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## Habeas Corpus in Three Dimensions

### Dimension III: Habeas Corpus as an Instrument of Checks and Balances

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This article is copyrighted by the author, Eric M. Freedman, who retains all rights thereto. Permission is hereby granted to nonprofit institutions to reproduce this work for educational use, provided that copies are distributed at or below cost and identify the author and this publication.

I am solely responsible for the contents of this piece, including certain deviations from the forms prescribed by *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) which have been made at my insistence in the interests of clarity and to facilitate document retrieval by future researchers. For clarification purposes I have also sometimes regularized the capitalization and punctuation in quotations from early sources.

By way of disclosure, I have served as a member of the legal teams pursuing writs of habeas corpus in several of the cases from the current century cited in this article. By way of acknowledgement, I have benefitted greatly from the insights of my co-counsel.

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Much of the research underlying this article was conducted in the New Hampshire State Archives in Concord during a year-long leave generously funded by Hofstra Law School. The time would have been far less productive (and enjoyable) without the absolutely extraordinary assistance I received from Frank C. Mevers, then the State Archivist, Brian Nelson Burford, then the State Records Manager (now the State Archivist), and John Penney, Armand Dubois, Peter Falzone, William G. Gardner, Benoit Shoja, Pam Hardy, Georgia-Rose Angwin, and Stephen Thomas of the Archives staff. Milli S. Knudsen, a New Hampshire independent scholar who was volunteering at the Archives while I was there, and volunteer Karol Yalcin were responsible for finding a number of the documents that I have relied upon. My work on the New Hampshire materials has also been enriched by the insights of Mary Susan Leahy, Esq., Robert B. Stein, Esq., Eugene Van Loan, Esq., and Richard M. Lambert.

Copies of the documents from the New Hampshire State Archives that undergird my descriptions of the cases are available from the reference desk of the Hofstra Law School Library. Some of these records, including ones cited to Provincial Case Files and the Judgment Books of the Superior Court, have also previously been microfilmed by the Genealogical Society of Utah.

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## Project Overview

This is the third of three planned articles in a project whose overall title is “Habeas Corpus in Three Dimensions.” The first installment discussed the importance of habeas corpus as a common law writ.<sup>2</sup> The second piece considered the significance of the fact that American habeas corpus until the first decades of the nineteenth century was embedded in a system of multiple constraints on government power.<sup>3</sup> This article broadly overviews habeas corpus within the horizontal aspect<sup>4</sup> of the system of checks and balances that developed here subsequently.<sup>5</sup>

### I. Introduction: Habeas Corpus and the Independent Judiciary

“Separation of powers” differs from “checks and balances.” One protects individual liberty by allocating particular governmental powers to specific branches. The other protects individual liberty by having each branch restrain the others. Part II.A makes this point and Part II.B shows that allocation of powers, enforced by judges, was an established feature of British government in the North American colonies. The concept of allocation of powers “passed uncontroversially into American law.”<sup>6</sup>

Checks and balances, though, was a new idea<sup>7</sup> and its

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2 See Eric M. Freedman, *Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591 (2011) [hereinafter Freedman I].

3 See Eric M. Freedman, *Habeas Corpus as a Legal Remedy*, 8 NE. U. L.J. 1 (2016) [hereinafter Freedman II].

4 See *infra* note 7 (discussing this limitation).

5 As Markus Dubber has observed, the historical literature on habeas corpus has neglected the question of how the English writ was incorporated over time into “American legal institutions and practices,” and how this issue bears on “the oft-invoked but rarely-substantiated notion of ‘Anglo-American’ law.” Markus D. Dubber, *The Schizophrenic Jury and Other Palladia of Liberty* 11, (Apr. 12, 2015) (unpublished manuscript) (on file at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2593563](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593563)).

6 Freedman II, *supra* note 3, at 72.

7 See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 673 (2008).

Federalism as a conscious means of structuring government for the protection of rights was also a new idea. In “the compound republic of America” a “double security arises to the rights of the people” because there are checks and balances operating vertically as well as horizontally. See THE FEDERALIST, No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). See also Coleman

acceptance was not possible until the judicial branch established its republican legitimacy.<sup>8</sup> As Part III.A describes, “judicial independence got off to quite a rocky start in the new nation both because the judges were so closely identified with the Crown and because the common law they administered had no plainly visible democratic source.”<sup>9</sup> The result was rampant legislative interference with judicial decision-making (Part III.B), built into the initial architecture of judicial systems (Part III.B.1) and often furthered by abolishing disfavored courts (Part III.B.2), by pressuring individual judges (Part III.B.3), or by intervening in specific cases (Part III.B.4).

The notion of an independent judiciary that restrained the other branches was still aborning in 1807, when John Marshall stated in dicta in *Ex Parte Bollman*<sup>10</sup> — quite wrongly as a matter of both British history and American constitutional law<sup>11</sup> — that federal courts had no inherent authority to issue the writ of habeas corpus in the absence of legislation granting them that power. As Part III.C emphasizes in recounting *Bollman*, the opinion was delivered at a time when the judicial branch was substantially subordinate to the others,<sup>12</sup> “a period of profound uncertainty, experimentation, and

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v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (describing federalism as a device whose purpose is to secure “to citizens the liberties that derive from the diffusion of sovereign power”). The present article, however, confines itself to horizontal checks and balances. See generally *infra* note 178.

8 See KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 65-67 (2d ed. 2009).

9 Freedman II, *supra* note 3, at 5. See MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 190-91 (2005); JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 31 (2012).

10 8 U.S. (4 Cranch) 75, 93-94 (1807).

11 See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 20-41 (2003) (arguing these positions); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 295 (2d ed. 1995) (explaining that “an Englishman’s rights existed in the maxims of the common law and nature, whatever Parliament did or did not say,” making law “basically what the principles of right reason declared to be law, the codification of which was hardly inclusive”); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1320-23 (2009); Halliday & White, *supra* note 7, at 683, 698; *infra* text accompanying notes 190-96. See generally Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. L. 67, 82-85, 99-102 (2009).

12 See R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW POLITICS AND THE CHARACTER WARS OF THE NEW GOVERNMENT* 5

contingency.”<sup>13</sup>

In succeeding decades, the shifting theoretical and institutional structure of checks and balances came to rest.

Part IV.A describes the converging forces which resulted in the judiciary, after a period of struggle on multiple fronts, establishing its institutional independence from the legislature and solidifying a cultural expectation that executive officers would comply with judicial decisions. This accomplishment came at a cost: juries lost autonomy inside the judicial structure, and their power was weakened permanently (Part IV.B).

Once the idea of judicial independence as an aspect of checks and balances had become accepted legally, respectable intellectually, and defensible politically, the judicial branch<sup>14</sup> should have reclaimed in the context of habeas corpus its inherent authority to police the limits of executive power,<sup>15</sup> this time in order to enforce structural as well as individual concerns.<sup>16</sup> But the Supreme Court proved

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(2012) (noting that at the time “judicial authority and independence had yet to be established, at both the state and national levels”); *infra* Part III.B.

- 13 Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 456 (2005). See also Freedman II, *supra* note 3, at 26-30 (noting inter-branch contests regarding writ).
- 14 This does not necessarily mean “judges.” As recounted in Freedman I, *supra* note 2, at 600 n.47, 600-01, 603 & n.58, there are numerous examples from the early national period of jury trials in habeas corpus actions or their functional equivalents. Moreover, actions of that kind should not be considered in isolation from other legal remedies for wrongful imprisonment (e.g. public and private criminal prosecutions, damages actions for false imprisonment or malicious prosecution), in all of which the jury played a central role. See Freedman II, *supra* note 3, at 32-67. Cf. Douglas A. Berman, *Making the Framers’s Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 912-15 (2010) (relying on jury control over law in founding era to support jury participation in modern statutory habeas proceedings). Discussions of the evolution of the jury’s role appear *infra* in note 97 and Part IV.B.
- 15 See Freedman I, *supra* note 2, at 607-08, 608 n.86, 611 n.99; Freedman II, *supra* note 3, at 5-6; Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 98 VA. L. REV. 753, 757-58 (2013). In successfully overcoming Executive Branch resistance on foreign policy grounds to the release of the slaves petitioning for habeas corpus in *The Amistad*, 40 U.S. (15 Pet.) 518 (1841), John Quincy Adams connected “the effective power of the habeas corpus” to “the power and independence of the judiciary itself.” See Eric M. Freedman, *Habeas Corpus Past and Present*, 59 FED. LAW. 40, 41 (2012) [hereinafter Freedman, *Past and Present*].
- 16 See *Bond v. United States*, 564 U.S. 211, 222-23 (2010) (unanimous) (noting that checks and balances serve to protect both the liberties of the individual

hesitant to repudiate *Bollman*'s dangerously flaccid view of the writ,<sup>17</sup> notwithstanding that history and policy alike called upon it to take that step.<sup>18</sup>

Finally, as Part V describes, in 2008 in *Boumediene v. Bush*,<sup>19</sup> — a landmark ruling that put it on the right side of history — the Court recognized habeas corpus as an instrument for the enforcement of checks and balances,<sup>20</sup> and the power to issue it as inherent in

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and the prerogatives of the three branches); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004) (stating that “the Great Writ of habeas corpus allows the Judicial Branch to play [its] necessary role in maintaining [the] delicate balance of governance,” as well as protecting citizens’ rights); FREEDMAN, *supra* note 11, at 6; William R. Casto, *If Men Were Angels*, 35 HARV. J. L. & PUB. POL’Y 663, 663-64 (2012). See generally EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 8 (2007).

17 See *INS v. St. Cyr*, 533 U.S. 289, 301 n.13, 304 n.24 (2001) (recognizing issue but resting ruling on statutory grounds); *Noriega v. Pastrana*, 559 U.S. 917, 924 n.4 (2010) (Thomas & Scalia, JJ., dissenting from denial of certiorari) (describing *St. Cyr*); FREEDMAN, *supra* note 11, at 3-4 (criticizing *St. Cyr* for not repudiating *Bollman*). Cf. James Oldham & Michael J. Wishnie, *The Historical Source of Habeas Corpus and INS v. St. Cyr*, 16 GEO. IMMIGR. L.J. 485, 499-500 (2002) (concluding that *St. Cyr* inferentially ruled in favor of inherent judicial authority to issue writ). A more recent statement of Professor Oldham’s views appears in James Oldham, *Habeas Corpus, Legal History, and Guantanamo Bay*, 36 MANITOBA L.J. 361 (2012).

Earlier, even *Fay v. Noia*, 372 U.S. 391 (1963), a famous ode to the writ delivered by Justice Brennan, explicitly reserved the question of whether it was “the Framers’ understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ,” although commenting that “[t]here have been some intimations of support for such a proposition in decisions of this Court.” *Id.* at 406.

18 See Halliday & White, *supra* note 7, at 683; Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?*, 17 CR. JUST. 14, 20 (2002). See also Dan Poulson, Note, *Suspension for Beginners: Ex Parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373, 398 (2008) (“[I]f the Great Writ is to have any meaning as a formidable restraint on tyranny and arbitrary confinement, it must be free from substantive limitation by the body that most fears it.”).

19 553 U.S. 723 (2008).

20 See Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 378 (2009) (concluding that after centuries of avoidance, “*Boumediene* represents a timely restoration of a healthy balance of power”); Emily Garcia Uhrig, *Boumediene v. Bush, the Great Writ, and the Power to “Say What the Law Is,”* 33 OKLA. CITY U. L. REV. 389, 390 (2009) (“The decision, at its core, is an affirmation of separation of powers principles. It affirms the Framers’ creation

the Article III judicial role. This welcome development dispelled a distorted vision of the past that held the potential to cloud clear thinking in facing the problems of the future, including those posed by the struggle against terrorism.<sup>21</sup>

## II. Background: British Judicial Enforcement of Separation of Powers

### A. Allocation of Roles in British Governments

Although it is sometimes loosely said that the English system had no separation of powers, this is imprecise.<sup>22</sup>

“Separation of powers” as we know it today consists of:

(a.) assigning duties to the government instrumentality best able to perform them, taking into account both efficiency and policy considerations. Thus, for example, courts not cabinets should try criminal charges against individuals. This concept, whose focus is at the level of the particular governmental action at issue, might be called “allocation of roles.”<sup>23</sup>

(b.) assigning duties to various branches in furtherance of the structural purpose of having them limit each others’ power.<sup>24</sup> This concept, whose focus is at the architectural level, is encapsulated in the American term “checks and balances.” Its premise, in general, is that requiring interaction between the branches before any problem can be finally disposed of will lead to decisionmaking that is both substantively sounder and more consistent with the goals of a

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of a tripartite system of government in which each branch checks and balances the others.”) (footnote omitted); *infra* Part V.

21 See FREEDMAN, *supra* note 18, at 19.

22 This paragraph and the one that follow are drawn from Freedman II, *supra* note 3, at 71-73. The terminological vagueness described in the text is quite common, extending to the Court and commentators on its work, *see, e.g., infra* note 261 and accompanying text.

23 Aziz Huq has given this principle the name “institution matching.” *See* Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417 (2012).

24 *See* THE FEDERALIST No. 51, at 320-22 (James Madison) (Clinton Rossiter ed., 1961) (advocating “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place.”).

representative non-tyrannical government than giving a single branch the first and last word.<sup>25</sup>

The British system of government in the North American colonies understood and largely respected allocation of roles. The distribution of powers to particular officials, which judges and juries enforced through habeas and other legal remedies, had the effect of insuring that individuals were treated justly and in accordance with law.<sup>26</sup> Indeed, because the sovereign was presumed to desire that the law be obeyed,<sup>27</sup> subjects could judicially invoke the law against the Crown itself.<sup>28</sup>

Plural office-holding was common in both England and early America.<sup>29</sup> But, as shown below, the officeholders took seriously the differences among their official roles. The result from the viewpoint of prisoners was that both release and confinement could be ordered by a variety of political actors but only within a judicially-sanctioned

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- 25 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-37 (2004) (criticizing government's view of "separation of powers" as one that "would turn our system of checks and balances on its head"); see also Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 n.11 (2015) ("Separation of powers and checks and balances have distinct meanings.").
- 26 See JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 6 (2004).
- 27 See Timothy Endicott, *Habeas Corpus and Guantanamo Bay: A View From Abroad*, 52 AM. J. JURIS. 1, 28-29 (2009).
- 28 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.").
- 29 See Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 253 (1967); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 803 (1999).

framework. The judiciary policed the boundaries of the powers of executive officers<sup>30</sup> up to and including the sovereign.<sup>31</sup>

### 1. The Governor and Council

As illustrated by the four cases presented below, a colonial governor and his council might interact in a number of ways with the judicial system regarding a detention.

1. Early in September 1750, an Indian by the name of Nambrous<sup>32</sup> was incarcerated on complaint of one Moses Winget of Dover, New Hampshire, who claimed that Nambrous had “attempted to kill him the said Winget with a knife by stabbing him in the arm and body.”<sup>33</sup>

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30 Those are the officers who are the focus of this Part of the article. Much of the important early development of habeas corpus in England took place in the context of King’s Bench establishing its role as against that of other courts, generating rules which were later expanded to restrain King and Council. See PAUL D. HALLIDAY, *HABEAS CORPUS FROM ENGLAND TO EMPIRE* 139-76 (2010). The American colonies lacked “the tangle of ecclesiastical courts, marshal’s courts, corporation courts, and many other courts that existed in the home country,” Freedman I, *supra* note 2, at 613 n.112, and thus the first aspect of the story was less salient here. Colonial prisoners indeed obtained release by challenging the jurisdiction of the committing court but the writ by which they did so was at least as likely to be denominated “supersedeas” or “certiorari” or “prohibition” as “habeas corpus.” There is a full discussion in Freedman I, *supra* note 2, at 597-608. See generally Kovarsky *supra* note 15, at 800-02 (discussing Supreme Court’s 19th century use of habeas corpus in conjunction with certiorari to review criminal convictions).

31 See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 71-73, 80-81, 97-98, 101, 113-14, 194-217, 234 (2008); *infra* Part II.A.2.

32 The name appears in the records under a variety of spellings. I have chosen this one to be consistent with the one that appears in 6 *PROVINCIAL PAPERS OF NEW HAMPSHIRE* 8-9 (Nathaniel Bouton ed., 1872) (reprinting documents quoted in this section of text). See also GEORGE WADLEIGH, *NOTABLE EVENTS IN THE HISTORY OF DOVER NEW HAMPSHIRE: FROM THE FIRST SETTLEMENT IN 1623 TO 1865*, at 144 (Tufts Coll. Press, 1913) (using this spelling in providing brief account of episode).

Relations between the colonists and the Indians have of course been the subject of extensive scholarship. For two recent historiographical summaries see Christopher Bilodeau, *Indians in Southern New England: Older Paradigms and Newer Themes*, 39 *REVS. AM. HIST.* 213 (2011) and Edward Countryman, *Toward a Different Iroquois History*, 69 *WM. & MARY Q.* 347 (2012).

33 Mittimus of Indian, Sept. 8, 1750, Provincial Case File No. 027045, New Hampshire State Archives. The documentation shows that Nambrous was accompanied during his captivity by a female companion who was also wounded.

When, however, the case came up later in the month the ruling was, “No evidence appearing against him the said Indian to convict him it is considered by the Court that the said Indian be acquitted and discharged.”<sup>34</sup> Yet, the order continued, “inasmuch as the Indian nations are making war upon his majesty’s subjects in New England therefore ordered that his Excellency the Governour be informed of this Court’s order to discharge the said Indian and that this Court can hold him no longer to the intent that his Excellency may take order as he shall see fit concerning him.”<sup>35</sup>

Later that day a copy of this order was presented to the Governor and Council, and “in as much as the tribe to which the said Indian belongs having committed hostilities against his Majesty’s subjects of neighbouring governments<sup>36</sup> the Council advised his Excellency to give the Sheriff orders to detain the said Indian and his squaw that is now with him till further order of the Governour and Council.”<sup>37</sup> They were detained accordingly until the following February.<sup>38</sup>

2. In December 1752 Ebenezer Ayres was indicted for

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*See* Benjamin Pitman’s Account of Keeping Indian, Sept. 1750, Provincial Case File No.06756, New Hampshire State Archives (jailkeeper’s account seeking reimbursement for boarding “the Indian man three weeks,” “the Indian woman two weeks,” and “rum for dressing their wounds”); Treasury Records, RG V, Box 6, Accounts 1750, New Hampshire State Archives (accounting of Drs. Sargent & Dearborn seeking payment for treating wounds of “Nimberos (an Indian)” and “Ditto for Squaws Wounds”).

34 Superior Court Minute, Sept. 26, 1750, Superior Court Minute Book Aug. 1750 & Feb. 1751 Terms, New Hampshire State Archives.

35 *Id.*

36 This may be a reference to an incident in Maine reported in Letter from Richard Waldron to [New Hampshire Governor] Jonathan Belcher (Sept. 10, 1750), M-1833-001, New Hampshire Historical Society Library (“Richmond fort was attacked by the Indians last week, who continued their fire two days and then went down the river and captured 14 people on an island. Tis reported that some are killed.”).

37 Minutes of Council Meeting of Sept. 26, 1750, 6 Council Book Minutes, at 63, New Hampshire State Archives. A slightly garbled version appears in the printed papers cited *supra* note 32.

38 The evidence for this statement is that the jailkeeper’s executor sought reimbursement from the Assembly for lodging the pair based on a memo found among the decedent’s papers reading, “1750 September 3d - The Indians was bro’t to his Maj’y’s Gaol and they were discharged the 23d day of February following.” *See* Petition of Joseph Mead to the New Hampshire Assembly, Petitions Index, New Hampshire State Archives. The Index entry carries a 1750 date but Mead’s petition was presumably filed during the period he served as

murder, a potentially capital offense. The jury found, however, that the shooting had been by “misadventure” and not “willful murder” because the victim had “been in a thicket of bushes” and Ayres “supposed he shot at a bear.” The court remanded Ayres “to his Majesty’s gaol there to remain till he be discharged by his Majesty’s grace and favour.”<sup>39</sup>

3. Over the summer of 1749 Jotham Ordione, a substantial citizen of Portsmouth, New Hampshire, received two alarming letters demanding that he deposit £500 in a specified place or else scores of men would destroy all his property down to the last sixpence worth and “your person also when ever you can be found in a convenient place.”<sup>40</sup> On July 23, a Sunday, he complained to the Governor and Council, which, perhaps fearing a significant outbreak of violence, launched an investigation.<sup>41</sup> The extortion money was due on July 25, and on that date Captain John Mitchell was arrested at the drop-off point.<sup>42</sup> The Governor and Council called him in for questioning<sup>43</sup> but seemingly concluded that the matter should be handled in ordinary course by the criminal justice system. In any event, Mitchell was indicted in August and pleaded not guilty.<sup>44</sup> After a jury trial he was convicted, and fined £1,000 plus

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the estate’s administrator, 1754-56. See 25 NEW HAMPSHIRE STATE PAPERS 11-12 (Hammond ed., 1936).

39 The documentation is to be found in Provincial Case File No. 26947 and Judgment Book of Superior Court, Vol. B, Sept. 1750 - Mar. 1754, at 287-88, New Hampshire State Archives. See generally Harbison v. Bell, 556 U.S. 180, 192 (2009) (noting that clemency power is a deeply-rooted feature of Anglo-American legal tradition with particular importance in capital cases). Cf. CAROLINE ALEXANDER, THE BOUNTY: THE TRUE STORY OF THE MUTINY ON THE BOUNTY 206-07, 285-86, 297-98 (2003) (reporting that when defense counsel heard news of one mutineer’s death sentence in 1792 he immediately and correctly concluded that pardon would be forthcoming and that client’s life was as safe as if he had been acquitted).

40 The material in this sentence is drawn from the indictment cited *infra* note 44.

41 See 5 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE 128-29 (1871).

42 See 3 COLLECTIONS, HISTORICAL AND MISCELLANEOUS AND MONTHLY LITERARY JOURNAL 133-34 (1824) (giving account of episode in which Mitchell was innocent passerby, as shown by subsequent confession of guilty party); Judgment Book of Superior Court, Vol. B, *supra* note 39, at 286 (recording guilty plea and sentencing of co-defendant William Blair in 1725).

43 See 5 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE, *supra* note 41, at 129.

44 The indictment with Mitchell’s plea endorsed is in Provincial Case File No 18130, New Hampshire State Archives.

costs of prosecution as well as being ordered to provide sureties.<sup>45</sup> In November the Governor reported to the Council that Mitchell and a number of his supporters had been seeking clemency.<sup>46</sup> After quoting the portion of his royal instructions dealing with his power of “remitting all fines and forfeitures &c.,” he sought and received the Council’s approval “to suspend the payment of the fine.”<sup>47</sup> Mitchell was discharged accordingly.<sup>48</sup>

4. In July 1725 George Walton of Portsmouth, New Hampshire was called before the Council to answer charges brought by Captain George Walker of “refusing as ferryman to transport troops and horses from Dover to Newington for his Majesty’s service,” and “expressing himself in contumacious and defamatory words in regard to the government of New Hampshire.”<sup>49</sup> After hearing both parties the Council referred the complaint to a special session of the Justices of the Peace to take place a week later.<sup>50</sup>

In the first three cases the prisoner’s continued incarceration rested with executive officers exercising their roles in a way complementary to that of the judges, while in the last one those officers concluded that the entire situation should be dealt with by judges.<sup>51</sup> In each instance the officeholders (even if the same individuals) self-consciously observed their assigned role allocations.

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45 See Minute Book of Superior Court, Aug. Term 1749, at 2, New Hampshire State Archives.

46 See 5 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE, *supra* note 41, at 130.

47 *Id.* at 130-31.

48 See Minute Book of Superior Court, Aug. Term 1749, at 2, New Hampshire State Archives.

49 The summons, with the disposition thereof appearing on its reverse, is in the Executive Council Records, Box 5, Folder - Council Minutes, 1690-1769, New Hampshire State Archives.

50 *Id.*

51 Another such example comes from the Maryland Court of Appeals in 1698. In *Burroughs v. Copley’s Administrator*, reprinted in PROCEEDINGS OF THE COURT OF APPEALS OF MARYLAND 45, 54 (Carroll T. Bond & Richard B. Morris, eds. 1933), 77 ARCHIVES OF MARYLAND ONLINE, <http://aomol.msa.maryland.gov/000001/000077/html/> (last visited June 20, 2015), the Court, on which the Governor sat, was divided 3-3. Counsel for the plaintiff asked whether the Governor would exercise “a swaying vote,” but he refused and the case was put over to be decided the next term by a five-member bench. This represented a decision that the case “should be disposed of routinely by the rule of law rather than by some special political calculus or gubernatorial political judgment.” William E. Nelson, *The Law of Colonial Maryland: Virginia Without its Grandeur*, 54 AM. J. LEG. HIST. 168, 186 (2014).

## 2. The Sovereign

Most critically, the monarch had various roles, whose boundaries the courts would enforce.<sup>52</sup> Tracing the development of this phenomenon through a wilderness of more-or-less reliable history from Magna Carta through the sixteenth century<sup>53</sup> and from there through the better documented period of Edward Coke and the Petition of Right,<sup>54</sup> the English Civil War and the execution of Charles I,<sup>55</sup> the Glorious Revolution and the English Bill of Rights<sup>56</sup> lies well beyond the scope of this article.<sup>57</sup> But the power of courts to hold royal acts unlawful was an accepted part of the English constitution,<sup>58</sup> with practical consequences that were quite clear by the eighteenth century.<sup>59</sup> For example:

The Crown could not validly make a second grant impairing the rights of a prior grantholder, whether the subject of the grant

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- 52 See 6 JOHN BAKER, *OXFORD HISTORY OF THE LAWS OF ENGLAND* 68-69 (2003); HAMBURGER, *supra* note 31, at 610-11.
- 53 See, e.g., HENRY CARE, *ENGLISH LIBERTIES OR THE FREE-BORN SUBJECT'S INHERITANCE* 26 (5th ed. 1721). See also Jesus Fernandez-Villaverde, *Magna Carta, the Rule of Law, and the Limits on Government*, at 8-9 (forthcoming 2016 INT'L REV. L. & ECON.) (on file at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2676184](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676184)).
- 54 See JOHN M. BARRY, *ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL: CHURCH, STATE AND THE BIRTH OF LIBERTY* 67-70 (2012).
- 55 See *id.* at 277-78, 356-57. See generally Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, at 14 n.17 (1992).
- 56 The Bill of Rights Act, 1689 [n.s.], 1 W. & M. c. 2 (Eng.). See generally HAMBURGER, *supra* note 31, at 156-59. For general accounts of the period see JOHN MILLER, *JAMES II* (2005); J.R. JONES, *THE REVOLUTION OF 1688 IN ENGLAND* (1972); and CRAIG ROSE, *ENGLAND IN THE 1690S: REVOLUTION RELIGION AND WAR* (1999).
- 57 One sketch appears in DANIEL J. HULSEBOCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD* 32-41 (2005).
- 58 See HAMBURGER, *supra* note 31, at 202.
- 59 For an excellent overview see REID, *supra* note 26.

was an office,<sup>60</sup> corporate privileges,<sup>61</sup> or land. Thus, for example, during 1749 the King created New Town, New Hampshire, from territory previously granted to South Hampton.<sup>62</sup> When an action was brought to test this it resulted in a ruling “that the King has not by law a power to make a second charter with addition of persons and estates for a town which has one in full force at the time of making the second so as bind the town thereby without their consent.”<sup>63</sup>

The judges could and did rule that certain offices or prerogatives were beyond royal power to grant at all. Thus, for example, when in 1558 Queen Mary selected one Robert Coleshill to be a judicial clerk to Anthony Browne, the Chief Justice of Common Pleas, the position was contested by Alexander Scroggs who had been appointed by Browne. The judges of Queens Bench ruled “that the title of Colsehill was null, and that the gift of the said office by no means and at no time belongs or can belong to our lady the queen.”<sup>64</sup> Similarly, in 1604 all the judges of England published formal advice to James I that the monarch lacked power to transfer (for a fee) to a private individual the royal prerogative of granting dispensations from the obligation of complying with statutes.<sup>65</sup>

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- 60 See *Rex v. Savage* (KB 1519), reprinted in 2 J.H. BAKER, REPORTS OF CASES BY JOHN CARYLL 699, 704 (2000) (quoting statement of court “that where the king, by his letters patent dated the first of May, grants me an office and something else, and then by other letters patent dated the second of May he grants the same thing to a stranger, these second letters patent are absolutely void.”).
- 61 See HAMBURGER, *supra* note 31, at 194 & n.41. Compare *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 560 (1819) (argument of Daniel Webster that “the king cannot abolish a corporation, or new model it, or alter its powers, without its assent”) with *id.* at 643 (statement of Chief Justice Marshall in opinion that Parliament would have had power to annul the charter but “the perfidy of the transaction would have been universally acknowledged.”).
- 62 The documentation is in Provincial Case File 23510, New Hampshire State Archives.
- 63 *Bagley v. Elliot*, Judgment Book of Superior Court, Vol. B, Sept. 1750 - Mar. 1754, at 260, New Hampshire State Archives.
- 64 *Skrogges v. Coleshill* (1559), 2 Dyer Rep. 175a, at 175b (Q.B.). To make the ruling stick the judges had to release Scroggs by habeas corpus from the Fleet prison, to which he had been committed by a commission appointed by the Queen to resolve the dispute after she was dissatisfied with the first ruling. See *id.*; J.H. Baker, *Personal Liberty Under the Common Law, 1200-1600*, in THE ORIGINS OF MODERN FREEDOM IN THE WEST 178, 199 (R.W. Davis ed., 1995) (describing case).
- 65 See *Penal Statutes* (1605), 7 Coke Rep. 36b.

The judges would restrain the monarch from encroaching on subjects' ancient liberties. For example, although the Crown could requisition provisions on condition of paying reasonable prices,<sup>66</sup> the Magna Carta barred the taking of standing timber without the owner's consent.<sup>67</sup> When the judges pointedly noted this in 1604, "James I eventually had to publicize that he would comply."<sup>68</sup>

The monarch could neither adjudicate individual cases extra-judicially<sup>69</sup> nor legislate by unilateral proclamation as opposed to Act of Parliament,<sup>70</sup> nor grant franchises that were contrary to statute or included penal provisions unauthorized by Parliament.<sup>71</sup>

In all of these instances the sovereign could not cause a person to suffer a legal hardship unless it was one affirmatively permitted by law.<sup>72</sup> The same principle was at work when the judges granted relief against unlawful imprisonments, whether by granting the great writ of habeas corpus,<sup>73</sup> issuing a prerogative writ<sup>74</sup> or imposing

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- 66 Cf. U.S. CONST. amend. V (forbidding taking of private property for public use without just compensation).
- 67 See 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (quoting Magna Carta ch. 21).
- 68 HAMBURGER, *supra* note 31, at 196 n.46.
- 69 See Prohibitions del Roy, (1607) 77 Eng. Rep. 1342, 1342-43 (C.P.) (providing Coke's account of his reliance on Bracton to inform an enraged James I to his face that he must rule under God and the Law); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 601-02 (2009); see also HAMBURGER *supra* note 31, at 71-73. As correctly observed by Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 25 (2003), the principle was not that the King could not adjudicate but rather that he could not do so unilaterally, being required to act judicially through the House of Lords. See generally Donald E. Wilkes, Jr., *Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603-1625*, 54 AM. J. LEGAL HIST. 200, 211-15 (2014) (describing judicial character of Parliament).
- 70 See HAMBURGER, *supra* note 31, at 200-02 (describing the point as settled by the middle of the seventeenth century).
- 71 See Attorney General v. Donatt (Ex. 1561), *reprinted in* 1 J.H. BAKER, REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER 49-50 (1994) (holding void as "utterly against the law" a royal patent to the town of Southampton making it sole port of entry for certain wines and authorizing collection of treble customs duty for any landed elsewhere).
- 72 See Freedman I, *supra* note 2, at 596.
- 73 See REID, *supra* note 26, at 5.
- 74 See Freedman I, *supra* note 2, at 593 (noting that "demands for release from unlawful imprisonment could be made during the colonial and early national period by seeking a variety of writs, including certiorari, supersedeas,

money damages.<sup>75</sup> In considering the powers of a committing court or a subordinate officer, “the central question the judges sought to decide was what right the jailer had to impose the restraint rather than what right the prisoner had to be free of it.”<sup>76</sup>

### III. Courts in the New Nation: A Tempestuous Beginning

#### A. Populist Storms Batter Legal Structures

In the first half century after Independence the legal systems of the states and the national government developed in ways particular to their own local political, intellectual, and economic environments.<sup>77</sup> Events in each jurisdiction moved in ways that were

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prohibition, trespass, and replevin — or even by pleadings that asked for no particular writ at all.”); see also Wilkes, *supra* note 69, at 231. See generally Kevin Costello, *The Writ of Certiorari and Review of Summary Criminal Convictions, 1660-1848*, 128 L.Q. REV. 443 (2012). As Professor Halliday has shown, unifying the judges’ use of the various prerogative writs was a sweeping conception that it was their role to insure that justice was being done to the prisoners. See HALLIDAY, *supra* note 30, at 77-83.

75 See Baker, *supra* note 64, at 192-94 (describing how civil damages actions were routine remedy for unlawful imprisonments well before rise of habeas corpus); Freedman II, *supra* note 3, Part II.B.1. See also William E. Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760-1775*, 18 AM. J. LEG. HIST. 1, 8-9 (1974) (listing numerous cases in Massachusetts seeking damages for official misconduct).

76 Eric M. Freedman, *Liberating Habeas Corpus*, 39 REVS. AM. HIST. 395, 396 (2011) (reviewing HALLIDAY, *supra* note 30). See Freedman I, *supra* note 2, at 601, 604, 614, 614 nn.114 & 116 (providing examples from 1629, 1732, 1749, 1772 and 1814 of courts in England and America releasing petitioners because custodians’ returns failed to demonstrate entitlement to detain); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (providing extensive post-Independence documentation); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 948 (2011) (describing issue before English habeas judges as “whether the jailer had a legal basis for confining the prisoner”).

77 See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 7 (1971). See generally Kathryn Preyer, *Penal Measures in the American Colonies*, 26 AM. J. LEGAL HIST. 326, 326-27 (1982) (emphasizing that because of geographical and temporal variations, “The character of each colony at its earlier and later stages needs to be considered in order to assess the process of change through time”).

“complex, halting, and at times irrational”<sup>78</sup> rather than linear,<sup>79</sup> and there remains ample room for future scholarship to illuminate the details of the timing and contents of specific struggles to create legal structures that could gain general acceptance.

For present purposes, though, it is sufficient to note that widespread gales were sweeping the landscape of public opinion in large parts of the country:

1. Judges were in bad odor. From Royal apparatchiks<sup>80</sup> they became State officials lacking a popular mandate. Moreover, they were not thought to add any valuable expertise to government. Whether or not they were lawyers (and many were not),<sup>81</sup> the general view was that they knew no more about law — and certainly less about justice — than a cross-section of the local community: “The authority of juries to determine the law in civil and criminal cases rested on the widespread understanding that ordinary citizens had as great an ability as judges to discern what the law was.”<sup>82</sup> This view, in turn, rested critically on the belief that legal constraints on individuals’ behavior should be ones “arising out of and reflecting the community” rather than ones “elaborated by legally trained professionals.”<sup>83</sup> In this vision, “Justice would be personal and pragmatic,” reflecting the

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78 ELLIS, *supra* note 77, at viii.

79 See SHUGERMAN, *supra* note 9, at 31-34 (noting that the “story of early American courts was not a steady march toward judicial supremacy” but was characterized by bursts of judicial assertiveness in particular places followed by political pushback with “judges often . . . taking two steps forward and one step back”).

80 See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 400-01 (2009); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 789-90 (1999) (observing that at Independence judges were considered dangerous, being regarded “essentially as appendages or extensions of royal authority”); see also HAMBURGER, *supra* note 31, at 341-42. Even when imposing constraints on the Crown, the judges were, by a fiction more or less strained, deemed to be implementing the royal will. See BRENDAN MCCONVILLE, *THE KING’S THREE FACES: THE RISE AND FALL OF ROYAL AMERICA, 1688-1776*, at 8 (2006).

81 See G. Alan Tarr, *Contesting Judicial Power in the States*, 35 HARV. J. L. & PUB. POL’Y 643, 657 (2012).

82 *Id.* See Jon P. McClanahan, *The “True” Right to Trial by Jury: The Founders’ Formulation and its Demise*, 111 W.VA. L. REV. 791, 809 (2009).

83 *Id.*

idea “that laws were made by people and should reflect the value system of their creators.”<sup>84</sup>

2. In consequence,

The mass of the people in rural or frontier regions cherished around 1800 an ingrained hostility to the law as a profession . . . . It was not that the American people were positively resolved on becoming lawless, in the manner of cinema badmen, but they did profoundly believe that the mystery of the law was a gigantic conspiracy of the learned against their helpless integrity.<sup>85</sup>

3. “Almost as soon as the lawyers of the young Republic began to mobilize the forces of the Head against the anarchic impulses of the American heart they found themselves further embarrassed by a hostility . . . to any and every use of the English Common Law.”<sup>86</sup> To the “patriotic hatred of everything British”<sup>87</sup> were added the attacks that common law doctrines (a) lacked any sort of American democratic legitimacy,<sup>88</sup> and (b) were retrogressive in substance — or at best “a haphazard accumulation of precedents, quirks [and] obscurities.”<sup>89</sup> Moreover, because the rules emerged from multifarious judicial pronouncements rather than an easily accessible statute they were liable to infinite manipulation.<sup>90</sup>

The confluence of the foregoing views, sometimes labelled “popular legalism” or “popular constitutionalism” led to powerful forces favoring legal systems that minimized the role of lawyers,

84 See Lars C. Golumbic, *Who Shall Dictate the Law?: Political Wrangling between “Whig” Lawyers and Backcountry Farmers in Revolutionary Era North Carolina*, 73 N.C. HIST. REV. 56, 64-65 (1996).

85 PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 102 (1965); see also Golumbic, *supra* note 84, at 65 (observing that from farmers’ viewpoint, “[l]awyers were selling the law, just as farmers sold their hogs and corn,” with the purpose of ensuring “backcountry dependence on the bar”).

86 MILLER, *supra* note 85, at 105.

87 *Id.*

88 See KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM* 76-77 (2011).

89 MILLER, *supra* note 85, at 121.

90 See WOOD, *supra* note 80, at 403-04.

promoted informal and case-specific dispute resolution,<sup>91</sup> and made the sources of legal obligation as accessible as possible to ordinary people.<sup>92</sup> In the words of Thomas Paine:

The courts of law . . . hobble along by the stilts and crutches of English and antiquated precedents. Their pleadings are made up of cases and reports from English law books; many of which are tyrannical, and all of them now foreign to us . . . . The terms used in courts of law, in sheriffs' sales, and on several other occasions, in writs, and other legal proceedings, require reform. Many of those terms are Latin, and others French . . . . [T]hey serve to *mystify*, by not being generally understood, and therefore they serve the purpose of what is called law, whose business is to perplex; and . . . from thence to create the false belief that law is a learned science, and lawyers are learned men . . . .

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91 See JOHN PHILLIP REID, *LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL COMPETENCY IN EARLY NATIONAL NEW HAMPSHIRE* 31 (2012) (describing “commonsense jurisprudence”: “Spur-of-the-moment judgments, decreeing neighborly, commonsense solutions to a dispute . . . were not only preferred, they were expected to be superior to the conclusions of a lawyer needing hours to find an answer in some musty precedent or inscrutable treatise”); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *COLUM. L. REV.* 547, 566 (1993) (describing people holding these views as “hostile to lawyers and legal doctrine. They viewed the legal system as serving an essentially arbitral function: Ordinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways.”). See also Thomas Paine, *To the Citizens of Pennsylvania on the Proposal for calling a Convention* (Aug. 1805), reprinted in 4 *THE WRITINGS OF THOMAS PAINE*, App. G, at 457, 459 (Moncure Daniel Conway ed., 1894), <http://oll.libertyfund.org/titles/paine-the-writings-of-thomas-paine-vol-iv-1791-1804>:

Every case ought to be determined on its own merits, without the farce of what are called precedents, or reports of cases; because, in the first place, it often happens that the decision upon the case brought as a precedent is bad, and ought to be shunned instead of imitated; and, in the second place, because there are no two cases perfectly alike in all their circumstances, and therefore the one cannot become a rule of decision for the other.

92 See Saul Cornell, *Idiocy, Illiteracy, and the Forgotten Voices of Popular Constitutionalism: Ratification and the Ideology of Originalism*, 69 *WM. & MARY Q.* 365, 366 & 366 n.3 (2012); Steven Wilf, *The First Republican Revival: Virtue, Judging and Rhetoric in the Early Republic*, 32 *CONN. L. REV.* 1675, 1687 (2000).

Two farmers or two merchants will settle cases by arbitration which lawyers cannot settle by law. Where then is the learning of the law, or what is it good for? It is here necessary to distinguish between *lawyer's law*, and *legislative law*. Legislative law is the law of the land, enacted by our own legislators, chosen by the people for that purpose. Lawyer's law is a mass of opinions and decisions, many of them contradictory to each other, which courts and lawyers have instituted themselves, and is chiefly made up of law-reports of cases taken from English law books. The case of every man ought to be tried by the laws of his own country, which he knows, and not by opinions and authorities from other countries, of which he may know nothing. A lawyer, in pleading, will talk several hours about law, but it is *lawyer's law*, and not *legislative law*, that he means.<sup>93</sup>

Views like these prevailed in many places, setting their judicial systems down paths very different from the ones that were eventually followed.<sup>94</sup> On the national level, these views were frequently associated with Thomas Jefferson and his Republicans as they attacked their Federalist rivals.<sup>95</sup>

## B. The Storm Surge: Legislative Limitations on Judicial Autonomy

93 Paine, *supra* note 91, at 463-64. Several similar Pennsylvania pamphlets of the period are cited in PARKER, *supra* note 88, at 99. For an extensive discussion of the surrounding history see ELLIS, *supra* note 77, at 157-83 and Elizabeth K. Henderson, *The Attack on the Judiciary in Pennsylvania 1800-1810*, 61 PA. MAG. HIST. & BIOG. 113 (1937).

94 See *infra* Parts III.B, IV.

95 See MILLER, *supra* note 85, at 105-06. For a lengthy attack by Jefferson on the view that the federal courts had inherent common law powers see Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), <http://founders.archives.gov/documents/Washington/05-17-02-0417> ("Of all the doctrines which have ever been broached by the federal government, the novel one of the common law being in force & cognisable as an existing law in their courts, is to me the most formidable. all their other assumptions of un-given powers have been in the details . . . in comparison of the audacious, barefaced and sweeping pretension to a system of law for the US. without the adoption of their legislature and so infinitely beyond their power to adopt."). See also WOOD, *supra* note 80, at 416-18; *infra* text accompanying notes 183-86.

## 1. Architectural Arrangements

Working within the framework of the ideas described in the previous section, legislatures in the early nation period often sought to create judicial systems that would maximize the power of lay people by (a) staffing the bench with judges who were not lawyers,<sup>96</sup> (b) allocating as much power as possible to juries rather than judges,<sup>97</sup> and (c) organizing the judiciary in such a way as to avoid

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96 See REID *supra* note 91, at 20-37.

97 See John Reid, *From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire*, N.H. B.J., Apr. 1959, at 27, 28-30. In the immediate aftermath of the Revolution the legislatures of North Carolina and Virginia were only willing to grant equity jurisdiction to the courts on condition that issues of fact be tried by a jury. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 82-84 (2005); Golumbic, *supra* note 84, at 68-69. New Hampshire was even more grudging. See REID, *supra* note 91, at 68-69.

Before admiralty litigation was made exclusively federal by Section 9 of the First Judiciary Act, see Act of Sept. 24, 1789, 1 Stat. 73, 77 (providing for non-jury trials); Kenneth G. Engerrand, *Admiralty Jury Trials Reconsidered*, 72 LOY. MAR. L.J. 73, 74-75 (2013), juries sat in state court admiralty cases in Pennsylvania, see, e.g., *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160 (1792) (publishing case decided in Supreme Court of Pennsylvania), Virginia, see Blinka, *supra*, at 78-81, and New Hampshire, see, e.g., *Freeborn v. Howell* (March 1782), Judgment Book of the Rockingham Superior Court, Vol. I, Mar. 1782 - Apr. 1785, at 6-7, New Hampshire State Archives; *Atwood v. Jones* (March 1781), Judgment Book of Superior Court, Vol. H, Feb. 1817 - Sept. 1819, at 474-76, New Hampshire State Archives; *Deane v. Parker* (Sept. 1779), *id.* at 393-95; *Doane v. Penhallow* (Sept. 1778), *id.* at 341-43; see also *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54 (1795) (detailing procedural history). See generally Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 n.51 (1973).

This is not surprising. During the colonial period the absence of juries in admiralty had often led litigants to take steps – including obtaining writs of habeas corpus – to avoid it. See 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660-1730*, at 94-96 (2013); Freedman I, *supra* note 2, at 606 n.77; William E. Nelson, *The Persistence of Puritan Law: Massachusetts, 1160-1760*, 49 WILLAMETTE L. REV. 307, 350-53 (2013). As the Revolutionary crisis intensified the Sugar Act of 1764 and the Stamp Act of 1765 expanded admiralty jurisdiction in ways designed to assist royal revenue collection, and “the admiralty grievance” emerged as a major issue. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 177-83* (1986); CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 207-11* (1960).

creating superior appellate courts with law-pronouncing powers.<sup>98</sup> They also imposed legislative prohibitions on the citation<sup>99</sup> and official publication<sup>100</sup> of judicial decisions in order to prevent their becoming an authoritative source of law.

## 2. Wiping Out Courts Wholesale

Once the Revolution broke out, Congress resolved that prize disputes should be adjudicated in the first instance by state courts, using juries, and then appealed to a Congressional committee. See HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787*, at 45-47 (1977); see also *infra* note 229 (describing later history). As Professor Bourguignon notes, trial by jury was “an unheard of innovation for prize courts, obviously inspired by the decade of complaints against the lack of jury trials in vice-admiralty courts,” *id.* at 46. The state courts’ practices varied with time and place, and there is still a good deal of historical work remaining to be done. See *id.* at 192-96.

98 See REID, *supra* note 91, at 116-17; Bond Almand, *The Supreme Court of Georgia: An Account of its Delayed Birth*, 6 GA. B.J. 95, 95-98, 106-07 (1944); Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129, 130-31 (1986).

99 See JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE* 8 (2009) (“One of the most direct and frequently implemented ways that legislatures supervised judges in the era of the early republic was to control what they could read in court and what they could cite or quote as authority.”).

100 As indicated *supra* text accompanying note 90, the official publication of judicial opinions (as distinct from statutes) could be an extremely controversial political issue in the early Republic because it implicated the lawmaking authority not just of judges, as opposed to juries, but also of judges as opposed to legislatures.

The New Hampshire history of this issue has been extensively documented by John Phillip Reid. See JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 25-29, 157-79 (2004); *id.* at 179 (noting that in December 1816 when the governor “signed into law ‘An act to repeal an act entitled ‘An act to provide for publishing reports of the supreme judicial court’” . . . [m]ost political observers in the state concluded that the struggle over who should control the law . . . had ended” and that “jurors would remain judges of law as well as fact”); REID, *supra* note 99, at 8-9 (observing that one reason legislators opposed case publication was that it “made judges’ pronouncements and decisions a source of law equal to—possibly more persuasive and usually more comprehensive than—ordinary legislation enacted by elected representatives”); REID, *supra* note 91, at 206-11 (tracing subsequent New Hampshire history of issue). See generally Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1116 n.353 (2010) (reporting limited case publication in other states).

When judicial decisions displeased legislatures, they might react by abolishing entire courts, thereby terminating the functioning of judges who otherwise held office during good behavior.<sup>101</sup> This happened in New Hampshire repeatedly,<sup>102</sup> and also in Maryland,<sup>103</sup>

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- 101 Judges in the colonies, unlike those in England following the Glorious Revolution, had served at the pleasure of the monarch, not during good behavior. See JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* 76 (2005). This was a longstanding colonial grievance in America, see, e.g., A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 63 (discussing Virginia complaint on the subject in 1700), which assumed greater importance as the Revolution neared, see Reid, *supra* note 97, at 176,192-93, and was articulated in the Declaration of Independence (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”). Post-Independence constitutions rectified the situation. See U.S. CONST., art. III, §1 (“The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *THE FEDERALIST* No. 78, at 465 (James Madison) (Clinton Rossiter ed., 1961) (Noting general public approval of good behavior tenure throughout the States as embodied in their constitutions and praising it as “certainly one of the most valuable . . . improvements in the practice of government,” an excellent barrier to despotism in monarchies and “in a republic . . . a no less excellent barrier to the encroachments and oppressions of the representative body,” as well as “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws”); see also James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1 (2008) (noting importance of compensation, as well as tenure, provision).
- 102 See REID, *supra* note 91, at 6 (“New Hampshire’s executive and legislature employed the tactic of legislating judges out of office at least five times to clear the high court of every member.”); see also Freedman II, *supra* note 3, at 19 n.58 (collecting sources on one of these episodes); Chuck Douglas, *Put a Republican on the Court, Governor Lynch*, CONCORD MONITOR, Dec. 7, 2008, at D1 (summarizing history through 1876).
- 103 See Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 71-72 (2002). One of the displaced judges, William Whittington (represented by Robert Goodloe Harper, a prominent federalist lawyer who would later represent Erick Bollman, see *infra* note 151) brought suit to reclaim his office. In an opinion that Professor Shugerman rightly sees as closely connected to *Marbury*, see SHUGERMAN, *supra* note 9, at 36, the Maryland General Court denounced the repeal legislation in harsh language but went on to hold against the plaintiff, see *Whittington v. Polk*, 1 H.& J. 236 (Md. 1802).

Kentucky<sup>104</sup> and South Carolina.<sup>105</sup> Very significantly for present purposes the method was also used on the federal level when the Judiciary Act of 1802<sup>106</sup> repealed the Judiciary Act of 1801,<sup>107</sup> and the Supreme Court effectively upheld the action<sup>108</sup> six days after deciding *Marbury v. Madison*.<sup>109</sup>

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- 104 See 1824 Ky. Acts 44. This statute was repealed by 1826-1827 Ky. Acts 13 (“An Act To Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals”). For a full discussion of the surrounding controversy see Theodore W. Ruger, “A Question Which Convulses a Nation”: *The Early Republic’s Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004). See also William E. Bivin, *The Historical Development of the Kentucky Courts*, 47 KY. L.J. 465, 478-79 (1959).
- 105 See 1835 S.C. Acts 11. For a description of the political context see James L. Underwood, *Judicial Review in a Legislative State*, 37 S.C. L. REV. 335, 348-49 (1986) (noting that although the South Carolina Court of Appeals was abolished the “offending judges were reassigned to other courts”). A similar set of events took place in Virginia beginning in 1788, see W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705, 707 (2004) (describing eventual outcome as “an amicable compromise”); Margaret V. Nelson, *The Cases of the Judges: Fact or Fiction*, 31 VA. L. REV. 243 (1944); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 513-17 (2005).
- 106 Act of March 8, 1802, 2 Stat. 132. See Richard H. Fallon, *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1768 (2015) (noting that statute “divested sixteen recently nominated and confirmed federal judges of their judgeships”); Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice, Federal Judicial Selection 1789-1861*, 100 IOWA L. REV. 551, 569-73 (2015).
- 107 Act of Feb. 13, 1801, 2 Stat. 89.
- 108 See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); see also Gerhardt & Stein, *supra* note 106, at 573-74 (noting political weakness of efforts by ousted judges to challenge repeal prior to Supreme Court ruling). In terms of the power of the judiciary vis. a vis. the legislative branch, *Stuart*, not *Marbury*, was “the main event.” SHUGERRMAN, *supra* note 9, at 46. See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 69 (2000) (observing that fundamental distinction between cases was that if Court had invalidated the Judiciary Act of 1802 in *Stuart* it “would have embroiled itself in a political contest with Congress and the president that it might not have survived”).
- 109 See 5 U.S. (1 Cranch) 137 (1803). Among the many discussions of the sequence of events recounted in this sentence of text are Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT REV. 345; Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI. KENT L. REV. 31, 77-86 (1998); and Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543 (2012).

