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You are young, my son, and as the years go by, time will change and even reverse many of your present opinions. Refrain therefore awhile from setting yourself up as a judge of the highest matters.

Plato
A Word from the Weary

After three and a half years, graduation is finally in sight! During the past few years, I have had the opportunity to serve and interact with the law school faculty and my fellow students in numerous capacities. I have also had the opportunity to listen to the concerns of the student body and have often used my position as Editor-in-Chief of Juris to discuss these concerns with the administration. However, while many of these concerns have been valid, others have been greatly exaggerated and propagated by a minority of students who would rather incite than solve. For four years, I have heard students complain about the same things: grading policies, attendance policies, etc... and threaten to transfer, or to never contribute as alumni. To these students I say, “GET OVER IT!”

Recently, I participated in a seminar in which approximately 90% of U.S. and Canadian law schools were represented. During this seminar, I listened to many students talk about their law school. After listening to the students, I realized how lucky I am to attend Duquesne University School of Law. Some of the complaints I heard concerned: large classes consisting of more than 100 students, inadequate libraries, too few computers, required internships, and of course grading policies. To my surprise, I found that many of the complaints I heard came from students attending so-called “elite schools.” This astonished me considering that U.S. News and World Report’s annual law school ratings often make it seem as though some schools have no problems, creating a false sense of security or fear depending on your school’s rating. Although graduation from one of these schools may give a student an employment edge, it does not make them a better attorney.

Duquesne University School of Law has a long history of quality education and a reputation for producing outstanding attorneys. Attending a particular school will not make you a great attorney; it is the effort you put forth that will bring you success in the future. Law school, like a marathon, will test your endurance, patience, and skill, and from these tests, character, knowledge, integrity and tenacity will surface. “Despite the success cult, men are most deeply moved not by the reaching of the goal but by the grandness of effort involved in getting there — or failing to get there.”

To my fellow classmates and those just beginning the marathon, good luck.

Nick Rodriguez-Cayro
Editor-in-Chief, Juris Magazine


Repressed memory and false memory syndrome
Current Scientific and Legal Perspectives

by Douglas Harhai

I. INTRODUCTION

Picture the following scenario: John had been an excellent parent to his children as well as a faithful spouse for nearly twenty-five years. He made an effort to attend their after-school baseball games, dance recitals, to comfort them when ill and to help them build a strong self-image. In short, John tried to be the best parent that he could be, and he would have done anything for his children.

Now, imagine the horror, betrayal and pain that John would experience if he was told that he was being sued by one of his children for damages resulting from John's molestation of the child some twenty years earlier. John is even more shocked that the basis to these allegations was “repressed memories” that were uncovered by the child's psychologist nearly fifteen years after the alleged
sexual assault occurred. Would John's life ever be the same? It takes very little imagination to recognize the damming horror that must ensue to a parent falsely accused of child molestation. The above scenario is fictional only as to the victim's name. This similar scenario has happened to hundreds of families in this country. This is not to say that some of the allegations were not true, for some of the defendants admit to the alleged episodes. But there are other cases where the victim recants the allegations and drops the lawsuit, claiming that they "really aren't sure anymore" if the molestation ever occurred.

Although any type of memory can classify as a repressed memory, it is those that involve sexual abuse that comprise the majority of litigation in this country. Only in the last decade has it been realized to what degree childhood sexual abuse has permeated our society. Although it is argued that instances of abuse may be underreported, reliable statistics reveal that approximately ten percent of women and five percent of men report having been sexually abused as children. Lawsuits based on repressed memories present several problems.

Continued, next page
Repressed Memory

Repressed memory syndrome

From previous page

This article will explore the phenomenon of repressed memory syndrome and false memory syndrome and will discuss whether there is any scientific basis to these phenomena.

II. HISTORY

The development of the Repressed Memory Theory is generally credited to Sigmund Freud, who viewed repression as an unconscious mechanism by which the mind disposed of unpleasant events. According to his theory, the mind "hides" the event from the process of normal memory retrieval, so that neither the traumatic event nor the process of forgetting is remembered. Freud also believed that these repressed memories continued to exert powerful influences over the behavior of the individual. A key element of the repressed memory theory is that the surrounding circumstances and the trauma itself are not simply forgotten but instead are completely inaccessible to the conscious mind. This is believed by proponents of the theory to be a coping mechanism of the human mind whereby we are sheltered from trauma. Once the traumatic memories are stored in the subconscious mind, the victim may lead a normal life without memories of the traumatic event. Years later, however, the repression coping mechanism may backfire on the victim. Psychiatrists and clinical psychologists believe repression of traumatic memories may lead to severe depression, substance abuse, low self-esteem, suicidal tendencies and sexual and social dysfunction. One theory for the recovery of the memory years later is that this "survival mechanism" is no longer needed since the adult is no longer subjected to the trauma and the memories may resurface either gradually or in sudden flashes.

III. DEFINITIONS

Repressed Memory (called dissociative amnesia in the psychiatry profession) refers to the act of making memories inaccessible to the conscious mind. False Memory Syndrome is "...a phenomenon whereby some people have 'come to believe' that they are suffering from emerging repressed memories of childhood incest and sexual abuse." Furthermore, "...(T)hese traumatic events are denied by the alleged perpetrators, and the memories cannot be supported by independent verifications. Most importantly, is the word 'false' which declares that these repressed, remembered abuses in fact never occurred." So while these terms may be used independently of each other and have distinct meanings, they are often used in the same sentence since victims of false memory syndrome often believe that they are suffering from repressed memories.

IV. SCIENTIFIC SUPPORT

The fact that humans experience memory loss is not uncommon. Not only does it tend to happen as we age, but it also happens when we are very young. The term for this early age memory loss is infantile amnesia and is well established and acknowledged in the medical profession. The first two or three years of life are erased from our minds by what is believed to be maturational and neurological changes that occur during these age periods. Therefore, memories of any age under three years old are prone to be either false memories or confabulations.

There are other instances where memory loss or suppression has been documented. Initially, the symptoms of post-traumatic stress disorder ("PTSD") suffered by soldiers in World War I were believed to have been a physical problem caused by the effects of exploding shells, known as "shell shock." It then became apparent that the difficulties were psychological. However, as in many previous and subsequent wars, soldiers suffering from trauma were considered to be of poor quality—maligners who were too cowardly and lazy to fight. As a result, they sometimes received electric shock treatments or were forced to return to the front lines despite their symptoms. After the Vietnam War, PTSD became an accepted diagnosis of the soldiers' symptoms, as more than three out of four soldiers returning from heavy combat zones experienced some type of PTSD, including memory loss and flashbacks. Documented cases of recovered memories of war veterans and concentration camp victims are often cited by proponents of the repressed memory theory as proof of its existence since the victims apparently had no reason to lie about their memory loss.

There are two sides to every argument, with repressed and false memories being no exception. Following is a summary of the best arguments for each side.

V. ARGUMENT IN FAVOR OF REPRRESSED MEMORIES

As mentioned previously, proponents of repressed memories like to cite the studies done on war veterans as being impartial and unbiased. Sigmund Freud himself is given credit for the development of the theory. Now we will examine other scientific evidence in support of the theory.

One must keep in mind that most mental health theories, specifically those that purport to explain how memory is stored and recalled, are difficult to test empirically. To create an identical testing situation, a subject would have to be exposed to severe
sexual trauma, the same kind of severe trauma that the proponents of repressed memory claim causes memory repressions. Obviously, this practice would be unethical. As a result, researchers in this area have studied the victims of childhood sexual trauma in an attempt to observe the victims' memory over a period of years. In one frequently cited study, researcher Linda Meyer Williams examined the medical records of 129 young women who were admitted for medical treatment as a result of being sexually abused. When interviewed years later, over one-third of the women failed to disclose their documented molestation. Advocates of repressed memory claim that repression occurred in the young sexual abuse victims, while critics are quick to point out that perhaps the victims consciously chose not to disclose the abuse. Another weak point in the study is the fact that all victims were under five years of age when abused, and the possibility exists that infantile amnesia buried or erased the memories. This may be corroborated by the fact that the younger the victims were at the time of the abuse, the less likely they were to remember (or claim to remember) the abuse. It may never be known if the victims truly repressed their memories or merely failed to admit to suffering the trauma since the researchers failed to conduct follow up interviews with the victims, another criticism of the study. However, sixteen percent of the subjects that remembered the abuse also claimed to have automatically repressed the memories in the past and only remembered the trauma upon the triggering by an external event. It may be important to note that the sixteen percent who eventually remembered the trauma did not do so by undergoing hypnosis or psychotherapy, which have been criticized for producing false memories in some subjects.

In another case study done by Dr. Judith Lewis Herman, fifty-three women with self-reported histories of childhood sexual abuse were interviewed. Sixty-four percent of the subjects reported experiencing complete or partial memory loss of the abuse for limited times in the past. However, of those experiencing the most extreme and violent forms of abuse, seventy-five percent reported having no recall of the event over extended periods of time. The researcher also concluded that seventy-five percent of those claiming repression were able to demonstrate corroborative evidence in support of their allegations of sexual abuse. However, researchers made no attempt to ascertain the validity of such corroborative evidence.

Other studies have concluded that children's memories are susceptible to repression when traumatized at a very young age. Researchers Scheflin and Brown reviewed twenty-five studies on amnesia in childhood sexual abuse. Relevant studies had to meet three criteria. First, actual sexual abuse had to have occurred repeatedly over time above the age of childhood amnesia. Second, there had to be an extensive period of time (sometimes decades) during which the memories of the abuse were unavailable to voluntary recall. Furthermore, there could be no organic explanation and no explanation in choosing not to talk about the memories based on privacy or shame. Third, there had to be evidence that the recovered memories were reasonably accurate. The authors found that there were twenty-five studies that fit within the criteria, and all reached the same result confirming the reality of dissociative amnesia in a subpopulation of sexually traumatized children. Furthermore, these studies have employed a variety of increasingly more sophisticated designs to overcome the inevitable claims that they are methodologically flawed. Even more significantly, no study has surfaced that disconfirms the dissociative amnesia hypothesis by failing to get reports of inability to voluntarily recall repeated childhood abuse.

There are also cases where the repressed memories are corroborated by witnesses. In Doe v. Roe, 955 P.2d 951, 954 (1998), the plaintiff lived a normal life except for eating disorders, and she considered her parents to be her closest friends. She had few memories of her childhood except for the times she spent with her grandparents. Shortly after her grandparents died, the plaintiff began having flashbacks of being sexually abused by her father. As the flashbacks worsened, the plaintiff fell into a state of depression and underwent counseling. She soon after confronted her parents with the allegations. Her mother replied that she was sorry for failing to stop the behavior, and her father acknowledged that his behavior was inappropriate and that he expected the allegations to surface. The parents raised the statute of limitations defense and were successful in the trial and appellate courts on motion for summary judgment. The Arizona Supreme Court reversed and remanded on the issues of whether the Plaintiff's mental distress should have tolled the statute Continued, next page
Repressed Memory Syndrome

From previous page

of limitations and whether the discovery rule applied.

Some advocates of repressed memory point to cases where it is to
the benefit of the subject to remember certain events, and the fact that they
have no recollection of these events is considered evidence that they must be
telling the truth. One example of this is a criminal case in which the
defendant has no memory of a crime in which he is implicated and could possibly exonerate himself by being
able to recall the circumstances. One such case is that of Marvin Bains. Bains was charged with first-degree
murder of his wife of twenty-eight years. Neighbors heard five gunshots
coming from Bains' house, and when they arrived they found Marvin Bains
with a gunshot wound to the jaw, while his wife was dead, missing the top of her head from a gunshot wound. Bains
denied having any memory of the event until his arrival at the hospital. He had a motive for murder—he suspected his wife was having an
affair. Prosecutors argued that since he had fired five shots, and only four were found, he must have intentionally shot his wife twice in the
head. However, under hypnosis, Bains claimed remembering that he was trying to commit suicide and accidentally shot his wife once, killing her. He was able to lead investigators to the fifth bullet. Murder charges were dropped, and Bains was convicted of
manslaughter. Since these uncovered memories only helped Bains' case and he had no motive to hide them, Tayloe claims that these had to be repressed
memories. 19

Although it may be true that Bains' memories were repressed, there are other explanations. First, he had a motive for murder. Second, it is not uncommon for smart defendants to keep quiet about the crime knowing that the less said, the less that can be used against him. Third, one look at his wife after the first gunshot would have made it apparent that no further shots were necessary to end her life. And last, Bains ended up only with a gunshot wound to the jaw. One shot
struck his wife, and the other four were attempts at suicide. Half-hearted attempts, perhaps. The only person who knows the truth is Marvin Bains. This is the problem with the arguments for and against memory repression—neither side can be objectively validated by science. To do so would require knowledge of the inner workings of the subject's mind.

Based on accounts of concentration camp survivors, veterans of war, and victims of other disasters and crimes, there appears to be enough evidence to convince even the most skeptical critics that repressed memory exists, though they doubt that there will ever be a way to separate false memories from true repressed memories. 20

VI. THE ARGUMENTS AGAINST REPRESSED MEMORY

Perhaps the arguments against repressed memory sound more plausible than the arguments in support of it because the proponents of the theory have a difficult task in proving the objective processes of the human mind, that repressed memories are as common as the proponents claim. Analogizing this to a lawsuit, the defense has a much easier day in court if the prosecution fails to meet their burden of proof.

One of the most vocal skeptics in the debate against repressed memory is Dr. Elizabeth Loftus. She has authored and co-authored several books and articles on the subject and has served as an expert witness on the subject. Even Dr. Loftus admits that memory repression is capable of occurring. However, she doubts that it occurs as often as is claimed, the validity of the retrieval method, or trigger, and she claims that many of these memories are actually false memories. Loftus has stated:

"...[I]t cannot be doubted that the experience of child sexual abuse is particularly traumatic for the child victim. Furthermore it is widely accepted by clinicians that the particulars of the trauma are especially conducive to repression of memory of the incident. Thus, in addition to the intense pain or fright that a child-victim of rape or molestation may suffer, other factors are present which exacerbate the trauma, leading to an increased likelihood of memory repression."

