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Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights

Donald H. Stone, J.D. & Linda S. Stone, Ed.D.*

I. Introduction

Violence in our schools, a national epidemic or a symptom of society at large? What should be the role and responsibility of the educational system in dealing with school discipline? With the implementation of zero tolerance policies for student violence and misbehavior, have school officials gone too far in suspending school children for talking back to teachers? For those students who habitually refuse to attend school, is out-of-school suspension the answer when giving them a vacation is just what they wanted? Are some school districts reluctant to remove violent students from school for fear of receiving the embarrassing label of “persistently dangerous”1 from the state department of education?

This Article will explore the trends in school violence and the response by various school systems to addressing the challenge. Teachers are becoming the victims of student violence, drugs and weapons are becoming commonplace in our educational settings, and tardiness and absenteeism are constant challenges for an over-burdened school system. The adverse effects of suspending a student from school have far-reaching implications for that student’s future employment prospects and higher education aspirations.2 The duty of the school system to provide alternative education environments for the suspended will also be examined. Finally, the responsibility of parents, through state imposed criminal sanctions, for the violent and delinquent actions of their children will be analyzed to determine if such consequences are effective at reducing this behavior.

The U.S. Supreme Court in 1975 addressed the requisite fundamental due process protections of notice and hearing implicated when schools remove dangerous and disruptive students from school.3 Thirty-five years after the U.S. Supreme Court announced the procedural due process protections to which school children are entitled in a disciplinary proceeding, how have schools and students

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1 Sara Neufeld, Pushing Hard, With No Excuses, BALTIMORE SUN, FEB. 9, 2009, at 8.


3 See id.
fared? Are schools safer? Do school children retain constitutional rights in the process?

This Article will analyze various school divisions’ responses to addressing school violence and rule violations. Recommendations for a model school disciplinary proceeding regarding the hearing, grounds for disciplinary actions, alternative educational programs, and uniformity in terms of length of removal will be offered. Thirty-five years after the U.S. Supreme Court initially addressed the issue, what is the current state of affairs and where do we go from here?

II. COURT DECISIONS: PROCEDURAL DUE PROCESS PROTECTIONS FOR STUDENTS

A. Laying the Framework: Due Process for Short-Term Suspension

The landmark U.S. Supreme Court case, Goss v. Lopez, set forth the basic framework for school suspensions. Ohio public high school students, who were suspended from school as a result of misconduct for up to ten days without a hearing, claimed a denial of due process in violation of the Fourteenth Amendment. The Court recognized, on the basis of Ohio state law, a legitimate claim of entitlement to a public education. The Court emphasized that although Ohio may not be constitutionally obligated to establish and maintain a public school system, it had nonetheless chosen to do so and had required its children to attend. Those children, reminds the Court, do not “shed their constitutional rights” at the schoolhouse door. In particular, the State’s authority to prescribe and enforce standards of conduct in its schools must be exercised consistently with constitutional safeguards. “[T]he State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest protected by the Due Process Clause and which [consequently] may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”

The Goss Court addressed and identified the harms caused by school suspensions. For school suspensions for periods of up to ten days, the charges could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with future higher education and employment opportunities.

Although the Supreme Court acknowledged that short-term suspensions are a far milder deprivation than expulsion, it nonetheless declared, referencing the

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5 Id. at 567.
6 Id. at 573.
7 Id. at 574.
8 Id. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
9 Id.
10 Id.
11 Id. at 574–75.
landmark case of *Brown v. Board of Education*,\(^\text{12}\) that “education is perhaps the most important function of state and local governments.”\(^\text{13}\) The Court delineated the dividing line between short-term suspensions of up to ten days from long-term suspensions of greater than ten days as the key determination of what due process protections are due.\(^\text{14}\)

Students facing temporary suspensions are entitled to the due process protections of receiving oral or written notice of the charges against him or her and, if the student denies them, an explanation of the evidence the school authorities have and an opportunity to present his or her side of the story.\(^\text{15}\) For these short-term suspensions, a student shall be given an opportunity to explain his version of the facts after first being informed of the accusations against him and the basis for such accusations.\(^\text{16}\) Although the hearing may occur almost immediately following the misconduct, as a general rule the Court asserted that notice and hearing should precede removal of the student from school.\(^\text{17}\)

The U.S. Supreme Court explained that the Due Process Clause does not require, for short-term suspensions of up to ten days, the student’s opportunity to secure counsel, confront and cross examine witnesses or call his or her own witnesses.\(^\text{18}\) Instead, the requirements of effective notice and an informal hearing permitting the student to give his or her version of the events provide a meaningful hedge against erroneous action.\(^\text{19}\)

The Court explained that the school disciplinarian, usually the school principal, is in a position to be alerted to the existence of any disputes about the facts during the informal hearing, which may result in the disciplinarian choosing to summon the accuser, permit cross-examination and allow the student to call his or her own witnesses, and in more difficult cases, permit counsel.\(^\text{20}\)

### B. Expanding the Framework: Due Process Protection for Long-Term Suspension

In addressing these due process protections for short term suspensions of up to ten days, the *Goss* Court acknowledged without great specificity that for suspensions of greater than ten days, expulsions for the remainder of the school

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\(^{13}\) *Goss*, 419 U.S. at 576.

\(^{14}\) See *id.* at 581.


\(^{16}\) *Goss*, 419 U.S. at 582.

\(^{17}\) *Id.* at 582–83 (acknowledging, however, that prior notice and hearing cannot be insisted upon where the student poses a continuing danger to persons or property; in such cases notice and hearing should follow the removal as soon as practicable).

\(^{18}\) *Id.* at 583.

\(^{19}\) *Id.*

\(^{20}\) *Id.* at 583–84.
term, or permanent removal from school, “may require more formal procedures.”\textsuperscript{21} The details of the due process requirements in such situations are found in the subsequent words of future court decisions. The more grave consequences of long-term suspensions and expulsions mandate the need for greater due process protections.

In \textit{Gonzalez v. McEuen}, eleven students claimed they were improperly expelled from school.\textsuperscript{22} Relying on \textit{Goss v. Lopez}, the students claimed their expulsion proceedings were constitutionally inadequate and denied them due process of law.\textsuperscript{23} In particular, the letter sent to the parents of the expelled students contained no notice of the students’ right to be present at the hearing, to be represented by counsel, nor to present evidence, in clear violation of California law.\textsuperscript{24} The \textit{Gonzalez} court relied on the \textit{Goss} determination that if the penalties are mild, such as for short-term suspensions, informal procedures are sufficient; however, where the penalties are more severe, such as for expulsions from school, more formal proceedings are required.\textsuperscript{25} The \textit{Gonzalez} court specifically recognized that expulsions from school for the remainder of the school year result in a more severe penalty, necessitating more formal procedures.\textsuperscript{26} Relying on \textit{Goss}’s principles, the court held that where a student is faced with the severe penalty of expulsion, he shall have the right to be represented by counsel, present evidence, and confront and cross-examine adverse witnesses.\textsuperscript{27}

In addition, the court announced that adequate notice must communicate the nature of the proceedings to the recipient.\textsuperscript{28} In the expulsion hearing, the notice must include a statement of the specific charges as well as the basic rights to be afforded to the student, including the right to: (1) to be represented by counsel; (2) to present evidence; and (3) to confront and cross-examine adverse witnesses.\textsuperscript{29}

1. The Right to Confront and Cross-Examine Witnesses

Several other courts have addressed the right to confront and cross-examine witnesses, with varying results. In \textit{Colquitt v. Rich Township High School District No. 227}, the expelled student claimed he was denied an opportunity to cross-examine his accusers, as the three witnesses to the alleged verbal altercation that formed the basis of the three semester expulsion were not present at the hearing.\textsuperscript{30}

\begin{itemize}
  \item \textit{Id.} at 584.
  \item \textit{Id.} at 463.
  \item \textit{Id.} at 466.
  \item \textit{Id.}
  \item \textit{Id.} at 467.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} at 471 (finding a violation of the Fifth Amendment for the school attorney’s comment on a student’s refusal to testify by arguing the student’s guilt could be inferred from such refusal).
  \item 699 N.E.2d 1109, 1113 (Ill. App. Ct. 1998).
\end{itemize}
The court recognized that the outcome of the hearing was directly dependent on the credibility of the witnesses whose conflicting statements were received by the hearing officer, making the opportunity for cross-examination by the student imperative. Although the school claimed the need to protect student witnesses’ anonymity from risks of retaliation, without a showing of significant risk of harm, denial of the right to cross-examine adverse student witnesses should not be the common practice at expulsion hearings.

However, other courts have declined to find the rights to know the identity of the accuser and to cross-examine witnesses at the expulsion hearing. In *Newsome v. Batavia Local School District*, the court held that expelled students did not have due process rights to cross-examine school administrators regarding their investigation of drug-trafficking nor did the expelled students have the right to cross-examine or even learn the identify of student accusers. The court assessed the value of cross-examining student witnesses in school disciplinary cases, determining that it was somewhat muted by the fact that the veracity of student accounts of misconduct by another student is initially assessed by a school administrator. Therefore, the court noted that the process of cross-examining witnesses may often be “duplicative of the evaluation process” the school administrator undertakes.

The court placed decisional significance on the critical importance of protecting the anonymity of students who ‘blow the whistle’ on their classmates. The court thus concluded that protecting student witnesses from ostracism and potential reprisals outweighed the value to the truth-determining process of allowing the accused student to cross-examine his accusers.

Similarly, in *Wagner v. Fort Wayne Community Schools*, the court found no due process violation where a seventh grader expelled for selling caffeine pills to other students was denied the right to cross-examine witnesses or learn of their identities. The court acknowledged that *Goss v. Lopez* “establish[ed] the

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32 *Colquitt*, 699 N.E.2d at 1113-14 ( declining to find a denial of due process or denial of equal protection due to an absence of a court reporter for verbatim transcription).

33 842 F.2d 920 (6th Cir. 1988).

34 Id. at 925.

35 Id. at 924 (noting the school principal had knowledge of the accusing student’s trustworthiness).

36 Id.

37 Id. at 925.

38 *Id. See also* Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 263 (5th Cir. 1985) (reasoning that all procedures afforded a criminal proceedings need not be afforded in school disciplinary proceedings and concluding that the student accuser’s identity would not be revealed).


40 *Id.* at 920, 927.

41 419 U.S. 565 (1975).
minimum requirements for long-term expulsion,” including notice of the charges, explanation of the evidence the authorities have, and an opportunity to present the student’s side of the story. However, the Wagner court refused to expand Goss’s framework and extend due process protections to confront and cross-examine witnesses believing this would be overly burdensome on schools and an unrealistic aspiration.

2. The Right To Be Represented by Counsel

The right of a student to be represented by counsel at a suspension or expulsion hearing is essential to leveling the playing field at the administrative hearing to determine a student’s ability to remain in school. Several courts have addressed this issue, including the case of Trujillo v. Taos Municipal Schools. In Trujillo, the seventh grade student was expelled for having a gun at school. Relying on Goss v. Lopez, the court proclaimed that short-term suspensions do not invoke the right to counsel, but acknowledged that “longer suspensions . . . may require more formal procedures.” The court, however, was unwilling to require the right to counsel at such expulsion hearings nor the right to appeal from an adverse expulsion hearing decision.

The case of Draper v. Columbus Public Schools involved an eighth grader expelled from school for threatening several students with a knife. The court recognized that a “student’s reputation and his uninterrupted education must be balanced against the state’s interest in maintaining safe, orderly, and effective public schools.” Repeating the common theme of Goss v. Lopez, the court noted that the requisite due process “to assure rudimentary precautions against unfair or mistaken findings for a [ten] day suspension . . . is merely notification of the

42 Wagner, 255 F. Supp. 2d at 925 (citing Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 927 (6th Cir. 1988)).
43 Id. at 928 (The court highlighted the importance of maintaining order and discipline and concluded that the challenges posed by permitting students to confront witnesses or even disclose their identity would be overly burdensome and unrealistic); See also Coplin v. Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377, 1383 (C.D. Cal. 1995) (holding that the expelled student has no due process right to know the identity of student accusers either at the time of initial removal from school or ten days later when his parents waived the right to a hearing).
45 Id. at *2.
46 Id. at *6 (quoting Goss v. Lopez, 419 U.S. 565, 584 (1975)).
47 Id. at *7. See also Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 264 (5th Cir. 1985) (noting that due process, once provided, is “not undone by appellate procedures that do not independently provide all of the elements of due process” and the reviewing body on appeal need not make an independent determination of appropriate punishment).
49 Id. at 133.
50 419 U.S. 565.
charges and a meaningful opportunity to contest them in an informal hearing.\textsuperscript{51} The Draper court, in evaluating whether to extend and enhance the protections for short-term suspensions in \textit{Goss} to expulsions, pointed out that the student’s suspension was “greatly mitigated” by the student’s reinstatement after “only” twenty-seven days.\textsuperscript{52} Unfortunately, this loss of education and the resultant harm to the student’s reputation is significant and long-term. Ten days or twenty-seven days may not appear much different at first look, however, the ability of the student to return to school, catch up on lost work, and advance to the next grade is significantly compromised by the longer absence from school.

In one case, the issue of whether a school was required to provide a list of low-cost legal services was litigated.\textsuperscript{53} The school’s failure to furnish the high school student involved in a cafeteria fight with low-cost legal resources was not actionable because it did not result in a prejudice as the student was able to obtain pro bono counsel on her own.\textsuperscript{54} Although this court recognized the importance of a school district’s obligation to provide students with a list of low-cost legal counsel, no prejudice was found.\textsuperscript{55}

Another important issue for schools is the obligation to provide an alternative education for students who are suspended or expelled from school. Courts and educational officials have struggled with how to address the problem of students who are removed from school from simply roaming the streets during their absence from school.

### III. Trends in School Violence, Disruptive Behavior, and Disciplinary Actions

Thirty-five years after the Supreme Court announced the procedural due process protections afforded to suspended or expelled students, what is the current state of affairs? What are the trends nationwide in school violence and school suspensions? How do policies of zero tolerance impact the type and frequency of school suspensions? What are the demographics of the suspended student? Is there a connection between school absenteeism and criminal delinquency? How do states vary in the process of conducting school suspension hearings? Are school suspensions effective in curtailing school violence and violation of school rules? The trends, policies, and practices will be discussed and evaluated for the purpose of recommending changes in school disciplinary proceedings which lead to suspension and expulsion of school children.

\textsuperscript{51} Draper, 760 F. Supp. at 134.
\textsuperscript{52} Id.
\textsuperscript{53} \textit{In re} Expulsion of N.Y.B., 750 N.W.2d 318 (Minn. Ct. App. 2008).
\textsuperscript{54} Id. at 327. \textit{See also} Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (Mass. 1995) (noting that MASS. GEN. LAWS ch. 71, § 37H (2009) provides the student with the right to counsel at an expulsion hearing).
\textsuperscript{55} \textit{In Re} Expulsion of N.Y.B., 750 N.W.2d at 327. \textit{See also} \textit{In Re} Expulsion of Z.K., 695 N.W.2d 656, 663 (Minn. Ct. App. 2005).
A. Trends of Crime in Schools

Ensuring safer schools requires establishing good indicators of the current state of school crime and safety across the nation and regularly updating and monitoring these indicators. This is the goal of “Indicators of School Crime and Safety,” a report produced by the Bureau of Justice Statistics which presents the most recent data available on school crime and student safety.56 This report encompasses topics including victimization, fighting, bullying, classroom disorder, weapons, student perception of school safety, teacher injury, and student use of drugs and alcohol.57 These indicators of crime and safety are compared laterally across different population subgroups and chronologically over time.

Between July 1, 1992 and June 30, 1999, no consistent pattern of increase or decrease in the number of yearly homicides occurring at school was illustrated; rather, the number fluctuated between 28 and 34 reported homicides of school-age youth on school grounds per year.58 The number of homicides of school-age youth at school was markedly lower during the 1999–2000 school year at 13 homicides, than during the 1998–99 school year at 33 homicides.59 However, the number of such homicides increased from 14 to 22 between the 2000–01 and 2003–04 school years, and then declined to 19 by the 2005–06 school year.60 In 2006–07, the number of homicides of school-age youth increased to 27.61

The report noted the prevalence of victimization at school in 2007; four percent of students ages twelve to eighteen reported being victimized at school during the previous six months.62 Overall, the percentage of students ages twelve to eighteen who were victimized at school decreased between 1995 and 2005 from 10% to 4%.63

The percentage of students who were threatened or injured with a weapon on school property has fluctuated between 7% and 9% between 1993 and 2007.64 In the Youth Risk Behavior Survey,65 students in grades nine through twelve were

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57 See id. at iii.
58 Id. at 6, 7 (Figure 1.2), 74 (Table 1.1).
59 Id.
60 Id.
61 Id.
62 Id. at 12, 13 (Figure 3.1) (Three percent of students reported theft and two percent of students reported violent victimization).
63 Id.
64 Id. at 14.
questioned about whether they had been threatened or injured with a weapon on school property during the previous year. In 2007, the survey showed that 8% of students reported being threatened or injured with a weapon on school property.

The likelihood of being threatened or injured with a weapon on school property varied by student characteristics, including gender and grade level, with males being threatened or injured with a weapon on school property twice as frequently as females. Another factor which varied the percentage of students who reported being threatened or injured with a weapon on school property is race and ethnicity. In 2007, higher percentages of multi-racial students (13%), African American students (10%), and Hispanic students (9%) reported threats or injury with a weapon on school property than Caucasian students (7%) and American Indian/Alaska Native students (6%). Nationwide, in 2007, student reports of threats or injury with a weapon on school property within the past twelve months varied, ranging from 5% in Massachusetts and North Dakota to 11% in Arizona, Utah, and the District of Columbia.

The “Indicators of School Crime and Safety” report (the “ISCS report”) also includes data about the percentage of teachers who feel they have been subjected to threats or physical attacks by students. The indicator revealed that the percentage of teachers being threatened with injury or physical attack by students during the 2003–04 school year was higher for public school teachers in city schools than their peers in suburban, town, or rural schools. Overall, the trend in student threats or attacks on teachers appears to decline over time based on the data taken during the 1993–94, 1999–2000, and 2003–04 school years.

Reports of discipline problems by public schools reveal some interesting trends. For example, the ISCS report states that between the 1999–2000 and 2005–06 school years, “the percentage of principals reporting student bullying as a frequently occurring discipline problem declined from 29% to 24% and student verbal abuse of teachers declined as well from [13% to 9%].”

As another indicator of school violence and crime, school principals were surveyed regarding various topics including racial tensions, bullying, sexual harassment of other students, verbal abuse of teachers, widespread classroom

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66 INDICATORS OF SCHOOL CRIME AND SAFETY, supra note 56, at 14.
67 Id. For the purposes of the survey, a weapon included a gun, knife, or club. Id. The percentage of students threatened or injured with a weapon ranged from 7% to 9%. Id.
68 Id. at 14, 15 (Figure 4.1), 82 (Table 4.1). In 2007, 10% of males, as compared with 5% of females, were threatened or injured with a weapon on school property. Id. at 14. In terms of grade level, ninth and tenth graders are threatened or injured more frequently than eleventh and twelfth graders. Id.
69 Id.
70 Id.
71 Id. at 83 (Table 4.2) (Note that data for eleven states was not reported for 2007).
72 See INDICATORS OF SCHOOL CRIME AND SAFETY, supra note 56, at 16.
73 Id.
74 Id. at 17 (Figure 5.1).
75 Id. at 26.
disorder, and acts of disrespect for teachers. 76 During the 2005–06 school year, 24% of public schools reported that student bullying occurred on a daily or weekly basis and 18% reported that student acts of disrespect for teachers took place on a daily or weekly basis. 77

In terms of school size as it relates to discipline problems, large schools experienced more discipline problems than smaller schools. 78 For example, 35% of principals at schools with 1,000 or more students reported student acts of disrespect for teachers occurred at least once a week, whereas only approximately 12% at schools with less than 300 students reported this discipline problem. 79

The availability of illegal drugs on school property was also reported. In 2007, 22% of students reported that illegal drugs were available, down slightly from 25% in 2005. 80 The availability of drugs to students on school property has a “disruptive and corrupting influence on the school environment.” 81 The Youth Risk Behavior Survey revealed that a higher percentage of males than females reported that illegal drugs were offered, sold, or given to them for each survey year from 1993 through 2007. 82 For example, in 2007, 26% percent of males reported illegal drugs were available as compared with 19% of females. 83 The perception of drug availability also varied with respect to race and ethnicity. 84 In 2007, higher percentages of Pacific Islander/Native Hawaiian (38%) and Hispanic (29%) students than Asian (21%), Caucasian (21%), and African American (19%) students reported that drugs were available to them. 85

Teacher reports on school conditions, including student misbehavior, class cutting, and tardiness, which interfere with teaching varied with respect to public or private school setting, revealing greater numbers among public school settings. 86

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76 Id.
77 Id. at 26, 27 (Figure 7.1), 98 (Table 7.1). During the 2005–06 school year, 9% of principals reported student verbal abuse of teachers, 3% reported student sexual harassment of other students, 3% reported racial or ethnic tensions, and 2% reported widespread disorder in the classroom; principals reported that each of these incidences occurred at least weekly. Id. Additionally, 17% of public schools reported that “undesirable gang activity” occurred at least once during the school year. Id.
78 See INDICATORS OF SCHOOL CRIME AND SAFETY, supra note 56, at 99 (Table 7.2).
79 Id. (Discipline problems, in 2005–06, were significantly greater in middle schools than primary schools).
80 Id. at 101 (Table 9.1).
81 Id. at 30 (quoting M.J. NOLIN ET AL., NAT’L CENTER FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, U.S. DEP’T OF EDUC., STUDENT REPORTS OF AVAILABILITY, PEER APPROVAL, AND USE OF ALCOHOL, MARIJUANA, AND OTHER DRUGS AT SCHOOL: 1993 (1997)).
82 Id. at 30, 31 (Figure 9.1), 101 (Table 9.1).
83 Id. at 101 (Table 9.1).
84 See INDICATORS OF SCHOOL CRIME AND SAFETY, supra note 56.
85 Id. (Discipline problems, in 2005–06, were significantly greater in middle schools than primary schools).
86 Id. at 41 (Figure 12.2) (revealing public school rates of 40% and private school rates of approximately 20%).
However, the numbers also show a slight decline overall from 1993–2004. Physical fights between students also showed an overall decline from 16% in 1993 to 12% in 2007. It is recognized that physical violence in schools has a detrimental effect on success in schools. The Youth Risk Behavior Survey revealed males in ninth grade were involved in fights at the greatest levels, with 17% of ninth graders as compared with 9% of twelfth graders who reported being in a fight on school property in 2007. Also, with respect to race and ethnicity, African American, Hispanic, American Indian, and multi-racial students reported being in a fight at school at rates of 15% to 20% as compared to Caucasian students at a rate of 8% to 10%.

The presence of weapons on school property creates an intimidating and threatening environment and interferes with student learning. Students carrying weapons on school property has declined from 12% to 6% between 1993 and 2007, but males were reported carrying a gun to school at a rate of three times that of female students. Perhaps correspondingly, student perception of personal safety at school has increased over the years. Between 1995 and 2007, the percentage of students who feared attack or harm while at school decreased from 12% to 5%.

B. Trends and Data Regarding Disciplinary Action

1. National Data

Disciplinary action taken by public schools reveals some interesting numbers. Forty-eight percent of public schools took “serious disciplinary action” against a student for specific offenses during the 2005–06 school year. The serious disciplinary action included suspensions lasting five days or more (74%),

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87 Id.
88 Id. at 44 (data for grades nine–twelve). While the percentage of males involved in school fights declined from 1993 through 2007, leading to an overall decline, the percentage of females involved in school fights remained constant. Id. at 45 (Figure 13.1).
89 Id. at 44.
90 INDICATORS OF SCHOOL CRIME AND SAFETY, supra note 56, at 44. Thirty-six percent of students in grades nine to twelve reported being in a fight “anywhere,” while 12% reported so on school property. Id. With respect to gender, 16% of males and 9% of females reported being involved with fights on school property. Id. The percentage of ninth through twelfth graders who reported being involved in a school fight also varied by state, with the highest rate in the District of Columbia (20%) and the lowest in Hawaii (7%). Id. at 115 (Table 13.2).
91 Id. at 115 (Table 13.1).
92 Id. at 46.
93 See id. at 116 (Table 14.1) (males at 9%, females at 3%).
94 Id. at 54.
95 Id.
96 INDICATORS OF SCHOOL CRIME AND SAFETY, supra note 56, at 60 (involving 39,600 schools).
expulsions (5%), and transfers to specialized schools (20%). The largest percentage of schools that reported taking a disciplinary action in 2005–06 did so in response to a physical attack or fight (32%), possession or distribution of drugs (21%), use or possession of a weapon other than a firearm (19%), distribution, possession, or use of alcohol (10%), and use or possession of a firearm (5%). The trends in schools taking serious disciplinary action of suspensions greater than five days decreased overall while schools taking serious disciplinary action for insubordination has increased, an alarming trend.

2. Selected State Data

Relative to national statistics, Maryland is representative of the alarming trend of increasing disciplinary action for non-violent offenses such as disrespect, insubordination, and absenteeism. Out-of-school suspensions in the 2006–07 given for non-serious, non-violent offenses accounted for 37.2% of suspensions in Maryland, whereby only 6.7% of suspensions were issued for dangerous substances, weapons, arsons and sex offenses combined. Similar data was reported for the 2007–08 school year as disrespect, insubordination, and disruption accounted for 37.4% of out-of-school suspensions, while suspensions for dangerous substances, weapons, arson, and sex offenses represented only 7.1% of total suspensions. Similarly, in Baltimore City, disrespect, insubordination, and disruption were the primary reasons for suspension, accounting for 32.9% of out-of-school suspensions.

Maryland trends in suspensions overall are on the rise over the past decade. During the 1996–97 school year, Maryland public schools suspended 8.1% of the student population and by 2006–07, the rate increased to 9%. Hopeful signs,
however, are on the horizon as the state of Maryland is beginning to see a decline, with 131,721 out of school suspensions in 2006–07 as compared to 118,963 in 2007–08, reflecting a 9.7% decrease in the number of suspensions.\textsuperscript{104} However, New York City public schools have seen an upward trend with a 76% increase in school suspensions between 2000 and 2005, jumping from 8,567 to 15,090 per year.\textsuperscript{105}

Moreover, the rates of suspension are much higher for African Americans, special education students, and males,\textsuperscript{106} a concern that should not be ignored.

\textbf{C. The Impact of “Zero Tolerance” Policies on Suspensions}

As the data shows, although school violence appears to be decreasing over the past decade, out-of-school suspensions have increased during that time.\textsuperscript{107} One possible explanation is more students are being suspended for non-violent offenses such as truancy, attendance, lateness, insubordination, and disrespect. Zero tolerance policies implemented by school officials may be at the heart of this alarming trend.\textsuperscript{108}

The public policy towards children has moved towards treating them more as adults, mimicking the criminal justice system.\textsuperscript{109} Unfortunately, zero tolerance policies in schools authorize theories of punishment that were once directed to adult criminals now being applied to first graders.\textsuperscript{110} “Zero tolerance” is the phrase that describes the response to student misbehavior by schools across America.\textsuperscript{111} It means that a school will automatically and severely punish a student for a variety of predefined infractions, becoming a one size fits all solution to all problems a school confronts ranging from student possession of guns, distributing aspirin to a classmate, and cutting class.\textsuperscript{112}

\begin{itemize}
  \item\textsuperscript{104} Maryland Suspension Data 2006–07, supra note 101, at 1; Maryland Suspension Data 2007-08, supra note 102, at 1.
  \item\textsuperscript{105} Donna Lieberman, N.Y. Civil Liberties Union, The Impact of School Suspensions and a Demand for the Passage of the Student Safety Act (2008), available at http://www.nyclu.org/node/1602 (Lieberman’s testimony before the New York City Council Committees on Education and Civil Rights).
  \item\textsuperscript{106} Liz Bowie, School, Paused, BALT. SUN, May 11, 2008, at 1.
  \item\textsuperscript{107} Mary Graham Tebo, Zero Tolerance, Zero Sense, 86 A.B.A. J. 40, 40 (2000) (“Nationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public schools since 1990 - some studies say by as much as 30%. Less than 1% of all violent incidents involving adolescents occur on school grounds.”).
  \item\textsuperscript{108} Id. (“So-called zero tolerance policies being implemented across the country are snaring large numbers of regular kids in broad nets designed to fish for troublemakers.”).
  \item\textsuperscript{110} Id.
  \item\textsuperscript{111} Id.
  \item\textsuperscript{112} Id.
\end{itemize}
Although zero-tolerance is theoretically directed at students who misbehave intentionally, because of its automatic application, it also applies to those who misbehave as a result of mental disorders, learning disabilities, or who merely forget what is in their pocket after legitimate non-school activities. It is blind to the differences between first graders and twelfth graders, treating them all alike. Zero tolerance results in expulsion or suspension regardless of a legitimate explanation, even possibly resulting in the student being arrested.

The zero tolerance approach to school discipline has received severe criticism from professional associations. The American Bar Association (ABA) asserts that “fueled by media hype, fear of the unthinkable and perhaps even a bit of guilt, more parents are demanding that school boards implement strict policies to deal with kids who step out of line.” According to the ABA, these zero tolerance policies being implemented across the country are resulting in large numbers of suspensions for “regular kids” who get caught in the broad net designed to catch the real “troublemakers.” Moreover, motivated by the No Child Left Behind Act, some school officials fear that suspensions of the truly disruptive and violent students may be limited to avoid having the school be listed as “persistently dangerous.” This results in the perverse situation where more serious infractions go undetected and non-violent offenses are strictly punished.

The American Psychological Association (APA) also lodged criticism on school zero tolerance policies. An APA report found that zero tolerance policies are not effective in reducing violence or promoting learning in school. With regards to academic performance, the report saw a “negative relationship between the use of school suspension and expulsion and school-wide academic achievement.” The APA report asserts that zero tolerance policies do not improve behavior or academic performance. In fact, by shifting the focus of discipline from schools to the juvenile justice system, zero tolerance policies cause a plethora of adverse consequences for students, families, and communities. The

113 Id.
114 Id.
115 Id.
116 Tebo, supra note 107.
117 Id.
120 Id. at 1.
121 Id. The report further found zero tolerance policies have not been shown to reduce violence or promote learning in school. Id.
122 Id.
123 Id. (“School suspension in general appears to predict higher future rates of misbehavior and suspension among those students who are suspended.”). Moreover,
report also raises concern over the disproportionate discipline of students of color and students with disabilities.\footnote{Id. at 2. Costs are another cause for concern; the costs related to referrals to the juvenile justice system dramatically increase the cost of treatment. Id.}

Furthermore, these zero tolerance policies increase referrals to the juvenile justice system for infractions that were once handled by schools, resulting in the creation of a “school to prison pipeline.”\footnote{Id. The report recommends alternatives to zero tolerance policies, including restorative practices of collaboration and communication between schools, parents, police, courts, and the mental health profession. Id.} Subjecting students to automatic punishments that do not take into account mitigating factors, zero tolerance policies represent a lost moment to teach children the valuable lesson of respect and a missed chance to inspire their trust of authority figures.\footnote{Liz Bowie, School, Paused, \textit{Balt. Sun}, May 11, 2008, at 9A (victims of crime are likely to have been suspended at least twice and have a history of truancy).}

\textbf{D. Adverse Consequences and Social Costs of Suspension}

School officials have also spoken out about the social cost of excessive suspensions. National research has shown that students suspended multiple times are more apt to drop out and commit crimes.\footnote{Id. at 1.}

Another challenge facing public schools is how to address truancy. Because research shows that suspended students are more likely to drop out and commit crimes, the consequence of suspending students is contrary to the purposes behind suspension.\footnote{Alternatives to Suspension, \textit{Balt. Sun}, Aug. 11, 2008, available at http://articles.baltimoresun.com/2008-08-11/news/0808100077_1_in-school-suspension-classroom-school-performance.} Rather than changing students’ actions to more appropriate behavior, suspension often leads to the opposite result: students are more likely to drop out.\footnote{See JANE SUNDIUS & MOLLY FARNETH, OPEN SOC’Y INST-BALTIMORE, PUTTING KIDS OUT OF SCHOOL: WHAT’S CAUSING HIGH SUSPENSION RATES AND WHY THEY ARE DETRIMENTAL TO STUDENTS, SCHOOLS, AND COMMUNITIES 2 (2008), available at http://www.soros.org/initiatives/baltimore/articles_publications/articles/suspension_20080123/whitepaper2_20080919.pdf (“Youth who are suspended or expelled are at far greater risk of academic failure, school drop-out, and incarceration . . . .”).} Taking a closer look at the purpose of school suspension and how to better achieve it is imperative.

When students are away from school, they often fall behind academically, leading to permanent drop out.\footnote{Student Attendance Fact Sheet, Soros.Org, http://www.soros.org/initiatives/baltim}
The “Student Attendance Fact Sheet” created by the Open Society Institute of Baltimore reveals some interesting data. Students are absent from school for a variety of reasons including “illness, work responsibilities, caring for children or sick relatives, fear of bullying, school disengagement or push-out, involvement in drug or criminal activity, lack of stable housing, or lack of transportation.” About half of truant ninth graders attribute “discretionary reasons” for their truancy such as oversleeping or a desire to spend time with friends, while a quarter cite bullying and another quarter report “external pull of factors such as work or family obligations.”

Gender is not a factor in truancy rates as male and female students are equally likely to be truant. However, children are at higher risk for chronic absence when they “live in poverty, face multiple family risks (e.g. their mother is a single parent, has limited education, is in poor health, depends upon welfare, and has three or more children), and experience domestic and/or community violence.” Factors that mitigate against truancy include participation in religious services, enrollment in college preparatory courses, strong academic achievement, and avoidance of drug use.

When students are absent from school, their academics suffer and they begin to fall behind; research reveals “that students who attended school less than 70% of the time in the 9th grade had at least a 75% chance of dropping out.” In addition, “Truant youth are more likely to become involved in the juvenile criminal justice system.” In fact, a Colorado study found over “90 percent of youth in juvenile detention facilities have a history of truancy.”

A comparison of statewide truancy rates in Maryland with the rates in urban, high poverty areas reveal some startling numbers. For the 2006–07 academic year, “2.21% of Maryland public school students [(18,000) statewide] were

ore/articles_publications/articles/truancyfact_20080124/truancy_fact_20080124.pdf (last visited Dec. 15, 2009) (“[S]tudents with a 6th grade attendance rate of at least 95 [percent] had more than double the on-time graduation rate of students with a 6th grade attendance rate below 90 [percent].”).

See id. (A student is considered habitually truant if the student is 5-20 years old, “enrolled in school for 91 days or more, and unlawfully absent for 20% or more of the days enrolled.”).

Id.

Id. (citing Center for Social Organization of Schools (2000). Survey of reasons ninth graders report for not attending school in an urban, high poverty city.).

Id. (noting that the reasons for truancy often differ between male and female students).

Student Attendance Fact Sheet, supra note 131.

Id.

Id. (citing Ruth Neild et al., An Early Warning System, 65 (3) EDUC. LEADERSHIP 28 (2007)).

Id.

Id. (citing Colorado Foundation for Families & Children (2002)).

See id.
habitually truant,” while “9.17% of Baltimore City public school students [(7,550)] were habitually truant,” more than four times the statewide rate.142

Another contributing factor and warning sign of truancy is students with disabilities.143 “Both state-wide and in Baltimore, and at all grade levels, special education students were more likely to be chronically absent than their peers.”144 “Truant youth are more likely to become involved with the juvenile justice system.”145 Such students are more likely to face negative consequences in their adult lives including “marital instability, job instability, criminal activity, and incarceration.”146 “Considerable evidence suggests that a history of [school suspension] accelerates [a student’s progress] along a pathway to delinquency and life-long failure.”147 Suspended students are three times more likely to drop out, which carries negative consequences: over 80% of incarcerated adults have been suspended and dropped out of school.148 Furthermore, school suspension has been linked to “school failure, dropout, delinquency, and criminal behavior.”149

IV. STATISTICAL REVIEW AND ANALYSIS OF SCHOOL DISCIPLINE AND SUSPENSION

The empirical data provided in this Article is submitted to demonstrate the extent and variety of school discipline provided to disruptive, dangerous, or disobedient high school students.

Forty high schools representing a student body of 78,696 responded from across the country in the survey.150 The empirical data contained in this Article is submitted to serve as a backdrop for purposes of elaboration and comparison in understanding how public schools deal with dangerous and disruptive students, as well as students who are tardy and absent from school. As the survey illustrates, during the 2009–2010 academic year, school administrators responded to school discipline a variety of ways.

142 Student Attendance Fact Sheet, supra note 131 (Baltimore City truancy rate was more than double the truancy rate of the next highest county).
143 See id.
145 Id. (explaining that a Colorado study found that “over 90% of youth in juvenile detention facilities have a history of truancy.”).
146 Id.
148 Id. (COALITION FOR JUVENILE JUSTICE, ABANDONED IN THE BACK ROW: NEW LESSONS IN EDUCATION AND DELINQUENCY PREVENTION (2001)).
149 Id.
150 DONALD STONE, SCHOOL SUSPENSION SURVEY (2010) [hereinafter STONE SURVEY] (reproduced at Appendix A). Although 40 schools responded to the survey, only 38 of 40 responded to the question of how many students were enrolled in the school. Therefore, the 78,696 reflects enrollment at 38 of the 40 surveyed schools.
A. Purpose of Suspension

Graph 1 – Purposes of Out-Of-School Suspension

School divisions’ primary goal for suspending students from school was to change student behavior, followed by adhering to school policy mandates, student safety, and teacher safety. Interestingly, punishment was the least cited goal of suspension. Further explanations provided by school officials included the purpose of sending a message to both the student and family about the seriousness of the violation and that a change in student behavior must take place. Other comments included the need for safety of the teachers and students to be ensured for any educational benefit to be gained. A stated desire of removing a student from school is to allow for student reflection and subsequent change of student

151 See STONE, SURVEY, supra note 150, at Question 2.
152 Id. (finding that 71.8% of those responding chose this reason, followed by other purposes including mandated by school policy (66.7%), student safety (69.2%), and teacher safety (56.4%)).
153 Id.
154 Id.
155 Id.
misbehavior upon return, or simply a cooling off period for the student. However, the notion that removal from school through suspension will cause a positive behavior change, without offering counseling, alternative programming to teach proper behavior, or alternative educational programs aimed at changing behavior is pie in the sky optimism. To expect a disruptive student to change behavior by simply being removed from the school environment is short sighted and unrealistic.

B. Effectiveness of Suspension

Graph 2 – Effectiveness of Out-Of-School Suspension

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156 Id.
157 See STONE, SURVEY, supra note 150, at Question 3.
Parent involvement is a crucial first step in changing student behavior. According to the American Academy of Pediatrics, a proposed side benefit of out-of-school suspension is the involvement of parents in the lives of their misbehaving children and that their involvement will help remedy the behavioral issues. However, it has been noted “that students at highest risk of being suspended are those least likely to have supervision at home.” We therefore need to find programs that will be effective with the population of parents who have not been extremely successful with managing their children’s behavior. There does not appear to be a body of research which discusses the positive aspects of in-school suspension, which is often proposed as an attractive alternative to out-of-school suspension. There are obviously a number of problems with these programs, ranging from being totally ineffectual to actually having the outcome of students returning to the classroom behaving in more negative ways than they did before being sent to in-school suspension. One potential solution to this would be stop using in-school suspension as “holding tanks” and use this setting to work with school counselors to institute mediation and conflict resolution approaches for decreasing negative behaviors.

When questioned about the effectiveness of out-of-school suspension in positively altering student behavior, the type of offense made a difference in the success seen by school officials. When examining school responses to addressing four different categories of offenses—violent offenses, drug related offenses, disrespect, and absenteeism—opinions on the effectiveness of out-of-school suspension varied considerably for each category. For absenteeism, tardiness, and truancy offenses, 79.5% of schools acknowledged that out-of-school suspension was not effective in altering student behavior. Additionally, in cases involving offenses of disrespect and disobedience, over half of the schools responded that out-of-school suspension was only somewhat effective. Only for the violent offenses, including physical harm or threats against students and teachers, was out-of-school suspension considered effective, at a rate of 43.6%, very effective at 17.9% of those responding, but still considered not effective by 15.4% of school administrators and only somewhat effective in 23.1% of responses. In drug offenses, schools were split on assessing the effectiveness of

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160 Id. at 10.
161 See STONE, SURVEY, supra note 150, at Question 3.
162 Id.
163 Id.
164 Id.
165 Id.
out-of-school suspensions in changing behavior. In 38.5% of responses, schools believed out-of-school suspension was either very effective or effective in addressing drug-related offenses, while 61.6% considered this out-of-school suspension to be not effective or only somewhat effective.\footnote{Id.}

C. Alternatives and Solutions

Graph 3 – Use Frequency of Various Disciplinary Methods in Response to Attendance Related Offenses\footnote{See Stone, Survey, supra note 150, at Question 4.}

The data indicates a clear dichotomy between violent and drug related offenses on the one hand and absenteeism, truancy, and disrespectful behavior on the other. In light of this division, schools need to take separate approaches when dealing with these separate and distinct violations. Recognizing that teacher and student safety should be one of the highest priorities, effectively changing student behavior is a complex and challenging task. To remove students from school for their failure to attend school on a regular basis is counter-productive and counter-intuitive. Schools should not reward a tardy or truant student by removing them from school. The consequence of the discipline is the same as the offense itself: the student is absent from school. The better approach is to determine the cause of the student’s absence from school and address this behavior through educational and counseling programs.

Often, the cause originates with the child’s parents. Parents are involved at all stages of the children’s educational life. Throughout the research, it is noted that there is a direct link between parenting abilities, skills and practice and a child’s
behavioral issues both in and out of the school setting. Ineffective parenting abilities have been shown to be strong predictors of early conduct issues in young children. Perhaps one place to begin would be with parent training programs which address teaching parenting practices before possible behavioral problems arise either in the home or school setting. If parents had a better understanding of the role they play in child’s educational success, they could establish a sound beginning for the school experience that could continue through their high school years.

Some schools are addressing attendance related offenses in a variety of thoughtful and progressive ways. For instance, schools are utilizing in-school suspension, after school detention and Saturday detention rather than out-of-school suspension. Examples of addressing truancy include community service, lunch time detention and various in-school suspension alternatives.

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169 Id.

170 STONE, SURVEY, supra note 150, at Question 4. Comments include: What message are we sending about the importance of attending school by sending them home on the day they actually decide to begin attending school? Id.

171 Id. Comments include that it would not make sense to take them out of class, it would be counter-productive, and it is not effective at changing behavior.
Schools recognize that attendance related offenses also involve parental responsibility as a component to changing student behavior. Some schools seek monetary fines from parents for their child’s chronic or habitual attendance related problems. In 90% of the responses, schools favor fines assessed against parents, believing the parent is a major factor in the student’s failure to attend school. Although some schools are concerned about enforceability, a significant number recognize the role parents play in getting students to attend school. When attendance becomes a significant issue, intervention at home as well as in school may be necessary to bring the parent into the discussion to work with school officials in getting students to attend school on a regular basis.

Indeed, “[p]arent and family involvement in schools supports achievement and school completion and has taken an increasing importance as we learn more about the consequences of school failure.” Recently there has been an increase in research which views the impact of parent involvement on positive outcomes for their children in the school setting. Parental involvement is linked to positive

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172 Stone, Survey, supra note 150, at Question 8.
173 Id. at Question 4. Comments include it starts at home, some parental pressure is effective, it brings a level of accountability to the parents, parents play a huge role in the success of their students.
175 See id.
academic performance, and research suggests that it “enhances student self-esteem, improves child–parent relationships, and helps parents develop positive attitudes toward schools.” 176 The question is how to get and keep parents involved in the schools realizing that the majority of parents are facing obstacles and time constraints with most parents being involved in the workforce and having other children who need attention who may be at other schools. One way to overcome this hurdle is through the use of technology. With the majority of parents having computer access at home, work, or the public library, this is another way to reach out to parents to increase their involvement in their child’s academic life and also increase their awareness of what is happening on a daily basis with their child. Teachers and administrators are beginning to set up websites and email accounts to keep parents abreast of what is happening in the school. This is also a potential delivery system for parent education and training programs. There will, of course, still be time constraints for busy parents, but if they have a computer in their home they will be able to access information as their time is available.

For an extreme view of parental responsibility, there are several school districts that would resort to seeking jail time against parents for chronic attendance related problems. Surprisingly, 37.5% of schools would favor jail time for parents who fail to ensure regular school attendance. 177 Although seen as a more drastic option when parents show no attempt to have their students attend school and are seen as a cause of the student’s truancy problems, 178 this alarmingly high number may reflect schools’ frustration in their inability to reach and convince students to attend school on a regular and consistent basis. Perhaps the student is failing in school, perhaps the student is inappropriately placed in a particular class, or perhaps the student is an individual with a disability in need of adjustment or modifications to their educational program.

School officials are required to follow different and well developed rules when it comes to suspending students with disabilities. 179 In Honig v. Doe, the Supreme Court mandated the process for removing disabled students from school resulting from a disciplinary action. 180 The Court restricted an emotionally disturbed student’s expulsion from public school, recognizing that even dangerous or disruptive students who experience a permanent change in the educational placement are entitled to a completion of review proceedings. 181 School officials are permitted to temporarily suspend disabled students for up to ten days at which time the due process proceedings must come in to play. 182 However, suspension is

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177 STONE, SURVEY, supra note 150, at Question 5.

178 Id.


180 Id.

181 Id. at 327 (quoting Burlington School Committee v. Massachusetts Dept. of Education, 471 U.S. 359, 373 (1985)).

182 Id. at 325-26.
only authorized in circumstances whereby a student causes an immediate threat to the safety of others. School officials are required to maintain the student in the current educational placement during the pending of the proceedings.

The fair and equitable procedures for disabled students who are disruptive in school should serve as a model for school divisions to consider implementing for all of its students. These established due process protections for both parent and child, whereby both parent and school division work together on providing an appropriate education to meet the needs of the student. Such rights afforded to disabled students in the disciplinary proceeding should be examined closely for implementation for all students facing removal from school. A thoughtful examination of placement alternatives, balancing school safety and individual student learning goals, will result in less permanent removal and more students remaining in school.

For violent offenses, school officials make a variety of suggestions for effective alternatives to out-of-school suspension. Examples include the use of counseling programs to redirect student behavior as the most effective, referral to criminal justice system, and placement in alternative schools for “at risk” students as effective alternatives to suspension. To simply transfer the student to another school is not seen as effective.

Recognizing that counseling programs for violent offenses committed in schools is seen as the most effective approach gives one pause for optimism. Instead of kicking them out and forgetting about them, providing counseling programs recognizes the belief that school age children can change their behavior. There is also recognition that redirecting student behavior and providing family therapy is preferable to referral to the criminal justice system.