### 3. Pressuring Individual Judges

A legislature might also put pressure on individual judges by impeachment — as happened dramatically to Justice Chase<sup>110</sup> and others<sup>111</sup> — by calling them before it to explain their conduct<sup>112</sup> or, in some states, by voting an “address,” i.e., removing judges by simple legislative vote without any imputation of misconduct.<sup>113</sup> Indeed, a frustrated President Jefferson, lamenting that it would take two years to try the Chase impeachment, commented to Senator Plumer of New Hampshire, “The Constitution ought to be altered, so that the President should be authorized to remove a Judge from office, on

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- 110 See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 1-134 (1992); JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE 157-310 (1980); David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 249-59 (1998) (describing proceedings); see also Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55 (1995). See generally ELLIS, *supra* note 77, at 102 (attributing Chase’s acquittal in part to fact that “Marshall had initiated a period of judicial self-restraint” after 1800).
- 111 On the federal level, the Chase impeachment was preceded by that of United States District Judge John Pickering. There is a colorful and insightful account in REID, *supra* note 99, at 90-109; see also REHNQUIST, *supra* note 110, at 127-28; LYNN WARREN TURNER, THE NINTH STATE: NEW HAMPSHIRE’S FORMATIVE YEARS 211-14 (1983). An important state-level counterpart in the same time period was the impeachment and conviction of Judge Alexander Addison of the Pennsylvania Court of Common Pleas, see ELSMERE, *supra* note 110, at 150-52, which was a closely-watched political event, see REHNQUIST, *supra* note 110, at 128. See generally Karen Orren & Christopher Walker, *Cold Case File: Indictable Acts and Officer Accountability in Marbury v. Madison*, 107 AM. POLI. SCI. REV. 241, 250 (2013); Jeremiah Smith, *John Marshall, in BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE, PROCEEDINGS . . . HELD AT MANCHESTER, N.H., FEBRUARY 4 1901*, at 287, 292 (1901) (describing episodes in Rhode Island and Ohio).
- 112 See HALL & KARSTEN, *supra* note 8, at 65-66 & 390 n.59.
- 113 See REID, *supra* note 99, at 59-60. Professor Reid describes the power of address as the “most excruciating hold that the legislators had over the judges as individuals” in New Hampshire and explains how it was used there to reinforce the weapon of court abolition. REID, *supra* note 91, at 203. See also Dean C.B. Seymour, *The Recall from the Standpoint of Kentucky Legal History*, 21 YALE L.J. 372, 372-73, 381-82 (1912) (noting that each Kentucky constitution since statehood had contained this device and arguing in favor of it).

the address of the two Houses of Congress.”<sup>114</sup>

Furthermore, in a number of states the legislatures elected the judges for a prescribed period, sometimes as short as a year, which meant that if the legislature did not like their decisions it could simply replace them with more pleasing incumbents.<sup>115</sup>

#### 4. Re-deciding Cases

Legislatures might also interfere with judicial decision-making on a retail rather than wholesale basis by reviewing the factual and legal determinations of courts and, if so disposed, reversing them.<sup>116</sup> Indeed, John Marshall wrote to Samuel Chase just before the latter’s impeachment trial that a more appropriate mechanism for dealing with “legal opinions deemed unsound by the legislature” than impeachment was the vesting of “appellate jurisdiction in the legislature.”<sup>117</sup>

It has long been known that legislatures exercised such power in Connecticut<sup>118</sup> and Rhode Island<sup>119</sup> but the practice was not limited to those states.<sup>120</sup> The New Hampshire legislature engaged in it

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114 See Letter from William Plumer to T.W. Thompson (Feb. 18 1803), reprinted in WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 253 (1857); see also ELLIS, *supra* note 77, at 104 (attributing Chase’s acquittal in part to fact that Jefferson did not want to see him removed from office by impeachment); WOOD, *supra* note 80, at 422-25.

115 See Wood, *supra* note 80, at 401-02 (identifying Rhode Island, Connecticut, and Vermont as states with annual legislative election of judges).

116 See, e.g., 1814 N.C. Sess. Laws 5 (requiring legislative ratification of any judicial judgment of divorce), repealed by 1818 N.C. Sess. Laws 21.

117 Letter from John Marshall to Samuel Chase (Jan. 23, 1805), reprinted in 6 THE PAPERS OF JOHN MARSHALL 347-48 (Charles F. Hobson et al. eds., 1990).

118 See *Calder v. Bull* U.S. (3 Dall.) 386 (1798) (rejecting federal constitutional challenge); SWIFT, *infra* note 207 (criticizing Connecticut practice). For a recent evaluation of *Calder*, see Evan C. Zoldan, *Is Calder Bull? How Exposing a Historical Blunder Resolves a Modern Constitutional Debate*, 2015 WIS. L. REV. 727 (2015).

119 See *Taylor v. Place*, 4 R.I. 324 (1856) (invalidating practice).

120 *But cf.* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1730 (2012) (asserting that “[o]utside Connecticut and Rhode Island, which . . . preserved the power of legislative adjudication until . . . 1818 and 1848, respectively, the only major adjudicatory powers that state and federal legislatures continued to enjoy” after Independence were “the power to impeach government officials and the power to satisfy private claims on public debt”).

frequently,<sup>121</sup> and similar evidence is emerging from Massachusetts.<sup>122</sup> Thomas Jefferson complained in 1788 that since Independence the Virginia legislature had “in many instances, decided rights which should have been left to judiciary [sic] controversy.”<sup>123</sup>

There is, moreover, every reason to believe that examples from other states remain to be unearthed by historians.<sup>124</sup> For instance, in 1824, the Kentucky legislature passed “An Act for the Benefit of Benjamin Craig and Others.”<sup>125</sup> This first recited that “it is represented to the present General Assembly, that there is a prosecution now depending in . . . Boone County against Ben. Craig for stabbing, and because the person with whom the said Craig had the conflict, possesses numerous and influential relations in said county . . . the said Craig believes . . . that a fair trial cannot be had in said country,” and then enacted that “a change of venue be granted and allowed the said Craig, to the county of Scott.”<sup>126</sup>

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121 Numerous examples are documented in REID, *supra* note 99, at 62-70 and Freedman II, *supra* note 3, at 68-70.

122 See HAMBURGER, *supra* note 31, at 526-29. See also WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 14 (1994 ed.) (noting same practice in colonial Massachusetts).

123 THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 127 (1788), *quoted in* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1331 (2016) (Roberts, C.J., dissenting).

124 See, e.g., 1821 N.C. Sess. Laws 66 (“An Act for the Relief of Charlotte McDonald”) (terminating proceedings against McDonald, who was then under indictment for bigamy).

125 1824 Ky. Acts 56.

126 *Id.* Subsequent sections of the statute similarly granted James K. Laird and Gilbert Christian, indicted for murder in Henderson County a change of venue to Hopkins County, *id.* at 58, and William Frogg, indicted in Cumberland County “for maliciously stabbing a man by the name of Rupe,” a change of venue to Wayne County, *id.* at 59. When Kentucky adopted a new constitution in 1850, it added art. II, § 38: “The General Assembly shall not change the venue in any criminal or penal prosecution, but shall provide for the same by general laws.” The provision currently in force, Section 11 of the Kentucky Constitution of 1891, provides that “the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.”

### C. Ex Parte Bollman and the Precatory Suspension Clause<sup>127</sup>

*Ex Parte Bollman*<sup>128</sup> was delivered when judicial independence was at its nadir<sup>129</sup> and Chief Justice Marshall was quite understandably deeply concerned for its future.<sup>130</sup> But his legal reasoning was wrong then;<sup>131</sup> the surrounding context changed subsequently;<sup>132</sup> and the policy implications of *Bollman* were disturbing.<sup>133</sup> The case is an artifact of a time that has passed and, as described in Part V below, has now been properly repudiated by the Supreme Court.

#### 1. The Political and Legal Background

As relevant here, the historic victory of Thomas Jefferson and his Republicans in the Presidential election of 1800 resulted in:

- The elevation of Secretary of State John Marshall to the Chief Justiceship, and to the titular leadership of the judicial branch, now the Federalists' last, and beleaguered, bastion;<sup>134</sup> and

- Connectedly, the ruling in *Marbury v. Madison*,<sup>135</sup> in which Marshall read Section 13 of the Judiciary Act of 1789 as conferring authority on the Supreme Court to exercise original mandamus powers, and then held the section unconstitutional because it

127 The narrative below is substantially drawn from Chapter 3 of FREEDMAN, *supra* note 11. An earlier version containing additional documentation appeared as Eric M. Freedman, *Just Because John Marshall Said it, Doesn't Make it So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000). For a more recent scholarly account that focuses on the issues of relevance to this article, see Halliday & White, *supra* note 7, at 683-98.

128 8 U.S. (4 Cranch) 75, 93-94 (1807).

129 See *supra* Part III.B & *infra* text accompanying notes 183-86.

130 Indeed, even the watered-down opinion he wrote drew political backlash. See NEWMYER, *supra* note 12, at 65 ("Loyal [Jefferson] supporters in Congress, with Jefferson's encouragement . . . renewed their effort to limit the Court's habeas corpus jurisdiction. Talk of Marshall's impeachment, already rampant after *Marbury*, now intensified.").

131 See *infra* text accompanying notes 187-96.

132 See *infra* Part IV.A.

133 See Freedman, *supra* note 18, at 19 (describing doctrinal situation as "potentially dangerous to constitutional liberty").

134 See William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 932-33 (1978); *supra* text accompanying notes 107-14.

135 5 U.S. (1 Cranch) 137 (1803).

expanded the original jurisdiction of the Supreme Court beyond the limits laid down in Article III of the Constitution.<sup>136</sup> In his famous opinion Marshall lambasted his successor, James Madison, for not delivering to the Federalist William Marbury the commission for the office of Justice of the Peace to which the Adams Administration had appointed him in its last hours (and that Secretary of State Marshall had probably lost himself in the confusion), while not issuing an order that the Jefferson Administration would surely have ignored.

As matters eventually turned out the *Bollman* opinion is the mirror image of the *Marbury* opinion. In *Marbury*, Marshall wrote a decision spiked with harsh dictum, but did not order the Jefferson administration to deliver Marbury's commission. In *Bollman*, Marshall ordered the Jefferson administration to release the prisoners, but wrote a decision softened with placatory dictum.

## 2. The Factual Background

When the Jefferson Administration completed its first term in office, Vice President Aaron Burr (whose poisoned relationship with Jefferson had led to his being brusquely removed from the second-term ticket, and who was facing charges in New York and New Jersey for murder as a result of having killed Alexander Hamilton in a duel), found it prudent to travel west.<sup>137</sup> There, he allegedly conspired with others to separate some of this country's newly acquired western territories from their allegiance to the United States.<sup>138</sup> Among his alleged co-conspirators were Samuel Swartwout and Dr. Erick Bollman. In December 1806, they were seized by General James Wilkinson, the American Army commander in New Orleans (who had himself been involved in Burr's plans),<sup>139</sup> and summarily transported by warship

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136 See generally Akhil Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989).

137 See Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HAST. CONST. L.Q. 7, 22 & n.47 (1992).

138 See REHNQUIST, *supra* note 110, at 115-16; ARNOLD A. ROGO, *A FATAL FRIENDSHIP: ALEXANDER HAMILTON AND AARON BURR* 277-82 (1998). In due course Burr was tried on these charges in a highly-publicized trial in a Richmond federal court over which Justice Marshall presided. There are full accounts in PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* (2008) and NEWMYER, *supra* note 12.

139 See 2 HENRY ADAMS, *HISTORY OF THE UNITED STATES DURING THE ADMINISTRATION OF THOMAS JEFFERSON* 241-42 (1891); HOFFER, *supra*

to Baltimore via Charleston — in defiance of writs of habeas corpus granted by federal judges in New Orleans<sup>140</sup> and Charleston.<sup>141</sup>

The day the prisoners arrived in Washington, President Jefferson met with Bollman to discuss a plea bargain,<sup>142</sup> and one of the President's leading Senate allies — seeking to insure that Bollman and Swartwout would not obtain any further pesky writs of habeas corpus — introduced legislation to suspend the writ for three months and to keep the two imprisoned.<sup>143</sup> Convening in closed session, the Senate passed the measure with only a single dissenting vote, but over a weekend, the atmosphere cooled and the House, by a vote of 113-19, bluntly rejected the proposal as unworthy of consideration.<sup>144</sup>

On the following day, the United States attorney moved the Circuit Court for the District of Columbia for an arrest warrant in order to have the pair committed to stand trial on a charge of treason.<sup>145</sup> A politically divided bench granted the motion.<sup>146</sup>

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note 138, at 86; NEWMYER, *supra* note 12, at 47-48.

- 140 See 1 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR 982-83 (Mary-Jo Kline & Joanne W. Ryan eds., 1983). Several detailed accounts appear in the N.Y. Eve. Post, Feb. 18, 1807, at 1, which also reports Henry Clay's much-publicized comment in the Senate on February 11 "that the late seizure of men at New Orleans, by military force, and the transportation of them to the Atlantic coast, was one of the most arbitrary and outrageous acts ever committed."
- 141 See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 302 (1922).
- 142 See HOFFER, *supra* note 138, at 95; MILTON LOMASK, AARON BURR: THE CONSPIRACY AND THE YEARS OF EXILE, 1805-1835, at 202 (1982).
- 143 See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 355 (1996). The Congressional proceedings are recounted at greater length in Amanda Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 981-85 (2012).
- 144 See HOFFER, *supra* note 138, at 88; NEWMYER, *supra* note 12, at 50-51; AM. MERCURY, Feb. 12, 1807 (Congress), at 1 (reporting House debate).
- 145 See *United States v. Bollman*, 24 F. Cas. 1189 (C.D.C. 1807) (No. 14,622). In support of the application, the United States attorney proffered an affidavit from General Wilkinson "and a printed copy of the president's message to congress of the 22d of January, 1807." *Id.* In this communication, Jefferson denounced the conspiracy and said that General Wilkinson's information placed Burr's guilt "beyond question." See 16 ANNALS OF CONG. 39, 40 (1807); see also *id.* at 1008-18 (reprinting supporting documents accompanying message).
- 146 See *Bollman*, 24 F. Cas. at 1189. The Chief Judge, William Cranch, a Federalist, opined that there was insufficient probable cause, but was outvoted by his two Republican colleagues. See HOFFER, *supra* note 138, at 95; NEWMYER, *supra* note 12, at 50-56. Extended accounts of the proceedings appear in the National

The prisoners then applied to the United States Supreme Court for writs of habeas corpus. As Justices Johnson and Chase expressed doubts as to the Court's jurisdiction, Chief Justice Marshall set that preliminary question down for a full argument.<sup>147</sup> In a reflection of the political context, interest in the argument "was at fever pitch, almost the whole of Congress being in attendance."<sup>148</sup>

### 3. Arguments of Counsel

The Attorney General, who apparently did not doubt the Court's power to grant the writ, "declined arguing the point on behalf of the United States."<sup>149</sup> In fact, he told the bench that if it should determine "to issue a writ of Habeas Corpus he should cheerfully submit to it."<sup>150</sup> Thus, the Justices heard argument only from petitioners' counsel, principally from the prominent Federalists Robert Goodloe Harper and Charles Lee.<sup>151</sup>

In the portion of his argument of present relevance, Harper addressed whether "this court has the power generally of issuing the writ."<sup>152</sup> In support of an affirmative response Harper urged that (1) the Court had inherent power to issue writs of habeas corpus

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Intelligencer of Feb. 2, 1807 and Feb. 4, 1807. See also WARREN, *supra* note 141, at 303-04 (reprinting letter from Cranch to his father describing surrounding atmosphere).

147 See *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 76 n.(a) (1807).

148 Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 625.

149 *Bollman*, 8 U.S. at 79.

150 *Extract of a Letter to the Department of War*, N.Y. EVE. POST, Feb. 14, 1807, at 1.

151 The four lawyers who appeared for the petitioners had constituted Justice Chase's defense team in his impeachment trial. See HOFFER, *supra* note 138, at 98-99. Lee, a former Attorney General of the United States, had been William Marbury's lawyer in his unsuccessful effort to obtain his commission. As indicated *supra* note 103, Harper had represented another of the displaced judges in connected litigation.

152 *Bollman*, 8 U.S. at 79.

generally, and (2) was authorized to do so in this case by a statute<sup>153</sup> that was (a) applicable and (b) constitutionally valid.<sup>154</sup>

(1) Harper's initial proposition was:

The general power of issuing this great remedial writ [of habeas corpus] is incident to this court as a supreme court of record. It is a power given to such a court by the common law . . . . [A court that] possessed no powers but those given by statute . . . could not protect itself from insult and outrage . . . . It could not imprison for contempts in its presence. It could not compel the attendance of a witness . . . . These powers are not given by the constitution, nor by statute, but flow from the common law . . . . [T]he power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.<sup>155</sup>

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153 The statute in question was Section 14 of the First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81 (1789). With clause numbering inserted for ease of reference, the section provided:

[1] That all the . . . courts of the United States shall have the power to issue writs of *scire facias*, *habeas corpus*, [2] and all other writs not specially provided for by statute, [3] which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. [4] And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. [5] Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

154 For convenience, I have numbered counsel's arguments, and in the next section of text used the same numbering to designate Marshall's responses and my own analysis. Also for convenience, I have relied on the version of the argument reprinted in the United States Reports. Another version, which is very similar but perhaps preserves Harper's oratory slightly better, was published in two parts in the National Intelligencer of Feb. 18, 1807 and Feb. 20, 1807. The surrounding atmosphere is well captured by HOFFER, *supra* note 138, at 97-111.

155 *Bollman*, 8 U.S. at 79-80.

Harper supported this argument by showing “that all the superior courts of record in England,” whether or not they had any criminal jurisdiction or statutorily-granted habeas jurisdiction, “are invested by the common law with this beneficial power, as incident to their existence.”<sup>156</sup> As an example providing “a conclusive authority in favour of the doctrine for which we contend,” he cited a case that would have been very familiar to his audience as a monument to English liberty, *Bushel’s Case*,<sup>157</sup> in which the court of common pleas (which had no statutory habeas corpus jurisdiction) employed its common law habeas corpus powers to release a juror who had been imprisoned because — contrary to evidence that the trial judge considered convincing — he had dared to vote to acquit William Penn on a charge of breaching the peace by preaching on a London street.<sup>158</sup> Harper then asked whether the American people had not “as good a right as those of England to the aid of a high and responsible court for the protection of their persons?”<sup>159</sup>

(2)(a). Turning to his argument that the Court had jurisdiction under Section 14 of the Judiciary Act, Harper first argued that the first sentence contained “two distinct provisions,” viz., clause [1] and the remainder of the sentence.<sup>160</sup> The authority to issue writs of habeas corpus, he argued “is positive and absolute; and not dependent on the consideration whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the courts of many of the most beneficial and important powers which such courts usually possess.”<sup>161</sup>

In other words, the federal courts had the authority to issue writs of habeas corpus when appropriate whether or not there was an underlying action over which they had subject matter jurisdiction — a point of some importance to the prisoners, since,

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156 *Id.* at 82. Harper’s account was correct. See Freedman I, *supra* note 2, at 610 & n.93; Freedman II, *supra* note 3, at 4 n.5; and FREEDMAN, *supra* note 11.

157 124 Eng. Rep. 1006 (1670).

158 See JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 426 (2009); Freedman II, *supra* note 3, at 58 n.247; see also Freedman, *supra* note 127, at 562 n.85.

159 *Bollman*, 8 U.S. at 80-81. See Halliday & White, *supra* note 7, at 690-92 (discussing this passage).

160 For the text of Section 14 with interpolated clause numbers see *supra* note 153.

161 *Bollman*, 8 U.S. at 83.

other than the habeas corpus application itself, there was no action pending in the Supreme Court.

(2)(b). Harper next addressed the problem posed by *Marbury*, namely, that the Section 13 of the Judiciary Act<sup>162</sup> — which bore an uncomfortable resemblance to Section 14 — had been held unconstitutional as an attempt to confer upon the Court original jurisdiction in violation of the limitations on that jurisdiction contained in Article III of the Constitution.<sup>163</sup> Harper asserted that “the object of the habeas corpus now applied for, is to revise and correct the proceedings of the court below.”<sup>164</sup> Hence, the proceedings were appellate, and fell within the class of cases in which Congress was authorized to confer jurisdiction on the Court.<sup>165</sup> Therefore, the statute authorizing the Court to issue a writ of habeas corpus was constitutional.

Indeed, Harper argued, the Court had in fact granted relief on similar facts twice before. In *United States v. Hamilton*<sup>166</sup> which arose out of the Whiskey Rebellion, Hamilton, who “had been committed upon the warrant of the District Judge of Pennsylvania, charging him with High Treason,” brought a habeas corpus petition to the Supreme Court challenging the sufficiency of the evidence against him. Rejecting the government’s defense that the decision of the District Judge could be revised only on the “occurrence of new matter” or a “charge of misconduct,” the Court had ordered that Hamilton

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162 “The Supreme Court shall . . . have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.” First Judiciary Act, ch. 20, § 13, 1 Stat. 73, 80 (1789).

163 U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned [in U.S. CONST. art. III, § 2, cl. 1], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”). The ruling in *Marbury* was that Section 13 authorized the Court to assume original jurisdiction over controversies, like the one involved there, that did not fall within the first sentence just quoted, and was therefore unconstitutional. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-76 (1803).

164 *Bollman*, 8 U.S. at 86.

165 That is, this case fell within the second sentence quoted from Article III *supra* note 163.

166 3 U.S. (3 Dall.) 17 (1795).

be admitted to bail.<sup>167</sup> And just the previous year, the Court had decided *Ex Parte Burford*.<sup>168</sup> There, Burford, confined in the District of Columbia under a commitment charging that he was “an evil doer and disturber of the peace,” had petitioned the Supreme Court for a writ of habeas corpus. Since the Court was “unanimously of opinion, that the warrant of commitment was illegal, for want of stating *some good cause certain, supported by oath*,” (original emphasis) it had ordered the prisoner discharged.<sup>169</sup>

#### 4. Marshall’s Opinion

(1). In the section of greatest significance for present purposes, Marshall’s opinion began by rejecting Harper’s argument that all courts of record have inherent habeas corpus powers and disclaiming “all jurisdiction not given by the constitution, or by the laws of the United States”:

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench,

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167 *Id.* at 17-18. See 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 514-21 (Maeva Marcus et al. eds., 1998). Dissenting in *Bollman*, Justice William Johnson agreed that the “case of Hamilton was strikingly similar to the present,” but argued “that the authority of it was annihilated by the very able decision in *Marbury v. Madison*,” since the *Hamilton* Court had been exercising original jurisdiction. *Bollman*, 8 U.S. at 103-04 (Johnson, J., dissenting).

168 7 U.S. (3 Cranch) 448 (1806).

169 *Id.* at 450-51, 453. Dissenting in *Bollman*, Justice Johnson reported that he had objected to the Court’s disposition of *Burford*, but had “submitted in silent deference to the decision of my brethren.” *Bollman*, 8 U.S. at 107 (Johnson, J., dissenting). He also reported that his *Bollman* dissent had the support of an absent Justice. *Id.* Scholars have long been hopelessly divided as to whether this was Chase or Cushing. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 81 n.131 (1985); see also NEWMYER, *supra* note 12, at 57 (picking Chase as most likely).

has even for an instant, been dissatisfied . . . . The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.<sup>170</sup>

(2)(a). Marshall accepted Harper's assertion that clause [1] of Section 14 is independent of the remainder of the first sentence, but did so in a way from which the field has only recovered in the past decade.<sup>171</sup>

(i) He began by quoting the Suspension Clause<sup>172</sup> and suggesting that, "[a]cting under the immediate influence of this injunction," the First Congress "must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."<sup>173</sup> Thus, the statute should receive a robust reading.

(ii) Marshall next observed that, since the restriction in clause [3] (i.e. "which may be necessary for the exercise of their respective jurisdictions") plainly did not apply to the second sentence of Section 14, if it were to be applied to clause [1], the result would be that individual judges would have more power than courts, which "would be strange."<sup>174</sup>

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170 *Bollman*, 8 U.S. at 93-94. The elided portion of the passage contains two further responses to Harper's arguments on the role of the common law. First, Marshall asserted, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." Second, responding to Harper's discussion of the contempt power, Marshall wrote, "This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals."

171 See *infra* Part V. To assist the reader of this page of text, Section 14 with interpolated clause numbers has been set forth *supra* note 153.

172 U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

173 *Bollman*, 8 U.S. at 95.

174 *Id.* at 96.

(iii) Moreover, Marshall continued, in a lengthy passage, to apply the limitation in clause [3] to clause [1] would render it largely meaningless, since, in light of the restrictions on the jurisdiction of the federal courts, there would never be any occasion to issue the writ if it could only be done in cases in which it is “being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally,”<sup>175</sup> with one exception.

That exception, he wrote — the only power “which on this limited construction would be granted by the section under consideration” — would be the power “of issuing writs of *habeas corpus ad testificandum*,” that is, ones designed to bring witnesses before the court. But the “section itself proves that this was not the intention of the legislature,” because that variety of the writ was the subject of its own special provision, namely the proviso in clause [5].<sup>176</sup>

He continued, “This proviso extends to the whole section. It limits the powers previously granted to the courts . . . . That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.”<sup>177</sup>

Therefore, Marshall concluded, Section 14 allowed a federal court to make “an inquiry into the cause of commitment” by federal authorities regardless of whether or not there was an underlying litigation pending before it<sup>178</sup> — meaning that the statute covered the present circumstances.

(2)(b). Having decided that the Court had statutory authority to issue the writ, Marshall turned to the constitutional issue framed by *Marbury* and, accepting Harper’s argument, ruled in a few terse sentences that the jurisdiction “which the court is now asked to

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175 *Id.* at 96-97.

176 *Id.* at 99.

177 *Id.*

178 *Id.* at 100. The prisoners in *Bollman* were federal, not state. Nonetheless, Marshall, in additional dictum not relevant to this article took the opportunity to construe the statutory provision respecting the issuance of the writ to state prisoners (clause [5] of Section 14 as reproduced *supra* note 153) in a way that, as I have argued in detail elsewhere, was indefensibly restrictive *see* FREEDMAN, *supra* note 11, at 30-35, and that in any event would not lead to the conclusions he sought to draw, *see id.* at 36-46. Aspects of my argument have been criticized in Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 622-25 (2014) and in a book review by Steven Semeraro, *Reconfirming Habeas History*, 27 T. JEFFERSON L. REV. 317 (2005). I hope to address these matters in future work.

exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol [sic].”<sup>179</sup> Thus the statute granting the Court the power to issue the writ on the facts before it was constitutional as well as applicable.

Accordingly, in proceedings stretching over five days, the Supreme Court proceeded to examine the merits. The “clear opinion of the court,” Marshall said, is “that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.”<sup>180</sup> With the prisoners present,<sup>181</sup> the Court “fully examined and attentively considered,” on an item-by-item basis, “the testimony on which they were committed,” held it insufficient, and ordered their discharge.<sup>182</sup>

### 5. *Bollman’s Sea Mine*

Because the actual (and correct) holding of *Bollman* was that a valid statute gave the Court jurisdiction to issue a writ of habeas corpus in the case at hand, its disclaimer of common law powers was pure dictum. Marshall’s insertion of these pronouncements is, of course, easy to explain. Ruling in a highly politicized case so soon after the 1805 attempt to impeach Justice Chase,<sup>183</sup> strong considerations of political prudence suggested that Marshall take every possible measure to minimize the risk of attacks on the independence of the federal judiciary. As so often, he “was doing what was politically smart and institutionally essential,”<sup>184</sup> engaging in a “mixture of

179 *Bollman*, 8 U.S. at 101.

180 *Id.* at 114.

181 See Supreme Court Minute Book (entries of Feb. 16-20, 1807); Letter from Buckner Thurston to Harry Innes (Feb. 18, 1807), Innes Papers, Manuscript Reading Room, Library of Congress.

182 *Bollman*, 8 U.S. at 125, 128-36. Although this portion of the opinion is not the focus of the present article, it was of considerable political significance because it served as a dress rehearsal for Burr’s eventual trial, see HOFFER, *supra* note 138, at 112, and presaged a successful defense there, see NEWMYER, *supra* note 12, at 5.

183 See WOOD, *supra* note 80, at 421-25; *supra* text accompanying note 110.

184 R. Kent Newmyer, *Chief Justice Marshall in the Context of His Times*, 57 WASH. & LEE L. REV. 841, 844-45 (1999). See also WOOD, *supra* note 80, at 438-40 (describing Marshall’s “strategy of retrenchment and conciliation and his genius for compromise while at the same time asserting the authority of the

political calculation and legal maneuvering,”<sup>185</sup> in this case “in order to maintain at least some level of judicial independence to issue the writ in the future.”<sup>186</sup>

As background to the argument presented at the end of this article that the Court has now reclaimed that independence,<sup>187</sup> it is important to recognize how weak *Bollman* was on the day it was decided.<sup>188</sup>

Marshall’s claim that the Court had “repeatedly” explained the reasoning behind the proposition that courts created by written law could only exercise the powers explicitly granted by such laws was false.<sup>189</sup> “Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect.”<sup>190</sup>

But this claim is the foundation of Marshall’s suggestion that Congress could suspend the writ by doing nothing at all — the mine floating underneath the surface of the case. According to the *Bollman* dicta, the Constitution as it emerged from Philadelphia did not preserve a pre-existing writ from suspension, but only whatever writ

Court”); David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONST. L. 1, 91-92 (2015) (describing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) in similar terms).

185 See JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 39 (2011). I have reviewed this volume at 43 J. INTERDISC. HIST. 122 (2012).

186 WERT, *supra* note 185, at 39. See also Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1286-87 (2009) (observing that effect of Marshall’s legal reasoning was that Court could continue to adjudicate habeas cases).

187 See *infra* Part V.

188 I have made this argument at some length in FREEDMAN, *supra* note 11, at 29-46. I note here only those points of present relevance.

189 See Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, in FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER, 55, 76-77 (Harold M. Hyman & Leonard W. Levy eds., 1967) (“Marshall’s reasoning in *Ex parte Bollman* was strained and evasive,” nor were “the precedents cited [reassuring]—though Marshall was always weak in this area.”). Scholars have frequently noted Marshall’s cavalier treatment of precedent, whether favorable or unfavorable. See, e.g., Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301 (showing how Marshall invented non-existent supporting precedent and ignored relevant negative precedent). For an insightful summary, see Christopher L. Eisgruber, *John Marshall’s Judicial Rhetoric*, 1996 SUP. CT. REV. 439.

190 Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, at 628.

Congress might choose to vouchsafe in the future. The Suspension Clause under this reading is merely precatory: a request to Congress to enact a statute giving the federal courts habeas corpus powers. But if Congress failed to do so, “the privilege itself would be lost, although no law for its suspension should be enacted.”<sup>191</sup>

This idea would certainly have come as a shock to all of the participants in the ratification debates over the Suspension Clause,<sup>192</sup> who had vied with each other in lauding the importance of the writ.<sup>193</sup> Those debaters knew (as did Marshall, of course) that suspension of the writ in England or its colonies had required an affirmative Act of Parliament,<sup>194</sup> and that the contours of Parliamentary suspension authority had been the source of bitter controversy in the context of the American Revolution.<sup>195</sup>

If any substantial body of opinion had shared Marshall’s precatory view of the meaning of the Suspension Clause, the ratifiers would surely have insisted on preserving the entitlement to the writ by an amendment in the Bill of Rights. But the ratifiers saw no need to do this because, since “the writ was not constitutionally granted in positive terms in many state constitutions, and [was] only recognized indirectly by a limitation placed upon the authority to suspend its operations,” they naturally assumed “that the non-suspension clause in the federal document also functioned in oblique fashion, implicitly

191 *Bollman*, 8 U.S. at 95. See Freedman, *supra* note 18, at 19–20 (describing modern terrorism scenarios that might trigger this hypothetical). Only by interpreting Marshall’s observation to mean the opposite of what it says, as Justice Stevens did in *INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001), is it possible to assert that *Bollman*’s dicta did not represent a lurking threat to civil liberties, see, e.g., Isaac J. Colunga, *Ex Parte Bollman: Revisiting a Federalist’s Commitment to Civil Liberty*, 23 T.M. COOLEY L. REV. 429, 434 (2006). See generally *supra* note 17 (collecting sources on *St. Cyr*).

192 See Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 S. CT. REV. 1, 11–12 (“[I]t would have astonished the Framers to think that they had protected the writ against suspension (presumably by Congress)—but that Congress could achieve the same result, not by suspending a writ it had otherwise made available, but instead by simply precluding the federal courts from making it available in the first place.”).

193 See FREEDMAN, *supra* note 11, at 12–19.

194 See DONALD E. WILKES, JR., *FEDERAL POSTCONVICTION REMEDIES AND RELIEF* 61 (1996).

195 For extended discussions see Halliday & White, *supra* note 7, at 644–51 and Amanda L. Tyler, *Habeas Corpus and the America Revolution*, 103 CAL. L. REV. 635 (2015).

conferring the right of the privilege”<sup>196</sup> until such time as a valid legislative suspension occurred.

#### IV. Hands to the Pumps

Over the course of time, and again with substantial local variations,<sup>197</sup> the hydraulic pressure of the ideas outlined in Part III.A was weakened by a sustained counter-attack whose forces included legal, intellectual, political, and economic elements.<sup>198</sup> None of these forces, however, could make room in their ranks for jury autonomy, which began a steep decline.<sup>199</sup>

##### A. Rebuilding Judicial Autonomy

###### 1. The Resuscitation of Common Law Pronounced by Legally-Trained Judges

The common law as applied by a professional judiciary had always retained some support<sup>200</sup> and important supporters,<sup>201</sup> and

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196 Cantor, *supra* note 189, at 75. See Tyler, *supra* note 143, at 958-59 (noting that pattern of states during Revolution was to assume existence of habeas privilege and suspend it legislatively as seemed warranted).

197 For sketches of the struggles in a few key states, see WOOD, *supra* note 80, at 425-32.

198 See generally McClanahan, *supra* note 82, at 827; Rowe, *supra* note 13, at 455-56.

199 See LANGBEIN, LERNER & SMITH, *supra* note 158, at 484-88; *infra* Part IV.B.

200 See Jeffrey K. Sawyer, *English Law and American Democracy in the Revolutionary Republic: Maryland, 1776-1822*, 108 MD. HIST. MAG. 261, 266-67 (2013) (noting that after several contested votes framers of Maryland constitution of 1776 determined to perpetuate “a traditional role for learned lawyers and judges in guiding the development of the law through the work of the judicial branch of government”).

201 One of these was Chief Justice Jeremiah Smith of New Hampshire who, regardless of the state of public opinion (which was volatile, see REID, *supra* note 100, at 33-55) believed it his duty to write reasoned opinions in the “quixotic” but ultimately correct belief that they would eventually be published, whether publicly or privately. See *id.* at 66. One example of such an opinion is *Kidder v. Smith* (N.H. 1807), reprinted in DECISIONS OF THE SUPERIOR AND SUPREME COURTS OF NEW HAMPSHIRE, . . . SELECTED FROM THE MANUSCRIPT REPORTS OF THE LATE JEREMIAH SMITH. . . 155 (Boston, Little, Brown, and Company 1879). In this ruling he first (a) determined that a tax statute might be construed in accordance with “the usage of the State from the earliest times of which we have any knowledge, *i.e.* by the common

during the first half of the nineteenth century a series of factors strengthened their influence.

On the intellectual level, the period saw a number of responses to the criticisms canvassed above.<sup>202</sup>

Some authors, building on Blackstone,<sup>203</sup> pointed out that statutes would inevitably require interpretation.<sup>204</sup> Not only were jurors unskilled in performing this function,<sup>205</sup> but even judges would be left to improvisation unless they had published judicial opinions to rely upon.<sup>206</sup> Made available to the public, these opinions would enable it to evaluate the work of the judges.<sup>207</sup> Legally-educated

law of the State” to contain an unstated exception for ministers, *id.* at 156, and then (b) after extended discussion of history and precedent concerning the extent of the ministerial exemption, concluded that it did not apply to the plaintiff. After his retirement, see CHARLES H. BELL, *THE BENCH AND BAR OF NEW HAMPSHIRE* 68 (Boston, Houghton Mifflin & Co. 1894), and long before the case was published, Judge Smith taught it to a law student, remarking “that it was absurd to suppose that we had no common law for what is always done in the State is good Common Law.”) See 2 DECISIONS OF THE SUPERIOR COURT OF JUDICATURE – N. HAMPSHIRE PREVIOUS TO 1816, at 164 (1824) (unpublished manuscript in library of New Hampshire Supreme Court, described in Freedman II, *supra* note 3, at 60 n.258. He would doubtless be pleased to know that his successors on the New Hampshire Supreme Court have cited the case from time to time. See *Town of Canaan v. Enfield Vill. Fire Dist.*, 70 A. 250, 252 (N.H. 1908); *Grafton v. Town of Haverhill*, 40 A. 399, 400 (N.H. 1894).

- 202 See *supra* text accompanying notes 81-93. Some of the scholarly sources describing these responses are cited in Freedman II, *supra* note 3, at 6 n.11.
- 203 See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 59-62 (Oxford, Clarendon Press 1765) (observing that interpretative power must necessarily exist somewhere because “all cases cannot be foreseen or expressed” when statutes are written).
- 204 See [JOSEPH HOPKINSON,] *CONSIDERATIONS ON THE ABOLITION OF THE COMMON LAW IN THE UNITED STATES* 50-58 (Philadelphia, William P. Farrand and Co. 1809); PARKER, *supra* note 88, at 100-01. See also WOOD, *supra* note 80, at 405-07.
- 205 See HOPKINSON, *supra* note 204, at 61; see also JOHN H. MORISON, *LIFE OF THE HON. JEREMIAH SMITH, LL.D.* 247 (Boston, Charles C. Little & James Brown 1845) (quoting Smith).
- 206 See HOPKINSON, *supra* note 204, at 56; REID, *supra* note 91, at 59-60; THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that “to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by . . . precedents”); Steven Wilf, *The First Republican Revival: Virtue, Judging, and Rhetoric in the Early Republic*, 32 CONN. L. REV. 1675, 1687-88 (2000) (discussing views of Chancellor Kent).
- 207 See REID, *supra* note 100, at 165 (noting this argument by New Hampshire and Pennsylvania authors); ZEPHANIAH SWIFT, *A VINDICATION OF*

judges were thus much-needed and valuable public servants for the dutiful implementation of the legislative will.<sup>208</sup>

THE CALLING OF THE SPECIAL SUPERIOR COURT . . . FOR THE TRIAL OF PETER LUNG, . . . WITH OBSERVATIONS ON THE CONSTITUTIONAL POWER OF THE LEGISLATURE TO INTERFERE WITH THE JUDICIARY IN THE ADMINISTRATION OF JUSTICE 40-41 (Windham [Ct.], J. Byrne 1816) (authored by sitting Chief Judge of Connecticut Superior Court) (arguing that judges of highest court “should assign the reasons of their decisions, which ought to be published for the information of the public. In this way we have a security for the faithful discharge of their duty and the correctness of their decisions . . . in their responsibility to public opinion.”); Jessica K. Lowe, *Guarding Republican Liberty: St. George Tucker and Judging in Federal Virginia*, in *SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY* 111, 126-27 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (describing Tucker’s corresponding view).

These arguments were well summarized in an anonymous encyclopedia article published by Justice Joseph Story in 1844:

As all trials, both civil and criminal, are public; and reports are printed, from time to time, of those which are most interesting either as to law, or facts; as the opinion of the court is always publicly given, and, generally, the reasons of that opinion, it is not easy for any court to trespass upon the known principles of law or the rights of the parties. In the U. States . . . the citizens at large watch with jealousy the proceedings of the courts of justice. The very great number of lawyers engaged in profession also furnishes an additional security.

JOSEPH STORY, *Courts of the U. States*, in *THE UNSIGNED ESSAYS OF SUPREME COURT JUSTICE JOSEPH STORY* 55, 68 (2015) (originally published in 3 *ENCYCLOPEDIA AMERICANA* (Francis Lieber ed., Philadelphia, Lea & Blanchard 1844)).

208 See MILLER, *supra* note 85, at 125. When, beginning in 1794, the Supreme Court of the United States began to evaluate the constitutionality of federal statutes, it took a similar approach, treating its task as implementing the will of the People who framed the Constitution. See Whittington, *supra* note 186, at 1270-84. See also 2 DAVID RAMSAY, *THE HISTORY OF SOUTH CAROLINA, FROM ITS FIRST SETTLEMENT IN 1670, TO THE YEAR 1808*, at 129 (1809) (stating that South Carolina judicial system was modeled on England “but with this difference, the state considered her courts as the courts of the people in their sovereign capacity, enforcing justice between separate units of one common mass of sovereignty”); *THE FEDERALIST* NO. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that because judges are empowered by the people judicial review does not “suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.”); Lowe, *supra* note 207, at 119-21 (describing same argument being made in Virginia state cases); see generally WOOD, *supra* note 80, at 449 (“[T]reating the Constitution as mere law that had to be . . . applied to particular cases like a statute suggested that American judges had a special authority to interpret constitutions that other branches of the government did not possess.”).

As to the common law, a long list of legal scholars, judges and eminent practitioners worked to re-frame it by “adding elements of consent and choice.”<sup>209</sup> The common law was not an anachronistic bundle of outmoded rules bequeathed by ancient foreigners, but rather the crowd-sourced and evolving expression of the current consensus of American society and therefore quite as democratically legitimate as any statute.<sup>210</sup> In lecture notes prepared in 1836, Jeremiah Smith described the common law of New England this way:

It is made just as the English common law was made; a collection of the general customs and usages of the community; maxims, principles, rules of action, founded in reason, and found suitable to that first condition of society; if not created by the wisest and most favored, sanctioned and approved by them.<sup>211</sup> Here, every member of society is a legislator; every maxim, which by long usage acquires the force of law, must have been stated, opposed, defended, adopted by rulers and judges, slowly and at first timidly, but so acceptable that all approve. If the custom be of a more doubtful class, again debated, criticised, denied, but finally confirmed and established. These principles, after all, may not be wise and salutary maxims; but they have all the wisdom that the people of all classes (every man having precisely the weight and influence he deserves,) can give them. Farther advances in knowledge and experience may demonstrate their unfitness and inutility; then they will be modified, and silently changed.<sup>212</sup>

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209 See ELEANOR HOLMES PEARSON, *REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC* 4-12 (2011).

210 *Id.* at 24-26. See also MILLER, *supra* note 85, at 126-28.

211 It is worth pausing to note here that, following a path pioneered by Alexander Hamilton and others, Smith’s definition of “the common law” embraces much more than judicial decisions, thereby giving a good deal of flexibility to its advocates. See Kate Elizabeth Brown, *Rethinking People v. Croswell: Alexander Hamilton and the Nature and Scope of “Common Law” in the Early Republic*, 32 *LAW & HIST. REV.* 611, 643-45 (2014). Justice Joseph Story took the same approach in 1844, see *The Common Law*, in STORY *supra* note 207, at 3, 4.

212 See MORISON, *supra* note 205, at 428-29; REID, *supra* note 100, at 55. This passage is quoted in LANGBEIN, LERNER & SMITH, *supra* note 199, at 497-98, where the authors situate Smith as one of a large group of influential writers

On the practical level, advocates undertook a sustained campaign to promote their views. They created and taught in law schools.<sup>213</sup> They wrote legal treatises.<sup>214</sup> They published their views in speeches and essays directed to the public.<sup>215</sup> And they aggressively promoted publication of judicial opinions<sup>216</sup> (including ones they themselves had written) in an ultimately successful effort to overcome

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of similar views, including Chancellor James Kent of New York; Joseph Story, Isaac Parker, Theodore Sedgwick, and Theophilus Parsons of Massachusetts; Jesse Root and Zepaniah Swift of Connecticut; George Wythe and Edmund Pendleton of Virginia; William Gaston and Thomas Ruffin of North Carolina; George Nicholas and John Breckinridge of Kentucky; Thomas McKean and Alexander Dallas of Pennsylvania; and Henry William Desaussure in South Carolina. Smith preceded the passage of the lecture quoted in the text with words of praise for Parsons. See MORISON, *supra* note 205, at 427-28. As indicated in the next paragraph of text, these advocates advanced their views in multiple fora.

213 See Steven J. Macias, *Book Review*, 62 J. LEGAL EDUC. 367, 368-69 (2012) (reviewing PEARSON, *supra* note 209); see generally Andrew M. Siegel, Note, "To Learn and Make Respectable Hereafter": The Litchfield Law School in Cultural Context, 73 N.Y.U. L. REV. 1978 (1998).

214 See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 277-79, 292, 294 (2005); see also John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 570 (1993) (describing Kent and Story as "artists who worked in three media – the published judicial opinion, juristic writing, and legal education.").

215 See, e.g., SWIFT, *supra* note 207. Jeremiah Smith reviewed anonymously the first volume of the Massachusetts Reports for the Monthly Anthology and Boston Review, a general interest literary magazine, devoting considerable effort to the task. See MORISON, *supra* note 205, at 215-24; REID, *supra* note 100, at 157-69. The following year Daniel Webster reviewed the first volume of the New York Reports for the same publication. See 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 167-68, 172-74 (Alfred S. Konefsky & Andrew J. King eds., 1982). Thereafter, he and other like-minded lawyers, including Caleb Cushing, Joseph Story, and Henry Wheaton, reviewed volumes of published law reports for the North American Review, a national literary magazine, see REID, *supra* note 100, at 170. See generally Rowe, *supra* note 13, at 455-56 & n.185 (establishing the authority of judiciary in the early Republic involved "petitioning, parading, toasting, arguing to juries, printing newspaper invective, and other uses of the public sphere," including the anonymous publication of newspaper articles by Supreme Court Justices in defense of their judicial opinions).

216 See Wilf, *supra* note 92, at 1686.

the scarcity of printed law reports<sup>217</sup> and demonstrate that case law could be made as accessible and transparent as statutory law.<sup>218</sup>

The more law became understood as a science and its devotees as scholars, the more judges were entitled to be respected as neutral authorities rather than treated as just another group of political actors,<sup>219</sup> a powerful reason that increasingly “courts generally could expect compliance with their mandates.”<sup>220</sup>

## 2. The Dangers of Democracy

Over time the orthodox Federalist view of the late 1780’s that the legislature on account of its very political responsiveness could pose “a major threat to minority rights and individual liberties”<sup>221</sup> that required a judicial counterweight<sup>222</sup> gained support as “large numbers of influential people [became] increasingly disillusioned

217 See generally M.H. HOEFLICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* 11-27 (2010); MILLER, *supra* note 85, at 109; Freedman I, *supra* note 2, at 609 n.89 (collecting sources); John D. Gordan III, *Publishing Robinson’s Reports of Cases Argued and Determined in the High Court of Admiralty*, 32 *LAW & HIST. REV.* 525, 528-29 (2014).

218 See REID, *supra* note 91, at 211-12; William E. Nelson, *The Province of the Judiciary*, 37 *J. MARSHALL L. REV.* 325, 333-35, 339, 342-43 (2004).

219 See Nelson, *supra* note 218, at 354-55 (explaining that establishment of judges’ power “rested upon their superior ability to research traditional professional sources and thereby find pre-existing law” while acknowledging ultimate democratic political control of the substance of the law, with the result that “elite leaders and the common people felt comfortable that they were in control.”); Wood, *supra* note 80, at 804 (describing withdrawal of judges from political activity). Reflecting the change, one study of journalistic accounts of trials finds that as the century progressed lawyers’ courtroom performances were praised more for their legal analyses than for their ability to sway the emotions of the jurors. See Simon Stern, *Forensic Oratory and the Jury Trial in Nineteenth-Century America*, 3 *COMP. LEGAL HIST.* 293 (2015).

220 NELSON, *supra* note 108, at 95.

221 Wood, *supra* note 80, at 791.

222 See, e.g., LYNN W. TURNER, *WILLIAM PLUMER OF NEW HAMPSHIRE, 1759-1850*, at 34-35 (1962); *THE FEDERALIST*, No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See generally, DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 22-28 (3d ed. 2013); David Grimsted, *Rioting in its Jacksonian Setting*, 77 *Am. Hist. Rev.* 361, 373 (1972).

with the kind of democratic legislative politics that was emerging in the early Republic.”<sup>223</sup>

### 3. The Decline of Legislative Adjudication

When the practice of legislative adjudication was challenged, the courts sometimes prevailed in whole or in part.<sup>224</sup> For example, judicial opinions in Connecticut,<sup>225</sup> New Hampshire<sup>226</sup> and Massachusetts<sup>227</sup> denied the validity of the practice, and seem to have reduced if not entirely eliminated it.<sup>228</sup>

Perhaps more significantly, legislatures found that holding quasi-judicial proceedings — and, to their credit, they commonly would hear from the parties when reviewing judicial rulings<sup>229</sup> — was a

223 Wood, *supra* note 80, at 807-08. See Timothy A. Lawrie, *Interpretation and Authority: Separation of Powers and the Judiciary's Battle for Independence in New Hampshire, 1786-1818*, 39 AM. J. LEGAL HIST. 310, 311 (1995).

224 For a survey see Treanor, *supra* note 105, at 508.

225 See *Symsbury Case*, 1 Kirby 444 (Conn. Super. Ct. 1785).

226 See *Merrill v. Sherburne*, 1 N.H. 199 (1818). For a full discussion of this case and its judicial precursors see Lawrie, *supra* note 223. See also Freedman II, *supra* note 3, at 17 n.51 (providing background on author of opinion).

227 The 1789 manuscript decision of the Supreme Judicial Court in *Goddard v. Goddard* is documented in HAMBURGER, *supra* note 31, at 529.

228 See *id.* at 533; REID, *supra* note 99, at 167.

229 See, e.g., SWIFT, *supra* note 207, at 14-19; Freedman II, *supra* note 3, at 69 n.281. Cf. REID, *supra* note 99, at 65 (noting that one of the rare instances of a gubernatorial veto of an act overturning a New Hampshire judicial ruling occurred when representatives had determined facts without being in a position to do so).

For a description of the elaborate quasi-judicial procedures followed by the New York provincial legislature of the early 1700's in adjudicating creditors' claims against the government, see Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1472-74 (1998). The legislatures of North and South Carolina during the colonial period seem to have delegated to the conduct of similar proceedings to their committees. See *id.* at 1497-98 nn.568-69. During the Articles of Confederation period, Congress found even this too burdensome and created administrative agencies for the purpose. See Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 157-58 (1978). So too, the first federal court came into existence because the Continental Congress found that giving admiralty litigants adequate process, even where the proceedings were only appellate and delegated to a committee, see *supra* note 97, was an untoward call on its resources. See Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 BUFF. L. REV. 477, 490-95 (2015).

significant resource drain.<sup>230</sup> By 1832 the New Hampshire legislature had “vest[ed] the courts with full authority to grant equitable relief.”<sup>231</sup>

#### 4. The Commercial Need for Predictability

As commercial transactions grew in size, complexity and geographical scope, so too did the pressures for a legal regime in which the participants could predict legal outcomes with a reasonable degree of certainty.<sup>232</sup> “Businesses could not prosper in a legal environment marked by the uncertainty of a legal system in which decisions were based on . . . ‘fairness.’”<sup>233</sup> They needed a legal system in which legally-knowledgeable decisionmakers ruled in accordance with known principles.<sup>234</sup> Moreover, the constituency in favor of the stability of property rights broadened as the diversification of the economy led to increasing numbers of people being “caught up in buying and selling and creating new modern sorts of property.”<sup>235</sup>

#### 5. The Election of Judges

In addition, recent scholarship has emphasized that the ongoing trend towards an elective judiciary helped reconcile “judicial accountability to the people and judicial independence from the

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230 See REID, *supra* note 99, at 66-69. The ruling in *Merrill*, 1 N.H. at 199, originated with a request by the legislature to the Superior Court of Judicature for an advisory opinion, and Professor Reid speculates that the request may have been made because the lawmakers, “had reached the limits of their tolerance for the time-consuming procedures they followed” in reviewing judicial rulings and were hoping for a decision that gave them political cover to cease entertaining such matters. See REID, *supra* note 91, at 19.

