



The Reformer

The Magazine of the MSLAW Community



Spring 2010

The Reformer

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The Reformer is published by the Massachusetts School of Law for students, alumni, and the legal community.

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Printed by Kelley Solutions
Portsmouth, New Hampshire

Message from the Alumni Bar Association



Dear Members of the MSLAW Community,

Thank you for all of your continued contributions and updates to the alumni office. We love to hear of your success, new ventures, and personal accomplishments. If you have any news you would like to share with the MSLAW community, please forward it to Professor Rudnick (rudnick@mslaw.edu) or me at mhebert@mslaw.edu.

This past fall, the Alumni and Career Services office collaborated with MCLE and the Massachusetts Bar Association to bring several continuing legal education classes to the Massachusetts School of Law including Handling Motor Vehicle Accidents, Estate Planning for the Moderate Estate, The Supreme Judicial Court's Guide to Evidence, and How to Search Residential and Foreclosed Real Estate Titles, all presented by MCLE. Programs presented by the Massachusetts Bar Association included the Young Lawyer Career Seminar, Forming a Business Entity, and Fundamentals of a Civil Jury Trial: Conduct and Procedures and Preparing to File a Lawsuit.

If you are interested in receiving materials from any of the above seminars, you may contact MCLE at 617-574-0300 or the Massachusetts Bar Association at 617-338-0500. Watch your e-mail for upcoming courses on The Basic Developments of Estate Planning, Elder Law Basics Plus, Low Tech Discovery in Criminal Cases, and How to Probate an Estate Part I and Part II. We will also be hosting the Family Law Judicial Forum once again on May 26th. If you wish to be added to our e-mail list, please contact the alumni office at mhebert@mslaw.edu.

The Career Services Office will be hosting the 4th Annual Career Fair on Thursday, April 8, 2010, from 11:00 a.m. - 4:00 p.m. Alumni interested in participating as an employer may contact me at 978-681-0800 ext. 162. This is a great opportunity to recruit interns, part-time employees, or new associates.

The annual Law Day Dinner Dance will be held on Saturday, May 8th, 2010. Please mark your calendars now! I will have tickets for sale for alumni in the upcoming weeks. Our keynote speaker this year will be the Honorable Deborah A. Capuano, ('93), who was confirmed as Associate Justice of the Worcester Juvenile Court on July 8, 2009. Also, this year the classes of 2005, 2000, and 1995 will all be celebrating their 5, 10, and 15-year class reunions. I can't believe it has been five years since I graduated! I hope to see lots of you in May, if not sooner.

Very truly yours,

Michelle M. Hebert, Esq.
Director of Alumni Relations
978-681-0800 ext 62
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SBA News



Dear MSLAW Students, Faculty, Administration, and Alumni:

The fall semester was a huge success, and there are great things to come this spring! The Student Bar Association, with the assistance of MSLAW administration, faculty, and other student organizations has improved several of the staple programs at MSLAW, and we are proud to announce the completion of two brand new events.

The first is that Professor Ursula Furi-Perry now provides mock examinations, allowing the SBA to focus on providing panel sessions in which students receive test-taking advice from upper-classmen and play legal trivia games with Kaplan PMBR exam prep prizes. The second is the mentorship program, which is in full swing. The SBA has received enough student volunteers that Professor Furi-Perry is now able to match students for personalized mentoring.

Partnered with the MSLAW chapters of the American Constitution Society and Black Law Students Association, the SBA instituted "Constitution in the Classroom" at the Silver Hill Horace Mann Charter School in Haverhill. Student volunteers, led by Professor Furi-Perry and assisted by MSLAW's Technology Director Dan Harayda, taught the foundations of the legal system to children in kindergarten through the fifth grade as part of Constitution Day celebrations. Activities ranged from arts and crafts to a simplified mock trial experience. Each grade presented what they learned at a school wide assembly at the end of the day. Haverhill District Court Judge Stephen Abany attended as our special guest.

The SBA recognized that students are not the only ones challenged by the journey through law school. With the assistance of MSLAW faculty and staff, we held "Family Day" at MSLAW to help bridge the gap between school and personal life. More than 130 loved ones were able to live a day in the life of a law student. Guests briefed cases in mock classes, attended professor-led question-and-answer sessions, performed legal research in the library, and watched the mock trial dress rehearsal. Young children played games and did activities. The day ended with everyone coming together for a family style meal. This year's SBA executive board hopes "Family Day" will become a longstanding tradition at MSLAW.

Finally, as a result of the generous donations of the MSLAW community, we have expanded our charitable efforts. We were able to double the amount of presents and activities at this year's Christmas party for the children of Saint Ann's group home.

The SBA will continue to work with the MSLAW community to hold quality events in the spring semester. The highlight event, Law Day and the dinner dance, will be held on Saturday, May 8th at the Wyndham Hotel in Andover. This year's keynote speaker is Judge Deborah Capuano. Judge Capuano is the first MSLAW graduate to be appointed to the bench. She currently sits at the Worcester Juvenile Court. For information on purchasing tickets, please email MSLSBA@gmail.com. We hope to see you all there!

Respectfully submitted,

Selena LarMoore
Student Bar Association President, 2009-2010

BLSA News



Greetings Alumni and Other Members of the MSLAW Community:

The fall semester was very busy! During the orientation for incoming students, BLSA and SBA sponsored a number of events in order to promote networking, social interaction, and unity. As the semester progressed, BLSA members collectively took part in numerous events that included a car wash to fundraise for other future events, a movie night, the “1L Survival” program, and the “Black & White Soiree,” an evening at a premier lounge in Boston. Prior to the end of the fall semester, the Executive Board of BLSA collectively joined other MSLAW student organizations to coordinate a Thanksgiving Clothing and Food Drive for needy families in the Lawrence community during the holiday season. The MSLAW community went into the depths of their hearts and closets and ended up donating bags and bags of food and clothing to the Lawrence Food Pantry.

Not surprising, the spring semester is following suit. Some BLSA members took part in the Thurgood Marshall Mock Trial Competition in Syracuse, advancing to the National Finals for the third time in four years (*see article on page 20*). And since February is Black History Month, BLSA presented “Dred Scott – Don’t Take My Property,” a reenactment of the arguments in *Dred Scott v. Sandford* (*see photos on page 23*). Adjunct Professor and Superior Court Judge Peter Agnes and Professors Malaguti, Rudnick, Puller, and Starkey participated in arguing and discussed the U.S. Supreme Court case. Also during Black History Month, we will be reintroducing our Courageous Conversations series, raising provocative and important issues involving race relations in our community and in the United States.

BLSA will also be presenting Albert Cius of Open Arms Haitian Service Project of Cambridge as a guest speaker. Obviously, the recent tragedy in Haiti has brought the trials and tribulations of this country to the forefront of our consciousness. An educational panel discussion about the past, present, and future history and politics of Haiti will be conducted by MSLAW’s students of Haitian descent.

As the school year comes to an end, the Officers and Executive Board of BLSA are proud of our accomplishments, and we would like to officially thank everyone in the MSLAW community for his or her assistance and support. The organization would like to extend an open invitation to all alumni of MSLAW, including former BLSA members, to assist the organization in making the next school year the best yet. Opportunities to mentor present students or assist with in-school and community projects are numerous, and help is always welcome! If you are interested, please contact Vice President Babatunde Adebayo at Adebayo_babatunde83@yahoo.com, e-Board Member James Ezeigwe at je118@hotmail.com, or Professor Rudnick at rudnick@mslaw.edu. Once again, thank you for allowing us to serve you this year.

Sincerely,

Babatunde Adebayo, Vice President
James Ezeigwe, E-Board Member, Head of Public Relations

An Officer and a Mayor

Two MSLAW alumni use their law degrees to climb the ladder in local government



Chip Segar, Esq.

Marshall “Chip” Segar (’08) has been a member of the New London Connecticut Police Department for 20 years. In January, he was appointed Deputy Chief of Police, making him responsible “for the oversight of day-to-day operations of a 115 person department.” Three police captains report to Chip on a daily basis, and he is also responsible for the department’s internal affairs function, in addition to serving as the Public Information Officer.

Before joining the police department, Chip was a military police officer in the Army, which set him on the road to his profession. For the past nine years, including the time he was at MSLAW, Chip was a Lieutenant assigned to the Patrol Division, supervising 25 men and women. During that period, he became involved in the police union. “I have a strong labor background, as I served as the Police Union President. It is a bit odd to be a former labor leader now wearing a management hat,” Chip noted. But he has discovered

that his experience working for the union is helping him to better understand labor’s side of issues and address them.

As for why Chip decided to go to law school, he is very blunt. “I wanted to do something more and better myself.” It’s a decision he has never regretted, even while he was commuting back and forth from New London to Andover for classes. He chose MSLAW because of its flexible schedule. As a Lieutenant, he rotated shifts every 28 days, and he was still able to get to classes and take care of his assignments at work. He describes his MSLAW experience as “top shelf.” He credits the faculty, staff, and other students, in particular his group of friends and study partner, for making the three-hour round trip worth while. Chip is grateful that the faculty insisted that students support their conclusions with authority. “It was not enough that you just say it, you had to cite it.”

One of Chip’s fondest memories of law school is attending a speech delivered by Supreme Court Justice Antonin Scalia. He got Justice Scalia to autograph a copy of part of the jurist’s dissent in *Kelo v. New London*, the controversial emi-

nent domain case involving proposed redevelopment plan in that city. He had the signed portion framed, and he presented it to Professor Sullivan from the Connecticut students in honor of MSLAW’s 20th anniversary.

In response to the question of whether his being a lawyer helped him to get his new assignment, he says, “Certainly. IA [Internal Affairs] is a lonely place—just right for a lawyer who knows how to dig for proof and cares about the details.” Chip is looking forward to his new position and the challenges it brings. He hopes to be accepted into the FBI academy, where police executives can receive extensive and up-to-date law enforcement training.

Chip’s family lives in Old Saybrook, with a new addition: “We just adopted a Shi-Chi (Shih-Tzu Chihuahua) mix from the animal shelter — her name is Roxy.” Both Chip and Roxy are looking forward to beach weather. ■

Donna Holaday, Esq.

Donna Holaday's 2009 election as Mayor of Newburyport (MA) was a long time coming, a trip over a long and sometimes bumpy road. But that makes the success all the sweeter. When she graduated from MSLAW in December 2001, she hoped to either find employment in the public sector or practice mental health or juvenile law. When a job failed to materialize, she was approached by a group of women in Newburyport who persuaded her to run for office. "I started attending City Council meetings and realized that my law degree would be a tremendous asset as well as my long-term involvement in a range of volunteer activities within the city," she said. "I launched my first campaign for City Councilor-at-Large running for one of five seats in a field of eleven. I placed third and subsequently served two, non-consecutive terms on the City Council. I chaired the Budget & Finance Committee and served on General Government, Public Safety and Joint Education committees during those terms."

In 2005, the then Mayor of Newburyport, where Donna has lived for the past 28 years and raised her family, decided not to seek reelection. Donna threw her hat into the ring and made it to the finals but lost. Two years later, she decided to return to the City Council, garnered the highest number of votes of any candidate in that election, and returned to another two-year term on that body.

Throughout law school and

up to her recent election, Donna was a grant writer (then Director of that office) at Middlesex Community College. As Director, she "researched and developed international proposals, workforce training grants for regional business and industries, and a range of community and educational collaborative programs." In addition, she was an adjunct faculty member teaching courses in social sciences and law.

As fate would have it, in another two years, Newburyport would find itself without an incumbent mayor, and this time, Donna won. She says of the reason she ran this time: "The main reason I ran for mayor is my love for Newburyport and the longstanding issues that need resolution. I felt strongly that my background in law, education, and finance were real assets in leading Newburyport. I must also confess that I am a political junkie and have always participated or followed state and federal elections but had never thought of running for office until finishing law school." And her membership on the State Democratic Committee since 2003 probably didn't hurt.

There were some special difficulties in running this last time. "The most challenging part of the campaign was assembling a team; many people were burned out from working on elections—Governor Patrick's followed by President Obama's election—and just wouldn't commit. So I violated just about every cam-



campaign management rule regarding organizational structure and pulled together a very small team of about a dozen people, and we focused on reaching the residents. My opponent, also the City Council President, opted to focus on the business community and out raised me three-to-one in campaign contributions. My message was simple: Who will best represent your needs? As a wife, mother, educator, [baseball] coach, Sunday school teacher, lawyer, grant writer, and city councilor, I had demonstrated my 28-year commitment to our city. The message was well received."

Some of the challenges facing Newburyport (population 17,000+) in these times of economic uncertainty are obvious. Some of the specific issues (besides stretching the tax dollar to get the most possible) that Donna hopes to address during her first term are increasing affordable housing; building a senior center; resolving waterfront development issues, particularly traffic and parking; creating new revenue streams; and funding the public schools. Part of her new job is to interface with those in Washington, including the Massachusetts Congressional delegation, who have control of much deeper purse strings than does the Massachusetts legislature. In

continued on next page

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February, she took her first trip to the nation's capital to make her case for three Newburyport projects: "The first is the creation of a Maritime Park on the waterfront with an expansion of the Custom House to include a wing dedicated to US Coast Guard and a visitor's center," she explained. "Newburyport is the birthplace of the USCG but has never received this official dedication. In addition, our city is working towards becoming a designated green community and I would like to develop an enterprise/incubator site to support research and development and new start-ups in clean and sustainable energy. The site could support economic development and new job creation for the Merrimack Valley. Finally, the city is completing an intermodal study with the Merrimack Valley Regional Transportation Authority and needs funding through the Federal Transportation Bond Bill to support design and development of a parking garage."

