The Reformer
The Magazine of the MSLaw Community

MSLaw celebrates its 25th anniversary

Fall 2012
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Submissions are welcome and encouraged. Please send an electronic version of your submission to holly@mslaw.edu or rudnick@mslaw.edu.
Dear MSLaw Students, Faculty, Administration, and Alumni,

The Student Bar Association (SBA) is excited about this upcoming academic year. First, let me introduce the Board of Governors for 2012-2013: Vice President Rachel Hollingsworth; Secretary Jessica Edwards; Treasurer Andrew Boulanger; and Audio/Visual Director M. Ray Arvand. Class Representatives for 2012-2013 are 2L Eloa Celedon-Rodrigues and 3L Gary Wheaton. Next, we all wish to welcome the class of 2015 to the MSLaw family. As in past years, we will continue to listen to the concerns and desires of the students and the faculty in order to better serve the MSLaw community.

Our goals for this upcoming year are twofold. First, we want to continue to bring educational and informative programs to the student body and the MSLAW community as a whole. We hope to continue to have speakers address students, faculty, and guests on topics of importance to our students and the community. Second, we want to further encourage students to demonstrate school spirit and awareness of issues in the community by both trying a few new ideas and continuing to build on the traditions of the SBA. Some of these traditions include hosting the St. Ann's Christmas Charity Drive, organizing the Annual Law Day Dinner Gala, presenting the guest speaker series, organizing the back-to-school BBQ, participating in the annual softball game, and participating in the midterm review sessions. We hope also to work with the Green Team in making MSLaw environmentally friendly and with the Barristers, in serving those who are less fortunate at the Lawrence YMCA.

To keep fully informed and up to date with the SBA, we encourage you to e-mail us at mslsba@gmail.com or drop a note in our SBA mailbox located in the cafeteria. We also have a SBA Facebook page which we keep updated with upcoming events and activities.

Please do not hesitate to contact any of the officers or representatives with suggestions or questions.

We look forward to hearing from you.

Sincerely,

Alicia M. Brenes
President 2012-2013
Dear Members of the MSLaw Community,

Although it took me almost a year to even attend a Diversity Alliance (DA) meeting, I ended up “jumping right in” and becoming the Vice President on that first day. I remember being a little nervous about walking into that group, but I was lucky to be greeted by Assistant Dean Paula Kaldis, Professor Mary Kilpatrick, and about eight other students who were chatting while eating a fantastic array of gourmet snacks. I felt right at home. They were nominating new officers, so when Asst. Dean Kaldis nominated me as V.P., I gladly accepted. (How do you say no to a dean?) Only about a month later, 10 of us got to attend the Spirit of Justice Award Dinner at the Copley Marriott to see Governor Patrick’s daughter and others receive awards for their contributions to the LGBT community. It was an honor to be there with the likes of the Governor and Senator John Kerry, among others.

At that time, a student named Danny was the enthusiastic DA President, but when he had to leave MSLaw for personal reasons shortly thereafter, I assumed that role.

As the new President, I wanted to make a difference, so I went about recruiting people to join the “gay club,” which wasn’t easy since all of my friends here were “straight.” Although the Diversity Alliance’s mission is to foster awareness of issues facing Lesbian, Gay, Bisexual, and Transgendered people, I decided to focus more on the word Diversity in order to bolster our ranks. It worked, and soon I had doubled our membership and had a great variety of students coming to our meetings to discuss their experiences of feeling “different” due to their being gay or from other countries and cultures outside of the U.S. We even had an awesome pot-luck luncheon, where we got to sample about 14 different ethnic foods, which was a welcome relief from the pressures of law school.

As a DA member, I also had the opportunity to attend the oral arguments given by GLAD (Gay & Lesbian Advocates & Defenders) in the U.S. Court of Appeals for the First Circuit in Boston, where the court found the federal Defense of Marriage Act (DOMA) to be unconstitutional! Wow, what a time to be gay and in law school! I couldn’t be more proud to be a student at MSLaw. In fact, this inspired me to help the cause of defeating DOMA, so now I am a phone-line volunteer at GLAD once a week and attended its annual Summer Party in Provincetown in July.

This coming fall, the DA is planning on having speakers come in to discuss the upcoming U.S. Supreme Court DOMA case and the recently enacted Transgender Rights Bill here in Massachusetts. We will also be doing some fundraising to help a nonprofit called Inn Motion Inc. in building a much needed shelter for Boston’s homeless LGBT youth.

So, please “come-out” and join us at our next meeting (look for signs on the student bulletin board by the restrooms on the second floor) or contact me, Leslie, at glbt@mslaw.edu. Good luck with your studies, and I really hope to meet you soon.

Leslie Arsenault
President, Diversity Alliance
Greetings Members of the MSLaw Community:

Last year was an active one for MSLaw’s BLSA Chapter. The year started off with a bang with the Congressional Black Caucus, which I attended with then-President Kellie Tiller and Katisha Brown. The three-day event, attended by law students and pre-law students from across the county, was in Washington, D.C. and consisted of professional development workshops and meetings with regional and national boards. The goal of the event was to assist attendees in building networks and connections with an eye towards securing jobs with the federal government.

Additionally, in February, to celebrate Black History Month, BLSA hosted two prominent speakers: William “Mo” Cowan, Chief of Staff to Governor Deval Patrick and MSLaw alum Andrew Crumbie (’03), principal in the largest minority-owned law firm in New England. Students were treated to stories of how each of these well-known and successful lawyers overcame adversity to become influential members of the bar. BLSA also held its annual Valentine’s Day Bake Sale, which succeeded thanks to donations of goodies from BLSA members, other students and faculty, and alum Dawn Inzitari (’06), who never ceases to amaze with her beautiful and delicious creations. We showed the movie “Thurgood,” the story of the life of the first black Supreme Court Justice Thurgood Marshall, and Professors Puller, Martin, and Coppola hosted a brown bag lunch at which attendees discussed the story of the tumultuous time of Boston’s school desegregation. The discussion was led by the three professors who personally experienced the events.

In March, BLSA hosted a party at Felt Nightclub, attended by approximately 50 members of the MSLaw community. BLSA continued to support its highly successful trial team, coached by Dean Coyne, Professors Harayda and Green and MSLaw Alum Kim Gillespie. The contributions of team members and coaches were recognized at the annual Law Day Gala.

Our clothing and shoe drive to help those victims of the earthquake was also successful. And we continue to work with the Barristers Club, serving dinner to the residents of the Lawrence YMCA the first Wednesday of every month.

Our goals for the upcoming school year are to repeat the successful events of the past year and improve our community service work. The new E-Board Members are:

- President - Patrick Brown
- Vice President - Kellie Tiller
- Secretary/Treasurer - Katisha Brown
- Historian - Lauren Pinnock
- Public Relations - Cassandra Louis

Anyone who has ideas for activities, or wants to participate in our events or join BLSA, feel free to contact me at BLSAPres@mslaw.edu or our faculty advisors: Professors Rudnick at Rudnick@mslaw.edu and Puller at puller@mslaw.edu.

All the E-Board members look forward to another productive year!

Patrick Brown
President
John Lakin (‘90), who was just elected to the bench of the 12th judicial circuit (Sarasota and Manatee counties in Florida), attended MSLaw when it first opened 25 years ago. Assistant Dean Paula Kaldis talked with him about those early days and his successful career since.

When did you decide to go to law school?

After graduating from Boston College in 1983, I began working for Liberty Mutual Insurance Company, just north of Boston. At that point, I began to see the importance of a legal education in both furthering my career as well as expanding my education. Finally, during the mid-1980s, I decided to pursue my legal education while continuing to work.

How did you choose MSLaw?

I was one of the original Commonwealth School of Law students who transferred to MSLaw in 1988. This group was made up of a dynamic group of individuals, driven to become lawyers, against big odds. I can recall meeting with Dean Velvel, Diane Sullivan, Dick Ahern, Al Zappala, and others to discuss the process. I suggested changing the name of the school to Massachusetts School of Law, and to my amazement, everyone agreed on the name. The law school was provisionally accredited near our graduation date and received state accreditation when we took the bar exam in 1990. I was well prepared for the bar exam because of the practical legal education I received and ultimately passed the exam in July 1990.

How did MSLaw prepare you for law practice?

While attending MSLaw, I was fortunate to be working for a Boston area law firm. The firm handled a great number of civil and criminal trials as well as federal criminal trials, and I was able to be involved with these trials while attending school in the evenings. The hands-on experience I gained while sitting at the counsel table with the lawyers was invaluable. My training at the law firm helped shape my future as a trial lawyer. This experience was of great value to me, teaching me the evidence code, as well as the proper way to handle a jury trial. The talented professors at MSLaw provided practical experience, excellent education, and a passion for teaching which combined to create a valuable learning environment. The experience I gained from the lawyers combined with the first-rate legal education and practical hands-on experience made for my easy transition into the legal world.

How would you respond to the typical question of “What drives you”?

Self-motivation. I consider myself an overachiever in many ways. I grew up in a blue collar neighborhood outside of Boston, where my father worked for the mail department at Harvard [University], and my mother worked as a secretary at Harvard. My parents instilled in me that a good education was the key to success, and they were correct. Fortunately my parents pushed education on me, and it has paid off.

Once I began practicing law, I was driven to provide justice for all my clients, and I hope this drive will continue in my new position as a Circuit Court Judge for Manatee-Sarasota Counties in Florida.

Further, I am motivated by my great family, including my wife Jo Anne (MSLaw ’90) and my two teenage children, who inspire me each day. My parents Ken and Nancy in Belmont and my siblings, including my twin brother Kenneth A. Lakin (MSLaw ’91), brother Brian, and sister Charlene have alwaysankin, Esq.
encouraged and supported me through the years.

How has law school changed you?

Law school has made me respect our legal system and understand the many legal hurdles the citizens of this country face on a daily basis. And further, I have come to realize the importance of an independent judiciary and respect for our laws, which are both critical to preventing anarchy in our great country. Each day I strive to instill the importance of a properly functioning judiciary on those around me.

Can you describe three of your most notable cases?

*Hurley v. Amtrak* was the first seven-figure case I settled on the eve of trial. My client was entering a train in Reading, Massachusetts, in the early 1990s and was caused to fall between a small space on the train platform. She lost her right arm and had other severe injuries. It was a difficult case, but through use of forensic evidence, we were able to graphically reconstruct the accident, resulting in a significant settlement for my client.

*State of Florida v. Malliaras* was an arson case in Sarasota, Florida in 2003. Again, forensic evidence was critical to my client’s acquittal. In fact, the Circuit Judge in the case allowed a judgment of acquittal at the end of the government’s case. The Sarasota local newspaper the next day reported, “It’s rare that a judge halts a big case, apologizes to a jury, and acquits a defendant.” The case was a big victory for my client who faced a long term in prison if he was convicted.

*Terrace Condominium v. Citizens Property Insurance Co.* (West Palm Beach, Florida) settled after a nine-day jury trial. I was co-counsel with my Florida-based law partner Randolph Smith in this case. The case involved 200 condominium units; Hurricane Wilma damaged 50 buildings in 2005. The insurer refused to pay the true value of the loss. There were more than 120 exhibits at trial and 40 witnesses and complex engineering issues on cause and origin of the damage. Discovery issues were complex and hard-fought in many pre-trial hearings. The case settled just prior to closing arguments for seven figures. Technical and insurance coverage issues were extremely challenging in a hotly contested case with the insurer. It was a great case to work on, and Randy Smith did a terrific job.

Do you have any regrets?

None. If I had to have one regret, it is that time moves too quickly, and a word of advice to every MSLaw student: enjoy the ride, and do not take yourself too seriously.

So...did you make the right decision to come to MSLaw?

Absolutely. Without the education and experience provided through attending MSLaw, my life as I know it would not exist. The decision to attend MSLaw has allowed me to passionately practice law, enjoy a satisfying personal life, and most recently, attain the position of Circuit Court Judge.

You have many firsts as a MSLaw graduate—you were the first MSLaw graduate to become a licensed lawyer in Florida and DC, first to be voted Florida Super Lawyer by your peers, and now the first Circuit Court Judge in Florida. How did you do it all?

Hard work, dedication, and drive. I did not let other people hold me back. I never let the negative people get me down, and most important, I stayed focused and strong and surrounded myself with supportive insightful people.

It is important that current MSLaw students continue to reach for the top, inspire and be inspired, never lose focus, and overcome all obstacles in an effort to achieve their goals.
Tiz Doto ('93) immigrated to America at the age of five with his parents and his two older brothers. The Doto family settled in Boston’s North End for three years before buying a home in Somerville, where Tiz grew up. His father Francesco was a union laborer; his mother Carmela was a union seamstress. Tiz attended grammar school at St. Benedict’s in Somerville and went on to graduate from St. Clement’s High School in Medford. Tiz graduated with honors from Salem State University in 1990 before enrolling in the Massachusetts School of Law. He was admitted to the Massachusetts Bar in 1993.

Tiziano practices law and manages the Law Offices of Tiziano Doto in Stoneham, where he specializes in commercial and residential real estate and title transactions. Previously, he was a practicing attorney and principal at the Law Offices of Tiziano Doto in Somerville from 1993 to 1996 and 2002 to 2005. He was also an attorney and partner at Curtatone, Doto & Frankel in Somerville from 1996 to 1999. In 1994, Tiziano was admitted to the Federal District Court for the District of Massachusetts and the First Circuit Court of Appeals.

Tiziano was Assistant VP of Business Development and Title Counsel at Old Republic Title Insurance Company from 2005 to 2009. He is also a licensed real estate broker.

Tiziano and his family reside in Wakefield where he has been actively involved with the community and public service. He sat on Wakefield’s Zoning Board of Appeals from 2008 to 2010. He was elected to the Wakefield Board of Selectmen and is currently the Vice Chairman of the Board and Chairman of the Collective Bargaining Committee.

As if that did not keep him busy enough, Tiziano ran for Middlesex Register of Deeds in the Democratic Primary this fall. His agenda was simple: “Make the Registry of Deeds work right.” Some of his goals include improving service, evaluating the budget, hiring and promoting only on merit, rejecting documents lacking authentic signatures (“robo-signatures”), developing a more user-friendly website, speeding up electronic recording, and accepting no donations or endorsements from unions or registry employees. Tiziano wants to remove any question of political favoritism in the workplace. He isn’t interested in a political career or lifelong position. He just wants to do a job and says that two terms is time enough to get some real changes made.

“I ran for Register of Deeds to get a specific agenda accomplished,” he explained. “I do not aspire to be a career politician—far from it. My own experience with the Register’s office has made it very clear that a lot needs to be and can be done to make it run better. But it will take a Register with the will and political courage to get some big changes made right from the start. It’s time to take patronage, favoritism and politics out of the Registry and turn it into a professional, modern, user-friendly office that every citizen can count on.”

Tiziano and his wife Allyson (Druce) have three young children: Alexandra, Daniela, and Matthew.
See How They Run

Two other MSLaw alumni seek political offices

When a vacancy for state Senate representing the 2nd Essex District opened, it did not take Salem City Councilor Joan Lovely (’09) too long to decide she would throw her hat into the ring. After serving eight terms in various positions (including President) of the Salem City Council, the time was right to take her extensive experience in city government to Beacon Hill.

"I've been deeply involved in Salem's city government, and over time, I've grown to understand how the decisions made on Beacon Hill affect our communities—for better or worse," Joan noted. "As a community leader for the past 15 years, I feel able to build a stronger relationship between state and local government. My experiences balancing municipal finances make me well prepared to make the tough decisions that need to be made. I grew up in the 2nd Essex District, I've raised my family there, and now I'm ready to represent it in the state Senate."

Over the past 15 years, Joan has seen how cities and towns in the Commonwealth rely on state funds to support local services. She understands how neighborhood schools and regional infrastructures often depend on state-level support and guidance. She wants to ensure that constituents from Beverly, Danvers, Peabody, Salem, and Topsfield get the help they need from the State House. In addition to representing the interests of families, she hopes to work within the state Senate to ensure that Massachusetts businesses have the ability to innovate and grow. In her view, the statewide economy is improving, but it still has a long way to go. Joan says she will approach her job in the state Senate with the same hard work and dedication that she has exhibited while serving on the city council.

Joan graduated from Beverly High School in 1976. After raising a family and working as a legal secretary, she decided to return to the classroom. In 2006, she earned her bachelor's degree in political science from Salem State University, and she graduated from MSLaw in 2009. While not on the campaign trail, Joan practices law in Salem. Her husband Stephen (’92) was one of the first graduates of MSLaw, and her daughter, Jenna, graduated from MSLaw this past spring.

You can learn more about Joan's campaign at www.joanlove-ly.com.

Mara Dolan (’03) ran for the Democratic nomination for Massachusetts State Senate, 3rd Middlesex District. The district is comprised of Bedford, Concord, Carlisle, Chelmsford, Lexington, Lincoln, Sudbury, Weston, and Waltham. Mara became active in politics when her daughter Grace, who recently graduated from college, was a senior in high school, after developing an active law practice. As a single mother, Mara finished college, then went on to law school after a career as a social worker. Since her graduation from MSLaw, she has practiced law in Andover, specializing in criminal defense as a member of CPCS' private bar defenders group. Mara was elected to the Massachusetts Democratic State Committee in 2008 and co-chairs the Public Policy Committee with Sen. Jamie Eldridge. She has hosted a government and policy talk show, interviewing such notables as Massachusetts Treasurer Steven Grossman, Congressman Mike Capuano, and Sheriff Peter Koutoujian.