231 [Chief Justice] Frank R. Kenison, *The Judiciary Under the New Hampshire Constitution, 1776-1976*, in NEW HAMPSHIRE AMERICAN REVOLUTION BICENTENNIAL COMMISSION, *THE FIRST STATE CONSTITUTION* 12, 13 (1977).

232 See Renee Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 828-29 & n.106 (2014). See also MILLER, *supra* note 85, at 133; Lawrie, *supra* note 223, at 319. See generally *Swift v. Tyson*, 41 U.S. 1, 18-20 (1842).

233 HOEFLICH, *supra* note 217, at 24.

234 See *id.*

235 WOOD, *supra* note 80, at 459; see *id.* at 462-66 (discussing proliferation of incorporated businesses).

other branches.”<sup>236</sup>

## B. Jetsam: The Jury as Law-Pronouncer

The very factors just canvassed in Part IV.A as strengthening the judicial branch as against the others converged to weaken the autonomy of the jury inside the court system.<sup>237</sup>

Juries remained ignorant of the formal law even as judges were becoming more knowledgeable about it.<sup>238</sup> Juries were prone to share transitory community passions and thus a source of instability to minority and property rights alike.<sup>239</sup> And with the rise of an elective judiciary, jurors no longer had inside the judicial branch the comparative advantage of democratic legitimacy.

The result in general terms<sup>240</sup> was that by around 1830 or so, “in civil cases . . . trial judges had successfully wrested control over the law for themselves and confined jurors to finding the facts in a particular case.”<sup>241</sup>

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236 SHUGERMAN, *supra* note 9, at 57; *see* Shugerman, *supra* note 100, at 1142. *See also* Wood, *supra* note 80, at 794. For a discussion of the older scholarship *see* Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993).

237 *See* Kramer, *supra* note 69, at 101.

238 *See* Albert W. Alshuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 904-06 (1994); Tarr, *supra* note 81, at 657. *See also* WOOD, *supra* note 80, at 453-55.

239 *See* Alshuler & Deiss, *supra* note 238, at 916-17; Lerner, *supra* note 232, at 828-31. “The Schizophrenic Jury” of Professor Dubber’s essay cited *supra* note 5 is one that is seen at some times and places as the idealistic representative of community norms and a check on arbitrary government and at others as an inefficient, arbitrary, prejudiced, and irrational decisionmaker. *See* Dubber, *supra* note 5, at 3, 10, 13, 15-16. *See generally* Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI. KENT L. REV. 861 (2015); Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825 (2015).

240 Specialists continue to debate the nuances of the timing and content of the change – a debate that is likely to become more not less complex as more historical studies covering additional jurisdictions and regions are completed – but the overall narrative arc has been reliably established. *See* Larry D. Kramer, *The Pace and Cause of Change*, 37 J. MARSHALL L. REV. 357, 371-78 (2004).

241 ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939*, at 30 (2011). The demise of the jury as the final word on the law in criminal cases took longer, and is generally traced to *Sparf v. United States*, 156 U.S. 51 (1895). For an overview of developments during the period *see* DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 117-46 (2016). The independent role of the jury in criminal cases has spawned an enormous,

## V. Boumediene Defuses *Bollman's* Sea Mine

*Boumediene v. Bush*<sup>242</sup> is a case of monumental importance in many dimensions, most of which are not relevant to the present historically-focused survey.<sup>243</sup>

For purposes of understanding its relationship to *Bollman*, the case may be summarized quite simply.<sup>244</sup> After the Supreme Court ruled in 2004 that the modern habeas corpus statute embodying Section 14 of the Judiciary Act of 1789<sup>245</sup> applied to prisoners detained at Guantanamo Bay in pursuit of the “war on terror,”<sup>246</sup> Congress sought to overrule the decision by statute; that effort failed when

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and often passionate, literature. A few recent contributions include Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133 (2011); Jenny Carroll, *Nullification as Law*, 102 GEO. L.J. 579 (2014); Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409 (2012); Monroe H. Freedman, *Jury Nullification: What It Is, and How to do It Ethically*, 42 HOFSTRA L. REV. 1125 (2014); Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 SANTA CLARA L. REV. 775 (2011); and Stacy P. Eilbaum, Note, *The Dual Face of the American Jury: The Antiauthoritarian and Antimajoritarian Hero and Villain in American Law and Legal Scholarship*, 98 CORNELL L. REV. 711 (2013).

242 553 U.S. 723 (2008).

243 In addition to raising a host of questions as to the validity of legal tactics the federal government is deploying in its global struggle against terrorism, see, e.g., Mark D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851 (2010); Tim J. Davis, Comment, *Extraterritorial Application of the Writ of Habeas Corpus After Boumediene: With Separation of Powers Comes Individual Rights*, 57 KAN. L. REV. 1199, 1231-33 (2009) (arguing that, notwithstanding test grounded in individual rights employed by case itself, focus on its checks-and-balances rationale supports conclusion that writ extends to any detainee of executive branch “at any time and in any place”), the opinion has significant implications for a variety of domestic questions. See Gerald L. Neuman, *The Habeas Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 556-77 (2010). These include statutory restrictions on the federal courts’ habeas corpus examination of state criminal convictions, see, e.g., Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 994-96 (2012), and of immigration cases, see, e.g., Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 111-17 (2012).

244 The history set forth in the remainder of this paragraph of text has been well summarized in Linda Greenhouse, *The Mystery of Guantanamo Bay*, 27 BERKELEY J. INT’L. L. 1, 8-20 (2009).

245 28 U.S.C. § 2241.

246 See *Rasul v. Bush* 542 U.S. 466 (2004). See generally Eric M. Freedman, *Who’s Afraid of the Criminal Law Paradigm in the “War on Terror”?*, 10 N.Y. CITY L. REV. 323 (2007).

the Court ruled that the statute applied only prospectively, and thus would not affect the hundreds of detainees who had habeas petitions pending.<sup>247</sup> Congress responded by passing yet another statute, the Military Commissions Act (MCA) of 2006, to make its intentions unmistakable.<sup>248</sup> The MCA amended the basic habeas corpus statute to provide:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>249</sup>

Such prisoners were to be relegated to a non-adversarial internal review procedure conducted administratively by the Defense Department with limited judicial review.<sup>250</sup> *Boumediene* invalidated the amendment under the Suspension Clause, leaving the petitioners free to pursue habeas corpus under the historic writ.<sup>251</sup>

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247 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006).

248 See *Boumediene*, 553 U.S. at 738 (“[W]e cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the [prior statute]’s jurisdiction-stripping provision had no application to pending cases.”).

249 28 U.S.C. § 2241 (e)(1) (Supp. 2007).

250 See 28 U.S.C. §2242 (e)(2) (Supp. 2007). See also *Boumediene*, 553 U.S. at 783-92 (describing aspects of the procedure).

251 In seeking to actually do so, they encountered from all three branches of government lawless stonewalling analogous to the “massive resistance” that followed *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See Muneer I. Ahmad, *Resisting Guantanamo*, 103 Nw. L. REV. 1683 (2009); JONATHAN HAFETZ, *Introduction to OBAMA’S GUANTANAMO: STORIES FROM AN ENDURING PRISON* (Jonathan Hafetz ed., forthcoming 2016); Freedman, *Past and Present*, *supra* note 15; see also Paola Bettelli, *The Contours of Habeas Corpus after Boumediene v. Bush in the Context of International Law*, 28 N.Y. INT’L L. REV. 1, 22-23 (2015) (concluding that post-*Boumediene* developments have put the United States in violation of international law). Although the underlying Constitutional principles do not command the unanimity among the Justices that existed in *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958), there are both practical and institutional reasons for the Court to respond. See generally *Boumediene*, 553 U.S. at 765 (insisting on importance of principle that “the political branches [not] have the power to switch the Constitution on or off at will . . . leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’ *Marbury v. Madison*”) (citation omitted).

So stated, *Boumediene* is not inconsistent with the precatory Suspension Clause theory of *Bollman*.<sup>252</sup> Congress had not done nothing. It had passed a statute in 1789 that extended to these prisoners. It repealed that statute by another in 2006. The Court invalidated the repealing statute. The original statute resumed its force. Nothing in the situation required the Court to exercise any inherent habeas-granting authority.<sup>253</sup>

Indeed, any statements *Boumediene* might make on that question could be categorized as dicta. But *Bollman*'s statements on the subject were dicta too.<sup>254</sup> Yet they remained a sea mine threatening the writ's function "of judicially ferrying persons whom the government, through restraints, has separated from their rights under the Fundamental Law of the Land to the safe harbor afforded by that Law."<sup>255</sup>

So the Court in *Boumediene* decided to defuse the sea mine. In a "momentous"<sup>256</sup> opinion resolving a question "that had not received an authoritative answer for more than two centuries into our nation's history,"<sup>257</sup> the Court clearly announced that the Constitution "affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention."<sup>258</sup>

After presenting a historical account of habeas steeped in the "duty and authority of the Judiciary to call the jailer to account,"<sup>259</sup>

252 See *supra* text accompanying note 191.

253 See Meltzer, *supra* note 192, at 20 (observing that there was no "need to consider the more difficult situation in which the Suspension Clause applies but there is no background congressional grant of federal court jurisdiction on which to rely").

254 See *supra* text accompanying notes 183-86.

255 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 2.3 at 29 (6th ed. 2011). See *supra* note 191.

256 See Meltzer, *supra* note 192, at 1, 58.

257 *Id.* at 17.

258 *Id.* at 1. This quote is set forth more fully *infra* note 267.

259 *Boumediene*, 553 U.S. at 745. See *id.* at 742-46. The Court relied heavily on the well-documented historical presentation in Halliday & White, *supra* note 7. Indeed, the historical data unearthed by Professor Halliday and subsequently presented in HALLIDAY, *supra* note 30, "drove *Boumediene*'s result." Kovarsky, *supra* note 15, at 759. This is of some significance because Halliday and White quite explicitly questioned the soundness of a *Bollman*-based understanding "that the source of the habeas privilege is exclusively statutory," and suggested that it "should be re-considered." Halliday & White, *supra* note 7, at 683; see also *id.* at 701.

*Boumediene* determined that “the judicial authority to consider petitions for habeas corpus relief” derives from principles “of separation of powers.”<sup>260</sup> (Of course, as the context makes clear, the Court is here using the phrase “separation of powers” in the sense that I assigned above to “checks and balances.”)<sup>261</sup>

The judiciary has the habeas power of inquiry and remedy<sup>262</sup> (including ordering release)<sup>263</sup> needed to effectively play its role in policing the other branches.<sup>264</sup> As *Boumediene* thankfully makes clear,

260 *Boumediene*, 553 U.S. at 797 (“Chief among [freedom’s first principles] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”). See Greenhouse, *supra* note 244, at 18 (describing opinion as “among the Court’s most important modern statements on the separation of powers”).

Scholars have uniformly emphasized the central importance of this aspect of the opinion. See, e.g., Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 466 (2010) (describing *Boumediene* as “rooted in separation of powers and a concern about executive manipulation of legal rules”); Katz, *supra* note 20, at 399-400 (arguing that checks and balances basis of opinion supports broad rule “that Congress cannot strip jurisdiction where doing so serves to shield Congress or the President from judicial review in constitutional cases, giving the political branches the last word on the constitutionality of their own actions”); Neuman, *supra* note 243, at 548-49; Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to The Courts and Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2109-11 (2009) (observing that case supports a view of habeas corpus that is “as much about preserving the role of the courts as it is about protecting individual litigants”).

261 See *supra* text accompanying notes 22-25.

262 See Kovarsky, *supra* note 15, at 795 (“*Boumediene* specifically identifies two core features of habeas power: the power to consider whether custody is lawful, and the power to order discharge.”).

263 See *Boumediene*, 553 U.S. at 787 (“We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”); *id.* at 779 (stating that power to order release is one of the “easily identified attributes of any constitutionally adequate habeas corpus proceeding”). See also Freedman, *Past and Present*, *supra* note 15, at 40-41 (criticizing D.C. Circuit for subsequently defying this holding in *Kiyemba v. Obama*, 553 F.3d 1022 (D.C. Cir. 2009)).

264 It follows that in adjudicating habeas cases courts must employ procedural mechanisms, e.g., discovery, that are sufficient for this purpose, regardless of whether those procedures existed at common law, are made available by statute, or conform to the wishes of the jailers. See generally Azmy, *supra* note 260, at 524-37; Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-*

this is true regardless of whether Congress has (1) passed a statute restricting the power (the actual situation in *Boumediene*) or (2) failed to pass one granting the power (the hypothetical posed by *Bollman*).<sup>265</sup>

(1). The issue actually before the Court arose under the Suspension Clause, which is a limit on the power of Congress to pass a statute like the MCA. That is why the Court explicitly grounded its holding invalidating the Act in the Suspension Clause.<sup>266</sup>

(2). But the broader proposition — the modern dicta supporting an inherent judicial habeas power which destroyed the older dicta rejecting it — does not originate in the Suspension Clause.<sup>267</sup> That proposition rests on Article III.<sup>268</sup> The Court in 2008 unmistakably if silently<sup>269</sup> accepted the argument that Harper had made unsuccessfully on behalf of *Bollman* in 1807:<sup>270</sup> “[T]he power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal

*Term Executive Detention*, 86 DENV. U. L. REV. 961 (2009); Garrett, *supra* note 243, at 100-08; Wiseman, *supra* note 243, at 993-97.

265 See Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 52-54 (2010) (explaining why Constitutional rule of *Boumediene* is that Suspension Clause protects common law habeas corpus “whether Congress has provided for it or not”).

266 See *Boumediene*, 553 U.S. at 739, 746, 771.

267 *But cf.* Meltzer, *supra* note 192, at 1 (“[T]he Supreme Court . . . clearly held . . . that the Constitution’s Suspension Clause, despite its indirect wording, affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention.”) (footnote omitted); *id.* at 17 (“[T]he Court’s holding that the Suspension Clause confers an affirmative right to habeas relief has not received the attention it deserves.”); *id.* at 30 (“Also correct, and of more fundamental importance, is the holding that the Suspension Clause affirmatively guarantees the right to habeas corpus review”); Neuman, *supra* note 243, at 541 (stating holding in *Boumediene*, which “should make us all breathe easier”: “The Suspension Clause . . . permanently requires a right to habeas corpus, with certain minimum content, when the writ has not been suspended.”).

268 This argument has been made fully and rigorously in the wake of *Boumediene* by Kovarsky, *supra* note 15, at 754-86, 810. It was sketched out prior to *Boumediene* by Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 277-78, 283-84, 302-05 (2008).

269 *Boumediene* makes only one entirely glancing reference to *Bollman*. See *Boumediene*, 553 U.S. at 779.

270 Perhaps Harper would have appreciated the thought of Oliver Wendell Holmes that the law offers to its practitioners “the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought — the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that

imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.”<sup>271</sup>

The inherent authority to grant writs of habeas corpus in the absence of a valid suspension is one of the attributes of the “judicial power” that Article III grants.<sup>272</sup> By embracing that proposition *Boumediene* defused the two-century-old *Bollman* dicta, effacing them from the U.S. Reports before they could do any harm. But the Court did more. It re-defined the basis of its own habeas corpus authority in a way that recognized the writ as an instrument for the enforcement of checks and balances. Those two aspects of *Boumediene* make it “an occasion for dancing in the streets.”<sup>273</sup>

They represent critical lessons about habeas corpus that the present has learned from the past and should bequeath to the future:

“[T]he practice of arbitrary imprisonment[] [has] been, in all ages, the favorite and most formidable instruments of tyranny.”<sup>274</sup> It oppresses the individual of course. But it also undermines the cathedral of government under law that the legal system of the United States is continuously seeking to construct. And that is true whether the fault lies with the legislature, the executive or both,<sup>275</sup> and

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which commands an army.” OLIVER WENDELL HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29, 32 (1920).

271 See *supra* text accompanying note 155. For a recent consideration of inherent judicial powers, see Alexander Volokh, *The Inherent Powers Corollary: Judicial Non-Delegation and Federal Common Law* (Aug. 7, 2015) (unpublished research paper, Emory University School of Law) (on file at <http://ssrn.com/abstract=2638490>).

272 See Kovarsky, *supra* note 15, at 804.

273 Cf. Harry Kalven, Jr. *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 S. CT. REV. 191, 208, 221 n.125 (agreeing with assessment of Alexander Meiklejohn that, quite apart from its doctrinal contributions to libel law, the decision in *New York Times Co. v. Sullivan*, 376 U.S. 24 (1964) was “an occasion for dancing in the streets” both because it definitively determined the unconstitutionality of the Sedition Act of 1798, 1 Stat. 586, and because it put that insight at the heart of the meaning of the First Amendment).

274 THE FEDERALIST No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See *Boumediene*, 553 U.S. at 744 (quoting this passage).

275 The judicial branch, not, may be responsible for wrongful imprisonments, but *Boumediene* did not present that problem and this article has put it to one side. See *supra* notes 30, 178.

whether their misuse of power consists of action or inaction.<sup>276</sup> The independent power of the judicial branch to grant habeas corpus in the absence of a valid suspension both restores liberty to the person who was arbitrarily deprived of it and strengthens the government structures that ought to have prevented the deprivation in the first place.<sup>277</sup>

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276 Cf. *United States v. Shipp*, 203 U.S. 563 (1906) (upholding criminal contempt proceedings against sheriff who stood aside and let mob lynch prisoner notwithstanding pending federal habeas corpus proceedings, rejecting defense that sheriff might have thought no habeas jurisdiction existed); *United States v. Shipp*, 214 U.S. 386 (1909) (upholding guilty verdict against sheriff following criminal trial held before Court in the exercise of its original jurisdiction); Mark Curriden, *A Supreme Case of Contempt*, ABA J., June 2, 2009, [http://www.abajournal.com/magazine/article/a\\_supreme\\_case\\_of\\_contempt](http://www.abajournal.com/magazine/article/a_supreme_case_of_contempt) (last visited Aug. 9, 2015) (describing case as “a pivotal turning point in asserting the importance of the rule of law and the need for an independent judiciary”). For a book-length account see MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT: THE TURN-OF-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM* (1999), and for a shorter one see Doug Lindner, *The Trial of Sheriff Joseph Shipp et al.: An Account*, <http://law2.umkc.edu/faculty/projects/ftrials/shipp/trialaccount.html> (last visited Aug. 9, 2015).

277 See Freedman I, *supra* note 2, at 618.

## Closing a Parol Evidence Rule Loophole: The Consideration Exception and the Preexisting Duty Rule

Daniel P. O’Gorman<sup>1</sup>

*The parol evidence rule and the preexisting duty rule are two classic contract-law doctrines. The parol evidence rule gives primacy to a written document over prior negotiations and agreements, and the preexisting duty rule provides that a promise to perform, or the performance of, a legal duty is not consideration. The former doctrine deals with the contract’s content and the latter doctrine deals with the agreement’s enforceability. One might therefore expect that the two would operate in their own corners of contract law without conflict.*

*Yet an exception to the parol evidence rule permits a party to rely on extrinsic evidence to show that a written agreement is not legally binding because it is not supported by consideration. If a party seeks to show that a written agreement was in fact a modification of a prior oral contract, and that the written agreement is not binding because it lacks consideration under the preexisting duty rule, the two rules come into conflict and one must give way. The Restatement (Second) of Contracts provides that the parol evidence rule should give way, and that position has been followed by some courts. Yet such an exception to the parol evidence rule threatens to undermine the rule’s evidentiary function, which is based on the belief that written evidence is more reliable than oral evidence, and its gatekeeping function, which is based on a distrust of the jury. Accordingly, an accommodation between the two doctrines is necessary to avoid undermining the parol evidence rule’s purposes.*

*This Article maintains that the consideration exception should not apply in a case involving a written agreement that a party asserts is an unenforceable modification under the preexisting duty rule, as long as the opposing party*

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*introduces sufficient evidence to create a genuine dispute regarding the prior agreement’s existence. Such an approach will preserve the parol evidence rule’s evidentiary and gatekeeping functions.*

## Introduction

The parol evidence rule and the preexisting duty rule are two titans of classical contract law. The parol evidence rule gives primacy to a written document (a so-called integrated agreement) over prior and contemporaneous agreements and negotiations not included in the integrated agreement.<sup>2</sup> The preexisting duty rule provides that a promise to perform, or the performance of, a legal duty is not consideration.<sup>3</sup> The former doctrine deals with the contract’s content<sup>4</sup> and the latter with an agreement’s enforceability.<sup>5</sup> Because the doctrines deal with distinct subject matters, one might expect the two would peacefully operate in their own corners of contract law.

Yet an exception to the parol evidence rule permits a party to rely on extrinsic evidence to show that an integrated agreement is not binding because it is not supported by consideration.<sup>6</sup> Thus, if a plaintiff seeks to show that an integrated agreement was a modification of a prior oral contract, and that the integrated agreement is not binding because it lacks consideration under the preexisting duty rule, the two doctrines come into conflict and one must give way.

For example, assume that the plaintiff and the defendant entered into a written contract under which the defendant promised to build a toolshed for the plaintiff and in exchange the plaintiff

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2 See RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981) (“A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them. A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.”).

3 See *id.* § 73 (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .”).

4 See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 107 (6th ed. 2009) (noting that the parol evidence rule determines “the content of the contract.”).

5 See RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (AM. LAW INST. 1981) (noting that the preexisting duty rule results in the denial of enforcement to promises that would otherwise be valid).

6 See *id.* § 214(d) (“Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . lack of consideration . . .”).

promised to pay the defendant a specified amount of money. After the defendant builds the toolshed the plaintiff demands that the defendant also paint the toolshed at no extra cost to the plaintiff, alleging that the parties orally agreed prior to reducing their agreement to writing that the deal included the paint job. The defendant refuses, denying the existence of any such oral agreement. The plaintiff therefore sues the defendant for breach of contract. The defendant argues that the oral agreement never existed and that, even if it did, the failure to incorporate it into the written contract discharges it under the parol evidence rule. In response, the plaintiff argues that he is seeking to introduce the prior oral agreement to show that the written contract was in fact a modification of a prior oral agreement that included the paint job, and that the subsequent written contract lacks consideration under the preexisting duty rule because no new consideration was provided to the plaintiff for the deletion of the defendant's duty to paint the toolshed.

The *Restatement (Second) of Contracts* provides that in such a situation the parol evidence rule should give way to the preexisting duty rule and evidence of the prior oral agreement should be admissible,<sup>7</sup> a position followed by some courts.<sup>8</sup> Yet such an exception to the parol evidence rule threatens to undermine the rule's evidentiary function, which is based on the belief that written evidence is more reliable than oral evidence,<sup>9</sup> and its gatekeeping function, which is based on

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7 See *id.* § 214 cmt. c, illus. 5 (“A and B make an integrated agreement by which A promises to complete an unfinished building according to certain plans and specifications, and B promises to pay A \$2,000 for so doing. It may be shown that, by a contract made previously with B, A had promised to erect and complete the building for \$10,000; that he had not fully completed it though paid the whole price. This evidence is admissible to show that there is no consideration for B’s new promise, since A is promising no more than he is bound by his original contract to perform.”).

8 See *Audubon Indem. Co. v. Custom Site-Prep, Inc.*, 358 S.W.3d 309, 316-18 (Tex. Ct. App. 2011) (holding that parol evidence was admissible to determine whether a written agreement that differed from a prior oral agreement was a modification that lacked consideration under the preexisting duty rule); *Guar. Trust Co. of N.Y. v. Williamsport Wire Rope Co.*, 222 F.2d 416, 420-21 (3d Cir. 1955) (holding that parol evidence was admissible to show that a written agreement that was an attempted modification of a prior agreement lacked consideration under the preexisting duty rule).

9 See *Duncan Kennedy, Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1778 (1976) (“The evidentiary function includes both providing good evidence of the existence of a transaction and providing good evidence of the legal consequences the parties intended should follow.”); Joseph M. Perillo,

a distrust of the jury.<sup>10</sup> Accordingly, an accommodation between the parol evidence rule and the preexisting duty rule is necessary to avoid undermining the parol evidence rule’s purposes.

This Article maintains that the parol evidence rule’s consideration exception should not apply in a case involving a written agreement that a party asserts is an unenforceable modification under the preexisting duty rule, provided the opposing party introduces sufficient evidence to create a genuine dispute regarding the prior agreement’s existence. Such an approach preserves the parol evidence rule’s evidentiary and gatekeeping functions.

Part I of this Article provides a background of the parol evidence rule. Part II provides a background of the preexisting duty rule. Part III discusses how the parol evidence rule’s consideration exception applies with respect to the preexisting duty rule, and why it is a parol evidence rule loophole. Part IV provides a test to accommodate the parol evidence rule and the preexisting duty rule, thereby closing the loophole. Part V is a brief conclusion.

## I. The Parol Evidence Rule

### A. The Contours of the Parol Evidence Rule

The parol evidence rule provides that an integrated agreement usually supersedes prior and contemporaneous promises and agreements that were not incorporated into the integrated agreement.<sup>11</sup> Specifically, the rule provides that “[a] binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them” and “[a] binding completely integrated agreement discharges

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*Statute of Frauds in Light of the Functions and Dysfunctions of Form*, 43 *FORDHAM L. REV.* 39, 64 (1974) (noting that the purpose of the evidentiary function is to “supply and preserve evidence of the contract.”).

10 See Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 *YALE L.J.* 365, 366 (1932) (arguing that the parol evidence rule is based on a distrust of the jury).

11 PERILLO, *supra* note 4, at 107; see also Arthur L. Corbin, *The Parol Evidence Rule*, 53 *YALE L.J.* 603, 603 (1944) (“When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the ‘parol evidence rule’ . . .”).

prior agreements to the extent that they are within its scope.”<sup>12</sup> Despite its name, the rule is not considered a rule of evidence but a rule of substantive law, in that it determines contract rights and duties.<sup>13</sup>

For the parol evidence rule to apply the parties must have manifested assent to a binding integrated agreement.<sup>14</sup> The manifestation of assent need not take any particular form, such as signing the document, and can include an oral manifestation or even assent by silence.<sup>15</sup> But if either of the parties fails to manifest assent to the document, there is no integrated agreement and the parol evidence rule does not apply.<sup>16</sup> Also, under the so-called conditional-delivery exception, where the parties to a written document agree orally that it is not effective unless and until a particular condition occurs, the document is not a binding integrated agreement until such condition occurs.<sup>17</sup>

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12 RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981).

13 *Id.* § 213 cmt. a. *But see* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119, 1244 n.473 (“These (and other) legalists’ views [that the parol evidence rule is not a rule of evidence] may be attributable to their having viewed the contemporary evidentiary regime—which favored liberal admission of evidence—as the only possible approach to evidence law. For example, Williston appears to justify his claim that the parol evidence rule is a matter of substantive law on the basis that ‘it defines the limits of a contract; it fixes the subject matter for interpretation, though not itself a rule of interpretation.’ That, of course, is exactly what a rule of evidence does: it determines *what* material is to be subject to the factfinder’s interpretation.”) (citation omitted).

14 *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (AM. LAW INST. 1981); *see also id.* cmts. b & c (noting that the court must make the preliminary determination that there is an integrated agreement); PERILLO, *supra* note 4, at 112 (“The first issue in a parol evidence problem is whether the parties intended the writing to be a final embodiment of their agreement in whole or in part.”).

15 *See* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b (AM. LAW INST. 1981) (“The intention of the parties may . . . be manifested without explicit statement and without signature. A letter, telegram or other informal document written by one party may be orally assented to by the other as a final expression of some or all of the terms of their agreement.”); *id.* cmt. b, illus. 2 (providing an example of manifesting assent through silence).

16 *See id.* cmt. b, illus. 1 (providing illustration where the parties reduce their oral agreement to written form but the parties are not satisfied with the document and agree to have it redrafted).

17 *Id.* § 217.

An integrated agreement is “a writing or writings constituting a final expression of one or more terms of an agreement.”<sup>18</sup> Thus, the parol evidence rule only applies when the last expression of the parties’ agreement is written.<sup>19</sup> An integrated agreement need not, however, take any particular written form;<sup>20</sup> it can even be a written confirmation of the agreement.<sup>21</sup> Also, it need not be a complete statement of the parties’ deal.<sup>22</sup> But a document intended to be tentative and preliminary to a final draft is not an integrated agreement.<sup>23</sup> Whether a document has been adopted as an integrated agreement is decided by the judge, not the jury, even though it is an issue of fact.<sup>24</sup>

Because the parol evidence rule does not apply unless the integrated agreement is binding, an integrated agreement does not supersede a prior agreement if the integrated agreement lacks consideration or is voidable and has been avoided.<sup>25</sup> Thus, “[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . lack of consideration [for the writing].”<sup>26</sup> For example, a majority of courts permit extrinsic evidence to show that a recital that consideration has been provided is false.<sup>27</sup> Also, extrinsic evidence is admissible to show

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18 *Id.* § 209(1). John Henry Wigmore apparently coined the term “integration.” ARTHUR L. CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION 535 (1952).

19 PERILLO, *supra* note 4, at 107. An integrated agreement that is a confirmation of a prior oral agreement is considered a modification of the prior agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b, illus. 2 (AM. LAW INST. 1981).

20 *See* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b. (AM. LAW INST. 1981) (“No particular form is required for an integrated agreement.”).

21 *Id.* cmt. b, illus. 2.

22 *Id.* § 210(2).

23 PERILLO, *supra* note 4, at 112.

24 *Id.* at 112-13.

25 RESTATEMENT (SECOND) OF CONTRACTS § 213(3), cmt. d (AM. LAW INST. 1981).

26 *Id.* § 214(d); *see also* PERILLO, *supra* note 4, at 126 (“It is frequently said that the parol evidence rule does not preclude the showing of an absence of consideration.”).

27 PERILLO, *supra* note 4, at 126-27; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 218(1) (AM. LAW INST. 1981) (“A recital of a fact in an integrated agreement may be shown to be untrue.”); E. ALLAN FARNSWORTH, CONTRACTS 429 (4th ed. 2004) (“Even if a completely integrated agreement recites that consideration was given, it may be shown that the recital is untrue.”).

that the only promise made by one of the parties was not intended by the parties to be performed, and thus the purported bargain is a sham.<sup>28</sup> The rationale for the exception for invalidating causes is that the parol evidence rule does not apply unless the integrated agreement is binding, and invalidating causes commonly do not appear on the document's face.<sup>29</sup>

If the parties manifest assent to a binding integrated agreement, the next question is whether the integrated agreement discharges the prior or contemporaneous agreement that a party is seeking to enforce.<sup>30</sup> The parol evidence rule is misnamed in the sense that under the rule an integrated agreement can supersede prior written agreements as well as prior oral agreements.<sup>31</sup> The rule does

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28 PERILLO, *supra* note 4, at 127.

29 RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c (AM. LAW INST. 1981). Interestingly, requiring that an integrated agreement be binding for the common-law parol evidence rule to apply results in a softer parol evidence rule for cases governed by the common law than for cases governed by Article 2 of the Uniform Commercial Code (U.C.C.). The U.C.C.'s parol evidence rule does not include a requirement that the integrated agreement be binding. *See* U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2012). Rather, the rule applies to "[t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement . . ." *Id.* Under the U.C.C., all that is necessary is a finding that "the writing was intended by both parties as a complete and exclusive statement of all the terms." *Id.* cmt. 3. And even if a requirement of a "binding" agreement could be supplied through the U.C.C. provision incorporating common-law rules, U.C.C. § 1-103, under the U.C.C. a modification does not need consideration to be binding, U.C.C. § 2-209(1), as long as it meets the test of good faith. *Id.* § 2-209 cmt. 2.

Thus, if the transaction involves the sale of goods and is therefore governed by Article 2 of the U.C.C., *see id.* § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods . . ."), the consideration exception would not prevent the parol evidence rule from having the effect of superseding the prior promise or agreement, unless perhaps it could be shown that the integrated agreement was prepared in bad faith by one of the parties. If the parties form an oral contract and one of the parties sends a signed, written confirmation to the other that includes additional or different terms, but the other does not manifest assent to the written confirmation, whether the additional or different terms supersede the prior oral agreement would be determined by U.C.C. § 2-207(2), not the parol evidence rule. *See id.* § 2-207(2).

30 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981).

31 *See id.* cmt. a.

not, however, discharge agreements subsequent to the integrated agreement, even if they are oral.<sup>32</sup>

If the binding integrated agreement contradicts the prior agreement, the prior agreement is discharged,<sup>33</sup> even if the integrated agreement does not contain all of the terms of the parties’ agreement (a so-called partial integration).<sup>34</sup> If the integrated agreement does not contradict the prior agreement, the prior agreement is still discharged if it was not agreed to for separate consideration and under the circumstances it would have been natural to include it in the integrated agreement.<sup>35</sup> If the prior agreement was agreed to for separate consideration or under the circumstances it was natural to omit it from the integrated agreement, the prior agreement is not discharged under the parol evidence rule and the integrated agreement is necessarily a partial integration and not a total integration.<sup>36</sup> In such a situation, the naturally-omitted agreement is often called a “collateral” agreement.<sup>37</sup> The natural-inclusion test is applied by

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32 See PERILLO, *supra* note 4, at 116. Of course, such an attempted modification might be unenforceable for other reasons, such as a lack of consideration or as contrary to a no-oral-modification clause.

33 RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (AM. LAW INST. 1981).

34 *Id.* cmt. b.

35 See *id.* § 216(2); see also PERILLO, *supra* note 4, at 116 (“Williston’s . . . rule states that when a term not found in the writing is offered into evidence by one of the parties and it would have been natural for the parties to have excluded that term from the writing, there is a partial integration with respect to that term; the term may be admitted into evidence if it does not contradict the writing.”).

36 RESTATEMENT (SECOND) OF CONTRACTS § 216(2) (AM. LAW INST. 1981).

37 McCormick, *supra* note 10, at 371. The idea of a collateral agreement not being discharged by a subsequent, integrated agreement gave rise to the so-called collateral-agreement test, but whether a prior agreement is collateral to the integrated agreement is simply a conclusion reached after applying the natural-inclusion test, and not itself a test. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 434 (5th ed. 2011) (“[T]o determine whether a particular extrinsic agreement was a collateral agreement, it is necessary to determine whether the parties ordinarily (naturally and normally) include such [an agreement] in the particular writing expressing their agreement. . . . If, however, they would not have naturally included such a matter in the writing, the extrinsic agreement is called ‘collateral’ and the evidence is admitted. . . . [Thus], the question of admissibility is determined by the ‘natural omission’ test and not by the label attached to the extrinsic agreement. . . . The so-called ‘collateral agreement’ test is not a test; it is a superfluous conclusory label attached after the critical natural omission test has been applied and the court has already determined whether the evidence should be admitted.”).

the court.<sup>38</sup> But if the parol evidence rule does not discharge the prior agreement, whether the prior agreement was actually made is an issue for the fact-finder.<sup>39</sup> With respect to the natural-inclusion test (also called the natural-omission test), there is disagreement as to whether an objective test (i.e., what reasonable parties similarly situated would have done) or a subjective test (i.e., what the parties actually intended) should be applied to determine if it would have been natural to include the prior agreement in the integrated agreement.<sup>40</sup>

## B. Rationales for the Parol Evidence Rule

Three different rationales have been provided for the parol evidence rule: an evidentiary function; a gatekeeping function; and a merger (or integration) function. Which of these can legitimately claim to be a basis for the rule is critical to determining whether the consideration exception undermines any of the parol evidence rule's purposes. Accordingly, each of the rationales is discussed below.

### 1. Evidentiary Function

One rationale, popularized by Professor Charles T. McCormick,<sup>41</sup> is that, like the Statute of Frauds, the parol evidence

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38 See RESTATEMENT (SECOND) OF CONTRACTS § 210(3) (AM. LAW INST. 1981) (“Whether an agreement is completely or partially integrated is to be determined by the court . . .”).

39 RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c (AM. LAW INST. 1981).

40 See PERILLO, *supra* note 4, at 116 (stating that under Williston’s test, “[t]he question of whether it was natural to exclude the proffered term is answered by the court’s conclusion of what reasonable parties similarly situated would naturally do with respect to the term. Williston’s rule was adopted by the First Restatement and became and probably still is the majority approach . . . . Corbin rejects Williston’s ‘reasonable person’ approach and is determined to search out the actual intention of the parties. The issue for Corbin is whether the parties actually agreed or intended that the writing was a total and complete statement of their agreement . . . . It is clear that Corbin’s approach undercuts the traditional parol evidence rule . . . . The trend is now in Corbin’s direction and will be accelerated by the Restatement (Second) which . . . has staked out a position similar to Corbin’s.”); see also McCormick, *supra* note 10, at 379 (stating that the natural-inclusion test is “aimed at abstract impersonal probabilities.”).

41 Professor McCormick was a prominent evidence scholar in the mid-twentieth century. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 370

rule performs an evidentiary function in that a written document is more reliable evidence of an agreement’s terms than oral testimony.<sup>42</sup> As Professor E. Allan Farnsworth acknowledged, parties reduce their agreements to written form “to provide trustworthy evidence of the fact and terms of their agreement and to avoid reliance on uncertain memory.”<sup>43</sup> Presumably, parties do not reduce their agreement to writing to simply supersede prior agreements. Under the evidentiary rationale, the parol evidence is more akin to a rule of evidence than a rule of substantive law.

Subsequent contract-law scholars have echoed McCormick’s argument. As stated by Professor Joseph M. Perillo, “[t]he policy behind the rule is to give the writing a preferred status so as to render it immune to perjured testimony and the risk of ‘uncertain testimony of slippery memory.’”<sup>44</sup> Chancellor John Edward Murray, Jr., noted, “[s]ince memories of oral understandings are fallible and subject to favorable or unfavorable (conscious or unconscious) recollection, the recorded evidence of the parties’ intention as a permanent record of their intention not subject to the vagaries of memory should prevail.”<sup>45</sup> And the *Restatement (Second) of Contracts* seemingly acknowledges the parol evidence rule’s evidentiary function: “The parties to an agreement often reduce all or part of it to writing . . . to provide reliable evidence of its making and its terms and to avoid trusting to uncertain memory. . . . In the interest of certainty and security of transactions, the law gives special effect to a writing . . . .”<sup>46</sup>

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(Roger K. Newman ed. 2009).

42 See McCormick, *supra* note 10; see also David E. Pierce, *Defining the Role of Industry Custom and Usage in Oil & Gas Litigation*, 57 SMU L. REV. 387, 469 (2004) (“Professor McCormick popularized the ‘evidentiary’ rationale for the parol evidence rule . . .”).

43 FARNSWORTH, *supra* note 27, at 415.

44 PERILLO, *supra* note 4, at 109 (quoting McCormick, *supra* note 10, at 366-67 & n.3).

45 MURRAY, *supra* note 37, at 418; see also JEFF FERRIELL, UNDERSTANDING CONTRACTS 335 (2d ed. 2009) (“Preventing the parties from introducing evidence beyond the terms of the written contract limits the parties’ opportunities to commit perjury. It also avoids the necessity of depending on fading and variable memories of the negotiations that led to the creation of the contract. Even scrupulously honest people have an uncanny ability to perceive events in a manner likely to serve their own interests.”).

46 RESTATEMENT (SECOND) OF CONTRACTS ch. 9, topic 3, intro. note (AM. LAW INST. 1981). See also Michael L. Closen & Charles N. Faerber, *The Case That There Is A Common Law Duty of Notaries Public to Create and Preserve Detailed Journal Records of Their Official Acts*, 42 J. MARSHALL L. REV. 231, 257-58 (2009)

McCormick acknowledged that the conditional-delivery exception to the parol evidence rule and the rule's inapplicability to an alleged subsequent oral modification weakened the argument that the rule has an evidentiary function, but he did not believe it eliminated it.<sup>47</sup> He argued that “[e]ach of these escapes from the writing presents difficulties to the one who attempts it, and, in any event, the fact that protection in some situations has not been perfect, does not disprove the desire to furnish it generally.”<sup>48</sup>

But for the parol evidence rule to perform an evidentiary function it must add to existing protections against unreliable evidence. For example, even without a parol evidence rule, “judges and juries have generally given greater weight to visual evidence (in the form of both writings and exhibits) than to oral evidence.”<sup>49</sup> As one commentator has explained:

People are fascinated by the real thing. The bullets that were found lodged in the victim's heart, the actual handwritten memorandum that was used to seal the agreement, the remains of the automobile gas tank that ruptured on impact burning the occupants of the car.

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(“The legal preference for evidence in the form of a writing over mere oral history or testimony is so well established that it rises to the level of a general standard of conduct. It is simply well founded in human experience that written instruments generated contemporaneously with an event (that is not subject to dispute until later) are more likely to be trusted than subsequent orally described recollections of the event, as the former represent fresh, unchanged and accurate impressions while the latter are subject to the vagaries of human memory. This attitude is reflected in a number of the law's earliest and longest-enduring evidentiary and substantive rules, including . . . the parol evidence rule . . . .”); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 122 (1987) (“It seems unlikely . . . that the [parol evidence] rule is completely untarnished by the desire to exclude unreliable testimony. While there are other reasons for giving primacy to written agreements, the rule is at least partly based upon the danger that jurors will overvalue testimony about oral agreements.”); Note, *Some Suggested Reforms in the Application of the Parol Evidence Rule to Insurance Contracts*, 47 HARV. L. REV. 1010, 1017 (1934) (“One of the most important practical purposes of the parol evidence rule is to . . . prevent proof of a contract by untrustworthy testimony.”).

47 McCormick, *supra* note 10, at 368 n.6.

48 *Id.*

49 Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 241 (1994).

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. . . Until we see something tangible, [the event] is something that did not happen, or at least did not happen to real people . . . .<sup>50</sup>

A judge could even instruct the jury regarding the weight to be given to different forms of evidence to help ensure that the jury does not give undue weight to oral testimony compared to written evidence.

How then does the parol evidence rule serve an evidentiary function in a way different from the typical fact-finder’s distrust of oral testimony compared to written evidence? For those who view the parol evidence rule as serving an evidentiary function, it does so by operating as a legal formality.<sup>51</sup> When conducting a parol evidence rule analysis, the court assumes that the prior agreement was made, and then determines whether the prior agreement is inconsistent with the integrated agreement or whether it would have been natural to include the prior agreement in the integrated agreement.<sup>52</sup> If the prior agreement is either inconsistent with the integrated agreement or it would have been natural to include it in the integrated agreement, a conclusive presumption arises that, contrary to the testimony of the proponent of the evidence, the prior agreement either never occurred as alleged or that the parties did not intend it to survive the integrated agreement (the proponent’s testimony to the contrary being either perjured, based on faulty memory, or an unreasonable interpretation of what transpired).<sup>53</sup>

The parol evidence rule test has the characteristics of a legal formality because it does not ask directly whether the prior

50 ASHLEY S. LIPSON, *ART OF ADVOCACY: DEMONSTRATIVE EVIDENCE* § 2.02 (1994).

51 See Kennedy, *supra* note 9, at 1691 (referring to the parol evidence rule as a legal formality); see also Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. Rev. 1726, 1743 (2008) (“A legal formality is a type of act, such as the utterance of special words or the production of a document in a certain form, that has no extralegal significance.”).

52 See RESTATEMENT (SECOND) OF CONTRACTS §§ 213(1)–(2) (AM. LAW INST. 1981).

53 See McCormick, *supra* note 10, at 369 (noting that the parol evidence rule is a device that used a formula to determine whether an agreement “is ‘conclusively presumed’ to embody the whole agreement”).

agreement existed (in fact it is assumed for purposes of the test that it did occur) or whether the parties intended it to be discharged by not including it in the integrated agreement. Rather, provided that an objective standard is applied, the natural-inclusion test is used as a proxy for determining whether the prior agreement existed or, if it did, whether the parties intended it to be superseded. This test is necessarily over-inclusive in that it will discharge some agreements that did exist and that were not intended to be superseded. (It will never be under-inclusive because it only discharges promises and agreements.) Accordingly, the prior agreement must pass an over-inclusive, preliminary credibility test before the issue of whether the agreement in fact existed and, if so, whether it was intended to be superseded by the integrated agreement, is submitted to the fact-finder for determination. As noted by McCormick, the parol evidence rule “enables the judge to head off the difficulty [of whether the prior agreement existed and, if so, whether the parties intended it to be superseded by the integrated agreement] at its source, not by professing to decide any question as to the credibility of the asserted oral variation, but by professing to exclude the evidence . . . altogether because forbidden by a mysterious legal ban.”<sup>54</sup>

If the objective standard essentially implements the reasonably-careful-person standard of negligence law,<sup>55</sup> the reasonably-careful person would usually incorporate prior agreements into an integrated agreement to ensure there was no dispute as to whether the agreement existed or whether it was superseded. Note that the reasonably-careful person “is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard.”<sup>56</sup> If one applied the Hand formula to determine how a reasonably-careful

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54 *Id.*

55 Under tort law, “[a] person acts negligently if the person does not exercise reasonable care under all the circumstances.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW INST. 2010). And “because a ‘reasonably careful person’ (or a ‘reasonably prudent person’) is one who acts with reasonable care, the ‘reasonable care’ standard for negligence [in tort law] is basically the same standard expressed in terms of the ‘reasonably careful person’ (or the ‘reasonably prudent person’).” *Id.* § 3 cmt. a.

56 W. PROSSER & W. KEETON, THE LAW OF TORTS 175 (5th ed. 1984).

person would behave under the circumstances,<sup>57</sup> the low cost of taking adequate precautions (ensuring that the agreement is included in the integrated agreement) would result in the parol evidence rule discharging many agreements that in fact existed and that were not intended to be superseded.<sup>58</sup>

The parol evidence rule operating as a legal formality was recognized by Professor Duncan Kennedy, who characterized it as a legal formality that “operate[s] through the contradiction of private intentions.”<sup>59</sup> Like other formalities, it “means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored” (what he termed the “sanction of nullity”).<sup>60</sup> Thus, if the parties fail to reduce a portion of their oral agreement to written form, yet reduce other portions to written form, the parol evidence rule might discharge those prior agreements even if such a result is contrary to the parties’ intentions.

Interestingly, the parol evidence rule applies the same test as a proxy for answering two different questions: whether the prior agreement existed and, if it did, whether the parties intended to supersede it with the integrated agreement. But the contradiction and the natural-inclusion tests do an acceptable job of addressing both questions. If the prior agreement is contradicted by the integrated agreement or it would have been natural to include the prior agreement in the integrated agreement, there is reason to doubt both the agreement’s existence and whether the parties intended it to survive the integrated agreement.

That the parol evidence rule performs the evidentiary function of form does not, however, answer the question of why such a legal formality is necessary. Why not simply decide whether the prior agreement existed and, if so, whether the parties intended it to be discharged by the subsequent agreement, particularly if fact-finders tend to favor tangible evidence? As noted by Professor Eric A. Posner,

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57 See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (setting forth a formula for determining whether a person’s conduct fell below the appropriate standard of care for purposes of determining negligence liability in tort).

58 See Daniel P. O’Gorman, *Contract Law and the Hand Formula*, 75 LA. L. REV. 127, 156 (2014) (discussing the Hand formula).

59 Kennedy, *supra* note 9, at 1691.

60 *Id.* at 1692.

a court could simply “[a]dmit extrinsic evidence, weigh it against the writing, and make an all-things-considered judgment.”<sup>61</sup>

The reason for the parol evidence rule to be cast as a legal formality is because the type of factual determinations involved are considered particularly subject to error. As noted by Professor Posner:

[N]egotiations that lead up to writings often involve give-and-take and take-back. A party might offer a particular term X and then retract it when it appears that the other party will not reciprocate by offering a term that the first party seeks. Courts that go back and look at the record of negotiations—often relying on the parties’ fallible memories—might mistakenly believe that term X was agreed to as part of the contract. The parol evidence rule . . . reflects doubts about judicial ability to understand the record of the negotiations.<sup>62</sup>

In fact, parties presumably reduce their agreements to writing to avoid unpredictable fact-finding by a court or jury.

But the cure might be worse than the disease. After all, legal formalities result in determinations contrary to the parties’ intentions, and thus the question arises as to why it is better to err on the side of under-enforcement of prior agreements rather than over-enforcement. Why is it worse to enforce agreements that never existed than to not enforce agreements that did? Either way there will be an error rate. Also, the test likely results in an error rate in favor of sophisticated parties, who are more likely to know about the parol evidence rule.

The answer is that the parol evidence rule’s purpose of avoiding erroneous findings that an agreement had been made is considered essential to the stability of contracts, particularly business contracts, enabling parties to more accurately determine their rights and duties. As stated by one court:

Without the rule there would be no assurance of the enforceability of the written contract. If such assurance were removed today from our law, general disaster would result, because of the consequent destruction

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61 ERIC A. POSNER, CONTRACT LAW AND THEORY 146 (2011).

62 *Id.*

of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts.<sup>63</sup>

As stated by Professor Perillo, “[t]he objective is to secure business stability.”<sup>64</sup> These benefits were further explained by a commentator as follows with respect to increasing the predictability of outcomes in lawsuits:

[C]onsider the parol evidence rule, a doctrine usually conceived as part of contract, but which, at its core, is an evidentiary rule incorporating an approach . . . which quells fighting among the parties. . . . By favoring documentary evidence over testimony and limiting the scope of the jury’s fact-finding responsibility, the rule eliminates considerable fighting among the parties and ousts any need for cross-examination over particularly fractious matters. Also, by making more certain the factual record with which both parties will have to work at trial, the rule eliminates the possibility that each party will interpret factual ambiguities in its favor while constructing his litigation strategy. This diminution in uncertainty, which cuts against advocates’ tendencies to overestimate the strength of their cases, is an important inducement to settlement.<sup>65</sup>

As stated by the New York Court of Appeals in the well-known case of *Mitchill v. Lath*, “[n]otwithstanding injustice here and there, on the whole it works for good.”<sup>66</sup>

Also, the idea is that once a legal formality becomes well known, parties will use it and the instances of injustice caused by the formality’s over-inclusiveness will be reduced. Legal formalities thus perform a “channeling function,” encouraging parties to adopt the required form.<sup>67</sup> For example, Professor Kennedy noted that the reason for ignoring the parties’ wishes when applying a legal formality “is to

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63 *Cargill Comm’n Co. v. Smartwood*, 198 N.W. 536, 538 (Minn. 1924).

64 PERILLO, *supra* note 4, at 109.

65 Rosen, *supra* note 13, at 1244-46.

66 *Mitchill v. Lath*, 160 N.E. 646, 647 (N.Y. 1928).

67 Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941).

force them to be self conscious and to express themselves clearly, not to influence the substantive choice about . . . what to contract for.”<sup>68</sup> Formalities “are supposed to help parties in communicating clearly to the judge which of various alternatives they want him to follow in dealing with disputes that may arise later in their relationship.”<sup>69</sup> Thus, all that parties need to do is incorporate their prior agreements into the integrated agreement, thereby communicating clearly to the judge that the agreement exists and that they intend for it to remain effective. Therefore, although the parol evidence rule, like the Statute of Frauds, causes erroneous determinations in some cases, the hope is that the overall error rate will be reduced as parties learn to include their entire agreement in the integrated agreement.