For the students suspended from school, schools vary on recognition of an obligation on their part to provide an alternative education for the suspended student. Options include separate classroom setting within the current school (17.5%), special education program in an alternative separate school (7.5%), and a home school alternative (5%). In over 45% of responses, no alternative

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183 Id. at 325. The state of Delaware reports that a disproportional number of students with disabilities are punished by school officials. Nichole Dobo, Delaware Schools: Discipline Numbers Flag Need to Address Disabilities, NEWS J., June 11, 2010, available at http://www.delawareonline.com/fdcp?1276526143953. For the 2008–09 school year, a Delaware News Journal analysis “found [disabled] students accounted for about 20 percent of the students suspended but [less than] 14 percent of the student population.” Id.

184 See Honig, 484 U.S. at 312 (as mandated by the Individuals with Disabilities Education Act).

185 STONE, SURVEY, supra note 150, at Question 7.

186 Id.

187 Id. (revealing that counseling is viewed as most effective by 40% of the responses, referral to the criminal justice system by 33.3%, and alternative school placement by 23.1%).

188 Id. at Question 9.
education was offered during the period of suspension.\footnote{Id.} However, 60\% of the responses indicated that some form of alternative education was offered for expulsion or long term suspension, but not for short term suspension (less than ten days).\footnote{Id.} Schools are clearly split over their obligation to their suspended students.

There should always be alternative programs offered to all suspended students, believing that the purpose of removing dangerous students from school should be focusing on changing behavior so upon return to school, repeating the violent behavior will cease to occur. This is most likely to occur when schools provide a structured alternative education and counseling program to all suspended students.

Graph 5 – Alternative Education Policies\footnote{STONE, SURVEY, supra note 150, at Question 9.}
Schools, community organizations, parents, and occasionally the criminal justice system should partner together in addressing school violence in our public schools. The larger community should be fully invested and take responsibility toward preventing school violence, addressing its root cause to save our vulnerable children. The need to strengthen the school environment through cooperative approaches across the community is our best hope to stop the violence and to bring our violent and disruptive students back to the classroom. The provision of alternative education for the suspended student is vital. Although 27.5% of schools oppose alternative education during suspension, two out of three schools believe in alternative education programs, a hopeful sign.\textsuperscript{192}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{graph6.png}
\caption{Opinions Regarding Whether Alternative Education Should Be Offered During Period of Suspension}
\end{figure}

\textbf{V. RECOMMENDATIONS}

\textit{A. Out-of-School Suspension Is Ineffective for Non-Violent Offenses}

The use of suspension for minor, non-violent offenses such as truancy, disobedience, disrespect, and classroom disruption is not effective in reducing the behavioral problems it is intended to address.\textsuperscript{194} Moreover, suspension is used disproportionately with students who are male, of a lower socioeconomic status, of a minority ethnic background, and those who have a disability or low academic

\textsuperscript{192} STONE, SURVEY, supra note 150, at Question 10. Settings include separate classroom, separate program in a separate school and home school.

\textsuperscript{193} \textit{Id}.

\textsuperscript{194} See \textit{id.} at Question 2.
competence. In a study of suspension rates in 161 Kentucky middle schools, the following characteristics were significantly associated with high rates of suspensions: low socioeconomic status, high number of reported law violations on school grounds, lower student grade retention rates, and high dropout rates. On the other hand, the high average daily student attendance rate, academic achievement scores, and majority ethnic status were associated with lower suspension rates. The report recommends family involvement to help reduce suspension rates.

A variety of parent training and conflict resolution programs have been promulgated by researchers to help reduce suspension rates. The Centers for Disease Control and Prevention (CDC) has conducted a large scale research project relating to Parent Training Programs which are already in existence throughout the country. Many of these are utilized with parents who are involved in the child welfare system due to concerns of child maltreatment of a child between 0 and 7 years of age. Two positive outcomes that were discussed in this Article were that they improved their parenting skills, which in most cases were the intended goal; but they also saw a marked decrease in the child’s externalizing behavior. This means that the child displayed less aggression and noncompliance. Even though these programs were aimed at parents who were referred for concerns of child maltreatment, the information gained in this research can be related to parent education or training programs which can be implemented with parents in other settings, such as for those whose children have school disciplinary problems.

Because many of the parent training programs are aimed at the parents of children who are 0-7 years of age, this may seem to have little bearing on behavioral issues of high school students. However, research shows that aggressive behaviors are generally set in a child’s personality traits by the time they reach the age of eight particularly if there have not been consistent interventions from parents. This research emphasizes the importance of teaching parents...
There is evidence, however, which shows that we should not assume that all is lost if you do not reach parents and their children during these early years. Some of this research addresses the fact that there can be improvements in negative behaviors and school disturbances for at-risk children and adolescents through working with parents.

Father involvement has also been shown to have a large number of positive benefits for the child’s development which can be carried into the school setting. Some examples, but not limited to, are earning higher grades in school, having a stronger moral center and conscience, maintaining a stronger work ethic, improved self-concept, and reaching higher levels of education. All of these are indicators of positive school behavior due to the fact that if the student is performing better academically it is unlikely that the child is engaged in negative behaviors at school. It should be noted that father involvement does not mean that the child has to be living in a two-parent home, but rather that the father has regular, positive, mother-supported contact with his child. Therefore fathers need to be encouraged to maintain positive contact with their children.

In addition to programs which focus on parenting, there are positive programs aimed at working directly with children within the school setting. One such program is the Roots of Empathy (ROE) program which started in Canada which brings parents and their infants to elementary schools to teach children empathy and caring for other individuals. This type of program becomes part of the school’s curriculum and can be seen as an example of an early intervention program which has thus far shown success in reducing negative behaviors in the classroom.

Other alternatives to suspending students, especially in cases of minor, non-violent infractions such as smoking, disrespect, or cutting class include mediation and conflict resolution. Removing the student from school for such offenses is simply not effective. In fact, a California report notes that many expulsions have

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Id.

See Oullette & Wilkerson, supra note 174.

See DAVID KNOX & CAROLINE SCHACHT, CHOICES IN RELATIONSHIPS: AN INTRODUCTION TO MARRIAGE AND THE FAMILY 360 (10th ed. 2010).

Id.

See id.

Id.

Mary Gordon, Roots of Empathy Program, CAN. TCHR. MAG., Fall 2005, at 4.

Id.

Id.
nothing to do with school safety, rather disruptions of school activities or defying the authority of school personnel are the leading offenses resulting in expulsion.  

Schools suspend students for talking back, truancy, and other non-violent offenses, essentially giving them a vacation without meaningful consequences. At the same time, some schools were not removing the violent students for fear of receiving the embarrassing “persistently dangerous” label from the state. Addressing this school discipline challenge in creative and unique ways is necessary. Schools should explore alternatives to removal from school for behavior which does not put school safety at risk.

Addressing the truancy issue is essential to influencing student success in school. In Baltimore’s high schools, the most common reason for suspension was cutting class, in fact, more than half of all suspensions and expulsions were imposed for truancy, class cutting, and non-violent opposition to authority. Students who are suspended from school are at far greater risk of academic failure, school dropout, and incarceration and there is growing evidence that suspension has negative effects on student mental-health and physical well-being.

Additionally, suspension is used inconsistently as a disciplinary consequence across school districts within each district and classrooms within schools. For example, in Maryland, the Open Society Institute reports that out of school suspension rates range from 4.0% in Howard County Public Schools to a high of 17.2% in Somerset County Public Schools. Variation in suspension rates among individual schools within a district is high, in the 2006–07 school year, two large Baltimore City high schools with similar demographics, Frederick Douglass High School and Patterson High School, administered short term out-of-school suspensions at the divergent rates of 7.2% and 27.5%, respectively. The reason for suspension is noteworthy when used for non-dangerous, non-violent student behavior. Many suspensions were given for “inappropriate or immature behavior that used to be labeled naughty, mischievous, or prankish and which resulted in detention, school clean-up, or other similar consequences.”


217 Id. at 4–6.

218 Id. at 5.

219 See Sundius & Farneth, supra note 130, at 1 (males, African Americans, and students with disabilities are suspended at higher rates than other students).

220 Id. at 4–6.

221 Id. at 4 (also noting that suspension rates for Baltimore City Public Schools were 12.5%).

222 Id. at 8 (citing Maryland State Dep’t of Educ., Div. of Accountability and Assessment (Dec. 2007)) (“Schools with a higher percentage of students living in poverty tend to have higher suspension rates.”).

223 Id. at 5.
However, “more suspensions [in Maryland] were issued for truancy or tardiness than for dangerous substances, weapons, arson . . . , and sex offenses combined.”224 The report raises concerns that such misplaced use of suspension might reflect the judgment of the teacher or administrator which makes suspension particularly susceptible to discriminatory application.225

The consequences to the suspended student excluded from school are grave. Although intended to improve student behavior problems, suspensions often serve as an incentive for students who wish to avoid school and suspensions can increase student misbehavior.226 Open Society reports that suspension often contributes to a gradual process of academic and social disengagement that increases the probability of academic failure and drop-out.227

“In Maryland . . . more than three-quarters of suspended students were not provided with alternative educational services, even though students are legally entitled to such services.”228 It is reported that suspension increases the students’ likelihood of juvenile justice involvement, described as the school-to-prison pipeline.229

Additionally, “the American Academy of Pediatrics (AAP) expressed grave concerns about the mental health impacts of suspension and expulsion on students.”230 “[T]he American Psychological Association (APA) in its Zero Tolerance Task Force Report, found little evidence that suspension and expulsion benefitted students or their communities . . . exacerbating the negative mental health outcomes for young people.”231 In fact, the APA expressed concern that suspension and expulsion policies may increase “‘student shame, alienation, rejection and breaking of healthy adult bonds.’”232

224 Id.
225 Id. at 6 (explaining that African American students are disproportionately punished for reasons that require the judgment of the teachers such as disrespect, loud noise, and loitering).
226 Id. at 7 (finding that repeat suspensions do not serve as a deterrent).
227 Id. at 6. (citing V. Costenbader & S. Markson, School suspension: A Study with Secondary School Students, 36 J. SCH. PSYCHOL., 59–82 (1998)).
229 Id. at 7.
230 Id. (citing American Academy of Pediatrics (AAP), Policy Statement: Out-of-school Suspension and Expulsion, 112 PEDIATRICS, 1206–1210 (2003)).
231 Id. at 7–8.
232 Id. (citing American Psychological Association Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations (August 2006)).
B. Alternatives to Out-of-School Suspension or Expulsion for Non-Violent, 
Absence Related Offenses

The use of suspensions for non-violent and non-dangerous behavior must 
cease and be replaced with alternative approaches to educating students and 
guiding their behavior. Involving parents, providing alternative dispute vehicles, 
and offering alternative educational settings are examples of steps for school 
systems to take to address the excessive, ineffective, and often discriminatory 
suspension practices found in our nation’s schools.

Interestingly, Maryland recently enacted a statute prohibiting suspension or 
expulsion from school solely for attendance related-offenses. The Maryland 
legislature should be applauded for recognizing that suspending a student from 
school for failure to attend school will not result in a positive change in student 
behavior.

The legislative decision in Maryland to no longer suspend students solely for 
being chronically late or absent is long overdue. The statute implicitly 
recognizes that suspending a child who is already absent from school is 
counterproductive and a futile disciplinary tool. The legislators were no doubt 
influenced by data that demonstrated suspensions lead to disengagement from the 
education process that increases the likelihood of dropping out. Furthermore, the 
American Academy of Pediatrics reports that “high rates of suspension are often 
associated with high rates of depression, drug problems, and home life stress.”

The Task Force, which studied multiple suspensions, recommends the provision of 
alternative interventions other than school suspensions to remedy the behavior of 
students, including professional development and financial resources to ensure 
students reach their maximum educational potential.

233 See MD. CODE ANN., EDUC. § 7-305 (LexisNexis 2009) (enacted and effective July 
1, 2009) (“[A] student may not be suspended or expelled from school solely for attendance 
related offenses.”). However, a student may be disciplined with an in-school suspension. 
Id.

234 Id.

235 Id. Other disciplinary tools such as in-school suspensions and after school 
detention are still permitted for truancy.

236 See Sundius, supra note 219, at 6–7.

237 TASK FORCE TO STUDY MULTIPLE SUSPENSIONS, THE USE OF STUDENT SUPPORT 
TEAMS AND OTHER INTERVENTIONS IN THE REDUCTION OF MULTIPLE SUSPENSIONS 4 (Dec. 
31, 2008), available at http://www.marylandpublicschools.org/NR/rdonlyres/0700B064-

238 Id. at 12–13 (reporting that “74,594 students accounted for 131,629 out-of-school 
suspensions in Maryland” during the 2006–07 school year and “38 percent received 
multiple suspensions”). Id. at 3.
1. Holding Parents Accountable

To encourage higher attendance rates and combat truant behavior, some states have enacted statutes allowing for parents to be held accountable for their children’s habitual absenteeism in certain situations via fines or possibly jail time. In California, parents may be civilly liable for failure to comply with compulsory school attendance with fines of $100, $250, or $500 imposed for first, second, and subsequent convictions. Maryland has a similar attendance policy pertaining to parents’ legal obligation to see that their child (5 to 15 years old) attends school by imposing fines and a potential 30 day jail sentence.

California’s approach to truancy whereby parents are punished for their children’s failure to attend school is but one approach to this complex issue. There is no doubt that student drop-out is the gateway to a life of poverty, unemployment, and prison for many students. California punishes parents who knew or reasonably should know that their child is at risk of delinquency and a court challenge to this approach was upheld by holding parents responsible for criminal acts of their children. Believing that parents have the ability to control their children, California’s approach provides viable options for prosecutions and signifies a public willing to take truancy seriously to halt the school-to-prison pipeline.

2. Counseling and Training for Students and Families

Another approach to truancy is seen in Baltimore’s truancy court. Operated by the University of Baltimore School of Law’s Center for Families, Children, and the Courts (CFCC), the program is designed to help schools and the courts address what has become a crisis, where 52.1% of Baltimore high school students have engaged in truant behavior. CFCC’s approach to court reform through a holistic

239 Cal. Educ. Code § 48200, 48260, 48293 (West 2009). (A child is considered truant if absent from school without a valid excuse 3 full days in one school year or tardy by 30 minutes or more on 3 occasions. Id. at § 48260.).
240 Md. Code Ann., Educ. § 7-301 (LexisNexis 2009) (First time offenses result of a fine of up to $50 per day of unlawful absence or up to 10 days of imprisonment; second time or subsequent offenses result in a fine of up to $100 per day and up to 30 days imprisonment.).
242 Id. at 511–12, 514.
244 See University of Baltimore School of Law, The Center for Children, Families, and the Courts, available at http://law.ubalt.edu/template.cfm?page=602. (last visited Nov. 10, 2010) The program (CFCC) recruits students, faculty, administrators and staff to serve as tutors or mentors. Studies reveal two-thirds of male juveniles arrested while truant tested positive for drug use.
look at the many systems affecting the lives of families and children has shown promise. The early intervention addressing problems underlying truancy are aimed at reducing delinquency. Initial data of students participating in the Truancy Court Program report an overall 75% decrease in absences from school. The program, which involves the student, parent, judge, mentor, and CFCC staff includes parenting classes, tutoring, basic skills training, counseling, and anger management. This creative and therapeutic approach to addressing the underlying causes of truancy are laudable.

3. Other Recommendations to Encourage Attendance

The Open Society Institute Policy paper series recognizes the importance of regular school attendance, “the bellwether for a city’s future.” The recommendations for improving school attendance include: (1) Making schools safe, engaging, and attractive to students; (2) Policies that make attendance everyone’s responsibility; and (3) Policies that eliminate push-out practices.

Included in Open Society Institute’s recommendations is improved safety and reliability of transportation to and from schools, two current impediments to regular school attendance. In particular, the high rate of foster care placement in Baltimore requires due diligence by school officials in identifying the appropriate school, arranging for transportation, and providing supportive services for those at risk children. Additionally, creating a change of focus from school policies that push children out of school with policies and incentives to keep children in school are key recommendations. Examples include school funding which rewards schools that retain enrollment and have high attendance as well as rewarding school for getting students to school every day and for keeping them enrolled. Finally, and most importantly, student discipline codes should be “revise[d] . . . to ensure equitable, appropriate, and limited use of suspension and expulsion, expand the set of meaningful consequences for misbehavior . . . and ensure that

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245 University of Baltimore School of Law, The Center for Families, Children, and the Courts, Truancy Court Program, http://law.ubalt.edu/template.cfm?page=1274 (last visited Nov. 10, 2010). The Truancy Court links families to social services and community support programs.

246 Id.

247 Id.


249 Id. at 4.

250 Id. at 6.

251 Id. at 7 (noting that in 2006–07, six thousand Baltimore city youth were in foster or kinship care, putting them at risk for academic failure due to greater frequency of school placement changes).

252 Id. at 8.

253 Id. at 9.
misbehaving students continue in school. Instead of resorting to out-of-school suspension for non-violent behavior, schools should utilize in-school suspensions, detention, counseling, conflict resolution programs, and alternative schools.

C. Recommendations for Disciplinary Action for Violent Offenses

For those students who commit violent acts in school and for those who place the safety of others at risk, the challenge is to provide a fair and just disciplinary system which conforms with due process and respects the learning system. The school’s need to provide its students with a safe and effective learning environment must be balanced against the offending student’s need for access to education, in conformity with the student’s due process rights.

The Goss case urges a formal procedure, but does not supply the specific details of the process. The following are recommendations for school districts to follow in developing and implementing a suspension policy regarding procedures for the student facing removal from school:

1. Written notice of the hearing sent to both the child and parent or guardian.
2. Notification of the availability of low cost or free legal representation.
3. An impartial hearing examiner who is not employed by the school district.
4. Right to the list of witnesses the school intends to call at suspension hearing.
5. Burden of proof to be the clear and convincing evidence standard.
6. Unless ordered by a court, the maximum length of suspension should be limited to forty-five school days.
7. Alternative educational programs should be provided to all suspended students.
8. Right to be accompanied and represented by counsel at the disciplinary hearing.
9. Uniformity in maximum length of time for school suspension, as established by the state department of education.
10. Uniformity in procedural protections and safeguards at disciplinary hearing, as established by the state department of education.
11. Prohibit out-of-school suspension for non-violent school offenses, including absenteeism, tardiness, truancy and other attendance related issues.
12. Uniformity in criteria for suspension (grounds for suspension), as established by the state department of education.

\(^{254}\) Id.
\(^{255}\) Id.
13. For non-violent attendance related offenses, consider alternatives including counseling programs, after-school detention and Saturday programs.
14. For violent and drug related offenses, require counseling programs and alternative schools prior to school suspension.
15. For all students suspended from school for greater than ten days, require the provision of alternative educational programming for students.
16. Prohibit the use of jail time against parents for child related offenses.
17. Monitor, on a state wide level and local school division level, data of suspension of disabled students, as to length and specific disability.
18. Require parents of suspended students to participate in parent training classes.
19. Encourage schools to establish a curriculum for young children to teach empathy, problem solving, and communication skills.
20. Require suspended students to successfully complete a conflict resolution program.

In addition, to promote the academic success of the violent offender, he or she should be “referred to appropriate services or treatment [during the suspension period in order to] return to school with new skills, tools, or support to help them make better choices in the future.”

VI. CONCLUSION

No doubt, zero tolerance and subsequent suspension for all school infractions helps no one. The willingness of schools to not give up on children and to offer positive and constructive alternatives to violence and misbehavior will lead to more children remaining in school and receiving a meaningful education leading to a future with greater potential for success.

“Stripping a child access to educational opportunities is a life sentence to a second rate citizenship.”

“‘There is no question that a high school student who is punished by expulsion might well suffer more injury than one convicted of a criminal offense.’

Pushing students out the schoolhouse door sends them out into the world without the necessary skills to become contributing members of society. To recognize the long term implications of school suspension and expulsion will hopefully lead to schools acknowledging their important role in educating all its students and preparing them for a successful future.

\[\text{257 See Sundius, supra note 219, at 9.}\]
\[\text{258 Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 705 (5th Cir. 1974).}\]
APPENDIX A: SCHOOL SUSPENSION SURVEY

**Question 1.** Please provide the following demographic information

Job Title: __________________________________________

School Type: __________________________________________
(Public/Private)

Grade Level: __________________________________________

School Enrollment: __________________________________________

Location: __________________________________________
(City, State)

Community Type: __________________________________________
(Urban, Suburban, Rural)

**Question 2. Purpose**

What is the school division’s goal or purpose for suspending students from school?

Please check all that apply.

___ Student Safety

___ Teacher Safety

___ Punishment

___ Changing Student Behavior

___ Mandated by School Policy

___ Used as a Last Resort (All other less restrictive options have been exhausted)

In your opinion, what should the goal(s) of out-of-school suspension be?

________________________________________________________________
________________________________________________________________
**Question 3. Effectiveness**

In your opinion and based on your experience, how effective is out-of-school suspension in positively altering student behavior for the following offenses?

<table>
<thead>
<tr>
<th>Violent Offenses</th>
<th>Drug-Related Offenses</th>
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<tr>
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<tr>
<th>Disrespect &amp; Disobedience</th>
<th>Absenteeism &amp; Tardiness</th>
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</tbody>
</table>
Question 4. Attendance Related Offenses

Please rank the following methods, in order of frequency, used to discipline students for serious or chronic attendance related infractions such as absenteeism, tardiness, and class cutting with 1 being the most frequent and 5 being the least frequent.

___ In School Suspension
___ After School Detention
___ Saturday Detention
___ Out-of-School Suspension
___ Expulsion

Question 5. Attendance Related Offenses

Part A

Do you think that out-of-school suspension should be used to discipline students for attendance related infractions (absenteeism, class cutting, tardiness)? Please state yes or no and briefly explain.

__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Part B

Do you think parents should be held responsible via fines for their child’s chronic or habitual attendance related problems? Please state yes or no and briefly explain.

__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
Part C

Do you think parents should be held responsible via jail time for their child’s chronic or habitual attendance related problems? Please state yes or no and briefly explain.

__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Question 6. Administrative

In your school district, which of the following professionals are able to recommend students for suspension? Check all that apply.

___ Principal
___ Vice Principal
___ Other Administrators
___ Guidance Counselor
___ Teachers
___ Other (Please list) _________________
Question 7. Alternatives to Suspension – Violent Offenses

Based on your opinion and experience, please rank the effectiveness of the following alternatives to out-of-school suspension for violent and drug-related offenses with 1 being the most effective and 4 being the least effective.

___ Referral to Criminal Justice System (Adult or Juvenile Court)

___ Placement in Alternative School for “At Risk” Students

___ Transfer to Another School

___ Use of Counseling Programs to Redirect Student Behavior and Provide Family Therapy

___ Other Alternatives (Please list) ____________________

Question 8. Alternatives to Suspension – Non-Violent Offenses

Based on your opinion and experience, please rank the effectiveness of the following alternatives to out-of-school suspension for non-violent offenses such as attendance-related offenses and disrespect or disobedience with 1 being the most effective and 4 being the least effective.

___ Saturday School

___ After School Detention

___ In-School Suspension

___ School Counseling
Question 9. Alternative Education

If a student is suspended from school, what is the current school policy with regards to providing an alternative education for these suspended students. Please check all that apply.

___ Separate classroom setting within the current school
___ Special education program in an alternative separate school
___ Home school
___ No alternative education offered during the period of suspension
___ Alternative education is available only for expelled students, but not suspended students
___ Alternative education is available only for expulsion and long term suspension (10 days or more), but not short term suspension
___ Other (Please Specify) ______________________________

Question 10. Alternative Education

In your opinion and based on your experience, do you believe that suspended students should be provided with an alternative education? If so, in what setting? Please check all that apply.

___ No
___ Yes, separate classroom setting
___ Yes, separate education program in a separate school
___ Yes, home school
___ Other (Please Specify) ______________________________
LEGAL AND ETHICAL ISSUES CONFRONTING GUARDIAN AD LITEM PRACTICE

Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas*

Abstract

Courts appoint guardians ad litem (GALs) to protect the interests of the courts’ most vulnerable populations. This widespread utilization of GAL appointments results in GALs performing diverse tasks including fact investigator, mental health evaluator, next friend attorney, family mediator, and child’s attorney. Their valuable work, however, is not without legal and ethical uncertainty. Incompatible ethical mandates, sparse statutory guidance, and undeveloped case law compound these quandaries. This Article explores several important legal and ethical issues impacting modern GAL practice. Part I briefly reviews the functions that GALs serve in the nation’s family and juvenile courts. Part II examines a number of legal and ethical issues surrounding GAL practice, exploring the guidance given or predicaments created by various statutes, case law, and professional rules of conduct. In particular, dilemmas surrounding dual appointments, non-confidentiality warnings, third-party access to records, waiver of privilege for a minor’s treatment records, the contents of the GAL report, and the safety of the GALs are considered. This Article brings to the forefront some difficult questions, compares differing approaches taken by jurisdictions, and discusses resolutions to these legal and ethical issues.

INTRODUCTION

A guardian ad litem (GAL)¹ is an individual appointed by the court to serve as an independent advocate who promotes the best interests of minors, elders, and legally incompetent persons in custody disputes, abuse and neglect cases, guardianships, and other court proceedings.² GALs generally have expertise as

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1 The term “GAL” is used generically in this paper to refer to those appointed by the court to represent the best interests of a minor or other incapacitated individual. Other states similarly call the position a “special guardian,” “best interests attorney,” “special advocate,” “court-appointed advisor,” or “attorney ad litem.”
lawyers, mental health professionals or both. Over the last decade, scholars, courts, and legislatures alike have acknowledged the important role that GALs serve in protecting children and other vulnerable populations. Indeed, since the passage of the federal Child Abuse Prevention and Treatment Act in 1974, the practice of appointing a GAL to represent the best interests of individuals has proliferated. GALs now play a central role in the family and juvenile courts of every state.

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3 See, e.g., Barbara Glesner Fines, Wells Conference on Adoption Law: Pressures Toward Mediocrity in the Representation of Children, 37 CAP. U.L. REV. 411, 411 (2008) (The GAL is called upon to meet many needs, including an advisor and advocate for children, a monitor for families, and a neutral informant for the court).

4 See, e.g., State ex rel. Bird v. Weinstock, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993) (“Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the ‘best interests of the child,’ has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents.”).

5 See, e.g., H.R. Con. Res., 79th Gen. Assemb., 2d Sess. (Iowa 2002) (GALs “have an important role in protecting the best interest of a child in need of assistance, a child involved in a delinquency proceeding, or a child involved in another proceeding under the juvenile justice code.”).

6 But cf. Robert N. Rosen, Viewpoint: Getting Rid of the GAL: How to Save Your Client from Those Expensive, Unnecessary Officious Intermeddlers, 14 S. CAROLINA LAWYER 15, 15 (2003) (arguing that lawyers have a duty to do away with GALs in custody cases).


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Despite this, or perhaps because of this wide-spread utilization of GAL appointments, GALs perform widely diverse, and occasionally concurrent, tasks. These tasks include functioning as an investigator of facts, mental health evaluator, next friend attorney, family mediator, or child’s attorney. While GALs functioning in each of these roles are appointed in order to assist the court in resolving custody disputes, visitation schedules, temporary placements, or other matters, legal and ethical issues arise in everyday GAL practice that have important implications for all parties involved.

I. GUARDIAN AD LITEM PRACTICE

Courts appoint GALs in cases where such appointments are statutorily required, upon request by parties to the matter, or sua sponte where a judge determines that such an appointment is in the ward’s best interest. Unlike the child’s attorney whose role is generally to represent the stated wishes of the child, the GAL is generally expected to advocate for the best interests of the child, whether or not the child is in agreement. Moreover, the GAL “owes his or her

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11 Id.
13 Jennifer Paige Hanft, Attorney for Child Versus Guardian Ad Litem: Wyoming Creates a Hybrid, But Is It a Formula for Malpractice?, 34 LAND & WATER L. REV. 381, 388 (1999). For example, it is not uncommon to see a GAL assume multiple roles during the pendency of a case. Id. Some have argued that a GAL assuming multiple roles in the case has an important symbiotic relationship that works to “better” the child’s best interests. See Tara Lea Muhlhauser, From Best to Better: The Interests of Children and the Role of a Guardian Ad Litem, 66 N.D. L. REV. 633, 638–39 (1990).
14 See, e.g., D.C. CODE § 16-2304 (b)(5) (2009) (“The Superior Court shall in every case involving a neglected child which results in a judicial proceeding . . . appoint a guardian ad litem . . . to represent the child in the proceedings.”).
15 See, e.g., MASS. GEN. LAWS ch. 190B, § 1-404(a) (2009) (The court may “appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor, mentally retarded person, autistic person, or person under disability or not ascertained or not in being . . .”).
16 See, e.g., FLA. STAT. § 61.401 (2009) (“[I]f the court finds it is in the best interest of the child, the court may appoint a guardian ad litem . . . ”).
17 To clarify, GALs do consider the child’s expressed wishes, but only as a component of determining the child’s best interest. See Nancy J. Moore, Conflicts of Interests in the Representation of Children, 64 FORDHAM L. REV. 1819, 1823 (1996).
primary duty to the court and not to the child-client alone.18 States have employed numerous GAL models, with variations found at the interstate level.19 In general, however, five types of GAL roles exist, each with distinct functions ranging from fact-finding and reporting to representing and advocating for the ward’s wishes.20 These roles include investigator, mental health evaluator, next friend attorney, mediator, or a hybrid form of a child’s attorney.21

The investigator role is by far the most common role for the GAL.22 GAL investigator duties include:

[R]eviewing documents, reports, records and other information relevant to the case, meeting with and observing the children in appropriate settings, and interviewing the natural parents, foster parents or kinship caregiver, healthcare providers, such as doctors, hospital personnel, therapists for both children and parents, and any other person, such as school personnel, with knowledge relevant to the case.23

The GAL then consolidates the information gathered, includes her own observations and, if applicable, the results of any evaluations such as psychological testing. This is presented to the court in the form of a written report,24 and is often accompanied with dispositional recommendations.25 Depending on jurisdiction,  

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20 Lidman & Hollingsworth, supra note 10, at 262.
21 Id. at 256–57.
22 Id. at 277. See also MICHI. COMP. LAWS § 712A.17d(1)(c) (2009) (The GAL’s duties include “determin[ing] the facts of the case by conducting an independent investigation.”); 750 ILL. COMP. STAT. 5/506 (2) (2006) (The GAL “shall investigate the facts of the case and interview the child and the parties.”); MASS. GEN. LAWS ch. 215, § 56A (2009) (“Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations . . . .”).
24 See, e.g., MASS. GEN. LAWS ch. 215, § 56A (2009) (The GAL shall “report in writing to the court the results of the investigation”).
25 See, e.g., Missouri Supreme Court, Standard 14.0, In re: Standards with Comments for Guardians Ad Litem in Missouri Juvenile and Family Court Matters, Sept. 17, 1996 (The GAL “shall present recommendations to the court on the basis of the evidence presented and provide reasons in support of these recommendations.”), available at http://www.rollanet.org/~childlaw/galstd/mogalstd.htm#S-14.0.
this report may or may not be shared with the parties to the case. Only Wisconsin rejects the idea that a GAL would be appointed to serve a fact-finding mission. In that jurisdiction, a GAL operates as an attorney for the child.

A second traditional role of the GAL is that of mental health evaluator. In such cases, courts typically either identify the existence of mental health issues, or determine that a GAL with a mental health background can better assess the issues before the court. GAL evaluators perform such functions as:

Data collection and analysis . . . regarding each child’s developmental needs; the quality of attachment to each parent and that parent’s social environment . . . including: . . . reviewing pertinent documents related to custody. . . . observing parent-child interaction. . . . interviewing parents conjointly, individually, or both . . . to assess . . . capacity for setting age-appropriate limits and for understanding and responding to the child’s needs. . . . history of involvement in caring for the child. . . . History of child abuse, domestic violence, substance abuse, and psychiatric illness. . . . Conducting age-appropriate interviews and observation with the children. . . . collecting relevant corroborating information or documents. . . . and. . . . consulting with other experts . . . .

GAL evaluators also owe a primary duty to the court and submit a report, often including specific recommendations. Since GAL evaluators are often mental health professionals whose presence in the matter might be construed by the parties as therapeutic and therefore confidential, GAL evaluators may be required to

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26 See, e.g., 750 ILL. COMP. STAT. 5/506(2) (2009) (The GAL “shall testify or submit a written report to the court regarding his or her recommendations . . . [t]he report shall be made available to all parties.”); c.f., In re Kalil, 931 A.2d 1255, 1258 (N.H. 2007) (finding that a GAL report was properly sealed despite father’s request to review the report).

27 See Hollister v. Hollister, 496 N.W.2d 642, 645 (Wis. Ct. App. 1992) (rejecting that the GAL has a “fact finding mission,” rather viewing the GAL role as that of the child’s attorney).


29 For example, child custody disputes may involve issues such as child development and emotional needs, parenting behaviors or capacity, psychopathology, emotional well-being, and other mental health issues that forensic mental health assessments can contribute insight to. See Randy K. Otto, John F. Edens & Elizabeth H. Barcus, The Use of Psychological Testing in Child Custody Evaluations, 38 FAM. & CONCIL. CTS. REV. 312, 312 (2000).


32 Id. at 37–38.
warn the parties that disclosures made are not privileged and will be disclosed to the court.\textsuperscript{33}

A third GAL role, that of GAL mediator, operates in sharp contrast to the roles discussed above. Despite being appointed or referred by the court,\textsuperscript{34} GAL mediators attempt an amicable resolution of a particular matter within the court’s subject matter jurisdiction.\textsuperscript{35} GAL mediators do not disclose to the court what the parties revealed during the mediation, nor do they independently investigate facts or evaluate the circumstances.\textsuperscript{36} Rather, their role is to “reduce acrimony which may exist between the parties and to . . . . develop an agreement assuring the child’s close and continuing contact with both parents after the marriage or the domestic partnership is dissolved.”\textsuperscript{37} Although GAL mediator appointments are less frequent than other types of GAL appointments, there is an increasing trend in favor of utilizing mediation.\textsuperscript{38}

The remaining two GAL functions resemble more traditional attorney roles. Since minors lack the legal capacity to sue on their own behalf, next friend attorney GALs\textsuperscript{39} allow a child (or another incompetent individual) to initiate or intervene in an ongoing legal matter when the child’s interests appear to diverge from that of his/her parents.\textsuperscript{40} Despite the next friend GAL’s role in representing


\textsuperscript{34} See, e.g., FLA. STAT. § 61.183(1) (2009) (“In any proceeding in which the issues of parental responsibility, primary residence, access to, visitation with, or support of a child are contested, the court may refer the parties to mediation. . . .”); N.C. GEN. STAT. § 50-13.1(b)(2009) (“Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter . . . shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation . . . .”).

\textsuperscript{35} Lidman & Hollingsworth, supra note 10, at 281–83.

\textsuperscript{36} Id.; see also, e.g., ARIZ. REV. STAT. § 25-381.16(D) (LexisNexis 2009) (“All communications, verbal or written, from the parties to the judge . . . in a proceeding under this article shall be deemed confidential communications, and shall not be disclosed without the consent of the party making such communication.”).

\textsuperscript{37} WASH. REV. CODE (ARCW) § 26.09.015(1) (2009); see also CAL. FAM. CODE § 3161 (Deering 2010) (“The purposes of a mediation are as follows: (a) To reduce acrimony that may exist between the parties. (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child . . . . (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.”).

\textsuperscript{38} Lidman & Hollingsworth, supra note 10, at 281–83.

\textsuperscript{39} While some jurisdictions use the terms interchangeably, technically a “next friend” is appointed to represent a minor or incapacitated individual as a plaintiff, while a GAL is appointed to protect a minor or incapacitated individual as a defendant. See Mary A. Hohmann & James W. Dwyer, Guardians ad Litem in Wisconsin, 48 MARQ. L. REV. 445, 445 (1964).

\textsuperscript{40} See Ann M. Haralambie, Kids’ Causes of Action, 27 FAM. ADV. 30, 30–31 (2005); see, e.g., IND. R. TRIAL P. 17(C) (“An infant or incompetent person may sue or be sued in
the child in litigation, these GALs nevertheless owe their primary duty of allegiance to the court and their obligation is to advocate for the child’s best interests. A jointly appointed child’s attorney/GAL, on the other hand, truly assumes the function of the traditional attorney, duty-bound by the client’s expressed wishes and to uphold attorney-client privilege. However, if her duty to advocate for the child’s wishes creates a conflict with her duty to advocate in the child’s best interests, she (or someone else) may request that another GAL be appointed. The process through which this must occur, however, is not without controversy. Since it is often the attorney/GAL that needs to bring to the court’s attention the need for a separate GAL, doing so may compromise the attorney’s obligation to the child.

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41 Moore, supra note 17, at 1842.
42 See, e.g., CONN. GEN. STAT. § 46b-129a (2) (2008) (“[A] child shall be represented by counsel knowledgeable about representing such children who shall be appointed by the court to represent the child and to act as guardian ad litem for the child. The primary role of any counsel for the child including the counsel who also serves as guardian ad litem, shall be to advocate for the child . . .”); MICH. COMP. LAW; § 712A.17d (2009) (“The lawyer-guardian ad litem’s powers and duties include at least all of the following: (a) The obligations of the attorney-client privilege, (b) To serve as the independent representative for the child’s best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child. (c) To determine the facts of the case by conducting an independent investigation. . . . (d) To meet with or observe the child and assess the child’s needs and wishes with regard to the representation and the issues in the case. . . .”). The potential ethical issues involved in the joint appointment of a single attorney as both the child’s GAL and attorney is explored in more detail below.
44 See, e.g., OHIO REV. CODE ANN. § 2151.281(H) (LexisNexis 2010) (Providing that if the GAL for a child is also an attorney, the GAL may serve as counsel to the ward unless the GAL or the court finds a conflict of interest exists between the dual roles of GAL and counsel, in which case the court shall appoint a separate GAL); see also Merril Sobie, The Child Client: Representing Children in Child Protective Proceedings, 22 TOURO L. REV. 745, 802–03 (2006).
45 Sobie, supra note 44, at 799–800 (citing In re Griffin, No. 18432, 2001 WL 43106, at *5 (Ohio Ct. App. Jan. 19, 2001)) (“Because a guardian ad litem has a duty to recommend what is in the best interests of the child, and an attorney has a duty to zealously represent his client, it is easy to see that a conflict could arise any time a child’s desire is not what he deemed in his ‘best interests.’”).
GALs in their various roles serve an important function in protecting the legal rights of minors (and other legally incompetent individuals). In difficult economic times, it is tempting to assign the dual roles of the child’s attorney and GAL to one individual, but can these roles be truly compatible? Must attorney GALs warn that their conversations are not confidential? Should parties be obligated to produce their medical or mental health records to the GAL and/or opposing parties? If they do not, how are the relevant issues evaluated? What information should be included in the GAL report? How can the GAL protect her own safety while advocating for the child’s best interests in a high-conflict situation?

II. LEGAL AND ETHICAL ISSUES IN GAL PRACTICE

As the above questions highlight, GAL practice is rife with yet unanswered questions that pose serious ethical concerns throughout the GAL’s involvement in a case. In this section, the GAL role is broken down into its basic components: the GAL appointment, the GAL’s data collection process, the GAL report, and post-report activity. Potential legal and ethical and issues are present at each of these stages.

A. The GAL Appointment

1. Attorney/Guardian ad Litem Hybrid Appointments

While all states acknowledge that children should have a “voice” in legal matters, states vary greatly in what procedural avenue is available to ensure the child is heard. Increasingly, financial pressures have resulted in many states entertaining dual appointments for child representatives, especially attorney/GAL appointments. Despite the financial benefits, the potential for conflicting obligations in the course of representation is uncomfortably palpable in the hybrid appointment model.

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48 Am. Bar Ass’n, Appointment Laws, supra note 47, at 601 (states which allow hybrid appointments include California, Georgia, Illinois, Michigan, Pennsylvania, and Wyoming).
49 Peters, supra note 19, at 1025 (estimating that dual appointment systems can save up to 50 percent of the money that would be spent otherwise).
50 Atwood, Workable Standards, supra note 46, at 200.
On a basic level, GALs share a number of core responsibilities with children’s attorneys. Both roles typically include independent factual investigation, communication with the child client, interview of relevant witnesses and collaterals, active participation in court hearings, and sometimes advocacy for a particular result. In many cases, an individual serving the functions of a GAL and a child’s attorney can perform both without contradiction. And yet, the potential for conflict looms in every case and many courts acknowledge that the hybrid attorney/GAL role poses inherent ethical challenges. Indeed, courts and legislatures continue to struggle to define the duties of the hybrid attorney/GAL in a manner that is consistent with the ethical obligations of lawyers in three core areas, discussed below: (1) advocating for the wishes of the client regarding the objectives of representation; (2) maintaining client confidentiality; and (3) avoiding an advocacy role when the lawyer is likely to become a necessary witness.

Ethical rules governing a lawyer’s scope of representation require lawyers to consult with their clients and follow the client’s direction. While a child’s attorney charged with advancing the child’s wishes in court avoids a conflict regarding the scope of representation, the position of the hybrid attorney/GAL is less clear. Pennsylvania, for example, statutorily charges the hybrid attorney/GAL with the representation of both the “legal interests and the best interests of the child at every stage of the proceedings.” Even in states such as Wyoming, where the duties of the hybrid attorney/GAL are more narrowly defined, courts still struggle with the role of the hybrid attorney/GAL in the courtroom absent a “modified application of the Rules of Professional Conduct.” In fact, some jurisdictions have used the hybrid nature of the attorney/GAL role to excuse “strict adherence to

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51 Atwood, Uniform Representation, supra note 47, at 81–82.
52 Atwood, Workable Standards, supra note 46, at 199.
53 See id.
54 Peters, supra note 19, at 1025–26.
55 Atwood, Workable Standards, supra note 46, at 200.
56 See MODEL RULES OF PROF’L CONDUCT R. 1.2 (2009) (directing a lawyer to abide by the client’s decisions regarding the goals of representation and how the client wishes those goals to be pursued.).
57 Atwood, Uniform Representation, supra note 47, at 82–83.
58 See 42 PA. CONS. STAT. § 6311 (2009) (Charging the GAL with advising the court of the child’s wishes and presenting evidence to support the child’s wishes and stating, “a difference between the child’s wishes . . . and the recommendations . . . shall not be considered a conflict of interest” for the GAL).
59 See Clark v. Alexander, 953 P.2d 145, 153-54 (Wyo. 1998). It is important to note that this isn’t synonymous with the attorney/GAL owing a duty to the court. Some jurisdictions, such as Michigan, statutorily provide that “[a] lawyer-guardian ad litem’s duty is to the child, and not the court.” MICH. COMP. LAWS § 712A.17d(1) (2009).
60 See Clark, 953 P.2d at 153-54 (acknowledging that the hybrid attorney/GAL model necessitates “a modified application of the Rules of Professional Conduct”).
some rules of professional conduct.\textsuperscript{61} In those jurisdictions that alter the traditional ethical requirement to abide by the client’s wishes in order to accommodate the hybrid role, the attorney/GAL is typically charged with advocating for the best interests of the child, “regardless of whether the lawyer-guardian ad litem’s determination reflects the child’s wishes.”\textsuperscript{62} Those jurisdictions typically also require attorney/GALs to “inform the court as to the child’s wishes and preferences” when they diverge from the best interests.\textsuperscript{63}

The hybrid attorney/GAL also confronts ethical uncertainty concerning the use of evidence, such as a child’s well-being, that is appropriate to the role of the GAL but incompatible with the trial strategy of the child’s attorney.\textsuperscript{64} Whereas a child’s relationship with the attorney is privileged, the relationship with the GAL is not.\textsuperscript{65} Like the ethical rule regarding the scope of representation, some jurisdictions have also modified confidentiality and privilege rules in order to accommodate the hybrid attorney/GAL role.\textsuperscript{66} Wyoming, for example, has decided that “[w]hile it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child’s consent.”\textsuperscript{67} However, not all jurisdictions that

\begin{itemize}
  \item \textsuperscript{61}Id. See also In re J.P.B., 419 N.W. 2d 387, 391–92 (Iowa 1988) (noting the difficulty of the attorney/GAL role when the child’s expressed wishes conflict with the attorney/GAL’s best interests determination, but concluding that a modification of the traditional lawyer-client relationship best serves the child’s best interests).
  \item \textsuperscript{62}MICH. COMP. LAWS § 712A.17d(1)(d)(i) (2009) (Lawyer-GAL duties include “[t]o make a determination regarding the child’s best interests and advocate for those best interests according to the lawyer-guardian’s understanding of those best interests, regardless of whether the lawyer-guardian’s determination reflects the child’s wishes.”). See also Clark, 953 P.2d at 153–54 (“Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client’s expressed preferences, but by the client’s best interests.”); COLO. REV. STAT. 14-10-116(2) (2009) (“the legal representative of the child is not required to adopt the child’s wishes in his or her recommendation or advocacy for the child unless such wishes serve the child’s best interest . . .”).
  \item \textsuperscript{63}MICH. COMP. LAWS § 712A.17d (2009) (“Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child’s wishes and preferences”). See also Clark, 953 P.2d at 153–54, (citing In re Marriage of Rolfe, 699 P.2d 79, 86–87 (Mont. 1985)) (If the attorney/GAL “determines that the child’s expressed preference is not in the best interests of the child, both the child’s wishes and the basis for the attorney/guardian ad litem’s disagreement must be presented to the court.”).
  \item \textsuperscript{64}Peters, supra note 19, at 1025. See also MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009) (providing three limited situations in which a lawyer may reveal information relating to a client’s representation).
  \item \textsuperscript{65}Peters, supra note 19, at 1025.
  \item \textsuperscript{66}See Clark, 953 P.2d at 154 (modifying the confidentiality inherent in the attorney-client relationship such that relevant information provided by the child may be brought to the court’s attention.).
  \item \textsuperscript{67}Id. (Noting that the attorney/GAL, as legal counsel to the child, must explain to the child that the attorney/GAL is charged with the child’s best interests which may result in
employ the hybrid attorney/GAL model subscribe to this policy. Michigan, for instance, statutorily provides that the obligations of the attorney-client privilege apply to the hybrid attorney/GAL, noting that “a lawyer-guardian ad litem’s duty is to the child, and not the court.”

While some courts and legislatures have modified their ethical rules of professional conduct in order to accommodate the hybrid attorney/GAL role, there are still ethical impediments to lawyers advocating in cases in which they may also be called to testify. This is problematic in the hybrid attorney/GAL model as GALs are routinely called upon to testify regarding their investigation and observations, while an attorney for a party is not. As the District of Columbia Court of Appeals explained, the primary reason for prohibiting an attorney from acting as both an attorney and a witness is to “avoid conflicts that arise when an attorney puts his or her own credibility at issue in litigation . . . [s]uch conflicts may prejudice the client when the attorney’s testimony is impeached on cross-examination, or may prejudice the opposing party, when the attorney’s testimony is given undue weight by the factfinder as a result of his dual role.” However, as the Supreme Court of Illinois explained in In re Marriage of Bates, there is also another important reason: the right of the parties to procedural due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

In Bates, a state statute empowered the child’s court-appointed representative to make recommendations consistent with the best interests of the child. In a sealed report to the court, the child’s representative detailed his observations and conversations with the parties and provided recommendations. The report was admitted into evidence, but the parent was unable to challenge adverse recommendations as the statute expressly prohibited the child’s representative from being called as a witness. The court, in finding that the parent’s right to

the disclosure of information that would traditionally be protected by the attorney-client relationship.)


