escalate defendant's passive involvement in the enterprise to active participation beyond the scope of what defendant had agreed to beforehand and pressured defendant into complying with Sykes' requests in order to remain a part of the enterprise. [Slip op at 3.]

[*503] It is somewhat unclear whether the majority's escalation analysis was based on its assessment of defendant's prior drug activity at his rental home or its conclusions about defendant's expected role in the undercover operation. However, regardless of what the majority held was escalated, it clearly erred.

As discussed above, defendant's previous actions concerning his drug house operation amounted to possession [***16] with intent to deliver. Both offenses charged as a result of the undercover operation were possession with intent to deliver. Therefore, no conduct by the state police in the undercover operation could serve to escalate defendant's prior criminal activity. Rather, the government simply provided defendant with an additional opportunity to commit a crime that he had previously committed. Presenting nothing more than an opportunity to commit the crime does not equate with entrapment. *Butler, supra.* Because defendant's previous drug activity amounted to possession with intent to deliver, the undercover activity at issue in this case did nothing more than present defendant with an opportunity

to commit that crime. Accordingly, no escalation occurred.

Similarly, defendant's culpability was not escalated at the scene of the first transaction in regard to the role defendant agreed to play in the undercover drug transaction. The touchstone of the Court of Appeals opinion in this regard was that placing the drugs in the hands of defendant at the scene of the first drug deal was a violation of what defendant had agreed to do. However, our review of the record leads us to [*504] conclude [***17] that touching the drugs should not have come as a surprise to defendant. n3

> n3 We note that the dissent's rationale for concluding that the lower courts correctly concluded that defendant could not have expected to handle the drugs at the transactions is based, again, on its limited review of the record. While the hearing transcript does indeed reflect that all parties agreed there was no evidence that defendant was informed that he would have to handle drugs *on the February 7th audio tape*, no such agreement was made regarding all the audio tapes introduced at the hearing. A full review of the taped recordings, as we provide below, supplies ample evidence that defendant fully understood that his role included handling the drugs. Contrary to the dissent's allegation, this is not a mischaracterization of the record or a failure to give deference to the trial court's credibility determinations. Rather, our conclusion is based on the actual audio recordings of the investigation that were admitted into the record.

[***18]

[**488] Although the taped recording of the first drug transaction suggests that defendant was unsure precisely what he was to do beyond providing "protection," that confusion was not based on defendant's lack of agreement to do more. **We disagree with the dissent's argument that the defendant's confusion about his role *on the day of the first transaction* was an absolute indication of defendant's agreed-upon role in the entire enterprise.** Rather, the record clearly shows that defendant indicated many days before the first transaction that he was willing to handle the drugs. Indeed, defendant was hired by Sykes to protect and secure against arrests, police raids, and "rip-offs." While the Court of Appeals construed "rip-off" as narrowly as possible by equating it with "theft," protecting against a "rip-off" would seem to include ensuring that drug packages received at drug deals contain actual drugs in the negotiated quantity and quality, a task that necessarily requires taking possession of the drugs in order to properly inspect them. A recorded audiotape of defendant and Sykes [*505] discussing their arrangement before the first staged drug transaction demonstrates that Sykes informed [***19] defendant that he would have to handle the drugs on occasion:

Sykes: ... And probably on occasion, I'm gonna need your expertise to accompany me to pick up a package or two, okay. ... So if, you know, just run here, run there, pick up some, and we'll be straight, okay. That's, that's basically all that you got to do, I'll run the rest.

Defendant: Okay. n4

> n4 **At the very least, this exchange between Sykes and defendant clearly establishes defendant's approval to constructively possess drugs.**

In addition, defendant's willingness to participate in the crimes charged is evidenced by his agreement to participate in further transactions *after* he participated in the first transaction, which included his taking possession of the drugs. We further note that the second drug transaction between defendant and the undercover police officers exposes a consideration that the lower courts appear to have overlooked during their review. Initial entrapment does not immunize a defendant from criminal liability [***20] for subsequent transactions that he readily and willingly undertook. See ***People v Crawford*, 143 Mich. App. 348, 353; 372 N.W.2d 550 (1985); *People v Larcinese*, 108 Mich. App. 511, 515; 310 N.W.2d 49 (1981).** Accordingly, even if the Court of Appeals had been correct in concluding that defendant was entrapped during the first transaction, his willingness to participate in the second transaction, after his duties were more emphatically explained, would prohibit dismissal of the second charge.

[*506] For these reasons, it is apparent that Sykes' handing the drugs to defendant for inspection during the first transaction failed to escalate defendant's criminal culpability. As a result, the Court of Appeals clearly erred in concluding otherwise.

Finally, the Court of Appeals majority clearly erred in holding that the amount of money offered for defendant's services was excessive and unusually attractive. [**489] The majority held that defendant knew that he stood to earn up to $ 50,000 by participating in the enterprise. **The prosecutor suggests that the record reflects that Sykes stated that Sykes stood to earn about $ 50,000.** Our [***21] review of the record leads us to conclude that the record does not

firmly establish either interpretation. However, we conclude that, given defendant's understanding that he would receive $ 1000 for each transaction, the compensation was neither excessive or unusually attractive. Each transaction involved approximately ten ounces of cocaine, which had an estimated street value of $ 75,000. A $ 1,000 fee for a transaction involving almost $ 75,000, roughly one percent of the street value, is not excessive. This is especially evident given that defendant previously earned a $ 200 profit, or nearly thirty percent of the street value, for the sale of one quarter ounce of cocaine at his crack house, which the record reflects had a street value of approximately $ 700. Thus, the Court of Appeals clearly erred in ascertaining that defendant was impermissibly induced because the consideration for his illegal services was excessive or unusually attractive.

In sum, we have concluded that the Court of Appeals clearly erred in regard to each of the three [*507] factors that persuaded that Court to conclude that the police engaged in conduct that would induce a law-abiding person to commit a crime in [***22] similar circumstances. Therefore, because none of the remaining *Juillet* factors are at issue, we hold that defendant failed to establish by a preponderance of the evidence that the police engaged in conduct that would induce a law-abiding person to commit a crime in similar circumstances.

B. Reprehensible Conduct

The Court of Appeals alternatively held that the police conduct was so reprehensible that, as a matter of public policy, it could not be tolerated regardless of its relationship to the crime and therefore constituted entrapment. The majority based its reasoning primarily on its escalation analysis, finding that "Sykes waited until the scene of the staged drug buy to inform defendant that he was expected to handle the drugs and gave defendant no choice but to accept the package that was placed in defendant's hands ...." Slip op at 3. We disagree.

As we discussed above, defendant was hired to protect against arrests, raids, and "rip-offs." In light of his alleged familiarity with drug operations, defendant should have expected that ensuring against "rip-offs" would include, among other things, examining the drugs for their legitimacy and holding the drugs to [***23] prevent a theft at the scene of the drug deal. More importantly, as indicated above, the negotiations between defendant and Sykes before the first transaction [*508] support this understanding. n5 Given our conclusion that defendant had previously committed the offense of possession with intent to deliver and that he agreed to provide protection against "rip-offs," which clearly includes handling the drugs in order to inspect them, the police did nothing more than provide defendant with an opportunity to commit a crime. Such conduct was not reprehensible and does not establish entrapment. *Butler, supra.*

n5 Further, as the dissenting Court of Appeals judge points out, defendant himself was a police officer and had a duty to arrest Sykes. Instead, defendant willingly participated in the criminal enterprise and even met with Sykes at the Pontiac police department station before these drug deals in order to determine whether Sykes was an undercover officer who would be recognized by defendant's fellow officers.

[***24]

For these reasons, we conclude that the Court of Appeals clearly erred in finding [**490] that defendant established by a preponderance of the evidence that the police conduct in this case was so reprehensible as to constitute entrapment.

C. The Entrapment Test in Michigan

We originally granted leave to appeal in this case to consider whether the current entrapment test in Michigan, a modified objective test, is the most appropriate one. Accordingly, we asked the parties to address whether this Court should adopt the federal subjective test for entrapment. Sorrells v United States, 287 U.S. 435; 53 S. Ct. 210; 77 L. Ed. 413; 38 Ohio L. Rep. 326 (1932). However, because defendant's case fails to meet even the current more lenient modified objective test, n6 we do not need to reach that question.

n6 The objective test is generally considered to be more favorable to defendants than the subjective test. *See* Tawil, *"Ready? Induce. Sting!": Arguing for the government's burden of proving readiness in entrapment cases*, 98 Mich. L R 2371, 2378 (2000).

[***25] [*509]

Nevertheless, after review of our entrapment defense law, we note that Chief Justice CORRIGAN has raised serious questions regarding the constitutionality of *any* judicially created entrapment test in Michigan. *Maffett, supra* at 878- 899 (CORRIGAN, C.J., dissenting). Accordingly, we urge the Legislature to consider these questions and determine whether a legislative response is warranted.

IV. Conclusion

The Court of Appeals clearly erred in finding that the defendant was entrapped by the government under

Michigan's current entrapment test. The police did not engage in conduct that would induce a law-abiding person to commit a crime in similar circumstances; nor was the police conduct in this case so reprehensible as to constitute entrapment. Indeed, the record suggests that defendant had already committed the crime for which he was charged. Accordingly, we reverse the Court of Appeals decision, reverse the trial court's order granting defendant's motion to dismiss the charges, and remand to the trial court for further proceedings consistent with this opinion.

CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY:
Elizabeth A. Weaver

CONCUR:

WEAVER, J. (*concurring*).

I concur in all but part III(C) of the [***26] opinion. I do not join with the Court in hinting that the judicially created entrapment defense may be unconstitutional, and then referring that unanswered question to the Legislature.

DISSENTBY:
Michael F. Cavanagh

DISSENT:

[*510] CAVANAGH, J. (*dissenting*).

I concur in the majority's holding that the police conduct did not entrap defendant into the second transaction. However, I would conclude that the police conduct did entrap defendant into the first transaction; therefore, I respectfully dissent.

The majority's conclusion that defendant constructively possessed cocaine and, therefore, was not entrapped into committing the possession crimes is based on repeated references to the informant's claim that defendant "arranged, oversaw, and protected" the drug sales at the home defendant owned. See slip op at 2, 9 ("defendant owned a home that he rented to tenants who operated it as a drug house" and protected and received money for drugs sold.) Upon review of the entrapment hearing testimony, I question how the majority relies on this as support for its conclusion. The informant did not testify at the entrapment hearing. Rather, [**491] the information that the informant allegedly relayed to the police came into [***27] evidence through the police officer the informant contacted about defendant. This officer testified as follows:

Q. Now did this [informant] tell you how he [defendant] was involved?

A. Yes he did.

Q. And would you tell us what it was?

A. He said he was running a dope house.

Q. When you say he, you mean [defendant]?

A. No. [The informant] was running a house that-[defendant] owned the house and [the informant] was selling crack out of the house with [defendant's] full knowledge and consent and more or less participation; not in the actual sale, but in setting it up and providing protection and in running the operation.

[*511] The majority's focus on this portion of the police officer's testimony to support its repeated assertion that there was sufficient evidence showing defendant was more involved than the Court of Appeals discussed is misplaced. The most crucial part of the officer's testimony, which sheds light on the Court of Appeals reasoning, is omitted.

Q. Did you ever run across any independent corroboration of [the informant's] word?

A. I'm sorry?

Q. Independent corroboration meaning was there any evidence other than [the [***28] informant's] statements that [defendant] had been involved in the-this proported [sic] dope house?

A. At that point, no.

Q. At any point?

A. Yes.

Q. And what was that?

A. I checked records on the house that was pointed out and [defendant] did in fact own that house; to me that was corroboration.

Q. Well ...

A. It was-I knew it personally to be a dope house. However, prior to that point I did not know that [defendant] owned it.

Q. Okay. I guess what I'm asking is [the informant's] story was that [defendant] was-knew about it and was looking the other way and taking money, isn't that it?

A. That's correct.

The police officer initially stated that the informant told him defendant set up, ran, and supervised the drug house. However, when asked what information corroborated what the informant allegedly said, the

officer pointed to *only the fact that defendant owned the home and accepted money to look the other way.* [*512] The trial court made its credibility determination on this testimony that defendant had no other involvement beyond owning the drug house and bribery. Contrary to the picture the majority paints of defendant's part [***29] in the drug sales occurring in the home he owned, the record supports the Court of Appeals conclusion that defendant did nothing more than own a crack house and accept money to keep silent. Thus, the majority's mischaracterization of defendant's involvement directly conflicts with this Court's duty to give deference to credibility determinations in light of direct testimony supporting them. n1

n1 The majority faults me for limiting my review to the hearing testimony from the entrapment hearing instead of the entire record, which, according to the majority, "supplies ample evidence" that defendant knew that his role was to "handle" the drugs. *Ante* at 13, n 3. Contrary to the majority's assertion, I did not limit my review, but extracted evidence from the entire record that I believe supports the conclusion that defendant was entrapped into possessing the drugs in the first transaction (the *only* transaction for which I would conclude defendant was entrapped). To satisfy the majority's concern, however, the following is an excerpt from the body recordings of the undercover officer and defendant, which again proves that the majority's heavy reliance upon ambiguous dialog between defendant and the undercover officer before the February 7 audio tape is suspect. See *ante* at 15. Even after the ambiguous discussion, which the majority quoted, defendant clearly stated that he thought his involvement was to protect.

[*Undercover Officer*]: Ah man, alright, alright look, the reason, the reason I got you there is so that you there not eight places away. If you eight places away, you ain't doing me no good.

[*Defendant*]: Two cars away.

[*Undercover Officer*]: That ain't doing me no good.

[*Defendant*]: I heard everything you said.

[*Undercover Officer*]: What?

[*Defendant*]: I could hear you talking.

[*Undercover Officer*]: No, no, I don't want you to hear me talk. I want you, I, you got to be there, that's why I said ride up in the car with me. That way I can, if something happens man, I'm still stuck with the Goddamn package. I want to pitch it .... That's, that's what I want.

[*Defendant*]: Oh, you want me to handle it.

[*Undercover Officer*]: I don't want, no, no, no, no, I, but if you're in the car, just roll down the window. I can pitch it in there. I ain't got, I ain't holding nothing. That's what I'm talking about, see? But you standing way over there, now I got to hold it and hold it, and hold it, until you get there because I, I, I can't check the package and check him too. Alright. That's my boy, but business is business.

[*Defendant*]: *I thought you wanted protection, that's what I was under the impression that you wanted me for.* [Emphasis added.]

This conversation took place *after* the first transaction, thus revealing that defendant did not know he was to "handle" the drugs, but only thought he was to protect the undercover officer before the first transaction.

[***30] [*513] [**492]

Moreover, the majority uses its own credibility judgment to supersede that of the lower courts to conclude that defendant knew about his duty to handle the drugs before the first transaction. The majority states, "A recorded audiotape of defendant and [the undercover officer] discussing their arrangement before the first staged drug transaction demonstrates that [the undercover officer] informed defendant that he would have to handle drugs on occasion ...." Slip op at 14. When faced with the same evidence, the lower court and the attorneys themselves disagreed with the police witness and came to the contrary conclusion:

A. [*Undercover Officer*]: I believe I told [defendant] that we would-we met with the individual in which I was to make the purchase from, he was to take the drugs, check them, ensure that the package was right, let me know that it was right, and then we would leave.

Q. [*Defense Counsel*]: Now, Lieutenant, I don't see that in the transcript of the audio tapes that was made. Let me hand this to you and maybe you can show me.

Mr. Martin [*Assistant Prosecutor*]: Which transaction are we talking about?

[*514] *Mr. Szokolay* [*Defense* [***31] *Counsel*]: The transcript of the recording, body recording made February 7, 1992 [the first transaction].

****The Court*: Are you looking for something?

Mr. Szokolay: Yes, your Honor. The witness told us that he had told [defendant] prior to the buy that he would be expected to hold the package, and I asked him to find us where he said that.

The Court: Mr. Martin, can you agree that maybe it's not there? [**493]

Mr. Martin: Your Honor, *I believe the recording on February 7th doesn't indicate prior to the deal that he was informed of that, but on page five it indicates that he was informed of that after, that it would be his job to check the package*. [Emphasis added.]
The Court: That would be from the next transaction.

The Court of Appeals did not clearly err in concluding that on the basis of this evidence, the defendant was not informed before the first transaction that he would have to hold the drugs. Rather, all parties agreed that there was *no* evidence on that audio tape suggesting defendant was informed he would have to handle the drugs prior to the first transaction.

I cannot join a decision that not only mischaracterizes the facts in favor of a result, but also [***32] strips the deference that is due credibility determinations made by lower courts in such a way as the majority does today. Accordingly, I would reverse in part the decision of the Court of Appeals holding defendant was entrapped into the second possession transaction and affirm in part the decision of the Court of Appeals holding defendant was entrapped into the first.
KELLY, J., concurred with CAVANAGH, J.

ALLSTATE INSURANCE COMPANY, Plaintiff-Appellee, v ROBERT DANIEL MCCARN, a Minor; ERNEST WARD MCCARN; PATRICIA ANN MCCARN, Defendants, and NANCY S. LABELLE, Personal Representative of the Estate of KEVIN CHARLES LABELLE, Deceased, Defendant-Appellant.

No. 118266

SUPREME COURT OF MICHIGAN

466 Mich. 277; 645 N.W.2d 20; 2002 Mich. LEXIS 1071

December 5, 2001, Argued

June 12, 2002, Decided

June 11, 2002, Filed

PRIOR HISTORY:
[***1] Shiawassee Circuit Court, Gerald D. Lostracco, J. Court of Appeals, ZAHRA, P.J., and HOEKSTRA, J. (WHITE, J., dissenting), (Docket No. 213041). Allstate Ins. Co. v. McCarn, 464 Mich. 873, 630 N.W.2d 623, 2001 Mich. LEXIS 1137 (2001).

DISPOSITION:
Reversed and remanded.

COUNSEL:
Collison, Collison & Zimostrad, P.C. (by Joseph T. Collison) Saginaw, MI, for the plaintiff-appellee.
Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by Timothy J. Donovan), Lansing, MI, for defendant-appellant LaBelle.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. KELLY, TAYLOR, and MARKMAN, JJ., concurred with CAVANAGH, J., YOUNG, J. (concurring in part and dissenting in part). CORRIGAN, C.J., and WEAVER, J., concurred with YOUNG, J.

OPINIONBY:
Michael F. Cavanagh

OPINION:

[**21] [*278] CAVANAGH, J.

This is an action for declaratory judgment. Allstate Insurance Company seeks a determination of its obligation to indemnify its insureds in connection with an underlying wrongful death suit stemming from the shooting death of Kevin LaBelle. [*279]

We hold that the shooting death of Kevin LaBelle was "accidental" and, thus, an "occurrence" as defined in the insurance policy at issue. Consequently, an "occurrence" gives rise to Allstate's liability under the policy. [***2] Therefore, we reverse the decision of the Court of Appeals and remand to the Court of Appeals to decide whether the criminal acts exception in this policy excludes coverage.

I

This case arises out of the death of sixteen-year-old Kevin LaBelle on December 15, 1995, at the home of defendants Ernest and Patricia McCarn, where their grandson, then sixteen-year-old defendant Robert McCarn, also resided. On that day, Robert removed from under Ernest's bed a shotgun Robert's father had given [**22] him the year before. The gun was always stored under Ernest's bed and was not normally loaded. Both Robert and Kevin handled the gun, which Robert believed to be unloaded. When Robert was handling the gun, he pointed it at Kevin's face from approximately one foot away. Robert pulled back the hammer and pulled the trigger and the gun fired, killing Kevin.

Nancy LaBelle, representing Kevin's estate, brought the underlying action against Robert and his grandparents, Ernest and Patricia McCarn, who had a homeowners insurance policy with plaintiff Allstate. Allstate brought the present action, seeking a declaratory judgment that it had no duty to indemnify defendants Robert, Ernest, or Patricia McCarn. [***3]

Plaintiff and defendants moved for summary disposition in the declaratory action. The trial court [*280] granted defendants' motions for summary disposition and denied plaintiff's, holding that the events constituted an "occurrence" within the meaning of Allstate's policy. The trial court also held that Robert McCarn's conduct was not intentional or criminal within the meaning of Allstate's policy.

Allstate appealed to the Court of Appeals, which reversed the trial court in an unpublished opinion. n1 The Court attempted to apply our recent decisions in *Nabozny v Burkhardt* n2 and *Frankenmuth Mut Ins Co v Masters* n3 and concluded that "Robert's intentional actions created a direct risk of harm that precludes coverage."

n1 2000 Mich. App. LEXIS 1529, Issued October 3, 2000 (Docket No. 213041).

n2 461 Mich. 471; 606 N.W.2d 639 (2000).

n3 460 Mich. 105; 595 N.W.2d 832 (1999).

Defendant LaBelle sought leave to appeal. We granted leave.

II

In determining whether Allstate must [***4] indemnify the McCarns, we examine the language of the insurance policies and interpret their terms pursuant to well-established Michigan principles of construction. *Masters* at 111.

An insurance policy must be enforced in accordance with its terms. *Id.* If not defined in the policy, however, we will interpret the terms of the policy in accordance with their "commonly used meaning." *Id.* at 112, 114.

The McCarns' homeowners insurance policy provides in pertinent part:

[*281] Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

According to the plain meaning of the policy, liability coverage for damages arises from an "occurrence." The term "occurrence" is defined in the insurance policy as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage."

Our task, therefore, is to determine whether the case before us involved [***5] an "accident."

III

In the instant case, the policy defines an occurrence as an accident, but does not define what constitutes an accident. In similar cases where the respective policies defined an occurrence as an accident, without defining accident, we have examined the common meaning of the term. In such [**23] cases, we have repeatedly stated that "'an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected.'" *Masters* at 114, quoting *Arco Ind Corp v American Motorists Ins Co*, 448 Mich. 395, 404-405; 531 N.W.2d 168 (1995) (opinion of Mallett, J.); *Auto Club Group Ins Co v Marzonie*, 447 Mich. 624, 631; 527 N.W.2d 760 (1994); *Metropolitan Property & Liability Ins Co v DiCicco*, 432 Mich. 656, 670; 443 N.W.2d 734 (1989). [*282]

Accidents are evaluated from the standpoint of the insured, not the injured party. *Masters* at 114, n 6. In *Masters,* we held that "the appropriate focus of the term 'accident' must be on both 'the injury-causing *act* or *event* and [***6] its relation to the resulting property damage or personal injury.'" *Id.* at 115, quoting *Marzonie* at 648 (Griffin, J., concurring) (emphasis in original).

We also stated that "'an insured need not act unintentionally' in order for the act to constitute an 'accident' and therefore an 'occurrence.'" *Id.*

Where an insured does act intentionally, "a problem arises 'in attempting to distinguish between intentional acts that can be classified as "accidents" and those that cannot.'" *Id.*

In *Masters* at 115-116, we applied the following standard from Justice Griffin's concurrence in *Marzonie* at 648-649.

[A] determination must be made whether the consequences of the insured's intentional act "either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly, ... when an insured's intentional

actions create a direct risk of harm, there can be no liability coverage [***7] for *any* resulting damage or injury, despite the lack of an actual intent to damage or injure." [Emphasis in original.]

What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the [*283] insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured.

As to the perspective from which the analysis should be made, the question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences. Accordingly, an objective foreseeability test should not be used in the present context. Rather, the analysis must be that, to avoid coverage, the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured.

The policy language dictates whether a subjective or objective standard is to be used. n4 However, the policy language [**24] here does not indicate whether a subjective [***8] or objective standard is to be used. Because "the definition of accident should be framed from the standpoint of the insured ... ," *Masters* at 114, and because, where there is doubt, the policy should be construed in favor of the insured, *id.* at 111, we conclude that a subjective standard should be used here. Further, in *Masters,* this Court, faced with similar policy language, concluded that there is no coverage where the insured intended his action, and the consequences of this intended action "either were [*284] intended *by the insured* or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions." *Id.* at 115.

n4 For example, a policy that excludes coverage of bodily injury that is expected "from the standpoint of the insured," dictates a subjective standard, *Metropolitan Property & Liability Ins Co v DiCicco*, companion case to *Allstate Ins Co v Freeman*, 432 Mich. 656, 709; 443 N.W.2d 734 (1989), just as a policy that covers bodily injury not expected "by the insured," also dictates a subjective standard, *Fire Ins Exchange v Diehl*, 450 Mich. 678, 685; 545 N.W.2d 602 (1996).

[***9]

In our judgment, the language "by the insured" modifies both "intended" and "expected." Therefore, there is no coverage where the consequences of the insured's act were either "intended by the insured" or "reasonably should have been expected *by the insured.*" The language, "by the insured," indicates that a subjective standard should be used here. *Fire Ins Exchange v Diehl*, 450 Mich. 678, 685; 545 N.W.2d 602 (1996). Although, "negligence alone is not sufficient to prevent the death from being an accident within the meaning of the policy," *Collins v Nationwide Life Ins Co*, 409 Mich. 271, 277; 294 N.W.2d 194 (1980), when the acts of the insured rise to the level of a "direct risk of harm intentionally created"--a level of culpability only slightly lower than intentionally acting to produce an intended harm-coverage is precluded, where the insured reasonably should have expected the harm, as the situation is virtually indistinguishable from intentionally causing the harm.

Further, the "direct risk of harm" must have been "intentionally created by the insured's actions." This language shows that the *Masters* test is not [***10] objective. On the contrary, the inquiry is entirely subjective-did the insured *intentionally* create a direct risk of harm? In this case, there was no intentional creation of a direct risk of harm because of the undisputed evidence that Robert McCarn believed he was pulling the trigger of an unloaded gun.

The dissent is incorrect in concluding that this Court adopted an *objective* test in *Masters*. As previously [*285] stated, in our judgment, the language "by the insured" modifies both "intended" and "expected," indicating a subjective test. A subjective test is not only consistent with *Masters* and *Nabozny*, it is the required test, based on the language the *Masters* Court adopted from *Marzonie*. Accordingly, we are not abandoning the rule established in *Masters*, as the dissent contends; rather, we are simply adhering to this rule. See *post* at 9, n 6.

Applying these principles to the present case, viewed from the standpoint of the insured, we hold that Kevin LaBelle's death was an "accident," thus an "occurrence," covered under the insurance policy. We agree with plaintiff that Robert intended to point the gun at Kevin and pull the trigger. However, [***11] Robert believed the gun was not loaded. Robert had no intention of firing a loaded weapon. No bodily injury would have been caused by Robert's intended act of pulling the trigger of an unloaded gun.

The dissent states:

What is the direct risk of harm consonant with pulling the trigger of a firearm? The obvious risk is that the weapon, [**25] if loaded, might discharge and cause

an injury. In my view, the evidence adduced at the summary disposition stage warrants the conclusion that the insured should have reasonably expected the consequences of his intentional act. [Slip op at 13.]

We agree that this case does not present a question of fact. The fact that Robert believed the gun was unloaded is a matter about which there is no genuine issue of material fact. This is because there is nothing in the record to reasonably support a conclusion that, contrary to Robert's testimony that he believed the gun was unloaded, he consciously believed the gun [*286] was loaded, or even contemplated that there was any possibility that it was loaded when he pulled the trigger. Even plaintiff, the insurer, acknowledged that Robert believed the firearm was unloaded when he pulled the trigger:

McCarn's subjective [***12] , although erroneous, belief that the firearm was not loaded does not alter the fact that he picked up the gun, pointed it, pulled back the hammer and pulled the trigger.

Further, Robert made statements at his deposition to support his belief that the gun was not loaded: Robert and Kevin were "horsing around" with the gun as they had done on previous occasions; Robert was surprised when the gun actually fired; and, immediately following the discharge of the gun, Robert called 911. Thus, there is nothing to reasonably indicate that Robert entertained knowledge that the gun might have been loaded.

In short, it would be speculation to suggest that Robert intentionally shot his friend or was conscious of a nontheoretical possibility that a shell was in the gun when he pulled the trigger. Clearly, such speculation cannot suffice to establish even a genuine issue of material fact, let alone to conclude that Robert's intended act of pulling the trigger of an unloaded gun intentionally created a direct risk of harm.

The dissent goes to great lengths to show that under an objective standard, the insured should have reasonably expected the consequences. We simply cannot agree because the language [***13] of the test adopted in *Masters* requires us to *subjectively* analyze what Robert thought when he pulled the trigger. Robert [*287] thought he was pulling the trigger of an *un*loaded gun. n5

> n5 The dissent asserts that this opinion makes "the insured's subjective belief regarding the status of the gun definitive." *Post* at 12. While this is not inaccurate, this should not be confused with making the insured's own *assertions* of his subjective belief definitive. A subjective test does not require courts to simply accept uncritically the insured's own assertions regarding his subjective belief. Instead, courts must examine the totality of the circumstances, including the reasonableness or credibility of the insured's assertions, evidence of "other acts," evidence concerning the faculties or the maturity of the insured, evidence concerning relationships between an insured and a victim of an injury, and so forth. In this case, there is simply no evidence to suggest that the insured intended shot to be discharged from *this* gun when he pulled its trigger.
>
> Further, that the insured can *now* logically explain how the accidental shooting most likely occurred, i.e., that the insured forgot to unload the gun the last time he used it, does not transform an otherwise accidental shooting into an intentional creation of a direct risk of harm. Merely because one can explain, after the fact, how an insured's actions inexorably led to certain consequences does not mean that that insured reasonably should have expected those consequences. If that were true, the only covered occurrences would be inexplicable ones.

[***14]

Robert McCarn may have been negligent in failing to see if the gun was loaded before he pulled the trigger, particularly because he was the last person to [**26] use the gun weeks earlier for target practice. However, the issue of negligence is not before us. As we stated in *Collins,* the negligence of the insured in acting as he did is not enough to prevent an incident from being an accident if the consequence of the action (e.g., shot coming from a gun) should not have reasonably been expected by the insured. n6

> n6 The dissent asserts that Robert's prior use of the gun should be considered in deciding whether Robert should have reasonably anticipated the harm caused. However, at most, the prior use of the gun would establish Robert was negligent. In Michigan, the test is not whether the insured was negligent, but whether the insured should have reasonably expected the consequence.

While it may be considered quite obvious that Robert's conduct was careless and foolish, it was negligence that simply did not rise [***15] to the level that he [*288] should have *expected* to result in harm. Otherwise, liability insurance coverage for negligence

would seem to become illusory. We must be careful not to take the expectation of harm test so far that we eviscerate the ability of parties to insure against their own negligence. n7

> n7 The dissent refers to Robert's nolo contendere plea to manslaughter. Slip op at 3. However, given that such a no- contest plea does not have the effect of an admission for any other proceeding than the one in which it is entered, MCR 2.111(E)(3), that plea has no legal relevance to this case. Regardless, even if we assume Robert's guilt of manslaughter in connection with this case, that does not change the fact that the shooting was an accident. Similarly, the dissent refers to Robert having smoked marijuana, slip op at 3, n 3, but this has no serious relevance to the issues at hand. Smoking marijuana did not affect the establishment of intent by Robert.

The problem, as we see it, with the dissent's opinion is [***16] that it undermines the ability of insureds to protect themselves against their own foolish or negligent acts. If courts are to review the acts of insureds for "objective reasonableness," as the dissent proposes, the very purpose of insurance would be compromised as insureds would find it increasingly difficult to recover on claims arising from injuries set in motion by foolhardy conduct on their own part or on the part of their families. However, the impetus for insurance is not merely, or even principally, to insure oneself for well thought out and reasoned actions that go wrong, but to insure oneself for foolish or negligent actions that go wrong. Indeed, it is obviously the latter that are more likely to go astray and to precipitate the desire for insurance. Under the dissent's approach, however, only the former actions would be clearly covered "accidents," or, at least, would clearly avoid disputes over coverage with insurers.

[*289] Further, under the dissent's approach, only occurrences that were truly unexplainable would be covered "accidents." For, in retrospect, a sufficiently diligent insurer could almost always determine the physical cause of an accident, tracing it back to [***17] *some* prior conduct by the insured that should have been performed differently. Actions have consequences, and with sufficient effort, a connection between an occurrence and a prior action on the part of the insured can invariably be identified. However, merely because, in retrospect, an insurer is able to identify such a connection, does not mean that what took place was not an "accident." If one is driving too fast on a highway, not intending to but nonetheless causing an accident, it can hardly be denied that what has resulted is an accident despite the fact that it might be traceable to "objectively unreasonable" conduct by the insured, i.e. driving too fast on a highway.

IV

Contrary to what our dissenting colleagues state, we are not abandoning or [27] calling into question the rule from *Masters* in any way. The facts of this case are distinguishable from *Masters* and *Nabozny*, where we held that specific acts failed to qualify as accidents under the respective insurance policies. In *Nabozny*, the plaintiff broke his ankle during a fight when the insured tripped him. The insured, while not intending to break the plaintiff's ankle, did intend to fight with him. This [***18] and the effort to trip during the fight was the creation of a direct risk of physical harm that should have caused the insured to reasonably expect the consequences that ensued. Thus, we concluded that the injury was not an accident.**

[*290] **In *Masters*, the insured and his son intentionally set a fire, intending to cause damage in their clothing store only, but that ultimately destroyed not just their store, but also a neighboring building. We held that the applicable insurance policy, which precluded coverage for intentional acts, did not provide coverage under the circumstances. Our reason was that, when the insured acted by starting a fire, it is irrelevant that the consequence, which was burning property, was different in magnitude from that intended.**

The difference between this case and *Nabozny* and *Masters*, however, is that here, while the act was intended, the result was not. n8 Thus, unlike in *Nabozny,* Robert should not have reasonably expected the consequences that ensued from his act because his intended act was merely to pull the trigger of an unloaded gun. Similarly, unlike *Masters,* where the consequence of the act was intended, here the consequence--shot leaving [*19] the gun--was not intended. Furthermore, even if one used some variation on a foreseeability test, no bodily harm could have been foreseen from Robert's intended act, because he intended to pull the trigger of an unloaded gun, and, thus, it was not foreseeable, indeed it was [*291] impossible, under the facts as Robert believed them to be, that shot would be discharged. Therefore, we cannot say Robert should have expected the unfortunate consequences of his act. The discharge of the shot was an accident and entitled to coverage unless a policy exclusion applies.**

n8 **The dissent contends that "there is no such 'difference' among these three cases. Rather, in *both Masters* and *Nabozny*, the insureds made precisely the same claim as presented here-that they did not intend *the result* of their deliberate acts." *Post* at 8 (emphasis in original). What the dissent is missing is that the insureds in *Masters* and *Nabozny did* intend the results of their deliberate acts-the fire and the tripping; they just did not intend the magnitude of those results-the burning down of the neighboring building and the broken ankle. So, again, this case *is* different from *Masters* and *Nabozny* because there the insureds *did* intend the results of their deliberate acts, while here the insured did *not* intend the result-the firing of shot-of his deliberate act-the shooting of a gun that he believed to be unloaded.**

[***20]

V

Allstate maintains that Robert McCarn's actions constitute a criminal act that, under the policy's criminal acts exclusion, negates Allstate's duty to indemnify the insureds. The Court of Appeals did not reach this issue because it concluded that Robert's actions created a direct risk of harm that precluded coverage. We remand this case to the Court of Appeals to decide this issue.

VI

We hold today that Kevin LaBelle's death was an "accident," and thus an "occurrence," covered under the policy because Robert did not intend or reasonably expect that his actions, pointing and pulling a trigger of an *unloaded* gun, would [**28] **cause any bodily injury to Kevin LaBelle. We reverse the judgment of the Court of Appeals and remand to the Court of Appeals to decide whether the criminal-acts exception in this policy excludes coverage.**

KELLY, TAYLOR, and MARKMAN, JJ., concurred with CAVANAGH, J.

CORRIGAN, C.J., and WEAVER, J., concurred with YOUNG, J.

CONCURBY:
Robert P. Young, Jr. (In Part)

DISSENTBY:
Robert P. Young, Jr. (In Part)

DISSENT:

YOUNG, J. (*concurring in part and dissenting in part*).

I agree with the majority that this case should be remanded to the Court of [***21] Appeals so that the applicability of the intentional [*292] act and criminal act policy exclusions can be decided. However, I respectfully dissent from that portion of the majority opinion that concludes that the policy provides indemnity coverage because the majority finds that the shooting incident here constituted an "accident" and thus an "occurrence" under the policy. The majority essentially adulterates any consistent or coherent application of the standards set forth by this Court just two terms ago in *Masters* n1 and later applied in *Nabozny* n2 concerning the differentiation between an accident and an intentional act. The majority's effort to distinguish the facts of this case from *Masters* and *Nabozny* are hollow and simply debases the clear standard set forth in those opinions.

n1 *Frankenmuth Mut Ins Co v Masters*, 460 Mich. 105; 595 N.W.2d 832 (1999).

n2 *Nabozny v Burkhardt*, 461 Mich. 471; 606 N.W.2d 639 (2000) .

I believe that the [***22] application of the definition of the term "accident" we recently announced in *Masters* and *Nabozny*, in which we construed identical policy language, requires an objective view of the insured's actions.

Under the facts of this case, the insured should have reasonably expected the consequences created by pointing a gun at another and pulling the trigger without checking to verify that it was unloaded. Accordingly, I would affirm summary disposition in favor of plaintiff.

I. ADDITIONAL FACTS

According to Robert McCarn's deposition testimony, he and Kevin LaBelle went to McCarn's house [*293] after school. At some point in the afternoon, n3 McCarn retrieved his .410 shotgun from under his grandfather's bed. Both boys handled the weapon.

n3 Before retrieving the shotgun, McCarn testified that he and LaBelle got something to eat after school, went to a friend's house for ten minutes, smoked "one joint and a bowl" of marijuana, watched videos, and played with a guinea pig and a hedgehog.

LaBelle and McCarn [***23] argued over crackers; LaBelle had the crackers and refused to share them with

McCarn when asked to do so. Attempting to frighten LaBelle into sharing the crackers, n4 McCarn intentionally pointed the shotgun at LaBelle with the barrel being approximately one foot away from LaBelle's face. McCarn again asked LaBelle for the crackers, but LaBelle declined to share them. McCarn pulled the hammer back, pretended to pull the trigger "a couple" times, and then actually pulled the trigger. The weapon discharged and LaBelle was killed. As a result of the death, McCarn pleaded nolo [**29] contendere to manslaughter, MCL 750.321 .

> n4 While earlier in his testimony, McCarn denied pointing the gun at LaBelle with the intention of frightening him, stating that he was "just playing," he also admitted that he thought the anticipated clicking sound "would be frightening" to LaBelle. Later on in his testimony, McCarn admitted that he was "attempting to frighten" LaBelle "into giving [him] the crackers."

In [***24] both his statement to the police and his deposition testimony, McCarn stated that he thought the gun was unloaded and would simply "click" when the trigger was pulled. McCarn acknowledged, however, that he did not check the gun to verify that it was unloaded before pulling the trigger. McCarn stated that he had owned the gun "for at least a year" before the shooting and had successfully completed a gun safety course. He also admitted that he had last used the gun without his grandparent's permission for target [*294] practice weeks before the shooting. On this prior occasion, McCarn was "in a hurry" to put the gun away because he did not want his grandparents to catch him using the weapon without their supervision. McCarn could not recall if he had unloaded the shotgun in his hurry to put the weapon away.

II. *MASTERS* AND *NABOZNY*

The policy language in this case and in *Masters* and *Nabozny* are *identical*. Each policy provided coverage for an "occurrence," which was later defined as an "accident." Accident was not further defined.

A. *MASTERS*

Masters involved an intentionally set fire that had the unintended result of destroying nearly a block of business [***25] establishments. As in this case, the policy in *Masters* provided coverage for an "occurrence," which was later defined in the policy as "an accident." 460 Mich. 113. The insureds claimed that the event was an accident because, although the fire in their business premises was deliberately set, they did not intend to damage the adjoining buildings.

The Court of Appeals applied a subjective standard in assessing whether the insured arsonists expected or intended to burn properties other than their own. This Court reversed. We first gave "accident" its customary, ordinary meaning as an "undesigned contingency, a casualty, a happening by chance, something not anticipated, ... and not naturally to be expected." *Id.* at 114. Having defined accident, we nevertheless recognized the difficulty of categorizing cases in which the action giving rise to the harm was intended [*295] even though the consequences were not. We *unanimously* held that an insured's intentional actions precluded coverage *even though* the insureds claimed not to have intended the consequences of their actions where the insured *"reasonably should have expected"* the harm the insured's [***26] acts created. We adopted this objective standard from Justice GRIFFIN's concurrence in *Auto Club Group Ins Co v Marzonie*, 447 Mich. 624, 648-649; 527 N.W.2d 760 (1994) :

> In such cases, a determination must be made whether the consequences of the insured's intentional act either were intended by the insured or *reasonably should have been expected* because of the direct risk of harm intentionally created by the insured's actions. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. *Similarly, ... when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for any resulting damage or injury, despite the lack of an actual intent to damage or injure.* [*Masters*, 460 Mich. at 115-116 (Emphasis added.)]

Granting summary disposition to the insurer, this Court held that, because the Masters intended to cause harm, "it is irrelevant whether the harm that resulted, [**30] damage to the clothing store and surrounding businesses, was different from or exceeded the [***27] harm intended, minor damage to the clothing inventory." *Id.* at 116-117. We later applied this same objective test in *Nabozny*.

B. *NABOZNY*

Similarly, in *Nabozny*, the plaintiff was injured in a fight with the insured. The policy at issue was identical [*296] to the one in *Masters* and this case, and provided coverage for an "occurrence," which, in turn, was defined as "an accident". 461 Mich. 474. As in the present case, the insured claimed that the injury he caused was a covered occurrence because he did not intend to break the plaintiff's ankle. We unanimously rejected that argument, holding:

In this case, Mr. Burkhardt apparently did not intend to break Mr. Nabozny's ankle. However, it is plain that in tripping someone to the ground in the course of a fight, *Mr. Burkhardt reasonably should have expected the consequences of his acts because of the direct risk of harm created.* This precludes a finding of liability coverage under the terms of this policy. In other words, the injury did not result from an "accident."

Moreover, Mr. Burkhardt's testimony that he did not intend to "break any bones" does not assist him. In our quote from *Marzonie,* [***28] Justice GRIFFIN cited *Piccard,* which explained:

"Where a direct risk of harm is intentionally created, and property damage or personal injury results, there is no liability coverage even if the specific result was unintended. It is irrelevant that the character of the harm that actually results is different from the character of the harm intended by the insured."

It is clear from the facts, as stated by the insured, that injury reasonably should have been expected. Therefore, it is irrelevant that the broken ankle was not the specific harm intended by the insured. [*Id.* at 480-481 (citations omitted).]

It is worth reemphasizing that in both *Masters* and *Nabozny* the policy language we construed was *identical* to the policy language contained in the present case. Here, like *Masters* and *Nabozny*, the insured engaged in a deliberate act but claimed that the [*297] resulting unintended consequences rendered the event an accident. In both *Masters* and *Nabozny*, this Court rejected this argument and held that there was no covered "occurrence" because the insured *reasonably should have expected* the consequences of his intentional actions--even [***29] when the insured himself did not anticipate such consequences. Thus, in *Masters* and *Nabozny* we declined to view the expectation of the injury from the subjective perspective of the insureds in making the determination whether an accident occurred.

C. THE MAJORITY'S MISAPPLICATION OF *MASTERS* AND *NABOZNY*

The majority erroneously states that the "difference" between the present case and *Masters* and *Nabozny* "is that here, while the act was intended, the result was not." Slip op at 16. There is no such "difference" among these three cases. Rather, in *both Masters* and *Nabozny*, the insureds made precisely the same claim as presented here--that they did not intend *the result* of their deliberate acts. Robert intended to pull the trigger of his shotgun, but he testified that he did not intend to cause any physical injury to his friend. The question for the purpose of coverage is [**31] whether the shooting can be considered an accident because Robert should *not* have *reasonably expected* the consequences when he intentionally aimed his shotgun at the head of his friend, cocked the hammer, and pulled the trigger.

The purported difference between this [***30] case and *Masters* and *Nabozny* has been *created* by the majority, which has imposed a different construction of the phrase "intentional act." As stated in *Masters*, this [*298] Court unanimously adopted an *objective* test of intentionality: an intentional act causing injury is not an accident if the insured actually intended the harm or if the harm should *reasonably* have been expected. n5

> n5 To reiterate, the Masters standard is as follows: "[A] determination must be made whether the consequences of the insured's intentional act 'either were intended by the insured or *reasonably should have been expected* because of the direct risk of harm intentionally created by the insured's actions.'"
>
> The majority attempts to avoid applying an objective standard, urging that, in the *Masters* standard, "by the insured" modifies both "intended" and "expected." This is grammatically incorrect. In fact, grammatically speaking, the phrases "intended by the insured" and "reasonably should have expected" modify "consequences." Therefore, the *Masters* standard unqualifiedly and grammatically requires an inquiry into the reasonableness of the insured's expectations concerning the consequences of his intentional acts. This is an objective inquiry, not, as the majority contends, a subjective one.
>
> It appears to me that this Court wisely chose to use an objective definition of accident in *Masters* because it creates a disincentive for collusion between an insured and a plaintiff. See *Nabozny, supra* at 479, n 10.

[***31]

Here, the majority fails to apply the objective *Masters* test of intentionality, instead substituting a subjective one. n6 The majority states that "we agree with plaintiff that Robert intended to point the gun at Kevin and pull the trigger.[n7] *However, Robert believed that the gun was not loaded. Robert had no intention of firing a loaded weapon.* No bodily injury would have been caused by Robert's intended act of pulling the trigger of an unloaded gun." Slip op at 9 (emphasis added). What the majority must justify, but cannot, is why we must consider his act of pointing a shotgun at another person and pulling the trigger [*299] from Robert's subjective perspective. n8 Under the *Masters* test, the question is whether the insured

"reasonably" should have expected the consequence because of the direct risk of harm he intentionally created. However, the majority tautologically [**32] concludes as a matter of law that "*Robert* should not have reasonably expected the consequences that ensued from his act because his intended act was merely to pull the trigger of an *unloaded* gun." n9 Slip op at 16 (emphasis added). However, what Robert's reasonable expectations *should have been* [***32] , not what his actual subjective beliefs may or may not have been, are the focus of the *Masters* standard.

n6 This Court is free to abandon for sufficient reason its own precedent. When it does so, it should do it openly and provide justification. Here the majority abandons the rule it established in *Masters* after years of contradictory precedent without acknowledging (1) that it has done so or (2) why it is justified in doing so.

n7 I note that the majority would have no factual or legal basis for concluding otherwise, because defendant admitted that he intentionally aimed the gun, engaged the hammer, and pulled the trigger in order to frighten his friend during their dispute over crackers.

n8 This insistence on viewing Robert's act from his subjective perspective represents a critical flaw in the majority opinion. The majority declares that it must employ a subjective standard because this, as opposed to an objective standard, aids in construing the policy in favor of coverage. "Where there is doubt, the policy should be construed in favor of the insured ...." Slip op at 7.

This is contrary to the rules of contract interpretation. Contracts, even insurance contracts, are construed according to their unambiguous terms. It is only when there is an ambiguity in the policy language that provides a basis for using a rule of construction favoring coverage. *Masters*, *supra* at 111. Because we considered the very contract term at issue here, "accident," in *Masters* and *Nabozny* and found no ambiguity, the majority has no warrant to "construe" that term in any different fashion in this case. [***33]

n9 Yet another flaw in the majority opinion is that it attempts to divide the "intentional act" into components. Rather than view the act from the required perspective--the consequences *reasonably* expected when a direct risk of harm is created--the majority focuses on whether the insured intended to pull the trigger of an *unloaded* gun. Without basis, the majority subdivides the intentional act into two components, the voluntary act and the chain of events that the volitional act sets into motion--the consequences. The intentional act committed by Robert was that of pulling the trigger of a gun. That the gun was or was not loaded does not transform the nature of the insured's volitional act.

The majority erroneously maintains that the test we articulated in *Masters* and *Nabozny* is a subjective one. However, the majority fails to explain our objective application of the test in both cases. In addition, [*300] the term "reasonably" has consistently been construed as indicating an objective rather than a subjective standard. In *Allstate Ins Co v Freeman*, 432 Mich. 656; 443 N.W.2d 734 (1989), [***34] six justices, including the author of the current majority opinion, agreed that "'reasonably be expected' is unambiguous" and "requires application of an objective standard of expectation." 432 Mich. 688. In *Fire Ins Exchange v Diehl*, 450 Mich. 678, 685; 545 N.W.2d 602 (1996), the Court held that injury "'neither expected nor intended by the insured'" required a subjective standard of expectation where the policy language did "*not* employ the term *'reasonably.'*" (Emphasis added.) The majority simply refuses to acknowledge that the test adopted in *Masters* and *Nabozny* utilizes the same language that has been construed by this Court as requiring an *objective* standard of inquiry.

Without offering any rationale for doing so, the majority makes the insured's subjective belief regarding the status of the gun definitive, as though no contrary conclusion were possible. The issue is whether, in intentionally creating a direct risk of harm--pulling the trigger of a shotgun without ascertaining if it was loaded--the insured should have *reasonably* expected the consequences. Given that the applicable standard is *objective*, the [***35] insured's subjective belief is not controlling.

Inexplicably, under the standard adopted by the majority, neither the holding nor the outcome in *Masters* or *Nabozny* could be sustained today.

III. APPLICATION OF *MASTERS* AND *NABOZNY*

In the present case, it is uncontested that Robert McCarn intentionally aimed the weapon at the victim, [*301] engaged the hammer, and pulled the trigger. n10 Because he denied intending the actual injury, the event is an "occurrence" only if he should not have *reasonably* expected the consequences in light of the direct risk of harm intentionally created.

n10 As such, the acts admitted by the insured constitute felonious assault, MCL 750.82 .

The scope of the direct risk of harm created by an insured's act is necessarily dependent upon the nature of the intentional act and the facts and circumstances surrounding the event. The direct risk of harm created by intentionally throwing knives, for example, is far greater than the direct risk of [***36] harm created by intentionally [**33] throwing cotton balls. In each instance, the natural result of the voluntary act must be considered. See 9 Couch, Insurance, 3d, § 126:27, p 126- 53.

What is the direct risk of harm consonant with pulling the trigger of a firearm? The obvious risk is that the weapon, if loaded, might discharge and cause an injury. In my view, the evidence adduced at the summary disposition stage warrants the conclusion that the insured should have reasonably expected the consequences of his intentional act.

In his deposition testimony, McCarn testified that he consumed marijuana before taking the weapon out of storage. He also testified that he believed that the gun was unloaded and that he was "just playing" when he pulled the trigger of the weapon. However, he later admitted that he intended to frighten LaBelle into parting with crackers. n11

n11 The majority would prefer to minimize the insured's *admitted* intent to cause harm--to commit a felonious assault. I do not. As we stated in *Nabozny*, "'where a direct risk of harm is intentionally created, and property damage or personal injury results, there is no liability coverage *even if the specific result was unintended*. It is irrelevant that the *character* of the harm that actually results is different from the *character* of the harm intended by the insured.'" 461 Mich. 481, quoting *Marzonie*.

[***37] [*302]

In addition, McCarn admitted that he did not check the status of the gun before pulling the trigger. He also testified that the last time he used the gun, he put it away hurriedly and could not recall whether he unloaded the weapon before putting it away. Further, the insured admitted that he deliberately aimed the weapon one foot away from the victim's face, engaged the hammer, and pulled the trigger in an effort to *assault* the victim. n12

n12 The majority attempts to explain why Robert's later testimony about his prior use of the shotgun is not dispositive. However, I cannot think of a single reason why all the defendant's admissions should not be considered in deciding whether Robert should have reasonably anticipated the harm he caused in using his weapon.

As we noted in *Nabozny*, "it can be in the interest of an insured defendant to provide testimony that will allow an injured plaintiff to recover from the insurer rather than directly from the defendant." *Id.*, at 479, n 10. As stated, [***38] I do not believe that reasonable jurors could conclude that Robert's stated beliefs about the harm he was creating were reasonable. Inasmuch as the reasonableness of Robert's expectations about the harm he created is *the* critical issue for the purpose of coverage under this policy, summary disposition in favor of plaintiff is appropriate. Therefore, I believe that the majority errs in holding that the event was an accident as a matter of law.

CONCLUSION

Because I believe that Robert reasonably should have expected the consequences of his actions in [*303] light of the direct risk of harm he created, I would affirm summary disposition in favor of plaintiff. n13

n13 As to the issue of how direct a harm the insured's actions created, this would be a much closer question--and one requiring a trial--if evidence were presented that the insured had checked the gun and mistakenly (or negligently) determined that it was unloaded before pulling the trigger.

Counsel's Office, White House
Kavanaugh, Brett

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REV_00458091

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v REGINALD JOHN LETT, Defendant-Appellee.

No. 117041

SUPREME COURT OF MICHIGAN

466 Mich. 206; 644 N.W.2d 743; 2002 Mich. LEXIS 1038

October 10, 2001, Argued

June 4, 2002, Decided

June 4, 2002, Filed

PRIOR HISTORY:
[***1] Wayne Circuit Court, Thomas W. Brookover, J. Detroit Recorder's Court, Helen E. Brown, J. Court of Appeals, JANSEN, P.J., and COLLINS and J. B. SULLIVAN, JJ., (Docket No. 209513).

DISPOSITION:
Reversed and remanded.

COUNSEL:
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Michael E. Duggan, Prosecuting Attorney, Timothy A. Baughman, Chief, Research, Training and Appeals, and Janet A. Napp, Assistant Prosecuting Attorney, Detroit, MI, for the people.
State Appellate Defender (by Gail Rodwan), Detroit, MI, for the defendant-appellee.
Amicus Curiae: Jeff Sauter, PAAM President, and Jerrold Schrotenboer, Chief Appellate Attorney, Jackson, MI, in support of the people.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J., CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[**744] [*208] YOUNG, J.

We granted leave to appeal in this case to consider whether defendant is entitled to the reversal of his convictions on the ground that he was retried, [***2] following the declaration of a mistrial, in violation of his constitutional right to be free from double jeopardy. We conclude that the trial court did not abuse its discretion in declaring a mistrial and in dismissing the jury where the jury foreperson indicated that the jury members were not going to reach a unanimous verdict and defendant did not object to the declaration of mistrial. We additionally conclude that defendant's retrial, following the proper declaration of a mistrial, [**745] did not violate the constitutional protection against successive prosecutions. Accordingly, we reverse the decision of the Court of Appeals and remand this matter to that Court for consideration of the additional issue that was raised by defendant, but not decided.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 29, 1996, Adesoji Latona, a taxi driver, was fatally shot at a Detroit liquor store. Latona was apparently confronted by a group of men, including defendant, as he entered the liquor store. One of the men, Charles Jones, accused Latona of throwing him out of Latona's cab, and an argument ensued inside the store. Latona's girlfriend testified that she saw defendant draw a gun, after which [***3] she heard two gunshots. In a statement given to police following the [*209] incident,

defendant admitted that he was at the party store at the time of the shooting and that he and Jones had fought with Latona inside the store. Defendant further stated that he had retrieved a gun from another friend in the parking lot, and that he went back inside and fired the gun into the air before running back outside. Latona died from two gunshot wounds, one to the head and one to the chest.

Defendant was charged with first-degree murder, MCL 750.316 , and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b . Defendant's first trial, which took place in June 1997 before Detroit Recorder's Court Judge Helen E. Brown, consumed-from jury selection to closing statements and jury instructions-a total of eight and one-half hours spread out over six days. After approximately four or five hours of deliberation, n1 the jury sent Judge Brown a note which stated: "What if we can't agree? Mistrial? Retrial? What?" n2 Upon receiving the note, Judge Brown called the jury into the courtroom and, with the assistant prosecuting attorney [***4] and defense counsel present, n3 engaged in the following exchange with the jury foreperson:

[*210] *The Court*: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves [sic], please?

Foreperson: [Identified herself.]

The Court: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?

Foreperson: Yes, there is.

The Court: All right. Do you believe that it is hopelessly deadlocked?

Foreperson: The majority of us don't believe that ...

The Court: (Interposing) Don't say what you're going to say, okay?

Foreperson: Oh, I'm sorry.

The Court: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

[**746] *Foreperson*: (No response)

The Court: Yes or no?

Foreperson: No, Judge.

The Court: All right. I hereby declare a mistrial. The jury is dismissed.

n1 The jury deliberated from approximately 3:24 p.m. to 4:00 p.m. on June 12, 1997, and ended its deliberations at 12:45 p.m. on June 13, 1997. [***5]

n2 During its deliberations, the jury sent out seven notes. Most of the notes were routine requests for evidence, instructions, and breaks. However, one note, sent out early on the second day of deliberations, stated that the jurors had "a concern about our voice levels disturbing any other proceedings that might be going on," indicating that perhaps the deliberations had already become somewhat acrimonious.

n3 We are unable to discern from the trial transcript whether any off-the-record discussion took place between Judge Brown and counsel before the jury was called into the courtroom concerning any proposed response to the jury's note.

In November 1997, defendant was retried before a different judge on charges of first-degree murder and felony- firearm. The second jury returned a verdict of guilty of the lesser offense of second-degree murder, MCL 750.317 , and guilty as charged of felony-firearm. n4

n4 The second jury deliberated for approximately three hours and fifteen minutes before delivering its verdict.

[***6]

In his appeal before the Court of Appeals, defendant, through appellate counsel, raised for the first time the claim that he was retried in violation of the Double Jeopardy Clause of the federal and state constitutions. Defendant argued that Judge Brown had [*211] sua sponte terminated the first trial without manifest necessity to do so and without his consent, and that retrial therefore violated his constitutional right to be free from successive prosecutions.

The Court of Appeals panel agreed and reversed defendant's convictions. The panel opined that defendant had not consented to the declaration of the mistrial, citing *People v Johnson*, 396 Mich. 424, 432; 240 N.W.2d 729 (1976), repudiated on other grounds in *People v New*, 427 Mich. 482; 398 N.W.2d 358 (1986), for the proposition that a defendant's mere silence or failure to object to the jury's discharge is not "consent."

The panel, turning to defendant's claim that the declaration of a mistrial was not manifestly necessary, concluded that the trial court's decision to discharge the jury was not reasonable because it had failed to consider alternatives or to make findings [***7] on the record:

Recognizing that the doctrine of double jeopardy does not preclude retrial after the discharge of a jury because of inability to agree, our Supreme Court has stated that the inquiry "turns upon [the] determination whether the trial judge was entitled to conclude that the jury in fact was unable to [agree]." *People v Duncan*, 373 Mich. 650, 660-661; 130 N.W.2d 385 (1964). This has led to the accepted rule that a trial court must consider reasonable alternatives before sua sponte declaring a mistrial and the court should make explicit findings, after a hearing on the record, that no reasonable alternative exists. *People v Hicks*, 447 Mich. 819, 841, [**747] (GRIFFIN, J.), 847 (CAVANAGH, C.J.); 528 N.W.2d 136 (1994); *People v Benton*, 402 Mich. 47, 61; 260 N.W.2d 77 (1977) (LEVIN, J.); *People v Rutherford*, 208 Mich. App. 198, 202; 526 N.W.2d 620 (1994); *People v Little*, 180 Mich. App. 19, 23-24; 446 N.W.2d 566 (1989); *People v Dry Land Marina*, 175 Mich. App. 322, 327; 437 N.W.2d 391 (1989). [***8]

In the present case, we must determine whether the trial court reasonably concluded that the jury was deadlocked. [*212] Based on the record before us, we are forced to conclude that the court did not reasonably declare a mistrial. The trial court declared a mistrial without a hearing or discussion of any alternatives. No deadlock jury instructions were given much less even considered by the trial court. See CJI2d 3.12. The jury had deliberated only four or five hours in a capital murder case following four days of trial testimony. There was clearly a reasonable alternative in this case, that is, to give the jury a deadlock jury instruction and send it back for further deliberation. See, e.g., Hicks, 447 Mich. at pp 843-844; Benton, 402 Mich. at pp 61-62; Rutherford, 208 Mich. App. at p 203; Little, 180 Mich. App. at pp 27-30.

Because a reasonable alternative existed in this case, an alternative never given consideration by the trial court, the trial court did not engage in a scrupulous exercise of discretion in sua sponte declaring a mistrial. Hicks, 447 Mich. at p 829, citing *United States v Jorn*, 400 U.S. 470, 485; 27 L. Ed. 2d 543; 91 S. Ct. 547 (1971). [***9] Put another way, it was not manifestly necessary for the trial court to have declared a mistrial given the shortness of the jury's deliberation and the court's failure to give a deadlock jury instruction. In fact, the trial court never even found on the record that the jury was genuinely deadlocked. Given these circumstances, we are compelled to conclude that retrial violated defendant's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. Therefore, defendant's convictions are reversed. [Slip op, pp 4-5.]

We granted the prosecution's application for leave to appeal. n5 Because we conclude that manifest necessity existed to support the mistrial declaration, we reverse.

n5 463 Mich. 939, 620 N.W.2d 855 (2000).

II. STANDARD OF REVIEW

A constitutional double jeopardy challenge presents a question of law that we review de novo. *People v* [*213] *Herron*, 464 Mich. 593, 599; 628 N.W.2d 528 (2001). Necessarily intertwined with the constitutional [***10] issue in this case is the threshold issue whether the trial court properly declared a mistrial. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court. *Arizona v Washington*, 434 U.S. 497, 510; 98 S. Ct. 824; 54 L. Ed. 2d 717 (1978) . n6 "*At most*, ... the inquiry ... turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." *Duncan*, *supra*, 373 Mich. 661 (emphasis supplied).

n6 See *Huss v Graves*, 252 F.3d 952, 956-957 (CA 8, 2001) (a case involving the sua sponte declaration of a mistrial in a *bench* trial, contrary to both the prosecution's and the defendant's motions for entry of verdict of not guilty by reason of insanity, was "not similar to those [cases] in which a mistrial is declared when a jury is unable to reach a verdict, a situation in which a finding of manifest necessity is *almost always justified*") (emphasis supplied).

[***11]

III. ANALYSIS

A. DOUBLE JEOPARDY IMPLICATIONS OF RETRIAL FOLLOWING MISTRIAL

Under both the Double Jeopardy Clause of the Michigan Constitution n7 and its federal counterpart, n8 an accused may not be "twice put in jeopardy" for the same offense. The Double Jeopardy Clause originated from the common-law notion that a person who has been convicted, acquitted, or pardoned should not be [*214] retried for the same offense. See *United States v Scott*, 437 U.S. 82, 87; 57 L. Ed. 2d [**748] 65; 98 S. Ct. 2187 (1978); *Crist v Bretz*, 437 U.S. 28, 33; 57 L. Ed. 2d 24; 98 S. Ct. 2156 (1978). The constitutional prohibition

against multiple prosecutions arises from the concern that the prosecution should not be permitted repeated opportunities to obtain a conviction:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing [***12] state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Green v United States*, 355 U.S. 184, 187-188; 2 L. Ed. 2d 199; 78 S. Ct. 221; 77 Ohio Law Abs. 202 (1957).

n7 Const 1963, art 1, § 15. Our constitution provides no greater protection than does the federal constitution with respect to retrial following a mistrial caused by jury deadlock. *People v Thompson*, 424 Mich. 118, 125-129; 379 N.W.2d 49 (1985).

n8 U.S. Const, Am V, made applicable to the states through the Fourteenth Amendment. *Benton v Maryland*, 395 U.S. 784; 23 L. Ed. 2d 707; 89 S. Ct. 2056 (1969).

From this fundamental idea, the United States Supreme Court has over the years developed a body of double jeopardy jurisprudence that recognizes, among other related rights, n9 an accused's "valued right to have his trial completed by a particular tribunal ...." *Wade v Hunter*, 336 U.S. 684, 689; 93 L. Ed. 974; 69 S. Ct. 834 [***13] (1949); see also*[O><O]* *Washington, supra*, 434 U.S. 503; *Illinois v Somerville*, 410 U.S. 458, 466; 35 L. Ed. 2d 425; 93 [*215] S. Ct. 1066 (1973). Jeopardy is said to "attach" when a jury is selected and sworn, see *Somerville, supra*, 410 U.S. 467; *Hicks, supra*, 447 Mich. 827, n 13 (GRIFFIN, J.), and the Double Jeopardy Clause therefore protects an accused's interest in avoiding multiple prosecutions even where no determination of guilt or innocence has been made. See *Scott, supra*, 437 U.S. 87-92; *Crist, supra*, 437 U.S. 33-34. It is this interest that is implicated when the trial judge declares a mistrial, thereby putting an end to the proceedings before a verdict is reached. *Scott, supra*, 437 U.S. 92; *Crist, supra*, 437 U.S. 33-34. However, the general rule permitting the prosecution only one opportunity to obtain a conviction "'must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.'" *Washington, supra,* 434 U.S. 505, n 11, quoting *Wade, supra,* 336 U.S. 689 [***14] .

n9 The Double Jeopardy Clause has often been described, in simple terms, as embodying three separate guarantees: protection against a second prosecution for the same offense following acquittal, protection against a second prosecution for the same offense following conviction, and protection against multiple punishments for the same offense. See *Ohio v Johnson*, 467 U.S. 493, 497; 81 L. Ed. 2d 425; 104 S. Ct. 2536 (1984); *Justices of Boston Municipal Court v Lydon*, 466 U.S. 294, 306-307; 80 L. Ed. 2d 311; 104 S. Ct. 1805 (1984); *Herron, supra,* 464 Mich. 599; *People v Vincent*, 455 Mich. 110, 120, n 5; 565 N.W.2d 629 (1997). However, as the Court noted in *Crist, supra*, 437 U.S. 32, the "deceptively plain language" of the Double Jeopardy Clause "has given rise to problems both subtle and complex ...."

"It is axiomatic that retrial is not automatically barred [***15] whenever circumstances compel the discharge of a factfinder before a verdict has been rendered." *Hicks, supra*, 447 Mich. 827 (GRIFFIN, J.). It is well settled, for instance, that where a defendant requests or consents to a mistrial, retrial is not barred unless the prosecutor has engaged in conduct intended to provoke or "goad" the mistrial request. See *Oregon v Kennedy*, 456 U.S. 667, 675-676; 72 L. Ed. 2d 416; 102 S. Ct. 2083 (1982); *United States v Dinitz*, 424 U.S. 600, 608; 47 L. Ed. 2d 267; 96 S. Ct. 1075 (1976); *Hicks, supra*, 447 Mich. 828 (GRIFFIN, J.). Additionally, retrial is always permitted [**749] when the mistrial is occasioned by "manifest necessity." *Kennedy, supra,* 456 U.S. 672; *Washington, supra,* 434 U.S. 505; *Hicks, supra*, 447 Mich. 828 (GRIFFIN, J.).

[*216] The concept of "manifest necessity" was introduced in *United States v Perez*, 22 U.S. (9 Wheat) 579; 6 L. Ed. 165 (1824), in which the Court addressed the propriety of the retrial of an accused following the discharge of a deadlocked jury without the accused's consent. [***16] Noting that in such a case the accused has not been convicted or acquitted, the Court held that the declaration of a mistrial under these circumstances poses no bar to a future trial. 22 U.S. at 580. However, the Court indicated that trial courts are to exercise caution in discharging the jury before a verdict is reached:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, *whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity* for the act, or the ends of

public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject*; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the [***17] faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American Courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption [*217] to the prisoner from being again put upon trial. [*Id.* (emphasis supplied).] n10

n10 Interestingly, in *Crist, supra*, 437 U.S. 34, n 10, the Court questioned whether the *Perez* Court was actually deciding a constitutional question, or was rather "simply settling a problem arising in the administration of federal criminal justice." See also 437 U.S. at 44-45 (Powell, J., dissenting) ("as both Justices Washington and Story believed that the Double Jeopardy Clause embraced only actual acquittal and conviction, they must have viewed *Perez* as involving the independent rule barring needless discharges of the jury"). However, the majority, declining to upset 150 years of settled Fifth Amendment jurisprudence, stated that "to cast such a new light on *Perez* at this late date would be of academic interest only." 437 U.S. at 34, n 10.

[***18]

As noted in *Richardson v United States*, 468 U.S. 317, 323-324; 82 L. Ed. 2d 242; 104 S. Ct. 3081 (1984), "it has been established for 160 years, since the opinion of Justice Story in [*Perez*], that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.'" See also *Washington, supra,* 434 U.S. 509 ("the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial"); *Kennedy, supra*, 456 U.S. 672 ("the hung jury remains the prototypical example" of a situation meeting the "manifest necessity" standard); *People v Thompson*, 424 Mich. 118, 128; 379 N.W.2d 49 (1985) ("we have consistently held that retrial after a mistrial [**750] caused by jury deadlock does not violate the Michigan Constitution or the United States Constitution"); *Duncan, supra,* 373 Mich. 660, quoting *People v Parker*, 145 Mich. 488, 499; 108 N.W. 999 [***19] (1906) (Michigan case law has without exception recognized that "the doctrine of former jeopardy does not preclude [*218] retrial after discharge of a jury 'for inability to agree, or for some other overruling necessity'").

Defendant nevertheless contends, and the Court of Appeals agreed, that his retrial constituted a violation of his constitutional right to be free from successive prosecutions because the trial court precipitously declared a mistrial without manifest necessity to do so. We disagree and hold that the Double Jeopardy Clause did not bar defendant's second trial or convictions.

B. MANIFEST NECESSITY

The Court of Appeals concluded that the trial court abused its discretion in discharging the jury without first examining alternatives, such as providing a "hung jury" instruction, and without conducting a hearing or making findings on the record. We hold that, because the record provides sufficient justification for the mistrial declaration, the trial court did not abuse its discretion in dismissing the jury.

The constitutional concept of manifest necessity does not require that a mistrial be "*necessary*" in the strictest sense of the word. Rather, [***20] what is required is a "high degree" of necessity. *Washington*, 434 U.S. 497 at 506-507, 54 L. Ed. 2d 717, 98 S. Ct. 824. Furthermore, differing levels of appellate scrutiny are applied to the trial court's decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration. At one end of the spectrum is a mistrial declared on the basis of the unavailability of crucial prosecution evidence, or when the prosecution is using its resources to achieve an impermissible tactical advantage over the accused. The trial judge's declaration of a mistrial [*219] under those types of circumstances will be strictly scrutinized. 434 U.S. at 508. At the other end of the spectrum is the mistrial premised on jury deadlock, "long considered the classic basis for a proper mistrial." 434 U.S. at 509. n11 [**751] The trial judge's decision to discharge a jury [*220] when he concludes that it is deadlocked is entitled to great deference. 434 U.S. at 510.

n11 See also *Duncan, supra,* 373 Mich. 660:

Defendant contends on appeal that discharge of the jury ... bars his retrial because he has previously been put in jeopardy of conviction of such charges. ... In none of the cases [defendant has] cited is it even suggested that discharge of a jury, without the defendant's consent, for its inability to agree upon a verdict thereby bars subsequent retrial.

When a mistrial is declared on the basis of juror deadlock, double jeopardy interests will rarely, if ever, be implicated, because jeopardy "continues" following the mistrial declaration. See *Richardson, supra*, 468 U.S. 325-326, reaffirming that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy" to which the defendant was subjected. See also *People v Mehall*, 454 Mich. 1, 4-5; 557 N.W.2d 110 (1997):

One circumstance that constitutes a manifest necessity is the jury's failure to reach a unanimous verdict. When this occurs, and the trial court declares a mistrial, a retrial is not precluded *because the original jeopardy has not been terminated*, i.e., there has not been an assessment of the sufficiency of the prosecution's proofs. [Emphasis supplied.]