The parol evidence rule’s evidentiary function and its role as a legal formality cannot be easily ignored because this was the rule’s original purpose. Early English evidence law adopted a “best evidence” approach, “which encouraged production of only the most probative pieces of evidence.”<sup>70</sup> “For example, written evidence always prevailed over oral testimony, which was distrusted due to imperfect memory and omnipresent partiality, and, among documents, sealed records (official memorials of the courts and legislatures) were more reliable *by law* than unsealed records, and so on.”<sup>71</sup>

Sealed documents were considered the most reliable evidence, and therefore could not be varied by a prior unsealed written agreement or a prior oral agreement.<sup>72</sup> Thus, at the time there was no need for a parol evidence rule.<sup>73</sup> But when the Statute of Frauds was enacted in 1677, requiring that certain categories of contracts be evidenced by a writing signed by the defendant (even if not under seal), concern arose that the writing requirement would be rendered meaningless if the jury could consider extrinsic evidence.<sup>74</sup> Thus, it was soon held that oral evidence could not be introduced to vary writings used to satisfy the Statute of Frauds.<sup>75</sup> The idea that the writing was the contract then extended from unsealed writings required under the

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68 Kennedy, *supra* note 9, at 1692.

69 *Id.* at 1691.

70 Rosen, *supra* note 13, at 1244 n.473.

71 *Id.*

72 KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 88 (1990).

73 *Id.*

74 *Id.*

75 *Id.* at 88-89.

Statute of Frauds to all writings, and by the late seventeenth century a modern parol evidence rule took shape.<sup>76</sup> By the early eighteenth century the parol evidence rule appeared in legal treatises.<sup>77</sup>

The rationale for the rule was that the writing provided greater certainty,<sup>78</sup> and the parol evidence rule was consistent with not only a best-evidence approach, but the objective theory of contract, which was the cornerstone of classical contract law.<sup>79</sup> As stated by P.S. Atiyah:

[A] reason behind the extreme objective approach is to be found in the importance of principle. The classical contract lawyers assumed that if it was open to a man to deny that his apparent intent was his real intent, many cases might occur in which the Courts would *wrongly* accept such a defense. In order to exclude the possibility of such erroneous decisions being made, therefore, it was desirable to exclude the question from consideration altogether. This line of reasoning is seen perhaps most clearly in those cases in which the Courts laid down the parol evidence rule . . . . This rule . . . was emphatically affirmed in a case in 1842 . . . . Erskine J. expressed clearly the anxiety that opening the door to [extrinsic] evidence might simply lead to more erroneous than correct decisions. If the parol evidence rule were once weakened, he insisted, ‘every man’s will and intention, however expressed, would be liable to be defeated, not, as now sometimes the case, by his own defective expression of that will, but contrary to his own plainly declared intention.’<sup>80</sup>

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76 *Id.* at 89.

77 *Id.* at 110 n.240.

78 *Id.*

79 See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1749 (2000) (“[C]lassical contract law doctrines lay almost wholly at the objective, standardized, and static poles, and also tended to be binary. In contrast, modern contract law employs substantive rather than formal reasoning, and pervasively (although not completely) consists of principles that are individualized, dynamic, multi-faceted, and, in appropriate cases, subjective.”).

80 P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 459-60 (1979) (quoting *Shore v. Wilson*, 9 Cl. & F. 514, 8 E.R. 513 (1842)); see also McCormick, *supra* note 10, at 367 n.3 (“Coke reports Popham, C.J., as saying, in the *Countess of Rutland’s* case: ‘Also it would be inconvenient that matters

The rule's evidentiary function is still referenced by courts.<sup>81</sup> Consider the following from a Missouri appellate court:

In Missouri, we state the parol evidence rule in classical terms. In the absence of fraud, accident, mistake, or duress, the parol evidence rule prohibits evidence of prior or contemporaneous oral agreements which vary or contradict the terms of an unambiguous, final and complete writing. We justify the rule on two basic, classical premises: (1) a written document is more reliable and accurate than fallible human memory, and (2) varying written terms by extrinsic oral evidence opens the door to perjury.<sup>82</sup>

A federal appellate court has also stated: "[T]he parol evidence rule both 'promotes the use of, and protects, written agreements; and it gives the trial judge a polite means of keeping *suspect oral evidence* from the jury.'"<sup>83</sup> And another court: "Underlying . . . the parol evidence rule . . . is the rationale that claims based upon *oral representations* are inherently unreliable."<sup>84</sup>

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in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.").

81 See *Demetree v. Commonwealth Trust Co.*, No. Civ. A. 14354, 1996 WL 494910, at \*4 (Del. Ch. Aug. 27, 1996) ("The theoretical underpinnings of the parol evidence rule are particularly applicable in cases such as this one where a very long period has passed since the execution of the contract, making oral testimony concerning expectations of the parties at the time potentially less reliable. See 32A C.J.S., EVIDENCE § 851, p. 216 (1964) (the parol evidence rule is founded on the maxim that 'written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to permit weaker evidence to control').").

82 *Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 811-12 (Mo. Ct. App. 1992).

83 *Intercorp, Inc. v. Pennzoil Co.*, 877 F.2d 1524, 1537 (11th Cir. 1989) (emphasis added) (quoting G. Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 654 (1979)).

84 *Cirillo v. Slomin's Inc.*, 768 N.Y.S.2d 759, 767 (N.Y. Sup. Ct. 2003) (emphasis added).

## 2. Gatekeeping Function

Professor McCormick also argued that the parole evidence rule was based on distrust of the jury.<sup>85</sup> He asserted that the proponent of the extrinsic agreement was often the economic underdog and among the “have nots,” and the opponent of the prior agreement often among the “haves.”<sup>86</sup> He thus believed that “[t]he average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by enforcement of the writing.”<sup>87</sup>

McCormick considered oral testimony inherently unreliable because of the passage of time and the conscious or unconscious bias of the party testifying about the oral agreement, and that it was doubtful whether a jury was likely to take sufficient account of this unreliability.<sup>88</sup> Also, upon concluding that a prior, oral agreement existed, it would be even more difficult for a jury to conclude that the parties intended the integrated agreement to supersede the prior, oral agreement.<sup>89</sup> The danger was heightened by the jury being untrained, and “a body numerous enough to invite emotional organ-playing by counsel.”<sup>90</sup> McCormick argued that “[f]rom all these sources springs grave danger that honest expectations, based upon carefully considered written transactions, may be defeated through the sympathetic, if not credulous, acceptance by juries of fabricated or wish-born oral agreements.”<sup>91</sup>

In contrast to juries, McCormick believed that

[t]he danger of undermining confidence in written bargains is one which can be appreciated by a trial judge, who looks back on many similar cases and is trained to take a long view. Moreover, he is likely . . . to discount testimony for the warping of self-interest. The jury, on the other hand, is likely to pass over these

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85 See McCormick, *supra* note 10, at 366.

86 *Id.*

87 *Id.*

88 *Id.* at 366-67.

89 *Id.* at 367.

90 *Id.* at 368.

91 *Id.* at 367.

considerations in its urge of sympathy for a party whom the shoe of the written contract pinches.<sup>92</sup>

Thus, McCormick maintained “[t]hat the parol evidence rule chiefly stems from an anxiety to protect written bargains from re-writing by juries . . . .”<sup>93</sup> By creating a rule to be applied by the court, the court can play a gatekeeping function, ensuring that the prior agreement passes a court-imposed test prior to being submitted to the jury, who, only then, would be permitted to determine whether the agreement was actually made.

Of course, whether the prior agreement was actually made, and, if so, whether the parties intended it to be superseded by the integrated agreement, could itself have simply been made an issue for the judge rather than the jury, but this was precluded by the notion that the jury was a “symbol of political liberty.”<sup>94</sup>

Forbidden this straight path by their own preconceptions, by a zig-zag route [the courts] came out near the same goal. The approach was made through doctrinal devices which gave no hint of any departure from the usual division of functions between judge and jury, but which were subtly convenient for jury control in cases where written transactions were threatened by claims of agreed oral variations not credited by the judge.<sup>95</sup>

In other words, a test was created where little or no fact-finding would be performed by the court.

The gatekeeping function cannot fully explain, however, the parol evidence rule. For example, while Professor Arthur L. Corbin

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92 *Id.* at 367-68.

93 *Id.* at 368 n.6.

94 *Id.* at 368-69.

95 *Id.* at 369. McCormick argues that phrasing the question as whether the prior, oral agreement was “collateral” to the integrated agreement provided further facial support for the issue being for the court: “The word [*collateral*], through long usage in other connections, had acquired a rich patina of technical legalism. Consequently, it would not occur to any one to suggest the submission to a jury of the question whether an alleged oral warranty by a landlord (at the time of making a written lease) that the drains of the house were in good order, was ‘collateral’ to the lease.” *Id.* at 371.

acknowledged that there might be truth to McCormick’s argument when the rule is applied in jury cases, he was quick to point out that the rule also applied in bench trials.<sup>96</sup> But this can be explained by a desire to have the rule protect against the possibility that judges will also be sympathetic to the economic underdog. In any event, “the pervasive attitude that judges provide the best protection against perjured testimony probably has been the reason for [the rule’s] continued viability.”<sup>97</sup>

### 3. Merger (or Integration) Function

A third rationale for the parol evidence rule is that “the offered term is excluded because it has been superseded by the writing, that is, it was not intended to survive the writing—a theory of merger [or integration].”<sup>98</sup> This theory was pioneered by Professor James Bradley Thayer in the late nineteenth century<sup>99</sup> and later supported by his former student John Henry Wigmore in the early twentieth century.<sup>100</sup> “Viewed in this way, the rule simply affirms the primacy of a subsequent agreement over prior negotiations and even over prior agreements.”<sup>101</sup> Professor Michael B. Metzger explained the merger rationale as follows:

Under this view, the parol evidence rule is nothing more than a particularized version of the basic

96 Corbin, *supra* note 11, at 609.

97 Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?*, 36 VAND. L. REV. 1383, 1387 (1983).

98 PERILLO, *supra* note 4, at 109; *see also* McCormick, *supra* note 10, at 374 (referring to the rationale as “the theory of ‘integration’”).

99 JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 409 (1898). Thayer was a professor at Harvard Law School in the late nineteenth century, and his book *A Preliminary Treatise on Evidence at the Common Law* was a meticulous historical study on the roots of evidence. Newman, *supra* note 41, at 540.

100 WIGMORE, EVIDENCE c. 86 (2d ed. 1923). Wigmore was a professor at Northwestern University Law School in the late nineteenth and early twentieth centuries, and the leading evidence scholar in the first half of the twentieth century. Newman, *supra* note 41, at 588. He served as the dean of the law school for 28 years. *Id.*

101 FARNSWORTH, *supra* note 27, at 418. *See also* Pierce, *supra* note 42, at 469 (“The most logical rationale for the parol evidence rule is the ‘merger’ concept that a subsequent integrated writing of the parties will discharge all prior oral or written agreements.”).

contractual interpretation rule which stipulates that later final expressions of intent prevail over earlier tentative expressions of intent. . . .

Under this view the primary purpose of the rule is to prevent courts from interpreting earlier, tentative agreements or negotiations as part of an integrated writing that the parties actually intended as the final expression of their agreement. Thus, according to this view the rule's justification is based upon the finality of the parties' written agreement. Courts exclude oral or written terms extraneous to such a writing *not because doubt exists concerning the terms' reliability*, but rather because the terms are irrelevant, since the parties superseded them in the final integrated writing.

This last view of the rule—the rule as insurer that the final expression of intent governs—seems to be currently in vogue.<sup>102</sup>

Importantly, Professor Corbin believed the merger rationale was the parol evidence rule's true basis:

Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract whether oral or written can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the 'parol evidence rule.'<sup>103</sup>

Later, Professor Farnsworth agreed that “[i]t is this purpose that the parol evidence rule ought to serve—giving legal effect to whatever intention the parties may have had to make their writing a complete expression of the agreement that they reached, to the exclusion of all

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102 Metzger, *supra* note 97, at 1389-90 (footnotes omitted) (emphasis added).

103 Corbin, *supra* note 11, at 607.

prior negotiations, whether oral or written.”<sup>104</sup> He agreed with Corbin that the “the true basis of the parol evidence rule is something other than a desire to keep from the jury an inherently unreliable type of evidence.”<sup>105</sup>

The merger rationale is supported by the fact that the parol evidence rule applies to prior *written* evidence in addition to prior oral evidence;<sup>106</sup> there is no special rule precluding the admissibility of an oral modification of a written contract;<sup>107</sup> and the rule is considered a rule of substantive law, not a rule of evidence.<sup>108</sup>

If the merger theory is accepted, the parol evidence rule analysis becomes not much different from determining whether a subsequent oral agreement supersedes a prior oral or written agreement.<sup>109</sup> There remain, however, important differences. The parol evidence rule might still operate as an over-inclusive legal formality. For example, the use of the contradiction and natural-inclusion tests as a proxy for determining whether merger was intended results in a test different from that employed when deciding whether an oral agreement supersedes a prior written agreement, at least if an objective natural-inclusion standard is used. Of course, if a subjective standard is used any difference would seem to disappear, except that the issue remains one for the court, not the jury.

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104 FARNSWORTH, *supra* note 27, at 418.

105 *Id.* at 417.

106 MURRAY, *supra* note 37, at 418; *see also* FARNSWORTH, *supra* note 27, at 416 (“That the rule is not limited to oral negotiations is clear. A host of cases have applied the so-called parol evidence rule to exclude such writings as letters, telegrams, memoranda, and preliminary drafts exchanged by the parties before execution of a final written agreement.”).

107 Corbin, *supra* note 11, at 609.

108 FARNSWORTH, *supra* note 27, at 417.

109 McCormick, *supra* note 10, at 374. *See also* MURRAY, *supra* note 37, at 417-18 (“Where the subsequent agreement is oral, the question is simply whether the parties intended the subsequent expression to control the earlier expression of agreement. Courts have no difficulty analyzing that question in the usual fashion of whether the subsequent agreement was so intended by the parties. They so do without mentioning the parol evidence rule. An oral subsequent agreement may constitute a final and complete expression of the parties’ intended agreement.”); RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b (AM. LAW INST. 1981) (“Indeed, the parties to an oral agreement may choose their words with such explicit precision and completeness that the same legal consequences follow as where there is a completely integrated agreement.”).

Whether the merger theory has been widely accepted is a matter of contention. Chancellor Murray maintained that Corbin's view has not been accepted by the courts or the *Restatement (Second) of Contracts*, though it influenced the *Restatement*.<sup>110</sup> In contrast, Farnsworth argued that while "[t]he view that the rule is evidentiary in purpose once had currency . . . [n]ow the conceit that the parol evidence rule is rooted in the relative unreliability of testimony based on 'slippery memory,' in contrast with the 'certain truth' afforded by a writing, has fallen from favor."<sup>111</sup> Metzger, in the 1980s, likewise argued that the merger theory "seems to be currently in vogue."<sup>112</sup> Farnsworth acknowledged, however, that the evidentiary purpose "has not vanished entirely."<sup>113</sup>

#### 4. Conclusion Regarding the Rationales for the Parol Evidence Rule

Although the merger theory appears to be in vogue,<sup>114</sup> the evidentiary function and the gatekeeping function remain important justifications for the rule.<sup>115</sup> First, as previously discussed, the merger theory has not been widely accepted by the courts, and would likely be a surprise to practicing lawyers. In fact, courts continue to explain the rule in terms of the unreliability of parol evidence.<sup>116</sup> Second, most parol evidence rule issues involve whether the prior agreement was in fact made, not whether the parties intended the integrated agreement to supersede an acknowledged prior agreement.<sup>117</sup> Third, although aspects of the parol evidence rule weaken the evidentiary and gatekeeping rationales, rarely are the substantive bases for rules implemented perfectly. Also, there is no reason to believe that the rule is not justified by multiple bases, and that some aspects of the rule can only be explained by reference to one of the bases. Merely because a particular aspect of the rule can only be explained by one basis does not inevitably lead to the conclusion that the other bases do not play a role with respect to other aspects of the rule. Accordingly, the

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110 MURRAY, *supra* note 37, at 418.

111 FARNSWORTH, *supra* note 27, at 416.

112 Metzger, *supra* note 97, at 1389-90.

113 *Id.*

114 *Id.* at 1390.

115 *See id.* at 1391.

116 *Id.*

117 *Id.*

evidentiary and gatekeeping functions should be taken into account when applying the rule and its exceptions.

## II. The Preexisting Duty Rule

The preexisting duty rule provides that the promise to perform, or the performance of, a legal duty that is neither doubtful nor the subject of honest dispute is not consideration.<sup>118</sup> Thus, a promise to perform an existing contract duty is not consideration for a contract modification because the promisor is under a preexisting duty to perform as promised.<sup>119</sup> Rather, “a modification to an existing contract must be supported by consideration independent from that which was given in order to form the original contract.”<sup>120</sup>

The preexisting duty rule dates to the sixteenth century and was an outgrowth of the existing rule that a promise given in recognition of a past benefit was not consideration.<sup>121</sup> For example, in *Greenleaf v. Barker* a creditor promised to pay 20 shillings if the debtor would pay the 5 pounds owed by him.<sup>122</sup> The King’s Bench held that the creditor’s promise was unenforceable because the debtor in exchange promised no more than the performance of his preexisting legal duty.<sup>123</sup> After some subsequent cases with contrary holdings, the preexisting duty rule was confirmed in *Stilk v. Myrick* in 1809, in which a ship captain’s promise to pay additional wages to sailors after two members of the crew deserted was held unenforceable.<sup>124</sup>

Two rationales have been provided for the preexisting duty rule. The first is formalistic, and “a logical consequence of the doctrine of consideration and its requirement of detriment . . . .”<sup>125</sup> Consideration for a promise has typically been described as something that is either

118 See RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981); PERILLO, *supra* note 4, at 162.

119 MURRAY, *supra* note 37, at 277.

120 Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 311 P3d 1285, 1288 (Wash. Ct. App. 2013).

121 TEEVEN, *supra* note 72, at 69.

122 *Greenleaf v. Barker*, 78 Eng. Rep. 449 (K.B. 1590), *reprinted in* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 403-04 (1949).

123 TEEVEN, *supra* note 72, at 69.

124 170 Eng. Rep. 1168 (1809). For a critical commentary on how the decision in *Stilk v. Myrick* became the “rule of *Stilk v. Myrick*,” see GRANT GILMORE, THE DEATH OF CONTRACT 22-28 (1974).

125 PERILLO, *supra* note 4, at 162.

a detriment to the promisee or a benefit to the promisor.<sup>126</sup> For example, the classic definition of consideration was provided by the English Exchequer Chamber in *Currie v. Misa* as follows: “A valuable consideration, in the sense of the law, may consist of either some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.”<sup>127</sup> Under the formalistic rationale, promising to perform, or the performance of, a preexisting duty might be a detriment to the promisor or a benefit to the promisee, but it is not a “legal detriment” or “legal benefit,” i.e., a detriment or benefit “in the sense of the law.”

The second rationale is practical: the preexisting duty rule polices against unfair pressure. Under this theory, without the preexisting duty rule

anyone who knows that the other party to the contract would face economic and other difficulties if the promisor refused to perform absent additional consideration would be able to exact an enforceable promise to pay additional consideration before performing his contractual duty. The pre-existing duty rule, therefore, provides an effective defense against such extorted promises.<sup>128</sup>

And “[b]ecause of the likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty, the promise does not have the presumptive social utility normally found in a bargain.”<sup>129</sup> “And the lack of social utility in such bargains provides what modern justification there is for the rule that performance of a contractual duty is not consideration for [the] new promise.”<sup>130</sup>

For example, in *Alaska Packers Association v. Domenico*, salmon fishermen sued their former employer for additional wages promised by the employer.<sup>131</sup> The fishermen, after arriving in Alaska, had refused to work unless paid more wages than agreed to between the

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126 FARNSWORTH, *supra* note 27, at 47.

127 [1875] LR 10 Ex. 153, 162 (Eng.).

128 MURRAY, *supra* note 37, at 277.

129 RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (AM. LAW INST. 1981).

130 *Id.* cmt. c.

131 *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 100 (9th Cir. 1902).

parties.<sup>132</sup> The employer, unable to obtain replacement workers on such short notice and in such a remote location, ultimately acceded to the fishermen’s demand and promised to pay the additional wages.<sup>133</sup> After the salmon season ended, the fishermen demanded the additional wages but the employer refused to pay.<sup>134</sup> The fishermen sued, but the court, not having to address the issue of duress, held that the promise was unenforceable because of the preexisting duty rule: “Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the [fishermen’s] agreement to render the exact services, and none other, that they were already under contract to render.”<sup>135</sup>

This rationale treats the preexisting duty rule as just that, a “rule,” rather than a standard,<sup>136</sup> in that the rule “renders unnecessary any inquiry into the existence of such an invalidating cause, and denies enforcement to some promises which would otherwise be valid.”<sup>137</sup> Accordingly, it creates a conclusive presumption of extortion based simply on the likelihood of extortion. The pre-existing duty rule has therefore been criticized because it applies even when the modification is made in good faith and not because of wrongful pressure.<sup>138</sup>

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132 *Id.* at 100-01.

133 *Id.* at 101.

134 *Id.*

135 *Id.* at 102.

136 *See MindGames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) (“A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard’s rationale. A speed limit is a rule; negligence is a standard.”); Kennedy, *supra* note 9, at 1687-94 (discussing the distinction between rules and standards).

137 RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (AM. LAW INST. 1981).

138 MURRAY, *supra* note 37, at 278-79; *see also* FARNSWORTH, *supra* note 27, at 270 (“Courts have become increasingly hostile to the pre-existing duty rule. . . . Although it serves in some instances to give relief to a promisor that has been subjected to overreaching, it serves in other instances to frustrate the expectations of a promisee that has fairly negotiated a modification. It does not, for example, distinguish between the situation in which the contractor’s demand for more money is motivated merely by opportunism and greed and the situation in which the demand is prompted by the discovery of circumstances or the occurrence of events that makes the contractor’s performance much more burdensome.”); RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt.

For example, in *Levine v. Blumenthal*, the plaintiff leased to the defendants premises for the operation of a retail clothing store.<sup>139</sup> The defendants alleged that during the lease term they informed the plaintiff that it was impossible for them to pay the increased rent required for the second year of the lease term because their business was suffering, and the plaintiff agreed to not increase it until their business improved.<sup>140</sup> When the lease term expired without the defendants exercising an option to renew, the plaintiff sued the defendants for the additional rent that had not been paid.<sup>141</sup> The court held that the plaintiff's promise to accept reduced rent, even if made, was unenforceable because it lacked consideration:

It is elementary that the subsequent agreement, to impose the obligation of a contract, must rest upon a new and independent consideration. . . . The principle is firmly imbedded in our jurisprudence that a promise to do what the promisor is already legally bound to do is an unreal consideration. It has been criticized, at least in some of its special applications, as 'mediaeval' and wholly artificial—one that operates to defeat the 'reasonable bargains of business men.' But these strictures are not well grounded. They reject the basic principle that a consideration, to support a contract, consists either of a benefit to the promisor or a detriment to the promisee—a doctrine that has always been fundamental in our conception of consideration. It is a principle, almost universally accepted, that an act or forbearance required by a legal duty owing to the promisor that is neither doubtful nor the subject of honest and reasonable dispute is not a sufficient consideration. . . .

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c (AM. LAW INST. 1981) (“[T]he rule has not been limited to cases where there was a possibility of unfair pressure, and it has [therefore] been much criticized as resting on scholastic logic.”).

139 *Levine v. Blumenthal*, 186 A. 457, 457 (N.J. 1936), *aff'd*, 189 A. 54 (N.J. Ct. Err. & App. 1937).

140 *Id.* at 457.

141 *Id.* at 457-58.

So tested, the secondary agreement at issue is not supported by a valid consideration; and it therefore created no legal obligation. General economic adversity, however disastrous it may be in its individual consequences, is never a warrant for judicial abrogation of this primary principle of the law of contracts.<sup>142</sup>

Thus, the absence of wrongful pressure was irrelevant; the lack of new consideration meant the modification was not binding.

As a result of criticism, the preexisting duty rule has been subject to a variety of exceptions. For example, under Article 2 of the U.C.C. a modification involving a transaction in goods does not require consideration to be enforceable.<sup>143</sup> Rather, the modification need only meet the test of good faith.<sup>144</sup> Thus, the question of extortion is addressed directly, rather than through a prophylactic rule such as the preexisting duty rule. Also, the preexisting duty rule does not apply if the legal duty is either doubtful or the subject of honest dispute.<sup>145</sup> Further, if the asserted preexisting duty is voidable or unenforceable the person is not considered under a duty to perform.<sup>146</sup> Thus, if the parties enter into a voidable contract, a subsequent modification that is favorable to just one party, and that is not voidable, is binding despite the preexisting duty rule.<sup>147</sup> Similarly, if an oral agreement is unenforceable under the Statute of Frauds, a subsequent written modification that is favorable to just one party is binding despite the preexisting duty rule. Detrimental reliance on a modification that lacks consideration could also make the modification binding under the doctrine of promissory estoppel.<sup>148</sup> Further, under the so-called unanticipated-circumstances doctrine, “[a] promise modifying a duty under a contract not fully performed on either side is binding . . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . .”<sup>149</sup>

142 *Id.* at 458-59.

143 U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM’N 2012).

144 *Id.* cmt. 2.

145 RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981).

146 *Id.* cmt. e.

147 *Id.* cmt. e, illus. 13.

148 *See id.* § 90(1).

149 *Id.* § 89. If the court in *Levine v. Blumenthal*, 186 A. 457, 457 (N.J. 1936), *aff’d*, 189 A. 54 (N.J. Ct. Err. & App. 1937), had applied the unanticipated-circumstances doctrine, the outcome would likely have been different.

### III. The Clash of Titans: The Parol Evidence Rule vs. the Preexisting Duty Rule

There are two different fact patterns in which a parol evidence rule issue arises. The first is when the parties' only manifestation of assent to an agreement is upon assent to the integrated agreement. For example, the parties might agree at the outset of negotiations that a binding agreement will not exist unless and until their agreement is reduced to a written document signed by both parties. In such a situation, only the parol evidence rule is implicated. The preexisting duty rule is not implicated because, lacking a prior agreement, there was no preexisting duty at the time the parties manifested assent to the integrated agreement (at least not stemming from a prior agreement).

The second is when the parties manifest assent to a binding agreement (oral or written) and thereafter confirm the agreement in an integrated agreement, but the integrated agreement is not accurate in all respects. In this situation, the *Restatement (Second) of Contracts* treats the confirmation as an offer of substituted terms and the offeree's manifestation of assent to the written confirmation as an acceptance of those terms.<sup>150</sup> In this situation, not only is the parol evidence rule implicated, but the preexisting duty rule as well, provided that one of the parties alleges that the integrated agreement did not include any new consideration.

A difficulty is distinguishing between these two situations, particularly when the alleged prior agreement is oral. Often, it will be unclear whether preliminary, oral negotiations rose to the level of an oral contract, or whether the first manifestation of assent was when the agreement was reduced to written form. The difficulty might arise either from conflicting testimony or from determining, even if the facts are undisputed, when the parties' negotiations rose from preliminary negotiations to an oral contract.

In general, it will not be difficult for a party to assert facts that, if believed, could lead a reasonable fact-finder to conclude that an oral agreement was formed prior to the integrated agreement. And because the parol evidence rule only applies if the integrated agreement is binding,<sup>151</sup> and thus does not prevent the use of extrinsic evidence

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150 RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b, illus. 2 (AM. LAW INST. 1981).

151 *Id.* §§ 213(1)–(2).

to establish that the integrated agreement lacks consideration, the parol evidence rule would not apply when the integrated agreement is alleged to be a one-sided modification of a prior oral agreement. In other words, the consideration exception provides that, in general, the preexisting duty rule prevails over the parol evidence rule in this clash of titans.

Accordingly, if a plaintiff sues for the breach of a promise that was not included in an integrated agreement to which the parties subsequently manifested assent, the parol evidence rule would not apply if the plaintiff alleges that the parties formed an enforceable oral contract prior to the integrated agreement and that the only difference between the two is the omission from the integrated agreement of the promise sued upon. Because the court, when applying the parol evidence rule, must assume the existence of the prior promise or agreement, the court cannot apply the parol evidence rule since, as a result of the assumption, the integrated agreement is considered non-binding under the preexisting duty rule. The proponent of the extrinsic agreement avoids application of the contradiction test and the natural-inclusion test and the agreement’s existence is submitted to the fact-finder for determination. Of course, “slight variations of circumstance are commonly held to take a case out of the [preexisting duty] rule,”<sup>152</sup> but the new performance must in fact be bargained for.<sup>153</sup> Thus, at least in the case of a prior oral agreement, the defendant could argue that it manifested assent to the integrated agreement in exchange for the modification (an exchange of written evidence of the deal for the modification), but evidence of an actual bargain of this nature would be necessary.

The *Restatement (First) of Contracts* provided the following illustration of the consideration exception to the parol evidence rule based on the preexisting duty rule:

A and B make an integrated agreement by which A promises to complete an unfinished building according to certain plans and specifications, and B promises to pay A \$2000 for so doing. It may be shown that by a contract made previously A had promised to erect and complete the building for \$10,000; that he had not fully completed it though paid the whole price.

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152 *Id.* § 73 cmt. c.

153 *Id.* cmt. a.

This evidence is admissible because it establishes that there is not sufficient consideration for the new agreement, since A is promising no more than he is bound by his original contract to perform.<sup>154</sup>

This illustration was used as support in *Guaranty Trust Co. of N.Y. v. Williamsport Wire Rope Co.*<sup>155</sup> In *Williamsport Wire* the trustees of a corporation in receivership (Lycoming Trust Co.) sold what they believed were the corporation's only remaining assets for \$30 at an auction on September 17, 1952.<sup>156</sup> Around ten days later the trustees signed a general assignment in the buyer's favor covering all the corporation's remaining claims.<sup>157</sup>

Six years earlier, stockholders, former stockholders, and former bondholders of the Williamsport Wire Rope Co. had sued to set aside the sale of Williamsport's assets to Bethlehem Steel Co.<sup>158</sup> In January 1952 a special master had recommended that the sale be set aside and that Bethlehem restore to former stockholders whatever stock had been sold to Bethlehem after July 1936.<sup>159</sup> In December 1936 Lycoming had sold shares it owned in Williamsport Wire Rope Co. to Bethlehem, and when the court adopted the special master's report on October 14, 1952, Bethlehem paid \$6 million for distribution to the former Williamsport stockholders (including Lycoming).<sup>160</sup> Thus, Lycoming's assets became unexpectedly greater than either the liquidating trustees or the buyer had believed at the time of the auction and the general assignment.<sup>161</sup>

The trustees and the buyer made conflicting claims to \$300,000 of the total amount deposited by Bethlehem for former stockholders.<sup>162</sup> The special master admitted over objection parol evidence to show that the general assignment was not intended to include the claim

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154 RESTATEMENT (FIRST) OF CONTRACTS § 238 cmt. a, illus. 2 (1932).

155 222 F.2d 416 (3d Cir. 1955).

156 *Id.* at 418.

157 *Id.*

158 *Id.* at 417.

159 *Id.* at 419; *Guar. Trust Co. of N.Y. v. Williamsport Wire Rope Co.*, 107 F. Supp. 759, 760 (M.D. Pa.), *vacated*, 107 F. Supp. 762 (M.D. Pa. 1952).

160 *Williamsport Wire*, 222 F.2d at 419.

161 *Id.* at 418.

162 *Id.* at 419.

against Bethlehem.<sup>163</sup> The special master recommended that the trustees prevail, and the district court ruled in their favor.<sup>164</sup>

On appeal, the issue was whether it was error to admit such parol evidence.<sup>165</sup> The court held that the parol evidence was admissible, among other reasons, to show that if the written assignment purported to assign more than had been previously agreed upon, the written assignment lacked consideration:

Parol evidence is also admissible to establish the failure of consideration. Restatement, Contracts, Sec. 238, Illustration 2 (1938). Here the appellant had already agreed to pay \$30 for the assignment and transfer of the items on the list in the sheriff’s office. The sale was completed on September 17, 1952.

‘A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner.’ Pa.Stat.Ann. tit. 69, § 161 (1931).

Only afterward, possibly more than ten days afterward, was the idea of a general assignment put forth by appellant as something it wanted in addition to the rubber stamp endorsements. Since \$30 constituted the consideration only for the items on the list referred to in the advertisement, the general assignment, if it did attempt to give appellant more than what was on the list, was without consideration and must accordingly fall.<sup>166</sup>

Thereafter, the *Restatement (Second) of Contracts*, published in 1981, included three illustrations involving the parol evidence rule and the preexisting duty rule. The first is notable because it involved a prior *oral* agreement that was not discharged because the subsequent integrated agreement was a modification without consideration, showing that the consideration exception applies even

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163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* at 420-21.

when the parol evidence rule's evidentiary function is implicated.<sup>167</sup> The second illustration involved an integrated modification induced by an agreement not incorporated into the integration, showing that if the parol evidence rule discharges the inducing agreement thereby causing the modification to be a non-binding modification due to lack of consideration (the new consideration having been the inducing agreement), the integration is non-binding even though the prior agreement would have been part of the integrated agreement (thereby supplying consideration) had it not been discharged by the parol evidence rule.<sup>168</sup> The third illustration was based on the *Restatement (First)*'s illustration.<sup>169</sup> The comment also stated that "[t]he circumstance may . . . show an agreement to discharge a prior agreement without regard to whether the integrated agreement is binding, and such an agreement may be effective."<sup>170</sup>

A recent example of a court relying on the *Restatement (Second)* and using the consideration exception to circumvent the parol evidence rule is *Audubon Indemnity Co. v. Custom Site-Prep, Inc.*<sup>171</sup> In *Audubon* the issue was whether an indemnification agreement in a written subcontract agreement, under which the subcontractor promised to indemnify the general contractor, was binding.<sup>172</sup> One of the subcontractor's defenses to the indemnification agreement was that it lacked consideration.<sup>173</sup> Consistent with their past practices, the subcontractor and the general contractor had operated on the project pursuant to an oral agreement and did not have a written contract until after the subcontractor performed the work on the

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167 RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. d, illus. 5 (AM. LAW INST. 1981).

168 *Id.* cmt. d, illus. 6. The illustration was in support of the following statements in the comment: "[A]n integrated agreement may be effective to render inoperative an oral term which would have been part of the agreement if it had not been integrated. The integrated agreement may then be without consideration, even though the inoperative term would have furnished consideration." *Id.* cmt. d.

169 *Id.* § 214 cmt. c, illus. 5. See also *id.* § 214 cmt. c, reporter's note ("Illustrations 5 and 6 are based on Illustrations 2 and 3 to former § 238.").

170 *Id.* § 213 cmt. d.

171 358 S.W.3d 309 (Tex. Ct. App. 2011).

172 *Id.* at 312.

173 *Id.* at 313.

project.<sup>174</sup> The general contractor and the subcontractor had not discussed indemnification at the time of the oral contract.<sup>175</sup>

After the work was completed, the subcontractor sent an invoice to the general contractor and the general contractor cut a check for the amount invoiced.<sup>176</sup> But before tendering the check, the general contractor signed and sent a written “subcontract agreement” to the subcontractor under which the subcontractor promised to perform the work (already performed), and also promised to indemnify the general contractor for any claims based on the subcontractor’s work.<sup>177</sup> The written agreement included a merger clause.<sup>178</sup> The parties testified that the general contractor typically required the subcontractor to sign a written, form subcontract agreement before the general contractor paid for the work and that they were typically signed after the work was completed.<sup>179</sup> The subcontractor signed the written agreement.<sup>180</sup>

Thereafter, the project owner sued the general contractor based on the subcontractor’s negligence, and the trial court ordered the dispute to arbitration.<sup>181</sup> The arbitrator found in favor of the owner, and the general contractor’s insurance carrier paid the award.<sup>182</sup> The insurance carrier then sued the subcontractor for contractual indemnity under the subcontract agreement’s indemnification provision.<sup>183</sup>

The subcontractor argued that the indemnification agreement was unenforceable because it lacked consideration, the subcontractor having fully performed at the time it was signed and the parties never having discussed indemnification at the time of the oral contract.<sup>184</sup> In response, the insurance carrier argued that the subcontractor’s lack of consideration defense was barred by the parol evidence rule.<sup>185</sup> If the parol evidence rule applied, the insurance carrier would

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174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 314.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* at 315, 318.

185 *Id.* at 315.

prevail because a lack of an indemnification agreement in the oral agreement would obviously conflict with the integrated agreement's indemnification provision.<sup>186</sup> The insurance carrier also argued that signing an indemnification agreement was an implied term of the oral contract.<sup>187</sup>

The appellate court rejected the insurance carrier's parol evidence rule argument, holding that a court may consider parol evidence to show a lack of consideration, citing to, among other authority, the *Restatement (Second) of Contracts*.<sup>188</sup> The court also held that parol evidence was admissible to determine whether the integrated agreement was the only agreement (simply memorializing the prior oral agreement) or whether it was a modification of a prior oral contract thereby needing independent consideration.<sup>189</sup> The court stated that "[i]f the terms of a subsequent written contract differ from what the parties intended in their original oral agreement—i.e., if the written contract modified the agreed upon terms—the written contract requires new consideration."<sup>190</sup>

Thus, as shown by *Williamsport Wire* and *Audubon Indemnity*, the parol evidence rule can be circumvented by an allegation that the integrated agreement was a one-sided modification of a prior oral contract. Having made such an allegation, the consideration exception applies, and the issue proceeds past the parol evidence rule and goes directly to the fact-finder to determine whether the prior oral contract was made and, if so, its scope. If the fact-finder concludes that the prior contract existed and that the integrated agreement was a one-sided modification, the integrated agreement is unenforceable under the preexisting duty rule.

It bears noting, however, that the consideration exception is inapplicable in a variety of situations. For example, if the agreement is considered a transaction in goods,<sup>191</sup> the preexisting duty rule and the consideration exception could not be used to circumvent the parol evidence rule because under the U.C.C. consideration is not

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186 See RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (AM. LAW INST. 1981) ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.").

187 *Audubon*, 358 S.W. 3d at 316.

188 *Id.*

189 *Id.* at 316-17.

190 *Id.*

191 See U.C.C. § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods . . .") (AM. LAW INST. & UNIF. LAW COMM'N 2012).

necessary for a contract modification.<sup>192</sup> Thus, because the U.C.C. retains the parol evidence rule,<sup>193</sup> yet discards the preexisting duty rule (at least with respect to contract modifications),<sup>194</sup> when the agreement is a transaction in goods the parol evidence rule trumps the preexisting duty rule.

Also, as previously discussed, if the prior agreement is voidable or unenforceable, the preexisting duty rule does not apply and the parol evidence rule trumps the preexisting duty rule. Thus, if the party who would ordinarily invoke the consideration exception happened to have contracted with a party who had the power to void the original contract (say, due to infancy), that party could no longer invoke the exception. The consideration exception would also not apply to oral agreements within the Statute of Frauds. For example, assume that in the well-known case of *Mitchill v. Lath* the buyer and seller had formed an oral contract for the sale of the parcel of land and the removal of the offensive icehouse before assenting to the integrated agreement.<sup>195</sup> This oral agreement would be unenforceable under the Statute of Frauds’ land-contract provision.<sup>196</sup> Even if the subsequent integrated agreement omitted the promise to remove the icehouse, with all other consideration remaining the same, the integrated agreement would be binding because the prior oral agreement was unenforceable. Thus, the consideration exception to the parol evidence rule would not apply.

While such results have the effect of reinforcing the parol evidence rule by narrowing the consideration exception, there is no logical connection between the cases in which it is narrowed and the rule’s purposes. Using the consideration exception for cases involving the preexisting duty rule (as opposed to say, showing that the recited consideration is a sham) results in a hodgepodge of disparate results driven by the finer points of the preexisting duty rule, rather than by the parol evidence rule’s evidentiary and gatekeeping purposes.

Interestingly, however, most courts and attorneys are likely unaware of this parol evidence rule loophole. For example, in *Petereit v. S.B. Thomas, Inc.*, the plaintiffs, who were distributors, sued the defendant manufacturer for breach of an oral contract under which

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192 *Id.* § 2-209(1).

193 *Id.* § 2-202.

194 *Id.* § 2-209(1).

195 *Mitchill v. Lath*, 160 N.E. 646, 646 (N.Y. 1928).

196 RESTATEMENT (SECOND) OF CONTRACTS § 125(1) (AM. LAW INST. 1981).

the defendant promised not to realign the plaintiffs' sales territories.<sup>197</sup> The district court, acting as fact-finder, found that the parties had formed an oral contract when, at a meeting, the defendant's representative laid out the terms of the proposed business relationship and the distributors then began delivering products within days of the meeting (and in some instances even before).<sup>198</sup> Consistent with the defendant's business practice, it sent letters to some of the plaintiffs shortly after the meeting or the commencement of the distributorship to confirm the terms previously agreed upon.<sup>199</sup> The letters, contrary to the oral agreement, noted that the distributor's territory was not permanently assigned.<sup>200</sup> The letters requested the distributor to contact the defendant if there were any questions or if the letter was unclear.<sup>201</sup>

On appeal, one of the issues was whether, under the parol evidence rule, the written confirmations were an integrated agreement that discharged the defendant's prior promise in the oral contract that it would not realign the plaintiffs' territories.<sup>202</sup> The appellate court acknowledged that "[s]ome, if not all, plaintiffs began their business relationship with defendant at a meeting with a [defendant] representative."<sup>203</sup> The court noted that at a typical meeting the defendant made an offer, and "[i]f the distributor accepted, nothing else needed to be done to have an enforceable contract."<sup>204</sup> Because the oral contracts were of an indefinite duration, the Statute of Frauds did not render them unenforceable under the Statute's one-year provision.<sup>205</sup> The court, however, held that the written confirmations, sent within a few days of the meeting or the effective date of the distributorship, were integrated agreements to which the plaintiffs manifested assent by not questioning the terms and by performing thereafter for many years.<sup>206</sup> As integrated agreements, the letters therefore discharged any prior inconsistent terms in the oral contract,

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197 *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1172-73 (2d Cir. 1995).

198 *Id.* at 1173.

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* at 1177.

203 *Id.* at 1176.

204 *Id.*

205 *Id.*

206 *Id.* at 1176-78.

thereby discharging the prior promise that the sales territories would not be altered.<sup>207</sup>

In reaching this conclusion, the court relied on the parol evidence rule’s evidentiary function, repeatedly referring to the preference for written agreements over prior *oral* agreements when discussing the rule. For example, the court stated that “[i]t is a cornerstone of contract law that written agreements hold a special place in the eyes of the law” and that evidence of a prior “unwritten” agreement should not have any effect on an integrated agreement.<sup>208</sup> The court noted that “to permit *oral testimony*, or prior or contemporaneous conversations, or circumstances, or usages [etc.], in order to . . . contradict what is written would be dangerous and unjust in the extreme.”<sup>209</sup> The court stated that permitting oral testimony in this case to contradict the written confirmations could lead to injustice:

Were we to hold otherwise, the recipient of a writing confirming the terms of a contemporaneous oral agreement could escape an unfavorable written provision that the recipient believes differs from the oral understanding simply by silence. The recipient could perform under the agreement and years later renounce the written terms of the contract to the surprise of the offeror. Such a rule would nullify the benefits of reducing an agreement to written form, and is one we decline to make.<sup>210</sup>

The court, however, never considered the parol evidence rule’s consideration exception, and whether the written confirmation, although an integrated agreement to which the parties manifested assent, was not “binding” under the preexisting duty rule. This is particularly surprising because the court treated the written confirmation as an offer and acceptance of substituted terms:

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207 *Id.* at 1179.

208 *Id.* at 1177.

209 *Id.* (quoting *TIE Communications, Inc. v. Kopp*, 589 A.2d 329, 333 (Conn. 1991) (quoting in turn *Glendale Woolen Co. v. The Protection Ins. Co.*, 21 Conn. 19, 37 (1851) (emphasis added) (alteration in original))).

210 *Id.* at 1178.

The logical outcome of the [parol evidence] rule is that when there is an oral agreement that one party reduces to a writing, the other party's assent to the writing, by words or conduct, even though a term of the writing differs from the oral understanding, is an acceptance of the substituted term . . . .

To the extent the writing differed from any oral understanding of the parties, it was a substitution of new terms.<sup>211</sup>

And although there was a dissenting opinion, it was based solely on the belief that the district court had made a factual finding that the plaintiffs had not manifested assent to the confirmation letters, not that the letters—even if integrated agreements—lacked consideration.<sup>212</sup>

#### IV. Closing the Loophole

When the parties manifest assent to an integrated agreement, and one of the parties disputes the existence or terms of the alleged prior agreement, permitting the proponent of the prior agreement to invoke the consideration exception based on the preexisting duty rule is a parol evidence rule loophole.<sup>213</sup> In such a situation, the consideration exception can be used as a means of escaping the parol evidence rule's evidentiary and gatekeeping functions. To avoid frustrating these purposes, the loophole should be closed.

Of course, applying the consideration exception in such a situation is consistent with the parol evidence rule's merger function. If the parol evidence rule were based solely on whether the parties

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211 *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b, illus. 2 (AM. LAW INST. 1981)).

212 *Id.* at 1187-88 (Kearse, J., dissenting). The court did not discuss whether the contract was governed by Article 2 of the U.C.C. If the U.C.C. governed, then the consideration exception would not apply because the U.C.C. does not require consideration for an effective modification. *See* U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

213 A *loophole* has been defined as “a means of escape; *esp*: an ambiguity or omission in the text through which the intent of a statute, contract, or obligation may be evaded.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 734 (11th ed. 2003).

intended the integrated agreement to supersede the prior agreement, such an intention is irrelevant if the integrated agreement is not binding under the preexisting duty rule. The preexisting duty rule is designed to prevent an agreement from being binding even when the parties intended it to supersede a prior agreement. Thus, under the merger rationale the preexisting duty rule would, and should, trump the parol evidence rule. The merger theorists would have no cause to complain, except to the extent they disliked the preexisting duty rule, another matter entirely.

But the use of the consideration exception in a situation involving the preexisting duty rule is inconsistent with the parol evidence rule’s evidentiary and gatekeeping functions. Under the evidentiary theory, the parol evidence rule is not designed to only protect against the enforcement of preliminary agreements that the parties intended to be superseded by the integrated agreement; it is designed to police against fraudulent and mistaken claims of a prior agreement. By failing to apply the parol evidence rule’s consistency test and natural-inclusion test in these situations, the rule’s evidentiary function of form is lost. Similarly, the rule’s gatekeeping function is lost, submitting the issue directly to the jury.

As discussed in Part I, the evidentiary and gatekeeping functions remain important justifications for the parol evidence rule. Accordingly, it is necessary to ensure that these functions are not frustrated by the use of the consideration exception in this fashion. At the same time, however, it is necessary to ensure that the preexisting duty rule’s purpose of policing against extorted modifications will not be frustrated. Essentially, there is a conflict between two over-inclusive rules, each of which should be accommodated to avoid frustrating their purposes. The question, of course, is how best to accommodate their competing purposes when the rules clash.

A possible solution would be to simply reject the consideration exception for situations involving the preexisting duty rule, and to therefore apply the parol evidence rule. If the prior agreement contradicts the integrated agreement or it would have been natural to include the alleged prior term within the integrated agreement, it is discharged, even if the integrated agreement is not supported by consideration under the preexisting duty rule. This would fully protect the parol evidence rule’s evidentiary and gatekeeping functions.

It would do so, however, at the expense of the preexisting duty rule’s policing function. In many cases there will be no dispute that a prior agreement was formed, and the only issue is whether the

integrated agreement was intended to supersede terms in the prior agreement that were not incorporated into the integrated agreement. In such a situation, the parol evidence rule's evidentiary function plays a more limited role, and the merger function is more strongly implicated. As previously discussed, even when the merger function is implicated, the parol evidence rule being cast as a legal formality still results in an over-inclusive test to determine intent to merge. Thus, simply because the merger function is more strongly implicated than the evidentiary function does not mean that the parol evidence rule is simply relegated to directly determining the parties' intentions.

But when the rule's merger function is more strongly implicated than its evidentiary function, the preexisting duty rule's countervailing extortion-policing function should be accounted for, because the merger function is in fact designed to implement the parties' intentions, even if in an over-inclusive way. And as previously discussed, the preexisting duty rule is designed to render an agreement unenforceable despite the parties' intentions that it be enforceable.<sup>214</sup> Accordingly, simply rejecting the consideration exception in cases involving the preexisting duty rule should be rejected.

This discussion, however, points the way to a solution. The solution is to be found in identifying the nature of the parol evidence rule dispute in a particular case: Are the parties disputing the existence of the prior agreement or its terms, or are they simply disputing whether the parties intended the prior agreement to be superseded by the integrated agreement? In other words, is the parol evidence rule's evidentiary function implicated or its merger function?

If there is a dispute about the existence of the prior agreement or its terms, a possible accommodation could be to require the plaintiff to prove the prior agreement by clear and convincing evidence, rather than by a preponderance of the evidence.<sup>215</sup> As noted by Professor Eric Posner, "courts sometimes impose higher evidentiary requirements . . . in order to maintain the spirit of the [parol evidence] rule."<sup>216</sup> For

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214 See *infra* Part II.

215 See *Parker v. Parker*, 238 A.2d 57, 61 (R.I. 1968) ("To verbalize the distinction between the differing degrees more precisely, proof by a 'preponderance of the evidence' means that a jury must believe that the facts asserted by the proponent are more probably true than false; proof 'beyond a reasonable doubt' means the facts asserted by the prosecution are almost certainly true; and proof by 'clear and convincing evidence' means that the jury must believe that the truth of the facts asserted by the proponent is highly probable.").

216 POSNER, *supra* note 61, at 149.

example, a party seeking to reform an integrated agreement because of a mistake in integration must establish the mistake by clear-and-convincing evidence so as not to frustrate the parol evidence rule’s purpose.<sup>217</sup> Similarly, for the Statute of Frauds’ multiple-documents exception to apply in the absence of explicit incorporation by reference, evidence of the connection between the documents must be clear and convincing.<sup>218</sup> Courts have also held that a party who relies on a lost document to satisfy the Statute of Frauds must prove the document’s contents by clear-and-convincing evidence.<sup>219</sup> And a similar recommendation for the parol evidence rule itself was proposed by Dean W. G. Hale, who argued that the rule should create a rebuttable presumption that an integrated agreement is complete, which could only be overcome by clear-and-convincing evidence.<sup>220</sup>

But under such a solution the fact-finder would likely need to be the jury. As previously discussed, to maintain the legitimacy of the parol evidence rule as an issue of law for the court, the court should not make factual findings. And if the jury, rather than the court, is the fact-finder, the parol evidence rule’s gatekeeping function will be frustrated.

A solution that would preserve the parol evidence rule’s evidentiary *and* gatekeeping functions would be to have the parol evidence rule apply when the evidentiary function is implicated but not when the merger function is implicated. A party, however, should not be permitted to invoke the parol evidence rule by simply denying the existence of the prior agreement. Rather, some minimal showing should be necessary to ensure that the parol evidence rule’s evidentiary function is truly implicated. As previously discussed, the court should (for the most part) not act as the fact-finder when resolving a parol evidence rule issue. Accordingly, the required showing by the defendant should not involve the court weighing the evidence and acting as a finder of fact.

The solution is to invoke the summary-judgment standard and determine whether there exists a genuine dispute of material

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217 RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. c. (AM. LAW INST. 1981).

218 *Id.* § 132 cmt. a.

219 *See, e.g.,* Weinsier v. Soffer, 358 So. 2d 61, 63 (Fla. Dist. Ct. App. 1978) (holding that proof of the contents of a lost document must be “clear, strong and unequivocal”).