Donna is certain that being a lawyer helped her get elected to City Council and Mayor and will be invaluable in running the city. "Once I completed my J.D., I realized I had experienced a profound impact on the way I viewed society, governance, and our country's history," she said. "I learned to appreciate the history and efforts of leaders that came before me and the challenges of leadership. I believe this is why so many elected officials are lawyers. I heard many times throughout the campaign about my positive background and qualifications to serve as our

next mayor."

Donna looks back fondly at her MSLAW experience. She came to the law school after resigning "from a very complex 15-year job as a senior manager for a non-profit focused on developing residential programs for some of the Commonwealth's most challenging individuals who were transitioning out of our state mental health facilities and institutions. I was on-call 24/7 and needed a change." She ran into an MSLAW alum who was also in the mental health field, and he put the bee in her bonnet. She was hooked after attending an open house and seeing so many people who were in similar positions and looking for a change in careers. "I knew it was meant to be. The location, schedule, and affordable tuition were real draws as well as the relaxed rules imposed by other law schools (amount of hours you could work, LSAT). I also really liked the philosophy of giving a wider range of candidates the opportunity to attend law school," she remarked. "One had to be willing to put in the time and effort, but MSLAW recognized the potential for those rejected by other law schools and provided a chance to earn a J.D. and become a member of the bar." Her experience at MSLAW exceeded all expectations, despite the rigorous curriculum. "It was interesting to note that while I was at MSLAW, a close friend was attending a prestigious Boston law school, and I was surprised to learn how much more intensive the program and workload was at MSLAW, especially the grading. I particularly enjoyed Moot Court and participating

on the trial team; both provided the opportunity to research and prepare for public argument and debate which I know helped in campaign debates and my comfort with public speaking," praised Donna.

Donna and her husband Joe, a professional musician and chef, just celebrated their 26th wedding anniversary. They have two sons, Jared, 25 and PJ, 20, both of whom attended the Newburyport public schools. "Both are following in their Dad's footsteps: Jared teaches sax, clarinet and flute at Governor's Academy, and PJ is studying percussion. They play in several jazz bands together. I keep threatening to pick up a microphone to sing with them during jam sessions, but for some reason, they lock me out of the rehearsal space!" joked Donna. Donna, Joe, and their budding musicians live in an old 1850 Victorian in the south end of the city, with their "very large black cat Malcolm, who acts more like a dog than a cat." ■

Alumni News

Dan Occena ('08) has opened his law office on Broadway in Revere, where his practice includes: Social Security disability advocacy, probate and family consultation/representation, criminal defense, and immigration services . . . **Manny Rabbitt** ('06) has relocated his tax practice to One Corporate Place, 55 Ferncroft Road in Danvers . . . **Jason Ebacher** ('05) is still with the Essex Sheriff's office and has opened a law office in North Andover, focusing on construction law, estate planning, and estate administration. He and his wife have a 2 ½-year-old son and another one on the way . . . After many years in Lawrence, **Saba Hashem** ('99) and **Steve D'Angelo** ('98) are relocating their office to North Andover . . . **Eric Klein** ('95) is practicing law in Florida. He heads a four-person firm, Eric N. Klein & Associates, P.A. They have offices in Boca Raton and Palm Beach Gardens . . . **Darshan Thakkar** ('95) is completing his Ph.D. in Education. After practicing immigration law for several years, in 2004 he went back to teaching full time. His thesis is on foreign language instruction and assessment. He also teaches graduate education students and in local high schools . . . **Sarah Hammond Misiano** ('06) is with Donahue, Grolman and Earle, a general practice firm in the South End (Boston) . . . **Roushi Sahagan** ('06) is practicing bankruptcy law in Quincy . . . **Michael Goldstein** ('06) and **Deidre Clegg** ('06) are of counsel to the Law Firm of Jeffrey Mazer in Lynnfield and have their own law firm handling mostly employment law and consumer debt matters . . . **Steve Kempisty** ('95) is the Director of the Legal Studies Program (paralegal and Criminal Justice and Court reporting coming in fall) at Bryant & Stratton College in Liverpool, New York. He also does arbitrations for civil matters at the SEC . . . **Gerald Levins** ('97) has opened a new office in Hopkinton (MA) and is hosting a radio show, "The Gerry Levins Tax Show" Sundays 9:00 a.m. - 10:00 a.m., on WCRN AM 830, Worcester-Boston. **Mary Beth Ayvazian** ('06) is an attorney with Exemplar Law in Boston, doing general corporate law, including intellectual property, mergers and acquisitions, and patent cases. . . . **Mara Dolan** ('03) has been named the Chair of the Concord (MA) Town Democratic Committee and is heading up the Patrick/Murray re-election effort there . . . **Bill Amann** ('00) is with the firm of Bodoff & Associates, P.C. on Water Street in Boston . . . **Devon Cormier** ('08) has opened an

office on Merrimack Street in Haverhill, where she has a general practice but hopes to use her experience managing a local nursing home to focus on elder law, including guardianship and long-term care planning . . . **John McKinnon** ('99) is the recipient of the Rural Access to Justice Pro Bono Award from the New Hampshire Bar Association. He has a general practice in Campton, New Hampshire, although, as the Bar noted in bestowing the award on John, his practice includes representing rural families throughout many New Hampshire towns . . . **Rita Sud** ('09) has a general practice, including appellate advocacy and business matters in Waltham . . . **George O'Connor** ('09) has a general practice in Northborough, but he hopes to use his experience as an engineer to focus on land use and permitting matters . . . **Joseph Finn** ('04) has opened a practice in Lynn, and **Gregg Tarayan** ('08) opened one in Salem (MA) . . . **Gary Sclar** ('99) is legal counsel to MedMetrics Health Partners, Inc. and Public Sector Partners, Inc., subsidiaries of the UMass Medical School in Worcester.

Congratulations!

Katie Benison-Camell ('07) and her husband welcomed their first child, son Jameson, on December 9, 2009 . . . **Stacey Alcorn** ('07) had a baby girl, Oshyn, on December 11 . . . **Janine White Duffy** ('05) had a second child, another boy, Eoin, in November 2009 . . . **Nick Howie** ('07) was married in July to Megan Gaudette. He is with the law firm of Patrick Shanley in Lowell . . . **Rohit Basin** ('06) is engaged to Rashi Jawade. A November wedding is planned.

In Memoriam

Unfortunately, MSLAW lost two alumni since the last issue of *The Reformer* was published. Former adjunct faculty member **Pat Schettini** ('94) passed away in December. Pat had been the Superintendent of the Reading Public Schools since 2003 . . . **Deborah Swanson** ('08), an associate with the firm of Consoli and Wilshusen in North Andover, died suddenly in January. The sympathy of the entire MSLAW community goes out to the families and friends of these two alumni. ■

2009 a Record Year for MSLAW Media

In addition to providing quality education in the classroom, MSLAW strives to provide quality education to the public, through its series of television programs airing on Comcast SportsNet.

Behind the scenes, MSLAW has been producing first-rate programming while amassing an unprecedented 48 awards in 2009. The big winner was the MSLAW Educational Forum program *Women in Government*, which earned six honors, including the prestigious Gracie Award. The *Books of Our Time* show



Holly Vietzke, Diane Sullivan, and Kathy Villare receive their Clarion awards

on the book *Free Lunch: How the Wealthiest Americans Enrich Themselves at Government Expense (and Stick You with the Bill)* by author David Cay Johnston won five awards. Media Director Kathy Villare picked up 10 awards for her videography in the Educational Forum and *Books of Our Times* shows. ■

MSLAW's 2009 Awards

Ava Awards

Platinum

Books of Our Time: *Free Lunch: How the Wealthiest Americans Enrich Themselves at Government Expense (and Stick You with the Bill)*
Books of Our Time: *The Limits of Power: The End of American Exceptionalism*
MSLAW Educational Forum: *Pursuing a Dream*
MSLAW Educational Forum (Information category): *Women in Government*

Gold

Books of Our Time: *Mr. Gatling's Terrible Marvel*
MSLAW Educational Forum: *Cervical Cancer*
MSLAW Educational Forum: *The Marriage Benefit*
MSLAW Educational Forum (Talk show category): *Women in Government*

Honorable Mention

Books of Our Time: *So Much Damn Money*
Books of Our Time: *The Cult of the Presidency*

Clarion Awards

MSLAW Educational Forum: *The National Guard*
Best local or regional television public affairs program

Please, Can We Keep the Donkey?
Best nonfiction, non-technical book

Communicator Awards

Award of Excellence

Books of Our Time: *Blown to Bits: Your Life, Liberty, and Happiness after the Digital Explosion*
MSLAW Educational Forum: *Cervical Cancer*
MSLAW Educational Forum: *The National Guard*
MSLAW Educational Forum: *Band of Sisters: American Women at War in Iraq*

Award of Distinction

Books of Our Time: *Free Lunch: How the Wealthiest Americans Enrich Themselves at Government Expense (and Stick You with the Bill)*
Books of Our Time: *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*

Davey Awards

Silver

Books of Our Time: *Mr. Gatling's Terrible Marvel*
Books of Our Time: *Free Lunch: How the Wealthiest Americans Enrich Themselves at Government Expense (and Stick You with the Bill)*
Books of Our Time: *The Limits of Power: The End of American Exceptionalism*
Books of Our Time: *I.Q.: A Smart History of a Failed Idea*
MSLAW Educational Forum: *The National Guard*

(continued on next page)

Gracie Award

MSLAW Educational Forum (Outstanding Talk Show): *Women in Government*

MarCom Awards

Platinum

Books of Our Time: *Free Lunch: How the Wealthiest Americans Enrich Themselves at Government Expense (and Stick You with the Bill)*

Books of Our Time: *The Limits of Power: The End of American Exceptionalism*

MSLAW Educational Forum: *Women in Government*

Please, Can We Keep the Donkey?

The Reformer

Gold

Books of Our Time: *Mr. Gatling's Terrible Marvel*

MSLAW Educational Forum: *Cervical Cancer*

The Long Term View

Honorable Mention

Books of Our Time: *The Cult of the Presidency*

Telly Awards

MSLAW Educational Forum: *Women Making a Difference*

MSLAW Educational Forum: *Tell Me Where it Hurts*

MSLAW Educational Forum: *Women in Government*

MSLAW Educational Forum: *Band of Sisters: American Women at War in Iraq*

Videographer Awards

Award of Excellence

Books of Our Time: *Free Lunch: How the Wealthiest Americans Enrich Themselves at Government Expense (and Stick You with the Bill)*

MSLAW Educational Forum: *Cervical Cancer*

MSLAW Educational Forum: *Women in Government*

MSLAW Educational Forum: *Minor League Baseball*

Award of Distinction

Books of Our Time: *Blown to Bits*

Books of Our Time: *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*

Books of Our Time: *I.Q.: Smart History of a Failed Idea*

MSLAW Educational Forum: *Tell Me Where it Hurts*

Honorable Mention

Books of Our Time: *Mr. Gatling's Terrible Marvel*

MSLAW Educational Forum: *Band of Sisters: American Women at War in Iraq*

IPPY Award

Gold

An Enemy of the People: The Unending Battle Against Conventional Wisdom, essay/creative category

ForeWord Award

Bronze

Blogs From the Liberal Standpoint: 2004-2005

Living Now Book Award

Silver

Please, Can We Keep the Donkey?, pets/livestock category

Enforcing the Trafficking Victims Protection Act: Reproductive Justice Meets Religious Right(s)

By Jonelle A. Kusminksy

Second of two parts

Part 1 of this article addressed the Trafficking Victims Protection Act and subsequent amendments and raised the question of whether the government's funding of private religious groups which provide services, including medical services, to trafficking victims, pursuant to the TVPA, violates the statute or the Constitution, when those groups, for religious reasons, refuse to provide abortion or birth control services to their clients. Part 2 will address the legal arguments attendant to that issue. Footnotes are numbered continuously from Part I.

Religiously-affiliated victims' assistance programs which accept federal funds to provide "necessary medical care" to victims of trafficking under the Trafficking Victims Protection Act (TVPA) should be legally required to make contraception and abortion services available to women who desire them; to fail to do so constitutes misuse of federal funding and arguably violates both the applicable federal law and the Constitution. This is so in spite of a trend toward fetal protection in contemporary American abortion politics and court decisions.

The Constitutionality of Abortion Legislation

A woman's right to choose abortion was established in *Roe v. Wade*, when the Supreme Court interpreted the right to privacy to include, at least theoretically, a woman's right to have an abortion

free of significant government intrusion in the first two trimesters of pregnancy.⁶⁷ *Roe* was a huge step toward reproductive justice—it did, after all, legalize abortion in the United States—but in the Court's decision, Justice Blackman also made painfully clear that abortion is not available to women "on demand."⁶⁸

The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* retreated from the broader holding of *Roe* because, as Justice O'Connor stated, the earlier decision did not sufficiently take into account a state's right to protect the fetus.⁶⁹ Subsequently, the Supreme Court has eroded a woman's right to choose. In *Gonzales v. Carhart*, the Court rejected a facial challenge to the federal Partial Birth Abortion Ban Act of 2003, asserted because, *inter alia*, it did not contain an exception to imposing criminal liability when the procedure

⁶⁷ 410 U.S. 113 (1973). The Court divided pregnancy into three trimesters. During the first trimester, the decision was one reached exclusively between the woman and her physician. In the second trimester, recognition of the state's interest in protecting the health of the mother permitted the state to impose restrictions on a woman's access to an abortion consistent with achieving maternal health. In the third trimester, subsequent to viability, the state's interest in promoting potential life permitted it to regulate access in any way, including complete proscription except where the procedure was necessary to protect the life or health of the mother. *Id.* at 163-64.

⁶⁸ *Id.* at 165-166.