We were recently guided by this principle in Herron, 464 Mich. 593, in which we determined that the defendant could be tried in a second trial for second-degree murder after the first jury arrived at a verdict with respect to one charge, but was unable to reach a verdict with respect to the murder charge:

Where criminal proceedings against an accused have not run their full course, the Double Jeopardy Clause does not bar a second trial. ... Thus, because the prosecutor's retrial of defendant on the charge of second-degree murder was the result of a hung jury, we conclude that there was no violation of double jeopardy principles aimed at multiple prosecutions. [464 Mich. at 602-603 (citations omitted).]

See also, e.g., *United States v Streett*, 2001 U.S. App. LEXIS 22556, 2001 WL 420367 (WD VA, 2001) (defendants' argument that retrial after a mistrial declared because of jury deadlock was constitutionally impermissible is without merit, both because of the "broad discretion" enjoyed by the trial court in making this determination and because "the Supreme Court has expressly held that the failure of a jury to reach a verdict is 'not an event which terminates jeopardy'").

[***21]

As the United States Supreme Court has opined:

There are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference [***22] by a reviewing court. [*Id.* at 509-510.]

Therefore, the mere fact that the reviewing court would not have declared a mistrial under the circumstances of this case does not mean that retrial is necessarily barred. The issue is not whether this Court would have found manifest necessity, but whether the trial court *abused its discretion* in finding manifest necessity. n12

n12 As noted, a trial court's decision to declare a mistrial on the basis of juror deadlock is entitled to a high degree of deference. It is well established that "an abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich. 219, 227; 600 N.W.2d 638 (1999); *Spalding v Spalding*, 355 Mich. 382, 384; 94 N.W.2d 810 (1959). Rather, "such abuse occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Alken-Ziegler, supra* at 227, quoting *Spalding, supra* at 384-385. We simply cannot conclude that the trial court abused its discretion in such a manner here.

[***23] [*221]

Consistent with the special respect accorded to the court's declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock n13; [**752] nor have we ever required that the judge conduct a "manifest necessity" hearing or make findings on the record. In fact, we long ago stated that, "at most, ... the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.*" *Duncan, supra*, 373 Mich. 661 (emphasis supplied). Moreover, the United States Supreme Court has expressly indicated [*222] that the failure of a trial judge to examine alternatives or to make findings on the record before declaring a mistrial does not render the mistrial declaration improper. Instead, where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. *Washington, supra*, 434 U.S. 515-517. n14

n13 We acknowledge that we have required the examination of alternatives in *other* mistrial contexts. See *Hicks, supra*, 447 Mich. 843-845 (GRIFFIN, J.) (declaration of a mistrial after the trial judge recused herself over the defendant's objection); *Benton, supra*, 402 Mich. 47 (sua sponte declaration of a mistrial on the basis of prosecutorial error). We need not determine whether the failure to consider alternatives to mistrial in circumstances other than jury deadlock is constitutionally impermissible. We note, however, that in support of the proposition that consideration of alternative measures is constitutionally required in these other contexts, this Court in *Benton* cited two federal circuit court opinions that were subsequently overturned by the United States Supreme Court: *Arizona v Washington*, 546 F.2d 829, 832 (CA 9, 1976), was reversed on appeal to the Supreme Court at 434 U.S. 497 (in which the Court rejected the notion that the trial judge was required to consider or utilize alternatives before declaring a mistrial), and *United States v Grasso*, 552 F.2d 46, 49-50 (CA 2, 1977), vacated by the Supreme Court at 438 U.S. 901; 98 S. Ct. 3117; 57 L. Ed. 2d 1144 (1978) (directing the Court of Appeals to reconsider in light of Washington, 546 F.2d 829). See *Benton, supra*, 402 Mich. 57, n 11, 61, n 19. [***24]

n14 Justice Marshall, joined by Justice Brennan, dissented: "What the 'manifest necessity' doctrine ... requires, in my view, is that the record make clear either that there were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings." *Id.* at 525 (Marshall, J.). The Court of Appeals panel's view in the instant case, although apparently consistent with the view of Justices Marshall and Brennan, was specifically rejected by the *Washington* majority.

Although we acknowledge that the "deadlocked jury" instruction, CJI2d 3.12, might have appropriately been given to the jury in this case, the fact remains that defendant did not request that this instruction be given. n15 We are not aware of any requirement that a trial court sua sponte instruct a deadlocked jury to resume deliberations. Moreover, we remain cognizant of the significant risk of coercion that would necessarily accompany a requirement that a deadlocked jury [*223] be forced to engage in protracted deliberations. [***25] See *Washington*, supra, 434 U.S. 509-510; *People v Hardin*, 421 Mich. 296; 365 N.W.2d 101 (1984). n16

n15 Further, it appears from the record that defendant did not object to the trial court's decision to discharge the jury. The prosecution contends that under these circumstances defendant "implicitly consented" to the declaration of mistrial, thus rendering it unnecessary to determine whether the declaration was supported by manifest necessity. See *Hicks, supra*, 447 Mich. 858, n 3 (BOYLE, J., dissenting) ("the Supreme Court appears to use 'consent' ... to refer to mistrials not requested by the defendant, *but only acquiesced to*") (emphasis supplied); see also *United States v Aguilar-Aranceta*, 957 F.2d 18, 22 (CA 1, 1992) ; *United States v Beckerman*, 516 F.2d 905, 909 (CA 2, 1975) ; *United States v Phillips*, 431 F.2d 949, 950 (CA 3, 1970) ; *United States v Ham*, 58 F.3d 78, 83-84 (CA 4, 1995); *United States v Palmer*, 122 F.3d 215, 218 (CA 5, 1997) ; *United States v Gantley*, 172 F.3d 422, 428-429 (CA 6, 1999); *Camden v Crawford Co Circuit Court*, 892 F.2d 610, 614-618 (CA 7, 1989); *United States v Gaytan*, 115 F.3d 737, 742 (CA 9, 1997); *Earnest v Dorsey*, 87 F.3d 1123, 1129 (CA 10, 1996); *United States v Puleo*, 817 F.2d 702, 705 (CA 11, 1987) . In light of our determination that the mistrial declaration was manifestly necessary, we save for another day the issue of implied consent. [***26]

n16 See also *United States v Klein*, 582 F.2d 186, 194 (CA 2, 1978):

> The appellant argues that a retrial is barred because of the failure of the trial court to make explicit findings that there were no reasonable alternatives to a mistrial .... *The short answer to this claim is the holding of* Arizona v Washington *that such findings are not constitutionally required.* [Emphasis supplied.]
> See also *Hicks*, *supra,* 447 Mich. 867 (BOYLE, J., dissenting)("the assumption that, as a matter of law, manifest necessity requires the exploration of less drastic alternatives to mistrial ... ignores that the United States Supreme Court has specifically rejected [this] proposition").

[**753] We conclude that the judge did not abuse her discretion in declaring a mistrial under the circumstances of this case. The jury had deliberated for at least four hours following a relatively short, and far from complex, trial. The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly [***27] heated. Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict. n17 We conclude that, in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. Accordingly, manifest necessity for the jury's discharge existed, and defendant's retrial did not constitute a constitutionally impermissible successive prosecution.

n17 This Court long ago indicated that "the court is justified in accepting [the jury's] statement that [it] cannot agree as proper evidence in determining the question." *People v Parker*, 145 Mich. 488, 502; 108 N.W. 999 (1906). See also *United States v Cawley*, 630 F.2d 1345, 1349 (CA 9, 1980) ("the most critical factor is the jury's own statement that it is unable to reach a verdict").

[*224] C. RESPONSE TO THE DISSENT

Our dissenting colleague opines that "the majority eviscerates established precedent requiring [***28] that trial judges exert reasonable efforts to avoid a mistrial." *Post* at 1. We disagree. In holding that double jeopardy considerations did not preclude defendant's retrial, we have merely set forth the unremarkable proposition that the failure of the jury to agree on a verdict is an instance of manifest necessity, allowing the trial court to declare a mistrial, discharge the jury, and retry the defendant.

Although the dissent ostensibly agrees that "no specific inquiry into alternatives to declaring a mistrial is required," *post* at 3, the dissent nevertheless points out that the trial court did not poll the jurors, did not give a deadlocked jury instruction, and did not ask defense counsel for his thoughts. *Post* at 4. These, of course, would have been alternatives to declaring a mistrial. However, this Court has never required the trial court to explain why it chose to declare a mistrial on the basis of jury deadlock, rather than poll the jury, give a deadlocked jury instruction, or ask defense counsel for his thoughts. As we have explained above, the United States Supreme Court has specifically rejected such a requirement. See *Washington*, *supra,* 434 U.S. 516-517: [***29]

The absence of an explicit finding of "manifest necessity" appears to have been determinative for the District Court and may have been so for the Court of Appeals. If those courts regarded that omission as critical, they required too much. Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

[*225] Further, even the dissent in *Washington* recognized that, where the necessity for a mistrial is "manifest on the face of the record," the trial court does not have to make findings of necessity on the record to justify the declaration of a mistrial. 434 U.S. at 526. [**754]

In this case, the record provides sufficient justification for the trial court's declaration of a mistrial, and thus there was no need for the trial court to articulate a rationale on the record. The reasons were plain and obvious: the jury foreperson indicated that the jury was not going to be able to reach a unanimous verdict.

IV. CONCLUSION

The trial court did not abuse its discretion in declaring a mistrial, in the absence of objection by either party, where the jury expressly indicated [***30] that it was deadlocked. Accordingly, defendant's retrial did not violate the constitutional bar against successive prosecutions. We therefore reverse the decision of the Court of Appeals and remand this matter to that Court for consideration of the additional issue that was raised by defendant, but not decided. We do not retain jurisdiction.

CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

DISSENTBY:
Michael F. Cavanagh

DISSENT:

CAVANAGH, J. (*dissenting*).

I disagree with the majority's conclusion that a manifest necessity required a mistrial. In reaching its holding, the majority eviscerates established precedent requiring that trial judges exert reasonable efforts to avoid a mistrial. Because I cannot agree that the prohibition [*226] against placing a defendant in double jeopardy evaporates simply because a defendant fails to object when a jury expresses discord, I respectfully dissent.

It is not apparent from the record that it was manifestly necessary to declare a mistrial. "Because of the high value placed on defendant's not being required to undergo the discommodity of a second trial, the declaration of a mistrial should not be made lightly, even when it is made [***31] ostensibly for the protection of defendant." *People v Johnson,* 396 Mich. 424, 438; 240 N.W.2d 729 (1976) . As a "general rule, ... trial judges must consider reasonable alternatives before declaring a mistrial." *People v Hicks,* 447 Mich. 819, 841; 528 N.W.2d 136 (1994) (opinion of Griffin, J.).

In the absence of a motion by a defendant for a mistrial, "'the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. ...'" [*People v Benton,* 402 Mich. 47, 57; 260 N.W.2d 77, 81 (1977), quoting *United States v Dinitz,* 424 U.S. 600; 96 S. Ct. 1075; 47 L. Ed. 2d 267 (1976) .]

Contrary to the majority's assertions, this Court's precedent finds support in the guidance provided by the United States Supreme Court, which has affirmed that a constitutionally protected interest is inevitably affected by *any* mistrial decision. The trial [***32] judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." In order to ensure that [*227] this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial. [*Arizona v Washington,* 434 U.S. 497, 514; 98 S. Ct. 824; 54 L. Ed. 2d 717 (1978) (citations omitted).] [Emphasis added.]

Thus, sound discretion requires a thoughtful, prudent analysis.

Even though no specific inquiry into alternatives to declaring a mistrial is required, [**755] such an inquiry would make clear the justification for retrial. Where no consideration of alternatives is evident, something else on the record must make clear the trial judge exercised "sound discretion" before declaring a mistrial. Unfortunately, no sound discretion was exercised here. Although this first-degree murder trial spanned a ten-day [***33] period, tried intermittently over six days, the deliberations lasted just over four hours. n1 The jury likely spent the first thirty-five minutes, late Thursday afternoon, doing little more than electing a foreperson. A few hours into the deliberations on Friday morning, the jurors sent a note to the judge that indicated concern over their voice levels during deliberation. Some time later, the jury sent another note that asked about the consequences if they failed to agree. On that basis, the trial judge ordered the jury into the courtroom at 12:45 p.m. and asked the foreperson whether the jury could reach a verdict. The foreperson responded, "no." The trial judge then immediately declared a mistrial, and by 12:48 p.m., the jury was excused. Never did the trial judge consider alternatives or otherwise provide evidence that she exercised [*228] sound discretion. For example, the judge did not poll the jurors, give an instruction ordering further deliberations, query defense counsel about his thoughts on continued deliberations, or indicate on the record why a mistrial declaration was necessary.

n1 Although it is not clear from the record when the jury reconvened June 13, 1997, I have assumed deliberations got under way at 9:00 a.m.

[***34]

Though I acknowledge that a trial judge need not perform any explicit act to ensure a mistrial is manifestly necessary, there must be some indication on the record that such a grave act was required. *Washington* at 516-517 (the record must provide "sufficient justification" of the manifest need for a mistrial). In this case, where the jurors had been deliberating only a short time, where the note from the jurors merely questioned what might happen if they did not agree, where the judge-albeit in an attempt to properly keep the jurors' positions concealed-suppressed all comments by the foreperson that could have shed light on the need for a mistrial, and where the record as a whole fails to reveal that "the ends of public justice" would be served by the declaration of a mistrial, I cannot agree that subjecting defendant to a new trial was manifestly necessary. *Benton* at 57.

The majority makes special note of defendant's silence, observing that defense counsel did not object to

the mistrial declaration. *Ante* at 20-21, n 15. However, it was not necessary that defendant object at the very moment the mistrial had been declared, particularly because the jurors were simultaneously [***35] dismissed. Though an objection on the record would have been helpful in determining defendant's position and in refreshing the judge concerning her duty to exercise sound discretion, defense counsel's failure to voice an objection cannot be considered evidence that a mistrial declaration was manifestly necessary.

[*229] The majority insinuates that defendant tried to have his cake and eat it too by failing to object to the mistrial declaration. However, defendant gained nothing as a result of his counsel's failure to timely object. n2 Either the trial judge properly [**756] declared a mistrial on the basis of manifest necessity, or she did not. If she had, retrial would have been proper. If not, defendant's right to be free from double jeopardy was violated by the second trial. If defendant had succeeded in convincing a majority of this Court that the mistrial declaration was improper, he would gain nothing other than the lawful protection of his inherent constitutional rights. That the state was able to try defendant a second time and to secure a conviction cannot make an unconstitutional second trial retrospectively valid.

n2 **Defense counsel's failure to raise the double jeopardy issue any time before or during the second trial was not objectively reasonable. No trial strategy could justify failing to object to the second trial. Defendant had nothing to gain by exposing himself to a second trial and, instead, lost the very thing the right was meant to protect: subjection to a trial in which the state had a second shot to get it right, i.e., to get a conviction.**

[***36]

The new standard articulated by the majority negates any substance the manifest necessity inquiry might have. Though the majority may feel that trial judges can declare a mistrial on the most meager record without even a cursory attempt to assure that the public interest in such a declaration outweighs the defendant's clear interest in resolution by the first factfinder, this narrow interpretation of "sound discretion" must be rejected. The majority's conclusion ignores precedent from this Court and cursorily dismisses the mandate from the Supreme Court affirming [*230] the need for trial judges to exercise "sound discretion." n3

n3 **The majority attempts to escape its duty to execute the Supreme Court's mandate, i.e., to assure the trial court exercised "sound discretion," by implying that I simply differ with the trial court's result. To clarify, I object not to the trial court's concern that the jurors held irreconcilable differences-in fact, I share that concern-but to its utter failure to make the pronouncement in a manner that evidences the exercise of "sound discretion." Because the judge did nothing more than act on a hunch with the most meager record for support, I cannot agree that "sound discretion" was exercised.**

[***37]

In erroneously finding that manifest necessity required mistrial, the majority diminishes the constitutional rights of our citizens, specifically the right to be free from double jeopardy. Even though defense counsel failed to timely object, causing defendant to suffer unnecessarily through a second trial, such an error does not excuse a violation of constitutional magnitude. Therefore, I would affirm the decision of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

16 of 51 DOCUMENTS

BRENT VEENSTRA, Plaintiff-Appellee, v WASHTENAW COUNTRY CLUB, Defendant-Appellant.

No. 117985

SUPREME COURT OF MICHIGAN

466 Mich. 155; 645 N.W.2d 643; 2002 Mich. LEXIS 1433; 88 Fair Empl. Prac. Cas. (BNA) 1709

November 7, 2001, Argued

May 29, 2002, Decided

May 29, 2002, Filed

PRIOR HISTORY:
[***1] Washtenaw Circuit Court, David S. Swartz, J. Court of Appeals, FITZGERALD, P.J., and NEFF and SMOLENSKI, JJ., (Docket No. 216907).

DISPOSITION:
Vacated the holding of the Court of Appeals and remanded this matter to the trial court for further proceedings consistent with this opinion.

COUNSEL:
Green, Green, Adams & Palmer, P.C. (by Thomas L. Kent), Ann Arbor, MI, for the plaintiff-appellee.
Miller, Canfield, Paddock & Stone, P.L.C. (by Charles A. Duerr, Jr. and Linda O. Goldberg), Ann Arbor, MI, for the defendant-appellant.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J. WEAVER, J. (concurring). CAVANAGH, J. (dissenting). KELLY, J., concurred with CAVANAGH, J.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[*156] [**644] YOUNG, J.

Defendant Washtenaw Country Club declined to renew plaintiff's contract as the club's golf professional, following plaintiff's apparently notorious and public separation from his wife and cohabitation with another woman. The trial court [***2] summarily dismissed plaintiff's breach of contract and marital discrimination claims. The Court of Appeals upheld the dismissal of the contract claim, but held that, under our decision in *McCready v Hoffius*, 459 Mich. 131; 586 N.W.2d 723 (1998) (*McCready II*), vacated in part 459 Mich. 1235, 593 N.W.2d 545 (1999), discrimination on the basis of "unmarried cohabitation" violated the Civil Rights Act, MCL 37.2101 *et seq.*

We granted leave to appeal to consider whether the Civil Rights Act extends to discrimination against an employee on the basis of the employee's conduct, in this case adultery. We hold that an employee discharged solely because of conduct such as adultery is not protected by the Civil Rights Act; the statute prohibits an employer only from making decisions *because of* race, sex, marital status, and the other *protected statuses* enumerated in the statute. [**645]

In opposition to defendant's motion for summary disposition, plaintiff has arguably introduced some [*157] evidence that defendant considered his marital status in addition to his unprotected conduct. However, because [***3] the trial court did not explain why this evidence was insufficient to meet plaintiff's burden under MCR 2.116(G)(4), we vacate the holding of the Court of

Appeals and remand this matter to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as defendant's golf professional from 1991 through 1996. His employment was based on a yearly contract.

Plaintiff's then current contract expired on its own terms in December 1996. In January 1996, plaintiff, who was married, began having an adulterous affair with a married woman. In April 1996, plaintiff moved out of his marital home. A few weeks after leaving the marital home, plaintiff began cohabitating with his mistress and escorted her to club events. All these activities became well known to members of the Washtenaw Country Club and were the subject of discussion.

In June 1996, board member Russo prepared and distributed a survey to the general membership of the country club asking members to evaluate certain key personnel, including plaintiff. The surveys revealed that a number of members were dissatisfied with plaintiff's performance as the club golf professional. [***4] Plaintiff received far more negative reviews than the other three personnel who were also the focus of the performance survey.

In September 1996, plaintiff's wife instituted formal divorce proceedings. Two months later, defendant [*158] informed plaintiff of its decision not to renew his yearly employment contract. The employment contract expired at the end of 1996. Plaintiff's divorce from his wife became final in May 1997.

In December 1997, plaintiff filed suit, alleging marital status discrimination and breach of contract. Regarding the discrimination claim, plaintiff alleged that his termination "was motivated in part if not entirely because of his status as a divorced person."

The trial court granted summary disposition for defendant on both counts of the complaint pursuant to MCR 2.116(C)(10). Relying on *McCready v Hoffius*, 222 Mich. App. 210; 564 N.W.2d 493 (1997) (*McCready I*), the trial court ruled that cohabitation was not a protected status under the Civil Rights Act. Viewing the evidence in a light most favorable to plaintiff, the trial court concluded that "if there was discrimination against plaintiff, it was not based on his pending [***5] divorce but on his cohabitation with his mistress." In granting summary disposition to defendant, the trial court did not address an affidavit plaintiff submitted that arguably supported a claim that his pending divorce was a factor in the decision not to renew his contract.

On appeal, the Court of Appeals affirmed in part and reversed in part. n1 The panel affirmed the granting of summary disposition on the breach of contract claim. n2 However, the panel reversed the order granting summary disposition regarding the marital status discrimination claim. *McCready I*, relied on by the [*159] [**646] trial court in granting summary disposition for defendant, had been reversed by this Court in *McCready II*. Citing the Court's decision in *McCready II*, the Court of Appeals concluded that plaintiff had a valid claim for marital discrimination "to the extent that plaintiff establishes discrimination on the basis of his unmarried cohabitation ...." In concluding that plaintiff presented direct evidence sufficient to create a genuine issue of material fact, the Court of Appeals cited the affidavit of defendant's outside operations manager who stated that three of the board's [***6] eight members specifically expressed their disapproval of plaintiff's divorce, stated that the situation was "disgusting," referred to plaintiff as a "slut," and stated that they "had to get rid of him."

n1 Unpublished opinion per curiam, issued October 6, 2000 (Docket No. 216907).

n2 Plaintiff did not appeal the Court of Appeals ruling on the breach of contract claim, so that issue is not before us.

Defendant sought leave to appeal, which was granted. 464 Mich. 873, 630 N.W.2d 623 (2001)..

II. STANDARD OF REVIEW

The decision to grant or deny summary disposition is a question of law that is reviewed de novo. *Van v Zahorik*, 460 Mich. 320; 597 N.W.2d 15 (1999). This case also presents the issue whether plaintiff's adulterous behavior is protected under the Civil Rights Act. [***7] The interpretation and application of a statutory provision is a question of law that is reviewed de novo by this Court. *People v Webb*, 458 Mich. 265, 274; 580 N.W.2d 884 (1998).

III. PRINCIPLES OF STATUTORY CONSTRUCTION

When interpreting statutory language, our obligation is to discern the legislative intent that may reasonably be inferred from the words expressed in the [*160] statute. *Wickens v Oakwood Healthcare System*, 465 Mich. 53; 631 N.W.2d 686 (2001).

When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich. 22; 528 N.W.2d 681 (1995). In construing a statute, the words used by the Legislature must be given their common, ordinary meaning. MCL 8.3a.

IV. ANALYSIS

A. THE STATUTE

Plaintiff's claim for [***8] marital status employment discrimination is premised upon MCL 37.2202(1) , which provides in relevant part:

An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

While the term "marital status" is not defined in the statute, this Court has historically defined the term as "*whether* a person is married." *Miller v C A Muer Corp*, 420 Mich. 355, 363; 362 N.W.2d 650 (1984); *Whirlpool Corp v Civil Rights Comm*, 425 Mich. 527, 530, 390 N.W.2d 625 (1986); *McCready II, supra* at 137.

The clear, unambiguous language of the statute protects status, not conduct. [***9] As a result, if an employer takes adverse action against an employee for conduct, without regard to marital status, the Civil [*161] Rights Act simply provides no redress. Thus, a discrimination claim premised merely on an employer's consideration of [**647] an employee's adultery would provide no basis for recovery under the act. n3

n3 **We note that the adultery statute applies equally to married and unmarried individuals. MCL 750.29** defines adultery as "sexual intercourse of 2 persons, *either of whom* is married to a third person." (Emphasis added.) Thus, because plaintiff's mistress was married, plaintiff would have been engaging in adultery even if he had been unmarried. This language alone demonstrates the irrelevancy in this case of the dissent's observation, slip op at 4, that the Civil Rights Act protects persons from discrimination "on the basis of acts found immoral solely because of one's status."

[***10]
B. THE APPLICABILITY OF *MCCREADY II*

In *McCready II*, defendants, who owned residential rental property, refused to rent their property to unmarried couples. In doing so, defendants stated "that the units were available only to married couples" and that they usually "did not rent to unmarried couples." 459 Mich. 134. Plaintiffs, two unmarried couples who intended to cohabit, brought suit after being denied the opportunity to rent the property. Defendants maintained that any discrimination was premised upon "their perception of plaintiffs' conduct" rather than the plaintiffs' marital status. 459 Mich. at 138.

The issue to be resolved in *McCready II* was whether a claim for marital status discrimination could be stated where the claim was premised on defendant's rejection of plaintiffs because of their unmarried cohabitation. The statutory provision at issue in *McCready II*, MCL 37.2502(1) , states in pertinent part: [*162]

A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of religion, race, color, national origin, age, sex, familial status, or [***11] *marital status of a person or a person residing with that person:*

(a) Refuse to engage in a real estate transaction with a person. [Emphasis added.]

In determining that the plaintiff had stated a claim for marital status discrimination, this Court attempted to distinguish status from conduct, concluding that "plaintiffs' marital status, and not their conduct in living together, is the root of the defendants' objection to renting the apartment to the plaintiffs." *Id.* at 140. We further noted that the case was "complicated" by a statute forbidding lewd and lascivious cohabitation by unmarried couples, MCL 750.335 . *Id.*, 136. However, the opinion held that there was "insufficient evidence that the plaintiffs intended to engage in lewd and lascivious behavior." *Id.*, 141.

In reversing the trial court's grant of summary disposition for defendant in this case, the Court of Appeals applied *McCready II* and concluded that plaintiff had a valid claim for marital discrimination "to the extent that plaintiff establishes discrimination on the basis of his unmarried cohabitation ...." Slip op at 4. However, [***12] *McCready* should not be read so expansively as to create a right to cohabit under our Civil Rights Act. Properly read, the plaintiffs in *McCready II* submitted sufficient direct evidence of marital status discrimination to survive defendant's motion for summary disposition.

While stated above, we take this opportunity to unequivocally reiterate that the unambiguous language of the Civil Rights Act protects *only* the consideration [*163] of a person's marital status. Adverse action against an individual for conduct, without regard to marital status, provides no basis for recourse under the [**648] act. It is irrelevant that the conduct at issue does or does not have criminal consequences. n4

n4 **Although the dissent takes pains to concur in this proposition, slip op at 6, it is**

important to understand that our opinion asserts this *only* because we believe that the act protects status and not conduct.

[***13]

In *McCready*, direct evidence was presented that the defendants considered the marital status of the plaintiffs in refusing to engage in the desired real estate transaction. Our Civil Rights Act requires no more. n5

n5 **Contrary to the dissent, slip op at 3, we do not suggest that *McCready II* is about a "right to cohabit." It is the dissent that appears to interpret it in this manner. Rather, the majority views *McCready II* as a case focused upon marital status discrimination, one of the express categories of statutory protection under the Civil Rights Act.**

C. DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(10). A motion under this section tests the factual sufficiency of the complaint. The movant must specifically identify issues to which it believes no genuine issue as to any material fact exists. [***14] MCR 2.116(G)(4). In opposition to the motion, the nonmoving party may not rest upon mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial. *Id.*; *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 N.W.2d 28 (1999). Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible. MCR [*164] 2.116(G)(6); *Maiden v Rozwood*, 461 Mich. 109, 121; 597 N.W.2d 817 (1999).

In evaluating a motion for summary disposition brought under this subsection, a trial court is required to consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co,* 451 Mich. 358; [***15] 547 N.W.2d 314 (1996).

In the instant case, defendant's motion for summary disposition maintains that its refusal to renew plaintiff's contract did not relate to his marital status. In response, plaintiff offered the affidavit of defendant's outside operations manager, Patrick Godfrey. Mr. Godfrey averred that, "on several occasions," he overheard three board members "specifically express their disapproval" of plaintiff's divorce, state that the situation was "disgusting," refer to plaintiff as a "slut," and state that they "had to get rid of him."

Plaintiff argues that sufficient evidence was presented that, at a minimum, defendant harbored mixed motives when it discharged him. Evidence of mixed motives, when one motive is impermissible under the Civil Rights Act, is sufficient to withstand summary disposition. In such a case, the impermissible factor must be a determining factor. See *Matras v Amoco Oil Co*, 424 Mich. 675, 682-683; 385 N.W.2d 586 (1986). When the Court of Appeals evaluated plaintiff's claim as one related to his pending divorce [***16] and [*165] adultery, it failed to evaluate whether the pending divorce was a determining factor.

Likewise, the trial court did not consider the affidavit suggesting that the defendant may have acted on an impermissible motive. In granting defendant's motion, the [**649] trial court merely concluded that any discrimination was motivated by plaintiff's cohabitation with his mistress and did not specifically address the adequacy of the affidavit. There is little evidence in the record indicating that the trial court considered the evidence contained in the affidavit as required by MCR 2.116(G)(5). We therefore remand this case to the trial court. On remand, the trial court is to consider defendant's motion for summary disposition, and plaintiff's response thereto, in conformance with MCR 2.116(G)(4)-(6). n6

n6 **In so remanding, we form no opinion, implicitly or explicitly, regarding whether plaintiff has submitted admissible evidence of specific facts sufficient to raise a genuine issue of material fact.**

[***17]

D. RESPONSE TO THE DISSENT

The dissent consciously and wilfully chooses to ignore the holding that has been stated several times throughout this opinion--that adverse action against an individual for conduct, *without regard to a protected status*, provides no basis for recourse under the Civil Rights Act. This construction is required because the act provides that it is unlawful to discriminate "*because of*" one of the enumerated protected characteristics. n7 Where no direct evidence of [*166] discrimination based on one of the protected characteristics exists, the burden is on the plaintiff to establish a link between the

conduct and a protected status. Absent evidence that the reason offered for the alleged discriminatory action is merely pretextual, the claim fails. *Hazle v Ford Motor Co*, 464 Mich. 456; 628 N.W.2d 515 (2001). However, where there *is* sufficient evidence of pretext, the claim survives.

n7 **The distinction that this opinion draws between conduct and status, and that the dissent characterizes as "artificial," slip op at 8, is a direct function of the words "because of." While there are other statutes that limit the scope of private and public decision making, the Civil Rights Act merely prohibits actions that are taken *with regard to* certain types of statuses, "*because of*" these characteristics. It does not prohibit actions that are legitimately taken for any other reason.**

[***18]

The dissent incorrectly maintains that our holding creates a "rule per se excluding conduct ...." Slip op at 2. However, as we have made clear, conduct may be the subject of protection under the Civil Rights Act if such conduct is mere pretext for action based on consideration of a protected status category. n8 In fact, the rule we articulate is undeniably consistent with the language of the statute, which protects enumerated characteristics, *not* conduct. This rule is also consistent with our jurisprudence under the Civil Rights Act. Like any other prima facie case of discrimination, a claim for marital status discrimination survives if a plaintiff can establish that adverse action was taken because of a protected status *notwithstanding* that conduct is asserted as the basis for the challenged action. However, in this case, plaintiff has not needed to posture his discrimination action as a [*167] [**650] prima facie case predicated within the *McDonnell Douglas n9* framework. Rather, this case is premised upon an allegation of direct evidence of marital status animus. [***19]

n8 **Contrary to the suggestions of the dissent, slip op at 7, we impose no requirement that a plaintiff must offer statements on the part of a defendant expressly communicating a prejudice toward persons of a protected status. Rather, "an invidious purpose may often be inferred from the totality of relevant facts," *Washington v Davis*, 426 U.S. 229, 242; 48 L. Ed. 2d 597; 96 S. Ct. 2040 (1976) . Such an assessment "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Hts v Metro Housing Dev Corp*, 429 U.S. 252, 266; 50 L. Ed. 2d 450; 97 S. Ct. 555 (1977).**

n9 ***McDonnell Douglas Corp v Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).** The *McDonnell Douglas* approach allows a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.

[***20]

Instead of simply adhering to the plain language of the statute and applying the analytical frameworks that currently exist in civil rights jurisprudence, the dissent prefers to engage in what it considers a more "thoughtful analysis" of marital status discrimination claims-an analysis that ponders the "essential conceptions of human dignity" as well as whether adverse actions are "motivated by moral judgments about a person's conduct ...." Slip op at 5. To say the least, these philosophical musings are not found within the canons of statutory construction. Accordingly, we simply decline to circumvent the language of the statute in favor of the sociological and moral inquiry favored by the dissent. n10

n10 **Needless to say, we do not agree with the dissent's characterization of this opinion as less than "honest," slip op at 5, or as "shallow," slip op at 7, because it does not reach the results preferred by the dissent. In this same regard, we would view the dissent as far more straightforward if it did not pay homage to a "societal interest in []fidelity," slip op at 5, at the same time that it concludes--in our judgment, without legislative warrant--that there is civil rights protection for adulterous conduct.**

[***21]

V. CONCLUSION

The clear language of the Civil Rights Act prevents only consideration of an employee's protected status--here, marital status. We further hold that an employee's conduct or misconduct is not a protected [*168] status under the employment provisions of the act, and our opinion in *McCready II* should not be read otherwise. Because there is no indication that the trial court considered plaintiff's evidence in opposition to the motion for summary disposition as required by the court

rules, we vacate the holding of the Court of Appeals and remand this matter to the trial court for further proceedings consistent with this opinion.

CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY:
Elizabeth A. Weaver

CONCUR:

WEAVER, J. (*concurring*).

I join all but part IV(D) of the opinion.

DISSENTBY:
Michael F. Cavanagh

DISSENT:

CAVANAGH, J. (*dissenting*).

The majority holds that the Civil Rights Act, MCL 37.2202(1) [***22] *et seq.*, prohibits employment discrimination only on the basis of status and not conduct. This conclusion results from an overly simplistic analysis of the statute and unnecessarily limits this Court's holding in *McCready v Hoffius*, 459 Mich. 131; 86 N.W.2d 723 (1998) (*McCready II*) vacated in part 459 Mich. 1235 (1999). Conduct and status are often inextricably linked, and I find unworkable any rule per se attempting to assert otherwise. Therefore, I must respectfully dissent.

Although the term "status" is used in identifying a prohibited ground for discrimination, i.e, "marital status," status and conduct are concepts that cannot always be easily distinguished. This is true because much of what the Civil Rights Act prohibits is discrimination on the basis of assumptions about conduct that stem from, and are often a manifestation of, one's status. Even so, I agree that actual conduct may be relevant in employment and housing considerations, [*169] and certain conduct [**651] need not be tolerated simply because a connection to status can be made. But while conduct is not *always* protected by the act, certain conduct [***23] can be directly linked to status in such a way that adverse action based on conduct will result in status-based discrimination. A rule per se excluding conduct from the protections of the act creates an artificial distinction and narrows the breadth of the remedial act.

Though such adverse action is prohibited by *McCready II,* the majority now recasts and diminishes its holding. In *McCready II,* this Court held that a lessor could not refuse to lease an apartment to an unmarried couple because plaintiffs' marital status was "the root of the defendant's objection to renting [the apartment]" and expressly rejected claims that conduct, not status, motivated the prohibited action. *Id.* at 140. Instead, this Court adopted the Alaska Supreme Court's rationale in *Swanner v Anchorage Equal Rights Comm*, 874 P.2d 274, 278, n 4 (Alas, 1994), which held that a landlord "'cannot reasonably claim that he does not rent or show property to cohabitating couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in [the landlord's] opinion.'" *McCready* [***24] *II* at 139. Similarly, for the purpose of resolving this issue of law, we have assumed the defendant in this case terminated the plaintiff's employment because it felt plaintiff's behavior was immoral, an act condemned only because he was married. n1 Thus, *McCready II* should control; but the [*170] majority now recharacterizes *McCready II* and suggests the *McCready II* defendants could have prevailed had they proven the plaintiffs *would*, in fact, have engaged in sexual intercourse while cohabitating. *McCready II* is not about "a right to cohabit" as the majority suggests, but, instead, makes clear that the Civil Rights Act guarantees the right to be free from discrimination on the basis of acts found immoral solely because of one's status.

n1 The majority asserts that "adverse action against an individual for conduct, without regard to marital status, provides no basis for recourse under the act." Ante at 11. As previously stated, the distinction between status and conduct is not so clear that it should be enmeshed in discrimination jurisprudence. Moreover, even if adopted here, the circumstances indicate the action taken by the defendant was *not* "without regard to marital status." But for his status, I suspect little attention would have been paid to his conduct.

[***25]

The majority might respond that employers *should* be able to make decisions as a result of the type of conduct at issue here, especially where it has an effect on the employee's credibility with clients who, assertedly, are known for their deference to etiquette standards and social mores. Where there is an employment at will relationship, some might argue that termination must be an option for employers. However, the Legislature arguably prohibited such actions with the passage of the Civil Rights Act. The decision to terminate plaintiff appears to have been based on the defendant's

disapproval of plaintiff's conduct, conduct that was scorned *only* because of plaintiff's marital status.

I concede that few in the Legislature likely anticipated that employees would be protected from discrimination resulting from what some would claim was socially justified condemnation for infidelity when drafting the Civil Rights Act. However, the statute as written does not create an exception for the [*171] types of bias that most feel is justified, and inserting a "status only" element that results in the automatic dismissal of claims where conduct and status [**652] are linked [***26] is not the proper manner in which to determine the legislative intent.

What might be more useful is a thoughtful analysis of discrimination claims in light of the social and historical context that prompted the Legislature to pass the Civil Rights Act and to protect people from discrimination on the basis of marital status. Does the different treatment closely relate to a personal characteristic of the complainant? Does the distinction serve to deny a person of the essential conception of human dignity? Does discrimination resulting from a married person's infidelity exacerbate the prejudices the act attempts to curb? Are discriminatory acts motivated by moral judgments about a person's conduct permissible when the motivation is directly tied to a protected status? The answers to these questions are not as clear, but I suspect a discussion of this nature would result in a more honest attempt to analyze the issues the majority frames as mechanical, rote rules of law. Such an inquiry would also diminish the risk that artificial distinctions could be used opportunistically to avoid the mandate of the Civil Rights Act.

At the end of the day the plaintiff may not be protected by the act, [***27] but *not* because he was not subject to status-based discrimination. Rather, he may be outside the protections of the act because the Legislature did not intend to protect a societal interest in infidelity. The majority claims such an analysis would be Solomonic, but I think it is the only reasonable position because it would dispel the illusion that the issue is clear and devoid of hidden value assumptions.

[*172] The majority claims such considerations are unnecessary because the plaintiff would be guilty of adultery under the criminal code whether he was married or single-he had sex with a married woman and his conduct would fall under the purview of the statutory prohibition regardless of his marital status. The majority concludes that this particular type of conduct-based discrimination has no connection to plaintiff's marital status. I find this distinction dangerous and illusory. As the majority correctly notes, "it is irrelevant that the conduct at issue does or does not have criminal consequences." Slip op, p 11. Moreover, the societal condemnation surrounding infidelity is based solely on expectations and presumptions associated with marriage and marital status. [***28] If the defendant had asserted that it reprimands and terminates employees on the basis of their promiscuous behavior, the act arguably would not protect such conduct. The act does not prohibit discrimination on the basis of lax sexual mores. However, that is not what the defendant claims, nor what this Court holds today. The majority states adultery is not protected by the act on the basis of a status/conduct distinction that creates an impermissible and arguably complete defense to direct evidence of status-based discrimination when disfavored conduct is shown.

McCready II did not attempt to make such shallow distinctions, and to claim now that it stands only for the proposition that an unmarried couple who is denied housing can only succeed if they show marital status discrimination without regard to their intended conduct-cohabitation-makes no sense to me. A defendant need only show the disfavored action was based on conduct to escape liability. If the majority view prevails, I cannot envision how an attorney [*173] could bring a discrimination claim on behalf of an unmarried couple denied housing on the basis of their marital status. Only if a landlord happened to expressly [***29] state that her refusal to rent was based on-and only on-their marital status would plaintiffs prevail. The act is not meant to prohibit adverse action only when [**653] randomly made prejudicial comments are aired.

The majority correctly states that the act requires only proof of status-based discrimination. However, how can such a claim be made if this Court prohibits plaintiffs from illustrating the manner in which status-based discrimination is given life, i.e., through conduct-based adverse action? I do not assert that all conduct is protected, but only that this doctrine is unworkable to the degree that it excludes claims where adverse action can be tied to conduct.

There is no principled reason to import a status/conduct distinction where it fails to properly and fully address the discriminatory action. I cannot agree that the Legislature intended to permit a "conceptual out" or "conduct defense" whenever this Court finds the discrimination morally permissible. Further, the majority opinion could be characterized as the first step in the creation of a doctrine that eviscerates the prohibition of status-based discrimination, picking up where *McCready I* left off. Contrary [***30] to the assertions made by the majority, the holding in *McCready II* would be considerably narrowed by the majority here. A bright-line rule excluding conduct from the protections of the act creates an artificial distinction and narrows the breadth of the remedial act.

Adoption of an artificial distinction between status and conduct in this case should not eviscerate the principles in *McCready II*. Such a meager interpretation [*174] cannot logically be made on the basis of the text of the statute and is inconsistent with the Civil Rights Act. The rationale provided by the majority inappropriately narrows our understanding of discrimination. Because the text of the Civil Rights Act is not exclusively limited to the prohibition of status discrimination where no conduct discrimination is present, and because *McCready II*'s holding is not so narrow, I would affirm the opinion of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

17 of 51 DOCUMENTS

ROBERT C. LESNER, Father of Randy Lee Lesner, Deceased, Plaintiff-Appellee, v LIQUID DISPOSAL, INC., and HARTFORD ACCIDENT AND INDEMNITY, Defendants-Appellants.

No. 116205

SUPREME COURT OF MICHIGAN

466 Mich. 95; 643 N.W.2d 553; 2002 Mich. LEXIS 746

November 7, 2001, Argued

May 7, 2002, Decided

May 7, 2002, Filed

PRIOR HISTORY:
[***1] Court of Appeals, REILLY, P.J., and BURNS and HORN, JJ., (Docket No. 136338). Court of Appeals, NEFF, P.J., and MURPHY and J. B. SULLIVAN, JJ., (Docket No. 211230).

DISPOSITION:
Remanded to the Worker's Compensation Appellate Commission for further proceedings consistent with this opinion.

COUNSEL:
John W. Simpson, Jr., Bloomfield Hills, MI.
Cox, Hodgman & Giarmarco, P.C. (by Marsha M. Woods, Troy, MI, for the defendants-appellants.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman, CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J., CAVANAGH, J. (concurring in part and dissenting in part)., WEAVER, J. (dissenting). KELLY, J. (concurring.)

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[**554] [*97] YOUNG, J.

The plaintiff's son was fatally injured in the course of employment. Plaintiff, a partial dependent of the decedent, sought worker's compensation benefits. Through extended proceedings, there has been uncertainty with regard to the proper amount of the benefits to be paid to plaintiff under the formula established by this Court in *Weems v Chrysler Corp*, 448 Mich. 679; 533 N.W.2d 287 (1995).

We hold that the formula for calculating worker's compensation death benefits for surviving partial dependents established in *Weems* is inconsistent with the governing statute, MCL 418.321 [***2] . Accordingly, we overrule that portion of the *Weems* opinion. However, the portion of this opinion that overrules *Weems* is to have limited retroactive effect.

We further hold that *Weems* correctly held that the minimum and maximum limits in MCL 418.355 (2) and MCL 418.356(2) do not require an alteration after the partial dependent benefits calculation. In addition, we hold that the 500-week limitation on benefits applies to benefits for a partially dependent person.

[*98] Set forth in this opinion is the proper method for determining partial dependent benefits in keeping with the controlling statutory language. Accordingly, we remand this case to the Worker's Compensation Appellate Commission for further proceedings consistent with this opinion.

I. Facts and Proceedings

In January 1982, plaintiff lived with his wife and two adult sons. All four individuals made financial contributions to the household as plaintiff drew a small pension and the others earned money from employment. Plaintiff, then 57 years old and disabled from employment since 1978, was partially dependent on the contributions of [**555] his sons and wife. One of [***3] the plaintiff's sons died as the result of a work-related accident in mid-January 1982.

The following month, plaintiff, as a survivor and partial dependent of the deceased son, sought benefits pursuant to § 321 of the Worker's Disability Compensation Act, MCL 418.321 . A hearing referee found that plaintiff was a partial dependent, and ordered a weekly benefit of $ 170.21 until further order of the bureau.

After both sides appealed to the former Worker's Compensation Appeal Board, a two-member panel affirmed the referee's decision, with some modification. n1

n1 The WCAB ordered compensation "at the rate of $ 170.23 per week from January 13, 1982 [in accordance with MCL 418.356(2)] for a period not to exceed 500 weeks from the date of the employee's death" and further ordered a reduction of that benefit amount, in accordance with the formula set forth in *Franges v General Motors Corp*, 404 Mich. 590; 274 N.W.2d 392 (1979). *Franges* concerned allocation of the cost of obtaining a third-party tort recovery.

[***4]

[*99] The Court of Appeals granted leave to appeal n2 and affirmed in part and reversed in part. n3

n2 Unpublished order, entered July 6, 1993 (Docket No. 136338).

n3 The Court of Appeals remanded for application of a formula it had employed in *LePalm v Revco DS, Inc*, 202 Mich. App. 33, 43-46; 507 N.W.2d 771 (1993). The Court directed that the plaintiff receive "the greater of the amount calculated under the *LePalm* formula or fifty percent of the average weekly wage in 1982" and that the award "be reduced appropriately pursuant to *Franges*."

While defendants' application for leave to appeal was pending in this Court, we decided *Weems, supra*, which provided a formula for calculating benefits for a partial dependent. Then, in lieu of granting leave to appeal in the present case, we directed the WCAC to recalculate death benefits using the formula set forth in *Weems*. 449 Mich. 1206 (1995).

On remand, the WCAC once again recalculated the benefit [***5] amount. A further recalculation occurred when the case returned to the Court of Appeals. n4

n4 The Court of Appeals initially denied leave to appeal for lack of merit in the grounds presented. Unpublished order, entered June 5, 1997 (Docket No. 199205). In lieu of granting leave to appeal, we remanded the case to the Court of Appeals for consideration as on leave granted. 457 Mich. 856 (1998). The Court of Appeals then decided this matter in an unpublished opinion per curiam, entered December 28, 1999 (Docket No. 211230).

We granted leave to appeal in order to clarify this area of the law and consider whether the formula for the calculation of worker's compensation death benefits for surviving partial dependents established in *Weems* is consistent with the governing statute, MCL 418.321 .

II. Standard of Review

This case presents an issue of statutory interpretation, which we review de novo as a question of law. [*100] *Levy v Martin*, 463 Mich. 478, 482, n 12; 620 N.W.2d 292 (2001); [***6] *Donajkowski v Alpena Power Co*, 460 Mich. 243, 248; 596 N.W.2d 574 (1999).

III. Analysis

A. The Statute at Issue

Death benefits for a dependent are governed by MCL 418.321 . In 1982, when the plaintiff's decedent died, the language for this section, drawn from 1980 PA 357, read:

If death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to [MCL 418.375], in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent [**556] upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death. If at the expiration of the 500-week period any such wholly or partially dependent person is less than 21 years of age, a hearing referee may order the employer to continue to pay the weekly compensation or some portion thereof

until the wholly or partially dependent [***7] person reaches the age of 21. If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of injury.

Later, the section was amended by 1985 PA 103 and 1994 PA 271. One significant change was made to the final sentence of the section to provide an eighty-percent [*101] multiplier in the formula for the calculation of benefits. n5

> n5 The current language, as enacted in 1994 PA 271, reads:
>
> If death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to [MCL 418.375], in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death. If at the expiration of the 500-week period any such wholly or partially dependent person is less than 21 years of age, a worker's compensation magistrate may order the employer to continue to pay the weekly compensation or some portion thereof until the wholly or partially dependent person reaches the age of 21. If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to the partial dependents bears to the annual earnings of the deceased at the time of injury.

[***8]

B. The *Weems* Formula is Inconsistent with the Formula Provided by the Plain Language of the Statute

As we have indicated with great frequency, our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. See, e.g., *Helder v Sruba*, 462 Mich. 92, 99; 611 N.W.2d 309 (2000); *Robinson v Detroit*, 462 Mich. 439, 459; 613 N.W.2d 307 (2000). We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc,* 460 Mich. 305, 311; 596 N.W.2d 591 (1999). In other words, the role of the judiciary is not to [*102] engage in legislation. *Tyler v Livonia Public Schools,* 459 Mich. 382, 392-393, n 10; 590 N.W.2d 560 (1999).

Interpreting the plain language of MCL 418.321 at the time of the work related death of the plaintiff's son in 1982, that statute provided that the weekly benefit to be paid to a partially dependent person (BPD) was calculated by multiplying the benefit that would [***9] be paid if the person were wholly dependent (BWD) by a percentage figure ("the proportion"). The benefit for a wholly dependent person (BWD) was eighty percent of the decedent's after-tax average weekly wage (WWAT). n6 [**557] The proportion (P) was calculated by dividing the amount the decedent contributed to the partial dependent (C) n7 by the decedent's annual earnings (AE). Thus:

BPD = (BWD)(P), where

P = (C/AE), and

BWD = (.80)(WWAT).

Accordingly,

BPD = (C)(.80)(WWAT)/(AE), or

Benefit = (decedent's contribution)(.80)(decedent's weekly wage after taxes)

(decedent's annual earnings)

[*103]

> n6 MCL 418.321 calls for "a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death." These limitations, to which the weekly payment is "subject," are respectively the maximum benefit of MCL 418.355(2) , the minimum benefit of MCL 418.356(2) , and the 500-week limitation that is expressly stated in MCL 418.321 . When these limitations are applicable, they can be substituted into the formula for (BWD). We will discuss these limitations later in the opinion. [***10]
>
> n7 The "amount" of a contribution must be computed with respect to a period and, given the ratio being described by the Legislature, it surely meant an *annual* amount.

This equation is the proper one; it is directly based on the plain language of MCL 418.321 as it was in force in 1982. n8

n8 As indicated above, the Legislature added, in 1985 PA 103, a second .80 multiplier that remained in effect after 1994 PA 271. See the final lines of the statutory language quoted in footnote 5 and Justice BOYLE's partial concurrence/partial dissent in *Weems*, 448 Mich. 679 at 719, 533 N.W.2d 287.

With that change, P = (.80)(C)/(AE), so that:

BPD = (.80)(C)(.80)(WWAT)/(AE), or

Benefit = (decedent's contribution)(.64)(decedent's weekly wage after taxes)

(decedent's annual earnings)

This modified formulation, currently applicable, would have been appropriately applied in *Weems*, where the fatal accident occurred in March 1986, well after the effective date of 1985 PA 103. In the present case, however, the accident occurred in 1982, so the statutory modification is not applicable.

[***11]

In our view, the statute on its face requires a factual determination of "the amount contributed by the employee" to the partial dependent, that is, the amount actually contributed by that deceased worker, in order to calculate the amount of benefits to which the partial dependent is entitled.

However, in *Weems, supra* at 695-697, this Court created its own formula for determining benefits payable to a partial dependent under MCL 418.321 , despite the plain language of the statute. n9 Rather than merely examining, as the statute directed, "the amount contributed by the employee" to the partial dependent, the *Weems* Court substituted other factors to determine the level of benefits. In particular, it concluded that the partial dependent would receive the amount obtained by dividing the deceased employee's annual after-tax earnings by the sum of [*104] those earnings *and* the partial dependent's regular and substantial annual income. n10 See *Weems, supra* at 696. [**558] The problem with this calculation is that it is not derived from the language of the statute. MCL 418.321 includes no mention of the income [***12] of a partial dependent as a factor in the calculation of the benefits due that partial dependent. n11

n9 While we recognize that MCL 418.321 requires significant study to parse, we also recognize that the complexity and density of a statute does not in itself cause the statute to be ambiguous and thus warrant construction of the statute.

n10 Like the present case, *Weems* involved a situation with only one partial dependent. In a footnote, the *Weems* majority seemed to indicate that the formula it adopted should be modified in a case involving multiple partial dependents. See *Weems, supra* at 697, n 22 (discussing treatment of a situation with multiple partial dependents). Because we are overruling the *Weems* formula and the present case involves only one partial dependent, this opinion does not address situations involving multiple partial dependents.

n11 Moreover, the *Weems* formula distorts the evident legislative goal of allowing different levels of benefits on the basis of the different circumstances of otherwise similarly situated partial dependents. This is illustrated by considering that the *Weems* formula, by eschewing any determination of the amount that the deceased employee actually contributed to the partial dependent's support, would provide the same benefit level to a partial dependent in each of the following two hypothetical cases. Assume that in both cases A and B, the deceased employees had exactly the same after-tax earnings and had a partial dependent who had the same regular and substantial income. Now consider that in case A, the partial dependent had substantial medical or educational expenses that the partial dependent in case B did not and that these expenses were paid for by the deceased. This would mean that the employee in case A contributed more to the partial dependent's support than in case B. That no allowance for the difference in the level of support actually contributed by the deceased employee to the partial dependent is made by the *Weems* formula demonstrates its inconsistency with the language of MCL 418.321 .

[***13]

As explained by Justice CAVANAGH in his partial dissent in *Weems*, in order to determine the benefits due a partial dependent, a faithful application of MCL 418.321 "would require a factual determination by the trier of fact" to establish the amount contributed by the employee to the partial dependent. *Id.* at 709. We agree.

This is necessary for the simple reason that the amount contributed by the deceased employee to the [*105] partial dependent will vary from case to case and cannot be determined by any blanket formula.

The *Weems* majority rejected such a factual inquiry, apparently primarily on the basis of the view that such a factual determination would be "unworkable":

> Such a determination is absolutely unworkable in practice. It would be impossible in most cases to even roughly estimate which portion of the decedent's income was used for the sole support of the dependent. [*Weems*, *supra* at 698.]

We acknowledge that, in many cases, the factfinder will be presented with a difficult task in determining what amount of money to consider as having been contributed by the deceased employee to the partial dependent. In large part, [***14] this is because household expenses are often paid in essentially a lump sum for items that benefit multiple members of the household. n12 Yet the difficulty of an administrative tribunal in making a factual determination called for by a statute is not a justification for ignoring the statute. The reason is that the Legislature, the policy-making arm of our government, in taking up this matter, is held to have considered this issue and settled on this approach. It is not within our authority to disregard that choice. See, e.g., *Helder, supra* at 99 (when a statute is clear on its face, the judicial role is to apply the statute in accord with its plain [**559] language, not to articulate its view of "policy").

n12 For example, a rental payment might allow both an employee and a partial dependent to live in the same apartment. Similarly, groceries might be purchased for a household with all of its members sharing in the food.

Accordingly, we overrule *Weems* to the extent that it is inconsistent with this [***15] opinion. In particular, we [*106] overrule the *Weems* formula for calculating benefits due a partial dependent because it is inconsistent with the plain language of MCL 418.321 . n13

n13 Specifically, we note that we have not overruled the *Weems* analysis regarding determining whether a person is partially dependent.

C. Statutory Limitations

In deducing the proper formula to be employed, consideration must also be given to the limitations stated in the opening sentence of MCL 418.321 . n14

n14 See n 6.

1. Maximum and Minimum Benefits

Recall that an element of the calculation for a partial dependent is the benefit that would be paid if the survivor had been wholly dependent on the decedent (BWD). If one were determining the benefit for a wholly dependent person, the first sentence [***16] of MCL 418.321 instructs that it might be necessary to reduce the benefit in light of the maximum benefit of MCL 418.355(2) or to raise it to reach the minimum benefit specified by MCL 418.356(2) .

The majority in *Weems* held that no separate adjustment should be made *after* the benefits for a partially dependent person are calculated. The majority said that "a partially dependent person's weekly benefits are inherently subject to the maximum and minimum rates of compensation because the calculation of a wholly dependent person's weekly benefit is included in the partially dependent person's calculation." 448 Mich. 679 at 684-685. We agree. [*107]

The minimum or maximum benefit language in MCL 418.321 is located in the sentence discussing benefits for wholly dependent persons, not the calculation for partially dependent persons. n15 Therefore, where the maximum or minimum is applicable, it is to be inserted at the step where (BWD) is determined.

n15 Unlike our concurring colleague, we do not believe that MCL 418.321 is ambiguous concerning the introduction of the minimum or maximum benefit rate into a partially dependent person's benefit calculation. The maximum or minimum benefit clause is directed solely at the calculation for a wholly dependent individual and is the only reference to the minimum or maximum benefit rate in the statute. Since, under the plain language of the statute, a partial dependent's benefit calculation first requires the calculation of the benefit that the partial dependent would have received if wholly dependent, we conclude there is no ambiguity about the point of introduction of a minimum or maximum benefit rate into the calculation of a partial dependent's weekly compensation.

[***17]

For that reason, when (BWD) is more than the maximum or less than the minimum, it will be necessary to substitute the minimum or maximum []for (BWD), which is calculated using the formula stated *ante* at page 7. That change would mean that the usual value of (BWD), which is (.80)(WWAT) or 80% of the decedent's weekly wage after taxes, would be replaced by the statutory maximum or minimum (SM) under MCL 418.355(2) or MCL 418.356(2) . This change would be necessary because in such cases the benefit level of a partial dependent is tied by the language of MCL 418.321 to the benefits that would be provided a wholly dependent person. Ordinarily, a wholly dependent person would be entitled to 80% of the deceased employee's after-tax earnings, but that is not the case in situations in which such a wholly dependent person's benefits would be subject to the maximum or minimum benefit restrictions.

[**560] [*108] Thus, where the minimum or maximum applies, as the law existed in 1982, the statutory formula would be:

BPD = (C)(SM)/(AE), or
Benefit = (decedent's contribution)(statutory maximum or minimum)

(decedent's [***18] annual earnings)

In a case arising under the amended language of 1985 PA 103 and currently applicable, it would be:

BPD = (.80)(C)(SM)/(AE), or
Benefit = (.80)(decedent's contribution)(statutory maximum or minimum)

(decedent's annual earnings)

2. 500-Week Limitation

The first sentence of MCL 418.321 also states a 500-week limitation of benefits for a wholly dependent person. This limitation also applies to benefits for a partially dependent person. The second sentence of MCL 418.321 provides a specific means for partially (and wholly) dependent persons to seek an extension of benefits beyond 500 weeks. In light of the entire structure of MCL 418.321 which the benefit for a partially dependent person is derived arithmetically from the benefit that would be paid if the person were wholly dependentthe second sentence communicates the Legislature's intent that the 500-week limitation is likewise applicable to partially dependent persons.

V. Retroactivity

The general rule is that judicial decisions are given complete retroactive effect. *Michigan Ed Emp Mut Ins Co v Morris*, 460 Mich. 180, 189; 596 N.W.2d 142 (1999) [***19] . However, recognition of the effect of changing settled law has led this Court to consider limited retroactivity [*109] when overruling prior case law. In examining the potential effect of a retroactive decision, this Court gauges (1) the purpose served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Id.* at 190.

The purpose of the rule adopted in this opinion is to correct what we believe to be the flawed construction of MCL 418.321 in *Weems*. However, *Weems* has been controlling authority for over six and one-half years. Thus, it appears that there has been widespread reliance on the *Weems* formula in calculating worker's compensation benefits for partial dependents of deceased employees. Further, attempting to revisit the benefit levels finally determined or agreed upon during the period that *Weems* was controlling authority could have a detrimental effect on the administration of justice by imposing an enormous burden on the worker's compensation system, not to mention the reliance of the beneficiaries on the benefits [***20] previously awarded under *Weems*.

For these reasons, we hold that the present opinion is to be given only limited retroactive effect. The interpretation of MCL 418.321 articulated in this opinion is to be applied only to the present case; to other cases pending decision by a worker's compensation magistrate or on appeal, to either the WCAC or the Court of Appeals, in which the determination of the level of benefits to be paid a partial dependent is in issue; and to future cases in which the level of benefits due a partial [**561] dependent under MCL 418.321 needs to be initially determined.

[*110] VI. Conclusion

In the present case, the WCAC and the Court of Appeals, as they were bound to do, attempted to apply *Weems* as binding precedent from this Court. However, for the above reasons, we overrule the portion of *Weems* that provides a formula for calculating worker's compensation death benefits for surviving partial dependents. The portions of this opinion that overrule the *Weems* opinion are to have limited retroactive effect.

We further hold that the minimum and maximum benefit limits do not require an alteration after the [***21] partial dependent benefits are calculated, but rather are to be inserted before that calculation. In addition, we hold that the 500-week limitation on benefits applies to partially dependent persons.

For these reasons, it is necessary to again remand this case to the WCAC. On remand, the commission shall calculate the plaintiff's benefits as a partial dependent in accordance with MCL 418.321 as explained in this opinion, and in accordance with other

provisions of law, including those stated in *Franges, supra.* MCR 7.302(F)(1).
CORRIGAN, C.J., and TAYLOR and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY:
Marilyn Kelly; Michael F. Cavanagh (In Part)

CONCUR:

KELLY, J. (*concurring*).

I agree with the formula that the majority has adopted to be used for determining death benefits of a partial dependent. However, it is obvious to me that § 321 of the Worker's Disability Compensation Act n1 is ambiguous. Consequently, the [*111] majority's plain meaning analysis is inadequate to determine the Legislature's intentions in writing it.

n1 MCL 418.321 .

[***22]

The majority has adopted the formula proposed in Justice Cavanagh's dissent in *Weems v Chrysler Corp,* n2 except that it retains the *Weems* majority's application of the maximum and minimum rates of compensation for injuries. Sometimes, the formula yields a benefit for a whole dependent that falls above the maximum rate or below the minimum rate. In those cases the statutory maximum or minimum is substituted for the figure representing eighty percent of the decedent's after-tax weekly wage in the formula. n3

n2 448 Mich. 679; 533 N.W.2d 287 (1995).

n3 In 2002, the minimum is $ 357.56 per week and the maximum is $ 644.00 per week. Http://www.cis.state.mi.us/wkrcomp/82_now.htm, on April 19, 2002.

When the maximum and minimum amounts do not apply, the majority's formula for a partial dependent is as follows: n4

n4 There are two 80% multipliers in this formula. The first is the multiplier in the whole dependent's benefit, which is 80% of the after-tax weekly wage of the decedent. The second 80% multiplier, which was added by a 1985 amendment of the act, is found in the partial dependent's formula. Slip op at 7, n 8.

[***23] [**562]
Benefit =(.80)(decedent's annual contribution)(.80)(decedent's after-tax weekly wage) (decedent's annual earnings)
Whenever the maximum or minimum is substituted, the benefit for a partial dependent is computed as follows: n5

n5 The 80% multiplier in this formula is the one found in the formula for a partial dependent's benefit.

Benefit = (.80)(decedent's annual contribution)(statutory maximum or minimum)

(decedent's annual earnings)

Justice Cavanagh's formula in *Weems* differs in this respect: The death benefit for a partial dependent is calculated without regard to the maximum and minimum rates. Then, whenever the resulting death benefit [*112] falls outside the maximum-minimum benefit range, the benefit is adjusted upward to the minimum or downward to the maximum, as the case may be.

Both interpretations are reasonably derived from the language of the statute. Section 321 of the Worker's Disability Compensation Act states that a wholly dependent survivor's benefit is calculated [***24] as follows:

If death results ... the employer shall pay ... a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death. [MCL 418.321 .]

Another part of the same section then directs how the benefit is adjusted for a partially dependent survivor:

If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payment for the benefit of persons wholly dependent as 80% of the amount contributed by the employee bears to the annual earnings of the deceased at the time of injury. [MCL 418.321 .]
The majority reasons that, because the clause "subject to the maximum and minimum rates of compensation" appears only in the whole dependents part of § 321, it refers only to the benefit paid to a whole dependent. On the other hand, the *Weems* dissent rejects that logic

because the 500-week limitation of § 321 appears in the whole dependents part. [***25] Yet it applies to partial dependents and is not repeated in the partial dependents part. Also, the partial dependents part does not state that the partial benefit is [*113] subject to the maximum and minimum rates of compensation, whereas the fact that it is so subject is undisputed.

Both constructions are antagonized by additional ambiguity in the wording of § § 355 and 356. Section 355(2), which defines the maximum rate of compensation, states:

The maximum weekly rate of compensation for injuries within the year shall be established as 90% of the state average weekly wage ....

Proponents of the *Weems* dissent can rely on the fact that the rate referred to is called *the* maximum rate of compensation. That suggests that they should adjust the result of *all* benefit calculations, whole or partial. On the other hand, the statutory language can reasonably be read to mean that placement of the maximum rate within the formula is determined by § 321.

The language of § 356(3) also can be read in two different manners. It states:

The minimum weekly benefit for death under section 321 shall be 50% of the state average weekly wage as determined under section 355.

Proponents [***26] of the *Weems* dissent argue that, because the minimum weekly benefit is referred to as *the* minimum "for death under section 321," it should replace any death benefit calculated under § 321 that is lower than it. It should be the smallest sum that a partial or whole dependent could possibly receive. On the other hand, one can again point to the minimum benefit as only one factor in the partial dependent's benefit calculation. [*114]

I find that both are reasonable interpretations of the language of § § 321, 355 and 356. Therefore, § 321 is ambiguous as [**563] regards application of the maximum and minimum benefit rates, and rules of statutory construction must be applied to determine the Legislature's intent.

It is undisputed that the overarching intention of the Legislature was to award a death benefit that is less than the amount that the employee contributed to the dependent. If the *Weems* dissent formula reflected legislative intent, it would yield that result. However, the contrary is true. Using it, in cases where an employee contributed a small but not de minimus amount before his death, a partial dependent would receive the minimum rate of compensation. Thus, the benefit could [***27] be significantly higher than the amount the decedent contributed to the dependent during his lifetime. n6

n6 This is demonstrated by an example from the Weems dissent:

...If, for instance, twenty percent of Mr. Weems' after-tax earnings were contributed to Mrs. Weems, the formula yields:

80% X $ 8,558 X $ 822.91 = $ 131.66
$ 42,791

However, applying § 356, which sets the statutory minimum for death benefits, the payable death benefit would be $ 207.35, the applicable minimum rate for these parties. [*Id.* at 718, n 17 (Cavanagh, J. dissenting).]

In this example, the calculated benefit of $ 131.66 was raised to $ 207.35 a week, which was the minimum rate for death benefits in 1986. However, the employee had contributed only $ 8,558 annually before death. Hence, under the *Weems* dissent formula, the dependent received only $ 164.57 a week from the decedent and would receive $ 207.35 a week after.

By contrast with the *Weems* dissent's formula, the majority's formula yields a death [***28] benefit that is normally eighty percent of the amount that the employee contributed to the dependent. [*115]

Because it satisfies the Legislature's purpose of compensating part, but not one hundred percent or more, of the dependent's loss, I agree with the majority's formula. Of the possible interpretations of § 321, it alone conforms with the legislative intent to calculate a death benefit that is normally less than the decedent employee's contribution. Therefore, I concur in the result of the majority opinion.

DISSENTBY:
Elizabeth A. Weaver; Michael F. Cavanagh (In Part)

DISSENT:

CAVANAGH, J. (*concurring in part and dissenting in part*).

While I agree that the formula the majority adopts today for calculating worker's compensation death benefits for surviving partial dependents is the correct formula under MCL 418.321 , I do not agree with the majority's interpretation of the minimum and maximum benefit language located in MCL 418.321 . Also, I write separately because I believe that leave was improvidently granted in this case.

The procedural history of this case is substantial. Plaintiff first sought benefits in connection with [***29] his son's death in 1982. In 1995, after this Court decided *Weems v Chrysler Corp*, 448 Mich. 679; 533 N.W.2d 287 (1995), this case was remanded to the Worker's Compensation Appellate Commission to recalculate death benefits using the formula set forth in *Weems*. 449 Mich. 1206 (1995). Today, the majority overrules the *Weems* formula and remands for yet another recalculation using a new formula.

This case has been up and down the worker's compensation and appellate court systems for over twenty years and has been remanded once already to calculate benefits under the now abandoned *Weems* formula. While I remain committed to the formula set forth in my partial dissent to *Weems*, which this Court adopts today, I believe that it is time to put this case [*116] to rest. Leave was improvidently granted. Further, I remain committed to the interpretation [**564] of the application of the minimum and maximum benefits as expressed in my partial dissent to *Weems*. *Weems*, 448 Mich. 679 at 711-712, 716-717 (1995).

WEAVER, J. (*dissenting*).

I dissent from the majority's decision to overrule the formula established by this Court [***30] in *Weems v Chrysler Corp,* 448 Mich. 679; 533 N.W.2d 287 (1995). As noted by the *Weems* majority, in most instances it is difficult, if not impossible, to calculate the amount contributed by the decedent solely to the support of the partial dependent. *Id.* at 698. The formula articulated in *Weems*, which takes into consideration the dependent person's regular and substantial income, represents a practical, workable formula that gives effect to the statute, MCL 418.321 , and is faithful to its intent. n1 Therefore, I would not overrule this aspect of the *Weems* opinion.

n1 At oral argument, counsel for both plaintiff and defendants agreed that the formula established in *Weems* has proven workable since the decision was made over six years ago.

[***31]

LISA ROBERTS, Plaintiff-Appellee, v MECOSTA COUNTY GENERAL HOSPITAL, GAIL A. DESNOYERS, M.D., MICHAEL ATKINS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., formerly known as GUNTHER, DESNOYERS & MEKARU, Defendants-Appellants.

Nos. 116563, 116570, 116573

SUPREME COURT OF MICHIGAN

466 Mich. 57; 642 N.W.2d 663; 2002 Mich. LEXIS 546

October 10, 2001, Argued

April 24, 2002, Decided

April 24, 2002, Filed

PRIOR HISTORY:
[***1] Mecosta Circuit Court, Lawrence C. Root, J. Court of Appeals, SAWYER, P.J., and GRIBBS and MCDONALD, JJ., 240 Mich App 175 (2000)(Docket No. 212675).

DISPOSITION:
Judgment of the Court of Appeals reversed and remanded to the Court of Appeals for further proceedings consistent with this opinion.

COUNSEL:
Granzotto & Nicita, P.C. (by Angela J. Nicita), Allen Park, MI, and Gary E. Levitt, Bloomfield Hills, MI, for the plaintiff-appellee.
Smith, Haughey, Rice & Roegge (by Jon D. Vander Ploeg), Grand Rapids, MI, for defendant-appellant Mecosta County General Hospital.
[***2] Bensinger, Cotant, Menkes & Aardema, P.C. (by Kerr L. Moyer), Grand Rapids, MI, for defendants-appellants DesNoyers, Davis, and Obstetrics & Gynecology of Big Rapids, P.C.
Burnheimer & Company, P.C. (by Mark A. Burnheimer), Traverse City, MI, for defendant-appellant Atkins.
Amici Curiae:
Kerr, Russell & Weber, P.L.C. (by Richard D. Weber and Joanne Geha Swanson), Detroit, MI, for Michigan State Medical Society.
Granzotto & Nicita, P.C. (by Mark Granzotto), Detroit, MI, and Gleicher & Patek, P.C. (by Barbara A. Patek), Detroit, MI, for Michigan Trial Lawyers Association.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J. KELLY, J. (dissenting). CAVANAGH, J., concurred with KELLY, J.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[**665] [*58] YOUNG, J.

This case again calls into question the authority of courts to create terms and conditions at variance with those unambiguously and mandatorily stated in a statute. We reaffirm that the duty of the courts of this state is to apply the actual terms of an unambiguous statute.