220 W. G. Hale, *The Parol Evidence Rule*, 4 OR. L. REV. 91, 122 (1925).

fact.<sup>221</sup> The parol evidence rule's evidentiary function would thus only be implicated if the party seeking to invoke the parol evidence rule introduces sufficient evidence to enable a reasonable fact-finder to conclude that the prior agreement, as alleged by the opposing party, did not exist. Because the parol evidence rule is considered a substantive rule, and not a rule of evidence,<sup>222</sup> the court would apply the summary-judgment standard of the state whose law governs the dispute.<sup>223</sup> The burden of establishing that there is a genuine dispute regarding the prior agreement's existence should be placed on the party invoking the parol evidence rule because it is seeking to displace the consideration exception.

If the party invoking the parol evidence rule introduces admissible evidence creating a genuine dispute regarding whether the alleged prior agreement existed or regarding its terms, a presumption should arise that the parol evidence rule will apply, so that the rule's evidentiary and gatekeeping functions are preserved. If, however, the party invoking the rule does not create a genuine dispute, and only the merger function of the parol evidence rule is implicated, the consideration exception should apply (because the issue of intent to supersede does not trump the preexisting duty rule) and the undisputed prior agreement would be admissible to render the integrated agreement unenforceable under the preexisting duty rule.

But having the accommodation hinge solely on whether there is a genuine dispute of fact regarding the existence of the prior agreement might undercut the preexisting duty rule's function of policing for extortion. For example, the parol evidence rule might discharge a prior agreement and thus enforce the subsequent integrated agreement even though the subsequent agreement might have been a modification without consideration, which ordinarily raises the suspicion of extortion. Accordingly, further refinement

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221 See, e.g., FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

222 RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (AM. LAW INST. 1981).

223 State summary-judgment standards often differ from the federal standard. See JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 769 (2004) (discussing the differences).

is necessary to not sacrifice the preexisting duty rule’s extortion-policing function.

The appropriate refinement is to provide the proponent of the prior agreement with the opportunity to create a genuine dispute as to whether she manifested assent to the integrated agreement as a result of the other party’s wrongful refusal to perform the alleged prior agreement. If the proponent carries this burden, then the parol evidence rule would not apply and the fact-finder would decide whether the prior agreement existed, what its terms were (so as to determine if there was consideration for the integrated agreement), and whether the parties intended the subsequent integrated agreement to supersede the prior agreement. This refinement accommodates the preexisting duty rule’s extortion-policing function.

To show how this proposed solution works, we will return to the hypothetical involving the building and painting of the toolshed discussed in the Introduction.<sup>224</sup> The plaintiff sues a defendant for breach of the alleged prior agreement to paint the toolshed, a promise that was not incorporated into the integrated agreement, which only included a promise to build the toolshed. In response, the defendant argues that the prior agreement was discharged under the parol evidence rule because it would have been natural to include such a promise in the integrated agreement. In reply, the plaintiff alleges that the parties formed an oral agreement prior to the integrated agreement, and that the only difference between the alleged prior agreement and the integrated agreement is that the defendant’s promise to paint the toolshed was not included in the integrated agreement. The plaintiff argues that the integrated agreement was therefore an attempted modification that lacked consideration under the preexisting duty rule and is thus not binding.

Under existing law, because the court must assume the existence of the prior agreement as alleged by the plaintiff, and because of the consideration exception, the parol evidence rule would not apply (no “binding” integrated agreement) and the issue of the agreement’s existence and its terms would be submitted to the fact-finder for determination. Although the fact-finder might conclude, under a preponderance-of-the-evidence standard, that the prior agreement was not formed, or, if formed, that the integrated agreement included modifications favorable to both parties and was

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224 See *infra* Introduction.

intended to supersede the prior agreement (leading to a conclusion that the integrated agreement is a binding modification), the benefits of the parol evidence rule's evidentiary and gatekeeping functions are frustrated.

Under this Article's proposed approach, if the defendant introduced admissible evidence creating a genuine dispute of fact as to whether the prior agreement existed as alleged—such as by submitting an affidavit denying the alleged promise or so testifying in court—a presumption would arise that the parol evidence rule will apply, so that its evidentiary and gatekeeping functions are not frustrated. For example, the defendant might testify that he never promised the plaintiff that he would paint the toolshed. The plaintiff would then be given an opportunity to introduce admissible evidence creating a genuine issue of material fact as to whether the defendant threatened not to perform the original agreement unless the plaintiff agreed to the modification. If the plaintiff does so, then the parol evidence rule would not apply. For example, the plaintiff might testify that the defendant threatened to not build the toolshed unless she signed the integrated agreement.

Adopting this Article's solution would not threaten the parol evidence rule's general exception for admitting extrinsic evidence to support invalidating causes, such as illegality, fraud, duress, mistake, or sham consideration.<sup>225</sup> An integrated agreement is not designed to render evidence of such invalidating causes inadmissible, whereas the very purpose of an integrated agreement is to render inadmissible evidence of a prior agreement. Thus, the proposed solution is appropriately limited to the situation involving the consideration exception and the preexisting duty rule.

Let us now return to the facts of *Williamsport Wire*, *Audubon Indemnity*, and *Petereit* to analyze how the analysis would proceed under the facts of those cases. In *Williamsport Wire* there was no genuine dispute as to the scope of the parties' prior agreement; it was undisputed that the prior agreement did not include a claim for stock sold to Bethlehem.<sup>226</sup> Accordingly, the parol evidence rule's evidentiary function was not implicated, and it would be appropriate to apply the consideration exception and to admit the prior agreement.

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225 RESTATEMENT (SECOND) OF CONTRACTS § 214(d) (AM. LAW INST. 1981).

226 *Guar. Trust Co. of N.Y. v. Williamsport Wire Rope Co.*, 222 F.2d 416, 419-20 (3d Cir. 1955).

In *Audubon Indemnity*, however, there was a genuine dispute as to whether the parties had agreed, even if impliedly, as part of their oral agreement as to whether an indemnification agreement would be part of the deal. Accordingly, the insurance carrier would be able to create a genuine dispute regarding the terms of the prior oral agreement. Thus, a presumption would arise that the parol evidence rule applies. The subcontractor did not argue that it manifested assent to the integrated agreement as a result of wrongful pressure. Although the parties agreed that the general contractor typically required the subcontractor to sign a written agreement before being paid,<sup>227</sup> there was no allegation that the general contractor pressured the subcontractor to sign the written agreement, the subcontractor alleging that the general contractor told the subcontractor that it (the general contractor) needed a written document in its file relating to payment.<sup>228</sup> Accordingly, the parol evidence rule should have applied.

In *Petereit*, the defendant maintained that no specific territories had been assigned to distributors on a permanent basis.<sup>229</sup> Accordingly, there existed a genuine dispute as to whether there was an oral agreement for permanent territories, and the plaintiffs did not allege that they assented to the written confirmations as a result of a threat by the defendant to not perform the existing oral contract. Thus, the court was correct to apply the parol evidence rule.

## V. Conclusion

Applying the parol evidence rule’s consideration exception to a situation in which the proponent of extrinsic evidence alleges that an integrated agreement is not binding because it modifies a prior agreement and lacks consideration under the preexisting duty rule threatens the parol evidence rule’s evidentiary and gatekeeping functions. It is therefore a parol evidence rule loophole, and an accommodation between the parol evidence rule and the preexisting duty rule is necessary. The appropriate accommodation is to apply the parol evidence rule if the party seeking to invoke the rule creates a genuine dispute as to whether the prior agreement existed, unless the proponent of the extrinsic evidence creates a genuine dispute as to

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227 *Audubon Indem. Co. v. Custom Site-Prep, Inc.*, 358 S.W.2d 309, 314 (Tex. Ct. App. 2011).

228 *Id.*

229 *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1177 (2d Cir. 1995).

whether she manifested assent to the integrated agreement because the other party wrongfully threatened to breach the prior contract. Such an approach accommodates the parol evidence rule's evidentiary and gatekeeping functions and the preexisting duty rule's extortion-policing function.



## The Legal and Social Movement Against Unpaid Internships

David C. Yamada<sup>1</sup>

### Introduction

Until recently, the legal implications of unpaid internships provided by American employers have been something of a sleeping giant, especially on the question of whether interns fall under minimum wage and overtime protections of the federal Fair Labor Standards Act<sup>2</sup> and state equivalents. This began to change in June 2013, when, in response to summary judgment motions in *Glatt v. Fox Searchlight Pictures, Inc.*, a U.S. federal district court held that two unpaid interns who worked on the production of the movies “Black Swan” and “500 Days of Summer” were owed back pay under federal and state wage and hour laws.<sup>3</sup> The court further certified a class action covering other interns on the production.<sup>4</sup> The decision triggered an abundance of media coverage and gave major public

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1 Professor of Law and Director, New Workplace Institute, Suffolk University Law School, Boston, MA. J.D., New York University School of Law. This Article grew out of my presentation at the March 2013 NORTHEASTERN UNIVERSITY LAW JOURNAL symposium on employee misclassification. By mutual agreement with the editors, we postponed publication of the article to allow for further resolution of legal developments concerning pending litigation relating to unpaid internships. I should acknowledge at the outset that my earlier scholarship on this topic (*see* note 8, *infra*) has led to my active *pro bono* support of the intern rights movement. Originally this was largely a behind-the-scenes role, including ongoing private and social media discussions with intern rights advocates, modest monetary contributions to non-profit initiatives addressing the intern economy, and continuing assessments of the legal and policy issues pertaining to internships. More recently, I also helped to draft and signed amicus briefs supporting the plaintiffs in *Glatt v. Fox Searchlight Pictures Inc.* and in *Xuedan Wang v. Hearst Corp.*, both of which are discussed in this Article. The public attention drawn to this topic has led to numerous media interviews as well.

2 29 U.S.C. §§ 206-207 (2012).

3 *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 521-52 (S.D.N.Y. 2013), *reconsidered in part by* No. 11 Civ. 6784(WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *vacated and remanded by* 791 F.3d 376 (2d Cir. 2015), *amended and superseded by* 811 F.3d 528 (2d Cir. 2016).

4 *Id.* at 522.

visibility to a burgeoning intern rights movement that had already been gaining momentum.<sup>5</sup>

In 2015, however, the U.S. Court of Appeals for the Second Circuit vacated the District Court's decision in the *Glatt* case and imposed a more pro-employer legal test for determining when interns are entitled to compensation under minimum wage laws.<sup>6</sup> The appeals court ruling was seen as a setback for the intern rights advocates and a victory for employers.<sup>7</sup> In January 2016, the court issued an amended decision that superseded its 2015 opinion, once again vacating the district court decision and remanding the case.<sup>8</sup> To date, it is the most significant judicial decision on this issue. As the discussion below will explore, the matter of whether interns are entitled to the minimum wage remains a murky one.

This Article examines and analyzes the latest legal developments concerning internships and the growth of the intern rights movement. It serves as a significant update and sequel to a 2002 article I wrote on the employment rights of interns,<sup>9</sup> well before this topic became fodder for the courts and the media. Now that the legal implications of unpaid internships have transcended mostly academic speculation<sup>10</sup> and entered the realm of litigation and, to a lesser extent, legislation, the underlying legal and policy issues are

5 See *infra* Part 2, for responses to the decision.

6 *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 383-85 (2d Cir. 2015), amended and superseded by 811 F.3d 528 (2d Cir. 2016) (discussing “primary beneficiary” test).

7 See, e.g., Thomas E. Chase, *When Are Interns Employees?*, N.Y.L.J. (Aug. 3, 2015) (stating that “[m]edia coverage characterized the Second Circuit’s decision as a decisive victory for employers and a defeat for interns”); Noam Scheiber, *Employers Have Greater Leeway on Unpaid Internships*, *Court Rules*, N.Y. TIMES (July 3, 2015) (noting that “the opinion raises the bar much higher for future interns who may seek to bring claims against their employers”); Susan Adams, *Why The Second Circuit Made a Flawed Decision in Upholding Unpaid Internships*, FORBES.COM (July 7, 2015) (criticizing the decision).

8 *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016).

9 See generally David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002) [hereinafter Yamada, *Student Interns*].

10 Other earlier law review commentaries included Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN’S L.J. 95 (2000); Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998); David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227 (1998).

sharpening at the point of application. Accordingly, Part I will examine the recent legal developments concerning internships, consider the evolving policy issues, and suggest solutions where applicable.

Additionally, Part II of this Article will address the emerging intern rights movement that is challenging the widespread practice of unpaid internships and the overall status of interns in today's labor market. Fueled mostly by current and recent college and graduate students, this movement stands as a response to America's "intern economy," an intermediate stage between classroom education and full-time employment that has become a staple for many young – and not so young – people seeking to enter certain skilled occupations. This movement has both fueled legal challenges to unpaid internships and engaged in organizing activities and social media outreach surrounding internship practices and the intern economy.

## I. Legal Developments

### A. Unpaid Interns and Wage and Hour Laws

The most significant legal issue concerning interns is whether unpaid internships violate minimum wage laws. The federal Fair Labor Standards Act ("FLSA") requires, among other things, that eligible employees be paid at least the federally mandated minimum wage.<sup>11</sup> The FLSA defines an "employee" as "any individual employed by an employer."<sup>12</sup> The term "employ" is defined as including "to suffer or permit to work."<sup>13</sup> The critical question for determining whether interns are entitled under the FLSA to earn at least the minimum wage is whether an intern is an "employee" within the meaning of the statute.

#### 1. Earlier Developments<sup>14</sup>

The starting place for analyzing these questions is a 1947 United States Supreme Court decision, *Walling v. Portland Terminal Co.*, in which the Court held that railway yard trainees were not

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11 29 U.S.C. § 206 (2012).

12 *Id.* § 203(e)(1).

13 *Id.* § 203(g).

14 See Yamada, *Student Interns*, *supra* note 9, at 225-31.

employees under the FLSA.<sup>15</sup> *Walling* concerned a training course for railway yard brakemen, completion of which was a prerequisite for being hired for a full-time job.<sup>16</sup> Applicants accepted for the course, which typically lasted seven or eight days, were turned over to an actual yard crew for the training.<sup>17</sup> The applicants first would merely observe the work being done, then would be allowed to do yard work under close supervision.<sup>18</sup> The applicants did not “displace any of the regular employees,” who were required to “stand immediately by to supervise” the trainees.<sup>19</sup> The trainees did “not expedite the company business;” rather, they sometimes impeded the work from being done.<sup>20</sup> Trainees who successfully completed the course were certified as being competent in railroad yard work and were eligible to be hired when their services were needed.<sup>21</sup>

The Court reasoned that, had these individuals taken an equivalent training course from a vocational school, they would not be employees.<sup>22</sup> Further, they could not be considered employees simply because successful completion of the course would place them in the labor pool of potential employees for the railroad.<sup>23</sup> To find to the contrary would “penalize” the railroad for providing free instruction.<sup>24</sup> Since on appeal it was unchallenged that the railroads received “no ‘immediate advantage’ from any work done by the trainees,” the Court concluded that they were not employees under the FLSA.<sup>25</sup>

Since then, the Wage and Hour Division of the U.S. Department of Labor (“DOL”), borrowing heavily from the reasoning in *Walling*, developed the following six-part test to determine whether someone designated as a trainee is actually an employee for purposes of the FLSA:

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15 *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947). In a companion case, *Walling v. Nashville, C. & St. L. Ry.*, 330 U.S. 158, 160 (1947), the court used similar reasoning in holding that trainees to become firemen, brakemen, and switchmen were not entitled to the minimum wage under the FLSA.

16 *Portland Terminal*, 330 U.S. at 149.

17 *Id.*

18 *Id.*

19 *Id.* at 149-50.

20 *Id.* at 150.

21 *Id.*

22 *Id.* at 152-53.

23 *Id.* at 153.

24 *Id.*

25 *Id.*

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.<sup>26</sup>

The DOL has required that all six criteria be met in order to find that “trainees are not employees within the meaning of the FLSA . . . .”<sup>27</sup>

In several opinion letters, the DOL applied this test to determine whether student interns are covered by the FLSA.<sup>28</sup> For example, in an opinion letter dated March 25, 1994, the DOL considered an inquiry from a private, non-profit organization that planned “to establish an internship program for people who have completed [the organization’s]

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26 See, e.g., U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (May 8, 1996), *available at* 1996 WL 1031777 [hereinafter Opinion Letter, May 8, 1996] (responding to inquiry as to applicability of FLSA to interns); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (July 11, 1995), *available at* 1995 WL 1032496 [hereinafter Opinion Letter, July 11, 1995] (same); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (Mar. 13, 1995), *available at* 1995 WL 1032473 [hereinafter Opinion Letter, March 13, 1995] (same); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (Mar. 25, 1994), *available at* 1994 WL 1004761 [hereinafter Opinion Letter, March 25, 1994] (same).

27 Opinion Letter, July 11, 1995, *supra* note 26.

28 See *id.*

Hostel Management Training Course at designated youth hostels around the U.S.”<sup>29</sup> The interns were to be responsible for performing a variety of administrative, programmatic, and maintenance tasks that were part of the normal operation of a youth hostel.<sup>30</sup> The DOL concluded that because “it is apparent the employer derives an immediate advantage from the duties performed by the interns in question . . . [the] interns would be considered employees under the FLSA.”<sup>31</sup>

Until *Glatt*, there was no published case authority specifically addressing whether typical internships meet the definition of employee status under the FLSA. However, three United States Court of Appeals decisions reveal differences between the circuits on how the six-part test for determining employee status should be applied, if at all.

In a 1982 decision, *Donovan v. American Airlines, Inc.*, the Fifth Circuit Court of Appeals cited with approval the DOL’s requirement that all six criteria be met in order to avoid a finding of employee status.<sup>32</sup> It ultimately held that trainees for flight attendant and reservation sales agent positions were not employees for purposes of the FLSA.<sup>33</sup>

In a 1993 decision, *Reich v. Parker Fire Protection District*, the Tenth Circuit Court of Appeals refused to apply an “‘all or nothing’ approach” that would require an employer to meet all six criteria in order to avoid a finding of employee status.<sup>34</sup> Instead, the court held that a “totality of the circumstances” standard should be used.<sup>35</sup> Utilizing this standard, the court found that firefighting trainees were not employees during the time they were in training at the firefighting academy.<sup>36</sup> The court concluded that only one factor, “the expectation of employment upon successful completion of the course”, weighed in the plaintiffs’ favor.<sup>37</sup>

Finally, in a 2011 decision, *Solis v. Laurelbrook Sanitarium and School, Inc.*, the Sixth Circuit Court of Appeals held that a church-affiliated boarding school was not in violation of the FLSA’s child labor provisions, in connection with an in-house program of practical instruction and experience in manual labor and the trades.<sup>38</sup> The court

29 Opinion Letter, March 25, 1994, *supra* note 26.

30 *See id.*

31 *Id.*

32 *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982).

33 *Id.* at 272-73.

34 *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026-27 (10th Cir. 1993).

35 *Id.* at 1027.

36 *Id.* at 1029.

37 *Id.*

38 *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 519-20 (6th Cir. 2011).

stated that the DOL's six-part test was "a poor method for determining employee status in a training or educational setting."<sup>39</sup> Instead, it cited approvingly to a "primary benefit" test used by the district court below, which asked "which party to the relationship received the primary benefit of the students' activities."<sup>40</sup> It further held that the students were not employees of the school under the FLSA.<sup>41</sup>

## 2. DOL Fact Sheet No. 71

In April 2010, the DOL issued Fact Sheet No. 71, which provides "general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to 'for-profit' private sector employers."<sup>42</sup> Adapting almost verbatim its six-part test for the trainee exemption, the DOL outlines the standard for exempting an internship provider from complying with the statute's minimum wage and overtime provisions:

The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the

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39 *Id.* at 525.

40 *Id.* at 532.

41 *Id.*

42 U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010) [hereinafter FACT SHEET NO. 71].

intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern.<sup>43</sup>

As the language of the Fact Sheet indicates, the six-part test is to be applied conjunctively,<sup>44</sup> that is, an employer must meet all six criteria in order to be exempt from the wage requirements.

DOL Fact Sheets are not, in themselves, provisions of law. As the DOL itself notes in Fact Sheet No. 71, “[t]his publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.”<sup>45</sup> However, as we will see below, this document has taken on a significant role in deliberations over unpaid internships.

### 3. *Glatt v. Fox Searchlight Pictures Inc.*<sup>46</sup>

#### a. District Court Decision

The developments discussed above would set the stage for direct challenges to unpaid internships under the FLSA and state equivalents. In 2011, Eric Glatt, Alexander Footman, and other named plaintiffs filed a putative class action lawsuit in a New York federal

43 *Id.*

44 *Id.*

45 *Id.*

46 The forthcoming analysis does not purport to be a complete review of all the legal issues present in the case and addressed by the court. Rather, it addresses the primary issue of whether the plaintiffs were “employees” within the meaning of the relevant wage and hour statutes, emphasizing the application of the six-part test.

district court, claiming violations of federal and state labor laws on the grounds that they were wrongly classified “as unpaid interns instead of paid employees” while working on the Fox Searchlight Pictures production of the motion pictures “Black Swan” and “500 Days of Summer.”<sup>47</sup> In the course of their respective internships, both Glatt and Footman performed a variety of back office clerical and administrative tasks.<sup>48</sup>

In 2013, the court ruled on cross motions for summary judgment, holding, *inter alia*, that Glatt and Footman were employees for purposes of the FLSA and the New York Labor Law,<sup>49</sup> entitling them to back pay. The court also certified the class of other unpaid interns who worked on the production.<sup>50</sup> The court further held that a third named plaintiff, Kanene Gratts, was time-barred from pursuing a claim.<sup>51</sup>

Citing favorably to *Walling* and applying the six-part test articulated in Fact Sheet No. 71,<sup>52</sup> the court methodically analyzed the claims of Glatt and Footman, finding that they were employees within the meaning of federal and state wage and hour laws. On the question of training, the court found that “Footman did not receive any formal training or education,” while the record for Glatt was inconclusive.<sup>53</sup> On the question of whether the internships were for the plaintiffs’ benefit, the court acknowledged that while “Glatt and Footman received some benefits . . . such as resume listings, job references, and an understanding of how a production office” works, this was “not the result of internships intentionally structured to benefit them.”<sup>54</sup>

Rather, noted the court, “Searchlight received the benefits of their unpaid work, which otherwise would have required paid employees.”<sup>55</sup> Glatt performed a variety of tasks for the accounting department, such as tracking purchase orders and invoices, obtaining

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47 *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 521-22 (S.D.N.Y. 2013), *vacated and remanded by* 791 F.3d 376 (2d Cir. 2015), *amended and superseded by* 811 F.3d 528 (2d Cir. 2016).

48 *See id.* at 533.

49 *Id.* at 534.

50 *Id.* at 538-39.

51 *Id.* at 525.

52 *See id.* at 531.

53 *Id.* at 532-33.

54 *Id.* at 533.

55 *Id.*

signatures on documents, and completing clerical assignments.<sup>56</sup> Footman's work assignments were of a similar nature, though perhaps leaning toward the clerical side.<sup>57</sup> With both plaintiffs, the court observed, had they not been available, paid employees would have had to do the work they performed.<sup>58</sup>

Fox Searchlight conceded that it obtained an "immediate advantage" from the plaintiffs' work.<sup>59</sup> The court added that on this factor, it was legally "irrelevant" that the plaintiffs' work assignments were at times "menial" or that of "beginners."<sup>60</sup> On the remaining two factors, the court found that "there is no evidence Glatt or Footman were entitled to jobs at the end of their internships or thought they would be" and that "Glatt and Footman understood they would not be paid."<sup>61</sup>

The court concluded that, "[c]onsidering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are 'employees'" under the FLSA and the New York Labor Law.<sup>62</sup> It stated that Glatt and Footman "worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training."<sup>63</sup> The benefits they received were incidental to their employment, and they "received nothing approximating the education they would receive in an academic setting or vocational school."<sup>64</sup>

In applying the six-part test, the court also rejected the defense argument for the adoption of a "primary beneficiary" test that examines whether "the internship's benefits to the intern outweigh the benefits to the engaging entity," noting that such a standard had little support in relevant case law and would prove "subjective and unpredictable" in its application.<sup>65</sup> However, the court found that even if this test was used to determine employee status, the

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56 *Id.*

57 *See id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 534.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* at 531-32.

defendants “were the ‘primary beneficiaries’ of the relationship, not Glatt and Footman.”<sup>66</sup>

### b. Court of Appeals Decision

In January 2016, the U.S. Court of Appeals for the Second Circuit vacated the district court’s orders and remanded the case for further proceedings.<sup>67</sup> On the question of the legal standard to be applied for determining when for-profit employers are exempt from paying the minimum wage to interns, the court adopted the very “primary beneficiary” test rejected by the lower court.<sup>68</sup> The court agreed “with defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship.”<sup>69</sup> The court proceeded to enumerate “a non-exhaustive set of considerations” for determining whether the intern or employer is the primary beneficiary of an internship:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates

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66 *Id.* at 533.

67 *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 531 (2d Cir. 2016). This included vacating the certification of class status. *Id.* This issue is discussed *infra* section A.8.

68 *Id.* at 536.

69 *Id.*

the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.<sup>70</sup>

The court added that “[n]o one factor is dispositive” and that “courts may consider relevant evidence beyond the specified factors in appropriate cases.”<sup>71</sup>

In adopting this test, the court acknowledged, but did not address, the plaintiffs' position that the central legal inquiry should be whether “the employer receives an immediate advantage from the interns' work.”<sup>72</sup> It also expressly rejected the “DOL's invitation to defer to the test laid out in the Intern Fact Sheet,” finding the approach “too rigid for [their] precedent to withstand.”<sup>73</sup> By contrast, stated the court, the primary beneficiary test properly “focuses on what the intern receives in exchange for his work” and “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.”<sup>74</sup>

The court also attempted to characterize the contemporary nature of internships, noting that the primary beneficiary test “reflects the central feature of the modern internship – the relationship between the internship and the intern's formal education,” and asserting that a “bona-fide internship . . . integrate[s] classroom

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70 *Id.* at 536-37.

71 *Id.* at 537.

72 *Id.* at 535.

73 *Id.* at 536.

74 *Id.*

learning with practical skill development in a real-world setting.”<sup>75</sup> According to the court, this differs from the formal training course at issue in *Walling v. Portland Terminal Co.*, the U.S. Supreme Court decision that informed the DOL’s test for exempting interns from the minimum wage, thus correctly focusing on “the educational aspects of the internship.”<sup>76</sup>

Ultimately, the court remanded the case to the district court for further proceedings.<sup>77</sup> The court indicated that the lower court may “permit the parties to submit additional evidence relevant to the plaintiffs’ employment status,” adding that it was expressing “no opinion with respect to the outcome of any renewed motions for summary judgment” based on the primary beneficiary test.<sup>78</sup>

#### 4. Other Intern Lawsuits for Back Wages

According to information compiled by the non-profit investigative news organization ProPublica, as of April 2014, over 30 wage and hour lawsuits had been filed on behalf of former unpaid interns since 2011, with a noticeable increase in filings following the *Glatt* district court decision.<sup>79</sup> Many of the defendants are media corporations,<sup>80</sup> perhaps reflecting the popular practice of offering unpaid internships in that field. Several cases have resulted in settlements.<sup>81</sup> In addition to *Glatt*, challenges to unpaid internships have yielded a small body of judicial and administrative decisions:

##### a. *Xuedan Wang v. Hearst Corp. (2013)*<sup>82</sup>

In *Xuedan Wang v. Hearst Corp.*, a putative class action was brought against the Hearst Corporation on behalf of unpaid interns at over twenty of the company’s American magazines and corporate

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75 *Id.* at 537.

76 *Id.*

77 *Id.*

78 *Id.*

79 See Stephen Suen, *Tracking Intern Lawsuits*, PROPUBLICA, <http://projects.propublica.org/graphics/intern-suits> (last updated Apr. 15, 2014).

80 See *id.*

81 See *id.*

82 293 F.R.D. 489 (S.D.N.Y. 2013), *aff’d in part, vacated in part, remanded by* 617 F. App’x 35 (2d. Cir. 2015).

offices.<sup>83</sup> The New York federal district court denied the plaintiffs' motions for partial summary judgment concerning alleged violations of federal and state wage and hour laws.<sup>84</sup> In a May 2013 decision, the court held that the Hearst Corporation had successfully raised contested issues of material fact concerning: (1) whether the conjunctive or totality of the circumstances approach should be applied under the six-part test; and (2) whether Hearst had satisfied at least four of the factors under the six-part test.<sup>85</sup>

While the court provided a detailed summary of the duties of the respective interns,<sup>86</sup> it did not engage in a close factual analysis using the six-part test.<sup>87</sup> The court did, however, acknowledge the confusion over what legal standard to apply. Although it found that the Supreme Court in *Walling* applied a totality of circumstances approach in determining employee status,<sup>88</sup> it also recognized that the DOL's six-part test may merit judicial deference under basic principles of administrative law.<sup>89</sup>

This discussion was rendered largely moot by the U.S. Court of Appeals for the Second Circuit, which heard the plaintiffs' appeal in tandem with *Glatt v. Fox Searchlight Pictures, Inc.*<sup>90</sup> The court vacated "the district court's order denying the plaintiffs' motion for partial summary judgment" and remanded the case "for further proceedings consistent with our opinion in *Glatt*."

### **b. *Kaplan v. Code Blue Billing & Coding, Inc.* (2013)<sup>91</sup>**

In an unpublished decision, the Eleventh Circuit Court of Appeals considered a consolidated appeal from three students in a medical billing and coding specialist program that required an

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83 *Id.* at 490.

84 *Id.*

85 *Id.* at 489. The court also denied class certification for interns at the magazines. See *infra* Part I.A.8 for further discussion on this point.

86 See *Wang*, 293 F.R.D. at 491-92.

87 See *id.* at 493-94.

88 See *id.* at 493.

89 See *id.* at 494.

90 *Wang v. Hearst Corp.*, 617 F. App'x. 35, 36 (2d Cir. 2015).

91 504 F. App'x 831 (11th Cir. 2013). This decision consolidated three appeals, *Kaplan v. Code Blue Billing & Coding, Inc.*, *Bevacqua v. Magnetic Med. Mgmt., Inc.*, and *O'Neill v. E. Fla. Eye Inst., P.A.*, from the United States District Court for the Southern District of Florida.

externship in addition to coursework.<sup>92</sup> The students sought back wages under the FLSA for work done in the externships.<sup>93</sup> The court granted summary judgment for the respective defendants, holding that under prevailing definitions of employee status and an application of the six-part test, the plaintiffs were not employees within the meaning of the FLSA.<sup>94</sup> Unfortunately, the court's reasoning is rather conclusory, providing little close factual analysis that would render this opinion a more helpful guide to how each part of the test should be applied.

***c. Workman v. Regents of the University of California (2013)***<sup>95</sup>

In a claim before the California Department of Industrial Relations involving an internship “to provide individual counseling to faculty and staff at the University of California, San Francisco,” the California Labor Commissioner ruled that Johanna Workman, a post-doctoral psychology intern, was owed back wages and liquidated damages.<sup>96</sup> The internship provided a monthly stipend of approximately \$1,600, covering seventeen hours of work per week.<sup>97</sup> Work hours beyond that “were unpaid and credited toward Plaintiff’s post-doctoral licensing requirements.”<sup>98</sup> Workman claimed that she worked 858 uncompensated hours.<sup>99</sup>

In ruling for Workman, the Labor Commissioner applied the DOL’s six-part test and determined that the “internship program did not satisfy all six criteria.”<sup>100</sup> Among the findings were that the “internship program predominantly benefits Defendant since Plaintiff provides counseling services to its staff, a job that can be performed by regular employees,” and that the “job is an integral part of the business activities which Defendant derives a substantial economic

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92 *Id.* at 832.

93 *Id.* at 833.

94 *Id.* at 834-35.

95 *Workman v. Regents of the Univ. of Cal., S.F. Branch, Case No. 11-43384 HM (Labor Commissioner, State of California, May 13, 2013).*

96 *Id.* at 2.

97 *Id.*

98 *Id.*

99 *Id.* at 3.

100 *Id.* at 3-4.

benefit.”<sup>101</sup> The Commissioner concluded that Workman was “an employee and is not exempt from the state’s minimum wage law.”<sup>102</sup>

### 5. The Future of Intern Compensation Litigation and a Proposed Test<sup>103</sup>

The unwieldy “primary beneficiary” test adopted by the court of appeals in *Glatt* gives the label of intern an unwarranted legal meaning and distracts us from the fundamental concept of paying people for work rendered. By simply pasting “intern” on what otherwise might be considered a part-time, summer, or post-graduate entry-level job, an employer now can take its chances and make the position unpaid, claiming that the training, experience, and networking opportunities provided to the intern exceed the benefits provided to the employer by the intern’s labor. The intern, in turn, is left in the unenviable position of either accepting what are likely to be unilaterally imposed terms or challenging the unpaid status and thus jeopardizing her future career.

Furthermore, the court’s conceptualization of the primary beneficiary test largely dismisses the significant benefits of internships to two major stakeholders, employers and institutions of higher education. First, employers benefit mightily from interns. Internship programs allow them to train, mentor, and evaluate the next generation of new people seeking to enter a profession, in addition to gaining the tangible work contributions that many interns provide, which in some cases will be substantial. Second, as suggested above, colleges and universities benefit by being able to incorporate internships into degree programs, thus enhancing their marketability to prospective applicants and, in many cases, charging full tuition for student time spent in internships.

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101 *Id.* at 4.

102 *Id.*

103 Portions of this section have been drawn and adapted from my contribution to an amicus brief in support of the plaintiffs’ petition for rehearing before the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.* See Brief Amicus Curiae by Professors and Educators Scott Moss & David C. Yamada, et al. in Support of Plaintiffs-Appellees’ Petition for Rehearing, *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2nd Cir. 2015) (No. 13-4478-cv), 2015 WL 5076745. That petition was denied.

Finally, the primary beneficiary test has an inherently illogical and unpredictable dynamic to it. As the district court in *Glatt* aptly observed:

Moreover, a “primary beneficiary” test is subjective and unpredictable. Defendants’ counsel argued the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot. Under this test, an employer could never know in advance whether it would be required to pay its interns. Such a standard is unmanageable.<sup>104</sup>

In fact, the question of who is the primary beneficiary may not be clear until *after* the internship has concluded.

Nevertheless, even if the primary beneficiary test is to become the majority legal standard for determining whether internships at for-profit institutions are exempt from the minimum wage, interns are not necessarily shut out from possible compensation. Unpaid internships uncoupled from academic credit or without an academic teaching component remain especially vulnerable to legal challenges. Unpaid internships that fail to deliver on promises of significant training and experience, and those in which interns provide considerable work contributions without much instruction (such as where an intern is asked to re-do a website or take over social media outreach for an organization), also are ripe for lawsuits.

If the DOL’s six-part test survives in other jurisdictions, the question of whether the conjunctive or totality of the circumstances approach should be applied remains to be settled. There very well could be splits among the federal circuits on this question, for in two non-intern cases discussed above, the Fifth Circuit, in *Donovan*, adopted the conjunctive test, while the Tenth Circuit, in *Reich*, opted for the totality of the circumstances approach.<sup>105</sup>

If the six-part test is used, the conjunctive approach should be adopted for all cases involving interns.<sup>106</sup> Furthermore, given that most internship sites gain an “immediate advantage” from the work of their interns, it is likely that most interns will be entitled to the

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104 *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013).

105 See *infra* Part I.A.1.

106 *Yamada, Student Interns*, *supra* note 9, at 235.

minimum wage under the FLSA. The “totality of circumstances” approach should be rejected, as it is too subjective to be consistently applied by the courts and thus invites further litigation.

If the courts and labor standards agencies are willing to consider a different approach, then the six-part test and the primary beneficiary test should be replaced by a narrower, work-specific inquiry:<sup>107</sup> First, interns should be paid for the time they work, like any other employee. Second, interns should be paid for time spent in training meetings or sessions intended primarily to prepare them to do work on behalf of the internship provider. The rationale for this streamlined approach is that people should be paid for their labor. The label or title of the position in question should be irrelevant. Whether “intern,” “office clerk,” “program assistant,” or any other designation is used, the main inquiry should examine whether genuine labor is provided. Furthermore, gaining work experience, credentials, and future references are not substitutes for a paycheck.

How these issues will play out in subsequent litigation points to at least four questions. First, how will plaintiffs be able to advocate within the strictures of the primary beneficiary test? Second, how will other federal circuits respond to the Second Circuit’s adoption of the primary beneficiary test? Third, as discussed below, how will the seemingly significant constrictions on obtaining class certification as set out by the Second Circuit in *Glatt* affect intern litigation? Finally, will efforts to litigate intern wage cases under state labor standards statutes result in the adoption of more intern-friendly legal tests?

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107 This is similar to what I recommended in my 2002 article:

For employers who independently hire student interns, the six-part test currently used by the [Wage and Hour] Division and the federal courts should be replaced by a single inquiry that asks whether the primary activity of an internship is to perform bonafide work of any kind. The determination for this should be a quantitative one: Where an intern spends more time performing work that provides an economic benefit to the employer than participating in formal training programs, it should be presumed that the employer meets the standard of “to suffer or permit to work” and thus has entered into an employment relationship with the intern.

*Id.*

## 6. Non-Profit and Public-Sector Internship Sites

A significant share of unpaid internships are hosted by non-profit and public-sector providers; according to the National Association of Colleges and Employers (“NACE”), over 60 percent of collegiate internships undertaken by 2013 graduates were in these sectors.<sup>108</sup> However, the question of whether wage and hour laws apply to internships with non-profit and public employers is complicated and unsettled.<sup>109</sup> The DOL’s Fact Sheet No. 71, which expressly applies to the private sector, fuels this confusion by adding this footnote:

The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.

The language of this footnote is confusing. It starts innocuously enough, by reiterating the FLSA’s express statutory exemption “for individuals who volunteer to perform services for a state or local government

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108 See *Just 38 Percent of Unpaid Internships Were Subject to FLSA Guidelines*, NAT’L ASS’N OF COLL. & EMP’RS (June 26, 2013) (“The remaining unpaid internships were conducted in organizations exempted from FLSA regulations: nonprofit organizations (40.7 percent) and government agencies (21.2 percent).”).

109 The distinction between an intern and a volunteer appears to be especially precarious for non-profit organizations. See, e.g., Ellen Aldridge, *Legalities of Nonprofit Internships*, BLUE AVOCADO (May 10, 2010), <http://www.blueavocado.org/content/legalities-nonprofit-internships> (applying DOL six-part test); Jennifer Chandler Hauge, *Summer Interns: Volunteers or Employees?*, NONPROFIT RISK MGMT. CTR. (June 3, 2009), <http://www.nonprofitrisk.org/library/news/2009/enews060309.htm> (same).

agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks.”<sup>110</sup> It adds that the DOL “recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation” to non-profit organizations.<sup>111</sup> Here, too, it is hard to imagine anyone claiming, at least with any credibility, that the FLSA prohibits genuine voluntarism in the non-profit sector.

But then the footnote takes a leap, stating that “[u]npaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible,” without explaining the legal grounds for that exception and how it came to be. The DOL frames the decision to take an unpaid internship as an affirmative decision on the part of the prospective intern, when in reality it typically is anything but that. It would appear, under the DOL’s reasoning, that if a non-profit or public-sector internship provider simply informs applicants that no compensation will be provided, then presumably this meets the requirement of “without expectation of compensation.”

To further complicate matters, state wage and hour laws may treat non-profit and public sector internships differently than does the FLSA. For example, while a full state survey is beyond the scope of this Article, it is worth noting that the New York State Department of Labor, in a Fact Sheet titled *Wage Requirements for Interns in Non-For-Profit Businesses*, states that “[t]here is no section of the Labor Law that exempts ‘interns’ at not-for-profit organizations from the minimum wage requirements.”<sup>112</sup> It also specifies limited exemptions for volunteers, students, and trainees or learners.<sup>113</sup>

Although the Second Circuit Court of Appeals rejected the DOL’s standards for determining minimum wage exemptions in *Glatt*, it, too, used a footnote to make clear that its analysis and holding applied only “to internships at for-profit employers.”<sup>114</sup> It appears that no one is eager to tackle this question. In my judgment, the legal status of unpaid internships for non-profit and public employers is

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110 FACT SHEET No. 71, *supra* note 42.

111 *Id.*

112 *Wage Requirements for Interns in Not-For-Profit Businesses*, N.Y. STATE DEP’T OF LABOR (June 2011), <http://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf>.

113 *Id.*

114 *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 384 n.2 (2d Cir. 2015), *amended and superseded by* 811 F.3d 528 (2d Cir. 2016).

as likely to be influenced by policy considerations as by statutory interpretation. Furthermore, though I would like to suggest an easy resolution, this question does not yield any clean, easy legal or policy approaches.<sup>115</sup> However, it may be useful to articulate a set of desirable policy parameters in an effort to inform this discussion:

First, we should not stray from the core rationale that people should be paid for their labor. Accordingly, it is desirable to maintain and create mechanisms, legal and institutional, that pay at least the minimum wage to interns who provide work contributions to non-profit and public employers. Just as in the private sector, unpaid internships in the non-profit and public sectors disproportionately and negatively impact those who do not have independent sources of financial support. This especially may be the case for those who want to pursue careers in public service and thus need to gain experience and credentials to become competitive for permanent employment.

Second, there are alternative approaches to providing compensation for internships with tax-exempt non-profit organizations and public agencies that are not available for the private sector, such as independently funded fellowships and stipends and the federal work-study program. The availability of such options should be factored into any policy response concerning unpaid internships.

Third, non-profit organizations have vastly differing levels of financial support and resources. A struggling community non-profit organization and, say, a well-funded private university are very different entities. These funding capacities should be considered in fashioning legal and regulatory approaches to internships and pay. These observations are also relevant to the public sector.

Fourth, we should preserve genuine volunteer opportunities with charitable organizations. Volunteer service is part of the fabric of a healthy civil society. If rules requiring payment of the minimum wage for interns are defined too broadly, then the line drawing may

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115 Two law student note writers have valiantly made the attempt, and while I believe their efforts are informative and laudable, I am not persuaded that all the necessary considerations have been factored into the picture. See generally Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363 (2012) (recommending enactment of legislative amendment that adds a test for an intern exemption to FLSA); Lisa M. Milani, Note, *The Applicability of the Fair Labor Standards Act to Volunteer Workers at Nonprofit Organizations*, 43 WASH. & LEE L. REV. 223 (1986) (recommending enactment of a legislative exemption for volunteers at charitable organizations).

lead to undesirable consequences. For example, a retired executive may be precluded from volunteering her services to a charitable organization for fear of violating minimum wage laws.

Therefore, at least four questions must be resolved. First, how should non-profit and public sector internships be treated generally under wage and hour laws? Second, may substitute forms of compensation such as third-party funded fellowships exempt an intern provider from rendering compensation? Third, should non-profit groups and public sector agencies with smaller budgets be exempted from obligations to pay interns? Finally, how should the line be drawn between “intern” and “volunteer”?

As these issues are being addressed, efforts to press non-profit and public sector employers into paying at least the minimum wage to interns may be grounded in efforts to persuade and cajole. As I detail in Part II below, a public advocacy effort by interns working for *The Nation* magazine resulted in changes to its internship compensation policies, and another campaign is pressuring the White House to start paying its interns. These are examples of how “soft power” can be exercised within a potentially shifting landscape concerning unpaid internships.<sup>116</sup>

## 7. Internships Sponsored by Academic Institutions<sup>117</sup>

Under the primary beneficiary test adopted by the Second Circuit in *Glatt*, an internship for academic credit or one closely connected with an academic program is more likely to be exempt from minimum wage requirements. Under the six-part test adopted by the DOL, agency opinion letters have revealed inconsistencies that, in some cases, could be significant. In a March 13, 1995, letter, the DOL reiterated the six-part test but added considerable commentary noting that, if this “internship program is predominately for the benefit of the college students, we would not assert an employment relationship.”<sup>118</sup> By contrast, a May 8, 1996, opinion letter also

116 For a brief discussion about applying international relations professor Joseph Nye’s theories of “hard power” (such as legal and financial leverage) versus “soft power” (such as redefining agendas and using persuasion) to the employment policy context, see David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 552 (2009).

117 See Yamada, *Student Interns*, *supra* note 9, at 229-30.

118 Opinion Letter, March 13, 1995, *supra* note 26.

invokes the six-part test, and offers similar language concerning college internship programs.<sup>119</sup> However, that letter also states:

Where educational or training programs are designed to provide students with professional experience in the furtherance of their education and the training is academically oriented for the benefit of the students, it is our position that the students will not be considered employees of the institution to which they are assigned, *provided the six criteria . . . are met.*<sup>120</sup>

The DOL appears to be saying that if the internship provider cannot meet the six criteria, it cannot escape a finding of employee status even if the internship program is “academically oriented for the benefit of the students.”

In my 2002 article, I looked closely at the DOL opinion letters and recommended that internships sponsored and overseen by educational institutions should be exempt from minimum wage requirements.<sup>121</sup> Upon further consideration, however, I believe that school sponsorship should be irrelevant. The analysis should be grounded in the nature of the relationship between the intern and the host site. As suggested above, the focus should be on the work done in the internship itself, applying whatever test or standard for determining employee status is used for internships generally.

Regardless of the legal standard applied in this context, educational institutions are now presented with a compelling ethical issue about charging tuition for credit-bearing internships. This practice allows educational institutions and internship sites to gain the respective benefits of interns’ tuition payments and work contributions, while the interns receive the standard intern “pay” of academic credit, experience, an additional resume entry, and perhaps a reference. Especially in a difficult economy and job market, and with added burdens from student loans, this is not a fair exchange.

As a baseline, schools should consider charging tuition and granting academic credit only for that part of the internship program that covers (1) the school’s “match making,” coordinating, and oversight role for the internship; and (2) any related classroom and

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119 Opinion Letter, May 8, 1996, *supra* note 26.

120 *Id.* (emphasis added).

121 See Yamada, *Student Interns*, *supra* note 9, at 235-36.

faculty mentoring components. However, care should be taken to ensure that the school is not using its internship brokering capacities as a revenue generating operation, such as charging internship providers a fee to match them with appropriate students.<sup>122</sup>

Internships in programs created, administered, and run by schools are a different matter. In these instances, the sole purpose of the internship program is an educational one. This might include, for example, in-house legal clinics at law schools that serve the poor, or in-house newspapers at journalism schools designed to give students practical reporting and editing experience. The only exception should be when a school derives income from such a program, in which case it may be appropriate to examine whether it serves a revenue-generating purpose.

## 8. Class Action Certification

While it is beyond the scope of this Article to examine the procedural aspects of these cases in the broader context of class-action employment litigation, it should be noted that if unpaid interns are effectively required to bring claims individually, then employers will have scant incentive to comply with the law. In order to discourage employers from providing unpaid internships in violation of wage and hour laws, the ability to bring class action claims on behalf of groups of interns serves as an important leveraging tool. The district court in *Glatt* granted the motion for class certification, while the district court in *Xuedan Wang v. Hearst Corp.* denied it.<sup>123</sup> The contrasting holdings were perhaps understandable, as the two cases presented tangible differences between the proposed classes. Among other things, the internships in *Glatt* were associated with a single film production

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122 A ProPublica article raised this concern in an article detailing how Northwestern University's journalism school has charged fees to internship providers in return for serving as a conduit to provide interns who are earning less than the minimum wage or nothing at all. See Kara Brandeisky, *Northwestern's Journalism Program Offers Students Internships with Prestige, But No Paycheck*, PROPUBLICA (Oct. 1, 2013), <http://www.propublica.org/article/northwesterns-journalism-program-offers-students-internships-but-no-pay>.

123 Compare *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 534-39 (S.D.N.Y. 2013) (motion for class certification granted where proposed class meets all certification requirements) with *Wang v. Hearst Corp.*, 293 F.R.D. 489, 498 (S.D.N.Y. 2013) (motion for class certification fails because "there is no uniform policy among the magazines with respect to the contents of the internship, including interns' duties, their training, and supervision").

company, while the internships in *Wang* were spread among some 20 magazines and different departments.<sup>124</sup> Nevertheless, the Second Circuit Court of Appeals vacated class certification in *Glatt* for both the proposed New York and nationwide classes,<sup>125</sup> while affirming the denial of class certification in *Wang*.<sup>126</sup>

The appeals court's decision in *Glatt* frustrates attempts to obtain class certification, even in cases where interns are doing similar work under similar circumstances. For example, in considering class certification for the smaller proposed New York class, the court observed that "the question of an intern's employment status is a highly context-specific inquiry" and proceeded to discuss the aforementioned factors for determining so in light of Fox Searchlight's intern program.<sup>127</sup> It ultimately concluded that the question of the interns' employment status "cannot be answered with generalized proof," thus precluding class certification.<sup>128</sup> It appears that the court's "context-specific" test for determining an intern's employment status is crafted in a way to make class certification for unpaid interns very difficult to obtain.

## B. Additional Legal Issues About Unpaid Internships

In addition to wage and hour laws, virtually any protective employment law that requires employee status to confer standing to bring a claim is relevant to interns. In my 2002 article, I discussed employment discrimination law, workers' compensation, and collective bargaining laws.<sup>129</sup> The following provides a brief update:

### 1. Discrimination and Sexual Harassment Claims

Unpaid interns also may face difficulties seeking legal relief for employment discrimination and sexual harassment. Federal

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124 *Glatt*, 293 F.R.D. at 522; *Wang*, 293 F.R.D. at 491-92 (interns in *Glatt* were not associated with a single film production since one of the plaintiffs worked on *500 Days of Summer*).

125 *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 531 (2d Cir. 2016).

126 *Wang v. Hearst Corp.*, 617 F. App'x. 35, 36 (2d Cir. 2015).

127 *See Glatt*, 811 F.3d at 531.

128 *Id.*

129 *See generally* Yamada, *Student Interns*, *supra* note 9, at 238-48 (discrimination law), 251-53 (workers' compensation) and 255-56 (National Labor Relations Act).

employment discrimination statutes require an individual to be an employee and a lack of compensation may preclude an intern from meeting the standard for employee status. I explored this question previously,<sup>130</sup> but recent legal developments have reaffirmed the significance of these issues, necessitating a short summary and update.

Three statutes form the heart of modern federal employment discrimination law: Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>131</sup> The Age Discrimination in Employment Act (“ADEA”) prohibits discrimination on the basis of age, with individuals 40 or over constituting the protected class.<sup>132</sup> Finally, the Americans with Disabilities Act (“ADA”) prohibits discrimination on the basis of disability.<sup>133</sup> Interns, like any other potential plaintiffs, must meet the statutory definition of “employee” in order to raise a claim under these statutes. Each of these three statutes, in the same circular language used by the Fair Labor Standards Act, defines an employee as “an individual employed by any employer.”<sup>134</sup>

When an intern is supervised and directly paid by her internship site, presumably she is an employee under these statutes. However, when an internship site is not paying an intern, the question of employee status becomes murkier. The leading case on this point remains *O’Connor v. Davis*, a 1997 Second Circuit Court of Appeals decision involving a student social work intern who alleged that she was sexually harassed by a staff psychiatrist in the course of an internship with the Rockland Psychiatric Center in New York.<sup>135</sup> The plaintiff filed suit, claiming, in part, that she was subjected to sexual harassment in violation of Title VII.<sup>136</sup> The district court granted summary judgment for the defendants on that count, finding that O’Connor was not an “employee” within the statutory meaning of

130 See *id.* at 238-48 (analyzing whether unpaid interns may pursue federal employment discrimination law claims).

131 42 U.S.C. § 2000e-2 (2012). See generally *id.* § 2000e-2 to 2000e-15.

132 29 U.S.C. §§ 621-634 (2012).

133 42 U.S.C. §§ 12101 (2012). See generally *id.* §§ 12101-12214.

134 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e(f) (2012); Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (2012); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2012).

135 *O’Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1048 (1998).