On her decision to run for office, Mara said, "I grew up in a politically engaged household, where the dinner conversation often revolved around politics. I have always wanted to be a legislator. State Sen. Susan Fargo, who has represented the 3rd Middlesex District for 16 years, is retiring and I am taking this opportunity to run for the open seat. Working as Co-Chair of the Policy Committee and work on my show have brought me side-by-side with legislators and other elected officials and policy analysts whom I'm very eager to work with to rebuild the foundation for long-term prosperity, and make this the Massachusetts we know it can be."

Mara particularly credits her work as a public defender with providing the experience and know-how for politics. "In

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A Supreme Victory
Alumnus describes her greatest legal experience

By Julie McNeill, Esq.

Last year, I had the greatest experience of my almost decade-long career practicing law: I argued a case before the Massachusetts Supreme Judicial Court. Even better, the SJC found unanimously in my client’s favor.1 Here are some highlights from the case and some things I learned while taking a case to the state’s highest court.

Summary of the case: The Local Ruling

My client, Shirley Wayside LP, owned a mobile home park (referred to in the court documents as “Wayside”) containing 65 units. Wayside has been located on the same parcel of land in Shirley since the 1950s. My clients bought Wayside in 1998, and in 2005, sought to expand the number of units to 79. The problem they faced was that in 1985, the Town of Shirley amended its zoning bylaw and no longer permitted mobile homes in any zoning district in the Town. When this happened, Wayside with its 65 units became what is called a “pre-existing, nonconforming” use, meaning it is allowed to continue because it existed prior to the change in the bylaw, even though it doesn’t conform to the bylaw.

Expansions of pre-existing, nonconforming uses of land are governed by Mass. Gen. Laws ch. 40A, § 6, which states, “Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”2 In 1920, the SJC issued an advisory opinion to the Massachusetts House of Representatives, declaring constitutional House Bill No. 1660 (what is now Mass. Gen. Laws ch. 40A), which authorized cities and towns to limit buildings according to their use or construction. The SJC stated that the legislation recognized that “rights already acquired by existing use or construction of buildings in general ought not to be interfered with.”3

Even though expansion of pre-existing, nonconforming uses are contemplated by ch. 40A, § 6, municipalities are not compelled to do so: cities and towns are free to prohibit modification or expansion of such uses. Shirley, however, has a provision allowing for expansion of pre-existing, nonconforming uses, and is therefore among the towns whose bylaw is "permissive in spirit" in that it sanctions, by special permit, changes in nonconforming uses.4 In dealing with the subject, the language of the by-law unequivocally rejects the concept that nonconforming uses or structures must either fade away or remain static.5

Because of this provision, Wayside was able to apply for a special permit to expand its mobile home park. To grant such a permit, a town must make the finding, as articulated in ch. 40A, § 6, that the expansion will not be substantially more detrimental than what already exists. The Shirley Zoning Board of Appeals denied Wayside’s special permit on a number of grounds. One reason it cited was that "the present zoning regulations do not allow additional trailers in the Town of Shirley." However, as just discussed, this reason was invalid, because even though additional mobile homes would not be allowed as of right,
Shirley’s bylaw allowed for expansion of the park as it was a pre-existing, nonconforming use.

The other factors the Board took into consideration in its denial were, “1) the impact of additional residents on the area and the infrastructure of the Town of Shirley, in particular the possible economic burden on the school system, as the tax base for trailer units is much less than the tax base for residential homes; 2) the encroachment on the wetlands; 3) the density of the existing area and expansion area; 4) groundwater runoff; 5) property devaluation to the abutters; and 6) the heavy amount of traffic already on the road.”

**Appeal to the Land Court**

My client and I believed that none of the grounds cited by the Board were valid. It was clear to us from the decision, and from what was expressed at the town hearings, that the Board simply did not want any additional trailers and inappropriately used the fact that its bylaw no longer allowed for them as a reason for denial. I appealed the denial by filing a complaint in Land Court on Wayside’s behalf pursuant to Mass. Gen. Laws ch. 40A, § 17, which allows for judicial review of local zoning decisions. As required by the statute, I alleged in Wayside’s complaint that the decision exceeded the authority of the Board.

Judge Long of the Land Court held a one-day trial in the matter. We called four witnesses at trial: the president of the company that runs Wayside and the manager of Wayside, who each testified about operations at the park itself; a civil engineer who worked on the application for the special permit on behalf of Wayside, and who testified about technical aspects of the expansion, and a real estate appraiser, who testified about the analysis he performed to determine that there would be no detrimental impact of the proposed expansion on the neighborhood. Wayside is restricted to residents age 55 and older, so there was testimony that the expansion would have little to no impact on Shirley’s school system, which accounts for over half of the Town’s budget.

The Board called one witness: the building inspector for the town who is also a member of the town’s Board of Health. He testified that mobile home parks were no longer allowed under the zoning bylaw as of 1985. On cross-examination, he confirmed that the Town’s zoning bylaw contains no area or density requirements for mobile home parks, but those requirements are located in Shirley’s Board of Health regulations, and Wayside’s proposed expansion would comply with them.

In reviewing the Board’s denial, the court hears the matter de novo and, "it is the duty of the judge to determine the facts for himself upon the evidence introduced before him and then to apply the governing principles of law and, having settled the facts and the law, to inspect the decision of the board and enter such decree as justice and equity may require in accordance with his determination of the law and facts." Upon hearing and evaluating the oral testimony at trial, the Land Court ruled that no rational board could have found the way Shirley’s Board did on every issue—the expansion percentage limitation, impacts on the school system, road maintenance, snow removal, trash removal, traffic, wetlands, values of surrounding properties, tax contributions, emergency services, and density.

The Board then appealed that decision to the Massachusetts Appeals Court. At the Appeals Court, the panel consisted of Justices Green, Brown, and Grainger. Although the Appeals Court agreed with the Land Court judge that no rational board could have found as Shirley’s Board did on most of the issues, the court found that the Board’s concern about the density of the proposed expansion was enough to justify the denial of the special permit and therefore reversed the Land Court decision. In doing so, the court cited the requirements for single-family homes (as opposed to mobile homes) in the relevant zoning districts and noted that Wayside did not comply with those.

However, as the Land Court judge had found—based on testimony from the Board’s own witness—the Town of Shirley’s Board of Health regulations contained provisions governing the densi-
ty of mobile home parks, and Wayside’s expansion complied with them. None of Shirley’s zoning bylaws addressed any density or area requirements for mobile home parks. The Appeals Court stated that Wayside argued that the Board of Health regulations supersede zoning laws, but that was not what I argued. I contended that the Town of Shirley chose to regulate the density of mobile home parks under its Board of Health regulations, as it is allowed to do under Mass. Gen. Laws ch. 140, § 32B. I further argued that Wayside acknowledged that its pre-existing nonconforming use can only be extended if the extension itself complies with the ordinance or bylaw, as the Appeals Court held in Cox v. Board of Appeals of Carver. However, unlike in the Cox matter, Shirley did not have any provisions in its bylaw governing mobile home parks themselves, other than they must comply with the requirements for expanding a pre-existing, nonconforming use.

The Appeals Court decision was somewhat of an anomaly and is a lesson in Massachusetts appellate practice. Although only a three-judge panel of the Appeals Court actually hears an appeal, the decision is deemed to be one approved by the entire court. Therefore, when one of the three panel justices dissents, and a majority of the members of that Court agree with the dissent, the Court is permitted to add two senior justices to the panel to in effect turn the dissent into a majority, as confirmed by Sciaba Constr. Corp. v. Boston.

However, in my case, the original three-panel vote was apparently 2-1 in favor of Wayside. Even so, after submitting the proposed panel opinion to the entire court, the panel was expanded and the majority of the remaining justices on the Court agreed with the one justice who would have found for the Board, so the decision was published as a 3-to-2 decision for the Board. The two justices who would have comprised the majority in the three panel case continued to dissent in the written decision. Prior to this, I had not realized that the Appeals Court could expand the judicial panel, and did not realize that a decision could be affected (in my case, negatively) by justices who did not participate in the hearing.

On to the SJC

I believed very strongly that the Appeals Court decision was incorrect. By applying density standards of single-family homes to Wayside’s pre-existing, nonconforming mobile home park, the Court removed the protection that is afforded to such uses under Mass. Gen. Laws ch. 40A, § 6. Also, I believed that the court misapplied the Cox case because, in that matter, the Town of Carver had a provision in its zoning bylaw that mobile home parks must contain 100 acres, a requirement with which that park did not comply. There was no such provision in Shirley’s bylaw. Also, Cox involved expansion onto land that was acquired subsequent to the zoning change that made mobile home parks non-conforming, whereas in my case, Wayside sought to expand onto land that had always been part of the park.

Armed with these facts, coupled with the dissent of Justices Brown and Grainger, I applied to the SJC for further appellate review. I was very gratified when it was granted, especially when I found out after the fact that only five percent of the cases that apply for this review receive it.

Between the Appeals Court decision and hearing at the SJC, Justice Barbara Lenk, who was part of the expanded panel of the Appeals Court that decided against Wayside, was appointed from the Appeals Court to the SJC. Although she participated in the four cases that were heard previous to my case the day of my SJC hearing, she (along with another Justice, Duffy, presumably to ensure an odd number of justices would hear the case) did not participate in the Wayside matter.

In a decision written by Justice Cordy, the SJC found unanimously for Wayside and reinstated the Land Court decision. The court concluded “that the expansion complies with the zoning bylaw at issue, which we interpret as imposing minimum lot size dimensions on the entire mobile home park and not on individual mobile homes, governed only by board of health regulations. We further agree with the Land Court judge that there is no evidence that either the density within the mobile home park expansion or the modest increase in traffic will be detrimental to the sur-

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Sam Ambroise (’10) has taken a position as an attorney with the family law section in the Fall River office of CPCS beginning October, 2012 . . . Beth Roth (’97) has a practice in North Andover in which she focuses on matters relating to business, corporate, and employment law as well as commercial and medical malpractice litigation . . . Matthew Welsh (’10) is a Conflicts Attorney with the Boston law firm of Bingham McCutcheon, LLC, where he advises other attorneys in the firm on compliance with the Rules of Professional Conduct . . . Rick Kelley (’11) and Glen Frederick (’10) have opened the firm of Kelley and Frederick in Andover. Rick completed training with the Federation of Children with Special Needs and has begun taking special education cases, and Glen will be taking the course. The firm is also handling criminal, family, and estate matters . . . Tiffany Roy (’10) is working at a private scientific testing laboratory in Deerfield Beach, FL. While Tiffany was at MSLaw, she worked at the State Police Crime Lab, but after passing the bar, she decided to move south. Her lab works for both the prosecution and defense, conducting paternity and forensic testing . . . David Laiche (’07) and his wife Kyla Coffee (’08) were at graduation, celebrating the graduation of Kyla’s father Francis . . . David is a senior contracts administrator and IT specialist at General Dynamics in Needham . . . This fall, Chris Bowman (’07) will be starting in the LLM program in Environmental Law at Vermont Law School . . . Paul Tucker (’00), Chief of Police of Salem, MA, was the recipient of an award given by the Anti-Defamation League at its Essex County Law & Education Day Breakfast, for his dedication to “keep[ing] schools and communities safe” . . . Brett Morton (’10) works in the payroll bureau of the office of the Comptroller of the Commonwealth . . . Bill Carino (’95) is the Vice President of Sales at Extraprise, a marketing service provider . . . Adam Buckley (’97) was named Assistant City Solicitor for Salem, MA . . . M. C. Sullivan (’94) is a nurse, bioethicist, attorney, and Director of Ethics at Covenant Health Systems in Tewskbury. She recently appeared on a panel discussing physician-assisted suicide, co-sponsored by The Pro Life Office of the Archdiocese of Boston, in partnership with Women Affirming Life . . . In February 2012, Mark Pearson (’96) was named the Town Manager of Old Orchard Beach, ME . . . Rita Sud (’08) has a practice in Lexington in which she focuses on representing and consulting to corporations and businesses . . . Joe Orlando (’10) is still practicing with his dad in Gloucester, where he does personal injury and breach of contract cases. He and his wife bought a house in Hamilton, and Joe has been appointed a member of the Hamilton Planning Board, where he is learning all about real estate and zoning issues . . . Anna Shapiro (’06) has a solo practice in Woburn, and she has just become certified to act as Guardian Ad Litem in family law cases . . . Kristen Lindsey (’94) is a partner in the law firm of Niederman, Stanzel, and Lindsey in Manchester, NH. She originally joined the firm as a paralegal shortly after her graduation from undergraduate college in 1986 and worked full time while she attended MSLaw. She currently handles complex collection matters, including construction claims, mechanics liens, bond claims, bankruptcy, and insurance matters. In addition to her responsibilities as an attorney, Kristen manages the 20+ personnel employed by the firm . . . Tom Walker (’06) is an associate in Kristen’s firm. He, too, worked there as a paralegal throughout law school, and he joined as an attorney upon passing the NH bar. This past year, Tom was one of 12 attorneys selected to the second annual New Hampshire Bar Association Leadership Academy. The NHBA Leadership Academy is a year-long program that aims to identify, inspire, and train emerging leaders of the legal profession in New Hampshire. Tom not only participated in monthly modules conducted by leaders in the fields of law, government, and business, but he also participated in his group’s community service project called ”Fostering Legal Independence.” This project meets with older foster children, teaching basic legal knowledge to children who will soon "age out" of the foster care program . . . Andy McAleer (’96) works as a prosecutor with the Massachusetts Department of Corrections and teaches at Boston College. He is currently serving in Afghanistan as a Combat Historian with the Massachusetts Army National Guard. His private eye novel Fatal Deeds was recently released, and his book The 101 Habits of Highly Successful Novelists became a best seller on Amazon . . . Dave Karasic (’10), who was a reg-
istered patent agent before he came to MSLaw, is general counsel to BioSystems, LLC, a drug development company. In addition to building its market and negotiating its contracts, Dave still maintains a patent practice, and is pleased to be able to do what, as a non-lawyer agent, he had to turn over to licensed attorneys in his prior life . . . Laura (Alley) Hermann (’09) is licensed in MA and NH and opened her own solo practice in Manchester, NH focusing on estate planning and elder law. Prior to that, she worked in Compliance at Fidelity Investments for 10 years. She is space sharing with Achsa Klug (’09), who is also licensed in MA and NH. She focuses on family law, personal injury, and general civil cases . . . After nine years with the Worcester D.A.’s office, Rob Iacovelli (’95) opened his own practice in Worcester, where he focuses on criminal cases . . . Sarah Nichols (’11) has her own firm in Lenox, MA, practicing real estate and (soon) bankruptcy law . . . Neil Judd (’10) and Rachel (Antoniello) Judd (’10) welcomed a new baby boy, Liam Judd, into their family on June 27. Rachel and Neil have their own firm in Haverhill, MA, Judd Law Group . . . Karin Bischoff (’10) and Salima Dhanani (’10) have opened their own practice in Chelmsford, MA, Dhanani & Bischoff, LLC. They focus on estate planning, bankruptcy, real estate, and mediation . . . Kimberly Stewart (’06) is a member of the full-time faculty at Hesser College. She is an assistant professor in the criminal justice department, along with Bob Harrington (’05), where she teaches Critical Issues in Criminal Justice and Legal Research and an online Constitutional Law class. She continues to teach Writing & Legal Reasoning at MSLaw . . . Izzy Goldreich (’95) owns an international business consulting firm in New York City. He lost his first business, located in the World Trade Center, on 9/11. (He had been in the office one week before the attack.) He is married and has two boys.

In Memoriam

In December 2011, MSLaw lost an alum and former colleague when Neloufar (“Nealy”) Daryabegi (’96) passed away following a lengthy illness. At the time she died, Nealy was residing in California with her family, including her son, Pasha. Nealy was born in Iran and came here as a young child. She enrolled in MSLaw in 1992 and passed the bar exam on the first try, despite the fact that English had not been her first language. After passing the bar exam, Nealy came to work for MSLaw, as an assistant to Professor Diane Sullivan, working on the production of MSLaw’s television shows, which have, over the years, amassed more than 400 awards. Nealy was a great friend to MSLaw’s faculty and staff, particularly to Professor Sullivan, who spoke at a memorial service held in Massachusetts following her burial in California: “Nealy was a faculty favorite. We adored her because of her spunk, humor, intelligence, generosity, kindness, and love of kids and family. Nealy contributed to our telecasts in the early years, making this TV production into a national award winning program. She did it all—wrote scripts, found guests, did production, on-air interviews, and arranged for national distribution. Because of her efforts we received some of the most prestigious awards in the industry. She was a perfectionist—always striving to make us look good.” The sympathies of the entire MSLaw community are extended to Nealy’s family.

Write On!