69 See Clark, 953 P.2d at 154 (noting that although some rules require compromise in order to allow for the dual attorney/GAL role, there would be no compromise of the rule prohibiting a lawyer from advocating in a case in which he is likely to be called as a witness. See also Model Rules of Prof’l Conduct R. 3.7 (2009) (“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”).


71 In re Marriage of Bates, 212 Ill. 2d 489, 515 (2004) (statute allowing child representative to submit recommendations in a sealed report to the court but prohibited the calling of the representative as a witness deprived the parent of her due process right to challenge an adverse recommendation through cross-examination).

72 Id. at 513. The pertinent statutory language as it existed at the time of litigation is documented in the case.

73 Id. at 506.

74 Id. at 510. The parent challenged the admission of the report, arguing that the child representative had acted as both an advocate and a fact finder.
procedural due process was violated by the statute, noted that “[t]he representative, like any other witness, is not immune from error in observation and from inadvertent bias . . . [c]ross-examination is likely to affect the trial court’s assessment of the worth of the representative’s recommendations in many cases.”75 The Illinois statute has since been modified to provide that “[t]he child representative shall not render an opinion, recommendation, or report to the court,” but continues to prohibit the calling of the child’s representative as a witness.76

Because of these representational challenges, many jurisdictions have found that the role of attorney and GAL are distinct and cannot be carried out concurrently. The Supreme Court of Montana, for example, recently held that “an attorney appointed by the court to represent a child is not also the guardian ad litem,” noting that the GAL role is “different from the traditional advocacy role played by attorneys.”77 New Jersey, reaching the same result, held that,

[t]he role of the representative attorney is entirely different from that of a guardian ad litem. The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.78

Despite the overlapping duties and economic incentives, most courts have concluded that this hybrid model is just not tenable.

B. The GAL’s Data Collection Process79

1. GAL Interviews and Non-Confidentiality Warnings

Both attorney and mental health professional GALs are routinely charged with interviewing parents, children, and relevant collateral sources such as

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75 Id. at 513–14. Although the court noted that the statute deprived her of her due process right to cross-examination, the court ultimately decided that the deprivation was harmless error.


77 Jacobsen v. Thomas, 100 P.3d 106, 111 (Mont. 2004) (Noting that a GAL may be an attorney but is not required to be one). See also FLA. STAT. § 61.403 (2009) (A GAL “shall act as next friend of the child, investigator or evaluator, not as attorney or advocate but shall act in the child’s best interest”).

78 In re M.R., 638 A.2d 1274, 1284 (N.J. 1994) (citing Supreme Court Judiciary Surrogates Liaison Committee, Guidelines for Attorneys Appointed to Represent Individuals with Developmental Disabilities (tentative draft) at 3 (Fall 1993)).

79 While attorney/GAL hybrid appointments present unique ethical issues beyond appointment, the remainder of this Article focuses on the more traditional GAL investigator or evaluator appointments.
relatives, close friends, teachers, psychologists, and physicians.\textsuperscript{80} Similarly, GALs are often expected to tender recommendations and to report their interview findings to the court.\textsuperscript{81} In order to ensure that parties understand that these professionals are not acting in the capacity of a therapist but instead have a duty to report to the court, GALs are commonly required to provide non-confidentiality warnings prior to interviewing parties in a case.\textsuperscript{82} This obligation, especially as applied to mental health professionals, has been consistently upheld, even in the course of court-ordered examinations.\textsuperscript{83} For this reason, scholars have noted the need to immediately inform the parties in a matter that information provided to a mental health professional GAL is not confidential.\textsuperscript{84} Moreover, states such as Massachusetts extend the requirement of non-confidentiality warnings to court investigators and all GALs, regardless of whether they are mental health professionals.\textsuperscript{85}

\textsuperscript{80} Hollis R. Peterson, \textit{In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation}, 13 Geo. Mason L. Rev. 1083, 1094 (2006). See, \textit{e.g.}, Iowa Code § 232.2(22)(b) (2008) (explaining that the GAL has a duty to conduct interviews with the child, each parent, and any person providing medical, mental health, social, educational, or other services to the child).

\textsuperscript{81} Lidman & Hollingsworth, \textit{supra} note 10, at 269.

\textsuperscript{82} Baerger, \textit{supra} note 31, at 38–39.

\textsuperscript{83} See, \textit{e.g.}, Conn. Gen. Stat. § 52-146c(c)(1) (2008) (providing that a judge may rule communications made to a psychologist in a court-ordered examination are admissible if the individual was informed that the communications would not be privileged); Ky. R. Evid. Rule 507(c)(2)(2009) (providing no privilege for communications made to a psychologist after being informed that those communications wouldn’t be privileged); R.I. Gen. Laws § 5-37.3-6(b)(3)(2009) (providing no privilege for communications with a psychiatrist if informed that the communications would not be privileged); Mass. Gen. Laws ch.233, § 20B(b) (2009) (providing no privilege for communications made to a psychotherapist after the patient has been informed that those communications would not privileged).

\textsuperscript{84} Baerger et al., \textit{supra} note 31, at 38–39.

\textsuperscript{85} Massachusetts Probate and Family Court Department, Standing Order 1-05, Standards for Guardians ad Litem/Investigators, p. 3, available at http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/standingorder1 05gal.pdf; Massachusetts Probate and Family Court Department, Standards for Category F Guardian ad Litem Investigators [hereinafter Category F Standards], available at http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/galstandards01 2405.pdf (“The GAL investigator is not a clinical evaluator and shall not perform clinical assessments of other clinical functions. The GAL should provide descriptive information without clinical interpretations, even if the GAL is a mental health professional”). Amy M. Karp & Pauline Quirion, \textit{Court Investigators and Guardians ad Litem}, Child Welfare Practice in Massachusetts, Vol. I (Ch.5) Mass. Cont. Legal Ed. 2009 24 (“The court investigator must explain his/her role and the purpose of the interview to the party . . . including the fact that information the party gives to the investigator is not confidential.”); Id. at 39–40 (“The GAL must provide a “Lamb warning” that explains there are no “off the
Non-confidentiality warnings are required not only for adults in a custody matter but for the children as well. In order to discern the best interests of the child, the GAL must be able to communicate with the child in a way that will establish trust and create an environment where the child feels comfortable being candid with the GAL. Establishing trust is no small task for the GAL: parents may instruct the child to not speak about certain matters; the child may not speak easily to strangers; or the child may try to manipulate the interview to achieve a desired result. Regardless of the cause, GALs commonly encounter children who are reluctant to speak openly with them, and warnings of non-confidentiality only exacerbate this difficulty.

Notwithstanding this, providing the child with a non-confidentiality warning is critical to ensure the child’s right to be heard. Thus, prior to collecting information, the GAL must discuss her role in advocating for the best interests of the child while also advising the child in a meaningful way that the communications are not confidential. In so doing, it is essential to ascertain that the child understands the warning in order to make an informed decision regarding what information to disclose. Scholars, however, have noted the risks of giving the child a warning, principally that the child will neither speak honestly nor divulge important information to the GAL. Despite these risks, scholars point out that the risks of not warning the child, including a loss of trust, potential for psychological damage, and the child’s right to due process, far outweigh the risks of the child not divulging important information once warned.

This situation becomes further complicated if the child, after receiving a non-confidentiality warning, thereafter discloses significant information, only to insist

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86 See Roy T. Stuckey, Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality, 64 FORDHAM L. REV. 1785, 1792 (1996).
87 Id.
88 Id.
90 Renne, supra note 89, at 4.
91 Id.
92 Id.
93 Peterson, supra note 80, at 1109.
94 Id.
it be kept “off the record.” In these situations, the GAL’s ethical obligations are unclear. She can remind the child that information disclosed must be reported to the court, watch for non-verbal cues, and help the child work through the worrisome information. Even then, the GAL faces the ethical quandary of what to do with information already disclosed. Such confidences may not be maintained as part of the GAL role and once revealed, information generally needs to be reported. However, if the child genuinely would not have revealed the information if he understood the warning, and such information could cause emotional harm to the child, the GAL must weigh these variables. This decision is more difficult than when an adult ignores a non-confidentiality warning and discloses information anyway; such information is generally included in the GAL’s report. The rules concerning children, however, are more fluid and some jurisdictions have modified their confidentiality requirements, or will appoint an attorney for the child. It is thus not surprising to find inconsistencies between states regarding the implementation of confidentiality warnings, as this area requires a sophisticated balancing between privacy interests, knowing and voluntary disclosure, and protection of children.

While there is much support for requiring GALs to provide non-confidentiality warnings to parties in a case, the issue of whether GALs must warn collateral sources (non-parties who have information about the family) is fraught with disagreement. This issue touches on the core of the GAL role as GALs routinely interview and rely upon collateral sources during the course of their investigations. Not surprisingly, scholars differ in their approach and there is

96 Peterson, supra note 80, at 1108.
97 Id. at 1109.
98 See id.
99 See id. at 1110.
100 Id.
101 Massachusetts, for example, allows GALs to report child maltreatment. Karp et al., supra note 85, at 39–40 (Noting that while many mental health professionals are required to file reports of suspected maltreatment, even those individuals who are not mandated reporters, such as lawyers, may report suspected maltreatment.). Notably, states such as Maine and Montana, statutorily require GALs who suspect child maltreatment to report that maltreatment. ME. REV. STAT. tit. 22 § 4011-A (2010); MONT. CODE ANN. § 41-3-201(2)(i) (2009).
102 Culley, supra note 95, at 89.
103 William G. Austin, A Focus on Child Custody Evaluations: Guidelines for Utilizing Collateral Sources of Information in Child Custody Evaluations, 40 FAM. CT. REV. 177, 177 (2002). Indeed, a number of states including Maine and South Carolina statutorily require GALs to interview collateral sources. See, e.g., ME. REV. STAT. tit. 22 § 4005 (1)(b)(5) (2009); 42 PA. CONS. STAT. § 6311(b)(5)(2009); S.C. CODE ANN. § 63-3-830(A)(2)(d) (2008). Indeed, many states statutorily provide that the GAL may interview collateral sources without the consent of the parents. See, e.g., COLO. REV. STAT. § 14-10-127 (II)(2) (2009); IND. CODE ANN. § 31-17-2-12 (b) (2009); W. VA. CODE § 48-9-301(b).
little judicial guidance. Some authors conclude that there is a duty of confidentiality between GALs, particularly evaluator GALs, and third-party sources, thus requiring a warning. Others conclude that since the relationship is not one that is protected by legal privilege, information provided to the GAL by collateral sources is not confidential and therefore no warning is required. This matter is still laden with inconsistency and subject to case-by-case review.

2. Waiver of Therapeutic Privilege on Behalf of a Minor

A GAL’s ability to access information concerning the child is essential. When mental health providers are treating the child or family, review of treatment records is often an informative part of the GAL investigation. This valuable information, however, is typically not available solely by virtue of the GAL appointment. Indeed, statutory provisions allowing GALs access to such records are absent in a majority of states. Further, mental health treatment for children and adults is generally afforded a higher level of privacy protection and often requires the permission of the privilege-holder (often a parent who is a party to the proceedings) to disclose confidential information. The presence of mental health information for a child raises two issues: whether it is available to the GAL, and if so, whether it is in the best interest of the child to access the information.

Preserving or waiving a child’s psychotherapist privilege is a matter that is separate from the content of the information held by the therapist. For some children, the psychotherapist can serve as an alternative source of sensitive
information, speaking on behalf of the child,\textsuperscript{112} bringing information before the court without requiring a child to do so directly. This may avoid forcing a child to provide information that is contrary to the wishes of his/her parents.\textsuperscript{113} For other children, however, the therapeutic relationship is one that is expected to be private and protected from disclosure, and waiver of the child’s therapeutic privilege could severely damage therapeutic progress, terminate the therapeutic relationship altogether or even shatter a child’s trust in the therapeutic process.\textsuperscript{114} As the U.S. Supreme Court recently acknowledged, “psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment.”\textsuperscript{115} For those children, waiver of the privilege risks causing more damage than benefit to the child.

The second “waiver” issue is one of procedure: who is the privilege-holder, legally entitled to assert or waive the child’s therapeutic privilege and consent (or not) to the release of the child’s records.\textsuperscript{116} In the usual course of events, parents make medical decisions on behalf of their children and are generally entitled to health information.\textsuperscript{117} The rules concerning mental health information vary from state to state, and often afford a child an increasing level of confidentiality as the child gets older.\textsuperscript{118} Further, when a child’s mental health information is relevant to litigation about the child, some courts hold that parents are no longer the presumptive privilege-holders and the court must determine whether release of mental health information is in the child’s best interest.\textsuperscript{119} In that case, the court or its appointee (generally a separate GAL) becomes the legal decision maker as to whether the child’s privilege should be waived.\textsuperscript{120}

\textsuperscript{112}See, e.g., Alicia F. Lieberman and Patricia Van Horn, Giving Voice to the Unsayable: Repairing the Effects of Trauma in Infancy and Early Childhood, 18(3) CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 707 (2009).
\textsuperscript{113}This aspect is discussed more in detail in The GAL Report section of this Article.
\textsuperscript{114}See infra Part C.
\textsuperscript{116}Myers, supra note 110, at 157.
\textsuperscript{117}See id.
\textsuperscript{118}Id.
\textsuperscript{119}For example, while the child does not wish to have their therapist’s records disclosed, the custodial parent would likely use the records to demonstrate that the child is well-settled in their current environment and the other parent wishes to use the records to establish the custodial parent’s undue influence over the child. See Merle H. Weiner, Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases, 58 AM. U. L. REV. 335, 380 (2008).
\textsuperscript{120}See, e.g., Carney v. Carney, 525 So. 2d 357 (La. Ct. App. 1988) (one parent cannot assert child’s privilege in custody modification proceeding to prevent disclosure of child’s statement to professional); Nagle v. Hooks, 296 Md. 123, 460 A.2d 49 (1983) (custodial parent could not assert child’s psychotherapist-patient privilege in custody proceeding); Ellison v. Ellison, 919 P.2d 1, 3 (Okla. 1996) (custodial parent cannot invoke child’s privilege in modification of custody proceeding to prevent testimony of child’s physician
In some states, a child who demonstrates the maturity to understand and articulate a position may waive or assert the privilege herself. This option is set forth either by case law or statute and requires a sufficient showing of maturity and understanding to enable a child to waive (or preserve) his/her own psychotherapeutic privilege. A separate hearing may be required, which can be quite invasive, to aid the court in determining the child's maturity.

When the child is too young to make a mature determination, and in those states that do not recognize maturity to waive a therapeutic privilege, the courts may appoint a separate GAL to determine whether the privilege should be asserted or waived. Although some states such as New Hampshire permit the existing GAL to make this determination, others hold that the existing GAL has a
conflicting interest and an independent GAL is required. This appears to be the more common practice.127

In sharp contrast to the procedure discussed above, still other states provide statutory authority to the GAL to inspect and copy a child’s medical and mental health records simply by virtue of the GAL appointment.128 While such a statutory scheme offers convenience and fiscal economy, there are also significant costs associated with statutory abrogation of the child’s privilege.129 In particular, automatic waiver of the therapeutic privilege may damage the ongoing therapeutic relationships or discourage high-conflict parents from seeking therapy.130 As one scholar noted, “[a]s asepsis is to surgery, so is confidentiality to psychiatry.”131 Yielding to expediency, these courts simply presume that a child's best interest is served by waiving the therapeutic privilege,132 and thus bypass an independent “ privilege GAL.”

C. The GAL Report

1. Hearsay in the GAL Report

In addition to information provided by the parties, GAL reports commonly contain important information gathered from collateral sources—family members, teachers, and treatment providers who provide valuable insight to the court.133 This information is typically considered “hearsay” since it consists of out-of-court statements that are offered as evidence of the truth of the matter asserted.134 Despite its hearsay status, many states permit GALs to include this information in their reports,135 although this situation is not uniform.136 In fact, rules can even

127 See JOANNA BUNKER ROHRBAUGH, A COMPREHENSIVE GUIDE TO CHILD CUSTODY EVALUATIONS: MENTAL HEALTH AND LEGAL PERSPECTIVES 74 (2008); Wolowitz, supra note 124, at 27.
128 See, e.g., 31 DEL. CODE ANN § 3610 (2010).
129 Deardurff, supra note 107, at 667–68.
130 Paruch, supra note 110, at 500.
132 Paruch, supra note 110, at 500.
134 “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c).
135 See, e.g., In re Chelsea C., 884 A.2d 97 (Me. 2005) (finding that hearsay in GAL report does not preclude the report’s admission into evidence); In re Sean, 630 N.E.2d 604 (Mass. App. 1994) (GAL report containing hearsay admissible if the GAL is available to testify and report identifies source of information).
136 Jurisdictions have attempted to strike a balance between allowing hearsay in the GAL report and excluding it entirely by allowing the court (and parties) to review the GAL report, but not allowing it in evidence. See Toms v. Toms, 98 S.W.3d 140, 144 (2003) (holding that although a GAL report is not admissible, it may be reviewed.”).
vary dramatically among different courts within a state. For example, in Minnesota, hearsay is permitted in its juvenile court but not in its family court.\footnote{137 See Minn. R. Juv. Prot. P. 3.02, subdiv. 2; Minn. Stat. \S 260C.165 (2009); cf. Minn. Stat. ch. 518 (2009). Both family court and juvenile court GALs in Minnesota are charged with the same roles and responsibilities, including collecting out-of-court statements as part of interviewing sources; Minn. R. of Guardian Ad Litem P., R. 901-907. See also Gilats, supra note 133, at 912. Nonetheless, GALs in juvenile court can include out-of-court statements in their report and in their oral testimony while GALs in family court cannot. Id. at 921. Little is written justifying the distinction except that “[t]he admissibility of these statements [in the juvenile court] is linked directly to the central purpose of the public policy and corresponding law that are designed to protect children,” though protecting children, however, is also a mission of the family court. Id. at 922. Protecting children, however, is also a mission of the family court. Id. This conflict regarding hearsay within one state is demonstrative of the larger divide nationwide.}

The hearsay rules serve to exclude unreliable evidence,\footnote{138 See Gilats, supra note 133, at 929.} primarily because hearsay statements cannot be tested through cross-examination.\footnote{139 Cal v. Green, 399 U.S. 149, 158; (1970) (“cross-examination . . . . [is] the greatest legal engine ever invented for the discovery of truth”) (original quotation omitted).} In the case of GAL investigations, however, the expedience of bringing to the court important information from a number of collateral sources, all of whom are available to testify, is generally thought to outweigh usual hearsay objections.\footnote{140 See Leigh Goodmark, From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases, 102 W. Va. L. Rev. 237, 297–98 (1999).} Indeed, in this context, hearsay statements may be at least as reliable as in-court testimony. For example, Goodmark\footnote{141 Id.} argues that since a child’s out-of-court statement is spontaneous, not the product of extended questions, and free of the stress of the courtroom, the statement’s reliability is enhanced. While few have examined the subject, the same argument concerning spontaneity could be extended to collaterals such as pediatricians and school teachers, especially since those collaterals rarely have an interest in the ultimate outcome of the case. Further, it is impractical for large numbers of collateral sources to appear in court before the matter is even tried. But for the GAL, much of this information simply would not be available to the court. The Federal Rules of Evidence go a step further, providing that “under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.”\footnote{142 FED. R. EVID. 803 advisory committee notes.} Under some circumstances, the out-of-court statements may independently enter into evidence via an exception to the hearsay rule.\footnote{143 For example, statements made to medical providers for the purpose of treatment, diagnosis, describing medical history, symptoms, pain, sensations, or the general cause or external source of those symptoms are independently admissible. See FED. R. EVID. 803(4). Some states have extended this exception to encompass mental health professionals as}
In the usual case, the identified declarant\textsuperscript{144} can be called as a witness at trial and subject to cross-examination. Providing the GAL report to the parties in advance of trial increases the likelihood of settlement and also assists in cross-examination of the GAL. The court’s discretion to strike portions of the report that are more prejudicial than probative\textsuperscript{145} also safeguards the potential unreliability of hearsay included in the report.\textsuperscript{146} Finally, courts have also found the GAL’s role as “a disinterested party and an agent of the court” a persuasive safeguard in reducing the risk of untrustworthy information influencing a court’s decision.\textsuperscript{147}

Even in jurisdictions where hearsay is permitted in a GAL report, it is important for GALs to honor the principle behind the hearsay rule: to exclude unreliable evidence.\textsuperscript{148} Specific evidentiary rules allow for the admissibility of hearsay within the GAL report to overcome the formality of articulating hearsay exceptions for each statement included in the report.\textsuperscript{149} Nevertheless, GALs should independently corroborate critical data and carefully consider the rules of evidence in deciding which statements to include,\textsuperscript{150} weigh the prejudicial and probative value of statements, and justify their reliance on such statements since any information may be later impeached during testimony at trial, jeopardizing the credibility of the GAL.

\textsuperscript{144} See, e.g., United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (statements alleging abuse made to a psychologist admissible under the medical treatment exception). Even statements made to a social worker were admissible under this exception in one state. See also \textit{In re Rachel T.}, 549 A.2d 27 (Md. Ct. Spec. App. 1988). Another hearsay exception exists for statements that describe the declarant’s then-existing state of mind, emotion, sensation, or physical condition. See \textit{Fed. R. Evid.} 803(3). Such an exception could be used to admit a child’s description of their parent’s behavior to show the child’s fear of that parent. See Goodmark, \textit{supra} note 140, at 301. While theoretically the excited utterance exception could also be used in custody litigation, courts vary in determining whether the declarant is still under the stress of excitement caused by the event. \textit{Id.} at 299–300; Krista MacNevin Gee, \textit{Hearsay Exception in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?} 19 \textit{Whittier L. Rev.} 559, 573 (1998). See also \textit{Fed. R. Evid.} 803(2). Finally, there is the residual exception for statements that have equivalent guarantees of trustworthiness but are not covered by another rule. \textit{Fed. R. Evid.} 807. While courts have admitted statements of a sexually abused child against his or her parent under this exception, it is typically not liberally construed. See, e.g., \\

\textsuperscript{145} FED. R. EVID. 403.


\textsuperscript{147} \textit{In re Chelsea C.}, 884 A.2d 97, 101 (Me. 2005).

\textsuperscript{148} Gilats, \textit{supra} note 133, at 929.

\textsuperscript{149} \textit{Id.} at 930.

2. *What to Include in the GAL Report*

The issue of hearsay aside, there are other ethical issues concerning what information goes into a GAL report. Inclusion of all important data, including that which disaffirms the GAL’s conclusions, is crucial to an objective report, though it is often impractical and unhelpful to include all the data gathered. GALs may also conduct home visits, observe the child’s interaction with the parents, and bring the family’s concerns to the court’s attention.

Selecting from the plethora of available data is a daunting task. Practitioners have taken various approaches in deciding what to include in the report. In *DesLauriers v. DesLauriers*, the GAL focused her report around the jurisdiction’s thirteen statutory factors that the court was obligated to consider in determining the best interests of the child. This approach, while logical since it addresses the factors a judge must ultimately consider, exposed the trial court (and impliedly, the GAL) to criticism at the appellate level after the petitioner argued the court improperly relied too heavily on the GAL report. Indeed, the Supreme Court of North Dakota held that “the trial court, not the guardian ad litem, has the authority to make a child custody award” and that although “the weight assigned to a guardian ad litem’s report or other independent recommendation is within the trial court’s discretion . . . [the trial court] should not regard a guardian ad litem’s testimony and recommendation as conclusive.”

In the absence of other statutory guidelines, but acknowledging the benefit of utilizing a uniform format, state bar associations, continuing legal education providers and professional organizations have suggested report formats. Nevertheless, no agreement

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151 See, e.g., McCullough v. McCullough, 2009 Miss. App. LEXIS 671, at *14 (Miss. Ct. App. Oct. 6, 2009) (holding that even though the GAL report was not submitted until the final day of trial, the party’s failure to object to the report’s admission into evidence or to request additional time to review the report procedurally barred appellate review of the issue).


153 See, e.g., id. at 475 (describing the GAL’s observation of an unsupervised visit between the child and the foster family’s household).

154 See, e.g., *DesLauriers v. DesLauriers*, 642 N.W.2d 892, 897 (N.D. 2002) (describing the GAL’s report to the court that mother was concerned that the father was verbally abusive to her and the children).

155 Id. at 896 (citing N.D.C.C. § 14-09-06.2(1) (2009)).

156 Id.

157 Id. (internal quotations and citations omitted).


exists as to how to sift through the copious data collected to create a comprehensive, but succinct, GAL report.

Another difficult situation arises when the scope of the GAL’s tasks are clear, but the court limits the GAL’s role by approving an inadequate amount of time or number of hours in order to contain costs. For example, Massachusetts has created standards for GAL appointments that include a comprehensive description of the GAL’s duties until the case is decided. The scope and content of GAL investigations are also dictated by the standards, encompassing over forty factual, legal, and investigative considerations to be addressed. The result is that GALs are put in an untenable position, forced to choose between declining the assignment, spending hours in excess of that authorized (and compensated) by the court, or conducting a superficial investigation or writing an incomplete report. None of these are good options and may expose the GAL to criticism, impeachment on cross-examination, a complaint to the licensing board, or even a malpractice action. There is no clear resolution to this problem.

3. Ultimate Issue Recommendations

Inclusion of “ultimate issue” recommendations in the GAL report is equally controversial. Ultimate issue recommendations opine on the issues awaiting resolution by the court, such as custody or visitation arrangements. Many states permit GALs to make ultimate issue recommendations in their report, and a

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162 See, e.g., Category E Standards, supra note 162; Category F Standards, supra note 85.

163 See, e.g., Zakhary v. Bifano, No. 02-P-380, 2003 WL 22439684, at *2 (Mass. App. Ct. Oct. 28, 2003) (illustrating that GAL’s appointment was limited to fifteen hours of work, which ultimately was insufficient to investigate the issue of visitation with grandmother).

164 See FED. R. EVID. 704(b).

165 Rodvik v. Rodvik, 151 P.3d 338, 343 (Alaska 2006); Delmolino v. Nance, 437 N.E.2d 578 (Mass. App. Ct. 1982) (indicating that a GAL may make ultimate issue recommendations regarding custody); Richmond v. Tecklenberg, 396 S.E.2d 111, 113 (S.C. Ct. App. 1990) (illustrating that a GAL may express an opinion as to the ultimate issue involved, provided cross-examination is permitted). Even the Federal Rules of Evidence permit ultimate issue recommendations provided it leaves to the court the issue of
majority of GALs do include such recommendations. Indeed, judges often request them. Judges are not required to adopt the recommendations. Yet, the GAL’s report and, in particular, the ultimate issue recommendations, frequently influence the judge’s decision and subsequently all remaining aspects of the case. Indeed, the Court in *Gilbert v. Gilbert*, was concerned with this very issue:

[a] careful review of the record demonstrates that the guardian’s report significantly influenced the presentation of evidence . . . defined the factual issues to be examined . . . placed one party in the position of using the hearing to corroborate the facts and conclusions given in the report, while the other party was left to refute them.

Likewise, GAL recommendations create “undue pressure” on the parties to settle as they “sense the weight that the judge will give to the guardian’s recommendations.” Thus, the practice remains contentious, especially for mental health professionals who serve as evaluator GALs.

Further, ultimate issue recommendations inherently include “moral and value judgments” and may reflect personal biases. Judges are also human beings, of course, and possess their own conscious or subconscious moral values.

“whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.” FED. R. EVID. 704(a)-(b).


See, e.g., Mason v. Coleman, 850 N.E.2d 513, 521 (Mass. 2006) (“The judge was not required to adopt the opinions of a guardian ad litem, therapist, psychologist, school official, and other evaluator.”).

See, e.g., Gilbert v. Gilbert, 664 A.2d 239 (Vt. 1995) (reversing a court’s award of parental rights after finding that the court erred in relying on a GAL report improperly admitted into evidence).

*Gilbert*, 664 A.2d at 242–43.

Goodmark, *supra* note 140, at 328.


Bounil, *supra* note 150, at 19–20 (“life experiences, upbringing and other factors, conscious and not” may generate evaluator bias).

See id. at 20.
injecting another layer of these subjective judgments may distort the issues more than clarify them. Frank analysis of the data and legal expertise to apply the legal presumptions or statutory factors places GALs in an appropriate position to offer ultimate issue recommendations that may aid the judge in making a determination. However, “if the facts are substantially disputed, the clinical data is unclear, or the application of the law is in doubt,” an ultimate issue recommendation is inappropriate.

Ultimate issue recommendations are equally contentious in proceedings where GALs are appointed to preserve or waive a child’s therapeutic privilege. Privilege GALs not only determine whether waiver of the child’s privilege would be in the child’s best interest, but must navigate the procedures of doing so. A GAL must be concerned with whether she should even make a recommendation to the court regarding privilege waiver or should stand in the child’s shoes as the holder of the privilege and waive or preserve the privilege without court input. Different states vary in which approach they take, and in many states there is no consensus. For example, the Massachusetts Supreme Judicial Court has declined to address the procedure, writing only that “[w]e note, without deciding the question, that waiver by the guardian ad litem was probably an appropriate procedure.” The result is a legal quagmire where “[s]ome Probate and Family Court judges accept the guardian ad litem’s decision as final, whereas other judges may treat it more like a recommendation.” While the data collection process that a GAL uses remains the same regardless of the procedure, the results may vary greatly. Where the GAL’s decision is treated as final, often no appeal is possible, but where the GAL proposes only a recommendation and the court makes the waiver decision, appeal is a matter of right.

177 Rosen, supra note 6 passim.
178 Delmolino v. Nance, 437 N.E.2d 578, 581 (Mass. App. Ct. 1982) (“In making that recommendation, it is plain that the guardian ad litem did not take into consideration the law that is applicable to a change of custody matter”).
179 Boumil, supra note 150, at 20.
180 Id.
181 See, e.g., Karp, supra note 120, § 9.4.5(a).
182 Most states have decided that assertion or waiver of a child’s privilege is the GAL’s decision, not merely a recommendation for the court’s consideration. See Nagle v. Hooks, 296 Md. 123,128 (1983) (holding that the court must appoint a GAL to act in the child’s best interest); Devlin v. Devlin, 598 N.Y.S.2d 1015, 1017 (N.Y. App. Div. 4th Dep’t 1993) (indicating that the child’s GAL waives or asserts the physician-patient privilege). Other states have reserved the ultimate issue to the court. In re Berg, 886 A.2d 980, 987 (N.H. 2005) (holding that the court is not bound by the GAL’s attempt to assert or waive the child’s privilege). Some states have declined to articulate the appropriate procedure. See In re Adoption of Diane, 508 N.E.2d 837, 840 (Mass. 1987).
183 Diane, 508 N.E.2d at 840.
184 Karp, supra note 120, § 9.13.4.
185 Id.
186 See, e.g., In re Berg, 886 A.2d 980, passim.
Making ultimate issue recommendations remains contentious in GAL practice, particularly because of the complex cases in which GALs are appointed. Importantly, as one former Massachusetts Probate and Family Court judge wrote, GALs and their recommendations are “only one cog in the wheel.”¹⁸⁷ Judges and lawyers must be fluent in the concepts of psychological testing, parenting ability, and children’s developmental needs so that they can critically parse and assess the merits of the GAL’s recommendations. In the end, it is the judge alone who decides a case.

4. Use of Psychological Testing

GALs routinely seek mental health information when conducting a child or family evaluation.¹⁸⁸ In some matters, a capable mental health evaluator has treated the family members and can be called upon to provide valuable information.¹⁸⁹ In other cases, either no mental health providers are present, or the information is not available to the GAL.¹⁹⁰ If the GAL determines that there are potential mental health issues substantial enough to affect the outcome of the evaluation, she may seek to have a psychological evaluation conducted, and it may or may not include psychological testing.¹⁹¹ Despite their widespread use in legal matters however, psychological testing in the context of family court proceedings can be quite contentious,¹⁹² particularly where the GAL uses this information to assess a child’s developmental and emotional needs or a parent’s ability to meet those needs.¹⁹³ In the course of the evaluation the GAL may seek to administer the testing instruments herself (if she is qualified to do so) as part of the evaluation, or may incorporate test results conducted by a separate tester.¹⁹⁴ These psychological tests provide objective data distinct from the evaluator’s opinion and assist the GAL in determining issues that interviews alone cannot such as “the psychological strengths and weaknesses of the parents and child, the presence of a major mental illness, and personality characteristics that may hinder implementation of certain custody or visitation arrangements.”¹⁹⁵

¹⁸⁸ See Boumil, supra note 150, at 11.
¹⁸⁹ See id. at 10, 15.
¹⁹⁰ See id. at 10.
¹⁹¹ See id. at 11–12.
¹⁹³ McCurley, supra note 28, at 277.
¹⁹⁴ See Boumil, supra note 150, at 11.
¹⁹⁵ Erickson et al., supra note 192, at 158.
Because psychological tests contribute objective data to what is otherwise a largely subjective assessment, they often have special importance to the GAL and the court, despite certain limitations on the tests’ potential admissibility. Like any other evidence, psychological inventories must meet the “basic standards of scientific rigor,” including relevance, reliability and validity. Jurisdictions apply their own standards to assess the reliability and relevance of evidence proffered by experts such as psychologists. There is a large body of literature that debates the virtues of psychological testing, particularly as it applies to custody evaluations, and nearly every jurisdiction has implemented standards that impose substantial scrutiny of the underlying data. Much of the controversy centers on the fact that most standard psychological testing instruments were not specifically created for custody evaluations. In particular, the Minnesota Multiphasic Personality Inventory (MMPI, versions 1 and 2) and the Rorschach Inkblot Technique have been widely criticized.

The MMPI was originally developed to assess the presence of severe psychopathology, leading critics to argue that its applicability in the custody arena is heavily dependent on the evaluator drawing inferences beyond the MMPI’s intended design. Specifically, use of this instrument requires the evaluator to correlate a parent’s personality profile with group MMPI profiles to predict the

196 See id. at 157–58.
198 Two key cases have provided guidelines for the admissibility of expert opinions. The most well known is Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993). In Daubert, the U.S. Supreme Court acknowledged that trial judges serve as gatekeepers of expert testimony and outlined factors that should be weighed in assessing the admissibility of expert testimony. Id. at 596–97. These factors include whether the methodology has been tested, whether the methodology has been subject to peer review, whether the rate of error is appropriate, and whether the methodology is generally accepted by the scientific community. Id. at 593–94. See also Steven K. Erickson, Psychological Testimony on Trial: Questions Arise About the Validity of Popular Testing Methods, 75 N.Y. St. B.J. 19, 19 (2003). Several jurisdictions continue to rely on the standard set forth in Frye, 293 F. 1013, 1014 (D.C. Cir. 1923), which articulated that expert testimony and evidence could be admitted in court if the methodology was generally accepted by the relevant field.
199 Shuman, supra note 197, at 138–39.
200 Id. at 142. Tests which were specifically created for conducting custody evaluations include the Bricklin Perpetual Scales (BPS), Perception of Relationships Test (PORT), Parent Awareness Skills Survey (PASS), and the Ackerman-Schoendorf' Scales for Parent Evaluation of Custody (ASPECT). Id.
201 See id. at 144–48. The revised version of the MMPI is the most utilized objective personality test in custody evaluations. The MMPI consists of 567 true-or-false questions with ten clinical scales and three validity scales which address psychopathology, personality, and the taker’s approach to testing. Id.
202 Id.
effect of that parent’s profile on the child’s development. Even more contentious is the use of the Rorschach Inkblot Test in custody litigation. The Rorschach has been regarded as both “the most cherished and the most reviled of all psychological test instruments,” and its use in custody litigation has been hotly debated. Critics of the use of the Rorschach Test in custody evaluations are concerned that it “has the propensity to present psychologically healthy children as severely disturbed,” that “no studies correlate personality attributes identified by the Rorschach with good parenting,” and that many of the studies that established the norms in the TRACS system manual have not been subject to peer review.

Of course, no psychological or other diagnostic test is specifically designed to assess the best interests of a child or which parent is “best.” Although GALs are appointed for the purpose of applying their special knowledge to assist the court in making such decisions, the assessment of human behavior will always be an imprecise science dependent on more variables than can be measured. In light of this as well as the added costs, courts often limit psychological testing to those matters in which “there is an identifiable reason to suspect that testing would shed light on an issue that cannot be assessed in any other way.” In some cases, objective tests assist GALs in seeing past the deception, hostility, and personality dysfunctions that cause the high-conflict divorces requiring child custody.
evaluations. To the extent that the testing is valid, reliable, and relevant, it can contribute some valuable insight.

Some scholars have suggested that GALs seek permission from the court prior to initiating testing so that there are clearly defined questions guiding the evaluation. Not only does this “minimalist approach” limit the testing issues, but it also allows the GAL to address, in advance, any reservations that the court has in admitting a GAL report that includes this type of data. GALs that utilize psychological testing must be satisfied that the methods employed have their foundation in empirical literature and conform to the nature of the evaluation. When approved by the court and administered properly, psychological testing can contribute to the court’s understanding of complex family dynamics and the child’s best interest.

D. After the GAL Report Is Completed

1. Discovery of the GAL File

As part of tendering a comprehensive report, GALs commonly access and rely on information held by third parties such as school records, psychological or educational testing, medical records, criminal records, social services records, and court documents. These records, if relied upon by the GAL, may be susceptible to discovery by the parties despite containing sensitive information that would otherwise not be available to those parties.

Whether the parties should have access to third party records in the GAL’s possession is a difficult issue. On the one hand, without the ability to inspect the records on which the GAL relied on in making recommendations, the parties (and their counsel) would be severely disadvantaged in cross-examining or challenging...
the GAL’s findings, thus impinging due process rights.\textsuperscript{222} On the other hand, a party may be entitled to privacy of those records and even when integral to the GAL investigation, may become a potential source of unfair or inappropriate leverage against a party who seeks to prevent disclosure of the records. Thus, a state’s rules governing access to third parties records in the possession of the GAL become a critical inquiry.

Some states, like Colorado and Illinois, statutorily provide that the GAL must make available to counsel and to pro se parties her file containing underlying data, reports, names and addresses of collateral sources, and the complete text of diagnostic reports made to the GAL.\textsuperscript{223} Depending on the nature of the GAL appointment, this may include confidential third-party medical and psychiatric records. Other states such as Alaska make access to records in the possession of the GAL contingent upon fulfilling civil discovery rules and allow access to those materials that are relevant and not privileged.\textsuperscript{224} Still other states, like Delaware, deem the records acquired or reviewed by the GAL to be confidential and require the parties seeking discovery to obtain a court order.\textsuperscript{225} Such an order would be at the court’s discretion based upon relevance, privilege and due process considerations in cross-examining the GAL.\textsuperscript{226}

Another important discovery consideration is whether the GAL’s notes and file constitute “work product.” Some states are more protective of the GAL’s work product than third-party records in the GAL’s possession. For example, Maine presumes that a GAL’s notes and work papers are privileged and thus not discoverable, though a party can challenge the GAL’s decision to not produce the documents by requesting an in-camera examination of the documents by the court.\textsuperscript{227} Many other states, however, such as Massachusetts and New Hampshire, are more liberal as to discovery of the GAL’s notes by the parties.\textsuperscript{228} This type of

\textsuperscript{222} Ross v. Gadwah, 554 A.2d 1284, 1286 (N.H. 1988) (citing the ability to counter evidence that the judge will rely on to reach a decision as part of parents’ rights of due process). See also Hill, supra note 222, at § 7(a).

\textsuperscript{223} See COLO. REV. STAT. § 14-10-127 (2009); 750 ILL. COMP. STAT. 5/605(c) (2010).


\textsuperscript{225} DEL. CODE ANN. § 3608 (2010). (Delaware’s GALs are called “Court Appointed Special Advocates”).

\textsuperscript{226} Id.\textsuperscript{27}


\textsuperscript{228} See Massachusetts Trial Court Probate and Family Court Department, Standards for Category F Guardian ad Litem Investigators, Jan. 24, 2005, p. 23 (“The GAL shall retain any notes, records, documents, taped recordings, videos, or other material gathered or created during the investigation so that these materials are available for trial, discovery, appeal, and remand of the case”); Ross v. Gadwah, 554 A.2d 1284 (N.H. 1988) (declining to shield the GAL’s data from the parents because their due process rights required an opportunity to counter evidence before the fact-finder.).
discovery policy requires the GAL to be more vigilant about what is contained in the file, particularly process notes of the GAL’s impressions that may change over time as information is gathered.229

A recent Massachusetts case highlights the implications of discovery practices on the litigants. In *P.W. v. M.S.*, 230 the husband sought visitation (but not custody) of his children, but refused to produce his mental health records in order to protect his privacy. He offered to produce the records to the GAL, but only if the GAL and the court would protect them from further discovery by his wife.231 The court offered to review the records *in camera*, but could not guarantee the records would not thereafter be released to the wife as part of the GAL’s file if they were relevant to the visitation issue.232 The Massachusetts Appeals Court upheld the trial court’s ruling that the husband had to choose between his desire for privacy of his mental health records and his claim for visitation with his children. 233

2. **High Conflict Families, Pro Se Access to the GAL Report, and Due Process**

Further complicating discovery issues is the recent trend toward self-representation in the nation’s family courts.234 Where attorneys once stood as an emotional buffer235 between bitter parents, candid collateral reports, revealing psychological testing, and blunt recommendations, *pro se* litigants are more frequently standing alone. Moreover, despite the general expectation that divorcing spouses equitably divide property and cooperate with each other in resolving

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229 GALs have attempted to limit parties’ access to their files when the requested discovery involves sensitive information about the children. In *Hogan v. Hogan*, Nos. CA2002-09-216, CA2002-09-225, 2003 WL 22073132, at *4–5 (Ohio Ct. App. Sept. 8, 2003), the court found that the GAL’s files were not subject to attorney-client privilege and did not constitute work product, but the trial court nonetheless had “discretion to grant a motion to quash a subpoena for a guardian ad litem’s files if the court finds that it would not be within the children’s best interests to allow disclosure of the files.” *Id.* Thus, GALs may be able to protect their wards by arguing that it is not in the children’s best interests to allow disclosure of sensitive information in GAL records. This case also demonstrates that data in the GAL’s possession may create an awkward tension between the children’s best interests and the parents’ right to confront witnesses.


231 *Id.*

232 *Id.* at 40-41.

233 *Id.* at 40. Throughout the proceeding, the mother expressed concerns about the father’s mental history, which included severe emotional difficulties, attempted suicide, a hospitalization, and counseling. *Id.*


custody, a “good divorce” has become an oxymoron. Divorcing spouses often add intense acrimony to an already difficult process by humiliating, insulting, and punishing each other. High-conflict matters may escalate to the point of creating risk to the spouse, children, providers of collateral information, and even the GAL. What was once a matter of family privacy is no longer private and the GAL report may contain an abundance of intimate information that, while impounded from the public, is nevertheless available to a warring spouse.

GALs are being appointed to an ever-increasing number of family matters burdened with a history of domestic violence. They are charged with investigating the allegations of abuse, reporting the extent to which the children

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237 Nat Stern & Karen Oehme, *Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L.J. 373, 373–74 (2003/2004) (High conflict cases often involve intense anger, blame, and refusal to cooperate regarding the needs of their children). See, e.g., Cooney v. Rossiter, 583 F.3d 967 (7th Cir. 2009) (dismissing pro se mother’s suit against judge, court-appointed child psychiatrist, her husband’s defense attorney, a therapist, and child’s attorney/GAL alleging that they conspired to deprive her of the custody of her children); Krempp v. Dobbs, 775 F.2d 1319 (5th Cir. 1985) (dismissing appeal of pro se father’s suit against his former wife and her present husband, his wife’s attorney during the divorce and custody suit, his wife’s attorney in a subsequent proceeding against him for contempt for failure to pay child support, four state judges, the court clerk, a judge’s secretary, a judge’s wife, the state commission on judicial contact, and the state bar alleging a conspiracy to deprive him of his rights); Goad v. United States, 661 F. Supp. 1073, 1081 (S.D. Tex. 1987) (noting “meanness of spirit” with which pro se party attempted to cut-off payments to former spouse under divorce decree), aff’d in part, vacated in part on other grounds, 837 F.2d 1096 (Fed. Cir. 1987), cert. denied, 485 U.S. 906 (1988).
238 Schacht, supra note 236, at 567–68.
have been exposed to it and making recommendations that protect the children. Of course, the risk of domestic violence does not end when the parents separate and custody litigation is a prime opportunity for abusive partners to control, manipulate or abuse a spouse, using finances, property and even the children as “bargaining chips.” The GAL investigation process may inadvertently exacerbate the abuse, contributing psychological testing results, detailed data and candid collateral interviews. This situation is compounded when litigants, particularly those without attorneys, do not understand the nuances of this information and unfettered access to the GAL report may increase the hostility and accusations between the battling parents rather than promoting resolution of the case.

In some cases, the GAL process itself becomes a catalyst for violence. For example, in a 2006 Florida case, a father murdered his wife and two children and thereafter set the family’s home on fire after the mother was granted custody of the children. A court-appointed psychologist who evaluated the family during the custody dispute recommended custody in favor of the mother, in part due to the children’s stated preferences. Eight days after the court’s ruling, the mother and the children were all dead.

Psychological harm can also result from incorporating children’s statements concerning their parents into the GAL report. GALs sometimes disclose not only a child’s stated preference in matters of custody, but may also reveal other family secrets such as a parent’s substance abuse or domestic violence. Even reporting

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242 Id. at 286.
244 Hastings, supra note 241, at 304 (Partners who abuse their spouses are twice as likely as non-abusers to seek sole custody of the children and the abuser’s primary motive is often to “hurt and frighten their former partners.”) Id. See also Nina W. Tarr, The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases, 13 S. Cal. Rev. L. & Women’s Stud. 35, 35–36 (2003).
245 MARC J. ACKERMAN, CLINICIAN’S GUIDE TO CHILD CUSTODY EVALUATIONS, 6 (3d ed. 2006) (Pro se parents do not understand legal proceedings, are “blinded by their own obsessions in the case,” and are overly litigious.).
246 Hastings, supra note 241, at 318.
248 Don Jordan, Doctor Saw Paranoia in Father Before Fire, Palm Beach Post, Dec. 29, 2006, at 1A.
249 Id.
250 For instance, a child may tell his GAL that “he does not want to live with his mother because she says nasty things when she is drinking.” See Michelle Johnson-Weider, Guardians Ad Litem: A Solution Without Strength in Helping Protect Dependent Children, 77 Fla. Bar J. 87, 89 (2003).
on interactions between a parent and a child during an observed visit may have consequences for the child.\textsuperscript{251} Upon reading the GAL report, parents may become angry with the child, blame the child for the consequences of the interaction, or act out against the child in other ways—all of which are documented to result in long-term psychological damage to the child.\textsuperscript{252}

Attempting to avoid that result is difficult. On the one hand, an individual “charged with zealously advocating for her client’s best interests can hardly be serving that mission by keeping secret information that directly bears on those interests.”\textsuperscript{253} Further, it is rarely within the discretion of the GAL to withhold information gathered.\textsuperscript{254} Even if a GAL report omits the child’s preferences,\textsuperscript{255} a parent may nevertheless call the child to the stand to provide testimony supporting or contradicting the GAL’s recommendations.\textsuperscript{256}

Restricting parents’ access to the GAL report might be a viable solution,\textsuperscript{257} but due process usually requires that all information gathered by the GAL be shared with the parties.\textsuperscript{258} Indeed in 1988, the Supreme Court of New Hampshire addressed these issues in an interlocutory appeal taken by a GAL.\textsuperscript{259} In \textit{Ross v. Gadwah}, the GAL raised the issue of “whether a parent’s right of due process requires access to and the opportunity to challenge any information forming the basis for the guardian’s recommendation, even if such information was obtained from the minor child.”\textsuperscript{260} The Court ruled unanimously in the affirmative:

\begin{quote}
251 Nat Stern & Karen Oehme, \textit{The Troubling Admission of Supervised Visitation Records in Custody Proceedings}, 75 TEMP. L. REV. 271, 271 (2002) (Although supervised visitation was created to protect children and domestic violence victims, the rampant misuse of visitation reports threatens to compromise those individuals.).