In this medical malpractice case, the Court of Appeals concluded that defendants had waived their ability to object to the sufficiency of the notices of intent by failing to raise their objections before the [*59] filing of the complaint. We hold that the statute of limitations cannot be tolled under MCL 600.5856(d) unless notice is

given in compliance with all the provisions of MCL 600.2912b . We further hold that MCL 600.2912b places the burden of complying with the notice of intent requirements on [***3] the plaintiff and does not implicate a reciprocal duty on the part of the defendant to challenge any deficiencies in the notice before the complaint is filed. In addition, because MCL 600.5856(d) is a tolling provision and a plaintiff relies on a tolling provision to negate a statute of limitations defense raised by a defendant, a defendant does not need to assert the defense or challenge a plaintiff's compliance with MCL 600.2912b , as required by MCL 600.5856(d) , until the plaintiff files suit. For these reasons, we reverse the Court of Appeals opinion and remand this matter for further proceedings consistent with this opinion.

I. Facts and Proceedings

Plaintiff was pregnant and sought treatment because she was experiencing severe pain in her abdomen. She was diagnosed as having suffered a spontaneous abortion and a D & C was performed. Plaintiff alleges that it was later discovered that she had actually been suffering from an ectopic pregnancy, not a spontaneous abortion, and that her left fallopian tube had burst. Emergency surgery was performed to remove plaintiff's left fallopian tube. [***4] Plaintiff claims that as a result of the second operation, she can no longer bear children because her right fallopian tube had previously been removed.

Plaintiff decided to pursue a medical malpractice claim, alleging that defendants misdiagnosed her condition [*60] and subsequently performed an unnecessary operation.

Plaintiff served a notice of intent on defendant Mecosta County General Hospital on September 19, 1996, and on the remaining defendants on September 23, 1996. Serving these notices constituted plaintiff's attempt to (1) meet the notice requirements for medical malpractice actions prescribed by MCL 600.2912b [**666] and (2) toll the statute of limitations pursuant to MCL 600.5856(d) .

After the waiting period required under MCL 600.2912b had passed, plaintiff filed her complaint. n1 Thereafter, defendants filed motions for summary disposition. Defendants argued, inter alia, that plaintiff's claims were barred by the statute of limitations because the notices of intent failed to comply with the requirements outlined in MCL 600.2912b(4) . n2 Specifically, [*61] defendants asserted [***5] that plaintiff's notices failed to sufficiently state the standard of care, the manner in which the standard was breached, the action the defendants should have taken, and the proximate cause of the injury. Defendants advanced the position that, since the notices were insufficient, the period of limitation was not tolled under MCL 600.5856(d) and had therefore expired. The trial court granted the motions for summary disposition.

n1 Under the statute, a plaintiff must wait 182 days after serving notice to file a complaint. MCL 600.2912b(1) . However, if a defendant fails to respond to the notice of intent within 154 days, a plaintiff may file a complaint immediately and need not await the expiration of 182 days. MCL 600.2912b(7) , (8); *Omelenchuk v City of Warren*, 461 Mich. 567, 572-573, 609 N.W.2d 177 (2000). Defendants in the present case did not respond to the notices of intent within 154 days, so plaintiff filed a complaint in Mecosta Circuit Court on February 25, 1997, before the expiration of 182 days. [***6]

n2 MCL 600.2912b(4) provides:

The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

The Court of Appeals reversed and remanded, holding that defendants had waived their ability to challenge plaintiff's failure to comply with the notice requirements because they did not raise their objections before the time the complaint was filed: [***7]

In short, defendants sandbagged, harboring the alleged error until plaintiff could no longer correct it and the only available remedy would be dismissal with prejudice. This Court cannot condone such conduct.

... The purpose behind subsection 2912b(1) is to encourage settlement without the need for formal litigation. This purpose cannot be served if defendants are permitted to sit on alleged deficiencies in the notice of intent until after suit has been filed. If the purpose of the notice requirement is to encourage settlement of legitimate claims before litigation is commenced, then any claims of deficiencies in the notice need to be raised before the complaint is filed, not after.

*** [*62]

Accordingly, we hold that any objections to a notice of intent under subsection 2912b(1) must be raised before the filing of the complaint. Summary disposition based on any alleged defect in the notice of intent not raised by the defendant before the filing of the complaint is [**667] not appropriate. [240 Mich. App. 175, 184-186; 610 N.W.2d 285 (2000).

We granted defendants' application for leave to appeal to consider the propriety of the Court of Appeals holding that [***8] a plaintiff's noncompliance with the provisions of § 2912b is waived by a defendant if no objection is raised before the filing of the complaint.

II. Standard of Review

Questions of statutory interpretation are reviewed de novo by this Court. *In re MCI Telecom*, 460 Mich. 396, 413; 596 N.W.2d 164 (1999). Similarly, we review de novo decisions on summary disposition motions. *Herald Co v Bay City*, 463 Mich. 111, 117; 614 N.W.2d 873 (2000).

III. ANALYSIS

A. The Tolling Statute Mandates Compliance with all of MCL 600.2912b

The limitation period for medical malpractice actions is two years. MCL 600.5805(5) . This period is tolled under MCL 600.5856(d)

if, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice *is given in compliance with section 2912b*. [Emphasis added.] [*63]

Plaintiff argues that the language "is given in compliance with section [***9] 2912b" indicates that the Legislature intended only the *delivery* provisions of § 2912b to be applicable to § 5856(d). In other words, plaintiff's position is that, as long as § 2912b(2) n3 is satisfied, the statute of limitations is tolled under § 5856(d), notwithstanding noncompliance with § 2912b(4). On the basis of a plain reading of the statute, we reject this contention.

n3 MCL 600.2912b(2) provides:

> The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

An anchoring rule of jurisprudence, and the foremost rule of [***10] statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich. 118, 123, n 7; 594 N.W.2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich. 53, 60; 631 N.W.2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich. 558, 562; 621 N.W.2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich. 305, 311; 596 N.W.2d 591 (1999). [*64]

Section 5856(d) clearly provides that notice must be compliant with § 2912b, not just § 2912b(2) as plaintiff contrarily contends. Had the Legislature intended only the delivery provisions of § 2912b to be applicable, we presume that the Legislature would have expressly limited [***11] compliance only to § 2912b(2). However, the [**668] Legislature did not do so. Rather, it referred to all of § 2912b.

Since the statute is clear and unambiguous, this Court is required to enforce § 5856(d) as written. *Stone, supra*. As a result, the tolling of the statute of limitations is available to a plaintiff only if all the requirements included in § 2912b are met.

B. The Notice of Intent Statute, MCL 600.2912b

The Court of Appeals did not decide whether the trial court erred in determining that plaintiff's notices of intent did not comply with § 2912b(4). Instead, the Court concluded that defendants had waived n4 their [*65] ability to challenge the sufficiency of the notices under that section, by failing to object to any deficiencies before the filing of the complaint.

n4 The Court of Appeals clearly used the term "waiver" in a colloquial sense and one at

odds with the established legal meaning of this term. As defined by this Court, "waiver" connotes an intentional abandonment of a known right. *People v Carines*, 460 Mich. 750, 762, n 7; 597 N.W.2d 130 (1999). Despite the dissent's conclusory assertion to the contrary, there is no record basis in this case for concluding that defendants here advised plaintiff or anyone else that they were intentionally abandoning their right to contest the adequacy of notice under § 2912b or their right ultimately to assert a statute of limitations defense to her malpractice claim. In fact, a review of the record produces a communication between defendants' adjusters and plaintiff that is in direct contradiction to the meaning of "an intentional abandonment of a known right." Defendant Mecosta County General Hospital's claim adjusters expressed in a writing requesting information that their information request "does not waive any rights Mecosta County General Hospital or the MHA Insurance Company may have to dispute any defects in any Notice of Intent or concede the validity of any such Notice." Thus, contrary to the dissent's assertion that defendants made "affirmative representations" so that there was a "voluntary relinquishment of a known right," not only were there no such representations, defendants specifically stated in one of their communications that the right to challenge the notice of intent was *not* being waived. Therefore, in addition to the absence of any affirmative representations, this communication provides further evidence that our dissenting colleague's assertion that defendants' communications "reasonably led plaintiff to believe that her notice was sufficient, thereby waiving any objections related to the adequacy of the notice" is unsupportable.

Rather, when referring to "waiver," both the Court of Appeals and dissent appear to rely on the related concept of "forfeiture." As defined by this Court, a "forfeiture" is the failure to make a timely assertion of a right. *Carines, supra.*

In any event, for the reasons explained below, it is simply inappropriate to characterize defendants' inaction as either a waiver or a forfeiture, because the statute at issue did not impose upon defendants a duty to assert that plaintiff's notice was deficient *until* her complaint was filed.

[***12]

The notice of intent required for medical malpractice actions is statutorily mandated. MCL 600.2912b(1) provides:

[A] person *shall not* commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis added.]

Subsection 2912b(4) provides that "the notice given to a health professional or health facility under this section *shall* contain a statement of *at least*" the facts, standard of care, action that should have been taken, breach, proximate cause, and the names of those being notified.

The phrases "shall" and "shall not" are unambiguous and denote a mandatory, rather than discretionary action. *People v Grant*, 445 Mich. 535, 542; 520 N.W.2d 123 (1994). Likewise, the phrase "at least" [*66] plainly reflects a minimal requirement and cannot plausibly be considered [**669] ambiguous. Because § 2912b is unambiguous, we must enforce its plain language.

Subsections 2912b(1) and (4) clearly place the burden of complying with the [***13] notice of intent requirements on the plaintiff. A clear and unambiguous statute requires full compliance with its provisions as written. *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich. 316, 320; 603 N.W.2d 257 (1999). Accordingly, plaintiff must fulfill the preconditions of § 2912b(4) in order to maintain a medical malpractice action.

Further, nowhere does the statute provide that a defendant must object to any deficiencies in a notice of intent before the complaint is filed. n5 In the absence of such a statutory requirement, we do not have the authority to create and impose an extrastatutory affirmative duty on the defendant. *Omne Financial, supra.* The role of the judiciary is not to engage in legislation. *Tyler v Livonia* Pub. *Schools*, 459 Mich. 382, 392-393, n 10; 590 N.W.2d 560 (1999). The Legislature did not require that an objection to a notice of intent must be raised before a certain stage of the litigation.

n5 The dissent suggests that its "waiver" analysis is derived from the structure of the statute. That argument is undercut by the fact that the statute provides an explicit remedy for a defendant's failure to respond to the notice of intent. It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court

prefers. *Senters v Ottawa Savings Bank*, 443 Mich. 45, 56; 503 N.W.2d 639 (1993). Although MCL 600.2912b(7) requires the defendant to respond to the notice of intent, subsection 8 clearly provides the remedy for a defendant's failure to do so. That is, plaintiff may commence an action after only 154 days after notice has been given, as opposed to the 182 days otherwise required under subsection 1. However, nothing in § 2912b suggests that defendant waives his right to object to the sufficiency of the notice of intent by failing to respond before the complaint is filed.

[***14]

[*67] C. The Tolling Provision, MCL 600.5856

Although the Court of Appeals incorrectly held that defendants had waived their ability to challenge the sufficiency of the notice of intent by creating and inserting a waiver provision into MCL 600.2912b , MCL 600.5856 provides an additional reason why waiver is inapplicable to the present case.

The plain language of § 5856(d) clearly requires a medical malpractice plaintiff to comply with the provisions of § 2912b in order to toll the limitation period. Absent an express waiver of its right to contest the adequacy of plaintiff's notice of intent or to assert the statute of limitations as a defense, defendant cannot forfeit, or "waive," those rights until the tolling provision becomes an issue. This is because a tolling provision effectively works to negate a statute of limitations defense raised by a defendant. Thus, unless done so expressly, the only ways in which a defendant could effectively "waive" any objections to plaintiff's fulfillment of the requirements of § 5856(d) would be to fail to invoke the pertinent statute of limitations after a plaintiff [***15] files suit or to fail to object to the adequacy of the notice of intent after a plaintiff advances tolling as a response to a statute of limitations defense.

In other words, under this statute, defendant's failure to respond to plaintiff's notice does not result in a waiver of a statute of limitations defense before a suit is even filed. Accordingly, since plaintiff sought to rely on the tolling provision of § 5856(d) and that section plainly requires compliance with § 2912b, defendants cannot logically be considered to have waived [**670] [*68] their right to object to plaintiff's compliance with § 2912b before the filing of the suit.

D. The Dissent

The lynchpin of the dissent is its repeated assertion that "defendants in this case made *affirmative representations* that reasonably led plaintiff to believe that her notice of intent was adequate." *Post* at 7 (emphasis added). We agree that, if a defendant affirmatively represents to a plaintiff that it waives any objection to plaintiff's notice or expressly waives its statute of limitations defense, such representations could be binding in any subsequent litigation under this statute. However, what is noteworthy about the dissent's [***16] theory is the fact that, despite the repeated contrary assertions, not a single *representation* is cited, much less an *affirmative* representation, by any defendant that they acquiesced in the adequacy of the notices that plaintiff filed in this case. The oddity of the dissent's analysis is that it relies on the *absence* of representations to establish a waiver. Indeed, the dissent is ultimately reduced to admitting that the so-called waiver it relies upon must be *implied* from the fact that defendants failed to include a disclaimer in each of the several written requests they made of plaintiff for more information. *Post* at 7, n 6. n6

n6 The dissent actually reasons that, because defendants contacted plaintiff for information following the issuance of her notice, "she had every reason to believe that the notice triggered the tolling provision of MCL 600.5856(d) ." *Post* at p 8 As noted previously, n 4, a reference in this record concerning the adequacy of plaintiff's notice was made in a September 6, 1996, letter to plaintiff from MHA. In what surely must have been the product of an abundance of lawyerly caution, in that letter Mecosta and MHA specifically *disclaimed* any waiver of rights to contest defects in plaintiff's notice. The dissent similarly cites a communication from defendants' insurance claim adjusters that indicates that the failure to comply with medical information requests will force defendants' insurers to consider the notice of intent defective as evidence that defendants made an *affirmative* representation that they were intentionally abandoning their right to contest the notice of intent. Such is the world that the dissent would create that defendants must communicate at their peril with any potential plaintiff unless each such communication specifically disclaims any waiver of any right of defense available. If the folly of this approach is not sufficiently self-evident, for the reasons set forth below, we reject the dissent's game theory of litigation and in particular its "nonrepresentation implied waiver" theory.

[***17] [*69]

We agree with the dissent that a "waiver requires an 'intentional and voluntary relinquishment of a known right.'" *Post* at 3, n 1. *Carines, supra*. However, as previously discussed, n 4, no such waiver occurred here.

It is simply contradictory for the dissent to conclude that the *failure* to raise an issue in preliminary communications amounts to a waiver, while it simultaneously instructs that waiver requires an "intentional and voluntary relinquishment."

In reality, the dissent is not relying on a waiver analysis, but a forfeiture analysis. As we have defined the term, a "forfeiture" is the failure to assert a right in a timely fashion. *Carines, supra.* The dissent has again confused these related, but distinct, concepts of forfeiture and waiver. See, e.g., *People v Carter,* 462 Mich. 206, 216; 612 N.W.2d 144 (2000).

Even if the dissent's argument is viewed as a forfeiture argument, it remains unpersuasive. This is because a *forfeiture* necessarily requires that there be a specific point at which the right must be asserted or be considered forfeited. As noted above, § 2912b does not require a response [***18] to the *adequacy* of plaintiff's notice. [**671] Thus, the first occasion that defendant *must* challenge the adequacy of the notice as required by the statute is after plaintiff has filed a complaint. This duty to challenge the adequacy of the notice arises [*70] not because of the statute, but because of our court rules concerning pleading, MCR 2.111(F)(3), and summary disposition, MCR 2.116(D)(2). n7

> n7 The objection to the notice must be made under these rules because, in this malpractice case, if plaintiff failed to comply with the notice requirement, her claim was arguably barred by the controlling statute of limitations, an affirmative defense that *must* be pleaded in defendants' motion for summary disposition or first responsive pleading. Once the statute of limitations is asserted as a defense as it was below, then a plaintiff is free to argue that the statute was tolled under § 5856(d). It is only at this point that a defendant is obligated to object to the adequacy of plaintiff's notice under § 2912b.

[***19]

In sum, in a medical malpractice case arising under this statute, it is only when the tolling provision becomes an issue that a defendant would be compelled to contest adequacy of the notice. The Court of Appeals and the dissent argue for the extrastatutory requirement of an earlier obligation to object to the adequacy of the notice because they contend that the statute was intended to promote settlement negotiations. Whatever the merit of this policy argument, we are obligated to apply the unambiguous terms of the statute, not our policy preferences. We conclude that the Legislature not only failed to require an earlier objection, it affirmatively provided a different remedy for a defendant's *failure* to respond to the notice thus negating the "waiver" arguments offered by the Court of Appeals and the dissent. See n 5.

For these reasons, regardless of whether it relies on waiver or forfeiture principles, the dissent's argument fails.

IV. Conclusion

In light of the plain language of MCL 600.5856(d), we conclude that the statute of limitations in a medical [*71] malpractice action is not tolled unless notice is given in compliance with all the provisions [***20] of MCL 600.2912b. We further conclude that MCL 600.2912b did not require defendants to object to the sufficiency of the notices of intent before the filing of the complaint. n8 In addition, because MCL 600.5856(d) is a tolling provision and tolling provisions work to negate a statute of limitations defense raised by a defendant, defendants did not need to assert the defense or challenge plaintiff's compliance with MCL 600.2912b, as required by MCL 600.5856(d), until plaintiff filed suit.

> n8 We express no opinion concerning plaintiff's compliance or noncompliance with MCL 600.2912b, an issue that the Court of Appeals declined to answer.

Accordingly, we reverse the judgment of the Court of Appeals and, recognizing that the panel did not reach a determination regarding whether the trial court erred in concluding that plaintiff's notices of intent did [***21] not comply with § 2912b(4), we remand this matter to the Court of Appeals for further proceedings consistent with this opinion.

CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

DISSENTBY:
Marilyn Kelly

DISSENT:

KELLY, J. (*dissenting*).

The majority implies that a statute must explicitly permit waiver before the waiver doctrine can operate to excuse noncompliance. Moreover, the majority seems to confuse the concept of an affirmative representation indicating waiver and an explicit statement of waiver. It seems to [**672] regard the latter as necessary in this case, but provides no authority to support that assumption. I disagree with the majority's analysis and

would affirm [*72] the Court of Appeals application of the doctrine of waiver in this case. n1

n1 The Court of Appeals initially couched its holding in these terms: "Defendants *waived* any alleged deficiencies in the notice of intent," (emphasis added). It went on to emphasize that defendants "failed to complain." Ultimately, it held that a defendant must raise any objections to a notice of intent before a complaint is filed. 240 Mich. App. 175, 181, 185; 610 N.W.2d 285 (2000).

Waiver requires an "intentional and voluntary relinquishment of a known right." Black's Law Dictionary (6th ed); see also *Moore v First Security Casualty Co*, 224 Mich. App. 370, 376; 568 N.W.2d 841 (1997). I would affirm the Court of Appeals decision to the extent that it applied the doctrine of waiver, but I would reverse the holding to the extent that it requires a potential defendant to object before a plaintiff files a complaint. MCL 600.2912b does not require that a defendant respond in any way to a notice of intent.

[***22]

I would not, and do not, infer waiver from mere silence. Moreover, I do not believe that either MCL 600.2912b or MCL 600.5856(d) supports a requirement that a defendant object to alleged deficiencies in a notice of intent before the complaint is filed. Therefore, I agree with the majority's conclusion that there is no duty to challenge deficiencies before the complaint is filed.

Generally, I agree that, to begin the tolling of the MCL 600.5856(d) statute of limitations, a plaintiff must fully comply with the requirements of MCL 600.2912b . Compliance with the delivery provision of the notice statute alone is insufficient. However, I would hold that a prospective defendant can waive the specific content requirements for the notice of intent by an affirmative action.

The majority neglects to consider an important fact in this case. Representatives of defendants' insurance companies corresponded with plaintiff's counsel without complaining that there were inadequacies in the [*73] notice of intent. n2 A review of the parties' numerous written communications reveals that plaintiff [***23] cooperated with defendants' requests for medical records and other personal information related to plaintiff's claim. I believe that these communications from defendants reasonably led plaintiff to believe that her notice was sufficient, thereby waiving any objections related to the adequacy of the notice.

n2 The majority points out that one defendant, Mecosta County General Hospital, reserved the right to object to plaintiff's notice of intent in a writing requesting information. That letter from Mecosta, dated September 6, 1996, refers to an earlier communication from plaintiff and states: "*This letter* does not waive any rights ...." (Emphasis added.) However, plaintiff's amended notice of intent to Mecosta is dated September 19, 1996. After that notice, plaintiff cooperated with Mecosta's requests for her personal medical history and access to plaintiff's medical records. None of those cooperative letters from Mecosta indicated any objections to the amended notice of intent or reserved a later objection.

I would note that representatives of other defendants, particularly Gail DesNoyers and Barbara Davis, explicitly stated that plaintiff's failure to comply with their request for medical information "will force [defendants' insurer] to consider this pre-suit notice defective." Presumably, once plaintiff complied with that request, those defendants had no objection premised on defective notice.

Moreover, plaintiff provided evidence that each of defendant's insurers communicated with defendant after receiving the notice of intent without objecting to its content. That evidence went uncontradicted by any defendant.

[***24]

The majority also confuses the issue by focusing on the tolling provision, MCL 600.5856(d) . In order for these defendants to maintain a statute of limitations claim, they had to challenge the sufficiency [**673] of plaintiff's notice of intent. Thus, the disposition of this case turns on an analysis of the requirements of MCL 600.2912b , including whether defendants waived any challenge related to those requirements.

Defendants advance no authority in support of their contention that the doctrine of waiver cannot be applied to a statutory provision that does not explicitly [*74] include the possibility of waiver. Nor does the majority cite such authority. n3 The majority relies only on the "mandatory" nature of the notice provision and the proposition that an unambiguous statute requires full compliance. n4 However, I believe that the mandatory nature of the notice statute is not dispositive here, where

it is undisputed that defendants had actual notice of plaintiff's intent to file suit.

n3 The majority relies on *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich. 316; 603 N.W.2d 257 (1999), and *Omne Financial, Inc v Shacks, Inc*, 460 Mich. 305; 596 N.W.2d 591 (1999), for the proposition that a clear and unambiguous statute requires full compliance with its provisions. However, neither decision addressed the equitable doctrine of waiver. [***25]

n4 The majority emphasizes that MCL 600.2912b provides a remedy for a prospective defendant's failure to respond to a notice of intent. I would point out that, by addressing a failure to respond, the remedy may preclude forfeiture, but it does not preclude waiver. Where defendants made affirmative representations that could only have been designed to induce plaintiff's reliance on her notice of intent, the statute provides no remedy for this plaintiff.

Waiver is an equitable doctrine, applied judicially to avoid injustice. 28 Am Jur 2d, Estoppel and Waiver, § 197. As is true with the doctrine of equitable estoppel, the possibility of waiver need not be set forth in the language of a statute. n5 Where a defendant makes affirmative representations implying that he has no [*75] objections to the content of a notice, we may, as a matter of equity, find his later objections waived. n6

n5 This Court has readily applied the doctrine of waiver in the criminal context. For example, we recently pointed out, in *People v Krueger*, 466 Mich. 50; 643 N.W.2d 223 (2002), that a criminal defendant may waive the right, specifically conferred in MCL 768.3 , to be present at trial. See also *People v Hyland*, 212 Mich. App. 701; 538 N.W.2d 465 (1995); *People v Staffney*, 187 Mich. 660; 468 N.W.2d 238 (1991). MCL 768.3 provides in absolute terms that "No person indicted for a felony shall be tried unless personally present during the trial ...." It gives no indication of the possibility of waiver. One would expect it to be more difficult for a criminal defendant to waive a right than a civil defendant. Hence, I see no need to examine the statute involved here for explicit permission to apply the equitable doctrine in this context. [***26]

n6 This is not to say, in the abstract, that a defendant waives an objection based on notice or the statute of limitations any time that the defendant participates in a lawsuit. When it enacted MCL 600.2912b and MCL 600.5856(d) , the Legislature created a unique and complex set of requirements that intertwine the notice requirement with the statute of limitations. Under the circumstances of this case, I believe that defendants sufficiently implied that they had no objection premised on inadequate notice to preclude a statute of limitations objection.

The defendants in this case made affirmative representations that reasonably led plaintiff to believe that her notice of intent was adequate. In so doing, defendants encouraged plaintiff to rely on the 182-day tolling period initiated by that notice. When plaintiff filed her complaint well within the extended limitation period, n7 defendants [**674] cannot be permitted to object on statute of limitations grounds and the requirements of the notice provision. The defense was affirmatively waived by defendants' [***27] actions.

n7 Proper notice under the statute initiates a 182-day tolling period regardless of whether a defendant responds pursuant to MCL 600.2912b(7) . However, plaintiff filed her complaint immediately upon the expiration of the 154-day abbreviated waiting period, as soon as the statute permitted. See *Omelenchuk v City of Warren*, 461 Mich. 567, 576-577; 609 N.W.2d 177 (2000).

Presumably, plaintiff could have filed her malpractice claim within the statutory period of limitation but for the statutory requirement that she provide a notice of intent to file her claim. After doing so, and particularly after receiving communications from defendants' agents because of that notice, she had every reason to believe that the notice triggered the tolling provision of MCL 600.5856(d) . The requirements of MCL 600.2912b are vague. Neither the statute nor related case law provides any guidance about [*76] the quantity [***28] of detail a potential plaintiff must furnish regarding the malpractice claim. n8

n8 I wonder how much detail can reasonably be expected from a plaintiff who has not yet had the benefit of discovery.

The majority also implies that a challenge on the basis of the statute of limitations cannot be waived before the filing of suit. Again, I disagree. Where parties are engaged in settlement negotiations, for example, a potential defendant might agree to waive a statute of limitations defense to continue negotiations and avoid a claim being filed. See, e.g., *Wickings v Arctic Enterprises, Inc*, 244 Mich. App. 125, 148-150; 624 N.W.2d 197 (2000) . n9 Should settlement negotiations fail, the affirmative representation that the defendant waived a statute of limitations defense would bar any objection when the plaintiff filed a claim outside the statutory period. Similarly, defendants' communications to plaintiff here should operate to waive the statute of limitations defense.

n9 Federal courts have recognized that the judiciary has equitable control over statutory periods of limitation, including tolling and waiver. See *Bowen v City of New York*, 476 U.S. 467, 479; 106 S. Ct. 2022; 90 L. Ed. 2d 462 (1986) *Zipes v Trans World Airlines, Inc*, 455 U.S. 385, 398; 102 S. Ct. 1127; 71 L. Ed. 2d 234 (1982) .

[***29]

The effect of today's decision is to shorten the statutory period of limitation for a medical malpractice claim by more than half a year. A potential plaintiff would be well advised to file a notice of intent at least 182 days before the period expires. There is now no telling whether a notice will be deemed sufficient to trigger the tolling provision. In fact, even the plaintiff who follows a notice by inquiring whether additional information is needed risks suffering the consequence of a notice found to be technically inadequate. A plaintiff should not rely even on the formal response [*77] outlined in MCL 600.2912b(7) . If the complaint were filed more than two years after the malpractice claim accrued and the notice were sufficiently flawed, the claim would still be time-barred. The Legislature could not have intended that result when it enacted MCL 600.2912b , which was designed to promote settlement.

In conclusion, I would reverse the Court of Appeals decision to the extent that it imposed a duty to object to a deficient notice of intent before a complaint is filed. However, I would affirm the application of waiver to the notice [***30] and tolling statute combination. These defendants communicated with plaintiff and investigated her claim as the notice statute contemplates, presumably in furtherance of the possibility of a settlement. The Court of Appeals recognized the unfairness of allowing them only much later to object that the notice of intent was defective because it gave insufficient information to promote pretrial investigation and settlement.

[**675] When defendants affirmatively responded to plaintiff's notice of intent, they reasonably should have expected plaintiff to understand that they had no objections to its form or content. By so doing, defendants affirmatively waived any objection premised on that notice. Because the statute of limitations objection in this case is necessarily based on an inquiry into the adequacy of the notice of intent, the objection was affirmatively waived.

CAVANAGH, J., concurred with KELLY, J.

19 of 51 DOCUMENTS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TERRY RAY SHEPARD, a/k/a TERRY RAY WILLIAMS, Defendant-Appellant.

SC: 115615

SUPREME COURT OF MICHIGAN

465 Mich. 920; 636 N.W.2d 514; 2001 Mich. LEXIS 2454

December 5, 2001, Decided

PRIOR HISTORY:
[*1] COA: 185242. Wayne CC: 94-009772.

JUDGES:
Young, Jr., J., dissents. Corrigan, C.J., joins in the dissent of Young, Jr., J.

OPINION:

On order of the Court, this case having been briefed and orally argued, the judgments of the Court of Appeals and Wayne Circuit Court are reversed, and the case is remanded to the Wayne Circuit Court for a new trial before a different judge. On the facts of this case, we find the defendant was denied the effective assistance of counsel. *People v Beard*, 459 Mich. 918- 919, 589 N.W.2d 774 (1998); *People v Yats*, 455 Mich. 861, 567 N.W.2d 249 (1997).

DISSENTBY:
Young, Jr.

DISSENT:

Young, Jr., J., states: I dissent because I do not believe the record establishes the prejudice required by *Strickland v Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See, also, *People v Carbin*, 463 Mich. 590, 623 N.W.2d 884 (2001).

Corrigan, C.J., joins in the dissent of Young, Jr., J.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee, v MICHAEL ROBERT CUSTER, Defendant-Appellee/Cross-Appellant.

No. 117390

SUPREME COURT OF MICHIGAN

465 Mich. 319; 630 N.W.2d 870; 2001 Mich. LEXIS 1339

March 7, 2001, Argued

July 30, 2001, Decided

July 30, 2001, Filed

SUBSEQUENT HISTORY:
[***1] As Corrected September 28, 2001.

PRIOR HISTORY:
76th District Court, James E. Wilson, J. Isabella Circuit Court, Paul H. Chamberlain, J. Court of Appeals, DOCTOROFF, P.J., and FITZGERALD and WILDER, JJ. 242 Mich App 59 (2000) (Docket No. 218817).

DISPOSITION:
Reversed and remanded.

COUNSEL:
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Larry J. Burdick, Prosecuting Attorney, and Roy R. Kranz, Assistant Prosecuting Attorney, Mt. Pleasant, MI, for the people.
Hall & Lewis, P.C. (by John W. Lewis), Mt. Pleasant, MI, for the defendant-appellee/cross-appellant.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. MARKMAN, J., CORRIGAN, C.J., and TAYLOR, J., concurred with MARKMAN, J., WEAVER, J. (concurring), YOUNG, J. (dissenting), CAVANAGH, J. (dissenting), KELLY, J., concurred with CAVANAGH, J.

OPINIONBY:
Stephen J. Markman

OPINION:

[*322] [**874] MARKMAN, J.
After arresting defendant's companion for possessing marijuana, a police officer conducted a patdown search of [***2] defendant. The officer removed what he believed to be blotter acid from defendant's pocket and placed it on the roof of the vehicle. When the officer finished searching defendant, he retrieved the object from the roof of the vehicle and observed what appeared to be three photographs facing down. He turned them over to examine the fronts of them. The photographs depicted defendant's companion posed in a house containing large quantities of marijuana. The police went to defendant's house and observed furnishings similar to those in the photographs. [*323] They obtained a search warrant for defendant's house and seized marijuana therein.

Defendant was charged with several drug-related offenses. The district court dismissed the charges on the ground that the patdown search of defendant had been illegal. The circuit court affirmed the district court's decision. The Court of Appeals affirmed the circuit court's decision on the ground that, even though the patdown search of defendant had been legal, the police officer should not have turned the photographs over to examine the fronts of them. We granted leave to consider whether it was proper for the police officer to: (1) briefly detain [***3] defendant, (2) patdown defendant, (3) seize the photographs from defendant, and (4) turn the photographs over to examine the fronts of them. We conclude that it was. Accordingly, [**875] we would

affirm the decision of the Court of Appeals that the brief detention of defendant, the patdown search of defendant, and the initial seizure of the photographs from defendant were proper, and we would reverse the decision of the Court of Appeals that the police officer's turning over and examining the photographs was improper.

I. FACTS AND PROCEDURAL HISTORY

Two police officers were dispatched to a residence in Bay City to investigate a possible trespass. When they arrived at the location, the officers observed a parked vehicle occupied by Billy Holder and defendant. One of the officers approached Holder, the driver of the vehicle, and asked him to get out of the vehicle. Because the officer believed that Holder was intoxicated, the officer advised Holder that he could not drive, and thus his vehicle would have to be [*324] towed at his own expense. When the officer asked Holder to demonstrate that he had enough money to pay for the towing, Holder removed approximately $ 500, mostly [***4] in ten and twenty dollar bills, from his pants pocket, along with a plastic baggie that contained marijuana. The officer arrested Holder and placed him in the patrol car. Once Holder was placed in the patrol car, Holder yelled to defendant, "don't tell them a f thing." The officer then asked defendant to step out of the vehicle, and conducted a patdown search of defendant. At this point, the officer anticipated finding weapons and drugs on defendant. During the patdown, the officer felt what he believed to be a two-by-three-inch card of blotter acid in defendant's front pants pocket. The officer's belief was based on his knowledge that blotter acid is often contained on sheets of cardboard. The object was actually three Polaroid photographs that showed Holder posed with large quantities of marijuana in the living room of defendant's house. The officer removed the photographs from defendant's pocket and placed them on the roof of Holder's vehicle face down. It was only after finishing the patdown of defendant moments later, that the officer picked the photographs up and turned them over to examine their fronts.

After the photographs were seized from defendant by the police, a Bay City [***5] detective contacted a Mount Pleasant detective and provided him with three addresses, including defendant's address, to determine if any of the houses contained furnishings similar to those found in the photographs. The Mount Pleasant detective peered into defendant's house through the front window using a flashlight. His [*325] observation of furnishings similar to those in the photographs was used to obtain a search warrant for defendant's house, from which marijuana was seized.

Defendant was charged with delivery and manufacture of 5 to 45 kilograms of marijuana, **MCL 333.7401(2)(d)(ii)**, maintaining a drug house, **MCL 333.7405(d)** , and conspiring to deliver 5 to 45 kilograms of marijuana, **MCL 750.157a**. The district court suppressed the photographs taken from defendant and the evidence obtained from the search warrant executed at defendant's home on the basis that the patdown search of defendant had been illegal. As a result of such suppression, the district court dismissed the charges against defendant. The circuit court then affirmed the decision of the district court, and the [***6] Court of Appeals affirmed the decision of the circuit court. **242 Mich. App. 59, 618 N.W.2d 75 (2000).** However, the Court of Appeals concluded that the patdown search of defendant had been legal, but that the officer should not have turned the photographs over to look at their fronts. Additionally, the circuit court found the search of defendant's home to be improper, but the Court of Appeals [**876] never reached that issue. n1 This Court granted the prosecutor's application for leave to appeal and defendant's application for leave to cross-appeal. **463 Mich. 907, 618 N.W.2d 772 (2000).**

n1 We do not address whether the search of defendant's home was proper because that issue is not properly before us. We remand this matter to the Court of Appeals for their consideration.

II. STANDARD OF REVIEW

This Court reviews a trial court's factual findings in a suppression hearing [***7] for clear error. *People v Stevens* [*326] *(After Remand)*, 460 Mich. 626, 631; 597 N.W.2d 53 (2000); *People v Burrell*, 417 Mich. 439, 448; 339 N.W.2d 403 (1983). However, "application of constitutional standards by the trial court is not entitled to the same deference as factual findings." *People v Nelson*, 443 Mich. 626, 631 n.7; 505 N.W.2d 266 (1993). The application of the exclusionary rule to a violation of the Fourth Amendment is a question of law. *Stevens*, 460 Mich. at 631. Questions of law relevant to the suppression issue are reviewed de novo. *Id.*; *People v Sierb*, 456 Mich. 519, 522; 581 N.W.2d 219 (1998). III. ANALYSIS

A. DETENTION

The first issue is whether the initial detention of defendant was invalid under the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, which guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. n2 " [***8] [A] police [*327] officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v*

Ohio, 392 U.S. 1, 22; 88 S. Ct. 1868; 20 L. Ed. 2d 889 (1968). A brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention. *Michigan v Summers*, 452 U.S. 692, 699-700, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981); *People v Shabaz*, 424 Mich. 42, 56-57; 378 N.W.2d 451 (1985). Police officers may make a valid investigatory stop if they possess 'reasonable suspicion' that crime is afoot." *People v Champion*, 452 Mich. 92, 98; 549 N.W.2d 849 (1996).

n2 MICHIGAN'S CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES "IS TO BE CONSTRUED TO PROVIDE THE SAME PROTECTION AS THAT SECURED BY THE FOURTH AMENDMENT [OF THE FEDERAL CONSTITUTION], ABSENT, 'COMPELLING REASON' TO IMPOSE A DIFFERENT INTERPRETATION." *PEOPLE V COLLINS*, 438 Mich. 8, 25; 475 N.W.2d 684 (1991). HOWEVER, IF THE ITEM SEIZED IS A "NARCOTIC DRUG ... SEIZED BY A PEACE OFFICER OUTSIDE THE CURTILAGE OF ANY DWELLING HOUSE IN THIS STATE," MICHIGAN'S CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES IS NOT APPLICABLE. CONST 1963, ART 1, § 11. SINCE MARIJUANA IS CONSIDERED A NARCOTIC DRUG FOR PURPOSES OF ART 1, § 11, IF THE MARIJUANA HAD BEEN SEIZED OUTSIDE THE CURTILAGE OF A DWELLING HOUSE, MICHIGAN'S CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES WOULD NOT BE APPLICABLE, ALTHOUGH THE FOURTH AMENDMENT'S WOULD BE. *MICHIGAN V LONG*, 463 U.S. 1032, 1044 n.10, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). HOWEVER, IN THE PRESENT CASE, THE MARIJUANA WAS FOUND IN THE CURTILAGE OF DEFENDANT'S DWELLING HOUSE, AND THUS BOTH THE FOURTH AMENDMENT'S AND MICHIGAN'S CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES ARE APPLICABLE.

[***9]

In this case, the police were dispatched to a residence to investigate a complaint regarding a possible trespass. When they arrived at the scene, they found Holder and defendant in a parked vehicle, and very briefly questioned them about their presence in the area. They [**877] determined that Holder, the driver of the vehicle, was too intoxicated to be driving. Therefore, they began to make arrangements for Holder's car to be towed so that defendant and others on the road would not be jeopardized. While making these arrangements, Holder (presumably inadvertently) pulled a baggie of marijuana out of his pocket, and was arrested. Immediately after this arrest, the police conducted a patdown search of defendant.

In summary, before the marijuana was found, the police, upon a complaint of criminal conduct, properly detained defendant in a public place, for the purpose of determining whether a crime had been committed. See *Shabaz*, 424 Mich. at 56. Further, after the [*328] marijuana was found, the police properly detained defendant for the purpose of conducting a limited search for weapons on the basis of reasonable suspicion. See *Champion*, 452 Mich. at 99. [***10] Therefore, we conclude that the brief detention of defendant in this case was valid under the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11.

B. PATDOWN SEARCH

The next issue is whether the patdown search of defendant was invalid under the Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11. A police officer may perform a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons. *Terry*, 392 U.S. at 27; *Champion*, 452 Mich. at 99. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion [***11] required for probable cause." *Champion*, 452 Mich. at 98. In order to demonstrate reasonable suspicion, an officer must have "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry*, 392 U.S. at 21.

It is the totality of the circumstances in a given case that determine whether a patdown search is constitutional. *Champion*, 452 Mich. at 112. In this case, [*329] defendant was a passenger in a vehicle in which criminal activity was discovered. The driver of the vehicle, Holder, was found with a large amount of cash in small denominations and a baggie of marijuana, which

led the officer to believe that Holder was selling drugs. The officer was told that defendant and Holder had been together all evening. After Holder was arrested and placed in the patrol car, he yelled to defendant not to tell the police anything. The officer testified that, because of his twenty-three years of experience and training as an officer, he knew that when drugs are involved, [***12] weapons are also often involved. Therefore, the basis for his decision to conduct a patdown search of defendant was that defendant might be in the possession of a weapon, thereby posing a threat to himself or his partner. Under the totality of the circumstances before us, we find that the police had reasonable suspicion to warrant a patdown search of defendant. n3

> n3 We agree with the dissent that "defendant could not be stopped and frisked merely on the basis that he was associated with Holder. Rather, the circumstances had to indicate that the defendant himself was **articulably** and reasonably suspected of criminal wrongdoing, and suspected of being armed and dangerous." *Post* , 2001 Mich. LEXIS 1339, *48. We further agree with the dissent that the fact that defendant was associated with Holder, *along with the other circumstances in this case, did* indicate that defendant himself was, articulably and reasonably, suspected of being armed. Thus, the police officers were justified in conducting a patdown search of defendant.

[***13] [**878]

Furthermore, the fact that the officer did [*330] not fear for his safety before the marijuana was found does not change our conclusion that the patdown search of defendant was proper. The relevant inquiry when determining whether the police have properly conducted a patdown search is "whether the officer's action was justified at its inception ...." *Terry*, 392 U.S. at 20. Therefore, the fact that the officer did not fear for his safety before the marijuana was found is irrelevant; what is relevant is that, after it was found, the officer was concerned for his safety, and this was when the officer conducted the patdown search of defendant. Additionally, the fact that the officer anticipated finding drugs on defendant as a result of this search does not change our conclusion that the patdown search of defendant was proper. The United States Supreme Court has held that evenhanded law enforcement is best achieved by the application of objective standards of conduct, [***14] rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by ... a valid exception to the warrant requirement. [*Horton v California*, 496 U.S. 128, 138; 110 S. Ct. 2301; 110 L. Ed. 2d 112 (1990).] The proper focus is on the *actions* of the officer, not his *thoughts*. In the present case, it is irrelevant that the officer was secondarily looking for drugs because the principal purpose of the patdown search of defendant was to ensure that he did not have any weapons. Accordingly, we find that the objective facts that prompted the officer to determine that his safety, and that of his partner, might be at risk, were sufficient to warrant the patdown search of defendant. Therefore, we conclude that the patdown search of defendant was valid under the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11.

C. SEIZURE OF THE PHOTOGRAPHS

The third issue is whether the seizure of the photographs [***15] from defendant during the patdown search of [*331] defendant was invalid under the Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11. This Court has previously held:

> The plain feel exception to the warrant requirement adopted by the United States Supreme Court in *Minnesota v Dickerson*, ... allows the seizure without a warrant of an object felt during a legitimate patdown search for weapons when the *identity of the object is immediately apparent and the officer has probable cause to believe that the object is contraband.* [*Champion*, 452 Mich. at 100-101 (emphasis in the original).]

In conducting a patdown search, an officer may seize items that the officer has probable cause to believe are contraband from the plain feel. "An object felt during an authorized patdown search may be seized without a warrant if the item's incriminating character is immediately apparent ... [***16] ." 452 Mich. at 105. Patdown [**879] searches are designed to discover weapons or other instruments that might injure an officer. However, when conducting a patdown search, police officers may also seize noncontraband objects that they have probable cause to believe feels like contraband. *Minnesota v Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *Champion*, 452 Mich. at 105-106.

In this case, while conducting the patdown search of defendant, the officer felt a two-by-three-inch object in defendant's pocket that he believed was a card of blotter acid. His belief was based on his knowledge that blotter acid was often contained on sheets of cardboard; his awareness that cards of blotter acid were capable of fitting into a pants pocket like that he felt on defendant;

the antecedent discovery of marijuana and a large amount of money on [*332] Holder, the driver of the vehicle in which defendant was a passenger; Holder's shout to defendant not to tell the police anything; the fact that defendant was with Holder during the entire evening; and the officer's training and twenty-three years of experience as a police [***17] officer. Under these circumstances, the officer had probable cause to believe that the object he felt in defendant's pocket was contraband. Accordingly, the officer was justified in removing the photographs from defendant's pocket pursuant to the plain feel exception to the warrant requirement.

Furthermore, it is irrelevant that what was ultimately retrieved from defendant's pocket was not, in fact, blotter acid. What is relevant is that the officer had probable cause to believe that the photographs were blotter acid from his plain feel. The probable cause requirement does not demand "that a police officer 'know' that certain items are contraband ...." *Texas v Brown*, 460 U.S. 730, 741; 103 S. Ct. 1535; 75 L. Ed. 2d 502 (1983). Rather, "probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' *Carroll v United States*, 267 U.S. 132, 162; 45 S. Ct. 280; 69 L. Ed. 543 (1925), that certain items [***18] may be contraband ...;it does not demand any showing that such a belief be correct or more likely true than false." 460 U.S. at 742. Once an officer has probable cause to believe that an object is contraband, he may lawfully seize the object. *Champion*, 452 Mich. at 105. The fact that the officer is ultimately wrong in his assessment of the object does not render the seizure unlawful. As discussed above, the officer had probable cause to believe that the photographs were blotter acid, and thus he lawfully seized them from defendant, [*333] regardless of the fact that they subsequently proved instead to be photographs. Therefore, we conclude that the seizure of the photographs from defendant was valid under the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11.

D. SEARCH OF THE PHOTOGRAPHS

The final issue is whether the turning over and examining of the fronts of the photographs that were validly seized was invalid under the Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11. [***19] A search for Fourth Amendment purposes occurs only when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v Jacobsen*, 466 U.S. 109, 113; 104 S. Ct. 1652; 80 L. Ed. 2d 85 (1984). If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." *Illinois v Andreas*, 463 U.S. 765, 771; 103 [**880] S. Ct. 3319; 77 L. Ed. 2d 1003 (1983). If a person has no reasonable expectation of privacy in an object, a search of that object for purposes of the Fourth Amendment cannot occur. *Dickerson*, 508 U.S. at 375; *People v Brooks*, 405 Mich. 225, 242; 274 N.W.2d 430 (1979).

In this case, when the officer turned the lawfully seized photographs over to examine their fronts, this was not a constitutional "search" for purposes of the Fourth Amendment. *At this point*, defendant's reasonable expectation of privacy in the outer surfaces of the photographs had already been significantly diminished, at least sufficiently to justify the officer's [***20] turning [*334] over and looking at the photographs. n4 The photographs were already lawfully seized by the officer. Once an object is lawfully seized, a cursory examination of the exterior of that object, like that which occurred here, is not, in our judgment, a constitutional "search" for purposes of the Fourth Amendment. n5 See *Arizona v Hicks*, 480 U.S. 321, 325-326; 107 S. Ct. 1149; 94 L. Ed. 2d 347 (1987). This is true because a cursory examination of the exterior of an object that has already been lawfully seized by the police will produce no *additional* invasion of the individual's privacy interest. n6 "It would be absurd to say that an object could be seized and taken from the premises, [*335] but could not be moved for closer examination." *Id.* at 326. Once the police have lawfully seized an item from a person, that person's reasonable expectation of privacy in the exterior of that item has, at the least, been significantly diminished. n7 "Once an item has been seized in connection with a lawful [**881] search ... any [***21] expectation of privacy by a person claiming ownership is significantly reduced. *MacLaird v Wyoming*, 718 P.2d 41, 44 (Wy, 1986). For example, in *United States v Bonfiglio*, 713 F.2d 932, 937 (CA 2, 1983), the Court held that the police, who had lawfully seized a tape cassette, were not required to obtain a search warrant before playing the cassette because, once it had been lawfully seized, defendant no longer had a reasonable expectation of privacy in the recorded statement. Similarly, in this case, the police, who had lawfully seized three photographs, were not required to obtain a search warrant before turning the photographs over to examine their outer surfaces because, once they had been lawfully seized, defendant's reasonable expectation of privacy in these surfaces had been significantly diminished, at least enough to justify the cursory examination that occurred here.

n4 By a reasonable expectation of privacy being "significantly diminished," we describe a situation in which an object, once lawfully seized,

is subject at least to *some* type of manipulation. However, it does not mean that the object is subject to *any* type of manipulation. Once an object has been validly seized, an individual's reasonable expectation of privacy is not necessarily lost altogether, allowing the police to manipulate the object *any* way they see fit; rather, one's reasonable expectation of privacy is merely diminished, allowing the police to manipulate the object *only* in a manner consistent with the individual's remaining reasonable expectation of privacy. A permissible manipulation may well be different for different types of objects and for different circumstances. The dissent asserts that "if an individual has a diminished expectation of privacy, as opposed to no expectation of privacy, then necessarily he must have some expectation of privacy in the place to be searched." *Post*, 2001 Mich. LEXIS 1339, *75. We agree. However, in this case, the officer's turning over and viewing the other side of the photographs did not, in our judgment, offend defendant's remaining reasonable expectation of privacy. [***22]

n5 We conclude that once an object has been lawfully seized, the police may move the object and look at its outer surface or exterior. However, we do not address whether the police may manipulate an object **in any other sort of way, i.e., open an object,** once it has been lawfully seized because that question is not before us. Such a search is not implicated by this case.

n6 We use the terms "outer surfaces" and "exterior" to mean essentially the same thing, i.e., the outside of an object. We use the phrase "outer surfaces" when referring to the photographs because photographs do not typically have an exterior and an interior. We use the term "exterior" when referring to objects in general to make the point that our holding addresses whether the police can look at the exterior of an object, not whether, under different circumstances, they can look at their interior.

n7 We conclude that once the police lawfully seized the photographs, defendant's reasonable expectation of privacy in the outer surfaces of those photographs was, at the least, significantly reduced. However, we do not address whether one has a reasonable expectation of privacy in items inside a container, i.e., purse, wallet, or luggage, once the police have lawfully seized the container because, again, that question is not before us.

[***23]

Again, we emphasize that the turning over of the photographs occurred only after the police had already lawfully seized them from defendant. The reason that the police, in this case, were allowed to turn the photographs over was because they already had [*336] valid possession of them. In *Hicks*, 480 U.S. at 326, the United States Supreme Court held that the police could not move stereo equipment to see the serial numbers on it because the police lacked probable cause to believe it was contraband *before* they moved it. However, in this case, the Court of Appeals correctly determined that the photographs had already been lawfully seized by the police. Where *Hicks* involved a preseizure movement or action by the police, the present case involves a postseizure movement or action. The police cannot manipulate an object in order to determine whether it is contraband; it must be immediately apparent from plain view or plain feel that the object is contraband. *Id.* In the present case, the police did not move the object to examine it more closely in order to determine [***24] whether it was, in fact, contraband; rather, the police already had probable cause to believe that it was contraband upon plain feel, and only after the object was validly seized did they move the object to examine it more carefully. Because the officer had already lawfully seized the photographs when he turned them over to examine their fronts, and because defendant's reasonable expectation of privacy in the outer surfaces of those photographs had, at the least, been significantly diminished, there was no constitutional "search" for purposes of the Fourth Amendment.

As discussed above, it is irrelevant that the officer originally suspected that the seized object was blotter acid when it was actually photographs. What is again relevant is that the officer had probable cause to believe that the object was contraband from plain feel, and thus he lawfully seized it. Once the object was lawfully seized, the officer could look at its outer surfaces without obtaining a warrant. See *Hicks*, [*337] 480 U.S. at 325-326. In *Brooks*, 405 Mich. at 250-251, this Court held that it was not a search for Fourth Amendment purposes when the police more carefully [***25] examined a noncontraband item that was seized from the defendant and that the police by then lawfully possessed. Once the police lawfully have possession of an object, there is no need for the police to obtain a search warrant to look at or scrutinize the exterior of that object. *People v Rivard*, 59 Mich. App. 530, 533-534; 230 N.W.2d 6 (1975). This is true because once the police lawfully take possession of an object, one's expectation of privacy with respect to that object has "at least partially dissipated ...." *Id.* For these reasons, we conclude that the exterior of an item

that is validly seized during a [**882] patdown search may be examined without a search warrant, even if the officer subsequently learns that the item is not the contraband the officer initially thought that it was before the seizure.

In this case, the Court of Appeals correctly determined that the police officer had lawfully seized the photographs and that the officer had lawfully placed the photographs face down on the roof of the vehicle. However, the Court of Appeals [***26] held that the officer should not have turned the photographs over to examine their fronts. Apparently, the Court of Appeals decision would have been different if the photographs had been placed on the car face up, rather than face down, because then the officer would not have had to turn the photographs over to see their face; instead, they would have been in plain view. We cannot agree with that kind of logic. The law should not turn on the serendipity of which side of the photographs were facing up when the officer removed them from defendant's pocket. Rather, the [*338] law turns on whether the officer's actions violated any of defendant's constitutional rights. We do not believe that they did. Regardless of which side of the photographs came out facing up or down, the officer could look at all the sides of the photographs without violating any of defendant's constitutional rights. Therefore, we conclude that the turning over and examining of the other side of the photographs by the police, under the circumstances of this case, did not deprive defendant of his constitutional rights under the Fourth Amendment of United States Constitution or Const 1963, art 1, § 11.

IV. RESPONSE [***27] TO THE DISSENT

The dissent agrees with our conclusion that the brief detention of defendant was proper and that the patdown search of defendant was proper. However, it disagrees with our conclusion that the seizure of the photographs from defendant was proper and that the officer's turning over and examining of the photographs was proper.

A. SEIZURE OF THE PHOTOGRAPHS

The dissent concludes that the seizure of the photographs from defendant was improper. We, of course, disagree. The dissent contends that "in *Champion*, the majority *extended* the United States Supreme Court decision in *Dickerson* to encompass plain feel seizures of items that *might* contain contraband." *Post*, 2001 Mich. LEXIS 1339, *60 (emphasis added). First, this Court did not *extend* anything in *Champion*; rather, it merely adopted the plain feel exception as articulated by [*339] *Dickerson*. n8 Second, *Champion* did *not* conclude that under the plain feel exception the police may seize objects that *might* be contraband. Rather, *Champion*, 452 Mich. at 105-106, concluded, as did *Dickerson*, that under the plain feel exception the police may [***28] seize an object from an individual *only* if they "develop[] probable cause to believe that the item felt is contraband ...."

n8 The dissent asserts that *Champion* did extend *Dickerson* because "the very type of additional search prohibited by *Dickerson* occurred in *Champion*" as evidenced by the fact that "before the officer in *Champion* could determine a pill bottle could be classified as contraband, he had to determine somehow that it was in fact used for an illegal purpose." *Post*, 2001 Mich. LEXIS 1339 *66, n 11. However, in our judgment, no such "additional search" occurred in *Champion*. Rather, the officer had probable cause to believe that the pill bottle was contraband without having to move, squeeze, or otherwise manipulate the pill bottle. Contrary to the dissent, the officer did not have "to determine somehow that it was in fact used for an illegal purpose"; rather the officer merely had to have probable cause to believe that it was contraband.

[**883] [***29]

The dissent asserts that the fact that the officer thought that the object was blotter acid before he seized it when, in fact, the object was actually photographs is "certainly relevant to our determination whether probable cause existed." *Post* , 2001 Mich. LEXIS 1339, *62. However, even assuming that it is relevant, it is certainly not dispositive. The United States Supreme Court has said "probable cause ... does not demand any showing that such a belief be correct." *Brown*, 460 U.S. at 742. Accordingly, in order to demonstrate probable cause, it is not necessary to show that the officer *knew* that the object was contraband before he seized it. Rather, it is *only* necessary, as was done in this case, to show that a reasonably cautious person in the circumstances would have been warranted in the belief that the object was contraband. *Brown, supra* at 742.

[*340] The dissent next asserts that the officer "would have had to manipulate the object in order to determine that it was in fact contraband." *Post*, 2001 Mich. LEXIS 1339, *65-66. However, the officer did not move, squeeze, or otherwise manipulate the [***30] contents of defendant's pocket in order to determine that the object was contraband. Rather, the officer merely patted down defendant and, when his hand came upon the object, he had probable cause to believe that this object was contraband, and thus he lawfully seized it from defendant's pocket.

The dissent further contends that we rely on the same factors to conclude that there was probable cause to believe that the object was contraband as we do to conclude that there was reasonable suspicion to believe that defendant was armed. Even if this were correct, we question its relevancy. We, of course, recognize that probable cause requires a higher level of justification than does reasonable suspicion. However, it is hardly improper to rely on the same factors to justify each. This is true because reasonable suspicion is merely a lower threshold of justification than probable cause. If, therefore, an officer has probable cause, he necessarily also has reasonable suspicion. Although it is then possible to rely on the same factors to justify each, we do not do so in this case. Rather, there are two relevant factors that support our finding of probable cause that do not support our finding [***31] of reasonable suspicion, i.e., the officer's knowledge that blotter acid is often contained on sheets of cardboard and his knowledge that such cards of blotter acid could fit into a pocket like that of defendant's.

[*341] B. SEARCH OF THE PHOTOGRAPHS

The dissent concludes that, even assuming that the police lawfully seized the photographs from defendant's pocket, the officer's turning over and examining of the photographs was improper. We again disagree.

The dissent contends that *Champion* "did not allow a subsequent search merely because the item had been seized. Rather, it *required* the additional justification that the search occur incident to arrest." *Post*, 2001 Mich. LEXIS 1339, *61, n.7 (emphasis added). First, the *Champion* Court did not *require* the additional justification; it merely concluded that, under the facts, which included a search incident to arrest, the search was lawful. Second, and more importantly, the search in *Champion* involved the *opening* of a container, whereas in this case, the police merely turned photographs over and viewed their other side. We merely hold that, once an object has been lawfully seized, [*32] the police may shift the object and look at its *exterior*; we do *not* address [**884] here whether the police may *open* an object and look at its *interior*. n9**

> n9 **The dissent asserts that "the majority seems to argue that the result might be different were the officer required to open a container and look inside. Yet, how can this be true considering that the majority places primary reliance on *Champion*, a case in which the officer did just that?" *Post*, 2001 Mich. LEXIS 1339 , *72, n.16. The dissent answers its own question: *Champion* "did not allow a subsequent search merely because the item had been seized. Rather, it required the additional justification that the search occur incident to arrest." *Post*, 2001 Mich. LEXIS 1339, *61, n.7.**

The dissent next contends that "once the officer removed the photographs from the defendant's pocket, it became clear that the object removed was not in fact cardboard ... thus, ... the police [*33] no longer had justification for infringing upon the defendant's [*342] right to possess private photographs." n10 *Post* , 2001 Mich. LEXIS 1339 at *70-71. However, given that the officer had already lawfully removed the photographs from defendant's pocket, the additional action on the part of the police officers in turning them over did not constitute an invasion of the defendant's privacy.**

> n10 **Contrary to the dissent's assertion, we do not, by failing to reference certain language contained in the dissent, *post*, 2001 Mich. LEXIS 1339, *71 n.14, fail to appreciate "that a search or seizure without a warrant is circumscribed by the warrant exception justifying it." Rather, we conclude that no "search" occurred for purposes of the Fourth Amendment where the officer merely turned the lawfully seized photographs over and viewed their other side, and thus no "search" without a warrant occurred, requiring the application of a warrant exception.**

The dissent [*34] asserts that "under the majority view, an individual's expectation of privacy in a personal possession would *evaporate* at the moment an officer removes the item from the individual's control, even when the officer's belief is wrong." *Post*, 2001 Mich. LEXIS 1339, at *72 (emphasis added). This is not an accurate statement of our holding. First, we make it quite clear that we do *not* conclude that, once the police lawfully seize an object from an individual, that individual's reasonable expectation of privacy in that object is *altogether* lost. Instead, we merely conclude that defendant's reasonable expectation of privacy in the outer surfaces of the photographs had been *diminished*, at least sufficiently to justify the officer's merely turning over and looking at the other side of the photographs. n11 Second, we do not even conclude [*343] that one's reasonable expectation of privacy is diminished *whenever* an officer removes an**

object from one's control, as the dissent implies. Rather, we conclude that one's reasonable expectation of privacy is diminished only when an officer *lawfully* seizes an object from an individual. In order for an officer [***35] **to *lawfully* seize an object from an individual, he must satisfy certain constitutional safeguards. *Only* after these safeguards have been satisfied** [**885] **can a police officer lawfully seize an object from an individual and view its exterior.**

n11 **The dissent asks "when would a legitimate expectation of privacy preclude a further search under the majority's rationale?" *Post*, 2001 Mich. LEXIS 1339, *72 n.16. The answer is that it would *always* preclude a further search. However, a further search would not necessarily be precluded where there is a warrant or an applicable exception to the warrant requirement. If an officer *improperly* seizes an object from an individual's pocket, that individual would have a legitimate expectation of privacy that would preclude any further "search" of that object. If, on the other hand, an officer *properly* seizes an object from an individual's pocket, that individual would also have a legitimate expectation of privacy, but, under the specific circumstances of the instant case, such expectation would not arise until some time after the officer had merely turned over the photographs to view their other side. As we have already made clear, we are not addressing whether the police may manipulate a lawfully seized object in some manner beyond what has specifically occurred here** because that question is not before us.

[***36]

The dissent further asserts that "the majority effectively creates an exception to the warrant requirement that permits a search incident to seizure." *Post*, 2001 Mich. LEXIS 1339, at *74. However, our opinion in no way, permits a Fourth Amendment "search" incident to seizure. Instead, we conclude that there was no "search" in this case when the police turned the photographs over to examine their other side because, in order for there to be a "search," one must have a reasonable expectation of privacy in the object being "searched." In this case, the police had already lawfully seized the photographs, and, therefore, defendant's reasonable expectation of privacy in the photographs already had been significantly diminished, at least sufficiently to justify the officer's cursory examination of the other side of the photographs. n12

n12 The dissent of Justice Young presents in more undiluted form the argument that the turning over of the photographs to view their other side constituted a Fourth Amendment violation. For the reasons set forth in this opinion, we do not believe that the constitutional underpinnings of the officer's conduct here rest upon whether the lawfully seized photographs were seized facing up or facing down, or adjusted from one position to the other.

[***37]

[*344]

CONCLUSION

We conclude that the brief detention of defendant, the patdown search of defendant, the seizure of the photographs from defendant, and the examination of the photographs were each proper. First, because the officer had reasonable suspicion that criminal activity was afoot, the brief detention of defendant was proper. Second, because the officer had reasonable suspicion that defendant might be armed, and thus pose a danger to him and to other persons, the patdown search of defendant was proper. Third, because the officer had probable cause to believe that the object he felt in defendant's pocket was contraband, the seizure of the photographs from defendant was proper under the plain feel exception to the warrant requirement. Finally, because defendant's reasonable expectation of privacy in the outer surfaces of the lawfully seized photographs had, at the least, been significantly diminished, no "search" for purposes of the Fourth Amendment took place when the officer turned the photographs over and examined their other side. Accordingly, we would reverse the Court of Appeals decision that the officer's turning over and examining of the photographs was improper. [***38] We would remand this case to the Court of Appeals for a determination whether the subsequent search of defendant's home was proper.

CORRIGAN, C.J., and TAYLOR, J., concurred with MARKMAN, J.

CONCURBY:
WEAVER

CONCUR:

[*345]

WEAVER, J. (*concurring*).

I concur in the result of the majority opinion. I write separately to emphasize that the dissenting opinions are inconsistent with the reasoning in *Arizona v Hicks,* 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), and this Court's opinion in *People v Champion*, 452 Mich. 92, 549 N.W.2d 849 (1996). If one believes that the initial seizure of the photographs was valid under the plain feel exception, then the subsequent examination of those photographs was also valid. ***Hicks,* 480 U.S. at 326; *Champion,* 452 Mich. at 105-106, 117.** However, I caution that if *Champion* is construed too broadly, it would be appropriate to revisit the proper limits of that decision in the future.

DISSENTBY:
YOUNG; CAVANAGH

DISSENT:

[**886] [*373contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination [***39] accurately reflects the pagination of the original published document.]
YOUNG, J. (*dissenting*).

I agree with Justice Cavanagh that Officer Greenleaf's actions in examining the photographs he removed from defendant's pocket did not meet Fourth Amendment requirements. Accordingly, I respectfully dissent.

As Justice Cavanagh explains in his dissent, *ante* at 31, "once the officer removed the photographs from the defendant's pocket, it became clear that the object removed was not in fact cardboard. At that moment, the justification supporting the seizure, that the object was immediately identifiable as contraband, no longer existed." In my view, under the Supreme Court's decision in *Arizona v Hicks*, 480 U.S. 321; 107 S. Ct. 1149; 94 L. Ed. 2d 347 (1987), any continued examination of the photographs, however cursory, required additional justification that simply is not present here.

Because I believe that the trial court properly suppressed the photographs as well as the evidence obtained during the subsequent search of defendant's residence, I would affirm the decision of the Court of Appeals.
CAVANAGH, [***40] J. (*dissenting*).

I cannot join in the majority's decision to chip away at the protections afforded by the Fourth Amendment of our United States Constitution. In this case, the probable cause supporting the defendant's ultimate arrest stemmed from the officer's decision to remove and inspect photographs that the defendant was carrying in his front pocket. I cannot support the majority's conclusion that the photographs were validly seized and inspected. I am unconvinced that the requirements of the Fourth Amendment were satisfied. n1 Therefore, I respectfully dissent.

n1 The question before us has not been directly addressed by our state courts. The closest case to being on point is *People v Champion*, 452 Mich. 92; 549 N.W.2d 849 (1996). However, *Champion* did not involve the type of postseizure search that occurred in this case. To the extent that our state constitution is involved, it provides rights coextensive with the federal constitution and need not be addressed independently from our resolution of the Fourth Amendment issues presented. Thus, this case hinges on the applicability of Fourth Amendment jurisprudence, and United States Supreme Court precedent.

[***41]
[*346] I
In this case, the defendant was ultimately charged with three drug-related offenses. The evidence linking the defendant to the crimes was discovered only after a series of searches and seizures. This appeal involves examination of several of the incidents occurring between the time the defendant was initially detained and the time that he was charged.

The majority adequately discusses the key facts of the case. In brief, the majority correctly points out that (1) the police initially came into contact with the defendant while investigating a trespass violation, (2) the patdown of the defendant occurred only after a baggie of marijuana and wad of money were found on his counterpart, (3) the officer testified that he removed photographs from the defendant's pocket on suspicion that they were blotter acid, (4) the officer first placed the photographs face down on the roof of the car and later flipped them over and examined them, (5) the photographs were later used to obtain a search warrant, and (6) the fruits of the search made pursuant to the warrant formed the basis for arresting and charging the defendant.

Next, the majority adequately identifies the issues [***42] presented on appeal. We are faced with determining whether the defendant's [**887] constitutional right to be free from unreasonable searches and seizures was violated when: (1) the defendant was stopped by the officers, (2) the defendant was frisked, (3) the defendant's photographs were removed from his front

pocket, or (4) the officer flipped the photographs [*347] over and examined them. n2 This case involves a series of searches and seizures subject to Fourth Amendment scrutiny. First the defendant was stopped for the purpose of investigating possible criminal activity. Next, the defendant was frisked under the auspices of protecting the investigating police officer. Third, an item was seized from the defendant's front pocket. Fourth, the item seized was searched. Fifth, the defendant was detained and taken to the police station. Sixth, the defendant's home was searched. Seventh, marijuana was seized from the defendant's home. Thereafter, the defendant was charged with the offenses forming the basis of the instant trial.

n2 The defendant also raises the additional Fourth Amendment questions. The majority concludes that we need not address the defendant's issues. Likewise, this opinion will not address the defendant's additional issues because I would grant relief to the defendant even without reaching the question.

[***43]

It is crucial at the outset to understand the basic premises guiding search and seizure law because Fourth Amendment jurisprudence provides that a criminal defendant has a claim for the suppression of evidence that has been gathered in violation of his Fourth Amendment rights. *Wong Sun v United States*, 371 U.S. 471; 83 S. Ct. 407; 9 L. Ed. 2d 441 (1963). First, it is important to understand that searches and seizures may raise distinct concerns. A "search" for Fourth Amendment purposes hinges on a person's privacy interest. The touchstone test for examining a search is whether a person has a legitimate expectation of privacy in the place to be searched. *Katz v United States,* 389 U.S. 347; 88 S. Ct. 507; 19 L. Ed. 2d 576 (1967). A seizure, on the other hand, deprives the individual of dominion over his person or property. *United States v Jacobsen,* 466 U.S. 109; 104 S. Ct. 1652; [*348] 80 L. Ed. 2d 85 (1984); *Horton v California*, 496 U.S. 128; 110 S. Ct. 2301; 110 L. Ed. 2d 112 (1990). A seizure occurs when some [***44] meaningful governmental interference with an individual's possessory interest in property has occurred. *Jacobsen, supra.* In the context of an investigatory stop, a seizure occurs when an officer, by means of force or authority, restricts a person's liberty of movement. *Terry v Ohio,* 392 U.S. 1, 27; 88 S. Ct. 1868; 20 L. Ed. 2d 889 (1968).

The United States Supreme Court has made it clear that searches without warrants are unreasonable per se, subject to a few "specifically established and well-delineated exceptions." *Katz* at 357. Similarly, the Court has stated that seizures must be circumscribed "in area and duration by the terms of the warrant or valid exception to the warrant requirement." *Horton* at 139. In the context of searches that result in the seizure of an item suspected to be contraband, the United States Supreme Court has recognized that a government agent's exercise of dominion and control over the item may be a "reasonable" seizure for Fourth Amendment purposes when the effect seized cannot be supported by a reasonable expectation of privacy, and when the agent can show that he had probable cause to [***45] believe that the effect contained contraband. *Jacobsen, supra.* Otherwise, the search will be constitutionally unreasonable.

In this case, the people place reliance on two doctrines that sometimes provide justification [**888] for searches and seizures without warrants. The first of these doctrines, the "stop and frisk" doctrine, pertains to the ability of law enforcement officials to institute investigatory stops and conduct weapons patdowns. The second doctrine, the "plain feel" doctrine, relates to an officer's ability to seize items detected through [*349] tactile perception during a patdown without a warrant when the officer perceives the items to be contraband. Each of these doctrines will be discussed.

A. The Stop and Frisk Doctrine

1. Guiding Legal Principles

The "stop and frisk doctrine" has roots in the United States Supreme Court decision in *Terry v Ohio*, which held that a reasonable investigatory stop of criminal defendants is permissible when an officer "observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot ...." *Id.* at 30. Further, the officer may conduct [***46] a "patdown" search for weapons when the "officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others ...." *Id.* at 24.

In the event of a *Terry* stop, courts should take into account the whole picture, and determine whether the stop was reasonable under the totality of the circumstances. *United States v Cortez*, 449 U.S. 411, 418; 101 S. Ct. 690; 66 L. Ed. 2d 621 (1981). Under the totality of the circumstances, a stop will be considered valid only when the detaining officer can reasonably articulate a particularized and objective basis for suspecting that the individual stopped had been engaged in or was about to engage in criminal activity. *Terry, supra* at 27. A hunch unsupported by particularized suspicion will not justify the seizure of a person. *Id.*

When the seizure of a defendant does not comport with *Terry*, it will be deemed unreasonable and the evidence flowing from the seizure may be suppressed as

fruit of the poisonous tree. *Wong Sun*; [*350] *Shabaz, supra*. Pursuant to [***47] *Wong Sun*, "the fruits of the officers' illegal action are not to be admitted as evidence unless an intervening independent act of free will purges the primary taint of the unlawful invasion." *People v Shabaz* 424 Mich. 42, 66; 378 N.W.2d 451 (1985).