⁶⁹ 505 U.S. 833 (1992). *Planned Parenthood* chose to jettison the trimester paradigm in favor of using of pre- and post-viability as the dividing line. Pre-viability, a state may regulate a woman's access to an abortion, so long as it does not "unduly burden" a woman's right in that regard. A law or regulation unduly burdens a woman's right if its intent or effect is to place a substantial obstacle in the woman's path to exercise the right. *Id.* at 877. Post viability, a state may regulate up to and including barring access to the procedure, except where necessary to protect the life or health of the mother. *Id.* at 874.

was sought to preserve the mother's health.⁷⁰

One problem with the Court's ruling in *Planned Parenthood*, whose "viability" standard is still arguably good law, is that what is considered a "viable" fetus—that is, one capable of survival outside the womb—is a varied and uncertain term, a changing construct. This is because medical technology is becoming increasingly advanced. Where it might not have been possible only a few decades ago to sustain the life of a child born at only five months gestation, now there have been instances where that is entirely possible. With this in mind, it seems likely that this Court will only affirm weightier restrictions on abortion earlier in pregnancy. This is a problem for anyone who might wish to avail herself of an abortion, but most especially poor women, whose ability to exercise the abortion privilege is severely obstructed by limitations on federal funding for abortion. Although the Court has repeatedly said it was not overruling *Roe*, the right to access has been significantly curtailed in the past 30 years, and there seems no reason to believe that the trend will not continue in the immediate future. Thus, it can be said at best, *Roe* created an abortion privilege; "right" is probably a misnomer.

The Medicaid Assessment

The Medicaid program provides a good framework within which to examine the issue of federal funding for "controversial" reproductive health-care services such as contraception and abortion. Medicaid is the largest healthcare program in the United States and covers up to 50 million people each year.⁷¹ Sixteen million of these are women;

one in 10 women, generally, and one in five low-income women, were covered under the program in 2003.⁷² In the United States today, 11.5 percent of reproductive-aged women receive their health-care benefits through Medicaid.⁷³ Yet, Medicaid authorizes abortions only in limited circumstances; specifically, federal funding for abortions is permissible only where a woman has been the victim of rape or incest or where her life is endangered by pregnancy.⁷⁴

In *Maher v. Roe*, the Supreme Court held that the 14th Amendment's Equal Protection Clause did not require states (Connecticut in that case) to expend Medicaid funds to pay for patient expenses incident to abortion even though states elected to cover expenses incident to childbirth.⁷⁵ In that case, the appellees were Medicaid recipients: a 16-year-old high school junior who had already obtained an abortion and a pregnant, single mother, both from Connecticut.⁷⁶ Neither woman was able to obtain a certificate of necessity so that Medicaid would pay for the procedure.⁷⁷ The 16-year-old was later asked to cover the bill—some \$244 in 1977—and the single mother, on account of her inability to come up with the money to pay for an abortion on her own, gave birth to a third child.⁷⁸ Though the Court expressed sympathy for the plight of the indigent, Justice Burger noted, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."⁷⁹

In other words, reiterated the Court in *Maher, Roe* went only so far as to create an abortion privilege; a state is not obliged to foot the bill for abortions.⁸⁰ Recognizing that lack of available funds

⁷⁰ 550 U.S. 124 (2007). Kennedy's opinion ruffled many feathers of pro-choice advocates for many reasons. First, it refused to invalidate the statute for failure to provide an exception where the abortion was for the health of the mother, which is expressly contrary to the holding in *Planned Parenthood*. Second, it did not distinguish between use of the procedure pre- or post-viability. Additionally, Kennedy repeated referred to the fetus as a "child," and paternalistically claimed, in defense of this heightened consent requirement, that the state had a right to protect women from making decisions they might later regret. *Id.* at 128-29.

⁷¹ Guttmacher Institute, *Issue Brief: An Update on Women's Health Policy*, Report for Henry J.

Kaiser Family Foundation 1 (October 2007).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ National Network of Abortion Funds, *Hyde: 30 Years is Enough*, http://www.hyde30years.nnaf.org/documents/hyde_flyer_color_011708.pdf (last viewed April 1, 2009).

⁷⁵ *Maher v. Roe*, 432 U.S. 464, 466 (1977).

⁷⁶ 432 U.S. 468, 474-475 (1977).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 474-475.

⁸⁰ *Id.* at 475.

might stand in the way of some women's ability to procure abortion services, the Court defended its ruling by noting that it isn't as if the government *directly* prohibited abortion; the ruling simply *encourages* pregnant women to consider the alternative (presumably, carrying their pregnancies to term).⁸¹ After all, if a poor woman really wanted an abortion, she could still procure one. It would just take time and, more important, money—two things to which a poor pregnant woman is not likely to have access, particularly not early in the pregnancy.⁸² However, abortion restrictions don't appear to dissuade determined poor women from obtaining abortions when they finally raise the money to do so.⁸³

Under the law as it existed at the time *Maher* was decided, it seems possible that trafficking victims would have been able to receive federally-subsidized abortions, providing they could prove "medical necessity," which at the time, included psychiatric necessity.⁸⁴ However, today is another story.

Congress first adopted the controversial Hyde Amendment in 1976,⁸⁵ and the Supreme Court ruled upon its constitutionality four years later.⁸⁶ The Amendment, which has been revised several

times since its inception, provides that the federal government is prohibited from using federal funds to reimburse states for abortions provided under the Medicaid program, except where the woman would be placed "in danger of death unless an abortion is performed," or where the "pregnancy is the result of an act of rape or incest."⁸⁷ While certainly not every victim of human trafficking would qualify for a federally-subsidized abortion under the "danger of death" prong, many victims of human trafficking have been raped and impregnated by their captors and others such that even the Hyde Amendment would support their abortion rights. Were a state's Medicaid program to deny an impregnated victim of rape or incest access to abortion under the Medicaid program, theoretically, the federal government should penalize the state program by withholding matching federal funds.⁸⁸

Even in those circumstances in which the government has elected not to provide federal funding for abortions, precedent supports that there is an exception in circumstances in which indigent women have been the victims of rape and sexual abuse. In this event, federal funds should be available for women to receive reproductive healthcare

⁸¹ *Id.* at 475.

⁸² Accurate statistics concerning the number of facilities currently performing late term abortions are not available. In light of the recent murder of Dr. Tiller, one of the few practitioners who performed such procedures, it is not surprising that reliable statistics do not exist. See Rob Stein, *New Attention on Late-Term Abortions: Doctors Who Perform Procedures Provide Little Data but Underscore Reasoning*, Wash. Post, June 5, 2009, at A3.

⁸³ Melody Rose, *Safe, Legal, and Unavailable? Abortion Politics in the United States* 110 (2007).

⁸⁴ *Maher*, 432 U.S. at 464, n.2.

⁸⁵ Restrictions known as the "Hyde Amendment" have been effectuated either by an amendment or rider to the annual appropriations bill for the relevant department or by a joint resolution of Congress.

⁸⁶ *Harris v. McRae*, 448 U.S. 297 (1980).

⁸⁷ Pub. L. No. 106-113, §§ 508-509, 113 Stat. 1501, 1501A-274 (1999).

⁸⁸ It appears that 49 of the 50 states will pay for at least those abortions allowed by the Hyde Amendment. Medicaid in South Dakota,

reportedly, will cover only abortions where the life of the mother is at stake. For a listing of coverage in the states, see Nat'l Abortion Federation, *Public Funding for Abortion: Medicaid and the Hyde Amendment* (2006), http://www.prochoice.org/about_abortion/facts/public_funding.html. In *Dalton v. Little Rock Family Planning Soc.*, 516 U.S. 474 (1996), the Supreme Court held that an Arkansas Constitutional provision prohibiting use of state funds for an abortion except one to save the life of the mother was unconstitutional only insofar as it was preempted by federal law. Because the programs were found to be entirely state funded, the decision had little practical effect. In 1999, however, in *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d. 341 (1999), the Arkansas Supreme Court ruled again, that the Arkansas Constitution was preempted by the Hyde Amendment when it came to federal Medicaid funding. See also 1 Am. Jur. 2d Abortion and Birth Control § 86, n.2, for other cases addressing this issue. In light of the majority of cases, it is difficult to comprehend how a state that takes Medicaid funding would not be subject to an order that it pay for the full extent of those abortions not prohibited by the Hyde Amendment.

up to and including abortion.⁸⁹

Thus, where Medicaid is concerned, the federal government has made it perfectly clear: In order to utilize this pot of federal money, those states that receive it must be mindful of these exceptions. The grants available under the TVPA merely represent a different pool of federal money, and denying trafficking victims access to contraception and abortion services in accordance with the TVPA is inconsistent with Congressional law and ought to result in an order to provide such services, or risk losing the federal funds.

The Devil in the Distinctions

TVPA funds merely represent a different pool of federal money, so why should victims of rape and incest be able to access federal funding for abortion under the Medicaid program but not under the TVPA? If the difference doesn't have anything to do with how federal funds are allotted, surely it must depend on the objectives to be served by the Medicaid program versus those of the victims' assistance programs operated under the TVPA.

On the one hand, Medicaid, in general, serves poor United States citizens and permanent residents.⁹⁰ TVPA programming, on the other hand, exists to benefit trafficking victims, including many undocumented (or, at best, *improperly*-documented) aliens—and it appears what is good for the American goose is not at all good for the alien gander.

In *Lewis v. Thompson*, a federal district court determined that it was not a violation of the Equal Protection Clause of the United States Constitution to deny indigent, undocumented

pregnant women access to prenatal care subsidized by Medicaid funds, when the statute did not cover these services.⁹¹ The court upheld the constitutionality of the Welfare Reform Act, noting that it was never Congress' intent to provide federally subsidized benefits to illegal aliens.⁹² *Children* born in the United States to undocumented or improperly-documented aliens, on the other hand, were entitled to full Medicaid benefits. Thus Congress appears to have intended that some federal funds be reserved for use by Americans and resident-alien.⁹³

In September 2002, then-president George W. Bush took things one step further by providing federal benefits to *would-be* Americans. He classified fetuses as "children" under the State Children's Health Insurance Program (SCHIP), which extends federally-subsidized health insurance benefits to poor children.⁹⁴ The Secretary of Health and Human Services then reworded the definition of "child" in Title 42 of the Public Health Law to include "any individual under the age of 19 including the period from conception to birth."⁹⁵ The SCHIP program entitles fetuses to federally funded health care—even if those fetuses happen to develop inside the bodies of undocumented aliens, who are *not* entitled to federally assisted benefits.

Of course SCHIP does not apply to non-citizen adults—whether legal or illegal aliens—so that actually administering health care to the fetus creates a number of conundrums. For instance, how is it possible to provide health care to a fetus separate from the woman carrying it? If the woman were an illegal alien and exhibited complications in the course of pregnancy, would

⁸⁹ See also *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003). In this case, several reproductive healthcare providers in Indiana alleged that abortion funding restrictions violated the Privileges and Immunities clause of the state constitution. Indiana provided for funding in cases where an indigent woman sought an abortion that was necessary to preserve the woman's life, or in cases of rape or incest, but not for abortions which were medically necessary. The Court held that the state was not required to fund all medically necessary abortions (including those where a woman's health was jeopardized by going forward with a pregnancy), but it was required to fund abortions for pregnancies that presented a

"serious risk of substantial and irreversible impairment of a major bodily function." *Id.* at 258-259.

⁹⁰ See, e.g., 42 U.S.C. § 1396a(b) (2010).

⁹¹ 252 F.3d 567 (2d Cir. 2001).

⁹² *Id.* at 571.

⁹³ *Id.* at 580-82.

⁹⁴ Catherine Berger, 'Unborn child' coverage moves ahead, CNN.com (Sept. 27, 2002) <http://archives.cnn.com/2002/ALLPOLITICS/09/27/wh.unborn.child/index.html> (last visited July 20, 2009).

⁹⁵ 42 C.F.R. § 457.10 (2003).

SCHIP cover the cost of medical care to return her to health for the sake of the fetus? The answers are not easily ascertained.

In reality, one major practical effect of this change to the Public Health Law seems to be to reinforce that fetal “personhood” is deserving of attention at the federal level. Meanwhile, the clear limitation on extending federal funds to some non-citizens illustrates that the government also appears to have a hierarchy of priorities where disseminating federal funds is concerned: citizens first (including *potential* citizens who may not ever be born), non-citizens later, or maybe never.

However, Congress apparently intended for the TVPA to protect a broader category of persons than Medicaid does. Even where a trafficking victim is an illegal alien, Congress has said that she should be offered help and protection first and, by all means, should not be *penalized* for her citizenship status.⁹⁶

With this in mind—and especially given the high likelihood that a trafficking victim will have been sexually victimized—it would be prudent for the federal government to guarantee that where a victim of human trafficking wishes to avail herself of contraception or abortion services incident to sexual abuse, she can do so.

But that’s not all. As it is, even where Medicaid funds abortions for poor American women who have been the victims of rape or incest, many of them still prefer private funding from grassroots organizations, such as the National Network of Abortion Funds, over making a request for federal monies.⁹⁷ This makes sense, too. It appears that some states that extend federal and state funding for abortions to victims of rape and incest also require victims to document with police and hospital reports alleged incidents of sexual abuse.⁹⁸ Suffice it to say, it’s probably the case that not all victims make reports of

such abuse. In the case of trafficking victims, that is highly unlikely, given they are kept under such a watchful eye by their captors. The opportunity to make the necessary reports simply isn’t there, so that were the government to carve out similar exceptions for female victims of human trafficking under the TVPA, abortion services must not be contingent on reports to law enforcement that a woman has been sexually abused.

Lessons from Title X

Even if Congress properly grasped to what extent Trafficking Victims Protection Act (TVPA) programs would benefit undocumented aliens, lawmakers may still be of the mindset that indeed women would be just fine without governmental support for certain reproductive healthcare services altogether.