MSLaw alumni continue to pursue fiction writing as an avocation. Bev Vucson (’04), writing under the name Bev Prescott, has been busy as a lawyer and an author. In May 2011, her novel My Soldier Too was published. It is the story of two women—a soldier and social worker—who fall in love and how they deal with their relationship in a country not ready to accept same-sex couples, a country for which one fought and laid down her life. Bev still works in Counsel’s office of the Department of Fish & Game, and is working on her second novel, due out next year. So, too, for Lee Graham (’04), who, in addition to his criminal defense practice in Haverhill, has published his first book, The Herald of Justice, which combines two of his favorite subjects, fantasy and the law. The book takes place in the middle ages and is the story of Justice Aaron Evron, the Arbiter of Niph, who is charged with ensuring that anarchy and chaos do not rule the planet. Congratulations to Bev and Lee, and keep putting those writing skills to great use!
MSLaw’s Veterans’ Association actually grew its roots two years ago, when a group of veterans and non-veterans banded together to raise money to erect a flagpole in front of the building. The Association thought the law school needed somewhere to display the flag—as a symbol of the respect and gratitude the MSLaw community has for its students and alumni, and all members of the armed forces, who have served and are serving our country. Along with faculty advisor Professor Martin, one of the instrumental movers behind the drive to establish the Association was current President Deanna Deveney, now a 2L, whose boyfriend has served two tours in Iraq as a communications specialist. The Vice President is Hadler Charles, a Staff Sargent in the Army Reserve, who served a tour in Kuwait during Operation Iraqi Freedom. There, he was in charge of a human resources section, which kept track of the number of troops who arrived and left the area of operation. He is still attached to the Reserve, currently performing essentially the same duties at the Army hospital at Ft. Devens in Ayer, MA.

As part of its fund-raising efforts during the past school year, the Association held a 50-50 raffle, sold T-Shirts, and organized the Run/Walk For the Troops in April 2012 (with the able collaboration of Professor Colby-Clements). Their goal is to raise enough money to erect a lighted flag pole adjacent to the bench, placed in memory of Sgt. Kurt Schamberg, son of alum Tom Schamberg (’06).

During the upcoming school year, the Association will continue its fundraising efforts. Any alumni wishing to help in these efforts, whether a veteran or not, should contact ddeveney2006@aol.com.

Do you have extra holiday cards? Do you like to buy holiday cards? If so, please consider setting some aside for our deployed military men and women who have sacrificed this time of year away from their loved ones so that we can enjoy our holidays safely with ours. You provide the cards, volunteers will do the rest! All donations are tax deductible. For more information, contact Denise Dalaklis at dalaklis@mslaw.edu. Cards will be accepted until November 21.
As Fifty Shades of Grey, a novel variously described as “Mommy porn,” erotic, and sexually sadistic, shoots to the top of the best seller list, it is time to review whether America’s treatment of pornography or, heaven forbid, obscenity, is outdated. The extraordinary popular appeal of E.L. James’ work to enlightened, educated men and women should cause judges and lawmakers to wonder whether laws that restrict an adult’s access to sexually explicit works in an internet world are appropriate or even workable. This article traces the history of the regulation of obscenity from ancient times to the present, focusing particularly on whether the current Supreme Court test for obscenity in an internet world has outlived its usefulness.

The Ancient World and Sexuality

In the ancient world, obscenity as a category of expression did not exist. In classical antiquity, erotic subject matter was often depicted in the visual arts, such as Egyptian papyrus scroll-painting, Greek sculpture and vase painting, and Roman frescoes discovered at Pompeii. And there is documentation that Sumerians, who date from 3000 B.C., adorned pottery with individuals displaying sexual organs, some patently engaged in sexual activity. One need only visit any of the myriad of world-renowned museums of art, in the United States or elsewhere, to see examples of the reverence ancient civilizations had for the unclothed human form.

Ancient Greek and Roman civilizations, from which we have learned so much, did not concern themselves with legal regulation of sexual expression. Greek and Roman poetry and literature described both what we would call traditional and non-traditional sexual activity in extraordinarily crude and graphic terms. In ancient Greek literature, sexual expression was openly and frankly discussed in works such as the play Lysistrata by Aristophanes. Today, such depictions of sexual expression would likely be deemed “pornographic,” but probably not obscene. The word “pornography” originally comes from the Greek pornographos, which means writing about prostitutes. The modern use of the term “pornography” in conjunction with erotic or “obscene” writings or

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1 The author is, on the other hand, not unmindful that, as this article is being written, the country is reacting to news that a Michigan legislator was sanctioned for using the term “vagina” on the floor of the state House of Representatives in a debate against adoption of a restrictive abortion bill. Rep. Lisa Brown, Silenced on the House floor for using correct body terms, The Detroit News, June 16, 2012, http://www.detroitnews.com/article/20120616/OPINION01/206160313#ixzz2150Qd6BX.

2 Geoffrey R. Stone, Origins of Obscenity, 31 N.Y.U. Rev. L. & Soc. Change 711, 711 (2007). This article is not intended to address the long-standing efforts to censor written materials for reasons other than their sexual content, such as the Church’s attempts to control works deemed to be heretical, or government enforcement of laws on defamation.


4 Id. The author notes that Ovid wrote about homosexuality, impotence, ménages à trois, and adultery.

5 Lysistrata by Aristophanes (J.A. Ball and Michael M. Chemers trans., Carnegie Mellon University Press 2008). Lysistrata is an anti-war comedy written by the fifth century Greek comic playwright Aristophanes. In the play, Lysistrata persuades the women of Greece to withhold sexual privileges from their husbands and lovers as a means of forcing the men not to fight in the Peloponnesian war. The play is notable for being an early treatment of sexual relations in a male-dominated society.

images dates only from the 19th century. In ancient Greek and Roman times, sex was not considered immoral or dangerous in itself, but rather only dangerous in excess.\(^8\)

In the Middle Ages, sexual stories proliferated in the form of fabliaux, which generally told tales of the sexual antics of a man and woman, not married to each other, and the woman’s “cuckolded” husband. These fabliaux were exchanged verbally in taverns and castles.\(^9\) The works of Chaucer, widely read as part of many English courses in American and foreign colleges and universities, are said to fall in this category.\(^10\)

After the decline of the Roman Empire, it was not until the Renaissance that “unorthodox” materials began to surface, particularly those critical of the Church. The Renaissance gave birth to renewed learning, and with it a rediscovery of the erotic themes of ancient Greece and Rome as seen in paintings such as \textit{La Primavera} by Sandro Botticelli.\(^11\)

**England’s approach to obscenity, 1500s—the Victorian Era**

Starting at the end of the reign of Elizabeth I, Puritanism was on the rise. In 1662, Parliament enacted a licensing act, which purported to prohibit the publication of “offensive” books, although bawdy works continued to flourish.\(^12\) Between classical antiquity in Athens and Rome and the rise of Christianity,\(^13\) a drastic change in attitude towards sexuality took place.\(^14\) The Church was very suspicious of sexuality—and was largely responsible for the production of most literary and artistic works.\(^15\) The Church’s monopoly on the production of artistic works made legal regulation unnecessary since erotic works of art were no longer being produced.\(^16\)

 Nonetheless, suppression of sexually explicit works was far from the norm. The first reported conviction for publishing obscenity was in 1727,\(^17\) when Edmund Curll, a controversial and shady character, known for his run-ins with the likes of Alexander Pope and Daniel Defoe, was arrested for publishing two books: \textit{Venus in the Cloister} or \textit{the Nun in her Smock} and an apparently graphic medical treatise.\(^18\) Curll would likely have been surprised at the indictment, since \textit{Venus}, a story of lesbian love, was a translation of a previously published French work that had also been published in England some years prior to the prosecution. And in 1708, an English court had dismissed...
an indictment against a printer for publishing a sexually explicit poem, holding that punishment for an obscene work could only be at the hands of a “Spiritual Court,” thereby questioning the court’s power to punish obscenity at all. Despite the apparent weight of factors in Curl’s favor, a divided court convicted him and sentenced him to pay a fine and stand in a pillory for one hour.20

Notwithstanding Curl’s conviction, England in the 1700s was the source of many well-known erotic works. John Cleland’s Memoirs of a Woman of Pleasure [Fanny Hill] and Henry Fielding’s Tom Jones are both products of this era.21

**Victorian England and the Hicklin Doctrine**

Obscenity and its wide-spread repression is said to be a creature of Victorian England.22 However, prior to Queen Victoria’s ascension to the throne, King George III had issued a proclamation calling on the public “to suppress all loose and licentious prints, books and publications, dispensing poison to the minds of the young and unwary,” and, in 1802, the Society for the Suppression of Vice was founded in England.23 Victorian England’s increased attack on sexually explicit works has been attributed to a variety of factors including: the development of the common law of libel, wider literacy rates, especially among the middle classes, political upheaval, attacks on the Church and the influence of the sexually liberated French on the English at the end of the Napoleonic Wars.24 In any event, the “modern” British and American approach to aggressively suppressing sexually graphic expression is generally said to date to the mid-1800s. In 1857, Parliament enacted The Obscene Publications Act, which was the first legislation that made the sale of obscene material a statutory offense and gave the courts power to seize and destroy offending material.25 Prosecution under this act was made famous in the case of Regina v. Hicklin in 1868.26 Benjamin Hicklin, a magistrate in London, brought a case against Henry Scott because he had created an offensive anti-Catholic booklet called “The Confessional Unmasked.”27 The magistrates convicted Scott, but the decision was reversed on appeal, as the magistrates held Scott’s intention was innocent.28 However, the matter was reserved for the consideration of the Court of Queen’s Bench, who held that Scott’s intention was material if the publication was obscene in fact, and reinstated the order of the justices.29

The Hicklin decision gave rise to the landmark Hicklin test, which dominated obscenity law both in the United Kingdom and the United States for almost a century.30 The test asks “whether the ten-

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28 Id. Note that this prosecution, brought under the Obscene Publications Act, was for publication of an allegedly heretical work, rather than a sexually explicit one.

29 Id.

30 Id.

31 It was not until Roth v. United States, 354 U.S. 476 (1957), that Hicklin was repudiated in American law. Prior to Hicklin, there were a few reported obscenity prosecutions in the United States. In Pennsylvania in 1815, the private showing for profit of a man and woman in “indecent posture” was held to be a violation of common law. Robbins, supra note 17, at 521-22. In Massachusetts in 1821, a book publisher was convicted for, inter alia, publishing a lewd and obscene book. However, the reported case appears to deal only with whether the court had jurisdiction to hear such a case. Id. (citing Commonwealth v. Holmes, 17 Mass 336 (1821)). For a more thorough treatment of this issue, see Donna Dennis, Obscenity Law and the Conditions of Freedom in the Nineteenth Century United
dency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall.”32

**Obscenity in the United States**

*What does the First Amendment Protect?*

Although the language of the First Amendment is absolute,33 few have seriously questioned the proposition that it was never intended to be without exception. For example, well-known commentators such as Professor Leonard Levy point to Congress’ enactment of the Sedition Act in 1798, not even a decade after the ratification of the First Amendment, as proof that those exceptions historically attendant to the British definition of “free speech,” such as libel, slander, and treasonous utterances, were meant to apply to American jurisprudence as well.34 In the early part of the 20th century, when addressing the constitutionality of criminal syndicalism laws, the Supreme Court said:

> [T]he First Amendment[,] while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech. [Cite omitted].35

Having established that the First Amendment was not intended to protect all expression, no matter what the intent or effect, the Supreme Court has set about a more than century-long effort to delineate which expression falls on which side of the line. In carving out categorical exceptions to the First Amendment’s protections, the Court has generally done so based upon the value of the speech to the underlying purpose of the Constitutional provision.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.36

Ultimately, obscenity was placed (or found to be) within the unprotected categories of “low value speech,” which has justified its regulation.37

**The United States and the Comstock Law**

*Hicklin’s “tendency to deprave and corrupt” standard soon found its way into American law largely through the efforts of Anthony Comstock,* a devout Christian and social activist.38 After fighting in the Civil War, Comstock returned, established the New York Society for the Suppression of Vice, and persuaded Congress in 1873 to expand the federal obscenity law. The new

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32 Regina v. Hicklin, 3 Queens Bench 360, 362, 371 (1868). The test allowed works to be deemed obscene based upon small passages in them, rather than by judging the entire work. Robbins, supra note 17, at 523.

33 “Congress shall make NO law . . . .” U.S. Const. amend. I. (Emphasis added).


37 See Roth v. United States, 354 U.S. 476 (1957), discussed further infra at note 55 and accompanying text.

"Comstock Law" barred sending through the mail not only “any obscene, lewd, or lascivious book, pamphlet, picture, print, or other publication of vulgar and indecent character,” but also “any article or thing designed or intended for the prevention of contraception or procuring of abortion.”

The statute described contraceptives as obscene and illicit, making it a federal offense to disseminate birth control through the mail or across state lines.

The “Comstock” legislation augmented the repression of sexually oriented speech. Although the Comstock Act provided for vigorous enforcement of laws banning sexually explicit works and prescribed harsh penalties for its violation, it did not define obscenity. Both federal courts and state courts adopted the Hicklin test to ascertain whether an obscenity violation had occurred.

Up until the mid-20th century, courts used this test to deem major literary works obscene, including classics such as *Lady Chatterley’s Lover* by D. H. Lawrence, and *An American Tragedy* by Theodore Dreiser. *Lady Chatterley’s Lover* was deemed obscene due to its explicit descriptions of the sexual relationship between a working-class man and an aristocratic woman. *An American Tragedy* depicted certain sexually explicit passages between a factory foreman and a poor female worker and included a discussion of abortion, resulting in the work being labeled “obscene, indecent, or impure, and manifestly tending to corrupt the morals of youth.”

The Hicklin test was used in a number of recorded prosecutions from the late 1800s to the 1930s, although its application in a particular case was occasionally questioned or modified. In *United States v. Kennerley*, Justice Hand commented that he had to employ the test because it had become widely adopted by the federal courts, but he stated:

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, “obscene, lewd, or lascivious.” I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses.

In *Halsey v. New York Soc. for Suppression of Vice*, the judge appeared to focus on whether the work, as a whole, was obscene, rather than taking the British view that if any part of the work was obscene, the entire work was deemed to be so.

“No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole.”

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39 Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, c. 258, § 2, 17 Stat. 598, 599 (1873). The federal obscenity law has been amended many times; it is now codified at 18 U.S.C. § 1461 (2012).

40 Id.

41 See United States v. Smith, 45 F. 476, 477 (E.D. Wis. 1891); United States v. Bennett, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879); United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889).


44 D.H. Lawrence, Lady Chatterley’s Lover (1928).

45 Friede, 271 Mass. at 321.


47 Halsey v. New York Soc. for Suppression of Vice, 234 N.Y. 1 (1922). This case was one for malicious prosecution brought by the seller of an English translation of *Mademoiselle de Maupin*, by Theophile Gautier, who the court described as “one of the greatest French authors of the nineteenth century.” Id. at 3-4. The book had been found not to be obscene in the original prosecution brought by the defendant Society. Id.

48 Id. at 4. See also United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930), in which Justice Hand, while citing Hicklin, determined that the work, which was a pamphlet a mother had written and disseminated to friends to assist adults in teaching children about sex, could not, as a matter of law, been deemed obscene. In employing a balancing test, the court stated that while there was a risk that the work could
The “beginning of the end” of the Hicklin doctrine is said to have stemmed from the opinion of Justice Woolsey in the case of United States v. One Book Entitled Ulysses by James Joyce.49 United States v. Ulysses was the prosecution of Joyce’s book Ulysses, in which the Second Circuit questioned if the work was an “obscene book” within the meaning of the Tariff Act of 1930.50 The trial judge, John Woolsey, held that the book did not fall under the meaning of the word obscene “as legally defined by the courts at that time: Tending to stir the sex impulses or to lead to sexually impure and lustful thoughts.”51 In deviating from the Hicklin test, the court held that “whether a particular book would tend to excite such impulses and thoughts must be tested by the court’s opinion as to its effect on a person with average sex instincts.”52 In contrast to Hicklin, the court considered the effects on the “person with average instincts” comparing it to the “reasonable man” in the law of torts, rather than the most impressionable, or “those whose minds are open to such immoral influences.”53 On appeal, the decision was affirmed by the Second Circuit in an opinion written by Augustus Hand, with a concurrence by his cousin Learned. The court stated that “the test is whether a publication, taken as a whole, has a libidinous effect.”54

**The Roth Test**

In 1957, the Supreme Court departed from the Hicklin test in the landmark case of Roth v. United States.55 Roth operated a book-selling business in New York and was convicted of mailing obscene circulars and an obscene book in violation of a federal obscenity statute. This was the first time the court ever “squarely had the question presented” as to whether obscenity was an “utterance within the area of protected speech and press.”56 Justice Brennan, writing the opinion for the plurality, stated “obscenity is not within the area of protected speech and press,” because it is “utterly without redeeming social importance.”57 In Roth, the court adopted a new standard for the test for obscenity: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest.”58 The court rejected the nearly century-old Hicklin test. “The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.”59

In a dissenting opinion, Justice Harlan stated:

> The problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their nature or supposed deleterious effect upon human conduct . . . 60 Congress has no substantive power over sexual morality.61

Justice Douglas, joined by Justice Black, harshly criticized the majority opinion and the Court’s new standard. These Justices opined that the new standard articulated by the majority

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51 One Book Called “Ulysses,” 5 F. Supp. at 184.