Although Loftus and other critics may acknowledge that repressed memory does occur in very young children, they are quick to point out the flaws in most of the memories that are recalled. To understand their point of view, one must briefly review the process of creating a memory.

The first general stage of creating a memory is Perception. How the mind
Repressed Memory

perceives an event is impacted by many factors, such as stress and length of exposure, and closeness in proximity or familiarity with the subject. Given that no two individuals are identical, any given event will be perceived differently by every spectator. As stress levels or exposure time change, so will the perception of the event.

Retention is the next stage of memory creation, where the event is absorbed into the mind. Exposure to external stimuli at this stage, before retrieval, can impact the way the memory is recalled. Critics of the repressed memory theory point out that in these cases where memories allegedly lie buried for years in the subconscious, external stimuli surrounding the victim can affect the retention stage, creating a distorted memory.

Retrieval of the memory is the final stage of memory creation. This is the “remembering” part of memory, and is also affected by external stimuli—sights, sounds, moods of the victim, as well as expectations in the mind of the victim. The critics of repressed memory are quick to point out that when memories are retrieved in the presence of a therapist or a hypnotist, these memories may be shaped by the patient into what he or she feels the therapist expects.²²

Professor Ulric Neisser conducted one such study that demonstrates the ability of the memory to distort. The day following the Space Shuttle Challenger disaster, Neisser distributed a short questionnaire to forty-four college students. In their responses, students described the circumstances surrounding their memories of the event. Three years later the students were asked to fill out a second questionnaire that was identical to the first, except that it asked them to rate their confidence in the accuracy of their memories. The results demonstrated that only three students were able to accurately recall all aspects of their memory, while eleven were unable to recall a single detail with accuracy. Details of the accident, such as where the student first witnessed the accident, what they did immediately after seeing the explosion, etc., conflicted in the first and subsequent questionnaires. Even more surprising is the fact that most students changed their reports, claiming that the subsequent questionnaire taken several years later was more accurate than the questionnaire taken only twenty-four hours after the accident.²³ Advocates of repressed memory claim that this study cannot be compared to child sexual molestation, since the ages of the subjects were college age, not preschool, and the subject matter was not as traumatic to the students as molestation would be to the children.

In a study by Elizabeth Loftus, a trusted sibling told one college student a false story about being lost at a shopping mall when the student was very young. While the student did not at first believe or remember the story, he subsequently came to adopt it as true and described it as if it were an actual memory.²⁴ Loftus points out that this person may not have been deliberately lying, but gives this as an example of false memory, one that the individual has come to believe as true. That the individual firmly believes in them is the exact reason why they are so dangerous.

VII. THE VALIDITY OF THE RECALL METHOD

Perhaps just as important as the memory is the method of recall for these memories. Types of recall include a spontaneous event (where the individual is suddenly reminded of the abuse by a sight, smell, touch, sound), therapy, hypnotism, and sodium amytal (truth serum). The type of retrieval method that is used can influence the actual memory itself.

Perhaps the most reliable of all of the modes of recall is the spontaneous recall, in part because it is consistent with the flashback experiences reported by trauma victims.²⁵ It is considered the most impartial and unbiased recall method because it can happen by the triggering of any stimulus. In one case, during a near-drowning incident in her adult life, the victim had a sense that she had suffered this same way in earlier years, in a sense, had “been there before.” Subsequent research uncovered that as a child she had nearly been drowned in a toilet by her foster parents.²⁶

Another type of spontaneous recall may occur when an adult smells certain cologne that her abuser used to wear, and she has flashbacks of the traumatic event.

Spontaneous recall cases have implicated defendants of differing vocations—clergy, camp counselors, parents, relatives and babysitters to name a few.²⁷ Many of these cases involved many abuse victims, i.e., after having spontaneous recall, the abuse victim investigates and finds that several others have charged the same person with abuse. In many cases the molester admits to the conduct.²⁸ From this evidence it would appear that at least some individuals are capable of repressing memories only to have them resurface at a later time.

But these spontaneous recall cases may be viewed with more credibility if the abuse happens when the child is very young, and when the trauma is one of a repeated nature, e.g., rape or incest, as opposed to those that occur once, e.g., witnessing a car accident.²⁹ Some experts believe that the severity of the repressed memory may be determined in part by the severity of the stressor. The trauma experienced by young children is thought to be more often repressed since the child lacks the capacity to grasp what is happening, which affects how the trauma is perceived (perception stage) and retained (retention stage). In theory, this would make for a greater likelihood that the mind would tend to repress the memory. Adults, on the other hand, have more life experience...
Repressed memory syndrome

The problem is that all false memories may not be readily identifiable as such. There is usually a shred of truth to the memories. For example, an adult may have belonged to a certain day care center as a child in which they never felt comfortable. The therapist, by asking leading questions, may (unintentionally) lead the patient to the conclusion that they were molested while alone with one of the supervisors. What makes this hard to refute is that the child actually attended the facility at the times when the abuse may have occurred, and may have been alone with the alleged molester on the day in question. This pits the child’s word against the supervisor’s word, with no other parties to serve as a witness.

Two other methods of retrieving repressed memories are hypnosis and psychotherapy. Memories recovered by these methods are admissible in some jurisdictions, but they remain open to scrutiny and skepticism by the medical and legal communities. The problem with these retrieval methods is that the hypnotist or therapist may fill in gaps in memories. In other words, the therapist guides the patient toward an end that the therapist may be seeking. The result may be false memories. In one lawsuit, a patient brought suit against her therapist for planting false memories of bizarre events in her mind, such as seeing her grandmother stir a cauldron of dead infants in a witchcraft ceremony, memories of giving birth at the age of eight years and surrendering the child for cult sacrifice, and being forced to take part in sexual ceremonies in this cult. Although there could always be a shred of possibility that these events occurred in some way, the more plausible explanation is that the therapist implanted the memories into the suggestible mind of a troubled patient. In addition, other patients brought similar charges against the therapist.

The problem is that some people, while under hypnosis, describe themselves as describing a memory when they are actually creating a memory. This may be in part due to the presence and tactics of the therapist. Remember that during the retention and retrieval stages of memory creation, external factors and expectations may influence the way the memory is perceived. For instance, under her therapist’s supervision, one patient made up stories of being sexually abused by her parents. She told the therapist that she made them up and didn’t believe that her father ever harmed her in a sexual way. The therapist told her that her feelings were normal, she was merely in denial and that most sexual abuse victims feel this way! She then told him that she had made the allegations up since after telling him all she knew (none of which implicated her parents in any abuse), the therapist pressed her for more, so she gave more, all the while thinking that she was a very bad person because she knew she was lying. The same type of phenomena occurs in so-called “past-life regression therapy” and “UFO abduction therapy.” In another book, The Courage To Heal, by Bass and Davis, 1988, the authors encourage readers to believe that they were abused if they have suspicions.

This is taking a large leap to say the least, claim critics of repressed memory. Sodium amytal and sodium pentothal are so-called “truth serums” and have been used more often to validate the individual’s belief in the memory than to actually recall the memory. The problem with these drugs is that the subject will claim that a false memory is true if he actually believes it. These drugs have failed to earn the general acceptance of the general medical community and are not widely used, especially for courtroom evidence.

VIII. PROPOSED SOLUTIONS FOR USE IN TRIAL

Until the debate has been settled, there have been several suggestions offered for using repressed memories in trial. Dr. Loftus makes four suggestions: (1) not tolling the statute of limitations for cases concerning a previously repressed memory; (2) requiring corroborating evidence in support of a returned memory; (3) adopting specific procedural requirements in cases involving the return of a previously repressed memory; and (4) admitting expert testimony on reliability of memories at the request of the defendant.

Other proposed solutions include the filing of the suit in fictitious names to protect a possibly
of procedural safeguards, the courts may be able to review a plaintiff’s claim while protecting the rights of all parties involved.

Douglas Harhai is a fourth-year evening law student.
The Internet and the First Amendment:

How much regulation is too much and what standards should be applied?

by Eliana Carrelli

The Internet began as a military experiment.1 Today, it is a new method of communication; a way to connect people across the world, a way to gather information, a place for more possibilities yet unexplored. It truly heralds a new technological era. However, it also raises a plethora of legal questions and issues. It questions the fundamental basis of our law, the Constitution and its directives. It questions the power and the role of the government. It requires us to reexamine the unity of our society and our communities and forces us to discuss morality as a national and global issue.

This article will focus on several issues imperative to the legal discussion of the Internet. It will examine the following questions, and while the answers are not exhaustive or exclusive of other alternatives or issues not discussed, they should highlight many of the underlying points of each of the following questions.2

- Do Internet communications constitute speech as protected by the First Amendment of the United States Constitution?
- How does one determine what material on the Internet is obscene or otherwise illegal?
- Is there a common community standard and if so, what is that standard?
- Under what authority can the government regulate the Internet?
- What is being done and are there alternative solutions?

The First Amendment and the Internet

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment

The Constitution is the framework, which makes the United States a legal nation. This fact, practically a cliche now, is taught to us from our infancy onwards. We are taught that the rights set forth in the Bill of Rights must be protected at all costs; they not only govern and define the power of the government but guide its citizens toward the idyllic goal of creating a haven for individual beliefs and values. There is no controversy that the directives of the First Amendment must be followed. But how are they to be interpreted? How should they be applied to the practical situations we face today? Nearly all who have dealt with the subject agree that the writers of the Constitution could not possibly have envisioned the creation of something like the Internet or the legal issues it would raise. However, as followers of the Constitution, we must find a solution to this query. We must extrapolate what the founding fathers' intentions were in light of today's society.

To begin the analysis of the role of the First Amendment regarding the Internet, it is important to define the Internet. There have been many definitions offered—all of which have valid points, but none that could be called conclusive or complete. It has been called a form of press, a public meeting place, a broadcasting station, and an extended conversation.3 While, in an abstract sense, the Internet can perform each of these functions, any single one of them cannot properly define it. In the end, the Internet is a unique medium of communication, which has the power to incorporate other forms of communication as well. Narrowly defining one facet of the Internet can make a substantial difference in our interpretation of the First Amendment.

It goes without saying that if the Internet functions as a forum, a press, or a gathering place, then the First Amendment expressly forbids the creation of laws by Congress restricting these functions. However, does the First Amendment include obscenity? Illegal material? Does censorship play a role as well? There have been heated arguments over these questions and a commonly approved solution does not seem to be coming for us in the near future. In fact, in 1996, Congress created the Common Decency Act (CDA, section 502 of the Telecommunications Act) which
stated, in part, that anyone who, "by means of a telecommunications device knowingly...makes, creates, or solicits...initiates the transmission of...[material]...which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age...shall be fined." However, this Act was later challenged as being constitutionally overly broad. In Reno v. ACLU, 521 U.S. 844 (1997), the Supreme Court of the United States held "that the statute abridges the freedom of speech protected by the first amendment." This decision partially rested on a particular definition of the Internet. Judge Stewart Dalzell stated, "the Internet may fairly be regarded as a never-ending worldwide conversation. The government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."

The Court's current interpretation is that the CDA would have "[presented] a greater threat of censoring speech that, in fact, falls outside the statute's scope, [and that] the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." However, the Supreme Court explicitly states in Reno v. ACLU that "the appellees do not challenge the application of the statute to obscene speech, which...can be banned totally because it enjoys no first amendment protection." Thus, one fact remains indisputable—obscene or otherwise illegal material is not protected by the First Amendment. Indeed, this conclusion is confirmed in Pacifica Fndn. v. FCC, 516 U.S. 1043 (1996) and Sable Communs. v. FCC 492 U.S. 115 (1989) where in each case the court held that obscenity is not protected as freedom of speech.

However, the issue of the role of the First Amendment, as applied to the Internet, has been by no means settled. In 1998, the courts confronted several controversial issues involving Internet access, freedom of speech, and the First Amendment. For example, in Loving v. Boren, 133 F.3d 771 (1998), the court affirmed a lower court ruling upholding the creation of boundaries to complete Internet access at higher education institutions. The court in Loving interpreted and applied the First Amendment in a seemingly narrower manner than that which had prevailed for the CDA.

The First Amendment should apply to all material considered legal on the Internet. The Internet should receive the greatest protection possible, but not because it is simply a "conversation." The Internet provides so many possibilities and has the potential to affect so many people because of its inherent global nature, that the government must continue, as it has done, to proceed with extraordinary caution in applying the Constitution.

Obscenity on the Internet

In the previous section, we saw that the First Amendment applies to practically all Internet material (with certain restrictions concerning as access to minors) which is not considered obscene or pornographic. The immediate question that arises is "what is considered obscene?" There is not much argument that descriptions or images of "ultimate sexual acts" would constitute obscenity and/or pornography. But how should borderline material be considered? Does the Internet medium affect our current definition of obscenity?

In 1973, the case of Miller v. California, 413 U.S. 15 (1973) established the "Miller test" for obscenity which, is still being used to determine, identify, and define what constitutes obscenity. In evaluating the material at issue, the fact-finder must consider:

Continued, next page
The internet and the First Amendment

From previous page

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

It is readily apparent that serious questions are raised when we apply this test to the Internet. How is something determined to be offensive or lacking in value? Who decides? This definition of obscenity, like others, is at best ambiguous.

In fact part of the reason, in part, of why the constitutionality of the CDA was questioned was because the wording of the statute was too vague. The CDA tried to equate the term “obscenity” with “indecency.” But, as the Supreme Court found, when the Act’s constitutionality was questioned, “in evaluating the free speech rights of adults, [it has been] made perfectly clear that sexual expression which is indecent but not obscene is protected by the first amendment.” Reno v. ACLU. Consequently, the word “indecent” cannot be used synonymously with obscene. As a result, the word was stricken from the context of what could be considered illegal.