254 Id. at 1744.

255 Most courts are required to consider the child’s preference in a custody proceeding and thus need to learn of the child’s preference in some way. \textit{See}, e.g., MINN. STAT. § 257C.04(a)(2) (2009). Often no other counsel is appointed for the children so they must rely on the GAL to give them a voice. Gilats, supra note 133, at 928.

256 Buss, supra note 253, at 1744.

257 Since GALs are appointed to assist the court in understanding the issues in the case, such a restriction could theoretically be imposed. \textit{See} Peters, supra note 19, at 1024–25. Thus, GALs have a duty to report to the court but have no parallel duty to inform the parents, particularly if it endangers the child. \textit{See} Mary Grams, \textit{Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn}, 22 LAW & INEQ. 105, 114 (2004) (GALs don’t need parental consent to examine any record related to the custody proceeding).

258 \textit{See} Buss, supra note 253, at 1739.


260 Id. at 1285.
It is apparent to us that since due process requires that either parent have the opportunity to challenge any evidence presented for consideration by the trier of fact, it must also preclude invocation of the attorney-client privilege. Accordingly, we now hold that the attorney-client privilege is incompatible with the guardian's role as a party to and expert witness in custody proceedings. Communications between a guardian ad litem and a minor child are not privileged.\textsuperscript{261}

The Court based its decision on the recognition of a parental interest regarding care and custody of children that is specifically recognized in many states’ constitutions.\textsuperscript{262}

Parental rights, however, are not without limit. In \textit{In re Kalil}, \textsuperscript{263} the Supreme Court of New Hampshire retreated, holding that “[a]lthough we recognize that parents have a due process right to be heard, to examine witnesses, to be informed of and to challenge all adverse evidence, such rights are not absolute.” The court upheld a request that a child’s statements to the GAL remain confidential, concluding that “even if we were to assume that the father has a due process right to review the sealed report,” the father’s oral agreement that the child’s statements to the GAL would remain confidential (at the child’s request) waived the assumed right.\textsuperscript{264} While this case seems to suggest that GALs could request that parents waive their rights to information provided by their children, this raises the same due process issues discussed earlier. At present, there is no good solution for protecting children from their own candid disclosures.

3. GAL Safety Concerns and Immunity

In many ways, the circumstances of a GAL investigation or evaluation create a perfect storm for threats and other safety concerns aimed towards a GAL. The storm begins to brew with a high conflict divorce or high-stakes custody determination and an abundance of bilateral allegations that aggravate the parties’

\textsuperscript{261} \textit{Id.} GALs in New Hampshire serve a dual, hybrid role representing the child and assisting the court in making its determination. \textit{Id.}

\textsuperscript{262} Numerous courts have decided that the parental interest in care and custody of children is a fundamental right protected by state and federal constitutions. \textit{See}, \textit{e.g.}, \textit{Provencal v. Provencal}, 122 N.H. 793, 797 (1982) (explaining that a parent’s interest in decisions regarding the custody of his children is a fundamental right that is protected by the due process clause, N.H. \textit{Const. Pt.1, Art. 2.}, of the New Hampshire Constitution). \textit{See also} Wisconsin \textit{v. Yoder}, 406 U.S. 205, 232 (1972) (parent’s interest in guiding the rearing of his children is a fundamental right secured by the U.S. Constitution).

\textsuperscript{263} \textit{In re Kalil}, 931 A.2d 1255, 1258 (N.H. 2007).

\textsuperscript{264} Id. (emphasis added). Leonardo \textit{v. Leonardo}, 665 N.E.2d 1034, 1038 (Mass. App. Ct. 1996), similarly found that where a party had the opportunity to review the GAL report with his attorney prior to becoming pro se, the party was not entitled to an actual copy of the report.
already existing mental health, stress, and anger issues. When these circumstances arise, which one court described as “worthy of a Puccini opera, or at least a midafternoon soap opera,” and are coupled with blunt questioning and brutally honest GAL recommendations, the perfect storm for anger and physical threats is created. As a result, GALs are frequently the target of abusive and threatening telephone messages, threatening and harassing letters, physical threats, vulgar name-calling in public places, and even stalking. Even more common than physical intimidation, however, are threats of professional ruin, discharge from the case, lawsuits, and professional discipline.


268 Thibodeau, 869 A.2d at 143 (father in child custody dispute left GAL abusive and threatening telephone messages); Johnson, 2003 WL 61249, at *2 (father in custody dispute left the GAL threatening telephone message telling her to “watch her back”).

269 Bergquist, 844 A.2d at 109 (ex-boyfriend sent GAL handwritten note saying “You will pay dearly next year.”); In re Nathan, 671 N.W.2d 578, 580-81 (Minn. 2003) (attorney for mother in a custody case sent GAL harassing letters, called her “worse than worthless,” threatened to “deal with her accordingly” and to tell others that she was not truthful or impartial).

270 In re L.M.S., 2009 WL 2030430, at *3 (mother in custody dispute threatened GAL when she advocated for child’s protection); Wallace v. Masten, No. 02CA13, 2003 WL 927600, at *1 (Ohio Ct. App.2003) (father in custody dispute tried to run down the GAL after he lost custody of his children); State v. Klimek, 398 N.W.2d 41, 42 (Minn. Ct. App. 1986) (father was verbally abusive during GAL visit and then followed GAL to her car while shaking his fist).

271 Wallace, 2003 WL 927600, at *1 (father in custody dispute called GAL obscene names, and shouted out questions in public such as “Are you still protecting child molesters?”).

272 Id. (father in custody dispute devised forty encounters with the GAL); Antoni, 2000 WL 1300357, at *2 (six months after custody dispute, father blocked GAL’s access to her car, yelling, “Leslie, will you dike my ex-wife for me?”).

273 See In re Nathan, 671 N.W.2d at 580-81 (mother’s attorney wrote letters to the judge complaining that GAL was biased, and threatened to publish GAL letters to him on his website “as examples of outrageous actions by a court-appointed quasi-expert.”).

274 See Antoni, 2000 WL 1300357, at *1 (father filed motion to remove GAL when GAL requested he undergo mental health evaluation).
Many states provide GALs with quasi-judicial immunity in the pursuit of their duties.\textsuperscript{277} The rationale behind providing GALs quasi-judicial immunity is directly linked to the leverage that parties seek by intimidating GALs,\textsuperscript{278} whether physically or professionally. As one court noted:

To safeguard the best interests of the children, however, the guardian’s judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian’s focus must not be diverted to appeasement of antagonistic parents.\textsuperscript{279}

Quasi-judicial immunity has resulted in unsuccessful lawsuits waged by disgruntled parties against GALs for causes of action such as professional malpractice\textsuperscript{280} and defamation.\textsuperscript{281}

\textsuperscript{275} Id. Father served GAL with complaint alleging abuse of process totaling $100,000 in damages after GAL requested father in a custody dispute undergo a mental health evaluation. Father later wrote GAL a letter, stating:

You are FIRED as an incompetent GAL for my daughter. . . . Legal action will commence upon you in the near future. Contrary to GAL immunity law, you have overstepped your authority. I will exhaust ALL my financial resources to bring the full force of [the] law against you.

See also \textit{In re} Rockwell, 673 S.W.2d 512, 513–14 (Tenn. Ct. App. 1983) (man was accused of unduly influencing the ward threatened the GAL with suit if he did not resign).

\textsuperscript{276} \textit{Antoni}, 2000 WL 1300357, at *1 (father informed GAL’s secretary he was filing a bar complaint against GAL after GAL testified unfavorably for father).

\textsuperscript{277} A thorough multi-jurisdictional review of quasi-judicial GAL immunity is undertaken in Fleming v. Asbill, 483 S.E.2d 751, 754–56 (S.C. 1997). Generally, most jurisdictions provide GALs immunity for damages claims based on the duties of the GAL, including testifying, written reports, and recommendations. Importantly, not all states provide GALs with immunity. For example, in South Carolina, volunteer GALs in abuse and neglect cases may be held liable for grossly negligent acts. \textit{See id.} at 756; S.C. CODE ANN. § 63-11-560 (West 2009).

\textsuperscript{278} \textit{See} Short v. Short, 730 F.Supp. 1037, 1039 (D. Colo. 1990) (articulating the need for GAL immunity).

\textsuperscript{279} \textit{Id.} While scholars have argued that GAL immunity will lead to decreased protection of the ward since the GAL knows she won’t be liable for her actions, courts disagree. In Fleming, 483 S.E. 2d at 755, the court noted safeguards such as GALs not being immune for actions beyond the scope of their duties, and preserved accountability to the parents via cross-examination.

\textsuperscript{280} \textit{See State ex rel. Bird}, 864 S.W. 2d 376, 379–80 (Mo. Ct. App. 1993) (issuing a permanent writ to dismiss father’s suit against the GAL for actual and punitive damages alleging GAL’s malpractice).

In recent years, GALs have also found themselves in the position of seeking judicial protection for their personal safety due to these threats. Indeed, GALs have obtained “no contact” orders (and contempt orders for their violation), disciplinary action against parties’ attorneys, civil protection orders, witness intimidation charges, and disorderly conduct charges against disgruntled parents and attorneys. Despite these recent attempts at protecting GALs from physical and professional harm, the high-conflict environment coupled with parents’ underlying mental health or anger issues and unfavorable recommendations for parents have caused the “best interest of the child” to be overshadowed by concerns of safety. Despite the judicial system’s intervention, GALs continue to be a target of anger in high-conflict cases.

CONCLUSION

While there are important differences among jurisdictions with respect to GAL appointments and practice, GALs serve an important function in the nation’s courts. There continues to be a plethora of unresolved ethical issues and unanswered questions, often because there are no good answers. GALs represent the interests of the courts’ most vulnerable populations, often working long hours and receiving minimal compensation. At times, they risk their own physical and emotional well-being. The continued existence of ethical issues speaks as much to the importance and complexity of GAL work as it does to the law’s ability to resolve matters for which there is often no good solution.

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283 See Bergquist v. Cesario, 844 A.2d 100, 109 (R.I. 2004) (ex-boyfriend given an opportunity by the court to avoid a contempt finding by making a sworn statement that he would refrain from all contact with the GAL.).

284 See In re Nathan, 671 N.W. 2d 578, 580–81 (Minn. 2003) (mother’s attorney in custody dispute indefinitely suspended from the practice of law for sending harassing letters and initiating frivolous litigation against GAL.).

285 See Wallace, v. Masten, No. 02CA13, 2003 WL 927600 (Ohio Ct. App. Feb. 11, 2003) (GAL successfully sought five-year civil protection order against father in a custody dispute after he arranged between forty and forty-five encounters with the GAL, called the GAL vulgar names, attempted to run down the GAL.).

286 See Antoni, 2000 WL 1300357, at **2–3 (maintaining an intimidation of a former witness charge against father in a custody dispute after he threatened the GAL with a lawsuit, disciplinary action, and yelled vulgar names at the GAL.).

287 See State v. Klimek, 398 N.W.2d 41, 42 (Minn. Ct. App. 1986) (upholding conviction of father in a custody dispute who showed up unannounced and intoxicated to the children’s GAL visit and threatened the GAL).
BANKRUPTCY, DIVORCE, AND THE ROOKER-FELDMAN DOCTRINE:
A POTENTIAL MARRIAGE OF CONVENIENCE

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I. INTRODUCTION

The Rooker-Feldman Doctrine is a relatively obscure principle. It is based on two cases: Rooker v. Fidelity Trust Co.¹ and District of Columbia Court of Appeals v. Feldman.² The doctrine stands for the principle that lower federal courts, including bankruptcy courts, lack subject-matter jurisdiction to review determinations made by state courts in judicial proceedings. Federal review of state court decisions lies only with the United States Supreme Court. Moreover, a lower federal court may not entertain a claim that is “inextricably intertwined” with a claim addressed in the state court.³ Sometimes confused with “claim preclusion” and “issue preclusion,” Rooker-Feldman has been applied in cases where the more familiar preclusion doctrines have not.

When an individual files bankruptcy and seeks to discharge all of his or her debts, creditors occasionally challenge the debtor’s ability to have any debts forgiven.⁴ The denial of a discharge is reserved for debtors whose activities are inconsistent with the purposes of bankruptcy. More often, creditors will challenge a debtor’s ability to discharge a particular debt, rather than all of his or her debts.⁵ Efforts to stop the discharge of marital debts fall within the second category of challenges. To block the discharge of a debt in bankruptcy requires the creditor to file adversary complaints⁶ with the bankruptcy court.⁷ Adversaries are akin to civil lawsuits and require all of the procedural safeguards that suits filed in the federal

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¹ 263 U.S. 413 (1923).
³ Id. at 483.
⁶ Hereinafter “adversaries.”
⁷ See FED. R. BANKR. P. 7001.
district courts enjoy. When a debtor owes a debt to an ex-spouse or to the children of a marriage, adversaries challenging the dischargeability of those debts are often raised to settle the question of whether the marital debt survives bankruptcy.

When bankruptcy courts adjudicate challenges to the discharge of marital debts, they revisit the same issues that the parties confronted in their divorce. The decision to award alimony, maintenance, support, and/or equitable distribution or property settlements in state court is often second-guessed in bankruptcy proceedings because the federal court must reexamine the divorce issues to determine whether the debt in question is dischargeable. Bankruptcy jurisprudence has long recognized that a fresh look at the terms of the divorce is required in order that federal law may be applied to determine whether a particular debt is in the nature of alimony, maintenance or support or whether it is “something else.” The former category of marital debts is not discharged in bankruptcy; the latter category, however, may be dischargeable in some types of bankruptcy cases.

As a consequence of the bankruptcy court’s need to reexamine the facts and circumstances surrounding the divorce, family law practitioners have often been frustrated when the terms of a divorce decree or a marital settlement agreement are reviewed and given new meaning in bankruptcy. Likewise, bankruptcy judges have expressed concern that they are becoming second-chance divorce courts. Unquestionably, family law matters have taken up a disproportionately significant portion of bankruptcy court dockets. This Article examines the little-known Rooker-Feldman Doctrine and offers Rooker-Feldman as an important jurisdictional tool in bankruptcy adversary practice to prevent parties from having to re-litigate disputes involving marital debts.

The Rooker-Feldman Doctrine stands for the proposition that bankruptcy judges are not only bound by what happened in state court, they lack jurisdiction to hear challenges that revisit the issues that were raised in state court. Facing an increasing number of marital-debt discharge challenges, bankruptcy judges may find that the Rooker-Feldman Doctrine provides much-needed relief.

This Article asserts that the recent amendments to the U.S. Bankruptcy Code (“the Code”) have eliminated many of the past reasons that bankruptcy courts had to review divorce decisions. Bankruptcy judges should invoke Rooker-Feldman and refuse to hear many marital-debt-dischargeability adversary actions. Under Rooker-Feldman, bankruptcy courts lack subject-matter jurisdiction to hold proceedings to determine the dischargeability of most marital debts.

9 See, e.g., In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985) (citing In re Williams, 703 F. 2d 1055,1056 (7th Cir. 1983)); In re Dirks, No. 08-8031, *2–4, 8–9, 2009 WL 103606 (B.A.P. 6th Cir. Jan. 16, 2009) (unpublished).
II. MARITAL DEBT DISCHARGEABILITY BEFORE 2005

Discharging marital debts in bankruptcy has been problematic since the Code was first enacted.\footnote{Charles J. Tabb, The Law of Bankruptcy 991 (2nd ed. 2009) (“Drawing the line between debts that are and those that are not actually in the nature of alimony, maintenance or support has proven difficult for courts.”).} From the Code’s ratification in 1978 until 2005, divorced parties too often had to revisit in bankruptcy court the painful financial issues arising from the dissolution of their marriage in order to determine whether a particular debt could or should be discharged in the bankruptcy.\footnote{See, e.g., In re Carlisle, 205 B.R. 812, 819–20 (Bankr. W.D. La. 1997) (citing In re Smither, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996) (listing ten factors that the court would consider, at minimum, in determining whether a debt, not in the nature of alimony, maintenance or support, would be discharged. The factors are:

1. The amount of debt involved, including all payment terms; 2. The current income of the debtors, objecting creditor and their respective spouses; 3. The current expenses of the debtor, objecting creditor and their respective spouses; 4. The current assets, including exempt assets of the debtor, objecting creditor and their respective spouses; 5. The current liabilities, excluding those discharged by the debtor’s bankruptcy, of the debtor, objecting creditor and their respective spouses; 6. The health, job skills, training, age and education of the debtor, objecting creditor and their respective spouses; 7. The dependents of the debtor, objecting creditor and their respective spouses, their ages and any special needs they may have; 8. Any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree; 9. The amount of debt which has been or will be discharged in the debtor’s bankruptcy; 10. whether the objecting creditor is eligible for relief under the bankruptcy code; and 11. Whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of 11 U.S.C. § 523(a)(15) issues.).} The situation was sometimes made more acute because the Code required that marital debts be separated into two categories: (1) those in the nature of alimony, maintenance or support\footnote{See 11 U.S.C. § 523(a)(5) (2010).} and (2) those not in the nature of alimony, maintenance or support, which usually meant property settlements, equitable distribution orders, or hold-harmless agreements.\footnote{See 11 U.S.C. § 523(a)(15) (2010); Margaret Dee McGarity, Family Law Provisions in the Bankruptcy Reform Act of 1994, 27 Bankr. Ct. Dec. (LRP) 1, 6 (1995) (“An obligation that is not a support debt is, by process of elimination, a property division debt.”).} If the debt in question were in the former category, it was non-dischargeable in bankruptcy; if it were in the latter category, it might or might not be dischargeable because the determination was subject to a balancing test.\footnote{See In re Crosswhite, 148 F.3d 879, 888 (7th Cir. 1998); In re Hill, 184 B.R. 750, 755–56 (Bankr. N.D. Ill. 1995); In re Miller, 247 B.R. 412, 416 (Bankr. N.D. Ohio 2000);}
other words, the classification of the marital debt was outcome-determinative in dischargeability litigation.

The classification of marital debts as either in the nature of alimony, maintenance or support or “something else” resulted in a few noteworthy decisions and many frustrated bankruptcy attorneys and judges. No case stands out more than In re Davidson.


See, e.g., Daulton v. Daulton (In re Daulton), 139 B.R. 708 (Bankr. C.D. Ill. 1992) (listing twenty factors to be considered when determining if a marital debt is in the nature of alimony, maintenance or support or if it is a property settlement. However, in ruling that the debt in question was dischargeable as a property settlement, the court barely addressed any of the factors it had just laid out. The court’s complete analysis consisted of two paragraphs. It wrote:

In considering the factors outlined above, the Court concludes that the fees in question were not intended to be in the nature of alimony, maintenance, or child support. The December 21, 1990, Dissolution Order contains a maintenance section at paragraph D. and specifically states at paragraph Z.Z. that maintenance is waived by both parties except as otherwise provided in the Order. Additionally, there is a separate paragraph concerning child support. This Court is not bound by the labels placed on these debts by the State Court, but, in this case, the Court finds the State Court Order indicative of the State Court’s intent and the intent of the parties as to the characterization of the debts in question.

The Court further finds that the income of the parties at the time of the December 21, 1990, Order was relatively equal given Plaintiff’s child support payments to Defendant and Plaintiff’s care of Defendant’s son. There is no indication that the fees were awarded against Plaintiff to balance the income of the parties. The parties are young and appear to have a relatively equal ability to earn a living. These factors, together with others of a more minor character, lead the Court to find in favor of Plaintiff as to all of the debts in question.

Id. at 711 (emphasis added). Daulton was potentially instructive to bankruptcy attorneys because of its twenty-factor test, but its importance was diminished by virtue of its truncated analysis.

See, e.g., In re Hesson, 190 B.R. 229 (Bankr. D. Md. 1995), abrogated by In re Dexter, 250 B.R. 222 (Bankr. D. Md. 2000) (“Professor Peter C. Alexander urges (much to the prayers of some bankruptcy judges) that jurisdiction over marital debts should remain in the divorce court with the bankruptcy court serving as an adjunct to enforce the state court orders . . . .”) Id. at 236. See also In re Ingalls, 297 B.R. 543 (Bankr. C.D. Ill. 2003) (rejecting the prevailing dischargeability analysis under 11 U.S.C. § 523(a)(15) in favor of a “totality of the circumstances” test as a way to be more precise when determining marital-debt dischargeability challenges); In re Gunia, 91 B.R. 989, 991 (Bankr. M.D. Fla. 1988) (cautioning that marital-debt discharge actions may turn the bankruptcy courts into appellate courts for divorce decrees). The most colorful exposition of a court’s frustration
The Davidsons were divorced in 1983 and, pursuant to their divorce decree, Mr. Davidson agreed to pay his ex-wife $7,732 per month for 121 months. The divorce decree explicitly stated that the obligation was for support and not a property settlement; Mr. Davidson labeled his checks to his ex-wife as “alimony” and deducted the payments as alimony on his income tax returns. The former Mrs. Davidson declared the checks as alimony on her tax returns. In March of 1988, Mr. Davidson filed for bankruptcy and, in defense of a challenge to the dischargeability of the marital debt by his ex-wife, Mr. Davidson argued that the debt in question was not in the nature of alimony, maintenance or support. The bankruptcy court agreed with Mr. Davidson, as did the district court on appeal. The United States Court of Appeals for the Fifth Circuit finally reversed the lower courts and ordered him to pay the debt to his ex-wife. Sixty-five months passed between the date on which Mr. Davidson first withheld payment to his ex-wife and the point at which the court of appeals ordered him to pay the debt. It is therefore not surprising that the process of determining the dischargeability of marital debts has been regarded by many as “confusing” and “unfair.”

Conquest, War, Famine, Death—these the Book of Revelations tells us are the Four Horsemen of Apocalypse, no matter what that later apostle known to the sporting gentry as Grantland Rice wrote some nineteen centuries later. Yet in the arena of consumer bankruptcy, neither prophet was right. Here and now those dread specters are: Divorce, Illness, Unemployment, and Overspending. These now are the harbingers of economic doom that spell the end of the “good life” for so many of the economic refugees that seek relief in this “Court of Last Resort.” But even here the tendrils of Divorce linger on and judges of these courts are called upon to decide whether the remaining shards of the former physical and spiritual union are “in lieu of maintenance” or “in the nature of property settlement” and thus correspondingly nondischargeable or dischargeable as the case may be.

This case illustrates some of the sadness, the bitterness and the economic desolation visited upon such parties, for they were and are the victims of both Divorce and Illness.

19 *Id.* at 797.
20 *Id.*
21 *Id.*
22 Davidson, 947 F.2d 1294 at 1296.
23 *Id.* at 1298.
24 See, e.g., Jana B. Singer, *Divorce Obligation and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. ON LEGIS. 43 (1993). She writes:

The Bankruptcy Code currently divides divorce-related obligations into two categories: awards or agreements in the nature of support are non-dischargeable;
One unintended consequence of the marital-debt-dischargeability paradigm, pre-2005, was that women, more often than men, seemed to be disenfranchised in bankruptcy.\textsuperscript{25} In case after case, ex-husbands who earned more money and who had either been ordered to pay or had accepted the responsibility to pay certain marital debts filed bankruptcy after the divorce.\textsuperscript{26} Soon thereafter, either the ex-husband sought to have the bankruptcy court declare the marital debt(s) in question to be dischargeable in bankruptcy or the ex-wife filed a challenge to have the bankruptcy court declare the debts to be excepted from discharge.\textsuperscript{27} The bankruptcy proceeding was an expensive second round of litigation for the parties, particularly the party with the fewest resources, which was often the ex-wife.\textsuperscript{28}

obligations arising from property divisions can be discharged in the same manner as ordinary commercial debts. Because recent developments in family law have undermined the support/property distinction and because privately negotiated divorce agreements often fail to distinguish between payments intended to serve as support and those intended to distribute property, the Code’s reliance on this classification often leads to confusion and hardship for divorce obligees. In addition, because of the rise of equitable distribution as the dominant method of allocating marital gains and losses, the policy of refusing to protect divorce-related property divisions is unfair to divorcing couples who structure their financial arrangements according to modern notions of marital partnership.

\textit{Id.} at 43.


\textsuperscript{27} Marital debt dischargeability may be used as either a sword or a shield. Dischargeability of marital debts may be raised by a debtor to have the debt declared dischargeable or it may be raised by the creditor spouse to keep the debtor from discharging the debt(s) in question. Shayna M. Steinfield & Bruce R. Steinfield, \textit{The Family Lawyer’s Guide to Bankruptcy} 99 (A.B.A., 2d ed. 2002).

The issue of determining the dischargeability of a marital debt is often complicated and can involve protracted litigation. In Jestice v. Jestice, a husband and his ex-wife were divorced on November 6, 2001. She filed a Chapter 13 reorganization in August of 2002; he filed a Chapter 7 liquidation almost two years later. In his bankruptcy, Mr. Jestice sought to discharge certain marital debts that he had been obligated to pay in the couple’s divorce decree, namely credit card debts, a motor vehicle loan, and a mortgage obligation. Ms. Jestice filed an adversary and sought a determination that her former husband’s debts were nondischargeable debts pursuant to Sections 523(a)(5) and (a)(15) of the Code.

The bankruptcy court held that the debts were not in the nature of alimony, maintenance or support under Section 523(a)(5) and turned its attention to whether the debts were dischargeable pursuant to Section 523(a)(15). In reaching its decision under Section 523(a)(15), the court was required to examine whether Mr. Jestice had the ability to pay the obligations in question and whether the discharge benefit to the debtor outweighed the detriment to Ms. Jestice. As part of its analysis, the court considered the income of each party (and income from Ms. Jestice’s live-in fiancé) as well as the fact that Mr. Jestice was paying child support to Ms. Jestice, who had been awarded primary custody of the couple’s children. The court then calculated the parties’ monthly expenses and concluded that the debtor did not have the ability to pay the obligations in question.

Once the bankruptcy court reached its decision, Ms. Jestice appealed the ruling to the Bankruptcy Appellate Panel ("B.A.P.") for the Sixth Circuit, which affirmed the bankruptcy court. The B.A.P. noted that the bankruptcy court applied the wrong test to determine dischargeability of the marital debts, but it

Dischargeability, supra note 25, at 363–65. See also Margaret F. Brinig, In Search of Prince Charming, 4 J. GENDER, RACE & JUST. 321, 325 (2001) (“For the last several years, I have noticed a puzzling phenomenon in American marriage and divorce. American women primarily file for divorce, even though they all too frequently end up in poverty following marital dissolution.”).

29 Dischargeability challenges, called “adversary complaints” in the world of bankruptcy, are governed by the Federal Rules of Bankruptcy Procedure, which provides all of the procedural safeguards that parties in a district court litigation would have. See F.R. Bankr. P. 7001 et seq. Actions begin with a complaint, followed by responsive pleading(s) and discovery, etc. Id.


31 “Chapter 13 offers an alternative to liquidation under Chapter 7 by allowing a debtor with regular income to keep his assets and establish a plan to pay creditors out of his future income.” Matter of Crippin, 877 F.2d 594, 596 (7th Cir. 1989).

32 Jestice, 168 Fed. Appx. at *41.

33 Id.

34 Id.

35 Id.

36 Id. at *43.

37 Jestice, 168 Fed. Appx. at *41.

38 Id. at *41, *45.

39 Id. at *39.
concluded that the lower court was correct to decide that the debtor’s assumption of the credit card, vehicle and mortgage debts “lacked the traditional indicia of support” and were dischargeable.40 Following the B.A.P. decision, Ms. Jestice appealed to the U.S. Court of Appeals for the Sixth Circuit, which affirmed the prior holdings.41

This Sixth Circuit decision acknowledged (as had the B.A.P.) that some of the facts weighed in favor of the ex-wife, suggesting that this was not an open-and-shut case.42 However, the senior court could not conclude that the bankruptcy court erred in finding in favor of the ex-husband.43

The final decision does not provide a complete picture of Ms. Jestice’s struggle to try and keep her ex-husband from discharging the marital debts in question. The Jestices were divorced pursuant to a decree entered on November 6, 2001, but the Sixth Circuit did not issue its ruling until February 9, 2006.44 The parties were living with the financial controversy swirling around them for more than four years; more importantly, the parties had to fund an initial court challenge plus two appeals in order to close this painful chapter of their marriage. In the end, the debtor’s discharge meant that any debts for which Ms. Jestice was a co-debtor (the credit cards and the mortgage in all likelihood) would become Ms. Jestice’s sole responsibility because her ex-husband discharged his obligation to these creditors in bankruptcy.45

III. MARITAL DEBT DISCHARGEABILITY AFTER 2005

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).46 The goal of this new law was, inter alia, to make bankruptcy more difficult to file and to end perceived abusive filings.47 To further

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40 Id. at *43.
41 Id. at *46.
42 Jestice, 168 Fed. Appx. at *43.
43 Id.
44 Id. at *40.
45 If Mr. Jestice was represented by a competent bankruptcy attorney, he also discharged any obligation to his ex-wife that he may have had to hold her harmless should the marital debts fall back to her to pay. She could be listed as a “contingent creditor” whose debts are subject to discharge. See 11 U.S.C. § 101(5)(A) (2005) (“claim” means “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . .” (emphasis added)). In Jestice, however, Ms. Jestice had filed a Chapter 13 reorganization and a portion of her debts, including the marital debt, would be paid in part through a plan and over a three-to-five-year period.
47 See Tally M. Wiener & Nicholas B. Malito, On the Nature of the Chapter 7 Bankruptcy Trustee Fee, 17 J. BANKR. L. & PRAC. 2 ART. 3 (2009) (BAPCPA’s purpose was to make it more difficult for consumers to declare personal bankruptcy); Marisa Terranova, Attorneys as Debt Relief Agencies: Constitutional Considerations, 13
its stated (and unstated) purposes, BAPCPA essentially changed basic bankruptcy theory. Prior to the enactment of BAPCPA, honest but unfortunate debtors typically filed bankruptcy and sought a discharge of their debts under Chapter 7 of the Code. If the debtor’s financial disclosures indicated that it would be an abuse to grant her a discharge under Chapter 7, the bankruptcy court, on its own motion, or on the motion of the Office of the United States Trustee, could move to dismiss the debtor’s bankruptcy unless the debtor converted her case to a consumer reorganization under Chapter 13. The burden was on the government to prove that the debtor was abusing the bankruptcy system by failing to file a reorganization.

Under BAPCPA, all debtors are presumed to be capable of paying something on their debts and are therefore presumed to be capable of completing a Chapter 13 reorganization plan. Those debtors who lack the ability to fund a Chapter 13 plan are identified through a complicated “means test,” which all consumer debtors must complete and which is intended to alert the court and the United States Trustee when a debtor is financially unable to file a Chapter 13 and is therefore eligible for the much simpler Chapter 7 liquidation. The goal of bottom-line

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objective of BAPCPA is clearly to move more debtors into Chapter 13 reorganizations.

Among the numerous amendments to the Code, BAPCPA significantly revised the marital debt discharge provisions. “Marital debts,” of all types, are now known as “domestic support obligations” as long as they are in the nature of alimony, maintenance or support. 53 “Domestic support obligation” includes debts that were established pursuant to a separation agreement, property settlement, divorce decree, or court order. 54 More importantly, these “domestic support obligations,” as well as debts that are not in the nature of alimony, maintenance or support, 55 are nondischargeable in a Chapter 7 liquidation. 56

There is no longer a classification distinction when determining the dischargeability of marital debts in Chapter 7 cases. A distinction remains in Chapter 13 cases, but changes under BAPCPA have rendered marital-debt dischargeability in Chapter 13 cases much less complicated. More troubling, however, is that BAPCPA should have ended litigation over the classification of marital debts in Chapter 7 cases and yet some cases that were filed pre-BAPCPA are still being litigated. 57

A. Chapter 7 Treatment of Marital Debts

BAPCPA eliminated the need for litigation in Chapter 7 liquidation cases where courts were trying to determine the type of marital debt that was the subject of a pending adversary dispute. Since all categories of marital debt are now nondischargeable in a Chapter 7, there is no reason to continue to make distinctions between debts in the nature of alimony, maintenance or support and debts that are something other than in the nature of alimony, maintenance or support.

In Chapter 7 cases, all the bankruptcy court must do is determine whether the marital debt(s) in question were owed “to a spouse, former spouse, or child of the debtor” and were “incurred by the debtor in the course of a divorce.” 58 Once that

54 Id.
55 The debts typically include property settlements, equitable distribution agreements, and hold-harmless agreements. See generally Bernice B. Donald & Jennie D. Latta, The Dischargeability of Property Settlement and Hold Harmless Agreements in Bankruptcy: An Overview of Section 523(a)(15), 31 FAM. L.Q. 409 (1997). See also In re Raffeld, 356 B.R. 786 (B.A.P. 6th Cir.) (stating that section 523(a)(15) “is intended to cover divorce-related debts such as those found in property settlement agreements . . . ” (citing Crosswhite v. Crosswhite, 148 F.3d 879, 882 (7th Cir. 1998)); In re Klein, 2008 WL 238848 (Bankr. D.N.D. 2008) (holding a property settlement nondischargeable under section 523(a)(15)).
The enactment of subsection 523(a)(15) and the increase in the scope of the discharge exception effected by the 2005 amendments, [sic] expresses Congress’s recognition that the economic protection of dependent spouses and children under state law is no longer accomplished solely through the traditional mechanism of support and alimony payments. State courts do not always draw sharp distinction between support and property division in providing for the post-divorce economic security of dependent family members. Property settlement arrangements are often “important components of the protection afforded individuals who, during the marriage, depended on the debtor for their economic well-being.”

B. Chapter 13 Treatment of Marital Debts

If a debtor files a Chapter 13 consumer reorganization, instead of a Chapter 7 liquidation, a domestic support obligation is not dischargeable, but the Chapter 13 discharge provisions still permit a discharge of a debt that is not in the nature of alimony, maintenance or support. The balancing test that used to be applied to the dischargeability of marital debts not in the nature of alimony, maintenance or support, however, has been eliminated. As a result, if a debtor files a consumer reorganization instead of a liquidation, it is possible that his or her marital debt could be deemed “dischargeable.”

In order to determine whether the marital debt in question qualifies for a discharge in a Chapter 13 reorganization, the interested parties must present the issue to the court by filing an adversary complaint and engage in the same arguments that the parties made pre-BAPCPA. This suggestion is not illusory;

59 Id.
60 Id. at 61–62, quoting 4 L. KING, COLLIER ON BANKRUPTCY, ¶ 523.21 at 523–118 (15th Ed. Rev. 2008). See also Crosswhite v. Ginter, 148 F. 3d 879, 881 (7th Cir. 1998) (“Bankruptcy law has had a longstanding corresponding policy of protecting a debtor’s spouse and children when the debtor’s support is required.”); Shine v. Shine, 802 F. 2d 583, 585–86 (1st Cir. 1986) (“The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce.”).
62 Under 28 U.S.C. §1334(a), bankruptcy courts, through reference from the district courts, have original and exclusive jurisdiction of all cases under title 11. “Cases” refers to the bankruptcy case itself. The bankruptcy court also has full “but not exclusive”
one of the intended (and actual) consequences of BAPCPA is to move more debtors into Chapter 13 and reduce the number of debtors who are permitted to walk away from their obligations in Chapter 7. Since the enactment of BAPCPA, there has been no decline in Chapter 13 filings. As a result, there are still considerable opportunities for bankruptcy courts to reexamine the nature of marital debts to determine dischargeability and many more opportunities for continued confusion and frustration.

After BAPCPA, the test for determining the dischargeability of a marital debt that is not in the nature of alimony, maintenance or support is quite simple in a Chapter 13 case. Section 523(a)(15) of the Code provides that, if the debt in question is not a “domestic support obligation” (which is covered by Section 523(a)(5) of the Code), the debt is dischargeable. “Dischargeable” doesn’t typically mean that a debtor spouse can walk away from this marital debt and not pay anything to his or her former spouse. In a Chapter 13 case, “dischargeable” usually means that the debt will be included with all of the other general unsecured creditors that are included in the debtor’s Chapter 13 plan. Those creditors will be paid a pro rata share of the funds that are to be distributed as provided in the

jurisdiction over proceedings “arising under title 11, or arising in and related to cases under title 11.” 28 U.S.C. §1334(b) (2009). Thus, state courts have jurisdiction to hear and determine some issues that arise out of a bankruptcy case. This has been generally understood to include nondischargeability determinations, except in instances identified in 11 U.S.C. §523(c)(1), which gives bankruptcy courts exclusive jurisdiction to determine four types of nondischargeability claims; and to include determinations of whether a particular debt is excepted from or prohibited by the automatic stay. See, e.g., Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934) (“The effect of the discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded . . .”).

63 See, e.g., Rafael I. Pardo, Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project, 83 AM. BANKR. L.J. 27, 37 (2009) (“the means test . . . is designed to shunt some [debtors] from Chapter 7 to Chapter 13.”); Bruce M. Price & Terry Dalton, From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences), 26 YALE L. & POL’Y REV. 135, 192 (2007) (increase in the amount of debts being repaid in Chapter 13 bankruptcies post BAPCPA). See also Alexander, supra note 52, at 604 (“[T]he means test is the centerpiece of the government’s new effort to force debtors who have some ability to pay their debts into chapter 13 consumer reorganizations and away from chapter 7 liquidations.”).


65 See Musselman, supra note 57 (reviewing the many issues that still surround the discharge of marital debts in bankruptcy).
Plan. Accordingly, the spouse may receive some distribution from the Chapter 13 trustee, but, typically, not the full amount of his or her claim.

When a debtor files a Chapter 13 consumer reorganization and marital debts are included in the overall debt picture, it is likely that either the debtor spouse or the creditor spouse may ask the bankruptcy court to determine the dischargeability of those debts. Advocates of the changes to the marital-debt dischargeability provisions of the Code would argue that, by making virtually all marital debts nondischargeable, Congress helped to reduce the number of adversaries seeking to discharge marital debts. The argument, unfortunately, does not take into account that the distinction between debts in the nature of alimony, maintenance or support and other marital debts still remains an issue in Chapter 13 cases. Moreover, since one of the purposes of BAPCPA is to move more debtors into Chapter 13 reorganizations, the number of Chapter 13 filings will likely continue to increase and the number of marital debt challenges will likely remain high. If so, all of the troubling issues surrounding marital-debt dischargeability will also remain.

Despite BAPCPA, the litigation to determine the dischargeability of marital debts in Chapter 13 cases still revolves around the classification of the debts as either in the nature of alimony, maintenance or support or as “something else.” There is no need to go beyond that inquiry because, if the debt is in the nature of alimony, maintenance or support, it is a domestic support obligation as defined in Section 101(14A) of the Code and it is not dischargeable in either a Chapter 7 liquidation or a Chapter 13 consumer reorganization. If the debt is not a domestic support obligation, then Section 523(a)(15) provides that it can be discharged in a Chapter 13. All of the parties’ efforts, therefore, must be directed toward having the marital debts in question classified as either a domestic support obligation or something other than a domestic support obligation. A debtor’s only chance to have a marital debt discharged in bankruptcy is to have a bankruptcy court conclude that the debt in question is not in the nature of alimony, maintenance or support.

When determining the classification of a marital debt, the bankruptcy court must examine the characteristics of the debt and consider factors that look

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strangely similar to the factors that the divorce court considered when the debtor and the creditor spouses were getting their divorce. Consider *In re Daulton*, wherein the court relied on twenty factors to determine if a marital debt was in the nature of alimony, maintenance, or support. The factors included the length of the marriage, the age and health of the parties, employment of the parties, the relative future earning power of each spouse, and whether the provisions of the parties’ settlement agreement was intended to balance the relative income of the parties. The list should look familiar to most family law practitioners because these are among the same factors that are considered when determining if alimony, maintenance or support are justified in a divorce.

One might justifiably ask why Congress did not conform dischargeability determinations in Chapter 13 cases with those in Chapter 7 cases. That is a mystery that cannot be resolved in this Article. However, it does seem that further amendment to the Code would be appropriate to eliminate the requirement that bankruptcy courts determine if marital debts are “in the nature of” alimony, maintenance or support. Simply declaring that marital debts are nondischargeable in Chapter 13 cases, just as they are in Chapter 7 cases, would eliminate the issues discussed herein.

### IV. PRECLUSION IN BANKRUPTCY

Generally, claim and issue preclusion are affirmative defenses that can bar the untimely litigation of certain matters or the re-litigation of others. As one court has noted, the two concepts are closely related but are certainly applied differently. “The concepts are distinct. Claim preclusion, otherwise referred to as *res judicata*, gives dispositive effect to a prior judgment if the particular issue, albeit not litigated in the prior action could have been raised. On the other hand, issue preclusion, often referred to as collateral estoppel, bars relitigation only of an issue identical to that adjudicated in the prior action.”

#### A. Claim Preclusion

One of the better-known preclusion doctrines is claim preclusion. The essential elements of claim preclusion are: “(1) a final judgment on the merits in an earlier action; (2) an identity of parties or privies in the two suits; and (3) an identity of the cause of action in both suits.” Once all of these elements are

69 Daulton, *supra* note 16.
70 *Id.* at 710.
72 FDIC v. Shearson-Amer. Express, Inc., 996 F.2d 493 (1st Cir. 1993).
satisfied, the parties are barred from re-litigating claims and from raising claims that could have been raised in the original action.\(^{74}\)

The United States Supreme Court in *Brown v. Felsen*\(^{75}\) held that claim preclusion does not apply in bankruptcy dischargeability proceedings.\(^{76}\) The Court stated “the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt.”\(^{77}\) It is well-settled that the dischargeability of debt in a bankruptcy proceeding is “the exclusive province of bankruptcy courts.”\(^{78}\) As such, the determination of the dischargeability of a marital debt is a different claim than those that could be brought before state courts.\(^{79}\) A party seeking to avoid re-litigating marital debt issues in bankruptcy clearly cannot rely on claim preclusion.

**B. Issue Preclusion**

Unlike claim preclusion, bankruptcy courts have continually given preclusive effect to state court judgments through issue preclusion, formerly known as “collateral estoppel.”\(^{80}\) The Supreme Court has explicitly recognized that “collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to Section 523(a).”\(^{81}\) Issue preclusion bars re-litigation of issues that were litigated and determined in prior legal proceedings.\(^{82}\) In order for issue preclusion to bar the re-litigation of an issue, four requirements must be met:

1. The precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;

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\(^{76}\) See also *In re Murphy*, 297 B.R. 332, 347 (Bankr. D. Mass. 2003) (\(\)“It is well established, however, that claim preclusion does not bar a bankruptcy court’s review of the nature of the debt in question for purposes of determining its dischargeability.\(\))\(\) (emphasis in original).

\(^{77}\) *Brown*, 442 U.S. at 138.

\(^{78}\) *In re Murphy*, 297 B.R. at 347 (citing *Brown*, 442 U.S. at 139).

\(^{79}\) *Id.*

\(^{80}\) See, e.g., *In re Livingston*, 372 F. App’x 613, 616 (6th Cir. Apr. 9, 2010) (affirming the lower court’s finding that “because the elements of a state common law fraud claim are virtually identical to those necessary to determine non-dischargeability, the Livingstons were collaterally estopped from re-litigating the issue of fraud”); *In re Tulloch*, 373 B.R. 370 (Bankr. D.N.J. 2007) (adversary plaintiff carried its burden of proving the non-dischargeability of drunk-driving debt by collateral estoppel); *In re LaRoche*, 207 B.R. 369 (Bankr. D.R.I. 1997) (the debtor’s state court criminal conviction binds the bankruptcy court under the doctrine of collateral estoppel).