52 Id.

53 Id.

54 United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 707 (2d Cir. 1934).

55 Roth, 354 U.S. at 481.

56 Id. at 484.

57 Id. at 496. The majority found that the history of the First Amendment strongly supported regulation of obscenity on this ground. Scholars and commentators have taken issue with this contention. See Ryen Rasmussen, *The Auto-Authentication of the Page: Purely Written Speech and the Doctrine of Obscenity*, 20 Wm. & Mary Bill Rts. J. 253, 256 (2011).

58 Id. at 489.

59 Id.

60 Id. at 497.

61 Id. at 504.
allows the legality of a publication to “turn on the purity of thought which a book or tract instills in the mind of the reader.” 62 “By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment.” 63 It is precisely this sort of thought control condoned by the majority in Roth that should be beyond the reach of the government.

In discussion of the new “community standards” test, Justice Douglas stated:

The standard of what offends the common conscience of the community conflicts, in my judgment, with the command of the First Amendment that Congress shall make no law abridging the freedom of speech, or of the press. Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned? 64

In summary, the dissent articulated that the Roth decision was an encroachment on our First Amendment rights and an intolerable standard that caused for undue censorship on speech:

Any test that turns on what is offensive to the community’s standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don’t like, provided the matter relates to ‘sexual impurity’ or has a tendency ‘to excite lustful thoughts.’ This is community censorship in one of its worst forms. 65

Though the Roth decision far from liberalized the law on obscenity, it differed significantly from Hicklin, in that rather than a court looking at isolated passages of a literary work to deem it obscene, the work would be considered a whole.

In 1966, the Supreme Court continued to redefine the test for obscenity in A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts. 66 Memoirs of a Woman of Pleasure (commonly known as Fanny Hill), was a book written by John Cleland in about 1750. The Supreme Court, with Justice Brennan writing the opinion, stated that under the Roth standard, in order for something to be deemed obscene: “Three elements must coalesce. It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.” 67 The third prong took into account, as the Court stated in Roth, that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.” 68

In a concurring opinion, Justice Douglas again articulated his opinion on restrictions on obscenity:

We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens . . . . If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include Fanny Hill in our own libraries. 69

Finally, in 1969, in what has been judged a victory for the First Amendment, the Supreme Court held that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. In Stanley v. Georgia, the court held that individuals had the right to possess obscene materials in the privacy of their own homes. 70 “The right to receive information and

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62 Id. at 508.
63 Id. at 509.
64 Id. at 511-512.
65 Id. at 512.
67 Id. at 418.
68 Id. at 413, 415 (1966).
69 Id. at 414.
70 Memoirs of a Woman of Pleasure, 383 U.S. at 427.
ideas, regardless of their social worth, is fundamental to our free society.”

Current State of the Law

The Miller Test

In 1973, with the landmark decision on obscenity law, Miller v. California, both American culture and the Supreme Court experienced a wave of change. The ‘60s marked a period of sexual liberalism, and with the presidency of Lyndon B. Johnson brought the retirement of Chief Justice Earl Warren, a long time liberal activist. Justice Abe Fortas, a Johnson nominee, stepped down from the Court after only four years, and the presidential election of conservative Richard M. Nixon brought the nomination of a new Supreme Court Chief Justice, Warren Earl Burger. With Chief Justice Burger, a new era of judicial conservatism was ushered in. President Nixon vowed for “law and order” and an end to the liberal judicial activism of the Warren court and the ‘60s. The ‘70s brought a new conservative Chief Justice and Miller, as well as a new test for obscenity, which is still the governing standard used today.

In Miller, a defendant was convicted of mailing unsolicited sexually explicit material in violation of a California statute. In questioning whether the sale and distribution of obscene materials by mail was protected under the First Amendment’s freedom of speech guarantee, the Court confirmed that “obscenity is not within the area of constitutionally protected speech or press.” However, the Supreme Court struck down the California statute as vague stating: “The ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.”

In Miller, the Court articulated a three-prong test that became the new standard for obscenity law that still exists today: “The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”

The Miller test bears striking resemblance to the test articulated in Memoirs, although it is the third prong of the test that changed significantly. The terms “utterly without redeeming social value” were changed to the arguably more conservative standard of “lacks serious literary, artistic, political, or scientific value.” The Court noted that the “utterly without redeeming social value” test had “never commanded the adherence of more than three Justices at one time.” Finally, the court’s majority agreed on a standard for obscenity, a standard that continues to survive after 40 years.

In a marked turning point from his prior opinions, Justice Brennan strongly dissented. After having authored the opinions in cases that established the foundation upon which the Miller test was formed, Roth and Memoirs, Justice Brennan abandoned his former position and opined “that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression.” After 16 years, Brennan repudiated his earlier opinions.

In both Miller and a companion case, Paris Adult Theatre I v. Slaton, Justice Brennan articulated a change in his opinion regarding the standard he had worked so hard to develop. “Our experience with the Roth approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we
have failed to formulate a standard that sharply distinguishes protected from unprotected speech. . .”84 The Court’s decisions in *Miller* and *Paris* forced Justice Brennan to conclude that the test for obscenity was a vague and unworkable standard that inevitably caused protected speech to be repressed:

After 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other, the asserted state interest in regulating the dissemination of certain sexually oriented materials.85

Justice Brennan went on to further identify three problems that arise from the new test: “First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe.”86 Failure to provide notice would be a violation of the Fourteenth Amendment.87 Second, he acknowledged that allowing for such vagueness in a statute has a chilling effect on protected speech.88 Third, placing on the judiciary the task of identifying the “point of separation between protected and unprotected speech,” particularly in marginal cases, creates “constitutional problems of exceptional difficulty” and creates “institutional stress.”89

As Justice Brennan stated in his *Roth* opinion: “Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages.”90

### The Concept of Community Standards

1973, the year in which the Supreme Court decided *Miller v. California* which cemented “community standards” as a fixture in obscenity law, is hardly ancient history. However, it is hard to imagine that the *Miller* Court could have envisioned how the internet has changed the First Amendment playing field. Today, an individual in one state or country can create a work and make it available online to anyone else who has a computer and internet access, no matter where the latter is located. Thus, the soundness of the idea that obscenity should somehow be controlled by the values of the community in which the work is made available is questionable at best.91

The concept of judging whether a work is obscene with reference to community standards brings with it significant constitutional problems. The notion of community standards is highly subjective, and possibly unascertainable. Furthermore, to have a constitutional standard based on varied localized community standards that differ significantly from urban to rural locales, city to city, and region to region, is incongruent with the notion of a nationally protected constitutional right. Consider the application of it on the defendant in New York City who ships sexually explicit materials to different parts of the country. Should that person’s rights be subject to the values of a more conservative locale?

The notion of a “community” generally brings to mind people with common interests or social characteristics.92 Yet within most communities, even the most homogeneous, some diversity is common, as individual members of a community come with a wide range of different views on

84 Id. at 81.
85 Id. at 84.
86 Id. at 86.
87 Id.
88 Id.
89 Id. at 91.
90 *Roth*, 354 U.S. at 487.
91 “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.” *Miller v. California*, 413 U.S. 15, 32 (1973).
92 The word community in this context is defined as “people with common interests living in a particular area; a group of people with a common characteristic or interest living together within a larger society; a group linked by a common policy; a body of persons or nations having a common history or common social, economic, and political interests.” Merriam-Webster’s Collegiate Dictionary (11th ed. 2008). Black’s Law Dictionary defines community as “1. A neighborhood, vicinity, or facility. 2. A society or group of people with similar rights or interests. 3. Joint ownership, possession, or participation.” Black’s Law Dictionary 297 (8th ed. 2004).
social and political issues. It is the confluence of diverse values and beliefs that is a fundamental tenant of a democracy. It can be expected that a wide range of attitudes with respect to provocative subjects such as obscenity or pornography will exist in any community. Yet, the law requires a consensus to create a community standard, even in light of this diversity.

Because of its subjectivity, the community standards test is one of the most troubling aspects of obscenity law. Even if the term “community standards” could be objectively ascertained, it does not follow that those standards would be based on what is harmful to society, rather than on subjective prejudice or irrationality. Nor does it follow that certain works or images should be considered obscene, just because a majority of a particular locality deems them so. A test based on community standards is inherently problematic, and should be reevaluated in light of the new age in which we live.

Keeping Your Eye on the Ball—Is it Erotic, Pornographic, or Illegally Obscene?

When it comes to judging content, the line between what is considered erotic or pornographic and what is illegally obscene is blurred. Under the community standards approach, where the line is drawn will depend upon the individual jurors in a community, who define the term “obscenity” based on their own subjective tastes, values, and preferences. The trouble lies in the fact that there is no consistent boundary between materials that are constitutional under the First Amendment, and those that are not. This problem preceded the Internet, and is now exacerbated in an Internet age.

The confusion of what materials are considered obscene leads to the inconsistent prosecution of obscenity. This problem is heightened on the Internet, as certain videos that are considered illegal when distributed via traditional media could be tolerated when distributed online. A simple Internet search will demonstrate that scatologically themed videos, such as the infamous Brazilian video “2 Girls 1 Cup,” a video that shows two women eating excrement purportedly for the sexual gratification of the viewer, are available for viewing and downloading.

So why is it that certain materials are tolerated and some criminally prosecuted? The answer seems to be connected to the lack of a clear and consistent definition of what is considered obscene. Perhaps a very clear definition outlining obscene materials, for example, including but not limited to scatological videos showing the eating of excrement or vomit, would clear the confusion regarding what is or is not considered illegal. The obvious problems with this solution are who is to decide, and what if something is left out? Or conversely, what if something is included in the definition that does not offend a certain audience or community?

Community Standards in an Internet Age—A Country in Confusion

In our age, the Internet poses a new and significantly different problem for the “community standards” test. The community standards test is difficult to apply to the Internet, and an additional challenge of the Internet is that it is difficult to distinguish adults from children for purposes of restricting content.

In Reno v. American Civil Liberties Union, the Court stated: “The ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience

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93 An example of how one is unable to predict the values of a community when it comes to obscenity based upon the general demographic and political characteristics of its population was seen in the 1996 prosecution of Larry Peterman, owner of two video stores in Utah City, Utah. Based upon the influence of the Mormon Church, one might assume a city in Utah to have conservative values when it comes to pornography and obscenity. However, Mr. Peterman was acquitted of all charges following a trial in which his attorney introduced the wide-scale use and availability of pornography in the community. John Fee, Obscenity and the World Wide Web, 2007 B.Y.U. L. Rev. 1691 n.19 (2007).


95 Id.

96 See, e.g., MFX Media, the distributor of the full length video from which the short video “2 Girls 1 Cup” originates, which is available for viewing or purchase in the United States, http://www.mfxmedia.com/.
will be judged by the standards of the community most likely to be offended by the message.” 97 In \textit{Reno}, the American Civil Liberties Union challenged the constitutionality of two provisions in the 1996 Communications Decency Act. 98 The act was created to protect minors from unsuitable internet material and criminalized the intentional transmission of “obscene or indecent” messages as well as the transmission of information which depicts or describes “sexual or excretory activities or organs” in a manner deemed “offensive” by community standards.99 In a unanimous decision, the Court held that the act violated the First Amendment because its regulations amounted to an overbroad content-based restriction of free speech that chilled the right of adults to access constitutionally protected material.100

In 2002, the Supreme Court addressed the concept of community standards as applied to the Internet in the case of \textit{Ashcroft v. American Civil Liberties Union}.101 The question presented in that case was whether the Child Online Protection Act’s (COPA) use of “community standards” to identify “material that is harmful to minors” violated the First Amendment.102 COPA was Congress’s second attempt, following the nullification of the Communications Decency Act, to protect children from exposure to pornographic material on the Internet.103 COPA imposed criminal penalties for anyone knowingly posting sexually explicit material that was “harmful to minors” for “commercial purposes.”104 In a highly fragmented decision, the plurality held that reliance on “community standards” to identify what material “is harmful to minors” does not by itself render the statute substantially overbroad for First Amendment purposes in the context of a facial challenge.105 Justice Thomas, with only two justices concurring in that portion of the opinion, held that the First Amendment did not compel the use of a national standard even as applied to Internet publication, and he refused to nullify the statute because it did not suffer from the same overbreadth flaws as the statute in \textit{Reno} did.106

The \textit{Ashcroft} decision demonstrates the complexity of the debate surrounding community standards and the Internet. Since online content is available nationally, the question of whether local community standards would chill too much speech is at issue. In a concurring opinion, Justice O’Connor stated that in future cases the use of local community standards will cause problems for regulating obscenity on the Internet, for adults as well as children.107 She noted: “Our precedents

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98 47 U.S.C. § 223(a)(1)(B)(ii) (2012) criminalizes the “knowing” transmission of “obscene or indecent” messages to any recipient under 18 years of age. Section 223(d) prohibits the “knowing” sending or displaying to a person under 18 of any message “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”

99 Id.

100 \textit{Reno}, 521 U.S. at 885. Most commentators agree that only “hard core” pornography will be subject to prosecution, but that term is no more subject to concrete definition than “community standards.” See Sarah Kagan, \textit{Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights}, 38 Hastings Const. L.Q. 233, 251-52 (2010).


102 Id. at 566.

103 Id. at 567.

104 To protect minors from exposure to sexually explicit materials on the Internet, Congress enacted the Child Online Protection Act (COPA), 47 U.S.C. § 231, which, among other things, imposes a $50,000 fine and six months in prison for the knowing posting, for “commercial purposes,” § 231(a)(1), of World Wide Web content that is “harmful to minors,” but provides an affirmative defense to commercial Web speakers who restrict access to prohibited materials by “requiring use of a credit card” or “any other reasonable measures that are feasible under available technology,” § 231(c)(1).

105 \textit{Ashcroft}, 535 U.S. at 566.


It should be noted the case was a pre-enforcement challenge, so no jury instruction as to the definition of “community standards” had yet been given. \textit{Ashcroft}, 535 U.S. at 577-78.

107 \textit{Ashcroft}, 535 U.S. at 587.
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do not forbid adoption of a national standard.”108 In a dissenting opinion, Justice Stevens stated: “In the context of the Internet, however, community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web.”109

**Local or National (or even International?) Standard**

The question of whether a local, national, or international standard should be used in obscenity-based prosecutions brings great debate when applied to cases involving the Internet. The *Miller* test, still the standard used in obscenity cases, originated during a time when the main method of distribution of obscenity was via postal mail.110 The test was developed when obscenity prosecutions were primarily localized in nature, and distributors intentionally chose the geographic areas in which they distributed or displayed their material.111 In an Internet age, we are confronted with a borderless world, where the distribution of obscenity via online content poses new legal problems and constitutional concerns.

Today, the legal community is divided over the application of community standards to Internet based prosecutions.112 Both a local standard and a national standard seem inherently problematic. Using localized community standards, obscenity status is decided upon by the trier of fact in the community.113 If local community standards are used, Internet publishers who make their materials available for download may be subject to criminal prosecution in a less tolerant community. For example, under a local standard, a Hollywood producer who makes his content available online could be charged with obscenity in Utah.114 Under the community standards approach, producers and distributors may be subject to criminal penalties solely because of where the buyer lives, even if the buyer himself voluntarily and knowingly purchases the material.115 Therefore, publishers are compelled to censor their content to tailor it to acceptance by these most restrictive communities, content that would otherwise be deemed constitutional in a more sexually tolerant community. Furthermore, application of a narrow definition of “community standards” allows prosecutors to “forum shop,” that is, bring a prosecution of nationally broadcast material in the most conservative district, thereby effectively stopping nationwide publication.116

However, additional problems arise even using a national standard. Less sexually tolerant communities would likely be forced to permit dissemination within their borders of materials they deemed obscene, while other communities could be forced to punish materials they find acceptable, depending on the how the national standard was defined.117 In the end, is it truly possible to create a national standard for decency in a country that is so diverse? The Supreme Court struggled with this issue for years, most notably between the *Roth* and *Miller* decisions. The *Miller* court even stated that “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation . . . .”118

In the age of the Internet, advocates of a national standard for obscenity argue that such a standard to evaluate whether online material is obscene is necessary to prevent the suppression of

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108 *Id.* at 587.

109 *Id.* at 603.


112 Kjar, *supra* note 94, at 142.


114 The result of such a prosecution is not necessarily certain. *See infra* note 120 and accompanying text.

115 Hertz-Bunzl, *supra* note 110, at 176.

116 *See, e.g.* Kagan, *supra* note 100, at 253-54. The author also sees due process problems with applying differing standards, depending upon where the work is published.


otherwise constitutional speech. In an online context, if a national standard existed, Internet publishers would not have to abide by the restrictions of the least tolerant community in order to minimize the risk of possible criminal prosecution, and First Amendment protections of free speech would be satisfied.

Even with a national standard, consistency may be an issue. As Justice Thomas pointed out in Ashcroft, even if a national standard existed, jurors may still reach inconsistent conclusions. On the other hand, perhaps the existence of a clearly defined national standard may over time lead to increased consistency across the nation of what is or is not obscene. Whether the standard is local or national, it is clear that the path forward has no simple solution.