The definition of what constitutes obscenity, however, has not stopped with the revision of the CDA. In March 1998, the case of U.S. v. Hilton, 1998 U.S. Dist. LEXIS 5007, went to trial “successfully challenging” the definition of child pornography which, because of the technical nature of the Internet, was “expanded...to include computer or computer-generated images [as well as] images of real children.” This case shows how current definitions are being modified to adapt to the new technology presented by the Internet and how new definitions are being challenged. US v. Hilton also raises the important issue of the relationship between the Internet, obscenity, and minors. Obviously, what adults might not consider obscene, could quite possibly constitute obscenity in regards to minors. Indeed, our primary goal should be the protection of children. However, the opportunity to ensure that the goal is carried out is oftentimes potentially hazardous because we must also consider valid arguments such as the one presented by Fred Wilks:

“Governments at the state and national level may constitutionally prohibit the distribution to minors of sexually explicit material that is obscene as to minors. They may not, however, reduce the adult population...to reading only what is fit for children by enacting wholesale bans on material that is obscene as to minors, but not as to adults.”

As Wilks implies, we cannot forget that the rights prescribed by the First Amendment must apply to everyone in the community, both adults and minors.

Overall, one can very easily generalize that there are numerous correct definitions of what constitutes obscenity depending on specific community standards, age, and other factors. The applicable definition must depend on the specific circumstances of the situation, and we cannot hesitate to apply or modify, as needed, our current methods for judging obscenity on the Internet.

Community Standards

Many pitfalls are encountered when one tries to define what the community standards regarding the Internet could be. Simply defining the community itself is problematic. Several alternatives have been expressed as to what the “community standard” should be, from choosing a representative local community to creating a new “cyberspace community.”

The definition of obscenity depends in great part on the audience that effectively receives the material regardless of who the intended audience may be. What might not be considered obscene in Los Angeles or New York might be in Salt Lake City, Utah. An example of this complex issue is United States v. Thomas, 74 F.3d 701, (1996) where a California couple, creators of a cyber porn bulletin board not considered illegal in California, were convicted in Memphis, Tennessee, where the material was considered to be illegal. Two main questions were raised in Thomas. First: “What standards should be used in testing whether certain materials are obscene?” Second, and even more fundamental, is “What standards could be constitutionally applicable?”

Where does the First Amendment fit in? The rights expressed in the First Amendment must be extended to everyone, while achieving a balance between those who wish to speak may

"As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."

-Judge Stewart Dalzell
do so without fear of being silenced and those who do not wish to hear inadvertently forced to do so. Because of the unique method of communication created by the Internet, all material, messages, etc. are sent to everyone or no one. If messages protected by the First Amendment in California are sent to Memphis where they are no longer protected, then balance has not been achieved. Therefore, diverse community standards have caused the directives of the First Amendment to fail.

Still, according to the traditional definition of “community,” the very creation of a community standard arises from the similar, shared beliefs of residents within a geographical area. We cannot restrict the expression of sensitive adults or minors’ rights (which includes the right not to hear what others would consider free speech) any more than we can the rights of those who feel the need to express their views, however controversial. Thus, we must find the common community standard which will allow us to achieve the desired balance.

The “Miller test” allows jurors or others to decide what constitutes obscenity by applying “contemporary community standards.” They cannot know with any certainty what the specific standards are—they must arrive at hypothetical conclusions. Under Miller, a jury employs the standards embraced by the least tolerant community. The application of this test raises many problems. As C. Trim states, “It would be unconstitutional and outside the requirements of Miller—as well as unrealistic—to require that the people of New York City behave like the people of rural Florida.” The courts could go the other way and adopt the standards of the most tolerant community. Either way, the result would still be the creation of a de facto national standard. No one would benefit from such a result. In the end, the courts often apply yet another de facto national standard in which they consider what the average person might find obscene or pornographic.

Application of the First Amendment cannot be conducted as a compromise in which each of the two sides loses a bit and potentially has very little to gain. Some people would still find their actions hampered by others’ opinions of morality, while others would still find their privacy invaded by offensive material.

Another approach to this problem of defining a common community standard would be to broaden the definition of “community” and to create a new community. In United States v. Thomas, the Thomas’s called for a new definition of community standards “based on the broad-ranging connections among people in cyberspace.” Although there are some valid points to this argument, the final objective of achieving a constitutionally valid community standard would not be realized. One of the arguments for a “cyberspace community” is that “the rules and customs have applicable to the Internet temporarily “reside” in cyberspace and thus create a de facto community. However, the purpose of trying to find a viable community standard is to find the rules, standards, and customs which are applicable to all who use the Internet. If we could not satisfactorily conclude what standards could be used when discussing specific locales, how are we ever to hope of reaching a conclusion as to what standards would apply to a “cyberspace community?”

The Internet itself is a unique medium of communication, and cyberspace “community” is a global agglomerate of all the values held by all geographically locatable communities, at various levels of tolerance, who have access to the Internet. The Internet transcends all geographical borders. In the words of Yousef Dham: “The Net negates geometry...it is fundamentally and profoundly anti-spatial. You cannot say where it is or describe its memorable shape and proportions or tell a stranger how to get there. But you can find things in it without knowing where they are. The Net is ambient—nowhere in particular and everywhere at once.”

Even if we accept this definition of the Internet, we cannot forget our individual, cultural, and geographical diversity. If we try to create a cyberspace standard, the results may be disastrous. Certain people, as yet unspecified, would be given the immense power to dictate what they believe to be the common beliefs of the people who access the Internet. Who should these people be? Would they be capable of responsibly representing the beliefs of all who access the Internet?

Some people who advocate this approach also say, “no geographical community standards can apply since no geographical community is affected by Internet communications.” Although advocates are correct in stating that the Internet cannot be “found” in one geographical location,
The internet and the First Amendment

From previous page

the fact that "cyberspace" is an abstract location is in fact, irrelevant. The specific sites located on the Internet are created in concrete geographical areas and are received by people living in concrete geographical locales.

In effect, creating a new cyberspace community standard would pose at least as many significant problems as would utilizing a national standard, or the contemporary community standards. Until we can find a better way of dealing with community standards, however, we must use the current methods available and apply them with deliberate consideration.

Governmental Regulations

Under what authority can the government regulate the Internet? What is its jurisdiction? The purpose of the government, in part, is to protect its citizens and their rights, to maintain order, and to protect the public interest. Above all, the government should protect the well being of the children. This last issue raises another interesting question—should the power of protecting minors reside in the hands of the government or of the parents? In a sense, this question is as much moral as it is social and hinges on the specific values each particular group or community holds.

Let us consider the following comment made by Fred Wilks:

"If the same concern for the special sensibilities of particular groups drives both the varying standards for children and for intolerant communities, then there really is no justification for allowing one heightened standard to control the eyes and ears of the entire nation while the other is limited in its application. If anything, we should be more ready to protect the eyes and ears of our children than those of our sensitive adults."

This statement touches on both the issue of jurisdiction and the issue of protection of minors. The government's primary jurisdiction should be the purpose of its existence. It is a public institution created to protect and provide for the interests of its citizens. Of course, the particular jurisdiction of specific laws applied (various state laws for example) are affected by the specific community standards involved.

What is the government's position in regards to the second issue, that is, the protection of minors? It seems that, in its justified worry that it could infringe on the First Amendment, the government has assumed a position of minimal regulation of the Internet while discussing at considerable length the possible implied and factual dangers that the Internet poses. When the Supreme Court considered on the constitutionality of the CDA, it remarked that "It is true that [they] have repeatedly recognized the governmental interest in protecting children from harmful materials," but rather than search for a governmental alternative that can ensure the protection of children, it recommended several software blocking devices such as Cybersitter, Cyberpatrol, and X-stop.

The Communications Act of 1934 was amplified to "restore freedom of speech to the Internet and to protect children from unsuitable online material," but this only occurs if the parents supervise their children's use of the Internet and order the blocking software (which cannot be foolproof and may block educational and cultural sites along with undesired ones). In effect, the government has truly maintained the position of "least restrictive alternatives...at least as effective."

Are there any other methods the government could utilize in order to regulate the Internet in a consistent manner? Is there a definition of the Internet, which could spawn a uniform method of regulation? Could there be an alternative to the blocking software that currently exists?
Opinions, Alternatives, and Conclusions

With a projected 200 million users, the Internet is truly becoming "a world" and not simply because of the undefined geographical boundaries. If certain boundaries of any genre (e.g., commercial, communication, etc.) are not taken into consideration and dealt with immediately, the Internet may soon be too large an entity to be governable. Indeed, the Internet could soon be considered a modern day analogy to the Roman Empire at its zenith. Fortunately, the government has taken the first steps towards concretely defining and regulating the Internet while showing great concern in securing the opportunity for all views, within legal bounds, to be expressed. However, is it possible for the government to do more without restricting the personal freedom of its citizens? In fact, can the government, through increased legislature and regulation, place the ultimate power of the Internet in the hands of the individual, the parent, and the community?

The answer to each of these questions is yes. Naturally, we are hesitant to overturn our traditions and our precedents, but at the same time, we have recognized the need to adjust laws and respect customs in a way that better serves the interests of today's society. These seemingly conflicting and irreconcilable views (keep the old in with the new) need not be contradictory. In this past century, we have seen amazing technological advances and these advances will continue to occur as we reach the millennium. When the television was first produced, it had to find its own place and function in the society that had no previous legal method of dealing with this newfangled technology. Today, however, television and cable laws are common. In fact, the Telecommunications Act of 1996 shows us the legal perspective with which technology should be treated. For example, today, cable companies are merely considered as providing a service. The Internet is also a service; indeed, there are countless possibilities and different services possible (including business transactions, communications, etc). Although it is difficult to define the Internet itself, the basic theories and foundations of the services it provides are well known and well established. Would it not be easier for us then, to simply consider the Internet as a "company" providing services? As a company, the Internet could certainly be regulated more easily. In the business and commerce arenas, the same interstate laws that apply to other methods of transportation, business deals, etc. would also apply to the Internet.

Also, if the Internet is considered another method of communication like the telephone or the television, then many of the same protective measures that apply to them could apply to the Internet. For example, telephone services provide a separate service for 900 numbers and cable companies require a prior subscription to specific channels in order to view adult entertainment programs. It seems logical then, that America On Line and other Internet service providers can make available a separate service for their customers who wish to retain access to sexually explicit sites. After all, when I called to get my phone line hooked up, I was asked if I wanted to have 900 numbers automatically blocked or not. If it were not unduly burdensome for the phone companies, why would it be for the Internet companies? An objection to my argument could perhaps be that whereas 900 numbers are already separated by the phone numbering system, it would be impossibly burdensome and costly for Internet companies to sift through the multitude of sites on the Internet and create a separate list of sexually explicit sites which must be blocked. I agree that if this were the case, this proposed solution would not be effective especially because it would raise the issue of who would decide what sites went on the list or did not. This would certainly place an undue amount of power in the subjective hands of the Internet companies. However, if it became mandatory for all sexually explicit sites which require age and credit card verification to include a specified series of numbers or code letters like 900 numbers, then these sites would be separated from others in an equal and objective manner. Any parent or adult who did not wish to receive these sites would have the power to simply call their Internet provider and request that all sites bearing a certain code be blocked from their computer.

If the government enacted this type of legislation, it is possible that the difficulties arising from different community standards would be reduced. By more government regulation, the communities and the individuals would be placed in the position of choosing how they wanted to use their rights provided by the First Amendment—whether it would be to speak freely or to retain the confidence that such speech would not be heard by them or by their children. In this way, the children would gain an additional method of protection. If the parents did not want to block these separate sites, or wished additional protection, then the additional software that exists today would still be available and would not be entirely redundant since they can focus on specific words or images found in other sites as well.

Also, the Internet companies could economically benefit from this type of legislation. They would have the power to offer their customers more options and services. Not only could they offer their own basic Internet programs or the WWW but they could also offer different “packages” or “custom-made programs” which would potentially attract specific groups of customers.

One thing which, of course, cannot

Continued, next page
The internet and the First Amendment

be forgotten, is that the Internet is global. The possible uses and implications of the Internet are nearly limitless. We have the power to govern the Internet exclusively within our own country. However, our government cannot restrict our access to any foreign sites. Perhaps in the future, there may be an international consensus on the material, which may be transmitted via Internet. Until then, however, we must realize that what we do is on a national level and beyond this nation. There still exists the world of the Internet—a technological world that beckons us and calls us forward to continue exploring the possibilities and advances which we, ourselves, create.

Ms. Carrelli is a second-year law student.

Internet & the First Amendment

ENDNOTES

1 The beginning of the Internet was a 1969 military program called ARPANET. For more details of the history of the Internet, see Reno v. ACLU Supreme Court Opinion or Description for the Internet - Reno v. ACLU

2 Questions reprinted from the paper topic assignment.


For the definition of "conversation", see Hammitt, Harry. Internet Censorship on Hold. http://www.govtech.net/publication...ide/january1997/igigcensorship.shtm

For more definitions and information, please see Biegel, Stuart. Reno v. ACLU in the Supreme Court: Justices Hear Oral Argument in Communications Decency Act Case.

4 Reno v. ACLU, at 5.

5 A statute is considered to be constitutionally overboard "with respect to the first amendment if it presents a genuine likelihood that it will sweep a substantial amount of protected speech within its prohibitions." Making Speech Safe for Children http://www.dcez.com/-alewine/cedic96/CDAdraft.html.

6 Reno v. ACLU, at 1.

7 Reno v. ACLU, at 1.

8 Reno v. ACLU, at 11.

9 Reno v. ACLU, at 14.

10 An analysis of these cases can be found in Reno v. ACLU as well as in Lewine.

11 For a summary of this case, see Top Cyberspace Law Cases of 1998.


14 This issue is raised in several articles including Trim, and Wilks.

15 Wilks, see supra note 12.

16 Wilks, at 4.

17 For a general discussion of this and other community standard issues, see Wilks.


19 "The Internet is the interconnection between any one of millions of computers around the world. Persons who adhere to common communications standards, particularly TCP/IP, independently manage each computer. The TCP/IP standard makes the Internet work. It defines a packet switching network, a method by which data is broken up into standardized packets, which are then routed, to their respective destinations via several intermediaries. As each intermediary receives data intended for another party, the data is forwarded along whatever route is most convenient. Thus, multiple bits of information from the same source may use more than one route to reach a destination where they will be reassembled." Monaghan, Tracy. Cyberspace Jurisdiction Under the minimum Contacts Analysis I. 20 Trim, at 2.