Title X was enacted in 1970 as the only federal program to offer “comprehensive” family-planning services to citizens, most especially poor people.⁹⁹ By its own admission, “The Title X family-planning program is intended to assist individuals in determining the number and spacing of their children.”¹⁰⁰ However, “Title X funds may not be used in programs where abortion is a method of family planning.”¹⁰¹

The aim of this program is, more accurately then, to assist individuals who are *not currently pregnant* in determining the number and spacing of their children. If one’s contraceptive method happens to have failed her—assuming she had a contraceptive method at all—she isn’t at liberty to decide she doesn’t, in fact, want to give birth. Title X is of no help to her if she wishes to terminate a pregnancy. Where pregnant women are concerned, Title X fails to meet its own objective.

The Supreme Court wasn’t bothered by the colossal failure of Title X programs to serve certain

⁹⁶ Ellen L. Buckwalter, Maria Perinetti, Susan L. Pollet & Meredith S. Salvaggio, *Modern Day Slavery in Our Own Backyard*, 12 Wm. & Mary J. Women & L. 403, 408-409; U.S. Department of State, Office to Combat and Monitor Trafficking of Persons, *Trafficking of Persons Report* (2008), at “Purpose.”

⁹⁷ Melody Rose, *Safe, Legal and Unavailable: Abortion Policies in the United States* 110 (2007).

⁹⁸ *Id.*

⁹⁹ U.S. Department of Health and Human Services: Office of Public Health and Science/Office of Population Affairs, *Family Planning*, <http://www.hhs.gov/opa/family-planning/index.html> (last viewed April 1, 2009).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

pregnant women either. In *Rust v. Sullivan*, the Court upheld the constitutionality of this Health and Human Services regulation prohibiting abortion counseling and referrals by programs grant-funded under Title X of the Public Health Service Act.¹⁰² Ultimately the Court determined that to extend Title X funds to organizations that provide or make referrals to abortion providers would create “the appearance of government support for abortion related activities.”¹⁰³

There was really never any danger of that since legislatures and the courts have regularly erred on the side of fetal protection. As recently as 2006, in *National Family Planning and Reproductive Health Ass’n, Inc. v. Gonzales*, the District of Columbia District Court upheld the constitutionality of the Weldon Amendment which provided that Title X grantees must not discriminate against providers who refused to provide or refer patients for abortion on the grounds of moral objection.¹⁰⁴

The issue of how “right of conscientious” affects trafficking victims’ assistance programs is unclear. There’s no express mention of a “conscience objection” anywhere in the text of the TVPA. However, there is a wealth of precedent in other analogous areas. Some federal laws expressly contain conscience exceptions. The Pharmacy Consumer Protection Act of 2005 and the Access to Birth Control Protection Act of 2007 protect an individual pharmacist’s right to refuse to fill a lawfully issued prescription on religious grounds.¹⁰⁵

If it has taken its cue from Title X programs—and if Title X cases are any indication of how a Court might rule on whether conscience objec-

tions might be upheld, Commonwealth Catholic and other similarly situated organizations might come out on top.

Trafficking Victims and the Establishment Clause

Anti-choice advocates and others in support of the United States Conference of Catholic Bishops have argued that to force an organization receiving federal funds to provide contraception and abortion services would violate the First Amendment freedom of religion of those involved. Yet, the award of federal funds to certain religiously-affiliated organizations that would impose their beliefs on non-believers participating in a federally-funded initiative is, to many, more offensive still, and raises other constitutional issues.¹⁰⁶

Granting federal funds to an organization—any organization—is one means the federal government uses to express its approval of the organization’s work and the necessity of the services it provides. Where a religiously-affiliated organization provides a service or elects not to provide a service that is—at least to some degree—constitutionally-protected, it would not be a violation of First Amendment freedom of religion to deny these organizations funding. They can, at least theoretically, go elsewhere for funding in much the same way as they’ve suggested that women in need of contraception and abortion services should do.

The First Amendment reads, “Congress shall make no law respecting an establishment of reli-

¹⁰² 500 U.S. 173 (1991).

¹⁰³ *Id.* at 174.

¹⁰⁴ 391 F. Supp. 2d 200 (D.D.C. 2005). The case was reversed for lack of standing in *National Family Planning and Reproductive Health Ass’n, Inc. v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006).

¹⁰⁵ A detailed survey of the current law on conscience exceptions in health care is beyond the scope of this article. Suffice it to say that during the Bush Administration, the trend was to expand the provider’s right to refuse to fill prescriptions for reproduction-related medications or to participate in procedures that might end a pregnancy. See Jane W. Walker, *The Bush Administration’s Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 Hous. L. Rev. 939

(2009). In 2008, HHS promulgated a regulation expanding protection for a range of health care providers against discrimination resulting from a refusal to prescribe or perform procedures on account of a religious or moral belief. *Id.* at 945 n.22. The path during the Obama Administration is not yet so clear. See also Robin Fretwell Wilson, *Essay: The Limits of Conscience: Moral Clashes Over Deeply Divisive Healthcare Procedures*, 34 Am. J.L. & Med. 41 (2008); Catherine Grealis, *Religion in the Pharmacy: A Balanced Approach to Pharmacists’ Right to Refuse to Provide Plan B*, 97 Geo. L.J. 1715 (2009); Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 Ave Maria L. Rev. 527 (2007).

¹⁰⁶ See, e.g., Gallagher, *supra* note 105.

gion or prohibiting the free exercise thereof.”¹⁰⁷ Yet where the religious beliefs of a person seeking to use contraception or obtain an abortion are not offended, but the government honors the religious objections of one whose beliefs do not countenance the procedure or the medication, then is the government not preferring one religious belief over another? If it’s actually true that Congress shall make no law respecting an establishment of religion, it appears unlawful that the conscientious objector’s position would be imposed upon someone who’s own religious beliefs respects her decision to use contraception or have an abortion.

Yet there is strong support for and precedent in favor of conscientious objectors. Conscience clauses (called “refusal clauses” in some states) have been upheld and enforced at the state and federal court level. Currently, the majority of states—43 total—have such refusal clauses that permit medical and pharmaceutical personnel to refuse to provide patients with contraception or abortion services if they have a religious objection to the procedure.¹⁰⁸ The reason this is so troubling for pro-choice advocates is because so many hospitals are religiously-affiliated—often, operated by various Catholic agencies or merged with religiously-affiliated hospitals—so that the number of facilities at which women can receive abortion services is limited by the staff’s own objections to these procedures. As referenced earlier, this can have a prohibitive effect on women’s ability to actually procure abortions since many—and most especially many poor women—will not be able to pay to go elsewhere for services. They’re effectively stuck with what’s nearby.

In one case decided some years ago, a group of taxpayers, clergy, and the American Jewish Congress alleged that the Adolescent Family Life Act violated the Establishment Clause of the First Amendment, both on its face and as applied.¹⁰⁹ The Act provided for grants to agencies to serve

primarily teenagers by providing counseling and education around various services relative to public health and family planning, although it had no provision prohibiting the use of federal monies for religious purposes.¹¹⁰ In that case, the Court held that the Adolescent Family Life Act, on its face, didn’t have a “primary effect of advancing religion,” nor would the Act lead to “excessive government entanglement with religion.”¹¹¹ The Court wasn’t so sure with respect to the “as applied” challenge and remanded the matter to District Court.¹¹²

The Court has at times considered blatant instances of the government’s protection of and preference for religious groups, and in at least one instance has rejected such preference. In one landmark case, the Court determined that a Massachusetts law that granted religious groups the power to veto applications for liquor licenses to be used within close proximity to a house of worship was unconstitutional.¹¹³ The law, on its face—and consequently as applied—protected conscientious objectors over non-believers or those whose religious beliefs were not offended by selling or consuming alcohol. The Court reiterated that the Establishment Clause stands for the proposition of religious neutrality and the government’s commitment to it.¹¹⁴ It would be inappropriate, the Court held—in particular where selling alcohol with a license and consuming it over the age of majority is legally permissible—to advance conscientious objections and effectively illustrate support of those religious beliefs.¹¹⁵

Certainly, it appears that on its face, the TVPA doesn’t have the primary effect of advancing religion and therefore would not encourage excessive religious entanglement. It has a purely non-religious purpose. However, the act itself does not provide for religious-based exemptions. If a court were to read such exception into the law, then the effect would not only be to diminish a victim’s

¹⁰⁷ U.S. Const. amend. I.

¹⁰⁸ See, e.g., Jason Green, *Refusal Clauses and the Weldon Amendment*, 26 J. of Legal Med. 401, 404 (2005).

¹⁰⁹ *Bowen v. Kendrick*, 487 U.S. 589 (1987).

¹¹⁰ *Id.* at 590.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982).

¹¹⁴ *Id.* at 120.

¹¹⁵ *Id.* at 125-26.

ability to access her statutorily and constitutionally protected procreative rights, but it would, in effect, acknowledge the primacy of one set of religious beliefs over another. Seemingly insurmountable barriers—financial and geographic, to say nothing for the undue burden on the patient-physician relationship—make abortion unconstitutionally difficult (sometimes next to impossible) to obtain, hindering rather than informing a woman’s choice. This is all the more tragic since the women affected sometimes never had a choice whether to engage in sex acts, never had a choice whether to use contraception, and never had a choice whether or when to get pregnant in the first place.

Conclusion

One thing that was painfully apparent in the course of this research is that the United States has yet to create a stable, solid, lasting policy protective of contraception and abortion rights. Abortion policy changes with the political administration, and with the make-up of the Supreme Court. It is possible that given Congress’ express commitment to provide for the necessary medical care of trafficking victims under the Trafficking Victims Protection Act (TVPA), as well as case precedent establishing that abortion should be available to women impregnated, or at the very least, as a result of sexual abuse, that a court should protect the reproductive rights of trafficking victims. On the other hand, given the political power of those groups—religious and otherwise—that oppose abortion and sometimes even birth control, legislation is sometimes enacted at the expense of women’s reproductive rights. It would probably be too much to ask that the government enforce the TVPA and the Constitution by refusing to fund organizations that will not provide comprehensive reproductive health care services, such as contraception and abortion, to victims of international trafficking. If or until these victims assistance programs offer much-needed contraception and abortion services, or if or until TVPA grant funds are allotted only to those programs that do, already-vulnerable women will be exploited by laws that, at least as applied, impose conscience objections on women whose own consciences don’t object to contraception, or even to abortion. Their struggle for reproductive justice continues. ■

Jonelle A. Kusminsky graduated from MSLAW in December. She is a chapter founder and coordinator of Law Students for Reproductive Justice. She is currently tracking healthcare reform legislation for its impact on reproductive health as part of a summer placement at the National Network of Abortion Funds, and she is also conducting legal research concerning abortion funding restrictions for other member funds. She recently sat for the February bar exam.

MSLAW, Harvard Take Top Honors

Trial Advocacy Team earns berth in finals for third time in four years

Massachusetts School of Law's Trial Advocacy Team once again demonstrated tremendous advocacy skills during the 2010 Thurgood Marshall Mock Trial Competition for the Northeast Region of the National Black Law Students Association. In winning third place in the competition, MSLAW's top two teams lost only to Harvard University Law School throughout the entire competition. Harvard University Law School won the Trial Competition and Columbia University Law School won the Moot Court Competition held at the regional convention at Syracuse University. The Northeast region is comprised of the 33 law schools in New England, New York, and northern New Jersey.



MSLAW's students displayed impressive command of the evidence, law, and facts while displaying great advocacy skills throughout the competition. MSLAW advanced two teams to the Elite 8 of the highly competitive Northeast Region, which included qualifiers Harvard, St. John's, and Syracuse. While teams are not allowed to disclose their team affiliation during the competition, among the teams that MSLAW beat were NYU, St. John's, Brooklyn, and Syracuse to advance to the semifinals, where it lost to Harvard in a tight match.

MSLAW now competes in the National Finals for the third time in four years. In the last five years, MSLAW teams have finished in third place three times, second place twice, and first place once. In 2008, when MSLAW won the top four spots in the regional competition and went on to

compete in the National Finals of the Thurgood Marshall Mock Trial Competition, MSLAW finished third in the country, losing only to the national champion.

Two teams from Harvard University Law School met in the finals to take top honors. The two Harvard teams and MSLAW now advance to the national finals with the 12 other winners from the remaining four regions across the United States.

For the first time in the last four years, the best advocate award in the competition did not go to a student from MSLAW. Nicole Dion (MSLAW '08)

won the award in 2007 and 2008, and Allen Woodward (MSLAW '09) won the award in 2009. An impressive performance and

perfect score by Harvard student Allison Reid won her the best advocate award despite strong competition from MSLAW students Shane Rodriguez, Mercy Saigbah, and Clynetta Neely.

MSLAW team members are Mirna Diaz, Morjietta Derisier, Jamal Johnson, James Ezeigwe, Shane Rodriguez, Clynetta Neely, Mercy Saigbah, Babatunde Adebayo, Diana Laurent, Sharon Legall, Rasheida Craig, Candice Robinson, Eversley Linsey, Marsha Clarke, Chantelle Hashem, and Nisha Mungroo. Associate Dean Michael Coyne, attorney and Professor Dan Harayda, and Attorney Joseph Filippetti serve as the coaches. Harayda praised team members for their professionalism and skill as advocates.