2. Application to the facts

In the present case, the defendant was stopped and frisked on the following grounds: he and Holder were spotted in the area where a trespass violation had been reported, the individuals were detained because Holder was too intoxicated to drive away, Holder was found to be in possession of marijuana, and there was a clear relationship between Holder and the defendant. The detaining officer testified that his twenty-three years of experience taught him that persons in possession of drugs also frequently possess weapons. As such, the officer felt that the defendant might pose a safety threat to himself or to his partner.

The majority opines that, under the totality of the circumstances, the detaining officer was reasonably suspicious of the defendant because the defendant was initially detained for questioning in an area where a suspected trespass had been reported. Similarly, [***48] the majority concludes that the defendant was reasonably detained after the officers found marijuana and money on the defendant's companion, Holder.

a. The initial detention of the defendant

I agree with the majority that the police did not violate the defendant's Fourth Amendment rights by approaching the automobile he shared with Holder. [*351] The constitution [**889] permits law enforcement officers to approach an individual in a public place for the purpose of asking him if he is willing to answer some questions. *Shabaz, supra* at 56, relying on *Florida v Royer,* 460 U.S. 491; 103 S. Ct. 1319; 75 L. Ed. 2d 229 (1983) (opinion of White, J.). Where there is no involuntary detention of a defendant, there is no Fourth Amendment seizure within the meaning of the Fourth Amendment. *Id.* In his brief, the defendant acknowledges that the police did not question or approach him until after they found marijuana on Holder. Thus, I would not find a violation of the defendant's rights stemming from the officers' decision to approach and question Holder while the defendant was a passenger in his car.

b. The continued [***49] detention of the defendant after marijuana was found on Holder

The majority next presents the question whether the defendant was further properly stopped after marijuana was found on Holder. After Holder was searched and detained, the police asked the defendant to step out of the vehicle. At that point, he was clearly detained. The officers testified that the defendant was asked to get out of the car so that a patdown search for drugs and weapons could be conducted. Thus, once the officers asked the defendant to leave the car so that he could be searched, their inquiry moved beyond the realm of merely stopping a person to inquire whether the person is willing to answer questions and into the realm of searches and seizures subject to the constraints of *Terry*.

An officer may initiate an investigatory stop pursuant to *Terry* when he can articulate a reasonable basis for suspecting that the particular individual [*352] detained has committed, or is about to commit, a crime. Further, an officer may conduct a "frisk," a form of limited weapons search, when he has reason to believe that the person suspected of a crime is presently armed and dangerous. However, the officer's [***50] ability to investigate the circumstances of a crime on the basis of reasonable suspicion are limited. Full blown searches and seizures must be based on probable cause. *Dickerson,* 508 U.S. at 378.

According to the majority, "after the marijuana was found, the police properly detained defendant for the purpose of conducting a limited search for weapons on the basis of reasonable suspicion." Slip op at 8. In the majority's view, there was suspicion because the defendant was the passenger in a vehicle in which criminal activity was discovered, drugs were found on Holder, the officer was told that Holder and the defendant had been together all evening, and Holder yelled to the defendant not to say anything. Thus, under the totality of the circumstances and in light of the fact that the officer testified that experience taught him that people with drugs often have weapons, the majority finds the requisite level of reasonable suspicion for a patdown.

Ultimately, I agree with the majority's conclusion that the patdown in this case is sustainable under *Terry*. Thus, I join the majority's holding that the stop and frisk were constitutionally permissible. However, because [***51] I believe that the majority jumps too readily from an officer's ability to make investigative inquiries to his ability to stop and frisk, I feel compelled to offer a somewhat more extended analysis than that offered by the majority. The majority bolsters its finding of reasonable [*353] suspicion primarily by pointing out that the defendant was and had been in the company of Holder, that Holder was in possession of marijuana, that Holder yelled to the defendant upon being arrested, and that the detaining officer testified [**890] that weapons often accompany drugs. Yet, the majority fails to clarify that the defendant could not be stopped and frisked merely on the basis that he was associated with Holder. Rather, the circumstances had to indicate that the defendant himself was articulably and reasonably suspected of criminal wrongdoing, and suspected of being armed and dangerous.

In *Ybarra v Illinois*, 444 U.S. 85; 100 S. Ct. 338; 62 L. Ed. 2d 238 (1979), the United States Supreme Court specifically rejected an argument that a person may be stopped and frisked simply for being in an area where drugs are found. There, the police had [***52] a warrant to search a bar and bartender for heroin. Ybarra was one of the patrons in the bar when the police arrived to perform the search. They conducted a protective patdown of Ybarra and the other patrons in the bar. In the process, the police seized a cigarette pack from Ybarra and found packets of heroin inside. The Court held that the evidence was subject to suppression on the grounds that the police lacked reasonable suspicion to conduct a patdown search of Ybarra simply because he was in an area where a drug search was occurring pursuant to a warrant. n3

> n3 This Court has also recognized that a defendant will not be considered individually suspicious simply because he is in a high crime area or in an area where drugs are known to be. *Shabaz, supra.*

In the instant case, the defendant was patted down on the basis of the officer's testimony that his experience taught him that people who have drugs often [*354] also have weapons. When the defendant was patted down, the police knew that [***53] Holder was in possession of an illegal substance, not that the defendant was in possession of an illegal substance. n4 The majority's analysis comes dangerously close to doing exactly what *Ybarra* prohibits-allowing a frisk of a person simply because that person is in propinquity with another reasonably suspected of engaging in criminal activity.

> n4 In fact, the officer testified that part of the purpose of the frisk was to search for weapons on the defendant. The majority finds the officer's motivation to be irrelevant; however, the law makes it clear that a search exceeding *Terry* must be based on probable cause. Thus, to the degree that the officer's knowledge relates to the extent of the search and to his belief that the defendant possessed drugs, it is plainly relevant.

While I agree that the police officers were justified in conducting a patdown under the specific facts of this case, I believe that we must take great care not to cross the threshold established in *Ybarra*. It cannot be summarily [***54] concluded that the defendant himself could reasonably be suspected of engaging in criminal wrongdoing simply because of his association with Holder. In order to meet the requirements of the Fourth Amendment, it must be shown not only that the officers had reason to suspect criminal wrongdoing, it must also be established that the officers had a reasonably articulable basis for suspecting that the defendant perpetuated the wrongdoing. *Terry, supra.* To the extent that the majority opinion could be read as overlooking the particularity requirement inherent in a reasonable suspicion inquiry, I disagree with it. n5

> n5 I believe a similar mistake was made in *People v Oliver,* 464 Mich. 184; 627 N.W.2d 297 (2001).

There is no bright-line test for determining whether articulable and particularized reasonable suspicion exists under the circumstances of an individual case. [*355] However, this Court has discussed the concept in some detail. In *Shabaz*, the Court held that no [***55] reasonable suspicion existed where a defendant was stopped because he was observed stuffing a paper [**891] bag under his clothing while leaving an apartment complex in a high crime area, and because he "took off running" when officers observing him slowed their unmarked police car to a stop. 424 Mich. at 60. In reaching the conclusion that reasonable suspicion was lacking under the circumstances, Justice Ryan, now judge of the Sixth Circuit Court of Appeals, stated for the Court,

> The police were not investigating a recently committed crime in the area which may have been linked to the defendant, nor was he known to the officers as a suspect in a crime. There was no visible contraband on the defendant's person; the officers could only guess at the contents of the paper bag. The defendant's flight from plain-clothes pursuers in an unmarked car was at most ambiguous and at least understandable. [424 Mich. at 64-65.]

While this quotation from *Shabaz* certainly makes it clear that *Terry* searches must be carefully scrutinized, I believe that in applying *Terry, Shabaz* also implicitly raised a distinction between situations in which an officer [***56] comes upon a person unknown to him and situations in which an officer is detaining specific individuals in association with the investigation of a particular crime.

The officers in this case were in the area investigating a trespass. Further, once marijuana was found on Holder, the officers were validly investigating another crime. Once Holder yelled to the defendant not to tell the officers a "f--ing thing," the officers had a basis for suspecting that the defendant had information

pertaining to the crime presently being investigated. [*356] Though it is true that the defendant had done nothing to indicate that he himself was in possession of drugs, the officers had an objective reason for suspecting that the defendant might have been involved in criminal wrongdoing. Moreover, the detaining officer's testimony that he feared for his safety when taken together with the fact that the tension in the situation had escalated when marijuana was found on Holder, objectively justified the officer's belief that the defendant posed a threat of being presently armed and dangerous. Thus, I believe that this case can more closely be analogized to *Terry* than to *Ybarra*. The circumstances [***57] of this case reveal a situation where the particular individuals were being investigated in association with the suspected commission of particular violations, rather than merely a situation where the defendant happened to be in an area where other crimes were suspected of being committed. Therefore, I would conclude that this case meets the threshold established by *Terry* and justified a limited weapons patdown.

II

Despite my agreement with the majority that reasonable suspicion for a stop and frisk existed under the totality of the circumstances, I would affirm on the grounds that the seizure of photographs from Custer's front pocket was constitutionally impermissible. I would hold that the scope of *Terry* was exceeded when the officer seized the photographs, and would further hold that the officer lacked probable cause.

The majority concludes that the seizure without a warrant of the photographs from defendant during [*357] the patdown search was valid under the Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution. According to the majority, the seizure was justified by the "plain feel exception" to the warrant requirement, [***58] citing *Minnesota v Dickerson*, 508 U.S. 366, 373; 113 S. Ct. 2130; 124 L. Ed. 2d 334 (1993); *People v Champion*, 452 Mich. 92; 549 N.W.2d 849 (1996). I disagree. [**892]

In a nutshell, the plain feel doctrine provides that police may seize nonthreatening contraband detected through the sense of touch during a patdown search, as long as the search remains within the bounds of *Terry* and as long as the search would be "justified by the same practical considerations that inhere in the plain-view context." *Dickerson* at 375-376. Thus, courts considering whether an item may be seized under the plain feel doctrine must consider both the *Terry* doctrine and the plain view doctrine.

In *Dickerson*, the officer patted down the defendant, and in the process examined a lump in the defendant's pocket that he believed to be cocaine. The Court held that the seizure was invalid because the incriminating character of the lump was not immediately apparent, and because the officer needed to conduct further examination in order to determine whether the lump was contraband. Though *Dickerson* itself invalidated the [***59] seizure of contraband made during a patdown search, the Court nonetheless stated that not all plain feel seizures are invalid per se. Still, the Court made clear that seizures stemming from a patdown must be carefully scrutinized:

> Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry*. Where, as here, "an officer who is [*358] executing a valid search for one item seizes a different item," this Court rightly "has been sensitive to the danger ... that officers will enlarge a specific authorization furnished by a warrant or an exigency, into the equivalent of a warrant to rummage and seize at will. Here, the officer's continued exploration of the respondent's pocket after having concluded that it contained no weapon was unrelated to ... the protection of the police officer and others nearby." It, therefore, amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, and that we have condemned in subsequent cases. [508 U.S. at 378 (citations [***60] omitted).]

Thus, although *Dickerson* clearly refused to impose a categorical ban on the plain feel seizure of objects "whose identity is already known" because of their immediately apparent characteristics, the Court in no way implied that any and every object that may potentially have characteristics similar to certain types of contraband would be seizable. 508 U.S. at 377.

Dickerson also stated that the "plain feel" concept has roots in the "plain view" doctrine, and the competing concerns expressed in plain view cases can be analogized to the plain feel context. Thus, it is important to understand the basic principles underlying the plain view doctrine when determining whether a particular plain feel seizure is valid. Under the plain view doctrine: (1) the seizure without a warrant of evidence in plain view is permissible as long as the police did not violate the Fourth Amendment in arriving in a place from which the evidence could be plainly viewed, (2) an item of immediately apparent incriminating character must be in plain view in order to be seizable, and (3) the police must have a lawful right of access to the item being seized. *Horton v California, supra*; [***61] *Coolidge v New Hampshire,* 403 U.S. 443; 91 S. Ct. 2022; 29 L. Ed. 2d 564 (1971); *Arizona v* [*359] *Hicks*, 480 U.S. 321; 107 S. Ct. 1149; 94 L. Ed. 2d 347 (1987). The ability of a

police officer to seize an item without a warrant pursuant to the plain view doctrine is thus circumscribed by the exigencies justifying the initiation of the search. *Horton* at 139-140. [**893] Further, "if the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Horton* at 140.

It is in light of these principles that the *Dickerson* Court enunciated its holding. The Court explicitly recognized that while *Terry* may authorize an officer to place his hands on a criminal defendant's outer clothing, the Fourth Amendment is violated when the officer must conduct a further search in order to determine whether an object is contraband. In such instances, a seizure will be invalidated for lack of probable cause.

Thus, in plain feel seizure cases, [***62] courts must determine whether the scope of the patdown search remained within the bounds of *Terry*. If not, then the seizure made pursuant to the search would exceed the exigency justifying the search in the first instance. Additionally, courts must determine whether the object felt by an officer is immediately apparent as being contraband. The determination must be supported by probable cause. Where the mass and contours of the object do not make it immediately identifiable as contraband, seizure without a warrant is not justified.

In this case, I would hold that the photographs were invalidly seized from the defendant both because the officer exceeded the scope of the *Terry* search, and because the officer lacked probable cause [*360] to remove them. First, it must be remembered that the patdown search of the defendant was purportedly initiated to protect the officer from a person suspected of being armed and dangerous. During the course of the patdown, the officer testified that he felt what he believed to be a piece of cardboard used as blotter paper for an illegal narcotic known as acid.

A. The Scope of *Terry*

Clearly, the cardboard seized by the officer was [***63] not seized in order to advance the interest of protecting the officer. The officer did not remove the photographs on belief that they were a dangerous instrumentality, but on suspicion that they were cardboard. The officer further suspected that the item he felt was used to blot acid.

In my view, the majority's opinion in this case is the first evil escaping the Pandora's box opened in *People v Champion*. n6 In *Champion*, the majority extended the United States Supreme Court decision in *Dickerson* to encompass plain feel seizures of items that might contain contraband. n7 Justice Brickley dissented, explaining why seizures of items not appearing to be contraband themselves is illegal. Though Justice Brickley's opinion did not win the day, I continue to [*361] believe that it was correctly decided. I would adhere to his view, that when the officer patted the objects in the defendant's pocket and knew [**894] that they were not a weapon, the removal of those objects was unrelated to the protection of the officer's safety. Thus, the exigencies supporting the patdown were unrelated to the subsequent seizure.

n6 See *Champion* at 143 (Brickley, C.J., dissenting)("The majority justifies its expansive reading of *Dickerson* by pointing out that it limited its holding to the facts presently before the Court. ... Yet, it would be naive to conclude that this state's lower courts will not read the majority opinion in a way that will allow evidence ... against those whose Fourth Amendment rights have been violated, indeed, opening Pandora's box."). [***64]

n7 Importantly, though *Champion* supported the plain feel seizure of an item that might contain contraband, it did not allow a subsequent search merely because the item had been seized. Rather, it required the additional justification that the search occur incident to arrest. This cuts against the majority's rationale for searching the photographs seized from the defendant pursuant to the plain feel doctrine.

Regardless of the view of *Champion* to which one subscribes, it is clear that the exigencies purportedly justifying the patdown search of the defendant in this case did not justify the seizure. n8 Even the majority recognizes the patdown in this case occurred as part of a protective sweep, but that the seizure was justified pursuant to the plain feel doctrine. Thus, we must turn to *Dickerson's* requirement that a plain feel seizure be supported by probable cause.

n8 There is a fundamental difference between the justification supporting a patdown search for weapons and the justification for seizing something that is clearly not a weapon. In order to determine whether a search or seizure remains within the confines of an exception to the warrant requirement, one must necessarily understand the justification circumscribing the otherwise constitutionally impermissible search or seizure without a warrant. Whereas the potential presence of a weapon may justify an officer's access to the outer surfaces of a

> defendant's clothing during a patdown search, the fact that an officer may lawfully be in a position to search a defendant does not in and of itself justify the officer in seizing anything that he believes is contraband. Rather, a seizure of contraband made during a patdown search requires its own constitutional justification.
>
> In the instant case, if the officer had justification for the seizure, it was because of the plain feel doctrine, not because of the *Terry* doctrine. Though the plain feel doctrine permits a seizure that would not have had justification but for the officer's decision to patdown the defendant, the exigencies supporting the search (fear for the safety of the officers or others) clearly would not support a seizure of blotter acid cardboard because blotter acid cardboard does not pose a threat to the officer's safety.

[***65]

[*362] B. The Absence of Probable Cause

Dickerson made it clear that an object is seizable only where its incriminating identity is immediately apparent because of the mass and contour of the object. As an initial matter, the majority too readily assumes that a limited patdown could clearly reveal the identity of objects in the defendant's front pocket so that manipulation would not be required to support probable cause for a seizure. Obviously, the contours and mass of the objects in the defendant's pocket were not unique. This is evidenced by the fact that the officer believed the defendant was carrying cardboard, though he was actually carrying photographs. The majority glosses over the officer's factual mistake and deems it irrelevant. Though perhaps not dispositive in every case, I believe that a factual mistake about the identity of an object must be "immediately apparent," because contraband tends to reduce the likelihood that a particular seizure is supported by probable cause. And because the existence of probable cause is made less likely by the mistake, I believe such factual errors are certainly relevant to our determination whether probable cause existed. [***66] n9

> n9 Again, I turn to Justice Brickley's *Champion* opinion to illustrate why the seizure of noncontraband items is constitutionally problematic. He wrote:
>
> I would hold that *Terry* specifically forbids the type of seizure conducted in this case and thereby eliminate the incentive to expand patdowns into general searches for contraband. To the extent that *Dickerson* departs from *Terry*'s strict prohibitions, it allows admission of nonweapons evidence found during a patdown if, but only if, the officers conducting the patdown have probable cause to believe that the item they feel is contraband. The item felt in this case, the pill bottle, while containing contraband, was not, in and of itself, contraband. Accordingly, it was impossible for Officer Todd to have probable cause to believe otherwise. His seizure of it, therefore, was illegal. [452 Mich. at 143.]

[**895]

[*363] Probable cause will be found to exist where the facts and circumstances, within the knowledge of the authorities [***67] and of which the authorities had reasonably trustworthy information "were sufficient in themselves to warrant a man of reasonable caution in the belief that [a crime has been committed]." *Carroll v United States*, 267 U.S. 132, 162; 45 S. Ct. 280; 69 L. Ed. 543 (1925). A very important distinction must be drawn between the basis for an officer's ability to stop and frisk and his ability to seize an item pursuant to the plain feel doctrine. The stop and frisk must be predicated upon only *reasonable suspicion*. The plain feel doctrine allows an officer to seize immediately apparent contraband that he feels during the patdown on the ground that the officer has *probable cause* for the seizure. In other words, if an officer feels something that he only reasonably suspects to be contraband, he cannot seize it.

In the present case, I am not convinced that the officer acted upon probable cause, though he may have subjectively suspected that the defendant was carrying blotter acid on cardboard. While the stop and frisk could potentially be justified on reasonable suspicion grounds, that justification would lie largely in the fact that the interest [***68] in protecting officers and innocent bystanders from the harm an armed suspect may cause outweighs a suspicious individual's interest in being free from a limited search. A seizure made pursuant to a frisk requires a higher level of justification than a frisk itself, however, because the officers have gained access to the defendant's person pursuant to a limited Fourth Amendment exception. When the seizure occurs, the balance to be considered is whether the officer's ability to seize an item to which he gained access on the basis of reasonable [*364] suspicion that an individual was armed and dangerous outweighs an individual's interest in possessing items and the individual's legitimate expectation of privacy.

Were there no concern for the officer's safety, an officer could not randomly frisk a defendant. Rather, the search must be limited to a weapons search. Here, we

have a defendant who was essentially deemed guilty by association. The officers observed that Holder was intoxicated, found money on Holder, and found drugs on Holder. When they patted down the defendant, they felt no weapons and no contraband. Yet, the majority stretches to the conclusion that the officer had probable [***69] cause to believe that the defendant was in possession of blotter acid simply because his friend had been found in possession of marijuana and because he had an object in his pocket that felt like cardboard, which could have been used to blot acid. n10

n10 **Under the majority's view, almost any object felt during a patdown could be seized. Could a pen be mistaken as a syringe? A marble as cocaine? A cigarette as marijuana? A letter as blotter paper?**

Further, *Dickerson* would support a conclusion that the seizure here was unjustified because the officer conducted a search under the auspices of the plain feel doctrine. *Dickerson* plainly stated that where a further search is required in order to determine that an object is contraband, it is not seizable under the plain feel doctrine. n11 Here, even if it had been cardboard [**896] that the officer felt, he would have had to [*365] manipulate the object in order to determine that it was in fact contraband. Cardboard itself is not contraband, and [***70] may lawfully be carried. Only a further search would reveal whether the cardboard somehow contained contraband.

n11 I, therefore, disagree with the majority that *Champion* in no way extended *Dickerson*. Obviously, an ordinary pill bottle is not illegal to possess. Thus, before the officer in *Champion* could determine a pill bottle could be classified as contraband, he had to determine somehow that it was in fact used for an illegal purpose. Thus, the very type of additional search prohibited by *Dickerson* occurred in *Champion*.

In any event, the factors cited in the majority opinion do not support the conclusion that the detaining officer had probable cause to believe that the defendant was carrying drug-laced cardboard in his front pocket. According to the majority,

In this case, while conducting the patdown search of defendant, the officer felt a two-by-three-inch object in defendant's pocket that he believed was a card of blotter acid. His belief was based on his knowledge that blotter acid [***71] was often contained on sheets of cardboard; his awareness that cards of blotter acid were capable of fitting into a pants pocket like that he felt on defendant; the antecedent discovery of marijuana and a large amount of money on Holder, the driver of the vehicle in which defendant was a passenger; Holder's shout to defendant not to tell the police anything; the fact that defendant was with Holder during the entire evening; and the officer's training and twenty-three years of experience as a police officer. Under these circumstances, the officer had probable cause to believe that the object he felt in defendant's pocket was contraband. [Slip op at 12-13.]

Interestingly, none of these factors indicates that the officer had reason to suspect that the defendant would be carrying contraband. The officer's knowledge that blotter acid is often carried on cardboard and that such pieces of cardboard would fit into a pocket do not support a conclusion that this defendant, a person previously unknown to the officers, would be carrying blotter acid in his pants. Additionally, the officer pointed to nothing specific that would distinguish a piece of cardboard used to blot acid [*366] from [***72] a photograph or any other piece of paper. He had no articulable basis for concluding that whatever piece of paper the defendant was carrying was used for acid blotter. n12 Moreover, the fact that the police knew Holder was carrying marijuana does not support an implication that the defendant would be in possession of acid. In fact, at the point at which he was frisked, the defendant himself had nothing to alert the police that he was engaged in criminal activity. Under the facts and circumstances, a man of reasonable prudence and caution would have no basis for concluding that the defendant had committed the offense of possessing narcotics. Unless it is now an offense to choose one's associates poorly, I see no reasonable ground for believing that the defendant could be charged with any illegality. n13 Accordingly, [**897] I do not believe a finding of probable cause is supportable.

n12 In fact, the officer's testimony that blotter acid paper is generally paper that can be divided easily into small sections and have acid dropped on it so that it may be sucked off by a recipient tends to imply that a photograph that is thicker and slipperier than paper would not have the characteristics of normal acid blotter. [***73]

n13 Interestingly, the majority's probable cause rationale is barely distinguishable from its reasonable suspicion rationale. The only factor that separates the reasonable suspicion supporting a patdown search and the probable cause required

for a seizure are that the officer knew cards of blotter acid could fit in a pocket. As emphasized herein, the officer had no articulable reason to believe that the defendant possessed blotter acid paper or other drugs.

Contrary to the majority's implication, I do not suggest that the same factors that would support a finding of reasonable suspicion cannot factor into the probable cause analysis. Rather, I believe it is important to recognize that the minimal factors justifying a patdown weapons search do not rise to the level of probable cause. Also the officer's additional indication that a piece of cardboard could fit in someone's front pocket, and his knowledge that some people blot acid on cardboard hardly move the degree of suspicion possessed in this case into the category of probable cause.

[*367] IV

Finally, because the majority concludes [***74] that the seizure of the photographs in the defendant's pocket was valid, it reaches the issue whether the photographs were validly examined. I will also address this argument because I believe the majority's argument is supported neither by logic nor by law.

According to the majority, "the exterior of an item that is validly seized during a patdown search may be examined without a search warrant, even if the officer subsequently learns that the item is not the contraband the officer initially thought that it was before the seizure." Slip op at 20. However, the majority's argument is premised on the assumption that the police validly possessed the photographs removed from the defendant's pockets when the search occurred.

If a Fourth Amendment infringement is unsupported by a warrant or other exception to the warrant requirement, the seizure is invalid. In other words, a search or seizure without a warrant is circumscribed by the exigencies justifying it. See, e.g., *Horton, supra*. Here, the officer removed the photographs from the defendant's possession and control on belief that they were blotter acid cardboard. The purported justification was plain feel. Yet, once [***75] the officer removed the photographs from the defendant's pocket, it became clear that the object removed was not in fact cardboard. At that moment, the justification supporting the seizure, that the object was immediately identifiable as contraband, no longer existed. n14 [*368] Thus, the scope of the plain feel exception was exceeded and the police no longer had justification for infringing the defendant's right to possess private photographs.

n14 In criticizing my approach, the majority conveniently omits this sentence. Such omission illustrates the majority's lack of appreciation of one of the most important aspects of this case-that a search or seizure without a warrant is circumscribed by the warrant exception justifying it.

Additionally, I cannot agree with the majority's conclusion that the search of the photographs taken from the defendant was supportable. The majority opines that the defendant's expectation of privacy in items he was carrying in his front pocket was "significantly diminished" because [***76] an officer removed them during a patdown search under the mistaken belief that they were blotter acid cardboard. n15 Certainly, a defendant has a legitimate expectation of privacy in his front pocket. I would contend that he continued to have a legitimate expectation of privacy after the photographs were removed. Under the majority view, an individual's expectation of privacy in a personal possession would evaporate at the moment an officer removes the item from the individual's control, even when the officer's belief is wrong. I cannot agree. n16

n15 Ironically, the majority cites *Arizona v Hicks*, in support of its position. In *Hicks*, the United States Supreme Court held that the plain view doctrine would not support a seizure where the officers exceeded the scope of the exigency allowing them to be in a place to see what was suspected to be contraband, and also where the police had to move an item in order to determine whether it was in fact contraband.

n16 The majority takes pains to try to explain why rights are only " diminished" under its approach. While the majority admittedly uses the phrase "significantly diminished" throughout its opinion, I am not persuaded that the label accurately fits the approach. When would a legitimate expectation of privacy preclude a further search under the majority's rationale?

The majority seems to argue that the result might be different were the officer required to open a container and look inside. Yet, how can this be true considering that the majority places primary reliance on *Champion*, a case in which the officer did just that? Further, the law does not support a conclusion that an officer somehow has justification to manipulate an object and search parts of its exterior that are not in the officer's

> view. Our Supreme Court has said that plain view seizures are not justified where the officer moves an object even minimally in order to determine whether the object is illegally possessed. *Hicks, supra.* Similarly, an object that must be manipulated in order to determine whether it is contraband is not subject to seizure under the plain feel doctrine. *Dickerson, supra.* The same rationale applies in the context of the present case. I see no meaningful or outcome-determinative distinction between a situation where an officer has to manipulate an object's exterior in order to determine whether the object contains contraband and a situation in which the officer must open the object and look inside to determine whether it contains contraband. In either situation, the officer is conducting a search of an object in order to convert his suspicion that an object contains contraband into confirmation that it does.

[***77] [**898]

[*369] Though the officer's correctness in his belief that an item is probably contraband might not ultimately invalidate a seizure, n17 a mistake on the officer's part would most certainly undermine the validity of a subsequent search. Subsequent searches of items seized by police under a Fourth Amendment exception allowing a seizure without a warrant, must necessarily be subjected to a determination whether the individual defendant retains a privacy interest though his possessory interest has been infringed. Surely, society is less likely to recognize an expectation of privacy in illegal materials as being legitimate than in legal materials. The legitimacy concerns associated with contraband simply do not attach to noncontraband items. Thus, if an officer mistakenly seizes a noncontraband item and then searches that item, despite the fact that the item seized is not the contraband he suspected it to be, the officer is necessarily infringing on a privacy interest. *Dickerson* itself recognized that contraband may be seized during a plain feel or plain view search because the police should not be forced to ignore an apparent illegality. Where the item "felt" [*370] [***78] is not illegal, the same concerns are not present and the exigency is no longer present.

> n17 It would, however, be relevant to a determination whether probable cause existed.

Moreover, the majority effectively creates an exception to the warrant requirement that permits a search incident to seizure. No such exception exists. Even if I were to agree with the majority that there was a valid basis for seizing the defendant's photographs, I would not support a rule that eliminates an individual's expectation of privacy in an item lawfully possessed, but nonetheless seized.

The majority protests that it cannot have created a search incident to seizure exception because it found no search. However, the basis for its conclusion that no search occurred is that a defendant has a "significantly diminished" legitimate expectation of privacy in something seized. The majority approach adds weight to my point that the majority's "significantly diminished expectation of privacy" conclusion is distinguishable from a "no legitimate [***79] expectation of privacy" conclusion in words only. The majority itself admits that "in order for there to be a 'search,' one must have a reasonable expectation of privacy in the object being "searched.'" Slip op at 27. To conclude that no search occurred, then, one must conclude [**899] that an individual has no reasonable expectation of privacy in the place to be searched. If an individual has a diminished expectation of privacy, as opposed to no expectation of privacy, then necessarily he must have some expectation of privacy in the place to be searched. If the majority is unwilling to conclude that the defendant had no expectation of privacy, then it cannot also satisfy the test it enunciates as a basis for concluding that no search occurred.

Further, the reason that no "search" occurred in the majority's view, is that the defendant's [*371] expectation of privacy had been significantly diminished by virtue of the prior seizure. Under this view, the police's subsequent search was justified by its own prior conduct. Were it not for the seizure, there could have been no subsequent examination because the defendant would have had a reasonable expectation of privacy in his pants [***80] pockets. Thus, the majority effectively allows the police to search something seized, and then allows the police to conduct an examination of an object they have seized, by concluding that such an examination would not be a search. Such logic is contrary to search jurisprudence, which focuses on whether a legitimate expectation of privacy has been relinquished.

Also, I find it significant that the majority relies on *Champion, supra,* to support its conclusion that the officer could seize an item from the defendant, but then ignores *Champion*'s recognition that the search of a container preceding a formal arrest can qualify as a search incident to arrest if probable cause for the arrest existed before the container was searched. ... However, a search of a container cannot be justified as being incident to an arrest if probable cause for the contemporaneous

arrest was provided by the fruits of the search. [452 Mich. at 116.]

Perhaps the majority would conclude that because no container was opened in this case, the search of the photographs in an attempt to develop probable cause to arrest was permissible. However, as explained above, such a distinction [***81] cannot validly be drawn. Here, the defendant was not arrested until after the photographs were removed from his pocket and examined. The probable cause for the defendant's [*372] arrest grew largely from the search of the photographs. n18

n18 There was some discussion at trial about when the defendant was actually placed under arrest. The trial transcript indicates that the defendant was not formally arrested at the time he was transported to the police station for questioning after the police examined the photos seized from his front pocket; however, the detaining officer also testified that the defendant was not free to leave after the photographs were seized. What is clear, though, is that this "arrest" of the defendant is not the same arrest upon which the charges of delivery and manufacture, maintaining a drug house, and conspiring to deliver or manufacture were predicated. Those charges were brought on the basis of evidence seized during a search of the defendant's home that occurred after officers decided to investigate the defendant because of what they had seen when examining the photographs.

Following the chain of events backward reveals the number of steps that were taken in order to develop probable cause for the defendant's ultimate arrest for the drug offenses that form the basis of the instant appeal: the arrest grew from the seizure of drugs, which grew from the search of the defendant's house, which grew from the search of the photographs, which grew from the seizure of the photographs, which grew from the patdown search of the defendant, which grew from reasonable suspicion that he was armed, which was inferred from the conduct of Holder.

[***82]

Despite the majority's conclusion to the contrary, not every item seized by police officers is automatically subject to search without a warrant. In fact, the United [**900] States Supreme Court has explicitly held otherwise. In *United States v Jacobsen*, for example, the United States Supreme Court wrote,

Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such packages are presumptively unreasonable. Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. [452 Mich. at 114, citing *United States v Place*, 462 U.S. 696, 700-701; 103 S. Ct. 2637; 77 L. Ed. 2d 110 (1983); *United States v Ross*, 456 U.S. 798, 809-812; 102 S. Ct. 2157; 72 L. Ed. 2d 572 (1982); *Robbins v California*, 453 U.S. 420, 426; 101 S. Ct. 2841; 69 L. Ed. 2d 744 [*373] (1981) (plurality [***83] opinion); *Arkansas v Sanders*, 442 U.S. 753, 762; 99 S. Ct. 2586; 61 L. Ed. 2d 235 (1979); *United States v Chadwick*, 433 U.S. 1, 13, n 8; 97 S. Ct. 2476; 53 L. Ed. 2d 538 (1977); *United States v Van Leeuwen*, 397 U.S. 249; 90 S. Ct. 1029; 25 L. Ed. 2d 282 (1970).]

Using *Jacobsen* as an analogy, the majority's approach would yield the result that a person's private package could be opened and searched because the individual expectation of privacy in the item was lost at the time it was seized. The United States Supreme Court reached a contrary conclusion, and so do I.

CONCLUSION

In this case, the officer impermissibly infringed upon both the defendant's possessory interest and his privacy interest. The photographs were impermissibly seized from the defendant in the first instance, impermissibly retained, and impermissibly searched. Therefore, I would affirm the decisions below and hold that the fruit growing from the seizure of the photographs must be suppressed.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v ABRAHAM SAFFOLD, Defendant-Appellee.

No. 116710

SUPREME COURT OF MICHIGAN

465 Mich. 268; 631 N.W.2d 320; 2001 Mich. LEXIS 1366

April 3, 2001, Argued

July 30, 2001, Decided

July 30, 2001, Filed

PRIOR HISTORY:
[***1] St. Joseph Circuit Court, James Noecker, J. Court of Appeals, WILDER, P.J., and SAWYER and MARKEY, JJ. (Docket No. 217802).

DISPOSITION:
Judgment of the Court of Appeals vacating defendant's guilty plea reversed, defendant's conviction and sentence reinstated.

COUNSEL:
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Jeffrey C. Middleton, Prosecuting Attorney, and Douglas K. Fisher, Chief Assistant Prosecuting Attorney, Centreville, MI, for the people.
State Appellate Defender (by Anne Yantus) Detroit, MI, for the defendant-appellee.
Amicus Curiae:
Jeffrey L. Sauter, President, Prosecuting Attorneys Association of Michigan, John D. O'Hair, Prosecuting Attorney, and Timothy A. Baughman, Chief, Research, Training and Appeals, Detroit, MI, for the Prosecuting Attorneys Association of Michigan.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman, CORRIGAN, C.J., and TAYLOR and YOUNG, JJ., concurred with WEAVER, J. YOUNG, J. (concurring). CORRIGAN, C.J., concurred with YOUNG, J. MARKMAN, J. (dissenting). CAVANAGH and KELLY, JJ., concurred with MARKMAN, J.

OPINIONBY:
Elizabeth A. Weaver

OPINION:

[*270] [**322] WEAVER, J.

The question presented is whether the trial court's failure to comply with MCR 6.302(B)(3)(c) in accepting defendant's guilty plea to one count of receiving and concealing stolen property and fourth felony offender demands reversal of defendant's conviction. This undertaking is one where we, as our predecessor courts have done for over a quarter century, are interpreting and applying our own rules concerning guilty pleas. MCR 6.302(B)(3)(c) requires the trial court to inform the defendant that he waived his right at trial to be presumed innocent until proven guilty. Here, the trial court did not inform defendant of the presumption of innocence during the guilty plea hearing. However, earlier in the day defendant was present while the same judge instructed the jury that convened for defendant's trial--on the charge to which he subsequently pleaded guilty--that the defendant was presumed innocent until proven guilty beyond a reasonable doubt. In light of the *Guilty Plea Cases*, 395 Mich. 96; 235 N.W.2d 132 (1975), the question is whether there [*271] was *substantial*, not strict, [***3] compliance with the requirements of MCR 6.302.

Despite the trial court's omission of the presumption of innocence during the plea hearing, we hold that defendant "was informed of such constitutional rights and incidents of a trial as reasonable to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents." *Guilty Plea Cases*, 395 Mich. at 122. We reverse the Court of Appeals decision and reinstate defendant's plea of guilty.

I

Jury selection for defendant's trial n1 began on the morning of April 13, 1998. In the afternoon of the first day of trial, after the first witness testified, the defendant decided to accept the prosecutor's plea bargain offer. Pursuant to that offer defendant pleaded guilty to one count of receiving and concealing stolen property, MCL 750.535, and to being a fourth felony offender, MCL 769.12 . The trial judge engaged in a lengthy hearing with defendant on his guilty plea. n2 However, during that hearing the trial judge did not inform defendant that by pleading guilty he was giving up the right to [***4] be presumed innocent until proven guilty. n3 On July 17, 1998, defendant was sentenced as [*272] an habitual [**323] offender, fourth offense, to a prison term of twelve to forty years.

n1 Defendant was charged with five counts: 1) home invasion, second degree, MCL 750.110a(3) , 2) home invasion, second degree, MCL 750.110a(3) , 3) receiving and concealing weapons or firearms, MCL 750.535b , 4) receiving and concealing stolen property in excess of $ 100, MCL 750.535, and 5) receiving and concealing stolen property in excess of $ 100, MCL 750.535.

n2 The transcript for the hearing totals thirty-one pages.

n3 MCR 6.302(B)(3)(c).

On December 14, 1998, defendant moved to withdraw his plea on the ground that the trial court failed to inform him of the presumption of innocence. After a hearing on January 25, 1999, the trial court denied the motion. On March 28, 2000, the Court of Appeals issued a memorandum opinion n4 reversing the trial court's [***5] denial of defendant's motion to withdraw his guilty plea. The prosecution appealed to this Court, and we granted leave to appeal. 463 Mich. 906; 618 N.W.2d 915 (2000). n5

n4 Unpublished memorandum opinion, issued March 28, 2000 (Docket No. 217802).

n5 In granting leave, we directed the parties to "include discussion of whether the alleged error is subject to harmless error review and, if so, what is the appropriate harmless error standard in this case." Because we hold that the trial court substantially complied with the requirements for taking a plea, we do not reach the question of harmless error.

II

The procedures governing the acceptance of a guilty plea were first adopted by this Court in 1973 n6 and are currently set forth in MCR 6.302. MCR 6.302(A) provides that

the court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath [***6] and personally carry out subrules (B)--(E).

n6 389 Mich. lv-lvii.

In *People v Shekoski*, 393 Mich. 134; 224 N.W.2d 656 (1974), this Court had held that "strict adherence to those requirements n7 is mandatory and that neither [*273] substantial compliance nor the absence of prejudicial error will be deemed sufficient." However, one year later in *Guilty Plea Cases, supra,* this Court renounced the *Shekoski* holding that "any failure of strict adherence to the procedure and practice specified in Rule 785.7 [now MCR 6.302] mandates reversal." *Guilty Plea Cases*, 395 Mich. at 113. Instead, the Court adopted a doctrine of substantial compliance, holding that "whether a particular departure from Rule 785.7 justifies or requires reversal or remand for additional proceedings will depend on the nature of the noncompliance." *Guilty Plea Cases,* 395 Mich. at 113. Thus, the question on appeal is whether it appears on the record that the defendant was informed of [***7] such constitutional rights and incidents of a trial as is reasonable to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents. 395 Mich. at 113, 122.

n7 At that time, the requirements, which were substantially similar to those of MCR 6.302, were found in GCR 1963, 785.7.

To determine if there was substantial compliance with the court rule, the first question is whether the right omitted or misstated is a "*Jaworski* right." In *People v Jaworski*, 387 Mich. 21; 194 N.W.2d 868 (1972), this Court held that a plea of guilty must be set aside where the record of the plea proceedings shows that the defendant was not advised of all three constitutional rights involved in a waiver of a guilty plea: 1) the right to trial by jury, 2) the right to confront one's accusers, and 3) the privilege against self- incrimination, relying on *Boykin v Alabama*, 395 U.S. 238; [***8] 89 S. Ct. 1709; 23 L. Ed. 2d 274 (1969). If a *Jaworski* right is omitted from the plea proceedings, then reversal is mandated. [**324] However, the omission from the plea proceedings of one or another of the rights attendant to a trial, other than a *Jaworski* right, or [*274] the imprecise recital of any such right, including a *Jaworski* right, does not necessarily require reversal. *Guilty Plea Cases,* 395 Mich. at 122.

Here, the trial court failed to inform the defendant of the presumption of innocence. Informing defendant of his right to be presumed innocent is required under MCR 6.302(B)(3)(c), n8 but is not one of the three *Jaworski* rights. We note that in some cases the Court of Appeals has stated or assumed that the presumption of innocence had the same status as the three *Jaworski* rights--that its omission mandates an automatic reversal. See *People v Russell,* 73 Mich. App. 628, 629-630; 252 N.W.2d 533 (1977), and *People v Bender,* 124 Mich. App. 571; 335 N.W.2d 85 (1983). In other cases, this Court and the Court of Appeals have reversed a guilty plea, without engaging in further [***9] analysis, when the trial court omitted the presumption of innocence. See *People v Lawrence*, 413 Mich. 866; 317 N.W.2d 856 (1982) n9 *People v Mitchell,* 125 Mich. App. 475; 336 N.W.2d 31 (1983), and *People v* [*275] *Heintzelman,* 142 Mich. App. 94; 368 N.W.2d 903 (1985). n10 To [**325] the extent that these cases held that the [*276] omission of the presumption of innocence from guilty plea proceedings requires an automatic reversal of the guilty plea, we disapprove of them. n11

n8 MCR 6.302(B)(3)(c) requires the court to advise the defendant and determine that the defendant understands that if his plea is accepted the defendant will not have a trial and gives up the rights he would have had at trial, including the right "to be presumed innocent until proven guilty."

n9 The order in *Lawrence*, read, in its entirety:

On order of the Court, the defendant having filed a request for review of his conviction, this Court having issued an order to show cause why the defendant's conviction should not be reversed because he was not advised of the presumption of innocence as required by GCR 1963, 785.7(1)(g)(iii), and the prosecutor's response to that order having been considered by the Court, now, therefore, it is ordered that the request for review be treated as an application for leave to appeal and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's convictions because he was not advised of the presumption of innocence. GCR 1963, 785.7(1)(g)(iii); *Guilty Plea Cases,* 395 Mich. 96, 125; 235 N.W.2d 132 (1975). We remand the cases to the Washtenaw Circuit Court for further proceedings. [***10]

n10 The dissent relies on the above-cited cases to assert that this Court has established a precedent that where a defendant is not informed of his right to be presumed innocent, his conviction must be set aside, and that the Court of Appeals has "followed this established precedent." Slip op at 7-8. We would note that in *Russell, supra,* the Court of Appeals *affirmed* the defendant's conviction despite the trial court's failure to "[speak] the precise words 'presumed innocent.'" 73 Mich. App. at 631. In *People v Jackson,* 71 Mich. App. 468; 248 N.W.2d 551 (1976), the Court of Appeals affirmed the defendant's conviction where, although he was not informed of his right to be presumed innocent at the guilty plea proceeding, he was informed of that right in a *prior* guilty plea entered the *preceding day* before the same judge. *Id.* at 469-470.

We futher note that the decision of the Court of Appeals in *People v Ingram,* 166 Mich. App. 433; 424 N.W.2d 19 (1988), did not involve a failure to advise, but rather an imprecise recital of the right to be presumed innocent. The trial court stated that the defendant would be "presumed innocent of this offense until proved guilty beyond a reasonable doubt." The Court of Appeals affirmed the defendant's guilty plea, finding that "it appears on the record that defendant was sufficiently informed of his constitutional rights and the incidents of trial to warrant a conclusion that he understood what a trial is and that by tendering his plea he was knowingly and intelligently giving up his right to a trial and its consequent rights and protections." *Id.* at 437-438.

In *Heintzelman, supra, Heintzelman, supra, Mitchell, supra,* and *People v Wilson,* 78 Mich. App. 307; 259 N.W.2d 356 (1977), the Court of Appeals reversed the defendants' convictions where there was a *total absence* of advice concerning the presumption of innocence.

Finally, in *Bender, supra,* the defendant pleaded guilty to an habitual offender charge after being tried and found guilty by a jury on the accompanying substantive offenses. The Court of Appeals observed that defendant was informed of a number of his rights through the statement of those rights by his counsel when the defendant expressed a desire to plead guilty to the habitual charge *while the jury was still deliberating on the substantive charges.* The Court of Appeals stated: "Although defendant was not personally advised of a number of his rights by the trial court, defense counsel's on- the-record statement of some of defendant's rights satisfies the requirement that the trial court 'personally address' the defendant as to those rights. ... As long as defendant is orally informed in open court of his rights and the trial court can personally observe defendant's demeanor and responses, the purpose of the personally address requirement is achieved. ... Nor is it fatal to the plea that defendant was informed of his rights before the jury returned a guilty verdict on the principal charge." 124 Mich. App. at 577 (citations omitted). Thus, the decision of the Court of Appeals in *Bender* supports this Court's analysis in the present case in determining that the recital of a right in open court at a time other than the actual plea proceeding is sufficient to satisfy the "personally address" requirement; the Court vacated the guilty plea only because there was a *total absence* of advice concerning the presumption of innocence. We note, of course, that under current practice, a defendant does not plead guilty to an habitual supplementation.

Therefore, while we agree with the dissent's view that "this line of precedent firmly establishes [that a complete failure] to advise [a] defendant of his right to be presumed innocent" will continue to result in reversal of a defendant's guilty plea, we conclude that the above precedent does not stand for the ultimate proposition urged by the dissent: that advice concerning the presumption of innocence delivered at an in-court proceeding close in time to the guilty plea proceeding is insufficient compliance with the court rule. In our view, the above precedent fully supports our conclusion in this case that the advice imparted earlier in the case by the trial court was sufficient compliance with MCR 6.302(B). [***11]

n11 We continue to emphasize the point we made in *People v Williams,* 386 Mich. 277; 192 N.W.2d 466 (1971), and *Jaworski,* supra, that it is important for the trial court to make a full and complete record of protecting all the defendant's rights. Although the trial court's plea hearing with defendant in this case was otherwise exemplary, the inadvertent omission of one sentence gave rise to three years of appellate review.

In *Guilty Plea Cases,* we did recognize that the presumption of innocence is "at the core of our criminal process and fundamental to defendant's understanding of a trial." 395 Mich. at 125. Nevertheless, the omission from a plea proceeding of a right attendant to trial, other than a *Jaworski* right, does not necessarily require reversal. *Id.* at 122. If from the record it appears that the defendant has been informed of his right to a trial and that this right is being waived by his plea of guilty, reversal is not required by the omission of any of the rights enumerated in the court rule, even the presumption of innocence. [***12] *Id.*

Here, defendant was not informed of the presumption of innocence during the plea hearing. However, earlier in the day, while defendant was present, the [*277] same judge had given the defendant's jury, which was empaneled on the same charge to which defendant pleaded guilty, a thorough explanation of the presumption of innocence, n12 stating: [**326]

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial, and entitles the defendant to a verdict of not guilty unless you find from the evidence beyond a reasonable doubt that he is.

n12 Although we reversed in the *Howell* case for failure to impart the presumption of innocence information, *Guilty Plea Cases,* 395 Mich. at 125, nothing in the opinion suggests that such information was supplied by the judge, or any other participant, at *another stage* of the proceedings. In other words, *Howell* represents a *complete failure* to impart the presumption of innocence information--not an "alternative" impartation of the information as in this case. The same is true of our summary order in *People v Lawrence,* 413 Mich. 866, 317 N.W.2d 856 (1982).

[***13]

Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt.

The defendant is not required to prove his innocence or to do anything.

Should you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is defined as a fair, honest doubt growing out of the lack of evidence or the evidence in the case. It is, however, not an imaginary or a possible doubt. Instead, it is a doubt based upon reason, and common sense. It is a doubt which is considered reasonable after a careful and considered examination of all the facts and circumstances in the case.

Before defendant pleaded guilty, his trial on the charge to which he pleaded guilty had begun. Defendant had participated in having his constitutional rights to a trial by jury implemented, and specifically [*278] had witnessed the jury being informed of the presumption of innocence to which he was entitled.

In *Guilty Plea Cases,* 395 Mich. at 114-115, we approved cases where the trial judge did not personally address the defendant by informing him of the maximum sentence [***14] (*Courtney*) or the charge that the defendant was facing (*Bauer*). We concluded that the *prosecutor's* statement of that information in the presence of the defendants was sufficient. We stated:

These departures do not justify reversal. While it would be better for the judge to cover all the points himself, as long as he assumes the principal burden of imparting the required information, as did the judges in *Courtney* and *Bauer*, the purpose of requiring him personally to address the defendant and in so doing observe his demeanor and responses is achieved.

A guilty plea conviction will not be reversed if the judge engages in the required colloquy but fails to mention an item which the record shows was established through, for example, an opening statement of or interjection by the prosecutor or defense counsel *in the hearing of the judge and defendant.* It is proper for the prosecutor or the clerk to read the information in the judge's presence. [Emphasis supplied.]

Here, the trial judge addressed defendant with respect to every right contained in the court rules save one. That failure was rectified by the *judge's* earlier statement, in defendant's presence, [***15] that informed the jury--and *defendant*--at length concerning the presumption of innocence. Thus, the judge clearly assumed "the principal burden of imparting the required information," 395 Mich. at 114.

In *Courtney* and *Bauer*, this Court approved the practice of some of the required information being imparted by the *prosecutor*--or, indeed, as we stated [*279] later, by "an opening statement of or interjection by the prosecutor or defense counsel in the hearing of the judge and defendant." 395 Mich. at 114-115. In such situations the reviewing court will rely on the [**327] defendant's *presence* when the information regarding the presumption of innocence is imparted to conclude that the defendant is aware of that information and that, therefore, his plea is knowing and *understanding*. n13 The clear import of our statements in *Guilty Plea Cases* is that observing the demeanor and responses of the defendant when advice regarding the "bulk" of the rights is imparted is sufficient to establish compliance with the "personally address" requirement. n14

n13 As indicated by the court rules themselves, and also by this Court's discussion in *Guilty Plea Cases,* 395 Mich. at 126-128, the *voluntariness* of a defendant's guilty plea is determined by his awareness of whether there have been any plea or sentence agreements, whether he has been threatened or otherwise coerced into pleading guilty, and whether it is his own choice to plead guilty, MCR 6.302(C), not by whether he has received the information concerning his trial rights. [***16]

n14 There is nothing in the *Guilty Plea Cases* opinion from which we could conclude that the trial judges in *Courtney* and *Bauer* were observing the defendants' demeanors when the prosecutors imparted the "missing" information, and, of course, the defendants would not have made any response to statements by the prosecutors.

In contrast to the situations already approved by us in the *Courtney* and *Bauer* cases, in this case it was the *judge* who imparted the additional information. Thus, we conclude that "the purpose of requiring [the judge] to personally address the defendant and in so doing observe his demeanor and responses [has been] achieved." 395 Mich. at 114.

III

Apparently the dissent agrees with us on the legal principles involved. Both opinions recognize that the [*280] defendant's plea must constitute a knowing and intelligent waiver of the defendant's rights. We also agree

that reversal of defendant's conviction is not required if there is substantial compliance with the court rule.

The point of difference between the majority and the dissent is in the [***17] dissent's application of the concept of "substantial compliance." The majority abides by the interpretation of our rules set forth in *Guilty Plea Cases* that has held sway for over twenty-five years: there is substantial compliance with the "personally address" requirement if, even though the judge fails to recite a specific right at the guilty plea proceeding, the omission is rectified by recitation of the right in the defendant's presence at some other point during the in-court proceedings. The dissent apparently would require strict compliance with MCR 6.302(B)(3)(c), and mandate reversal whenever the defendant was not instructed on the presumption of innocence at the guilty plea hearing itself. In so doing, the dissent would sub silentio overrule *Guilty Plea Cases,* and return to the strict compliance rule of *People v Shekoski.* We believe that the crucial question is whether the defendant's plea was knowing and voluntary, not whether the trial court has engaged in a letter-perfect "talismanic chant." n15 Under the court rule, a failure to state one of the rights at the plea hearing does not require vacating the conviction where, as here, the court has directly addressed [***18] the defendant regarding the enumerated rights generally and the defendant has otherwise been informed adequately of the omitted right. The dissent has not identified any basis in the rule to support its contrary position. Thus, we decline the dissent's invitation to turn our [*281] backs on established precedent and re-interpret "substantial compliance" [**328] to require strict compliance at the time of the plea-taking.

n15 People v Willsie, 96 Mich. App. 350, 353; 292 N.W.2d 145 (1980).

Finally, the dissent suggests that the presumption of innocence has the same status as the three *Jaworski* rights--that its omission mandates an automatic reversal. In *Jaworski* this Court held that in order for there to be a valid guilty plea, there must be an enumeration and a waiver on the record of the three federal constitutional rights as set forth in *Boykin v Alabama, supra*: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's [***19] accusers. The United States Supreme Court has not held that the presumption of innocence is such a right. See *Johnson v Ohio*, 419 U.S. 924, 925; 95 S. Ct. 200; 42 L. Ed. 2d 158 (1974). Although we continue to recognize the importance of the presumption of innocence, we decline to elevate it to the status of the *Boykin/Jaworski* rights.

IV

On the basis of the whole record, including the beginning of the jury trial earlier that same day, we find that the trial judge's initial determination that the defendant knowingly and voluntarily gave up his right to a trial and all the attendant rights was correct.

We reverse the judgment of the Court of Appeals vacating defendant's guilty plea, and reinstate defendant's conviction and sentence.
CORRIGAN, C.J., and TAYLOR and YOUNG, JJ., concurred with WEAVER, J.

CONCURBY:
Robert P. Young, Jr.

CONCUR:

YOUNG, J. (*concurring*).

I join in the majority opinion and fully concur that an omission *from the plea* [*282] *proceedings* of one or another of the rights attendant to trial, other than a *Jaworski* right, does not necessarily require reversal. However, I write separately because I wish to [***20] clarify that, in my view, there was no omission of the "presumption of innocence," and thus, no error under MCR 6.302(B)(3)(c) occurred in this case.

The trial court, during the plea proceeding, advised defendant that he had a right to a trial by jury and that he had a right to have his guilt proven beyond a reasonable doubt. Specifically, the trial judge directly said the following to defendant:

The Court: You obviously know what a jury trial is. You've been sitting here during jury selection, and you've seen witnesses testify so you understand that you're here because you have the right to be here. Meaning you have the right to have this trial, and *you have the right to have the jury decide the facts, and decide whether or not your guilt is proven beyond a reasonable doubt.* And you've seen cross-examination so you understand you have the right to see, hear and cross-examine the State's witnesses. Am I correct in inferring that? [Emphasis added.]

****The Court*: Do you understand that you give up those rights, and give up the right to a trial if you change your plea to guilty?

In my view, advising defendant that he had a right to have his guilt proven beyond [***21] a reasonable doubt necessarily encompassed the advice that he would have been presumed innocent. The presumption of innocence is "nothing more than an amplification of the prosecution's burden of persuasion." See 2 McCormick, Evidence (5th ed), § 342, p 437. If the presumption of

innocence adds anything, it is merely [*283] "a warning not to treat certain things improperly as evidence." 9 Wigmore, Evidence (3d ed), § 2511, p 409. [**329] The court did not recite literally the court rule terminology. However, when defendant was told that he had a right to have his guilt proven beyond a reasonable doubt, he necessarily learned that he would be considered innocent in the absence of such proof of his guilt. In my view, this advice adequately informed defendant of the "presumption of innocence." No single method of recital is required. *Guilty Plea Cases*, 395 Mich. 96, 119-120; 235 N.W.2d 132 (1975).

I believe that the phrase "presumption of innocence" is merely a shorthand way of referring to the right to have a jury find a defendant guilty beyond a reasonable doubt. Accordingly, I believe defendant was in fact informed of the "presumption of innocence" and that [***22] no omission of advice as required by the rule occurred in this case.

CORRIGAN, C.J., concurred with YOUNG, J.

DISSENTBY:
Stephen J. Markman

DISSENT:

MARKMAN, J. (*dissenting*).

I respectfully dissent. The issue before this Court is whether the trial court's failure to comply with MCR 6.302 in accepting defendant's guilty plea (to a charge of receiving and concealing stolen property) requires the reversal of his conviction. n1 Contrary to the requirement of MCR 6.302, the trial court failed to inform the defendant, at [*284] his guilty plea hearing, of his right to be presumed innocent. The trial court denied defendant's motion to withdraw his guilty plea on this ground. The Court of Appeals subsequently reversed, asserting that the rule required the trial court "to directly advise a defendant of the presumption of innocence on the record before accepting a guilty plea." Unpublished memorandum opinion, issued March 28, 2000 (Docket No. 217802), at 2.

n1 MCR 6.302, in pertinent part, provides:

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court *must* place the defendant under oath *and* personally carry out subrules (B)-(E).

(B) An Understanding Plea. *Speaking directly to the defendant,* the court *must* advise the defendant and determine that the defendant understands:

***(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

***(c) to be presumed innocent until proved guilty .... [Emphasis added.]

[***23]

I. PURPOSE AND GOAL OF GUILTY PLEA HEARING

The primary purpose of MCR 6.302's mandate that the defendant be personally addressed with the required statements is grounded in the principle that the defendant's plea must constitute a "knowing and intelligent" waiver of his constitutional rights. *McCarthy v United States*, 394 U.S. 459, 465; 89 S. Ct. 1166; 22 L. Ed. 2d 418 (1969). To that end, the rule: (1) provides the court accepting the guilty plea the opportunity to observe the defendant's demeanor and the manner in which he responds to the court's statements and questions; (2) impresses upon the defendant the full gravity and import of his plea, and that, in so pleading, [*285] he waives the right to a trial and all of his other related constitutional rights; n2 and (3) creates a [**330] record of factors relevant to ascertaining the voluntariness of defendant's plea. n3 *People v Napier*, 69 Mich. App. 46, 48; 244 N.W.2d 359 (1976), see also *Guilty Plea Cases*, 395 Mich. 96, 122; 235 N.W.2d 132 (1975).

n2 *McCarthy*, *supra* at 465. See also *McMann v Richardson*, 397 U.S. 759, 774; 90 S. Ct. 1441; 25 L. Ed. 2d 763 (1970); *North Carolina v Alford*, 400 U.S. 25, 31; 91 S. Ct. 160; 27 L. Ed. 2d 162 (1970) (stating that a voluntary plea is one made with knowledge of fundamental constitutional rights and an understanding of the nature of the crimes charged); *People v Siebert*, 450 Mich. 500, 511-515; 537 N.W.2d 891 (1995); *People v Thew*, 201 Mich. App. 78, 95; 506 N.W.2d 547 (1993), citing *Brady v United States*, 397 U.S. 742, 747-748; 90 S. Ct. 1463; 25 L. Ed. 2d 747 (1970) (stating that "a guilty plea is the most serious step a defendant can take in a criminal prosecution [and] for that reason, the plea 'not only must be voluntary but must be [a] knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.'"). [***24]

n3 An equally important, albeit more pragmatic, reason for requiring an on-the-record recitation of defendant's rights is to avoid, or at least discourage, numerous and sometimes frivolous post conviction attacks on the constitutional validity of the plea. See Orfield, *Pleas in federal criminal procedure*, 35 Notre Dame Lawyer 1, 31-32 (1959); Hoffman, *What next in federal criminal rules?* 21 Wash & Lee L R 1, 8 (1964).

II. PRESUMPTION OF INNOCENCE

The principle of the presumption of innocence is an essential foundation of our adversarial system of criminal justice. *In re Winship*, 397 U.S. 358, 363; 90 S. Ct. 1068; 25 L. Ed. 2d 368 (1970), see also *Coffin v United States*, 156 U.S. 432, 453; 15 S. Ct. 394; 39 L. Ed. 481 (1895). The presumption of innocence is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin*, *supra* at 453. n4 "The [*286] accused during a criminal prosecution has at stake interest of [***25] immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Id.*

n4 "One of the rightful boasts of Western civilization is that the (prosecution) has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. *Irvin v Dowd*, 366 U.S. 717, 729; 81 S. Ct. 1639; 6 L. Ed. 2d 751 (1961) (Frankfurter, J., *concurring*). One of these safeguards is the presumption of innocence. See also Abraham, The Judicial Process (7th ed), pp 104-105, stating:

It is a cornerstone of Anglo-Saxon justice that an accused is presumed innocent unless and until proved guilty beyond a reasonable doubt. Few, if any, concepts are more deeply rooted in our traditions. ... The layperson may quite naturally be quick to adjudge an accused guilty in his or her own mind and be sometimes joined by the press, particularly in America, but the Anglo-Saxon legal profession on both sides of the Atlantic Ocean, and throughout the English-speaking world, has done its best to adhere to the time-honored principle that an accused person is presumed to be innocent until proved otherwise beyond a reasonable doubt by due process of law.

[***26]

A guilty plea constitutes a waiver of the fundamental right to a jury trial. *Parke v Raley*, 506 U.S. 20, 29; 113 S. Ct. 517; 121 L. Ed. 2d 391 (1992). It is because of the waiver of these rights and because a guilty plea is itself effectively a self-imposed conviction, that the process "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v Alabama*, 395 U.S. 238, 243-244; 89 S. Ct. 1709; 23 L. Ed. 2d 274 (1969). It is with this principle in mind that a court must review a guilty plea and determine whether the accused has been informed of all the rights that he is waiving.

III. MCR 6.302

MCR 6.302 states that the defendant is entitled during the guilty plea hearing to a *direct* and *explicit* [*287] statement from the court concerning the rights set forth in the rule. It is expressly required that the court "speak[] directly to" the defendant, [**331] and that the court "must advise" the defendant and "determine that the defendant understands" that he [***27] has the right to be presumed innocent until proved guilty. MCR 6.302.

Clearly, the omission in this case was more than merely an imprecise recital of the rights to which defendant was entitled and which he was surrendering by virtue of his plea. See *People v Russell*, 73 Mich. App. 628, 631; 252 N.W.2d 533 (1977), asserting that "the determinative question ... is whether the trial judge omitted advice on that subject or merely gave an imprecise recital." The flaw in procedure in the instant case was not that the wrong formulation or the wrong articulation of defendant's rights was provided, but rather that *no* formulation and *no* articulation were provided. As the majority recognizes, I agree that substantial compliance with MCR 6.302, with regard to the right to be presumed innocent, is all that is required. However, the question in the instant case is whether there was *any* compliance with the rule. I can only answer this in the negative because the statement required by the rule was not made, precisely or imprecisely, perfectly or imperfectly, at the guilty plea hearing.

IV. ANALYSIS OF THE MAJORITY OPINION

The majority cites the *Guilty Plea Cases*, 395 Mich. 96, 113; [***28] 235 N.W.2d 132 (1975), and states that "whether a particular departure from [the rule] justifies or requires reversal or remand for additional proceedings will depend on the nature of the noncompliance." [*288] Slip op at 5. The majority then asserts that the inquiry on appeal "is whether it appears on the record that the defendant was informed of such constitutional rights and incidents of a trial as is

reasonable to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents." *Id.*, citing *Guilty Plea Cases*, 395 Mich. at 122. The actual rule itself appears to be little more than a bit actor in this process.

While it is true that the *Guilty Plea Cases* established that the determination whether MCR 6.302 was "substantially complied with" was to be part of a case-by-case inquiry, this Court also made clear at the time that the rule requires that a defendant be advised of his right to be presumed innocent, because such right is "at the core of our criminal process and fundamental to defendant's understanding of a trial." 395 Mich. at 125. In *Guilty* [***29] *Plea Cases*, this Court reversed a conviction entered on a plea of guilty where the trial court had failed to inform the defendant, during the guilty plea hearing, of his right to be presumed innocent. *Id.*

Further, this Court has had subsequent occasion to address whether a defendant must be advised of this right, and has concluded that a trial court's failure to advise the defendant, at the guilty plea hearing, that he has the right to be presumed innocent is error requiring reversal of the conviction. In *People v Allen*, 396 Mich. 829 (1976), the defendant was not advised of the presumption of innocence, and, as a result, had his conviction set aside. In *People v Lawrence*, 413 Mich. 866, 317 N.W.2d 856 (1982), there was an omission of any statement to the defendant that he had the right to be presumed [*289] innocent and, as a result, his conviction was reversed.

The Court of Appeals has also followed this established precedent. In *People v Ingram*, 166 Mich. App. 433, 437-438; 424 N.W.2d 19 (1988), the Court of Appeals held that a defendant must be advised at the guilty plea hearing, however imprecisely, that he is relinquishing [***30] his right to be [**332] presumed innocent. In *People v Heintzelman*, 142 Mich. App. 94, 95; 368 N.W.2d 903 (1985), the defendant's conviction was reversed where the trial court had failed to advise him of his right to be presumed innocent. In *People v Mitchell*, 125 Mich. App. 475, 477; 336 N.W.2d 31 (1983), the Court of Appeals reversed the defendant's conviction where the trial court did not advise him of his right to be presumed innocent until proved guilty. In *People v Bender*, 124 Mich. App. 571, 578; 335 N.W.2d 85 (1983), the Court of Appeals held that "the right to be presumed innocent is of preeminent importance and, therefore, a defendant must be informed of this right on the record or his plea is constitutionally defective." The Court proceeded to reverse the defendant's conviction where the record did not disclose that he was "personally informed, precisely or imprecisely, of his right to be presumed innocent." *Id.* In *People v Wilson*, 78 Mich. App. 307, 308; 259 N.W.2d 356 (1977), the Court of Appeals reversed the defendant's conviction where the record did not [***31] establish that the trial court had advised him of his right to be presumed innocent until proved guilty beyond a reasonable doubt.

This line of precedent firmly establishes that, where a trial court has completely failed to advise the defendant of his right to be presumed innocent at the guilty plea hearing, the defendant is entitled to a [*290] reversal of his conviction, and either to replead or proceed to trial. In this case, defendant was not informed, in any manner, of his right to be "presumed innocent until proved guilty." MCR 6.302(B)(3)(c).

A waiver of the constitutional right set forth by the rule is supposed to be "an *intentional* relinquishment or abandonment of a *known* right or privilege." *Johnson v Zerbst*, 304 U.S. 458, 464; 58 S. Ct. 1019; 82 L. Ed. 1461 (1938) (emphasis added); see also *People v Siebert*, 450 Mich. 500, 510; 537 N.W.2d 891 (1975). In this case, it is impossible to conclude that defendant made an *intentional* relinquishment of his right at trial to be presumed innocent. *People v Scott*, 381 Mich. 143, 147-48; 160 N.W.2d 878 (1968). This is simply [***32] because defendant was never informed at all of this right. Obviously, it could not be determined that he understood that this right was being "forever relinquished" with respect to the charges to which he pleaded guilty. Given the circuit court's omission in this case, we cannot conceivably determine whether the purpose of MCR 6.302 was fulfilled, i.e., whether the defendant's pleas constituted a "knowing and voluntary" waiver of his constitutional rights. n5

> n5 Indeed, it appears that one fundamental difference between "imprecise recitals," which we have deemed appropriate in most instances, and no recital at all, is that, with respect to the former, it can still be determined, however imperfectly, on the appellate review whether a defendant's plea has been made knowingly and voluntarily, whereas with the latter, it is impossible to conclude similarly because there is simply no record evidence at all.

I am unpersuaded by the argument of the majority that, while this Court has previously stated that a failure [***33] to advise the defendant of his right to be presumed innocent at the guilty plea hearing is error requiring reversal, it is not error if the omitted statements [*291] concerning the presumption of innocence were made *at some point* during the criminal justice process,

although not, as expressly required, at the guilty plea hearing itself.

The majority observes, in this regard, that "earlier in the day defendant was present while the same judge instructed the jury that convened for defendant's trial--on the charge to which he subsequently [**333] pleaded guilty--that the defendant was presumed innocent until proven guilty ...." Slip op at 2. The majority accords greater weight to this happenstance than to the fact that the judge failed to comply with its obligation that it "must ... personally" advise defendant of his constitutional rights, and that it must do so *at* the guilty plea hearing. The majority opinion continues in this regard:

In light of the *Guilty Plea Cases*, 395 Mich. 96; 235 N.W.2d 132 (1975), the question is whether there was *substantial*, not strict, compliance with the requirements of MCR 6.302. n6

> n6 While I agree that the proper inquiry is whether the trial court has "substantially complied" with the court rule, I disagree that a complete failure to make the required statements can nonetheless be characterized as "substantial" compliance. It is not as if, for example, the court had advised the defendant that he had a right to be presumed "not guilty" as opposed to being presumed "innocent." Rather, there has been no compliance at all. As noted, our jurisprudence clearly articulates that there is a substantial difference between "imprecise recitals" and situations in which the required statement advising the defendant of his rights is not made at all. See *Russell*, 73 Mich. App. at 631; *Ingram*, 166 Mich. App. at 437-438; *Bender*, 124 Mich. App. at 578.

[***34]

Despite the trial court's omission of the presumption of innocence during the plea hearing, we hold that defendant "was informed of such constitutional rights and incidents of a trial as reasonable to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial [*292] and such rights and incidents." [Slip op at 2, quoting *Guilty Plea Cases*, 395 Mich. at 122 .]

One could hardly imagine a trial proceeding where the *jury* has not been informed that the defendant has a right to enjoy the presumption of innocence. Is it the majority's new rule that where, as might commonly occur, a guilty plea is taken after a defendant has decided to abort a trial, the court need not comply with those aspects of MCR 6.302 that were touched upon in any manner during such trial? Does such a partial trial effectively nullify the requirement that a pleading defendant be apprised of his presumption of innocence? Is the explicit requirement of the rule that the trial court "speak directly" to the defendant satisfied where the court instead "speaks directly" to the jury? Is the explicit requirement [***35] of the rule that the trial court advise the defendant of his rights during the guilty plea hearing satisfied when the defendant overhears these words in the court's statement to the jury? Is the purpose of the rule, that the defendant be advised of his rights when he is most focused upon the implications of his nearly irrevocable decision to convict himself by a guilty plea, fulfilled where he overhears these rights in a context far removed from this moment of irrevocability? n7

> n7 "[A] guilty plea is more than an admission of conduct; it is a conviction." *Boykin*, 395 U.S. at 242.

To all of these questions, I answer that it is the defendant, not the members of the jury, who must ultimately consider the gravity of an admission of guilt. And it is unwarranted to equate, as the majority does here, the defendant's *possible* awareness of [*293] these rights when they were brought to the attention of the jury with the defendant himself being personally advised of these rights at the guilty plea hearing, after he [***36] has chosen to acknowledge the crime for which he has been charged. n8 It is not during the jury trial [**334] that the defendant has made the momentous decision to admit guilt, and, thus, it is not at that juncture that he must be impressed with the import of his decision to plead guilty and be apprised of the consequences of his decision. Indeed, as this Court stated in the *Guilty Plea Cases*:

That a defendant may have been tried by a jury in another case or learned of his rights in an earlier plea-taking proceeding would no more negate his right to be informed of the right to and incidents of a trial *at the time a plea of guilty is offered* than would proof that he had seen Perry Mason on television or read Erle Stanley Gardner.