22 When trying to define what specific community standards may be, the issue of morality is raised. There have been many discussions over time as to the government's role in applying morality in the legal system. There seems to be agreement that the "majority" of people in a given location often share the same morals. However, if the morals of one particular group were selected as the standard over the other groups, even if the other groups constituted a minority, would there still be freedom of expression as provided for by the first amendment? For selections on law and moral issues see Saltzburg, Diamond, Kinports, Morawetz. Criminal Law Cases and Materials, Charlottesville, Virginia. Michie Co., 1994.


24 Wilks, at 7.

25 Wilks, at 7.


27 Wilks, at 7.

28 It should be noted here that there are other aspects of government Internet regulation, although they are not central to the scope of my paper. Quite interesting, is the government's position of regulation of Internet Commerce. For a summary of recent proposals such as the Tax Freedom Act and the Internet Protection Act, see Recent CyberLegislation: U.S.Congress Explores Proposals to Regulate the Online World.

29 For more information on this topic see Trim, id. and Wilks, id.

30 See endnotes 21 and 23 for more information.

31 Wilks, at 5.

32 See section 3 of this paper and the accompanying endnotes.

33 Reno v. ACLU.

34 Recent Cyberlegislation..., at 3.

35 Wilks.
The ABCs of avoiding malpractice
A Young Lawyer's Guide
by Jeffrey L. Pollock, Esq.

Always know the law and be prepared; your reputation and livelihood are at stake.

Be accessible to your clients; they need to be able to count on you and your expertise.

Copy your clients on every important document, pleading, correspondence or order.

Draft specific, and keep current, client fee agreements defining both your duties.

Economic disputes with clients should never affect your service; your reputation is at stake.

First impression is key to earning a good reputation; be punctual and dress for success.

Golden Rule: Treat others fairly, as you would want the same respect and courtesy extended to you.

Hold confidential all those communications that the clients expect and deserve to be privileged.

I enjoy my practice; therefore I do not resent going the extra mile to help clients in need.

Jot short status notes, birthday cards, etc.; keep your clients informed and in touch.

Keep open, cordial lines of communications with your client and opposing counsel.

Let your client assist in their case; they want to feel involved and not powerless.

Mind your manners regarding clients, counsel, judges, court staff, and especially your secretary.

Never curse or yell; you never know whom you may offend as to your reputation or referrals.

Often attending CLE increases expertise, boosts networking and keeps your library current.

Promise-keeping and pursuit of excellence are hallmarks of quality in any career.

Quiet confidence in and genuine empathy for your client's case enhances professionalism.

Return all phone calls by sundown of the day received or at least within twenty-four hours.

Stake out the high road; do not be dragged down to the level of the "Rambo Litigator."

Tell the truth and always to keep your reputation intact; honesty defines one's eminence.

Use every opportunity to resolve problems without trial and get the client's permission to settle.

Vigorous advocacy with civility ensures zealous representation without offending others.

When you lie down with dogs, you get up with fleas; do not stoop to a lower level of conduct.

Xactly the right answer later is better than bluffing the wrong answer now.

Your personal integrity and ethical standards should be evident and consistent in office and home.

Zero typographical errors is an indicator of diligent time, effort and dedication.

Alpha and Omega of Law:
Give back to your community; do regular pro bono work for indigent and good causes because our profession has earned a higher standard.

Mr. Pollock has served on the YLS Council and the YLS Board of Governors.
The editor-in-chief of Juris has kindly permitted this writer to have an Ethics Corner (my name for the column and not his). A corner, an inglenook, a warm and restful hideaway next to a fireplace invites something we have lost, namely, the art of conversation. Incidentally, the very word scholarship has its roots in the Latin word schola which means leisure and the fruits of leisure such as an unhurried conversation that would transpire in front of a fireplace in a cozy nook with good friends and a glass of fine wine—an Isaiah Berlin sort of evening. This is the locus in which ethics of any sort (general, legal, medical, etc.) can become a subject of leisurely conversation.

Now you may interject with a challenging question. For instance, you might ask "Is this where ethics belong, tucked away in some corner?" But I would answer in feigned modesty that I gladly place it there in the corner because many in our midst who call themselves "realists" often assert that ethics is most likely invoked in the public forum by scoundrels at this present moment in history. I do not know why so-called realists are always a bit wary and a mite cynical, but be this as it may, I am willing to talk about ethics from a corner, from the margins so to speak. Of course, there is some empirical evidence that in contemporary society, ethics is lived by people in or on the margins of late capitalism—the marginalized. And Nietzsche would remind us that the last ethicist died on a cross, so to speak, not an inglenook exactly but rather the ultimate in marginalization. It is further to be noticed that in mainstream public life in America, ethics occupies what could be called a rhetorical space rather than a space of any real performance—particularly if that performance would occur at a costly price to the performer. Holders of public spaces mean by ethics that which would not clash with cost/benefit analysis or the bottom line. So bottom line, I choose a real space, although in the corner, rather than a rhetorical space of the shakers and movers who verbally wrap themselves in ethical garb. Beware the manipulative power wielder in ethical garb! Now if this metaphor of "cornered ethics" doesn't seem to fit your experience, then simply regard me as backed into a corner or as a Greek chorus of one, so to speak, commenting on and questioning the very lines and actions of life's real players. And the savants among our readership might detect that I occupy the res media between Alisdair Mcintyre (see his book After Virtue) and John Caputo, author of the book Against Ethics.

But the sexiest (now do I have your attention?) subject matter in legal education today is indeed ethics—legal ethics (no, it's not an oxymoron). And it is invoked often and everywhere—at law schools, at continuing legal education courses, at the convivial gatherings of the Bench and Bar. Perhaps this invocation comes out of a real performance and not just a rhetorical one, but on that matter you will have to decide. Nonetheless, legal ethics is so often talked about that one would rightly infer that it occupies the center field rather than being out in left field and on the margins. However all of this stacks up, I can personally assure you that at this law school ethics really does occupy a premier place, both de facto and de jure. Let me explain. A very generous gift from one of our distinguished alumni, Attorney Thomas W. Henderson, is now making it possible for us to deepen as well as broaden the professional, ethical component of our curriculum. The ultimate goal for us is to have professional ethics provide the integrating bond of our curriculum—a platform driven hard and persuasively by the ABA. Many steps have been and are currently underway toward realization of this objective. For example, this faculty, long committed to the teaching of ethics and values, has expanded the requirements of Professional Responsibility from two to three-credit hours. But the modifications are not limited to those students about to graduate.

The entering class, at the orientation program for this academic year 1999-2000, was given a problem in legal ethics in order to introduce the students to the Socratic method and the experience of thinking like a lawyer about ethical matters. And in the legal writing and research component of our curriculum, problems in legal ethics are frequently being utilized by the teachers. Even in the first year Civil Procedure courses, an area most remote from the experiences of legal novices, matters in professional responsibility are now being emphasized. The pedagogical point of this expansion of legal ethics and professional responsibility is to get the students to see that in whatever area of law, in actual practice the lawyer encounters matters treated in the Rules of Professional Conduct. And finally in the area of curriculum, several courses—Law and Religion, Philosophy of Law, and Constitutional Jurisprudence—have been integrated and yield a provocative and sustained reflection upon the religious, ethical, and philosophical foundations of law and lawyering.

Now rules alone can be deadly dull. So we are beginning to develop a video library of ethical materials as well as expanding our library holdings in areas germane to ethics in general and legal ethics/professional responsibility in particular.
speakers from the Disciplinary Board, the Client Security Fund, and Lawyers Concerned for Lawyers provide striking and memorable tales for our students that mirror actual realities of the practicing lawyer. This year, the teaching of legal ethics/professional responsibility climaxed with a lecture by Professor William H. Simon, the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford University. On October 27, 1999, he delivered the first Thomas W. Henderson Lecture on Legal Ethics, titled “Thinking Like A Lawyer—About Ethics.” He is the author of the widely read book The Practice of Justice: A Theory of Lawyers’ Ethics (Harvard University Press, 1998). This book is currently being read by all of our students now enrolled in Professional Responsibility. In addition, it is being critically discussed and addressed by a study group of this faculty. For an extensive treatment of this work, I would refer those who are interested to volume 51 of the Stanford Law Review (April, 1999).

And in the midst of all of this, we even have a “wish list.” It is our hope to eventually achieve integration in legal ethics/professional responsibility under the rubric of “Professional Leadership in the New Millennium.”

Under this umbrella concept, we hope to develop a totally new discipline called Comparative Professionalism. Within this discipline, we will precipitate a conversation among lawyers, physicians, and clergy, as well as others who perceive themselves in terms of professional life. This dialogue will center on the concept of leaders trained to bring about an American Renaissance through the education of citizens in the ways of civic life.

Benjamin Franklin was purportedly asked just what it was that he and the founding fathers did. He responded that they had fashioned a Republic—if we could keep it. Our highest aspiration is to precisely achieve that perpetual and necessary re-founding that is implicit in his challenge to us and to use all of our professional expertise in doing so. This surely fits in with this University’s motto of education for the mind, heart, and soul. We even dream of a “Journal of Comparative Professionalism” that would begin such a movement.

Yet, we realize that secure foundations can only be reached by digging. And we have begun our digging by posing questions, fundamental questions about that which lawyers do, namely, representing clients and intervening in various modes on their behalf. Each of these concepts are occasions for “cornered” meditation and reflection. For example, what does representing a client mean? Is a lawyer a clone of the client? Well, certainly not where “independent professional judgment” is called for. Does representation of the client mean that the lawyer is translating the client? If so, from what to what? And what manner of translation is this? Doesn’t the client’s story get lost, that is, its vibrant and robust reality is attenuated by the legal language into which it is translated? And what does intervention entail? Does it not itself lead to unanticipated turbulence requiring more intervention? I haven’t seen a Kung-Fu-like lawyer yet able to walk on rice paper without leaving footprints. And over all of these questions is the question of who the client is really?

(More will be said on this in the forthcoming columns.) Each of these matters must be thought through to ground or the practice of law itself will remain a sort of free floating, along with the giddiness attendant thereon. All too often, lawyers (although not the best of them) start with a posit as some arbitrary ground for thinking, the point where the spade of their thinking turns, so to speak (thank Ludwig Wittgenstein for this pragmatic metaphor).

Recall now, that corporate America hungerers for those who are capable of thinking outside the box. If this be so, then law, understood as a professional, yet academic, discipline is famished for those able to do so. As a law school in a great university, we know that within the realm of thinking itself there ought not be any custom agents at disciplinary boundaries asking after the papers of those willing to cross the boundaries so often held in place by political power plays. The Enlightenment tradition, to which contemporary legal education, legal theory, and legal practice is indebted, believed that in the realm of thinking, there can be no transgression because there are no boundaries. Here is the only ethical way to perform within such a tradition, namely, to engage in ceaseless questioning, questing, and self-questioning. Only those abounding in self-evident certitudes need fear such. Ethics begins by casting away such fears.
The Ukrainian government has issued a very simple Year 2000 (Y2K) contingency plan: prepare for mass evacuations. This is not a comforting thought, considering that numerous Russian nuclear reactors and weapons are stored in the deteriorating Baltic country.

The United States arguably is in better shape than most of the former Warsaw Pact nations. Significant testing has occurred among utility companies, financial institutions, and other critical services. General awareness to the problem is high. However, many individual and corporate contingency plans feature lawsuits—not dehydrated food stacked in a remote bunker.

As a result, lawmakers and business leaders have become fearful of a Y2K lawsuit storm. Whether it was to prevent lawyers from hitting the jackpot in fees, such as what happened during the tobacco litigation, or an attempt to protect businesses from falling under the weight of legal fees, Y2K law has seen tremendous—and arguably positive—change during a short period.

In the last year, many misguided authors attempted to predict the future of Y2K claims, only to find their writings impotent and obsolete shortly thereafter. From federal and state legislation to the blossoming number of cases, Y2K law is evolving rapidly.

This article, written only months before the new millennium, will provide a summary of Y2K laws, judicial trends, and the use of alternative dispute resolution (ADR) techniques.
Legislation

Y2K legislation has been passed to limit lawsuits, cap liability, encourage settlement, and prevent the court system from becoming even more clogged. A secondary focus has been to limit liability of software companies that disclose information for the purpose of assisting others in remediation.

It should be noted that Pennsylvania is one of the few states that lack specific Y2K legislation, although a “computer date failure” bill has been introduced twice in the House and Senate.

The most important legislation for both attorneys and businesses is the “Y2K Act,” that President Clinton signed into law on July 20, 1999. The Y2K Act preempts state law that places more strict limits on liabilities and damages, but it does not provide for a separate Y2K cause of action. Its most relevant provisions are:

- **Heightened Pleadings:** In order to prevent frivolous lawsuits, each complaint must provide specific information to prove the damages sought, including allegations of a material defect. Additionally, if a cause of action requires showing a defendant’s “state of mind,” the complaint must include facts indicating a “strong inference” of the defendant’s actions.

- **“Cooling” Period:** This provision is extremely important because it utilizes notice, alternative dispute methods, and remediation by the defendant as a means to prevent Y2K litigation. Before a Y2K lawsuit can be filed, with the exception of those seeking injunctive relief, a plaintiff must submit by certified mail a detailed notice of the harm suffered, a desired remedy, the legal basis for the remedy, the impact of any material defect, and the name of an authorized negotiator for settlement or ADR.