In praising the team's performance, Dean Coyne said, "In California at the National Criminal Defense Trial Competition where the

team placed 9th in the country and at Syracuse in the Thurgood Marshall Trial Competition where it won third place, this team displayed great intelligence, command of the law and the rules of evidence. It is not surprising how much they accomplished. The only surprise is that anyone could do better than they did but there is no shame in losing to an equally talented team as that from Harvard. Both groups of team members are truly among the very best law students in the United States. It was a pleasure to see the team demonstrate their significant knowledge and command of the law. They will be great lawyers who will serve their communities well." ■



MSLAW to Launch Undergraduate College

Having successfully blazed the trail in reforming legal education, Dean Velvel and the MSLAW Board of Trustees have decided to use their wealth of experience and knowledge to effect equally revolutionary changes to the typical undergraduate school model. Scheduled to open this fall, the American College of History and Legal Studies (ACHLS) will be a senior or completion college, located in Salem, New Hampshire. Its mission will be to offer a rigorous yet affordable education to students having completed their first two years of college elsewhere. Its curriculum will focus exclusively on American History and legal history, with attention to U.S. history of important legal subjects such as constitutional and regulatory law. As is the norm at MSLAW, its faculty will use the Socratic or discussion method in small classes. This process is designed to make students think about, reason, and analyze relevant facts and solve problems in a particular subject. Among the courses ACHLS intends to offer will be the History of the Women's Movement, the History of Civil Rights, the History of Sports in America, and the

History of Foreign Relations. Its overall curriculum will stress critical thinking, fluent speaking, and good writing.

Students completing their first (junior) year at ACHLS with necessary academic credentials will have the option of attending MSLAW following their junior year and will receive their undergraduate degree after successfully completing their first-year requirements at MSLAW. However, Dean Velvel has emphasized that an ACHLS education will be equally valuable to those not wanting to pursue the law as a career, because it will instill in its students skills (and substantive information) that can be used in other professions.

As pioneers in legal education, it is not surprising that Dean Velvel, with the approval of MSLAW's forward thinking Board of Trustees, has decided to transfer MSLAW's model—giving a rigorous but affordable education to non-traditional students—to the college arena.

If you want further information on ACHL, please contact Paula Colby-Clements at colby@achls.org. ■

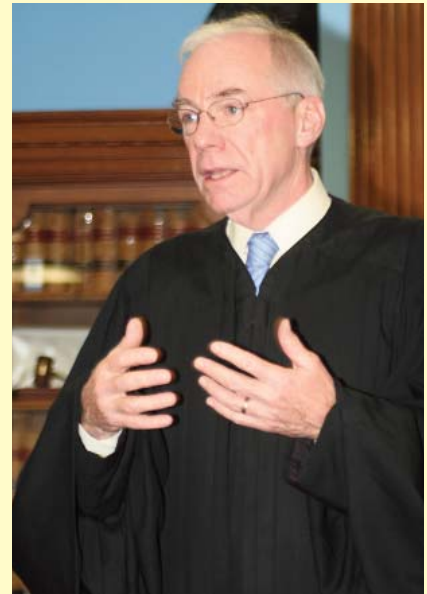
MSLAW Events

Heard on Appeal

Justices return to MSLAW to hear oral arguments



Faculty members enjoy a breakfast with the justices



Justine McHugh chats with students



Local high school students learn about the court system



Justine Hanlon listens carefully

Professors Argue About Slavery in 1857

As part of Black History Month, Professors Peter Malaguti and Constance Rudnick reenacted the unpleasant 1857 Supreme Court decision *Dred Scott v. Sandford*, which held that slaves of African descent and their descendants were not considered U.S. citizens. Professor Rudnick, on behalf of Scott, argued that the Constitution did not exclude blacks from the term “citizen” and that, because he had been taken to free territory, he should be declared a free man. Professor Malaguti argued the *Sandford* side, stating that property and state rights should be the only issue that should be considered. He argued that since Scott was a slave once, he was always a slave, a position that made him so uncomfortable, he apologized several times for the arguments he was making.

It would take a civil war, several amendments

to the Constitution, more Supreme cases and almost 100 years for the impact of the decision to be negated.



Professor Rudnick objects to an argument as “client” Professor Puller looks on



BLSA President Iyabo Fadairo introduces the participants

Professor Malaguti takes the unpopular position, arguing for state and property rights



Birdies and Eagles Help the Dogs

The third annual MSLAW Golf Tournament and Silent Auction raised more than \$5,000 for The Shadow Fund, a non-profit organization founded by MSLAW to provide financial assistance to pet owners who cannot afford veterinary care for life threatening injuries and diseases to their pets. Joined by *Nightside's* Dan Rea and his own dog Charlie, newcomers and tournament veterans alike enjoyed a crisp fall afternoon. The winning foursome took home 42" flat screen televisions, and runners-up received DVD players. All participants and volunteers enjoyed a delicious post-round dinner, accompanied by a silent auction which featured a fierce bidding war for an MSLAW "Surprise Bag" and a week in Professor Coppola's St. Martin home.

Jeff Kitaeff and Paul McCarthy take a moment to pose with their foursome



Tyrone takes a hack



Shane Rodriguez entices golfers to bet on their shot



Dan Rea is congratulated after sinking a long putt



The winners, posing with Associate Dean Coyne, Diane Sullivan, and tournament organizers Denise Eddy and Michelle Hebert

SJC Approves Dual-Stage Sobriety Checkpoints

By Ron Sellon, Esq.

Roadside sobriety checkpoints have long been very useful tools for law enforcement personnel in maintaining safer roadways primarily by detecting drivers operating under the influence and removing them from the highways before they cause physical harm. Nonetheless, cases that raise the issue of whether roadblocks violate the Fourth Amendment of the United States Constitution and/or Article 14 of the Massachusetts Declaration of Rights have been the bread and butter of criminal attorneys and consequently the Massachusetts courts for the past 15 years.

Over the years, both the United States Supreme Court and the Massachusetts Supreme Judicial Court have delineated the requirements for establishing a roadblock and stated for what limited purposes one may be conducted. It is now beyond question that drunk drivers chronically plague our streets and highways and cause countless deaths and tragic accidents involving innocent victims. As long ago as 1957, the United States Supreme Court recognized the dangers drunk drivers presented to the public. In *Breithaupt v. Abram*, the Court noted, "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding

figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous."¹ This observation was further reinforced in *South Dakota v. Neville*: "The situation underlying this case – that of the drunk driver -- occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy."²

Defendants have historically grounded their challenges to so-called sobriety checkpoints or roadblocks as violative of the Fourth Amendment of the federal Constitution and Article 14 of the Massachusetts Declaration of Rights. The SJC first articulated standards that police must follow in *Commonwealth v. McGeoghegan*³ and *Commonwealth v. Trumble*.⁴ From the beginning, the Court recognized that even a brief a stop at a sobriety checkpoint, effected without individualized suspicion, constitutes a seizure under the federal and state constitutions,⁵ and hence, must be reasonable.⁶ However, that court later held that there is no

¹ 352 U.S. 432, 439 nn.6-7 (1957).

² 459 U.S. 553, 558-559 (1983)(citing *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring); *Perez v. Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) (footnote omitted); and *Mackey v. Montrym*, 443 U.S. 1, 17-19 (1979)).

³ 389 Mass. 137 (1983)(dismissing complaints resulting from roadblock arrest where police presence, lighting and notice were insufficient).

⁴ 396 Mass. 81 (1985).

⁵ In *McGeoghegan*, the Court indicated that the protections afforded by both documents were coextensive. *Id.* at 141 n.2. The United States Supreme Court has, not surprisingly, failed to address the issue in many years. The last comprehensive appeal on the issue was 20 years ago

in *Michigan v. Sitz*, 496 U.S. 444 (1990), where this Court applied a balancing test and upheld the constitutionality of a sobriety checkpoint against a claim that it violated the Fourth Amendment. Emphasizing the magnitude of the damage drunk drivers caused in the United States annually, the Court said the intrusion occasioned by an initial stop was slight in light of the gravity of the circumstances. It rejected the respondent's contention that the fact that only a few drunk drivers were actually caught by the checkpoint invalidated the program since the means did not effectuate the legitimate governmental ends. The Court reiterated that such decisions (between or among the possible manners of achieving governmental goals) is left for the policy makers, not the courts. *Id.* at 453-454.

need to prove as a precondition to the admission of evidence derived from a roadblock that there was no less intrusive alternative available.⁷

In *McGeoghegan*, the SJC established parameters on how the procedure of the roadblock is to be conducted. The SJC stated that the following factors must be present:

1. The selection of the motor vehicle to be stopped must not be arbitrary.
2. The safety of the public must be assured.
3. The inconvenience to the public must be minimized.
4. The roadblock must be conducted pursuant to a written plan consisting of pre-determined neutral criteria.
5. The SJC suggested, but did not mandate, that advance publication of the date and location of the roadblock might “have the virtue of reducing surprise, fear, and inconvenience. Such a procedure may achieve a degree of law enforcement and highway safety that is not reasonably attainable by less intrusive means. Also, while we do not suggest that roadblocks can only be constitutional if prescribed by statute or appropriate governmental regulation, we think that procedures conducted pursuant to such authorizations and standards would be more defensible than would other procedures.”⁸

In the years following *McGeoghegan* and *Trumble*, the SJC continued to refine the parameters within which law enforcement is permitted to conduct sobriety checkpoints, consistent with the demands of Article 14 of the Massachusetts

Declaration of Rights and the Fourth Amendment to the United States Constitution. The written plan must be strictly adhered to and cannot be deviated from.⁹ “In order to assure that a roadblock seizure of a citizen without even individualized suspicion is ‘reasonable’ under the Fourth Amendment and Article 14 of the Declaration of Rights, the court has demanded that the roadblock meet standard, neutral guidelines, and be conducted pursuant to a plan devised in advance by law enforcement supervisory personnel. This requirement is meant not only to assure the public's safety but also to minimize the intimidation and surprise a driver may feel upon being asked to stop for no suspicious behavior on his or her part. More important, it also aims to remove the invasion of the driver's reasonable expectation of privacy from ‘the discretion of the official in the field.’”¹⁰ That the SJC is intent on strictly enforcing its articulated requirements was evident in *Commonwealth v. Cameron*, when it reversed both the trial court and the appeals court’s refusal to suppress evidence resulting from a stop and seizure that was conducted in the absence of a written plan.¹¹

Although, as stated, the Commonwealth is not required to prove that there are no less restrictive alternatives than conducting a roadblock to effectuate its legitimate goals,¹² the site selected for the roadblock may not be arbitrary and must have an articulable history of problems related to the issue of drunk driving or excessive traffic accidents.¹³ And, in 1990, the SJC made it clear that the leeway afforded law enforcement to deal with the extensive problem of driving under the influence

⁶ *McGeoghegan*, 389 Mass. at 143.

⁷ *Commonwealth v. Shields*, 402 Mass. 162 (1988).

⁸ *McGeoghegan*, 389 Mass. at 143-144. Most jurisdictions treat advance publication of the time and place of the roadblock as strongly suggested, but virtually none make it constitutionally required. See, e.g., *Tennessee v. Muncie*, No. M2008-02097-CCA-R3-CD, 2009 WL 3031269 (Tenn. Crim. App. Sept. 23, 2009)(holding advanced publication one factor to be considered in determining if intrusion has been minimized); *Ohio v. Williams*, 181 Ohio App. 3d 472, 909 N.E.2d 667 (2009)(although not constitutionally required, advance notice serves to lessen intrusion); see also *New Hampshire v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985). Some of law enforcement’s written protocols require

advance notice to the public, and courts have upheld stops conducted at checkpoints established pursuant to these pre-established procedures. See, e.g., *Connecticut v. Boisvert*, 40 Conn. App. 420, 671 A.2d 834 (1996).

⁹ *Commonwealth v. Anderson*, 406 Mass. 343 (1989) (an arrest that occurred 15 minutes after the expiration of the time set forth in the written plan was illegal, as duration was not extended by person with authority).

¹⁰ *Id.* at 347 (cases and footnote omitted).

¹¹ 407 Mass. 1005 (1990).

¹² *Commonwealth v. Shields*, 402 Mass. 162 (1988).

¹³ *Commonwealth v. Donnelly*, 34 Mass. App. Ct. 953 (1993).

and its concomitant public safety issues does not apply to drug crimes. In *Commonwealth v. Rodriguez*, the Court refused to extend the law concerning sobriety checkpoints to roadblocks to intercept drug traffickers, except in the event of an emergency.¹⁴

Recently, after taking a brief hiatus from deciding checkpoint cases, the Supreme Judicial Court, in two separate opinions, returned to the issue, by approving the controversial two-stage sobriety checkpoint plan that was created through Massachusetts State Police Rule TRF-15.¹⁵ In *Commonwealth v. Murphy*, the Court explained that the plan was comprised of two stages.¹⁶ The first was an initial screening that involved stopping every vehicle that approached the checkpoint. If the officer observed articulable signs of intoxication, she or he would be permitted to divert the driver to a secondary checkpoint, where the officer would make more concrete inquiries into possible violations of law. "At the time of the defendant's arrest, TRF-15 allowed, but did not require, an officer who makes an initial stop of a vehicle at a sobriety checkpoint to divert the vehicle to a secondary screening area for further inquiry when the officer has a reasonable suspicion, based on articulable facts, that the driver is operating while under the influence of alcohol or drugs (OUI) or has committed another violation of law."¹⁷ The Court rejected defendant's contention that because the protocol made further secondary inquiry of the driver permissive rather than mandatory, the plan vested too much discretion in the officer. The preliminary seizure, the Court said, was acceptably brief, the intrusion minimal, and the circumstances made it clear to motorists they were not being singled out for a stop.¹⁸

A TRF-15 checkpoint was again the subject of consideration in the companion case of *Commonwealth v. Swartz*.¹⁹ *Swartz* followed *Murphy's* reasoning and result, but the defendant challenged the checkpoint guidelines based upon documentary evidence that he claimed trans-

formed the sobriety roadblock into a generalized search, which was rejected by the SJC.²⁰

The moral of the story for law enforcement and the lesson taken from the cases is simple. Strictly follow the four requisites laid out by the courts without deviation. Although Massachusetts courts have not mandated it, following the fifth recommendation of advance publication also would be an excellent suggestion.²¹ Certainly, the argument has been made that by giving advance notice to those who would be violating the law, police will be defeating the purpose of roadblocks in particular and law enforcement in general. However, this argument fails to take into account several things. First, the extent to which drunk drivers will intentionally circumvent known roadblocks is unclear. Second, it is certainly possible that knowing one must drive through a checkpoint after imbibing might deter some individuals from drinking, or at least drinking and driving. Finally, publication of this information would also be useful in the event of any civil litigation that may arise out of conducting the roadblock, such as a civil rights case (under 42 U.S.C. § 1983) for injuries resulting from motor vehicle accidents that occur at the checkpoint. If drivers know that there is likely to be traffic stopped at a particular place, then they should drive with heightened caution. So, advance publication probably does not hurt, and may well help in upholding stops occurring at the checkpoints. In sum, conducting a roadblock that is in total compliance with a pre-approved plan that complies with legal pre-requisites will provide substantial protection to law enforcement officers. ■

Ron Sellon ('08) has contributed two articles to this issue. See his case note on the pat frisk law and full bio on page 40 of this issue.