> n8 I emphasize the "possible" awareness of the defendant because, of course, there is no certainty that the defendant was even paying attention to, much less apprehending, any particular statement by the trial court to the jury.

> Defendant, at the time, may instead have been daydreaming or distracted or confused or consulting with his lawyer. The virtue of MCR 6.302 is that, because the court must *personally* address the defendant and take into consideration the nature of his response in determining whether to accept the guilty plea, appellate courts can be reasonably confident that a defendant has intelligently relinquished the full panoply of rights attendant to a jury trial. The appellate courts can have no similar assurance in the instant circumstance.

[***37]

Many defendants have been made aware at one time or another of the right to and incidents of a trial and the consequences of a plea of guilty. Nevertheless, *whatever the personal history of the accused and the quality of his representation*, the appearance of justice and the integrity of the process by which pleas of guilty are offered and accepted require, *in the solemn moment of passage from presumed innocence to conviction and potential imprisonment*, that the judge apprise every defendant of the rights [*294] he is waiving and the consequences of his plea and make the other determinations required by the rule. *However, a recital of rights to one defendant by one judge on one day*, may suffice as a recital of rights to that same defendant by the same judge on that same day in another case. [395 Mich. at 121-122 (emphasis added).] n9

> n9 The implication of the majority's reasoning is that the "habitual offender," or the defendant who has previously been involved in the criminal justice system, has something less than a full right to be informed, at the guilty plea hearing, of his constitutional rights in accordance with MCR 6.302, by virtue of his presumed familiarity with such rights. Would the majority also conclude that no compliance with the rule is required for the defendant-lawyer or the defendant-judge because of his presumed knowledge of constitutional law? Simple adherence to the express requirements of the rule would avoid this Court having to determine which class of defendants possessed alternative means by which to become informed of the rights that they were relinquishing by a plea of guilty.

[***38]

That is, a recital of rights at a *previous guilty plea hearing in the same case* of the rights that a defendant is waiving may suffice to satisfy the requirements of MCR 6.302. However, this Court has never before subscribed to the proposition that the mere fact that a jury, in a partial trial, has been instructed on a defendant's right to be presumed innocent is sufficient to obviate the specific requirements of the court rules. n10

> n10 See also *People v Jackson*, 71 Mich. App. 468, 471-72; 248 N.W.2d 551 (1976) (BURNS, J., dissenting), disagreeing with the majority's holding that advisement of a defendant's rights at a guilty plea hearing earlier in the day constituted sufficient waiver of his rights at a subsequent hearing, and citing the *Guilty Plea Cases*, noting that while the presumption of innocence is not a *Jaworski* right, this Court "has deemed it necessary to continue to require reversal in cases where the guilty-pleading defendant is not advised of that incident of trial."

[***39]

The fundamental error that pervades the majority opinion is in its reading of *Guilty Plea Cases* and its holding that [**335] "there is substantial compliance with the 'personally address' requirement ... even though [*295] the judge fails to recite a specific right at the guilty plea proceeding ...." Slip op at 14. The focus of the majority opinion in this regard is on the language found at 114-115 of *Guilty Plea Cases*. There, the Court addressed the requirement of the rule that the judge "personally address[] the defendant" at the guilty plea hearing. The Court concluded in one of the twenty-four consolidated cases, *Courtney*, that the judge did not "personally advise the defendant of the maximum sentence but in moving to add a second count the prosecutor stated the maximum penalty of five years." 395 Mich. at 114. The Court next addressed *Bauer*, a case in which "the judge did not state the charge but the prosecutor read the information *on the plea record.*" *Id.*(emphasis added). n11 This Court stated:

These departures do not justify reversal. While it would be better for the judge to cover all the points himself, as long as he assumes the principal burden of imparting the [***40] required information, as did the judges in *Courtney* and *Bauer*, the purpose of requiring him personally to address the defendant and in so doing observe his demeanor and responses is achieved.

> n11 *Courtney* and *Bauer* were the only two cases among the twenty-four cases consolidated in *Guilty Plea Cases* that specifically concerned

the "personally address" requirement of MCR 6.302.

A guilty plea conviction will not be reversed if the judge engages in the required colloquy but fails to mention an item which the record shows was established through, *for example, an opening statement of or interjection by the prosecutor or defense counsel in the hearing of the judge and defendant. It is proper for the prosecutor or the clerk to read the information in the judge's presence.* [395 Mich. at 114-115 (emphasis added).]

[*296] Both *Courtney* and *Bauer* involved the assessment of statements occurring *during the guilty plea hearing* itself in order to determine whether there had been substantial compliance [***41] with the rule. Contrary to the majority opinion, *Guilty Plea Cases* does not rely upon statements or events occurring outside the four corners of the guilty plea hearing. n12 Therefore, I reject its assertion that "twenty-five years" of precedent establish that the required statements do not have to be made *at the guilty plea hearing*. Rather, the precedent cited in this opinion establishes that for twenty- five years, since the *Guilty Plea Cases*, Michigan courts have adhered to the principle that a defendant must be informed *at the guilty plea hearing* that he has a right to be presumed innocent. The majority's extrapolation from focusing upon substantial compliance *at* the guilty plea hearing to focusing upon substantial compliance over some indeterminate period surrounding the hearing runs counter to this well-established precedent. It also runs counter to the principle that, in order for a guilty plea to be knowing and voluntary, a defendant must be informed of the rights he is surrendering at that time, at that hearing at which he finally decides to admit guilt. n13

n12 One of the reasons for requiring that a guilty plea hearing be conducted in a discrete proceeding is to preserve the overall integrity of the defendant's decision to plead guilty. [***42]

n13 Further, contrary to the majority's statement at 14 that "the dissent has not identified any basis in the rule to support" its position that trial judges must personally advise the defendant at the guilty plea hearing concerning the right to be presumed innocent, I believe that my position is adequately supported by the language of MCR 6.302(B). This rule requires the court to "speak[] directly to the defendant, ... advise the defendant and determine that the defendant understands ...." Only by a great stretch can this rule be read to authorize a situation where, as here, the defendant was never directly addressed in regard to the presumption of innocence.

[**336]

[*297] The majority seeks to distinguish the right to be presumed innocent until proved guilty from the rights identified in *Jaworski* of which a defendant *must* be informed. n14 However, the mere fact that the *Jaworski* rights have not encompassed the presumption of innocence does not indicate that this right is of any less consequence or should be treated in any different fashion, nor does the majority suggest any rationale for [***43] such treatment. In *Russell*, 73 Mich. App. at 629-630, the Court of Appeals noted that, in the *Guilty Plea Cases*, this Court "elevated the presumption of innocence to the same status as the three *Jaworski* rights." n15 See also *Johnson v Ohio*, 419 U.S. 924, 926; 95 S. Ct. 200; 42 L. Ed. 2d 158 (1974) (Douglas, J., dissenting), in which one justice, in dissenting to a denial of certiorari, observed that "the *Boykin* enumeration [of rights to [*298] which a pleading defendant is entitled to be advised] was illustrative, not exhaustive." n16

n14 See *People v Jaworski*, 387 Mich. 21, 28-29; 194 N.W.2d 868 (1972), holding that a defendant *must* be advised of the three constitutional rights enumerated in *Boykin*: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers.

n15 The United States Supreme Court has stated that "the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v Williams*, 425 U.S. 501, 503; 96 S. Ct. 1691; 48 L. Ed. 2d 126 (1976). See also Abraham, note 4 *supra* at 105, stating:

The presumption of the innocence of the accused is transformed into courtroom procedure in the Anglo-Saxon countries. Essential to it are the ancient, basic safeguards inherent in that philosophy of the law, safeguards which, to a greater or lesser degree, are fundamental to the notions of liberty and justice that pervade the political system of the liberal democratic West. Among these are the privilege against compulsory self-incrimination; the right to cross-examine witnesses; the writ of habeas corpus ... perhaps the most basic right of all, dating at least to the Magna Carta (1215)--and many others in the same general category.

Notably, the rights referred to in this passage along with the presumption of innocence, are the *Jaworski* rights. [***44]

n16 It is not my view that the trial court is required during the guilty plea hearing to "strictly" comply with the obligation that a defendant be advised of his right to be presumed innocent, or with regard to any other particular obligation, beyond what is required by *Jaworski*. I do believe, however, that the extent of a court's compliance with the requirements of MCR 6.302 must be assessed in terms of what has occurred *at the guilty plea hearing*.

V. RESPONSE TO THE CONCURRENCE

I also respectfully disagree with the concurrence that advising the defendant at his guilty plea hearing that he was relinquishing the right to have the jury decide whether his guilt could be proven beyond a reasonable doubt sufficiently imparted the idea that he was also relinquishing his right to be presumed innocent. MCR 6.302(B)(3)(c) requires a statement to the defendant that the judge, jury, and prosecutor are to presume his innocence until his guilt is proven. MCR 6.302(B)(3)(d) requires a separate statement informing the defendant that it is the prosecutor's burden to prove his guilt beyond a reasonable [***45] doubt. Thus, subrules (c) and (d) are distinct requirements of the guilty plea hearing. n17

n17 In note 10, the majority, perhaps inadvertently, adopts the premises of the concurrence that the "beyond a reasonable doubt" instruction embodied in subrule (3)(d) is sufficiently equivalent to the "presumption of innocence" instruction contained in subrule (3)(c) to warrant a finding that the former instruction suffices in lieu of the latter. This is because *Russell* approved the instruction given to the defendant, during the guilty plea hearing, that the "prosecutor must prove you guilty beyond a reasonable doubt" even though, as the majority observes, the judge "never spoke the precise words 'presumed innocent.'" *Russell*, 73 Mich. App. at 631. Yet, as explained here, the two instructions clearly are distinct, both conceptually and in the specific context of the language of MCR 6.302. As *Guilty Plea Cases* made clear, and as evidenced by the change in the court rules, see GCR 1963, 785.7(1)(d)(ii) (which combined the two instructions), and GCR 1963, 785.7(1)(g)(iii), (iv) (which separated the two instructions), the presumption of innocence is a distinct right that should always be stated in advising the defendant at the guilty plea hearing.

Concerning the other cases referenced by the majority in that note, as the dissent has already observed, (a) in *Jackson*, the defendant was informed of his right to be presumed innocent at a guilty plea hearing; (b) in *Ingram*, defendant was instructed on the presumption of innocence at his guilty plea hearing; (c) in *Bender,* 124 Mich. App. at 579, defendant's conviction was reversed because the defendant "was not personally informed of his right to be presumed innocent"; and (d) in *Heintzelman*, *Mitchell*, and *Wilson,* the Court of Appeals held that a defendant must be given the required instruction.

[**337] [***46]

[*299] The distinction between the presumption of innocence and the "reasonable doubt" standards has been extensively discussed by the United States Supreme Court. *Coffin v United States*, 156 U.S. at 460-461 (holding that a trial judge's failure to instruct the jury on the presumption of innocence required reversal, notwithstanding the adequacy of instructions provided on the closely related reasonable doubt standard). In *Coffin*, the Court traced the "presumption of innocence" back to ancient law, and stated of the argument that "proof beyond a reasonable doubt" and "presumption of innocence" are equivalent:

To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, make more apparent [***47] the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist. [156 U.S. at 460.] n18

n18 See also Chambers, *Reasonable certainty and reasonable doubt*, 81 Marq L R 655, 671, 674 (1998), stating:

The reasonable doubt standard and the presumption of innocence work in tandem to help assure that defendants are convicted fairly. Reasonable doubt requires that jurors be thoroughly convinced of a defendant's guilt

before conviction. The presumption of innocence effectively requires that jurors begin and end their inquiry with a skeptical mindset.

***That reasonable doubt and the presumption of innocence are related is undeniable. Understanding the relationship between them requires recognizing that the pairing of the two concepts forces a juror to move from a subjective state of disbelief regarding the prosecution's claims of defendant's guilt to a subjective state of justified certainty regarding defendant's guilt. That the juror must be so transformed ensures that the evidence used to convict a defendant will be powerful. Reasonable doubt requires only that a juror be subjectively certain that defendant committed the crime before voting for guilt. A juror can reach a subjective, but possibly unjustified, state of certainty in the absence of a presumption of innocence. The presumption of innocence requires that jurors think more deeply than they otherwise would about whether all reasonable doubts have been eliminated before convicting a defendant

See also Diamond, Note, *Reasonable doubt: To define, or not to define*, 90 Colum L R 1716, 1730-1731 (1990).

[**338] [***48]

[*300] Subsequently, in *Taylor v Kentucky*, 436 U.S. 478, 484; 98 S. Ct. 1930; 56 L. Ed. 2d 468 (1978), the Supreme Court observed:

[The requirement that a jury be informed both of the presumption of innocence and of the requirement of proof beyond a reasonable doubt] derives from a perceived salutary effect upon lay jurors. While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence.

In my judgment, this reasoning applies with equal force to the guilty plea hearing, where a criminal defendant is faced with the decision to admit or deny guilt. Omitting the instruction on the presumption of [*301] innocence deprives such a defendant of an opportunity to fully assess his own circumstances and intelligently reflect upon his options.

While a scholar of the law may well recognize the close philosophical and constitutional connection between (indeed the inextricability of) the right to be presumed innocent and the right to be proved guilty beyond a reasonable [***49] doubt, MCR 6.302 understandably sets these apart as discrete rights to be explained to the pleading defendant. The rules do so because, considered together, these formulations explain more thoroughly and more clearly to the nonscholar, to the defendant, the full measure of the rights that he is relinquishing by his guilty plea. n19

n19 By the concurrence's analysis, the trial court could just as well advise the defendant that he is entitled to "due process" of law, and have such an instruction suffice to satisfy MCR 6.302 in lieu of instructions concerning the individual components of due process set forth in the rule.

CONCLUSION

The *Guilty Plea Cases* established that a trial court's failure to comply with MCR 6.302 and advise the defendant of his right to be presumed innocent constituted error requiring reversal. Until today, this Court has not wavered from adherence to this principle. In my judgment, the trial court is obligated under the Michigan rule to inform the defendant of his presumption of [***50] innocence at the guilty plea hearing, and the extent to which there has been "substantial compliance" with this obligation must be assessed in terms of what occurred at such hearing. Because there was a complete failure on the part of the trial court in this case to comply with MCR 6.302 by advising defendant, at his guilty plea hearing, of his right [*302] to be presumed innocent, I would affirm the Court of Appeals decision reversing defendant's conviction.

CAVANAGH and KELLY, JJ., concurred with MARKMAN, J.

JEFFREY LEE OADE and Thomas E. Walsh, Personal Representative of the Estate of SHEILAH CHOUINARD, Plaintiffs-Appellees, v JACKSON NATIONAL LIFE INSURANCE COMPANY OF MICHIGAN, Defendant-Appellant.

No. 114786

SUPREME COURT OF MICHIGAN

465 Mich. 244; 632 N.W.2d 126; 2001 Mich. LEXIS 1398

January 17, 2001, Argued

July 30, 2001, Decided

July 30, 2001, Filed

PRIOR HISTORY:
[***1] Ingham Circuit Court, Laurence M. Glazer, J. Court of Appeals, GAGE, P.J., and MACKENZIE and WHITE, JJ. (Docket No. 202501).

DISPOSITION:
We reverse the Court of Appeals decision and reinstate summary disposition in favor of defendant.

COUNSEL:
Fraser, Trebilcock, Davis & Foster, P.C. (by C. Mark Hoover, Marcy R. Matson, and Graham K. Crabtree) [Lansing, MI], for the plaintiffs-appellees.
Butzel Long (by Phillip C. Korovesis and David H. Oermann) [Detroit, MI], for the defendant-appellant.
Amicus Curiae:
Mika, Meyers, Beckett & Jones, P.L.C. (by Michael A. Zagaroli) [Grand Rapids, MI] and Victoria E. Fimea, Senior Counsel, Litigation [Washington, D.C.], for American Council of Life Insurers and Life Insurance Association of Michigan.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J. KELLY, J. (concurring in part and dissenting in part). CAVANAGH, J., concurred only in the result reached by KELLY, J.

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[**127] [*246] YOUNG, J.

I. INTRODUCTION

In this life insurance dispute, plaintiffs, Jeffrey Lee Oade and Sheilah Chouinard, seek to recover benefits from a Jackson National Life insurance policy issued and [***2] delivered to Gary Oade. Plaintiffs, the son and friend of Mr. Oade, respectively, are the named beneficiaries of the insurance policy. Defendant claims that the policy never became effective because Mr. Oade failed, as required by the terms of the insurance application, to provide updated information about his health and medical treatment between the date he signed the application and the day the policy was issued. We granted leave to address the applicability of the statutory requirement under MCL 500.2218(1) , that a misrepresentation in an application of insurance be material in order to make the insurance policy avoidable.

Because Mr. Oade had an explicit, contractual continuing duty to ensure that the answers in his insurance application remained true until the effective date of the policy, we hold that Mr. Oade's failure to supplement his medical history rendered his original answers false, making them "misrepresentations" within the meaning of **MCL 500.2218(2)** . However, contrary to the Court of Appeals decision, we conclude that these

misrepresentations were material, and that defendant was therefore entitled to avoid [***3] the contract. Accordingly, we reverse the Court of [*247] Appeals decision and reinstate summary disposition in favor of defendant.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 29, 1993, Mr. Oade, a fifty-three year-old store owner, contacted his insurance agent and completed a Jackson National Life Insurance Company of Michigan application for a "preferred" $ 100,000 life insurance policy. n1 **In order to evaluate the insurance risks posed by an applicant and consistent with standard underwriting procedures, the Jackson National application required answers to certain** [**128] **questions about an applicant's health status. That application further required that the applicant inform defendant in writing if the applicant's health or any of the answers or statements contained in the application changed between the time the original answers were given and the date the policy was issued and delivered. n2**

n1 **Mr. Oade applied for a "preferred" life insurance policy. After evaluating Mr. Oade's medical history, Mr. Oade was finally approved for a "standard" policy which was more expensive than the "preferred" policy. Though both parties neglect to provide an explanation of the difference between the two policies, it appears that a "preferred" policy is issued to applicants who are in "better" health.** [***4]

n2 **The interim insurance receipt is another document that Mr. Oade signed. The language on the interim insurance receipt provided:**

I ... understand and agree that:

1. no policy will go into force unless all my statements and answers in this application continue to be true as of the date I receive the policy:

2. if my health or any of my answers or statements given in this or any other supplement to this application change prior to delivery of the policy, I must so inform the Company in writing ....

The application contained the following questions relevant to the resolution of this case:

[*248] **2. Have you ever been treated for, or ever had any indication of:**

*****d. Chest pain, discomfort or tightness; palpitations, high blood pressure, rheumatic fever, heart murmur, heart attack or blood vessels?**

3. Have you, in the past five years:

a. Consulted or been treated by a physician or other medical practitioner?

b. Been a patient in a hospital, clinic, or medical facility?

In answering the application questions, Mr. Oade denied, in response to question 2(d), that he had [***5] been treated for chest pain, discomfort or tightness, palpitations, rheumatic fever, heart murmur, heart attack or other disorder of the heart or blood vessels. However, he disclosed that he had been treated for high blood pressure. In response to question 3(a) and (b), he denied that he had been hospitalized but disclosed that he had been treated by a physician or other medical practitioner during the preceding five years. Defendant did not contest the accuracy of the initial answers Mr. Oade made in response to the application.

On December 25, 1993, between the submission of Mr. Oade's application and defendant's approval and delivery of the policy, Mr. Oade went to a hospital emergency room, complaining of chest pains. He was admitted to the hospital and stayed overnight while tests were performed. As noted, the application for insurance required Mr. Oade to provide updated health information. In particular, Mr. Oade's initial answers that he had *not* been a patient in a hospital in the preceding five years, and had never been treated for chest pains thus became inaccurate information [*249] concerning his health status. Despite the requirement to provide updated health information, [***6] it is undisputed that Mr. Oade did not inform defendant of his December hospitalization for chest pains.

On January 4, 1994, after evaluating Mr. Oade's application, defendant approved him for a "standard" policy rather than the "preferred" policy he had originally sought. Oade paid the additional premium on January 6, and the policy was delivered that day.

Mr. Oade died suddenly from a heart attack on September 1, 1994. Plaintiffs submitted a claim to defendant for payment of the death benefits provided in the life insurance policy. Defendant investigated, discovered the undisclosed hospitalization, and denied the claim on the ground that, although required to do so under the terms of the insurance application, Mr. Oade failed to report his change in medical history. Defendant declared that, because Mr. Oade had violated conditions

precedent [**129] to create insurance coverage, the policy never became effective.

Following defendant's refusal to pay under the policy, plaintiffs brought this action in the circuit court where both parties filed cross-motions for summary disposition. The circuit court granted summary disposition in favor of defendant, holding that Mr. Oade's failure to communicate [***7] in writing the "material changes" to his answers in the application prevented the policy from taking effect.

The plaintiffs appealed, and the Court of Appeals reversed in an unpublished per curiam decision. n3 The Court of Appeals recognized that parties may mutually agree that certain conditions be met before an [*250] insurance contract will become effective. However, the Court reasoned that such contract terms must not conflict with applicable statutes. The Court held that the case was governed by MCL 500.2218(1) . It rejected defendant's argument that the insurer was not claiming misrepresentation permitting *rescission* of an existing policy, but that the policy never became effective in the first instance.

n3 **Unpublished opinion per curiam, issued February 26, 1999 (Docket No. 202501).**

In applying the statute, the Court of Appeals attempted to determine whether the undisclosed health information was material within the meaning of MCL 500.2218(1) . In [***8] so doing, the Court relied on *Zulcosky v Farm Bureau Life Ins Co of Michigan*, 206 Mich. App. 95; 520 N.W.2d 366 (1994), for the proposition that a misrepresentation is not material if the insurer would have issued "a" policy, albeit a different one issued at a higher rate.

Applying these principles to the facts of the case, the Court of Appeals concluded that, because plaintiffs had presented the deposition and affidavit of one of defendant's underwriters indicating that there was a possibility that Mr. Oade would have been offered a policy at a higher rate, plaintiffs had established a genuine issue of fact concerning the materiality of Mr. Oade's failure to disclose.

This Court granted defendant's application for leave to appeal. n4

n4 **463 Mich. 864; 463 Mich. 864 617 N.W.2d 692 (2000).**

III. STANDARD OF REVIEW

Issues of statutory interpretation are questions of law and are therefore reviewed de novo. ***Cardinal*** [*251] ***Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich. 75, 80,** [***9] **467 N.W.2d 21 (1991).**

A motion for summary disposition under MCR 2.116 (C)(10), which tests the factual support of a claim, is subject to de novo review. ***Smith v Globe Life Ins Co*, 460 Mich. 446, 454; 597 N.W.2d 28 (1999).**

IV. ANALYSIS

The Court of Appeals relied on the materiality requirement found in MCL 500.2218(1) :

No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract.

Although we agree with the Court of Appeals that MCL 500.2218 applies to the facts of the instant case, we disagree with its conclusion that Mr. Oade's misrepresentations were not material.

A. APPLICABILITY OF **MCL 500.2218**

The touchstone of the statute's applicability is a "misrepresentation." **MCL 500.2218(2)** [**130] defines a "misrepresentation" as a "false representation." A "representation," in [***10] turn, is statutorily defined as a "statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof." **MCL 500.2218(2)** .

When he submitted his insurance application, Mr. Oade indicated on the application that he had not [*252] **been a patient in a hospital in the preceding five years and that he had never been treated for chest pains. However, between the submission of Mr. Oade's application and defendant's approval and delivery of the policy at issue, Mr. Oade was hospitalized for chest pains. It is undisputed that Mr. Oade did not inform defendant of this event.**

The question, then, is whether Mr. Oade engaged in a misrepresentation for purposes of MCL 500.2218(2) . We conclude that he did. Under the express language of the insurance application, Mr. Oade had a continuing duty to ensure that the answers in his insurance application remained true as of the date he received the policy. In relevant part, the application variously states:

It is represented that the statements and [***11] **answers given in this application are true, complete,**

and correctly recorded to the best of my ... knowledge and belief.

***I understand that no policy based on this application will be effective unless all of my statements and answers continue to be true as of the date I receive the policy. I understand that if my health or any of my answers or statements change prior to delivery of the policy, I must so inform the company in writing.

***I understand that my statements and answers in this application must continue to be true as of the date I receive the policy. I understand that if my health or any of my answers or statements change prior to delivery of the policy, I must so inform the Company in writing.

Likewise, the interim insurance receipt provides as follows: [*253]

No policy will go into force unless all my statements and answers in this application continue to be true as of the date I receive the policy:

***If my health or any of my answers or statements given in this or any other supplement to this application change prior to delivery of the policy, I must so inform the Company in writing ....

Despite contractually promising that his [***12] **answers would "continue to be true" as of the effective date of the policy, Mr. Oade failed to do so. This failure rendered Mr. Oade's previous answers false, thereby making them misrepresentations under MCL 500.2218(2).**

Having determined that the statute applies, we turn to the Court of Appeals decision that Mr. Oade's misrepresentations were not material and that defendant therefore could not avoid the insurance contract.

B. MATERIALITY REQUIREMENT

MCL 500.2218(1) provides:

No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract.

The Court of Appeals relied on its prior decision in *Zulcosky v Farm Bureau* [**131] ***Life Ins Co, supra,*** for the proposition that a change in facts is "material" only where the correct information would cause the insurer to reject the applicant altogether. *Zulcosky* would not find materiality where the correct information [*254] would merely prompt [***13] the insurer to offer a policy at a higher premium. However, this is contrary to the binding precedent of this Court. Our decision in ***Keys v Pace,* 358 Mich. 74, 82; 99 N.W.2d 547 (1959),** made clear that a fact or representation in an application is "material" where communication of it would have had the effect of "substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Keys*, in turn, is consistent with the plain language of **MCL 500.2218(1)**, which defines materiality in terms of the insurer's refusal "to make *the* contract" (emphasis added), not "a" contract.

In this case, the undisputed evidence presented to the trial court made clear that the correct information would have led the insurer to charge an increased premium, hence a different contract. Indeed, defendant's underwriter stated in her affidavit that defendant "may have been willing to offer a more expensive 'rated' insurance contract at approximately double the premium cost that Mr. Oade had paid for the 'standard' insurance policy in this instance."

Thus, the Court of [***14] **Appeals erred in focusing on whether defendant would have issued *any* contract of insurance to Mr. Oade. The proper materiality question under the statute is whether "the" contract issued, at the specific premium rate agreed upon, would have been issued notwithstanding the misrepresented facts. The Court of Appeals contrary decision in *Zulcosky* is overruled.**

Because there is no genuine issue of material fact on the issue of materiality, defendant is entitled to summary disposition under MCR 2.116(C)(10).

[*255] **V. RESPONSE TO THE DISSENT**

Contrary to the dissent, we conclude that it is altogether irrelevant that plaintiff's health did not change during the prepolicy period. The dissent, in concluding that the case presents a question of material fact, asserts that plaintiff offered evidence that he had not suffered a heart attack. It further asserts that plaintiff's personal physician affirmed that decedent's health "did not change in anyway [sic]" between the date he applied for the insurance policy and when it was delivered. *Post* Post, 2001 Mich. LEXIS 1398, at *26. On the basis of this evidence, the dissent concludes that "the fact issue concerning the materiality of decedent's misrepresentations should [***15] be resolved by the trier of fact." *Post* Post, 2001 Mich. LEXIS 1398, at *33.

However, the focus of inquiry under the statutory "materiality" test is whether a reasonable underwriter would have regarded Mr. Oade's updated answers regarding his hospitalization for chest pains as sufficient grounds for rejecting the risk or charging an increased premium, not whether the status of Mr. Oade's health had

changed. Because there is no dispute that defendant would have, at minimum, issued an insurance policy at a higher premium rate, no reasonable jury could conclude that it would have issued the same contract.

To create an issue of fact on the materiality question, plaintiffs were free to bring forth evidence drawing into question the testimony of defendant's underwriter. Because plaintiffs did not do so, the trial court properly granted summary disposition to defendant under MCR 2.116(C)(10). [**132] [*256]

VI. CONCLUSION

While we agree with the Court of Appeals that MCL 500.2218 applies here, we conclude that Mr. Oade's misrepresentations were material, thereby entitling defendant to avoid the insurance contract. Accordingly, we reverse the Court of Appeals decision and reinstate summary disposition in [***16] favor of defendant.
CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY:
Marilyn Kelly (In Part)

DISSENTBY:
Marilyn Kelly (In Part)

DISSENT:

KELLY, J. (*concurring in part and dissenting in part*).

I concur in part IV(A) of the majority's opinion. Because the decedent violated his contractual duty by failing to update his medical history, true statements in his insurance application became false at the time the contract was made. The false statements were "misrepresentations" within the meaning of MCL 500.2218(2).

However, I dissent from the majority's conclusion in its part IV(B) that there was no genuine issue of material fact concerning the materiality of the misrepresentations. Plaintiff introduced sufficient evidence to raise a fact question whether defendant would have issued the same policy at the same premium if timely notified of decedent's 1993 episode and hospitalization. Because the issue should be resolved by the trier of fact, I would affirm the Court of Appeals decision that summary disposition for defendant was improper.

I. Misrepresentation and § 2218(2)

A trial court's ruling on a motion for summary disposition [***17] under MCR 2.116(C)(10), which tests the factual [*257] support for a claim, is reviewed de novo. See *Smith v Globe Life Ins Co*, 460 Mich. 446, 454; 597 N.W.2d 28 (1999). Affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, are considered in the light most favorable to the party opposing the motion. MCR 2.116(G)(5). This case involves statutory interpretation, a question of law, that is also subject to de novo review. See *Oakland Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich. 590, 610; 575 N.W.2d 751 (1998).

As the majority points out, "representation" and "misrepresentation" are defined in the act:

A representation is a statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false. [MCL 500.2218(2).]

Unless defined [***18] in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning. See *Western Mich. Univ Bd of Control v Michigan*, 455 Mich. 531, 539; 565 N.W.2d 828 (1997). Where a statute does not define a word, courts may consult dictionary definitions to ascertain the word's plain meaning. See *Popma v Auto Club Ins Ass'n*, 446 Mich. 460, 470; 521 N.W.2d 831 (1994).

Although § 2218(2) defines a misrepresentation as, in essence, a "false statement as to past or present fact ... at or before the making of the insurance contract ... ," it does not define "statement." Resorting to a dictionary, one finds that "statement" is "something stated," "a communication or declaration in speech or writing, setting [**133] forth facts, particulars, etc.," or "a single sentence or assertion." n1

n1 *Random House Webster's College Dictionary* (1995).

[*258] In the present case, it is undisputed that, at the time he completed the insurance application, decedent [***19] provided accurate answers to the questions relating to his health and medical treatments. The application required him to provide an update to defendant if any of his answers changed between the time of his application and the time defendant issued the policy.

Because of decedent's December 1993 hospitalization, his statements that he had not been hospitalized in the preceding five years and had never been treated for chest pains were rendered false. Given

that he did not update the statements, decedent's application contained false statements regarding his health at the time defendant issued the policy. n2 Because there were false statements or representations by decedent at the time the policy was delivered to him, there were misrepresentations within the meaning of § 2218(2).

n2 See 6 Couch, Insurance, 3d, § 82:2, pp 82-6, 82-7, ns 8-9 (1998). Statements set forth in an application for insurance are "continuing representations" until the date the contract becomes binding; see generally *Stipcich v Metropolitan Life Ins Co*, 277 U.S. 311, 316; 48 S. Ct. 512; 72 L. Ed. 895 (1928), explaining the "continuing representation" concept. This Court has recognized the concept of "continuing representations," at least where an indorser of a note gives a financial statement to a bank to secure a line of credit. See *First State Savings Bank v Dake*, 250 Mich. 525, 528; 231 N.W. 135 (1930). In *Dake*, this Court called the financial statement a "continuing representation" of defendant's responsibility. There, the indorser represented that the information within the financial statement was and continued to be true and correct unless notice of a change was given.

[***20]

The case of *Guardian Life Ins Co of America v Aaron*, n3 is instructive. In *Aaron*, the defendant answered in his application for insurance with plaintiff Guardian Life Insurance Company that he had never been refused life insurance. That answer was true at the time. However, before Guardian accepted the policy, the defendant applied for and was refused life insurance by a second insurance company. He failed to give Guardian this information before it accepted the policy.

n3 181 Misc. 393; 40 N.Y.S.2d 687 (1943).

The New York court held that the defendant's failure to provide updated information constituted a misrepresentation under the applicable New York statute. See *id.* at 395-396. [*259] n4 The court reasoned that, because the defendant had a duty to disclose new information, statements in his application constituted continuing representations. They were considered as having been made before the time of the delivery of and payment for the policy. See *id.* at 395. [**134] There, the [***21] defendant's earlier statement that he had never been refused insurance was rendered false because he did not update his application. It was deemed a misrepresentation under the New York insurance statute.

n4 The New York statute provisions implicated in *Aaron* are remarkably similar to § 2218. In particular, § 149(1) of the New York Insurance Law defined, at that time, a representation as "a statement as to past or present fact made to the insurer ..., at or before the making of the insurance contract as an inducement to the making thereof." A "misrepresentation" was defined as "a false representation." *Gay v NY Property Ins Underwriting Ass'n*, 1985 U.S. Dist. LEXIS 19099, 1985 WL 1665 (SD NY 1985). The statute further provided:

(2) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract. [*Greene v United Mut Life Ins Co*, 38 Misc. 2d 728, 730; 238 N.Y.S.2d 809 (1963). NY Ins Law § 149, revised and renumbered and is now McKinney's Insurance Law § 3105 (1985).]

[***22]

Also instructive is *Cosby v Transamerica Occidental Life Ins Co*, n5 describing an insurance applicant's change of health as rendering untrue his responses in an insurance policy application where the application provided that "all of the statements and answers given in this application to the best of my ... knowledge and belief continue to be true and complete as of the date of delivery of the policy."

n5 860 F. Supp. 830, 834 (ND Ga, 1993).

Finally, there is *Fjeseth v New York Life Ins Co*, 20 Wis. 2d 295; 122 N.W.2d 49 (1963). In that case, the decedent asserted on an insurance application that he had never had pain in his chest. He asserted that he had not consulted or been examined by a physician in the previous ten years. After he completed the application, but **before the policy was delivered,** the plaintiff **suffered chest pains and went to a doctor. The plaintiff failed to disclose these facts to the defendant insurer. A provision in the policy conditioned** [***23]

it [*260] **becoming effective on the continued truth of such answers up to the time that the policies went into effect. See *id.* at 304. The Supreme Court of Wisconsin held that the plaintiff's failure to update constituted a material misrepresentation under Wis Stat § 209.06(1)** . See *id.* at 305. At the time, Wis Stat § 209.06(1) provided:

No oral or written statement, representation, or warranty made by the insured or in his behalf in the negotiation of a contract of insurance shall be deemed material or defeat or avoid the policy, unless such statement, representation, or warranty was false and made with intent to deceive, or unless the matter misrepresented or made a warranty increased the risk or contributed to the loss. [*Fjeseth, supra* at 305, n 1; § 209.06(1) has been revised and renumbered and is now Wis Stat § 631.11 .]

Following the reasoning in *Aaron, Cosby*, and *Fjeseth,* I would conclude that decedent's December 1993 hospitalization rendered false his statements in the application regarding his hospitalization and chest pain history. As a consequence, his application contained false statements or representations at the time the policy was [***24] delivered to him. These constitute misrepresentations within the meaning of § 2218(2).

II. Materiality

The next question is whether defendant may avoid the insurance policy, as a matter of law, on the basis that the misrepresentations were material. Under § 2218(1), a misrepresentation is deemed "material" when knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to "make the contract." MCL 500.2218(1) .

[*261] The Court of Appeals relied on *Zulcosky v Farm Bureau Life Ins*, 206 Mich. App. 95; 520 N.W.2d 366 (1994)n6 for the proposition that a misrepresentation is "material" only where the insurer would have rejected the application altogether. See *id.* at 99, citing *In re Certified Question, Wickersham v John Hancock Mut Life Ins Co*, 413 Mich. 57, 65; 318 N.W.2d 456 (1982); *Clark v John* [**135] *Hancock Mut Life Ins Co*, 180 Mich. App. 695, 699-700; 447 N.W.2d 783 (1989). n7

n6 206 Mich. App. 95; 520 N.W.2d 366 (1994).

n7 We denied leave to appeal in *Zulcosky.* 448 Mich. 929, 534 N.W.2d 519 (1995).

[***25]

As the majority observes, the *Zulcosky* test for materiality appears contrary to *Keys v Pace*, 358 Mich. 74; 99 N.W.2d 547 (1959). In *Keys*, we articulated the proper test for materiality as follows:

"The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as substantially increasing the chances of loss insured against[,] so as to bring about a rejection of the risk or the charging of an increased premium." [*Id.* at 82, quoting 29 Am Jur, Insurance, § 525.]

However, even under the seemingly more stringent *Keys* test, there exists a genuine factual dispute whether decedent's misrepresentations were "material."

Defendant submitted an affidavit from one of its underwriters in support of its claim that the misrepresentations were material to its acceptance of the risk or hazard assumed. The affiant stated that she would have provided a policy [***26] at a higher premium had she [*262] known of the 1993 hospital visit when issuing the policy, hence a different contract.

Plaintiff proffered evidence that one day after the 1993 hospital visit, medical tests ruled out a heart attack as the cause of the decedent's chest pain. Also, about two weeks later, decedent passed a cardiovascular stress test. It showed that his level of cardiovascular fitness was above average for someone his age.

Plaintiff also introduced an affidavit from Dr. John Hall, the decedent's personal physician. In it, Dr. Hall stated that decedent's health "did not change in anyway [sic]" between the date he applied for the insurance policy and when it was delivered.

A jury reasonably could conclude, on the basis of the record, that a reasonable underwriter would have issued the same policy to decedent even had he given it notice of his hospitalization. It reasonably could conclude, also, that a reasonable underwriter would not have charged an increased premium.

The majority notes that the underwriter's affidavit was "uncontradicted" in stating that defendant would have charged a higher premium had it known of decedent's hospitalization. It asserts, also, that plaintiff's [***27] evidence that the decedent's health did not change is "altogether irrelevant." 2001 Mich. LEXIS 1398, at *12. This evidence leads it to conclude that a reasonable jury could only find that defendant would have charged an increased premium. *Id.* This conclusion impermissibly invades the province of the factfinder by resolving an unsettled question of fact.

I disagree that the affidavit from defendant's underwriter precludes a finding that a genuine factual dispute exists here whether defendant would have charged an increased premium. First, as the majority [*263] observes, the *Keys* test for materiality is an objective inquiry. See *Keys*, *supra* at 82. Thus, the evidence from defendant's underwriter, while relevant, is not dispositive. Instead, the question is what a reasonable underwriter would have decided had it known of the misrepresented facts when it issued the policy of insurance. *Id.* In this regard, I find evidence that the decedent's health did not change during the prepolicy period [**136] very relevant. It challenges the credibility of the affiant. See generally, *McDaniels v American Bankers Ins Co of Florida*, 227 A.D.2d 951, 952; 643 N.Y.S.2d 846 (1996). [***28] The affiant did not assert that the mere fact of the hospitalization would have occasioned an automatic premium increase irrespective of whether there was a change in the applicant's health. n8 The affiant did not indicate that she had been informed that there had been no change in decedent's health within two months after the hospitalization.

> n8 The majority asserts that "the undisputed evidence presented to the trial court made clear that the correct information would have led the insurer to charge an increased premium, hence a different contract." 2001 Mich. LEXIS 1398, at *13. The correct information was that, at the time of and after the 1993 hospitalization, no test or medical opinion evidenced that defendant had had a heart attack. The affiant based her conclusion that the defendant would not have entered into the insurance contract on her belief, stated in the affidavit, that the decedent "had been admitted to Sparrow Hospital in December 1993 complaining of shortness of breath, chest pains and a probable heart attack ...."
>
> Hence, the affiant's reference to charging an increased premium was based on inaccurate or incomplete information. Also, it did not state that any hospitalization, regardless of the triviality of its cause, would have given rise to a different contract having been offered.

[***29]

Moreover, plaintiff introduced evidence questioning the veracity of the defendant's underwriter's assertions in the affidavit. Specifically, plaintiff proffered evidence that his 1993 hospitalization was not due to a heart attack and that he passed a cardiovascular [*264] stress test shortly after the hospitalization. Also, he showed that his health did not change between the date he applied for the insurance policy and the date it was delivered. Therefore, the affidavit does not stand unchallenged. See *Meyer v Blue Cross & Blue Shield of Minnesota*, 500 N.W.2d 150, 153 (Minn App 1993).

In *Meyer*, the defendant's underwriter testified that the defendant would have denied coverage had it known of the insured's physical condition. The court found that a question of fact existed on the issue, nonetheless. It stated that "materiality is a fact question based on the objective facts of the particular case, and '[a] jury is not required to accept even uncontradicted testimony if improbable or if surrounding facts and circumstances afford reasonable grounds for doubting its credibility.'" *Id.* at 153, quoting *Blazek v North Am Life & Casualty Co*, 251 Minn. 130, 137; [***30] 87 N.W.2d 36 (1957).

The same is true respecting defendant's self-serving affidavit in support of the motion for summary disposition. Surely the majority would not assert that any affidavit by its underwriters, if not directly refuted, would eliminate a fact question on materiality. By way of hypothetical example, assume that questions in the insurance application asked the applicant, "Do you use tobacco in any form other than cigarettes?" "Did you ever use tobacco in any other form?" Assume that the applicant answered "No" and that, between the date he submitted the application and received the policy, he smoked a cigar in celebration of a newborn child. Assume, also, that he did not inform the insurer of that fact. Assume that, in subsequent litigation, the insurer's underwriter submitted an affidavit in support of the insurer's motion for [*265] summary disposition. Assume he asserted that the insurer would not have issued the insurance policy to the applicant had it known about the cigar. Would that assertion, if not directly rebutted, require a finding, as a matter of law, [**137] that the failure to disclose the cigar was a material misrepresentation?

In *Brown v Pointer*, [***31] n9 this Court expressed its agreement with the proposition that summary disposition is inappropriate where a factual assertion in a movant's affidavit depends on the affiant's credibility. In particular, it stated:

Where the truth of a material factual assertion of a movant's affidavit depends on the affiant's credibility, there inheres a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted. *Arber v Stahlin*, 382 Mich. 300, 309; 170 N.W.2d 45 (1969); *Durant v Stahlin*, 375 Mich. 628, 647-648; 135 N.W.2d 392 (1965). [390 Mich. at 354.]
In this case, plaintiff's evidence of the state of decedent's health after the hospitalization afforded reasonable grounds to doubt the credibility of the underwriter's

affidavit. Thus, plaintiff created a triable fact question whether defendant would have charged an increased premium had it known [***32] of the hospitalization that, decedent's physician said, showed no change in decedent's health. See *Skinner v Square D Co*, 445 Mich. 153, 161; 516 N.W.2d 475 (1994), "the court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."

n9 390 Mich. 346; 212 N.W.2d 201 (1973).

Moreover, the court should be cautious in concluding that no factual dispute exists solely on the basis of an "uncontradicted" affidavit from an insurance [*266] company's underwriter. See *Gibbons v John Hancock Mut Life Ins Co*, 227 A.D.2d 963, 964; 643 N.Y.S.2d 847 (1996); *Volunteer State Life Ins Co v Richardson*, 146 Tenn. 589; 244 S.W. 44 (1922); 6 Couch, Insurance, 3d, § 82:7, p 82-15.

In *Volunteer State L Ins Co*, the Tennessee Supreme Court articulated well the concerns associated with accepting as dispositive statements from insurance companies regarding the materiality of a misrepresentation:

It is not to be left to the insurance company to say after a death has occurred that it would or would not have issued the policy had the answer been truly given. It is true the practice of an insurance company with respect to particular [***33] information may be looked to in determining whether it would have naturally and reasonably influenced the judgment of the insurer, but *no sound principle of law would permit a determination of this question merely upon the say so of the company after the death has occurred.* [244 S.W. at 49 (emphasis added).]

When reviewing the ruling on defendant's motion for summary disposition, we construe the facts in the light most favorable to plaintiff. That, coupled with the reasoning already set forth, leads me to conclude that the fact issue concerning the materiality of decedent's misrepresentations should be resolved by the trier of fact. Summary disposition in defendant's favor, therefore, was improper.

III. Conclusion

I would hold that, because decedent failed to update his health information, his application contained misrepresentations on the date the insurance policy was delivered. Thus, because a genuine factual [*267] dispute exists regarding whether the misrepresentations were material, I would affirm the Court of Appeals conclusion that summary disposition for defendant was improper. [**138]

CAVANAGH, J., concurred only in the result reached by KELLY, [***34] J.

23 of 51 DOCUMENTS

NICOLE M. BEAUDRIE, Plaintiff-Appellant, v PAULINE HENDERSON, Defendant-Appellee, and CITY OF DEARBORN, and DEARBORN POLICE DEPARTMENT, Defendants.

No. 114261

SUPREME COURT OF MICHIGAN

465 Mich. 124; 631 N.W.2d 308; 2001 Mich. LEXIS 1208

March 6, 2001, Argued

July 27, 2001, Decided

July 27, 2001, Filed

PRIOR HISTORY:
[***1] Wayne Circuit Court, Susan D. Borman, J. Court of Appeals, GAGE, P.J., and HOEKSTRA, J. and KELLY, J. (Docket No. 202304).

DISPOSITION:
The decision of the Court of Appeals is reversed, and this case is remanded to the trial court for further proceedings.

COUNSEL:
Fieger, Fieger, Schwartz & Kenney (by Geoffrey N. Fieger and William J. McHenry) [Southfield, MI], and Bendure & Thomas (by Mark R. Bendure) [Detroit, MI], for the plaintiff.
Laurie M. Sabon and Debra A. Walling [Dearborn, MI], for the defendant-appellee.

JUDGES:
Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J. CAVANAGH, J. (concurring). KELLY, J., concurred with CAVANAGH, J.

OPINIONBY:
Robert P. Young

OPINION:

[*125] [**309] YOUNG, J.

Plaintiff was abducted, assaulted, and raped by her ex-boyfriend. This case pertains to the actions of defendant Pauline Henderson, a police dispatcher and friend of the assailant's mother. Defendant Henderson allegedly was contacted at her place of employment by the assailant's mother while plaintiff was being held captive. Plaintiff alleged that defendant was grossly negligent and engaged in active misconduct when she failed to notify [***2] the police of the [*126] whereabouts of plaintiff's assailant and acted in concert with the assailant's mother in withholding information from authorities. Defendant argued that the public duty doctrine shielded her from liability, and moved for summary disposition under MCR 2.116(C)(8). The trial court denied defendant's motion, but the Court of Appeals reversed.

We granted leave to consider whether the public duty doctrine, first recognized by this Court in *White v Beasley*, 453 Mich. 308; 552 N.W.2d 1 (1996), should be extended to protect governmental employees other than police officers who are alleged to have failed to provide protection from the criminal acts of third parties. We conclude that, given the comprehensive governmental immunity statute, MCL 691.1407, n1 this judicially [*127] created doctrine should not be so extended. Thus, we reverse the decision of the Court of Appeals and remand this case to the trial court for further proceedings.

n1 **MCL 691.1407** provides, in relevant part:

(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

[***3]

I. Factual and Procedural Background

Because this appeal arises under MCR 2.116(C)(8), we take all material facts from plaintiff's first amended complaint. According [**310] to her complaint, plaintiff was abducted by her ex-boyfriend, David Wilke, on April 6, 1994. Earlier that day, plaintiff had given preliminary examination testimony against Wilke in a case that arose out of a series of prior assaults committed by Wilke against her, including criminal sexual conduct. Wilke was released on bond.

At approximately 1:21 a.m. on April 7, 1994, the Dearborn Police Department issued an all points bulletin (APB) regarding the suspected abduction, including a description of Wilke and the vehicle that was believed to be involved. The police knew that plaintiff had parked her own vehicle in her driveway, but never made it inside her home. The police also knew that Wilke had criminal charges pending against him involving plaintiff, that he had been released on bond, that he had threatened to kill plaintiff in the past, and that he had access to handguns. n2

n2 Plaintiff's amended complaint specifically quotes the following portion of the APB:

The victim parked her vehicle in the driveway and never made it inside at her home in the south end of our city. The victim has pending CSC charges out against the suspect, and he was freed on bond today. He has threatened to kill her in the past and he does have access to handguns.

[***4]

[*128] Around 9:30 a.m., defendant, who was working as a dispatcher at the Dearborn Police Department, received a call from Wilke's mother, who was defendant's personal friend. Wilke's mother informed defendant that Wilke was missing, that she believed him to be armed and dangerous, and that it appeared that he had taken plaintiff with him.

Plaintiff's first amended complaint further alleged that defendant suspected that Wilke had taken plaintiff to a family-owned trailer at Camp Dearborn. Plaintiff alleged that defendant contacted Camp Dearborn, represented herself as a Dearborn police dispatcher, and requested that Camp Dearborn employees verify whether the suspect vehicle was there. She gave the employees a description of the vehicle, its license plate number, and warned them not to approach the vehicle.

Approximately fifteen minutes later, defendant received notification that Wilke and the vehicle were indeed at Camp Dearborn. At that point, defendant contacted Wilke's mother. Plaintiff alleged that the two women agreed to withhold information from the police until Wilke's mother could contact Wilke's attorney. Wilke's mother, having spoken with Wilke's attorney, allegedly contacted [***5] defendant again at approximately 11:45 a.m., at which time they agreed to withhold information about Wilke's whereabouts. At approximately noon, defendant left Dearborn Police Dispatch, picked up Wilke's mother and sister, and drove to Camp Dearborn.

[*129] According to plaintiff's first amended complaint, "as a direct and proximate result of these acts and/or omissions by Defendant Pauline Henderson, the

brutal rape, beating and abduction of Plaintiff Nicole Beaudrie was allowed to continue, and the suspect, David James Wilke, was allowed the opportunity to escape the fenced perimeter of Camp Dearborn with his victim." Plaintiff subsequently filed suit against defendant, n3 alleging that defendant's conduct amounted to "intentional misconduct ... active malfeasance, and gross negligence," and that plaintiff's continued victimization was "a direct and proximate result" of defendant's actions.

n3 Plaintiff also brought suit against the city of Dearborn and the Dearborn Police Department. However, those parties are not involved in this appeal.

[**311] [***6]

Defendant moved for summary disposition under MCR 2.116(C)(8) on the ground that, under the public duty doctrine, she did not owe any duty to plaintiff. The trial court denied the motion. The Court of Appeals then reversed in a split decision. n4

n4 Unpublished opinion per curiam, issued December 4, 1998 (Docket No. 202304).

We granted plaintiff's application for leave to appeal. *Beaudrie v. Henderson*, 463 Mich. 888, 618 N.W.2d 767 (2000). II. Standard of Review

The trial court granted summary disposition to defendants under MCR 2.116(C)(8). We review that decision de novo. *Maiden v Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to [*130] determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. *Spiek v Dep't of Transportation*, 456 Mich. 331, 337, [***7] 572 N.W.2d 201 (1998).

Summary disposition of a plaintiff's gross negligence claim is proper under MCR 2.116(C)(8) if the plaintiff fails to establish a duty in tort. See ***Maiden*, 461 Mich. at 135.** Whether a defendant owes a plaintiff a duty of care is a question of law for the court. 461 Mich. at 131. III. History of the Public Duty Doctrine

It appears that the origins of the common-law public duty doctrine can be traced to *South v Maryland*, 59 U.S. (18 How) 396, 15 L. Ed. 433 (1855). There, the plaintiff was kidnapped and held for ransom. Upon his release, the plaintiff sued the county sheriff, alleging that, despite the plaintiff's request for protection, the sheriff neglected and refused to protect him or to otherwise keep the peace. In rejecting the plaintiff's claim, the United States Supreme Court held that the sheriff's duty to preserve the public peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." 59 U.S. (18 How) at 403. The Supreme Court of Tennessee has noted that a clear majority of state courts considering the issue adhere to the public duty doctrine [***8] in one form or another. See ***Ezell v Cockrell*, 902 S.W.2d 394, 399, n 5** (Tenn, 1995).

Before our 1996 decision in *White*, *supra*, this Court had not recognized the public duty doctrine. However, the lead opinion in *White* noted that our [*131] Court of Appeals had consistently relied on the doctrine as early as 1970. See *id* **453 Mich. at 322 n.7.** A majority of the Court agreed that the public duty doctrine serves a useful purpose and should apply in Michigan. 453 Mich. at 316 (Brickley, C.J., joined by Riley and Weaver, JJ.), 453 Mich. at 330 (Cavanagh, J., joined by Mallett, J.).

IV. The Scope of the Public Duty Doctrine under *White*

Before we can determine the future of the public duty doctrine in Michigan, it is necessary to examine its current state. At issue in *White* was whether the defendant police officer who failed to assist and protect the plaintiff from a criminal assault by a third party was liable in tort. This Court invoked the public duty doctrine and found no liability.

Chief Justice Brickley's lead opinion in *White* adopted the following articulation of the public duty doctrine from Justice Cooley's leading 19th century treatise on torts:

If the duty which [***9] the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an [**312] inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. [***White*, 453 Mich. at 316,** quoting 2 Cooley, Torts (4th ed), § 300, pp 385-386.]

However, it is not entirely clear from our fractured decision in *White* whether application of the public duty doctrine was intended to apply to all government employees or only to police officers who are alleged to have failed to provide police protection. [*132] The lead opinion suggested an expansive application of the doctrine:

In conclusion, we find that the public-duty doctrine still serves useful purposes. ... Government employees should enjoy personal protection from tort liability based on their action in conformity with, or failure to conform to, statutes or ordinances not intended to create tort liability. The job titles of government employees alone [***10] should not create a duty to specific members of the public. [**453 Mich. at 319.]**

Fairly read, nothing in the lead opinion indicated an intent to limit application of the public duty doctrine to any particular class of governmental employees.

Justice Boyle agreed with the statement in the lead opinion that "applied to police officers, the public-duty doctrine insulates officers from tort liability for the negligent failure to provide police protection ...." **453 Mich. at 325.** She noted that "a contrary result could lead to officers arresting (and detaining) all persons who might conceivably jeopardize a foreseeable plaintiff." **453 Mich. at 329-330.** However, Justice Boyle argued that, even when limited to police officers, the doctrine should only apply to cases involving *nonfeasance*, i.e., "'passive inaction or the failure to actively protect others from harm.'" **453 Mich. at 328,** quoting *Williams v Cunningham*, 429 Mich. 495, 498-499, 418 N.W.2d 381 (1988).

Justice Cavanagh would have limited the decision "to only those cases in which liability is alleged on the basis of the police officer's failure to protect an individual from the actions of a *third* [***11] *party.*" **453 Mich. at 330** (Cavanagh, J., concurring in part and dissenting in part). He opined that the case "should have no bearing in a case involving an injury caused by the police officer's own actions." *Id.* Justice Cavanagh [*133] noted that "the public-duty doctrine recognizes that police officers and their departments must make discretionary or policy decisions in order to carry out the duties imposed on them." **453 Mich. at 331.** However, Justice Cavanagh also suggested that the public duty doctrine should apply to "fire fighters, life guards, and similar governmental safety professionals." **453 Mich. at 331 n 1.**

Justice Levin dissented, arguing that the public duty doctrine is inconsistent with the governmental immunity statute, which "holds governmental officers and employees, except those at the highest levels, subject to liability on the basis of gross negligence, defined as reckless conduct." **453 Mich. at 342-343.**

Clearly then, the various opinions in *White* offered relatively little guidance to lower courts regarding the scope of the doctrine recognized in that case. Since *White*, the Court of Appeals has not hesitated broadly to apply the public duty doctrine outside [***12] the police protection context. n5

n5 See, e.g., *Elmadari v Filiak*, 2001 Mich. App. LEXIS 377, unpublished opinion per curiam of Court of Appeals decided May 25, 2001 (Docket No. 221564) (a city maintenance worker owed no duty to a child injured by an allegedly dangerous slide); *McGoldrick v Holiday Amusements, Inc*, 242 Mich. App. 286; 618 N.W.2d 98 (2000) (a state ski lift inspector owed no duty to an injured skier); *Koenig v South Haven*, 221 Mich. App. 711; 562 N.W.2d 509 (1997), rev'd in part on other grounds 460 Mich. 667; 597 N.W.2d 99 (1999) (city officials owed no duty to decedent who was swept off a pier into a lake during inclement weather); *Reno v Chung*, 220 Mich. App. 102; 559 N.W.2d 308 (1996), aff'd on other grounds 461 Mich. 109; 597 N.W.2d 817 (1999) (a medical examiner owed no duty to the plaintiff who was mistakenly convicted of murder in part because of the examiner's report).

[**313]

V. The Future of the Public Duty Doctrine [***13] in Michigan

We now address the issue left open in *White*: should the public duty doctrine apply in cases other [*134] than those alleging a failure to provide police protection from the criminal acts of a third party? As illustrated by our differing opinions in *White,* as well as the split decision in the Court of Appeals in this case, the doctrine has proven to be difficult to define and apply. Even more important, further expansion of the doctrine is unwarranted because the governmental immunity statute already provides government employees with significant protections from liability.

Thus, we reject further expansion of the public duty doctrine. The liability of government employees, other than those who have allegedly failed to provide police protection, should be determined using traditional tort principles without regard to the defendant's status as a government employee.

A. Shortcomings of the Public Duty Doctrine

As stated, the public duty doctrine is widely applied. The lead opinion in *White* set forth two commonly cited justifications for retaining the doctrine: "First, the doctrine protects governments from unreasonable interference with policy decisions, and, [***14] second, it protects government employees from unreasonable liability." **453 Mich. at 317.** However, as the Supreme Court of Colorado recognized in ***Leake v Cain*, 720 P.2d 152, 158** (Colo, 1986):

[A] growing number of courts have concluded that the underlying purposes of the public duty rule are better

served by the application of conventional tort principles and the protection afforded by statutes governing sovereign immunity than by a rule that precludes a finding of an actionable duty on the basis of the defendant's status as a public entity. [*135]
Indeed, a number of courts that have examined the doctrine in detail have rejected it. n6

n6 See, e.g., *Adams v State*, 555 P.2d 235 (Alas, 1976); *Ryan v State*, 134 Ariz. 308; 656 P.2d 597 (1982); *Leake, supra*; *Commercial Carrier Corp v Indian River Co*, 371 So. 2d 1010 (Fla, 1979); *Jean W v Commonwealth*, 414 Mass. 496; 610 N.E.2d 305 (1993); *Maple v Omaha*, 222 Neb. 293; 384 N.W.2d 254 (1986); *Brennen v City of Eugene*, 285 Ore. 401; 591 P.2d 719 (1979); *Hudson v East Montpelier*, 161 Vt. 168; 638 A.2d 561 (1993); *Coffey v Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

[***15]

As formulated by Justice Cooley, the public duty doctrine provides only that a plaintiff cannot rely on the fact that a public employee owes general duties to the public at large to support a claim of negligence. Justice Cooley explained:

"The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an [**314] individual, and that he has suffered a special and peculiar injury by reason of its nonperformance." [2 Cooley, Torts (4th ed), § 300, p 386 (citation omitted).]
Such an analysis merely states the obvious: a plaintiff must show some common-law duty owed to him by the public employee.

However, application of the public duty doctrine has not been so limited. In our view, application of the doctrine has been reduced to a conclusory statement that where there is a duty to all, there is a duty to none. Such a "reformulation" of the doctrine is tantamount to a grant of common-law governmental immunity, an area already dealt with by statute in many jurisdictions, including Michigan. The Supreme Court of Alaska was one of the first courts to reject the doctrine [***16] on precisely this basis. In ***Adams v State*, 555 P.2d 235** (Alas, 1976), the plaintiffs were injured in [*136] a hotel fire. The hotel had been inspected eight months earlier by the state fire marshall's office. It was alleged that the state inspectors had failed to abate several hazards that they had discovered. Rejecting the argument that the state owed a duty only to the public generally, the Supreme Court of Alaska noted that an application of the public duty doctrine in that case would have resulted in a finding of no duty even though "a private defendant would have owed such a duty ...." ***Id.* at 242.** In the absence of statutory immunity, the court declined to make it more difficult to establish a duty when the state is the defendant. *Id.* n7

n7 As noted in ***Wilson v Anchorage*, 669 P.2d 569, 571** (Alas, 1983), the Alaska Legislature has since conferred upon municipalities immunity from liability arising from negligent inspections.

Other courts have also recognized [***17] that routine application of the public duty doctrine has resulted in an artificial distinction between so-called "public" and "private" duties. In ***Commercial Carrier Corp v Indian River Co*, 371 So. 2d 1010, 1015** (Fla, 1979), the Florida Supreme Court explained that it is circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivision where the duty breached is said to be owed to the public at large but not to any particular person.
In rejecting the public duty doctrine in *Ryan v State*, 134 Ariz. 308, 310, 656 P.2d 597 (1982), the Arizona Supreme Court found the attempt to distinguish [*137] between public and individual duties to be a "speculative exercise." n8

n8 Following the decision in *Ryan*, the Arizona Legislature enacted various immunity provisions. See *Clouse v Dep't of Public Safety*, 194 Ariz. 473, 476-477, 984 P.2d 559 (Ariz App, 1998).

We agree [***18] with these sentiments. The fact that a public employee owes general duties to the public at large does not logically preclude the imposition of a private, individual duty. These duties are not mutually exclusive. Consequently, any attempt to draw a distinction between a government employee's "public duty" and "private duty" has proven to be confusing and prone to arbitrary and inconsistent application.

Consider, for example, the case of building inspectors. As did the *Adams* court, the Supreme Court of Wisconsin, in *Coffey v Milwaukee*, 74 Wis. 2d 526; 247 N.W.2d 132 (1976), imposed on a building inspector an actionable duty of care to perform fire safety inspections in a reasonable manner. The court held that

there was no distinction in that case between "a 'public duty' and a '[private] duty.'" 74 Wis. 2d at 540. Reaching the opposite result, in *Lynn v Overlook Development*, 98 N.C. App. 75, 78; [**315] 389 S.E.2d 609 (1990), aff'd in part and rev'd in part 328 N.C. 689; 403 S.E.2d 469 (1991), the Court of Appeals of North Carolina held that the duty to carry out building inspections was owed "not to the plaintiffs, [***19] individually, but to the general public." n9 However, the conclusory analysis in *Lynn* merely begs the question why a duty to carry out building inspections, which undeniably benefits the [*138] general public, cannot also give rise to an individual duty in an appropriate case. n10

n9 We note that, although it did not expressly overrule *Lynn*, the Supreme Court of North Carolina recently decided that the public duty doctrine should no longer apply outside the police protection context. *Thompson v Waters*, 351 N.C. 462, 464-465; 526 S.E.2d 650 (2000).

n10 Indeed, Justice Cooley himself recognized that, in the inspection context, "duties are imposed in respect to the public and also in respect to individuals." 2 Cooley, Torts (4th ed), § 304, p 403.

From these examples it is clear that the courts "have not managed to draw an intellectually defensible line between immune 'public' duties and actionable negligence." *Jean W v Commonwealth*, 414 Mass. 496, 510; 610 N.E.2d 305 (1993) [***20] (citation omitted). We will not attempt to do so because a traditional common-law duty analysis provides a far more familiar and workable framework for determining whether a public employee owes a tort-enforceable duty in a given case. Moreover, as explained below, the need for an expanded application of the public duty doctrine has been undermined by the protections afforded governmental employees by our state's broad governmental immunity statute.

B. Relationship Between the Public Duty Doctrine and the Governmental Immunity Act

A government employee is immune from tort liability under the governmental immunity statute if all the following conditions are met:

(a) The officer ... is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's ... conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [**MCL 691.1407(2).**] [***21]

[*139] In our view, the Legislature has expressed through these provisions its intent to subject lower-level government employees to potential liability for performing their jobs in a grossly negligent manner. n11 This is so even though the governmental agency itself would be exempt from liability. See **MCL 691.1407(1)** . Thus, expanding the common-law public duty doctrine to shield all government employees from tort liability is at least arguably inconsistent with this statutory scheme. n12

n11 Judges, legislators, and the elective or highest appointive executive officials of all levels of government are, of course, absolutely immune from liability for their policy-making decisions. See **MCL 691.1407(5)** .

n12 However, we reject Justice Levin's suggestion in ***White*, 453 Mich. at 355,** that **MCL 691.1407** "defines the duty pursuant to which a governmental employee is subject to liability." The statute does not *create* a cause of action. Plaintiffs are still required to establish a common-law duty.

[***22]

Even if that were not the case, the fact that the governmental immunity statute makes public employees immune from liability [**316] for conduct that does not amount to "gross negligence" and is not "the proximate cause" of the injury certainly undermines the need for the common-law "immunity" granted by the public duty doctrine. n13

n13 Although we recognized in *White*, *supra*, that the public duty doctrine is part of tort law, 453 Mich. at 323, the effect of the rule arguably is identical to that of governmental immunity. "Under both doctrines, the existence of liability depends entirely upon the public status of the defendant." *Leake*, *supra* at 160.

The Supreme Court of Vermont employed similar reasoning in *Hudson v East Montpelier*, 161 Vt. 168, 179; 638 A.2d 561 (1993), where it "declined to adopt the confusing and inconsistent public duty doctrine as a means of limiting liability of government employees who

are already protected to some extent by [statutory [***23] immunity.]"

[*140] We recognize that public employees often are required to perform various tasks by virtue of their position. However, "private persons [also] have affirmative duties arising from their employment responsibilities that others do not have." *Jean W, supra* at 508. Again, the governmental immunity act contemplates that government employees may be held liable for performing their jobs in a grossly negligent manner. Indeed, the Legislature has expressly authorized government agencies to defend and indemnify employees facing potential tort liability for injuries caused by the employee "while in the course of employment and while acting within the scope of his or her authority ...." MCL 691.1408(1) .

In sum, the Legislature, through the governmental immunity statute, has signified that a defendant's status as a government employee alone does not preclude liability. We choose not to undermine that public policy choice by expanding the application of the judicially created public duty doctrine.

Consistent with our decision in *White*, we will, however, continue to apply the public duty doctrine, and its concomitant "special relationship" [***24] exception, n14 [*141] in cases involving an alleged failure to provide police protection. n15 We agree with Chief Justice Brickley's statement in *White* that "police officers must work in unusual circumstances. They deserve unusual protection." 453 Mich. at 321. Moreover, the public duty doctrine as applied in *White* is consistent with the general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent "a 'special [**317] relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury." *Murdock v Higgins*, 454 Mich. 46, 54; 559 N.W.2d 639 (1997).

n14 Under the "special relationship" test adopted and applied by a majority of the Court in *White*, a police officer may be exposed to liability for failure to protect a plaintiff from the criminal acts of a third party only if the following elements are met:

"(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

(2) knowledge on the part of the municipality's agent that inaction could lead to harm;

(3) some form of direct contact between the municipality's agents and the injured party; and

(4) that party's justifiable reliance on the municipality's affirmative undertaking ...." [*White*, 453 Mich. at 320 (citation omitted).]

[***25]

n15 The Supreme Court of North Carolina has adopted such a distinction. *Thompson v Waters*, 351 N.C. 462, 464-465; 526 S.E.2d 650 (2000).. As has the Supreme Court of Georgia. See *Hamilton v Cannon*, 267 Ga. 655; 482 S.E.2d 370 (1997); *Dep't of Transportation v Brown*, 267 Ga. 6; 471 S.E.2d 849 (1996). Interestingly, in its decision limiting application of the public duty doctrine to the police protection context, the Supreme Court of North Carolina cited the same concerns that we express today. *Thompson, supra*.

However, for purposes of determining the liability of public employees other than police officers, we will determine a government employee's duty using the same traditional common-law duty analysis applicable to private individuals.

VI. Application

The Court of Appeals relied solely on the public duty doctrine in ordering that summary disposition be entered in defendant's favor under MCR 2.116(C)(8). As stated, application of the public duty doctrine is limited to cases like *White* involving [***26] an alleged failure of a police officer to protect a plaintiff from the criminal acts of a third party. We agree with plaintiff that [*142] this case clearly does not fall within the circumstances presented in *White*. Accordingly, the Court of Appeals erred in relying on the public duty doctrine to dismiss plaintiff's case.

VII. Conclusion

Distinguishing between a government employee's "public" and "private" duties has proven to be an unwieldy exercise. Moreover, the need for expanding the public duty doctrine outside the police protection context is undermined by the comprehensive protections from liability provided to government employees by the governmental immunity statute. Therefore, we decline to do so. The decision of the Court of Appeals is reversed, and this case is remanded to the trial court for further proceedings.

CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY:

Michael F. Cavanagh

CONCUR:

CAVANAGH, J. (*concurring*).

I join parts I and II of the majority opinion, which accurately discuss the pleadings. I also join the majority's decision to reverse. I write separately, however, because I believe the majority goes beyond what is necessary [***27] to resolve the limited question before us. I would hold only that (1) the plaintiff successfully pleaded a claim upon which relief may be granted, and (2) that the defendant failed to overcome the plaintiff's amended pleadings because the defendant's claim of nonstatutory immunity was predicated on inapplicable precedent.

I believe the majority's discussion of the history and wisdom of the public duty doctrine is misplaced, given that we are examining a motion for summary [*143] disposition that tests only the sufficiency of the pleadings. MCR 2.116(C)(8). Therefore, I would not delve into the statutory issues discussed by the majority. Instead, I would resolve this case on the basis of the narrow grounds discussed in this opinion.

I

MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Spiek v Dep't of Transportation*, 456 Mich. 331, 337; 572 N.W.2d 201 (1998). The plaintiff's first amended complaint alleged that the defendant had engaged in gross [***28] negligence and active misconduct. n1 The most direct discussion [**318] of gross negligence and active misconduct can be found at the first paragraph 27 of the plaintiff's amended complaint, which states as follows:

At all relevant times, Defendant Pauline Henderson committed acts of intentional misconduct, and active malfeasance, and gross negligence, which are not protected by the Public Duty Doctrine and/or governmental immunity including, but not limited to, the following:

a. Representing herself to be conducting official police business for improper purposes;

b. Using her authority as a Dearborn Police Dispatcher to verify the location of the suspect for improper purposes;

c. Actively withholding and concealing information from the authorities regarding the verified location of a felony [*144] suspect which she otherwise would have provided without hesitation;

d. Purposefully accepting instruction from the suspect's mother and criminal attorney in contravention of her duties;

e. Intentionally conspiring to keep the verified whereabouts of the suspect concealed despite actual knowledge of a police emergency;

f. Affirmatively abrogating her obligations in order to prevent the authorities [***29] from apprehending a known suspect in the commission of a brutal felony;

g. Intentionally abandoning her post as a police dispatcher in order to engage in misconduct;

h. Driving to Camp Dearborn to meet with the suspect;

i. Engaging in other active misconduct, gross negligence and/or intentional malfeasance which may become known prior to trial.

Further in support of her claim, the plaintiff repeatedly alleged that the defendant conspired and agreed to abrogate her duties as a police dispatcher and to conceal information from the authorities. The complaint also specifically alleged that the defendant's active misconduct was "intended to prevent police authorities from saving a rape and kidnapping victim," that the defendant's intentional acts and omissions proximately resulted in the continued abuse of the plaintiff for an additional ten hours, and that damages resulted from the defendant's acts and omissions. [***30]

n1 The plaintiff labels her claims under the title, "Count I-Gross Negligence/Active Misconduct."