Division in the Courts

As expected, the lack of an explicit rule of law at the Supreme Court level has left the lower courts’ decisions in a state of disarray. The legal challenges surrounding prosecutions for obscenity relating to the Internet have caused division in the lower federal courts. In 2009, the Ninth Circuit addressed the issue of community standards in a case arising from an email spamming operation. In United States v. Kilbride, the court held that the definition of contemporary community standards, in jury instructions for federal obscenity prosecution, was not required to be limited to a particular geographical area. Also, it decided that national contemporary community standards, rather than local community standards, should be applied to the determination of whether images transmitted over the Internet were obscene, in prosecution for interstate transportation of obscene materials.

The Kilbride decision was based largely on an interpretation of the Supreme Court’s Ashcroft decision. The Kilbride court determined that five of the Court’s justices, concurring on the narrowest possible grounds, held that the use of local community standards for Internet obscenity was significantly problematic, but that a national standard was not.

In 2010, the Eleventh Circuit addressed the issue of community standards in United States v. Little. That court held that when judging whether an online work is obscene, jurors should apply a local community standard as defined by a small area around the place where the work was downloaded. Disagreeing with the Kilbride court, the Eleventh Circuit stated:

[T]he Ninth Circuit interpreted Ashcroft in such a way as to mandate a national community standard for Internet-based material. We decline to follow the reasoning of Kilbride in this Circuit. The portions of the Ashcroft opinion and concurrences that advocated a national community standard were dicta, not the ruling of the Court.

The circuit-splitting decisions by the Eleventh Circuit shows the tension between the courts on what standard should apply to Internet based obscenity prosecutions. Both decisions illustrate how one court’s fractured decision may be interpreted differently by reasonable people who, in turn, arrive at different conclusions.

Potential Solutions

Geotargeting

If a perfect technological solution existed, perhaps the problem of varying tolerances in different communities could be solved in relation to obscenity and the Internet. Thus, some advocate the hopeful creation of “geotargeting.” Geotargeting is technology that creates borders on a previously borderless Internet. This new technology allows publishers to specifically target geographically localized communities, allowing for the selection of communities that are more liberal. Through geotargeting, sophisticated meth-

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119 Dawson, supra note 113, at 723.
120 Ashcroft, 535 U.S. at 577.
121 United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2009).
122 Id. at 1248.
123 Id. at 1252.
124 Id. at 1253.
125 Id. at 1254.
126 United States v. Little, 365 F. App’x 159, 161 (11th Cir. 2010).
127 Id. at 162-164.
128 Id. at 164.
129 Kjar, supra note 94, at 125.
130 Id.
131 Id.
ods such as tracking location of the user by Internet Protocol (IP) addresses associated with domain registries track the location of users.\textsuperscript{132} This would allow publishers to control where their content is accessible and minimize the risk of prosecution for obscenity. Geotargeting could be the solution as to what standard to use in Internet based obscenity prosecutions. Ostensibly, the traditional method put forth in \textit{Miller}, using localized community standards, could be applied to online content, just as it has been applied to traditional forms of media.\textsuperscript{133} This would apply equally to content that is downloadable or purchased via the Internet, as producers and distributors would have the power to decide who to do business with by their location. While the technology is not yet perfect, accuracy rates are increasing over time.\textsuperscript{134} Increasing acceptance of geotargeting or geolocation technology has even been signaled by a proposed federal Internet gambling law that ensures that individuals placing bets are physically located in a jurisdiction that permits gambling.\textsuperscript{135}

\textbf{Overrule \textit{Miller}—All sexually explicit work (except child pornography) should be protected for adults}

The time to overrule \textit{Miller} is now.\textsuperscript{136} The Supreme Court’s obscenity doctrine is an outdated relic left over from the Victorian era. Assuming that today, obscenity is legally equated with hardcore pornography, the suppression of even hardcore pornography implicates what nearly everyone agrees is a central First Amendment concern—the right of each citizen to participate freely and equally in the speech by which we govern ourselves.\textsuperscript{137} The obscenity doctrine, after over 40 years, is outdated in the current age of sexuality and technology in which we live.

All sexual expression (not involving minors) available to adults should be protected under the First Amendment.\textsuperscript{138} The obscenity doctrine is incongruous with the First Amendment’s core purposes. As stated above, exceptions to the general rule that the government may not restrict free speech under the First Amendment have been based upon the low or non-existent value of that speech.\textsuperscript{139} However, in an age of sexual enlightenment and relative tolerance, to say that even hardcore pornography has no or little societal value is untrue. Freedom of expression, protected under the First Amendment, should include the right of an individual to decide what to read, watch, view, say, and think. This fundamental right should belong to and be judged by the individual—and not the community. The current state of the law concerning adult sexual expression and the suppression of obscenity is vague,\textsuperscript{140} malleable,\textsuperscript{141} and obsolete in the age of new technology.\textsuperscript{142}

The social tide is now ready for change. With the mass obsession with and mainstreaming of \textit{Fifty Shades of Grey}, such erotic fiction signals that the time has come to revisit our pornography and obscenity laws.\textsuperscript{143} A book saturated with such detailed depictions of sexuality and graphic sadomasochistic images would likely have been deemed obscene 50 years ago. In 1870, Leopold von Sacher-Masoch penned \textit{Venus in Furs}, and unwittingly became the father of the sexual pro-

\textsuperscript{132} \textit{Id.} at 147.

\textsuperscript{133} \textit{Id.} at 132.

\textsuperscript{134} Hertz-Bunzl, \textit{supra} note 110, at 188.

\textsuperscript{135} \textit{Id.}


\textsuperscript{138} In \textit{Ginsberg v. State of N.Y.}, 390 U.S. 629, 673 (1968), the Supreme Court held that the government can constitutionally prohibit children from accessing certain types of sexually explicit material that it cannot constitutionally ban for adults. However, obscenity as a category of speech which includes specific forms of sexual expression, is unprotected by the First Amendment. See \textit{Miller v. California}, 413 U.S. 15, 24 (1973).

\textsuperscript{139} See Weinstein, \textit{supra} note 137, at 865.

\textsuperscript{140} It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. \textit{Grayned v. City of Rockford}, 408 U.S. 104, 108 (1972).

\textsuperscript{141} “Whether something rises to the level of obscene is a legal conclusion that, by definition, may vary from community to community.” \textit{Am. Civil Liberties Union v. Reno}, 929 F. Supp. 824, 863 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997).

\textsuperscript{142} “As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.” \textit{Id.} at 883.

\textsuperscript{143} E.L. James, \textit{Fifty Shades of Grey} (2011).
clivity we know as masochism.\footnote{144} Why is it that almost 150 years later, such graphically erotic works now have mass appeal,\footnote{145} and the public seems hungry for them? Statistics reflecting the availability and use of pornography in the United States will be staggering to some. According to compiled numbers from respected news and research organizations in 2005-2006, $3,075.64 is being spent on pornography every second. In that same second, 28,258 Internet users are viewing pornography, and 372 Internet users are typing adult search terms into search engines. Every 39 minutes, a new pornographic video is being created in the United States.\footnote{146}

Current obscenity jurisprudence is an anomaly in the constitutional law of freedom of expression. In 1989, the Supreme Court noted, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\footnote{147} It is precisely when speech is found to be offensive that constitutional protection is most important. Yet, the constitutional standard created to suppress obscene materials is based upon their offensiveness.\footnote{148} In \textit{F.C.C. v. Pacifica Foundation}, the Supreme Court explained:

Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.\footnote{149}

The law of obscenity is aimed at the substance of the work, but in reality, the test is based upon the jury’s opinion of the content within the parameters of whatever jury instruction is given by the judge.

Government control over adults’ consumption of sexually oriented speech should end, and obscenity should be held to be protected speech under the First Amendment. All sexually explicit materials, where the depiction does not include child pornography, should be available for adult consumption without regulation. The majority of prosecutions today concerning unprotected sexual materials are for child pornography and not obscenity.\footnote{150} Long gone are the days of the adult movie theater, replaced with the Internet and payper-view; the prosecution of obscenity on the federal front not concerning minors is operating in uncharted legal waters.\footnote{151} Doesn’t this, a fortiori, indicate social acceptance? Why continue to waste time and resources banning it? Why not let adults police themselves? The Supreme Court should revisit and embrace Justice Brennan’s dissenting opinion in \textit{Paris Adult Theatre v. Slaton}:

In the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly ‘obscene’ contents.\footnote{152}

All adults, no matter where they are located in the United States, should be able to choose what materials they wish to consume, in the name of the freedom and liberty on which our country was founded. As former A.C.L.U. President Nadine

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\footnote{144} Leopold von Sacher-Masoch, \textit{Venus in Furs} (1870), first published as a novella as part of his uncompleted series of novellas called \textit{The Legacy of Cain}.  
\footnote{145} The \textit{Fifty Shades of Grey} trilogy holds four out of the 10 spots on the top 10 \textit{New York Times} best seller list. Three of the spots are for the individual books that together create the trilogy, and a fourth spot held for the three works packaged together as a bundle. \textit{N.Y. Times, Best Sellers, Combined Print & E-book Fiction} (July 30, 2012), \url{http://www.nytimes.com/best-sellers-books/combined-print-and-e-book-fiction/list.html}.  
\footnote{148} Miller, 413 U.S. at 24.  
\footnote{152} \textit{Paris Adult Theatre I}, 413 U.S. at 113.
Strossen has argued, the issue of protection for sexual expression is even greater than it seems:

The historical and ongoing enforcement record of laws against sexual speech make clear that what is at stake is more than freedom of sexual expression, important as that is. Even beyond that, the freedom to produce or consume anything called “pornography” is an essential aspect of the freedom to defy prevailing political and social mores.153

In her seminal work Defending Pornography,154 Strossen argued that efforts to censor pornographic materials violate the “clear and present danger test,” which holds that “a restriction on speech can be justified only when necessary to prevent actual or imminent harm, such as violence or injury to others.”155 If the government may restrict political expression only if there exists a threat of imminent harm, how then can it justify restriction of sexual speech if no imminent harm can be proven? For over three decades, feminists with opposing views have debated whether pornography causes harm to women and if so, should anything be done about it.156 Anti-porn feminists argue that pornography causes sexual violence, while pro-porn feminists argue that the debate centers on the “struggle for power waged within the larger constitutional arena of freedom of expression.”157

Living in an Internet age, there is no doubt we now have greater access to sexually explicit, pornographic, or allegedly obscene materials. As a result, one would think that there would be even more criminal prosecutions for obscenity than there are, and more crimes against women, if indeed such materials cause harm. Studies show, however, that there is no direct correlation between the availability of pornographic materials and crimes against women.158 If the availability of pornographic materials is now greater than at any time in history due to the proliferation of the Internet, then why has the FBI reported that the crime rate for the forcible rape of women is at its lowest in over 20 years?159 Furthermore, internationally, there is evidence to show that gender equality and sexually explicit materials flourish in tolerant climates.160 Violent crimes against women are prevalent in such Middle Eastern countries such as Saudi Arabia and Iran where speech is controlled. In contrast, such violence is uncommon in countries such as Denmark, the Netherlands, Germany, and Japan.161

My opinion is based not only on academic study, but on personal experience. In my pre-law school life, I spent years touring internationally in my own original theatrical erotic rock band. I sang and performed on stage in small clubs for audiences of 50 to 5,000 or more at adult-entertainment conventions in the major capital cities of Europe and even in the United States. I wrote songs with sexually explicit lyrics and performed live in a semi-choreographed show. I performed, uneventfully I must say, in sexually tolerant countries such as Finland and Sweden, where the rights of women are well established, and attitudes toward sex are more liberated. Back in the United States, however, my show was accepted in places such as New York City and Las Vegas but not in other locales.

My performance career generated a desire within me to learn more about my individual right to sexual expression, and the law that governs it. After extensive research, coupled with my own experiences, I have come to the conclusion that all sexual expression for adults should be completely protected by the First Amendment, and the obscenity doctrine should be overturned.

156 Margaret McIntyre, Sex Panic or False Alarm? The Latest Round in the Feminist Debate over Pornography, 6 UCLA Women’s L.J. 189, 190 (1995).
157 Id.
161 Id.
Conclusion

The law governing obscenity is currently at a cross road, and in which direction it will go remains uncertain. It is apparent that reasonable individuals could disagree at the solution. Ultimately, the only chance for real reform in this area requires reevaluating the entire community standards approach to obscenity, and either specifically defining obscene content or repealing obscenity laws altogether.\(^{162}\)

In an age where the Internet’s global reach is limitless, applying community standards to obscenity creates a potentially insolvable conundrum. Perhaps we as a nation should stand up for higher ideals of autonomy by allowing adult individuals to decide for themselves what appeals to their interests, prurient or not. As vulgar and reprehensible as some materials deemed obscene would appear to be, why shouldn’t we as individuals decide for ourselves, and not be plagued by a paternalistic government and legal system to make the decision for us? In the words of Justice Douglas:

> When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world.\(^{163}\)

We live in a country founded on principles of freedom and liberty, so let us be the keepers of our own tastes, beliefs, and ideas, and let the obscenity doctrine be a page in our history. □

Selena Snow is a third-year law student at MSLaw. She earned her Bachelor of Arts degree at Sarah Lawrence College in Bronxville, New York, in 1999. While at Sarah Lawrence, she studied theater, dance, and constitutional law. Prior to law school, Selena recorded, performed, and toured nationally and internationally in her original theatrical rock group, Erocktica, which she created in New York City in 2000. In 2009 she wrote, directed, and performed in her own biographical musical called Porn Rock: the Musical, which was produced for the International Fringe Theater Festival in New York City. This article was based on an independent study done in Spring 2012 under the wisdom and guidance of Professors Malaguti, Rudnick, and Kilpatrick. Selena would like to thank them each personally for their help and contribution.

\(^{162}\) Hertz-Bunzl, supra note 110, at 182-83.

\(^{163}\) Paris Adult Theatre I, 413 U.S. at 73.
rounding neighborhood. We therefore affirm the judgment of the Land Court judge.”

Needless to say, my client and I were very happy with this decision. Even if I hadn’t been involved with this case, though, I would believe that it is correct. The Court understood that it was the entire mobile home park that was a pre-existing, nonconforming use, and that it was improper to impose single-family home standards on the individual units. Had the Appeals Court decision been allowed to stand, then the protections afforded to pre-existing, nonconforming uses by Mass. Gen. Laws ch. 40A, § 6 would no longer exist. With this decision, however, the SJC has affirmed that towns must comply with their own bylaws and their reasons for denial of an expansion must not be “vague, speculative, or otherwise unsupported by the evidence,” as the court described the Board’s reasons in this case.

Aside from being very happy with the outcome of this case, I was very grateful to have worked on it for several other reasons. It gave me invaluable experience at the Land Court, the Appeals Court and the SJC. Of course, being thoroughly prepared on every aspect of your case is key. You also have to be well-versed in the precedent of your subject matter so that you can draw similarities and distinctions as appropriate. On appeal, you have not one, but several judges who will ask you any number of questions about your case or the area of law in general.

Regarding the trial level of a case, if it is a land use matter, I strongly believe that it should be brought in Land Court. Superior Court has jurisdiction over these types of matters as well, but Land Court judges have expertise in land use law, whereas in Superior Court, you may get a judge who is a former prosecutor, or one who practiced bankruptcy law, domestic relations, or any other area of law. One potential drawback of going to Land Court is that you get a bench trial, so if you have claims that you want a jury to decide, you need to bring them in Superior Court.

I got involved in land use law because, prior to becoming a lawyer, I worked at the Massachusetts Department of Environmental Protection for five years as a paralegal. I worked on a variety of environmental cases, most notably wetlands and septic matters. I graduated from Massachusetts School of Law in 2002 and joined the Chelmsford firm Hall, Finnegan, Ahern & Deschenes, which later became Deschenes & Farrell. The firm concentrated its practice in real estate, primarily permitting and transactional work. I was the attorney at the firm who would take the cases when a problem was encountered—if a developer was denied his permit (as in Wayside) I would appeal it to a state agency or to court as appropriate. Also, I would help clients resolve other land-related problems such as access issues and boundary disputes.

I started my own law office in 2010 where I continue to represent property and business owners in civil litigation, land and title disputes, environmental and zoning appeals, insurance coverage, and contract matters. To find out more about my practice, and to view arguments, materials, and the decision in Wayside, please visit my website: http://www.lawofficeofjuliemcneill.com.

See How They Run

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court, you have to work with assistant district attorneys, probation officers, and judges who may all have a very different view of how a case should be resolved. You also have to work with clients who sometimes have great struggles. Learning how to negotiate and come to solutions that work is invaluable. I also see first-hand exactly what kind of criminal justice reform we need. We’re spending money incarcerating non-violent offenders who need treatment for drug and alcohol abuse. No matter how much we raise awareness of the issue, until we change the law we will continue to waste money on programs that don’t work. We need someone in the Massachusetts State Senate who understands that and can help frame the issues in ways that make change.”

Although Mara’s first run was unsuccessful, she is proud of what she and her supporters accomplished.
A Primer on the Admissibility of Digital and Electronic Communications in the Commonwealth

By Hon. Peter W. Agnes, Jr.1

I. Introduction
Questions about the admissibility of evidence in the form of electronically or digitally stored or transmitted information and related issues arising from the use of devices and services designed to store or transmit such information are among the routine problems that face trial lawyers and judges in judicial proceedings in a digital age.2 This article examines one species of such evidence: communications by means of e-mail, text messaging, Twitter feeds, etc.