136 *Id.*

Title VII.<sup>137</sup> The court of appeals affirmed.<sup>138</sup> Compensation, reasoned the court, “is an essential condition to the existence of an employer-employee relationship.”<sup>139</sup> The absence of any kind of salary, wages, health insurance, vacation and sick pay, or any promise of such direct or indirect remuneration from Rockland was fatal to O’Connor’s claim of employee status, and consequently, to the Title VII count of her complaint.<sup>140</sup>

In October 2013, a federal district court in New York cited favorably to O’Connor in holding that an unpaid intern could not bring a claim under the New York City Human Rights Law.<sup>141</sup> In *Wang v. Phoenix Satellite Television US, Inc.*, the plaintiff, a graduate student in journalism, alleged, among other things, that she had been subjected to ongoing social and sexual overtures and physical touching by a bureau chief who supervised her work.<sup>142</sup> The court held that “[b]ecause it is uncontested that Ms. Wang received no remuneration for her services,” her “hostile work environment claim must fail.”<sup>143</sup>

The O’Connor holding also apparently represents the current position of the Equal Employment Opportunity Commission (“EEOC”), the federal agency charged with interpreting and enforcing America’s employment discrimination laws. An inquiry to the EEOC on this question from ProPublica yielded a response from an agency spokesperson stating that the statutes it enforces, “including the Civil Rights Act, don’t cover interns unless they receive ‘significant remuneration.’”<sup>144</sup> Thus, concluded the agency spokesperson, “an unpaid intern would not be legally protected by our laws prohibiting sexual harassment,” adding that it is “unclear how many interns are sexually harassed at work.”<sup>145</sup> Accordingly, the challenge of establishing employee status will continue to block unpaid interns who attempt

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137 *Id.* at 114.

138 *Id.* at 116.

139 *Id.* (quoting *Graves v. Women’s Prof’l Rodeo Assoc.*, 907 F.2d 71, 73 (8th Cir. 1990)).

140 *Id.*

141 *Wang v. Phx. Satellite Television US, Inc.*, No. 13-cv-00218, 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013).

142 *Id.* at \*1-3.

143 *Id.* at \*8.

144 Blair Hickman & Christie Thompson, *How Unpaid Interns Aren’t Protected Against Sexual Harassment*, PROPUBLICA (Aug. 9, 2013, 9:00 AM), <http://www.propublica.org/article/how-unpaid-interns-arent-protected-against-sexual-harassment/>.

145 *Id.*

to sue under federal employment discrimination statutes, and quite possibly, most state equivalents.<sup>146</sup> In most cases, this question is inextricably linked with the question of compensation. In instances where the failure to pay an intern constitutes an unchallenged violation of wage and hour laws, the internship site may gain unjust legal insulation by citing the reasoning of *O'Connor* to claim that the absence of compensation precludes a discrimination claim as well. However, because it is unclear whether every intern is entitled to compensation, settling the legal issues under wage and hour laws would not necessarily close this loophole in federal employment discrimination laws.

Earlier I recommended that the gap be closed by statutory amendments expressly covering interns,<sup>147</sup> and the court's holding in *Wang* and the EEOC's representations underscore the need for such a fix. Discrimination and sexual harassment will continue to be relevant to the intern economy and the experiences of interns. Furthermore, even if there are unsettled legal questions and policy disagreements over whether interns should be paid, I cannot imagine any valid argument that would deny interns the baseline protections of personal dignity provided by employment discrimination laws.<sup>148</sup>

There is growing recognition of this gap. At the federal level, in January 2016, the U.S. House of Representatives passed a bill that protects interns working in the federal sector from discrimination.<sup>149</sup> Similar legislation has been filed to extend

146 See, e.g., James J. LaRocca, *Lowery v. Klemm: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131 (2006) (analyzing attempts to apply Massachusetts civil rights laws to unpaid interns and volunteers).

147 Yamada, *Student Interns*, *supra* note 9, at 246-47.

148 In the context of discrimination law, I see little need for drawing sharp legal distinctions between employees, interns, and volunteers in a given work setting, as the conduct can be detrimental and hurtful regardless of status. Cf. Tara Kpere-Daibo, Note, *Employment Law – Antidiscrimination – Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135 (2009) (recommending statutory amendment to add coverage for unpaid volunteers). For an excellent overview of employment-related legal issues concerning volunteers, including anti-discrimination law, see Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147 (2006).

149 See Federal Intern Protection Act of 2016, H.R. 3231, 114th Cong., <https://www.govtrack.us/congress/bills/114/hr3231> (Rep. Cummings, sponsor); Samantha Cooney, *Congress Might Grant More Protection to Unpaid Interns –*

employment discrimination protections to interns generally.<sup>150</sup> In 2014, New York City amended its Human Rights Law to include interns,<sup>151</sup> a direct response to the federal district court's ruling in *Wang v. Phoenix Satellite Television US, Inc.*<sup>152</sup> Also, in 2013, the State of Oregon amended the state's employment statutes to expressly protect unpaid interns from discrimination, sexual harassment, and retaliation for whistleblowing.<sup>153</sup>

## 2. Whistleblower and Retaliation Protections

The residual legal impacts of unpaid internships manifested themselves in another way in April 2013, when the Wisconsin Court of Appeals denied anti-retaliation protection to Asma Masri, a doctoral candidate who served as an unpaid psychologist intern at a medical college.<sup>154</sup> Masri claimed that she was terminated after reporting "alleged medical ethics violations" that she believed violated the state's "health care worker protection statute."<sup>155</sup> The appeals court affirmed the dismissal of her claim, holding that the statute protects only "employees" from retaliatory behavior and that Masri did not receive compensation or other "tangible benefits" that would render her an employee under the statute.<sup>156</sup>

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*but There's a Catch*, MASHABLE.COM (Jan. 15, 2016), <http://mashable.com/2016/01/15/congress-might-grant-more-protection-to-unpaid-interns-but-theres-a-catch/#H4ly6jekI5qI>.

- 150 See Intern Protection Act, H.R. 2034, 114th Cong., <https://www.govtrack.us/congress/bills/114/hr2034> (Rep. Meng, sponsor).
- 151 N.Y.C. N.Y., A Local Law: To Amend the Administrative Code of the City of New York, in Relation to the Prohibition of Discrimination Against Interns, No. 9 (Apr. 15, 2014), [http://www.nyc.gov/html/cchr/downloads/pdf/amendments/Int\\_173-A.pdf](http://www.nyc.gov/html/cchr/downloads/pdf/amendments/Int_173-A.pdf).
- 152 See Alexander Gallin, et al., *The New York City Human Rights Law Amended to Protect Unpaid, Non-employee Interns from Discrimination and Harassment*, NIXON PEABODY (Apr. 2, 2014), [http://www.nixonpeabody.com/amended\\_NYC\\_Human\\_Rights\\_Law\\_protects\\_unpaid\\_interns](http://www.nixonpeabody.com/amended_NYC_Human_Rights_Law_protects_unpaid_interns) ("The Council passed this amendment in response to a recent federal lawsuit in which the court dismissed an unpaid intern's sexual harassment claims on the basis that the NYCHRL applied only to 'employees.'").
- 153 See H.B. 2669, 77th Legis. Assemb., Reg. Sess., 2013 Or. Laws 379.
- 154 See *Masri v. State of Wis. Labor & Indus. Review*, 832 N.W.2d 139 (Wis. Ct. App. 2013).
- 155 *Id.* at 141-42.
- 156 See *id.* at 145-47 (analyzing Masri's potential employee status under the statute).

The full opinion goes into considerable detail about standards of judicial deference to legal interpretations of administrative agencies and to questions of statutory interpretation relevant to Masri's claim.<sup>157</sup> For purposes of this Article, however, it is sufficient to identify this decision as another example of how an intern's unpaid status carries significant legal implications, to the extent where an obviously exasperated dissenting judge invoked George Orwell in characterizing the majority holding.<sup>158</sup> Presumably, had Masri been paid a salary or wages for her work, the entire appeal would have been unnecessary, at least on these grounds.

## II. Intern Rights Movement

### A. A Movement in Four Stages

The intern rights movement illustrates how legal developments can fuel social activism and how a generation can claim and organize around issues of special pertinence to their lives. In terms of a timeline, the emergence of this movement breaks down into four major stages, starting in 2010:

#### 1. 2010: Early Stirrings

The DOL's April 2010 issuance of Fact Sheet No. 71<sup>159</sup> signaled the federal government's affirmative interest in addressing the legalities of unpaid internships, at least in the private sector. The fact sheet did not break any new legal ground; as noted earlier, it basically adapted the long-recognized trainee exemption under the FLSA to internships. However, it publicly legitimized the unpaid intern question as a wage and hour issue for labor relations stakeholders.

The DOL's efforts got a boost from a lengthy *New York Times* piece about unpaid internships by labor reporter Steven Greenhouse, who wrote that the scarcity of jobs for young people has led "federal and state regulators to worry that more employers are illegally using

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157 See *id.* at 142-43 (discussing judicial deference to the state labor commission), 143-45 (discussing statutory language).

158 See *id.* at 147 (Fine, J., dissenting) (quoting Orwell).

159 FACT SHEET NO. 71, *supra* note 42.

such internships for free labor.”<sup>160</sup> That same month, the Economic Policy Institute, a think tank, published a policy memorandum that highlighted the legal and social equity concerns about internships and called for both stronger enforcement of wage and hour laws and amendments to major employment statutes to expressly cover interns.<sup>161</sup>

## 2. 2011: A Book and a Lawsuit

On occasion, the publication of a book plays a major role in fueling a social movement, and the 2011 appearance of Ross Perlin’s *Intern Nation*<sup>162</sup> was one of them. *Intern Nation* was the first comprehensive, book-length examination of the social, economic, and legal implications of the intern economy. Its catchy title, content, and timing of release (concurrent with the impact of the Great Recession on students and recent graduates) helped to draw public attention to concerns about unpaid internships.<sup>163</sup>

Eric Glatt, holder of an MBA who worked as an unpaid intern in the accounting operation of Fox Searchlight Pictures production of the movie “Black Swan,” was among Perlin’s attentive readers.<sup>164</sup> *Intern*

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160 Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html>. Greenhouse is one of a handful of newspaper reporters expressly assigned to the labor beat, and his articles are regarded as providing mainstream validation of emerging labor relations issues.

161 See generally Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection: Reforming the Regulation of Student Internships*, ECONOMIC POLICY INSTITUTE (Apr. 5, 2010), [http://www.epi.org/files/page/-/pdf/epi\\_pm\\_160.pdf](http://www.epi.org/files/page/-/pdf/epi_pm_160.pdf).

162 ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* (2011).

163 See generally, e.g., Katy Waldman, *Ross Perlin’s “Intern Nation,” on Life as an Intern*, WASH. POST (May 20, 2011), [https://www.washingtonpost.com/entertainment/books/ross-perlins-intern-nation-on-life-as-an-intern/2011/04/25/AFIM5z7G\\_story.html](https://www.washingtonpost.com/entertainment/books/ross-perlins-intern-nation-on-life-as-an-intern/2011/04/25/AFIM5z7G_story.html) (“Most powerfully, [Ross Perlin] shows how internships lie beyond the means of most Americans even as employers increasingly regard internship experience as a prerequisite for jobs.”); Anna Winter, *Intern Nation by Ross Perlin - Review*, THE GUARDIAN (May 15, 2011, 11:00 AM), <http://www.theguardian.com/books/2011/may/15/intern-nation-ross-perlin-review> (“Full of restrained force and wit, this is a valuable book on a subject that demands attention.”).

164 This is based on personal conversations with Eric Glatt, during which he recounted that reading *Intern Nation* and my 2002 law review article (see

*Nation* and other writings helped inform Glatt's decision to proceed as a lead, named plaintiff in the lawsuit against Fox Searchlight Pictures seeking back wages. The claim was strategically well situated to attract its own round of media attention. It was filed in the nation's media capital against a well-known (and presumably wealthy) movie studio, in connection with the production of a major motion picture.

### 3. 2012–2013: Publicity, Organizing, and More Legal Claims

The seeds planted in 2010 and 2011 bore fruit in 2012 and early 2013 with more media coverage, additional filings of lawsuits, and the emergence of a grassroots intern rights movement. Much of this activity was centered in New York City, a favorite site for internships and a global media capital. For example:

- At least six additional wage and hour lawsuits were filed in 2012 on behalf of former interns.<sup>165</sup>
- *New York* magazine recognized that an “intern-rights movement is afoot,”<sup>166</sup> while a *Time* magazine headline proclaimed “The Beginning of the End of the Unpaid Internship.”<sup>167</sup>
- Intern Labor Rights,<sup>168</sup> a New York City-based group that grew out of the Arts & Labor working group of Occupy Wall Street, emerged as a local and social media organizing presence. In 2012, it issued a public call to “major online job boards” to stop circulating “classified listings for unpaid internships at for-profit businesses.”<sup>169</sup> In 2013, its members

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Yamada, *Student Interns*, *supra* note 9) were significant factors in persuading him to file his lawsuit.

165 See Suen, *supra* note 79.

166 *The Intern's Burden*, N.Y. MAG. (Mar. 25, 2012), <http://nymag.com/news/intelligencer/topic/intern-poll-2012-4/>.

167 Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/> (observing that “[a]s college students make the annual rite of passage from college classroom to summer internship, those unpaid positions may have finally peaked”).

168 See INTERN LABOR RIGHTS, <http://www.internlaborrights.com/> (last visited Apr. 26, 2016).

169 Media Advisory, Arts & Labor #OWS Expands Campaign Against Unpaid Internships at For-Profit Business, Arts & Labor (Apr. 18, 2012),

handed out clever “swag bags” to New York Fashion Week attendees that included a “Pay Your Interns” button and information about intern rights.

- On a campus level, New York University undergraduate Christina Isnardi became the subject of a *USA Today* news feature when she circulated a student petition calling upon the university’s career services office to stop listing unpaid internship announcements.<sup>170</sup>
- The developing lawsuits and public discussion over unpaid internships led some employers to reconsider the practice.<sup>171</sup>

#### 4. Summer 2013: Coming Out Party

It took the June 2013 *Glatt* district court decision, however, to illustrate how the right type of impact litigation can propel a social movement. Although it was only a set of rulings on pre-trial motions before a single federal trial court, its impact was fast and significant, and it either fed, or coincided with, a slew of other developments. For example:

- The decision triggered a wave of mainstream national media coverage that, in turn, spurred public discussions about the intern economy and whether unpaid internships should be permitted under the law.<sup>172</sup>

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<http://artsandlabor.org/wp-content/uploads/2012/04/OWSartsandlaborMediaAdvisoryJobBoardLetter20120418.pdf>.

- 170 Susannah Griffree, *Students Fight Back Against Illegal Unpaid Internships*, USA TODAY (May 13, 2013, 4:58 PM), <http://www.usatoday.com/story/news/nation/2013/05/09/students-fight-unpaid-internships/2145033/> (reporting on Christina Isnardi’s initiatives to stop the practice of posting unpaid internship listings at NYU’s career center).
- 171 See Paul Davidson, *Fewer Unpaid Internships To Be Offered*, USA TODAY (June 23, 2012), <http://usatoday30.usatoday.com/money/workplace/story/2012-03-07/summer-internships-paid-unpaid/53404886/1> (reporting that “[a]s summer intern season draws near, many employers are doing away with unpaid internships or converting them to paid programs amid lawsuits that claim interns should have been compensated for their work, labor lawyers say”).
- 172 See, e.g., Michelle Chen, *For Disgruntled Young Workers, Lawsuits May Spark Intern Insurrection*, IN THESE TIMES (June 24, 2013), <http://inthesetimes.com>.

- In the immediate aftermath of the *Glatt* decision came a marked increase in filings of legal claims for unpaid wages by former interns.<sup>173</sup>
- ProPublica created a project to examine the intern economy in America and conducted a well-publicized and successful crowdsourced fundraising campaign for a paid project intern.<sup>174</sup>
- When a senior official with the Lean In Foundation, a charitable organization launched by Facebook executive Sheryl Sandberg to support the careers of women, advertised for an unpaid editorial intern in August 2013, the result was a loud public backlash.<sup>175</sup> Within 48 hours, the Foundation announced that it would create a paid internship program.<sup>176</sup>
- During the summer of 2013, interns at the Nation Institute in New York, publisher of the political magazine *The Nation*, submitted a letter to the editor to the magazine, calling upon it to pay its full-time summer interns a living wage, rather

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com/working/entry/15190/for\_disgruntled\_young\_workers\_lawsuits\_may\_portend\_intern\_insurrection/; Sam Hananel, *Unpaid Internships in Jeopardy After Court Ruling*, AP (June 13, 2013, 8:27 PM), <http://bigstory.ap.org/article/unpaid-internships-jeopardy-after-court-ruling> (nationally syndicated Associated Press story); Steven Greenhouse, *Judge Rules That Movie Studio Should Have Been Paying Interns*, N.Y. TIMES (June 11, 2013), <http://www.nytimes.com/2013/06/12/business/judge-rules-for-interns-who-sued-fox-searchlight.html>; Taryn Luna, *Court Ruling Stirs Debate Over Intern Pay*, BOS. GLOBE (June 26, 2013), <http://www.bostonglobe.com/business/2013/06/25/court-ruling-triggers-debate-fairness-unpaid-internships/wOshEPfGG9t8BP8Nncr8ML/story.html>; Jim Snyder & Christie Smyth, *Sleeping-Giant Issue of Unpaid U.S. Interns Gets Scrutiny*, BLOOMBERG (June 27, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-06-27/sleeping-giant-issue-of-unpaid-interns-gets-scrutiny.html>.

- 173 See Suen, *supra* note 79 (lawsuits filed after June 11, 2013, the date of the *Glatt* decision).
- 174 See Blair Hickman, *Meet Our Kickstarter Intern!*, PRO PUBLICA (Aug. 13, 2013, 10:33 AM), <http://www.propublica.org/article/meet-our-kickstarter-intern>.
- 175 Rachel Feintzeig, *After Internship Posting, Some Say Lean In Should Pay Up*, WALL ST. J. BLOG (Aug. 15, 2013, 2:25 PM), <http://blogs.wsj.com/atwork/2013/08/15/after-internship-posting-critics-say-lean-in-should-pay-up/>.
- 176 See *id.*

than the \$150 weekly stipend it currently paid.<sup>177</sup> The institute's director responded by saying that it will raise the internship stipend and raise money for travel and housing grants.<sup>178</sup>

- The intern rights movement moved beyond its New York base to Washington, D.C., another common site of unpaid internships.<sup>179</sup> The Fair Pay Campaign went public with a call for the White House to pay its interns, citing “the hypocrisy of the Obama Administration lobbying for a higher minimum wage while paying some of its young workers nothing at all.”<sup>180</sup>

Intern rights advocates are finding support in survey data by NACE that challenge the very proposition that unpaid internships open doors to full-time, paid post-graduate employment. NACE's survey of 2013 college graduates found that among those “who had applied for a job, those who took part in paid internships enjoyed a distinct advantage over their peers who undertook an unpaid experience or who didn't do an internship.”<sup>181</sup> NACE further reported:

Results of NACE's 2013 *Student Survey* show that 63.1 percent of paid interns received at least one job offer. In comparison, only 37 percent of unpaid interns got

177 Alleen Brown, et al., *Yes, Let's Diversify Journalism*, THE NATION (July 30, 2013), <http://www.thenation.com/article/175515/letters#>.

178 See Taya Kitman, *The Nation Institute Replies*, THE NATION (July 30, 2013), <http://www.thenation.com/article/175515/letters#> (responding to interns' letter). See also Blair Hickman, *Nation Institute to Pay Interns Minimum Wage*, PROPUBLICA (Aug. 2, 2013), <http://www.propublica.org/article/nation-institute-to-pay-interns-minimum-wage>.

179 Tess VandenDolder, *What We Do: The Fair Pay Campaign Takes on Unpaid Internships*, IN THE CAPITAL (Sept. 23, 2013), <http://inthecapital.streetwise.co/all-series/what-we-do-the-fair-pay-campaign-takes-on-unpaid-internships/> (“Washington D.C. in particular seems to be a hub for [unpaid internships], as non-profits and the federal government alike offer internships to attract idealistic young people looking to change the world.”).

180 John D. Sutter, *Obama Should Pay His Interns*, CNN (Aug. 21, 2013), <http://www.cnn.com/2013/08/20/opinion/sutter-white-house-interns/index.html>.

181 *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*, NACE (May 29, 2013), <http://www.naceweb.org/s05292013/paid-unpaid-interns-job-offer.aspx>.

an offer; that's not much better than results for those with no internship—35.2 percent received at least one job offer.

In terms of starting salary, too, paid interns did significantly better than other job applicants: The median starting salary for new grads with paid internship experience is \$51,930—far outdistancing their counterparts with an unpaid internship (\$35,721) or no internship experience (\$37,087).

This is the third consecutive year that NACE's annual student survey has captured internship data for paid and unpaid interns; in each survey, paid interns exceeded their peers in job offers and starting salaries.<sup>182</sup>

Accordingly, the NACE survey data suggest that unpaid internships may have become a second-class type of internship experience, carrying far less clout in the entry-level job market and leading to lower entry-level salaries than their paying counterparts.

## B. Global Movement

The American intern rights movement has fueled, and been fueled by, activism in other nations. *Intern Nation* author Ross Perlin, assessing the landscape in the aftermath of the *Glatt* district court decision, noted that the movement is going international:

Intern Labor Rights, a New York-based group formed out of the Occupy Wall Street movement, is forming a coalition with like-minded groups in Canada, Britain, France, Switzerland, the Netherlands and Austria. In all of those countries, campaigns to make internships fairer are also under way.<sup>183</sup>

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182 *Id.*

183 Ross Perlin, *Unpaid Interns: Silent No More*, N.Y. TIMES, July 21, 2013, at BU7, <http://www.nytimes.com/2013/07/21/jobs/unpaid-interns-silent-no-more.html>.

In fact, the summer of 2013 saw another successful crowdsourced fundraising campaign in support of a new international magazine, *Intern*, whose mission includes hosting, “[t]hrough a variety of perspectives[,] . . . a balanced, unbiased and frank discussion” about the role of internships and interns in modern society.<sup>184</sup> By the fall of 2013, the “backlash against unpaid internships in America” had spread to Europe in the aftermath of the death of a 21-year-old Merrill Lynch intern in London after “allegedly working . . . for 72 hours without sleep.”<sup>185</sup>

### C. Opposition to the Intern Rights Movement

Opposition to the intern rights movement appears to be coming in the form of four categories of messaging. The first is a sort of chiding defense of unpaid internships, grounded in the spirit that *hey, it worked for me, so it should work for you*. For example, in a column for the human resources magazine *Workforce Management*, managing editor Rick Bell tipped a cap to the *Glatt* lawsuit before waxing nostalgic about his own unpaid internship experience working for a “tough as nails” news station boss who gave him invaluable experience.<sup>186</sup> He went on to recommend a change in laws to preserve unpaid internships:

So sure, pay your intern, or at least hand over a stipend; it’s the right thing to do. Yet with managers complaining that college grads are ill-prepared for the rigors of a daily job, unpaid internships can offer basic training for young workers they couldn’t get anywhere else. Instead of letting the *Black Swan* ruling kill off a truly valuable training tool, let’s revisit the laws governing all internships.<sup>187</sup>

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184 *About*, INTERN MAG., <http://www.intern-mag.com/about/> (last visited Jan. 21, 2014).

185 Ella Delany, *Interns Resist Working Free*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/09/30/us/interns-resist-working-free.html>.

186 Rick Bell, *The Last Word: In Defense of Unpaid Internships*, WORKFORCE (July 2, 2013), <http://www.workforce.com/articles/the-last-word-in-defense-of-unpaid-internships>.

187 *Id.*

This kind of soggy remembrance combines with the dubious assumption that unpaid internships are mostly about “training” and less about work. It also raises questions about whether these sentimental defenders of unpaid internships share the personal financial pressures facing heavily-indebted college students and recent graduates.

A second defense of unpaid internships carries a more ridiculing tone toward those who are challenging the practice. For example, in 2011, CNN program host Anderson Cooper, son of heiress Gloria Vanderbilt, took to the airwaves to ridicule the lawsuit against Fox Searchlight Pictures.<sup>188</sup> Clearly not impressed with the lawsuit, he said, “[w]ould it be great if all unpaid internships paid really well? Sure, it also would be great if my dog made breakfast for me every morning, but I’m not going to file a lawsuit over it.”<sup>189</sup> His dismissive tone reflected a common criticism that lowly interns seeking the minimum wage for their work are acting in an entitled manner.

A third defense comes from the higher education industry. In 2010, for example, 13 university presidents wrote to the U.S. Secretary of Labor, urging that the DOL “reconsider undertaking the regulation of internships,” which have proven to be “valuable and sought-after opportunities for American college students.”<sup>190</sup> Perhaps the most outrageous statement in the presidents’ letter is this characterization: “[s]ome internships are paid and some, on a mutually agreed upon basis, are uncompensated.”<sup>191</sup> The letter suggests that students have a degree of choice over whether they are paid, perhaps even implying that some opt not to receive compensation.

The higher education industry has put itself in something of a bind. Having raised tuition to levels that necessitate heavy student loan debts for all but the most fortunate, it is feeling enormous pressure to deliver programs that maximize employability in an era of job scarcity for new graduates. The unpaid internship, either offered

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188 Anderson Cooper, *The Ridiculist: Unpaid Interns*, ANDERSON COOPER 360 (Sept. 29, 2011), <http://ac360.blogs.cnn.com/2011/09/29/the-ridiculist-unpaid-interns/>.

189 *Id.* (quote comes at approximately the 40-second mark of the online recording).

190 Letter from Joseph E. Aoun, President, Ne. Univ. & Robert A. Brown, President, B. Univ., et al., to Hilda L. Solis, Sec., U.S. Dep’t of Labor (Apr. 28, 2010), [http://s1.epi.org/files/page/-/pdf/20100428\\_univ\\_presidents\\_letter\\_to\\_USDOL.pdf](http://s1.epi.org/files/page/-/pdf/20100428_univ_presidents_letter_to_USDOL.pdf).

191 *Id.*

for credit or facilitated by a school's career office, becomes a featured component of an easy supposed fix. The university becomes, in essence, an internship broker paid with tuition dollars. Furthermore, the more that students opt for credit-earning internships, the fewer expenses that universities incur for classroom education, while awarding the same degrees.

The fourth, most hyperbolic defense of unpaid internships can only be characterized as an ideological rant. A prime example is a *Fiscal Times* article by Liz Peek titled "Obama Criminalized Unpaid Internships and Killed Jobs," in the aftermath of the *Glatt* district court decision:

In yet another blow to young people, a federal judge has made it nearly impossible for companies to take on unpaid interns. This flies in the face of President Obama's incessant appeal for more job training.

Turns out, President Obama loves job training programs – but only the kind that increase our budget deficit. In other words, those provided by the federal government. The private sector kind, not so much.<sup>192</sup>

The column closes with a personal attack on lead plaintiffs *Glatt* and *Footman*:

It is of course the very people that these two litigious fellows think they are helping that will be hurt by this outcome. Fox says they will appeal the decision. One can only hope so. One can also hope that these two nitwits find it challenging to land their next job.<sup>193</sup>

Beyond the contemptuous rhetoric, the article avoids the obvious logic that paying people for their work is the most direct way to create jobs. Furthermore, the column's headline crosses into the ridiculous, confusing the enforcement of civil statutory provisions with criminal prosecution.

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192 Liz Peek, *Obama Criminalized Unpaid Internships and Killed Jobs*, FISCAL TIMES (June 19, 2013), <http://www.thefiscaltimes.com/Columns/2013/06/19/Obama-Criminalized-Unpaid-Internships-and-Killed-Jobs>.

193 *Id.*

## Conclusion

The intern rights movement has been sparked by youthful energy, high levels of education, technological and social media savvy, and growing resentment toward an employment practice that can be exploitative and exclusionary. The court of appeals decision in *Glatt v. Fox Searchlight Pictures, Inc.*, however, poses a significant challenge to the vitality of that movement and to subsequent legal and policy efforts to stem the practice of unpaid internships. Now that one significant case has suffered a setback in the courts, will the movement have the determination to keep working for law reform? Furthermore, without the full weight of the law behind their sails, will intern rights advocates find other ways to persuade employers to compensate interns and protect them from mistreatment on the job? The answers to these questions will tangibly influence the state of the law and employer practices concerning interns during the coming years.

**Department of Homeland Security v. MacLean:  
The Supreme Court's Interpretation of the Application of  
Whistleblower Protection Laws to Disclosures  
Made Contrary to Transportation Security  
Administration Regulations**

*Samantha Arrington Sliney<sup>1</sup>*

## I. Introduction

Since the attacks of September 11, 2001, it has become increasingly difficult for the different facets of the United States (U.S.) government to protect all Americans while still allowing all Americans the right to freely exercise the fundamental rights afforded to them by the Constitution. This challenge is one that continues to plague the U.S. government and the various U.S. court systems. After the attacks, Congress, the President, and relevant administrative agencies have worked diligently to ensure that the U.S. and its citizens are safe both on and off American soil; however, this safety comes at a price. Information exchanged between these government departments may be of a classification that prohibits its release to the American public. These prohibitions are necessary to keep the American public safe and, as a result, various laws have been enacted which prohibit the release of information that could pose a risk to homeland and national security.<sup>2</sup>

Recognizing the need for federal government employees to be able to voice their own personal concerns regarding information they have access to due to their federal employment, Congress enacted whistleblower protection laws in 1978, 1989, and 2012.<sup>3</sup> The

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  - 2 See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978); Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989); Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).
  - 3 Civil Service Reform Act, 92 Stat. 1111; Whistleblower Protection Act, 103 Stat. 16; Whistleblower Protection Enhancement Act, 126 Stat. 1465.

application of these whistleblower protection laws to other statutes, which prohibit the release of protected information, presents court systems in the U.S. with complicated and potentially significant issues of law that must be resolved.

A recent U.S. Supreme Court case, *Department of Homeland Security v. MacLean*, evidences this struggle between homeland and national security, and the right of federal government employees to voice their opinions regarding an issue they believe to be a danger to public health and safety.<sup>4</sup> In *MacLean*, the Supreme Court ruled in a 7-2 decision, with Chief Justice Roberts writing the opinion of the Court, that the disclosure of information by a Federal Air Marshall under a whistleblower protection law was not prohibited by the Transportation Security Administration's (TSA) regulations because the regulations did not qualify as "law" under the applicable whistleblower protection statute.<sup>5</sup> Interestingly, the Court noted that the concerns raised by the Government about the danger to public safety created by whistleblower protections for individuals like MacLean were legitimate, but needed to be addressed by Congress or the President, and not the Court.<sup>6</sup> In the dissenting opinion, Justice Sotomayor, joined by Justice Kennedy, reached a different conclusion that strikes more of a balance between both homeland security interests and the interests of federal government employees concerned for the safety of the American public.<sup>7</sup>

To understand the ultimate opinion of the Court in *MacLean*, this note provides a background of whistleblower protection laws, specifically the one implicated in this case, and the Aviation and Transportation Security Act (ATSA). Secondly, this note provides a factual summary of *MacLean*, the procedural posture, the rationale of the Court, and a synopsis of the dissenting opinion. This note then provides an analysis of how the dissenting opinion presents a more equal balance between the protection of homeland security and the rights of federal employees. Thus the dissenting opinion presents a rationale that protects both homeland security interests and the interests of the American public. Lastly, this note concludes with an overview of the key points of discussion.

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4 135 S. Ct. 913 (2015).

5 *Id.* at 921.

6 *Id.* at 923-24.

7 *See id.* at 924-26.

## II. Background

*MacLean* implicates two statutes, each of which addresses different areas of the law. To understand how these statutes work together and how the Supreme Court interpreted their application in *MacLean*, it is important to know their purposes and what the statutes themselves state.

### A. Whistleblower Protection Laws – 5 U.S.C. § 2302(b)(8)(A)

Since 1978, Congress has consistently recognized the need for statutes that protect government employees who are aware of government wrongdoing.<sup>8</sup> When passing the Civil Service Reform Act of 1978, Congress expressly admitted that it was limited in its ability to uncover government wrongdoing due to “the vast Federal bureaucracy.”<sup>9</sup> Understanding that government employees who “summon[] the courage to disclose the truth” often face “harassment and abuse,” Congress felt the need for “a means to assure [government employees] that they w[ould] not suffer if they help uncover and correct administrative abuses.”<sup>10</sup> The 1978 Act established “the core protections for government whistleblowers.”<sup>11</sup>

Over the years, government agencies have resisted the protections afforded to government employees through whistleblower laws and, in return, Congress has continued its effort to strengthen the laws.<sup>12</sup> In 1989, Congress unanimously passed the Whistleblower Protection Act (WPA).<sup>13</sup> The purpose of this act is

to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within in the Government by— (1) mandating that employees should not suffer

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8 Brief for Respondent at 3-4, *Dep’t of Homeland Sec. v. MacLean*, 125 S. Ct. 913 (2015) (No. 13-894), 2014 WL 4726507 (citing S. REP. NO. 95-969, at 8 (1978)); see also Civil Service Reform Act, 92 Stat. 1111; Whistleblower Protection Act, 103 Stat. 16; Whistleblower Protection Enhancement Act, 126 Stat. 1465.

9 Brief for Respondent, *supra* note 8, at 3-4.

10 *Id.*

11 *Id.* at 4.

12 *Id.*

13 *Id.*

adverse consequences as a result of prohibited personnel practices; and (2) establishing . . . that while disciplining those who commit prohibited personnel practices may be used as a means to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remain the paramount consideration.<sup>14</sup>

Later, Congress once again unanimously reinforced whistleblower protections in 1994.<sup>15</sup>

Congress' most recent reinforcement of whistleblower protections came in 2012 with the passage of the Whistleblower Protection Enhancement Act.<sup>16</sup> Congress sought "'to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws,' and in particular to 'overturn[ ] several court decisions that narrowed the scope of protected disclosures.'"<sup>17</sup> In its report, the Senate "emphasized that protecting whistleblowers helps protect the nation against terrorist threats[,]” specifically stating, “[i]n a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation’s airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment.”<sup>18</sup>

The part of the whistleblower laws implicated in *MacLean* is 5 U.S.C. § 2302(b)(8)(A), which states in relevant part:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of (A) any disclosure of information by an employee or applicant which the

14 Whistleblower Protection Act, § 2(b), 103 Stat. 16.

15 Brief for Respondent, *supra* note 8, at 4 (citing An Act to Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994)).

16 Brief for Respondent, *supra* note 8, at 4.

17 *Id.* (quoting S. REP. NO. 112-155, at 3-5 (2012)).

18 *Id.* (quoting S. REP. NO. 112-155, at 1 (2012)).

employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a *substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . .*<sup>19</sup>

The Respondent stated it very succinctly, this Section means that “[e]xcept where Congress or the President has determined that the costs of any disclosure would outweigh its benefits, government employees should be encouraged to reveal illegal, dangerous, or grossly wasteful agency acts. And when they do so, the agencies that employ them should be prevented from retaliating.”<sup>20</sup>

## **B. Aviation and Transportation Security Act - 49 U.S.C. § 114(r)(1)**

The purpose of the ATSA can be directly linked to the terrorist attacks of September 11, 2001.<sup>21</sup> Congress passed the ATSA “to ‘address the security of the nation’s transportation system,’” determining “that ‘the best way to ensure effective Federal management of the nation’s transportation system is through the creation of a new Administration’ within the Department of Transportation ‘to be called the [TSA],’ whose responsibilities would ‘encompass security in all modes of transportation.’”<sup>22</sup> Congress determined that the TSA would be tasked with the duties outlined under the ATSA to include “daily security screening for air travel; receipt, analysis, and distribution of intelligence relating to transportation security; improvement of existing security procedures; assessment of security measures for cargo transportation; and oversight of security at airports and other transportation facilities.”<sup>23</sup> Congress also ensured

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19 5 U.S.C. § 2302(b)(8)(A) (2014) (emphasis added).

20 Brief for Respondent, *supra* note 8, at 5.

21 See Brief for Petitioner at 2, *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015) (No. 13-894), 2014 WL 3720326 (citing H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001)).

22 *Id.* (quoting H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001)).

23 *Id.* at 2 (citing Aviation and Transportation Security Act, § 101(a), 115 Stat. 597-598 (49 U.S.C. 114(d)(1)-(2), (e)(1), (f)(1)-(3), (6)-(8) and (10)-(11))).

under the ATSA that “certain information acquired or developed in the course of security activities, the dissemination of which could be harmful, would be shielded from public disclosure.”<sup>24</sup>

The part of the ATSA implicated in *MacLean* is 49 U.S.C. § 114(r)(1),<sup>25</sup> which states in relevant part:

The Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Under Secretary decides that disclosing the information would (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.<sup>26</sup>

This section essentially directs TSA to create regulations that prohibit the release of information that would invade personal privacy, reveal confidential information, or be detrimental to national security. Specifically, *MacLean* focused on the disclosure of information that would be detrimental to national security.

### III. The Case

In 2001, Robert J. MacLean became a Federal Air Marshal with the TSA.<sup>27</sup> Air Marshals “protect passenger flights from potential hijackings” and may be assigned to any flight that, in the opinion of the TSA, presents high security risks.<sup>28</sup> Due to the duties Air Marshals are tasked with fulfilling, they have access to sensitive

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 926 (2015) (“This statute has a complicated history. It was codified as 49 U.S.C. § 40119(b)(1) when the TSA initially promulgated its regulations on sensitive security information. It was codified at § 114(s)(1) when MacLean disclosed the text message to MSNBC. And it is now codified at § 114(r)(1). The Federal Circuit referred to § 40119(b)(1) in its opinion. Because the statute has remained identical in all relevant respects, however, we and the parties refer to the current version.”).

<sup>26</sup> 49 U.S.C. § 114(r)(1) (2014) (emphasis added).

<sup>27</sup> *MacLean*, 135 S. Ct. at 916.

<sup>28</sup> Brief for Petitioner, *supra* note 21, at 6 (citing 49 U.S.C. § 44917(a)(1)-(2) (2004)).

security information (SSI).<sup>29</sup> Per TSA regulations, disclosure of SSI is restricted.<sup>30</sup> In 2003, SSI included a range of sensitive information like security plans, threat-detection mechanisms, and vulnerability assessments.<sup>31</sup> Specifically as it relates to this case, SSI included details of aviation security measures, such as

‘information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations,’ as well as other information deemed essential to transportation security, such as ‘[a]ny approved, accepted, or standard security program’ adopted under certain regulations; ‘Security Directives and Information Circulars promulgated under certain regulations; ‘[a]ny selection criteria used in any security screening process, including for person, baggage, or cargo’; ‘[a]ny security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto’; and the technical specifications of certain security equipment.<sup>32</sup>

TSA regulations generally prohibited the release of SSI unless a person had a “need to know.”<sup>33</sup> “Need to know” is well-defined in the TSA regulations and persons who disclose the prohibited information to others who did not have a “need to know” could face civil penalties and other enforcement or corrective action.<sup>34</sup> Generally, a person has a “need to know” “if access to the information is necessary for performance of the employee’s official duties.”<sup>35</sup>

“On July 26, 2003, the Department of Homeland Security (DHS) issued a confidential advisory about a potential hijacking plot.”<sup>36</sup> The advisory stated that al-Qaeda, a terrorist group, was planning to use passenger flights to attack ground targets.<sup>37</sup> The

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29 *Id.*; see *MacLean*, 135 S. Ct. at 916.

30 Brief for Petitioner, *supra* note 21, at 5; 14 C.F.R. pt. 191 (1977).

31 Brief for Petitioner, *supra* note 21, at 4.

32 *Id.* at 4-5 (quoting 49 C.F.R. § 1520.7(a)-(f) and (j) (2002)).

33 *Id.* at 5 (citing 49 C.F.R. § 1520.5(a) (2002)).

34 *Id.* (citing 49 C.F.R. § 1520.5(b) and (d) (2002)).

35 49 C.F.R. § 15.11(b)(1) (2011).

36 *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 917 (2015).

37 *Id.*

advisory further detailed that al-Qaeda “considered suicide hijackings and bombings as the most promising methods to destroy aircraft in flight, as well as to strike ground targets.”<sup>38</sup> The advisory listed the United Kingdom, Italy, Australia, and the east coast of the U.S. as possible targets.<sup>39</sup> The advisory seemed to suggest that at least one of the attacks “could be executed by the end of summer 2003.”<sup>40</sup>

Shortly after this advisory, the TSA briefed all of its Air Marshals, including MacLean, on the hijacking plot by al-Qaeda. During this briefing, MacLean was told by a TSA official

that the hijackers were planning to “smuggle weapons in camera equipment or children’s toys through foreign security,” and then “fly into the [U.S.] . . . into an airport that didn’t require them to be screened.” The hijackers would then board U.S. flights, “overpower the crew or the Air Marshals and . . . fly the planes into East Coast targets.”<sup>41</sup>

Subsequently, “the TSA cancel[ed] all overnight missions from Las Vegas until early August.”<sup>42</sup> Maclean was notified of this change a few days after the TSA briefing regarding the potential hijacking plot by al-Qaeda.<sup>43</sup> After receiving the notification, MacLean asked a supervisor why the missions had been cancelled when the advisory was still in place regarding potential attacks by al-Qaeda.<sup>44</sup> MacLean believed the decision to remove Air Marshals from those flights was dangerous due to the advisory and in violation of federal law, which requires “the TSA to put an air marshal on every flight that ‘present[s] high security risks.’”<sup>45</sup> The supervisor told MacLean “that the TSA wanted to save money on hotel costs because there was no more money in the budget.”<sup>46</sup> MacLean then called the DHS Inspector General’s Office to alert them to the cancellations, but the

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38 *Id.* (quoting app. 16).

39 *Id.*

40 *Id.*

41 *Id.* (quoting app. 16).

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* (citing 49 U.S.C. § 44917(a)(2) (2015)).

46 *Id.*

office responded that “there was ‘nothing that could be done.’”<sup>47</sup>

In an attempt to bring awareness to the situation, MacLean contacted an MSNBC reporter and told him about the situation.<sup>48</sup> Using the information obtained from MacLean, “the reporter published a story about the TSA’s decision, titled ‘Air Marshals pulled from key flights.’”<sup>49</sup> The article stated “that Air Marshals would ‘no longer be covering cross-country or international flights’” due to “‘the expense of staying overnight in hotels.’”<sup>50</sup> More importantly, the article stated “that the cancellations were ‘particularly disturbing to some’ because they ‘coincide[d] with a new high-level hijacking threat issued by the [DHS].’”<sup>51</sup>

The story prompted Congress to become involved, and within 24 hours of MSNBC reporting the removal of Air Marshals from flights, the TSA put Air Marshals back on the flights.<sup>52</sup> MacLean went undiscovered as the person who had spoken with the MSNBC reporter until September 2004 when “MacLean appeared on NCB Nightly News to criticize the TSA’s dress code for Air Marshals, which he believed made them too easy to identify.”<sup>53</sup> Although the news station attempted to disguise MacLean’s identity, the disguise did not work and several co-workers recognized his voice, which motivated the TSA to begin investigating MacLean.<sup>54</sup> Through the course of the investigation, MacLean admitted to his communications with the reporter in 2003 regarding the cancellation of the missions due to budget constraints.<sup>55</sup> Eventually, in April of 2006, MacLean was fired “for disclosing sensitive security information without authorization.”<sup>56</sup>

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47 *Id.* (quoting app. 97).

48 *See id.*

49 *Id.* (quoting app. 36). *See generally* Brock N. Meeks, *Air Marshals Pulled from Key Flights*, MSNBC (July 29, 2003), <http://www.urondisplay.com/airmarshal/MSNBC%20Air%20Marshals%20pulled%20from%20key%20flights%207-29-2003.pdf>.

50 *Id.* (quoting app. 36).

51 *Id.* (quoting app. 36).

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 918.

### A. Merit Systems Protection Board Decision

MacLean subsequently challenged the TSA's decision at the Merit Systems Protection Board (the Board),<sup>57</sup> arguing that his termination was erroneous because his disclosures were protected whistleblowing activities under the WPA, specifically 5 U.S.C. § 2302(b)(8)(A).<sup>58</sup> The Board concluded that MacLean's disclosures were not protected whistleblowing activities because the disclosures were "specifically prohibited by law."<sup>59</sup>

### B. The Court of Appeals for the Federal Circuit Decision

MacLean appealed the decision of the Board to the Court of Appeals for the Federal Circuit (the Federal Circuit).<sup>60</sup> The Federal Circuit vacated the Board's decision.<sup>61</sup> The Federal Circuit noted that both parties "had agreed that, in order for MacLean's disclosure to be 'specifically prohibited *by law*,' it must have been 'prohibited by a statute rather than by a regulation.'"<sup>62</sup> Therefore, the Federal Circuit was tasked with determining "whether the statute authorizing the TSA's regulations—now codified at 49 U.S.C. § 114(r)(1)—'specifically prohibited' MacLean's disclosure."<sup>63</sup>

The Federal Circuit held that § 114(r)(1) was not a prohibition

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57 *About MSPB*, MSPB.GOV, <http://www.mspb.gov/about/about.htm> (last visited Sept. 18, 2015) ("The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and, the Board. The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM.").

58 *MacLean*, 913 S. Ct. at 918 (citing 116 M.S.P.R. 562, 569-72 (2011)).

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* (quoting *MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301, 1308 (Fed. Cir. 2013)).

63 *Id.* (citing *MacLean*, 714 F.3d at 1308).

against disclosure of SSI.<sup>64</sup> The Federal Circuit concluded that “[t]he statute did ‘not expressly prohibit employee disclosures,’ . . . but instead empowered the TSA to ‘prescribe regulations prohibiting disclosure[s]’ if the TSA decided that disclosing that information would harm public safety.”<sup>65</sup> Ultimately, the Federal Circuit found that MacLean’s disclosure was in violation of a regulation and not a statute, and since the parties had agreed that a regulation was not “law” under § 2302(b)(8)(A), the disclosure was protected by the WPA.<sup>66</sup> The decision of the Board was vacated “and remanded for a determination of whether MacLean’s disclosure met the other requirements under § 2302(b)(8)(A)”;<sup>67</sup> however, the Board did not revisit the case because the Supreme Court granted certiorari.<sup>67</sup>

### C. The Supreme Court Decision

The U.S. Supreme Court granted certiorari on May 19, 2014, and heard oral arguments on November 4, 2014.<sup>68</sup> The Court delivered its opinion on January 21, 2015.<sup>69</sup>

#### 1. Opinion of the Court

The Government made three primary arguments in *MacLean*, which were addressed by the Court in order.<sup>70</sup> First, in response to the Government’s argument that the disclosure by Maclean was specifically prohibited by law within the meaning of § 2302(b)(8)(A), the Court held that even though the disclosure was specifically prohibited by regulation, that prohibition did not meet the requirements of § 2302(b)(8)(A), which stated that the disclosure must be “specifically prohibited by law.”<sup>71</sup> The Court relied heavily upon its finding that in various sections of 2302 Congress used

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64 *Id.*

65 *Id.* (quoting *MacLean*, 714 F.3d at 1309).

66 *Id.*

67 *Id.* (citing *MacLean*, 714 F. 3d at 1310-11).

68 *Id.*, petition for cert. filed, 134 S. Ct. 2290 (U.S. May 19, 2014) (No 13-894): See also *Department of Homeland Security v. MacLean*, SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/department-of-homeland-security-v-maclean/> (last visited Apr. 9, 2015).

69 *Id.*

70 *MacLean*, 135 S. Ct. at 919, 923-24.

71 *Id.*

the phrase “law, rule or regulation,” however, in § 2302(b)(8)(A), it used only the word “law,” which showed that Congress did not intend to include rules and regulations for the purposes of § 2302(b)(8)(A).<sup>72</sup>

In reaching this conclusion, the Court relied on the “interpretative canon that Congress acts intentionally when it omits language included elsewhere” in a particular statute.<sup>73</sup> Congress’ intent to not include rules and regulations as part of § 2302(b)(8)(A) is evidenced by the fact that Congress used the phrases “law, rules and regulations” and “laws” in close proximity to each other, in fact, using the phrases in the same sentence.<sup>74</sup> Congress also used the broader phrase “law, rules and regulations” nine times throughout the statute, showing that Congress’ use of the narrower word “law” in § 2302(b)(8)(A) was intentional and deliberate.<sup>75</sup>

The Court cited its decision in *Department of Treasury, IRS v. FLRA* to support its finding.<sup>76</sup> In that case, the Government also “argued that the word ‘laws’ in one section of the Civil Service Reform Act of 1978 meant the same thing as the phrase ‘law, rule or regulation’ in another section of the Act.”<sup>77</sup> In *FLRA*, the court found that a statute which referred to “‘laws’ in one section and ‘law, rule, or regulation’ in another ‘cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.’”<sup>78</sup>

The Court found that if § 2302(b)(8)(A) was read to include rules and regulations as part of the word “law,” such a broad interpretation would defeat the sole purpose of the whistleblower statute.<sup>79</sup> Congress passed this whistleblower law because it believed government agencies could not be trusted to appropriately handle whistleblowers within the various government agencies.<sup>80</sup> Therefore, Congress enacted a statute that would provide whistleblowers with protections; however, if the word “law” included rules and regulations then agencies could insulate themselves from the

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72 *Id.* at 919.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 920.

77 *Id.* (quoting *Dep’t of Treasury, IRS v. FLRA*, 494 U.S. 922, 931 (1990)).

78 *Id.* (quoting *FLRA*, 494 U.S. at 932).

79 *Id.*

80 *Id.*

scope of § 2302(b)(8)(A) by simply promulgating a regulation that “specifically prohibited” whistleblowing.<sup>81</sup> The Court concluded that it was not Congress’ intent to include rules and regulations as part of the definition of “law” as it is used in § 2302(b)(8)(A).<sup>82</sup>

The Government, relying on the Court’s prior ruling in *Chrysler Corp. v. Brown*, also argued “that the word ‘law’ include[ed] all regulations that have the ‘force and effect of law (i.e., legislative regulations),’ while excluding those that [did] not (e.g., interpretative rules).”<sup>83</sup> In *Chrysler*, the Court concluded that “legislative regulations generally fall within the meaning of the word ‘law,’ and that it would take a ‘clear showing of contrary legislative intent’ before [the Court would] conclude[] otherwise.”<sup>84</sup> The Court in *MacLean* determined *Chrysler* to be distinguishable, finding that a review of other statutes passed by Congress around the time of the enactment of this whistleblower law showed that Congress was very well equipped “to distinguish between regulations that had the force and effect of law and those that did not, but chose not to do so in [§] 2302(b)(8)(A).”<sup>85</sup>

In its second argument, the Government contended that 49 U.S.C. § 114(r)(1) prohibited “MacLean’s disclosure by imposing a ‘legislative mandate’ on the TSA to promulgate regulations to that effect.”<sup>86</sup> The Court found that § 114(r)(1) did not prohibit anything, but instead authorized the TSA to promulgate regulations.<sup>87</sup> The Court further articulated that the language of § 114(r)(1) granted substantial discretion to the TSA to decide what exactly would be prohibited and whether to prohibit anything at all.<sup>88</sup>

The Government cited *Administrator, Federal Aviation Administration v. Robertson*<sup>89</sup> to support its argument that § 114(r)(1)

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81 *Id.*

82 *Id.*

83 *Id.* (quoting Brief for Petitioner, *supra* note 21, at 19-22).

84 *Id.* (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979)).

85 *Id.* at 921; *see, e.g.*, 29 U.S.C. § 1144(c)(1) (1976 ed.).

86 *Id.* (quoting Brief for Petitioner, *supra* note 22, at 28, 33).

87 *Id.*

88 *Id.* at 922.