II

In response to the allegations raised by the plaintiff, the defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(8). In support of its position that no amount of factual development could justify the plaintiff's claim, the defendant [*145] argued that defendant Henderson is protected by the public duty doctrine.

The basis of defendant's public duty doctrine claim

The defendant's brief in support of summary disposition claimed that "Under the public duty doctrine, a public employee owes a duty to the general public and not to any one individual unless a special relationship exists between the employee and the individual." In the defendant's view, the plaintiff in the present case failed to establish that a special relationship existed, citing *White v Humbert*, 206 Mich. App. 459; 522 N.W.2d 681 (1994), and *Reno v Chung*, 220 Mich. App. 102, 105; 559 N.W.2d 308 (1996), aff'd sub nom *Maiden v*

Rozwood, 461 Mich. 109; 597 N.W.2d 817 (1999). As such, the public duty doctrine would bar recovery. In response to the defendant's motion for summary disposition, the plaintiff argued [***31] that the defendant was not protected by the public duty doctrine because the doctrine applies only to cases involving nonfeasance. The present complaint alleged active misconduct [**319] amounting to malfeasance. Further, the plaintiff alleged that the defendant's actions arose out her relationship with David Wilke and his mother. Thus, plaintiff argued, the public duty doctrine would be inapplicable. The defendant filed a reply brief, arguing that the malfeasance versus nonfeasance argument advocated by the defendant was unsupportable because "there is no allegation or implication that Henderson took any dynamic step toward aiding David Wilke in his criminal activity."

I cannot agree with the defendant that the public duty doctrine shields her from liability. I believe that the defendant applies the public duty doctrine too [*146] broadly, and ignores the plaintiff's allegations that she called Camp Dearborn, confirmed Wilke's presence there, left work, drove to Camp Dearborn, and collaborated with Kondzer and Wilke's attorney in addition to deciding to withhold information from the authorities.

As noted in the majority opinion, the public duty doctrine on which the defendant builds her argument [***32] was the subject of much discussion in *White v Beasley*, 453 Mich. 308, 552 N.W.2d 1 (1996). There, in separate opinions, a majority of this Court adopted a formulation of the doctrine that provides that an officer may be shielded from an individual action for damages when the officer is being charged with failing to perform or inadequately performing a duty to the public. Yet, the opinion did not preclude the possibility that the officer nonetheless might owe an individual enforceable duty in tort. n2 Though in *Beasley*, this Court acknowledged a "special relationship exception" to the public duty doctrine, the Court did not hold that the doctrine is so broad that a public officer would automatically be protected from liability under the public duty doctrine when the officer's abrogation of duties and personal involvement in the circumstances surrounding the plaintiff allegedly caused the plaintiff's injuries to result.

> n2 "If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly is an individual wrong, and may support an individual action for damages." [*Beasley* at 316, quoting 2 Cooley, Torts (4th ed), § 300, pp 385-386.]

[***33]

[*147] Though the defendant tries to squeeze her case into the parameters of *Beasley*, her efforts must fail because this case is distinguishable from *Beasley*. The plaintiff is not asserting that the defendant should be liable simply because the defendant was a police dispatcher who owed a general governmental duty to the plaintiff as a member of the public. Instead, the pleadings assert that the defendant became personally involved by acting upon special knowledge that she obtained because of a personal relationship with the assailant and his mother, and that the defendant chose to abrogate rather than perform her duties as a police dispatcher, despite the fact that she received information while on duty. According to the complaint, the relationship between the defendant, Kondzer, and Wilke made the defendant privy to special information about the alleged attack on the plaintiff. Thus, it was not the defendant's position as a police dispatcher that gave rise to the alleged misconduct, it was her relationship with the assailant's mother. Additionally, the complaint alleged various ways in which the defendant actively engaged in conduct that delayed apprehension [**320] of Wilke so that injury [***34] to the plaintiff resulted.

The allegations throughout the plaintiff's amended complaint, and specifically listed in the first paragraph 27, state that the defendant knowingly and intentionally abrogated her duties as a police dispatcher and became involved in the case for personal reasons. I believe that the plaintiff's repeated references to the relationship between the defendant, Kondzer, and Wilke, if accepted as true, would support a claim for a common-law cause of action. As such, I am not persuaded that this is the type of case [*148] in which the public duty doctrine of *Beasley* should be applied. Thus, the basis for the defendant's MCR 2.116(C)(8) motion collapses, as does the decision of the Court of Appeals. Therefore, I join the majority's decision to reverse.

III

I agree with the trial court that the defendant failed to establish that the plaintiff failed to state a claim upon which relief may be granted. As such, summary disposition was correctly denied. Therefore, I would reverse the decision of the Court of Appeals and remand this case for further proceedings.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v CHRISTOPHER THOUSAND, Defendant-Appellee.

No. 116967

SUPREME COURT OF MICHIGAN

465 Mich. 149; 631 N.W.2d 694; 2001 Mich. LEXIS 1210

March 7, 2001, Argued

July 27, 2001, Decided

July 27, 2001, Filed

SUBSEQUENT HISTORY:
[***1] Certiorari Denied February 19, 2002, Reported at: 2002 U.S. LEXIS 696.

PRIOR HISTORY:
Wayne Circuit Court, Deborah A. Thomas, J. Court of Appeals, CAVANAGH, P.J., and SAWYER and ZAHRA, JJ. 241 Mich App 102 (2000) (Docket No. 220283).

DISPOSITION:
Reversed in part, affirmed in part, and remanded to the circuit court for proceedings consistent with this opinion. We do not retain jurisdiction.

COUNSEL:
Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Michael E. Duggan, Prosecuting Attorney, and Timothy A. Baughman, Chief, Research, Training and Appeals, Detroit, MI, for the people.
David E. Fregolle, Southfield, MI, for the defendant-appellee.

JUDGES:
BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER and MARKMAN, JJ., concurred with YOUNG, J. KELLY, J. (concurring in part and dissenting in part). CAVANAGH, J., concurred with KELLY, J. TAYLOR, J. (concurring in part and dissenting in part).

OPINIONBY:
Robert P. Young, Jr.

OPINION:

[*151] [**695] YOUNG, J.

We granted leave in this case to consider whether the doctrine of "impossibility" provides a defense to a charge of attempt to commit an offense prohibited by law under MCL 750.92 , or to a charge of solicitation to commit a felony under MCL 750.157b . [***2] The circuit court granted defendant's motion to quash and dismissed all charges against him on the basis [*152] that it was legally impossible for him to have committed any of the charged crimes. We conclude that the concept of impossibility, which this Court has never adopted as a defense, is not relevant to a determination whether a defendant has committed attempt under MCL 750.92 , and that the circuit court therefore erred in dismissing the charge of attempted distribution of obscene material to a minor on the basis of the doctrine of legal impossibility. We additionally conclude that, although the Court of Appeals erred to the extent that it relied upon the concept of "impossibility" in dismissing the charge of solicitation of third-degree criminal sexual conduct, the charge was nevertheless properly dismissed because there is no evidence that defendant solicited any person to "*commit a felony*" or to "do or omit to do an act which if completed would *constitute a felony*" as proscribed by MCL 750.157b . Accordingly, we reverse in part and

affirm in part the decision of the Court of Appeals and remand this matter to the circuit [***3] court for proceedings consistent with this opinion.

I. FACTUAL n1 AND PROCEDURAL BACKGROUND

n1 This case has not yet been tried. Our statement of facts is derived from the preliminary examination and motion hearing transcripts and from the documentation contained in the lower court record, including computer printouts of the Internet dialogue between "Bekka" and "Mr. Auto-Mag."

Deputy William Liczbinski was assigned by the Wayne County Sheriff's Department [**696] to conduct an undercover investigation for the department's Internet Crimes Bureau. Liczbinski was instructed to pose as a minor and log onto "chat rooms" on the Internet for [*153] the purpose of identifying persons using the Internet as a means for engaging in criminal activity.

On December 8, 1998, while using the screen name "Bekka," Liczbinski was approached by defendant, who was using the screen name "Mr. Auto-Mag," in an Internet chat room. Defendant described himself as a twenty-three-year-old male from Warren, and Bekka described herself as a fourteen-year- [***4] old female from Detroit. Bekka indicated that her name was Becky Fellins, and defendant revealed that his name was Chris Thousand. During this initial conversation, defendant sent Bekka, via the Internet, a photograph of his face.

From December 9 through 16, 1998, Liczbinski, still using the screen name "Bekka," engaged in chat room conversation with defendant. During these exchanges, the conversation became sexually explicit. Defendant made repeated lewd invitations to Bekka to engage in various sexual acts, despite various indications of her young age. n2

n2 Defendant at one point asked Bekka, "Ain't I a lil [sic] old??" Upon Bekka's negative reply, defendant asked, "You like us old guys?" Bekka explained that boys her age "act like little kids," and reiterated that she was fourteen years old. Bekka mentioned that her birthday was in 1984 and that she was in ninth grade, and defendant asked when she would be fifteen. Defendant asked whether Bekka was still "pure," to which Bekka responded that she was not, but that she did not have a lot of experience and that she was nervous.

[***5]

During one of his online conversations with Bekka, after asking her whether anyone was "around there," watching her, defendant indicated that he was sending her a picture of himself. Within seconds, Liczbinski received over the Internet a photograph of male genitalia. Defendant asked Bekka whether she liked and wanted it and whether she was getting "hot" yet, [*154] and described in a graphic manner the type of sexual acts he wished to perform with her. Defendant invited Bekka to come see him at his house for the purpose of engaging in sexual activity. Bekka replied that she wanted to do so, and defendant cautioned her that they had to be careful, because he could "go to jail." Defendant asked whether Bekka looked "over sixteen," so that if his roommates were home he could lie.

The two then planned to meet at an area McDonald's restaurant at 5:00 p.m. on the following Thursday. Defendant indicated that they could go to his house, and that he would tell his brother that Bekka was seventeen. Defendant instructed Bekka to wear a "nice sexy skirt," something that he could "get [his] head into." Defendant indicated that he would be dressed in black pants and shirt and a brown suede coat, [***6] and that he would be driving a green Duster. Bekka asked defendant to bring her a present, and indicated that she liked white teddy bears.

On Thursday, December 17, 1998, Liczbinski and other deputy sheriffs were present at the specified McDonald's restaurant when they saw defendant inside a vehicle matching the description given to Bekka by defendant. Defendant, who was wearing a brown suede jacket and black pants, got out of the vehicle and entered the restaurant. Liczbinski recognized defendant's face from the photograph that had been sent to Bekka. Defendant [**697] looked around for approximately thirty seconds before leaving the restaurant. Defendant was then taken into custody. Two white teddy bears were recovered from defendant's vehicle. Defendant's computer was subsequently seized from his home. A search of the hard drive [*155] revealed electronic logs of Internet conversations matching those printed out by Liczbinski from the Wayne County-owned computer he had used in his Internet conversations with defendant.

Following a preliminary examination, defendant was bound over for trial on charges of solicitation to commit third- degree criminal sexual conduct, MCL 750.157b(3)(a) [***7] and 750.520d(1)(a), attempted distribution of obscene material to a minor, MCL 750.92 and 722.675, and child sexually abusive activity, MCL 750.145c(2) . n3

n3 The prosecution's motion to add a count of attempted third-degree criminal sexual conduct was denied by the district court.

Additionally, although the original information charged defendant with the *completed* offense of distribution of obscene material to a minor, the circuit court subsequently granted the prosecution's motion to amend the charge to *attempted* distribution of obscene material to a minor.

Defendant brought a motion to quash the information, arguing that, because the existence of a child victim was an element of each of the charged offenses, the evidence was legally insufficient to support the charges. The circuit court agreed and dismissed the case, holding that it was legally impossible for defendant to have committed the charged offenses. The Court of Appeals affirmed the dismissal [***8] of the charges of solicitation and attempted distribution of obscene material to a minor, but reversed the dismissal of the charge of child sexually abusive activity. n4 241 Mich. App. 102, 614 N.W.2d 674 (2000).

n4 The Court of Appeals concluded that, because the child sexually abusive activity statute proscribes mere *preparation* to engage in such activity, the circuit court erred in dismissing that charge on the basis of the doctrine of legal impossibility. 241 Mich. App. 102, 115-117; 614 N.W.2d 674 (2000). We denied defendant's application for leave to appeal from this portion of the Court of Appeals opinion, and this charge is not presently before us.

[*156] We granted the prosecution's application for leave to appeal. n5 463 Mich. 906, 618 N.W.2d 772 (2000).

n5 In our order, we specifically directed the parties to address (1) whether legal impossibility is a viable defense under the circumstances of this case, and (2) whether the attempt statute codified the legal impossibility defense as part of the common law of attempt.

[***9]
II. STANDARD OF REVIEW

We must determine in this case whether the circuit court and the Court of Appeals properly applied the doctrine of "legal impossibility" in concluding that the charges against defendant of attempt and solicitation must be dismissed. The applicability of a legal doctrine is a question of law that is reviewed de novo. *James v Alberts*, 464 Mich. 12, 14; 626 N.W.2d 158 (2001). Similarly, the issue whether "impossibility" is a cognizable defense under Michigan's attempt and solicitation statutes presents questions of statutory construction, which we review de novo. *People v Clark*, 463 Mich. 459, 463, n.9; 619 N.W.2d 538 (2000); *People v Morey*, 461 Mich. 325, 329; 603 N.W.2d 250 (1999).

III. ANALYSIS

A. THE "IMPOSSIBILITY" DOCTRINE

The doctrine of "impossibility" as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant's mistake of fact or law, his actions [**698] could not possibly have resulted in the commission of the substantive crime underlying an attempt charge. Classic illustrations of the concept [***10] of impossibility [*157] include: (1) the defendant is prosecuted for attempted larceny after he tries to "pick" the victim's empty pocket n6; (2) the defendant is prosecuted for attempted rape after he tries to have nonconsensual intercourse, but is unsuccessful because he is impotent n7; (3) the defendant is prosecuted for attempting to receive stolen property where the property he received was not, in fact, stolen n8; and (4) the defendant is prosecuted for attempting to hunt deer out of season after he shoots at a stuffed decoy deer. n9 In each of these examples, despite evidence of the defendant's criminal intent, he cannot be prosecuted for the *completed* offense of larceny, rape, receiving stolen property, or hunting deer out of season, because proof of at least one element of each offense cannot be derived from his objective actions. The question, then, becomes whether the defendant can be prosecuted for the *attempted* offense, and the answer is dependent upon whether he may raise the defense of "impossibility."

n6 See *People v Jones*, 46 Mich. 441; 9 N.W. 486 (1881); *Commonwealth v McDonald*, 59 Mass. 365 (1850); *People v Twiggs*, 223 Cal. App. 2d 455; 35 Cal. Rptr. 859 (1963). [***11]

n7 See *Waters v State*, 2 Md. App. 216; 234 A.2d 147 (1967).

n8 See *Booth v State*, 398 P.2d 863 (Okla Crim App, 1964); *People v Jaffe*, 185 N.Y. 497; 78 N.E. 169 (1906).

n9 See *State v Guffey*, 262 S.W.2d 152 (Mo App, 1953).

Courts and legal scholars have drawn a distinction between two categories of impossibility: "factual impossibility" and "legal impossibility." It has been said that, at common law, legal impossibility is a defense to a charge of attempt, but factual impossibility is not. See American Law Institute, Model Penal Code and Commentaries (1985), comment to § 5.01, pp 307-317; Perkins & Boyce, Criminal Law (3d ed), [*158] p 632; Dressler, Understanding Criminal Law (1st ed), § 27.07[B], p 349. However, courts and scholars alike have struggled unsuccessfully over the years to articulate an accurate rule for distinguishing between the categories of "impossibility."

"Factual impossibility," which has apparently never been recognized in any American jurisdiction as a defense to a charge of [***12] attempt, n10 "exists when [the defendant's] intended end constitutes a crime but she fails to consummate it because of a factual circumstance unknown to her or beyond her control." Dressler, *supra*, § 27.07[C][1], p 350. An example of a "factual impossibility" scenario is where the defendant is prosecuted for attempted murder after pointing an unloaded gun at someone and pulling the trigger, where the defendant believed the gun was loaded. n11

n10 See *Commonwealth v Henley*, 504 Pa. 408, 411; 474 A.2d 1115 (1984); *State v Logan*, 232 Kan. 646, 648; 656 P.2d 777 (1983).

n11 See *State v Damms*, 9 Wis. 2d 183; 100 N.W.2d 592 (1960).

The category of "legal impossibility" is further divided into two subcategories: "pure" legal impossibility and "hybrid" legal impossibility. Although it is generally undisputed that "pure" legal impossibility will bar an attempt conviction, the concept of "hybrid legal impossibility" [***13] has proven problematic. As Professor Dressler points out, the failure of courts to distinguish between "pure" and "hybrid" legal impossibility has created confusion in this area of the law. Dressler, *supra*, § 27.07[D][1], p 351. [**699]

"*Pure legal impossibility* exists if the criminal law does not prohibit *D*'s conduct or the result that she has sought to achieve." *Id.*, § 27.07[D][2], p 352 [*159] (emphasis in original). In other words, the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law: "There can be no conviction of criminal attempt based upon D's erroneous notion that he was committing a crime." Perkins & Boyce, *supra*, p 634. As an example, consider the case of a man who believes that the legal age of consent is sixteen years old, and who believes that a girl with whom he had consensual sexual intercourse is fifteen years old. If the law actually fixed the age of consent at fifteen, this man would not be guilty of attempted statutory rape, despite his mistaken belief that the law prohibited his conduct. See Dressler, *supra*, § 27.07[D][2], pp 352-353, n 25. [***14]

When courts speak of "legal impossibility," they are generally referring to what is more accurately described as "hybrid" legal impossibility.

Most claims of legal impossibility are of the hybrid variety. *Hybrid legal impossibility* exists if D's goal was illegal, but commission of the offense was impossible due to a factual mistake by her regarding the legal status of some factor relevant to her conduct. This version of impossibility is a "hybrid" because, as the definition implies and as is clarified immediately below, D's impossibility claim includes both a legal and a factual aspect to it.

Courts have recognized a defense of legal impossibility or have stated that it would exist if D receives unstolen property believing it was stolen; tries to pick the pocket of a stone image of a human; offers a bribe to a "juror" who is not a juror; tries to hunt deer out of season by shooting a stuffed animal; shoots a corpse believing that it is alive; or shoots at a tree stump believing that it is a human.

Notice that each of the mistakes in these cases affected the legal status of some aspect of the defendant's conduct. The status of property as "stolen" is necessary to commit [***15] [*160] the crime of "receiving stolen property with knowledge it is stolen"-i.e., a person legally is incapable of committing this offense if the property is not stolen. The status of a person as a "juror" is legally necessary to commit the offense of bribing a juror. The status of a victim as a "human being" (rather than as a corpse, tree stump, or statue) legally is necessary to commit the crime of murder or to "take and carry away the personal property *of another*." Finally, putting a bullet into a stuffed deer can never constitute the crime of hunting out of season.

On the other hand, in each example of hybrid legal impossibility *D* was mistaken about a fact: whether property was stolen, whether a person was a juror, whether the victims were human or whether the victim was an animal subject to being hunted out of season. [Dressler, *supra*, § 27.07[D][3][a], pp 353-354 (emphasis in original).]

As the Court of Appeals panel in this case accurately noted, it is possible to view virtually any example of "hybrid legal impossibility" as an example of "factual impossibility":

"*Ultimately any case of hybrid legal impossibility may reasonably be characterized as factual* [***16] *impossibility....* By skillful characterization, one can describe virtually any case of hybrid legal impossibility, which is a common law defense, as an example of factual impossibility, which is *not* a defense." [241 Mich. App. at 106 (emphasis [**700] in original), quoting Dressler, Understanding Criminal Law (2d ed), § 27.07[D][3][a], pp 374-375.]

See also Weiss, *Scope, mistake, and impossibility: The philosophy of language and problems of mens rea*, 83 Colum L R 1029, 1029-1030 (1983) ("because ordinary English cannot adequately distinguish among the various kinds of impossible attempts, courts and commentators have frequently misclassified certain types of cases"); *United States v Thomas*, 13 U.S.C.M.A. 278, 283; 32 C.M.R. 278, 283 (1962) ("what is abundantly [*161] clear ... is that it is most difficult to classify any particular state of facts as positively coming within one of these categories to the exclusion of the other"); *State v* , 52 N.J. 182, 189; 244 A.2d 499 (1968) ("our examination of [authorities discussing the doctrine of impossibility] convinces us that the application of the [***17] defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice").

It is notable that "the great majority of jurisdictions have now recognized that legal and factual impossibility are 'logically indistinguishable' ... and have abolished impossibility as a defense." *United States v Hsu*, 155 F.3d 189, 199 (CA 3, 1998). n12 For example, several states have adopted statutory provisions similar to Model Penal Code, § 5.01(1), n13 which provides:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

[*162] (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting [***18] a substantial step in a course of conduct planned to culminate in his commission of the crime.

In other jurisdictions, courts have considered the "impossibility" defense under attempt statutes that did not include language explicitly abolishing the defense. Several of these courts have simply declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing "factual" or "legal" impossibility, and have instead examined solely the words of the applicable attempt [***19] statute. See *Darnell v State,* 92 Nev. 680; 558 P.2d 624 (1976); *Moretti, supra* 52 N.J. at 189; *People v Rojas*, 55 Cal. 2d 252; 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

n12 Apart from judicial abrogation of this doctrine, many states have done so by legislative enactment. In a 1995 law review article, California Deputy Attorney General Kyle Brodie listed twenty states that had specifically abolished the defense of impossibility by legislative enactment. Brodie, *The obviously impossible attempt: A proposed revision to the Model Penal Code*, 15 N Ill U L R 237, n 39 (1995).

n13 See, e.g., Kan Stat Ann 21, § 3301; Colo Rev Stat 18-2-101(1); New York Penal Law 110.10.

B. ATTEMPTED DISTRIBUTION OF OBSCENE MATERIAL TO A MINOR

The Court of Appeals panel in this case, after examining Professor Dressler's exposition of the doctrine of impossibility, concluded that it was legally impossible for defendant [***20] to have committed the charged [**701] offense of attempted distribution of obscene material to a minor. The panel held that, because "Bekka" was, in fact, an adult, an essential requirement of the underlying substantive offense was not met (dissemination to a minor), and therefore it was legally impossible for defendant to have committed the crime.

We begin by noting that the concept of "impossibility," in either its "factual" or "legal" variant, has never been recognized by this Court as a valid defense to a charge of attempt. In arguing that impossibility is a judicially recognized defense in Michigan, defendant [*163] relies heavily on our statement in *People v Tinskey*, 394 Mich. 108; 228 N.W.2d 782 (1975), that it is possible, *although we need not decide*, that defendants could not have been convicted of attempted abortion; at common law the general rule is that while factual impossibility is not a defense (*People v Jones*, 46 Mich. 441; 9 N.W. 486 [1881]) n14, legal impossibility is a defense. LaFave & Scott, Criminal Law, § 62, p 474. [Emphasis supplied.]

n14 In *Jones*, this Court, without mentioning the term "impossibility," held that a conviction of attempted larceny could stand notwithstanding that the defendant picked an empty pocket.

[***21]

As is readily apparent, our statement in *Tinskey* regarding "legal impossibility" as a defense to an attempt charge is nothing more than obiter dictum. The defendants in *Tinskey* were not charged with attempt; rather, they were charged with statutory conspiracy. Moreover, we *specifically declined* in *Tinskey* to express any opinion regarding the viability of the "impossibility" defense in the context of attempts. No other Michigan Supreme Court case has referenced, much less adopted, the impossibility defense.

Finding no recognition of impossibility in our common law, we turn now to the terms of the statute. MCL 750.92 provides, in relevant part:

Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

*** [*164] 3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment [***22] in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor ....

Under our statute, then, an "attempt" consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense. We have further explained the elements of attempt under our statute as including "an intent to do an act or to bring about certain consequences which would in law amount to a crime n15; and ... an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich. 88, 100; 504 N.W.2d 158 (1993), quoting 2 LaFave & Scott, Substantive Criminal Law, § 6.2, p 18.

n15 The characterization of "attempt" as a "specific intent" crime is fully consistent with the plain meaning of the word "attempt." See Perkins & Boyce, *supra* at 637 ("the word 'attempt' means to try; it implies an effort to bring about a desired result. Hence an attempt to commit any crime requires a specific intent to commit that particular offense").

[***23] [**702] In determining whether "impossibility," were we to recognize the doctrine, is a viable defense to a charge of attempt under MCL 750.92 , our obligation is to examine the statute in an effort to discern and give effect to the legislative intent that may reasonably be inferred from the text of the statute itself. *People v McIntire*, 461 Mich. 147, 152-153; 599 N.W.2d 102 (1999). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular [*165] case." *Id.* at 153 (citation omitted). Accordingly, if our Legislature has indicated its intent to criminalize certain conduct despite the actor's mistake of fact, this Court does not have the authority to create and apply a substantive defense based upon the concept of "impossibility." See *People v Glass (After Remand)*, 464 Mich. 266, 627 N.W.2d 261 (Mich. 2001).

We are unable to discern from the words of the attempt statute any legislative intent that the concept [***24] of "impossibility" provide any impediment to charging a defendant with, or convicting him of, an attempted crime, notwithstanding any factual mistake-regarding either the attendant circumstances or the legal status of some factor relevant thereto-that he may harbor. The attempt statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.

Defendant in this case is not charged with the substantive crime of distributing obscene material to a minor in violation of MCL 722.675 . n16 It is unquestioned that defendant could not be convicted of that [*166] crime, because defendant allegedly distributed obscene material not to "a minor," but to an adult man. Instead, defendant is charged with the distinct offense of attempt, which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be "impossible" for the defendant to have committed the *completed* offense is simply irrelevant to the [***25] analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act "towards the commission" of the intended offense.

n16 At the time of the alleged offense, MCL 722.675 provided, in relevant part:

(1) A person is guilty of distributing obscene matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

***(2) A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.

(3) A person knows the nature of matter if the person either is aware of the character and content of the matter or recklessly disregards circumstances suggesting the character and content of the matter.

(4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.

[**703] [***26]

Because the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case, the circuit court erred in dismissing this charge on the basis of "legal impossibility."

C. SOLICITATION TO COMMIT THIRD-DEGREE CRIMINAL SEXUAL CONDUCT

1. ANALYSIS

Defendant was additionally charged, on the basis of his Internet conversations with "Bekka," with solicitation [*167] to commit third-degree criminal sexual conduct. Defendant maintains that it was "legally impossible" for him to have committed this crime, because the underlying felony requires the existence of a child under the age of sixteen. n17 The Court of Appeals panel agreed, concluding that it was legally impossible for defendant to have committed the crime because the underlying form of third-degree criminal sexual conduct charged, MCL 750.520d(1)(a) , required the existence of a person under the age of sixteen. The panel further concluded that it was legally impossible for defendant to have committed the crime for the additional reason that he did not "solicit[] another person to commit a felony" as proscribed by the solicitation statute.

n17 MCL 750.520d(1) provides that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and ... (a) that other person is at least 13 years of age and under 16 years of age."

[***27]

Our solicitation statute, MCL 750.157b , provides as follows, in relevant part:

(1) For purposes of this section, "solicit" means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.

***(3) ... [A] person who solicits *another person to commit a felony*, or who solicits *another person to do or omit to do an act which if completed would constitute a felony*, is punishable as follows:

(a) If the offense solicited is a felony punishable by imprisonment for life, or for 5 years or more, the person is guilty of a felony .... [Emphasis supplied.]

[*168] The Court of Appeals erred to the extent that it relied on the doctrine of "impossibility" as a ground for affirming the circuit court's dismissal of the solicitation charge. As we have explained, Michigan has never adopted the doctrine of impossibility as a defense in its traditional *attempt* context, much less in the context of *solicitation* crimes. Moreover, we are unable to locate any authority, and defendant has provided none, for the proposition that "impossibility" is a recognized defense to a charge [***28] of solicitation in other jurisdictions. n18

n18 On the other hand, some courts have had occasion to specifically reject the notion that impossibility is a defense to solicitation. See, e.g., *Benson v Superior Court of Los Angeles Co*, 57 Cal. 2d 240, 243-244; 368 P.2d 116, 18 Cal. Rptr. 516 (1962) ("if the solicitor believes that the act can be committed 'it is immaterial that the crime urged is not possible of fulfilment at the time when the words are spoken' or becomes impossible at a later time" [citations omitted]). See also Model Penal Code, § 5.04(1) (Proposed Official Draft 1985) ("It is immaterial to the liability of a person who solicits or conspires with another to commit a crime that: (b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime").

Nevertheless, the solicitation charge was properly dismissed for the reason that there is no evidence that defendant [**704] in our case solicited [***29] anyone "to commit a felony" or "to do or omit to do an act which if completed would constitute a felony" as prohibited by MCL 750.157b . Pursuant to the plain statutory language, the prosecution was required to present evidence that defendant requested that *another person* perform a criminal act. The evidence here shows only that defendant requested that "Bekka" engage in sexual acts with him. While the requested acts might well have constituted a crime on defendant's part, "Bekka" (or Liczbinski) would not have committed third-degree criminal sexual conduct had she (or he) done [*169] as defendant suggested. As the Court of Appeals properly concluded:

What is lacking here is defendant's request to another person to commit a crime. "Bekka," the fourteen-year-old online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a crime for defendant to engage in sexual intercourse with a fourteen-year- old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC- III) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to engage [***30] in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC-III. ...

For the above reasons we conclude that the trial court properly dismissed the charge of solicitation to commit criminal sexual conduct. [241 Mich. App. at 111.] Accordingly, while the concept of "impossibility" has no role in the analysis of this issue, we agree with the panel's conclusion that an element of the statutory offense is missing and that the solicitation charge was therefore properly dismissed.

2. RESPONSE TO THE DISSENT

In his partial dissent, Justice TAYLOR opines that our construction of MCL 750.157b(3) renders the second phrase of that subsection a "nullity," and that this phrase- "or who solicits another person to do or omit to do an act which if completed would constitute a felony"-should be read to encompass "situations where the solicitee could not be charged with the felony, but the solicitor could be." Slip op, pp 3- 4. We disagree.

[*170] We first note that, pursuant to the plain language of this phrase, it is the act of "*another person*" that must, if completed, [***31] "constitute a felony." We believe that the plain language of the statute does not support the interpretation our dissenting colleague gives it.

Moreover, our construction of § 157b(3) does not render the second phrase of that subsection "nugatory" or "surplusage." Rather, it appears that the Legislature, by its use of the phrase "do or omit to do an act which if completed would constitute a felony," intended to make clear that the solicited offense does not have to be completed.

It is noteworthy that § 157b was substantially amended in 1986, following this Court's holding in *People v Rehkopf*, 422 Mich. 198; 370 N.W.2d 296 (1985). In *Rehkopf*, this Court examined two cases in which the defendants were charged under the former version of § 157b. Defendant Rehkopf had asked an undercover police officer to kill her husband, and defendant Snyder had asked someone to kill his brother. In neither case did the intended murder ever occur. This Court held that the statute was not violated where the defendants' conduct did not lead to the results the defendants urged-namely, the deaths of Rehkopf's husband or Snyder's brother. [**705]

In 1985, the statute [***32] read as follows, in pertinent part:

Any person who incites, induces or exhorts any other person to ... do any act which would constitute a felony ... shall be punished in the same manner as if he had committed the offense incited, induced or exhorted.

The *Rehkopf* majority held that

[*171] § 157b does not subject a person to criminal responsibility for utterances that do not result in the commission of the offense sought to be committed. A person who does no more than utter words seeking the commission of an offense is subject to liability only for the common-law offense of solicitation. [*Id.* at 205.] n19 Justice BOYLE and Chief Justice WILLIAMS dissented, opining that § 157b contained no requirement "that the solicitation result in either actual incitement or completion of the solicited offense." *Id.* at 223.

n19 This Court pointed out that "solicitation remains a common-law offense in Michigan for which a maximum of five years imprisonment and a $ 10,000 fine may be imposed" pursuant to MCL 750.505 . 422 Mich. at 205 n.3.

In [***33] 1986, the Legislature rewrote § 157b. The first clause of current subsection 157b(3) ("a person who solicits another person to commit a felony"), apart from using the term "solicits," is quite similar to the phrase "any person who incites, induces or exhorts any other person to do any act which would constitute a felony" as used in the prior version of § 157b. However, the Legislature apparently deemed it necessary-

reasonably so, in light of the *Rehkopf* Court's construction of § 157b-to clarify that the solicited act need not be completed in order to satisfy the elements of the statute. Accordingly, the second clause of subsection 157b(3) provides further that the statute is violated where the defendant "solicits another person to do or omit to do an act which *if completed* would constitute a felony" (emphasis supplied). It is quite probable that the Legislature believed that the phrase "solicits another person to commit a felony" would not have reached solicitations in which the [*172] solicited act never came to fruition, and that the second clause was added for this purpose.

IV. CONCLUSION [***34]

This Court has never recognized the doctrine of impossibility. Moreover, we are unable to discern any legislative intent that the doctrine may be advanced as a defense to a charge of attempt under MCL 750.92 . Accordingly, the circuit court erred in dismissing this charge on the basis that it was "legally impossible" for defendant to have committed the crime.

Furthermore, although we do not agree with the circuit court or the Court of Appeals that "legal impossibility" was properly invoked by defendant as a defense to the charge of solicitation, we nevertheless affirm the dismissal of this charge. There is no evidence that defendant solicited anyone "to commit a felony" or "to do or omit to do an act which if completed would constitute a felony."

Accordingly, we reverse in part, affirm in part, and remand this matter to the circuit court for proceedings consistent with this opinion. We do not retain jurisdiction.

CORRIGAN, C.J., and WEAVER and MARKMAN, JJ., concurred with YOUNG, J.

CONCURBY:
Marilyn Kelly (In Part); Clifford W. Taylor (In Part)

DISSENTBY:
Marilyn Kelly (In Part); Clifford W. Taylor (In Part)

DISSENT:

KELLY, [***35] J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's conclusion that the doctrine of "legal [**706] impossibility" has never been adopted in Michigan. There is ample evidence to the contrary in the case law of the state. Because "legal impossibility" is a viable defense, I [*173] would affirm the Court of Appeals decision affirming the circuit court's dismissal of attempted distribution of obscene material to a minor. MCL 750.92 , 722.675.

I would also find that legal impossibility, while a viable defense to solicitation, is inapplicable to the charge of solicitation to commit third-degree criminal sexual conduct in this case. MCL 750.157b(3)(a) , 750.520d(1)(a). I agree with the majority's conclusion that there is no evidence that defendant solicited anyone to commit CSC-III. Therefore, I would affirm the Court of Appeals decision affirming the circuit court's dismissal of the solicitation charge, but on different grounds.

I. "LEGAL IMPOSSIBILITY" IN MICHIGAN

The majority errs in concluding that "legal impossibility" has never been adopted in Michigan. It focuses on language in *Tinskey* n1 pertaining [***36] to "legal impossibility" as a defense to attempt, but ignores the reasoning of the decision. Viewing the forest as well as the trees, one observes that the reasoning and the conclusion of the *Tinskey* Court prove that it accepted the doctrine of "legal impossibility."

n1 *People v Tinskey*, 394 Mich. 108; 228 N.W.2d 782 (1975).

Tinskey held that the defendants could not be guilty of conspiracy to commit abortion because the woman who was to be aborted was not pregnant. *Tinskey, supra* at 109. The Court reasoned that the Legislature, in enacting the statute, purposely required that conspiracy to abort involve a pregnant woman. It thereby rejected prosecutions where the woman was not pregnant. It concluded that the defendants [*174] in *Tinskey* could not be prosecuted for conspiracy to commit abortion because one of the elements of the crime, a pregnant woman, could not be established.

Significantly, the *Tinskey* Court stated that " the Legislature has not, as to [***37] most other offenses, so similarly indicated that impossibility is not a defense." *Id.* n2 By this language, *Tinskey* expressly recognized the existence of the "legal impossibility" defense in the common law of this state. Even though the reference to "legal impossibility" regarding the crime of attempt may be dictum, the later statement regarding the "impossibility" defense was part of the reasoning and conclusion in *Tinskey*. This Court recognized the defense, even if it did not do so expressly concerning charges for attempt or solicitation.

n2 I take this to mean that with respect to conspiracy to abort, as with most other statutory crimes, the Legislature has not indicated that

impossibility is not a defense. Hence, it *is* a defense.

Moreover, Michigan common law n3 is not limited to decisions from this Court. The majority should not ignore decisions from the Court of Appeals. That Court has accepted "legal impossibility" as a defense.

n3 Common law is "the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs .... In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments." Black's Law Dictionary (6th ed), p 276.

[***38]

For example, in *People v Ng*, the Court of Appeals distinguished between "factual impossibility" and "legal impossibility" in [**707] rejecting a defendant's argument that he was not guilty of attempted murder. 156 Mich. App. 779, 786; 402 N.W.2d 500 (1986). It found [*175] that factual impossibility is not a defense to a charge of attempted murder, but observed that legal impossibility *is* a defense, citing *Tinskey*. Similarly, in *People v Cain*, the court distinguished between "legal impossibility" and a defense based on a claim of right. 238 Mich. App. 95, 117-119; 605 N.W.2d 28 (1999). It implicitly read *Tinskey* as acknowledging the existence of the "legal impossibility" defense. n4 Accordingly, in this case, the Court of Appeals correctly considered "legal impossibility" a viable defense.

n4 See also *People v Genoa*, 188 Mich. App. 461, 464; 470 N.W.2d 447 (1991). *Genoa* held that the circuit court correctly dismissed the charge of attempted possession with intent to deliver 650 grams or more of cocaine. Judge Shepherd based the holding on the fact that it was legally impossible for the defendant to have committed the offense.

[***39]

II. INTERPRETATION OF THE ATTEMPT STATUTE

Even if "legal impossibility" were not part of Michigan's common law, I would disagree with the majority's interpretation of the attempt statute. It does not follow from the fact that the statute does not expressly incorporate the concept of impossibility that the defense is inapplicable.

Examination of the language of the attempt statute leads to a reasonable inference that the Legislature did not intend to punish conduct that a mistake of legal fact renders unprohibited. The attempt statute makes illegal an "... attempt to *commit an offense prohibited by law* ...." MCL 750.92 (emphasis added). It does not make illegal an action not prohibited by law. Hence, one may conclude, the impossibility of completing the underlying crime can provide a defense to attempt.

[*176] This reasoning is supported by the fact that the attempt statute codified the common-law rule regarding the elements of attempt. See *People v Youngs*, 122 Mich. 292, 293; 81 N.W. 114 (1899); People *v Webb*, 127 Mich. 29, 31-32; 86 N.W. 406 (1901). At common law, "legal impossibility" is a defense [***40] to attempt. *United States v Hsu*, 155 F.3d 189, 199-200 (CA 3, 1998); Dressler, Understanding Criminal Law (2d ed), § 27.07[B], p 369; 21 Am Jur 2d, Criminal Law, § 178, p 254. Absent a statute expressly abrogating "legal impossibility," this common-law rule continues to provide a viable defense. *Bandfield v Bandfield*, 117 Mich. 80, 82; 75 N.W. 287 (1898), rev'd in part on other grounds *Hosko v Hosko*, 385 Mich. 39; 187 N.W.2d 236 (1971). n5

n5 The *Bandfield* Court stated: "The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations." 117 Mich. at 82.

This state's attempt statute, unlike the Model Penal Code and various state statutes that follow it, does not contain language allowing for consideration of a defendant's beliefs regarding "attendant circumstances." Rather, it takes an "objective" [***41] view of criminality, focusing on whether the defendant actually came close to completing the prohibited act. 1 Robinson, Criminal Law Defenses, § 85(a), pp 423-424; § 85(b), p 426, n 22. The impossibility of completing the offense is relevant to this objective approach because impossibility obviates the state's "concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent." *Id.* at 424. [**708]

[*177] The majority's conclusion, that it is irrelevant whether it would be impossible to have committed the completed offense, contradicts the

language used in the attempt statute. If an element of the offense cannot be established, an accused cannot be found guilty of the prohibited act. The underlying offense in this case, disseminating or exhibiting sexual material to a minor, requires a minor recipient. Because the dissemination was not to a minor, it is legally impossible for defendant to have committed the prohibited act.

This Court should affirm the Court of Appeals decision, determining that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor, MCL 750.92 , [***42] 722.675.

III. THE SOLICITATION STATUTE

I further disagree with the majority's conclusion that "legal impossibility" is not a recognized defense to a solicitation charge. As discussed above, the defense has been implicitly acknowledged in Michigan's case law. The majority states that no authority supports the proposition that "legal impossibility" is a defense to solicitation in other jurisdictions. However, this fact is unremarkable in light of the rarity with which the defense is invoked. Moreover, "the impossibility issue can arise in all inchoate offenses," including solicitation. Robinson, *supra* at § 85(f)(2), p 436.

The language of our solicitation statute demonstrates that an illegal solicitation must concern an act that would constitute a felony if completed. The statute [*178] states, "a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows ...." MCL 750.157b(3) .

"Legal impossibility" would be a defense if the defendant's goal were illegal but the offense incomplete due to the defendant's factual mistake concerning the legal status [***43] of a relevant circumstance. See Dressler, *supra* at § 27.07[D][3][a], p 373 (discussing "hybrid legal impossibility"). In this case, defendant was mistaken regarding the legal status of "Bekka," whom he believed to be a female minor but who was actually a male adult.

However, defendant's factual mistake is irrelevant in analyzing the charge of solicitation to commit third-degree criminal sexual conduct. Even if he had made his request to engage in sexual intercourse to a fourteen-year-old girl, defendant, not the girl, would have violated the CSC-III statute. Therefore, I agree with the majority that defendant did not solicit "Bekka" to commit an act that constituted a felony within the meaning of the solicitation statute.

I note that this is the same conclusion reached by the Court of Appeals. See *People v Thousand*, 241 Mich. App. 102, 111; 614 N.W.2d 674 (2000). That Court erred, however, in applying a "legal impossibility" analysis. It was not defendant's mistake regarding the minority status of "Bekka" that is significant. Rather, an element of the solicitation charge is missing. "Legal impossibility" is, therefore, irrelevant under the facts of this [***44] case. The solicitation charge was properly dismissed because the prosecution could not prove all elements of the crime.

[*179] IV. CONCLUSION

As judges, we often decide cases involving disturbing facts. However repugnant we personally find the criminal conduct charged, we must decide the issues on the basis of the law. I certainly do not wish to have child predators loose in society. However, I believe that neither the law [**709] nor society is served by allowing the end of removing them from society to excuse unjust means to accomplish it. In this case, defendant raised a legal impossibility argument that is supported by Michigan case law. The majority, in determining that legal impossibility is not a viable defense in this state, ignores that law.

In keeping with precedent and legal authority, I would affirm the Court of Appeals decision that it was legally impossible for defendant to commit the charged offense of attempted distribution of obscene material to a minor. Of course, if this view prevailed, defendant could still be prosecuted for his alleged misconduct. He is to be tried on the most serious of the charges, child sexually abusive activity, MCL 750.145c . [***45]

With regard to the solicitation charge, I disagree with the majority's conclusion that "legal impossibility" is not a defense to solicitation. However, the defense does not apply under the facts of this case. Even if the facts had been as defendant believed, defendant did not solicit "Bekka" to commit CSC-III. Hence, an essential element of the solicitation charge is missing. The charge was properly dismissed for that reason, not because of the availability of the "legal impossibility" defense.

[*180]

CAVANAGH, J., concurred with KELLY, J.

TAYLOR, J. (*concurring in part and dissenting in part*).

I agree with the majority's recitation of the facts and its excellent analysis of why "hybrid legal impossibility" should not be recognized as a defense to a charge of attempt under MCL 750.92 . Thus, I concur with parts I, II, III(A), and III(B) of the majority opinion.

However, I respectfully dissent from the majority's analysis of the solicitation of third-degree criminal sexual conduct (CSC-III) charge in part III(C). In my view, defendant may be charged with solicitation on the

basis of the evidence that he solicited a person whom he believed to be a fourteen-year-old child to engage in an act of sexual [***46] penetration even though a child victim of such an act of CSC- III would not be guilty of CSC-III for "voluntarily" engaging in the act.

My difference with the majority is in its understanding of the solicitation statute, MCL 750.157b(3) . That section provides in pertinent part:

[A] person who solicits another person to commit a felony, *or who solicits another person to do or omit to do an act which if completed would constitute a felony,* is punishable as follows: .... [Emphasis added.]

As to the first clause ("a person who solicits another person to commit a felony"), I agree with the majority that defendant cannot be considered to have asked "Bekka" to *commit* the felony of CSC-III in violation of the solicitation statute because she cannot commit this felony by engaging in sex with an adult. If an adult and a child aged thirteen to fifteen engage in an act of "consensual" sexual penetration, only the [*181] adult would be committing the crime of CSC-III. n1 Thus, an adult who asks a fourteen-year-old child to engage in such an act cannot be considered to have asked [**710] the child to commit CSC-III. That is, the solicitor has not breached the first clause in this [***47] section.

n1 The CSC-III statute provides, in pertinent part, that "[a] person is guilty of [CSC-III] if the person engages in sexual penetration with another person and ... that other person is at least 13 years of age and under 16 years of age." MCL 750.520d(1)(a) . As one would expect, this language is phrased so as to impose criminal liability on an adult who engages in sexual penetration with a child aged thirteen to fifteen without imposing liability on the child victim of the crime.

However, regarding the disjunctive clause that follows the first clause, i.e., "or who solicits another person to do or omit to do an act which if completed would constitute a felony," this language is broader in scope than merely prohibiting a person from soliciting another person to commit a felony. I believe this language makes it unlawful to solicit another person to do an act that if the act were completed would be a felony. While this part of the statute surely is not as clear as it could be, [***48] n2 we must use statutory construction rules to give it meaning. A primary rule is that we should avoid making the second clause a nullity by giving it the same meaning as the first clause. n3 Using this tool, I conclude that the second clause means it is unlawful to solicit another person to join with the solicitor in doing an act that would constitute a felony [*182] whether the solicited party could be guilty of the felony or not.

n2 Perhaps the Legislature will want to consider revising the solicitation statute to employ more straightforward language in place of the phrase "to do or omit to do an act which if completed would constitute a felony."

n3 "It is a maxim of statutory construction that every word of a statute should be read in a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecommunications Complaint,* 460 Mich. 396, 414; 596 N.W.2d 164 (1999); see also *People v Warren,* 462 Mich. 415, 429, n.24; 615 N.W.2d 691 (2000) (no word of a statute should be treated as surplusage or rendered nugatory).

[***49]

This all means that the first clause requires that the solicited act would be a felony for which the solicitee could be charged. The second clause encompasses situations where the solicitee could not be charged with the felony, but the solicitor could be. This construction of the statute gives viability to both clauses of the section at issue and is, thus, in my view, not only preferable, but required.

The gist of the majority opinion, with regard to the solicitation issue, is that the second phrase, i.e., "or who solicits another person to do or omit to do an act which if completed would constitute a felony," is merely clarifying language to make clear that the Legislature did not intend to require that the solicitee actually complete the solicited felony in order for the solicitor to have violated the statute. That is, the majority states that the second clause was "intended to make clear that the solicited offense does not have to be completed." Slip op, p 23. Yet, the majority seems to acknowledge that the first clause is also violated by a solicitation to commit a felony even if the felony is never actually completed. This, then, makes the second clause a nullity. It is that [***50] outcome that disciplined readers of statutes should avoid.

Also, the majority indicates that my interpretation is contrary to the plain language of the statute because "it is the act of '*another person*' that must, if completed, 'constitute a felony.'" Slip op, p 23. I disagree because the majority's view on this point fails to give meaning to the words "if completed." If, as the majority argues, the

conduct of the solicitee in itself must constitute a felony, then the language of the second [*183] phrase has no different meaning than if it simply referred to "an act which ... would constitute a felony." The reason is that, if the statutory language read "or who solicits another person to do or omit to do an act which would constitute a felony," then it might well be argued that the solicited person's contemplated "act," standing alone, must constitute a felony for the statute to be violated. However, the [**711] "if completed" language allows for the imposition of liability where completion of the solicited act by another person would necessarily constitute a felony.

I agree with the majority that the current language of the solicitation statute, MCL 750.157b , seems to [***51] be in large measure a reaction to this Court's interpretation of the preceding statutory language at issue in *People v Rehkopf,* 422 Mich. 198; 370 N.W.2d 296 (1985). However, that means only that the Legislature intended to include circumstances in which the solicited felony is never actually committed within the scope of the solicitation statute. Indeed, the language of the first clause proscribing a person from merely asking another person "to commit a felony" suffices, by its plain and unambiguous meaning, to accomplish that goal. That does not mean, however, that the Legislature might not have wanted to cover more situations inasmuch as it was acting to broaden the scope of the statute. Accordingly, the discussion of *Rehkopf* does not alter my view that, in keeping with the canon of construction against rendering statutory language nugatory or surplusage, the second clause must be taken as encompassing more than the first clause, standing alone, does.

Turning to the circumstances of the present case, there was evidence that defendant solicited "Bekka," [*184] believing "her" to be a fourteen-year-old child, to engage in an act of sexual penetration with [***52] him. In other words, defendant solicited "Bekka" to engage with him in an act of sexual penetration between an adult and a fourteen-year-old child. Thus, defendant solicited "Bekka" to do an act that, "if completed" by the participation of defendant, would constitute the felony of CSC-III on defendant's part. Accordingly, I conclude that such a solicitation falls within the range of conduct in the solicitation statute's prohibition of soliciting another person "to do ... an act which if completed would constitute a felony." MCL 750.157b(3) .

Of course, I recognize that because "Bekka" was actually Deputy William Liczbinski, an adult, the solicited person could not actually have committed the act envisioned by defendant. However, that is immaterial. There is nothing in the language of the pertinent part of the solicitation statute, MCL 750.157b(3) , that requires that it be possible for the solicited person to carry out the conduct that is solicited in order for the statute to be violated. Thus, consistent with the majority opinion's rejection of the "legal impossibility" defense, I conclude that it is immaterial that the deputy could [***53] not have carried out the solicited act.

Accordingly, I agree with the majority's treatment of the attempted distribution of obscene material to a minor charge. However, I would also reverse the Court of Appeals with regard to the solicitation of CSC-III charge, and would remand to the circuit court for trial on that charge.

Ralston, Susan B. 536021

From: Karl Rove [kr@georgewbush.com]
Sent: Wednesday, May 21, 2003 8:19 AM
To: Ralston, Susan B.
Subject: FW: FINAL KY Gov.'s Primary Update & Fletcher Congratulatory Call #'s

Run off copy for potus file and add Fletcher to call list
------ Forwarded Message
From: "Matt Schlapp" <mschlapp@georgewbush.com>
Date: Tue, 20 May 2003 21:01:02 -0400
To: <David_B._Rachelson@who.eop.gov>, "Karl Rove" <KR@georgewbush.com>, "Ken Mehlman" <kmehlman@georgewbush.com>, "Coddy Johnson" <cjohnson@georgewbush.com>, <Collister_W._Johnson@who.eop.gov>, "Kate Walters" <kate@georgewbush.com>
Cc: <Kevin_B._Graney@who.eop.gov>
Subject: Re: FINAL KY Gov.'s Primary Update & Fletcher Congratulatory Call #'s

I called daniel groves and told him that the wh was very excited for ernie and left a message (ernie was in an interview)

-----Original Message-----
From: David_B._Rachelson@who.eop.gov <David_B._Rachelson@who.eop.gov>
To: Karl Rove <KR@georgewbush.com>; Ken Mehlman <kmehlman@georgewbush.com>; Matt Schlapp <mschlapp@georgewbush.com>; Coddy Johnson <cjohnson@georgewbush.com>; Collister_W._Johnson@who.eop.gov <Collister_W._Johnson@who.eop.gov>; Kate Walters <kate@georgewbush.com>
CC: Kevin_B._Graney@who.eop.gov <Kevin_B._Graney@who.eop.gov>
Sent: Tue May 20 20:51:37 2003
Subject: FINAL KY Gov.'s Primary Update & Fletcher Congratulatory Call #'s

(See attached file: 5-20 FletcherCall Info..doc)

Fletcher has been declared the winner in the GOP primary by media outlets.
Below are the most recent results. And in case Karl, Ken, or Matt would like to call and congratulate Fletcher, his contact numbers are as follows:

This Evening:
c. PRA 6 (Daniel Groves' - campaign manager - cell)
or
c. PRA 6 (Ernie Fletcher's personal cell)

Tomorrow:
c. PRA 6 (Ernie Fletcher's personal cell).

The attachment provides expanded background on the race.

With 3,306 of 3,464 total precincts reporting (95.4 percent of total precincts):
GOP
Fletcher - 57.9 %

5/21/2003

Jackson - 27.8 %
Nunn - 12.9 %
Moore - 1.4%

Democrat
Chandler - 50.5%
Richards - 46.2 %
Hensley - 3.3 %

Thanks again,
David

------ End of Forwarded Message

5/21/2003


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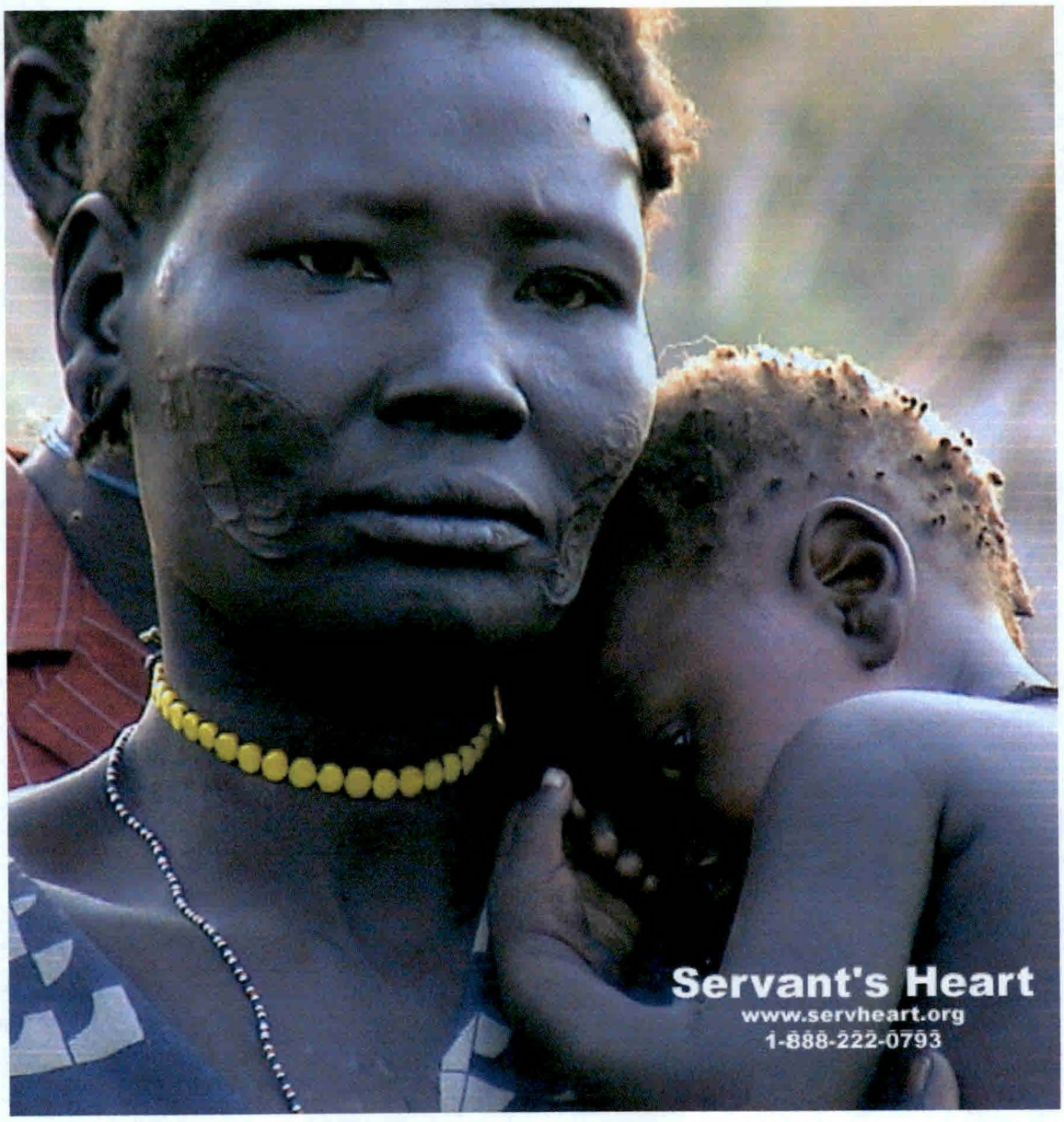
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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Douglas J. McCarron
General President

September 30, 2002

The Honorable Paul Sarbanes
Chairman
Senate Committee on Banking, Housing and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Michael Oxley
Chairman
House Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Sarbanes and Oxley:

As the 107th Congress enters into its last few legislative days, I remained concerned that Congress has yet to finish its business: passing much needed Terrorism Insurance legislation.

The legislation now being considered in conference is critical to getting the U.S. economy moving. The lack of terrorism insurance is having a profound consequence on job creation and economic growth. Nearly $16 billion in real estate transactions have been cancelled or delayed due to the lack of availability of terrorism insurance. Over 300,000 jobs in the construction industry have been lost or delayed. This situation cannot and must not continue.

For the sake of the U.S. economy and the prosperity of Union Carpenters and all American workers, the Congress must reconcile the differences between the House and Senate bills, and pass this legislation prior to its October adjournment.

Sincerely,

Douglas J. McCarron
General President

cc: House and Senate Terrorism Insurance Conferees
House and Senate Leaders
George W. Bush, President of the United States

101 Constitution Avenue, N.W. Washington, D.C. 20001 Phone: (202) 546-6206 Fax: (202) 543-5724

538440
FG006-27

Facsimile

Dow Jones

Peter Kann, Chairman and Chief Executive Officer
200 Liberty Street
New York, NY 10281
Tel: (212) 416-4882
Fax: (212) 732-8356

Date: October 10, 2002

To: Karl Rove

From: Peter Kann

Number of Pages = 2 including this one.

Attached please find invitation.

Peter R. Kann and the Dow Jones Board of Directors
Invite you to a dinner and
valedictory address:

Thirty Years of Progress, Mostly

By Robert L. Bartley
Editor of The Wall Street Journal

on November 19, 2002

at 6:30 p.m.

The St. Regis
Versailles Room
Two East 55th Street
New York

RSVP
laura.sulborski@dowjones.com
212-416-4882
business attire

Decline
10/22

NO

Robert L. Bartley

This event honors the career of
Robert L. Bartley,
Editor of The Wall Street Journal.

Mr. Bartley has directed
editorial policy of
The Wall Street Journal for 30 years.
In January 2003
he will become Editor Emeritus.

His address will reflect on public events
and lessons learned during his tenure,
and what they suggest
about the outlook for the future.

EDITORIAL

Mexico IS the issue

President Bush has been absent on one of the major topics in our country

President George W. Bush is no dummy.

Sure, the media and late-night comedians portray him as a word-slurring Texan who is more comfortable trimming brush at his ranch than trimming budgets in Washington. There's some truth to that image, but Bush didn't become president on a whim.

He's a shrewd judge of character and is good delegator. He usually surrounds himself with some of smartest, toughest and most skilled people in the country, who make this job that much easier.

Karen Hughes, Condoleezza Rice and Colin Powell all have the president's ear. They are intelligent and articulate, and they too surround themselves with some of the nation's top minds.

That's why it's that much harder to understand why the Bush administration continues to keep this country's relations with Mexico in the deep freeze about as far down in there as last year's venison.

Immigration, water, immigration, Fox, trucks, immigration and economics keep coming up, and each time an issue comes forth the Bush folks choose to deal with the subject by not dealing with it, simply giving it the old "We're busy running a war" bit.

So with Powell, undersecretaries of state, negotiators and even governors who will move at his whim, Bush refuses to talk about Mexico and address any issue that has come up since 9-11. And that's unfortunate.

We believe that the Bush administration is capable of chewing gum and walking at the same time. The White House ought to be able to deal with two fires at once. It ought to be able to have Powell in Israel and Saudi Arabia and an undersecretary of state in South Texas and Mexico with a staff furiously working to hammer out answers to the problems that have been mounting in this region because of Bush's inaction.

Next to the war on terrorism, Mexico IS the issue. We would understand that truth even if we weren't here on the border, where the issues affect us even more directly.

And while Bush has completely ignored the region, we've watched over the months state and local leaders such as Gov. Rick Perry tell constituents they would relay messages and convey the area's issues to the president.

They've promised action. We've seen nothing.

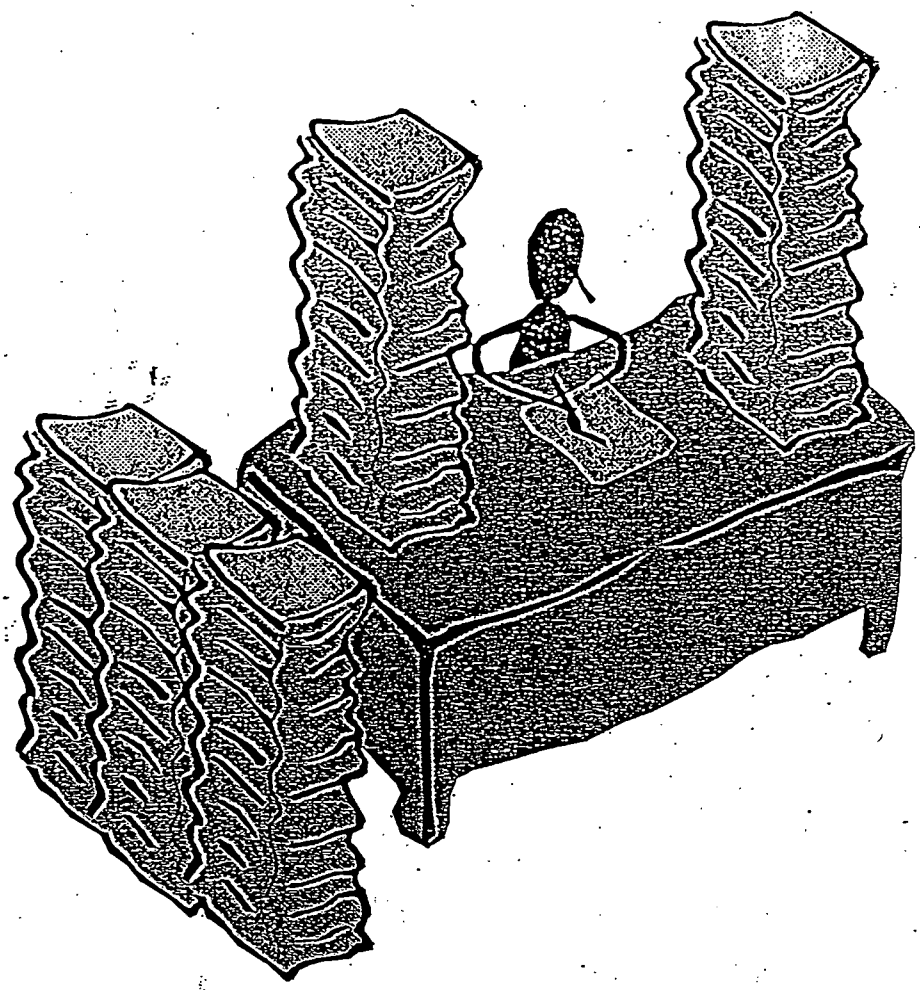
So Bush not only doesn't think the region is worth talking about now, he's not even giving the time of day to his own party members, friends and the very folks to voted him into office from South Texas. Which is even more puzzling.

Perhaps the president believes he must be the entire country's leader and shouldn't concentrate on what he might now perceive as a local or regional issue. Here's another news flash: Mexico IS the issue — for the entire country. Trade, immigration, water, economics, people and whatever else you might to throw in for good measure.

Bush would be well-served to find the nearest Rand McNally and Census 2000 and then look at what could be holding up some of the country's economic engines and he just might find the answer in little ol' South Texas.

If he doesn't, we just might begin to believe what we see.

➤ The Brownsville Herald



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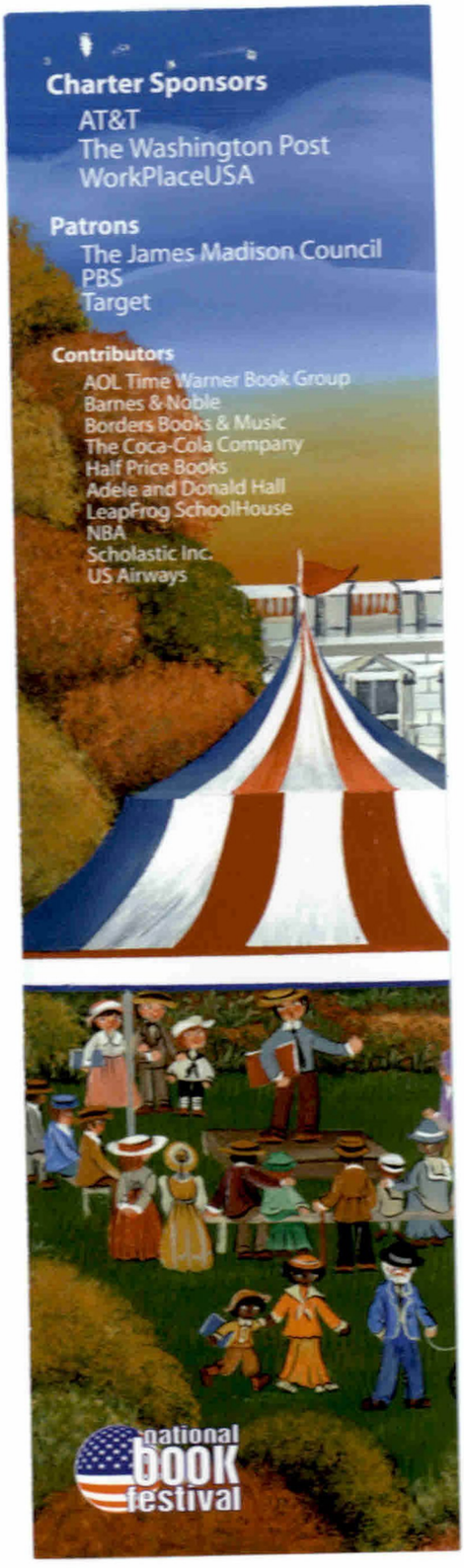

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DOUGLAS MACKINNON

Campus protest undercurrents

The liberal movement has finally met the enemy . . . and it is them.

On college and university campuses all across the United States, liberal professors and students are uniting in their latest cause. A naive, misguided and highly charged campaign against the State of Israel.

I have long maintained that many on the left who participate in these protests, be they against the International Monetary Fund and World Bank, possible war with Iraq, or now Israel, would rather protest life than live life.

If they are older, rather than look in the mirror and admit life and success have passed them by, they get involved in any cause so they don't have to confront their own failures. If students, many times they come from affluence, feel a certain degree of guilt about their money and jump on any bandwagon against the establishment.

Often their protests, while based in ignorance, are harmless. Not this time. The "Palestinian Solidarity Movement" these liberal professors and students are now uniting behind, harbors very dangerous and destructive overtones, and is already turning American against American.

These protesters are equating Israel with South Africa and apartheid. In their rush to judgment, and under the guise of a divestiture drive to pressure universities and colleges to sell their holdings in companies that do business with Israel, these professors and students are really creating an atmosphere of anti-Semitism. To say otherwise would be to deny the facts.

According to the American Jewish Committee, because of this protest movement, the incidents in which Jewish students are facing intimidation on college campuses for supporting Israel is on the rise. The AJC further reports that Jewish students are receiving death threats, property connected to Jewish organizations has been defaced or destroyed, and that posters and Web sites displaying libelous information or images have been widely circulated, creating a climate of fear.

Do these liberal professors and students not recognize that they are creating much the same environment that existed in Adolf Hitler's Germany during the 1930s? Or worse, they do recognize it, and that is the purpose of some?

In a line that has stayed with me since the moment I first heard it, a major Hollywood personality and self-described "liberal," once said, "Sadly, no one hates like a liberal." Well, there is now a hate campaign being waged against the State of Israel, and indirectly, Jews, by these liberals, and in my opinion, only other liberals can stop it before it spirals out of control.

Last month, while talking about the Israel divestiture movement, Harvard University President Lawrence H. Summers, warned of an "upturn in anti-Semitism" on colleges and around the world. "Serious and thoughtful people are advocating and taking actions that are anti-Semitic in their effect if not their intent."

These protesters are neither "serious" nor "thoughtful," and Mr. Summers knows better. How can one advocate and take actions that are "anti-Semitic" and still be considered "serious" and "thoughtful?" If that is your position, you are a bigot or worse.

There are a huge number of highly successful, influential and liberal Jewish Americans in this country, and now is the time for them to take a stand. As the saying goes, "If not you, who? If not now, when?"

Wrong is wrong, and especially since September 11, 2001, none of us can afford to blindly follow an ideology. As a Republican and "conservative," I am expected to walk in lock step with the National Rifle Association. Well, guess what? I don't. I have always maintained that the leadership of the NRA is brain dead and only hurts the "Republican" cause. Since the sniper shootings in and around the D.C. area, I believe their comments and conduct border on the criminal.

Just as I believe what these professors and students are doing borders on the criminal. But like Nixon going to China, we need high-profile liberal Jewish leaders in Congress, business and Hollywood, to condemn this movement in the strongest possible terms and stand behind Israel and these persecuted Jewish students.

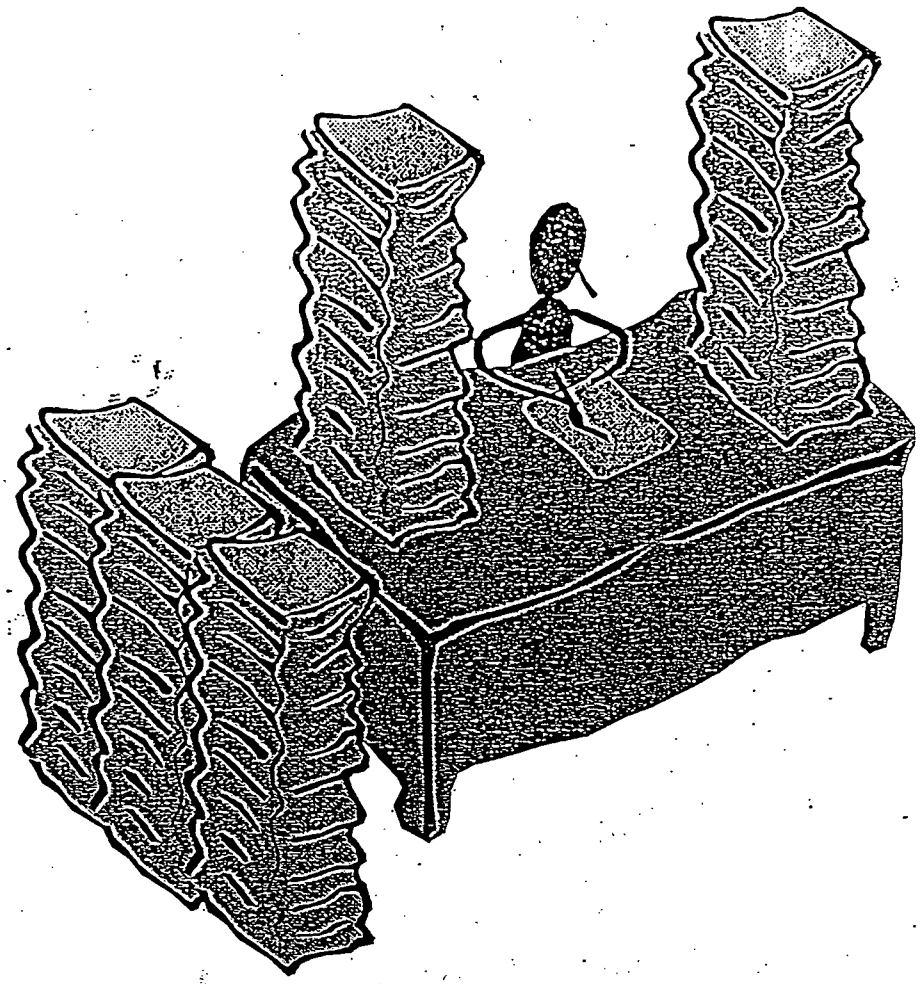
During my time in the Pentagon, I spent three years working with members of the Israeli Defense Forces, and have never encountered anyone more committed to peace. Israel is by far, the most open and diverse government in the Middle East. Women are not only equal, but many times lead the nation and its sectors.