  Within 30 days, the defendant must acknowledge receipt of the plaintiff’s notice, and describe steps to address the claim, but note that this response is not admissible as evidence in subsequent litigation. If the defendant proposes remediation or a willingness to use ADR, the plaintiff must allow an additional 60 days from the end of the initial 30-day notice period to implement the plan or ADR proceeding. Only after this period expires, or if the defendant fails to act, can the plaintiff file a lawsuit.

- **Tort Claim Control:** Plaintiffs cannot seek damages for lost profits, business interruption, third-party claims, consequential damages, or losses that must be plead as special damages due to a Y2K failure under the economic loss rule. The rule does allow a previous contractual agreement between the parties to permit such damages, and does not prevent claims for injuries to personal or real property.

- **Contract Claim Limitation:** Breach of contract claims are limited, and deference is given to the intent of the parties at the time of contract. No claim for breach or repudiation of contract will be allowed unless provided for in the terms. If the contract is silent as to a particular claim, state or federal law at the time of acceptance will apply.

- **Duty to Mitigate:** There always is a duty to mitigate damages. However, the Y2K Act imposes a higher burden to mitigate damages to avoid litigation. Recovery is barred for damages that could have been avoided, unless intentional fraud exists.

- **Punitive Damage Cap:** One fear of Congress was the significant impact of Y2K litigation on small businesses. As a result, punitive damages will only be awarded under a “clear and convincing evidence” standard, and liability is limited to $250,000 for individuals and small businesses holding a net worth of less than $500,000.
$500,000. Government entities enjoy immunity from punitive damages, regardless of intent.

- Proportionate Liability: Generally, courts are prohibited from applying joint and several liability in Y2K cases, and instead utilize proportionate liability.16 This requirement prevents plaintiffs from seeking “deep pocket” defendants, and limits liability to the percentage of the defendant’s fault in causing the injury. Because this is a factual determination, a judge or jury must make specific findings to determine and apportion fault. If the defendant is found by the trier of fact to have manifested specific intent to cause harm, or knowingly committed fraud, only then can he be found jointly and severally liable. In cases with multiple defendants where one is judgment-proof, individual plaintiffs with a net worth of less than $200,000 or consumer product users can jointly and severally recover judgment from other defendants. Finally, defendants that settle these claims are discharged from contribution during the latter situation, which further demonstrates the intent of Congress to settle claims.

Complementing the Y2K Act is the Year 2000 Information Readiness and Disclosure Act17 ("IRDA"). The basic focus of the IRDA is to help businesses prepare for Y2K and eliminate readiness disclosures from the scope of evidence.18 The IRDA applies to “Year 2000 Statements,” which are almost any corporate communication about Y2K planning or preparation; and “Year 2000 Readiness Disclosures,” which address each company’s specific compliance. The main thrust of the IRDA provides protection to companies for Y2K disclosures, defined as “statements clearly identified as being such a document, written in a tangible or electronic form, and about the author’s products or services.”19

The IRDA also prevents admission of Y2K disclosures to prove the accuracy or truth of such a statement, with the exceptions of anticipatory breach or repudiation of contract, and bad-faith or fraudulent claims.20 It is interesting to note that admission of such an out of court statement to prove truth certainly could be considered hearsay.21 However, if the declaration is sought to prove only that a statement was made, such as an awareness of Y2K compliance or proof of a specific Y2K response process, several hearsay exceptions could be invoked.

Considering the broad scope of both the Y2K Act and the IRDA, it would appear that most state Y2K legislation would be almost impotent. For the most part, the nineteen state Y2K laws currently in force limit liability and provide immunity to government entities, which also are echoed in the Y2K Act.22

Pennsylvania has made an attempt to enact such legislation in its “Computer Date Failure” bill23 introduced in February, 1999 and again in April. This bill potentially could be adopted as an amendment to Title 42 prior to the new millennium.24

The Pennsylvania Y2K bill allows for damages against defendants who fail to properly detect, disclose, prevent, or remediate a computer date failure25 that result in bodily injury to the plaintiff, physical damage to the plaintiff’s property, and costs to reprogram or replace and test relevant computer equipment.26 All government entities are immune from liability.

Litigation

What is touted as the first Y2K case ever filed involved a grocery store that sued a company that produced computerized cash registers and software.27 The grocery store’s system was only a few years old when it shut down every time it processed a credit card holding an expiration date for years 2000 and 2001. As a result, the store reported 105 such crashes in one week. The case was settled for approximately $260,000.

Since that time, approximately 79 more cases have been filed28 and it is estimated that many other cases have been settled.29 Considering the number of potentially flawed microprocessors sold in the U.S., the number of lawsuits filed to date is remarkably low.

The almost miniscule number of lawsuits should raise suspicion among practitioners and prompt the following questions: Has the public figured out that it can sue? Are plaintiff attorneys up to speed on the issue? Are local judges being forceful in refusing Y2K lawsuits, which would not be covered in any written opinions?

Though the level of litigation is speculative, the types of claims are not. As a general guideline, the following types of lawsuits are expected to be the most common:

- Breach of Contract: Typically, software is licensed by the company that created it, and the license serves as a contract to bind both parties. As mentioned in the previous section on Y2K legislation, courts will look to the intent of the parties when the contract was formed, and will require specific language before determining liability.

- Negligent or intentional misrepresentation or fraud: These claims will arise when computer software or hardware companies intentionally conceal Y2K problems, or make affirmative statements that software is compliant. Additionally, there have been claims where software companies should have known about the Y2K problem and failed to act.30

- Violation of consumer protection laws: In addition to the
various state consumer protection statutes, the Magnuson-Moss Consumer Product Warranty Act still is a powerful weapon for individual plaintiffs.

- **U.C.C. violations:** Provisions of the Uniform Commercial Code discussing express warranties, as well as implied warranties of merchantability and fitness for a particular purpose will be especially relevant in cases where contract language is silent. As discussed previously, the Y2K Act defers to the intent of the parties and relies on federal and state law to fill in the blanks.

An important note about Y2K litigation is that the injury hasn’t occurred in many cases, and instead licensees are attempting to recover for remediation costs. Some courts have held that these cases are speculative. However, software companies that have thrown down the gauntlet and told customers that free “fixes” will not be provided—or have provided fixes to some customers and not others—has given rise to claims of anticipatory repudiation and violating warranty of fitness for a particular purpose.

Absent a contractual provision requiring the computer company’s voluntary remediation, which also is discussed in the Y2K Act, the requirement of a present injury can be insurmountable. Because the Y2K problem has not “hit,” and may very well never, plaintiffs are having a difficult time finding relief from judges who are unwilling to base a final decision on an anticipated injury.

A noted Pennsylvania class action case, Peerless Wall and Window Coverings v. Synchronics, provides a preview of how anticipatory Y2K claims may be handled, and shows how far a court will go to avoid a final decision before an injury occurs. Peerless sued a software company for licensing non-Y2K compliant software. The court noted that at the time the case was filed, as well as during the present motion, all damages claimed were speculative because Y2K had not arrived and the software was still working. Regardless, the trial judge allowed a stay in the case to allow Synchronics to fix the problem, which was done through a software update called a “patch,” but part of that order allowed the plaintiff to access materials needed to test the Y2K update.

Synchronics claimed that it did not anticipate providing Peerless with detailed technical information about its software, and denied use of that material to the plaintiff—not just because of the burden of time and resources on the defendant, but also because counsel would have to be present. Such supervision would then “amount to a de facto deposition.” To remedy the situation, the court allowed the plaintiff to submit one set of interrogatories focused on technical questions, which the defendant had to complete in good faith. This case should serve as a preview to how judges will focus the resolution of Y2K claims on solutions, not blame. Additionally, it should prove that just because a company claims Y2K problems, the courts will not break down the defendant’s doors and break open its proprietary information.

The ability of defendants to offer a patch, similar to the defendant’s response in Peerless, further complicates the issue of having a present injury. In Issokson v. Intuit, Inc., a case against the creator of Quicken—a popular financial management software program—was dismissed because Intuit created a free update to eliminate potential Y2K problems, not to mention the fact that there was no present injury.

For the most part, Y2K litigation so far has focused on companies suing other companies. Issokson and his unsuccessful lawsuit and class action represent situations where an individual seeks a claim against a software company and the defendant had the means to correct the situation and eliminate the lawsuit.

But what happens when the individual sues a distributor for products it does not produce? The answer shows how the Y2K Act may be applied in state court claims by individual plaintiffs, and should draw cheers from plaintiffs attorneys.

In Johnson v. Circuit City, a class action lawsuit against several major retailers, including Circuit City, CompUSA, Staples, The Good Guys, OfficeMax, and OfficeDepot, was filed claiming non-Y2K compliant electronics were advertised and sold as being millennium “safe.” The defendants sought to remove the case to federal court under the Y2K Act, but the trial judge denied the motion, claiming that the Y2K Act does not preempt state court litigation. However, defendants finally succeeded in removal, and it is
expected to be the first attempt to limit lawsuits under the Y2K Act. As a closing note to this section, it should be noted that expert testimony will be crucial in Y2K cases to clarify technical issues. A recent U.S. Supreme Court decision provides trial courts with great discretion in determining the reliability, and ultimately the admissibility, of expert testimony based on “technical” and “other specialized” knowledge.

ADR

When considering the potential impact of the Y2K problem on businesses, and the limitations placed on them by federal legislation, using Alternative Dispute Resolution is a logical remedy. Using ADR, such as arbitration or mediation, not only saves money for both sides because it is fast and usually more economical, it also will prevent a previously good business relationship between a business and its software company from destruction. ADR also could prevent disaster from occurring.

During the previous discussion about the Y2K Act, it was noted that litigation cannot begin until 30 days before a lawsuit. The arbitrator could suggest ADR, or attempt remediation to buy an additional 60 days before a lawsuit.

But what happens during the 90 days that the defendant has to act? Consider the following scenario: A small manufacturer's assembly line is not Y2K compliant. It stops working on January 1, 2000. If the Y2K Act cooling period is stretched to its limit, and the defendant sits idly, the manufacturer is left with a dead assembly line and could go out of business.

If the manufacturer and the software company had proposed mediation or arbitration prior to the shutdown, a simple remedy could have been proposed, a contract signed, and the problem would be solved—without violating the Y2K Act.

The movement to use ADR is growing among trade associations, government officials, and even attorneys. In fact the first Y2K case that resulted in a “judgment on the merits” was conducted before an arbitrator in Allegheny County.45

ASE is significant because it shows how ADR can effectively decide the merits of Y2K claims, and how this decision mirrors the same results found in federal and state claims filed so far. The case involved a $3.9 million Y2K remediation claim, where INCO attempted to break a contract requiring ASE to develop and install computer hardware and software. INCO claimed that if ASE's products were used, it would cost approximately $3.9 million to conduct Y2K remediation.

Because the contract did not specifically address Y2K remediation, the arbitrator decided ASE would not be responsible for the costs. The process was much faster through ADR, and considering the provisions of the Y2K Act, probably arrived at the same conclusion a trial judge would.

Conclusion

The flurry of Y2K cases and legislation over the past few years provide a glimpse of things to come. But until we see what damages actually occur, and the extent of Y2K failure, the current policies and decisions will not truly be tested. This problem is compounded by a lack of specific Y2K precedent in both state and federal courts, as well as the limited technical knowledge of attorneys and judges. Reliance on expert testimony could be extraordinarily high.

However, the main premises of most Y2K claims—breach of contract, fraud, and warranty—are grounded in well-settled principles of law. The question remains whether the technical issues, which will provide considerable power to expert witnesses, will emerge as the deciding factor in many cases, or whether well-settled legal principles will cut through the zeros and ones.

Julian Neiser is a third year evening student and Senior Editor elect for the 2000-2001 academic year.

Endnotes

1 "Lawyers will get in there and start feathering their pockets," said Tom Olsson, an analyst at International Data Corp. (http://cnn.com/TECH/computing/990325/y2kstates.idg/)
2 Senators Beck Y2K Litigation Reform (last modified Feb. 14, 1999). (http://www.techlawjournal.com/y2k/199901/iil.htm), quoting Sen. Bob Bennett (R-UT) "There could be as much as a trillion dollars in liability (from the Y2K problem). If trial lawyers loved the tobacco settlement, they are going to go bananas over this one, unless we can find ways to deal with it intelligently in Congress..."

(Endnotes continued next page)
The price of liberty

by Maria D. Comas

Query: what is ten years of your life worth? Should society bear the burden of repaying a convicted but innocent man for the time he lost with his wife and children, for the psychological turmoil he endured, for the education that he was unable to obtain, for the job that he had to give up, and for all of his other opportunities lost? At least fifteen jurisdictions believe that society should pay this debt owed to a wrongfully imprisoned man. In a civil justice system that routinely compensates for contract damages, property damages, and other tortious conduct, it seems rather peculiar that the majority of jurisdictions are so hesitant to compensate for the loss of liberty.

Consider the following. Alonzo Cunningham was suspected of shoplifting a shirt from an Eddie Bauer clothing store in Maryland. They were detained for ten minutes as they denied the security guards’ accusations. They filed false imprisonment and defamation claims against the store. One of them received $850,000, and the other two received $75,000 each. A total of one million

Continued, next page
The price of liberty

From previous page

dollars for ten minutes of unjust confinement.2

A pregnant woman was beaten, raped, and left for dead. The woman survived, the baby did not. Kevin Green, the woman’s husband, was convicted of the crimes and was sentenced to 15 years to life in prison. Green continually professed his innocence to no avail. Convicted of one of the most inexcusable crimes, Green was beaten and ambushed while in prison in an attempt to kill him. Sixteen years after his conviction and sentencing, Green was exonerated when DNA evidence implicated a serial killer for the crimes. He received $10,000 from the State of California for his incarceration.3 A total of $10,000 for 8,409,600 minutes of unjust confinement.