\(^{82}\) For a more complete definition of collateral estoppel, see *Black’s Law Dictionary* 256 (7th ed. 1999).
(2) Determination of the issue must have been necessary to the outcome of the prior proceeding;
(3) The prior proceeding must have resulted in a final judgment on the merits; and
(4) The party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.83

Bankruptcy courts, relying on issue preclusion, have given preclusive effect to state court judgments84 most often when determining dischargeability exceptions when the debts in question are classified as “drunk-driving debts,”85 “fraud debts,”86 or “willful and malicious injury debts.”87

1. Drunk-Driving Injuries

Section 523(a)(9) of the Code excepts from discharge debts “for death or personal injury caused by the debtor’s operation of a motor vehicle, . . . if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug or another substance.”88 Through the use of issue preclusion, bankruptcy courts have found that state court judgments determining that an injury was caused by a debtor’s operation of a motor vehicle while intoxicated can satisfy all the elements necessary to grant an exception to discharge under Section 523(a)(9).89 When the state court judgment satisfies the 523(a)(9) elements, there is no need for the bankruptcy court to reevaluate the evidence or circumstances presented at state court. In fact, when such a judgment exists, the bankruptcy court simply grants a plaintiff’s motion for summary judgment and excepts the judgment from discharge.90

83 Id.
84 See In re Calvert, 105 F.3d 315, 321 (6th Cir. 1997) (stating “a creditor may utilize collateral estoppel to prevent litigation of the dischargeability of a debt after obtaining a default judgment on claims of fraud in state court.”); Colorado West Trans., Inc. v. McMahon, 380 B.R. 911, 924 (N.D. Ga. 2007) (district court overruling bankruptcy court, finding that “the Bankruptcy Court’s determination that McMahon did not defraud Colorado West was precluded by the prior default judgment.”); In re Thorne, 1995 WL 506843, *2 (Bankr. E.D. Va. 1995) (finding that “the precise issues raised in plaintiff’s dischargeability complaint were previously litigated in Virginia state court and judgment entered against debtor.”).
89 In re Thorne, 1995 WL 506843, at *2. But see In re Caffey, 24884 B.R. 920, 923 (Bankr. N.D. Ga. 2000) (holding that a state criminal proceeding that acquitted the debtor was based on a beyond reasonable doubt standard of proof, and thus was not preclusive under the bankruptcy court’s preponderance of the evidence standard).
90 Thorne, 1995 WL 506843, at *2.
2. Fraud Debts

Section 523(a)(2) of the Code excepts from discharge, debts obtained by “false pretenses, false representation, or actual fraud . . . .” Bankruptcy courts have routinely given preclusive effect to state court judgments based on fraud.91 Often times the jury in state court proceedings will have to consider the same elements as the bankruptcy court would have under § 523(a)(2).92 In fact, in many states, even “default judgments on fraud claims are considered to be a full and fair litigation of the fraud issue” when determining dischargeability under Section 523(a)(2).93 As long as the state considers default judgments a full and fair litigation of the fraud issue, the judgment will be given preclusive effect by the bankruptcy court.94 One bankruptcy court has gone so far as to say that “there is nothing specific about fraud determinations that make them especially well suited for determination by the bankruptcy court.”95

3. Willful and Malicious Injuries

Issue preclusion is also regularly used by bankruptcy courts with regard to litigation under Section 523(a)(6) of the Code, which provides an exception to discharge “for willful and malicious injury by the debtor to another entity or to the property of another entity.”96 In these situations, courts will use issue preclusion as an “alternative basis to satisfy the elements of Section 523(a)(6).”97 When the issues implicated by Section 523(a)(6) are actually litigated in a state court proceeding, the bankruptcy court can accord the state court judgment “preclusive effect.”98 If the bankruptcy court determines that the state court judgment determined the elements necessary under Section 523(a)(6), it will not reevaluate those elements.99

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92 See In re Diamond, 285 F.3d 822, 828 (9th Cir. 2002) (stating that “the reliance issues in the state law fraudulent misrepresentation claim are identical to those in the nondischargeability claim under § 523(a)(2)(A).”).
93 McMahon, 380 B.R. at 918.
94 Id.
95 Id.
97 In re Keaty, 397 F.3d 264, 270 (5th Cir. 2005).
98 Id. at 273 (finding that the Louisiana Fourth Circuit Court of Appeal’s findings on a “claim for sanctions under Louisiana law encompasses the elements of the willful and malicious injury requirement under § 523(a)(6) of the Bankruptcy Code”); In re Diamond, 285 F.3d 822, 828 (9th Cir. 2002) (holding that the state court judgment “necessarily included” the Section 523(a)(6) element of “willful and malicious injury”); In re Baldwin, 249 F.3d 912, 917–920 (9th Cir. 2001).
99 In re Keaty, 397 F.3d at 2743.
4. Issue Preclusion’s Inapplicability to Martial Debts

It is relatively straightforward for a bankruptcy court to give preclusive effect to a state court’s determination that a debtor caused an accident while driving under the influence of alcohol or drugs. Section 523(a)(9) of the Code does not provide leeway for bankruptcy courts to reevaluate the state court’s decision. Similarly, the dischargeability exception for fraud under Section 523(a)(2) is not as stringent but still can tie the hands of the bankruptcy court if the state court’s decision clearly indicates that debt obligation is based on some type of fraudulent activity. In dealing with both fraud and drunk-driving exceptions, the language and terminology used by the state court are identical to the applicable exception under 523(a) of the Code.

Unlike fraud and drunk driving, the language and terminology of willful and malicious torts under Section 523(a)(6) can be somewhat different than that used by the state court. The state court action giving rise to a claim that a debt is nondischargeable under Section 523(a)(6) is bound up in varying terminology and many different causes of action. Litigants don’t file “willful and malicious” torts. Typically, the plaintiff seeks recovery for an “intentional tort” of some sort and pleads that the defendant’s actions were willful and malicious. There are many ways to identify an injury as “willful and malicious.” Accordingly, a bankruptcy court will have to examine the underlying facts and circumstances of a particular controversy to determine whether the definition of “willful and malicious” has been met. While state courts may not use the terminology, their determinations may have preclusive effect if the state court’s reasoning fulfills the elements of a “willful and malicious” exception.

The dischargeability exception for domestic support obligations is different from the three exceptions discussed above. Under Section 523(a)(5), the language and terminology used to determine dischargeability is similar to what a state court may use but an extra phrase is added that is not present in the exceptions for drunk driving, fraud, and willful and malicious injuries. Under Section 101(14A) of the Code, domestic support obligations are defined not as “alimony, maintenance or support” but rather as those obligations that are “in the nature of alimony, maintenance, or support . . .”. While the words “alimony, maintenance, and support” could easily be found in state court divorce judgments, the additional words “in the nature of” have justified courts in finding that such determinations are solely an issue of federal law. Based on this premise, courts have repeatedly

100 See Michael D. Martinez, Note, Where There’s a “Will” There Should be a Way: Why In Re Salvino Unjustifiably Restricts the Application of §523(a)(6) to Exclude Willful and Malicious Breaches of Contract, 219 N. Ill. U. L. Rev. 441, 448 (2009) (stating with regard to determining whether an injury is malicious, “some courts have required a showing of ‘specific malice’—that is, ‘proof of an intent to injure’ while other courts have found a showing of implied or constructive malice to be sufficient.”).


102 In re Werthen, 329 F.3d 269, 272–73 (1st Cir. 2003); Cummings v. Cummings, 244 F.3d 1263, 65 (11th Cir. 2001); In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998); In
found that while an obligation may have one classification under state law, it may also have another under Section 523(a)(5). Since federal law is asking whether a debt is in the nature of alimony, maintenance, or support and not if it is alimony, maintenance, or support, issue preclusion is inapplicable.

Issue preclusion bars re-litigation of issues which were litigated and determined in prior legal proceedings. Whether a debt is alimony, maintenance or support is uniquely the province of divorce courts. Likewise, divorce courts do not consider whether an obligation by one spouse to another is in the nature of alimony, maintenance or support; rather, they are concerned about awarding (or not awarding) something that is alimony, maintenance or support.

V. ROOKER-FELDMAN DOCTRINE

The Rooker-Feldman Doctrine provides the piece that is missing from the concept of issue preclusion being used to stop parties from re-litigating matters that were previously litigated by the same parties in state court. In order for Rooker-Feldman to apply, three conditions must be met:

(1) “[T]he party against whom the doctrine is invoked must have actually been a party to the prior state-court judgment”; (2) “the claim raised in the federal suit must have been actually raised or inextricably intertwined with the state-court judgment”; and (3) “the federal claim must not be parallel to the state-court claim.”

In addition, “Rooker-Feldman is entirely federal and requires no reference to principles of state law.”

When parties are divorced, a state court judge must determine how to divide the couple’s property and must further determine whether equity requires that one spouse be awarded alimony, maintenance, or support in order to provide financial assistance to that spouse or for the benefit of minor children from the marriage.
Divorce courts often spend considerable amounts of time reviewing factors to determine if a property settlement is equitable and whether to award alimony, maintenance or support. Among the factors that courts consider are the parties’ relative ability to earn money (both now and in the future), their respective ages and health status, the length of the marriage, the kind of property involved, and the conduct of the parties.107

purpose of temporary maintenance is to preserve the status quo between the spouses while the dissolution proceeding is pending.”); Moore v. Moore, 619 N.W.2d 723, 724–65 (Mich. Ct. App. 2000) (primary purpose of spousal support is to “The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party.”).

See Stigall v. Stigall, 277 N.E.2d 802, 809 (Ind. Ct. App. 1972) (finding that the determination of alimony should be guided by factors such as “‘(1) the existing property rights of the parties, (2) the amount of property owned and held by the husband . . . [and] (3) the financial condition and income of the parties and the ability of the husband to earn money.’”) (quoting Bahre v. Bahre, 181 N.E.2d 639, 641 (Ind. Ct. App. 1962)); Olson v. Olson, 671 N.W.2d 64, 71–72 (Mich. App. 2003) (stating that factors to be considered in determining alimony are: “(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party’s fault in causing the divorce, (13) the effect of cohabitation on a party’s financial status, and (14) general principles of equity.”); Lorenz v. Lorenz, 881 N.Y.S.2d 208, 209–10 (N.Y. App. Div. 2009) (court awarded maintenance after considering the parties’ incomes, their future earning capacity, the long duration of the marriage, and the husband’s good health conditions); Miles v. Miles, 202 P.2d 485, 486 (Or. 1949) (finding that the proper amount of alimony depend on factors like “the capacity of the husband to earn money; . . . the social standing of the parties; their health, age, and general physical condition”); see also Rogers v. McGahee, 602 S.E.2d 582, 586 (Ga. 2004); Gaschler v. Gaschler, 176 P.3d 250, at *2, 2008 WL 440751 (Kan. Ct. App. 2008) (memorandum opinion) (per curium) (quoting KAN. STAT. ANN.§ 60-1610(b)(1)(C) (2010)) (unpublished disposition) (stating that “[w]hen dividing property in a divorce, the trial court must consider factors such as ‘the age of the parties, the duration of the marriage, the property owned by the parties; [and] their present and future earning capacities; . . .’”); In re Marriage of Payer, 110 P.3d 460, 462–63 (Mont. 2005) (finding that the court “shall consider, among other things, the amount and duration of the party’s request; the financial resources of the party seeking maintenance, including marital property and ability to meet financial needs; the duration and standard of living established during the marriage; the age and the physical and emotional condition of the spouse seeking maintenance; and the ability of the spouse from whom maintenance is sought to meet his needs as well as his spouse,” as well as factors outlined in state statute); In re Marriage of McFarland, 176 S.W.3d 650, 654–55 (Tex. Ct. App. 2005) (listing factors the court may consider); Slade v. Slade, 872 A.2d 367, 371 (Vt. 2005) (holding that the lower court appropriately considered “considered the statutory factors and the evidence that the parties presented on the issue of maintenance.”); Stuck v. Stuck, 218 S.E.2d 367, 371 n.9 (W. Va. 2005) (noting that courts may consider “(1) monetary contributions to marital property . . . , (2) non-monetary contributions to
When divorced spouses are parties to a dischargeability proceeding in bankruptcy and a debtor spouse seeks to have a marital debt discharged or a creditor spouse seeks to keep one from being discharged, the bankruptcy court must examine the debt in question and assess the character, or “nature,” of the debt.108

In the case of a Chapter 7 liquidation, the bankruptcy court really does not have to consider anything because the debt is per se not dischargeable in bankruptcy.109 If the debtor filed a Chapter 13 consumer reorganization, debts that are in the nature of alimony, maintenance, or support are likewise nondischargeable. However, the debts will be dischargeable if they are deemed to be part of a property settlement or equitable distribution order.110 In order to determine the type of debt that exists for bankruptcy purposes, the bankruptcy court will have to conduct an inquiry very near to the one performed by the state court thereby inviting a “free appeal” for the party who lost in state court.

While the Code, post-BAPCPA, relieves bankruptcy judges of having to hold lengthy dischargeability hearings in Chapter 7 liquidations, they may still be called upon to take testimony and hear arguments in Chapter 13 reorganizations. In Chapter 13 cases where the dischargeability of marital debts is at issue, the Rooker-Feldman Doctrine should be available to relieve the parties from having to replay the state court litigation. So long as the Rooker-Feldman conditions have been met, the bankruptcy court lacks subject-matter jurisdiction and should not hear the marital-debt dischargeability dispute. Rooker-Feldman is a potentially helpful tool for bankruptcy judges who want to avoid protracted marital-debt dischargeability litigation and repeating significant portions of the divorce proceeding. It is equally helpful for family law practitioners who do not wish to have divorce decrees and marital settlement agreements re-examined in bankruptcy court. Examining each prong of the Rooker-Feldman test reveals that it has application in bankruptcy and may prevent bankruptcy judges from having to preside over disputes that are essentially being re-litigated by the divorced parties.

A. The Party Against Whom the Doctrine Is Invoked Must Have Actually Been a Party to the Prior State-Court Judgment

The first of the three Rooker-Feldman conditions requires that the parties to the bankruptcy dischargeability action be the same as the parties to the divorce. Stated another way, Rooker-Feldman will not bar a federal court plaintiff who was not actually a party to the underlying state-court judgment.111 In marital debt

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dischargeability actions, the parties to the dissolved marriage are normally the same parties who are involved in the bankruptcy litigation. More explicitly, the ex-husband is often the party filing bankruptcy and the ex-wife is the creditor attempting to keep the debtor from discharging the marital debt but, occasionally, the ex-wife files the bankruptcy. It is not difficult to meet the first prong of the *Rooker-Feldman* test.

The Code does permit governmental units to bring dischargeability actions in bankruptcy court. Section 101(14A)(ii) of the Code provides that one class of marital debts—domestic support obligations—may be “owed to or recoverable by” a governmental unit. In those limited instances where a government agency is filing a dischargeability action, *Rooker-Feldman* could not bar the bankruptcy court from hearing the dispute. In all other circumstances, however, the parties should not be able to re-litigate their divorce issues in bankruptcy court.

**B. The Claim Raised in the Federal Suit Must Have Been Actually Raised or Inextricably Intertwined with the State-Court Judgment**

After BAPCPA, when a bankruptcy court is asked to determine the dischargeability of a marital debt, the only decision the court must make is whether the debt is a “domestic support obligation” as defined in the Code. That inquiry requires the court to first determine if the debt in question is “in the nature of alimony, maintenance, or support.” If the debt is in the nature of alimony, maintenance or support, it is a “domestic support obligation” and the Bankruptcy Code is clear that the debt is not dischargeable in bankruptcy. It does not matter if the bankruptcy was filed as a Chapter 7 liquidation or a Chapter 13 consumer reorganization; the debt is not discharged. If a court decides that the debt is not in the nature of alimony, maintenance or support (i.e., it is equitable distribution, a property settlement, etc.), then the debt is still nondischargeable in a Chapter 7, but

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113 See *Adams v. Zentz*, 963 F.2d 197, 199 (8th Cir. 1992) (finding that the legal fees awarded to an ex-husband were a dischargeable debt when the ex-wife filed for bankruptcy); *Batlan v. Bledsoe*, 569 F.3d 1106 (9th Cir. 2009) (trustee brought adversary proceeding to set aside transfer of assets to debtor’s ex-husband); *In re* McQuade, 232 B.R. 810 (Bankr. M.D. Fla. 1999) (ex-wife filed for bankruptcy and received a discharge from a profit sharing plan). See also 11 U.S.C. Section § 523(a)(5), as defined by Section § 101(14)(A), does which permits governmental units to petition the bankruptcy court to except a marital debt from discharge; however, this Article does not attempt to advocate for the application of the *Rooker-Feldman* Doctrine to governmental creditors because they could not have been parties to the underlying divorce.


it would be dischargeable in a Chapter 13. Consequently, in three out of the four circumstances in which marital debt discharge matters arise in consumer bankruptcies, the debt is automatically not discharged.

While determining if a debt is “in the nature of” is not exactly identical to whether it “is” alimony, maintenance or support, under Rooker-Feldman it does not have to be exactly identical. Rooker-Feldman provides that the doctrine applies if the matter to be reviewed by the federal court is “inextricably intertwined” with the state court matter. “Inextricably intertwined” has been defined to mean that the federal court in question is “in essence being called upon to review the state-court decision.” In other words, “the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.” The nature of a marital debt is surely inextricably intertwined with the specific category of debt into which the debt falls.

C. The Federal Claim Must Not Be Parallel to the State-Court Claim

As explained in Lance v. Davidson, Rooker-Feldman challenges are not appropriate if the federal action and the state action are running simultaneously. In other words, the federal claim must have been filed after the state court judgment was entered.

Bankruptcy cases may be filed at any time in relation to a state court dispute. Sometimes, a debtor will file a bankruptcy petition following an adverse state court judgment. But, in some instances, a debtor will not wait for the resolution of a state court proceeding to file. Those debtors who file “early” are often plagued by other financial pressures and cannot wait for the resolution of a state court dispute.

118 United States v. Shepherd, 23 F.3d 923, 924 (5th Cir. 1994) (citing D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 n.16 (1983)). See also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (“While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.”).
121 Id. at 1124.
122 See, e.g., In re Johns-Manville Corp., 36 B.R. 727, 729 (Bankr. S.D.N.Y. 1984) (illustrating an example of a corporation that filed bankruptcy in the face of 16,000 pending asbestos lawsuits, which would be “compounded by the crushing economic burden to be suffered by Manville over the next 20-30 years by the filing of an even more staggering
those situations where the bankruptcy filing occurs before a state court judgment is entered, one must concede that Rooker-Feldman does not apply. However, more typically, the bankruptcy challenge follows the state court judgment. When it does, Rooker-Feldman should provide bankruptcy judges with a device to refuse to sit as second-chance divorce courts.

D. Application of Rooker-Feldman to Bankruptcy

Federal courts, including bankruptcy courts, have struggled to determine the exact reach of the Rooker-Feldman Doctrine and two recent Supreme Court decisions have called into question the continued viability of Rooker-Feldman. In 2005, the Court decided *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* and held that Rooker-Feldman “is confined to cases of the kind from which the doctrine acquired its name: cases brought by state court losers complaining of injuries caused by state-court judgments.” Less than a year later, the Court decided *Lance v. Dennis* in which Justice John Paul Stevens wrote:

*Rooker* and *Feldman* are strange bedfellows. *Rooker*, a unanimous three-page opinion written by Justice Van Devanter in 1923, correctly applied the simple legal proposition that only this Court may exercise appellate jurisdiction over state-court judgments. *Feldman*, a nonunanimous, 25-page opinion written by Justice Brennan in 1983, was incorrectly decided and generated a plethora of confusion and debate among scholars and judges. Last Term, in Justice Ginsburg’s lucid opinion in *Exxon Mobil v. Saudi Basic Industries*, the Court finally interred the so-called ‘Rooker-Feldman doctrine.’ And today, the Court quite properly disapproves of the District Court’s resuscitation of a doctrine that has produced nothing but mischief for 23 years.

The two most recent Supreme Court decisions, when read together, suggest that federal courts should limit the application of Rooker-Feldman to matters actually litigated (Rooker) and should not apply the doctrine to matters inextricably intertwined with those actually litigated (Feldman). In fact, the Sixth Circuit recently stressed the Supreme Court’s preference for a narrow and limited

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125 Id. at 284.


application of *Rooker-Feldman* when it held that the claim in question was not a review of a state court decision but was, rather, an independent legal claim.\(^{128}\) The Supreme Court’s expressed “preference” for limiting the reach of *Rooker-Feldman*, however, is not the end of the discussion.

Without a clear pronouncement by the Supreme Court that the Doctrine is abolished, some federal cases decided after *Exxon Mobil* and *Lance* have refused to significantly modify how *Rooker-Feldman* is applied.\(^{129}\) If the *Rooker-Feldman* Doctrine remains a recognized jurisdictional device—and nothing in either the *Exxon Mobil* or *Lance* decisions explicitly says otherwise—it remains available to bankruptcy courts and to family law practitioners who do not want marital debts redefined in bankruptcy.

Another concern over the use of *Rooker-Feldman* in bankruptcy is that bankruptcy courts are vested with original jurisdiction over “core bankruptcy proceedings” \(^{130}\) and that jurisdictional grant is not disturbed by the *Rooker-Feldman* Doctrine.\(^{131}\) While it is true that certain bankruptcy proceedings are unique to bankruptcy, e.g., imposing an automatic stay to protect debtors and granting a discharge of one’s debts, not all bankruptcy proceedings are created equal. Not surprisingly, many of the bankruptcy cases that have rejected *Rooker-Feldman* are, contextually, different than marital-debt dischargeability cases.

In *In re Chinin USA, Inc.*, the debtor filed a Chapter 11 reorganization after settling, by agreement, a multi-million-dollar dispute in state court.\(^{132}\) As part of the settlement, the debtor released its claims against the other parties to the state court litigation.\(^{133}\) Once in bankruptcy, the debtor sought to void the settlement agreement as constructively fraudulent by arguing that it did not receive reasonably equivalent value in exchange for the release of claims.\(^{134}\) The court held that *Rooker-Feldman* did not require the dismissal of a claim asserting that a pre-

\(^{128}\) Pittman v. Cuyahoga Cnty Dep’t of Children and Family Services, 241 F. App’x 285, 287 (6th Cir. 2007) (emphasis added) (citing McCormick v. Braverman, 451 F.3d 382 (6th Cir. 2006)). *But see* Lawrence v. Welch, 531 F.3d 364, 368 (6th Cir. 2008) (criticizing *Pittman*).


\(^{130}\) *In re Toledo*, 170 F. 3d 1340, 1348 (11th Cir. 1999) (“If [a] proceeding involves a right created by the federal bankruptcy law, it is a core proceeding. . . .”). *See also* 28 U.S.C. § 157(b)(2) (listing core proceedings).

\(^{131}\) *See, e.g.*, *In re Chinin USA, Inc.*, 327 B.R. 325 (Bankr. N.D. Ill. 2005) (“The [*Rooker-Feldman*] [D]octrine states the general rule that lower federal courts lack subject matter jurisdiction over claims that seek to review or modify a state court judgment”); *see also In re Murphy*, 331 B.R. 107 (Bankr. S.D. N.Y. 2005); *In re Kye Soon Chung*, 334 B.R. 271 (Bankr. C.D. Cal. 2005).


\(^{133}\) *Id.* at 330.

\(^{134}\) *Id.*
petition settlement agreement upheld by a state court was a fraudulent conveyance.\[^{135}\]

In *In re Murphy*, a Chapter 7 trustee filed an adversary complaint seeking to avoid a municipality’s tax forfeiture of the debtor’s residential real estate as a fraudulent conveyance.\[^{136}\] The municipality sought to dismiss the complaint, *inter alia*, on the ground that *Rooker-Feldman* precludes the bankruptcy court from hearing the claim because it constitutes an impermissible federal lower-court review of a state court judgment.\[^{137}\] The court declined to dismiss the complaint based on *Rooker-Feldman* and stated that the claim asserted in the bankruptcy court (a determination whether the tax forfeiture constitutes a fraudulent conveyance) is independent from the claim heard in the state court proceeding.\[^{138}\]

In both *Chinin USA* and *Murphy*, the bankruptcy court was being asked to perform a function that is specifically assigned to bankruptcy courts. Determining whether a transfer is a fraudulent conveyance is unique to bankruptcy;\[^{139}\] it is a core proceeding that takes place within a bankruptcy case. The determination of whether a transfer constitutes a fraudulent conveyance cannot be made in state court so it makes perfect sense that bankruptcy would look upon fraudulent conveyance litigation as being an independent claim and not a review of a state court decision.

The application of *Rooker-Feldman* in other bankruptcy disputes is less clear. Dischargeability actions, including complaints to determine the dischargeability of marital debts, involve the exploration of a variety of subjects. Consequently, determining if *Rooker-Feldman* is applicable in a particular proceeding is more nuanced than deciding that the doctrine does not apply to fraudulent conveyance actions.

In *In re Kye Soon Chung*, the bankruptcy court was asked by a trustee to review a state court judgment entered against Chapter 7 debtors in a deed-of-trust foreclosure and fraud action.\[^{140}\] The trustee sought to have the judgment deemed nondischargeable as fraud under 11 U.S.C. Section 523(a)(2). The court had to determine what portion of the state court judgment was nondischargeable and what portion was discharged in bankruptcy because the underlying judgment was a result of a foreclosure judgment as well as a fraud judgment.\[^{141}\] The trustee argued that the bankruptcy court could not review the state court’s decision because of the *Rooker-Feldman* Doctrine, but the bankruptcy judge disagreed.\[^{142}\] Judge Bufford wrote:

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\[^{135}\] *Id.* at 335–36.

\[^{136}\] *Id.* at 107, 115–16 (Bankr. S.D.N.Y 2005).

\[^{137}\] *Id.* at 131.

\[^{138}\] *Id.* at 132.

\[^{139}\] Fraudulent conveyances are governed by two provisions of the Code, 11 U.S.C. §§ 544(b) and § 548 (2009).

\[^{140}\] *Id.* at 271, 274 (Bankr. C.D. Cal. 2005).

\[^{141}\] *Id.* at 274.

\[^{142}\] *Id.*
The court finds that the *Rooker-Feldman* doctrine is not applicable in this case. This doctrine does not prevent a federal court from exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents an independent claim supporting federal jurisdiction, preclusion based on the state court judgment may apply, but *Rooker-Feldman* does not.

Where federal litigation is not filed for the purpose of attacking the result of state court litigation, the *Rooker-Feldman* doctrine is not applicable.143

There is one recent marital-debt-dischargeability case wherein the *Rooker-Feldman* Doctrine was applied. In *Schwartz v. Schwartz*,144 a Chapter 7 debtor’s ex-wife filed an adversary complaint to have the debtor’s obligation to her deemed nondischargeable in bankruptcy as being a domestic support obligation.145 The ex-wife was an Israeli citizen prior to the marriage and the debtor executed an Affidavit of Support to assist her in obtaining permanent resident status from the U.S. Immigration and Naturalization Service (INS).146 In the affidavit, the debtor agreed “[t]o provide sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines.”147 The obligation would terminate upon the death of either spouse or until the immigrant spouse either became a U.S. citizen, was credited with forty quarters of work, or departed the United States permanently.148

The couple divorced and the state court that adjudicated the divorce issued a decree of divorce, which specifically provided that “[M]r. Schwartz’s] obligation to support [Ms. Schwartz] shall terminate as of 12:00 noon on June 1, 2004, and from and after such time and date [M]r. Schwartz shall have no further obligation to provide any support whatsoever to [Ms. Schwartz].”149 Following the parties’ divorce, Mr. Schwartz filed bankruptcy and Ms. Schwartz filed a complaint to determine the dischargeability of the debt that he owed to her by virtue of the INS support affidavit. She argued that she was entitled to specific performance of the Affidavit of Support and that the divorce decree did not automatically terminate the debtor’s obligations to provide support as provided in the Affidavit.150

The bankruptcy court dismissed the ex-wife’s adversary complaint for lack of subject matter jurisdiction and cited the *Rooker-Feldman* Doctrine as the basis for

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143 Id. (citations omitted).
145 Id. at 243 (quoting the Affidavit of Support).
146 Id.
147 Id.
148 Id.
149 Id. (quoting Decree of Divorce).
150 Id. at 243-44.
In the facts before me, it is clear that the Affidavit was submitted to the divorce court. The Decree of Divorce does not specify the reasoning behind its support order. The Plaintiff here seeks an order declaring the Affidavit to be a domestic support obligation and any claims arising thereunder to be nondischargeable. She is, in essence, seeking review of the Decree of Divorce. Under the Rooker-Feldman doctrine, I lack jurisdiction to review the Decree of Divorce.\footnote{Id. at 244.}

The \textit{Schwartz} court’s use of the phrase “in essence” is an indication that the issue to be reviewed in bankruptcy does not have to be the exact same issue as the state court addressed.\footnote{Id. (quoting lower court’s decision).} It appears that \textit{Rooker-Feldman} is satisfied when the bankruptcy issue is “in essence” the same as the state court issue; it is sufficient because the bankruptcy issue is inextricably intertwined with the state court’s resolution. One can certainly argue that \textit{Rooker-Feldman} still lives.

The ex-wife in \textit{Schwartz} appealed the bankruptcy court’s decision and the Bankruptcy Appellate Panel for the Sixth Circuit affirmed the lower court and cited to the \textit{Rooker-Feldman} Doctrine or, alternatively, to the doctrine of \textit{res judicata} to support its decision.\footnote{See 11 U.S.C. §523(a)(5) (2009).} The \textit{Schwartz} decision noted that there was a factual dispute as to whether the Affidavit of Support was submitted as evidence in the divorce proceedings, but it affirmed the decision of the bankruptcy court because it believed that the alternate theory of \textit{res judicata} would require the same result.\footnote{In re Schwartz, 409 B.R. at 250.}

Distinguishing itself from the Sixth Circuit, the Second Circuit no longer considers matters in the second challenge that are “inextricably intertwined” with the original dispute. The court has held that \textit{Rooker-Feldman} applies only if four conditions are met:

First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced-i.e., \textit{Rooker-Feldman} has no application to federal-court suits proceeding in parallel with ongoing state-court litigation.\footnote{Hoblock v. Alban Cnty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005) (alterations and citations omitted).}
If *Rooker-Feldman* were to be applied to deny bankruptcy courts jurisdiction to hear marital-debt-dischargeability complaints, the conditions laid down by the Second Circuit would have to be satisfied.

To test whether the application of the Doctrine would have any effect on marital-debt-dischargeability litigation in bankruptcy, it is helpful to revisit a case where the bankruptcy court actually determined the dischargeability of a marital debt and apply the *Rooker-Feldman* Doctrine as constructed by both the Sixth Circuit and the Second Circuit.

Recall *In re Davidson*,\(^{157}\) the extraordinary case from the Fifth Circuit wherein sixty-five months had passed between the time Mr. Davidson had stopped making his support payments to his ex-wife and the decision of the Fifth Circuit to hold the marital debt nondischargeable. The bankruptcy court and the district court both held that the obligation was a property settlement even though Davidsons were divorced in 1983 and, pursuant to their divorce decree, Mr. Davidson agreed to pay his ex-wife $7,732 per month for 121 months and all indications were that the obligation was intended to be for alimony.\(^{158}\)

If the bankruptcy court had applied the Sixth Circuit’s recent interpretation of the *Rooker-Feldman* Doctrine to the controversy, the court could have found that it lacked subject matter jurisdiction to hear the marital debt dischargeability action and Ms. Davidson would not have been deprived of her support checks for sixty-five months. The bankruptcy court could have easily concluded that: (1) the federal-court plaintiff, Mr. Davidson, lost in state court; (2) Mr. Davidson’s dischargeability action was actually a complaint about having to make $7,732 per month in support payments to comply with the state-court judgment; (3) Mr. Davidson’s request of the bankruptcy court was, in essence, to have the district court review and reject the state court judgment; and (4) the state-court judgment was rendered before the district court proceedings commenced.

Applying the Second Circuit’s *Rooker-Feldman* test, a similar result is achieved: (1) “the federal-court plaintiff,” Mr. Davidson, “lost in state court”; (2) in trying to discharge his marital debts, he was “complain[ing] of injuries caused by a state-court judgment,” i.e., that the obligation he owed to his ex-wife was alimony; (3) Mr. Davidson was “invit[ing] district court review and rejection of [the state court] judgment”; and (4) the bankruptcy challenge took place after the state-court judgment had been rendered.\(^{159}\) Even without considering whether the review in bankruptcy involved issues that were “inextricably intertwined” with the state court issues, the Second Circuit’s analysis could still permit a bankruptcy court to apply *Rooker-Feldman* and claim that it lacked jurisdiction to hear the marital debt discharge case.

Regardless of which circuit’s test is applied, Ms. Davidson would not have been without her court-ordered support payments for more than five years; the

\(^{157}\) See Davidson v. Davidson (*In re Davidson*), 133 B.R. 795, 800–01 (N.D. Tex. 1990), rev’d *In re Davidson*, 947 F.2d 1294 (5th Cir. 1991).

\(^{158}\) Id. at 797–78.

\(^{159}\) Id.
Davidsons would not have had to engage in expensive litigation in bankruptcy to determine if alimony was still alimony; and the bankruptcy court—and two reviewing courts—would not have had to engage in an exhaustive review of factors to determine the classification of the couple’s marital debt and repeat the state court’s process.

1. Exceptions to Rooker-Feldman

There are exceptions to the Rooker-Feldman Doctrine. The doctrine does not apply where a federal statute, such as habeas corpus, authorizes federal review of state court decisions; the state court judgment was procured through fraud, deception, accident, or mistake; the federal suit is brought by a party that was not a party in the state court suit; and the state court did not have subject matter jurisdiction over the prior action (“void ab initio” exception).

The aforementioned exceptions are not applicable in marital debt dischargeability cases. One scholar has argued that the Eleventh Circuit has made an exception in which Rooker-Feldman “will not bar a party from bringing a claim which it did not have a fair or reasonable opportunity to raise in the initial state court case.” Recently though, the Eleventh Circuit has gone on to explain that “[t]he doctrine applies not only to claims actually raised in the state court, but also

160 See Young v. Murphy, 90 F.3d 1225, 1230 (7th Cir. 1996) (stating that “[b]eyond the limited authority to examine state judicial proceedings pursuant to habeas corpus review . . . district courts have no authority to review the proceedings or final judgments of state courts.” (citing D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). See also Boddie v. Connecticut, 401 U.S. 371 (1971) (Black, J., dissenting) (“Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce. . . . [t]he institution of marriage is of peculiar importance to the people of the States.”).

161 See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc. (In re Sun Valley Foods Co.), 801 F.2d 186, 189 (6th Cir. 1985) (stating that “[a] federal court ‘may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake . . . .’” (quoting Resolute Ins. Co. v. North Carolina, 397 F.2d 586, 589 (4th Cir. 1968))).

162 See, e.g., Snider v. Excelsior Springs, Mo., 154 F.3d 809, 812 (8th Cir. 1998) (“It is true that . . . the Rooker-Feldman rule does not bar a federal claim brought by one who was not a party to the state court action and therefore not in any position to seek appellate review of the state court judgment.” (citing Johnson v. De Grandy, 512 U.S. 997, 1005–06 (1994))).

163 See Pavelich v. McCormic, Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich), 229 B.R. 777, 783 (B.A.P. 9th Cir. 1999) (“An exception to Rooker-Feldman applies when the state proceeding is a legal nullity and void ab initio.”).

to claims that were not raised in the state court but are ‘inextricably intertwined’ with the state court’s judgment.”

VI. APPLICATION OF THE ROOKER-FELDMAN DOCTRINE: PUBLIC POLICY CONSIDERATIONS

When a party files an adversary complaint in bankruptcy to prevent a former spouse from discharging a marital debt in bankruptcy, the bankruptcy judge must first take into account the type of bankruptcy the debtor-spouse filed. Recall that the classification of the marital debt will determine if it will be dischargeable in bankruptcy. If a Chapter 7 liquidation is filed, the marital debt will be deemed to be nondischargeable. If a Chapter 13 consumer reorganization is filed, the judge will have to determine whether the debt in question is a “domestic support obligation” under Section 523(a)(5) of the Code or some other marital debt, which is covered by Section 523(a)(15) of the Code. If, in the Chapter 13, the judge determines that the marital debt is a “domestic support obligation,” it is nondischargeable and the debtor will have to pay the debt in full. If, on the other hand, the judge concludes that the debt falls under Section 523(a)(15), the debt will be discharged to the extent that the Chapter 13 plan does not provide for full payment of creditors’ claims.

The concern of both parties to the adversary proceeding is to produce enough evidence to convince the bankruptcy judge that the debt(s) in question should or should not be dischargeable, even if the inquiry requires the judge to review the exact same facts and apply the exact same factors that the state court judge reviewed at the time of the divorce. The concern of bankruptcy judges, on the other hand, seems to be two-fold: to determine whether the debt in question is in the nature of alimony, maintenance or support, but not to become a second-chance divorce in order to avoid a flood of dischargeability challenges.

Deciding whether a marital debt is dischargeable in bankruptcy has long been regarded as a uniquely federal inquiry. But why? Federal court decisions make it very clear that the federal courts should abstain from deciding marital issues.

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165 Powell v. Powell, 80 F.3d 464, 466 (11th Cir. 1996) (citation omitted).
166 See Grogan v. Garner, 498 U.S. 279, 291 (1991) (holding that the burden of proof in all dischargeability cases is to be established by a preponderance of the evidence and not by clear and convincing evidence).
168 See Marshall v. Marshall, 547 U.S. 293, 299 (2006) (“Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called ‘domestic relations’ and ‘probate’ exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history.”).
Despite the oft-repeated statement that bankruptcy courts must apply federal law to the question of whether marital debts are in the nature of alimony, maintenance or support, there is no federal divorce law. In fact, in 1859, the U.S. Supreme Court held that “the federal courts have no jurisdiction over suits for divorce or the allowance of alimony” and that basic principle has remained true for over one hundred and fifty years.

Even though determining whether a debt is nondischargeable as “alimony” is not the same as a suit for the “allowance of alimony,” bankruptcy courts should be guided by spirit of the domestic relations exception to federal court jurisdiction. The state courts are more appropriate venues within which to hear family law cases; there are more judges and, in many jurisdictions, they have specialized knowledge and training to help them adjudicate matters efficiently. The federal courts, by contrast, will find their dockets overrun if they are to continue to hear divorces and divorce-related litigation.

Hundreds of marital-debt-dischargeability decisions have been reported since the Bankruptcy Code was enacted and, in each case, bankruptcy judges state that the bankruptcy court must decide if the debt in question is in the nature of alimony, maintenance or support under federal law. As a result, bankruptcy courts also state that they are therefore not bound by the labels used in state court and must make an independent decision as to the nature of the debt. There is nothing within the

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170 Although federal courts have repeatedly abstained from hearing domestic relations cases, the Supreme Court has clearly stated that the “domestic relations exception” is not absolute. See Ankenbrandt, 504 U.S. at 700-02 (1992) (acknowledging the existence of a domestic relations exception as a matter of statutory interpretation, but stating that the exception was inapplicable to the facts sub judice).

The Ankenbrandt court, however, acknowledged that the domestic relations exception is sometimes interpreted broadly. “So strong is our deference to state law in this area that we have recognized a ‘domestic relations exception’ that ‘divests the federal courts of power to issue divorce, alimony, and child custody decrees.’” Elk Grove Unif. Sch. Dis. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Ankenbrandt, 504 U.S. at 703). “We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving ‘elements of the domestic relationship,’” even when divorce, alimony, or child custody is not strictly at issue . . . .” Id. at 13 (quoting Ankenbrandt, 504 U.S. at 705).

171 See In re Carlisle, 205 B.R. 812, 818 (Bankr. W.D. La. 1997) (stating that “it is well settled that bankruptcy courts may inquire behind labels” created in divorce settlements). See also In re Brody, 3 F.3d 35, 39 (2d Cir.1993) (deciding that labels given an obligation by the parties or the state court are not dispositive); In re Sampson, 997 F.2d 717, 722 (10th Cir.1993) (concluding that the label attached to an obligation does not control); Adams v. Zentz, 963 F.2d 197, 199 (8th Cir.1992) (determining that state law or the divorce decree characterization of the debt is not binding on bankruptcy courts); In re Gianakas, 917 F.2d 759, 762 (3d Cir.1990) (ruling that bankruptcy courts must look beyond the label attached to settlement agreements to find the debt’s true nature); In re Seibert, 914 F.2d 102, 106 (7th Cir.1990) (ruling that state law does not control the issue of whether an obligation constitutes alimony, maintenance, or support); In re Long, 794 F.2d
Code, however, that mandates that a court *ignore* the state court’s findings. It is the insistence on classifying marital debts pursuant to federal law that has created the additional work for bankruptcy courts. Bankruptcy should defer to state courts on all divorce matters and, if the parties disagree about the type of debt they have incurred, they should return to state court and seek a modification of the divorce decree or judgment. Bankruptcy courts should not be involved in those disputes.

Even if marital-debt-dischargeability actions are to remain within the jurisdiction of the bankruptcy courts, the courts need not spend time adjudicating these disputes because BAPCPA has eliminated the need for a federal common law on divorce, if there ever was one. As discussed above, whether a marital debt is dischargeable in bankruptcy is not the real focus of a dischargeability dispute; the Bankruptcy Code makes a debt nondischargeable—automatically—if it meets the definition of a domestic support obligation in consumer bankruptcies. Moreover, a marital debt that does not meet the definition of a domestic support obligation is also automatically nondischargeable in a Chapter 7 liquidation. The real fight to be waged is over the classification of the debts in a Chapter 13 reorganization, i.e., whether they are in the nature of alimony, maintenance or support. Since BAPCPA was enacted, the parties must focus their efforts in bankruptcy on resolving the classification issue because determining what type of marital debt is at issue is the only way a debtor has any chance of discharging a marital debt in bankruptcy.

The bankruptcy judge, in determining the dischargeability of the marital debt, is duplicating the efforts of the parties and/or the divorce judge because the bankruptcy judge is considering:

whether the parties or the court intended the obligation to be for support,
how the debt was characterized in the order or decree, . . . who had custody of minor children, whether the obligation was payable in a lump sum or by periodic payments and whether it terminated when the divorce was final, whether payment was enforceable by contempt, the relative financial resources and earning power of the spouses at the time the order or agreement was made, and what the obligation served to pay.\(^{172}\)

Recent federal court decisions suggest that the *Rooker-Feldman* Doctrine is inapplicable to marital debt dischargeability actions in bankruptcy because the "determination of whether an obligation arising out of a divorce settlement is in the nature of alimony, maintenance, or support . . . is a matter of federal

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928, 930 (4th Cir.1986) (determining that labels are not controlling); Stout v. Prussel, 691 F.2d 859, 861 (9th Cir.1982) (holding that the descriptions which parties give obligations in settlements or decrees are not conclusive).

\(^{172}\) Judith K. Fitzgerald, *We All Live in a Yellow Submarine: BAPCPA’s Impact on Family Law Matters*, 31 S. ILL. U. L.J. 563, 567–68 (2007) (citing Cummings v. Cummings, 244 F.3d 1263 (11th Cir. 2001); In re Fitzgerald, 9 F.3d 517 (6th Cir. 1993); In re Gianakas, 917 F.2d 759 (3d Cir. 1990)).
bankruptcy law.173 The parties could therefore not have litigated this issue in
state court and, consequently, the bankruptcy court cannot serve as a reviewing
court.

These courts assert that dischargeability is unique to the bankruptcy system
and that state courts could not have entered a dischargeability judgment. The cases
are correct insofar as they recognize the parameters of dischargeability disputes.
Case law has long established that it is federal law, and not state law, that
determines the nature of a marital debt for bankruptcy purposes. The long line of
cases, however, may be incorrect in their application of federal law and, even if
they are correct, the courts that assert that state courts could not have litigated
dischargeability matters pre-bankruptcy mischaracterize what actually happens in a
marital debt dischargeability proceeding.

Even if it is appropriate to create a federal definition of alimony, maintenance
or support, each marital debt dischargeability adversary proceeding is fact-specific
and the crux of the dischargeability determination is the classification of the debt.
More simply stated, each couple presents to the bankruptcy court the unique facts
and circumstances surrounding the dissolution of a marriage and the reallocation of
marital assets, but what the couple is really is litigating how the debts in question
are to be classified and not whether they should be discharged. The actual question
of whether a marital debt is dischargeable is not the focus in Chapter 7 liquidations
or in Chapter 13 reorganizations involving debts that are in the nature of alimony,
maintenance or support because the statute clearly states that those debts are
nondischargeable. There is no statutory exception to the rule. Moreover, debts that
are not in the nature of alimony, maintenance or support are also nondischargeable
in Chapter 7 cases.

If the focus of marital debt dischargeability actions is on how the debts in
question are classified, one must closely examine how bankruptcy courts make that
determination. Courts look to the facts and circumstances arising from the
dissolution that shed light on the real nature of the final judgment in the divorce.
That means that a spouse who was required by a divorce court to assume certain
marital debts or to pay certain debts as “alimony, maintenance, or support” could
use bankruptcy as the means to have a lower federal court—a division of the
federal district court—look again at the same factors as the divorce court.
“Preclusive effect is often extended to pre-petition state judgments as to identical
issues raised in subsequent bankruptcy proceedings.”174 In marital debt
dischargeability cases, the issue before the bankruptcy court—the classification or
“nature” of the debt—is precisely the issue that was litigated in state court and that

173 Cline v. Cline, 259 F. App’x 127, 133 (10th Cir. 2007). See also, Sweeney v.
Sweeney (In re Sweeney), 276 B.R. 186, 195 (B.A.P. 6th Cir. 2002) (“[T]he doctrine does
not require lower federal courts to surrender their own exclusive jurisdiction. Jurisdiction
to determine the dischargeability of debts . . . is exclusively within the bankruptcy courts
. . .”).
174 Gruntz v. Cnty. of Los Angeles 4 (In re Gruntz), 202 F.3d 1074, 1084 (9th Cir.
2000).
is sought to be reviewed in bankruptcy court. Bankruptcy courts should decline jurisdiction in marital-debt disputes.

The bankruptcy judge in In re Gunia accurately summed up the controversy surrounding marital debt dischargeability cases when he wrote, “The Bankruptcy Code was not designed to give litigants a second chance to challenge a state court judgment nor did it intend for the Bankruptcy Court to serve as an appellate court for divorce decrees. The proper forum to challenge such judgments is within the state court appellate system. . . .”

VII. CONCLUSION

Bankruptcy judges are called upon to adjudicate a wide variety of disputes and, too often, judges have to inquire into detailed facts and circumstances that take them far beyond the traditional contours of bankruptcy law and practice. In the area of the dischargeability of marital debts, courts have, historically, considered information that one would expect a divorce court to rely upon and not a federal court. Moreover, the dischargeability determination often requires bankruptcy judges to review decisions of state court judges. In each dischargeability action, it is possible for a bankruptcy court to review the very same facts that a divorce court considered but conclude that the nature of the underlying obligation is very different. A state court judge could award “alimony,” but a bankruptcy judge could decide that the award was “not in the nature of alimony” and, therefore, take it away from the recipient spouse.

Bankruptcy judges have spent too much time being second-chance divorce courts. They have grown weary of the practice and family law practitioners do not like bankruptcy judges substituting their judgment, albeit pursuant to a federal statute, for that of divorce court judges. It is bad policy. Divorce should be the end of a marital dispute; the issues should not continue into bankruptcy.

To date, Congress has not seen fit to amend the Code to remove the “in the nature” language from the Chapter 13 marital-debt dischargeability provision, but that discussion is best left for another day. Congressional inaction notwithstanding, the Rooker-Feldman Doctrine may provide bankruptcy judges with a way to avoid hearing many marital-debt disputes. Rooker-Feldman is a jurisdictional device that deprives federal courts, other than the United States Supreme Court, from reviewing decisions of state courts. Under Rooker-Feldman, whatever the parties and/or the state court determined a marital debt was, it is. One reason is because, regardless of what it’s called, all marital debts are nondischargeable in a Chapter 7 bankruptcy and the greatest percentage of cases filed are Chapter 7 liquidations. Query why spend significant time and money to figure out what the nature of the debt in question is when it will not be discharged?

A second reason arises in Chapter 13 consumer reorganization cases. In Chapter 13 cases where a debtor spouse seeks the dischargeability review, he is most often attempting to have debts reclassified as something other than debts that

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are in the nature of alimony, maintenance or support. Debtors seek dischargeability determinations in Chapter 13 because alimony, maintenance and support debts are not dischargeable in bankruptcy but debts that are not in the nature of alimony, maintenance or support are dischargeable. The factors the court must weigh in determining how to classify the debts are the same factors that the state court used in creating the obligation in the first place.

When a marital-debt dischargeability action is filed in bankruptcy, the party who lost in state court is, in effect, getting a second chance to litigate the nature of the post-divorce obligations that will define the relationship of the formerly married couple. *Rooker-Feldman* stands for the proposition that lower federal courts cannot review the lower court decision; only the United States Supreme Court can hear appeals from state court judgments.

Critics may argue that, when bankruptcy courts are determining the dischargeability of debts, they are employing an analysis which is entirely different from the ordering of alimony by a divorce court. While the two actions are different, dischargeability of marital debts is inextricably intertwined with the initial debt classification and, a matter that is inextricably intertwined with a state court decision, is properly precluded by *Rooker-Feldman*.

A bankruptcy court cannot determine dischargeability without determining exactly what type of marital debt is under review. Furthermore, a bankruptcy judge has to review the same factors that a divorce judge considers in order to determine the type of marital debt in question. Under *Rooker-Feldman*, the practice of re-litigating marital issues is ended because the federal court would lack jurisdiction to hear the dispute.