89 422 U.S. 255, 255 (1975) (“Respondents requested the Federal Aviation Administration (FAA) to make available Systems Worthiness Analysis Program (SWAP) Reports which consist of the FAA’s analyses of the operation and maintenance performance of commercial airlines. Section 1104 of the Federal Aviation Act of 1958 permits the FAA Administrator, upon receiving an objection to public disclosure of information in a report, to withhold

prohibited MacLean’s disclosures despite the discretion granted to TSA under the statute.<sup>90</sup> The Court vehemently disagreed with the Government’s contention, citing two specific reasons why *MacLean* was different from *Robertson*.<sup>91</sup> First, in *Robertson*, the FOIA provision at issue dealt with information exempted from disclosure, specifically 5 U.S.C. § 552(b)(3), while in this case § 2302(b)(8)(A) involved information prohibited from disclosure.<sup>92</sup> The Court provided:

. . . statute that exempts information from mandatory disclosure may nonetheless give the agency discretion to release that exempt information to the public. In such a case, the agency’s exercise of discretion has no effect on whether the information is ‘exempted from disclosure by statute’ – it remains exempt whatever the agency chooses to do.<sup>93</sup>

The situation in *Robertson* was completely different than that of *MacLean* because the statute at issue in *MacLean* gave the agency discretion to prohibit the disclosure of information.<sup>94</sup> “The information [was] not prohibited from disclosure by statute regardless of what the agency [did]. It [was] the agency’s exercise of discretion that determine[d] whether there [was] a prohibition at all.”<sup>95</sup> Since § 114(r)(1) did not create the prohibition, the disclosure by MacLean was not “prohibited by law” for the purposes of § 2302(b)(8)(A), it was prohibited by TSA regulation.<sup>96</sup> The Court further distinguished *Robertson* by stating that *Robertson* was a case about FOIA, which required the consideration of FOIA-specific factors.<sup>97</sup> The Court’s decision in *Robertson* turned on the analysis

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disclosure when, in his judgment, it would adversely affect the objecting party’s interest and is not required in the public’s interest. The Administrator declined to make the reports available upon receiving an objection from the Air Transport Association, which claimed that confidentiality was necessary to the effectiveness of the program.”).

90 *MacLean*, 135 S. Ct. at 922.

91 *Id.* at 922-23.

92 *Id.* at 922.

93 *Id.* (emphasis added).

94 *Id.*

95 *Id.*

96 *Id.* at 923.

97 *Id.*

of two FOIA-specific factors that were not applicable in this case since FOIA was not implicated.<sup>98</sup>

Lastly, the Government argued that “providing whistleblower protection to individuals like MacLean would ‘gravely endanger public safety.’”<sup>99</sup> The Government articulated that providing whistleblower protections to employees like MacLean “would make the confidentiality of [SSI] depend on the idiosyncratic judgment of each of the TSA’s 60,000 employees.”<sup>100</sup> The Court recognized this argument as legitimate but noted that Congress or the President, and not the Court, could more appropriately address these safety concerns.<sup>101</sup> The Court further expounded that there was no evidence in either statute or executive order that action had been taken to prohibit the disclosure of SSI, despite the option to do so, and the Court did not find it within their role to do a job more suitable for Congress or the President.<sup>102</sup>

In summary, the Court found that the TSA’s regulations prohibiting the disclosure of SSI did not qualify as “law” under § 2302(b)(8)(A).<sup>103</sup> The Court also held that § 114(r)(1) did not prohibit MacLean’s disclosure; thus, the disclosure was not “specifically prohibited by law” for the purposes of § 2302(b)(8)(A).<sup>104</sup>

## 2. Dissenting Opinion

In the dissenting opinion, Justice Sotomayor and Kennedy disagreed with the majority’s opinion that § 114(r)(1) did not itself prohibit the disclosure by MacLean.<sup>105</sup> Justice Sotomayor reasoned that the Court, in reaching the conclusion that § 114(r)(1) *authorizes* the TSA to prescribe regulations prohibiting certain disclosures, overlooked the use of the word “shall” by Congress in § 114(r)(1).<sup>106</sup>

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98 *Id.*

99 *Id.* (quoting Brief for Petitioner, *supra* note 21, at 38).

100 *Id.* (citing Brief for Petitioner, *supra* note 21, at 37).

101 *Id.*

102 *Id.* at 924.

103 *Id.* at 921.

104 *Id.* at 921-23.

105 *Id.* at 924 (Sotomayor, J., dissenting).

106 *Id.* (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n. 9 (1995)). *See also, e.g.,* *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (“Congress’ use of the term ‘shall’ indicates an intent to ‘impose discretionless obligations’” (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)) (internal quotations omitted)); A. SCALIA & B. GARNER, *READING LAW: THE*

This Court has found consistently that the word “shall” means “must;” therefore, based on precedent set by this Court,<sup>107</sup> Congress did not *authorize* the TSA to promulgate regulations, it directed the TSA to promulgate such regulations and even described what those regulations should prohibit, specifically information that would be detrimental to transportation security.<sup>108</sup>

Justice Sotomayor also noted that, while it is true that the language of § 114(r)(1) vested some discretion in the TSA to determine what information would be “detrimental to the security of transportation,” the TSA is “required to prevent the disclosure of any information it determines is within Congress’ prohibition.”<sup>109</sup> The TSA’s “discretion pertains only to *identifying* whether a particular piece of information falls within the scope of Congress’ command.”<sup>110</sup> Justice Sotomayor stated that by “concluding that such residual agency discretion deprives § 114(r)(1) of prohibitory effect,” the Court ignored “the degree of agency involvement that is necessary in the administration of many antidisclosure statutes. Congress cannot be expected to identify with particularity each individual document or datum the release of which it wants to preclude.”<sup>111</sup> Just because Congress vested some discretion in the agency to determine which information fits within Congress’ prohibition, which Congress frequently has done in the past, does not mean that Congress is no longer the source of the prohibition.<sup>112</sup> Congress remains the source of the prohibition despite the authority it grants the agency to make

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INTERPRETATION OF LEGAL TEXTS 114 (2012) (“[W]hen the word *shall* can reasonably read as mandatory, it ought to be so read”).

107 See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“Congress’ use of the permissive ‘may’ . . . contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section.”); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895) (“[I]n the law to be construed here it is evident that the word ‘may’ is used in special contradistinction to the word ‘shall’”); *Lamagno*, 515 U. S. at 432 n. 9; *Holowecki*, 552 U. S. at 400; A. SCALIA & B. GARNER, *supra* note 107, at 114.

108 *MacLean*, 135 S. Ct. at 924 (Sotomayor, J., dissenting).

109 *Id.* at 924-25.

110 *Id.* at 925.

111 *Id.*

112 *Id.*

the “fine-grained distinction[s]’ in fulfilling [Congress]’ charge.”<sup>113</sup>

To solidify her point, Justice Sotomayor indicated that “Congress appear[ed] to have anticipated the need for agency involvement in the interpretation and enforcement of antidisclosure statutes at the time it enacted the WPA.”<sup>114</sup> This is evidenced by the Senate Report to the WPA, which clearly indicates that Congress “identified only two statutes the violation of which would preclude whistleblower protection,” including “Section 102(d)(3) of the National Security Act of 1947 . . . which provided that ‘the Director of the Central Intelligence Agency shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.’”<sup>115</sup> This provision, argued Justice Sotomayor, undoubtedly demonstrated that “Congress contemplated that a statute directing an agency to protect against disclosures and delegating substantial authority to the agency should nevertheless be deemed to impose the relevant prohibition.”<sup>116</sup> This example is no different than the issue at hand, reflecting “Congress’ recognition of the inevitable fact that the agency [would] be tasked . . . with enforcing its statutory mandate.”<sup>117</sup>

Next, Justice Sotomayor turned her attention to the majority opinion’s focus on the structure of the statutory language of § 114(r)(1).<sup>118</sup> Justice Sotomayor identified that had the statutory language been written or constructed differently, then based on the majority opinion, the Court probably would have reached a different conclusion.<sup>119</sup> For example, if the language read “the disclosure of information detrimental to the security of transportation is prohibited, and the TSA shall promulgate regulations to that

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113 *Id.* at 925. For the same reasons, the agency’s decision that a disclosure contravened a statute may not necessarily be determinative in any given WPA case: Although an agency may no doubt receive deference in the interpretation and implementation of a prohibitory statute, ultimately WPA protection will not apply if the agency improperly concluded that a given disclosure was prohibited by that statute. *Cf.* *CIA v. Sims*, 471 U.S. 159, 168-181 (1985) (accorded deference to Central Intelligence Agency’s expertise, but engaging in an extended analysis of whether the particular information that agency refused to disclose fell within the scope of the statutory prohibition). *Id.* at 925 n.2.

114 *Id.* at 925.

115 *Id.* (quoting S. REP. NO. 95-969, at 21-22 (1978)).

116 *Id.* at 926.

117 *Id.*

118 *Id.*

119 *Id.*

effect,’ or ‘[t]he Under Secretary shall prescribe regulations prohibiting the disclosure of information detrimental to the security of transportation; and such disclosures are prohibited,” then it is likely the Majority of this Court would have determined that § 114(r)(1) did expressly prohibit MacLean’s disclosures.<sup>120</sup> Justice Sotomayor refused to “render so fully to sheer formalism” when “transportation security is at issue and there is little dispute that the disclosure of air marshals’ locations is potentially dangerous and was proscribed by the relevant implementing regulation.”<sup>121</sup> Justice Sotomayor opined “the Court [] left important decisions regarding the disclosure of critical information completely to the whims of individual employees.”<sup>122</sup>

In summary, Justice Sotomayor found that Congress’ intent in regards to § 114(r)(1) was to require “agency action that would preclude the release of information ‘detrimental to the security of transportation.’”<sup>123</sup> Congress’ intent to prohibit disclosure of this information was very clear, and Justice Sotomayor suggested that Congress’ intent should be respected by finding “that a disclosure contravening that mandate is ‘prohibited by law’ within the meaning of the [§ 2302(b)(8)(A)].”<sup>124</sup>

#### IV. Analysis

Justice Sotomayor, joined by Justice Kennedy, hit the nail on the head in the dissenting opinion. The dissent provided a ruling that displayed a fair balance between homeland and national security concerns and the rights of federal government employees. The dissenting opinion recognized the potential devastation that the Court’s opinion could have on homeland and national security.<sup>125</sup>

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120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *See id.* *See also* Steve Vladeck, *Opinion Analysis: Justices Adopt Broad View of Whistleblower Protections in Air Marshal Dispute*, SCOTUSBLOG.COM (Jan. 21, 2015, 2:45 PM), <http://www.scotusblog.com/2015/01/opinion-analysis-justices-adopt-broad-view-of-whistleblower-protections-in-air-marshal-dispute/>; Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. MacLean: What Law Is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1075 (2015).

While the majority ignored the potential ramifications of its decision, Justice Sotomayor pointed out the key reasons why the Court's opinion presented problems, and now this note will expound on those reasons.

First, the Court's opinion leaves a huge possibility for the release of SSI that could devastate our homeland security infrastructure. The TSA and other similar agencies handle a wealth of SSI that is not suitable for release to the public for good reason;<sup>126</sup> for example, the information prohibited by the TSA regulation at issue here, specifically "18 categories of [SSI], including '[s]pecific details of aviation security measure . . . [such as] information concerning specific numbers of [] Air Marshals, deployments or missions, and the methods involved in such operations."<sup>127</sup> This information is protected by agency regulations, and the dissemination of such is prohibited to combat the fear of the information falling into the wrong hands, and being used for criminal or terroristic purposes.<sup>128</sup> It is undeniable that the information disseminated by MacLean, if it had fallen into the wrong hands, could have resulted in a catastrophe, possibly similar to that of 9/11. Just imagine the ramifications if Air Marshals' schedules were in the hands of al-Qaeda or the Islamic State.

The Court's ruling effectively makes it more probable that this information could be released to the public in the event a disgruntled employee purports to feel like the agency he or she works for is putting the American public in danger. Even though that employee may feel like the U.S. populace may be in danger because of the agency's decisions, the broadcast of such information could ultimately result in even more danger or harm. Furthermore, how is a person to know whether the employee has a legitimate concern for public safety, is simply upset with his or her employer, or is working with a terrorist organization to effectuate a terrorist agenda? This is obviously a legitimate question that cannot be answered very easily.

Congress creates and grants powers to many agencies, such as the Central Intelligence Agency and the Federal Bureau of

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126 U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-32R, TRANSPORTATION SECURITY ADMINISTRATION'S PROCESSES FOR DESIGNATING AND RELEASING SENSITIVE INFORMATION (2007), available at <http://www.gao.gov/assets/100/95269.html>.

127 Civil Aviation Security Rules, 49 C.F.R. § 1520.7(j) (2002).

128 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 126.

Investigation to name a few.<sup>129</sup> Congress does this because it knows that it does not have the specific knowledge and skill set to regulate highly technical areas of the law like aviation security.<sup>130</sup> Therefore, Congress creates a specialized agency to regulate the area for them.<sup>131</sup> This is exactly how the concept of American government agencies was born. In this case, Congress directed the TSA to promulgate certain regulations to protect the release of information that could “be detrimental to the security of transportation.”<sup>132</sup> In the case of aviation security, Congress recognized that it did not have the necessary knowledge of the subject matter to identify and expressly prohibit the exact information that would “be detrimental to the security of transportation.”<sup>133</sup> So, logically Congress called upon the experts at TSA to answer the questions that Congress itself could not answer. The Court’s opinion totally ignores established government agency law, the discretion that Congress instilled in the TSA to fulfill its charge, and the faith that Congress placed in the agency. The Court has effectively stated that the President or Congress are better suited than a specialized government agency to determine what information should be prohibited due to homeland and national security concerns.

The Court’s ruling now places a huge burden on the President and Congress to do the job of a government agency. The American people are left hoping that Congress and the President get it right the first time or else risk danger to the American public. This is simply not a burden that the President or Congress should have to shoulder. This burden is more appropriately placed with the requisite government agency, like Congress did here with the TSA, and as it has been since the creation of government agencies. The President and Congress lack the knowledge necessary to establish the appropriate prohibitions on specific information, in large part because they do not work in these particular areas on a day-to-day basis like government agencies do. Because of the Court’s opinion, the President or Congress must now state specifically, in either Executive Order or statute, the precise, exact prohibitions that are sufficient to protect the American public

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129 See generally DON MAYER, ET AL., *LEGAL ASPECTS OF PROPERTY, ESTATE PLANNING, AND INSURANCE 200-07* (2012), available at <http://2012books.lardbucket.org/books/legal-aspects-of-property-estate-planning-and-insurance/s08-01-administrative-agencies-their-.html>.

130 *Id.*

131 *Id.*

132 Aviation and Transportation Security Act, 49 U.S.C. § 114(r)(1) (2009).

133 *Id.*

from harm. Therefore, agency regulations that were promulgated pursuant to a charge from Congress are effectively irrelevant and mean less than the paper they are etched on.

The Court's opinion sets the precedent that only disclosures "specifically prohibited by law," and more specifically by statute, be exempted from whistleblower protections.<sup>134</sup> That means that SSI not specifically prohibited by statute or Executive Order is not protected from whistleblower disclosure, resulting in the TSA, and any other similar government agency regulations, being "trumped" by whistleblower laws.<sup>135</sup> The Court's ruling creates a scary landscape for agencies trying to protect information that could result in harm to the American public if released. Justice Sotomayor accurately stated "the Court has left important decisions regarding the disclosure of critical information completely to the whims of individual employees."<sup>136</sup>

The Court's decision has far reaching effects and poses potential serious consequences for homeland and national security in the U.S. The Court's disregard for basic agency principles and the main purpose of government agencies is a major pitfall of the Court's opinion. That, coupled with the burden the Court placed on the President and Congress to do what is more appropriately done by a government agency, shows that the dissenting opinion presents a more suitable analysis that is supported by precedent and the legislative history of the laws involved in this case. For all these reasons, it is clear that Justice Sotomayor and Kennedy's opinion provides a better balance between concerns for homeland and national security and the rights of federal government employees.

## V. Conclusion

Justice Sotomayor, joined by Justice Kennedy, struck a fair balance between appropriate whistleblower protections and homeland and national security concerns in their dissenting opinion; a balance that the majority opinion failed to find. The majority opinion throws homeland and national security concerns at the wayside based on the formalism and sentence structure of § 114(r)(1). As pointed out by Justice Sotomayor, had the word choice or arrangement of words been

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134 Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 921 (2015).

135 See *id.* at 922-24.

136 *Id.* at 926 (Sotomayor, J., dissenting).

slightly different, the Court probably would have ruled differently.<sup>137</sup> With homeland and national security implications at stake, to read the statute so formalistically totally ignores the true intent of § 114(r)(1) and the intent of Congress to prohibit such disclosures that could be “detrimental to the security of transportation.”<sup>138</sup>

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137 *Id.*

138 *Id.*; 49 U.S.C. § 114(r)(1) (2009).

## When Justice May Not Have Been Done: Arguing for a New Interpretation of Massachusetts' Rule 30(b), Motions for a New Trial Based on Newly Discovered Evidence, Through the Lens of *Commonwealth v. Weichell*

Catherine McNamara

### Introduction

This article explores the Supreme Judicial Court's (SJC) interpretation and application of Massachusetts' Rule of Criminal Procedure 30(b), motions for a new trial based on newly discovered evidence, through the lens of one particular case, *Commonwealth v. Weichell*,<sup>1</sup> in which Frederick Weichell<sup>2</sup> was convicted of first-degree murder. In 2006, the SJC denied Weichell's motion for a new trial based on two items of newly discovered evidence, under the theory that the evidence was not actually "newly discovered."<sup>3</sup> Despite Rule 30(b)'s open-ended language, the SJC has created an intricate jurisprudence of when evidence may be considered "newly discovered," thus meriting a new trial.<sup>4</sup> This article argues that strict adherence to that jurisprudence leads to unjust results, contrary to the purpose of Rule 30(b), and calls for the SJC to reconsider its decision.

### I. Weichell's Trial

On August 20, 1981, Frederick Weichell was convicted of first-degree murder for the shooting death of Robert LaMonica. He was sentenced to life in prison. LaMonica was shot and killed outside his apartment building in Braintree, Massachusetts, shortly after midnight on May 31, 1980.<sup>5</sup> On that night, LaMonica had been returning home from his 4:00 p.m. to midnight shift at the Boston

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1 *Commonwealth v. Weichell*, 847 N.E.2d 1080 (Mass. 2006).

2 In this paper, I follow the SJC's spelling of Fred Weichell's last name, although the Court acknowledged that the correct spelling is "Weichel," not "Weichell." They did so in order to follow the spelling of his name on the indictment. *Id.* at 1085 n.7.

3 *Id.* at 1092.

4 Mass. R. Crim. P. 30(b); see *Commonwealth v. Grace*, 491 N.E.2d 248, 305-08 (Mass. 1986).

5 *Commonwealth v. Weichell*, 453 N.E.2d 1038, 1041 (Mass. 1983).

Water and Sewer Commission.<sup>6</sup> On this night, as on most other nights, LaMonica drove straight home from work, arriving between 12:15 a.m. and 12:30 a.m.<sup>7</sup> As LaMonica exited his car, four shots were fired, two of them hitting him; he died in the parking lot.<sup>8</sup>

There were no witnesses to the shooting itself. However, there were four young adults walking through Faxon Park (located across the street from the entrance to LaMonica's parking lot), returning from a drive-in movie.<sup>9</sup> The group had been drinking.<sup>10</sup> John Foley, the only one of the four to make a positive identification, later testified that he had consumed four or five beers during the movie. "[Foley] heard four 'bangs' and saw a man run out of the parking lot and turn up Faxon Street to a waiting car . . . [He] testified that he had a full-faced view of the man for approximately one second as the man passed under a street light."<sup>11</sup>

Foley and his friends stayed at the scene until the police arrived "shortly thereafter."<sup>12</sup> Foley described the man he saw running from the scene as being "five feet, nine inches tall, 175 pounds, wearing jeans and a pullover shirt. He said that the man had dark curly hair, bushy eyebrows, and sideburns. He also stated that the man had a slightly crooked nose, 'as if it had been broken.'"<sup>13</sup> Foley went to the police station and assisted in making a composite drawing of the man he saw.<sup>14</sup> Unable to draw the face himself, Foley instead gave the detective a "general description," from which the detective, using an Identikit,<sup>15</sup> assembled a composite.<sup>16</sup> Foley made a couple of changes to the first composite, having the detective alter the nose and hairstyle, after which Foley "declared that the composite 'looks like [the assailant].'"<sup>17</sup> The next day, Foley picked Fred Weichell's picture out of an array of nine photographs, saying that Weichell's

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6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 1041.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 Identikit is a type of software used by law enforcement to create facial composites of suspects. IDENTI-KIT (2016), <http://www.identikit.net/index.php>.

16 *Weichell*, 453 N.E.2d at 1041.

17 *Commonwealth v. Weichell*, 847 N.E.2d 1080, 1083 (Mass. 2006).

picture was “a pretty good likeness of the man”.<sup>18</sup> Foley picked the same picture out of another photo array several months later, with this array including one extra photograph.<sup>19</sup> On June 12, 1980, Foley drove through the streets of South Boston in a van with two State troopers and the victim’s two brothers, who “gave directions, but did not speak to Foley.”<sup>20</sup> The van passed a group of young men, one of whom, Fred Weichell, Foley identified as “the guy.”<sup>21</sup>

Three other people accompanied Foley in Faxon Park on the night of the shooting, but only Foley made an identification.<sup>22</sup> Jean Castonquay, who was with Foley that night, did testify at Weichell’s trial, but wavered in her identification of Weichell as the perpetrator; she “was unable to say whether the defendant was the man she saw [running from the parking lot]. Moments later, she tentatively identified another person sitting in the back of the courtroom as the man [the victim’s brother].”<sup>23</sup> Three times prior to trial, police showed Castonquay the same photo array as they had shown to Foley, but Castonquay “was unable to pick out any one photograph. Instead, she picked out two or three photographs each time, always including that of the defendant.”<sup>24</sup>

To establish motive, the Commonwealth claimed that Weichell’s shooting LaMonica to death was the culmination of an ongoing feud between their respective groups of friends.<sup>25</sup> The Commonwealth put forward eyewitness testimony that on May 18, 1980, Thomas Barrett, a good friend of Fred Weichell’s, got into an altercation with one Francis Shea, a friend of Robert LaMonica.<sup>26</sup> Weichell was present at the fight, and in the “heated argument” following the physical fight, threatened to kill Shea if Shea killed Barrett.<sup>27</sup> After the incident, LaMonica allegedly told his girlfriend, “[m]e and my friends, we’re going to get him, and we’re going to kill him.”<sup>28</sup> Although LaMonica referred only to a single “him” in his

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18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Commonwealth v. Weichell*, 453 N.E.2d 1038, 1041 (Mass. 1983).

23 *Weichell*, 847 N.E.2d at 1083.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Weichell*, 453 N.E.2d at 1040.

28 *Id.*

statement, his “paramour,” Maureen A. Connolly, testified at trial that he had been referring to both Barrett and Weichell.<sup>29</sup> On May 21, 1980, Francis Shea allegedly saw Weichell and LaMonica arguing.<sup>30</sup> Shea did not hear what they said to each other, “but testified that the defendant was pointing his finger in Robert LaMonica’s face and stepping up and down the sidewalk.”<sup>31</sup>

At trial, Fred Weichell’s attorney tried to discredit Foley’s testimony, succeeding in getting Foley to admit that while the man he described to the police had “bushy eyebrows” and sideburns, Weichell possessed neither trait.<sup>32</sup> Weichell’s attorney also “attempted to show that the lighting in the area was poor and that the identification process was unreliable.”<sup>33</sup> Weichell also put forth an alibi, calling three witnesses. One witness placed him in downtown Boston until midnight, and the other two placed him at the Triple O Lounge in South Boston “at, or shortly after, the time of the shooting.”<sup>34</sup> The Commonwealth rebutted Weichell’s alibi, claiming that he “could have left downtown Boston shortly before midnight and driven to LaMonica’s apartment by the time of the shooting” and arrived at the Triple O Lounge fifteen or twenty minutes after shooting LaMonica.<sup>35</sup> Despite the defense team’s efforts and based almost entirely on the testimony of John Foley, the jury found Fred Weichell guilty of first-degree murder.<sup>36</sup>

## II. Post-Conviction Efforts

Around 1982, after Fred Weichell was convicted, his mother, Gloria Weichell, received a letter from Thomas Barrett (the same Thomas Barrett who had gotten into the altercation with Robert LaMonica’s friend) confessing to the murder of Robert LaMonica. The letter stated:

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29 *Id.*

30 *Id.*

31 *Id.* at 1040-41.

32 On direct appeal of the conviction, the SJC concluded that although Weichell did not have curly hair at the time of the trial, “the jury could have concluded that [he] had curly hair at the time of the murder.” *Id.* at 1042.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 1040.

Dear Gloria, I really don't know what to say! So I will get straight to the point. I haven't had a good night sleep in almost a year because I know [Weichell] did not kill [the victim]. I did! Yes, Gloria, I killed [LaMonica]. [Fred] has known this. I told him a couple weeks after it happened! Gloria, I never thought in a million years that they would blame and convict a[n] innocent man. Gloria, I am so sorry for all of the pain I put you and [Fred] through. I can't let [Fred] spend the rest of his life for something he didn't do! So, Gloria, if there is *ANYTHING* I can do to help clear [Fred] please let me know. Gloria, I mean anything at all." (Emphasis in original.) The letter was signed "Tommy Barrett" [and] was dated March 19, 1982.<sup>37</sup>

After receiving the letter, sometime in 1982 or 1983, Gloria called her sister, Lorrie Doddie, and read her Barrett's confession letter.<sup>38</sup> Gloria also told Doddie "that after she had received the letter, two men (unknown to her) came to her home in the South Boston area of Boston, asking for the letter, but she had not given it to them."<sup>39</sup> In the same phone call, Gloria "expressed fear to Doddie about the letter and the two men who had visited her."<sup>40</sup>

Four times prior to Fred Weichell's arrest, and one time after his arrest, Weichell was approached by James "Whitey" Bulger and Stephen Flemmi (a.k.a. "The Rifleman").<sup>41</sup> Bulger told Weichell, "I do not want you to bring up Tommy Barrett's name ever," and threatened to harm Weichell or his family should he disobey.<sup>42</sup> Sometime in 1982, Weichell's mother, Gloria, called him in prison and told him of Barrett's letter, saying that Barrett had declared that Weichell was innocent of the murder. Because of Bulger's threats, Weichell "stopped his mother before she divulged the actual contents of the specific letter to him."<sup>43</sup>

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37 Commonwealth v. Weichell, 847 N.E.2d 1080, 1085 n.5 (Mass. 2006).

38 *Id.* at 1087.

39 *Id.* at 1086.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 1087.

In 1990, Gloria gave the letter to Francis Hurley, an attorney and family friend who frequently held onto documents for people, “often without being aware of the contents.”<sup>44</sup> In 2001 or 2002, Weichell’s friend, Donald J. Lewis, contacted Hurley and asked for the letter after learning from Weichell that Hurley was holding a letter for his deceased mother. Weichell had told Lewis that the letter “may have information to convince Wells that he was . . . innocent.”<sup>45</sup> It was only after Hurley received permission from Weichell to provide copies of the letter to Lewis and to Jonathan Wells, a Boston Herald reporter, that Hurley read the contents of the letter. Hurley then gave the original letter to Weichell’s new attorney.<sup>46</sup> It was only at this time, after his mother had died and Bulger was a “fugitive from justice,” that Weichell officially learned of the contents of Barrett’s letter.<sup>47</sup>

It was on the basis of this letter that Weichell filed his second Motion for a New Trial<sup>48</sup> in January of 2002. In the motion, Weichell argued that Barrett’s letter constituted “newly discovered evidence,” which Massachusetts case law<sup>49</sup> has established as one of the avenues through which a defendant can make a motion for a new trial under Mass. R. Crim. P. 30(b).<sup>50</sup> During the evidentiary hearing for Barrett’s

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44 *Id.* at 1086. Weichell filed his first Motion for a New Trial in August of 1991, which was denied without a hearing. In that motion, Weichell included no mention of the letter or any other “newly discovered evidence,” arguing instead that his trial counsel (he was by then represented by new counsel) had deprived him of his right to testify on his own behalf at trial. *Id.* at 1084.

45 *Id.*

46 *Id.* at 1086.

47 *Id.* at 1087.

48 *Id.* at 1084. “There are two basic grounds for a motion for a new trial: (1) an occurrence at the trial amounting to a substantial error in the conduct of the trial which materially affected the result, and (2) newly discovered evidence. The standard applied to either ground is that the new trial should be granted ‘if it appears that justice may not have been done.’” RICHARD W. BISHOP & THOMAS B. MERRITT, 17C MASS. PRAC., PRIMA FACIE CASE § 60.87 (5th ed. 2015).

49 *See, e.g.,* Commonwealth v. Grace, 491 N.E.2d 248, 305-08 (Mass. 1986) (in which the SJC outlines the requirements for pursuing a new trial, allowable under Mass. R. Crim. P. 30(b), through the theory of “newly discovered evidence.”).

50 In his 2002 Motion for a New Trial, Weichell also raised a claim of ineffective assistance of counsel and new testimony concerning his alibi (“hearsay statements attributed to Special Agent John Connolly of the FBI and ‘Whitey’ Bulger”). The motion judge dismissed both claims, and Weichell did not appeal those rulings. *Weichell*, 847 N.E.2d at 1084-85.

letter, it came to light through the testimony of Barrett's mother,<sup>51</sup> that Barrett had made self-incriminating statements to one Sherry Robb, a friend of Weichell's with whom Barrett had lived "periodically" in California after the murder.<sup>52</sup> <sup>53</sup> Robb had moved to California from South Boston prior to the 1981 murder and had stayed in touch with Fred Weichell. In the months following the murder, Weichell asked Robb if Barrett could come and stay with her in California for a while, because Barrett was "in trouble" and needed to get out of

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51 Her name is not given in the case; she is referenced only as "Barrett's mother." *Weichell*, 847 N.E.2d at 1085 n.6.

52 *Id.* at 1085.

53 In considering these statements as potentially "newly discovered evidence," Judge Borenstein "recognized that Barrett's confession letter and Barrett's verbal statements to Robb constituted hearsay, but concluded that the evidence would be admissible under the exception to the hearsay rule for statements against penal interest. [Judge Borenstein] focused on the corroboration requirement of that exception, namely that 'the statement [against penal interest], if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness.'" *Id.* at 1089 (quoting *Commonwealth v. Drew*, 489 N.E.2d 1233 (Mass. 1986)). "After reviewing the circumstances in which Barrett made his statements, the judge stated that the totality of the circumstances 'clearly show that Barrett had little to gain and much to lose by confessing to the [victim's] murder . . . . Given the unlikelihood that Barrett would fabricate a story and risk criminal liability by twice repeating it to two people who were loyal to the defendant, I find that sufficient corroboration merits the admissibility of Barrett's confessions.'" *Id.*

In its decision, however, the SJC found that Judge Borenstein had erred in ruling the two pieces of evidence admissible (in addition to finding them not "newly discovered"). The SJC agreed with Judge Borenstein that the letter and the statements both met the first two requirements of the statement against penal interest exception to the hearsay ban (that the declarant's testimony be "unavailable" and that "the statement . . . so far tend[s] to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true." *Id.* at 1092-93 (quotations omitted) (citations omitted)). However, the SJC held that the statements failed to fulfill the third requirement, that the statement be sufficiently corroborated. The Court reasoned first that "the timing of the statements [being neither contemporaneous with the defendant's arrest nor his conviction] did not properly warrant a determination that they were trustworthy"; second, that they were not trustworthy because "there was no evidence linking [Barrett] to the victim's murder," which "Barrett likely also knew"; and third, that the two statements did not corroborate each other because "his statements contained no details about the crime and no factual details as to his involvement in it." *Id.* at 1093-94.

South Boston.<sup>54</sup> <sup>55</sup> Robb agreed, and Barrett lived with her for the next few months. It was during his time with Robb that Barrett made several statements to Robb. These statements led her to conclude that Barrett, not Fred Weichell, had in fact murdered Robert LaMonica:

. . . Barrett told Robb that he wanted to kill himself because ‘someone was taking the rap for something that he had done.’ Barrett also told Robb that [Weichell] had been wrongly accused and that Barrett had killed someone. Robb testified that she ‘pieced it together’ that Barrett had in fact committed the crime for which [Weichell] was convicted and incarcerated.<sup>56</sup>

Judge Isaac Borenstein, the motion judge, found that both Barrett’s confession letter and his incriminatory statements to Sherry Robb constituted “newly discovered evidence” under Mass. R. Crim. P. 30(b) and granted Weichell’s motion for a new trial. Regarding the letter, Judge Borenstein ruled the following:

I find the defendant’s testimony that he was unaware of the contents of the letter to be credible. Although the defendant knew of the letter’s existence for over twenty years prior to his filing a motion for a new trial, he did not know the letter’s import. The backdrop of South Boston provides the context which buttresses [the defendant’s] credibility. The defendant was accused of murder and received five visits from Bulger and Flemmi. During those visits, Bulger made it abundantly clear that Tommy Barrett was a name that [the defendant] was not to utter. The force behind Bulger’s admonition derived from his reputation for ruthlessness and violence earned by terrorizing the Boston community. Bulger’s threats were not empty.

When Gloria Weichell approached her son with news of a letter written by Barrett, [the defendant] did not want to discuss it. It is fair to infer that at the time Gloria Weichell

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54 *Id.* at 1087.

55 It is unclear why exactly Weichell wanted to help Barrett – the facts of the case provide no illumination as to his motivation. *Id.*

56 *Id.*

told her son about the letter, Bulger's threats to him were fresh; [the defendant] had been convicted of murder just months earlier. Bulger's words would have been at the peak of their potency, given that [the defendant] had only been incarcerated for a few months. It is credible that [the defendant] would not have inquired about the contents of the letter at that point, and that he did not do so until 2001.<sup>57</sup>

After concluding that Weichell did not in fact learn the contents of Barrett's letter until 2001, Judge Borenstein "explained that the issue remaining was whether the defendant reasonably could have discovered the exculpatory content of the letter."<sup>58</sup> Likening Weichell's situation to that in *Commonwealth v. Pike*, in which the court held that, "in appropriate cases, evidence of battered woman syndrome may constitute 'newly discovered' evidence . . ." because characteristic of the condition is "an inability of a woman to perceive herself as abused or to gain help by communicating abuse to others."<sup>59</sup> Judge Borenstein concluded, "[given] the 'fear and intimidation' that [Weichell] 'faced at the hands of Bulger and Flemmi,' it was reasonable for [Weichell] to fear for his safety and his family's safety and 'decide not to uncover the content contained in Barrett's letter.'"<sup>60</sup>

Regarding Barrett's incriminatory statements to Sherry Robb, Judge Borenstein concluded that those also constituted newly discovered evidence: "[The defendant's] counsel on his motion for a new trial did not discover that Robb had information relating to the defendant's case until after the evidentiary hearing had begun, and there is no evidence that [the defendant] had any reason to believe that Robb possessed exculpatory evidence."<sup>61 62</sup>

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57 *Id.*

58 *Id.* at 1089.

59 *Id.* (citing *Commonwealth v. Pike*, 726 N.E.2d 940, 948 (Mass. 2000)).

60 *Weichell*, 847 N.E.2d at 1089.

61 *Id.*

62 After concluding that both the letter and the statements constituted newly discovered evidence, Judge Borenstein held that although both were hearsay, they were nonetheless admissible as statements against penal interest. This exception to the hearsay ban requires that: (1) "the declarant's testimony must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true; and (3) the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness." *Commonwealth v. Tague*, 751 N.E.2d

On appeal the SJC overturned Judge's Borenstein's ruling,<sup>63</sup> concluding that Weichell was not entitled to a new trial.<sup>64</sup> Regarding Barrett's confession letter, the SJC ruled that by concluding that Weichell's decision not to discover the contents of the letter prior to 2001 was a reasonable one in light of Bulger's threats, Judge Borenstein impermissibly "carved out a coercion or fear exception to the reasonable diligence requirement of newly discovered evidence."<sup>65</sup> The SJC stated that Judge Borenstein's analogy to *Pike* was inappropriate, explaining: "[u]nlike the defendant in *Commonwealth v. Pike*, [Weichell] did not suffer from any recognized psychological syndrome, or other mental impairment, that prevented him from pursuing potentially exculpatory evidence . . . Despite knowing at the time of trial that Barrett was considered a suspect;<sup>66</sup> despite, before his trial, having been given repeated warnings by Bulger not

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388, 516 (Mass. 2001) (citations omitted). Judge Borenstein concluded that the first two prongs were met: when called to testify at the evidentiary hearing, Barrett invoked his Fifth Amendment right against self-incrimination to "every question asked of him," making him sufficiently "unavailable." Regarding the second prong, in his letter and statements, Barrett was clearly conscious of admitting to serious criminal conduct. Finally, Judge Borenstein ruled that the evidence satisfied the requirement of reliability because the letter and the statements served to corroborate each other: "Given the unlikelihood that Barrett would fabricate a story and risk criminal liability by twice repeating it to two people who were loyal to the defendant, I find that sufficient corroboration merits the admissibility of Barrett's confessions." *Weichell*, 847 N.E.2d at 1089, 1093.

63 The case went straight from Norfolk Superior Court to the SJC, bypassing the Massachusetts Appeals Court. *Commonwealth v. Weichell*, 847 N.E.2d 1080 (Mass. 2006) (No. SJC-09556).

64 *Weichell*, 847 N.E.2d at 1095.

65 *Id.* at 1090-91.

66 The SJC concluded that at the time of his trial, Weichell either did know, or reasonably should have known, that the police had considered Barrett a suspect in the murder. The police initially theorized that Barrett and Weichell had committed the murder together, with Barrett actually shooting LaMonica and Weichell driving the getaway car. During the investigation, the police (with court authorization) wiretapped Barrett's phone and placed a "listening device" in Weichell's car for twenty-four hours "to intercept conversations between [Weichell] and Barrett." *Id.* at 1088. Although these efforts yielded no evidence against either man, on one occasion Barrett did call Weichell, stating, "Pick up the phone, pick up the phone Freddy, they're coming." *Id.* The Commonwealth argued, and the SJC agreed, that this, coupled with Weichell's statement to Sherry Rob that Barrett needed to get out of South Boston because he was "in trouble," necessitated the conclusion that Weichell either knew or reasonably should have known that the police considered Barrett a suspect. *Id.* at 1092.

to say anything about Barrett; despite learning in March, 1982, from his mother that she had received a letter from Barrett that claimed [Weichell] was innocent; and despite having heard ‘word on the street’ that Barrett had killed the victim, [Weichell] decide[d] not to uncover the content contained in Barrett’s letter.”<sup>67</sup> Therefore, the Court concluded, Weichell “had it within his means to ascertain the content of the Barrett letter long before he filed his current motion, and his deliberate failure to do so renders the information clearly not newly discovered.”<sup>68</sup>

Similarly, the Court concluded that Barrett’s statements to Sherry Robb also did not qualify as newly discovered evidence.<sup>69</sup> At the time of his trial, the Court reasoned, Weichell knew or reasonably should have known that the Commonwealth considered Barrett a suspect and the fact that Weichell stayed in touch with Robb (“albeit not on a regular or frequent basis”) during and after Barrett’s stay with her, Weichell “had to make no more effort than to ask Robb (before filing his first motion for a new trial in 1991) if Barrett, whom he knew to be a suspect, had said anything about the murder.”<sup>70</sup> Based on this, the Court determined that Weichell had not exercised reasonable diligence in discovering the evidence prior to filing his motion, and therefore the evidence was not “newly discovered.”<sup>71</sup>

Lastly, the Court ruled that Judge Borenstein had also erred in finding the evidence admissible under the statement against interest exception to the hearsay ban.<sup>72</sup> The Court agreed that the evidence satisfied the first two requirements for statements against penal interest.<sup>73</sup> However, they determined that the evidence failed to satisfy the third requirement, that of reliability.<sup>74</sup> Neither statements were “contemporaneous with [Weichell’s] arrest or conviction,” nor did either include any “details about the crime and no factual details as to [Barrett’s] involvement in it.”<sup>75</sup> The Court also thought it

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67 *Id.* at 1091.

68 *Id.* at 1092.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 1092-95.

73 The unavailability of the declarant and that the statement must “so far tend to subject the declarant to criminal liability that a reasonable man . . . would not have made the statement unless he believed it to be true.” *Id.* at 1092-93.

74 *Id.* at 1093-94.

75 *Id.*

pertinent that “Barrett’s character was, at best, questionable,” due to his history of alcohol abuse and marijuana use and his 1970s arrest for armed robbery and for assault and battery by means of a dangerous weapon.<sup>76</sup>

### III. Requirements for “Newly Discovered Evidence”

Mass. R. Crim. P. 30(b) states, “[t]he trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done.” The SJC has elaborated upon this standard, holding that there are two ways through which a criminal defendant can pursue a motion for a new trial: “(1) an occurrence at the trial amounting to a substantial error in the conduct of the trial which materially affected the result, or (2) newly discovered evidence.”<sup>77</sup> The SJC has created still more elaborate standards for what constitutes “newly discovered evidence”:

A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction . . . . The evidence said to be new not only must be material and credible . . . but also must carry a measure of strength in support of the defendant’s position. Thus newly discovered evidence that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind . . . . Moreover, the judge must find there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial . . . . The strength of the case against a criminal defendant, therefore, may weaken the effect of evidence which is admittedly newly discovered . . . . The motion judge decides not whether the verdict would have been different, but rather

<sup>76</sup> *Id.* at 1093.

<sup>77</sup> BISHOP & MERRITT, *supra* note 48; *see* Commonwealth v. Cook, 403 N.E.2d 363, 367 (Mass. 1980) (*superseded by rule*, Latimore v. Commonwealth, 633 N.E.2d 396 (Mass. 1994); Commonwealth v. Grace, 491 N.E.2d 248, 248 (Mass. 1986); Commonwealth v. DiBenedetto, 941 N.E.2d 580, 586-87 (Mass. 2011).

whether the new evidence would probably have been a real factor in the jury's deliberations . . . . This process of judicial analysis requires a thorough knowledge of the trial proceedings . . . and can, of course, be aided by a trial judge's observation of events at trial . . . .<sup>78</sup>

**A. The Evidence Must Have Been Unknown or Unavailable at the Time of Trial, Despite "Due Diligence."**

According to the SJC's interpretation of Mass. R. Crim. P. 30(b), to be considered "newly discovered," the proffered evidence must have been "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for new trial)." <sup>79</sup> The standard has been otherwise stated as requiring that the defendant show that "the evidence could not have been procured by due diligence"<sup>80</sup> or through "reasonable pretrial diligence."<sup>81</sup>

In its brief on appeal to the SJC in *Commonwealth v. Weichell*, the Commonwealth acknowledged that that court had yet to define what constituted "due diligence" in criminal cases.<sup>82</sup> Referring to Black's Law Dictionary, the Commonwealth argued, "the standard suggests the prudence and care one might expect of a reasonably prudent person under the circumstances."<sup>83</sup> In *United States v. Maldonado-Rivera*, the First Circuit Court of Appeals expounded upon the standard for due diligence required under Fed. R. Crim. P. 33, the federal counterpart to Massachusetts' Rule 30(b): "[i]n the Rule 33 milieu, due diligence is a context-specific concept. As a general proposition, however, the movant must exercise a degree of diligence commensurate with that which a *reasonably prudent person* would exercise in the conduct of

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78 *Grace*, 491 N.E.2d at 248 (citations omitted); see *DiBenedetto*, 941 N.E.2d at 586-87.

79 *Grace*, 491 N.E.2d at 248.

80 *Commonwealth v. Toney*, 433 N.E.2d 425, 430 (Mass. 1982).

81 *Grace*, 491 N.E.2d at 248.

82 Brief for the Commonwealth at 21, *Commonwealth v. Weichell*, 847 N.E.2d 1080 (Mass. 2006) (No. SJC-09556).

83 *Id.*

important affairs.”<sup>84</sup> <sup>85</sup> This approach was adopted by a Maine District Court in *United States v. McCurdy*,<sup>86</sup> and reiterated by the First Circuit in *United States v. Garcia-Alvarez*.<sup>87</sup>

The use of the “reasonable person standard” is supported by the language in Massachusetts case law that the evidence “must . . . have been unknown to the defendant or his counsel and not *reasonably discoverable* by them at the time of trial” and that “the defendant has the burden of proving that *reasonable* pretrial diligence would not have uncovered the evidence.”<sup>88</sup>

In its brief, the Commonwealth failed to establish that Fred Weichell did in fact act unreasonably under the circumstances.<sup>89</sup> As Judge Borenstein noted in his decision granting the motion for a new trial, Bulger and Flemmi’s in-person threats were

relevant . . . ; they were leaders of gangs that operated largely in South Boston [where Fred Weichell lived] during the 1970’s and 1980’s. Bulger and Flemmi operated gambling rackets and trafficked in narcotics and weapons. Neither party disputes that Bulger and Flemmi were ruthless killers who used fear, intimidation, coercion, threats, and murder to hold the community of South Boston hostage. Their gangs worked with

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84 *United States v. Maldonado-Rivera*, 489 F.3d 60, 69 (1st Cir. 2007) (emphasis added) (citations omitted).

85 FED. R. CRIM. P. 33(a) reads: “Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.” FED. R. CRIM. P. 33(a). The text is very similar to that of Mass. R. Crim. P. 30(b), which reads: “The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant’s allegations of error of law.” Mass. R. Crim. P. 30(b).

86 *United States v. McCurdy*, 828 F. Supp. 2d 335, 356 (D. Me. 2011).

87 *United States v. Garcia-Alvarez*, 541 F.3d 8, 18 (1st Cir. 2008).

88 *Commonwealth v. Grace*, 491 N.E.2d 246, 248 (Mass. 1986) (emphasis added); see *Commonwealth v. Lessieur*, 34 N.E.3d 321, 332 (Mass. 2015).

89 In its brief, the Commonwealth argued that Weichell in fact could “reasonably have discovered” both the contents of the letter and Barrett’s statements to Robb. Brief for the Commonwealth, at 20-30, *Commonwealth v. Weichell*, 847 N.E.2d 1080 (Mass. 2006) (No. SJC-09556). The Commonwealth further argued that even if the Weichell could not have reasonably discovered the evidence, his attorney at the time could have. *Id.* at 32-34.

virtual impunity as the FBI protected and even aided Bulger, a confidential informant for the FBI. In the mid-1990's Bulger fled authorities and remains at-large. Bulger has previously sat atop the FBI's most wanted list and remains on it currently. Flemmi is incarcerated and has assisted investigators in locating the bodies of people that he, Bulger, and their associates murdered.<sup>90</sup>

Considering these facts and the culture of fear cultivated by Bulger in South Boston during the 1970s and 1980s, Judge Borenstein concluded that "it was *reasonable* for [Fred Weichell] to fear for his safety and his family's safety and 'decide not to uncover the content contained in Barrett's letter.'"<sup>91</sup>

In its 2006 decision, the SJC stated that Judge Borenstein was wrong to consider "subsequent disclosures about the evils and wrongdoings of Bulger and Flemmi," saying that they were "not legally relevant."<sup>92</sup> The court claimed that these facts had no bearing on what Fred Weichell would reasonably have known in 1980 when the threats were made.<sup>93</sup> In making this determination, the court seems to ignore the fact that Fred Weichell had lived his entire life in the South Boston community and associated with individuals either within or close to Bulger and Flemmi's circle. In light of those factors, it is reasonable to conclude that Weichell was in a position to know more about Bulger's true power and extent of his influence than were Bostonians unfamiliar with the city's criminal underworld.

The SJC stated further that it was "inappropriate" for Judge Borenstein to "carve[] out a coercion or fear exception to the reasonable diligence requirement of newly discovered evidence."<sup>94</sup> The court is misguided: granting Fred Weichell's motion need not require any such exception, for he fulfilled the requirement of "due diligence" by acting in accordance with the reasonable person standard, which case law has established is the appropriate criterion.<sup>95</sup> The reasonable 1980 South Boston resident, if threatened *in person five*

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90 Commonwealth v. Weichell, 847 N.E.2d 1080, 1086 (Mass. 2006).

91 *Id.* at 1089 (emphasis added).

92 *Id.* at 1092.

93 *Id.* at 1091-92.

94 *Id.* at 1091.

95 Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986); *see* Commonwealth v. Lessieur, 34 N.E.3d 321, 334 (Mass. 2011).

times by both “Whitey” Bulger and Stephen Flemmi, that his family would be killed should he even mention this name, would heed that warning, just as did Fred Weichell.

### **B. The Evidence Must be Material and Not Merely Cumulative**

The “evidence . . . must carry a measure of strength in support of the defendant’s position.”<sup>96</sup> Thus, courts will likely deny a motion for a new trial based on evidence that, while perhaps technically newly discovered, serves only to reiterate what the evidence actually introduced at trial first stated. This requirement is logically connected to the next requirement: that the evidence must be of a nature that the jury would likely seriously consider it in the event of a new trial. In its 2006 decision in *Commonwealth v. Weichell*, the SJC never argued that Barrett’s confession letter and incriminatory statements failed the materiality requirement.<sup>97</sup>

### **C. The Evidence Would Probably Mean a Different Result at a New Trial**

The SJC’s interpretation of Rule 30(b) does not require that the newly discovered evidence be an absolute guarantee of an acquittal at a new trial. Rather, the new evidence must only “. . . cast[] real doubt on the justice of the conviction.”<sup>98</sup> Stated another way, the motion judge must determine “whether the new evidence would *probably have been a real factor* in the jury’s deliberations.”<sup>99</sup> According to these standards, then, evidence could be considered “newly discovered” under Rule 30(b) as long as the jury would have spent time deliberating its merits in regards to the defendant’s guilt or innocence, even if they ultimately may have reached a guilty verdict.

The SJC has applied the same standard in civil cases: “[i]t is enough if the newly discovered evidence appears to be so grave, material and relevant as to afford a *probability that it would have a real factor* with the jury in reaching a decision . . . It is not essential in all cases that the judge must be convinced that the verdict at a new trial

96 *Grace*, 491 N.E.2d at 248.

97 *See generally Weichell*, 847 N.E.2d 1080.

98 *Commonwealth v. Lykus*, 885 N.E.2d 769, 781 (Mass. 2008).

99 *Grace*, 491 N.E.2d at 248 (emphasis added).

would inevitably be changed by the new evidence.”<sup>100</sup> That very excerpt has been quoted and referenced in Massachusetts criminal cases.<sup>101</sup> In these cases, the courts were quoting from a civil, not criminal, trial. If the SJC has recognized a measure of leniency regarding the weight of the effect the evidence must have on a jury (i.e., not requiring absolute certainty that the jury would reach a different result), then there should be even greater leniency for criminal defendants because the stakes are so much higher. This is especially important in cases like Fred Weichell’s, in which it is a virtual certainty that a jury presented with Barrett’s confession letter and incriminatory statements would reach a different result. Furthermore, *Davis* was written “when the statutory inquiry was whether ‘justice has not been done’ rather than whether ‘justice *may not* have been done.’”<sup>102</sup> Based on this statutory change, the *Markham* court decided, “[u]nder the standard which now governs, the *Davis* criteria are to be applied with somewhat more generous predisposition.”<sup>103 104</sup>

As with the materiality requirement, the SJC never argued that the evidence of Barrett’s confession letter and incriminatory statements at a new trial would not have been a “real factor” in the jury’s deliberations and decision.<sup>105</sup> Thus, the evidence fulfills that particular requirement for “newly discovered evidence.”

#### D. What Qualifies as a “Miscarriage of Justice”?

Massachusetts precedent allows for the granting of a new trial based on newly discovered evidence if the court finds that there is a “substantial risk of a miscarriage of justice,” which

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100 *Davis v. Bos. Elevated Ry. Co.*, 126 N.E. 841, 843 (Mass. 1920) (emphasis added).

101 *See Commonwealth v. Markham*, 411 N.E.2d 494, 496 (Mass. 1980); *Commonwealth v. Sacco et al.*, 156 N.E. 57, 61 (Mass. 1927); *Commonwealth v. Ortiz*, 471 N.E.2d 1321, 1331 (Mass. 1984); *Commonwealth v. Nass*, 426 N.E.2d 723, 725 (Mass. 1981).