¹⁴ 430 Mass. 577 (1990).

¹⁵ 454 Mass. 318 (2009). The full plan was set forth in TRF-15 and written instructions issued by the Troop Commander to the trooper carrying out the roadblock. While the Court would have preferred the supplemental instructions had been a part of the written protocol, the supplemental instructions could be considered part

of the roadblock plan. *Id.* at 328.

¹⁶ *Id.* at 319.

¹⁷ *Id.*

¹⁸ *Id.* at 325.

¹⁹ 454 Mass. 330 (2009).

²⁰ *Id.* at 333-34.

²¹ See *supra* note 8.

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Lucky The
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An Interview with Professor Fred Golder

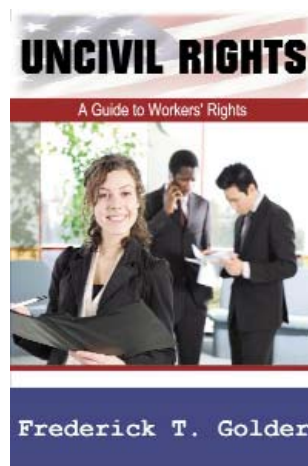
*Professor Golder is an adjunct professor at MSLAW, teaching labor and employment law. He has served as a trial advisor to the Harvard Law School Trial Advocacy Program and a judge in the Moot Court Competition at Boston College Law School. In addition, he was a member of the Governor's Advisory Board for the Massachusetts Commission Against Discrimination. He is the author of a new book published in November, called *Uncivil Rights: A Guide To Workers' Rights*.*

Tell us about your professional background – how long have you been practicing employment law, did you take a particular side, what made you specialize in that kind of law?

I have been a trial lawyer for 40 years. I was active in the civil rights movement in the '60s. That was the spark that led me to law school right from college. From the beginning, my goal was to advocate for workers' rights. After I finished law school, I went to NYU to get a master's in labor law, which was a very important issue to me at that time. I believe that people of all races, colors, and genders should have a fair and equal opportunity to work for a living wage. At that time there were very few people practicing this kind of law. I met (now Supreme Court Justice) Ruth Bader Ginsburg at a conference, and I thought she was brilliant. I went up to her after she spoke and asked her how many lawyers in New York City represented workers who were not members of unions. She said "you can count them on one hand." No one at that time was fighting against employment discrimination or workplace harassment. I started an organization in Massachusetts, called the Plaintiff Employment Lawyers Association, dedicated to advancing the rights of individual employees in the workplaces of Massachusetts and to provide support and education for other lawyers who were interested in advocating for workers. The organization has grown significantly. It is now called the Massachusetts Employment Lawyers Association (MELA) and consists of more than 150 members. MELA is affiliated with the National Employment Lawyers Association with chapters in every state.

So that's the kind of law I've done for 40 years. I always had a solo private practice, sometimes I shared space with other lawyers, but I always worked for myself. It was difficult to make a living, but I wasn't in it for the money, I was in it for the cause.

What prompted you to write the book?



Almost every single person who came into my office looking for legal advice had these terrible stories about problems they had encountered in the workplace. They had no idea about the legal system. They wanted to know what it was like. My clients inspired me to write the book, because I wanted them to have an easily readable book that would explain their rights in the workplace and the problems inherent in the courts.

Who is the target audience?

Employees who do or may have legal issues with their workplace environment. Material in the book gives them information about the law and the system and offers practical suggestions on how to resolve issues, protect yourself from unfair treatment, and respond if you have been unjustly treated. When one is armed with knowledge, the playing field, which usually favors the employer, is more even, and knowing what the future may hold helps employees move on to the next place. That said, lawyers can also benefit from reading it. They might learn about different claims or causes of actions they can pursue. Actually, even employers can learn from it. If they are responsible employers, they can make the workplace a friend-

lier place to work and increase productivity of their workers. Employers can even learn how to terminate an employee and leave the worker with his or her self-esteem intact.

You say “employment cases are difficult to win.” Why?

The law itself isn't the problem, although I'd like to see the United States reject the concept of “at will” employment and permit firing only for just cause. Many European countries have such laws—they are much more protective of workers. If an employer does adequate research on a prospective employee's background and skills and gives that employee a probationary period to “work out the kinks,” there should be no reason to fire anyone except for cause. It shouldn't be a financial benefit to fire someone “just because.” If you have adequately researched and trained someone, it should be cheaper to keep them working and productive.

Some judges are absolutely biased against workers. For some, the bias is subconscious or unconscious. For others it is boiling at the surface. Considering where most judges come from—government employment, big firms, the business sector—and the fact that they usually have political connections, this kind of bias is not unexpected. Judges generally come from employment situations where they are used to making unquestioned decisions. They have rarely been in private sector employment except for law firms, which are not typical employment situations. The employer is the status quo and judges are there to maintain the status quo. Additionally, because this is an area of law in which so few attorneys practice, some judges lack familiarity with the law. It's like going to a brain surgeon to have your knee scoped out.

A worker is at a substantial disadvantage going into a lawsuit—the employer has all the information, and the employee is lucky to have a small part of it. It's hard to paint a picture without understanding the whole scope of what went on. Sophisticated employers are very good at hiding their unlawful motives behind apparently legitimate business decisions. Discovery has helped, but a worker's lawyer has to be more tenacious to obtain the information needed to win. What keeps us going is that “even if you don't succeed this time, it will be better for the next person.”

Juries do not usually pose a problem in these cases so long as they get good instructions from the Court. The only problem is if you get members of the venire who do not want to serve. They

blame the plaintiff and plaintiff's lawyer for their being stuck in court.

So they are hard cases for a variety of reasons—sort of a “perfect storm” of negativity!

Is federal law better in protecting employees' workplace rights than Massachusetts law or vice-versa?

It is difficult to get beyond summary judgment in federal court. Federal judges interpret the law in a very conservative way—which results in summary judgment for the employer in many, many cases. Massachusetts state courts applying Massachusetts law are much more hospitable to plaintiffs' claims. For example, under federal law, all the employer has to do is articulate a legitimate business reason for the termination, and it has satisfied its burden. Employers do not have to act because of that reason. The employee loses. Under Massachusetts law, employers have to prove that the legitimate reason proffered is the actual reason for the action taken. At least it gives the plaintiff a fighting chance. The culture in the federal court seems to be to dispose of these cases at summary judgment. This is less the case in the Massachusetts courts.

There has been much discussion about whether non-competition agreements should be outlawed. What do you think?

I think they should be outlawed because they impair the worker's freedom to move on. Competition is for the public good. Unless an employer wants to protect his or her intellectual property, which he or she has a legal right to do, there is no reason to restrict a former employee's movement except as punishment for the employee leaving. And if the employee is fired, then there is no reason.

Most of those who read this interview will be lawyers. Can you give a couple of pieces of what you consider the most important advice that lawyers who represent employees can pass on to their clients?

Before you bring a lawsuit, get as much information as you can from as many sources as you can. You need allies, and the more you have, the better.

How about for lawyers who represent employers?

They should encourage their clients to treat people
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fairly, consistently, and humanely. Employers who do this will have fewer lawsuits. This may not be as good for the lawyers, but it's better for the clients. And they need to remember that no decision is risk-free; at best a lawyer can minimize the risk.

You now spend most of your time doing mediation and arbitration. What made you change the course of your legal career?

I had an epiphany about 20 years ago that there must be a better way to resolve conflicts. I had a case that went on for 15 years. The employer wasn't winning, the employee wasn't winning, I wasn't winning—only the employer's lawyer was winning. Having tried more than 200 cases in my career, I thought it was time to hang up my guns

and work to resolve conflicts in peaceful ways.

Do you think these tools are over or underutilized? Why?

Alternative dispute resolution tools are absolutely underutilized. The system needs more people willing to take a collaborative approach to resolve legal disputes. ADR benefits the principals but not necessarily the lawyers. The key is to get the clients to push the lawyers if the lawyers won't push the clients. The employee wants to move the process, but the employer and his or her lawyer does not necessarily agree. Sometimes getting in-house counsel onboard helps. He or she is more likely to care about the client's bottom line. ADR is more efficient than litigation and costs a lot less. Defendants in general have to believe that not dragging out litigation in courts is a smart business decision. ■

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AAJ Student Spotlight

This issue features two of the AAJ trial team members, Margaret Byrnes and Brittany Forgues. The trial team began competition after this issue went to press.

Margaret Byrnes



Which is more surprising: the fact that Margaret (“Megg”) Byrnes *chose* to study Attic Greek and Latin in college, or the fact that halfway through her junior year of high school, Megg dropped out of preparatory school to home-school herself?

Anyone who knows Megg will undoubtedly agree that the latter is more stunning. It was a foregone conclusion growing up in Watertown, Connecticut, that Megg would (and did) attend the Taft School. But she never felt she fit in. “I really didn’t enjoy private school,” Megg admitted. “I didn’t enjoy it so much that when I reached my junior year, I said, ‘I’m not doing this anymore,’ and I just dropped out. I thought, ‘There has to be a better way to do this.’ So I enrolled in an accredited home-school academy that allowed me the flexibility to take classes at community colleges and really enjoy my education. It was the best year and a half for me, because I really enjoyed education.”

And “home-school herself” means exactly that: Megg educated herself—without guidance from any teachers. Her father signed the paperwork agreeing to act as her teacher, but that was just a formality. Megg followed the curriculum, did the work at her pace, and taught herself, even graduating a month earlier than her prep school classmates. Upon graduating, she attended Smith College, a decision she made because of the freedom it gave her to choose her classes. “There are no core requirements; your curriculum is totally up to you. I loved it,” she said. That flexibility gave Megg the opportunity to take Latin and Attic Greek, courses unrelated to her English language and literature major but ones she enjoyed much

more than her literature courses (“I loved the reading, but not the repetitive analysis of it,” she explained). “Translating Attic Greek was the most difficult thing I’ve ever done, but at the same time, I really enjoyed the small size of the classes, which were relaxing and very satisfying,” noted Megg. “Sometimes when I’m struggling to learn something here, I look back and remember that I survived two and a half years of Attic Greek.”

Megg decided to attend law school because of her love of reading and desire to have a flexible career. “Law school would give me not only a skill, but an ability to have a career that is not narrow, but would have lots of opportunities,” she explained. “It would also give me some control over my career. I would have a degree that I could do a lot with, and I could choose whatever path I want, depending on what I like.”

The hatred of prep school, in fact, prompted Megg, in part, to choose MSLAW. “Ever since I stepped off that [prep school] ledge, I’ve had a different perception of what is important when it comes to education,” said Megg. “I’m not driven by the brand names and paying for the prestige. I didn’t want my law school experience to be a re-entry into the private school world that had suffocated me in high school. I didn’t want to go back to the same pressures, irritants, and pretentiousness.” Megg knew of MSLAW because her stepmother (Donna Booth, ’05) attended MSLAW. After attending an open house, Megg knew it was the right fit for her and declined to apply to any other schools. “I picked MSLAW because I knew I would enjoy the practicality of it and the mix of people, and after going to a very expensive college for four years, I thought this was more practical,”

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she added.

The 2L AAJ trial team member has been extremely happy with her decision. “The thing I like *the* best about MSLAW is the professors. That’s my favorite part,” noted Megg. “There is a good mix between full-time professors and adjunct professors who are practicing attorneys. Everyone is so different; there isn’t a uniformity that often happens at other colleges, like for example, the English department at Smith, where everyone has the exact same personality. That is definitely my favorite thing about MSLAW.”

Megg is emphatic in her advice to 1Ls: “Read the cases. That’s it. I’ve never needed any supplements or outlines. Listen to your professors—they’ve passed the bar exam.”

After graduation, Megg is unsure of what she’d like to do, but she believes she would be happy litigating. She is currently preparing for

that field by participating in the 2010 American Association for Justice (AAJ) trial advocacy competition with fellow classmate and prep-school rival Brittany Forgues (*see accompanying feature below*). “I really don’t know what I want to do after graduation exactly, but I think I want to be in court,” said Megg. “I think that would suit me well.” Ultimately, Megg does see herself teaching in addition to practicing law.

Megg now resides in Portsmouth, New Hampshire, where she lives with one older brother, two stepbrothers, and one stepsister. Her hobbies include shopping and shoes, and when she is not in school, she is an avid reader: Ernest Hemingway is her favorite, Stephen King is a close second, and she is not above a good Danielle Steele or Nora Roberts romance novel. And, of course, there is Attic Greek. ■



Brittany Forgues

As a former Division I college hockey player, Brittany Forgues loves to compete. So it makes perfect sense that she would bring her competitive personality to the mock courtroom as well, bolstering a very strong AAJ trial advocacy team. “It has been great working with everyone on the team; I really enjoy it,” Brittany said of her first mock trial experience. But nothing in Brittany’s mind can compare to playing competitive ice hockey. “I miss it all the time—I have withdrawal,” she admitted.