These two scenarios display the stark realities that an individual faces upon exoneration. Because California places a cap on recovery, Green could only recover $10,000 for his wrongful imprisonment of 16 years. Compared to the three young men who were unjustly confined for 10 minutes, this amount is inadequate; nevertheless, Jackson, Plummer and Cunningham were awarded 100 times as much in money damages and were confined 8,409,590 less minutes. What is most disturbing to some is that only fifteen states offer compensation to victims of unjust imprisonment. If Green would have been imprisoned in a state without this type of statute, he probably would not have recovered any damages.

Because state legislatures are fiscally responsible to their constituents, they have attempted to create legislation to prevent erroneous convictions as well establish fair and reasonable compensation for the deprivation of liberty. Although fifteen states have adopted compensation statutes, damage calculations vary.4 Two states, New York and West Virginia, offer unlimited damages. Others assess damages according to a formula that addresses time served, lost employment, and attorneys fees; while others set a maximum damages cap regardless of the amount of time served. Each statute also contains elements that the exonerated individual must establish before he will be compensated. An estimated 10,000 innocent people are convicted each year.5 Variables that have contributed to erroneous convictions include incorrect witness identification, prosecutorial misconduct, and false accusations against the innocent.6 Because so many variables exist in the criminal justice system, there will always be errors in its operation. This discussion is not intended to be an attack on the system; however, in light of the inherent defects caused by variability, legislation should provide the convicted-innocent with an avenue of recourse to recover for their lost freedom?

Without a compensation statute, an individual who was wrongfully convicted of a felony or misdemeanor offense has four possible causes of action to recover damages: false imprisonment, malicious prosecution, a civil rights violation claim against the prosecutor, and a civil rights violation claim against the government. Neither a false imprisonment nor a malicious prosecution claim provide the convicted-innocent with a form of redress. In order to recover, the claimant must establish the absence of a privilege or actual malice.7 Because conduct of the state officer effectuating the arrest and convictions are judicially authorized, these elements are practically impossible to prove.8 Just as a false imprisonment and malicious prosecution claim does not provide for the adequate recovery of damages by the exonerated, neither does a sec. 1983 civil rights violation claim against the prosecutor or the state agency employing the prosecutor.9 A sec. 1983 action against the prosecutor does not provide relief for the innocent in most instances because the prosecutor acts in a quasi-judicial function and is free to act upon his own convictions, without apprehension of personal consequences to himself.10 The state agency employing the prosecutor also is protected against a sec. 1983 action absent the discovery of an official government sponsored policy that promoted the civil rights violation.11 This absolute immunity is essential to the criminal justice system and without it, a chilling effect towards prosecutors would be created.

In lieu of ineffectual remedies, states such as New York have attempted to provide relief for the exonerated through the creation of moral obligation bills. Driving such legislation are horror stories like that of Isidore Zimmerman who, at the age of 19, was convicted of first-degree murder for the death of a New York City police officer. He was charged with supplying the guns used for the murder.12 In 1967, his conviction was overturned after it was established that a key prosecution witness supplied false testimony. Before his release from prison, Zimmerman had his head shaved and ate his “last meal” as he awaited his execution. Zimmerman attempted to recover for this improper conviction, but he was unable to recover; however, in 1984, 47 years after his conviction and 17 years after his release, Zimmerman received an award of one million dollars from the state of New York.13 The catalyst for his recovery was a moral obligation bill. This bill waived New York’s immunity and supplied the proper forum for Zimmerman’s claim.14

Special legislation, as well as wrongful conviction statutes, are frequently vetoed.15 Because
legislatures are ultimately responsible to their constituents, they may not sponsor special legislation for fear of appearing "soft on crime." However, some legislators may pass moral obligation bills in an effort to gain the votes of the opposite political party or of a different segment of the population. As a result, special legislation is very arbitrary and factually specific to the lobbyist's case.

Developing a compensation statute may have a two-fold effect, providing a remedy for people who were unjustly imprisoned, and civil rights violations. A "uniform mechanism of redress for victims of wrongful imprisonment is a legitimate area of state-wide concern intimately connected with maintaining [and enhancing] the quality and integrity of a prosecutorial system responsible for enforcing the state's penal code." Additional policies may be created in an effort to reduce misconduct or increase efficiency.

Wrongful imprisonment statutes essentially have two aspects to their foundations: to identify the most appropriate defendant and to ensure that only the innocent recover. These statutes contain safeguards to ensure that only the factually innocent recover damages. The state has a responsibility to society to spend its money wisely, and that responsibility is met when only the factually innocent recover. Because convictions are overturned for procedural and/or constitutional violations, an individual who is not factually innocent may be released from prison. Allowing a factually guilty defendant to recover would be irresponsible.

Upon exoneration, the innocent are deposited into a society where they may not have any family, a job, or a residence. It is suggested that unjust conviction statutes provide for financial compensation and socioeconomic reintegration by including the following in the calculation of damages: loss of liberty, physical injuries, emotional or mental anguish, actual attorney fees and court costs, injury to reputation, the greater of actual lost wages or median family income for each year incarcerated, and any other damages directly related to the imprisonment. It also is suggested that these statutes provide for employment services or other social welfare services.

States that have adopted unjust imprisonment statutes recognize the importance of providing a mechanism for automatic relief. While no one statute provides every situation, most do provide some type of relief for these individuals. It is completely possible that those are ideal situations that can only be addressed in an ideal society. However, formulas have been developed to compensate the wrongly imprisoned for their unjust incarceration. Some of these formulas are better for the claimant than others. The factors used in determining damages and the amount of damages vary widely. Factors include time served, lost wages, pain and suffering, and attorneys fees. Some states provide for unlimited damages while others place a limit on recovery regardless of individual circumstances.

The following exemplifies these different recovery schemes using people who were incarcerated for between 2 and 2-1/2 years as a model. If the claimant was imprisoned in one of the seven states which places a cap on damages, he could recover as little as $5,000. For example, Victor Ciancanelli, who was convicted of robbery, served approximately 2-1/2 years of his sentence before he was granted a pardon of innocence. Ciancanelli received $5,000 for his unjust conviction and imprisonment pursuant to the California statute.

The court admitted that this sum may not be adequate to compensate Ciancanelli for his pecuniary loss. Nonetheless, it noted that the
The price of liberty

From previous page

responsibility for increasing the amount of damages lies with the legislature. If Ciancanelli would have been unjustly imprisoned in a different state, such as Ohio, he would have recovered considerably more damages. Damages in Ohio are awarded pursuant to a statutory formula. That formula is as follows: $25,000 per year incarcerated and a pro rata share for portions of years; plus costs, including attorney fees; plus lost income resulting from arrest, prosecution, conviction, and wrongful imprisonment. In Fay v. Ohio, the claimant received $129,867.70 for his two-year, eighty-day wrongful incarceration. The following allocations were deemed appropriate and reasonable by the court: $55,547.90 for the incarceration; $10,127.50 for attorney fees and costs; and $61,701 for lost income.

New York provides yet another recovery scheme. In Johnson v. State of New York, Johnson's decedents recovered $40,000 for his two-year incarceration. New York sets forth no limit on recovery, but "awards damages in such sum of money as the court determines will fairly and reasonably compensate the claimant." The court determined that Johnson did not show any loss of income. It also stated that, although his daily freedom was taken away from him, he had a criminal record and did not suffer the loss of reputation, humiliation, and pain that someone without a record would endure.

Each statute encompasses a variation of the elements necessary for recovery. These elements reinforce the statement that the statutes are drafted and enforced in a manner that furnishes recovery to the factually innocent rather than the technically-not-guilty. Generally, the claimant must prove, by clear and convincing evidence, that (1) he was convicted of one or more felonies or misdemeanors, sentenced to a term of imprisonment, and served all or part of his sentence; (2) he was pardoned based on his innocence, his conviction was reversed and vacated based on his innocence, or he was found not guilty at his retrial; (3) he did not commit any of the acts charged; and (4) he did not bring about his conviction by his own conduct.

Courts have noted that the "linchpin" to recovery is innocence. When statutes and courts use the general criteria in their decisions to award damages, the totality of the circumstances can be evaluated. For example, when a claimant proved that he acted in self-defense, he was permitted to recover. In Ohio, although this claimant "committed the act charged," a self-defense claim exempted him from liability. A crime was not committed, and recovery was available. Conversely, a determination that the claimant is not guilty by reason of insanity is not afforded the same treatment. The court in this example reasoned that the word "innocent" was not intended to encompass this finding.

Whether or not the claimant caused his conviction also is an issue the courts have addressed. "[G]iving an uncoerced confession of guilt, removing evidence, attempting to induce a witness to give false testimony, and attempting to suppress testimony or conceal the guilt of another" are noted examples of when the claimant's conduct caused his conviction. When the claimant does not deny all of the claims against him, he cannot recover. Where it was alleged that the claimant illegally possessed a gun, and he did not deny the allegation, he could not recover. When he did not contest the allegations after given the opportunity to do so, he contributed to his own conviction. Similarly, a claimant charged with the wrong crime, but who did commit the offenses leading to the improper charge, could not recover. In these instances, the courts determined that the claimant brought about his conviction when he engaged in unlawful conduct. He is "technically-not-guilty" of the prescribed charge, but he is not innocent of committing any crime.

The courts award damages when the claimant did not cause his conviction. Where witnesses have provided incorrect identifications or false testimony or the claimant received inadequate counsel at the original trial, courts have awarded damages. These circumstances "do not rise to the level of the potentially more difficult situation[s] where the acts of a claimant may be intertwined with the conduct of others as the proximate cause of conviction." The courts have noted that the "linchpin" to recovery is innocence. When statutes and courts use the general criteria in their decisions to award damages, the totality of the circumstances can be evaluated. For example, when a claimant proved that he acted in self-defense, he was permitted to recover. In Ohio, although this claimant "committed the act charged," a self-defense claim exempted him from liability. A crime was not committed, and recovery was available. Conversely, a determination that the claimant is not guilty by reason of insanity is not afforded the same treatment. The court in this example reasoned that the word "innocent" was not intended to encompass this finding.

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A new era of forensic and DNA evidence is emerging that will inevitably lead to more overturned convictions for the innocent.

“No amount of money, no compensation of any kind can buy back a person’s freedom.” But that should not dissuade states from at least suggesting provisions. As stated above, nothing is perfect. Simply put, the ultimate question is this, are you willing to place a value on your freedom?

Maria D. Comas is a third-year law student.

1 These jurisdictions are the states of California, Illinois, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, North Carolina, Ohio, Tennessee, Texas, Washington, and Wisconsin, and the District of Columbia. For purposes of this paper, the District of Columbia is referred to as a state. The federal government also has a wrongful compensation statute, 28 U.S.C. 2513. This discussion does not include the federal statute.


4 See CAL. PENAL CODE 4904 (West 1998); D.C. CODE ANN. 1-1221 (1981-1998); 705 ILL. COMP. STAT. ANN. 505/8 (West 1998); IOWA CODE ANN. 663A.1 (West 1998); ME. REV. STAT. ANN. tit. 14, 8241 (West 1998); NJ. STAT. ANN. 52:4C-1 (West 1999); N.Y. CT CLMS LAW 8-b (McKinney 1999); N.C. GEN. STAT. 148-82 (1944-1999); OHIO REV. CODE ANN. 2743.48 (Banks-Baldwin 1999); TEX. CODE ANN. 51-c (West 1998); VA. CODE 14-2-13 (1966-1998); WIS. STAT. ANN. 775.05 (West 1999) for state damages amounts and elements necessary for recovery.


8 Id. at 209-212.


10 Kasdan, supra, note 7, at 219 (citing, Bradley v. Fisher, 8 U.S. 335, 347 (1871)

11 Kasdan, supra, note 7, at 224.

12 HUFF ET AL., supra, note 5, at 32.

13 DE CHIARO, supra, note 17, at 295-296.

14 Kasdan, supra, note 7, at 207.

15 See, Higgins, supra note 3, at 52. See also, Kasdan, supra, note 7, at 201.

16 Higgins, supra note 3, at 52.

17 See, Higgins, supra note 3, at 50.

18 Kasdan, supra, note 14, at 216.

19 Kasdan, supra, note 7, at 237.

20 Kasdan, supra, note 7, at 233.

21 See, Fudger v. State of N.Y., 131 A.D. 2d 136 (1987). In Fudger, the claimant was precluded from recovery because his conviction was overturned on double jeopardy grounds. The court reasoned that allowing recovery in this situation would be inconsistent with the scope of the compensation statute.

22 HUFF ET AL., supra, note 5, at 158.

23 Higgins, supra, note 3, at 48-49.

24 Id.


26 The statutory limit in 1967 was $5,000.00. The current statutory is $10,000.00. See CAL. PENAL CODE 4904 (West 1998).


30 Fay, 610 N.E. 2d at 623.


32 N.Y. CT CLMS LAW 8-b (McKinney 1999).

33 Johnson, 588 N.Y.S. 2d at 725.

34 Supra, note 54.


44 Id.

45 The Innocence Project is a program in which law students and journalism students investigate the cases of convicted individuals claiming innocence. Initiative to Free the Innocent Expanding, (Nov. 20, 1997) http://www.criminaljustice.org/MEDIA/pr000095.htm.

46 Higgins, supra, note 3, at 51.

What is a hostile work environment? This is not an easy question to answer. There are many issues to consider before examining what comprises a hostile work environment sexual harassment. Constant changes in the business world have led to an increase in sexual harassment claims, raising many new questions about what constitutes a hostile work environment. One issue is the changing role of male and female employees in the work environment; this includes employee perceptions of their changing roles.

An employer's inability to define what comprises a hostile work environment causes many problems for the business world. Conduct that creates a hostile work environment includes intimidating behavior. According to recent opinions by the United States Supreme Court, a hostile work environment is created by conduct that is sufficiently severe or pervasive to alter the conditions of the victim's employment. Thus, sexual harassment includes intimidating behavior that alters an employee's behavior in the work environment.