102 *Markham*, 411 N.E.2d at 496 (emphasis added).

103 *Id.*

104 Since the *Markham* decision, the SJC has continued to follow this “somewhat more generous” approach. *See, e.g., Grace*, 491 N.E.2d at 248; *Commonwealth v. Moore*, 556 N.E.2d 392, 398-99 (1990).

105 Rather than addressing this factor, the SJC rested its decision solely upon its conclusions that the two pieces of evidence were not “newly discovered” and, even if they were, they were inadmissible hearsay. *Commonwealth v. Weichell*, 847 N.E.2d 1080, 1090-95 (Mass. 2006).

occurs when there is “serious doubt whether the result of the trial might have been different had the error not been made.”<sup>106</sup> The SJC first laid out the rule in *Commonwealth v. Freeman*, stating: “[t]he question is whether the error was of a type and seriousness which should lead us to reverse *in the absence of a proper exception*. The test is whether there is a substantial risk of a miscarriage of justice.”<sup>107</sup> In *Commonwealth v. Alphas*, the Court further explained the test: “[i]n making that determination [of whether there is a substantial risk of a miscarriage of justice], we consider the strength of the Commonwealth’s case against the defendant . . . , the nature of the error, [and] whether the error is ‘sufficiently significant in the context of the trial to make plausible an inference that the [jury’s] results might have been otherwise but for the error.’”<sup>108</sup>

The applicable cases mandate that courts “consider *all issues* apparent from the record.”<sup>109</sup> Considering all aspects of the case as a whole, courts must then determine whether these aspects lead to the conclusion that there is “serious doubt that the defendants’ guilt had been fairly adjudicated.”<sup>110</sup>

Conducting “a survey of the whole case” and all relevant factors is exactly what Judge Borenstein did when considering Fred Weichell’s 2002 motion for a new trial. It is also exactly what the SJC refused to do in its 2006 reversal of Judge Borenstein’s decision. Rather than looking at the evidence of Barrett’s letter and incriminatory statements in a vacuum, Judge Borenstein recognized that they come with surrounding circumstances that reasonably affected how Fred Weichell, and any reasonable person under the circumstances, for that matter, would deal with those developments. The Commonwealth and the SJC have a valid argument that the contents of Barrett’s letter were technically “discoverable” prior to his first motion for a new

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106 *Commonwealth v. LeFave*, 714 N.E.2d 805, 809 (Mass. 1999).

107 227 N.E.2d 3, 9 (Mass. 1967) (emphasis added).

108 712 N.E.2d 575, 580 (Mass. 1999) (quoting *Commonwealth v. Miranda*, 490 N.E.2d 1195, 1202 (Mass. App. Ct. 1986)).

109 *Commonwealth v. Randolph*, 780 N.E.2d 58, 64 (Mass. 2002) (emphasis added); see *Commonwealth v. Azar*, 760 N.E.2d 1224, 1234 (Mass. 2002) (“We review the evidence and the case as a whole.”); *Commonwealth v. Robertson*, 259 N.E.2d 553, 556 (Mass. 1970) (requiring “a survey of the whole case” in considering motions for a new trial).

110 *Commonwealth v. Amirault*, 671 N.E.2d 652, 671 (Mass. 1997); see *LeFave*, 714 N.E.2d at 809 (“This court’s traditional treatment of the substantial risk issue calls for us to decide if we have serious doubt whether the result of the trial might have been different had the error not been made.”).

trial in 1991. However, as Judge Borenstein noted, Fred Weichell's decision not to bring the Barrett letter forward to the judicial system until 2002 was the direct result of the five in-person threats he received from the South Boston gangster "Whitey" Bulger and his number-one henchman, Stephen Flemmi, that they would kill his family should he so much as mention Thomas Barrett's name.<sup>111</sup> It was not until 2001, after his mother had died and Bulger had been a fugitive from justice for several years, that Fred Weichell "inquire[d] or learn[ed] the contents of the letter" and came forward with it.<sup>112</sup> Any reasonable person in those circumstances would have done the same.

The SJC, however, refused to consider these factors, dismissing them as "not legally relevant."<sup>113</sup> By the Court's own precedent, those factors are, in fact, highly legally relevant in determining whether or not there was a "substantial likelihood of a miscarriage of justice."<sup>114</sup> The Court has mandated that in making this determination, courts must make a "full and reasonable assessment of the trial record,"<sup>115</sup> and in so doing "focus on the probable effect of the circumstances on the jury's decision-making, and not his or her own 'personal assessment of the record,' in order to 'preserve[] . . . the defendant's right to the judgment of his peers.'"<sup>116</sup> Considering Fred Weichell's motion, the SJC made absolutely no mention of these directives, despite each of those cases having been decided at least several years before *Weichell* came across the Court's docket. In doing so, the Court failed to follow its own legal precedent without explanation or acknowledgment. Had the Court performed the analysis it requires of lower courts, the near surety that a "miscarriage of justice" would result from denying Fred Weichell a new trial would have been undeniable.

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111 *Commonwealth v. Weichell*, 847 N.E.2d 1080, 1086 (Mass. 2006).

112 *Id.* at 1087.

113 *Id.* at 1092.

114 *See, e.g., Commonwealth v. Lessieur*, 34 N.E.3d 321, 327 (Mass. 2015); *Commonwealth v. Rivera*, 712 N.E.2d 1127, 1132 (Mass. 1999); *LeFave*, 714 N.E.2d at 809.

115 *Commonwealth v. Tucceri*, 589 N.E.2d 1216, 1224 (1992).

116 *Commonwealth v. Brescia*, 29 N.E.3d 837, 845 (2015) (quoting *Tucceri*, 589 N.E.2d at 1222).

#### IV. How to Interpret Rule 30(b)? Interplay Between Rule 30(b) and Rule 2(a).

##### A. Legislative History

Until 1964, a motion for a new trial “could only be granted within one year after the end of the trial.”<sup>117</sup> The state legislature amended the statute in 1964 to say, “The trial judge upon motion in writing may grant a new trial *at any time* if it appears that justice may not have been done.”<sup>118</sup> The standard established in the first sentence is, however, taken directly from former section 29 of the Massachusetts General Laws Chapter 278.<sup>119</sup>

This demonstrates the state legislature’s intent that defendants not be unfairly and arbitrarily barred from bringing forward new evidence and arguing for a new trial. This is in stark contrast to Fed. R. Crim. P. 33, under which a criminal defendant may file a motion for a new trial based on newly discovered evidence only within the three year period following his trial.<sup>120</sup> The rule is even more stringent for non-newly discovered evidence motions: “[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.”<sup>121</sup>

##### B. Interplay Between Rule 30(b) and Rule 2(a)

Rule 2 instructs as to the purpose and intent of the rest of the Massachusetts Rules of Criminal Procedure.<sup>122</sup> Rule 2(a) states, “[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay.”<sup>123</sup> The Reporters Notes to Rule 2(a) explain further:

Rule 2 is perhaps the most significant of the rules in advancing the trend toward a high degree of procedural

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117 Mass. R. Crim. P. 30(b); *see id.* at n.30(b).

118 *Id.* at 30(b) (emphasis added).

119 *Id.* at 30; *cf.* G.L. c. 278, § 29 (St.1966, c. 301).

120 FED. R. CRIM. P. 33(b)(1).

121 *Id.* at 33(b)(2).

122 Mass. R. Crim. P. 2.

123 Mass. R. Crim. P. 2(a).

fairness in the administration of criminal justice. This is so because the rule not only permits, but requires the rules to be construed and applied in a manner which provides for fairness in their administration to the end that a just determination in every criminal proceeding shall be achieved. The rules must be approached with sympathy for this purpose; they must be interpreted with common sense. The rules were not intended to be administered inflexibly without regard for the circumstances of the particular case. Where a literal interpretation of a rule and its application in a specific situation would lead to unnecessary expense or delay, would unduly complicate the proceedings, or would operate unfairly or produce an unjust result, that interpretation is to yield to the principle enunciated in Rule 2(a).<sup>124</sup>

The SJC has cited Rule 2(a) in numerous cases to guide its interpretation of some of the Massachusetts Rules of Criminal Procedure, when one particular interpretation of the rule would lead to a seemingly unjust or nonsensical outcome. In *Barry v. Commonwealth*, the court cited Rule 2(a) to be used as guidance in its interpretation of Rule 36(b)(1)(A)-(C) (under which a defendant is entitled to a dismissal of all charges against him if he is not brought to trial within twelve months of his “return day”).<sup>125</sup> Noting that Rule 36(b)(1)(A)-(C) “is designed in some measure to operate mechanically,” and “provides for very specific definitions of what constitutes an excluded period,” the SJC denied the defendant’s motion to dismiss, finding that the delays fell under the specific exclusions mentioned in the Rule.<sup>126</sup>

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124 *Id.*

125 For the purposes of Rule 36(b), the defendant’s “return day” is the date on which “a defendant is ordered by summons to first appear, or, if under arrest, does first appear . . . to answer to the charges.” *Id.* at 2(b)(15).

126 Rule 2(a) was an important factor in the Court’s decision in *Barry*, with the Court stating specifically: “In determining the proper construction of rule 36, we are guided by its language as well as the mandates of Mass. R. Crim. P. 2(a), 378 Mass. 844 (1979), that the ‘rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity, fairness in administration, and the elimination of expense and delay.’ *Barry v. Commonwealth*, 455 N.E.2d 437, 442 (Mass. 1983).”

Unlike the simplicity of Rule 30(b)'s language, Rule 36(b) contains dozens of lines expounding upon the initially simple mandate that a defendant must be tried within one year of his "return day."<sup>127</sup> For instance, Rule 36(b)(2) contains no less than fourteen examples of exceptions to the twelve-month period (during which the clock stops, so to speak).<sup>128</sup> The SJ, therefore, is constrained in the extent to which it may utilize Rule 2(a) to reach a different outcome. This is in stark contrast to Rule 30(b), which does not contain stringent rules but rather a mandate that the motion judge use his discretion to grant a new trial "if it appears that justice may not have been done."<sup>129</sup> Therefore, absent specific and mechanical language for the application of the rule, judges should pay special attention to the factors at play in a specific case, reaching the fairest possible outcome.<sup>130</sup>

In *Commonwealth v. Pavao*, the Court rejected the defendant's argument that the trial judge's failure to hold a jury-waiver colloquy "requires automatic reversal [of his conviction] regardless of prejudice or any other factor," concluding that, considering *all relevant factors*, "there [was] . . . no suggestion that [the defendant's] waiver decision was in any way the product of duress, coercion, undue influence, incompetency, mental or physical incapacity, substance abuse, educational deficits, lack of language skills, or any other factor that might have affected his ability to understand or have rendered his waiver less than voluntary and intelligent."<sup>131</sup> Citing Rule 2(a), the court concluded, "[i]t is difficult to conceive of a more 'just' result than a conviction founded on such a deliberately counseled concession of guilt."<sup>132</sup> Here, the court explicitly considers *all relevant factors*, getting the full, rounded view of the case and its context before interpreting the rule to lead to the fairest result.

In *Commonwealth v. Downs*, the court rejected the Commonwealth's argument that the defendant's motion for reconsideration was improper because it lacked the required accompanying affidavit, reiterating, "the rules are not to be

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127 Mass. R. Crim. P. 36(b).

128 *Id.* at 36(b)(2).

129 *Id.* at 30(b).

130 See *Commonwealth v. Bourdon*, 863 N.E.2d 88 (Mass. App. Ct. 2007).

131 658 N.E.2d 175, 177, 180 (Mass. App. Ct. 1995), *rev'd*, 672 N.E.2d 531 (Mass. 1996).

132 *Id.*

administered inflexibly.”<sup>133</sup> The court held that while the rules did technically require that the motion be accompanied with an affidavit, in this specific case the motion’s purpose was only “to ask the judge to reexamine his initial ruling.”<sup>134</sup>

In *Commonwealth v. Santiago*, the trial judge had denied the defendants’ motion to suppress partly on their “failure to produce affidavits with sufficient particulars based upon personal knowledge of the affiants,” as required by Rule 13(a)(2).<sup>135</sup> The appellate court disagreed with the trial judge’s ruling, saying that although the “affidavits . . . did not meet the strict requirements of the rule” and that “ordinarily, a judge is not obligated to consider a motion not satisfying the requirements of an applicable rule,” the circumstances of this specific case, bearing in mind Rule 2(a),<sup>136</sup> made the judge’s denial of the motion “an abuse of discretion.”<sup>137</sup>

In *Commonwealth v. Santosuosso*, the appellate court held that the defendant’s affidavit supporting his motion to suppress “served the *purpose* of [Rule 13(a)(2)],” despite not fulfilling the per se requirements of the rule, concluding, “based on the purpose of [R]ule 13(a)(2), that strict application of the rule sought by the Commonwealth is not appropriate in the peculiar circumstances of this case.”<sup>138</sup>

In *Commonwealth v. Mottola*, the defendant argued that the Commonwealth’s interlocutory appeal failed to follow the strict procedural requirements of Rule 15(a)(3)(B) and therefore must be thrown out.<sup>139</sup> The court held: “The defendant’s reading of Rule 15 is contrary to the rules of construction contained in [Rule] 2 . . . The general principles of construction set forth in [R]ule 2(a) and in the Reporter’s Notes preclude the defendant’s wooden reading. Rule 2(a) states that the ‘rules . . . shall be construed to secure simplicity in

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133 579 N.E.2d 679, 681 (Mass. App. Ct. 1991).

134 *Id.*

135 *Commonwealth v. Santiago*, 567 N.E.2d 943, 947 (Mass. App. Ct. 1991). *See* Mass. R. Crim. P. 13(a)(2).

136 The court stated, citing Rule 2(a): “In some circumstances . . . insistence on strict requirements to deprive a defendant of a fair hearing of a motion raising constitutional claim may be an abuse of discretion.” *Id.* *Commonwealth v. Santiago*, 567 N.E.2d 943, 947 (Mass. App. Ct. 1991).

137 *Id.* at 948.

138 501 N.E.2d 1186, 1187-88 (Mass. App. Ct. 1986) (emphasis added).

139 412 N.E.2d 1280, 1282 (Mass. App. Ct. 1980); *see* Mass. R. Crim. P. 15(a)(3)(B).

procedure, fairness in administration, and the elimination of expense and delay.’ As indicated by the [R]eporter in his notes to [R]ule 2, ‘the rules were not intended to be administered inflexibly . . . Where a literal interpretation . . . would lead to unnecessary expense or delay . . . that interpretation is to yield to the principle enunciated in Rule 2(a).’<sup>140</sup>

These cases demonstrate the SJC’s (as well as some lower courts’) ability and willingness to call on the directives of Rule 2(a) to guide their interpretation of the rule at issue in a case when one particular application would bring about an unjust, nonsensical, or wasteful result. The Court’s demonstrated readiness to use Rule 2(a) in other cases makes it all the more unusual that it Rule 2(a) did not appear at all in the Court’s 2006 denial of Fred Weichell’s motion for a new trial. The injustice inflicted upon Fred Weichell by an inflexible interpretation and application of Rule 30(b) (or, more accurately, the judicially created requirements for Rule 30(b)) is at least comparable, if not far exceeding, the interpretation avoided by the Court in the above cases. According to Rule 2(a), its accompanying Reporters Notes, and the SJC’s own precedent, the result reached in their 2006 denial of Fred Weichell’s motion is exactly what the state legislature intended to avoid.

#### **V. Instances in Which Massachusetts Courts Have Relaxed the Otherwise Stringent Requirements of Rule 30(b) When Strict Adherence Would Violate the Fundamental Rules of Fairness and Result in a “Miscarriage of Justice.”**

While the SJC’s 2006 decision in *Commonwealth v. Weichell* might lead readers to believe that the Court has never, nor will it ever, allow or advocate for anything less than the most stringent interpretation and application of its judicially created standards for Rule 30(b), its case law shows otherwise. There have been several occasions in which the Court has seen fit to relax standards to allow for a more just outcome. For instance, the Court has recognized an exception to the requirement that evidence not have been reasonably discoverable at the time of trial for evidence that was not lawfully available to the defendant at the time of trial but later

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140 *Id.* (quoting Rules of the Courts of the Commonwealth, Rules of Criminal Procedure at 6 (M.C.L.E. 1979)).

becomes available.<sup>141</sup> In *Chiappini*, the Court ruled that a new trial was warranted based on newly discovered evidence in which the bar fight victim admitted in a later plea colloquy to an act of violence against the defendant, which would have supported the defendant's self-defense claim at trial.<sup>142</sup> The Court held that the victim's admission was newly discovered evidence, and further, that even if it wasn't technically "newly discovered," it would "certainly [be] 'exculpatory' and it obviously was not disclosed to the defendant before trial, as exculpatory evidence must be."<sup>143</sup> Here the court recognizes the unfairness to the defendant that would result from the exclusion of this evidence, even though it is arguable that the evidence, showing that the victim did in fact engage in violence against the defendant, was "reasonably discoverable" at the time of trial and although exculpatory, did not need to be turned over to the defendant because the defendant was already aware of it.<sup>144</sup> However, recognizing that this approach would be nonsensical and unfair and against the thrust of the Massachusetts Rules of Criminal Procedure, the Court granted the defendant's motion for a new trial.<sup>145</sup> While the *Chiappini* Court did not directly discuss Rules 30(b) and 2(a) in its decision, the opinion reflects the flexibility and primary interest in justice found in the spirit of both procedural rules.

In another case, the court allowed a criminal defendant to introduce a police report as newly discovered evidence when he had been deprived access to the report in advance of his trial.<sup>146</sup> In *Commonwealth v. Daye*, the defendant filed a motion for a new trial, arguing that a Boston Police Department (BPD) police report was "newly discovered evidence" because it had not been turned over to him at the time of his trial.<sup>147</sup> The court dismissed the defendant's argument that the Commonwealth suppressed the BPD police report but did consider it as potentially "newly discovered evidence."<sup>148</sup> While the court stated that such evidence *could* be deemed "newly

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141 *Commonwealth v. Chiappini*, 889 N.E.2d 966, 973 (Mass. App. Ct. 2008).

142 *Id.* at 968.

143 *Id.* at 973 n.13.

144 Meaning that the defendant was already aware that the fight had happened as described by the alleged victim's changed statement. *Id.* at 973-74.

145 *Id.* at 974.

146 *Commonwealth v. Daye*, 587 N.E.2d 194, 203 (Mass. 1992).

147 The defendant's case had been investigated by the Essex County prosecution team, which had no control over the Boston Police Department. *Id.*

148 *Id.*

discovered,” in this particular instance it was not, because “there [was] no[] realistic possibility that [the Boston police department reports] would or could have been utilized by any defendant in a way in which either of the two juries would have been influenced in any significant way.”<sup>149</sup> Despite the ultimately unfavorable outcome for the defendant, *Daye* is an example of the SJC working to reach as fair an outcome for the defendant as possible. Presumably, the Court could have ended its analysis on its conclusion that the report was not suppressed. Instead, the court tried to see whether the evidence could qualify as “newly discovered.”

In *Commonwealth v. Lykus*, the defendant based his motion for a new trial on the ground that at the time of his trial, the FBI had failed to turn over exculpatory evidence that he had specifically requested.<sup>150</sup> In response to the motion, the Commonwealth did not dispute

that the evidence was exculpatory, that it had been requested specifically, or that it had not been disclosed. Rather, the Commonwealth contend[ed] that the prosecutor’s duty to disclose such evidence applie[d] only to exculpatory evidence ‘in the possession of the prosecutor and information in the possession of persons sufficiently subject to the prosecutor’s control,’ and it assert[ed] that it [could not] be held responsible for the failure of the FBI to disclose the report because the FBI was not under its control.<sup>151</sup>

The Commonwealth’s argument in *Lykus* bears striking similarity to its argument in *Commonwealth v. Weichell*: it argued that the court should reach an unjust result based on a technicality.<sup>152</sup> In *Lykus*, unlike in *Weichell*, the Court recognized the injustice that would result from the Commonwealth’s advocated application of the rules, reasoning that the case exemplified the “‘potentiality for unfairness’ arising out of the presence of two sovereigns,” and therefore that “the burden for the failure to disclose the FBI voiceprint laboratory report should fall on the Commonwealth, not the defendant.”<sup>153</sup>

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149 *Id.*

150 885 N.E.2d 769, 771, 778 (Mass. 2008).

151 *Id.* at 782 (quoting *Commonwealth v. Beal*, 709 N.E.2d 413 (Mass. 1999)).

152 *See generally id.*

153 *Id.* at 783 (quoting *Commonwealth v. Liebman*, 400 N.E.2d 842 (Mass. 1980)).

After ruling that the Commonwealth should bear the burden of the FBI's failure to disclose exculpatory evidence, the Court went on to hold that the defendant was nonetheless not entitled to a new trial because the evidence would not have changed the result at trial: "[w]e . . . conclude that the case against the defendant was overwhelming, and we further conclude that there is no reasonable possibility that the nondisclosed . . . exculpatory evidence created a substantial basis for claiming prejudice."<sup>154</sup> *Lykus* demonstrates that the SJC is capable of recognizing the risk of unfairness that would result were they to adhere to technicalities without regard for the unique circumstances of a specific case, even when it ultimately ruled that the "newly discovered evidence" would not have made a difference in the trial's outcome.

Similarly to the *Lykus* decision, the Commonwealth in *Weichell* recognized the importance of newly discovered evidence, but made two main arguments: that a retrial would be difficult and Rule 30(b) should be interpreted rigidly.<sup>155</sup> Unlike in *Lykus*, the Court agreed with the Commonwealth in *Weichell*. The Court's reason for ultimately rejecting the defendant's motion in *Lykus* does not apply in Fred Weichell's case – neither the Commonwealth nor the SJC seemed to believe that the evidence, if presented to a jury, would at least be a significant factor in the jury's decision, thereby fulfilling that particular requirement of Rule 30(b).<sup>156</sup> In a case such as Fred Weichell's, therefore, the SJC should be at least willing to reach a fair and just result when the "newly discovered evidence" would almost certainly result in an acquittal for the defendant at trial.

In his decision granting Fred Weichell's motion for a new trial, Judge Borenstein analogized his decision to that of the SJC's in *Commonwealth v. Pike*, in which the SJC first recognized the potential viability of a battered woman syndrome claim as newly discovered evidence.<sup>157</sup> While the Court ultimately ruled against the defendant, denying her motion for a new trial (out of deference to the motion judge's determination that "the defendant's claim, that she suffered

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154 *Id.* at 784.

155 Brief for the Commonwealth at 26-27 n. 22, *Commonwealth v. Weichell*, 847 N.E.2d 1080 (Mass. 2006) (No. SJC-09556).

156 Referring to the two pieces of "newly discovered evidence" offered by Fred Weichell. *Commonwealth v. Weichell*, 847 N.E.2d 1080, 1090 (Mass. 2006).

157 726 N.E.2d 940, 948 (Mass. 2000).

from battered woman's syndrome, was false"),<sup>158</sup> the Court did hold that battered woman syndrome *could* be considered newly discovered evidence.<sup>159</sup> The Court explained, "[i]t would contravene the purpose of [Rule] 30(b), which permits a new trial 'at any time if it appears that justice may not have been done,' to deny a defendant the opportunity to present evidence that she is, or was, subject to battered woman syndrome, on the ground that the evidence is not 'newly discovered,' when the failure to recognize (or be able to communicate to one's attorney or others) that she is a battered woman is itself a specific characteristic of the syndrome."<sup>160</sup>

The SJC is correct that the analogy to *Pike* is not a perfect match based on the facts. The main hurdle to overcome with the analogy is that a hallmark of battered woman syndrome is that the woman is unaware of the syndrome while in its grips.<sup>161</sup> Courts have thus determined that if the woman really did have battered woman syndrome, it was by definition unknown and unknowable to the woman at the time of the trial and therefore meets the requirement for "newly discovered evidence."<sup>162</sup> The difference between that and Fred Weichell's situation, as the SJC pointed out, was that Weichell was acutely aware of the threats made to him by "Whitey" Bulger, and therefore they did not constitute a hidden psychological condition: "[u]nlike the defendant in *Commonwealth v. Pike*, [] the defendant did not suffer from any recognized psychological syndrome, or other mental impairment, that prevented him from pursuing potentially exculpatory evidence."<sup>163</sup> Rather, the court noted, Weichell made the conscious decision "not to uncover the content contained in Barrett's letter."<sup>164</sup>

While not an exact factual match, however, *Pike* is still applicable to Fred Weichell's case not because Weichell was suffering from a "recognized psychological syndrome," but rather because it demonstrates the potential flexibility in Massachusetts case law in applying the standard for newly discovered evidence in cases that do not qualify for an explicit exception, but would nonetheless result

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158 *Id.* at 949.

159 *Id.* at 948.

160 *Id.*

161 *Weichell*, 847 N.E.2d at 1091.

162 *Pike*, 726 N.E.2d at 948.

163 *Weichell*, 847 N.E.2d at 1091.

164 *Id.*

in “manifest injustice” or a “miscarriage of justice.” Although not suffering from a diagnosed or diagnosable psychological syndrome, Fred Weichell was prevented by outside forces (the threats from “Whitey” Bulger and Stephen Flemmi) from acting upon his knowledge of the existence of Barrett’s letter. Weichell did not cause Bulger and Flemmi to make these threats, and he acted reasonably in heeding those threats, and therefore penalizing him by denying him a new trial when it was finally safe for him to come forward with the evidence would almost certainly qualify as “manifest injustice” and a “miscarriage of justice.”

## VI. Similarity Between Standards for New Trial Motions in Civil and Criminal Cases

Currently, “[i]n general, the rules governing motions for a new trial are the same in criminal and civil cases.”<sup>165</sup> In *Commonwealth v. Jefferson*, the SJC stated, “[t]he governing rules of law as to motions for a new trial in capital cases are the same as in civil and in other criminal cases.”<sup>166</sup>

In *Wojcicki v. Caragher*, a civil case, the SJC enunciated the standard for “newly discovered evidence” under Rule 59<sup>167</sup>: “[e]vidence is considered ‘newly discovered’ . . . only if it was ‘unknown and unavailable at the time of trial despite the diligence of the moving party.’”<sup>168</sup> This is the same standard for newly discovered evidence in a criminal trial, and the court even cited a criminal case for the civil standard. Similarly, in *Commonwealth v. Kobrin*, the court cited directly to *Wojcicki v. Caragher* for its definition of “newly discovered evidence.”<sup>169</sup>

While it may make sense from a purely academic perspective, in which uniformity is paramount, for the rules and standards to be the same in civil and criminal courts, this approach ignores the glaring reality that the stakes are substantially higher in criminal court than in civil court: in criminal court a person’s life and liberty

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165 BISHOP & MERRITT, *supra* note 48.

166 620 N.E.2d 768, 773-74 (Mass. 1993). See *Commonwealth v. Devereaux*, 153 N.E 881, 882 (Mass. 1926).

167 Mass. R. Civ. P. 59.

168 849 N.E.2d 1258, 1268 (Mass. 2006) (quoting *Leavitt v. Mizner*, 533 N.E.2d 1334, 1339 (1989)).

169 *Commonwealth v. Kobrin*, 893 N.E.2d 384, 403-04 (Mass. 2007).

are at stake. An approach allowing greater flexibility in granting motions for new trials in criminal cases is consistent with the thrust of Rule 2(a) and the accompanying Reporter's Notes to the Rule, which direct that the Rules be "interpreted with common sense" and "be construed and applied in a manner which provides for fairness in their administration to the end that a just determination in every criminal proceeding shall be achieved."<sup>170</sup>

## VII. Unreliability of the Commonwealth's Evidence at Trial

The bulk of the Commonwealth's case against Fred Weichell was the eyewitness testimony of one man, John Foley, who admitted to seeing a man, whom he later claimed was Weichell, for only one second, at about 12:15am, under a streetlamp, when he had recently consumed four or five beers.<sup>171</sup> Foley described the man he saw running from the scene as being: "five feet, nine inches tall, 175 pounds, wearing jeans and a pullover shirt. He said that the man had dark curly hair, bushy eyebrows, and sideburns. He also stated that the man had a slightly crooked nose, 'as if it had been broken.'"<sup>172</sup> "At the time of his arrest, Defendant was five feet, seven inches tall and weighed 155 pounds."<sup>173</sup> Weichell had neither curly hair nor sideburns.<sup>174</sup>

Throughout the investigation of the murder, Foley picked Weichell's picture out of a photo array on two separate occasions, several months apart.<sup>175</sup> Additionally, Foley participated in a drive through of the streets of South Boston with Robert LaMonica's (the victim's) two brothers and two police officers, with the LaMonicas giving directions, in which they drove by a group of men that included Weichell. When they drove by the group a second time, Foley identified Weichell as "the guy."<sup>176</sup> Lastly, Foley identified Weichell at trial as the man he saw running from the crime.<sup>177</sup>

Although Foley was with a group of three other people in the park the night of the murder, he was the only one who gave a positive

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170 Mass. R. Crim. P. 2(a).

171 Commonwealth v. Weichell, 453 N.E.2d 1038, 1041 (Mass. 1983).

172 *Id.*

173 Commonwealth v. Weichell, 847 N.E.2d at 1082 (Mass. 2006).

174 *Weichell*, 453 N.E.2d at 1042.

175 *Id.* at 1041.

176 *Id.* at 1041-42.

177 *Id.* at 1041.

identification. Jean Castonquay, a woman who had been with Foley that night, tried and failed three times to identify the man from a photo array (the same array shown to Foley).<sup>178</sup> Each time, she was “unable to pick out any one photograph,” instead “pick[ing] out two or three photographs each time, always including that of [Weichell].”<sup>179</sup> Testifying at trial, Castonquay again failed to identify Fred Weichell as the man she saw running, instead pointing to the victim’s brother who was sitting in the back of the courtroom.<sup>180</sup> Neither of the other two members of the group in the park that night were able to make an identification.<sup>181</sup>

Convictions based on the testimony of one single eyewitness are hugely unreliable. Eyewitness misidentifications account “for more wrongful convictions than all other causes combined.”<sup>182</sup> Of the nearly 200 individuals exonerated by DNA evidence since 1989, “approximately 75 percent were convicted on evidence that included inaccurate and faulty eyewitness identifications.”<sup>183</sup> Many factors that contribute to the unreliability of eyewitness testimony were present in John Foley’s identification of Fred Weichell and his testimony at trial. The police had Foley assist in the creation of a composite drawing of the suspect and showed him multiple photo arrays as well as having him identify Weichell in a drive-by and at trial.<sup>184</sup>

While composite drawings are widely used in police investigations, particularly those of serious crimes, they are “highly problematic,” given people’s “difficulty giving an accurate verbal description of individual facial features [rather] than recognizing an entire face.”<sup>185</sup> This difficulty has been studied and documented by

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178 *Id.*

179 *Id.* at 1042.

180 *Id.*

181 *Id.*

182 THE JUSTICE PROJECT, *Eyewitness Identification: A Policy Review*, at 2 (2007), available at [https://public.psych.iastate.edu/glwells/The\\_Justice%20Project\\_Eyewitness\\_Identification\\_%20A\\_Policy\\_Review.pdf](https://public.psych.iastate.edu/glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf) [hereinafter *Eyewitness Identification*]; see Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639 (2009).

183 *Eyewitness Identification supra* note 182, at 2.

184 *Weichell*, 847 N.E.2d at 1041.

185 BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 52, 68 (2011).

social scientists that “have found no connection between ability to accurately describe a person and the accuracy of an identification.”<sup>186</sup>

Photo arrays, another frequently used identification procedure, are similarly problematic. They

. . . can be conducted in a suggestive manner . . . .  
[E]yewitnesses can be led to believe, or can erroneously assume, that the culprit is definitely among the persons presented. In such cases, eyewitnesses are prone to employ a psychological process known as “relative judgment” that causes them to choose the person who most closely resembles the culprit.<sup>187</sup>

Furthermore, the officer administering the photo array may give conscious or unconscious cues to the witness about which photograph to choose, particularly if the officer is one of the investigating officers.<sup>188</sup> An example of a conscious cue would be the officer arranging the photo array in such a way as to make one particular photograph stand out. This would not only make the witness “more likely to identify the person highlighted, but [also make them] . . . more certain” about the identification.<sup>189</sup>

All identification processes carry the risk of false reinforcement when they involve multiple procedures. “Studies have found that repeat viewings, or ‘laps,’ increase choosing rates and error rates, with particularly high error rates among witnesses who choose to view a second time.”<sup>190</sup> Just like John Foley, many eyewitnesses end up being

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186 *Id.* at 70; see Gary L. Wells, *Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?*, 70 J. APPLIED PSYCHOL. 619, 619 (1985) (finding that congruence and accuracy of eyewitness reports were not highly related); Melissa Pigott & John Brigham, *Relationship Between Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCHOL. 547, 547-48 (1985) (finding no such relationship and citing additional studies).

187 Thompson, *supra* note 182, at 645; see Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1, 10 (1998); *Eyewitness Identification*, *supra* note 182, at 4.

188 Thompson, *supra* note 182, at 645; see Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1504 (2008).

189 Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 470 (2012).

190 GARRETT, *supra* note 185. See, e.g., Nancy K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 LAW & HUM. BEHAV. 262 (2011).

asked by the police to make an identification on several different occasions. In *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Brandon Garrett found that witnesses' "certainty may have increased with each identification procedure used, if police conducted not one but multiple identifications."<sup>191</sup> Routine trial preparation can also have this effect.<sup>192</sup> Thus, a witness who began as very unsure of her identification could, by the time of trial, be completely convinced of her accuracy, regardless of what the reality is. This phenomenon is particularly dangerous for wrongful convictions: "studies suggest that repeated identification procedures create an enhanced risk that a witness will identify an innocent suspect. Even permitting more than one 'lap' or viewing of a photo array increases the risk of errors."<sup>193</sup> These dangers are increased due to the fact that "many [police departments] still do not have any written procedures or formal training on how to conduct lineups or photo arrays."<sup>194</sup>

Paradoxically, while eyewitness testimony is arguably the most unreliable form of evidence, juries see it as perhaps the most credible evidence, thus compounding the problem. Jurors "tend to give more weight to eyewitness testimony than is justified, particularly focusing on the confidence with which the eyewitness identifies the defendant."<sup>195</sup> Unfortunately, studies have further revealed that an eyewitness's perceived level of confidence in his or her identification is not a reliable indicator of accuracy, despite what the legal community previously believed.<sup>196</sup> Major factors that can increase a witness's

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191 GARRETT, *supra* note 185, at 64.

192 *Id.*

193 Garrett, *supra* note 189, at 470.

194 GARRETT, *supra* note 185, at 53.

195 Neil Vidmar, *Rethinking Reliance on Eyewitness Confidence*, 94 JUDICATURE 16, 18 (2010).

196 "Traditionally, a witnesses' self-reported degree of certainty in an identification was considered a good indicator of accuracy. Unfortunately, a great deal of research in recent decades has proven this intuitive assumption false . . . . An eyewitness's confidence that she has identified the culprit can fluctuate as a result of factors that occur after the identification and have little to do with memory. This is what is referred to as confidence malleability. For example, experiments have been conducted in which witnesses were shown a staged crime and asked to identify the culprit from a lineup. The lineup they were shown, however, did not contain the culprit. After the witnesses unknowingly made false identifications, they were then asked their level of confidence. Before doing so, however, some of the witnesses were given various types of reinforcing feedback. Those witnesses who received some confirmation of the false identification, whether the information that a co-witness identified the

confidence in his identification are “external sources, such as [police] giving a witness feedback about their choices or information about the behavior of other eyewitnesses.”<sup>197</sup>

Aside from police and trial procedures that can have an effect on an eyewitness’s certainty and testimony, the natural fallibility and malleability of the human memory also have an enormous impact.<sup>198</sup> “In general, eyewitness identification experiments show that the elapsed time between witnessing an event and later identification accuracy is negatively correlated with accurate identifications and positively correlated with mistaken identifications.”<sup>199</sup> The less time the witness had to perceive an event, the less able the witness is to “form an accurate memory of the event,” making that memory that much more malleable and unreliable.<sup>200</sup> The result is that “the certainty of eyewitnesses by the time of trial may be completely

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same individual or some other confirming feedback, were far more confident in their identifications than other witnesses who were given no feedback – despite having given false identifications.” *Eyewitness Identification*, *supra* note 182, at 5 (2007).

197 Wells et al., *supra* note 187, at 20.

198 In his 2011 article, *Making the Jurors the “Experts”: The Case for Eyewitness Identification Jury Instructions*, Christian Sheehan explains: “The accuracy of an identification can also be negatively impacted during the retention and retrieval phases of memory. With regard to the retention phase, in which the witness commits the information to memory, the amount of data to be retained and the retention interval are two leading factors that can disrupt accuracy. Another less obvious factor is the effect of post-event misinformation. A witness’s exposure to newly released information can dramatically affect memory and lead a witness to falsely accept misinformation. Not only can such exposure cause a witness to enhance existing memories, but it can also change a witness’s memory and cause non-existent details to become incorporated into that memory. In the retrieval phase, when the witness describes what he or she observed to police or a court, a phenomenon known as ‘unconscious transference’ can occur, in which different memory images become combined with one another. As a result, the witness confuses a person observed in an unrelated instance with the person seen at the event in question, leading the witness to mistakenly identify an innocent individual as the perpetrator.” Christian Sheehan, *Making the Jurors the “Experts”: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 658 (2011).

199 Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 14 (2009).

200 See Thompson, *supra* note 182, at 1501.

different from their certainty at the time their memory is most reliable – when they first identified the defendant.”<sup>201</sup>

John Foley’s identification of Fred Weichell as the man he saw running from the parking lot the night of the murder can be called into question by all of these factors, making an argument to discredit his testimony fairly simple. What’s more, this was the evidence on which the Commonwealth rested almost its entire case against Fred Weichell.<sup>202</sup> Apart from circumstantial evidence of a possible motive, the Commonwealth’s only evidence was that of a single eyewitness, perhaps the most unreliable type of evidence in criminal law. Given the weakness of the Commonwealth’s case against Fred Weichell at trial and the comparative strength of Barrett’s confession letter and incriminatory statements, it is apparent that the SJC’s decision to deny Weichell’s motion for a new trial carries at least a substantial risk, if not a surety, of a miscarriage of justice.

### VIII. The Commonwealth’s Interest in the Finality of Criminal Judgments

In its first brief to the SJC on its appeal from Judge Borenstein’s granting of Weichell’s motion for a new trial, the Commonwealth relied upon the “community’s interest in the finality of criminal judgments” to argue that the Court should overturn Judge Borenstein’s grant of a new trial to Weichell.<sup>203</sup> In support of this argument, the Commonwealth cited the “potential difficulties in retrying a case twenty-five years after the original trial,” given that the Commonwealth’s case relied primarily upon the eyewitness testimony of one man who, “even if . . . still available, . . . is highly unlikely [to have] retained a detailed recollection of such minutia, or that it would seem credible to a jury, if, by some miracle, he did.”<sup>204</sup>

This interest is based primarily on concerns of financial and judicial efficiency. Courts have recognized that in most cases, it is not fair for the Commonwealth to have to continue spending scarce

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201 GARRETT, *supra* note 185, at 63.

202 Commonwealth v. Weichell, 453 N.E.2d 1038, 1040-42 (Mass. 1983).

203 Brief for the Commonwealth at 26-27, Commonwealth v. Weichell, 847 N.E.2d 1080 (Mass. 2006) (No. SJC-09556).

204 *Id.* at 27 n.22.

resources retrying old cases.<sup>205</sup> Therefore, in considering motions for new trials, courts may consider the “Commonwealth’s interest in the fair and efficient administration of justice . . . [as] factors . . . along with the ever-present concern that justice not miscarry for the defendant.”<sup>206</sup> The further along in the appeals and post-conviction process a case progresses, the greater weight courts tend to give the “community’s interest in finality.”<sup>207</sup> As the court in *Commonwealth v. Wheeler* explained, the principle of judicial finality of criminal convictions “promotes judicial efficiency and finality by discouraging a defendant from letting years pass without challenging the proceeding only to attempt to undo it many years later, whether by neglect or by intention.”<sup>208</sup>

The Commonwealth has advocated, and the SJC has recognized, the same interest in the finality of judgments in both criminal and civil cases, citing the financial and logistical difficulties that potentially endless litigation would entail. In *Davis v. Boston Elevated Railway*, a civil case, the court explained: “[w]hen a case has been fairly and fully tried upon correct principles of law, and a verdict has been rendered, it is in the interest of the commonwealth that there should be an end of the litigation.”<sup>209</sup> This explanation is strikingly similar to that in *Commonwealth v. Amirault*, a criminal case, in which the court stated: “[o]nce the process has run its course – through pretrial motions, trial, post-trial motions and one or two levels of appeal – the community’s interest in finality comes to the fore.”<sup>210</sup> The fact that the SJC recognizes and weighs the same interest in finality in both criminal and civil cases is absurd. In both situations, the Commonwealth’s primary argument is against financial waste – it doesn’t want to spend the money to be tied up in court any longer. While this may be a compelling interest in civil litigation, this cannot be so in criminal litigation, when the criminal defendant has much more at stake than does a civil plaintiff.

However, courts have recognized one major exception to the Commonwealth’s interest in finality, for those situations in which

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205 See *Commonwealth v. Amirault*, 424 Mass. 618, 637 (1997); *Commonwealth v. Deeran*, 397 Mass. 136, 142 (1986); *Commonwealth v. Pisa*, 384 Mass. 362, 366 (2002); *Commonwealth v. Randolph*, 438 Mass. 290, 294 (2002).

206 *Commonwealth v. Curtis*, 632 N.E.2d 821, 825 (Mass. 1994).

207 See *Commonwealth v. Amirault*, 677 N.E.2d 652, 655 (Mass. 1997).

208 756 N.E.2d 1, 6-7 (Mass. App. Ct. 2001) (quotations omitted).

209 126 N.E. 841, 843 (Mass. 1920).

210 677 N.E.2d at 665.

“the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth.”<sup>211 212</sup> In *Commonwealth v. Nikas*, the Court granted the defendant’s motion to vacate his guilty plea on the grounds that “the defendant was not sufficiently informed of the elements of the crime with which he was charged.”<sup>213</sup> Nikas had been charged with first degree murder for the shooting death of Michael Povio.<sup>214</sup> On advice of counsel, however, Nikas decided to plead to the reduced charge of second-degree murder “rather than risk prosecution for murder in the first degree.”<sup>215</sup> “At the plea colloquy, the defendant maintained that he had not acted intentionally.”<sup>216</sup> In 1996, Nikas filed a motion for a new trial, arguing that there had been defects in his plea colloquy.<sup>217</sup> The motion judge granted Nikas’ motion, finding that the “Court [had] seriously misstated the elements of first-degree murder,” thus rendering the plea not “knowing and voluntary.”<sup>218</sup> The SJC upheld the lower judge’s ruling, finding that “[t]he record supports the judge’s determination that the defendant was not sufficiently informed of the elements of the crime with which he was charged. Because ‘justice may not have been done,’ we affirm the judge’s decision vacating the conviction of murder in the second degree.”<sup>219</sup>

In *Commonwealth v. Wheeler*, a case distinguishable from Weichell’s case, the appellate court stressed the particular importance of “[t]he presumption of regularity and the principle of finality” when, as in that case, “adverse consequences appear, especially

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211 *Commonwealth v. DeMarco*, 440 N.E.2d 1282, 1285-86 (Mass. 1982); see *Commonwealth v. Nikas*, 727 N.E.2d 1166 (Mass. 2000).

212 While both *DeMarco* and *Nikas* consider defendants’ motions to withdraw a guilty plea after conviction, Massachusetts courts treat these motions as motions for new trials under Mass. R. Crim. P. 30(b), distinct from motions to withdraw pleas before trial under Mass. R. Crim. P. 12(c)(2)(B). *DeMarco*, 440 N.E.2d at 1284.

213 727 N.E.2d at 1171.

214 *Id.* at 1168.

215 *Id.*

216 *Id.*

217 *Id.* at 1167.

218 *Id.* at 1170. The colloquy judge “told the defendant that the elements of second degree murder are an unlawful killing and an ‘intent to inflict serious injury.’ *Id.* The judge then explained that, for ‘[f]irst degree murder, they have to prove all of that plus they have to prove that you not only intended to injure, but you intended to kill.’ *Id.* The judge did not mention ‘premeditation’ or ‘deliberation.’” *Id.*

219 *Id.* at 1171 (citations omitted).

adverse consequences not contemplated or considered possible at the time of the proceeding.”<sup>220</sup> In a footnote, the court explained that such “adverse consequences” included immigration status, federal sentencing enhancement, sex offender registration, and parole eligibility.<sup>221</sup> However, neither the Commonwealth nor the SJC raised any of these concerns regarding Frederick Weichell’s motion for a new trial. There was nothing to suggest that his case involved any such “adverse consequences” that would weigh in the Commonwealth’s favor. To the contrary, the only “adverse consequence” that could have been considered in connection to Fred Weichell’s motion was the fact that his proffered evidence raised the significant possibility that the true murderer was still at large and a danger to society.

What’s more, the Commonwealth’s purported interest in finality goes against its elsewhere-stated concern with finding and punishing murderers, no matter how long ago the crime took place. Every crime, unless specifically stated as otherwise in a statute, has a statute of limitations attached to it.<sup>222</sup> The purpose of statutes of limitations is to “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.”<sup>223</sup> The more serious the crime, the longer the statute of limitations attached to it. Massachusetts law states clearly that there is no statute of limitations for the crime of murder: “[a]n indictment for murder may be found at any time after the death of the person alleged to have been murdered.”<sup>224</sup> Massachusetts has no statute of limitations on the crime of murder because murder is the most serious crime, and the Commonwealth wants to be able to solve the murder and put the culprit safely behind bars at any point when it is able, regardless of how long ago the crime occurred. But at the same time, the Commonwealth, in cases like Fred Weichell’s, argues that its job is finished: *someone* is being punished for the murder, and the financial and logistical difficulties of a retrial and reinvestigation make that man’s potential (arguably probable) innocence irrelevant. Neither the Commonwealth nor the SJC seem overly concerned with the proposition that there is and

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220 756 N.E.2d 1, 7 (Mass. App. Ct. 2001).

221 *Id.* at 7 n.10.

222 14A SUMMARY OF BASIC LAW § 7.319 (5th ed. 2014).

223 *Id.*

224 MASS. GEN. LAWS c. 277 § 63 (2012).

innocent man in prison and an admitted murderer roaming free on the streets of South Boston.

### X. Conclusion: What's Wrong With the SJC's Decision?

Rule 30(b) states: “[t]he trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done.”<sup>225</sup> The rule itself makes no reference to “newly discovered evidence,” nor to any other potential bases for a motion or requirements and standards. Massachusetts courts, led by the SJC, have supplemented Rule 30(b)'s somewhat bare provisions by identifying the bases upon which such a motion may be made and the requirements for granting motions under each basis. Under current case law, “there are two basic grounds for a motion for new trial: (1) an occurrence at the trial amounting to a substantial error in the conduct of the trial which materially affected the result, and (2) newly discovered evidence. The standard applied to either ground is that the new trial should be granted ‘if it appears that justice may not have been done.’”<sup>226</sup> (Citations omitted.) The Court has, essentially, created these requirements and standards out of thin air, in order to provide guidance to lower courts in applying the mandate of Rule 30(b). Having created these standards, the SJC is similarly free to change them, provided that they remain congruent with the purpose of Rule 30(b) and the Massachusetts Rules of Criminal Procedure as a whole.

Unlike the justices of the SJC, Judge Borenstein, when presented with Fred Weichell's motion for new trial, had his hands tied with respect to the current case law regarding such motions. This predicament led Judge Borenstein, while aiming to reach the fairest decision possible, to write a decision.

While Judge Borenstein reached the fair and just result in granting Fred Weichell's motion for a new trial, his decision seemed to be an exercise in legal gymnastics, trying to fit the square peg of Weichell's evidence into the round hole of the SJC's requirements

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225 Mass. R. Crim. P. 30(b).

226 BISHOP & MERRITT, *supra* note 48; *see* Commonwealth v. Cook, 403 N.E.2d 363, 367 (Mass. 1980), *superseded by rule*, Latimore v. Commonwealth, 633 N.E.2d 396 (Mass. 1994); Commonwealth v. Grace, 491 N.E.2d 248, 248 (Mass. 1986); Commonwealth v. DiBendetto, 941 N.E.2d 580, 586-87 (Mass. 2011).

for newly discovered evidence. As the SJC noted in its 2006 reversal, Judge Borenstein “in essence . . . carved out a coercion or fear exception to the reasonable diligence requirement of newly discovered evidence.”<sup>227</sup> Judge Borenstein knew that Barrett’s letter and incriminatory statements, with the surrounding circumstances of the in-person threats from “Whitey” Bulger and Stephen Flemmi, did not comfortably fit into the SJC’s definition of newly discovered evidence, but he also knew that justice required a new trial for Fred Weichell.

Being a district court judge and therefore bound by the rules set out by the SJC, Judge Borenstein had to frame his decision in the context of the existing newly discovered evidence standard. For instance, the Commonwealth and the SJC are likely correct that while Weichell may not have known the exact contents of Barrett’s letter because he stopped his mother before she read it to him, he knew well enough what the letter said.<sup>228</sup> To get around this, Judge Borenstein hung his hat on the fact that technically, Fred Weichell didn’t know the *exact contents* of the letter until he actually read it in 2001. Realistically, though, the Commonwealth and the SJC have a plausible argument that because Weichell knew of the letter’s existence and its gist since 1982, Weichell could reasonably have “discovered” the evidence and included it in his 1991 motion for a new trial instead of waiting until 2002. But, as Judge Borenstein recognized, such strict reasoning would lead to a result that flew in the face of the purpose of Rule 30(b) the Massachusetts Rules of Criminal Procedure as a whole, as laid out in Rule 2(a), that “these rules are intended to provide for the *just determination* of every criminal proceeding.”<sup>229</sup> The fact that the SJC may be correct that Weichell’s proffered evidence did not fit the current interpretation and administration of Rule 30(b) does not mean, however, that the evidence did not merit a new trial under the rule. It means only that the SJC’s interpretation of the rule is unduly strict and does not allow for judges to give full use of Rule 30(b). It means that it is time for a change.

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227 Commonwealth v. Weichell, 847 N.E.2d 1080, 1091 (Mass. 2006).

228 When his mother called Fred Weichell at prison after she had received Barrett’s letter, she “informed him that she had received a letter from Barrett . . . declaring [Fred’s] innocence.” *Id.* at 1087. Presumably because of Bulger’s threats, Weichell stopped his mother before she read the letter to him verbatim. *Id.*

229 Mass. R. Crim. P. 2(a) (emphasis added).

Unlike Judge Borenstein, the SJC is not inextricably bound to its established case law; it is free to change the rules and make new rules as it sees fit (provided, as always, that those changes follow the mandate of Rule 30(b) and the guidance of Rule 2(a)). As demonstrated by several cases, the SJC has in the past, like Judge Borenstein, attempted to create (or has sanctioned efforts of lower courts to create) new exceptions to its own standards for newly discovered evidence.<sup>230</sup> This is bad policy. What began with the straightforward mandate of Rule 30(b) that a new trial should be granted “if it appears that justice may not have been done,” has become enormously and unnecessarily convoluted. Rather than abide by, and further confuse, these judicially created standards, the SJC should exercise its power as the Commonwealth’s highest court and replace those standards with one that better exemplifies the straightforward purpose of Rule 30(b).

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230 See *Commonwealth v. Chiappini*, 889 N.E.2d 966 (Mass. App. Ct. 2008); *Commonwealth v. Lykus*, 885 N.E.2d 769 (Mass. 2008); *Commonwealth v. Pike*, 726 N.E.2d 940 (Mass. 2000).