Brittany, who is from a small town outside of Ottawa, Canada, started playing the sport when she was nine years old. Playing on a club hockey team (which required travel every weekend to Toronto or Montreal) because her Montessori school had no team itself, Brittany started to catch

the eye of U.S. coaches. At age 14, she was recruited to play high school soccer and hockey in the U.S., where ironically, the competition for girls is stronger than it is in the birthplace of the sport. “In Canada, there are far fewer opportunities for female hockey players. First, there aren’t as many high schools or colleges to begin with, and second, since most of the good male hockey players play junior hockey because that’s where the scouts are, the Canadian colleges don’t have strong men’s programs, and thus they don’t develop women’s programs, either,” she explained. “High schools don’t have their own rinks, so there is no high school girls hockey. Even the soccer season is only six or eight weeks long to accommodate the trimester calendar.” The result is that most girls play on club/travel teams, which then requires

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them to miss one day of school each week. "Here in the U.S., sports and school coincide nicely, and there is much more support for high school and college teams," she added.

Accepted by Phillips Academy in Andover and The Hotchkiss School in Lakeville, Connecticut, Brittany chose the latter partly because of its reputation as a feeder school for Yale University and partly because she felt more comfortable on the smaller campus. While she was there, she played both soccer and hockey, and she also played for the Connecticut state hockey team, which introduced her to the college recruiters. Brittany was recruited by several schools: Yale University, Princeton University, Cornell University, University of Florida, Colby College, Bowdoin College, Amherst College, and Middlebury College. After narrowing her decision to choosing between Yale and Cornell, she chose Cornell for three reasons: 1) the coach made a verbal commitment that Brittany could play both soccer and hockey, 2) the school was a bit closer to Ottawa, and 3) she would be accepted into the business program.

Although the coach did not uphold the verbal promise for Brittany to play soccer, Brittany had a successful four-year career at Cornell as a left wing for the hockey team, graduating *cum laude* as a business major, hoping to enter the banking field. "A lot of athletes go into banking because it's competitive like athletics, and I was pretty sold on that being what I wanted to do," she added. When the lending crisis hit, however, Merrill Lynch and other major banks cancelled their recruiting visits to the universities, and Brittany decided to change her career path. "I considered going into coaching, but when you first enter coaching, you do more recruiting and marketing than actual coaching, and that wasn't what I wanted to do," she said. So upon the suggestion and offer from fellow Cornell and MSLAW alum Richard Hayes ('94), who was involved with the Cornell women's hockey team ("He would host us whenever we came out here to play Harvard and Dartmouth," explained Brittany) and has his own practice in Haverhill, Brittany moved to Andover to work in his law office as a clerk/receptionist and coach girls' hockey on the side. When Brittany found that she enjoyed her work and started considering law school, Hayes suggested MSLAW, and after an open house, Brittany made her

choice: "I thought it would be a good fit for me."

Brittany's perception turned out to be accurate. The 2L is enjoying herself and has many positive things to say about MSLAW. "The people here are here to help always, and the student body is so diverse," she noted. "Everyone has something else going on in addition to school, which is different from Cornell, where everyone was only a student. That's what I enjoy most, but I also like that the classes are small, and you get a lot of attention. I've been in the big lectures, and you really do miss out. The small classes do make a difference. The flexibility here is huge, too."

To 1Ls and incoming students, Brittany advises, "Just keep plugging away; just keep doing the work. Even if you're not doing it right, or you don't think you can, or you're getting frustrated, just keep doing it, and eventually you will understand or feel comfortable that you know what's going on. Just keep doing the work."

After graduation, Brittany hopes to make use of both her business and law degrees to do something in the field of sports. "My ultimate dream job would be working for a sports team in some capacity, but if that's not possible, I just want to do something with sports and law together," she said. Although her parents are still in Ottawa, her brother followed her to Boston, where he works at Massachusetts General Hospital and plans to enter dental school here. "I enjoy the U.S. and am thankful for all the opportunities I've had here, so I don't plan to leave," she answered when asked where she sees herself in five years.

In addition to school, Brittany coaches girls' ice hockey at The Brooks School in North Andover and even runs her own hockey camp in the summer. She enjoys the flexibility her MSLAW schedule gives her so that she can continue to coach part time, something she would always like to be doing in some capacity. "I think it's really important in the women's game to have women who have played keep giving back, to keep building the programs," she said. When she isn't studying or coaching, Brittany is usually watching sports on television or cooking. Occasionally, she will seek out a pickup hockey game, which usually starts with the male players questioning her ability to compete with them. "They'll say, 'I don't know; you're kind of small,' to which I always reply, 'Don't worry about it,'" Brittany added. She hasn't entered an arena yet where she can't compete, something her fellow AAJ competitors are about to find out. ■

Books of Our Time

Since our last publication, Dean Velvel has continued to entertain television audiences nationwide with his informative and educational programs, *Books of Our Time*, aired on Comcast, DirectTV, and MyTV networks. Anyone wanting more information on any of these shows, or copies of the shows themselves, please call MSLAW at (978) 681-0800.

Inside the Stalin Archive: Discovering the New Russia

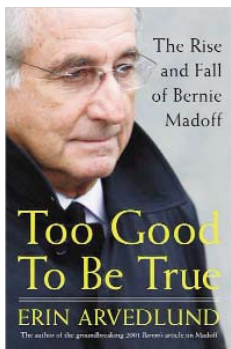
Jonathan Brent



Soviet scholar and editor of the Yale University Press, Jonathan Brent, appeared on a two-part show to discuss his book: *Inside the Stalin Archive: Discovering the New Russia*. The book gives readers an introduction into the world behind one of the most difficult eras in the history of one of the world's most enigmatic powers. However, a large part of the work chronicles Brent's efforts to gain access to the papers of one of history's most infamous dictators. His ultimate success in negotiating with the Russians for rights to these records results in a work that reveals not only a history of Stalin's time, but also his observations of the changes that Russia underwent starting in 1992, his first trip to Moscow for this project, and ending some 15 years later.

Too Good To Be True: The Rise and Fall Of Bernie Madoff

Erin Arvedlund



Erin Arvedlund, author, financial journalist and contributor to *Barron's*, *The Wall Street Journal* and *The New York Times*, appeared on three shows in the period since *The Reformer's* last publication. In 2001, she wrote a lengthy piece on Bernie Madoff, published in *Barron's*, in which she raised serious questions concerning the integrity of Madoff's investing strategies and unbelievably consis-

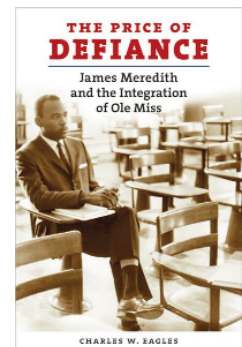
tent return on investments. Unfortunately, no one took Erin's extensive research seriously, until many years later when the now infamous Ponzi schemer took down scores of investors and financial institutions. In two of the shows, Dean Velvel and Erin discussed her book, *Too Good To Be True: The Rise and Fall Of Bernie Madoff*, in which she attempts to address many then (and perhaps still) unanswered questions, including how he managed to carry out one of this nation's largest frauds right under the noses of the SEC.

Erin returned to MSLAW to do a show on the Report of the Inspector General of the SEC, which blamed the financial melt-down on massive failures on the part of that regulatory body to follow up on evidence that hinted at Madoff's massive investor fraud. Clearly laying significant blame at the feet of the governmental body charged with protecting investors, Erin and the Dean discussed how lawyers and others at the SEC could have ignored the red flags waving right under their noses.

The Price of Defiance: James Meredith and the Integration of Ole Miss

Charles Eagles

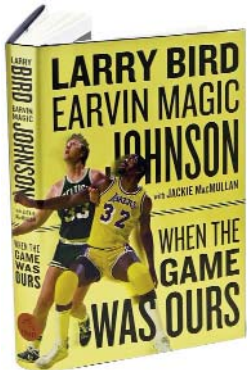
In *The Price of Defiance: James Meredith and the Integration of Ole Miss*, University of Mississippi Professor Charles Eagles tells the story of how Meredith came to be the first African American to attend and graduate from that institution. The book details the years leading up to integration, the deep-rooted racism harbored by faculty, administration, politicians and the judicial system, that had allowed the school to remain segregated until 1962. He puts the momentous event in historical context, then follows Meredith's journey throughout his college years and beyond.



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When the Game Was Ours Jackie MacMullan



More than 15 years after they retired, NBA superstars Larry Bird and Magic Johnson collaborated with former *Boston Globe* sportswriter Jackie MacMullan to reflect on their college days, their NBA careers, and their intertwined relationship with each other. The Celtics and Lakers greats epitomized the teams' noted East Coast vs. West Coast, high profile vs. blue collar rivalry. In interviewing more than 100 former players, teammates, and coaches, MacMullan takes the reader behind the scenes of all major events in the players' professional lives, including much detail about Johnson's HIV announcement.

For copies of any of the book shows, call MSLAW at (978) 681-0800. ■

drive to benefit the New Hampshire Food Bank which raised almost 8,000 pounds of dog and cat food.

MSLAW Hires New PR Director

Lynne Snierson is a veteran publicist and journalist who brings her talents to the Massachusetts School of Law and the American College of History and Legal Studies as public relations director.

As one of the first female sports journalists in the country, she covered the National Football League and horse racing beats for major metropolitan daily newspapers in Boston, Chicago, Miami, and St. Louis during an award-winning career spanning 20 years. Her work has also been published in *USA Today*, *The Sporting News*, *Pro Football Weekly*, and *BloodHorse Magazine* among other national publications. As a sportscaster, she has covered major events for ESPN and Fox Sports/Chicago and co-hosted a weekly horse racing show on CBS-TV/Chicago.

She is the former communications director for Arlington Park in Chicago and served as the communications and marketing director for Rockingham Park in Salem, New Hampshire for the past 15 years.

Snierson, the daughter of a lawyer and judge, sits of several boards which include the Duke University Alumni Admissions Advisory Committee and the Duke Alumni Club of Boston. As an advocate and activist for animal rights and their welfare, she created and organized a pet food



She resides in Salem, New Hampshire with her rescued Shetland sheepdog, Reggie Love, who is named for President Barack Obama's personal aide and former Duke basketball and football star Reggie Love. ■

Upcoming Events

Conferences

Fourth Annual Animal Rights Day April 3, 2010

Free event featuring agility and police dog demonstrations, update on animal cruelty cases, bird intelligence, whale & dolphin rescue presentation, foster parrots, practicing animal law, and an Easter Egg hunt and arts & crafts for children. Open to the public. Register at animallaw@mslaw.edu or call (978) 681-0800.

Legal Education Seminars

Elder Law Basics Plus March 25, 9:00 a.m. to 12 p.m., Room 216

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Low Tech Discovery in Criminal Cases April 21, 1:30 p.m. to 5:30 p.m., Room 204

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

How to Probate an Estate: Part I April 21, 4:00 p.m. to 7:00 p.m., Room 208

and

How to Probate an Estate: Part II April 28, 4:00 p.m. to 7:00 p.m., Room 208

Contact the Massachusetts Bar Association (617-338-0500 or www.massbar.org) for fee schedule and to register. Alumni who are not new admittees should use Promotional Code PROMO 31 for the MSLAW discounted rate. MSLAW students should use Promotional Code PROMO CODE 32 .

Family Law Judicial Forum May 26, 4:00 p.m. to 7:00 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Networking & Social Events

Law Day Dinner Dance Wyndham Hotel, Andover 6:00 p.m.

Keynote speaker: Honorable Deborah Capuano, Worcester Juvenile Court (MSL '93). Sponsored by the

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Student Bar Association. For ticket information, contact Michelle Hebert (mhebert@msslaw.edu or 978/681-0800).

Fourth Annual Career Fair

April 8, 11:00 a.m. to 4:00 p.m., Courtroom

Come learn about career opportunities and speak with potential employers. Contact Michelle Hebert for more information.

Other

Fourth Annual Alumni Golf Tournament

October 11, Stow Acres Country Club

See ad on page 21 for more details.

Case Note: SJC Reaffirms Pat Frisk Law

By Ron Sellon, Esq.

***Commonwealth v. Gomes*, 453 Mass. 506 (2009).**

Recently, the Supreme Judicial Court was called upon to address the permissible scope of an intrusion that police may justifiably conduct as part of a so-called *Terry* stop. In *Commonwealth v. Gomes*,¹ the Court held that the officer was not authorized to perform a pat frisk of the defender based solely on generalized concern for officers' safety. Newspaper headlines announcing the Court's decision proclaimed it as a blow to police and a victory for libertarians. Close examination of this case and precedent reveals that these headlines were incorrect and misleading.

Facts

On December 17, 2005, at about 4:00 a.m., Boston Police Officer Greg Walsh was working in uniform, along with two other members of the drug control unit, in the area of Stuart and Tremont Streets (an area known for high drug trafficking and violence), when he saw Paul Gomes (the defendant) standing in a doorway with another person, identified as Paul Bates. Walsh recognized Gomes from a booking photo and other sources identifying him as a major player in the drug business in another section of Boston.²

Walsh watched the two men for a moment and believed he was witnessing a drug transaction. He observed Gomes holding his right hand out flat as if to show Bates an object, which Walsh could not see. Walsh and the other officers exited their vehicles and approached the men. As Walsh neared them, he saw Gomes put his right hand to his mouth, appearing to swallow something.