Hostile work environment sexual harassment is about power, control and suppression. This should not be a part of an employment relationship. Sexual harassment can be directed toward both male and female employees and the harasser can be the opposite or same sex. Nevertheless, most sexual harassment cases involve a male being in a supervisory position over a female employee. For this reason, male dominance of the business world has resulted in a "glass ceiling" effect. According to recent articles on sexual harassment, a sexually hostile workplace is one of the reasons women have had trouble breaking through the glass ceiling into the ranks of corporate management. Sexual harassment in the form of a hostile work environment acts as a barrier holding women back. This perpetuates the idea that women are merely sexual objects rather than competent workers and professionals equal to their male colleagues. Until a clear definition for hostile work environment is developed, claims for sexual harassment will continue to escalate. Because employers have no idea what constitutes hostile work environment sexual harassment, they cannot develop policies defining what
is inappropriate conduct for their employees. In addition, technological advances have spurred more questions regarding what type of conduct constitutes harassment.

E-mail and the Internet are being used more often in the workplace. When integrating these technological systems into their businesses, employers did not envision legal issues developing as a result of employee misuse of those systems. Because obscene and perverse materials are easily transmitted across electronic systems, and due to an expanding "electronic work environment," sexual harassment claims are on the rise. The deluge of Internet pornographic and obscene sites and employees who visit these sites while at work may create a hostile work environment for other employees who do not approve of or are offended by such material. Additionally, sending inappropriate messages via e-mail may also create a hostile work environment. There will always be a new way to create hostile work environments. New avenues of commerce and communication invariably raise questions regarding what connotes sexual harassment, especially in the creation of a hostile work environment.

Determining what conduct goes too far and crosses the line of decency is a difficult task for employers and employees. Due to ambiguous policies and an absence of barriers that screen perverse and obscene materials, the workplace has become a feeding ground for sexual harassment suits because of an ever-expanding definition of hostile work environment. Opposite sexes no longer want to work together on projects or attend conferences together because of very real fears that misstatements or innocent jokes will turn into a sexual harassment suits. These fears cause a lack of cohesion in the workplace and in many cases lead to decreased productivity. Employers and employees need to be able to work together to accomplish their company's ultimate goals. Cohesion and trust are required in the workplace if the business world is to flourish. An operable definition of hostile work environment sexual harassment must be developed so companies can return to the business at hand and get away from the constant battle over what constitutes this form of sexual harassment.

According to Title VII of the Civil Rights Act of 1964, "it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Sexual harassment in the forms of both quid pro quo and hostile work environment began to be defined as discrimination because the conduct in question was of a sexual nature. The Equal Employment Opportunity Commission ("EEOC") regulations state that sexual harassment is "[u]nwelcome sexual advances ... and other verbal or physical conduct of a sexual nature ... when ... such conduct ... has the purpose or effect of ... creating an intimidating, hostile or offensive working environment."

When the definition of "hostile work environment" was introduced, many factors were required for a showing of sexual harassment as a result of a "hostile work environment." Originally, the courts required proof by the totality of the circumstances. Using this approach, the work environment had to be so severe as to cause psychological instability to the employee being harassed. A year after codification of the EEOC regulations, the case of Andrews v. City of Philadelphia was filed. The Third Circuit Court of Appeals held that in order to claim hostile work environment sexual harassment, "five constituents must converge: (1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) it detrimentally affected the plaintiff; (4) it would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondent superior liability."

Many of the ideas once thought necessary to establish the existence of a hostile work environment have been eradicated. In order to curb these problems in today's businesses, there must be a set definition for hostile work environment that everyone understands and adheres to. Moreover, the definition must clarify every ambiguous term currently causing confusion. In order to alleviate the constant fear of being charged with sexual harassment, employers and employees need to know where the lines will be drawn with regard to their conduct. Due to constant changes in what defines a hostile work environment, there is currently no clear definition of a hostile work environment.
authority under the agency relationship in committing the tortious conduct.3

EEOC guidelines set forth the concept of third-party sexual harassment that can also contribute to a hostile environment in violation of Title VII of the Civil Rights Act of 1964. Employers can be liable for harassment by clients and customers. Clients are not employees and employers have no control over the operations of the clients they are conducting business with. Neither does a client have an agency relationship with the employer. Therefore, none of the necessary criteria for respondeat superior are present. This leads to the conclusion that since a client’s conduct can create hostile work environment sexual harassment, respondeat superior is no longer a requirement to set forth a claim. Recently, the United States Supreme Court determined that an employer could be held vicariously liable for the actions of supervisory employees who have authoritative power over subordinates.

The definition of hostile work environment sexual harassment set out in King v. Hillen has left many questions unanswered. These questions must be answered before hostile work environment will be understood and companies have an operable sexual harassment policy in place.

Sexual Conduct or Conduct Based on Sex

Initially, there must be a determination as to whether the conduct is based on sex is of a sexual nature, both of which may lead to Title VII sexual harassment claims. Conduct of a sexual nature is most commonly the basis for claims. Included in this category are verbal sexual innuendoes, touching, asking someone out on a date repeatedly after receiving a negative response, comments about physical attributes, sexual jokes, pornography and pin-up calendars. Conduct of a sexual nature is commonplace and more easily identifiable. In contrast, conduct based on sex is a debatable topic. According to King v. Hillen, sex-based harassment does not involve sexual activity or language but may give rise to Title VII liability if it is “sufficiently patterned or pervasive” and directed at employees because of their sex.6

Sexual harassment can come in many forms. Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances. In Fullerv.City of Oakland, the Ninth Circuit Court of Appeals held that Fuller was subjected to hostile work environment sexual harassment.7 Fuller was a female police officer being harassed by a male colleague after informing him that she no longer wanted to date him. The male officer obtained Fuller’s unlisted phone numbers from police files after she had changed the number on two occasions. After extracting the numbers, he called continuously and left unsolicited messages. On one occasion, he called and told her that he was going to kill himself. In addition to the phone calls and threats of suicide, the male officer ran Fuller and her new boyfriend off of the road. All of these incidents were sex based but not of a sexual nature. They were directed at Fuller after she refused advances of her male co-worker. The court concluded that all of the conduct in combination was sufficiently severe to lead Fuller to reasonably believe that her work environment was abusive and hostile. In accordance, the court upheld the sexual harassment hostile work environment claim.

The foregoing incident demonstrates how the courts have extended the scope of hostile work environment sexual harassment. Whether the victim is male or female and the harasser is the same or opposite sex, the victim can maintain an action as long as it can be shown that the conduct was brought about because of gender and was sufficiently severe to interfere with the employee’s work performance. Clarifying that sexual harassment claims can be based on the sex of the victim, in addition to conduct of a sexual nature, aids in beginning to define hostile work environment—what it is or can be.

Severe or Pervasive Conduct

The next question that must be answered before an operable definition of hostile work environment sexual harassment can be developed is what is “sufficiently severe or pervasive” with regard to conduct and how is it determined to be such?

In order to determine whether or not conduct is “sufficiently severe or pervasive” to substantiate a claim of hostile work environment sexual harassment, the conduct must be tested both subjectively and objectively. Moreover, to objectively determine a hostile or abusive environment, the totality of the circumstances must be considered. This includes the frequency of the discriminatory conduct and the severity. For example, whether the conduct was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance. It is objectively based on a “reasonableness” standard for a person with very similar characteristics or in the same situation. Subjectively, the perception of each individual victim must be considered
to determine whether the conduct actually affected the victim's conditions of employment. This is where the psychological injury can come into play. If the victim is mentally disturbed because of the conduct, it will be easier for the court to find that the conduct actually was offensive to the plaintiff.

Most sexual harassment claims involve some form of sexually offensive language, pornographic material, off-color or sexual jokes, profanity, degrading speech, touching, offensive pin-ups, requests for dates or even suggestive looks. This type of conduct can be highly offensive to anyone who seeks to deal with fellow employees and clients with professionalism and without barriers of sexual differentiation and abuse.

Frequency
In DeAngelis v. El Paso Municipal Police Officers Ass'n, a female officer was satirized in the association's newsletter. Within a two and one-half year period, four derogatory references to DeAngelis appeared in the newsletter, none of which were sexual in nature. The references were based solely on the fact that DeAngelis was a woman. DeAngelis claimed that the articles were humiliating and that they affected her self-esteem, deterring her from applying for a promotion. However, her work performance remained good. The Fifth Circuit Court of Appeals opined that, because her work performance did not suffer and the working conditions were not disadvantageous, the articles, because of their infrequency, were not sufficiently severe to create a hostile work environment.8

The Fifth Circuit Court of Appeals based its determination on the frequency of the conduct and the articles being mere offensive utterances. The use of these factors in determining "severe or pervasive" raises additional questions.

Single Occurrence
Can a single occurrence justify a claim for hostile work environment sexual harassment? Normally, harassment is more than a single occurrence or isolated act of intentional discrimination. A person must demonstrate a continuous pattern of discrimination. However, an incident that is severe may on its own give rise to a claim of hostile work environment. Courts are changing their view regarding hostile work environment sexual harassment. The gravity along with the frequency of the incidents are now being considered when determining if the conduct was severe enough to affect an employee's work performance. Requiring that a set number of incidents be committed before a hostile work environment can be found would be error on part of courts. A plaintiff bringing a claim under Title VII will not prove harassment or the existence of a hostile working environment merely by alleging a set threshold number of incidents. Therefore, it is possible to bring a claim with the occurrence of a single act. However, this causes a problem in trying to determine what "severe or pervasive" conduct is. To do so, one must consider the frequency of the conduct, but should that include a single incident? It may include a single act if the incident is severe enough, but severity is not what is being defined. Is it possible to define a term when using that same term in defining one of the factors used in defining the original term? The answer to this question would seem to be a resounding no.

Mere Offensive Utterance
The same problem arises when trying to determine whether a mere offensive utterance is enough to constitute a hostile work environment claim. Verbal conduct alone can be the basis of a successful hostile work environment claim. The utterance, however, must be severe in order to substantiate a claim for sexual harassment. Courts have held that rumors intended as offensive utterances could be severe enough to cause inability to deal with present working conditions. Therefore, there has been a shift in jurisprudence to conclude that a mere offensive utterance can affect a person's employment to such an extent that it can substantiate a claim for hostile work environment sexual harassment. Defining hostile work environment is very difficult. When an element, such as conduct that is "severe or pervasive," cannot be defined because the factors used to determine the extent or scope of that element are being determined by the element itself, there is no possibility of extracting a straightforward definition. It is impossible to define something by using the word or term to define itself, which is what the courts are trying to do. Because of this, the courts are left with the responsibility of deciding what conduct is "severe or pervasive," and they are indecisive and inconsistent with each other. Conduct that is considered severe or pervasive in one circuit may not be in another circuit. If the courts cannot decide this issue, then how are employers and employees to know when conduct is severe enough to withstand a hostile work environment sexual harassment claim?

Unwelcome Conduct
Another issue raised by the hostile work environment definition set forth in King v. Hillen is, how to define unwelcome conduct. The threshold for determining what conduct is unwelcome is whether it was uninvited. Determining whether the conduct was uninvited is a subjective standard, because it depends on how the actual victim perceived the conduct. Since people perceive conduct differently; there is no way to actually decide what and when
Hostile Work

Undeniable sexual harassment

From previous page

conduct is universally unwelcome.

Should dress or actions outside the workplace be considered when deciding whether the conduct was unwelcome? According to the Federal Rules of Evidence, in cases dealing with sexual misconduct, evidence of past sexual conduct is inadmissible. Federal Rule of Evidence 412 states that evidence offered to prove that any alleged victim engaged in other sexual behavior (or) any alleged victim’s sexual predisposition is admissible in determining whether the victim was actually affected by the harassing or hostile conduct. In addition, the Reasonable Person Standard comes into affect under this element. Deciding whether the conduct is severe or pervasive is very difficult to determine. The determination should be conducted on a case-by-case basis on how the actual victim perceives the conduct with respect to the surrounding circumstances and by applying how a reasonable person in a similar situation would react. The reasonable person standard is a gender-neutral standard applied to a person with the same fundamental characteristics.

The harassment does not have to occur in the workplace for it to affect or interfere with work performance. Functions or social events that are work-related but take place outside of the workplace are filled with instances of inappropriate conduct. Employees harassed at work-related functions can bring sexual harassment suits against employers because the function is part of the work relationship. The harassed employee may not feel comfortable working with a fellow employee who acted inappropriately, and then job performance may suffer because of the awkwardness between them.

Employers need to take extra precautions when having work related social functions. Many employees do not realize that work rules are in effect at company social functions or parties, and employees who would not think of acting in an offensive manner at work may lose their good judgement when they are in social settings involving alcoholic beverages. Employers are still responsible for the conduct of their employees because they are still within the scope of their employment or have an agency relationship. Harassment that occurs at company parties can lead to interference with job performance as well, because of feelings of intimidation on the part of the harassed employee when having to deal or work with the harasser. Therefore, no matter what they do and say will be construed as sexual harassment or creating a hostile, abusive or offensive work environment. Henceforth, productivity and camaraderie in the workplace will continue to suffer until the courts and legislature determine that enough is enough. A line must be drawn in order to define hostile work environment sexual harassment.

Since people perceive conduct differently; there is no way to actually decide what and when conduct is universally unwelcome.
A constitutional right to physician-assisted suicide

by Peter C. Ibe

Humans and their ancestors have recognized the sanctity of life from the beginning of time. Presently, virtually all human cultures and societies share the belief that life is holy, precious and invaluable. This explains why human life is so highly regarded, well protected, and greatly cherished. In short, human beings believe that life is good.

At the opposite end of the spectrum is death, which often strikes without warning, ending human endeavors, the most illustrious careers, drawing the curtain on the most illustrious careers, and mercilessly extinguishing the enjoyment of life. In short, death is generally dreaded and feared by virtually every human being.

Despite the precious nature of life and the tragic nature of death, there are times when life is arguably worse than death. Such is true when life has so deteriorated that one cannot be truly said to be living a life, but could more appropriately be said to be enduring life or living death.