Family law practitioners and bankruptcy attorneys who represent creditor spouses in bankruptcy should look to the *Rooker-Feldman* Doctrine to prevent bankruptcy courts from engaging in an inquiry that might result in a change to the terms of a divorce decree. Bankruptcy judges should invoke *Rooker-Feldman* so as to avoid becoming a second-chance divorce court. To do otherwise invites continued litigation in bankruptcy in which debtor spouses seek to recast alimony orders as equitable distribution orders or to obtain rulings that maintenance awards are really just property settlements.
SAME-SEX MARRIAGE AND THE RIGHT TO PRIVACY

Mark Strasser∗

I. INTRODUCTION

Over the past decade, several state appellate courts have analyzed whether their respective state constitutions protect the right to marry a same-sex partner. Those courts addressing the issue have differed both in their analyses and in their ultimate conclusions, although there have been striking similarities among those courts upholding same-sex marriage bans and among those striking them down, differences in wording among the respective state constitutional provisions notwithstanding.

To understand the widely differing analyses regarding the right to marry someone of the same sex, it will be helpful to consider some of the background regarding the right to marry in particular and the right to privacy more generally. The United States Supreme Court has recognized that certain rights related to family matters are extremely important and cannot be abridged by the state absent a showing that compelling state interests would be undermined. A matter of some dispute involves the criteria used by the Court to determine which rights qualify for this heightened protection and how the scope of those rights should be defined.

The cases discussed in this Article have all been decided on state constitutional grounds, 1 which differ both in their wording and in the degree of protection that they offer. While a state’s equal protection guarantees might provide an additional basis upon which to argue that the right to marry a same-sex partner is protected by the state constitution, 2 the focus of this Article is on the privacy or substantive due process analyses offered by the differing courts.

Part II of this Article examines the background right to privacy jurisprudence contained in the United States Constitution, discussing those rights that have been designated as protected and why the existing federal jurisprudence cannot plausibly be construed as affording same-sex marriage no constitutional protection. Part III discusses several of the state appellate court analyses of the right to marry that have been offered since Lawrence v. Texas 3 was decided, and notes how several courts upholding the respective bans have offered specious or irrelevant

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1 A case is winding its way through the courts challenging California’s same-sex marriage ban on federal constitutional grounds. See Valerie Richardson, Prop 8 Trial Stirs Up Questions, Emotions, Gay-Marriage Allies Optimistic, WASH. TIMES, Feb. 8, 2010, at A01 (discussing Perry v. Schwarzenegger, which addresses “the federal constitutionality of California’s Proposition 8”).


reasons that would never have been offered in any other context. The Article concludes that all of these opinions help demonstrate why the right to marry a same-sex partner should be found protected as a matter of both state and federal due process guarantees.

II. PRIVACY RIGHTS UNDER THE UNITED STATES CONSTITUTION

The United States Supreme Court has recognized that several rights related to family fall within the right to privacy and are accorded significant constitutional protection. It is a matter of some dispute, however, which rights do or should fall within the contours of the right to privacy and, further, how narrowly those rights should be defined. Yet, it is not as if there are no guidelines on this matter—the existing jurisprudence suggests both that a commonly used test for determining which rights are fundamental should not be used and that the traditional prioritizing within the right to privacy would have to be turned on its head for same-sex marriage not to be recognized as protected under the right to privacy.

A. The United States Constitution and the Right to Privacy

The United States Supreme Court has recognized that certain rights fall within the right to privacy including marriage, procreation, contraception, family relationships, and child rearing and education.4 Such a designation is important, because statutes abridging privacy rights will be struck down as unconstitutional unless they meet a very demanding standard. As the plurality explained in Planned Parenthood of Southeastern Pennsylvania v. Casey,5 “[t]he Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny – that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.”6 In contrast, if an interest does not fall within the right to privacy and is, instead, a mere liberty interest, then a statute adversely affecting that interest will be upheld so long as that statute is rationally related to the promotion of a legitimate state interest.7

Given the importance of how rights are characterized, one might expect that there would be a clear test to determine which rights are fundamental and which are not. The Court explained in Washington v. Glucksberg that the “Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation's history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist

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6 Id. at 929.
7 See, e.g., Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (“the asserted ‘right’ . . . is not a fundamental liberty interest protected by the Due Process Clause. . . . [The statute adversely affecting that interest must merely] be rationally related to legitimate government interests”).
if they were sacrificed.” While the statement is accurate insofar as it is describing some of the rights that are protected, a separate question is whether the Due Process Clause offers robust protection for only those rights falling within the description offered by the Glucksberg Court.

The Glucksberg test, which is frequently cited in analyses holding that a particular right does not merit increased protection, is clear and very demanding. Very few rights evaluated in light of this test qualify as fundamental. Such a result might be thought unsurprising—if fundamental rights cannot be abridged unless very important state interests would otherwise be at risk, the recognition of many such rights would hamstring legislatures in their attempts to regulate everyday affairs.

Reasonable people might disagree about whether the constitutional test to determine fundamental rights should err on the side of giving states more discretion, for fear that legislatures would be straitjacketed, or less discretion, for fear that legislatures would run roughshod over very important rights. Yet, regardless of one’s viewpoint, a separate consideration is that any test for fundamental rights should account both for those rights that have been recognized as fundamental and for those that have not. The difficulty with the Glucksberg Test is that it performs its gate-keeping function too well—many of the rights currently recognized as falling within the right to privacy could neither be described as deeply rooted in this nation’s history and tradition nor as implicit in the concept of ordered liberty such that neither liberty nor justice would exist were those rights not recognized.

Consider, for example, the right to access contraception. Laws criminalizing contraception had been on the books for eighty-six years at the time that the Court found contraception for married couples to be protected by the U.S. Constitution. Such laws had existed for an even longer period when the Court found contraception for unmarried persons to be constitutionally protected. Yet, a practice that had been criminalized for several decades could hardly be said to be deeply rooted in the Nation’s history and traditions or implicit in the concept of ordered liberty such that neither liberty nor justice would exist were the right not recognized.

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8 Id. at 720–21 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).
9 See, e.g., Conaway v. Deane, 932 A.2d 571, 616–17 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 976-77 (Wash. 2006).
recognized. Historical prohibitions notwithstanding, the statute banning access to contraception for unmarried individuals was struck down as unconstitutional, and the right to access contraception is now considered a fundamental right falling within the right to privacy.

The same point might be made about the right to abortion, which had been criminalized for over a century before it was found to be protected by the right to privacy. Here, too, a right recognized as falling within the right to privacy involved a practice long criminalized. Indeed, the Roe Court suggested that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.” By using “or” rather than “and,” Roe suggests that it is mistaken to believe that “fundamental” is appropriately defined in terms of what is implicit in the concept of ordered liberty. Instead, a right falling under privacy protections will be fundamental (where that term is defined independently) or implicit in the concept of ordered liberty.

One final illustration might be offered to establish why the Glucksberg Test is simply not an appropriate test to determine whether a right is fundamental. Consider the right to marry someone of a different race. Anti-miscegenation statutes had existed since before the Nation’s founding, so it could hardly be thought that such a right was protected by the Nation’s history and traditions. Further, when holding that the right to marry someone of another race was protected by the right to privacy, the Court did not claim or even imply that neither liberty nor justice existed in the several states prohibiting interracial unions.

It might be thought that the reason the right to marry someone of another race is protected is because the right analyzed by the Court was not described with such specificity—the right to marry, as a general matter, is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of another race

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12 See Lawrence v. Texas, 539 U.S. 558, 596 (Scalia, J., dissenting) (suggesting that something historically criminalized cannot be deeply rooted in the Nation’s history and traditions).

13 See Glucksberg, 521 U.S. at 726.


15 Id. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

16 Id. at 152 (emphasis added) (internal citation omitted).

17 See Loving v. Virginia, 388 U.S. 1, 6 (1967).

18 For a list of those states, see id. at 6 n.5 (listing fifteen states in addition to Virginia: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and West Virginia). The Court also noted that in the past fifteen years fourteen states have repealed interracial bans: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. See id.
is not. However, the same point might be made about the right to marry someone of the same sex: the right to marry, as a general matter, is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of the same sex is not.\textsuperscript{19} In any event, the \textit{Loving} Court refused to address the correct level of specificity when holding that the right to marry someone of another race was protected. It was only after the Court had already recognized various rights including rights to contraception, abortion, and the right to marry someone of another race that the \textit{Glucksberg} Court suggested that there must be a “‘careful description’ of the asserted fundamental liberty interest”\textsuperscript{20} whenever a particular right is claimed to be fundamental. Had the right to marry someone of another race been carefully described, it could not have passed the \textit{Glucksberg} Test.

There is no small irony in the \textit{Glucksberg} Court’s claim that the relevant interest had to be carefully described. Consider the case, \textit{Moore v. City of East Cleveland}, cited for the proposition that fundamental rights must be deeply rooted in this Nation’s history and tradition.\textsuperscript{21} In \textit{Moore}, the issue was whether the City of East Cleveland was violating constitutional guarantees when defining “family” for zoning purposes. Under the city’s zoning scheme, a grandmother was prohibited from living with her son and two grandsons, who were first cousins.\textsuperscript{22}

Certainly, the \textit{Glucksberg} Court was not guilty of misquotation—the \textit{Moore} plurality in fact suggested that the “institution of the family is deeply rooted in this Nation’s history and tradition.”\textsuperscript{23} Yet, members of the lesbian, gay, bisexual, and transgender (“LGBT”) community can point to the \textit{Moore} Court’s recognition of the central importance of family as a reason to recognize LGBT families, whether or not those families include children.\textsuperscript{24} This is where the \textit{Glucksberg} Court’s point about “careful description” can be used to suggest that while the institution of family may be deeply rooted in the Nation’s history and traditions, the institution of LGBT families is not. However, were the careful description test used in \textit{Moore} (the very case cited with approval in \textit{Glucksberg}), the Court would likely have reached the opposite result. As Justice White suggested in his \textit{Moore} dissent, “[u]nder our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the . . . interest in residing with more than one set of grandchildren is one that calls for any kind of heightened

\textsuperscript{19} See Lewis v. Harris, 908 A.2d 196, 228 (N.J. 2006) (Poritz, C.J., concurring and dissenting).
\textsuperscript{21} \textit{Id.} at 720–21 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
\textsuperscript{22} \textit{See Moore}, 431 U.S. at 496-99.
\textsuperscript{23} \textit{Id.} at 523.
\textsuperscript{24} \textit{See} Danielle Epstein & Lena Mukherjee, Note, \textit{Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit}, 12 ST. JOHN’S J. LEGAL COMMENT 782, 798 n.91 (1997) (suggesting that \textit{Moore}’s boundary expansion beyond the nuclear family supports recognizing LGBT families); Julienne C. Scocca, Comment, Society’s Ban on Same-Sex Marriages: A Reevaluation of the So-Called “Fundamental Right” of Marriage, 2 SETON HALL CONST. L.J. 719, 763–64 & n.263 (same).
protection under the Due Process Clause."\textsuperscript{25} Thus, one of the very cases cited by the Glucksberg Court to establish the relevant test would likely have been decided differently had the Court actually used the test that Moore epitomizes.

The Glucksberg Test, especially when requiring a “careful description” of the interest at issue, provides an extremely effective bulwark against courts recognizing that interests have or deserve constitutional protection, although the test’s very effectiveness counsels against it being helpful in determining which rights are fundamental and which are not. Indeed, it should be noted that the “implicit in the concept of ordered liberty” test comes from Palko v. Connecticut.\textsuperscript{26} In Palko, the Court offered a catalog of those rights in the criminal context which would not qualify under the applicable test as being fundamental, including the right to a trial by jury, the right against compulsory self-incrimination, and the right not to be subjected to double jeopardy.\textsuperscript{27} All of these rights are now viewed as fundamental.\textsuperscript{28}

\textbf{B. The Federally Protected Right to Marry}

The right of privacy is understood to protect the right to marry, and it would be helpful to examine the cases in which the Court developed this jurisprudence. The Court first recognized that the right to marry was protected by the U.S. Constitution in Loving v. Virginia, where Virginia’s anti-miscegenation statute was held to violate both equal protection and due process guarantees.\textsuperscript{29}

The Due Process analysis was surprisingly underdeveloped in that case. The Court observed that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”\textsuperscript{30} a description that might be made of individuals regardless of their sexual orientation. The Court noted that marriage “is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,”\textsuperscript{31} and then explained that to “deny

\textsuperscript{25} Moore, 431 U.S. at 549 (White, J., dissenting).
\textsuperscript{26} 302 U.S. 319 (1937).
\textsuperscript{27} Id. at 325. The Palko Court discusses the right to a jury trial and self-incrimination to illustrate the notion that a Constitutional right may exist without being “fundamental.” The Palko Court ultimately held that the right against double jeopardy was not fundamental. \textit{See id.} at 328, a holding that was overruled in Benton v. Maryland, 395 U.S. 784, 794 (1969).
\textsuperscript{29} \textit{See} Loving v. Virginia, 388 U.S. 1, 12 (1967) (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).
\textsuperscript{30} Id.
\textsuperscript{31} Id.
this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . , is surely to deprive all the State’s citizens of liberty without due process of law.” The Court concluded its analysis by suggesting that the “freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”

This analysis needs to be unpacked. For example, the Court fails to explain why marriage is fundamental to our very existence and survival. Possible reasons include the kinds of benefits that marriage provides to those in the relationship; the kinds of benefits that marriage provides to those children who might be brought up within that setting including their being taught important societal values; and other kinds of societal benefits, such as alleged domesticating effects of marriage on individuals who might otherwise be “wild” and irresponsible singles.

The Court’s suggestion that marriage is fundamental to the existence and survival of humankind might be interpreted to be saying something about assuring that there will be future generations, although the Loving Court nowhere expressly discusses children in the opinion and only obliquely mentions them in the discussion of the state’s justifications for its anti-miscegenation statutes. The Court noted that in Naim v. Naim the Virginia Supreme Court announced that “the State’s legitimate purposes were to preserve the racial integrity of its citizens, and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’” When eschewing the desirability of having “mongrel citizens,” Virginia was invoking one of the arguments that had long been made with respect to why interracial marriages should not be allowed, namely, that the children of such marriages were allegedly inferior to the children produced when the couples were composed of individuals of the same race. The United States Supreme Court dismissed such purposes as an obvious “endorsement of the doctrine of White Supremacy.” Nonetheless, the Court was strikingly reluctant to discuss the role, if any, that children play in making the right to marry fundamental, perhaps because the Court desired to shift the argument away from

32 Id.
33 Id.
34 See Zablocki v. Redhail, 434 U.S. 374, 397 (1978) (Powell, J., concurring in the judgment) (“the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society”).
36 See Loving, 388 U.S. at 7.
37 87 S.E.2d 749 (Va. 1955).
38 Loving, 388 U.S. at 7 (quoting Naim, 87 S.E.2d at 756).
39 See Scott v. State, 39 Ga. 321, 1869 WL 1667, at *3 (Ga. June Term 1869) (“The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.”).
40 Loving, 388 U.S. at 7.
Virginia’s contention that the anti-miscegenation statutes should be upheld to promote the interests of children.

The Court was much less reticent about children when it again discussed the right to marry in *Zablocki v. Redhail*. At issue was a Wisconsin statute making it difficult for noncustodial parents to marry if they could not establish their ability to support their children. The state believed that if indigent, noncustodial parents were prevented from marrying, fewer children would be born to those parents and there would be fewer children in need of public assistance.

The *Zablocki* Court explained that while the *Loving* Court had talked about the importance of the right to marry in the context of a challenge to a law banning interracial marriage, the “right to marry is of fundamental importance for all individuals.” This time, however, the Court explained why the right to marry has such significance:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

*Zablocki* provides some guidance with respect to which factors are relevant when analyzing which kinds of families can and should receive constitutional protection. First, the Court is not restricting protection to traditional nuclear families. The Court obviously understood that children are not only born into existing marriages. Roger Redhail had fathered a child out of wedlock while he was still in high school, and later had conceived a child with a different woman whom he wanted to marry. Regardless of his marital status, he was the father of one child and would soon be the father of another. The state’s refusal to permit him to marry his pregnant fiancée would not reduce the number of children produced but would instead simply increase the number of children not living in a marital home.

Nor can the Court be thought to be asserting that legal, as opposed to biological, parenthood must occur in the context of marriage. That approach had

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42 *Id.* at 375.
43 *Id.* at 375 (noting that the “statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order ‘are not then and are not likely thereafter to become public charges’”). *Id.* at 377–390.
44 *Id.* at 384.
45 *Id.* at 386.
46 *Id.* at 377–78.
47 *Id.* at 379 (“appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time”).
already been rejected in *Stanley v. Illinois*, where the Court recognized that unwed fathers have constitutionally protected rights.\(^{48}\)

The *Zablocki* Court suggested that decisions relating to: (1) procreation, (2) childbirth, (3) child rearing, and (4) family relationships all have the same level of importance, and *each* of these involves a constitutionally protected, fundamental interest.\(^{49}\) In addition, the Court criticized the state’s unjustified effort to establish barriers to the creation of legally recognized families.\(^{50}\)

When describing marriage as the foundation of family, the Court had at least two relationships in mind: the relationship between the adults and the relationship between the parent(s) and child. The Court noted that the marital setting was the only context in which sexual relations could legally take place,\(^{51}\) referring to one of the important aspects of the relationship between the adults. (It was still permissible at the time for a state to criminalize non-marital relations, and Wisconsin had a law making sexual relations between unmarried, consenting adults a misdemeanor.\(^{52}\))

Marriage is important to the adults in the relationship for other reasons as well, since it involves an expression of “emotional support and public commitment,”\(^{53}\) and may have religious significance for the parties.\(^{54}\) Further, it is a precondition for a variety of state or federal benefits.\(^{55}\) In short, marriage implicates a variety of interests of the adults in the relationship even when they have no ability or desire to have children.

Marriage is also important for those individuals who have or plan to have children, and the *Zablocki* Court pointed out that it made little sense to recognize the fundamental nature of the relationships between parents and their children while not permitting the parents to marry.\(^{56}\) Yet, members of the LGBT community are having, and raising, children, and those relationships both trigger constitutional protection and are of fundamental importance.\(^{57}\) It makes no more

\(^{48}\) Stanley v. Illinois, 405 U.S. 645, 651–52 (1972). See also *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Steward, J., dissenting) (“In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.”) (referring to *Stanley* opinion).

\(^{49}\) See *Zablocki*, 434 U.S. at 386.

\(^{50}\) Id. at 388 (“We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.”).

\(^{51}\) Id. at 386.

\(^{52}\) Id. at 386 n.11 (“Wisconsin punishes fornication as a criminal offense: ‘Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both.’ Wis.Stat. § 944.15 (1973).”)


\(^{54}\) Id. at 96.

\(^{55}\) See id.

\(^{56}\) *Zablocki*, 434 U.S. at 386.

sense for states to deny same-sex couples the right to marry when they have children to raise than it did to deny Redhail the right to marry.

The Zablocki Court was careful to qualify its holding, noting that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”\(^{58}\) Thus, the Court was not precluding states from enacting regulations regarding marriage. Nonetheless, where “a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”\(^{59}\) But any statute precluding an individual from marrying a same-sex partner is significantly interfering with that person’s ability to enter into such a relationship. A separate issue is whether the state has sufficiently important reasons to justify the prohibition, but same-sex marriage bans are not an insignificant stumbling block for members of the LGBT community wishing to marry a same-sex partner.

Consider how courts analyze the claim that polygamous marriage is protected by the Constitution. Rather than say that the Court did not have polygamous marriage in mind when recognizing that the Constitution protects the fundamental right to marry, courts instead analyze whether the state can meet the relevant burden to justify the prohibition.\(^{60}\)

The Zablocki Court did not expressly mention members of the LGBT community when striking down the Wisconsin law at issue. However, Justice Powell noted in his concurrence that the Court’s analysis might have ramifications for same-sex relations and relationships as well.\(^{61}\)

The Court’s analysis of the fundamental right to marry suggests that marriage implicates a host of issues for the adults, including their relationship with each other (sexual and otherwise), their ability to make a public statement about their relationship, their ability to fulfill religious duties or aspirations, and their ability to receive a variety of governmental benefits.\(^{62}\) Yet, a discussion of the adults’ relationship should not obscure the importance of marriage both for the children being raised and for the adults raising those children. Notwithstanding that all of these interests are implicated in families, whether the parents are of the same sex or of different sexes, courts and commentators have somehow come to the conclusion that states are permitted to ban same-sex marriage.\(^{63}\)

\(^{58}\) Zablocki, 434 U.S. at 386.

\(^{59}\) Id. at 388.

\(^{60}\) See, e.g., Potter v. Murray City, 585 F. Supp. 1126, 1138-43 (D. Utah 1984) (discussing the state’s “compelling state interest in prohibiting polygamy”).

\(^{61}\) See Zablocki, 434 U.S. at 399 (Powell, J., concurring).

\(^{62}\) See supra notes 56–58 and accompanying text.

\(^{63}\) See, e.g., infra text accompanying notes 85–108 & 117–85 (discussing appellate cases holding that same-sex marriage is not constitutionally protected).
C. Regulation of Sexual Activity

One of the perceived stumbling blocks to the recognition of same-sex marriage has been that up until 2003, when the Supreme Court overruled Bowers v. Hardwick, states were permitted to criminalize same-sex sexual relations. In Bowers, the Court upheld a Georgia statute prohibiting sodomy, reasoning that there was no connection between family, marriage, or procreation on the one hand and same-sex sexual relations on the other.

Yet, the Bowers Court’s inability to see this connection cannot go unexamined. There was no connection between marriage and same-sex relations because no state allowed same-sex couples to marry. There was no connection between same-sex relations and family because, in the Court’s eyes, two individuals of the same sex who were not related by blood or adoption could not be members of the same family. While it is of course true that acts of sodomy, whether between individuals of the same sex or of different sexes, are not directly related to procreation, that hardly establishes that such relations may be criminalized.

The Bowers analysis was disappointing in a number of respects, because much of the reasoning could have been used to justify laws prohibiting sexual relations between members of different races. Before Loving v. Virginia, various states prohibited interracial marriage, so it could not be argued that there was a connection between interracial coupling and marriage in those states. Further, because the marriages were prohibited, the families were not recognized—indeed, any children produced through such unions would be illegitimate, which might have resulted in those children being disadvantaged in various ways. Finally, even the potentially procreative aspect of such unions would be used in a modified form to justify the prohibition. Just as Virginia had claimed that interracial marriage bans should be upheld to avoid the production of allegedly inferior, biracial children, states prohibiting interracial sexual relations would attempt to justify their bans by appealing to the same theory.

In 2003, the United States Supreme Court overruled Bowers in Lawrence v. Texas, taking the unusual step of suggesting not only that Bowers was no longer good law, but that the case had been wrongly decided at the time the opinion was

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65 See id. at 191.
66 See supra note 18 (listing states with anti-miscegenation laws pre-Loving).
67 See Pickett v. Brown, 462 U.S. 1, 8 (1983) (noting “the history of treating illegitimate children less favorably than legitimate ones”).
68 See supra notes 40–44 and accompanying text (discussing Virginia’s justification for prohibiting interracial marriage).
69 See McLaughlin v. Florida, 379 U.S. 184, 195 (1964) (Florida’s “interracial cohabitation law, § 798.05, is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.”).
issued. 70 Lawrence is noteworthy for several reasons. While refusing to address whether same-sex marriage was constitutionally required, the Court went out of its way to explain that when “sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” Here, the Court suggested that the relationship itself has value independent of the sexual relations.

Justice Scalia in his Lawrence dissent complained that the Court had laid the foundation for a federal constitutional right to same-sex marriage. 72 He may well be correct, although not because Lawrence somehow constitutionally protected adultery and bestiality, 73 but because the Court removed a barrier that had falsely been thought to prevent recognition of a right to marry a same-sex partner. 74 After Lawrence, same-sex adults’ consensual sexual relations could not be criminalized, although the Court had already made clear in Zablocki that there was nothing incompatible with a state’s criminalizing sexual relations outside of marriage while protecting such relations within marriage. 75

Traditionally, the Constitution has prioritized relationships over sexual relations—marital relations were found to be constitutionally protected in 1964, 76 and marriage itself was found to be a fundamental right in 1967 in Loving. However, the right to have sexual relations outside of marriage was not recognized until 2003 in Lawrence.

Almost fifty years ago, Justice Harlan argued that

laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed

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71 Id. at 567.
72 Id. at 604 (Scalia, J., dissenting).
73 Id. at 599 (Scalia, J., dissenting).
74 See Jeffery Hubins, Note, Proposition 22: Veiled Discrimination or Sound Constitutional Law? 23 WHITTIER L. REV. 239, 252 (2001) (“[C]ourts have held that marriage is a fundamental right, protected by the right to privacy. As such, this fundamental right to privacy does not protect same-sex marriages because the Supreme Court held in Bowers that the fundamental right to privacy does not extend to homosexual sex.”).
75 See supra note 52 and accompanying text (noting that in Wisconsin at the time sexual relations could only take place legally within the context of marriage).
into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.\textsuperscript{77}

Justice Harlan described a world in which same-sex relations only occur outside the familial context and children are usually born and raised within that context. Whether or not that picture was accurate when offered, it certainly is not accurate now.\textsuperscript{78} Same-sex couples are living together as families, sometimes with children and sometimes without.\textsuperscript{79} It simply is not true that same-sex relationships should somehow be considered contrary to marriage and family.

Nonetheless, Justice Harlan captured something important when he suggested that family provides the foundation upon which the jurisprudence in this area is based. That insight provided the underpinning for \textit{Zablocki}.\textsuperscript{80} Yet, one can build upon that foundation. Starting with the family does not mean that the jurisprudence cannot go beyond the family. Adult, consensual sexual relations, even outside of marriage, are sufficiently central to individual identity and autonomy that they should not be subject to state control absent some compelling justification. \textit{Lawrence} protects single adults engaging in consensual sexual relations whether or not those individuals are in a committed relationship. Yet, if Justice Harlan is correct that marriage and family are the bedrock of privacy jurisprudence, then one would expect that if sexual relations between individuals engaging in a one-night stand are constitutionally protected, then consensual sexual relations between individuals in a committed relationship are also constitutionally protected.\textsuperscript{81} Further, \textit{Zablocki} counsels that the same-sex relationship itself should be afforded constitutional protection, especially if those individuals are raising children.

The claim here is not that the state must recognize same-sex marriage and LGBT families at the expense of undermining a state’s very important interests. Rather, a state refusing to accord such recognition to LGBT families should

\textsuperscript{78} See, e.g., Valerie Boateng, \textit{A Good Morning for Bonding with Dad}, COSHOCTON TRIB., Feb. 6, 2010, available at 2010 WLNR 2536513.
\textsuperscript{79} See Maura Dolan, \textit{Proposition 8 Trial Turns Its Attention to Children Witness for Opponents of the Gay Marriage Ban Says Those Raised by Same-Sex Couples Are Not Worse Off}, L.A. TIMES, Jan. 16, 2010, at 11 (“Thompson said 2000 census data showed that 33% of lesbian households and 22% of gay male households were raising children.”).
\textsuperscript{80} See \textit{supra} notes 48–53 and accompanying text (discussing \textit{Zablocki}’s recognition that a constellation of family rights all implicate fundamental interests).
\textsuperscript{81} See \textit{supra} note 74 and accompanying text (discussing the \textit{Lawrence} Court’s point that sexual relations may be one element of an enduring personal bond).
identify what substantial or compelling interests justify that refusal, and provide an analysis of how those interests would be adversely affected if LGBT families were given legal recognition. In several cases decided since the Court issued its Lawrence opinion, courts in different jurisdictions have discussed the state justifications for the respective same-sex marriage bans.

III. STATE COURT ANALYSES OF SAME-SEX MARRIAGE BANS

Several state appellate courts have recently addressed whether their respective state constitutions protect the right to marry a same-sex partner. The analyses are instructive because of the states’ strikingly differing “legitimate” objectives. Ultimately, both those opinions upholding same-sex marriage bans, and those striking them down, demonstrate why such bans cannot survive the relevant constitutional test.

A. Arizona

An Arizona appellate court was one of the first to examine the constitutionality of a same-sex marriage ban in light of Lawrence.82 The Standhart court correctly noted that the Lawrence Court did not hold that the right to marry a same-sex partner was protected by the Constitution.83 That issue had not been before the Court, so it is unsurprising that the Court had refused to reach the question. Nonetheless, the Arizona court paid too little attention to what the Court said in Lawrence, and to local law, to offer a persuasive analysis of the implicated legal issues.

The Standhardt court understood that using the Glucksberg Test to deny that there was a fundamental right to marry a same-sex partner was undercut by Loving, given Virginia’s longstanding anti-miscegenation laws.84 However, the court tried to distinguish between interracial and same-sex marriage by suggesting that the former was a mere expansion of the traditional scope of the fundamental right to marry, rooted in procreation, whereas recognizing same-sex marriage would involve redefining the term.85 Yet, by this point in time, it was not as if same-sex marriage was unimaginable and would involve a radical redefinition of marriage.86 Many thought that Hawaii would be the first to recognize same-sex marriage in this country years before the question was addressed by the Standhart court,87 civil

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83 Id. at 457.
84 Id. at 458 (noting that “historical custom supported such anti-miscegenation laws”).
85 Id.
86 Regrettably, some commentators still speak as if same-sex marriage involves a radical redefinition of marriage. See, e.g., Lynn D. Wardle, The “End” of Marriage, 44 FAM. CT. REV. 45, 45–46 (2006) (arguing that “court decisions raise and illustrate the possibility of a radical judicial redefinition of marriage”).
unions were already recognized in Vermont, and the Netherlands had already started recognizing same-sex marriages. To expand a definition is to include what had not previously been included, and the difference between expansion and redefinition is too slim a reed to base a refusal to recognize something as fundamental as the right to marry one’s life-partner.

Therefore, courts tend to distinguish between interracial unions and same-sex unions by appealing to procreation in order to justify affording constitutional protection to the former but not the latter relationship. However, this distinction is misguided for two reasons. First, the Loving Court tried very hard to avoid discussing the children of interracial couples when discussing why Virginia was precluded from arbitrarily prohibiting interracial couples from marrying. Second, the procreation aspect of marriage is a reason to recognize rather than refuse to recognize same-sex marriage.

Consider the claim that marriage is necessary to the survival of the human race. Presumably, this is because marriage is to provide a setting in which the young may be produced, raised, and nurtured. Yet, both same-sex and different-sex couples are providing environments in which children can grow and thrive.

Members of Congress anticipated that Hawaii would recognize same-sex marriage and that individuals from other states would go to Hawaii, marry their same-sex partners, and then return to their domiciles claiming that their home states had to recognize their marriages. Passage of DOMA allegedly permitted domiciles to refuse to recognize same-sex marriages validly celebrated in Hawaii.


92 See infra notes 97–98 and accompanying text (discussing the Loving Court’s shifting the focus of its analysis away from children).

93 See infra notes 97–98 and accompanying text.


Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the
whether those children are biologically related to neither parent, one parent, or both parents. While it is true that a child’s biological parents can provide such a setting, others can too, and the human race will continue as long as children are born, and these nurturing homes are provided.95

The Standhart court accepted that Arizona had a legitimate interest in promoting procreation and childrearing in stable homes, and that limiting marriage to different-sex couples was rationally related to promoting that end. Yet it was unclear how the latter promoted the asserted goal. The court recognized that same-sex couples are having and raising children and that those children would benefit were their parents able to marry.96 However, the court accepted that the marital restriction would somehow benefit children when the only evidence presented undermined that very conclusion—the same-sex marriage ban would not help children raised by different-sex parents and would positively harm those raised by same-sex parents.97

To add insult to injury, a brief review of Arizona law undercuts the state’s commitment to limiting marriage to those capable of reproducing though their union. For example, Arizona does not bar individuals who are beyond their procreative years from marrying,98 which one might have expected were Arizona only interested in having marriages among those able to reproduce.

Although the U.S. Supreme Court has never stated that those beyond their procreative years retain the fundamental right to marry, the Court would presumably so hold precisely because of the irrationality of limiting marriage that

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96 Standhardt, 77 P.3d at 462 (“Petitioners more persuasively argue that the State’s attempt to link marriage to procreation and child-rearing is not reasonable because . . . same-sex couples also raise children, who would benefit from the stability provided by marriage within the family.”).


The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare.

98 Arizona specifies who is too young to marry, see Ariz. Rev. Stat. Ann. § 25-102 (2010), but does not have any limitations on those who are too old to marry.
But this means that the fundamental right to marry does not rest on one’s ability to have children.

Suppose that Arizona were to argue that it would preclude the elderly from marrying, but that the United States Constitution bars the state from doing so. Even if one were to ignore the very low probability that the state would embrace or ever articulate such a policy given the political firestorm that would result among the many retired individuals in Arizona, there is additional reason to doubt that the state values procreation so highly. Arizona, one of several states that bars first cousins from marrying, permits such marriage only if the first cousins can show that they are unable to have a child through their union.

There is no caselaw suggesting that Arizona must provide such an exception as a constitutional matter. This means that Arizona goes out of its way to permit such marriages, which might well be sensible as a public policy matter but is antithetical to the state’s alleged commitment to limiting marriage to those capable of producing children through their union.

The state offered, and the court accepted, other articulations of alleged state policy that were surprising at best. For example, the court implied that the state only had an interest in promoting fidelity among those who might have children. Yet, the state’s criminal prohibition of adultery does not include an exception for those who do not have or, perhaps, cannot have children.

The Standhart court argued that Arizona would be unwise to insist that different-sex individuals must show that they were able and willing to procreate before allowing them to marry. The court reasoned that it would be intrusive to find out whether couples had the ability and willingness to have children; couples who do not intend to have children at the time of their marriages might later change their minds; those unable to have children at the time of marriage might later be aided by improved medical technology; or the couple might decide to adopt.

The court’s points would be well-taken were the hypothesized requirement really at issue, but rang rather hollow in the context under discussion. While it is true that different-sex couples currently unable to have children may be helped by scientific breakthroughs or might decide to adopt, those same points might also be made about same-sex couples. That couples sometimes have a change of heart and later wish to have children is true, but might be said of couples regardless of

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99 Cf. Lawrence v. Texas, 539 U.S. 558, 605 (Scalia, J., dissenting) (noting that “the elderly are allowed to marry”).

100 See, e.g., 750 ILL. COMP. STAT. 5/212(4) (2010); IND. CODE § 31-11-8-3 (2010); IOWA CODE § 595.19 (1)(c) (2010); MICH. COMP. LAWS §§ 551.3 & 551.4 (2010); 23 PA. CONSOL. STAT. § 1304(e) (2010); UTAH CODE ANN. § 30-1-2 (2010).


104 Standhart, 77 P.3d at 462.
whether they are composed of individuals of the same sex or of different sexes. The alleged difficulty in asking members of a couple about their ability to have children does not prevent the state from requiring that first cousins establish their inability to have children in some cases. Basically, all of the points made were either undercut by existing practices or might also have been made about the very couples whose denial of access to marriage was being upheld by the court.

Those challenging Arizona’s marriage law were not trying to preclude different-sex couples unable or unwilling to have children from marrying. On the contrary, the challengers were suggesting that those couples should be permitted to marry, as should same-sex couples. The court seemed to accept that the mere possibility that different-sex couples might have children was reason to permit them to marry, but that the actuality of same-sex couples having children to raise was not enough to justify their having the opportunity to marry.

B. Massachusetts

In the same year that the Arizona court upheld a challenge to that state’s same-sex marriage ban, the Supreme Judicial Court of Massachusetts struck down that state’s ban in *Goodridge v. Department of Public Health*.

The court noted the numerous benefits that marriage provides, and analyzed whether the state had adequate reasons to justify excluding those wishing to marry a same-sex partner from receiving those benefits. The court rejected the argument that the state had an interest in limiting marriage to those who could procreate through their union, noting that the state promoted adoption and the production of children through noncoital means. Indeed, Massachusetts recognizes second-parent adoption, so two members of a same-sex couple might each be recognized as the legal parent of the same child. The court understood that prohibiting the same-sex partners from marrying would inure to the detriment of those adults and to any children that they were raising without providing any offsetting benefits to different sex couples and their children.

A surprising claim in one of the *Goodridge* dissenting opinions was that reserving marriage for different-sex couples was rationally related to the state’s desire to provide an optimal setting in which children might be raised. Suppose that one brackets that children raised by same-sex parents are thriving and that various national organizations whose mission is to promote the interests of children have recognized the parenting abilities of members of the LGBT community. Even so, the position offered in the *Goodridge* dissent imposes

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106 Id. at 955–56.
107 Id. at 962.
108 See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).
109 *Goodridge*, 798 N.E.2d at 964.
110 Id.
111 See id. at 997 (Cordy, J., dissenting).
112 See *Varnum*, 763 N.W.2d at 874.
opportunity costs on the children raised by same-sex couples, i.e., a denial of those tangible and intangible benefits that would have accrued had the parents been permitted to marry, without any offsetting benefits for anyone else. But it makes no sense to justify a denial of the parents’ right to marry by appealing to the interests of children when the denial harms rather than helps children.

C. Indiana

A new justification was offered for limiting marriage to different-sex couples in *Morrison v. Sadler*. The Indiana court recognized that many same-sex couples are having and raising children. However, the court noted, there is a key difference between same-sex and different-sex couples, namely, the ease of procreation:

Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.

The court suggested that this difference in the ways that couples might reproduce justified the state’s promoting the institution of different-sex marriage so as to increase the likelihood that children would be born within wedlock. The court apparently believed that the great emotional and financial investment associated with adoption or assisted reproduction would make it sufficiently likely that the couple would stay together with or without marriage, which suggested that the state did not need to provide the benefits of marriage to such couples.

This is a very unusual view of the purpose of marriage, because it frames marriage as an institution designed to provide stability for children only in those cases where the stability would likely not exist but for the marriage. The same

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114 *Id.* at 24.
115 See *id.*:

What does the difference between “natural” reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana’s clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.
rationale would support barring the marriage of two individuals of different sexes if it could be shown that those individuals were so committed to each other that only death would make them part. This rationale would also support prohibiting marriage for the infertile or elderly. Unsurprisingly, this view of the purpose of marriage does not reflect Indiana public policy more generally. For example, like Arizona, Indiana limits marriage to first cousins who cannot have a child through their union. One would not expect a state committed to affording marriage only to those who might accidentally have children to make an express exception only for those first cousins who cannot have a child together. While there might be public policy rationales to justify such an exception, one would not find them in the Morrison opinion.

According to the Morrison court, Indiana believes that the difficult part of parenting is in producing rather than in raising children. If, however, raising children involves numerous challenges, then the state has an interest in promoting couples staying together even when their relationship is rather stable when there are children produced. All couples may face trying times during the course of their relationship. If marriage encourages couples to stay together and, at least as a general matter, the parents staying together will provide increased stability for the children, then the state has an interest in recognizing both same-sex and different-sex marriage.

Ironically, one infers from the Morrison opinion that the right to marry a same-sex partner would be more likely to be recognized if only same-sex couples would be less responsible when having children. Consider a lesbian who approaches males whom she does not know and asks them to provide sperm to be used in artificial insemination. She does not want to raise the child with any of these strangers and, indeed, takes steps to assure everyone’s anonymity so that the

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116 See id. at 36 (Friedlander, J., concurring in result) (“Pursuant to this rationale, the State presumably could also prohibit sterile individuals or women past their child-bearing years from marrying.”).

117 See supra note 104 and accompanying text.


119 See Morrison, 821 N.E.2d at 25.

120 But see In re Marriage Cases, 183 P.3d 384, 432 (Cal. 2008), superseded by constitutional amendment as stated in Strauss v. Horton, 207 P.3d 48 (Cal. 2009):

None of the past cases discussing the right to marry - and identifying this right as one of the fundamental elements of personal autonomy and liberty protected by our Constitution - contains any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally, or implies that this constitutional right is not equally important for and guaranteed to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood.
donor cannot later assert parental rights. The *Morrison* rationale suggests that the state should recognize the right to marry a same-sex partner were this kind of scenario more prevalent, because the state would then be promoting her relationship with her female partner so that the child could be raised in a stable, responsible environment. But it would be absurd for Indiana to structure its right to marry jurisprudence to incentivize or reward irresponsible parenting. The kind of analysis offered by the *Morrison* court regarding the purpose of marriage undercuts individual interests, societal interests, and the integrity of the courts.

D. New York

The irresponsible procreation argument might seem so obviously specious that it should not be mentioned. Both planned and unplanned children benefit from stable environments in which the children can thrive, and the state should not arbitrarily restrict those couples receiving incentives to provide such environments. However, this very argument was cited with approval in *Hernandez v. Robles* by New York’s highest court when analyzing the state’s same-sex marriage ban. The court reasoned that the legislature could find that different-sex “relationships are all too often casual or temporary . . . [and] that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.” Yet, it is presumably an important function of marriage to provide permanence for children even where the adults’ relationship is not casual. Any number of factors including illness or loss of employment might put added stress on a relationship, so the state should not limit its focus to only those in casual relationships.

The *Hernandez* court reasoned that the legislature “could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.” Here, the court was addressing a situation not before the court, namely, if the legislature could recognize different-sex marriages or same-sex marriages but not both, which should be chosen? As Chief Judge Kaye pointed

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122 855 N.E.2d 1 (N.Y. 2006).

123 *Id.* at 7.

124 See Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 J. AM. ACAD. MATRIM. L. 233, 238 (1997) (discussing “life stressors such as relocation, illness, job loss, birth or death of a child, and other episodes that impinge on the couple from the outside”).

125 *Hernandez*, 855 N.E.2d at 7.
out in dissent, however, there was no need to choose; there were enough marriage licenses for everyone.126

The Hernandez court accepted an argument that the Goodridge court rejected, namely, that the legislature might have reserved marriage for different-sex couples, believing that it was better for children to grow up with a father and a mother.127 But this rationale simply does not make sense in this context.128 New York, like Massachusetts, permits second-parent adoptions.129 Precluding same-sex couples from marrying is not preventing same-sex couples from raising children; it is merely denying those families the benefits that marital status might have afforded. A same-sex marriage ban does not increase the number of children born into marriages; on the contrary, it increases the number of children being raised in a non-marital context.

E. Washington

The Washington Supreme Court offered reasoning that tracked the reasoning offered by the New York court:

[T]he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children’s biological parents. Allowing same-sex couples to marry does not, in the legislature’s view, further these purposes.130

Yet, the court never explained how the legislature could hold these views. Washington also recognizes second-parent adoption,131 so the state obviously does not object to LGBT parenting. No argument was offered to suggest that limiting marriage to different-sex couples would somehow induce more couples to have children while married. Nor was any evidence presented somehow demonstrating that different-sex couples would be more likely to divorce were same-sex couples

126 Id. at 30 (Kaye, C.J., dissenting).
127 Id. at 7.
128 See supra note 115 and accompanying text (discussing why Justice Cordy’s Goodridge dissent was unpersuasive).
129 See In re Jacob, 660 N.E.2d 397 (N.Y. 1995); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).
130 Andersen v. King County, 138 P.3d 963, 969 (Wash. 2006) (emphasis added).
131 Id. at 982 (“plaintiffs correctly say, same-sex couples can and do legally procreate through assisted reproduction and adoption”). See also Vanessa A. Lavelle, The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases, 55 UCLA L. R. 247, 249–50 (2007) (“Courts in Massachusetts, New York, and Washington all allow same-sex couples to legally adopt children.”).
allowed to marry. But without some kind of account suggesting how restricting marriage would promote marriage among different-sex couples or promote procreation within marriage, it is not rational to believe the same-sex marriage prohibition would promote these ends.

The Washington court is correct that permitting same-sex couples to marry would not directly promote the interests of those children being raised by their biological parents. But no one would seriously claim that legislatures are solely concerned with those members of the next generation being raised by both of their biological parents, given the huge number of children who do not fall into that narrow category, and permitting same-sex couples to marry would promote the interests of children more generally. Promoting the interests of children more generally indirectly promotes the interests of children being raised by their biological parents, because society benefits as a general matter when children benefit. Any legislature ignoring those children not being raised by both of their biological parents is ignoring a large percentage of the state’s children and cannot be thought to have the best interests of the state at heart.

The Washington Supreme Court noted that the legislature could have found that “encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.” But those challenging the Washington ban were not questioning whether it was better for children to be raised by married parents; on the contrary, they were instead questioning whether the legislature could have found that it would be better for the children of same-sex parents to be raised by unmarried parents. If not, then the court should have examined whether the legislature could have found that the benefits of such a ban for the parents of children in families where the parents are of different sexes could plausibly be thought to outweigh the costs to the families where both of the adults were of the same sex. If same-sex marriage bans do not promote the interests of children raised by different-sex parents and positively undermine the interests of children raised by same-sex parents, then the legislature could not credibly have believed that the same-sex marriage ban somehow promoted the interests of children or society more generally.


135 Andersen, 138 P.3d at 982.
The Washington court seemed to understand that the legislative classification was not closely tied to the desired ends. The court explained that the:

link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple’s willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.\(^{136}\)

But the questions at hand involve the work that the link between marriage and procreation is supposed to perform. Even if many different-sex, married couples cannot or do not choose to have children,\(^{137}\) it is fair to suggest that many married couples do have children. It might indeed be rational for a legislature to encourage different-sex couples to marry in the belief that the adults, the children, and society itself would thereby benefit. Yet, a separate question is whether these same benefits plus others would be accrued were marriage open not only to different-sex couples but same-sex couples as well. The difficulty with the Washington statute was not merely that it was somewhat over- or under-inclusive, but that the state had adopted a policy that harmed the individuals it was claiming to help without providing any compensating benefits to anyone else.

\(F. \) New Jersey

In Lewis v. Harris\(^ {138}\) in which New Jersey’s same sex marriage ban was challenged, the New Jersey Supreme Court recognized both that same-sex couples were forced to endure various “social indignities and economic difficulties” because of the inability to marry,\(^ {139}\) and that promoting procreation and optimal parenting could not credibly be used to justify restricting marriage to different-sex couples.\(^ {140}\) However, the court rejected that the right to marry a same-sex partner was a fundamental right\(^ {141}\) in light of the Glucksberg Test.\(^ {142}\) As Chief Justice Poritz pointed out in her concurrence and dissent, the court’s conclusion was predetermined by the way the question was framed. By asking whether the right to

\(^{136}\) Id. at 983.

\(^{137}\) Melissa B. Neely, Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed, 41 IND. L. REV. 245, 268–69 (2008) (“[M]any marriages are childless; U.S. Census data for 2005 indicates that approximately 21% of married couples between fifteen and forty-four do not have children.”).

\(^{138}\) 908 A.2d 196(N.J. 2006).

\(^{139}\) See id. at 202.

\(^{140}\) Id. at 205–06.

\(^{141}\) Id. at 200.

\(^{142}\) Id. at 208.
marry a same-sex partner is deeply rooted in the nation’s history, the court framed the question so narrowly that it could not help but answer in the negative. But, framing the relevant question narrowly would also have resulted in others being denied the right to marry, such as the Lovings. Had the question instead been “whether there is a fundamental right to marriage rooted in the traditions, history and conscience of our people, there is universal agreement that the answer is ‘yes.’”