If these liberal professors and students are so concerned with human rights and the rights of women, why are they not targeting the various Arab dictatorships that discriminate against women and suppress free thought and democracy?

Would that be too difficult, or would it instead detract from their anti-Semitic message?

It's time for Jewish liberals to take a stand against liberals who hate.

Douglas MacKinnon is press secretary to former Sen. Bob Dole and is a former White House and Pentagon official and a novelist.



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A complete list of the generous people who have agreed to support the 7th Annual CMR Celebration will be published in the event program and in a future edition of CMR Notes.

Special Camps for Special Kids
Camp John Marc

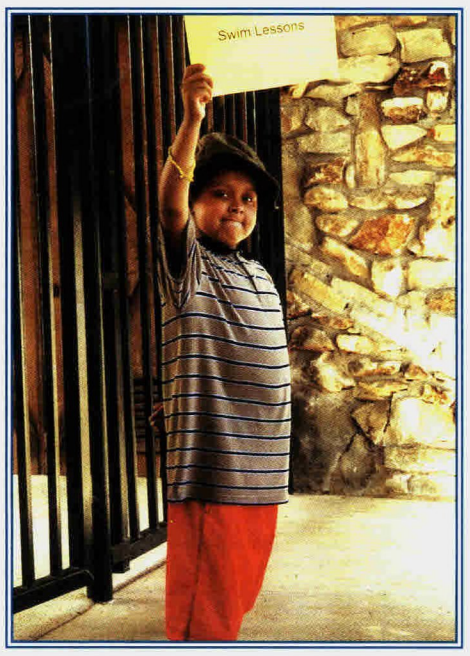
Camp Talk

The Special Camps for Special Kids - Camp John Marc Newsletter

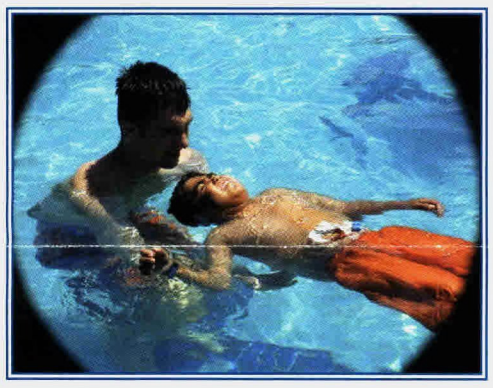
Fall 2002

Swim Lessons—Right This Way!

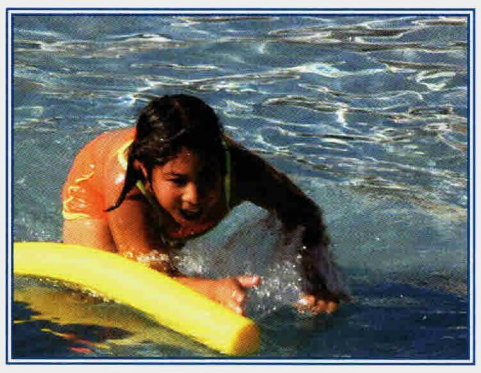
1,230 summer campers enjoyed an improved pool at Camp John Marc because of the kindness and generosity of the donors listed below. The improvements turned out so well, the campers nicknamed the Swimming Center "The Resort."



Swimming activities are valuable for any child who lives in Texas. However, for our campers this age-old activity takes on a whole new meaning. For some, it means having the confidence to take off their shirts without worrying about the large scars that cover their bodies. Others who must use wheelchairs due to their diagnosis, find our "zero entry" beach accessible and user friendly. For others, cancer may have taken an arm or a leg, but they can swim at Camp with confidence and safety. And those with sickle cell anemia may swim for the first time because their parents were reluctant to let them swim previously for fear they may have a pain crisis. In these cases and more, children at Camp have the opportunity to experience what many of us take for granted: the therapeutic benefit and wonderful buoyancy that aquatic activity provides.



However, at Camp John Marc we offer much more than just recreational swimming. We also offer lessons for our campers who may be entering the water for the first time or who need specialized instruction to make a particular swim stroke work specifically for them. Specially trained camp instructors devote an hour each day to helping campers learn the basics of swimming by following a program created by the Camp John Marc staff.



During "project time" (a daily skilled-based activity period), we had an average of 15 campers learning to swim each week. The program is fairly intense and each camper has his or her own instructor. It is awesome to see these non-swimmers become comfortable with the water, then each day add to their skill bank, until on the last day of the week the vast majority have mastered learning an independent stroke. It is a powerful moment to see children who were resistant to entering the water at the first of the week, take off and swim the length of the pool by the end of the week. Many swim using modified strokes due to their diagnosis, but all glide through the water independently.

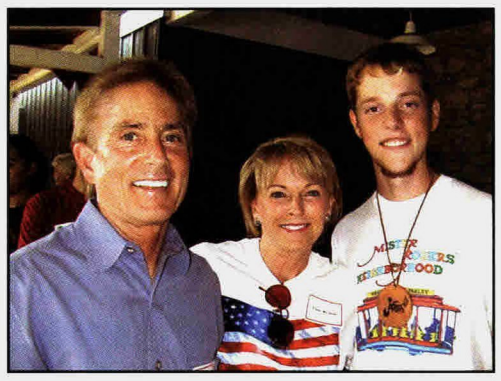
Children spend a special week with us who have been discouraged from swimming in other situations because of a fear for their safety or the desire to not be compared to able-bodied children. At Camp they enjoy what other kids have enjoyed for many years: floating on their backs, propelling themselves in the water, or just having fun in the pool.

Swimming Center Donors

Dallas Stars Foundation
M.S. Doss Foundation
Pauline Allen Gill Foundation
Dottie & Bobby Hill
Hillcrest Foundation
Hoblitzelle Foundation
Ronald McDonald Children's Charities
Acorn Fund-Morning Star Family Foundation
Park Cities Rotary Club

Ellen's Corner

When you looked at the picture accompanying this article, I hope you focused on the smile on the young man's face. His name is Josh and he is only one of the many great kids who made up summer staff 2002. They were a geographically diverse, multi-talented and caring group of young people who demonstrated a lot of enthusiasm, energy, encouragement, hope and wisdom as they translated our mission statement into reality.



Ellen McStay, Camp John Marc Board Chair, with husband John & staff member Josh Stewart

These wonderful characteristics were not only exhibited by the staff. As I visited camp this summer, I saw the same attitudes in the actions of the medical staff, the counselors, volunteers and kids! In my opinion, care and consideration define the medical staff. I so appreciated a note from Susan Williams, a Board Member and nurse for the Spina Bifida week at Camp TLC. She related a story about a young boy's reluctant first horse experience. From his initial decision to "avoid the horses at all costs" to his exuberance in yelling, "I love this!", the incredible benefits of the horseback riding experience were confirmed. You probably realize that for some of our kids, actually sitting on a horse is too difficult. I am happy to say they were able to experience the "horses" through our new wheelchair accessible buggy. It was quite a hit! Look for the related article elsewhere in the newsletter.

John and Joanie Scott represent two of our many great volunteers. They also helped with Camp TLC; John was a cabin counselor and Joanie taught arts and crafts. The kids are so fortunate to interact with people who are so caring and talented. Did you know that we had 19 board members spend a week at camp? This incredible display of dedication and commitment is very heartwarming.

Two experiences with the kids illustrate the attitudes mentioned earlier. Wisdom, hope and enthusiasm permeated the atmosphere of the opening chapel service at Camp Sanguinity as the children faced this year's camp experience without some of their fellow campers. Their energy and enthusiasm was witnessed in the throes of the "water war" and fireworks celebration at the Sanguinity's July 3rd "4th of July" celebration.

Each time I experienced camp, it reminded me of the therapeutic effects of laughter, tears, challenging activity, caring human interaction and just plain fun. Thanks to the summer staff, counselors, volunteers and you, our so appreciated donors, 1,230 children experienced the "time of their lives" this summer.

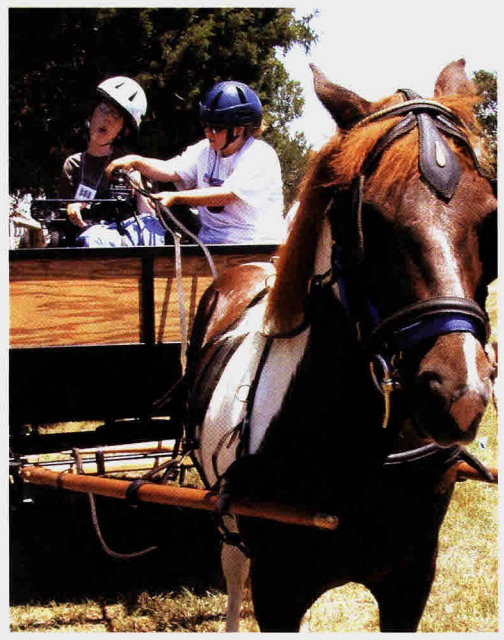
About an equal number will enjoy Camp John Marc in the "off-season" through family camps, young adult/teen programs and getaway weekends. The programs deal with a wide range of challenges, including sensory issues, bereavement, transplants, upper limb differences, PKU, and cancers. An innovative family camp was started a couple of years ago by Tom and Joanne Hurtekant to help Hispanic families with the diagnosis of Spina Bifida. The education and communication of the families with their medical teams has been significantly enhanced by their efforts. A new family program for this year is a Texas Scottish Rite program for families with a child with Tuberous Sclerosis.

In total there are 24 weekend camps, 14 of which are family camps. There will be over 350 volunteers involved in our mission—Wow! It renews your faith in humanity to witness all of these special people who are our "ambassadors" to the kids. So, once again, thanks to our summer and off-season staff, counselors, volunteers, donors and the kids for being who you are! The reality of Camp John Marc depends on you.

Ellen

An Unusual Summer Hero, PatchE

At some point in our lives we have heard the quote, "Don't put the cart before the horse." An experience during the summer of 2002 at Camp John Marc substantiated this quote.



Horseback riding is a popular activity at Camp. Our campers love the excitement of mounting a horse and enjoying the freedom of the horse taking them for a walk. Unfortunately, due to the loss of muscle tone or other conditions, some of our campers cannot comfortably sit in a saddle and ride.

This past year, we were able to locate a wheelchair accessible horse buggy. The buggy is the brainchild of Jerry Grander from Indiana. The campers stay in their wheelchairs and ride up on a lift on the back of the buggy and then roll into the driver's spot to "take the reins." Through the generosity of the Morning Star Family Foundation, Camp John Marc was able to purchase one of these buggies. With great confidence, we knew we would find the right horse to pull the buggy.

Camp John Marc Board Member David Bell took on the task of finding the right animal to do the job of pulling the buggy. After being assured by a horse trader that he had the perfect horse for the job, David anticipated smooth sailing. However, David soon learned this horse would not even tolerate being hooked onto the buggy.

Next, came a pair of mules that David was told could pull anything. Though they could tolerate being hooked up to the buggy, both animals quickly proved why mules have a reputation for being stubborn. Neither mule would pull the buggy.

Time was running out before the buggy would desperately be needed for some of our muscular dystrophy campers. On a whim, David decided to try one of his daughter Jordan's ponies to pull the buggy.

Thus PatchE the pony became our unusual summer hero. PatchE pulled the buggy with ease and gave several campers the joy of "riding" that they would not have had otherwise.

We also learned the value of an old saying!

Special Thanks To Our Major Donors

Anonymous (4)

John "Denny" & Connie Carreker

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CIBC World Markets

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Morning Star Family Foundation

Harry S. Moss Heart Trust

Agnes Cluthe Oliver

Dear Camp John Marc,

My name is Charlotte and I am ten years old. I have had art camps, bake sales, and lemonade stands to raise money. Enclosed is $17.10, I hope it helps.

Sincerely,
Charlotte

CAMP JOHN MARC COUNSELOR SPOTLIGHT

Katie Nelson helps a camper with a craft project at TLC.

Each summer Camp John Marc hires 24 college-age students to be our core staff. This group organizes all daily activities and evening programs, and at various times they serve as cabin counselors. They always strive to put the camper first, helping insure that the camper's experience is a meaningful and positive one.

Katie Nelson came to Camp John Marc after her sophomore year at the University of Missouri where she was pursuing a degree in English and Chemistry. The idea of attending medical school in her future was a possibility, but not necessarily a strong one.

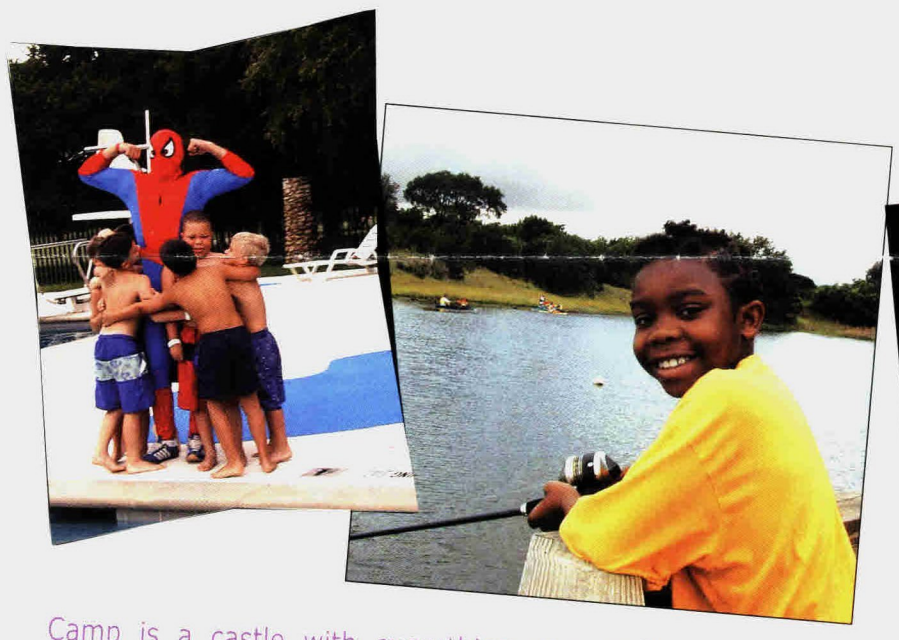
That first summer Katie worked at Camp, she brought to us a positive energy and tremendous skills in working with children. Katie came back to Camp after her junior year and again spent three months reaching out to our campers in a positive and caring way. She again interacted with many fine doctors, nurses, and therapists. We noticed she seemed to be watching these folks a little more closely than the summer before. By the end of the summer she decided to take the Medical College Admission Test exam the following spring.

Katie was back with us for her third summer this year. We all rejoiced with her as she received word that she scored extremely well on the Medical College Admission Test. Katie is now busy visiting medical schools across the country, preparing to make her selection. At the same time she is completing her undergraduate degree at the University of Missouri.

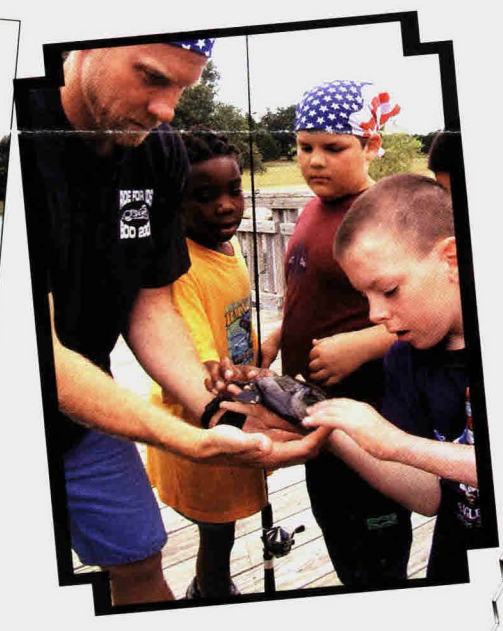
Katie has not only achieved strong academic performance (Phi Beta Kappa, Theodore Hesburg Senior Award), she has established a pattern of living her life in a manner that serves others. Katie's stated the following on her medical school application: "The air was unusually cool for July in Texas, as I grabbed my journal and hiked into the woods to spend my half-hour break. I was working at a camp for children with chronic illnesses, and we had just finished a difficult staff meeting. The camp director had told us that one of our campers, a lanky 14-year-old named Lisa, had died the night before. Picturing her cropped, curly hair and blue nail polish, I recalled how she shrieked in pain when I touched her back to help her climb off the bus. I pushed my way through the scrub trees, found a stump to sit on, and tried to process the news. After crying briefly, I wrote, 'What kind of a place is this that means so much to kids that they hold on to life until they can come back?' Although I did not realize it then, this brief respite in the woods was critical in my decision to become a physician."

Camp John Marc is so pleased to have been a part of Katie Nelson's life journey and to have helped her recognize that medicine will provide her the synthesis of service, creativity and personal interaction she is seeking.

Let's Hear From Our Campers!



Camp is a castle with everything you could ever want, except I feel right at home right away. Jalen, age 7

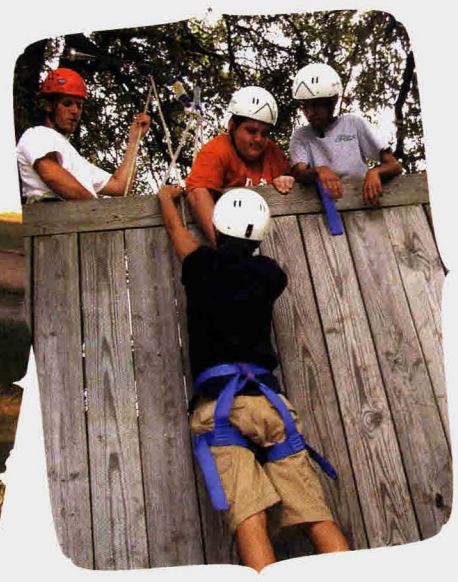


Camp can't possibly get any better. Cody, age 12

The best part was making new friends Brittany, age 9

I thought I was the only one in the world with sickle cell until I came to camp. Suki, age 9

Whenever you are down, there is always someone there to make you feel better. Krystal, age 11



My favorite things were field kicking, ropes, bug stories, and the counselors. Reid, age 10

This place is magical. Morgan, age 9

Too much fun. Can't wait until next year Marvin, age 12

Please make camp extend for the whole summer!!!!! Erin, age 12

Photography by Karen Gilmore

Memorials

Gifts were given to Camp John Marc in memory of . . .

Lorene C. Adams
E "Mack" Anderson
Tiny Anderson
Mary Lou Badger
Craig Baggett (MDA camper)
Dor Bangs
Hayley Barnes (MDA camper)
Joyce Bell
Judge Bolin
Stephanie Brascia
Benjamin R. Briggs
Frances Burns
Bill Buchanan
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Ross Love, Jr.
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Brad Manson, Sr.
Robert Marshall
Dixie McConnell
Martha McMackin
Juan Merlan (Esperanza camper)
Mary Miles
Joe Mize
Ben Monning
Stephanie Moore
David Mueggenborg
Jean Mueggenborg
Mayor George Nattin
Connally Neal
Mike Needleman
Vern Oltmer
Antonella Otiniano (Esperanza camper)
Johnny Payne
Judge Henry Politz
Peaches
Paul Pettigrew
Irene Pollon
Theta Redding
Mercedes Reed (Sanguinity camper)
Wilton Wade Regent
David Ruiz (Sanguinity camper)
Javier Rodriguez (Sanguinity camper)
Madame Sack
Charles Sandova (MDA camper)
Mrs. Wilson Schoellkopf
David Shafer
Victoria Smith (TLC camper)
Norma Spitler
Millie Stewart
Mrs. Antonio Stout
Bob Strief
Wes C. Stripling, III
Brittanie Struggs (Esperanza camper)
Earl T. Summers
Spencer Taylor
Marvin Tate
Bob Thompson
Dr. I.L. VanZandt
Constance Wandel
Pauline Weinel
John L. Wilson
Karen Yeaman
Laura Young

Honorariums

Gifts were given to Camp John Marc in honor of . . .

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Leaf Bennett
Kaci Bittner
Cindy Cochran
Catherine & Caroline Cochran
Vance Gilmore
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Harry Levy
Donald & Margaret Mahoney
Jeff & Laura Marker
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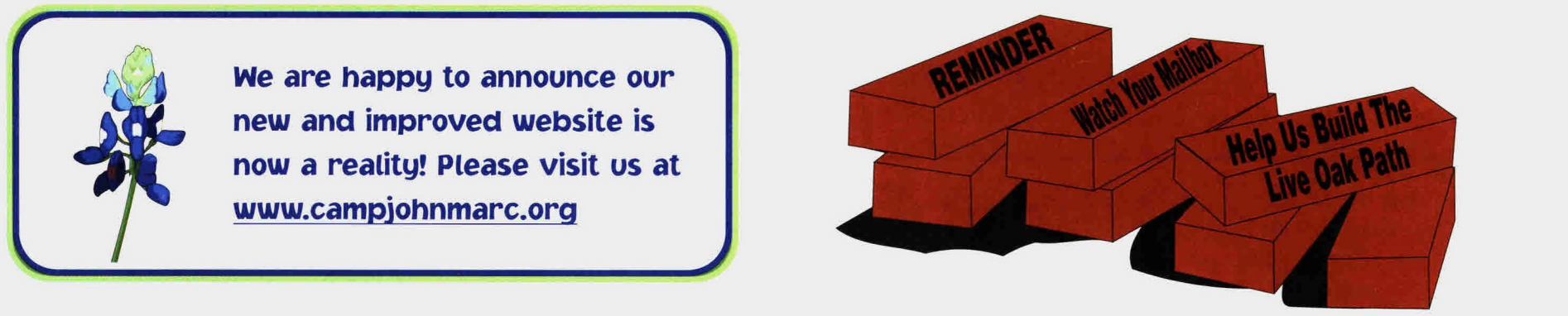
Kyle Moore
Benjamin Matthew Nelson
Michal Powell
Andrew Jones Tanner
Ley Waggoner
Gifford & Carol Touchstone
Paul Wallace



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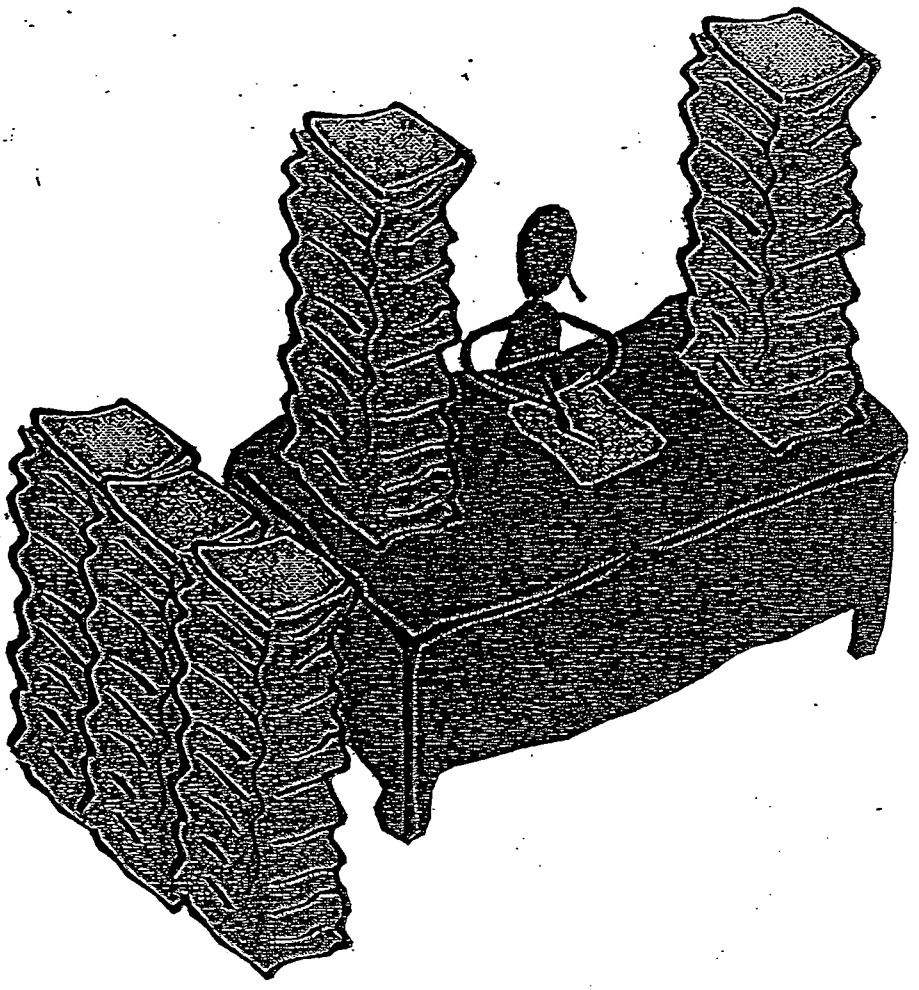

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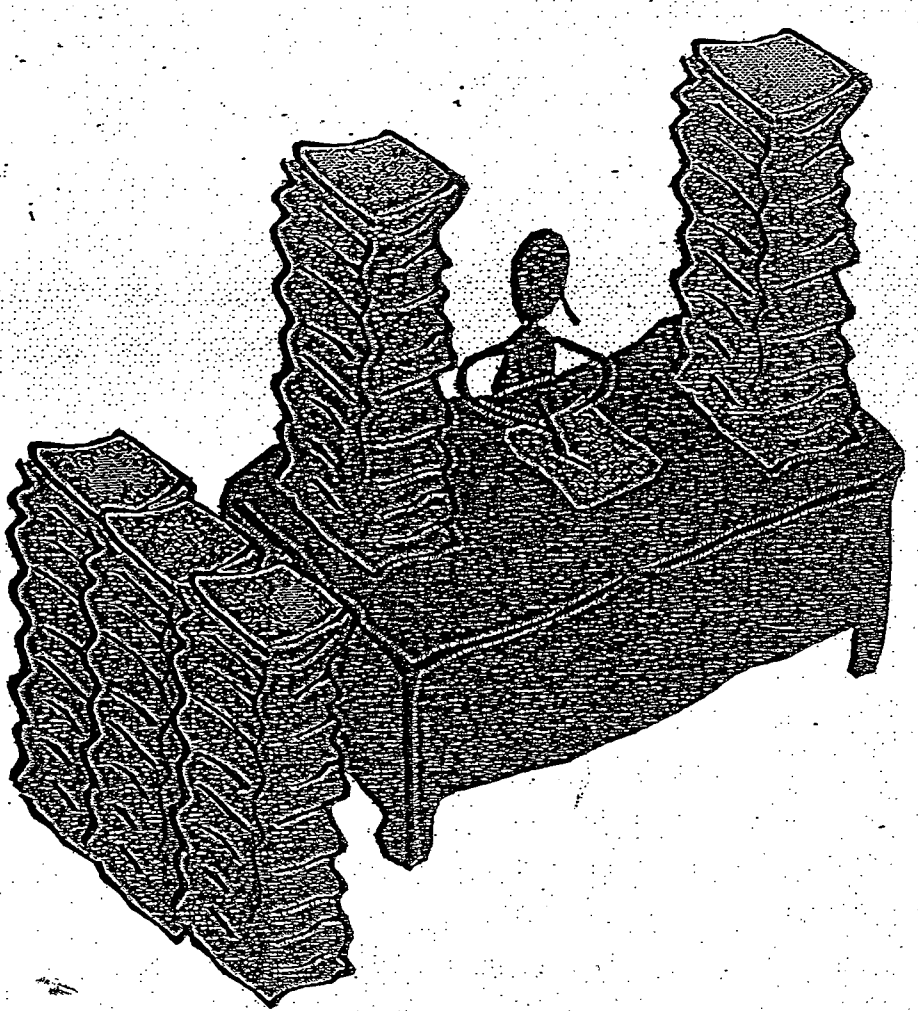

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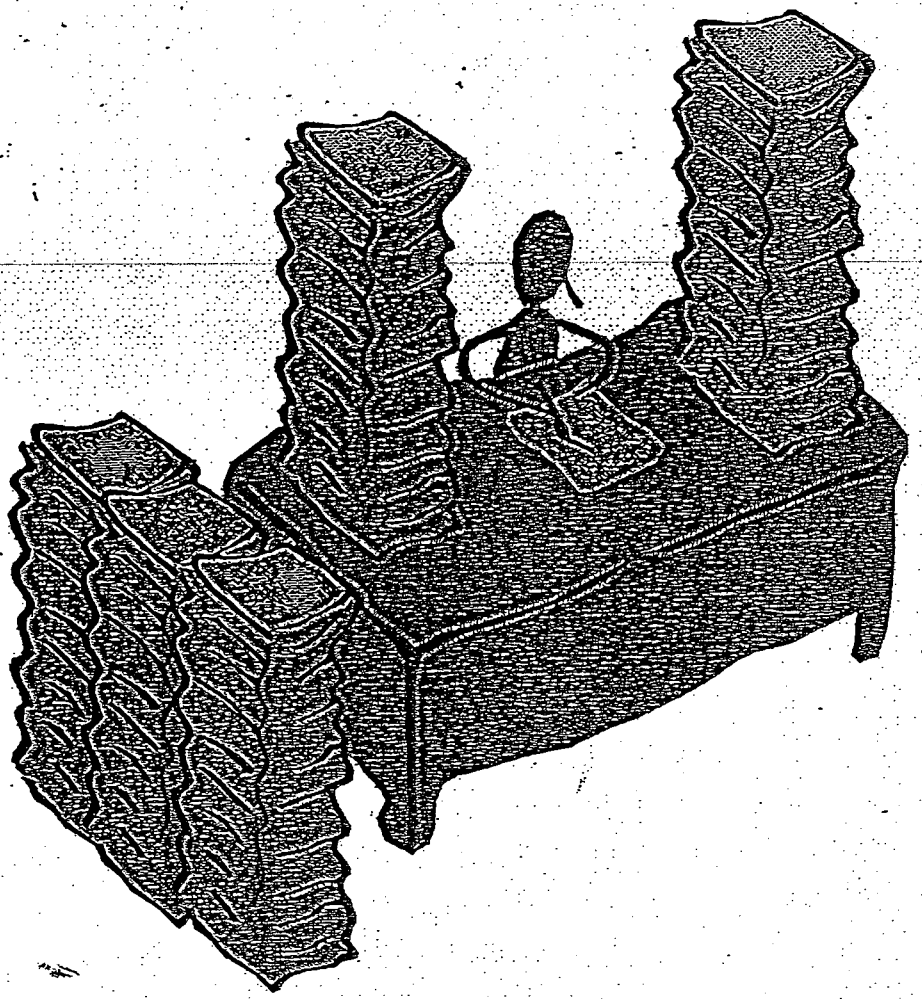

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career at EPA including: OPP's Director of the Registration Division, Director of OPP's Field Operations Division, Deputy Director of OPP's Hazard Evaluation Division, and Executive Secretary of the Scientific Advisory Panel for the Federal Insecticide, Fungicide, and Rodenticide Act. Mr. Johnson has also held staff and management positions in EPA's Office of Research and Development and Office of Toxic Substances. Prior to joining EPA, Mr. Johnson served as the Director of Operations at Hazelton Laboratories Corporation and Litton Bionetics Inc. Mr. Johnson received his B.A. from Taylor University and his M.S. from George Washington University.

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Due to mail screening procedures, The Office of Presidential Correspondence has just received this letter. Please process accordingly.

570426

OFFICE OF THE EXECUTIVE CLERK

CORRESPONDENT: Stephen Koplan (Chairman)

AGENCY: U.S. International Trade Commission

DATE OF INCOMING: June 14 2002

ROUTE TO: Tim Saunders

119793

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572749

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FO 002
(Diplomatic Affairs - Consular Relations)

572766

OA/NARA#: 12031 / 12241
11139

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Folder Title:

572766

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FO 002
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572770

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1169

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THE NEWS' VIEW

Published Friday, January 24, 2003

One week later, beginning to heal

Now suddenly, as if much too soon, it is Friday again.

A week's distance from the early morning car accident that killed four Yalies, injured five of their friends, and left the campus worn and bleary brings with it something in the way of comfort -- but little of what might be called relief.

It began with dawn seven days ago, when most of us were sleeping. Since then we have witnessed tragedy and recovery, collapsed into tears and ourselves, and come together to ease, as best we could, out of what might be the longest weekend Yale has seen.

This week has been filled with remarkable warmth and quiet generosity, though -- from the outside world to a University turned inward, focused on caring for its aching own. The flowers came first, piling on the doorsteps of the Delta Kappa Epsilon house, sent by students and parents and people who had seen the broken Chevrolet Tahoe and the icy interstate on television. Then came diligent e-mail updates from masters and deans; notes and letters and baseball bats of support from other universities; and, of course, the airplane tickets to memorial services handed out to overwhelmed classmates and grieving friends.

Then came the stories, the countless memories that became part of speeches and eulogies throughout the week. Andrew Dwyer '05, Kyle Burnat '05, Sean Fenton '04 and Nicholas Grass '05 very abruptly became the center of our lives, the idyllic, characteristic Yale men we no longer have the chance to walk by on Cross Campus, read about on the sports pages, or call for help on a problem set. You may not have known them last week. You know them now.

And now it is Friday again: another frozen morning in what has been a relentless January. Today we are a week removed and busy, occupied mercifully with classes and the end of shopping period. In a way, Yale hums as it always has, but in truth the anxiety lingers: People you eat with in the dining hall should not vanish; someone who is 19 or 20 years old is not supposed to die. There is still a sense that a grave and arbitrary injustice has been done. But meanwhile, the flag hangs at half-mast on Beinecke plaza and another weekend begins. We are edging back toward the ordinary and continuing, ever so gradually, to heal.

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(Policy Positions)

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127126

076513

Box
Folder

2018-0011-P [ ]

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WHORM
PE002-01

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	12	13	3	2	12726			

Folder Title:

576513

Records Management, White House Office of (ORM)
Subject Files

PE009
(Retirement, Federal)

571276

2018-0011 - F

OA/NARA#: 12138/12348
12493

Box
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2018-0011-F [ ]

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WHORM - Subject Files

PE009

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Folder Title:

571276

Records Management, White House Office of (ORM)

Subject Files

PL003
(Messages - Political - Sent or Denied)

445565

OA/NARA#: 12193 / 12359
12527

Box
Folder

2018-0011 P [ ]

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PL003

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W	12	13	8	3	12527	25390	12359	12193

Folder Title:

445565

Records Management, White House Office of (ORM)

PL003
(Messages, Political - Sent or Denied)

547089

Subject Files

OA/NARA#: 12194 / 12360
12526

Box
Folder

2019-0011-P [ ]

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WHORM

-PL 003

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W	12	13	9	1	12526		12360	12194

Folder Title:

547089

Records Management, White House Office of (ORM)

PP007
(Litigation Involving the President)

448381

Subject Files

OA/NARA#: 11919 / 12057
12250

Box
Folder

2018-0011-P [ ]

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WHORM

PP007

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	12	16	11	1	12250	25113	12057	11919

Folder Title:

448381

Records Management, White House Office of (ORM)

PR005
(Autographs – Photographs – Holographs)

448183

Subject Files

OA/NARA#: 11924 / 12062
60112

Box
Folder

2018-0011-P [ ]

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WHORM
PR005

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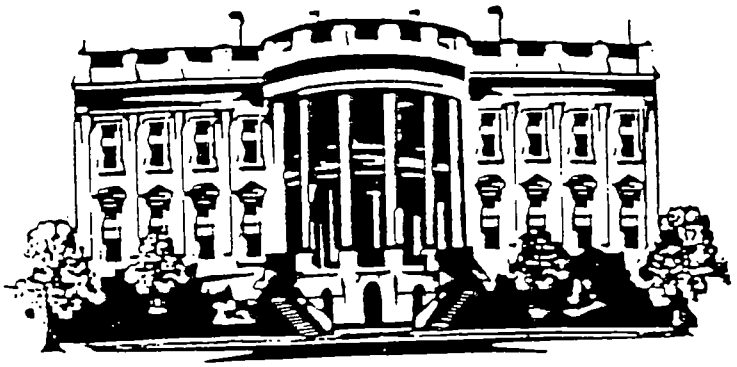
W	12	17	6	2		60112		

Folder Title:

448183

THE WHITE HOUSE

Washington, DC



OFFICE OF THE STAFF SECRETARY

Fax Transmittal Sheet

To: Loretta Jones

Fax Number: (703)750-2352 Telephone Number: (703) 750-9090

From: Carol Cleveland

Subject: Agreement

Date: 4-29-02

Number of Pages (including cover sheet): 3

Message:

(If all pages are not received, please call (202) 456-2702.)

Records Management, White House Office of (ORM)

Subject Files

PR005
(Autographs - Photographs - Holographs)

4527731

OA/NARA#: 11924/12062
12138

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Folder

2018-0011-P [ ]

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WHORM
PR005

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
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Folder Title:

452731

Records Management, White House Office of (ORM)

Subject Files

SP729

(Remarks on Medical Liability Reform High Point University, High Point, NC, 07/25/02)

527166

OA/NARA#: 11531/11653
11012

Box
Folder

2018-0011-P [ ]

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WHORM
SP729

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
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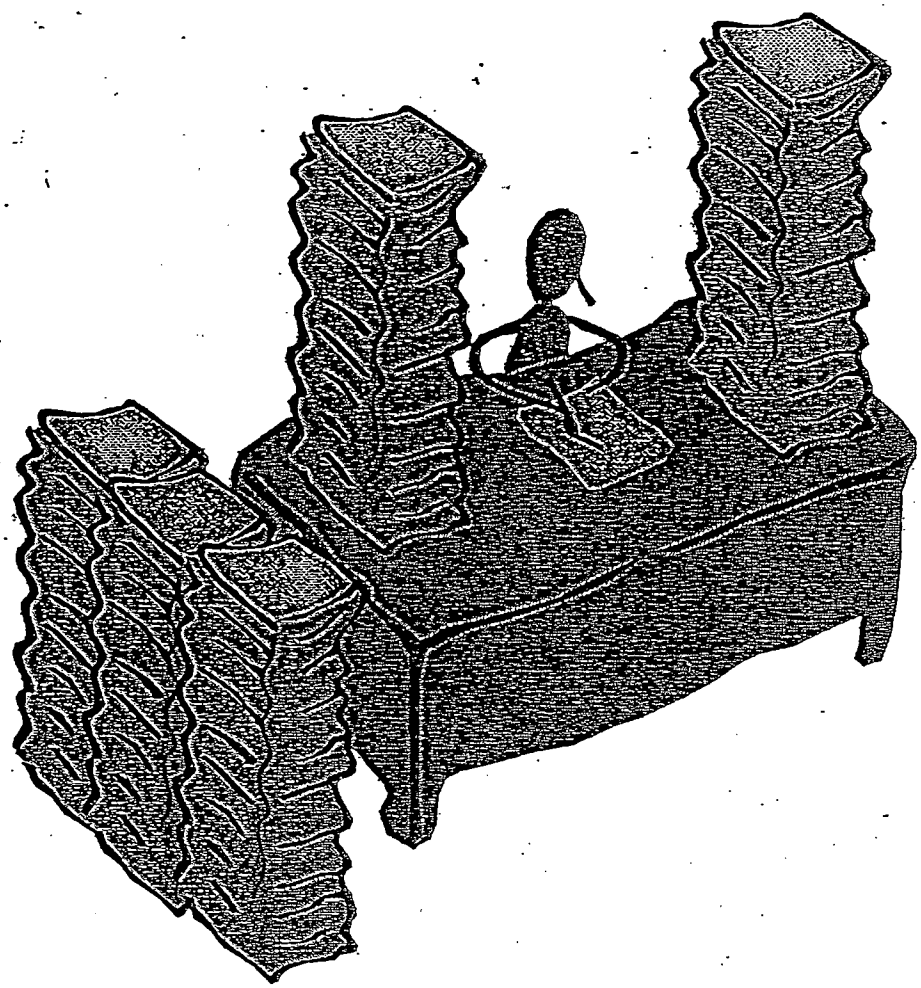
Folder Title:

527166



ORM

SCANNING INSERT SHEET

REMAINDER OF CASE NOT SCANNED

REV_00458282

Records Management, White House Office of (ORM)

SP822-05

(Remarks at the Red Sea Summit in Aqaba Jordan, 06/04/03)

560966

Subject Files

OA/NARA#: 11537/11659
11063

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REV_00458283

2018-0011-P [ ]

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WHORM

SP 822-05

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
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Folder Title:

560966

Remarks at the Red Sea Summit in Aqaba, Jordan

June 4, 2003

King Abdullah. President Bush, Prime Minister Sharon, Prime Minister Abbas, distinguished guests: We gather today in Aqaba, this small city that symbolizes the immeasurable potential of bringing different peoples together. Not far from here, Jordan and Israel signed a peace treaty in 1994. Nine years later, what brings us here is the same dream, the dream of peace, prosperity, coexistence, and reconciliation. But dreams alone cannot fulfill hopes. It is thanks to the efforts of President Bush and the commitments of Prime Minister Sharon and Prime Minister Abbas that we meet here today to transform these dreams into real achievements on the ground.

Mr. President, Prime Ministers, let us have ambitions, ambitions to move beyond the violence and occupation, to the day when two states, Palestine and Israel, can live together, side by side in peace and security.

And in our hands today, we hold the mechanism that can translate these ambitions into realities on the ground. It is a plan, the roadmap, that addresses the needs of both Palestinians and Israelis. To the Israelis, this plan offers collective security guarantees by

all Arabs, a peace treaty, and normal relations with Arab states, and an end to the conflict. To the Palestinians, it offers an end to the occupation, a viable state, and the promise to live as a free and prosperous people.

To be sure, the road to realizing this vision will not be straightforward or without obstacles. I'm aware that many in our region and around the world view our gathering today through a lens marred with skepticism and suspicion. The failures and frustrations of the past have left many disbelievers in their wake.

Today we have an opportunity and obligation to reinstate faith in the process and to reinvigorate hopes for a better tomorrow. We simply cannot afford the alternative. The road to confrontation has shown its consequences: loss of innocent lives, destruction, and fear. Most costly, however, was the loss of hope. The most precious gift that you can present to your peoples over the coming weeks is renewed hope born out of tangible progress on the ground. And it's not only your people who will be watching and waiting. The eyes of the entire world will be upon you.

The nature of our new borderless world means that we all have a stake in what happens here today. Jordanians, Americans, Europeans, and many around the world stand ready and willing to lend all their support to ensure your success. But at the end of the day, it is you, the Palestinians and the Israelis, who have to come together to resolve the many outstanding issues that divide you.

Many will view the compromises that will be made during your negotiations as painful concessions. But why not view them as peace offerings, ones that will provide in return the priceless gifts of hope, security, and freedom for our children and our children's children. It is only by putting yourselves in each other's shoes that we can hope to achieve real progress.

Thus, we reaffirm today our strong position against violence in any form and from whatever source. Blowing up buses will not induce the Israelis to move forward, and neither will the killing of Palestinians or the demolition of their homes and their future. All this needs to stop. And we pledge that Jordan will do its utmost to help achieve it.

Mr. President, you have stayed the course. Your presence here today to witness the two leaders meeting together, agreeing on common grounds to solve this conflict, provides a great impetus to move forward and a clear answer to all the skeptics. I thank you, sir, for your leadership and your courage.

Prime Minister Sharon, Prime Minister Abbas, I urge you today to end the designs of those who seek destruction, annihilation, and occupation. And I urge you to have the will and the courage to begin to realize our dreams of peace, prosperity, and coexistence. And remember that in the pursuit of these noble goals, Jordan will always remain a true friend.

Thank you very much. And it is with great pleasure, if I may introduce Prime Minister Abbas to say a few words.

Prime Minister Mahmoud Abbas. I would like to thank King Abdullah for hosting our meeting here today. I would like also to thank President Mubarak and King Abdullah, King Hamad, and Crown Prince Abdullah, who met in Egypt yesterday. I thank them for their statements supporting our efforts. I also would like to thank the Israeli Prime Minister Sharon for joining us here in Jordan. And many thanks especially to President Bush, who took the longest journey for peace of all of us.

As we all realize, this is an important moment. A new opportunity for peace exists, an opportunity based upon President Bush's vision and the Quartet's roadmap, which we have accepted without any reservations.

Our goal is two states, Israel and Palestine, living side by side in peace and security. The process is the one of direct negotiations to end the Israeli-Palestinian conflict and to resolve all the permanent status issues and end the occupation that began in 1967, under which Palestinians have suffered so much.

At the same time, we do not ignore the suffering of the Jews throughout history. It is time to bring all this suffering to an end.

Just as Israel must meet its responsibilities, we, the Palestinians, will fulfill our obligations for this endeavor to succeed. We are ready to do our part.

Let me be very clear: There will be no military solution to this conflict, so we repeat our denunciation and renunciation of terrorism against the Israelis, wherever they might be. Such methods are inconsistent with our religious and moral traditions and are dangerous obstacles to the achievement of an independent sovereign state we seek. These methods also conflict with the kinds of state we wish to build, based on human rights and the rule of law.

We will exert all of our efforts, using all our resources, to end the militarization of the *intifada,* and we will succeed. The armed *intifada* must end, and we must use and resort to peaceful means in our quest to end the occupation and the suffering of Palestinians and Israelis. And to establish the Palestinian state, we emphasize our determination to implement our pledges which we have made for our people and the international community. And that is a rule of law, single political authority, weapons only in the hands of those who are in charge of upholding the law and order, and political diversity within the framework of democracy.

Our goal is clear, and we will implement it firmly and without compromise: a complete end to violence and terrorism. And we will be full partners in the international war against occupation and terrorism. And we will call upon our partners in this war to prevent financial and military assistance to those who oppose this position. We do this as a part of our commitment to the interests of the Palestinian people and as members of the large family of humanity.

We will also act vigorously against incitement and violence and hatred, whatever their form or forum may be. We will take measures to ensure that there is no incitement—[*inaudible*]—from Palestinian institutions. We must also reactivate and invigorate the U.S.-Palestinian-Israeli Anti-Incitement Committee. We will continue our work to establish the rule of law and to consolidate government authority in accountable Palestinian institutions. We seek to build the kind of a democratic state that will be a qualitative addition to the international community.

All the PA security forces will be part of these efforts and will work together toward the achievement of these goals. Our national future is at stake, and no one will be allowed to jeopardize it.

We are committed to these steps because they are in our national interest. In order to succeed, there must be a clear improvement in the lives of Palestinians. Palestinians must live in dignity. Palestinians must be able to move, go to their jobs and schools, visit their families, and conduct a normal life. Palestinians must not be afraid for their lives, property, or livelihood.

We welcome and stress the need for the assistance of the international community and, in particular, the Arab states to help us. And we also welcome and stress the need for a U.S.-led monitoring mechanism.

Together, we can achieve the goal of an independent Palestinian state, sovereign, viable, in the framework of good neighbors with all states in the region, including Israel.

Thank you very much.

Prime Minister Ariel Sharon. Thank you. I would like to thank His Majesty King Abdullah for arranging this meeting and express Israel's appreciation to President Bush for coming here to be with Prime Minister Abbas and me. Thank you.

As the Prime Minister of Israel, the land which is the cradle of the Jewish people, my paramount responsibility is the security of the people of Israel and of the state of Israel. There can be no compromise with terror. And Israel, together with all free nations, will continue fighting terrorism until its final defeat.

Ultimately, permanent security requires peace, and permanent peace can only be obtained through security. And there is now hope of a new opportunity for peace between Israelis and Palestinians.

Israel, like others, has lent its strong support for President Bush's vision expressed on June 24, 2002, of two states, Israel and a Palestinian state, living side by side in peace and security. The Government and people of Israel welcome the opportunity to renew direct negotiations according to the steps of the roadmap, as adopted by the Israeli Government, to achieve this vision.

It is in Israel's interest not to govern the Palestinians but for the Palestinians to govern themselves in their own state. A democratic Palestinian state fully at peace with Israel will

promote the long-term security and well-being of Israel as the Jewish state.

There can be no peace, however, without the abandonment and elimination of terrorism, violence, and incitement. We will work alongside the Palestinians and other states to fight terrorism, violence, and incitement of all kinds. As all parties perform their obligations, we will seek to restore normal Palestinian life, improve the humanitarian situation, rebuild trust, and promote progress toward the President's vision. We will act in a manner that respects the dignity as well as the human rights of all people.

We can also reassure our Palestinian partners that we understand the importance of territorial contiguity in the West Bank for a viable Palestinian state. Israeli policy in the territories that are subject to direct negotiations with the Palestinians will reflect this fact. We accept the principle that no unilateral actions by any party can prejudge the outcome of our negotiations.

In regard to the unauthorized outposts, I want to reiterate that Israel is a society governed by the rule of law. Thus, we will immediately begin to remove unauthorized outposts.

Israel seeks peace with all its Arab neighbors. Israel is prepared to negotiate in good faith wherever there are partners. As normal relations are established, I am confident that they will find in Israel a neighbor and a people committed to comprehensive peace and prosperity for all the peoples of the region.

Thank you all.

President Bush. King Abdullah, thank you for hosting this event. Her Majesty, thank you for your hospitality. It is fitting that we gather today in Jordan. King Abdullah is a leader on behalf of peace and is carrying forward the tradition of his father, King Hussein.

I'm pleased to be here with Prime Minister Sharon. The friendship between our countries began at the time of Israel's creation. Today, America is strongly committed, and I am strongly committed, to Israel's security as a vibrant Jewish state.

I'm also pleased to be with Prime Minister Abbas. He represents the cause of freedom and statehood for the Palestinian people. I strongly support that cause as well.

Each of us is here because we understand that all people have the right to live in peace. We believe that with hard work and good faith and courage, it is possible to bring peace to the Middle East. And today we mark important progress toward that goal.

Great and hopeful change is coming to the Middle East. In Iraq, a dictator who funded terror and sowed conflict has been removed, and a more just and democratic society is emerging. Prime Minister Abbas now leads the Palestinian Cabinet. By his strong leadership, by building the institutions of Palestinian democracy, and by rejecting terror, he is serving the deepest hopes of his people.

All here today now share a goal: The Holy Land must be shared between the state of Palestine and the state of Israel, living at peace with each other and with every nation of the Middle East.

All sides will benefit from this achievement, and all sides have responsibilities to meet. As the roadmap accepted by the party makes clear, both must make tangible, immediate steps toward this two-state vision.

I welcome Prime Minister Sharon's pledge to improve the humanitarian situation in the Palestinian areas and to begin removing unauthorized outposts immediately. I appreciate his gestures of reconciliation on behalf of prisoners and their families and his frank statements about the need for territorial contiguity. As I said yesterday, the issue of settlements must be addressed for peace to be achieved. In addition, Prime Minister Sharon has stated that no unilateral actions by either side can or should prejudge the outcome of future negotiations. The Prime Minister also recognizes that it is in Israel's own interest for Palestinians to govern themselves in their own state. These are meaningful signs of respect for the rights of the Palestinians and their hopes for a viable, democratic, peaceful Palestinian state.

Prime Minister Abbas recognizes that terrorist crimes are a dangerous obstacle to the independent state his people seek. He agrees that the process for achieving that state is through peaceful negotiations. He has pledged to consolidate Palestinian institutions, including the security forces, and to make them more accountable and more democratic. He has promised his full efforts

and resources to end the armed *intifada.* He has promised to work without compromise for a complete end of violence and terror. In all these efforts, the Prime Minister is demonstrating his leadership and commitment to building a better future for the Palestinian people.

Both Prime Ministers here agree that progress toward peace also requires an end to violence and the elimination of all forms of hatred and prejudice and official incitement in schoolbooks, in broadcasts, and in the words used by political leaders. Both leaders understand that a future of peace cannot be founded on hatred and falsehood and bitterness.

Yet, these two leaders cannot bring about peace if they must act alone. True peace requires the support of other nations in the region. Yesterday, in Sharm el-Sheikh, we made a strong beginning. Arab leaders stated that they share our goal of two states, Israel and Palestine, living side by side in peace and in security. And they have promised to cut off assistance and the flow of money and weapons to terrorist groups and to help Prime Minister Abbas rid Palestinian areas of terrorism.

All sides have made important commitments, and the United States will strive to see these commitments fulfilled. My Government will provide training and support for a new, restructured Palestinian security service. And we'll place a mission on the ground, led by Ambassador John Wolf. This mission will be charged with helping the parties to move towards peace, monitoring their progress, and stating clearly who was fulfilling their responsibilities. And we expect both parties to keep their promises.

I've also asked Secretary of State Colin Powell and National Security Adviser Condoleezza Rice to make this cause a matter of the highest priority. Secretary Powell and Dr. Rice, as my personal representative, will work closely with the parties, helping them move toward true peace as quickly as possible.

The journey we're taking is difficult, but there is no other choice. No leader of conscience can accept more months and years of humiliation, killing, and mourning. And these leaders of conscience have made their declarations today in the cause of peace.

The United States is committed to that cause. If all sides fulfill their obligation, I know that peace can finally come.

Thank you very much, and may God bless our work.

NOTE: King Abdullah spoke at 3:30 p.m. at Beit al Bahar. Prime Minister Abbas spoke in Arabic, and his remarks were translated by an interpreter. In his remarks, the President referred to Queen Rania of Jordan; former President Saddam Hussein of Iraq; and Assistant Secretary of State for Nonproliferation John S. Wolf. Prime Minister Abbas referred to President Hosni Mubarak of Egypt; King Hamad bin Isa Al Khalifa of Bahrain; and Crown Prince Abdullah of Saudi Arabia. A portion of these remarks could not be verified because the tape was incomplete.

Records Management, White House Office of (ORM)

Subject Files

TR074
(Pittsburgh, PA, 02/05/02)

512072

OA/NARA#: 18492/12601
12855

Box
Folder

2018-0011-P [ ]

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Folder Title:

512072

2018-0011-P [ ]

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Folder Title:

606488

508575
FA006-27

Gordon Smith

United States Senator

April 29, 2002

The Honorable Karl Rove
Senior Advisor to The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Karl,

Mr. J. W. Marriott, Jr. and his wife Donna have graciously agreed to host an event in June on my behalf at their home in Bethesda, Maryland. It is my sincere hope that you can attend this important to assist my efforts toward re-election.

The event will take place on June 13th from 6:00pm to 9:00pm. There will be a private reception, followed by a general reception. The Marriott's address is:

PRA 6

As you know, the Marriotts are true friends of our party, and I have known them for many years. Your participation would help this event achieve our substantial fundraising goals. I know the demands on your time are enormous, and I thank you in advance for your consideration.

Bill and Donna join me in hoping that you will be able to assist us in my re-election efforts. If you have questions or need additional information, please contact Rachel Pearson of my campaign at (202) 367-1326.

Call & let them know we just got this & to fax in future.

Sincerely,

Gordon Smith

EXEC. OFC. PRESIDENT
WH STRATEGIC INITIATIVES
2002 JUN 24 PM 5:27

5005 SW MEADOWS RD • SUITE 310 • LAKE OSWEGO, OR 97035
Phone: (503) 227-1462 • Fax: (503) 226-1425 • Email: info@gordonsmith.com
www.gordonsmith.com

508575
FG006-27

Marjorie M. Arsht

PRA 6

NO RESPONSE NECESSARY

August 1, 2002

By Fax 202 456 0191

Dear Karl:

The attached page was written over a month ago. I forgot that mail to the White House is now virtually undeliverable. The contents of the letter are slightly out of date.

More to the point: I wish there were another spokesman for the Economic team. When they passed out "personality" chips they skipped Mr. O'Neil. We need a Rumsfeld for the Sunday shows or even Mitch Daniels who exudes confidence.

The White House pictures have come and they are wonderful except for my bulging midriff and the fact we didn't take one with you.

Thanks for all you and Susan did.

Love and a hug,

Marjorie

Just remembered I wrote this President, T-o — Orwell —

Telephone PRA 6 Facsimile PRA 6 E-Mail PRA 6

Marjorie M. Arsht
PRA 6

June 26, 2002

Mr. Karl Rove
The White House
1600 Pennsylvania Avenue NW
Washington D.C. 20500

My dear Karl:

It was wonderful seeing you again, particularly since I really don't know how many trips like that are in store for me. I hoped my emphysema wasn't showing. If I was breathing hard when we got to the Oval Office it wasn't just because I was so pleased to be there. John Culberson pushed me around the East Wing in a wheel chair. At least I got to see the White House kitchen.

I really did regret our visit with you was so brief. I wanted to talk about this new love affair with my co-religionists and the Republican Party. Until the White House Speech on the Middle East, I was extremely skeptical about this new "move-over," and whether or not it would translate into votes in Texas this November, but now I suspect we are going to see another 1928.

As the historian you are, you will know that in 1928 Al Smith came out strongly against the Ku Klux Klan, while Hoover equivocated. Prior to that election Jews, primarily located in the Northeast, were Republicans, because there is safety in numbers, and Jews are endemically, a fearful people. (Somehow I escaped.)

But in 1928 they "moved over" en masse, and in the next election of 1932, Roosevelt sealed the pact with his mantra of "Freedom from fear" which was music to fearful Jews. And they have stayed with the Democrats ever since.

You will forgive me if I chuckle at the union of Jews and Tom Delay. What a marriage! But there is no doubt there is a rumble. Alan sees it in New York, the most Jewish of Jewish places. And I see it with my Orthodox Jewish doctor who wants to join some "Republican Jewish group." I told Fred Zeidman to call him.

As you know the Jewish vote is small, but like a rock in a pond it has a ripple effect. I call that Christian guilt. I know people who feel that if the Jews vote for it, it must be all right. They are sometimes very wrong.

In any case, thank you for taking time out from your busy schedule. My grandchildren and great grandchildren were paralyzed with awe. As I always am, too.

With affection,

Marjorie

Telephone PRA 6 · Facsimile PRA 6 · E-Mail PRA 6

To: Karl Rove

508575
FC006-27

TEXAS CIVIL JUSTICE LEAGUE
401 WEST 15TH, SUITE 975
AUSTIN, TEXAS 78701
512-320-0474
512-474-4334 FAX
info@tcjl.com EMAIL
www.tcjl.com

NO HARDWARE
NECESSARY

July 31, 2002

To: Friends of George Christian

From: Ralph Wayne

Our mutual friend George Christian continues to amaze all of us. He looks absolutely great!

Earlier this summer, he and JoAnne spent two weeks in London and outlying areas and then returned home to Austin for a week. Following that respite, they left again and spent two weeks in the Czech Republic, Poland, Germany, and other countries. They returned a few days ago and George is already back in the office.

As always, your support continues to help. Please keep George, JoAnne and the family in your prayers.

508575
FC 006-27

Diana Jane Pascoe NPA

July 24

Dear Karl –

I just had to tell you thanks for taking the time to call me personally! I can only imagine how busy you are so it meant a lot. You're the best!☆

Regards –

Diana (Heyrich) Pascoe

508575
FG006-27

OK with changes Brett Kavanaugh 7/19/02

Please join

the Honorable

~~White House Senior Advisor~~

Karl Rove

in a

Roundtable

~~Roundtable~~ Discussion

benefiting The Indiana Republican Party
Victory 2002 Program

Tuesday, August 6th
6:00p.m.

at the home of

Al & Kathy Hubbard

PRA 6

$2500 per person
$5000 per couple

business attire

Please R.S.V.P. by faxing this sheet back to (317) 632-8510 or by calling (317) 964-5000.
Please make checks payable to The Indiana Republican Party and mail to
47 S. Meridian St. 2nd Floor, Indianapolis, IN 46204

_____ Yes, I(We) will be attending the Roundtable Discussion at the home of Al & Kathy Hubbard on August 6th.

Name(s) of attendees _____

_____ No, I(We) will be unable to attend the Roundtable Discussion on August 6th, but we would like to make a donation of $_____.

Paid for by the Indiana Republican Party, 47 S. Meridian St. 2nd Floor, Indianapolis, IN 46204. All contributions will be deposited in the Indiana Republican Party State Victory 2002 Account. Contributions are not tax deductible.

HOST COMMITTEE

Jim Kittle, Jr.
Republican State Chairman

Al and Kathy Hubbard

Richard and Renee Ackley
James M. Cornelius
Bob and Melody Grand
John Keeler
Fred and Judy Klipsch
Curt and Debbie Smith
Randy and Marianne Tobias

You are cordially invited to fund raising reception with:
Karl Rove

in honor of
Chris Chocola
Candidate for Indiana's Second Congressional District

PRA 6

August 6, 2002
Private Photo Reception 6:30 PM
Hors d'oeuvres and Cocktails 7:00 PM

$1,000 per person for Photo & Private Reception
$250 per person for Hors d'oeuvres and Cocktails

Please make checks payable to: Chocola for Congress
R.S.V.P. Enclosed
Please call 574-277-9252 with questions
Paid for by Chocola for Congress, Inc

Kate
Marinis
from Brett

Do not send the biography of Karl with the invitation.

Brett
Kavanaugh
7/19/02

CHOCOLA
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www.chocolaforcongress.com

Reception for Chris Chocola with Karl Rove

Yes, I would like my picture taken with Karl Rove at the Hubbard Home on August 6, 2002 in support of Chris Chocola. Enclosed is my contribution of $_____.

_____ Yes, I (we) will attend the event at the Hubbard Home on August 6, 2002 in support of Chris Chocola. Enclosed is my contribution of $_____.

_____ No, I am unable to attend the reception, but I would like to support Chris' campaign. Enclosed is my contribution of $_____.

Name _____

Address _____

City _____ State ____ Zip ____

Phone _____

e-mail _____

For more information please call 574-277-2000

Paid for by Chocola for Congress Inc Contributions are not tax deductible for federal tax purposes. Limited to the greater of $2,000 per election

Biography for Chris Chocola

Chris Chocola is the Republican Nominee for Congress in Indiana's
[illegible] District. He is Indiana's only "open seat." The race has been targeted by both
parties as the site of their efforts in their battle for control of Congress.
[illegible] Retired as a result of the Principle" by Charles Lee.

"[illegible] conservative, businessman and entrepreneur who understands that elected officials
should be [illegible] of creating jobs in the businesses they create. Chris believes that his
practical experience would bring a unique perspective to Congress — very different from that
of the career professionals politicians who have made a career out of working in politics.
Since graduating magna cum laude from Notre Dame in 1986, Chris has been with CTB
International Corp., in Fort Wayne, Indiana. He initially managed all the legal aspects of the
business as Corporate Counsel and held various management positions prior to his
ultimately named Chief Executive Officer in 1994.

Under his leadership, CTB has more than doubled in size and made a successful transition
from a family business to a publicly held company that is traded on the NASDAQ.
In April of 1999, Chris became Chairman of the Board of CTB.

Chris is a member of the Rotary Club, on the Board of Directors of Goodwill Industries, Community
Health Network, on the Council of Advisors of the Notre Dame Center for the Homeless.
Chris also has various business interests in many central Indiana businesses and is on the
Board of Directors of the Boys & Girls Club in Goshen.

~~White House Senior Advisor~~ The Honorable

Karl Rove

Karl Rove '91, who served as chief strategist for President Bush's presidential campaign, previously led the Office of Political Affairs, the Office of Public Liaison and the Office of Strategic Initiatives in the White House.

Before joining the campaign, he was president of Karl Rove and Company, an Austin-based political affairs firm.

Rove attended the University of Utah, the University of Texas at Austin and George Mason University.

He has taught at the LBJ School of Public Affairs and in the Journalism Department at the University of Texas at Austin.

THE WHITE HOUSE

WASHINGTON

September 13, 1985

Dear Mr. Souham:

Warmth, generosity, and spirited dedication have long been recognized as prominent characteristics of the American people. When I established the Office of Private Sector Initiatives at the White House, I knew the American people would respond. This response has been overwhelming, and I am touched each time I hear another example of the results of personal voluntarism.

The Private Sector Committees of the United States Information Agency have made particularly outstanding contributions. Director Charles Wick has kept me informed of the invaluable advice he has received from committee chairmen and members.

On the occasion of your Second Annual Meeting, I would like to extend my personal appreciation for the time and talent you have volunteered, at no cost to the government, to the U.S. Information Agency and our Nation.

You exemplify the great American spirit and I salute you.

Sincerely,

Ronald Reagan

Mr. Gerard Souham
Chairman and
Chief Executive Officer
Gerard Souham Group Communication Co.
500 Fifth Avenue
New York, New York 10036

UNITED STATES INFORMATION AGENCY
WASHINGTON, D.C. 20547

DIRECTOR

(202) 619-4742

December 14, 1992

Mr. Gerard Souham
Chairman and Chief Executive Officer
S3C Gerard Souham Group
Communication Companies
500 Fifth Avenue
New York, NY 10036

Dear Mr. Souham:

Please accept the enclosed certificate of appreciation expressing our gratitude for your work as a member of the United States Information Agency's private sector Public Relations Committee.

We value your dedication to USIA's mission. Your service exemplifies the very best in American voluntarism.

Sincerely,

Henry E. Catto
Director

United States Information Agency

Certificate of Appreciation

presented to

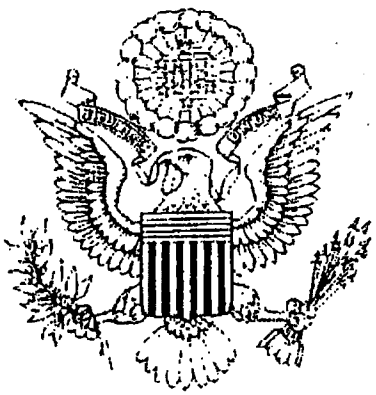
Gerard Souham

Member
USIA private sector Public Relations Committee

In appreciation of your guidance, dedication and distinguished service which have brought immeasurable benefit to the USIA mission in this period of sweeping and historic global change.

Director
Washington, D.C.
December 1992

REV_00458306



United States Information Agency

Certificate of Appreciation

Awarded to

Gerard Souham

For the unflagging energy, good humor, and spirit of cooperation which characterized your work as a member of USIA's Private Sector Public Relations Committee. This award is a small token of USIA's appreciation for your contributions to its goal of increasing understanding between the American people and the citizens of other nations.

Director
September 1991

REV_00458307

United States Information Agency

Washington, D.C. 20547

Office of the Director

USIA

October 1, 1991

Mr. Gerard Souham
Chairman and Chief Executive Officer
S3C Gerard Souham Group
Communication Companies
500 Fifth Avenue
New York, New York 10036

Dear Mr. Souham:

In the absence of the Director, it is with great pleasure that I present to you the United States Information Agency's Certificate of Appreciation. This Certificate is in recognition of the continuing outstanding counsel and assistance which you give to the Office of Private Sector Committees.

Due to your efforts and awareness, the mission of USIA is being enhanced overseas. Your generosity of spirit and energy greatly contribute to our work of furthering the cause of public diplomacy.

Sincerely,

Eugene P. Kopp

Eugene P. Kopp
Acting Director

December 20, 2001

Mr. Gerard Souham
Founder/Chairman/CEO
Gerard Souham Group of
Communication Companies
500 Fifth Avenue
New York, NY 10110

Dear Jerry,

As you are aware, your term on the USO World Board of Governors has expired. On behalf of the entire USO organization, I would like to express my thanks for your service on the Board and your support of our men and women in uniform through the USO. Over the past few years, we have made great strides to provide long-term stability for the organization to ensure its viability for the future.

Thanks to your participation, the USO continues to "Deliver America" to our sons and daughters in uniform wherever they are called to serve. Today, our programs are reaching those in harm's way, far from friends and family during the holidays.

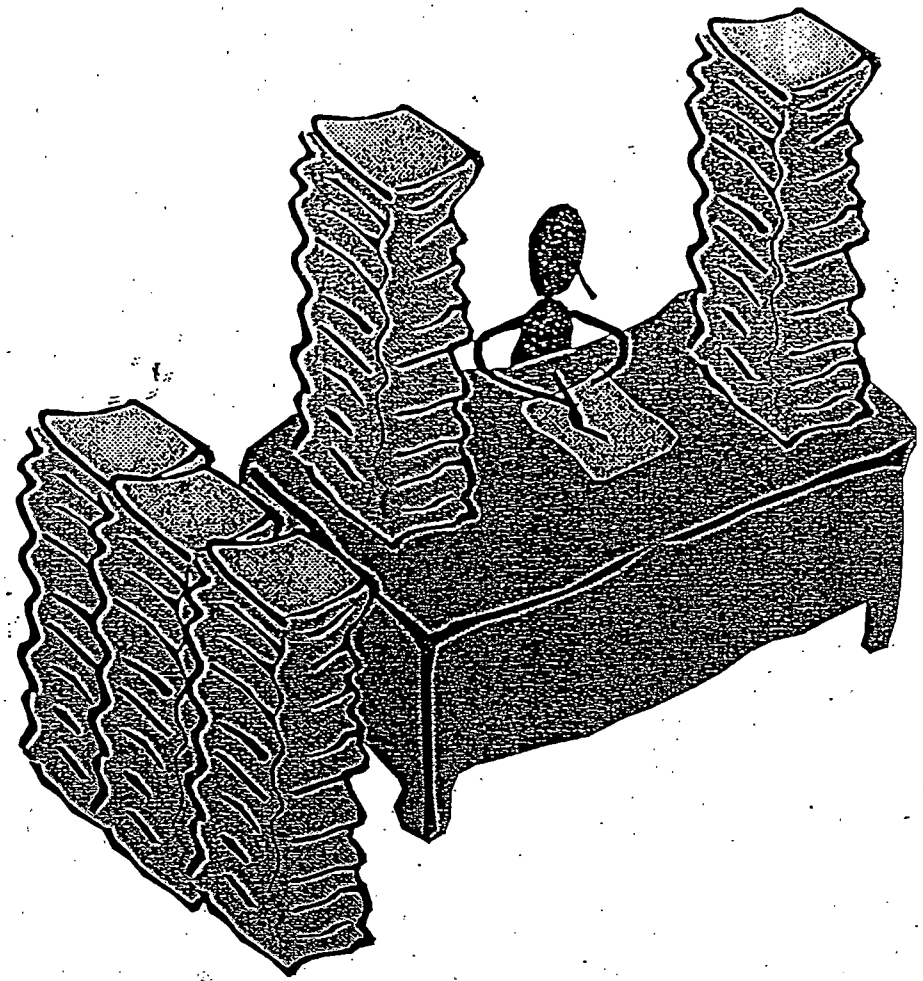
We appreciate your service on the Board and hope we can count on your continued support. Best wishes for the holidays and the coming year.