Since the mid-1990s, courts have been attempting to change the mindset of hostile work environment looks like gender discrimination and not sexual harassment, so why not just bring a claim for sex discrimination instead of a claim for sexual harassment? If we are going to include “because of sex” conduct as creating a hostile work environment, we should change the category from sexual harassment to sex harassment. It would be easier to place both arms of hostile work environment under a category so termed.

All the elements required to prove hostile work environment are themselves vague and difficult to define. Since the elements themselves cannot be determined, there is no possible way to define a hostile work environment. The constant changes in the business world make the determination even harder and more impossible. This form of sexual harassment will never be defined because too many questions regarding it are unanswerable, and at every turn there is a new twist or wrinkle hindering the defining process. This is a never-ending cycle. A hostile work environment is like a disease in that it can have many symptoms which may change over time, but all of which stem from the same root-bias because of a protected status, in this case, gender.

Amy Gregg is a 1999 graduate of Duquesne University School of Law.

Endnotes
6. Id. at 1583.
7. Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).
Constitutional right to physician-assisted suicide

Several Supreme Court decisions regarding the right to privacy, such as Roe v. Wade, and Griswold v. Connecticut, have indicated that an individual has the right to make intimate and fundamentally personal decisions free from state intrusion. Proponents therefore argue that the right of a dying patient to physician-assisted suicide flows from this right to make intimate and personal decisions without state intrusion and that an individual has a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. Since this liberty interest includes "the right to define one's own existence, of meaning, of the universe, and of the mystery of human life," this liberty interest includes a patient's right to physician-assisted suicide. If a patient's liberty interest includes the right to define the patient's own conception of existence and of the meaning of, and mystery of human life, this liberty interest must necessarily include a patient's right to decide his or her time and manner of death.

Another safeguard of individual liberty is the Equal Protection Clause of the Fourteenth Amendment that prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. In other words, states should treat people who are similarly situated in relevant respects, similarly. Many state statutes prohibit patients from obtaining physician-assisted suicide, but permit dying patients on life support mechanisms to direct the withdrawal or discontinuation of the life support mechanism. Some argue that those state statutes treat similarly situated people (terminally ill patients on life-support, and those who are not on life support) differently, in violation of the Equal Protection Clause. Thus while dying patients on life-support can end their lives, dying patients who are not on life support are forbidden from ending their lives through assisted suicide.

... American legal tradition has always recognized an individual's right to control one's own body free from governmental interference or intrusion.

Recently the Supreme Court has addressed these arguments in favor of the constitutional right to assisted suicide. In Cruzan v. Director, Missouri Department of Health, the Supreme Court considered the issue of whether the Constitution "grants what is in common parlance referred to as a 'right to die.'" The Supreme Court did not go as far as recognizing a constitutional right to die, but rather assumed that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." In this case, Nancy Cruzan was in persistent vegetative state with little or chance of survival. Her parents wanted to discontinue the life support mechanism to which she was attached but could not because under Missouri law, a person wishing to discontinue treatment to an incompetent patient must present clear and convincing evidence that such a discontinuation was in accordance with the patient's wishes. Cruzan's parents challenged the constitutionality of this statute but the Supreme Court upheld its validity.

The Supreme Court began its analysis by referring to the tort concept of battery that protects a person's interest in his bodily integrity and freedom from unwanted touching. An individual has the right "to the
possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”

Accordingly the Supreme Court opined that this right to one's bodily integrity is the source of the requirement for a patient's informed consent before medical treatment is administered to the patient. Under this concept of informed consent, “every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable for damages.”

From the right to bodily integrity and the concept of informed consent, the Supreme Court inferred that an individual has a right not to consent to, or to refuse medical treatment. Further, they reasoned that if an individual has the right to refuse curative treatment, it follows that an individual has the right to refuse either life sustaining or lifesaving medical treatment. Since the common law concept of informed consent does not differentiate between curative and either life-sustaining or lifesaving medical treatment: It requires a patient's consent before any medical treatment is administered, whether it is lifesaving or not. Therefore, the Supreme Court concluded that the doctrine of informed consent, which is grounded in the right to bodily autonomy, provides an individual with the right to refuse either life-sustaining or lifesaving medical treatment.

The difficulty of Cruzan's case is that she is not only on a life support mechanism, but also incompetent and in a vegetative state. She has lost virtually all her cognitive powers and could not consent to either the continuation or discontinuation of the life support mechanism. Cruzan's parents sought to discontinue the life support mechanism, but since she did not have a living will authorizing such discontinuation, Missouri courts refused to permit the discontinuation of her life support. The Supreme Court agreed with the Missouri courts that Missouri has a legitimate interest on the life support mechanism. 

... While dying patients on life support can end their lives, dying patients who are not on life support are forbidden from ending their lives through physician-assisted suicide.
Constitutional right to physician-assisted suicide

From previous page

In the protection and preservation of human life and that it may legitimately seek to safeguard the “personal element” of the choice between life and death. This deeply rooted personal decision is protected by requiring a higher evidentiary standard of a third party asserting that a terminally ill patient has consented, or would consent to the withdrawal of lifesaving medical treatment. The Supreme Court then held that “Missouri has permissibly sought to advance these interests through the adoption of a ‘clear and convincing’ standard of proof to govern such proceedings.”

It was further stated that: In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state... [M]any courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more general proof of what the individual’s decision would have been, require a clear and convincing standard of proof for such evidence.

Based on its analysis of the tort concept of battery and the concept of informed consent, the Supreme Court conclusively assumed that “the Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” The Supreme Court’s assumption, that a competent person has the right to refuse life-sustaining medical treatment, was interpreted by proponents of physician-assisted suicide as offering a glimmer of hope. Since the Court would, in the appropriate case, uphold the right to physician-assisted suicide, ending or refusing life-sustaining medical treatment is nothing more or less than assisted suicide. However, this glimmer of hope, was short-lived as it was promptly extinguished by two recent Supreme Court decisions in Washington v. Glucksberg and Vacco v. Quill.

In Washington v. Glucksberg, the plaintiffs argued that the Fourteenth Amendment Due Process Clause, and the liberty interests which it protects, provide has a constitutional right to physician-assisted suicide to a mentally competent terminally ill adult. Rejecting this argument, the Supreme Court held that the purported right to physician-assisted suicide is not a fundamental liberty interest entitled to constitutional protection under the Due Process Clause. At issue in this case was the application of the Washington state statute prohibiting assisted suicide, under the rational basis test, the Supreme Court held that this statute was rationally related to a legitimate governmental interest.

The Supreme Court began its Due Process analysis by tracing the treatment of suicide in Anglo-American legal history and tradition, finally concluding that, despite the fact that contemporary attitudes toward suicide have changed, [O]ur [Anglo-American] laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology, and notwithstanding an increased emphasis on the importance of end-of-life decision making, we [Anglo-Americans] have not retreated from this prohibition.

The Court concluded that the right to assisted suicide is not a fundamental liberty interest. The Court also stated that:

[M]any of the rights and privileges protected by the Due Process Clause sound in personal autonomy, [this] does not warrant the sweeping conclusion that any and all important, intimate and personal, decisions are so protected.

The Supreme Court also indicated that Cruzan should not warrant the sweeping conclusion that there is a constitutional right to die or to assisted suicide. According to the Supreme Court, “we [the Court] were in fact more precise: we assumed that the Constitution granted competent persons a ‘constitutionally protected right to refuse lifesaving hydration and nutrition.’”

Next, the Supreme Court analyzed the Washington statute, banning assisted suicide, under the rational basis test and found that the state has a legitimate interest in protecting human life. Washington was found to have an interest in protecting the integrity of the medical profession [by preventing doctors from becoming killers rather than healers]. “The state has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes.” Since members of these groups could be
forced into accepting assisted suicide due to their vulnerability, the state has a legitimate concern that permitting assisted suicide may degenerate into a slippery slope in which involuntary euthanasia could become rampant. Given the legitimate state interests, the Court held that Washington's ban on assisted suicide was reasonably related to their promotion and protection of these interests.

In Vacco v. Quill, the New York ban on assisted suicide was challenged under the Equal Protection Clause of the Fourteenth Amendment. The New York Statute allows terminally ill patients on life support systems to direct the removal of such systems, resulting in the patients' death, but does not permit terminally ill persons that are not on life support to hasten their death by directing the administration of lethal drugs. It was therefore argued that this statute treats similarly situated persons—terminally ill patients on life support and those that are not on life support—differently, in violation of the Equal Protection Clause. The Supreme Court disagreed with this argument; however, it noted that under this statute, "[e]veryone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; no one is permitted to assist a suicide." Since this statute generally applies evenhandedly to everyone, it does not violate the Equal Protection Clause. More importantly, the Supreme Court, relying on the principles of intent and causation, distinguished between assisting suicide and withdrawing lifesaving treatment.

When a life-sustaining medical treatment is withdrawn, a patient dies from an underlying pathology, whereas in cases of physician-assisted suicide, the patient's death is caused by the lethal medication prescribed by the physician. A patient who refuses life-sustaining medication may not necessarily have the specific intent to commit suicide, whereas a patient who procures the aid of a doctor in order to commit suicide, has the specific intent to commit suicide. A doctor who provides such a service specifically intends the patient to die from the lethal medication prescribed by the doctor. In emphasizing this difference in causation and intent, the Court recognized that there is a big difference between killing and letting die.

Although virtually all human beings believe in the sanctity of life, and are united in their abhorrence and dread of death, proponents of physician-assisted suicide argue that the deterioration of the life quality entails patients to physician-assisted suicide. Because death is often more humane and more dignified than continued vegetative existence, in these situation, proponents argue that physician-assisted suicide is more humane.

In Cruzan, the Supreme Court assumed that the constitution would grant a competent person the right to refuse lifesaving medical treatment. In its later decision, when faced with the issue of whether a dying patient has a constitutional right to physician-assisted suicide, the Supreme Court unequivocally held that a dying patient has no such constitutional right under the Due Process Clause. The Supreme Court also pointed out that refusing lifesaving medical treatment and assisted suicide are fundamentally different, and as such, the Equal Protection Clause is not violated when a state permits the former and prohibits the latter.

Based on the Supreme Court's jurisprudence, especially in Cruzan, Glucksberg, and Vacco v. Quill, it can be unequivocally stated that even though the debate on the issue of physician-assisted suicide has not been completely foreclosed, a dying patient does not have a constitutional right to physician-assisted suicide under the United States Constitution.

Peter C. Ibe is a 1999 graduate of Duquesne University School of Law.
The 1999-2000 Academic Year is a very busy and exciting one for various constituencies here at the Law School. In September, the Alumni Relations & Development Office coordinated Duquesne Law Parents & Spouses Council Programs and the Fall Alumni Reception. The Career Services Office (CSO) launched a busy fall recruiting season and conducted an interviewing skills workshop. Various student organizations kicked off the new school year by sponsoring programs for first year students and by beginning to invite speakers from various practice groups to speak to students.

The CSO started the month of October with a First Monday in October program which called attention to the problems of housing and homelessness nationwide and in Allegheny County. In addition, the CSO hosted nationally known speaker Kimm Walton, author of the books “Guerrilla Tactics for Getting the Legal Job of Your Dreams” and “America’s Greatest Places to Work with a Law Degree.” October was a very active month for the student organizations. ADR held its Negotiation Competition, Trial Moot Court conducted its in-school competition, the Women’s Law Association hosted various activities in recognition of Domestic Violence Awareness Month, the Public Interest Law association held its Silent Auction to raise funds for public interest scholarships, Phi Alpha Delta held fund drives to raise funds to benefit the Hill House, and SBA sponsored a Halloween party and the annual 5K walk/run, Race Ipsa Loquitur. Also in October, the program “Thinking Like a Lawyer About Ethics” which featured Stanford Law Professor, William H. Simon, was held.

November featured two very exciting programs: “President Ford’s Pardon of President Nixon” with key members from both administrations participating (November 12th); and “Generations Together: Celebrating 75 Years of Women Graduates of Duquesne University School of Law” (November 16th). November also saw the launching of the Law Alumni Mentor Program with “Meet Your Mentor” week. On November 20th, the Career Services Office, in conjunction with the Law Alumni Relations and Development Office, hosted a program titled “Legal Marketing Overview for the Law Student and New Lawyer.” In addition, the Law Alumni Relations and Development Office introduced a line of specially-designed Duquesne Law School clothing just in time for the holidays.

Spring classes resumed on January 10, 2000, and a number of events are already planned for the second half of the school year. In January, the CSO conducted a seminar on Judicial Clerkships, and ground breaking is scheduled to begin on the new addition to the law school. An International Canon Law conference was conducted at the Law School on February 4th and 5th. Spring on-campus interviewing began on February 14th, and the CSO plans to hold a program on Managing Student Loans/Law School Debt. February was also Black History Month, and BLSA conducted various programs including their annual Soul Food Sampler. March will feature the Annual Law Alumni Reunion dinner and the CSO’s Interview Skills Workshop and Mock Interview Program. Plans are also underway for a law firm management program for current students and recent graduates. In April we will have the Duquesne University Downtown Alumni Luncheon, the Law Alumni Mentoring Program reception, and the Women’s Law Association’s annual Woman of the Year Award Reception. The CSO is planning to hold a seminar on Alternative Careers. Also in April, the Student Organizations Office will be coordinating Diversity Day events. While students are taking exams, the Law Alumni will be enjoying their annual golf outing at the Fox Chapel Golf Club on May 15th. In addition to all of these activities at Duquesne Law School, the law school also regularly conducts CLE programs. For more information about upcoming CLEs, contact Kathy Koehler, faculty secretary, at (412) 396-6282.

If you would like additional information on any of the Career Services Office or Student Organizations Office events, or if you are interested in participating in a program, please contact Ella Kwisnek, Assistant Dean for Students, at (412) 396-6279 or at kwisnek@duq.edu. For more information on Alumni events, please contact Amy Eozzo Black, Director of Alumni Relations and Development, at (412) 396-5216.
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