Walsh asked the two men what they were doing, and immediately conducted a pat frisk for weapons. During the pat down, a plastic bag containing several individually packaged bags of crack cocaine slid out from Gomes' pant leg. More evidence of drug dealing was discovered during a search at the station, which followed Gomes' arrest for drug dealing. A pat frisk of Bates, as well as a warrant check, turned up nothing, so he was released.³

Decision

Justice Spina, in his decision on behalf of a majority of the Court, held that officer Walsh lacked reasonable suspicion necessary to conduct the pat frisk for weapons. The Court reaffirmed that, under *Commonwealth v. Wilson*,⁴ once a person has been held to have been "seized," the Court must undertake a two step inquiry to determine the constitutionality of the search: "first, whether the initiation of the investigations by the police was permissible in the circumstances and second, whether the scope of the search was justified by the circumstances." Both inquiries ascertain whether the conduct was "reasonable" under the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights.⁵

The Court first held that the stop of the defendant constituted a seizure, that is, circumstances under which the person would not feel free to leave.⁶ It occurred at the point where Walsh asked the men what they were doing, and immediately patted them down for weapons.⁷

The Court then proceeded to the two-step analysis. Following the established rule that "[a] police officer may make an investigatory stop where suspicious conduct gives the officer reason-

¹ 453 Mass. 506 (2009).

² *Id.* at 570-71.

³ *Id.* at 508.

⁴ 441 Mass. 390, 393-4 (2004).

⁵ *Id.* (quoting *Commonwealth v. Silva*, 366 Mass. 402, 405 (1974); *Gomes*, 453 Mass. at 509).

⁶ *Gomes*, 453 Mass. at 510.

⁷ *Id.*

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able grounds to suspect that a person is committing, has committed, or is about to commit a crime,”⁸ the Court agreed with the trial judge and the Commonwealth, holding that the officers possessed sufficient articulable facts to believe the defendant was engaged in drug activity.⁹ An officer is entitled to rely on a specific and articulable facts and reasonable inferences therefrom, in light of the officer’s experience.¹⁰ Thus, the stop was legal.

However, the SJC then departed from the ruling of the trial court and the Commonwealth’s position. It concluded that the police lacked particularized facts that the defendant was armed and dangerous, facts necessary to support the pat frisk for weapons. There was no evidence in the defendant’s criminal history of weapons-related offenses.¹¹ There was no evidence he made gestures or used body language indicative of someone carrying a weapon. The defendant did not attempt to flee. Officer Walsh was neither alone nor even out-

numbered, circumstances which might have created a sufficient threat.¹² Generalized evidence that “there had been shootings downtown,” or there were numerous incidents involving firearms in the area without connecting that evidence to the defendant, did not meet the evidentiary threshold. “[T]he degree of police intrusion was not proportionate to the articulable risk to officers safety and the fruits of the unlawful pat frisk had to be suppressed.”¹³

Justice Cowin dissented. She would have held the patdown reasonable in light of the overwhelming evidence that the defendant was a drug dealer, present in an area known for weapons-related violence.

Old News or New Law?

The day the decision was released, April 3, 2009, the *Boston Globe* ran an article that described the ruling as “monumental,” one that “shifted the way that police do business.”¹⁴ The paper declared that this case was a major change in the direction of

⁸ *Id.* at 510 (citing *Wilson*, *supra* note 5).

⁹ *Id.* at 511.

¹⁰ *Id.* The Court relied on the following:

See *Commonwealth v. DePeiza*, *supra* at 373, 868 N.E.2d 90 (police may rely on experience and training as basis for reasonable suspicion). The neighborhood where the police were patrolling was a high crime area, and it was around 4 a.m. when the events at issue transpired. See *Commonwealth v. Thompson*, 427 Mass. 729, 734, *cert. denied*, 525 U.S. 1008 (1998) (presence in high crime area is one factor that, in combination with others, may contribute to reasonable suspicion of criminal activity). Officer Walsh was familiar with the defendant as an individual who previously had been arrested on drug charges. See *Commonwealth v. Ciaramitaro*, 26 Mass. App. Ct. 110, 115 (1988) (police knowledge of defendants’ involvement in past drug activities is factor for consideration in justifying stop). The police observed the defendant displaying items in his hand to Bates and then appearing to swallow those items as the officers approached. That there may be an innocent explanation for the defendant’s actions ‘does not remove [those actions] from consideration in the reasonable suspicion analysis.’ *Commonwealth v. DePeiza*, *supra*. See

Commonwealth v. Kennedy, 426 Mass. 703, 710-711 (1998) (even though officer did not see what was exchanged, officer’s training, education, and knowledge supported reasonable suspicion of drug transaction). Further, Officer Walsh testified that, based on his observations as a police officer, drug dealers and users often ingested drugs to prevent the recovery of evidence. See *Commonwealth v. Rivera*, 27 Mass. App. Ct. 41, 43-44, 534 N.E.2d 24 (1989) (officer’s observation of person attempting to conceal suspected contraband from police view may justify arrest and search). When the facts and inferences underlying Officer Walsh’s suspicions are viewed in their totality, they constitute more than a mere hunch. We conclude that the seizure of the defendant was a proper investigatory stop based on reasonable suspicion of illegal conduct.

¹¹ *Id.* at 512-513 (other cases).

¹² *Id.* at 513

¹³ *Id.* at 513-14.

¹⁴ John R. Ellement, *SJC Puts Limits on Pat Down Searches*, *Boston Globe*, April 3, 2009, available at http://www.boston.com/news/local/massachusetts/articles/2009/04/03/sjc_puts_limit_on_pat_down_searches/.

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personal liberties and police authority. Nothing could be further from the truth. The case is merely a reaffirmation of the Commonwealth's previously existing police procedural law.

The similarities between *Gomes* and another case decided 11 years earlier are numerous. In *Commonwealth v. Kennedy*¹⁵ (cited in *Gomes*, but as little more than parenthetical supporting secondary authority), the SJC examined the limits of the term "probable cause" and the extent to which police training and experience can contribute to it. In reality, the reasoning of *Kennedy* dictated the result in *Gomes*.

In *Kennedy*, the SJC described the facts as follows:

At 1 P.M. on August 29, 1994, while parked some forty yards from the intersection in a marked police cruiser and conducting surveillance of the intersection, the officer observed a vehicle pull up and stop at a curb on the corner. Efrain Morales, an individual who had been the basis "of many complaints in the area" and who was known by the police officer to have been arrested previously for narcotics sales, approached the passenger side of the vehicle. Morales leaned down, put his head in the open window, and appeared to exchange words with the driver and sole occupant of the vehicle, who later was determined to be Kennedy. Moments later, Morales ran away, but in approximately one minute, he returned to the vehicle. Morales reached into the vehicle toward Kennedy, while Kennedy reached toward Morales. It appeared to the officer that something was exchanged. Morales then walked away and the vehicle drove off.¹⁶

Relying on his "knowledge, education, training" and "previous experience with those types of sales," the officer concluded he had observed conduct "[c]onsistent with a narcotics sale," even

though he had not seen what had passed between the parties. After making his observations, the officer followed the vehicle and pulled it over. He observed Kennedy to be "nervous and fidgety." He ordered Kennedy to get out of the vehicle, and when the officer frisked the defendant, he discovered a small glassine bag containing two "rocks" of crack cocaine. The officer arrested Kennedy.¹⁷

In upholding Kennedy's arrest and conviction, the SJC, affirming the trial judge, but overruling the Appeals Court, found that the police officer had probable cause to arrest the subject. "[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense."¹⁸

The SJC went on to compare the mosaic of facts in possession of narcotics officers conducting an arrest to a "whole silent movie," where analysis of each isolated fact is not appropriate. Rather, the court should look at the overarching picture, the overall amalgamation of facts to determine if probable cause exists.¹⁹

The Appeals Court's ruling appeared to turn in large part on the fact that the officer admitted he had not observed anything actually change hands between the parties alleged to be involved in a drug deal. Addressing this point, the SJC said, "We decline, however, what seems to be an invitation in the Appeals Court's opinion to adopt a *per se* rule that an officer must actually see an object exchanged in circumstances such as these before he has sufficient evidence supporting probable cause to arrest."²⁰ It reached this conclusion for a variety of reasons:

First, small quantities of drugs are easily concealed and move quickly in hand-to-hand exchanges. *See, e.g., Commonwealth v. Blatz*, 9 Mass. App. Ct. 603, 605 (1980). 'In dealing with probable cause ... we deal with probabilities. These are not technical; they are the factual and

¹⁵ 426 Mass. 703 (1998) overruling 42 Mass. App. Ct. 668 (1997).

¹⁶ 426 Mass. at 704.

¹⁷ *Id.* at 704-5. Kennedy disputed numerous individual findings and conclusions of the judge who heard the motion. The SJC agreed that some were not supported by the evidence. It excluded those from their analysis on review. However, even excepting certain

findings, the Court held remaining evidence amply supported the existence of probable cause. *Id.* at 705-708.

¹⁸ *Commonwealth v. Santaliz*, 413 Mass. 238, 241 (1992) (quoting *Commonwealth v. Storey*, 378 Mass. 312, 321 (1979), *cert. denied*, 445 U.S. 955 (1980)).

¹⁹ *Id.* at 708 (citing *Santaliz*, 413 Mass. at 242).

²⁰ 426 Mass. at 710.

practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949).²¹

Making one factor the sine qua non of probable cause would hamper law enforcement on one hand and encourage law enforcement to "shade their testimony as to the one piece of evidence required, in order to justify retroactively an arrest or search that may be well supported by other facts and circumstances."²² However, the SJC made clear that whether an experienced narcotics officer can see or identify the item alleged to be the subject of the drug transaction remains a critical part of a court's inquiry where cause to arrest (or presumably to stop or pat frisk) is at issue. "Certainly whether the officer sees an object exchanged is an important piece of evidence that supports probable cause, and its absence weakens the Commonwealth's probable cause showing."²³

However, *Kennedy* does obviously differ from *Gomes* in one salient way: in the former case, the issue was probable cause to execute a full-blown arrest, and in the latter the validity of a pat frisk was at stake. And, the SJC in *Kennedy* acknowledged the distinction between the two: "The District Court judge concluded that the officer stopped the car for the purpose of searching for drugs, and that the pat down was not a protective search for weapons for the officer's safety. Based on this conclusion, the judge correctly ruled that the officer had to have probable cause to arrest the defendant when he searched him." This is consistent with the ruling the Court in *Gomes* eventually issued.²⁴

So, in *Gomes*, the SJC broke no new ground

regarding acceptable reasons for a pat frisk. The difference between the result in that case and *Kennedy* comes down to what the officers did, and the grounds on which the case was argued. Pursuant to the holding in *Kennedy*, Officer Walsh was entitled to rely on his experience as a narcotics officer, what he observed about the accused, and the location where the accused was seen as factors justifying the conclusion that he was observing an ongoing drug transaction.²⁵ And, as the Court in *Kennedy* stated, the fact that Walsh could not see what, if any, items *Gomes* showed to his partner and then apparently swallowed, was not fatal to the prosecution's case. However, the prosecution in *Gomes* did not argue that it had probable cause to arrest. Its position was consistently that the pat frisk was justified because of the concern that the accused was armed and dangerous. Over and over again it cited the fact that it was a high crime area and that the officer felt his safety was in danger, which the Commonwealth claimed justified the pat down for weapons. If justified by the facts, its argument should have been that Walsh had probable cause to arrest under *Kennedy*, and the pat down was a valid search incident to arrest, not a pat frisk for weapons.

As a law enforcement officer who has many times been in situations similar to that faced by Officer Walsh on that night, I have no doubt that he believed that his safety was in question. However, he failed to give either the SJC, or any other courts that reviewed the case, salient facts to support his fear, beyond the suspect's reputation and the geographic area in which the activities were observed. The defendant's conduct in cases such as these, where a pat frisk for weapons is conducted, is highly relevant.²⁶ Officers should be

²¹ *Id.* at 710-11.

²² *Id.* at 711.

²³ *Id.* at 711. In *Kennedy*, the Court confirmed that ample other facts existed to constitute probable cause.

²⁴ *Id.* at 704, n.1. *Gomes* continues to be relied on as a pure "pat frisk-dangerousness" case. See *Commonwealth v. Martinez*, 74 Mass. App. Ct. 240, 247 (2009).

²⁵ Following *Kennedy*, Massachusetts courts continued to permit officers to rely on the intangibles acquired by narcotics officers' training and expertise to play a role in the overall panoply of facts justify-

ing searches and arrests. See, e.g., *Commonwealth v. Daniels*, 73 Mass. App. Ct. 1103 (2008) (Experienced police officers observed the individuals known to them as drug users in a neighborhood known to them as a place of frequent drug trafficking, observing the individuals hand the defendant a small object, inspect it, place the object in her pocket and face away from the police. The known drug users immediately walked away and against the traffic, which the officers knew was to prevent any pursuit by a vehicle).

²⁶ See, e.g., *Commonwealth v. Harrison*, 2007 WL 5193941 (Trial Order)(Mass. Superior Court, Aug. 9, 2007).

attuned for the following in the defendant: sudden or furtive motions, changes in body posture, inconsistencies in verbal responses to questions, failure to make eye contact. None of these, if present, were articulated. Courts have cited time and again that it is the compilation of all relevant facts that create the justification, not individual isolated ones. I have no doubt that Officer Walsh saw something that alerted him to what turned out to be criminal behavior. The result, regrettable for law enforcement, likely stemmed from what I will assume was a lack of adequate facts to justify an arrest. Then, officers would have had considerable leeway in conducting a search of the person as a search incident to an arrest.

The unfortunate result of this ruling is the adverse publicity it generated. Some defense attorneys and civil libertarians will hail it as a major retreat in a police officer's ability to conduct threshold inquiries and, in one respect, it is. Conversely, police officers and prosecutors may condemn it as largely a shift to the left by the Massachusetts courts, and evidence that they "coddle criminals." I say it is neither, but merely the reaffirmation of the previously decided case law. ■

Ron Sellon graduated in December 2008. In addition to being a practicing attorney, he is a Sergeant in the Marshfield Police Department. He also teaches criminal procedure at the Massachusetts State Police academy and works with fellow MSLAW alumni police officers Brian Simoneau and John MacLaughlan on Policelegal.com, a blog for police officers on relevant legal issues in association with Policelaborlaw.com.

The Reformer

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