Sincerely,

John Gottschalk
Chairman

JH/kh

REV_00458309



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SCANNING INSERT SHEET

REMAINDER OF CASE NOT SCANNED

REV_00458310

Gerard Souham Group of Communication Companies

NEW YORK

508575
FG006-27

August 1, 2002

EXEC. OFC. PRESIDENT
WH STRATEGIC INITIATIVES

2002 AUG -6 PM 1:40

Mr. Karl Rove
Senior Advisor to the President
The White House, West Wing
Washington, DC 20500

Karl,

Just a short note to offer my assistance as you begin to think about a re-election effort. As you may remember, I helped Josh Bolten out during the campaign on trade issues. Desiree and I would be happy to help in Illinois, or on the national level.

Congratulations on the trade bill, which I followed closely on behalf of several clients, including Wal-Mart, Sara Lee/Hanes and Payless. I hope the press recognizes what a major achievement this is and a great credit the President's leadership. Clinton could not do this in eight years, two of which were with a Democratically controlled Congress.

Sincerely yours,

Ronald J. Sorini

SANDLER, TRAVIS & ROSENBERG, P.A.

RONALD J. SORINI
PRESIDENT, TRADE NEGOTIATIONS
& LEGISLATIVE AFFAIRS

200 WEST MADISON STREET, SUITE 2670
CHICAGO, ILLINOIS 60606
(312) 236-6555
FAX: (312) 236-6568

1300 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 216-9307
FAX: (202) 842-2247
E-MAIL: rsorini@strtrade.com
www.strtrade.com

THE WHITE HOUSE
WASHINGTON

Mr. Ronald J. Sorini
Sandler, Travis & Rosenberg
1300 Pennsylvania Avenue, NW
Washington, DC 20004

THE WHITE HOUSE

6 August 2002

Dear Ron,

Thanks for the offer and I'll keep it in mind.

Best,

Ken

REV_00458313

August 1, 2002

Mr. Karl Rove
Senior Advisor to the President
The White House, West Wing
Washington, DC 20500

Karl,

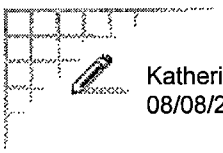
Just a short note to offer my assistance as you begin to think about a re-election effort. As you may remember, I helped Josh Bolten out during the campaign on trade issues. Desiree and I would be happy to help in Illinois, or on the national level.

Congratulations on the trade bill, which I followed closely on behalf of several clients, including Wal-Mart, Sara Lee/Hanes and Payless. I hope the press recognizes what a major achievement this is and a great credit the President's leadership. Clinton could not do this in eight years, two of which were with a Democratically controlled Congress.

Sincerely yours,

Ronald J. Sorini

508575
FG006-27



Katherine M. Walters
08/08/2002 01:20:57 PM

Record Type: Record

To: Susan B. Ralston/WHO/EOP@EOP

cc:
Subject: Karl's table tonight

Sitting next to Karl tonight will be Jim Cicconi (AT&T) and Mrs. Augusta Petrone. Here is the rest of the table:

-Adam Goldman (WH)
-Kerry Knott (Microsoft)
-Jennifer Oschal (PFA)
-Joseph Petrone
-Sheryl Shelby (UPS)
-David Thompson (Spectrum Astro)

PROGRESS for America

TO: Karl Rove
Ken Mehlman

FROM: Tony Feather
Robyn G. Judelsohn

DATE: August 5, 2002

RE: PFA Dinner

Thank you for joining us for our PFA Membership dinner on Thursday, August 8.

Here is a list of attendees, their title, and company (to date). We are still working on table assignments and seating, we will get that to you by Wednesday, Aug. 7 at close of business.

Jim	Cicconi	General Counsel	AT&T
Dan	Combs	Vice President, Law & Government	DCI
David	Condit	Affairs	AT&T
Don	DiFransisco	frm. Gov	NJ
Dwight	Evans	President-Southern Company External Affairs Group	Southern Company
Mallory and Elizabeth	Factor		Mallory Factor Inc.
Tony	Feather		PFA
Jose	Fuentes	former AG	Puerto Rico
Tim	Goeglein		WH
Adam	Goldman		WH

Judge	Gonzales		WH
Coley	Hudgins		DCI
Tim	Hyde		DCI
Brett	Kavanaugh		WH
Dr. Munr	Kazmir		
Kerry	Knott		Microsoft
Ted	Kratovil	Sr. Vp	UST
Roma	Malkani	CEO	ISN Corp.
Ken	Mehlman		WH
Bill	Oliver	VP, Public Relations	AT&T
Ambassador Joseph and Augusta	Petrone		
Leigh Ann	Pusey	Sr. VP Federal Affairs	American Insurance Association
Leonard	Rodriquez		WH
Karl	Rove		WH
Ann	Sauer	Vice President, Washington Operations, Executive Branch.	Lockheed Martin
Sheryl	Shelby		UPS
David	Thompson	Owner, CEO	Spectrum Astro
Skip	Vallee	President & CEO	RL Vallee
Karen	Watson	Director of Government Affairs	EchoStar
Virgil	Williams	Chairman & CEO	Williams Group International

Line by Line-

6-6:30 cocktails. Very casual- milling around. Cocktails and Hors d'oeurves will be served.

6:30 Everyone will take their assigned seats for the dinner. There will be either be 3 tables of 10 or 4 tables of 8, RSVP's are still coming in and we want to accommodate everyone. .

Appetizer- Tony Feather will get up and welcome everyone. Thank them for attending and their participation in PFA. Tony will let everyone know, there won't be Q&A, we

want everyone to have time to chat with their guests at each table. Each VIP will make short remarks and then we will enjoy the course.

Intermezzo- Judge Gonzales

Main Course- Karl Rove remarks (see talking points below)

Dessert- Ken Mehlman remarks (see talking points below)

Talking Points- Karl Rove

- As Judge Gonzales said, Progress for America has proven over and over again to be helpful to this administration.
- The Administration has had some large successes in our less than two years in office. Many of which, PFA has played a substantial role - Tax Cut, 'No Child Left Behind' and most recently TPA. We actually had the bill signing this week for TPA, thanks to many of you that played a roll helping get that passed.
- PFA is what I like to call the administration's 'utility player'. There are so many groups out there doing wonderful things to help the President, but PFA plays a unique roll, they fill in what is not getting done. If we need letters to the editor in a particular state or district, PFA makes sure that gets done; if we need community leaders to meet with Members, they make sure to get that done, etc.
- In the early part of President Bush's term, there was much talk of President Bush's domestic legislative agenda. But the national conversation dramatically changed after our nation was attacked on September 11th. Our country went through a terrible tragedy that has changed us. The way we do business has changed forever. We are working very hard to put together a Department of Homeland Security so we are prepared to protect ourselves at home as well as we do abroad. While we will never forget those who gave so much for our country, while we must understand there is a war going on, we can not allow the President's campaign promises to fall by the wayside. .

- The President himself has made it clear there are still important domestic issues that must be addressed during this Congress. No matter what crises we face in foreign policy there are still issues we must address here at home.
- This President is committed to turning the economy around. We have a three prong approach- tax cut; trade promotion authority and an economic stimulus package that promotes jobs and promotes investment. Future economic initiatives on the President's agenda??
- Will tort reform be on the President's agenda? If so, comments on that.
- PFA has been successful thanks to so many of you- It is so important we do everything we can to help them be successful, because that in turn can mean, this Administration is successful.

Talking Points- Ken Mehlman

- PFA has a similar plan to the Bush campaign in '00- they understand that in this day with so many organizations and campaigns up on TV, grassroots is vitally important to get an issue passed and build support.
- They understand it is the person-to-person contact that gets legislation passed- PFA recognizes building support among Republicans is not enough, they engage Democrats and Independents as well.
- We all know grassroots is not always the sexiest part of this business and it is hard to quantify how much grassroots works, but the bottom line is, it has been proven time and time again, grassroots works. It makes the difference. Look at TPA, we won in the House by ONE vote, that did not happen due to luck.
- PFA works the grassroots at a level not rivaled by many. They help carry legislation through and they realize that it takes business leaders, lawyers, doctors, community leaders, educators etc. in order to be successful.
- PFA emphasizes the positive sides of the legislation and how it is helpful to folks at home- they are not out on the attack- going negative.

- There are so many groups out there against the WH; Progress for America is out there 100% fighting for the President's agenda. They are a true friend to this Administration.
- PFA has a unique capability of being able to engage at the last minute on projects where we need an additional boost of grassroots in key areas – such as the President's tax cut, No Child Left Behind, TPA, judicial nominees.
- PFA has proven time and time again, they are there for the long haul- and they need your help to be successful.
- Touch on what we expect to see from 2002 election

Judge Gonzales received separate talking points. He will be speaking on Judicial nominees and the role PFA has played in building grassroots support for that effort.

>leaving Salt Lake City at 4:40PM and arriving at Dulles at 10:35PM.
>
>These attachments serve as Mr. Rove's electronic tickets and he will
>need to take a copy of them to the airport.
>
>Please let me know if you have any questions or need me to make any
>changes. I look forward to working with you.
>
>Sincerely,
>Becky Murphy
>
>
>
>
>CHRISTOPHERSON TRAVEL/STATE OF UTAH
>1170 STATE OFFICE BLDG.
>SALT LAKE CITY UT 84114
>801-538-3350 / EMERGENCY LINE 801-537-9124 800AM-500PM M-F
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>   PNR: 1P-2D9SG8
>   TK-54/FP9 BK-54/FP9
>
>UNIV. OF UTAH
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>NAME : ROVE/KARL
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>   SEAT   16-C **RESERVED**
>   ROVE/KARL
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>V TU 12NOV *****NONREFUNDABLE POLICY*****   CONFIRMED
>   2002 TICKETS NOT RESCHEDULED DEFORE PLANNED
>   TRAVEL DATE WILL HAVE NO VALUE.
>   PENALITIES APPLY TO CHANGES MADE PRIOR TO DEPRTURE DATE.
>   NO NAME CHANGES ARE ALLOWED.********
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> AIR FARE 385.11
> TAX 48.89
> TOTAL AIR FARE 434.00
> AMOUNT CHARGED 434.00
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>THIS AMOUNT WILL BE CHARGED TO CREDIT CARD: DC
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>RESERVATION BOOKED BY COLLEEN - REQUESTED BY BECKY 1-7579
>*NOTICE* AIRPORT REQUIRES STATE-FEDERAL PHOTO I.D.
>164145/01/00129/6000/03388//60000/03
>
> CHRISTOPHERSON TRAVEL THANKS YOU FOR YOUR BUSINESS
>
> (CO)DE: A-AIR H-HOTEL C-CAR T-TOUR S-SURFACE V-OTHER TRVL SERVCS
>(ST)ATUS:OK-CONFIRMED WL-WAITLIST RQ-REQUESTED NS-NO SEAT SA-STANDBY
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>1170 STATE OFFICE BLDG.
>SALT LAKE CITY UT 84114
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>UNIV. OF UTAH
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>NAME : ROVE/KARL
> -164145-
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> AIR FARE 296.74
> TAX 32.26

Movies of the Week

Movies Available as of June 19, 2003
This List is Void After June 24, 2003

HOLLYWOOD HOMICIDE PG-13 111 Min.
Crime/Drama (Rated PG-13 for violence, sexual situations and language.
Starring Harrison Ford, Josh Hartnett, Lena Olin, Bruce Greenwood *SONY PICTURES

2 FAST 2 FURIOUS PG-13 100 Min.
Action/Thriller (Rated PG-13 for violence, language and some sexuality.)
Starring Paul Walker, Tyrese Gibson, Eva Mendes, Cole Hauser *UNIVERSAL

THE IN-LAWS PG-13 98 Min.
Comedy/Romance (Rated PG-13 for suggestive humor, language, some references and action violence.)
Starring Michael Douglas, Albert Brooks, Ryan Reynolds *WARNER BROS.

6/20/03
THE PRESIDENT HAS SEEN

HOLLYWOOD HOMICIDE

Starring Harrison Ford, Josh Hartnett, Lena Olin, Bruce Greenwood. Directed by Ron Shelton. Produced by Ron Shelton and Lou Pitt. Crime/Drama. Rated PG-13 for violence, sexual situations and language. A Sony Pictures release. Running time 111 min.

Veteran detective Joe Gavilan, a weary but tenacious police veteran at the top of his game professionally, though his personal life is rapidly unraveling. His partner, K.C. Calden, seems to be more interested in his side jobs as a yoga teacher and aspiring actor than in the high-profile gangland-style murder they are currently investigating. Welcome to the land of blue skies, palm trees and dead bodies.

2 FAST 2 FURIOUS

Starring Paul Walker, Tyrese Gibson, Eva Mendes, Cole Hauser. Directed by John Singleton. Produced by Neal H Moritz. A Universal release. Action/Thriller. Rated PG-13 for violence, language and some sensuality. Running time: 100 min.

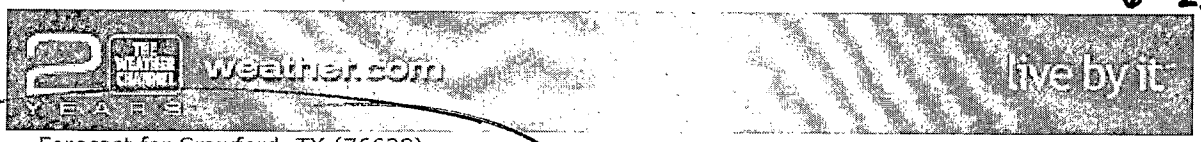
Speed--it's easy to get and it's as close as the nearest set of high-performance wheels. Brian O'Connor, now a disgraced cop, fell victim to it--and now he's paying the price. As far as his bosses and the FBI brass are concerned, the hothead undercover officer threw one of their largest investigations ever. After losing his badge and any chance of redemption along with it, O'Connor is given one last chance when the feds in Miami need his help to collar Carter Verone, a flashy businessman whose using his import/export business as a cover for an international money laundering cartel. Customs has had Verone under intense surveillance for over a year with nothing more to show for it than the kingpin's link to illegal street racing. With their backs against the wall and time running out, officials put out a call for O'Connor to do what he does best--talk the talk and push the metal. But the rule-breaking loner has his own demands before taking on the job. He insists on recruiting his childhood friend and ex-con Roman Pearce as his partner. The Feds and Agent Markham offer Pearce, an accomplished criminal with an aptitude for barrier-shattering speed, a deal--work with O'Connor and his impressive rap sheet will disappear. Now, it's last chance for both, ex-con and ex-cop, and their ticket out of disgrace is bringing down Verone. But the lines become blurred once again for O'Connor with the appearance of undercover agent Monica Fuentes, the key to entering Verone's world who may herself be in bed with the shady entrepreneur.

THE IN-LAWS

Starring Michael Douglas, Albert Brooks, Ryan Reynolds and Lindsay Sloane. Directed by Andrew Fleming. A Warner Bros. release. Comedy/Romance. Rated Pg-13 for suggestive humor, language, some drug references and action violence. Running time: 98 min.

When prospective fathers-in-law Steve Tobias and Jerry Peyser meet for the first time to celebrate their children's upcoming marriage, the cake hits the fan. Dr. Jerome Peyser is a mild-mannered podiatrist with a well-organized daily routine designed to eliminate all possible sources of stress. Meanwhile, daredevil CIA operative Steve Tobias moves through life like a heat-seeking missile. His average day consists of dodging bullets, stealing private jets and negotiating with international arms smugglers. Now he's giving potential father-of-the-bride Jerry a serious case of pre-nuptial jitters. Steve's dramatic entrances and exits, his cryptic references to a Russian runaway named Olga and his fight with a gunman in a restaurant washroom causes Jerry to see a vision of his daughter's perfectly planned wedding blowing up in his face. As far as Jerry's concerned, letting Steve into his family takes "til death do us part" way too literally. Before he can say the wedding is off, Jerry suddenly finds himself embroiled in the chaos that follows in Steve's wake as he is dragged kicking and screaming into a series of perilous adventures that take the mismatched in-laws-to-be halfway around the world.

THE PRESIDENT HAS SEEN
6-23-03



Forecast for Crawford, TX (76638)

10-Day Forecast

		High / Low (°F)	Precip. %
Today Jun 23	Sunny	**95°/73°**	0 %
Tue Jun 24	Partly Cloudy	**96°/73°**	20 %
Wed Jun 25	Partly Cloudy	**93°/72°**	10 %
Thu Jun 26	Scattered T-Storms	**93°/70°**	30 %
Fri Jun 27	Scattered T-Storms	**82°/64°**	50 %
Sat Jun 28	Partly Cloudy	**91°/65°**	20 %
Sun Jun 29	Mostly Sunny	**90°/68°**	20 %
Mon Jun 30	Scattered T-Storms	**89°/67°**	40 %
Tue Jul 01	Mostly Sunny	**92°/68°**	20 %
Wed Jul 02	Mostly Sunny	**93°/69°**	0 %

Last Updated Monday, June 23, 2003, at 7:21 AM Central Daylight Time (Monday, 8:21 AM EDT)

Back to Previous Page

REV_00458327

THE PRESIDENT HAS SEEN
6-23-03

5 DAY WEATHER FORECAST

PROVIDED BY THE JOINT PRESIDENTIAL WEATHER SUPPORT UNIT, SITE R

Monday, 23 June 2003

WASHINGTON, DC

Monday: Sunny. Winds north at 8 to 12 knots. Low 65°F. High 88°F.

Tuesday: Sunny. Winds northwest at 5 to 10 knots. Low 68°F. High 90°F.

Wednesday: Partly cloudy. Winds west at 5 to 10 knots. Low 70°F. High 91°F.

Thursday: Partly cloudy. Winds southwest at 5 to 10 knots. Low 70°F. High 90°F.

Friday: Partly cloudy becoming mostly cloudy with isolated evening showers and thunderstorms. Winds southwest at 5 to 10 knots. Low 69°F. High 88°F.

CAMP DAVID, MARYLAND

Monday: Partly cloudy. Winds northwest at 8 to 12 knots. Low 57°F. High 81°F.

Tuesday: Sunny. Winds northwest at 5 to 10 knots. Low 61°F. High 86°F.

Press Avail. is outdoors

NEW YORK CITY, NEW YORK

Monday: Mostly cloudy becoming partly cloudy by afternoon. Winds northwest at 8 to 12 knots. Low 58°F. High 85°F.

5 DAY WEATHER FORECAST

PROVIDED BY THE JOINT PRESIDENTIAL WEATHER SUPPORT UNIT, SITE R

6/25/03 THE PRESIDENT HAS SEEN

Wednesday, 25 June 2003

WASHINGTON, DC

Wednesday: Sunny. Winds west at 5 to 10 knots. Low 71°F. High 95°F.

Thursday: Partly cloudy becoming mostly cloudy overnight. Winds southwest at 5 to 10 knots. Low 75°F. High 96°F.

Friday: Mostly cloudy with scattered afternoon and evening showers and thunderstorms. Winds southwest becoming northwest at 5 to 10 knots. Low 75°F. High 91°F.

Saturday: Decreasing clouds. Winds south at 5 to 10 knots. Low 70°F. High 88°F.

Sunday: Partly cloudy becoming mostly cloudy with isolated afternoon showers and thunderstorms. Winds south at 5 to 10 knots. Low 68°F. High 87°F.

SAN FRANCISCO, CALIFORNIA

Friday: Sunny. Winds northwest at 8 to 12 knots. Low 54°F. High 70°F.

LOS ANGELES, CALIFORNIA

Friday: Partly cloudy. Winds light and variable becoming west at 10 to 15 knots by evening. Low 64°F. High 81°F.

CRAWFORD, TEXAS

Friday: Mostly cloudy with scattered morning showers and thunderstorms. Expect decreasing clouds by afternoon. Winds north to northeast at 8 to 12 knots. Low 73°F. High 87°F.

Saturday: Mostly sunny. Winds east at 5 to 10 knots. Low 75°F. High 89°F.

Sunday: Mostly sunny. Winds east at 5 to 10 knots. Low 76°F. High 91°F.

MIAMI, FLORIDA

Sunday: Partly cloudy with scattered afternoon and evening showers and thunderstorms. Winds southeast at 12 to 18 knots. Low 73°F. High 87°F.

TAMPA, FLORIDA

Sunday: Partly cloudy with scattered afternoon and evening showers and thunderstorms. Winds southeast at 12 to 18 knots. Low 76°F. High 87°F.

Mr. Hall

Mr. P.:

THE PRESIDENT HAS SEEN
6-25-03

Thanks for signing
so many pictures
for my family.

Ralph

6/27/03
THE PRESIDENT HAS SEEN

Movies of the Week

Movies Available as of June 26, 2003
This List is Void After July 1, 2003

ALEX & EMMA PG-13 96 Min.
Romance (Rated PG-13 for sexual content and some language.)
Starring Kate Hudson, Luke Wilson, Robert Downey Jr. *WARNER BROS.

THE HULK PG-13 138 Min.
Sci-fi (Rated PG-13 for Sci-fi action violence, some disturbing images and brief partial nudity.)
Starring Eric Bana, Jennifer Connell, Sam Elliott, Nick Nolte *UNIVERSAL

HOLLYWOOD HOMICIDE PG-13 111 Min.
Crime/Drama (Rated PG-13 for violence, sexual situations and language.
Starring Harrison Ford, Josh Hartnett, Lena Olin, Bruce Greenwood *SONY PICTURES

2 FAST 2 FURIOUS PG-13 100 Min.
Action/Thriller (Rated PG-13 for violence, language and some sexuality.)
Starring Paul Walker, Tyrese Gibson, Eva Mendes, Cole Hauser *UNIVERSAL

THE IN-LAWS PG-13 98 Min.
Comedy/Romance (Rated PG-13 for suggestive humor, language, some references and action violence.)
Starring Michael Douglas, Albert Brooks, Ryan Reynolds *WARNER BROS.

ALEX & EMMA

Starring Kate Hudson, Luke Wilson and Robert Downey Jr. Directed by Rob Reiner. Produced by Rob Reiner, Alan Greisman, Elie Samaha and Jeremy Leven. Romance. Rated PG-13 for sexual content and some language. A Warner Bros. release. Running time: 96 mins.

Alex Sheldon is an author whose writer's block is the least of his problems--he also happens to be flat broke and owes Cuban loan sharks $100,000. The thugs give Alex an ultimatum: pay up in 30 days or wind up dead. The only way Alex is going to get that kind of money is by finishing his novel, which is currently less than one sentence long. He's got some idea of what he wants the story to be, but he just can't seem to get it out onto paper. Now lacking both inspiration and a laptop, Alex secures the services of opinionated stenographer, Emma Dinsmore, to help him complete the novel and get paid by his publisher in time to save his skin. The story of Adam Shipley soon begins to emerge. The fictional Adam is a romantic young writer who has been hired to tutor the children of Polina Delacroix, a chic, gorgeous French woman in dire financial straits. The story that reveals itself is of the obsessive love that Adam develops for Polina, while ignoring the potential for true love with Polina's au pair, known in successive incarnations as the stern Swede Ylva, Elsa the bawdy German, Eldora the Spanish beauty, and down-to-earth American Anna. Meanwhile, Alex and Emma spend their days and nights working together on the novel. Emma challenges his ideas at every turn, and her initially irritating but undeniably intriguing input begins to influence Alex and his story. Soon, real life begins to imitate art--and art, to imitate life.

THE HULK

Starring Eric Bana , Jennifer Connell , Sam Elliott, Josh Lucas and Nick Nolte. Directed by Ang Lee. Produced by Gale Anne Hurd , Avi Arad , James Schamus and Larry J. Franco. SCI-FI. Rated PG-13 for Sci-fi action violence, some disturbing images and brief partial nudity. A Universal Pictures release. Running time: 138 min.

Scientist Bruce Banner has, to put it mildly, anger management issues. His quiet life as a brilliant researcher working with cutting edge genetic technology conceals a nearly forgotten and painful past. His ex-girlfriend and fellow researcher, Betty Ross, has tired of Bruce's cordoned off emotional terrain and resigns herself to remaining an interested onlooker to his quiet life--until a simple oversight in the lab leads to an explosive situation in which Bruce heroically saves a life by absorbing a normally deadly dose of gamma radiation. Believing himself to have emerged from the accident unscathed, Bruce can't deny he's experiencing some strange side effects--including blackouts and the feeling that there is some kind of strange and dark, yet attractive, presence within him. All the while an impossibly strong, rampaging creature, who comes to be known as the Hulk, continues its sporadic appearances, cutting a swath of destruction in his wake. But Betty Ross has her theories, she knows the shadowy figure lurking in the background, Bruce's father David, is somehow connected. She may be the only one who understands the link between the scientist and the Hulk, but her efforts may be too late to save both man and creature.

HOLLYWOOD HOMICIDE

Starring Harrison Ford, Josh Hartnett, Lena Olin, Bruce Greenwood. Directed by Ron Shelton. Produced by Ron Shelton and Lou Pitt. Crime/Drama. Rated PG-13 for violence, sexual situations and language. A Sony Pictures release. Running time 111 min.

Veteran detective Joe Gavilan, a weary but tenacious police veteran at the top of his game professionally, though his personal life is rapidly unraveling. His partner, K.C. Calden, seems to be more interested in his side jobs as a yoga teacher and aspiring actor than in the high-profile gangland-style murder they are currently investigating. Welcome to the land of blue skies, palm trees and dead bodies.

2 FAST 2 FURIOUS

Starring Paul Walker, Tyrese Gibson, Eva Mendes, Cole Hauser. Directed by John Singleton. Produced by Neal H Moritz. A Universal release. Action/Thriller. Rated PG-13 for violence, language and some sensuality. Running time: 100 min.

Speed--it's easy to get and it's as close as the nearest set of high-performance wheels. Brian O'Connor, now a disgraced cop, fell victim to it--and now he's paying the price. As far as his bosses and the FBI brass are concerned, the hothead undercover officer threw one of their largest investigations ever. After losing his badge and any chance of redemption along with it, O'Connor is given one last chance when the feds in Miami need his help to collar Carter Verone, a flashy businessman whose using his import/export business as a cover for an international money laundering cartel. Customs has had Verone under intense surveillance for over a year with nothing more to show for it than the kingpin's link to illegal street racing. With their backs against the wall and time running out, officials put out a call for O'Connor to do what he does best--talk the talk and push the metal. But the rule-breaking loner has his own demands before taking on the job. He insists on recruiting his childhood friend and ex-con Roman Pearce as his partner. The Feds and Agent Markham offer Pearce, an accomplished criminal with an aptitude for barrier-shattering speed, a deal--work with O'Connor and his impressive rap sheet will disappear. Now, it's last chance for both, ex-con and ex-cop, and their ticket out of disgrace is bringing down Verone. But the lines become blurred once again for O'Connor with the appearance of undercover agent Monica Fuentes, the key to entering Verone's world who may herself be in bed with the shady entrepreneur.

THE IN-LAWS

Starring Michael Douglas, Albert Brooks, Ryan Reynolds and Lindsay Sloane. Directed by Andrew Fleming. A Warner Bros. release. Comedy/Romance. Rated Pg-13 for suggestive humor, language, some drug references and action violence. Running time: 98 min.

When prospective fathers-in-law Steve Tobias and Jerry Peyser meet for the first time to celebrate their children's upcoming marriage, the cake hits the fan. Dr. Jerome Peyser is a mild-mannered podiatrist with a well-organized daily routine designed to eliminate all possible sources of stress. Meanwhile, daredevil CIA operative Steve Tobias moves through life like a heat-seeking missile. His average day consists of dodging bullets, stealing private jets and negotiating with international arms smugglers. Now he's giving potential father-of-the-bride Jerry a serious case of pre-nuptial jitters. Steve's dramatic entrances and exits, his cryptic references to a Russian runaway named Olga and his fight with a gunman in a restaurant washroom causes Jerry to see a vision of his daughter's perfectly planned wedding blowing up in his face. As far as Jerry's concerned, letting Steve into his family takes "til death do us part" way too literally. Before he can say the wedding is off, Jerry suddenly finds himself embroiled in the chaos that follows in Steve's wake as he is dragged kicking and screaming into a series of perilous adventures that take the mismatched in-laws-to-be halfway around the world.

Crawford

THE PRESIDENT HAS SEEN
6.27.03

10-Day Forecast

		High / Low (°F)	Precip. %
Today Jun 27	Partly Cloudy	**90°/64°**	10 %
Sat Jun 28	Sunny	**93°/65°**	0 %
Sun Jun 29	Sunny	**92°/72°**	20 %
Mon Jun 30	Scattered Showers	**89°/72°**	30 %
Tue Jul 01	Partly Cloudy	**92°/69°**	20 %
Wed Jul 02	Partly Cloudy	**93°/69°**	20 %
Thu Jul 03	Mostly Sunny	**93°/68°**	20 %
Fri Jul 04	Partly Cloudy	**92°/69°**	20 %
Sat Jul 05	Partly Cloudy	**93°/70°**	10 %
Sun Jul 06	Partly Cloudy	**93°/71°**	0 %

Last Updated Friday, June 27, 2003, at 5:36 AM Central Daylight Time (Friday, 6:36 AM EDT)

THE PRESIDENT HAS SEEN
6·27·03

The family of Donald T. Regan
appreciates both your
expression of sympathy, and
your friendship.

The Family

We all admire you so.
With much appreciation for the kind
note - I'm a relative of yours from
your father's Virginia line.
Ann B. Regan

Mrs. Donald T. Regan

(b)(6)

Records Management, White House Office of (ORM)

Subject File

CLOSED - PRM (PRESIDENTIAL PERSONAL)

PP

565238 [1]

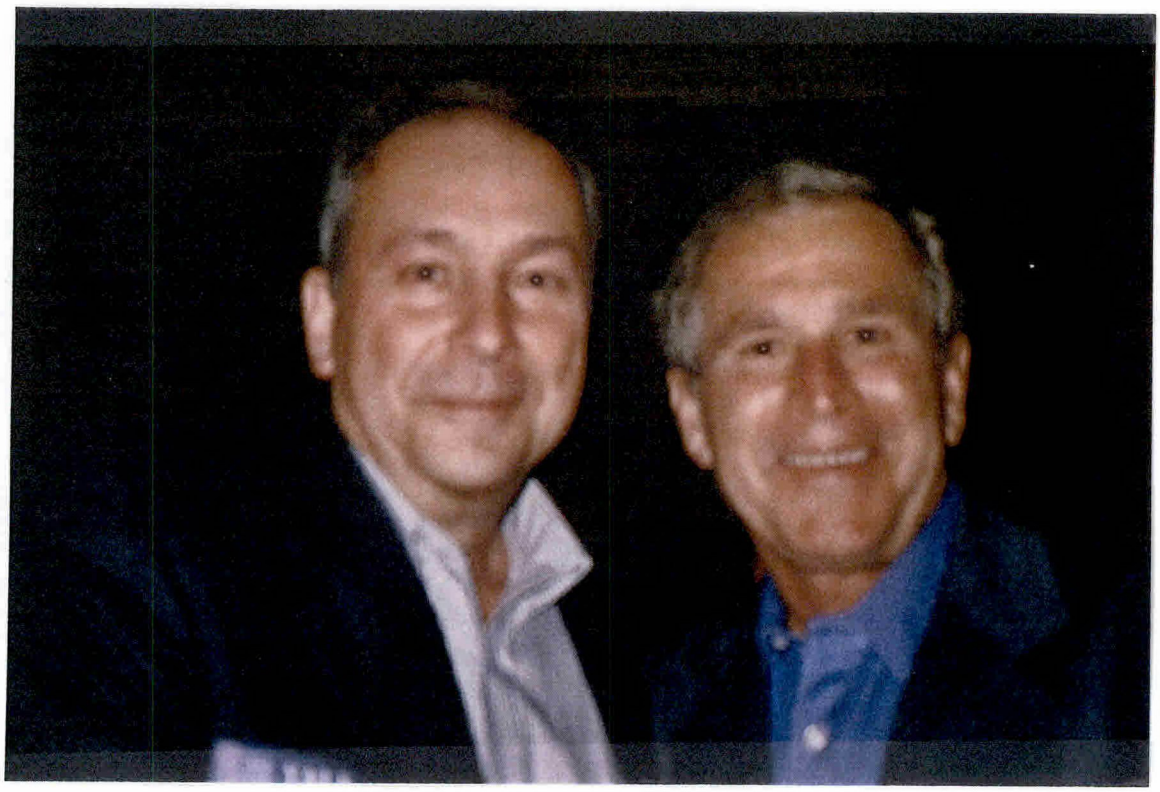
CLOSED - PRM

2019-0231-F [1]

Box _____

Folder _____

OA/NARA #: 12204/12570
12475



PROPOSED PUBLIC MEMBERS OF THE US-UNESCO DELEGATION

Michael Beschloss, Historian and Commentator

Called "the nation's leading presidential historian" by *Newsweek*, "he uses colorful anecdotes and brilliant inside analysis while comparing the leadership styles of American presidents. He shows executives what they can learn from these great men to better manage, lead, and inspire." Beschloss is a regular commentator on PBS' *The NewsHour with Jim Lehrer* and is the author of national best sellers *Taking Charge: The Johnson White House Tapes, 1963-1964*, *The Crisis Years: Kennedy and Khrushchev, 1960-1963*, *Mayday: Eisenhower, Khrushchev, and the U-2 Affair*, and *Kennedy and Roosevelt: The Uneasy Alliance* in addition to his latest, *The Conquerors: Roosevelt, Truman and the Destruction of Hitler's Germany*. With co-author Strobe Talbott, he also wrote *At The Highest Levels: The Inside Story of the End of the Cold War*. Beschloss is also a member of the White House Historical Society.

Dr. S. Allen Counter, Director of the Harvard Foundation and Neurophysiologist

Professor S. Allen Counter, Ph.D., D.M.Sc. is Director of The Harvard Foundation of Harvard University. He is also Neurophysiologist at the Massachusetts General Hospital and Harvard Medical School. In 1989, he was the recipient of the distinguished NAACP Image Award, and in 1994 the National Medical Association Hall of Fame Award. In 2003, Dr. Counter was appointed Visiting Professor of Neuroscience at the Karolinska Institute in Stockholm, Sweden.

Dr. Counter has published extensively in both cultural and scientific journals, including *National Geographic* and *Scientific American*. He has appeared on local and national television in numerous programs ranging from children's science shows ("3-2-1 Contact" and "Spaces") to talk shows. He is especially interested in increasing the scientific literacy of young people. To this end, he has presented talks and videos on science education to elementary, junior high, and high school students throughout the metropolitan Boston area and the nation. He has also lectured on topics in science, medical anthropology, ethics, and environmental health to scientists at Lawrence Livermore National Laboratories, to Fulbright Scholars, and internationally in, The People's Republic of China, Sweden, Suriname, South America, Togo, West Africa, and Ecuador.

In addition to his scientific interests, he continues to work in the area of ethics in science and technology, nature conservation, and human rights at the international level. He is presently co-host of *EcoForum,* a nationally televised program on earth conservation. Dr. Counter has served as a member of the National Advisory Council of the National Institutes of Health and the National Institute of Mental Health.

Dr. David Donald, Harvard Historian and Author

Donald is perhaps the foremost Abraham Lincoln scholar alive today. His recent biography, *Lincoln*, reflects both his years of comprehensive study and his mastery of his subject. From Lincoln's youth in the log cabins of the Midwest to his early legal career with Herndon, through his days in the House and his Senatorial losses to Stephen Douglas, and finally through the turbulence of the Civil War, Donald succeeds in painting a remarkably human portrait of one of our greatest Presidents.

Donald has also written several more scholarly treatments of Mr. Lincoln, the best collection of which is entitled *Lincoln Remembered.*

Susan Graham, Mezzo-soprano

One of the most sought-after singers of our time, Susan Graham is celebrated worldwide for the lustrous timbre of her voice, the enchanting allure of her stage presence, and the fervent emotion that infuses her varied repertoire. Graham's impassioned voice brims with feeling in the most demanding lyric mezzo-soprano roles; in traditional opera standards, art song, and symphonic literature. Her discography now features 15 titles, the latest of which, Erato's *C'est ça la vie, c'est ça l'amour: French Operetta Arias*, was named one of the best classical music albums of 2002 by *Entertainment Weekly* and won Editor's Choice awards from *Gramophone* and *Opera News* magazines.

Dr. Vartan Gregorian, University President and President of the Carnegie Corporation

Vartan Gregorian is the president of Carnegie Corporation of New York, a grant-making institution founded by Andrew Carnegie in 1911. Prior to his current position, which he assumed in June 1997, Gregorian served for nine years as the president of Brown University.

He was born in Tabriz, Iran, of Armenian parents, receiving his elementary education in Iran and his secondary education in Lebanon. In 1956, he entered Stanford University, where he majored in history and the humanities, graduating with honors in 1958. He was awarded a Ph.D. in history and humanities from Stanford in 1964.

Gregorian has taught European and Middle Eastern history at San Francisco State College, the University of California at Los Angeles, and the University of Texas at Austin. In 1972, he joined the University of Pennsylvania faculty and was appointed Tarzian Professor of History and professor of South Asian history. He was founding dean of the Faculty of Arts and Sciences at the University of Pennsylvania in 1974 and four years later became its provost until 1981.

For eight years (1981-1989), Gregorian served as president of the New York Public Library, an institution with a network of four research libraries and eighty-three circulating libraries. In 1989, he was appointed president of Brown University.

Gregorian is the author of *Emergence of Modern Afghanistan, 1880-1946*. A Phi Beta Kappa and a Ford Foundation Foreign Area Training Fellow, he is a recipient of numerous fellowships, including those from the John Simon Guggenheim Foundation, the American Council of Learned Societies, the Social Science Research Council and the American Philosophical Society. He is a Fellow of the American Academy of Arts and Sciences, and the American Philosophical Society.

He currently serves on the boards of the Institute for Advanced Study at Princeton, Human Rights Watch, the Museum of Modern Art, and The McGraw-Hill Companies. He served on the boards of the J. Paul Getty Trust, the Aga Khan University, and the Bill and Melinda Gates Foundation. He has been decorated by the French, Italian, Austrian and Portuguese governments.

In 1986, Gregorian was awarded the Ellis Island Medal of Honor and in 1989 the American Academy of the Institute of Arts and Letters' Gold Medal for Service to the Arts. In 1998, President Clinton awarded him the National Humanities Medal.

Dr. Alan J. Heeger, Nobel Chemist

Alan J. Heeger won the 2000 Nobel Prize in chemistry with two other scientists for the discovery and development of electrically conducting polymers, and he continues his laboratory research at UCSB. He believes that the key to future

progress in the sciences is in interdisciplinary collaborations. Heeger is also chief scientist for UNIAX, a company he founded that was acquired last year by Dupont. It focuses on the uses of plastic electronics commercial products.

In 1977, Heeger and his colleagues discovered conducting polymers, a novel class of materials with electrical and optical properties like metals and semiconductors coupled with the mechanical and processing advantages of polymers.

Applications of work by Heeger and his associates include conducting polymer blends for electromagnetic shielding and for antistatic packaging, and semiconducting polymers for use in the emerging field of plastic electronic devices, which already include diodes.

"Even though I received the Nobel Prize in chemistry," he says, "I still think like a physicist."

Dr. Heeger's appointments, awards and honors include:

Alfred P. Sloan Foundation Fellow ; Professor, University of Pennsylvania; Fellow, American Physical Society; John Simon Guggenheim Foundation Fellow; Visiting Professor of Physics, University of Geneva; Morris Loeb Visiting Lecturer in Physics, Harvard National Academy Exchange Scholar – USSR; Yamada Science Foundation Exchange Scholar – Japan; Acting Vice-Provost for Research, University of Pennsylvania; Professor of Physics, UCSB; Oliver E. Buckley Prize for Condensed Matter Physics; Professor of Materials (in Engineering), UCSB; Founder and President, UNIAX Corporation, Santa Barbara; Honorary Doctor of Science, University of Mons (Belgium); Balzan Prize, "Science of New Materials", Bern, Switzerland; Doctor of Technology (H.C.) University of Linköping, Sweden; and Doctor of Science (H.C.) Abo Akademie University, Turku (Finland)

Karen Hughes, Counselor to the President

As Counselor to The President for his first eighteen months in the White House and as his communications director since he first ran for Governor of Texas in 1994, Hughes has been a crucial influence in President Bush's inner circle.

During her tenure in the Bush White House, Mrs. Hughes advised the President on a wide range of issues, crafted the communications and message strategy for the administration and was responsible for overseeing the Offices of Press Secretary, Media Affairs, Speechwriting and Communications. She helped develop and lead

the international communications effort during the early months of the war against terror and was instrumental in creating the new White House Office of Global Communications.

Dr. Manuel J. Justiz, Dean of the College of Education, University of Texas at Austin

Dr. Manuel J. Justiz, a former director of the National Institute of Education, has been dean of the College of Education at the University of Texas at Austin since January 1, 1990.

Dr. Justiz was appointed by President Reagan and confirmed by the U.S. Senate in 1982 as director of the National Institute of Education in Washington, D.C., where he served from 1982 to 1985. In that capacity, he served as principal spokesman for educational policy and research to the President, Secretary, Congress, and education associations. While in Washington, Dr. Justiz worked with the National Commission on Excellence in Education to produce the celebrated study A Nation at Risk, which warned of declining standards in American schools and the consequent economic dangers to society.

From 1985 to 1989, Dr. Justiz was a chaired professor of educational leadership and policies at the University of South Carolina in Columbia, and in 1988-1989 he served as the Martin Luther King-Rosa Parks Distinguished Scholar-in-Residence at the University of Michigan, Ann Arbor.

At UT Austin, Dr. Justiz has focused on building the academic programs of the College of Education and on partnering with public schools to improve preparation programs for future teachers and educational leaders. Under his leadership, the College rose to seventh in the 2001 *US News & World Report* rankings of the nation's top public graduate schools of education.

Prior to his Washington experience, Dr. Justiz was on the faculty at the University of New Mexico, where he directed the Latin American Programs in Education. In that role, he established the only Spanish-language M.S. program in educational administration in the nation and provided liaison with American embassies, the US Department of State, federal agencies, and ministers of education in Latin American countries.

Dr. Justiz earned a doctorate in higher education administration from Southern Illinois University in 1976. He has published extensively in edited book series and professional journals on topics relating to diversity in education, partnerships

between education and business, improving education through research, and higher education policy.

Wynton Marsalis, Artistic Director, Jazz at Lincoln Center

Marsalis is the most accomplished and acclaimed jazz artist and composer of his generation, in addition to being a distinguished classical musician. Mr. Marsalis has helped propel jazz to the forefront of American culture through his brilliant performances, recordings, compositions, educational efforts, and his vision as Artistic Director of the world-renowned arts organization Jazz at Lincoln Center.

Mr. Marsalis' prominent position in the performing arts was secured in April 1997, when he became the first jazz artist to be awarded the prestigious Pulitzer Prize in music for his work *Blood on the Fields.*

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From: Collister W. Johnson (CN=Collister W. Johnson/OU=WHO/O=EOP [WHO])
Sent: Sunday, October 20, 2002 4:18 PM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : Fw: door-to-door lit drop piece for TN
Attachments: P_ZEF1B003_WHO.TXT_1.txt

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Collister W. Johnson (CN=Collister W. Johnson/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:20-OCT-2002 16:17:32.00
SUBJECT:: Fw: door-to-door lit drop piece for TN TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

your approval? thanks sir -
c

---------- Forwarded by Collister W. Johnson/WHO/EOP on 10/20/2002 04:19 PM ----------

Coddy Johnson <cjohnson@georgewbush.com>
10/20/2002 03:43:25 PM
Record Type: Record

To: Collister W. Johnson/WHO/EOP@EOP
cc:
Subject: Fw: door-to-door lit drop piece for TN

----- Original Message -----
From: "Randy Kammerdiener - Political" <RKammerd@rnchq.org>
To: "Coddy Johnson" <cjohnson@georgewbush.com>
Sent: Saturday, October 19, 2002 5:29 PM
Subject: door-to-door lit drop piece for TN

Coddy:

We need White House approval on this door hangar which will serve as the literature for our Tennessee flushing effort. Also, the campaigns would like
to have the President's signature on the piece rather than just his printed name. Is that something that you can also get approval on and email an electronic copy of the signature to me or Majority Strategies for placement on the door hangar?

Thanks for your help.

Kammerdiener

-----Original Message-----
From: Elizabeth Todd [mailto:libby@majoritystrategies.com]
Sent: Saturday, October 19, 2002 2:51 PM
To: Matt Sonnesyn; Randy Kammerdiener - Political; Susie Alcorn; Graham Shaffer; Dan Thompson
Subject: <no subject>

these should have the changes from both campaings. randy-could you send it on to the white house

- Hilleary_Alexander_Hanger.pdf

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZEF1B003_WHO.TXT_1>

Exception Document

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Monday, October 21, 2002 8:56 AM
To: Collister W. Johnson (CN=Collister W. Johnson/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re: Fw: door-to-door lit drop piece for TN
Attachments: P_3QM1B003_WHO.TXT_1.txt

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:21-OCT-2002 08:56:13.00
SUBJECT:: Re: Fw: door-to-door lit drop piece for TN TO:Collister W. Johnson (CN=Collister W. Johnson/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

Approved. Is the signature provided by Olson Delisi?

Collister W. Johnson
10/20/2002 04:14:56 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:Fw: door-to-door lit drop piece for TN

your approval? thanks sir -
c

---------- Forwarded by Collister W. Johnson/WHO/EOP on 10/20/2002 04:19 PM ----------

Coddy Johnson <cjohnson@georgewbush.com>
10/20/2002 03:43:25 PM
Record Type: Record

To: Collister W. Johnson/WHO/EOP@EOP
cc:
Subject: Fw: door-to-door lit drop piece for TN

----- Original Message -----
From: "Randy Kammerdiener - Political" <RKammerd@rnchq.org>
To: "Coddy Johnson" <cjohnson@georgewbush.com>

Sent: Saturday, October 19, 2002 5:29 PM
Subject: door-to-door lit drop piece for TN

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Sent: Saturday, October 19, 2002 2:51 PM
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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_3QM1B003_WHO.TXT_1>

Exception Document

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- Hilleary_Alexander_Hanger.pdf

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_3QM1B003_WHO.TXT_1>

Exception Document

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From: Bartlett
Sent: Thursday, January 02, 2003 4:31 PM
To: Mehlman; Ken (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=50BA7341-700F1B8A-85256B0A-6B34A8 [UNKNOWN]); Kaplan; Joel D. (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=AB40E70D-1309FE17-852569DC-4D7D0B [UNKNOWN])
Cc: Warsh; Kevin (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=30FE7FCE-D1703678-85256B59-6CFEFC [UNKNOWN]); Kavanaugh; Brett M. (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=6246020-C20FEE19-852569DA-7648DC [UNKNOWN]); Conner; Charles (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=EC0006FB-901F59D9-85256AFC-4D5FD0 [UNKNOWN]); Gross; Taylor S. (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=87F123B8-5D1718E2-852569F2-5452D7 [UNKNOWN])
Subject: RE: Dinner for Dylan
Attachments: P_VH7A000674POERS_WHO.TXT_1

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (MS Mail) CREATOR:Bartlett, Daniel J. (Daniel_J._Bartlett@who.eop.gov [WHO]) CREATION DATE/TIME: 2-JAN-2003 17:31:21.00
SUBJECT:RE: Dinner for Dylan
TO:Mehlman, Ken (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=50BA7341-700F1B8A-85256B0A-6B34A8 [UNKNOWN]) READ:UNKNOWN TO:Kaplan, Joel D. (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=AB40E70D-1309FE17-852569DC-4D7D0B [UNKNOWN]) READ:UNKNOWN CC:Warsh, Kevin (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=30FE7FCE-D1703678-85256B59-6CFEFC [UNKNOWN]) READ:UNKNOWN CC:Kavanaugh, Brett M. (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=6246020-C20FEE19-852569DA-7648DC [UNKNOWN]) READ:UNKNOWN CC:Conner, Charles (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=EC0006FB-901F59D9-85256AFC-4D5FD0 [UNKNOWN]) READ:UNKNOWN CC:Gross, Taylor S. (/O=EOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=87F123B8-5D1718E2-852569F2-5452D7 [UNKNOWN]) READ:UNKNOWN
End Original ARMS Header

Just me - I got a hallpass.

-----Original Message-----

From: Mehlman, Ken

Sent: Thursday, January 02, 2003 5:04 PM

To: Kaplan, Joel D.

Cc: Bartlett, Daniel J.; Warsh, Kevin; Kavanaugh, Brett M.; Conner, Charles; Gross, Taylor S.

Subject:Re: Dinner for Dylan

Please let me know whether you're coming and if you're bringing someone else. I have reserved for 20 and will need to make any changes pretty quickly.

<<Picture (Device Independent Bitmap)>>

Joel D. Kaplan
01/02/2003 04:42:32 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject:Dinner for Dylan

Due to popular demand, the dinner at Morton's Sat. night (7:00 p.m.) is open to spouses/significant others. Please let me/Ken know if you'll be bringing someone so we can let the restaurant know.

Message Sent
To:_____

Daniel J. Bartlett/WHO/EOP@Exchange@EOP

Ken Mehlman/WHO/EOP@EOP
Kevin Warsh/OPD/EOP@EOP

Brett M. Kavanaugh/WHO/EOP@EOP

Charles Conner/OPD/EOP@EOP
Taylor S. Gross/WHO/EOP@EOP

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_VH7A000674POERS_WHO.TXT_1>

Exception Document

.

From: MIchael Thielen (MIchael Thielen <thielen@republicanlawyer.net> [UNKNOWN]) <thielen@republicanlawyer.net>
Sent: Tuesday, February 04, 2003 9:24 AM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : [Fwd: RE: Welcome to the RNLA Judicial Advocacy Panel, Details and Background Information]
Attachments: P_2TELD003_WHO.TXT_1.txt

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:MIchael Thielen <thielen@republicanlawyer.net> (MIchael Thielen <thielen@republicanlawyer.net> [UNKNOWN]) CREATION DATE/TIME: 4-FEB-2003 10:24:17.00
SUBJECT:: [Fwd: RE: Welcome to the RNLA Judicial Advocacy Panel, Details and Background Information] TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

- att1.htm
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_2TELD003_WHO.TXT_1>

Exception Document

.

From: Kavanaugh
Sent: Monday, February 17, 2003 12:30 PM
To: Bartlett; Daniel J. (Daniel_J._Bartlett@who.eop.gov [WHO])
Subject: Re: estrada q&a
Attachments: P_WX27000674POERS_WHO.TXT_1

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (MS Mail) CREATOR:Kavanaugh, Brett M. ([UNKNOWN]) CREATION DATE/TIME:17-FEB-2003 13:30:05.00
SUBJECT:Re: estrada q&a
TO:Bartlett, Daniel J. (Daniel_J._Bartlett@who.eop.gov [WHO]) READ:UNKNOWN
End Original ARMS Header

btw, if you do not have 4-wheel SUV, do not even try. You will get stuck.

Brett M. Kavanaugh
02/17/2003 08:14:31 AM

Record Type: Record

To: Daniel J. Bartlett/WHO/EOP@Exchange
cc:

bcc: Records Management@EOP

Subject: Re: estrada q&a <<Untitled Attachment>>

yes, the 4-wheel Jeep came in handy.

From: Daniel J. Bartlett/WHO/EOP@Exchange on 02/17/2003 08:15:39 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Re: estrada q&a

Did you get into the office?

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_WX27000674POERS_WHO.TXT_1>

Exception Document

.

From: Kavanaugh
Sent: Monday, February 17, 2003 12:30 PM
To: Bartlett; Daniel J. (Daniel_J._Bartlett@who.eop.gov [WHO])
Subject: Re: estrada q&a
Attachments: P_WX27000674POERS_WHO.TXT_1

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SUBJECT:Re: estrada q&a
TO:Bartlett, Daniel J. (Daniel_J._Bartlett@who.eop.gov [WHO]) READ:UNKNOWN
End Original ARMS Header

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Brett M. Kavanaugh
02/17/2003 08:14:31 AM

Record Type: Record

To: Daniel J. Bartlett/WHO/EOP@Exchange
cc:

bcc: Records Management@EOP

Subject: Re: estrada q&a <<Untitled Attachment>>

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Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Re: estrada q&a

Did you get into the office?

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_WX27000674POERS_WHO.TXT_1>

Exception Document

.

From: Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@Exchange [WHO])
Sent: Monday, March 24, 2003 3:23 PM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]); Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO]); Jennifer G. Newstead (CN=Jennifer G. Newstead/OU=WHO/O=EOP@EOP [WHO]); Edward McNally (CN=Edward McNally/OU=WHO/O=EOP@EOP [WHO]); Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Jonathan F. Ganter (CN=Jonathan F. Ganter/OU=WHO/O=EOP@EOP [WHO]); J. Elizabeth Farrell (CN=J. Elizabeth Farrell/OU=WHO/O=EOP@EOP [WHO]); James W. Carroll (CN=James W. Carroll/OU=WHO/O=EOP@EOP [WHO]); Hana F. Brilliant (CN=Hana F. Brilliant/OU=WHO/O=EOP@EOP [WHO]); H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO]); Theodore W. Ullyot (CN=Theodore W. Ullyot/OU=WHO/O=EOP@EOP [WHO]); Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]); Charlotte L. Montiel (CN=Charlotte L. Montiel/OU=WHO/O=EOP@Exchange [WHO]); David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@Exchange [WHO]); Tracy Jucas (CN=Tracy Jucas/OU=WHO/O=EOP@EOP [WHO]); Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]); Nanette Everson (CN=Nanette Everson/OU=WHO/O=EOP@EOP [WHO]); Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO]); John B. Bellinger (CN=John B. Bellinger/OU=NSC/O=EOP@EOP [NSC]); David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP])
Subject: : FW: due to cancellation, tickets are available for the following performance
Attachments: F_BZ6ZE003_NSC.TXT_1.gif; F_BZ6ZE003_NSC.TXT_2.gif; F_BZ6ZE003_NSC.TXT_3.gif; F_BZ6ZE003_NSC.TXT_4.gif; F_BZ6ZE003_NSC.TXT_5.jpeg; F_BZ6ZE003_NSC.TXT_6.gif

Begin Original ARMS Header ###### RECORD TYPE: FEDERAL (NOTES MAIL) CREATOR:Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@Exchange [WHO]) CREATION DATE/TIME:24-MAR-2003 16:22:56.00
SUBJECT:: FW: due to cancellation, tickets are available for the following performance TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Jennifer G. Newstead (CN=Jennifer G. Newstead/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Edward McNally (CN=Edward McNally/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Jonathan F. Ganter (CN=Jonathan F. Ganter/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:J. Elizabeth Farrell (CN=J. Elizabeth Farrell/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:James W. Carroll (CN=James W. Carroll/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Hana F. Brilliant (CN=Hana F. Brilliant/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Theodore W. Ullyot (CN=Theodore W. Ullyot/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Charlotte L. Montiel (CN=Charlotte L. Montiel/OU=WHO/O=EOP@Exchange [WHO]) READ:UNKNOWN TO:David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@Exchange [WHO]) READ:UNKNOWN TO:Tracy Jucas (CN=Tracy Jucas/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Nanette Everson (CN=Nanette Everson/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO]) READ:UNKNOWN TO:John B. Bellinger (CN=John B. Bellinger/OU=NSC/O=EOP@EOP [NSC]) READ:UNKNOWN TO:David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP]) READ:UNKNOWN
End Original ARMS Header

Any takers?
-----Original Message-----
From: Gray, Ann

Sent: Monday, March 24, 2003 4:19 PM
To: Wolff, Harry W; Barnett, Cheryl E.; Becks, Amy B.; Cleveland, Carolyn E.; Gillmor, Eleanor L.; Fibich, Mary; Field, Jennifer D.; Figg, Kara G.; Gerdelman, Sue H.; Hernandez, Israel; Ingwell, Carmen M.; Jones, Alison ; Harrelson, Leah J.; Litkenhaus, Colleen; Nelson, Carolyn; Parrish, Jobi A.; Cabral, Raquel; Riecke, January M.; Ritacco, Krista L.; Ryun, Catharine A.; Spagnoli, Deborah A.; Stewart, Angela R.; Waters, James A.
Subject: due to cancellation, tickets are available for the following performance

Youth Orchestra of the Americas
Mar 26, 2003 at 8:00 PM
Concert Hall
<http://www.kennedy-center.org/about/virtual_tour/concerthall.html>
Running Time: Approx 2 hours
About the Kennedy Center Etcetera! Series <http://www.kennedy-center.org/programs/specialprograms/series.html#somethingnew>
About the Kennedy Center AmericArtes Festival <http://www.kennedy-center.org/programs/specialevents/americartes>

Tickets: $20.00 - $35.00

<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=showEvent&event=XDIAU#schedule>
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=remindMe&event=XDIAU>
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=tellFriend>

View image
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=showEnriched&event=XDIAU&asset_type=Image>
with descriptive text

THE PROGRAM
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=showEvent&event=XDIAU#details> - ADDITIONAL RESOURCES
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=showEvent&event=XDIAU#moreinfo>

Paquito D'Rivera

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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <F_BZ6ZE003_NSC.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <F_BZ6ZE003_NSC.TXT_2>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <F_BZ6ZE003_NSC.TXT_3>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <F_BZ6ZE003_NSC.TXT_4>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <F_BZ6ZE003_NSC.TXT_5>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <F_BZ6ZE003_NSC.TXT_6>

SCHEDULE & TICKETS


REMIND ME


TELL A FRIEND

REV_00458375

The Program

.

From: Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@Exchange [WHO])
Sent: Monday, March 24, 2003 3:23 PM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]); Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO]); Jennifer G. Newstead (CN=Jennifer G. Newstead/OU=WHO/O=EOP@EOP [WHO]); Edward McNally (CN=Edward McNally/OU=WHO/O=EOP@EOP [WHO]); Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Jonathan F. Ganter (CN=Jonathan F. Ganter/OU=WHO/O=EOP@EOP [WHO]); J. Elizabeth Farrell (CN=J. Elizabeth Farrell/OU=WHO/O=EOP@EOP [WHO]); James W. Carroll (CN=James W. Carroll/OU=WHO/O=EOP@EOP [WHO]); Hana F. Brilliant (CN=Hana F. Brilliant/OU=WHO/O=EOP@EOP [WHO]); H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO]); Theodore W. Ullyot (CN=Theodore W. Ullyot/OU=WHO/O=EOP@EOP [WHO]); Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]); Charlotte L. Montiel (CN=Charlotte L. Montiel/OU=WHO/O=EOP@Exchange [WHO]); David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@Exchange [WHO]); Tracy Jucas (CN=Tracy Jucas/OU=WHO/O=EOP@EOP [WHO]); Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]); Nanette Everson (CN=Nanette Everson/OU=WHO/O=EOP@EOP [WHO]); Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO]); John B. Bellinger (CN=John B. Bellinger/OU=NSC/O=EOP@EOP [NSC]); David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP])
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SUBJECT:: FW: due to cancellation, tickets are available for the following performance TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Jennifer G. Newstead (CN=Jennifer G. Newstead/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Edward McNally (CN=Edward McNally/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Jonathan F. Ganter (CN=Jonathan F. Ganter/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:J. Elizabeth Farrell (CN=J. Elizabeth Farrell/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:James W. Carroll (CN=James W. Carroll/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Hana F. Brilliant (CN=Hana F. Brilliant/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Theodore W. Ullyot (CN=Theodore W. Ullyot/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Charlotte L. Montiel (CN=Charlotte L. Montiel/OU=WHO/O=EOP@Exchange [WHO]) READ:UNKNOWN TO:David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@Exchange [WHO]) READ:UNKNOWN TO:Tracy Jucas (CN=Tracy Jucas/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Nanette Everson (CN=Nanette Everson/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO]) READ:UNKNOWN TO:John B. Bellinger (CN=John B. Bellinger/OU=NSC/O=EOP@EOP [NSC]) READ:UNKNOWN TO:David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP]) READ:UNKNOWN
End Original ARMS Header

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To: Wolff, Harry W; Barnett, Cheryl E.; Becks, Amy B.; Cleveland, Carolyn E.; Gillmor, Eleanor L.; Fibich, Mary; Field, Jennifer D.; Figg, Kara G.; Gerdelman, Sue H.; Hernandez, Israel; Ingwell, Carmen M.; Jones, Alison ; Harrelson, Leah J.; Litkenhaus, Colleen; Nelson, Carolyn; Parrish, Jobi A.; Cabral, Raquel; Riecke, January M.; Ritacco, Krista L.; Ryun, Catharine A.; Spagnoli, Deborah A.; Stewart, Angela R.; Waters, James A.
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Concert Hall
<http://www.kennedy-center.org/about/virtual_tour/concerthall.html>
Running Time: Approx 2 hours
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Tickets: $20.00 - $35.00

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<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=tellFriend>

View image
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=showEnriched&event=XDIAU&asset_type=Image>
with descriptive text

THE PROGRAM
<http://www.kennedy-center.org/calendar/index.cfm?fuseaction=showEvent&event=XDIAU#details> - ADDITIONAL RESOURCES
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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BZ6ZE003_WHO.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BZ6ZE003_WHO.TXT_2>

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File attachment <P_BZ6ZE003_WHO.TXT_3>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BZ6ZE003_WHO.TXT_4>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BZ6ZE003_WHO.TXT_5>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BZ6ZE003_WHO.TXT_6>

SCHEDULE & TICKETS


REMIND ME


TELL A FRIEND

The Program

.

From: Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@Exchange [WHO])
Sent: Wednesday, April 02, 2003 11:23 AM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : RE: Gonzalez
Attachments: P_0PE9F003_WHO.TXT_1.doc; P_0PE9F003_WHO.TXT_2; P_0PE9F003_WHO.TXT_3.doc; P_0PE9F003_WHO.TXT_4

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@Exchange [WHO]) CREATION DATE/TIME: 2-APR-2003 12:22:30.00
SUBJECT:: RE: Gonzalez
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

Sure.

-----Original Message-----
From: Kavanaugh, Brett M.
Sent: Wednesday, April 02, 2003 12:19 PM
To: Nelson, Carolyn
Subject:RE: Gonzalez

Is Judge available to meet with Frist et al next Tuesday at 3:45

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 04/02/2003 12:18 PM ----------

"Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov>
04/02/2003 12:14:22 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: RE: Gonzalez

Tuesday at 3:45 has been tentatively saved. Let me know if this works.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov
<mailto:Brett_M._Kavanaugh@who.eop.gov>]
Sent: Wednesday, April 02, 2003 11:20 AM
To: Miranda, Manuel (Frist)
Subject: Re: Gonzalez

checking; do you have presumpotive times yet?

(Embedded
image moved "Miranda, Manuel (Frist)"
to file: <Manuel_Miranda@frist.senate.gov>
pic11802.pcx) 04/02/2003 11:15:55 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Gonzalez

Any thinking on what day is good for the Judge to meet next week?

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_0PE9F003_WHO.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_0PE9F003_WHO.TXT_2>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_0PE9F003_WHO.TXT_3>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_0PE9F003_WHO.TXT_4>

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STG34092

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STG12791

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From: Robert McConnell (Robert McConnell <RMcConnell@hyi-usa.com> [UNKNOWN]) <RMcConnell@hyi-usa.com>
Sent: Wednesday, April 09, 2003 3:49 PM
To: Ziad S. Ojakli (CN=Ziad S. Ojakli/OU=WHO/O=EOP@EOP [WHO]); Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Lewis Libby (CN=Lewis Libby/OU=OVP/O=EOP@EOP [OVP]); David W. Hobbs (CN=David W. Hobbs/OU=WHO/O=EOP@EOP [WHO])
Subject: :
Attachments: P_AB6HF003_WHO.TXT_1.htm; P_AB6HF003_WHO.TXT_2.gif

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Robert McConnell <RMcConnell@hyi-usa.com> (Robert McConnell <RMcConnell@hyi-usa.com> [UNKNOWN]) CREATION DATE/TIME: 9-APR-2003 15:48:55.00
SUBJECT::
TO:Ziad S. Ojakli (CN=Ziad S. Ojakli/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Lewis Libby (CN=Lewis Libby/OU=OVP/O=EOP@EOP [OVP]) READ:UNKNOWN TO:David W. Hobbs (CN=David W. Hobbs/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

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- att1.htm - fe2fe6.gif
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_AB6HF003_WHO.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_AB6HF003_WHO.TXT_2>

Exception Document


U.S. FORCES ARE NOWHERE NEAR BAGHDAD!
HI MOM!
IRAQI INFORMATION MINISTER
WALDO SAYS, WHERE'S SADDAM?
U.S.

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Monday, April 28, 2003 6:24 PM
To: Ashley Estes (CN=Ashley Estes/OU=WHO/O=EOP@Exchange@EOP [WHO])
Subject: : POSTMASTER: Volunteer Opportunities
Attachments: P_ND0ZF003_WHO.TXT_1.doc; P_ND0ZF003_WHO.TXT_2; P_ND0ZF003_WHO.TXT_3; P_ND0ZF003_WHO.TXT_4; P_ND0ZF003_WHO.TXT_5; P_ND0ZF003_WHO.TXT_6

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:28-APR-2003 18:23:54.00
SUBJECT:: POSTMASTER: Volunteer Opportunities TO:Ashley Estes (CN=Ashley Estes/OU=WHO/O=EOP@Exchange@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 04/28/2003 06:23 PM ----------

PostMaster
04/28/2003 06:03:32 PM
Record Type: Record

To: All EOP Users
cc:
Subject:POSTMASTER: Volunteer Opportunities

In answer to the President's Call to Service, many EOP staff have offered their time and talent to others by volunteering through USA Freedom Corps organized events and activities. As a result of your dedication, EOP staff have worked with Habitat for Humanity to build new homes, joined KABOOM! to build a playground in a day and completed hours of volunteer service as a part of the registration fee for last year ,s White House Fun Run.

In an effort to keep you informed about upcoming volunteer opportunities in the Washington, D.C. area, we have highlighted several volunteer service activities below that will be taking place over the next few months. If you have any questions, please call the USA Freedom Corps office at (202) 456-7381.

Thank you.

DC Special Olympics Summer Competition) May 12-13, 15-16
The Special Olympics Summer Competition provides opportunities for mentally challenged athletes of all ages to compete for medals in Track and Field and Water Sports competitions. Special Olympics needs volunteers to fill the roles of referees, timers, line judges, athlete

escorts and award presenters. The Summer Competition will take place at Catholic University. For more information, please contact Katie Cranford at the Naval District Community Service Program at (202) 433-3728 or katheryn.cranford@navy.mil.

Greater DC Cares Servathon) Saturday, May 31st
The Greater DC Cares Marathon Day of Community Service, also known as the annual Greater DC Cares Servathon, needs volunteers to participate in hands-on projects to benefit over 20 area community service organizations on May 31st. DC Cares provides volunteer opportunities designed to brighten the lives of adults and children throughout the Greater Washington area. Projects for this event include revitalizing public spaces, rejuvenating low-income housing, refurbishing schools and building playgrounds. For more information, please call (202) 770-4440 or send an e-mail to tkujawski@dc-cares.org <mailto:tkujawski@dc-cares.org%20>.

Komen National Race for the Cure - Saturday, June 7th
Many of you may be planning to participate in the annual Susan G. Komen Breast Cancer Foundation National Race for the Cure. You may link your own commitment to helping others, and also encourage other individuals to get involved in their community by this or other volunteer efforts, by joining fellow &USA Freedom Corps 8 team members for this year ,s National Race for the Cure, which takes place Saturday, June 7th.

If you would like to run/walk with &USA Freedom Corps 8 team members on race day, you may pick up registration information and return it to Katy Mynster at 736 Jackson Place by 5:00 PM on Thursday, May 8th with the team code &FCO 8 marked in the appropriate box. All White House staff, friends and families are invited to participate as team members. More information, including registration forms, is available from Katy Mynster, in the USA Freedom Corps Office, located at 736 Jackson Place, or online at www.natl-race-for-the-cure.org <www.natl-race-for-the-cure.org>. Volunteer opportunities are also available for individuals who would like to help in the weeks leading up to the Race, such as manning one-stop registration centers in the Washington area, and on Race Day. Please contact Katy Mynster at kmynster@who.eop.gov or (202) 456-7343 if you have any questions.

Cyzygy Day of Service) Saturday, June 7th
Join City Year corps members, staff and alumni, area school children, local service organizations, area residents and corporate sponsors in a day of service activities to help revitalize D.C. communities. City Year is a national service program uniting young people from diverse backgrounds for a year of full-time community service, leadership development and civic engagement. The Cyzygy Day of Service is on June 7th from 6:00 PM) 11:00 PM at The George Washington University. For more information, please call (202) 776-7780 or visit http://www.cityyear.org/dc <http://www.cityyear.org/dc>.

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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ND0ZF003_WHO.TXT_2>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ND0ZF003_WHO.TXT_3>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ND0ZF003_WHO.TXT_4>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ND0ZF003_WHO.TXT_5>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ND0ZF003_WHO.TXT_6>

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From: Charles Spies - Legal (Charles Spies - Legal <CSpies@rnchq.org> [UNKNOWN]) <CSpies@rnchq.org>
Sent: Friday, May 02, 2003 3:11 PM
To: Jim Dyke - Communications (Jim Dyke - Communications <JDyke@rnchq.org> [UNKNOWN])
Cc: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Tom Josefiak - Legal (Tom Josefiak - Legal <tomj@rnchq.org> [UNKNOWN])
Subject: : FW: CONFIDENTIAL:

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Charles Spies - Legal <CSpies@rnchq.org> (Charles Spies - Legal <CSpies@rnchq.org> [UNKNOWN]) CREATION DATE/TIME: 2-MAY-2003 15:10:31.00
SUBJECT:: FW: CONFIDENTIAL:
TO:Jim Dyke - Communications <JDyke@rnchq.org> (Jim Dyke - Communications <JDyke@rnchq.org> [UNKNOWN]) READ:UNKNOWN CC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:Tom Josefiak - Legal <tomj@rnchq.org> (Tom Josefiak - Legal <tomj@rnchq.org> [UNKNOWN]) READ:UNKNOWN
End Original ARMS Header

FYI - Look like we're going to get an opinion in the next 1/2 hour!

-----Original Message-----
From: Burchfield, Bobby [mailto:bburchfield@cov.com]
Sent: Friday, May 02, 2003 3:07 PM
To: Alex Vogel; Ben Ginsberg; Charles Spies - Legal; Don McGahn; Eric Kuwana; Mike Carvin; Randy Evans; Tom Josefiak - Legal
Cc: Kelner, Robert; Newsom, Kevin; Smith, Richard; Moss, Nicole; West, Edward; Cohen, Jay
Subject: CONFIDENTIAL:

THE DISCS WILL BE AVAILABLE AT 3:30. SMITH AND I WILL GO DOWN TO PICK THEM UP.

JAY, PLEASE GET WITH PISD IMMEDIATELY AND ARRANGE FOR THEM TO COPY AND PRINT FROM THE DISCS.

THERE WILL BE NO EMAILED DISTRIBUTION. THAT WAS A HEAD FAKE.

WE WILL ATTEMPT TO DISTRIBUTE BY EMAIL.

Bobby R. Burchfield
Covington & Burling
Washington, D.C.
bburchfield@cov.com
(202) 662-5350
(202) 778-5350 (fax)