Even if the New Jersey Constitution did not protect a fundamental right to marry a same-sex partner, a separate question was whether the state constitution precluded the state from refusing to accord same-sex couples the tangible rights and benefits associated with marriage. The court found that the state’s refusal violated state constitutional equal protection guarantees, and held that the legislature either had to open up marriage to same-sex couples or had to create a separate civil union status.

The Lewis Court suggested that “families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual,” and the court could not “discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.” Yet, there is no reason to believe that same-sex couples in New Jersey have certain special needs that couples in other states do not have. On the contrary, all couples, whether or not raising children, stand to benefit from having the opportunity to marry. If, indeed, a particular kind of marriage would be harmful to society, then the state should offer some kind of plausible account of what the harm would be and how the prohibition prevents the harm. But without such a showing, it is difficult to understand how a state can justify harming LGBT families and society as a whole by denying same-sex couples the right to marry.

G. Maryland

In Conaway v. Deane, the Maryland Supreme Court analyzed the constitutionality of that state’s same-sex marriage ban. The court’s analysis, like that offered by the New Jersey Supreme Court, focused on whether the right to

143 See id. at 228 (Poritz, C.J., concurring and dissenting).
144 See supra note 21 and accompanying text.
145 Lewis, 908 A.2d at 228 (Poritz, C.J. concurring and dissenting).
146 Id. at 220.
147 Id. at 220–21.
148 Id. at 224 (“the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision”).
149 Id. at 218.
150 Id.
151 932 A.2d 571 (Md. 2007).
152 See supra note 146 and accompanying text.
marry a same-sex partner was deeply rooted in the state’s history and traditions, notwithstanding that none of the right to marry cases were predicated on a preexisting history or tradition of recognizing the particular marriage at issue. The Conaway court claimed that almost all of the federal right to marry cases were focused on producing children. Yet, Loving was not, since the Court nowhere mentions children and seemed determined to shift the focus away from the children that might be produced through the union of the parties. Further, as the Maryland court recognized, Turner did not focus on procreation. Even Zablocki, which involved a man who wanted to marry his pregnant fiancé, did not focus on producing children in particular but, instead, focused on a number of aspects of families including the production and raising of children.

153 Conaway, 932 A.2d at 618. Thus, there was no history and tradition in Virginia of having a right to marry someone of another race. See Loving, 388 U.S. at 6 (“Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.”). There was no history and tradition in Missouri of incarcerated individuals being permitted to marry, on the contrary, there was a history of refusing to permit the marriages of female inmates. See Turner, 482 U.S. at 99 (“the Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of all female inmates were scrutinized carefully even before adoption of the current regulation”). Further, in a related case issued after Loving, the Court in Butler v. Wilson, 415 U.S. 953 (1974) had summarily affirmed Johnson v. Rockefeller, 365 F.Supp. 377 (C.D. N.Y. 1973) in which a federal district court had upheld New York’s prohibition on prisoners with life sentences from marrying. Moreover, no history of refusing inmates the right to marry, especially when it was claimed that prison security might thereby be threatened. See Turner, 482 U.S.at 97 (“Petitioners have identified both security and rehabilitation concerns in support of the marriage prohibition. The security concern emphasized by petitioners is that “love triangles” might lead to violent confrontations between inmates.”). And there was no history and tradition in Wisconsin of permitting individuals to marry even when they had already had children not in their custody whom they could not support. The Wisconsin statute, Wis. State Ann. § 245.10, was based on previous statutes going back almost twenty years. See West Wis. Stat. Ann. 845 (2009), suggesting that the statute was derived from L.1959 c. 595 § 17. See also In re Ferguson’s Estate, 130 N.W.2d 300, 302 (Wis. 1964):

This section was originally created by ch. 595, sec. 17, Laws of 1959, to become effective January 1, 1960. In its then form it provided no license to marry should be issued when it appeared that either applicant had a minor of a previous marriage not in his custody and which he was under obligation to support by court order or judgment without the written permission of a judge of a court having divorce jurisdiction in the county in which the license was applied for.

130 N.W.2d 300, 302 (Wis. 1964).

154 See supra notes 40–44 and accompanying text (discussing the Loving Court shifting the focus away from the children that might be born of interracial marriages).

155 Conaway, 932 A.2d at 621.

156 See supra notes 48–53 and accompanying text (noting Zablocki’s focus on various family matters).
The perceived focus on children in the federal marriage cases allegedly convinced the Maryland court that the relevant issue was the “‘inextricable link’ between marriage and procreation,”\(^{157}\) notwithstanding that some different-sex couples are neither willing nor able to have children and that some same-sex couples are having and raising children.\(^{158}\) The court recognized that its analysis might seem dated, given the changing demographics of the American family.\(^{159}\) Yet, given these changing demographics which include the increasing number of married couples choosing not to have children\(^{160}\) and the increasing number of children raised by same-sex parents,\(^{161}\) one might well wonder how to spell out this inextricable connection discussed by the court. For example, insofar as the link involves the recognition that marriage provides a setting in which children might thrive, then one would have expected the court to have held that the connection between marriage and the next generation provided the basis for striking down, rather than upholding, the Maryland law.

It may well be that the Maryland court was not really convinced by the inextricable link to procreation argument but instead was simply following the example that the U.S. Supreme Court had allegedly set. The Conaway court noted that Lawrence had not expressly recognized a fundamental right to engage in same-sex relations and hypothesized that the Court had not “intended to confer such status on the public recognition of an implicitly similar relationship.”\(^{162}\) Yet, the Maryland court failed to mention that the Lawrence Court had supported its holding by discussing many of the important recent right to privacy cases including Griswold v. Connecticut,\(^{163}\) in which the Court recognized the right of married individuals to have access to contraception; Eisenstadt v. Baird,\(^ {164}\) in which the Court recognized the right of unmarried individuals to have access to contraception; Roe v. Wade,\(^ {165}\) in which the Court recognized a right to be free from unwarranted government interference in one’s attempt to secure an abortion; Carey v. Population Services,\(^ {166}\) in which the Court struck down certain limitations on the sale and distribution of contraceptives to minors; and Planned Parenthood

\(^{157}\) Conaway, 932 A.2d at 631.

\(^{158}\) Id. at 631.

\(^{159}\) Id. at 632.

\(^{160}\) See, e.g., Keith Lawrence, Middle America Slipping Away, MESSENGER-INQUIRER, Nov. 22, 2009, available at 2009 WLNR 23550550 (discussing a demographer’s prediction that in the next census “married couples with no children will be the prevalent household”).

\(^{161}\) See Sally Jacobs, What Can Social Science Add to the Gay Marriage Debate? Not Much So Far, BOSTON GLOBE, Mar. 9, 2004, at C1 (discussing the children of gay and lesbian parents—who number between 6 and 14 million in the United States, according to various studies).

\(^{162}\) Conaway, 932 A.2d at 626.

\(^{163}\) 381 U.S. 479 (1965).

\(^{164}\) 405 U.S. 438 (1972).

\(^{165}\) 410 U.S. 113 (1973).

\(^{166}\) 431 U.S. 678 (1977).
of Southeastern Pennsylvania v. Casey, in which the Court “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.” If all of these cases involved rights falling within the right to privacy but adult, consensual relations did not, then one might rightly ask, “Why are those cases being cited as support for protecting an interest that does not fall within the right to privacy?”

The Lawrence Court neither expressly designated the right to have non-marital relations with a same-sex partner as a fundamental right nor expressly designated such relations as implicating a mere liberty interest subject to rational basis review. Instead, the Court noted that the sodomy statute “furthers no legitimate interest which can justify its intrusion into the personal and private life of the individual.”

The language here is important to examine. The Court refrains from saying that the state has no legitimate interest at all in regulating non-marital conduct, but instead suggests that the state has no legitimate interest that justifies the intrusion. The Court’s description is compatible with a reading suggesting that adult, consensual, intimate relations implicate more than a mere liberty interest.

Consider the statute at issue in Zablocki, where Wisconsin was trying to restrict the marriage rights of indigent noncustodial parents. The state had a legitimate interest at stake, namely, protecting the public fisc. The difficulty was that Wisconsin’s legitimate interest could not justify the limitation on Redhail’s personal life. It would have been quite accurate to say that Wisconsin did not have a legitimate interest that justified the burden imposed, notwithstanding Wisconsin’s clearly legitimate interest in conserving scarce resources. Basically, Wisconsin’s legitimate interests in Zablocki were not “sufficiently important” to justify the prohibition.

Ironically, even if Lawrence is read as protecting a mere liberty interest, the decision nonetheless supports same-sex marriage being constitutionally protected. The Lawrence Court suggested that the Constitution precludes states from criminalizing voluntary, adult, consensual sexual relations. What justification could be offered for such a statute? Arguably, by criminalizing such relations, the state is providing couples with an incentive to marry, where their voluntary sexual relations would be legal. Promoting marriage is considered a

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168 Lawrence, 539 U.S. at 573–74.
169 Id. at 579.
170 See Zablocki, 434 U.S. at 388.
171 See Lawrence, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).
172 Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (“Lawrence was a substantive due process decision that recognized a right in all adults, regardless of sexual orientation, to engage in certain intimate conduct.”)
legitimate state interest, and it seems reasonable to believe that some might be induced to marry were voluntary non-marital relations criminalized. Basically, the *Lawrence* Court suggested that the state’s legitimate interest in promoting marriage is not sufficiently important to justify criminalizing non-marital relations.

Here is at least one of the difficulties posed by *Lawrence* for those opposing same-sex marriage. Suppose that the decision is read as only implicating rational basis scrutiny. If that is so, then it must be claimed that the state promoting marriage by criminalizing consensual, non-marital relations either is not a legitimate goal or, perhaps, the state’s chosen method is not rationally related to the promotion of that goal. But consider, instead, how excluding same-sex couples from marriage is supposed to promote marriage. It does not seem credible to claim that different-sex couples are less likely to get, or remain, married because same-sex couples are also allowed to marry. But if promoting different-sex marriage is the goal, and it is more credible to believe that different-sex marriage would be promoted by criminalizing non-marital relations than by maintaining a same-sex marriage ban, then *Lawrence* counsels that same-sex marriage bans are constitutionally infirm even using the rational basis test.

Suppose, instead, that adult, voluntary, non-marital relations (including such relations between same-sex partners) fall within the right to privacy and thus trigger close scrutiny. Then, presumably, the same would be said for marriage (even between same-sex partners), which would also mean that the state will have great difficulty justifying its ban.

One of the noteworthy omissions in the *Lawrence* Court’s recounting of the privacy cases involved its utter refusal to discuss the marriage cases—*Loving*, *Zablocki*, and *Turner*—when discussing privacy rights. Further, same-sex marriage opponents might point out that the *Lawrence* Court made quite clear that it was not discussing same-sex marriage. Yet, the claim here is not that *Lawrence* held that same-sex marriage must be recognized, but that its reasoning supports that conclusion. That the *Lawrence* Court refused to address the constitutionality of same-sex marriage bans does not establish their

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174 *See*, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 480 (Conn. 2008) (“It is only because the state has not advanced a sufficiently persuasive justification for denying same sex couples the right to marry that the traditional definition of marriage necessarily must be expanded to include such couples.”).

175 *Lawrence*, 539 U.S. at 573–74.

176 *See id.* at 578 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

177 *See Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).
constitutionality. On the contrary, past experience indicates that the Court’s refusal to address same-sex marriage might cut the other way.

In *McLaughlin v. Florida*, the Court struck down Florida’s imposing a more severe penalty on interracial compared to intra-racial non-marital relations. The state had claimed that the statute promoted the state’s anti-miscegenation law. The Court rejected that argument but expressly declined to reach “the question of the validity of the State’s prohibition against interracial marriage.”

Three years later, the *Loving* Court struck down anti-miscegenation laws.

The same-sex marriage opponent will not save his position by noting that *Lawrence* involved a criminal statute. *McLaughlin* involved a criminal statute and although *Loving* involved both criminal and civil statutes, there was no suggestion in *Loving* that the case would have been decided differently had Virginia merely refused to recognize the validity of the Loving’s marriage. On the contrary, the *Loving* Court made it quite clear that Virginia’s attempt to ban interracial marriages could not stand, at least in part, because the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].”

**H. California**

In *In re Marriage Cases*, the California Supreme court addressed a relatively narrow question, namely, whether the state violated state constitutional guarantees by reserving marriage for different-sex couples and offering same-sex couples virtually all of the benefits of marriage through domestic partnerships. Yet, opening up marriage to same-sex couples would not deprive different-sex couples of any benefits, and the state’s vital interests in promoting marriage for the sake of the next generation would be served rather than undermined by permitting same-sex couples to have access to that institution. The right to marry has never been understood to be limited to those who can procreate through their union, and the court noted the irony in justifying restrictions on marriage by appealing to the possibility of accidental procreation, as if it made sense to burden

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179 Id.
180 See id. at 195.
181 Id.
182 See *Loving v. Virginia*, 388 U.S. 1, 4 n.3 (1967) (quoting the statute making interracial marriages void. See also id. at 4 (quoting the criminal statute pertaining to interracial marriages)).
183 Id. at 12.
185 See id. at 397–98.
186 Id. at 401.
187 See id. at 423.
188 Id. at 431.
individuals for being responsible when making decisions about when to have and raise a child. \^{189}

The California court’s points are of course applicable in a jurisdiction not offering the option of domestic partnership. Indeed, they are all the more telling in such a jurisdiction, because the denial of marriage recognition would be imposing an even greater burden on the LGBT community, and that denial still would not have afforded different-sex couples and their families or society any benefits.

I. Connecticut

The Connecticut Supreme Court addressed an issue similar to the one faced by the California court—the question addressed in *Kerrigan v. Commissioner of Public Health* \^{190} was whether the state’s creating a separate status of civil unions for same-sex couples violated state constitutional guarantees. \^{191} The state’s recognition that sexual orientation does not affect one’s ability to parent played an important role in the court’s analysis. \^{192} Basically, the state could not offer sufficient justification for its restriction of marriage, \^{193} notwithstanding the state’s affording the tangible benefits of marriage to couples who had entered into civil unions. \^{194}

In his *Kerrigan* dissent, Justice Borden worried that “to change the law of marriage by expanding it to include same-sex couples is to change the institution that the law reflects.” \^{195} But it is not clear how the institution is changed by this expansion, just as it is not clear how the institution was changed by its expansion to include interracial couples. While some couples are permitted to marry who could not have married previously, that does not establish that the institution itself has changed.

Rather, as the *Goodridge* court wrote:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. \^{196}

This understanding of marriage is not at all changed by affording same-sex couples access to the institution. Indeed, different-sex marriage has not been destroyed in

\^{189} *Id.*
\^{190} 957 A.2d 407 (Conn. 2008).
\^{191} *Id.* at 414–15.
\^{192} *Id.* at 435 (“It is highly significant, moreover, that it is the public policy of this state that sexual orientation bears no relation to an individual’s ability to raise children.”).
\^{193} *Id.* at 480.
\^{194} *Id.* at 417–18.
\^{195} *Id.* at 503 (Borden, J., dissenting).
Massachusetts now that same-sex couples are also allowed to marry,\footnote{197}{See Harold P. Southerland, “Love for Sale”—Sex and the Second American Revolution, 15 DUKÉ J. GENDER L. & POL ’ Y 49, 76 (2008) (“Those who oppose gay and lesbian marriage cannot seem to realize that these unions are in a real sense ‘traditional’ in a way that many of today’s heterosexual marriages are not, and that they may actually be more consonant with the family values the opponents claim to espouse.”).} and there is no reason to think that there would be adverse effects on the institution of marriage in any other state in which same-sex couples were accorded access to that institution.

\textit{J. Iowa}

The most recent state supreme court decision examining the right to marry was issued by the Iowa Supreme Court in \textit{Varnum v. Brien}.\footnote{198}{763 N.W.2d 862 (Iowa 2009).} The court noted that the societal benefits that accrue when different-sex couples are permitted to marry would also accrue were same-sex couples permitted to marry, e.g., the benefits that are thereby provided the children that the married same-sex couples might be raising.\footnote{199}{See id. at 883.} Indeed, the state’s same-sex marriage ban neither promoted the interests of children raised by same-sex parents nor the interests of children raised by different-sex parents, and so could not be justified using a child’s best interests rationale.\footnote{200}{Id. at 900.} Further, the court gave short shrift to the claims that restricting marriage would somehow promote more procreation or more stability among different-sex couples.\footnote{201}{See id. at 901–02.} The Iowa Supreme Court rejected that the state had offered an adequate justification for its restrictions on marriage.

While the Iowa Supreme Court struck down the state’s same-sex marriage ban using heightened scrutiny,\footnote{202}{See id. at 896.} the court’s analysis suggests that the ban should not have withstood rational basis scrutiny. For example, when examining the claim that parenting by different-sex couples is optimal for children, the court noted the abundance of evidence suggesting that children are doing equally well whether with same-sex or different-sex parents.\footnote{203}{Id. at 899 (“Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.”).} After noting that some commentators nonetheless sincerely claim that children do better with different-sex parents,\footnote{204}{Id.} the court noted that such opinions “were largely unsupported by reliable scientific studies.”\footnote{205}{Id.}

Yet, even if reliable scientific studies were to support such a contention, that would not justify restricting marriage to different-sex couples. As the court pointed
out, same-sex couples already were raising children and would continue to do so, and thus restricting marriage would not further the state’s alleged goals. Restricting marriage would only affect children if “people in same-sex relationships [would] choose not to raise children without the benefit of marriage” and if children would be “adopted by dual-gender couples who would have been adopted by same-sex couples but for the same-sex civil marriage ban.” But there was no reason to think that a same-sex marriage ban would produce such results. Indeed, the court might have added a further point. Children adopted by members of the LGBT community tend to be either a partner’s child or a hard-to-place child. If same-sex couples are indeed being deterred from adopting because of their inability to marry, then this may well mean that a child who might otherwise have been placed will now simply not be accorded the benefits of permanent placement in a loving home. Arguably, no state that is seriously interested in providing permanency and stability for its children should want such an outcome.

IV. CONCLUSION

The right to marry has already been recognized as falling within the right to privacy—the only question confronting those courts analyzing whether same-sex marriage is constitutionally protected is whether the right to marry includes the right to marry a same-sex partner. The analyses offered are often remarkably disappointing. The Court has never suggested that marriage rights are somehow tied to the ability and willingness to have children through the parties’ union. Further, it is implausible to think that any court would ever assert such a tie in any context other than in an attempt to justify a same-sex marriage ban.

Traditionally, the right to marry has been given greater protection than the right to engage in adult consensual relations outside of marriage, at least in part, because the right to marry has been associated with a variety of family functions including having and raising children, even though it is of course true that non-marital relations can also result in the production of children. Yet, if non-marital (including same-sex) relations are constitutionally protected, it is difficult to see why same-sex marriage should not also be protected, especially because permitting states to regulate non-marital relations would more plausibly promote marriage than would restricting access to marriage to different-sex couples.

Courts upholding same-sex marriage bans have deferred to the legislature’s alleged judgment that marriage restrictions would promote marriage among different-sex couples or advance the interests of their children when no plausible connection could be made between the restriction and the goals to be promoted.

\[206\] Id. at 901.
\[207\] Id.
\[208\] Id.

Yet, the very goals articulated by these courts were themselves illuminating, because the courts implicitly assumed that *same-sex couples and their children did not have interests that should be weighed in the balance*. That very focus makes clear that members of LGBT community are being treated as non-persons in these analyses, which alone makes such laws constitutionally suspect.

If it could be shown that opening up marriage to same-sex couples would impose significant costs on different-sex couples, then a more difficult cost-benefit analysis would have to be performed, which included justifications for imposing burdens on one group to benefit another. But maintaining such restrictions when they do not benefit anyone, and instead harm both the families of those precluded from marrying and society as a whole, is simply unconscionable, and courts upholding such bans are, in the words of the Connecticut Supreme Court, guilty of ignoring their own responsibility.210

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210 Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 480-81 (“Contrary to the suggestion of the defendants, therefore, we do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.”).
I. INTRODUCTION

The determination of custody and visitation arrangements for minor children is an event normally accompanying a divorce, and it may also be a part of other proceedings involving the care of minor children. The process for determining child custody and visitation is important to the parents, the children, the courts, and society. Historically, this was a judicial decision in contested cases, and the standards used by courts have varied over time.

Mediation, as an adjunct to the court’s determination of child custody and visitation, began its rise in popularity in the early seventies. As states moved away from fault-based divorce toward no-fault dissolution of marriage, courts and legislatures embraced mediation as a less divisive way for couples to navigate the often painful process of deciding custody and visitation issues, which marked a shift toward the best interest of the child standard.

While mediation has many proponents, it is not without its critics. Criticisms have included concerns about the fairness of the process for women and whether mediation is simply another way to force the parties into a settlement of the issues to save the court time and resources. Because some states have chosen to mandate mediation of child custody and visitation issues, the purposes and efficacy of mediation in child custody and visitation are extremely important and should be carefully examined. There is little quantitative or qualitative research on these issues. This Article describes a qualitative research study that explored mediators’ understanding of the purposes of mediation in child custody and visitation in the Tenth Judicial Circuit of Illinois, a state that has recently mandated mediation for these issues.

II. A BRIEF HISTORY OF THE STANDARDS FOR CHILD CUSTODY AND VISITATION

The roles that parents play in the lives of their children, both during marriage and after divorce, have changed over time. Under early Roman laws, the children
of a family were considered the property of their father, and he could sell the
children or put them to work.\textsuperscript{4} Mothers did not have legal rights to their children,
even upon the death of the father.\textsuperscript{5} Such a patriarchal view of child custody
continued for centuries into the new world.

The first known divorce in the United States occurred in 1639.\textsuperscript{6} At that time,
the colonies followed the patriarchal legal system where fathers were entitled to
the custody of their children as if they were property. In an early Virginia custody
dispute, the court continued this tradition by giving the husband complete control
of his children except if there was gross misconduct on the husband’s part or if the
“interest or happiness of the child imperatively required it.”\textsuperscript{7}

Following the British Custody of Infants Act of 1839,\textsuperscript{8} British courts
dramatically changed custody decisions of young children. The statute required
courts to award custody of children under the age of seven to their mothers and to
provide mothers with visitation rights for their children seven years and older.\textsuperscript{9}
This statute impacted custody law in the United States\textsuperscript{10} and became known as the
“tender-years doctrine,” which presumed that mothers were more capable of caring
for infants and children of a tender age.\textsuperscript{11}

This presumption was followed by the United States’ courts and was virtually
unchallenged until the 1960s when it was criticized due to its heavy bias toward
women.\textsuperscript{12} After much debate, the Uniform Marriage and Divorce Act was drafted
in 1970 and amended by the American Bar Association in 1974.\textsuperscript{13} The Uniform

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\textsuperscript{4} Kelly, supra note 3, at 121.
American couple to divorce obtained their decree in 1639 from a Puritan court in
Massachusetts. Anecdotal evidence indicates that untold numbers of other colonists simply
deserted their unwanted or offending mates.”). \textit{Id.}
\textsuperscript{7} Latham v. Latham, 71 Va. 307, 332 (1878).
\textsuperscript{8} 2 & 3 Vict., c. 54 (Eng.) (Women of unblemished character were given access to
their children in the event of separation or divorce). For a look at the British case that led to
this statute, see Lucy S. McGough, Protecting Children in Divorce: Lessons from Caroline
\textsuperscript{9} Kelly, supra note 3, at 121–22.
\textsuperscript{10} Although the Pennsylvania Supreme Court had acknowledged the “tender years”
doctrine much earlier in \textit{Commonwealth v. Addicks}, 5 Binn. 520 (Pa. 1815).
\textsuperscript{11} Black’s Law Dictionary 1480 (7th ed. 1999). (“The doctrine holding that
custody of very young children (usually five years of age and younger) should generally be
awarded to the mother in a divorce unless she is found to be unfit.”). This entry further
asserts that the doctrine has been rejected by most states and replaced by a presumption of
joint custody.
\textsuperscript{12} Kohm, supra note 3, at 368.
\textsuperscript{13} See Harvey L. Zuckman, The ABA Family Law Section v. The NCCUSI: Alienation,
\end{flushleft}
Marriage and Divorce Act adopted the best interests of the child standard for child custody decision-making. Today, when deciding child custody issues, most state statutes and courts focus on what is in the best interests of the child, an approach that does not give judicial preference for either parent. However, the “best interest” determination must often be made in the context of an adversarial process between two competing parents. Yet, because states have recognized that the adversarial process itself is not necessarily conducive for safeguarding the best interest of the child, many jurisdictions have begun using mediation to assist in making child custody and visitation determinations.

III. A BRIEF HISTORY OF MEDIATION IN CHILD CUSTODY AND VISITATION

Mediation is defined as “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” Prior to 1980, mediation was within the discretion of many state courts, but it was not required. In 1980, California became the first state to mandate mediation in child custody and visitation cases.

The stated purpose of the California law was to “reduce acrimony which may exist between the parties and to develop an agreement, assuring the child or children’s close and continuing contact with both parents after the marriage is dissolved.” Early criticisms of the law centered on three flaws that were later corrected by the California legislature: (1) it did not specifically consider the best interest of the child; (2) it did not provide for judicial protection of women who may suffer an imbalance of power in the marital relationship; and (3) it did not provide any exception to mandated mediation for cases of spousal abuse. As more states embraced mediation in child custody and visitation cases, those states benefited from California’s (and other states’) early experiences and mistakes. Over the fifteen years following California’s mandate of mediation, only six states adopted mandatory mediation, but over thirty states provided for some form of mediation in child custody and visitation cases.

15 BLACK’S LAW DICTIONARY 996 (7th ed. 1999).
18 Gaschen, supra note 16, 470–71.
19 As of 1995, the six states with mandatory child custody and visitation mediation were Delaware, Maine, New Mexico, Oregon, Washington, and Wisconsin. See id. at 469 n.3.
20 Id. at 472.
Perceived benefits of mediation in family court include: lower costs to the parties and courts; a decrease in docket congestion; increased control of the parents in making decisions for their children; increased compliance with the courts’ orders; increased communication and conflict resolution skills; and fewer post-decree petitions to the court. Many of these perceptions and assertions have been anecdotal and without research substantiation. Mediation has been criticized as a process that may take advantage of women due to the possible imbalance of power in the relationship and that “mandatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfill its promises.” Conversely, mediation has been praised as “show[ing] more promise than litigation as a fair and effective method for resolving custody disputes for both men and women.”

Given this range of contentions, specific research addressing the benefits and purposes of mediation seems warranted. Further, the perceptions of those who have been trained and directly involved in mediation, that is, the mediators themselves, should be relevant and insightful.

IV. MANDATORY MEDIATION IN CHILD CUSTODY AND VISITATION IN ILLINOIS

While Illinois permitted mediation in child custody and visitation cases for a number of years, the Illinois Supreme Court mandated mediation beginning January 1, 2007. In 2006, the Illinois Supreme Court adopted a set of rules for child custody proceedings dubbed the “900 series.” The stated purpose of the 900 series rules is to “expedite cases affecting the custody of a child, to ensure the coordination of custody matters filed under different statutory Acts, and to focus child custody proceedings on the best interests of the child, while protecting the rights of other parties to the proceedings.” Mediation is mandated in all cases

22 Id. at 562; Zylstra, supra note 1, at 72.
23 Wheeler, supra note 21, at 563 (citing SARAH R. COLE, ET. AL., MEDIATION: LAW, POLICY, PRACTICE §12:2 at 122–23 (2d ed. Supp. 2001)).
24 According to this website, “. . . studies show that mediated agreements are more likely to be complied with than decisions imposed by arbitrators or judges. This success may be because the parties take an active role in the decision-making process.” However, there is no citation of authority to support this premise. Arbitration & Mediation, http://www.statelawyers.com/Practice/Practice_Detail.cfm/PracticeTypeID:8 (last visited Sept. 13, 2010).
26 Gaschen, supra note 16, at 487.
27 ILL. SUP. CT. R. 905, available at http://www.state.il.us/court/SupremeCourt/Rules/Art IX/ArtIX.htm#900. This rule is part of Article IX, Child Custody Proceedings, Rules 900-942, of the Illinois Supreme Court.
28 Id. R. 900(a). The Committee Comments to Rule 900 state that “Rule 900 emphasizes the importance of child custody proceedings and highlights the purpose of the
involving the custody and visitation of a child, whether pursuant to a petition for
dissolution of marriage or otherwise, unless the court determines an impediment to
mediation exists. The issues of early concern that were apparent in California are
not present in Illinois because the 900 series rules focus on the best interests of the
child, and give the courts discretion to excuse cases from mediation if an
impediment to mediation exists, such as an imbalance of power or spousal abuse.

The mandate for mediation includes the requirement that each judicial circuit
in Illinois addresses mandatory training for mediators. The Committee
Comments recognize that different populations and resources in the circuits will
necessitate differences in local rules. The qualitative research described herein
was conducted in the Tenth Judicial Circuit in Illinois.

rules that follow, which is to ensure that child custody proceedings are expeditious, child-
focused and fair to all parties.” ILL. SUP. CT. R. 900(a) cmt.

29 ILL. SUP. CT. R. 905 cmt., stating:

[t]he Committee believes mediation can be useful in nearly all contested
custody proceedings. Mediation can resolve a significant portion of custody
disputes and often has a positive impact even when custody issues are not
resolved. The process of mediation focuses the parties’ attention on the needs of
the child and helps parties to be realistic in their expectations regarding custody.

ILL. SUP. CT. R. 905 cmt.

30 Id. The Committee Comments to Rule 905 state:

[ p]arties may be excused from referral under both paragraphs (a) and (b) if
the court determines an impediment to mediation exists. Such impediments may
include family violence, mental or cognitive impairment, alcohol abuse or
chemical dependency, or other circumstances which may render mediation
inappropriate or would unreasonably interfere with the mediation process.

ILL. SUP. CT. R. 905 cmt.

31 See Id. Rule 905 does not provide any minimum educational or background
requirements for mediators in child custody and visitation.

32 ILL. SUP. CT. R. 905 cmt. states:

Rule 905 requires each judicial circuit to establish a mediation program for
child custody proceedings. Local circuit court rules will address the specifics of
the mediation programs. The Cook County model for mediation programs,
which provides county-employed mediators at no cost to the parties, may not be
financially or administratively feasible for every circuit. Alternatively, some
circuits have required approved mediators to mediate a certain number of
reduced fee or pro bono cases per year as identified by the court. The individual
judicial circuits may implement rules which are particularly appropriate for
them, including provisions specifying responsibility for mediation costs.

Id.
The Tenth Judicial Circuit is centrally located within the state, and it has adopted local circuit rules in compliance with Illinois Supreme Court Rule 905 on Mediation. The local circuit definition of mediation is:

a cooperative process for resolving conflict with the assistance of a trained court-appointed, neutral third party, whose role is to facilitate communication, to help define issues, and to assist the parties in identifying and negotiating fair solutions that are mutually agreeable. Fundamental to the mediation process, described herein, are principles of safety, self-determination, procedural informality, privacy, confidentiality, and full disclosure of relevant information between the parties.\(^3\)

The local circuit rules include the following requirements for mediators:

1. have a law degree or master’s or higher degree in a social science field related to marriage and family interpersonal relationships.\(^3\) Retired judges who have served in family court are deemed qualified;\(^3\)
2. maintain the license if the mediator is engaged in a licensed discipline;\(^3\)
3. be a member of the Association for Conflict Resolution or Mediation Council of Illinois;\(^3\)
4. complete a specialized training course in family mediation of at least forty hours. A particular course was specified as meeting the requirements and a procedure exists to have other courses or experience be evaluated for sufficiency;\(^3\)
5. maintain professional liability insurance;\(^3\) and
6. obtain continuing education.\(^3\)


\(^34\) Amended Order § II(B)(1).

\(^35\) Id. Notably, this requirement is part of the formal education section of the local rule, not part of the training section. However, in practice, this language is interpreted to mean that retired Illinois family court judges are “grandfathered” as to the training requirements.

\(^36\) Id.

\(^37\) Id.

\(^38\) Id. § II(B)2. The following issues must be included in the training program: conflict resolution; psychological issues in separation, dissolution and family dynamics; issues and needs of children in dissolution; mediation process, skills and techniques; and screening for and addressing domestic violence, child abuse, substance abuse and mental illness.

\(^39\) Id. § II(B)(3).

\(^40\) Id. § II(C). Continuing education requirements include: “All approved mediators are required to complete ten (10) hours of circuit-approved continuing education every two (2) years of which two (2) hours must cover domestic violence issues and provide evidence of completion to the Chief/Presiding Judge or his/her designee every two (2) years.”
V. METHODS

A. Subjects and Sampling Frame

Subjects were mediators from a single judicial circuit within the state of Illinois. Three mediator categories were designated: (1) attorney-mediators, (2) counselor-mediators, and (3) retired judge-mediators (referred to as judge-mediators). Attorney-mediators and counselor-mediators had completed the required forty-hour training course, however, judge-mediators were exempt from this requirement, and none in our study had voluntarily attended the training. All subjects had been actively involved with mediation cases over the previous two years.

Although some circuits in Illinois utilized mediation for contested child custody and visitation cases for some time, mediation did not become a state-wide mandate until January 1, 2007. The circuit chosen for this study began mandatory mediation at that time. Our interviews were conducted during the third quarter of 2009. Accordingly, the mediator subjects in this study drew their impressions from mediation experiences that had occurred over the previous thirty months. The researchers determined that such a restrictive selection methodology would allow the greatest degree of respondent experience similarity, particularly with regard to the relative recency of mediation training and the similarity of economic context within which mediations were conducted.

The researchers began the exploratory and pilot phases of this study by recognizing the presence of three somewhat distinct groups of mediators. The first group was comprised of attorneys who also served as mediators. In most cases, these individuals were family practice attorneys who engaged in limited mediation activity. There was general agreement within this group that successful mediation required them to take off their attorney hat and put on their mediator hat. Understandably, all attorney-mediators recognized and abided by the commitment that there could be no overlap between family-practice clients and mediation clients.

The second group consisted of counselors who also served as mediators. Similar to attorneys, counselor-mediators accepted that counseling clients could

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41 See supra note 34.

42 Interviews were conducted after applying and receiving approval from Bradley University’s Committee on the Use of Human Subjects. As part of the approval, confidentiality of the identities of the interviewees was required. In addition, each interviewee signed an informed consent, which also promised confidentiality. Each interviewee was told that he/she would not be identified in any article published about this research other than as an attorney-mediator, counselor-mediator, or retired judge-mediator. Each interviewee quoted in this Article was contacted and read the quotation and asked whether it was accurate. Therefore, in the text of the Article, each quote is identified only as being made by an attorney-mediator, counselor-mediator, or retired judge-mediator.

43 Tenth Circuit Medication Rules R. 3(B); Amended Order § III R.3(B).
not be mediation clients. Although a rotational system of mediators was in place for situations when clients and their attorneys had no mediator preference, this feature of the mediation process was rarely used. Consequently, counselor-mediators conducted relatively few of the mediations that had occurred in the circuit under consideration. Specifically, of the external cases referred, counselor-mediators conducted two percent, attorney-mediators conducted thirty-eight percent, and judge-mediators conducted sixty percent.

The third group included retired judges who served as mediators. These judge-mediators handled the overwhelming bulk of the mediations within the circuit being studied. As noted earlier, judge-mediators were “grandfathered” into the mediation system and were not required to participate in or complete the forty-hour mediation training program.

B. Qualitative Analysis

Qualitative methodology was used to attain perspectives for this study. The researchers selected participants from the list of approved mediators from the Tenth Judicial Circuit of Illinois. In person, interviews were conducted with fifteen mediators. Interviews within each of the three mediator categories continued until saturation was achieved. As such, three judge-mediators, six attorney-mediators, and six counselor-mediators were interviewed. Additionally, two non-mediators within the circuit who had extensive experience with the mediation process since its mandated inception (a sitting judge and a non-mediator family attorney) were interviewed to assure that saturation had been achieved.

While considerable speculation and a variety of assumptions have surrounded mandated mediation, our research goal was to discover the critical approaches or theories underlying this strategy by listening to those directly involved. We began with no a priori model. Rather, our model was discovered by carefully studying the interviews. This approach, known as “grounded theory” is a key methodology

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44 Id.
45 See supra notes 34 and 35.
46 The key in our study is not the number of cases, but the level of interviewing depth and the method of analysis. See Anselm Strauss & Juliet Corbin, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory 11 (1998). Notably, many classic qualitative studies have been built on sample sizes that are quite small. For an excellent review of some of these classic studies, see Ellen Brantlinger et al., Qualitative Studies in Special Education, 71 Exceptional Child. 2, 195, 198–199 (2005). Doctoral dissertations utilizing this methodology are often limited to less than ten respondents.
for exploring a deep understanding of a complex social phenomenon. In short, our methodology provided depth by letting those directly involved explain the underlying themes rather than have the researcher impose them for verification. In their classic work, Glaser and Strauss outline the dynamics of this qualitative methodology, and their framework guided our investigation. Glaser and Strauss’s methodology has become a widely accepted method for careful study of important social issues.

Our study used careful methodology commonly used in qualitative research. First, we interviewed until we reached “the theoretical saturation point.” In other words, we continued our interviewing process until it became clear that additional perspectives were not being added. As Taylor and Bogdan note, “[q]ualitative researchers typically define their samples on an ongoing basis as the study progresses. . . . [R]esearchers consciously select additional cases to be studied according to the potential for developing new insights. . . .”

Our analysis of the interviews was also uniquely rich. Interviews were audio taped to ensure accuracy. Each interview was studied and coded using a line-by-line approach. Further, two researchers, working independently, coded each interview. Next, all three researchers met to reach agreement or in qualitative terms, achieve “concordance.” This is a discursive and reflective process that requires researchers to act as the “devil’s advocate” whenever interpretative differences appear. The primary researchers conducted all analysis and coding. This process of sitting together for hours and pouring over each interview allows one to “listen to the data.” That is, themes emerge from the words of the participants. Given the parameters that we imposed, our sample size of fifteen is actually considered quite acceptable and rather large.

Confirmability—the use of additional documentation to confirm or help assure confidence in the respondents’ perspectives—was achieved through external data (secured from the circuit court under consideration, which provided checks on mediator perceptions of the extent of mediation and mediation success rates). In addition, the qualitative techniques of respondent validation and member checking were utilized. Here, each participant was contacted, apprised of the study’s results,

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48 See generally Glaser & Strauss, supra note 47 (In grounded theory, no theory is brought to the table. Instead, the results are analyzed without a theory in order to develop a theory. In one approach, theory is a tool; in the other, it is the goal.).
49 Id.
51 Taylor & Bogdan, supra note 50, at 26–27.
53 Id. at 1116.
and asked to confirm that their personal perspectives were indeed included in our results. Additionally, the interviews with the non-mediator sitting judge and family practice attorney helped confirm that key perspectives were not omitted from consideration.

VI. RESULTS

Attorney-mediators, counselor-mediators, and judge-mediators bring different educational foundations, training, experiences, and perspectives to their work as mediators. Accordingly, it seems reasonable that some of the disparity in desired mediation outcomes or purposes could be affected by the perceptual and experiential base of each mediator. In this regard, our findings revealed important distinctions across groups.

In general, attorney-mediators and judge-mediators approached mediation with the primary goals of reducing the adversarial logjam between parents, resolving all or some of the custody and visitation issues, and thereby expediting the remaining court process. This theme of “expediting the process” was dominant. As one judge-mediator noted:

Some of these cases are highly contested, deeply bitter. I was in the domestic court myself . . . so I’ve seen it all practically. And the mandatory mediation is just passing some of that work off . . .

However, counselor-mediators, while focused on resolution, also sought to provide parents with interpersonal and relational skills that contributed both immediate and longer-term impacts. Their goals seemed to be both achieving an outcome and helping parents understand how child-oriented decisions could be achieved between parties with a history of adversarial encounters. The significance of these dual outcomes was emphasized by all counselor-mediators. Counselor-mediators expressed that successful mediators should facilitate helping parents “to do the interpersonal work” in order to get “the resolution done.” However, counselor-mediators were keenly aware of the fine line and accompanying risk between emphasizing skill development and potentially straying off-task.

Attorneys seem to be trained in the adversarial system . . . They bring that more directive, leverage-seeking, you’d-better-do-this-or-this-will-happen kind of style to mediation . . . It might force an outcome, an agreement even, but none of the qualitative benefits of mediation really occur . . . Counselors struggle in that . . . we want to help people . . . empathize with people . . . care about their feelings . . . We can get lost or involved in the emotional aspects and not stay focused on the task aspects of mediation.

With these initial thoughts in mind, we will explore the perceived goals, or categories, of mediation outcomes that were revealed from our study.
A. Categories of Mediation Outcomes

“I’m convinced that the court system doesn’t work very well with people who are in the process of divorcing, especially when there are minor children.” (Attorney-mediator)

To a large extent, the mediators we studied shared the sentiments noted above. Fundamentally, the purpose of mediation is for the parental parties to reach a resolution rather than accept a court-imposed decision.54 Within this broad purpose, our analysis revealed five deeper mediation impact categories. Those impact categories include: the immediate court impact of streamlining or expediting court time; the extended court impact that may save court time in the future; the impact on the child; the impact on the parents; and finally, a joint parenting assumption that impacts any resolution reached. Each impact category will be discussed, and the relative focus of each mediator group will be noted where relevant.

1. Immediate Court Impact – Streamlining or Expediting Use of Court Time

Successful resolution through mediation serves both an immediate and an extended impact for the courts. Initially, we will examine the immediate court impact.

First, successful or partially successful mediation streamlines or “expedites” court time.55 Mediation is a commodity that is increasingly important for all court systems in order to preserve judicial resources, given the increasing demands on our judicial system.56 Participants acknowledged that contested custody cases often develop “a life of their own,” extending for weeks or months. Further, because such cases are usually handled in isolated segments of time with lengthy gaps between sessions, the flow and efficiency of these cases is problematic. One

55 Thomas Vu, Note, Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution with Their Clients, 47 FAM. CT. REV. 586, 589 (2009).
56 Ben Barlow, Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion, 52 CLEV. ST. L. REV. 499, 509 (2005). “The United States has one of the highest divorce rates in the world and . . . this rate has continuously grown over the past 140 years.” Id. (internal citation omitted). “The United States Census Bureau reports that the marriage and divorce statistics forecast that, in the future, ‘the percentage of first marriages ending in divorce may be as high as 50 percent[, which] is up from an estimate of one-third of marriages made by demographers in 1976.’” Id. (citing ROSE KREIDER & JASON FIELDS, UNITED STATES CENSUS BUREAU, ECON. & STATISTICS ADMIN., NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 3, 19, available at http://www.census.gov/prod/2002pubs/p70-80.pdf).
attorney-mediator captured this argument by commenting, “I’ve seen a lot of cases where a lot of time and a lot of court resources and a lot of heartache have been solved by a good mediator getting in and helping people reach agreements.”

Some mediators noted that the mere presence of mandated mediation may streamline the process by incentivizing the parties toward more immediate action. For example, one attorney-mediator took a very practical, utilitarian line of reasoning:

People realize, ‘Oh my gosh, here’s somebody else we have to pay, and here’s more time we have to take off. And maybe we ought to rethink this thing.’ As a result, we see a lot of cases where the parties end up with an agreement on custody and visitation even before they go to the mediator. But I think three years ago, when they wouldn’t have had to go through mediation, they’d just say, ‘Well, we’re going to ride this horse all the way through the system.’

A number of reasons for this “streamlining argument” were noted. For example, mediation may “weed out those cases that need to be tried so they can be tried faster.” Further, parental engagement with an impartial negotiator may facilitate a more open and frank discussion of issues than would occur in other settings, particularly the adversarial courtroom setting:

Cases that do go to trial are tried more efficiently because the issues have been narrowed and to certain extent because the parties have had a chance to blow off steam at each other. And that’s a valuable thing. They don’t do that necessarily when they are sitting with their attorney. There’s a certain magic about being face-to-face in a room with a stranger that allows them to say what’s on their mind. (Judge-mediator)

Second, mediated or partially mediated resolutions allow those issues that do require court determinations to be achieved with greater efficiency than would be present without the use of mediation. In part, this perceived outcome arises from success begetting further success. Having achieved at least some degree of agreement, parents may be predisposed to anticipate and expect further agreement. Third, the mediation process was perceived by many mediators as one that reduced the level of acrimony that is experienced in court. It was noted that this may arise from a sort of “emotional purging” that can occur during mediation. It may also arise if parents learn interpersonal resolution skills that broaden their capacity to address confrontational and problematic issues. Reduced acrimony may thus be a product of the emotional release and grounding that can occur during the mediation process.
2. Extended Court Impact

Respondents indicated that mediation could have longer-term, or extended court impact. Here, a number of mediators argued that well-handled mediation processes could foster the attitude, perspective, and skill base to enhance parents’ capacity to resolve future differences on their own, rather than returning to court for an imposed determination. Admittedly, some respondents argued that such hopes were heroic at best and naïve at worst. However, counselor-mediators generally heralded this extended impact argument. Of course, this outcome is predicated on the assumption that improving attitudes and skills are important goals in addition to just reaching closure on the issues. Considerable disagreement revolved around whether this was even a reasonable and appropriate goal of mediation. We cannot, from our data, attribute this preference to any single group. It appears quite idiosyncratic and arises from each mediator’s unique set of professional and life experiences.

3. Child Impact

In its most optimistic form, mediation exists because it has a better, or more positive, impact on the children than what would result if the court process progressed without the intervening step of mediation. Nearly all mediators in our study agreed that the court system was “no place” for children. One attorney-mediator noted that “the court system is not good for divorcing couples and kids.” Therefore, to the extent that mediation led to a reduction of court time, the impact of mediation on the children was viewed favorably. Further, most mediators noted that mediation held the potential of yielding better decisions (than the court process) that could result in immediate and long-term benefit for the children.

In addition, a number of respondents believed that if parents could place the child’s interest as their sole and paramount concern, parents could abandon or mitigate their adversarial stances in at least custody and visitation matters. Respondents felt that this approach allows the parents to jointly reach better overall decisions for their children than those that would be court-imposed. One judge-mediator emphasized this stance at the outset:

I don’t want [the parents] to think about custody and visitation. I think custody is a fighting word. I think visitation is something you do with people in jail or at funeral homes. I talk instead about parenting rights and obligations and parenting time. How can we divide that in the best interests of the children?

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4. Parental Impact

Three themes emerged under the parental impact category. Although interrelated, each will be discussed individually.

An initial outcome could be termed the “parental resource argument.” Through mediation, both time and money (including lower fees to attorneys) may be saved. The impact here should not be minimized, as this practical outcome can push parties toward resolution. In short, the parties know that if mediation is unsuccessful, they must return to court for what can be an expensive and painful process.

There’s probably nothing like a contested custody case to stir up the kinds of feelings that may never be assuaged. It’s just a dreadful kind of thing to have to go through. So, I think that mandatory mediation . . . does focus the parties’ attention. . . . It forces them really to understand . . . ‘The judge has told us he’s gonna in effect keep our feet to the fire.’ So I think the combination of legalism and psychology and time and energy and money [make it work].