The party who offers evidence at trial and in certain other proceedings governed by the formal rules of evidence3 is responsible for demonstrating to the satisfaction of the presiding judge, magistrate, or hearing officer that the foundational requirements for the admissibility of that evidence are satisfied. The intricacies of this issue are best understood by presenting them in context of a hypothetical case, so let’s consider a concrete set of facts to make this more comprehensible. In

1 Peter W. Agnes, Jr. is an Associate Justice of the Massachusetts Appeals Court and an Adjunct Professor of Law at the Massachusetts School of Law. Judge Agnes served as a trial court judge for 21 years in both the District and Superior Court Departments. Justice Agnes gratefully acknowledges the assistance of Nadia Klystov, Esq., a 2011 graduate of MS Law who is currently serving as his Law Clerk at the Massachusetts Appeals Court.

2 As the following cases demonstrate, the range of situations in which the admissibility of electronic or digital information is raised is enormous. See, e.g., Commonwealth v. Barnes, 461 Mass. 644 (2012) (considering constitutional, statutory and common law issues arising out of project known as “OpenCourt,” which broadcasts or “streams live” over the Internet on a daily basis audio and video recordings of the proceedings taking place in the first session of the Quincy District Court); Bulldog Investors General Partnership v. Secretary of the Commonwealth, 460 Mass. 647 (2011) (holding partnership’s communications, through its web site, concerning its financial products, management, and investment philosophy were speech protected by the federal constitution; presentation, press articles, letter, and other materials that were attached to an e-mail sent to prospective customer through the web site constituted an offer of securities pursuant to the state and federal securities acts because they were designed to stimulate interest in partnership’s funds, and the documents that comprised this offer were forms of expression akin to advertising materials); Commonwealth v. Nelson, 460 Mass. 564 (2011) (describing limited circumstances in which evidence seized pursuant to a warrant issued based upon communication by telephone and facsimile transmission would satisfy state law); Commonwealth v. Tavares, 459 Mass. 289 (2011) (discussing the one-party consent exception under the Massachusetts Wiretap Law); Commonwealth v. Werner, 81 Mass. App. Ct. 689 (2012) (addressing problem of improper use of social media networks by trial jurors); Commonwealth v. Hall, 80 Mass. App. Ct. 317 (2011) (addressing issues involving child pornography in connection with images received and viewed on a cell phone); Commonwealth v. Dodson, 80 Mass. App. Ct. 307 (2011) (finding evidence that defendant had a subscription to an internet adult dating service was relevant to motive, and thus admissible in prosecution of defendant for attempted dissemination of matter harmful to a minor and discussing issues relating to internet communications between defendant and undercover police officers); Commonwealth v. Walerz, 79 Mass. App. Ct. 132 (2011) (finding evidence seized by police, which consisted of electronic mail messages printed from the defendant's computer, fell within the scope of a search conducted on the basis of consent by defendant's girlfriend); Commonwealth v. Amaral, 78 Mass. App. Ct. 671 (2011) (holding document provided by company providing web-based e-mail services, indicating that a certain e-mail address was registered to an individual bearing defendant’s name, was admissible under business records exception to hearsay rule).

3 Massachusetts is one of only several states in the United States which has not codified the law of evidence into a set of rules based on the Federal Rules of Evidence or the Uniform Rules of Evidence. Instead, Massachusetts evidence law is an amalgamation of statutes, common and constitutional law, and court rules. However, a committee appointed by the Supreme Judicial Court has developed the
February 2012, a lawsuit was filed by Jim Jones (JJ) against Mary Moss (MM), his former girlfriend, in which Jim sought to recover damages because Mary has harassed and stalked him, sent threatening text messages to him, his new girlfriend, and members of his family, and caused extensive damage to his new Lexus automobile while it was parked in the driveway of Anita Ames (AA), his new girlfriend. In his lawsuit, JJ refers to conduct by MM that took place between the period just after Thanksgiving, 2011 up to New Year’s Day, 2012. On that day, JJ called the police because he said MM was outside the front door to AA’s home, spray painting obscene pictures and slogans on AA’s home and JJ’s automobile. When the police arrived, JJ told them that MM had fled. He gave the police identifying information about MM, including her address and her vehicle’s license plate number. MM was not at home when the police went to her address, but she was interviewed several days later, denied any involvement, and offered an alibi (and the names of alibi witnesses), saying she was in New Hampshire from the morning of New Year’s Eve until late on New Year’s Day. She was not arrested. JJ was told he could seek a criminal complaint. He did so but at a clerk’s hearing, the matter was continued generally for six months based on AA’s agreement to the issuance of a restraining order (issued by the court in a separate proceeding under Mass. Gen. Laws ch. 209A) and a representation by MM’s attorney that she would remain away from and have no contact with JJ and AA.

The trial of the stalking-harassment case comes before the District Court of Andover-Essex for trial. Both parties waive their right to trial by jury. After the judge conducts a final pretrial conference to explore the potential for settlement, she asks the parties (each of whom is represented by counsel) to outline the nature of the case and to identify any exhibits they propose to offer. Attorney P, counsel for JJ, indicates that his client, JJ, will testify to the nature of the relationship between JJ and MM which began in late 2010 and ended abruptly around Thanksgiving time in 2011, the events of the break-up which include: (1) JJ allegedly confronting MM around that time with the fact that she had been arrested for her involvement in a drug distribution ring and his suspicions that she had been stealing from him to feed a drug habit, (2) an incident on December 10th when his new car was damaged by an act of vandalism (spray painted with red paint and the words “bleed mother f..... bleed”) while it was parked in AA’s home driveway, (3) the threatening e-mails and text messages, and (4) the second spray painting incident. Attorney P also informs the trial judge that he will offer into evidence two e-mails sent to him by MM in which she makes disparaging remarks about JJ and AA and threatens retaliation for the break-up and one e-mail sent directly to AA. Attorney P also indicates that he has text messages from MM to JJ’s cell phone on New Year’s Day, 2012 that he will offer and pictures that were on the wall of MM’s Facebook page that show some of the obscenities MM allegedly spray painted on AA’s house.

Attorney D, counsel for MM, indicates that her client vehemently denies all of the misconduct alleged against her and explains that the drug arrest was due to the fact that unknown to her, her roommate’s brother was using her apartment as a drug stash and, unfortunately, she happened to be at home when the police arrived with a search warrant. Attorney D also states that her client denies sending any improper e-mails or text messages or engaging in any spray painting incidents. She adds that her client will testify that the

*Massachusetts Guide to Evidence* (2012 ed.) (“Guide”), an authoritative compilation of Massachusetts evidence law which is organized along the lines of the Federal Rules of Evidence but based on the current law in Massachusetts. Each statement of law in the Guide is supported by extensive explanatory notes. The Guide is distributed annually to every trial judge courtesy of the Flaschner Judicial Institute. The Guide is in widespread use by the bar and has been cited frequently by the Supreme Judicial Court and the Appeals Court. The Guide provides that the formal “rules” of evidence, which refer principally to the law of hearsay, applies in judicial proceedings as distinguished from administrative proceedings unless otherwise noted. Mass. G. Evid. § 1101(a) (2012 ed.). The Guide also contains a list of proceedings in which the formal “rules” of evidence do not apply. Mass. G. Evid. § 1101(c)(2) & (3) and (d), and Notes (2012 ed.) (*e.g.*, grand jury proceedings, bail hearings, etc.). The authoritative edition of the Guide used by judges which contains a very useful index is available for purchase from the Flaschner Judicial Institute. The text of the Guide is available as a free pdf download from the Supreme Judicial Court’s web site, *[http://www.mass.gov/courts/sjc/guide-to-evidence/](http://www.mass.gov/courts/sjc/guide-to-evidence/)*.
breakup was over JJ's decision to strike up a relationship with AA, whom MM suspects is jealous of her and who has the technical skill to fabricate evidence because she works as a techie at “Andover-Essex Cyber Fraud Prevention International,” a huge world-wide consulting company that Attorney D says “has something to do with investigating abuses of privacy and theft and destruction of confidential business information by persons using the internet.”

II. Evidence at Trial

We can assume that the evidentiary rulings on any objections to JJ's testimony will be straightforward. Let's assume he describes the events as his attorney outlined them for the judge in a predictable chronological fashion.

A. Alleged E-mails from MM

While JJ is on the witness stand, Attorney P wants to offer into evidence three e-mail messages, originally printed out using JJ's home computer and printer, which bear dates beginning on November 26, 2011, and going through January 3, 2012. The three messages were combined into a single Word™ document which JJ then converted into a single PDF file. The first entry in the file is described by JJ as an e-mail message from MM as follows:

E-mail #1

FROM: MMbadgirl@mdt.com
TO: JJhomeboy@hrs.net

Hey [expletive deleted]!! You think i was born yesterday?? I know all about your new f ... [expletive deleted] bunny Anita!! Good luck you deserve each other!! Just stay away from me and mine and watch your back!! NOTE FROM JJ: I accidently deleted the last paragraph in which MM said she was very patient. JJ

There is no salutation and no signature on this entry. The second so-called e-mail message appears below the first in the same PDF file but does not have any headers or footers and simply reads as follows:

E-mail #2

Hey [expletive deleted]. Saw your car today!! New paint job?? How’s the new f ... [expletive deleted] bunny?? I guess I’m not the only one who thinks you are an as ... [expletive deleted]!!.

There is no salutation and no signature. The third and final e-mail also was copied into the same Word™ document and then converted into a PDF file and is from the same address as the first e-mail.

E-mail #3

TO: AA.Tech12@aecfp.com

Someone I know told me that you put that nasty note on my windshield?? Do ya think I care?? He’s a loser!! You won the raffle on this one except that the prize is Mr. dirt bag of the year!! Have a wonderful New Years f ... [expletive deleted] bunny because you are in for a surprise!!

B. Legal Analysis

Ordinarily, it would be good practice for Attorney P, the proponent of this evidence, or Attorney B, the opponent, to file a motion in limine in advance of the trial seeking or opposing, as the case may be, a ruling on the admissibility of the e-mail messages. This would give the trial judge an opportunity to conduct a hearing, take testimony if necessary, and to make a ruling without the time pressure that exists during a jury trial as a result of the need to make the jury wait while the judge makes a ruling or rulings on the question of whether evidence is admissible.4 However, in our hypothetical case, there is no jury so the trial judge decides to make rulings at the appropriate times during the trial. Let's assume that during JJ's direct testimony the judge allows Attorney P to question JJ about the PDF file he seeks to offer into evidence. JJ testifies that it is his practice at home to convert

4 It is important to note that although Massachusetts law strongly favors the use of motions in limine, an objection made to a ruling on a pretrial motion in limine does not preserve the issue for appellate review. Mass. G. Evid. § 103(a)(3) (2012 ed.). In order to do so, the parties must offer and object to the introduction of the evidence during the trial.
any e-mails or documents he receives electronically into PDF files because it helps him to be more organized. He thinks he deleted the original e-mails and then discarded the printouts of those e-mails. He also explains that he originally copied them into a Word™ document and accidentally left out a paragraph from the second e-mail. He says AA forwarded the third e-mail to him electronically. He then added its contents to the other two and converted that single Word™ document into a PDF. JJ also testifies that he actually received two of these e-mails and that AA told him she received the third one. The third e-mail was addressed, he said, to the business e-mail he recognizes as being the one that Anita uses and which appears on her company’s website. It was dated December 31, 2011. JJ adds that he is familiar with MM’s e-mail address and has seen her e-mail messages using that particular address. Finally, JJ testifies that he has no doubt that the e-mails were sent by MM because she always uses double punctuation to end her sentences such as “!!” or “??.” AA does not testify.

Let’s also assume that the trial judge permits Attorney D to cross examine JJ about the so-called e-mails and that he testifies in a manner that is consistent with his direct testimony. The trial judge also allows Attorney D to question MM, who denies sending any e-mails to JJ, and in addition, who testifies that her best girlfriend Annabel Lee works as a bartender at the Down-n-Dirty Pub in Andover-Essex, Massachusetts, and knows AA, who is a regular customer. MM testifies over objection by Attorney P that Annabel told her she overheard AA say to a group of friends that she (Annabel) and JJ were finally going to put an end to “MM’s bull. . . . when they get to court because they have a great plan and are sure the judge will buy it hook, line and sinker . . . .” Finally, Attorney D argues that the evidence is not admissible because it involves some totem pole hearsay, the absence of the original e-mail violates the requirements of the best evidence rule and the omission of a portion of the e-mail message violates the doctrine of verbal completeness.

1. Relevance and authentication. The foundation requirements for the admission of electronic forms of documentary evidence are essentially the same as they are for more traditional forms of documentary evidence such as writings. The burden of proof is on the proponent. As with all evidence, relevance is the first and most important consideration. Massachusetts follows the traditional rule which is embodied in the Federal Rules of Evidence: “Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” If evidence is relevant, it is admissible “except as otherwise limited by constitutional requirements, statute, or other provisions of the Massachusetts common law of evidence. Evidence which is not relevant is not admissible.” Obviously, if MM sent e-mails as alleged by JJ, the contents of those e-mails are relevant because they are either direct or indirect evidence of MM’s wrongdoing, i.e., her threats and her acts of vandalism, or they suggest she had a motive to engage in such conduct.

However, in order for evidence to be relevant, it must be authentic. The issue is whether the item is what the proponent describes it to be, in this case, a communication from MM. All authentication questions are preliminary questions of fact.

7 See, e.g., Commonwealth v. Phim, 462 Mass. 470, 477 (2012) (“We have recognized repeatedly that evidence of a defendant’s gang membership risks prejudice to the defendant in that it may suggest a propensity to criminality or violence. Nevertheless, gang affiliation evidence is admissible to show motive.”) (citation and quotation omitted).
9 See Gorton v. Hadsell, 63 Mass. 508, 511 (1852) (explaining that Massachusetts follows the orthodox principle under which “it is the province of the judge . . . to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility.”); Mass. G. Evid. § 1101(c)(1) (2012 ed.).
Every time a witness testifies, there are foundation requirements that must be satisfied. Is the witness competent?10 Does the witness have personal knowledge of the subject matter of her testimony?11 Often, there is no dispute over these preliminary questions of fact and thus no occasion for the judge to make any ruling.

Some preliminary questions of fact are entirely for the judge. For example, whether a witness is competent, whether an expert witness is qualified, and whether a scientific principle is reliable are questions reserved for the judge. The judge is the final arbiter of the credibility of witnesses in making such determinations,12 and her ruling on the matter is final as to the admissibility of the evidence.13 The jury is not required to make its own independent determination of that preliminary question but is free to give the evidence whatever weight or degree of importance it decides the evidence should be given.14 With respect to other kinds of evidence, preliminary questions of fact are decided initially by the judge, but the final determination of the weight, if any, that the evidence will be accorded is left up to the jury.15 One example of this type of evidence is the admissibility of so-called prior bad acts in criminal cases not to prove that the defendant is a person of bad character, but to prove a subsidiary question like intent or knowledge.16 Authenticity is another one of these questions. If the evidence is sufficient to permit the jury to find an item of evidence is authentic, it should be admitted if the other requirements for admission are satisfied.17 Again, it then becomes a matter for the jury to decide “its weight and credit.”18

When a judge is determining preliminary questions of fact, the “formal” rules of evidence do not apply. In such cases, for example, the judge may consider hearsay.19

In the context of e-mails and text messages, the importance of authentication cannot be underestimated. “It appears patently clear that in the computer age, one may set up a totally fictitious e-mail account, falsely using the names and photographs of others.”20 The Supreme Judicial Court clarified and amplified the requirements that must be met for authentication in Commonwealth v. Purdy.21 In Purdy, the SJC drew an analogy between electronic communication and telephone conversations: “The role of the trial judge in jury cases is to determine whether there is evidence sufficient, if believed, to convince the jury by a preponderance of the evidence that the item in question is what the proponent claims it to be.”22 When, as in our hypothetical case, the relevance of the evidence depends on whether it was authored by a particular person (here MM), the proponent of the evidence must offer sufficient evidence to satisfy the judge that a jury could find it is more likely than not that (i) the PDF document in question is actually the text of a series of e-mails and (ii) that they were authored by MM. In Purdy, the SJC explained that “[e]vidence may be authenticated by direct or circumstantial evidence, including its `[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics.’”23

As the Texas Court of Criminal Appeals aptly stated:

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Jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consis-
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10 See Mass. G. Evid. § 601(c) (2012 ed.)
13 See Nally v. Volkswagen of Am. Inc., 405 Mass. 191, 197-99 (1989); Mass. G. Evid. § 104(a) and cases cited in Note (2012 ed.)
15 See Mass. G. Evid. § 104(b) (2012 ed.)
16 See Commonwealth v. Leonard, 428 Mass. 782, 785-86 (1999) (judge must decide by preponderance of the evidence that jury could reasonably conclude that the act occurred and that the defendant was the actor). See also Mass. G. Evid. § 404(b) (2012 ed.)
17 See Hove v. City of Boston, 311 Mass. 278, 281-82 (1942) (preliminary question of whether photograph was admissible as a true representation of the location where the accident occurred [at the time it occurred] a question for the trial judge).
19 See Mass. G. Evid. § 104(a) (2012 ed.)
22 Id. at 447.
23 Id. at 447-48, quoting Mass. G. Evid. § 901(b)(1), (4).
tent with Federal Rule 901 and its various state analogs. Printouts of e-mails, internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. Such prima facie authentication has taken various forms. In some cases, the purported sender actually admitted to authorship, either in whole or in part, or was seen composing it. In others, the business records of an internet service provider or a cell phone company have shown that the message originated with the purported sender’s personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone. Sometimes the communication has contained information that only the purported sender could be expected to know. Sometimes the purported sender has responded to an exchange of electronic communications in such a way as to indicate circumstantially that he was in fact the author of the particular communication, the authentication of which is in issue. And sometimes other circumstances, peculiar to the facts of the particular case, have sufficed to establish at least a prima facie showing of authentication.24

JJ’s testimony before the court is direct evidence sufficient to establish that the PDF document contains a series of e-mails and that they were authored by MM. JJ testified he received these e-mails and created the PDF documents himself from the three e-mails. Even if the judge finds MM’s overall testimony to be more credible than JJ’s testimony, the judge’s reservations about JJ’s credibility are not determinative of whether the evidence will be admitted. This is the type of preliminary question of fact that is not left entirely up to the judge. So long as the judge is satisfied that a jury could find the foundational facts, the judge should admit the evidence and leave its weight to the fact finder.

Even if JJ was not able to testify that he recognized MM’s e-mail address, the court could still determine that the obligation to authenticate the e-mails was met by circumstantial evidence. “A judge making a determination concerning the authenticity of a communication sought to be introduced in evidence may look to ‘confirming circumstances’ that would allow a reasonable jury to conclude that this evidence is what its proponent claims it to be.”25 For example, the judge could find “confirming circumstances” based on JJ’s testimony that MM has a distinctive way of expressing herself in e-mails (e.g., the use of certain profanities and the double exclamation points and question marks after every sentence) and that these features appear in other e-mails he received which he knows were from MM because they discussed their contents.26

Admission of electronically stored or transmitted evidence may be enhanced by an emerging discipline known as forensic linguistics, in which an expert witness may be qualified to offer opinions about whether a writing is authentic based on an analysis of a known person’s writings and comparison of the known writings with evidence sought to be attributed to the person. Such experts seek to determine whether there are significant points of similarity in the usage, style, and grammar (“digital fingerprints”), as opposed to the methods used by experts in traditional forms of handwriting analysis, that permit an inference to

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25 Purdy, 59 Mass. at 448-49.
26 In Purdy, the SJC offered these illustrations of circumstantial authentication: “Thus, a witness who lived in the same home as the victim was allowed to testify about the statements made by a caller who claimed to be the defendant, where she had previously answered other telephone calls from a person who identified himself as the defendant, the behavior of the victim and defendant on these previous occasions corroborated the identity of the caller, telephone records showed that a call had been placed from the defendant’s telephone number to the victim’s residence around the time of the call in question, and the defendant said he had telephoned the victim’s residence that day. Similarly, where a witness placed a telephone call to a ‘land-line’ telephone number located in an apartment in which the defendant was the only male resident, where the male answering the telephone had the same voice as the male who had answered previous telephone calls to that telephone number, and where the male provided information during the telephone call that confirmed his identity as the defendant, the telephone call was sufficiently authenticated and properly admitted in evidence.” 459 Mass. at 449 (citation and quotation omitted).
be drawn that the unknown sample was written by the known author. What is clear, however, is that just as a phone call cannot be authenticated simply on the basis of evidence that the caller identified himself as a particular person, neither can an e-mail or text message be authenticated simply on the basis of a name that appears in the text or the identity of the subscriber information for the e-mail account or service in question.

In cases in which an e-mail or text message is found to have originated from a computer or device that is used by a number of different people who all might have access to a particular e-mail or text messaging service (e.g., members of a family or co-workers), there is the possibility that the message was sent by someone other than the person who is suspected of sending it. However, if circumstantial evidence exists which supports the view that the communication came from a particular person, the mere possibility that someone else misused the computer or hacked into someone’s e-mail service is not sufficient to result in the exclusion of the evidence. Finally, in Purdy, the SJC explained that “we do not suggest that expert testimony or exclusive access is necessary to authenticate the authorship of an e-mail. Nor do we suggest that password protection is necessary to authenticate the authorship of an e-mail, even though there was such protection here.”

In order to assist both lawyers and judges with the various authentication issues, the current edition of the Massachusetts Guide to Evidence contains a new section based on Purdy explaining the requirements for authenticating electronic communications. Section 901(b)(11) provides:

Electronic or Digital Communication.
Electronic or digital communication, by confirming circumstances that would allow a reasonable fact finder to conclude that this evidence is what its proponent claims it to be. Neither expert testimony nor exclusive access is necessary to authenticate the source.

Another consideration that arises in connection with the admission of every item of relevant evidence, testimonial or physical, is the potential for its exclusion if the opponent is able to establish to the satisfaction of the judge that the probative value of the evidence is substantially outweighed by its prejudicial effect. Here, it is important to understand that the term “prejudice” does not refer to the inherent prejudice suffered by a party when highly probative and material evidence is offered by the opposing party. Rather, the term “prejudice” in this context refers to the potential for unfair prejudice resulting from the fact-finder’s relevant to the weight, not the admissibility, of these messages.”). See also Paul R. Rice, Electronic Evidence: Law & Evidence 348 (2d ed. 2008) (Self-identification in an unsolicited e-mail supports authenticity, but is not, by itself, considered sufficient).

Purdy, 459 Mass. at 451 n.7.

See Mass. G. Evid. § 403 and Note (2012 ed.). For example, in Hogan v. Gordon, No. 08 MISC 376292, 2011 WL 4863478 (Mass. Land Ct. Oct. 7, 2011), the trial court excluded an email as not relevant to the easement rule dispute; in Mariano v. Pacella, 79 Mass. App. Ct. 115 (2011) (Rule 1:28), the contents of an email correspondence between parties was held not relevant to the freeze-out claim and cumulative of the other available evidence in an unpublished decision. The test applies not only in court proceedings, but in administrative hearings as well. Thus, in Doe v. Sex Offender Registry Bd., 81 Mass. App. Ct. 1333 (2012) (Rule 1:28), the Massachusetts Appeals Court held in an unpublished disposition that a hearing examiner did not abuse discretion by excluding printouts of MySpace pages in which victim allegedly posed as a 17-year-old, as they were not relevant and amounted to an attack on victim’s credibility.

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27 The admission of expert witness testimony in the form of an opinion that a particular document was authored by a particular person based on comparisons of its contents with the contents of writings by a known author for purposes of authenticating the document is controversial, and Massachusetts appellate courts have yet to decide the issue. See generally United States v. ZaJac, 748 F. Supp. 2d 1340 (D. Utah 2010). See also Jack Hitt, Words On Trial: Can Linguists Solve Crimes that Stump the Police, The New Yorker, July 23, 2012, at 24-29; Ben Zimmer, Decoding Your Email Personality, N.Y. Times, July 23, 2011.

28 See Purdy, 459 Mass. at 450 (“Evidence that the defendant’s name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant’s name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant. There must be some ‘confirming circumstances’ sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails.”).

29 Purdy, 442 Mass. at 451 (“The defendant’s uncorroborated testimony that others used his computer regularly and that he did not author the e-mails was
misuse of the evidence.\textsuperscript{32}

\textit{Practice tip.} The authenticity of an electronic communication may be the subject of a stipulation. If your opponent agrees that his client or witness authored the communication, there usually will be no necessity to engage in the authentication analysis.\textsuperscript{33} Because proof of authentication may require the use of witnesses and evidence that is not required for the trial itself, lawyers are advised to obtain stipulations to the admissibility of such evidence well in advance of trial.

2. The best evidence rule. Returning to our hypothetical, Attorney D also argued that the court should not admit the evidence because JJ’s manipulation of the original e-mails and conversion of the text into a PDF file violates the best evidence rule. “The best evidence rule provides that \textit{‘to prove the content of a writing or recording, the original writing or recording is required, except as otherwise provided in these sections, or by common law or statute.’}”\textsuperscript{34} In \textit{Commonwealth v. Amaral}, the Appeals Court noted that the applicability of the best evidence rule in the context of electronic communications is questionable both because the doctrine was developed before the era of digital communications in which, in a sense, there are no original writings,\textsuperscript{35} and Massachusetts law includes a broadly worded statutory provision that appears to authorize the routine use of copies of data stored in electronic form.\textsuperscript{36} In any case, in our hypothetical, the fact that JJ testified that he originally received two of the e-mail messages and has personal knowledge that AA received the third one, has personal knowledge of their contents, copied them from the “original” printouts, and lost or destroyed the “originals” should address any concerns that the content of his PDF file violates the best evidence rule.

3. The doctrine of verbal completeness. “When a party introduces a portion of a statement or writing in evidence the doctrine of verbal completeness allows admission of other relevant portions of the same statement or writing which serve to ‘clarify the context’ of the admitted portion.”\textsuperscript{37} “The purpose of the doctrine is to prevent one party from presenting a fragmented and misleading version of events by requiring the admission of other relevant portions of the same statement or writing which serve to clarify the context of the admitted portion.”\textsuperscript{38} In the present case, there is no evidence before the judge that any material that was omitted from one of the e-mails would, if available, change the meaning or significance of what portions were preserved by JJ. In a case in which counsel believes the opposing party has

\textsuperscript{32} The general rule is that a reviewing court will give judges more leeway in admitting evidence in a jury-waived trial than in trial by jury. Although judges are bound to follow the rules of evidence, in a jury waived case, because the judge is acting as both the gatekeeper of the evidence and the trier of fact, he or she will necessarily be privy to information a jury would not. Judges are presumed capable of disregarding any evidence offered but deemed inadmissible, and in giving appropriate weight to evidence admitted. \textit{See, e.g., Commonwealth v. Watkins}, 63 Mass. App. Ct. 69, 75 (2005), \textit{Commonwealth v. Collado}, 426 Mass. 675, 677 (1998) (The law presumes judge can sort out what evidence is admissible and inadmissible and rely only on the former).


\textsuperscript{36} Mass. Gen. Laws. ch. 233, § 79K, inserted by St. 1994, ch. 168, § 1, permits the admission of a duplicate “computer data file or program file.” This was interpreted in \textit{Amaral} to include electronic or digital communications such as emails or text messages stored on a computer’s hard drive. \textit{Amaral}, 78 Mass. App. Ct. at 675-76.


purposely or inadvertently omitted material and relevant portions of an electronic communication from a proposed exhibit, counsel should seek discovery of the entire e-mail and, alternatively, consider issuing a subpoena to the e-mail provider for a copy in the event it has been preserved. 39

4. Hearsay issues. The admissibility of electronic communications such as e-mails and text messages may also present hearsay issues. Electronic communications, no less than verbal declarations, if intended as an assertion of some fact (like those involved in the present case) are “statements” within the meaning of the rule against hearsay, 40 and will be inadmissible if offered into evidence for the truth of the matter asserted unless they fall into one of the recognized exceptions. 41 In our hypothetical, the e-mails are alleged to be the statements of MM, a party opponent. Under Massachusetts law, such evidence is described as non-hearsay as opposed to an exception to the hearsay rule. 42

5. Privileges. In Massachusetts, most evidentiary privileges are set forth in statutes and are conveniently listed and annotated in the Guide to Evidence. 43 Our hypothetical does not implicate any privileges, but it is not uncommon to encounter privilege issues in connection with the admissibility of electronic communications. One privilege commonly encountered is the attorney-client privilege. 44 Other privileges that may arise include the spousal privilege and disqualification, 45 and the patient-psychotherapist privilege. 46

Conclusion

Contemporary litigation in both civil and criminal cases requires lawyers and judges to become familiar with the principles governing the admissibility of electronic communications including the fundamental requirement of authentication. Although a myriad of factual situations may arise and the danger of falsified evidence is ever present, the principles for authenticating this evidence, whether in the form of e-mails, text messages, twitter feeds, postings on web pages, etc., are based on an established body of case law dealing with writings and telephone calls.

This law is set forth in the Massachusetts Guide to Evidence which contains a new provision, section 901(b)(11) (2012 ed.), modeled on the SJC’s decision in Commonwealth v. Purdy, discussed above. 47 Massachusetts law provides that authentication turns primarily on whether the proponent of the evidence can establish that there

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39 Another consideration for lawyers dealing with electronic forms of evidence like e-mails, etc., is the doctrine of spoliation. See Mass. G. Evid. § 1102 (2012 ed.). This doctrine authorizes a judge to impose sanctions against a party for the “negligent or intentional” destruction of evidence. The doctrine requires proof that at the time the evidence is destroyed, the party in question knew or reasonably should have known that it could be important in litigation. See Kippenhan v. Chaulk Serrs., Inc., 428 Mass. 124, 127 (1998).

40 See Mass. G. Evid. § 801(a). A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Mass. G. Evid. § 801(a) (2012 ed.).


47 See supra note 8 and accompanying text.
MSLaw Recognized Again for Outstanding Television Productions

MSLAW Assistant Dean Diane Sullivan and Director of New Media Kathy Villare were again recognized for their outstanding work by both the Women in Media Foundation and the New England Chapter of the National Academy of Television Arts & Sciences. Dean Sullivan’s one-on-one interview with former Judge Nancy Gertner of the Federal District Court of Massachusetts won a Gracie Award in the Outstanding Talk Show—Entertainment/Information category and was a finalist for a local Emmy as well. In the show, Dean Sullivan interviews Judge Gertner on a number of topics, particularly her 2011 book In Defense of Women, in which she writes about her efforts to succeed in a male-dominated profession. Before being named to the Federal District Court in 1997, Judge Gertner distinguished herself representing controversial clients in high profile cases, among them anti-war activist Susan Saxe, who was charged with murder as a result of her participation in a 1970 bank robbery in which a police officer was killed. Saxe was one of the few women ever to be on the FBI’s Most Wanted List. Among Judge Gertner’s other notable clients were Lisa Grimshaw, an abused woman charged with murdering her husband; Clare Dalton, a Harvard Law School Professor suing for sex discrimination; and Matthew Stuart, brother of Charles Stuart. Charles Stuart spawned a period of racial unrest in Boston when he allegedly killed his wife and blamed it on a black man.

Finalists for local Emmy Awards are chosen from numerous submissions and is an honor in and of itself. The Gertner show was one of seven finalists considered in the Interview/Discussion category. This category recognizes excellence in a program, series, or special consisting of inter-

Nancy Giles with Kathryn Villare and Assistant Dean Sullivan

view/discussion material that is at least 75% unscripted.

Professor Holly Vietzke and producer Pamela Sinton-Coffman were also honored for the show “The Future of Women’s Softball,” which examined the reasons behind the International Olympic Committee dropping the sport and the decline of a national league, amid an increase in national television coverage. The show, which won a Clarion Award in the category of sports programming, featured interviews with former Olympic pitcher and current ESPN commentator Michele Smith, Amateur Softball Association Commissioner Joseph Alfonse, and professional softball player Carrie Leto Martin.
On June 1, 2012, the Massachusetts School of Law graduated its 23rd class. Associate Dean Michael Coyne passed out bracelets to graduates with the letters “WWDD?” He asked the graduates to consider what Dean Velvel, Dean Kaldis, or Dean Sullivan would do when they face a difficult question. He said, “As lawyers, we get to do work that matters. Find work that matters to you and make a difference. And when faced with those hard difficult choices that a lawyer is often called to make of what’s right or how can the law be cleverly manipulated to permit the client to do that which is not right, take a step back and think hard about how those three Ds would address this problem. Think hard about how each of them over the last 25 years has solved the everyday challenges and individual struggles in building your law school—a law school that still stands hard for doing the right thing.”

Associate Justice Peter Agnes, Jr., who is also a long-time adjunct professor at MS Law, received an honorary degree and gave the commencement address. As part of his address, he quoted from The Eagles’ classic “Hotel California”: “we are all just prisoners here of our own device.” He warned students not to become prisoners of their own electronic devices so that they can concentrate and be fully engaged with both their families and their clients.

The first Sullivan Scholars, named in honor of Assistant Dean Diane Sullivan, were John Fisher and Casey Powers. Both spoke to their fellow classmates about their shared accomplishments, their thanks to the faculty and their families, and their hopes for the future.
**Honorable Mention**

**Law Day and Animal Rights Day honor MSLaw alumni**

MSLaw students and faculty celebrated Law Day at Indian Ridge Country Club on May 5, 2012. Polly Tatum, an MSLaw alumna and President of the Worcester County Bar Association, was this year’s honoree. Attorney Tatum is a domestic relations attorney and family mediator, who has conducted over 1400 divorce and family mediations. Ms. Tatum’s commitment to her community involves past and present work with United Way, Dr. Martin Luther King Jr. Business Empowerment Center, Girls, Inc., Dr. Martin Luther King, Jr. Community Breakfast Committee, First Night Worcester, and the Central Massachusetts Legal Assistance Corporation.

She spoke about her experiences in the legal profession and the challenges of building a rewarding law practice while raising a family. As the first African American woman elected president of the Worcester County Bar Association, and only the third female President, she emphasized the importance of networking and joining bar associations. Ms. Tatum’s daughter, Jamee, is now attending MSLaw.

Dean Velvel presented Marc Pepin and Effie Panagiotakis with Dean’s Awards for personifying the MSLaw mission of hard work leading to achievement.

SBA President Joshua Darakjian awarded Tyrone Scott, Building and Ground Coordinator, and Kathryn Villare, Director of New Media, Community Spirit Awards for their service and commitment to the school.

Casey Powers won the Kleinman Award this year. Winners receive a $1,000.00 award for writing the best essay on a legal, professional responsibility issue developed by Sidney Kleinman who has been a lawyer in Chicago for approximately the last 40 years.

In April, the law school hosted its very popular Animal Rights Day for the sixth year. Attendees enjoyed learning about tiger legislation, current MSPCA projects, handling animal abuse calls, and the effects of Colony Collapse Disorder on our food supply. Children enjoyed arts and crafts, face painting, a visit from the always popular Curious Creatures, and an Easter egg hunt, while attendees of all ages packed the room for the Essex County Sheriff’s Department canine team demonstration.

The annual Humaneitarian Award featured a surprise. The award, which is given to someone who demonstrates activism on behalf of animals, is chosen by Assistant Dean Diane Sullivan, and this year’s recipient was Rose Church, an MSLaw alumna, who has worked tirelessly to end the exploitation of tigers in the United States. At the conclusion of her acceptance speech, Associate Dean Michael Coyne announced the presentation of a second Humaneitarian Award: to Sullivan herself. Coyne explained to the crowd, “We had to keep it a surprise because she would never have allowed it if she knew,” to which Sullivan shouted, “You’re right!”
Did you always want to go law school?

Yes, ever since I was a young girl. I never pursued it because I grew up being told that I will never be successful. I believed these words, and my life went in many different directions, good and bad!

Why did you believe these words?

These words became real to me because I had low self-esteem. I grew up in an alcoholic home. My dad seemed like a very powerful man. He had a way of getting my siblings and me to believe anything he would say including how dumb, stupid, ugly, and unsuccessful I was going to be. I heard this so many times that I believed it to be true.

So when did things change for you?

I remember the exact day: August 10, 1994. I decided to put the drugs and alcohol down for good. I believed in what people were saying to me in Alcoholics Anonymous. They showed me through a 12-step program that I am good, I am strong, and I can do and be anything I want to be!

How did you choose MSLaw?

About 18 years ago, I walked into Richard Consoli’s (Attorney Consoli teaches Family Law at MSLaw) office for a divorce from my second husband. Dick and his wife were petrified of me. I am not sure why. Perhaps it might have had to do with the fact that I was a biker, with black leather everything, long bleached white hair, and all the tattoos? Dick’s wife would tell him to leave the conference room door open in fear that I might do something to him. Over time, this gentleman encouraged me to change. He encouraged me to put down the bat and believe that I am good. I went to a Christian weekend and got blown away by what I learned spiritually. I learned that Dick was right—I am good, and I can be successful in anything that I can put my mind to.

Every time I would go visit after that, he and his wife could not believe that I wasn’t angry and not saying the “F” word in all my sentences. They were shocked that I removed the leather look.

Dick always would say that I would be a great attorney. He said that I could help lots of people through my experiences—my former drug addiction and the experiences I had with that, the many issues I had with handling three children on my own—and would be inspirational to others. He would always say how proud he was of me when wonderful things happened. For example, I went to Northern Essex and received an associate’s degree in computer applications and operations. Today, if you walk into Dick’s conference room, you will see a picture of me in my cap and gown, smiling because it was snowing during my very special day. I thought, Oh my, my parents never cared enough to put a picture of me—why would they? Dick was proud of me. He encouraged me to continue. I went on to get my bachelors in education at Southern New Hampshire University and then my masters in education.

When I was continually getting laid off, Dick, his wife Maryellen, and my wonderful husband encouraged me to follow my lifelong dream. So, I decided that I was going to go towards my dream. I will tell you that I was afraid—I was an older woman who learned how to read in my 30s—and I feared I couldn’t do it. But, with the encouragement of my husband and the inspiration of my special needs son Craig, I jumped in.

Today, I will tell you that Dick, Maryellen, my husband Julio, and all six of our children are my continued on next page
The Reformer

angels sent by God. Without them I would not be the woman I am today.

**How do you juggle law school and family life?**

My first year of law school was difficult. Not just the subject matter but family life. The first semester I was just trying to figure out the way of the school. Oh my gosh, the writing style, the hours upon hours of studying, reading, organizing, etc. Then the second semester came, and I had a little more control. I was really doing well; midterms were great. Then, boom—a bombshell hit a week before finals: my son Craig was diagnosed with a pituitary tumor which had to be removed immediately. It was taking total control of his body. I took the finals but did not do well. I did not pass two of them. I was so frustrated. I thought, *How I am going to do this?* Well, with the help of the academic support program, the writing lab, Dean Coyne, and Dean Sullivan, I was able to pull through. The support of other students and the above staff gave me the boost I needed to realize that I can do this. If my son can go through brain surgery and continue on with life—why can’t I. And I am!

**What do you want to do when you graduate and pass the bar exam?**

My goal is to be a special education attorney (pro bono mostly) and also practice juvenile law. I believe that I can be an asset to all juveniles through my experiences throughout my life.

Also, I have struggled being a parent of special needs children. Many times a lawyer would have made the difference as to whether my children did or did not achieve some goals. But being single and unable to work for multiple reasons, I could not afford one. My dream is to give to others what I couldn’t afford myself. I want to help ALL children and their families.

**Have you taken any courses, or will you take any courses that will help you gain experience and contacts in the legal community?**

I am currently a member of the Women’s Bar Association and Massachusetts Bar Association. I am currently volunteering at a criminal attorney’s office. This fall I am taking the juvenile clinic class as well.

**What problems do you think you will encounter as a lawyer?**

Lawyers can experience very exciting, highly paid and interesting careers. They can also suffer from extreme stress, guilt, and alienation after years of dealing with humans in crisis. Whether the benefits of being a lawyer outweigh the drawbacks is largely a matter of individual preference. I fear that I may not know whether it’s a suitable career for me until I have gone all the way through law school and become a practicing lawyer.

Right now, however, it feels GREAT!!! I think I will go with that for now, keep my feet planted where they are. I can’t think about the future now…I need to pass my writing class!

**Has law school changed you in any way?**

Wow, in so many ways. I see the law from the other side. I understand why law is not cut-and-dried. Studying law is exciting and has changed my vocabulary, my way of thinking, my perspective on life, and my passion. I have grown to respect the law and how it works. I love learning and watching the law change.

Have you ever seen the 1966 movie, “Blow-Up,” directed by Michelangelo Antonioni? In the movie, a young photographer snaps a photo of a couple kissing in the park. Proud of having captured a simple yet magical moment, he rushes home to develop the shot. But as the image develops, he notices something in the background that he didn’t realize was there. Each time he blows photo up larger, he sees more and more detail that leads him to believe a crime may have been committed, and his camera may have been the only witness.

From my experience, law school requires you to hone and intensify your ability to see things (in the form of issues) that most people would miss completely. This gives you a greater awareness of your environment and how your actions, or the actions of others, will impact society and be treated by our legal system. In the process, you learn to better evaluate the facts that support or refute a given conclusion.

I’ve noticed throughout my life that most people don’t really want to consider all the facts when formulating an opinion. People are generally drawn to the conclusion that makes them “feel
good.” In fact, they tend to resist facts or reasoning that challenge the validity of such conclusions.

Massachusetts School of Law School teaches logic, and tries to help me see that there is rarely a single answer to difficult problems in the law or in the world generally. To be a good lawyer one must be able to figure out what the “other side” may think about an issue, what the “other side” may argue, so that the lawyer can develop his or her own arguments. In a sense, therefore, a lawyer needs to be able to better appreciate the “opposing” position. To the extent that law students come to law school with fixed ideas about the world, based on the assumption that there is no plausible argument for an opposing position, then law school attempts to broaden the student's (future lawyer's) capacity to see the opposing argument, to make him or her more open-minded.

Perhaps this process of intellectual development will cause some persons to rethink their positions on issues they thought were settled in their mind before. But my law school education is not trying to change my substantive views, only to help me to think about those issues. And surely someone who comes to law school with a highly developed set of values is not going to have his or her view views turned 180 degrees.

In the course of my “transformation” in law school, I will hope to stifle much my ability to accept a conclusion based upon the “feel good test.”

So I need to be careful as to what I wish for! But remember, because of a person’s unique ability to see legal issues with such clarity, people will pay you to guide them through the legal mine field that is life.

Digital and Electronic Communications
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are “confirming circumstances” supporting the identity of the author of the communication. Expert witness testimony is not required. It is not sufficient merely to establish that the e-mail purports to be from an identified person, or the identity of the person who owns the device on which or from which the communication was created or transmitted or the service used to accomplish the same. Although technology will undoubtedly continue to evolve, leaving most of us at a loss to explain how it works, lawyers and judges can rely on much of the traditional law of evidence to manage questions about the admissibility of the communicative products of this technology in judicial proceedings.

Join the Justices!
As it has in years past, MSLaw welcomes the Court of Appeals for a live sitting in our historic courtroom. All are invited. If you would like to have lunch with the justices following the oral arguments, contact Professor Paula Colby-Clements at pcolby@mslaw.edu to reserve a spot.

Thursday, November 15
9:30 a.m. to 1:30 p.m.
Courtroom
### Upcoming Events

**Legal Education Seminars**

- **Alimony Summit**
  
  Tuesday, November 27, 8:30 a.m. to 4:30 p.m.
  
  Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

- **Massachusetts Uniform Probate Code**
  
  Friday, November 30, 9:00 a.m. to 1:00 p.m.
  
  Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

**Other**

- **Talk the Vote Live Broadcast**
  
  Wednesday, October 17, 8:00 p.m. to 10:00 p.m., Courtroom
  
  Join WBZ NewsRadio and Nightside’s Dan Rea, broadcasting from MSLaw’s historic courtroom. Rea will discuss issues that are critical to the upcoming Presidential election. Reserve a seat at cbsboston.com/wbzvote or e-mail Professor Paula Colby-Clements at pcolby@mslaw.edu. Attendees may arrive at 6:00 p.m. to speak with Rea before the show airs.

- **School + Spirit = Success!**
  
  Monday, October 22, 12:00 p.m. to 6:00 p.m.
  
  Wear your undergraduate school spirit and learn about the NEW CAREER SERVICES OFFICE UPDATES. Prizes will be given in the café for the one who wears the most school spirit in the following categories: 1L, 2L, 3L, & Faculty. Career resources will also be shared with all who attend.

- **MSLaw Networking Event**
  
  Thursday, October 25, 4:00 p.m. to 8:00 p.m., Chili’s Grill & Bar, Andover
  
  An informal networking opportunity for students, alumni, and faculty to share contact information, updates, and memories. This event will take place on the fourth Thursday of every month (except November) at the same time and place (Chili’s). For more information, e-mail the Assistant Director of Career Services Becki A. Jacobson at jacobson@mslaw.edu.

- **Trick-or-Treat Networking Event**
  
  Wednesday, October 31
  
  A networking training event where students will hand out business cards to the faculty and staff in exchange for candy and feedback on the student’s introduction style.

- **Football, Wine, Cheese, and—what else—Botox! An Alumni and Faculty Event**
  
  Thursday, November 15, 7 p.m. to 9 p.m., New England Eye & Facial Specialists, Andover
  
  Adam P. Beck (‘11), “pays it backward” by hosting a complimentary event for all alumni and faculty. Adam is a lawyer and a board certified retinal surgeon, additionally trained in ocular plastics. He is delighted to provide FREE Botox until supplies last. For more information, e-mail jacobson@mslaw.edu.
MSLaw Goes Green

by Jane Ceraso

In early 2012, MSLaw took an important step in reducing the solid waste generated in Massachusetts by initiating a school-wide single stream recycling program. Increasingly, educational institutions are implementing recycling programs because of the multiple benefits they provide, including: 1) recycling allows schools to help prevent a substantial portion of their waste from entering our already overflowing landfills; 2) recycling allows materials to be reused to create new products, reducing energy and the need for extracting new materials; and 3) recycling mitigates waste disposal costs because manufacturers will pay for the recyclable materials. In recent years, new technologies have significantly simplified the recycling process for many participants, allowing for all recyclables to be placed into a “single stream” of co-mingled materials that are later sorted at recycling materials processing plants.

Every year, Massachusetts disposes of enough trash to fill 74 Fenway Parks.1 Landfill capacity in Massachusetts is expected to decline from just under two million tons in 2009 to about 600,000 tons in 2020 as current landfills close and are not replaced.2 Disposal of solid waste carries a significant cost to our economy and environment, including contributing to the problem of global warming through greenhouse gas emissions generated during waste transport, combustion, and storage. As landfills close and disposal options become more limited, state, federal and local regulations mandate and encourage waste reduction strategies. Increasingly, municipalities, businesses, and educational institutions have begun to implement innovative solutions to the problem of solid waste disposal.

MSLaw’s recycling program was launched at the beginning of 2012 by then-student-trustee Felicea Robinson (’12). After careful consideration, Robinson and Dean Coyne picked the recycling program offered by Waste Management, Inc. The new recycling program, based on the innovative single stream, or co-mingled, recycling process, does not require MSLaw students and staff to separate any of their recyclables. All recyclable materials such as paper, cans, and plastics can be thrown together into the recycling containers, and sorted later in processing plants that use technologies such as sorters, screens, optical scanners, and magnets to separate the materials. Waste Management sells the recyclables, and credits MSLaw with a portion of what it gets, and we have been able to downgrade the size and cost of the container we use for solid waste. As a result, the recycling program, is saving MSLaw about $500 every month.3

The single stream recycling process increases recycling efficiencies by collecting more material with less labor and less energy expended on transportation. Single stream collection allows for the use of single-compartment trucks which are cheaper to purchase and operate, and which accommodate larger loads, necessitating fewer trips to the recycling center than multi-compartment trucks.

Single stream allows people to place more material in their recycling bins by giving them larger bins in which all recyclable materials can be collected together. The simplicity of the single stream process encourages people who may have refrained from recycling, due to confusion about how to separate waste materials, to begin recycling. During the past 10 years, communities, businesses, and educational institutions are increasingly implementing single stream recycling programs, leading to overall increases in the tonnage of waste recycled, material diverted from landfills, and reducing the solid waste generated in Massachusetts. MSLaw’s recycling program is saving the school about $500 every month.

2 Id. at 13.

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and the number of people participating in recycling.

Once collected, the co-mingled materials are separated at processing facilities and are sold to businesses which “remanufacture,” using the recycled feedstocks in a variety of manufacturing processes. At a time when we are looking for environmentally responsible ways to build jobs and our economy, remanufacturing helps us to do both. In Massachusetts, recycling, reuse, and remanufacturing directly supports more than 2,000 businesses with an estimated 14,000 jobs, maintaining a payroll of nearly $500 million, and bringing in annual revenues of $3.2 billion.

Since the inception of the MSLaw recycling program in the beginning of 2012, twenty cubic yards of material is being recycled at the school every week. This means that, on a monthly basis, over two tons of material that had been previously sent to a landfill is now being reprocessed into other materials such as paper products, decking, and even clothing, such as polartec fleece.

The help of the entire MSLaw community is necessary to keep this effort successful. Thus far, the recycling efforts have been executed almost entirely by student volunteers, including whatever separation is required of recyclable and non-recyclable waste deposited in the green containers found all over the school. While the single stream recycling process does allow for most plastics, glass, paper, and aluminum to be deposited into recycling bins together, there are certain materials which, when put in the recycling bins, contaminate and compromise the separation of the waste materials. Students managing the recycling efforts note that getting students to comply with the requirements of the single stream process is a “learning experience.” Foodstuffs, liquids, and styrofoam are the worst offenders. Depositing these materials in the recycle bins causes contamination of the materials, increases processing costs and lowers the resale value of the recycled feedstocks. Additionally, these “non-recyclables” often create a mess in the recycling bins and extra work for the volunteers who empty the bins.

Everyone in the MSLaw community is asked to cooperate in the school’s effort to go green and save money. Just remember the following materials should not be placed in the recycling bins: food, frozen food containers, styrofoam (sorry, Dunkin Donuts), sharp objects, bubble wrap or plastic bags, potato chip bags, CDs, or porcelain. It is important that people take the time to dispose of non-recyclables in the trash, rather than throwing them into the recycling bins. All bottles and cans should be emptied prior to being deposited in the recycling bins.

Clearly, MSLaw’s new recycling program is an important first step in greening the school. By helping to reduce its solid waste “footprint,” MSLaw joins the ranks of many other institutions helping to address the burgeoning program of solid waste in Massachusetts. It is clear that this is just a first step, however. Ongoing education and broader participation will be important to ensure ongoing success and to optimize the recycling program. Additionally, other waste reduction programs should be considered at MSLaw, such as minimization of waste and packaging in the cafeteria, collection of food wastes to be sent to anaerobic waste-to-energy facilities, school purchasing that prioritizes materials made from recycled materials, and programs to reduce paper and other waste in the classrooms and computer lab. The acceptance and success of the MSLaw recycling program will hopefully serve to motivate the implementation of additional “green” programs, helping MSLaw enter the ranks of other institutions working to address the solid waste problem in Massachusetts.

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