Emphasizing that money and time expenditures can be reduced through the use of mediation rather than the court, one mediator-attorney described his explanation to contentious parents:

The chances that they are going to get along better down the road and do what they need to do for the kids through difficult times isn’t that great. This is your opportunity to try to work things out . . . You don’t have to like each other, but . . . you’re going to be doing this forever. And if you are fighting tooth and nail now, you’re spending thousands of dollars a piece on attorneys, and you have to call in all kinds of witnesses to talk about what a horrible parent . . . the other person is or whatever.

A number of mediators suggested that one of the key effects of mediation was a contribution to, and enhancement of, parental empowerment. In short, when parents make decisions rather than abide by court imposed decisions, they feel better about the overall process and gain initiative to pursue further resolution on matters beyond those of custody and visitation. Here, mediators suggested that parental clients were generally more pleased with the mediation solution, largely due to the integral and involved role they played in the process. A counselor-mediator noted that the “parties feel good about talking it through.” Mediators stated that courts, by nature, create an adversarial condition, while mediation encourages the parties to explore resolution.

A related goal of mediation is simply to enhance parental interaction in a focused problem-solving setting.\textsuperscript{58} The impact here is drawn from a psychological

\textsuperscript{58} Vu, \textit{supra} note 55, at 589.
base, assuming that as parties increase activities and interactions, recognition of shared sentiments will likely emerge. This line of thinking was noted by two attorney-mediators who suggested:

And then you’ve got [parents] talking. You’re seeing how they’re talking to each other, how they’re listening to each other, how much do they respect the other person’s role in the child’s life. And then you can go back to the custody issue and see if you can make progress there. . . .

... I think generally when you get people talking, the process kind of takes care of itself, especially when they come back over a series of weeks. They consider it and look at the big picture.

In part, this arises from the mediation setting, which is contrasted with the uncomfortable, adversarial, and unfamiliar court setting. Mediation was described as a controlled setting where parents were made to feel safe. Although mediators utilized differing boundaries and ground rules, all mediators reported specific procedures to assure parental safety, freedom to openly express their needs, and checks against dominating or intimidating behaviors from either parent.

Importantly, respondents noted that parents could gain or develop enhanced resolution and parenting skills through the mediation encounters. Clearly, counselor-mediators felt more strongly about this role than did attorney-mediators or judge-mediators. One counselor-mediator expressed it carefully:

You’re bringing in people who used to love each other and who now do not like each other . . . . If we can teach them new skills to get along with this person who is going to be part of their life forever because they have children, then to me, it’s (mediation) a wonderful service.

The divorce may have a history of people being unable to communicate . . . . I can see people who haven’t literally talked to each other about their children for weeks or months. I think one of the biggest benefits . . . is helping people to have some insights into what needs to happen for them to communicate about some of these issues and cut away some of that very important emotional involvement so they can start to address the practical and factual issues . . . . (Attorney-mediator)

In addition, one counselor-mediator commented that one of the goals of mediation should be to “help people live better lives.” Another counselor-mediator expanded on this perspective:

The court, by itself, isn’t going to make conflict go away – even in making decisions. It won’t do it. The attorneys, in adversarial situations, certainly won’t. Mediation will help put people on the right step if it’s
done well. It empowers them to really learn how to talk and solve problems.

While commendable, this goal is not without controversy. Some mediators argued that such lofty hopes exceeded the intent and logical perspective of mediation. For example, most counselor-mediators recognized that establishing a productive method of dealing with differences and developing personal conflict skills demanded that more time be committed to the mediation process. In fact, the majority of counselor-mediators were comfortable taking extra time or extra sessions than those specifically mandated. One counselor-mediator noted that the first mediation session usually took about two hours and the desired outcome was to secure a parenting agreement. This mediator felt strongly that “knocking out the parenting agreement” during the first session was the “hook” to get the parents to come back for subsequent sessions and devote the time and energy for further progress. This mediator even noted that “if you can’t get that done (the parenting agreement), . . . I don’t think [the parents] see a reason to come back.”

Counselor-mediators recognized that a fine line exists here—one that may be particularly problematic for those with counseling backgrounds. Without question, mediators must remain focused on the specific custody and visitation issues at hand, thus avoiding tendencies to delve into deeper counseling issues. One counseling-mediator expressed the approach and the challenge succinctly:

I tell them, I have one goal, and my goal is to finish this co-parenting plan and statement and get you a Memorandum of Understanding so that you have more control over your family than the courts do. Is that what you want? ‘Oh, yea, that’s what I want.’ Good, then let’s get back to business. ‘But, I hate him.’ Well, I’m sure you both hate each other, but we have this issue that we need to get done. So let’s get back to business.

The sensitivities noted above are certainly not the exclusive purview of counselor-mediators. A number of the attorney-mediators noted similar concerns. However, counselor-mediators more commonly emphasized the importance of skill development.

Most attorney-mediators and judge-mediators emphasized an approach to mediation that focused on the primacy of securing a solution. Other behavioral effects could occur, but generally, they were viewed as residual effects to the dominate goal of “getting it done.” Recall that these mediators, drawing from their experience base, often saw the key contribution of mediation as streamlining the use of court time and resources.

On the other hand, counselor-mediators emphasized an emotive-skill-resolution approach to mediation. Here the emotive component, the mediator begins the mediation by listening to and acknowledging the parents’ stories. This approach is based on a fundamental belief that people have to believe that their unique stories are heard and that their feelings are acknowledged before
meaningful progress can be made. Certainly, the nature of this activity varies, as the depth of animosity covers a broad range. The distinction between mediation and counseling is that these feelings and the complexity of issues driving them are not addressed in mediation. Mediation does not have the luxury to talk about the past.

Next in the skill phase, parents are taught the fundamental, or basic, skills of how to relate to one another. Essentially, the mediator helps parents see how they can move from vested self-interest to child-centered compromise. Through this process, counselor-mediators felt that a resolution could be structured and secured. The emphasis on a jointly-discussed resolution over a “get-it-done” solution was evident. Here is the way one counselor-mediator expressed the model:

You have to acknowledge people’s feelings. They have to be heard. Then, you have to say, ‘This is extremely difficult. I’m sorry that you all are going through this situation. What can we do to get to the point where we can move forward?’ Then . . . give them the resources, and stay focused on your path.

Again, we must emphasize that while all counselor-mediators in our study adhered to this emotive-skill-resolution approach, select attorney-mediators and judge-mediators also employed behaviors consistent with the parameters of this approach. For example, one attorney-mediator noted that “courts deal with facts, but mediation is better with emotions and continuing relationships.”

Nearly all mediators indicated that a fine, and often impenetrable, line had to be crossed before skill enhancement had any or much chance of success. Namely, parents had to be able to progress beyond raw emotion and focus on interactive and negotiating skills. Here, the mediator’s capacity to help the parental parties listen, hear, and understand were stressed over and over again. Most mediators assumed that such an approach established ground for more fruitful exchanges. An attorney-mediator expressed this view:

I might respect their privacy and say okay well you know what he’s talking about . . . We don’t have to discuss it, but does it help you make your decision . . . in terms of what to do with the visitation?

A final parental advantage of mediation is that parents can learn skills in mediation that help them deal more effectively with issues that may arise down the road.

I think I do a better job of reducing the conflict and emotional baggage so that not only the mediation session but to some limited extent later they can use those same kind of skills. (Attorney-mediator)
5. A Joint Parenting Assumption

A number of mediators possessed a strong bias toward joint parenting. These individuals felt, in general, that such arrangements were more favorable to the interests of the involved children. One counselor-mediator expressed this argument quite strongly:

Mediation in some ways presupposes the better outcome for kids [is] to have parents in their lives and have joint custody, which goes against the old school of law which says . . . unfortunately, that moms are the better parents and should have primary custody. Dads – they provide – so if they see the kids every other weekend, that’s good enough.

B. Summary of Impacts

Five sets of conclusions and related impacts are derived from this study. In this section, we will highlight each conclusion and address its significance for the mediation process.

First, all participating mediators expressed positive impressions of the mediation process, and viewed mediation as a useful adjunct to the court’s processes and procedures. As we noted earlier, in many cases, mediation helped reduce court resources by securing agreements on custody and visitation matters and decreasing time spent in court. However, even when mediation produced no settlement (or partial or limited settlement), participants recognized that mediation often helped parents express emotions, thereby reducing some degree of subsequent tension. Further, the mediation process helped the parties to begin more productive communications about child-focused issues, thereby building a more positive basis for future interactions. Accordingly, residual issues and subsequent problems may more likely be resolved without court involvement in the future. Although we have no definitive measures here, mediator impressions were strikingly consistent.

This line of reasoning leads to a second conclusion regarding how we determine or “measure” the success of mediation. Here, we recognize that measuring the success of mediation must be a multi-faceted process. In an ideal sense, mediation is clearly successful when a full agreement on custody and visitation is secured, signed, and directed to the court. However, a partial agreement also represents a degree of success, and all mediators in our study valued the contribution of such agreements. In many cases, the tough work necessary to secure a partial agreement was viewed by the mediators with a sense of accomplishment.

Furthermore, the participating mediators noted that even when items of formal agreement could not be secured, some level of success was probably attained. Hopefully, the parental parties learned interactive communication skills that would enable them to handle future problems with greater effectiveness. The mediators,
quite realistically, noted that in some cases emotions were just “too raw” and hurts “too deep” to achieve any level of agreement. However, the mediation process provided an important forum for needed interaction.

This leads to a third conclusion. Part of the value of mediation arises from the mediation format and setting that is quite distinct from that experienced in court. Not surprisingly, parents often feel unsure and intimidated by the unfamiliar court setting. Consequently, they depend on their attorneys and engage in the court process with an “assumption of representation.” In contrast, our mediator respondents indicated that mediation is built on an “assumption of participation,” wherein parents are provided an opportunity to be actively involved in decisions.

The participative imperative arises from a series of seemingly small yet critical decisions that are made by the mediator. For example, most mediators extend their schedules to provide parents considerable flexibility of meeting times. These schedules may include evenings and weekends. Further, as our mediator participants noted, parental participation requires a comfortable and safe setting for the parents. A sense of parental control and freedom must be established, and these conditions generally emanate from the mediation setting and the basic ground rules that are established by the mediator. Importantly, mediators understood the need to address parental grieving, regardless of its stage of development. With an eye focused on securing agreement, mediators still accepted withdrawal, denial, emotional release, and angry retorts from parents as parts of the mediation process. In fact, they recognized that such responses were often necessary precursors to subsequent agreement. Although methods varied, each mediator established mechanisms to enhance the foundations needed for maximum parental participation.

The conclusions expressed above lead to a fourth conclusion: successful mediators must practice a “melding of skills.” Here, the distinctions between attorney (judge)-mediators and counselor-mediators were most apparent. As noted in our Results section above, attorney-mediators and judge-mediators, through training and experience, focused on a “solutions approach” to mediation. Counselor-mediators, drawing from their background, emphasized an “emotive-skill-resolution approach” to their mediations. Successful mediators must understand the demands of each unique situation, recognize the needs of the parents, and assess the emotional state of events in order to select and practice a “balance of skills” that fits the situation. In essence, the mediator must be sure that his or her behavioral approach is directed by the situation and not by personal comfort and preference.

The skill of blending skills and behaving “out of preference” can be achieved. However, sensitivity and practice are required. These needs underscore the

importance of mediation training, and they lead us to conclude that additional, regular training and refresher programs throughout the year should be required. Further, the importance of all mediators participating in mediation training is critical.

There is a final point on the fourth conclusion. We have uncovered a philosophical distinction among mediators regarding their desire for solutions versus resolutions. Solutions are decision outcomes, while resolutions imply a “meeting of the minds,” an open, freely discussed, and negotiated agreement. We believe that both perspectives are important, and the proper blend is situational.

Our fifth conclusion deals with the practical question of mediator selection. This study revealed that attorneys preferred to use attorney-mediators and judge-mediators over counselor-mediators. The reasoning was straightforward. The attorneys believe that understanding the court process, and sharing with parents the likely impact of an unsuccessful mediation, will provide attorney-mediators and judge-mediators with advantages that were not possible with counselor-mediators. Further, attorneys noted that they felt comfortable knowing how attorney-mediators and judge-mediators were likely to think and process decisions, and accordingly, felt that a bias toward these mediators was reasonable for their clients’ best interests. Interestingly, the impact of this conclusion runs counter to that of conclusion four. In short, it appears that attorney preferences trumped parental needs when mediator selection was addressed.

VII. CONCLUSION

In summary, all mediators conceded that child, court, and parental impacts are important considerations when examining the purpose and outcomes of mediation. However, the emphasis on this triad of interests varied considerably among the mediators we interviewed. The relative weight given to the interests of the child, parent, or the court varies depending on the mediator’s underlying theoretical approach to mediation. For example, one might argue, convincingly, that the interest regarding the impact on the judicial system should predominate, and any other effects (on the child or parent) should be viewed simply as residual. On the other hand, others may argue that child, parental, and court interests must work in concert. The greatest impact and promise of mediation comes when all elements of the triad can gain some level of recognition.

60 Solutions to child custody and visitation issues can include sole custody by one parent with visitation by the other or joint custody. Many variations regarding the days and times of visitation, holiday and vacation schedules, consultations required of each parent, and religious education are often part of such solutions. Among these many possible solutions, a resolution occurs when the parties work through their conflict and arrive at the solution that both can accept. Mediation is often praised as the best method of achieving resolution. See Robert D. Taichert, Mediation Is the Best Means of Dispute Resolution, 76 CPA J. 64 (2006).
NOTE

PROSECUTING WOMEN FOR PARTICIPATING IN ILLEGAL ABORTIONS: UNDERMINING GENDER EQUALITY AND THE EFFECTIVENESS OF STATE POLICE POWER

Staci Visser*

INTRODUCTION

In May 2009, a seventeen year-old girl in southern Utah made a desperate attempt to prevent her boyfriend from leaving her by paying $150 for a twenty-one year-old male stranger to “terminate” her seven month-old fetus.1 The stranger, Aaron Harrison, took the teenager to his home where she instructed him to make the beating appear as if she had been randomly assaulted.2 According to the girl, Harrison punched her in the stomach five times, slapped her face, and bit her neck as she lay on his bed in the dark.3 The brutal abortion attempt failed, and Harrison was charged with and pled guilty to attempted murder.4 Despite the plea, a Utah judge chose to sentence Harrison to up to five years in prison under Utah’s anti-abortion statute, namely third-degree “attempted killing of an unborn child.”5

Initially, the seventeen year-old girl pled no contest to a charge of solicitation to commit murder and Eighth District Juvenile Court Judge, Larry Steele, placed her in secure confinement until she turned twenty-one.6 But in October 2009, Judge Steele reversed himself and released the teen after her new defense attorney argued that mothers are immune from criminal abortion liability under Utah law.7 Accordingly, Judge Steele dismissed the charges entirely in November.8 In December, the Utah State Attorney General’s Office in conjunction with local

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2 Id.

3 Id.


5 Id.

6 Id.


8 Id.
prosecutors appealed this decision to the Utah Court of Appeals where it is currently awaiting review. ⁹

Widely publicized, the teen’s self-abortion attempt and subsequent exoneration evoked a strong response from Utah Representative Carl Wimmer (“Rep. Wimmer”) who introduced House Bill 12 (“H.B. 12”) and its predecessor House Bill 462 (“H.B. 462”), proposing homicide prosecution of pregnant women who participate in illegal abortions. ¹⁰ The much criticized original bill¹¹ included liability for a woman’s criminally negligent or reckless act inducing miscarriage, but ultimately this language was removed. The subsequent bill limited criminal liability to intentional and knowing acts.¹² This latter version was signed by Governor Gary Herbert in March 2010.¹³ While two other states have similar statutes that criminalize self-abortion,¹⁴ these laws were enacted prior to Roe v. Wade when the Supreme Court recognized the right to abortion.¹⁵ The Utah bill breathed life into a nationwide controversy regarding immunity for women in abortion prosecutions and whether disregarding this immunity is the appropriate social response to self-abortion.¹⁶

The following Note outlines the legal and social history of women’s common law immunity leading up to the passage of Utah’s statute in Part I. Part II analyzes the legislative history of the Utah self-abortion provision prior to its passage as H.B. 462. Part III examines the relationship between state police power and the movement to create gender equality under the law, specifically under the Utah criminal laws involving rape and domestic violence. In Part IV, I posit that the inconsistency of the self-abortion prosecution law with other Utah provisions undermines gender equality and the efficacy of Utah’s police power.

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¹⁶ See, e.g., Johnson, supra note 14.
I. EVOLUTION OF WOMEN’S ILLEGAL ABORTION IMMUNITY
IN THE UNITED STATES

While abortion statutes have existed since the early nineteenth century, fetal
homicide statutes are largely a development of the twentieth century. This
development parallels advances in scientific and medical research on fetal
maturation. In the sixteenth and seventeenth centuries, legal punishment for death
of an unborn child was effectively nonexistent due to the common law “born-
alive” standard.17 Later, into the nineteenth century, liability was determined by the
common law concept of “quickening.”18 Overall, fetal homicide liability has
evolved from no liability, to near nationwide third-party liability, and finally to the
recent efforts to impose liability on pregnant women.

A. Third Party Liability for Fetal Homicide

Under the common law “born-alive” standard, a fetus that was not born living
could not be “killed” in a legal sense, thereby obviating almost all feticide
liability.19 In the sixteenth and seventeenth centuries, the prevalence of pregnancy
complications and miscarriages made it necessary to ascertain a child’s viability
prior to imposing liability.20 The practical effect of the “born-alive” standard was
that only in the very rare circumstance that an injured fetus survived birth and died
shortly after could a party be punished.21 While clearly underinclusive and archaic,
the “born-alive” standard has not wholly disappeared from American jurisprudence
and is still cited as an early common law definition of “human being” in the
context of abortion debates.22

Significant in the path towards feticide liability, the United States issued
abortion code revisions in the 1820s and 1840s that imposed punishment for
abortions that occurred “post-quickening.”23 Legally, quickening referred to “the
moment when the pregnant woman first experiences perceptible fetal movement,
occurring approximately sixteen to eighteen weeks into gestation.”24 These code
revisions are evidence of the social and legal shift in focus from the rights of the
mother to the rights of the child that continue to this day. In the mid-1800s, at least

17 Douglas S. Curran, Note, Abandonment and Reconciliation: Addressing Political
and Common Law Objections to Fetal Homicide Laws, 58 DUKE L. J. 1107, 1112–14
(2009).
18 Ashley Gorski, Note, The Author of Her Trouble: Abortion in Nineteenth- and
Early Twentieth-Century Judicial Discourses, 32 HARV. J. L. & GENDER 431, 433–34
(2009).
19 See Curran, supra note 17, at 1112.
20 Id. at 1113–14.
21 Id. at 1115.
22 Id. at 1131–32.
23 Gorski, supra note 18, at 434.
24 Id. at 433–34.
six states enacted statutes declaring feticide to be a crime punishable as manslaughter.\textsuperscript{25} Despite this shift, liability for the death of an unborn child was limited to those that could be reached under anti-abortion statutes, such as those performing abortions or the woman’s former sexual partners.\textsuperscript{26}

Interestingly, the anti-abortion prosecution limitation accompanied the “born alive” standard well into the twentieth century. A good illustration of this is the California Supreme Court’s infamous decision in \textit{Keeler v. Superior Court}.\textsuperscript{27} Mrs. Keeler was approximately seven months pregnant when she was stopped on a mountain road by her ex-husband.\textsuperscript{28} Her ex-husband, upset by Mrs. Keeler’s carrying another man’s child, shoved his knee into her abdomen, crushing the unborn child’s skull.\textsuperscript{29} The ex-husband was then charged with murder.\textsuperscript{30} On appeal, the court interpreted the meaning of “human being” under California’s murder statute, traced the origins of the statute back to 1850, and examined the legislative intent in enacting it.\textsuperscript{31} Finding the “born alive” standard to be the pervasive understanding at the time of statutory enactment, the court ruled that an unborn child was not included in the definition of “human being,” regardless of the stage of viability.\textsuperscript{32} The \textit{Keeler} decision prompted swift action to amend the California homicide statute to include murder of “a human being, or a fetus, with malice aforethought,”\textsuperscript{33} thus making third parties liable for the death of an unborn child.

Hesitation in holding parties, specifically third parties, accountable for feticide has largely been due to conflict over the legal definition of a human being. At the heart of the resistance to feticide laws is the perception that extending the definition of human being to include unborn children restricts a pregnant woman’s personal autonomy.\textsuperscript{34} Realistically, it has taken tragedies such as the facts in the \textit{Keeler} case to motivate legislators to overcome the hesitancy and codify third party feticide liability.\textsuperscript{35} As of 2010, at least thirty-eight states have enacted third party feticide legislation.\textsuperscript{36} Given that public response has been a significant factor in holding third parties accountable for feticide, the reaction to the recent Utah self-abortion incident seems almost appropriate.

\begin{itemize}
\item \textsuperscript{25} Keeler v. Superior Court, 470 P.2d 617, 621–22 (Cal. 1970) (en banc).
\item \textsuperscript{26} See Gorski, supra note 18, at 434.
\item \textsuperscript{27} \textit{Keeler}, 470 P.2d at 618.
\item \textsuperscript{28} \textit{Id.} at 618.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 619.
\item \textsuperscript{31} \textit{Id.} at 628.
\item \textsuperscript{32} \textit{Id.} at 629.
\item \textsuperscript{33} \textit{CAL. PENAL CODE} § 187 historical and statutory notes (emphasis added).
\item \textsuperscript{34} See id.
\item \textsuperscript{36} John Leland, \textit{Abortion Foes Advance Cause at State Level}, N.Y. TIMES, June 2, 2010, at A18.
\end{itemize}
B. Immunity Cures Challenges Faced by Prosecutors in Prosecuting Abortions

Understanding the development of third party feticide liability begs the question of how women procuring and submitting to illegal abortions have escaped liability. While concerns over a woman’s autonomy dominate the current discussion of abortion, whether legal or illegal, such concerns were practically nonexistent in the nineteenth century when the concept of feticide began to emerge. Ironically, at a time when women were still considered a legal entity only by and through their husbands, it seems counterintuitive that women would be entitled immunity from illegal abortion prosecution.37

While some scholars argue that paternalism regarding women in the eighteenth and nineteenth centuries is the primary root of this immunity, the early procedural practicalities of prosecuting abortions were a contributing factor.38 In order to convict an abortionist, it was almost always necessary for prosecutors to present the testimony of the woman.39 In labeling the participating woman as an accomplice to the crime, the prosecution would have been required to adduce corroborating testimony to convict the defendant.40 By the very nature of performing abortions, particularly illegal ones, the availability of other witnesses would have been unusual, thereby making prosecution under abortion statutes effectively impossible. To avoid this obstacle, courts defined the female undergoing illegal abortion as a victim or simply declared that there was no accomplice.41

An early example from 1845 of the judiciary’s use of the common law immunity for women is found in Commonwealth v. Parker.42 In Parker, the Supreme Judicial Court of Massachusetts found that “the use of violence upon a woman” to induce miscarriage carried with it the same “imputation of malice” regardless of whether or not the pregnant woman consented.43 In other words, the court found that a woman’s involvement in her own abortion was of no consequence in determining the liability of the other actors. This finding suggests

37 See, e.g., Lynne M. Kohm, Sex Selection Abortion and the Boomerang Effect of a Woman’s Right to Choose: A Paradox of the Skeptics, 4 WM. & MARY J. WOMEN & L. 91, 122–25 (1997) (“[T]he genders are unequal in their power over their own bodies, and more importantly, over their own reproduction . . . [a]bortion coerces women to handle crises that they did not create alone. Yet the men, who are at least equally responsible for the crisis, are relieved of any concern . . . by a woman’s choice of abortion.” (internal citation omitted)).
38 See Gorski, supra note 18, at 438; see also 34 A.L.R.3d 858 (originally published in 1970) (woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony).
39 Gorski, supra note 18, at 439.
40 Id. at 443–44.
41 Id. at 444.
43 Id. at 265.
that the court perceived the woman as less of an active participant and more as a victim.

This immunity was further solidified in cases such as State v. Smith in 1896.\textsuperscript{44} The Smith court found that Iowa’s criminal abortion statute had no provision for punishing a pregnant woman who underwent an abortion, and therefore the woman could not be an accomplice.\textsuperscript{45} Some sixty years later, the Supreme Court of Delaware, applying the same rationale, came to the same conclusion that women cannot be held liable as accomplices to their own abortions.\textsuperscript{46} As discussed in the proceeding sub-part, this common law immunity for women in illegal abortion liability has persisted to present day.

C. Prosecutorial Attempts to Circumvent Immunity

For the past century, prosecutors took advantage of women’s common law immunity in abortion prosecution to pursue charges against third parties utilizing the woman’s testimony as a “victim.” At the same time, prosecutors attempted to circumvent this immunity by prosecuting women under other statutory provisions such as child abuse statutes. Though circumvention efforts were and are largely unsuccessful, a brief discussion of prominent and recent decisions in this area enhances our understanding of the origins of Utah’s H.B. 462.

Many of the prosecutorial efforts aimed at circumventing immunity involve cases of alleged reckless or criminal acts of the mother during pregnancy, resulting in damage to the fetus. Illustrative of these efforts are cases where prosecutors charge women under child abuse and/or endangerment statutes for illegal drug use during pregnancy.\textsuperscript{47} This circumvention effort was addressed by the Florida Supreme Court in Johnson v. State.\textsuperscript{48} In Johnson, the court refused to hold a mother liable for passing cocaine via the umbilical cord to her fetus, under a Florida statute criminalizing adults giving controlled substances to minors.\textsuperscript{49} The court examined the legislative intent behind the statute and found that Florida legislators had expressly considered and rejected liability for mothers under the statute.\textsuperscript{50} Perhaps influenced by the pervasive perception that pregnant women are more of a victim than a perpetrator, the court favored rehabilitation over punishment for pregnant substance abusers.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{44} State v. Smith, 68 N.W. 428, 428 (Iowa 1896).
\item \textsuperscript{45} Id. at 430–31.
\item \textsuperscript{46} See Zutz v. State, 160 A.2d 727, 729–30 (Del. 1960).
\item \textsuperscript{48} Johnson v. State, 602 So.2d 1288, 1297 (Fla. 1992).
\item \textsuperscript{49} Id. at 1288–89.
\item \textsuperscript{50} Id. at 1292–94.
\item \textsuperscript{51} See id. at 1296 (citing AMA Board of Trustees Report, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, 264(20) JAMA 2663, 2667–68 (Nov. 1990)).
\end{itemize}
Efforts to prosecute pregnant women for causing harm to their fetus is not limited to circumvention, rather, it is becoming increasingly direct. Perhaps this is due to the continued frequency of women who attempt to self-abort, despite the legalization of pre-viability abortions in Roe v. Wade and Planned Parenthood v. Casey. Due to its illegal nature and subsequent lack of reporting, statistics regarding self-abortion are difficult to obtain but some medical experts suggest that there was resurgence in self-abortion attempts as recently as the 1990s. Despite the lack of empirical data, the Utah case and statute discussed suggests that legislators and prosecutors still struggle with this pertinent issue.

An example of prosecutors’ direct attempts to confront women’s abortion immunity is found in Hillman v. State. In Hillman, the Georgia Court of Appeals interpreted a criminal abortion statute and exonerated a woman eight months pregnant who shot herself in the abdomen to kill her unborn child. The Hillman court stressed the policy ramifications for extending the abortion statute, which did not require a mental state beyond the “intent to produce a miscarriage or abortion,” to encompass pregnant women and stated:

A woman would be at risk of a criminal indictment for virtually any perceived self-destructive behavior during her pregnancy which could cause a late term miscarriage, to wit: smoking or drinking heavily, using illegal drugs or abusing legal medications; driving while under the influence of drugs or alcohol; or any other dangerous or reckless conduct. . . . [t]aken to its extreme, prohibitions during pregnancy could also include the failure to act. . . .

In a strikingly similar case, the state of Florida in 1997 attempted to convict Kawana Ashley of manslaughter and third-degree felony murder with the underlying felony of criminal abortion. In Ashley, the defendant shot herself in the third trimester of pregnancy, striking the fetus on the wrist and emergency surgery was used to remove the fetus. The premature child died fifteen days later. In responding to questions certified by the lower court, the Florida Supreme Court reaffirmed the common law immunity for women who harm their unborn
Moreover, the Ashley court found that this immunity was “grounded in the wisdom of experience.”62 These cases support the assertion that the judiciary is resistant to removing women’s common law abortion immunity, regardless of whether the woman is prosecuted under anti-abortion statutes or other criminal provisions. These cases also show that Judge Steel’s dismissal of the attempted homicide charges against the Utah teenager in 2009 was based on long-standing judicial precedent.63 In fact, the cited judicial discourse suggests that women’s abortion immunity has and will continue into the foreseeable future but for intervening legislative action.

II. Utah State Criminal Abortion and Homicide Statutes

H.B. 462 amended Utah’s criminal homicide statute to read: “[a] woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child: is caused by a criminally negligent act or reckless act of the woman; and is not caused by an intentional or knowing act of the woman.”64 This revision effectively eliminated the common law abortion immunity for women in Utah.65 Along with adding criminal homicide language, the legislature removed, “[n]otwithstanding any other provision of law, a woman who seeks to have or obtains an abortion for herself is not criminally liable.”66

The initial bill, H.B. 12, was subject to several amendments and was eventually superseded by H.B. 462 because the Utah governor rejected H.B. 12.67 Designed as a tack-on to the criminal homicide statute, the bill presented to the House Health & Human Services Committee included liability for intentional, knowing, reckless or criminally negligent acts of a mother, outside of a legal abortion procedure, that resulted in the death of her fetus.68 Recognizing the spectrum of conduct that could be prosecuted, the House Committee amended H.B. 12, removing homicide liability for fetal deaths resulting from the mother’s refusal to consent to medical treatment or failure to follow medical advice.69 Rep. Wimmer acknowledged in committee that the bill could encompass a large number of miscarriages, regardless of the medical consent amendment.70

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61 Id.
62 Id. at 341 (quoting Basoff v. State, 119 A.2d 917, 923 (Md. 1956)).
63 See Carlisle, supra note 7.
64 H.B. 0462, 58th Leg., Gen. Sess., ll. 1–23 (Utah 2010) (amending relevant code provisions, UTAH CODE ANN. §§ 76-5-201, -202, -301, -302; 76-7-314 (West 2010)).
66 UTAH CODE ANN. § 76-7-314 (West 2010).
67 Gehrke, supra note 13.
68 House H.B. 12 Committee Hearing, supra note 65.
69 Id.
70 Id.
Before the House committee, the executive director of Planned Parenthood Action Council stated:

[W]e’re still concerned about whether or not the bill would allow a prosecutor to investigate any still birth or miscarriage for violation of the statute . . . most of the time when a woman miscarries she has no idea why, and this bill requires her to prove the sole reason it happened.71

To address these concerns prior to submission to the Utah House of Representatives, liability for “criminally negligent” acts by a mother was removed from the bill.72 Despite Rep. Wimmer removing the lowest level of criminal culpability, H.B. 12 was met with serious concerns in the full house hearing. Among the objections were: continuing concern for investigations into any miscarriage, the general lack of wisdom in “legislating to outliers,” and the state’s intrusion into the privacy of individuals.73

H.B. 12 was passed by the Utah House, 59–12, over these objections,74 but discussion in the Utah State Senate hearing brought up additional concerns.75 For example, senators ruminated on whether a pregnant woman that returned to domestic abuse could be held liable under the bill’s “reckless acts” language.76 This concern was mirrored by Governor Gary Herbert when he vetoed H.B. 12 on March 8, 2010.77 On the same day, Rep. Wimmer introduced H.B. 462, which removed the language for reckless culpability, and moved it through both houses.78 Governor Herbert signed the revised version into law, also on March 8th.79

In presenting H.B. 462, Rep. Wimmer hinted at making efforts in the future to reevaluate inclusion of the lower mental states in the legislation, and amend the statute back to include reckless acts.80 Rep. Wimmer made it clear that the success of passing the bill, and passing it quickly, was essential to his pro-life agenda.81 

71 Id. (statement by Executive Director Melissa Berg).
73 Id.
74 Id.
76 House H.B. 12 Hearing, supra note 72.
77 Id.
78 Id.
79 Id.
81 Id.
advocates throughout the nation. The letter, written by the adoptive mother of the child born after the failed Vernal abortion attempt, describes the child as “full of life and personality” and asks legislators to join in support for H.B. 12.

Rep. Wimmer’s hearing commentary demonstrates how public outrage over rare incidents can and do shape feticide laws. These comments also flag the underlying concern behind H.B. 462, that is, states struggle with effectively exercising their police power in areas of the law heavily burdened by the changing social constructs of gender. I posit that Utah has undermined its own police power by enacting the self-abortion provision, in direct contradiction to legislative efforts in the areas of rape and domestic violence.

III. UTAH CRIMINAL LAW INFLUENCED BY GENDER

While prosecution of women for self-abortion is arguably unconstitutional, it is inconsistent with efforts in other gender-related prosecutions, such as rape and domestic violence. Largely through feminist self-analysis, the influence of gender on criminal law is well researched. Gender’s influence in Utah is evident by tracing the treatment of criminal offenses with underlying gender implications in recent history. In general, Utah has followed the national trend toward greater protections and harsher punishments for offenses society perceives as gender related.

A. Recent History of Utah’s Treatment of Criminal Rape Prosecutions

The treatment of rape laws in the late nineteenth through the early twentieth century has become one of the most dismal and blatant examples of gender inequality in American history. Owing largely to the perception of women as property, rape laws required women to demonstrate utmost resistance to the rape itself and corroboration of the facts for a prosecution to be successful. Gradually, feminist-based reforms transitioned these laws away from the presumption of female sexual subservience and therefore away from the proof of resistance and

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82 Id.
83 House H.B. 12 Hearing, supra note 72.
84 Id.
85 This Note does not discuss the constitutionality of H.B. 462 under the Supreme Court’s “undue burden” analysis announced in Planned Parenthood v. Casey, 505 U.S. 833 (1992). Nor does this Note address how the “undue burden” analysis might be juxtaposed with the Supreme Court’s analysis of State laws proscribing self-harm as described in Washington v. Glucksberg, 521 U.S. 702 (1997). See Alford, supra note 52 (analyzing whether self-abortion is a fundamental right).
corroboration standards. Though these developments in the law reflected changing social norms, women were still hesitant to confront the persisting social stigmas associated with rape complaints. This stigma was and is particularly prevalent in the lack of reporting non-stranger rape.

Utah rape law has similarly evolved to reflect the changing social perception of female sexuality and autonomy by enacting harsher punishments and expanding protections for rape complainants. For example, on March 18, 1991, the Utah Legislature eliminated the spousal exception to rape prosecutions. Prior to the amendment, Utah’s rape law read in part, “[a] person commits rape when the actor has sexual intercourse with another person, not the actor’s spouse, without the victim’s consent.” The rationale for this exemption was largely to protect the privacy of marriage. The practical result of the exemption was to leave the fourteen percent of married women raped by their husbands without a legal remedy outside of divorce.

The progression of Utah’s rape reform continued in 1994 when Utah adopted Federal Rule of Evidence 412. The corresponding Utah Rule of Evidence 412 (“Rule 412”) made the victim’s sexual behavior and sexual history inadmissible in sexual misconduct proceedings. Before the adoption of Rule 412, some defenses to rape allegations focused the jury on the victim’s lifestyle and appearance in order to excuse the defendant’s behavior. As the Utah Rule Advisory Committee noted,

[[t]he Utah Supreme Court has recognized that evidence of an alleged victim’s prior sexual conduct gives rise to unique evidentiary problems . . . even where such evidence has some slight relevance, it has “an

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87 See Ronald J. Berger, Patricia Searles, & W. Lawrence Neuman, *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC’Y REV. 329 (1988) (discussing four areas of rape reform: “(1) redefinition of the offense; (2) evidentiary rules; (3) statutory age offenses; and (4) penalties.”).


91 Id. (emphasis added).

92 *Marital Rape Exemption*, supra note 88, at 1268.

93 See id.


95 UTAH R. EVID. 412(a).

unusual propensity to unfairly prejudice, inflame, or mislead the jury” and is “likely to distort the jury’s deliberative process.”

More recently, Utah continued the tradition of protecting victims and promoting gender equality by eliminating the statute of limitations for rape prosecutions. In 2008, the Utah Legislature amended the statute defining “[o]ffenses for which prosecution may be commenced at any time,” thus removing the four to eight year statute of limitations that existed for rape and several other sexual offenses. Interestingly, the sponsor of House Bill 13 (which eliminated the statute of limitations) was sponsored by Rep. Wimmer, the same legislator that sponsored the recently enacted self-abortion homicide provision.

B. Recent History of Utah’s Treatment of Domestic Violence Prosecutions

Though domestic violence, like rape, is not always perpetrated by a man against a woman, this dynamic is more prevalent than others. In response to this, the 1970s saw a national surge in the feminist movement to address the issue of domestic violence through the “battered women’s movement.” The movement sought to address domestic physical, emotional and economic abuse and focused on developing women’s autonomy.

The progression of Utah’s domestic violence law, while perhaps less progressive than Utah’s rape law, has similarly evolved to provide women more protection. In 1983, the Utah Legislature passed the “Cohabitant Abuse Procedures Act.” This chapter of the Utah Criminal Code has come to regulate reporting procedures, protection orders, and police response to victims, and the control and punishment of domestic violence offenders. In 2010, this Act was amended to add even more protections for domestic violence victims. For example, it removed the requirement of showing a possibility of future violence in order to keep the victim’s location confidential.

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97 UTAH R. EVID. 412 Advisory Committee Note (quoting State v. Dibello, 780 P.2d 1221, 1229 (Utah 1989)).
98 UTAH CODE ANN. § 76-1-301(8) (2009).
100 Id.; see also House H.B. 12 Hearing, supra note 72.
102 Margaret E. Johnson, Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law, 42 U.C. DAVIS L. REV. 1107, 1125 (2009).
103 Id. at 1125–26.
104 UTAH CODE ANN. § 77-36-1 to -10 (2010).
105 Id. §§ 77-36-1.1, -2.1, -2.5, -7.
While Utah’s domestic violence laws may need to further evolve in order to achieve gender equality goals, Utah has progressed outside the statutory codifications as well. In February 1997, Utah developed a particularized Domestic Violence Court. The ultimate concern in creating this specialized court was effectiveness. In particular, there was concern that “defendants were coming up multiple times on the same charges and simply ignoring judicial orders . . . seemingly invincible offenders [ ] reportedly felt they ran the courts[.]” Moreover, at the time, Utah’s leading cause of homicide was domestic violence, a brutal reminder of the state’s need to aggressively address the issue. In her study of the Salt Lake City Domestic Violence Court, Rekha Mirchandani, noted the progressiveness within the court itself, “[j]udges, lawyers, clerks, detectives, victims’ advocates, and others show a devotion to the battered women’s movement’s feminism . . ., their commitment to large-scale social change, and their stress on the participation of battered women.” The domestic violence court was therefore two-fold in its social progression, as an institution itself and within the institution.

IV. CONTRADICTORY TREATMENT OF GENDER-RELATED OFFENSES UNDERMINES THE STATE POLICE POWER

The advances in Utah laws and practices governing rape and domestic violence are state examples of a national trend toward creating remedies for women as the most frequent victims of gender-related offenses. These advances directly conflict with Utah’s new law holding pregnant women accountable for feticide because it attacks the relationship the state has been building with its female citizens. By taking care to protect women statutorily, judicially, and through social programs, Utah has encouraged women to not only exercise their right to seek legal redress for harms, but has also sought to aid in women’s recovery from these harms. Prosecuting women while encouraging them to seek redress is inherently suspect, particularly as self-abortion attempts may also involve domestic and/or sexual violence.

109 Id. at 393.
110 Id.
111 Id. (internal citation omitted).
112 Id. at 409.
H.B. 462 fails to locate and remedy the cause of the self-destructive behavior that would compel a woman to knowingly and intentionally harm oneself to abort a fetus. It is not in dispute that curbing self-abortion is within the legislative purview, but enacting criminal prosecution statutes ignores the opportunity the state has to address the numerous social issues intertwined in the case of the Vernal teen.

I suggest that a correct way to formulate a reaction to the incident in Vernal, if a reaction was necessary at all, was to address the socioeconomic difficulties facing women in seeking legal abortions. Instead, the Utah Legislature chose to ignore the limitations that likely played a role in the Vernal incident. Salt Lake City, the nearest metropolitan area to Vernal, Utah is approximately 175 miles away and over a three hour drive. This distance alone would be inhibitory to a Vernal teen seeking a legal abortion.

Compounding the issue, the teen had to obtain parental consent or judicial bypass of consent, make travel arrangements to comply with mandatory waiting periods, and probably obtain financial assistance. Rural minors who wish to obtain a legal abortion may find it relatively impossible to go through this process while retaining their privacy. As a Sixth Circuit judge noted, “confidentiality is a particular problem in rural communities where the minor’s actions can easily be detected by relatives and friends.” The reality is that Utah has made it insurmountably difficult for a rural teen to exercise her right to a legal abortion.

Moreover, in an effort to make women more visible in the eyes of criminal law, the self-abortion homicide statute actually fogs judicial vision by placing the life of the fetus “at any stage of development,” before the woman. H.B. 462 reverts back to the gender perceptions of the early twentieth century. Rep.

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114 State v. Ashley, 701 So.2d 338, 342 (Fla. 1997) (per curiam) (citing separation of powers issues in deciding the illegality of self-abortion attempts and declining “the State Attorney’s invitation to join in the fray”).
115 See House H.B. 12 Hearing, supra note 72 (house representative discounting the wisdom in legislating to rare occurrences).
116 Driving Directions from Vernal, UT to Salt Lake City, UT, GOOGLE MAPS, http://maps.google.com (follow “Get Directions” hyperlink; then search “A” for “Vernal, UT” and search “B” for “Salt Lake City, UT”; then follow “Get Directions” hyperlink).
118 Id. at 478.
120 Not only does Utah make it difficult for women to exercise their legal right to obtain abortions, but it actively encourages litigation challenging “the legal concept that a woman has a constitutional right to an abortion.” Utah Code Ann. § 76-7-317.1 (2009) (setting up an Abortion Litigation Account).
121 Utah Code Ann. § 76-5-201(1)(a) (West 2010) (feticide statute for third parties to which the self-abortion provision was attached). See also H.B. 462, 58th Leg., Gen. Sess. (Utah 2010).
Wimmer’s efforts are reminiscent of the Supreme Court’s decision in *Muller v. Oregon*, which held constitutional a law that limited working hours for women due to women’s unique reproductive roles.\(^{122}\) By prosecuting a woman for the death of her fetus at any stage of development, the legislature discourages the efforts in other areas of the law to encourage women to come forward to the state to help recover from gender-related crimes. For example, Utah recently removed the statute of limitations for rape prosecutions.\(^{123}\) This legislative action should encourage rape victims to come forward and exercise their right to be free from personal invasion. But, when read with the self-abortion provision, it tells victims they can rely on the state only in certain contexts or face criminal prosecution.

In addition, the legislation ignores the Supreme Court’s decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, which deal expressly with women’s autonomy and place a high value on protecting this autonomy, at least prior to fetal viability.\(^{124}\) Rather than recognizing the issue as a socioeconomic issue, the Utah Legislature chose to view the Vernal teen’s self-abortion attempt as a criminal issue. To emphasize, the Utah Legislature *did* have this choice. By choosing to formulate the issue as an abortion issue, Rep. Wimmer made his intentions clear: that he, other legislators, and Utah’s Governor are making steps to overrule *Roe* and *Planned Parenthood v. Casey*. As stated by Rep. Wimmer in response to removing “reckless” from the self-abortion legislation, “I intend to take this bill to . . . legislative council national groups and see if I can’t have this bill become a model legislation for the pro-life cause. I didn’t want controversy attached to a model piece of legislation, clearly that would hold up its ability to become such.”\(^{125}\) This legislation was advancing a personal cause, drawing on outrage garnered from a tragic incident, without due regard for the overall effect on victims of gender-related crimes.

**Conclusion**

In March 2010, the Utah Legislature enacted H.B. 462, which allows for the prosecution of women who intentionally or knowingly cause the death of their unborn child, at any stage of the child’s fetal development. The legislation sparked national debate over a woman’s liability for death of her unborn fetus and the

\(^{122}\) Muller v. Oregon, 208 U.S. 412, 421–22 (1908) (holding that physical differences between men and women justify different treatment under labor laws governing work hours).

\(^{123}\) *See supra* Part III(a); *see also* Utah Code Ann. § 76-1-301(8) (2009).

\(^{124}\) *Roe v. Wade*, 410 U.S. 113, 153 (1973) (the right of privacy “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned”).

\(^{125}\) *See House H.B. 462 Hearing, supra* note 80.
rights of pregnant women. This provision was enacted partially in response to charges being dropped against a Utah teen who attempted to self-abort by paying a stranger to beat her. Moreover, this provision was a calculated effort by a representative of the Utah Legislature to further his pro-life agenda.

Prior to passing H.B. 462, women in Utah were immune from liability for harming their unborn child, a common law tradition shared by relatively all other United States jurisdictions. Though feticide laws have come to hold third parties accountable for harm to an unborn child, liability for mothers is considered to be against “the wisdom of experience.” A mother harming her unborn child, at great cost to herself, is seen as best remedied by social and psychological means.

With the Utah teen’s brutal self-abortion attempt, the legislature had the opportunity to confront any number of issues, including the socioeconomic limitations that prevent women from obtaining legal abortions. Instead, the legislature chose to examine the incident as a criminal one. This framing directly contradicts Utah’s recent history in promoting gender equality. Utah’s rape and domestic violence reforms have shown that the state encourages victims, who are frequently women, to trust in and align themselves with the state police power. The demonstrated commitment to gender equality is undermined by H.B. 462 which effectively places the life of the unborn fetus above the interests of the pregnant woman.

Rather than use the tragic, self-destructive behavior of a pregnant teen as a platform for a pro-life agenda, the Utah Legislature should have evaluated the cause of her behavior and formulated an appropriate remedy, supposing any legislative remedy was necessary. Overall, H.B. 462 was not the appropriate remedy and shows a lack of regard for the overall effect the provision will have on the victims of gender-related crimes.

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126 State v. Ashley, 701 So.2d 338, 341 (quoting Basoff v. State, 119 A.2d 917, 923 (Md. 1956)).
INTRODUCTION

Irva Nelson’s son, Bobbie, received a call from an old friend of his mother. Bobbie, who lived in Ohio, would need to check on his mother’s deteriorating health, as Irva suffered from Alzheimer’s disease. Upon his arrival in New Mexico, Bobbie found his mother “unclothed, sleeping in an unmade bed stained with urine and fecal matter, and living in a cluttered, unkept house” where she lived with her husband, Claude. Irva weighed only sixty-nine pounds when Bobbie found her.

Irva’s friends testified at her competence hearing about Claude’s mistreatment and neglect of Irva. They had heard Claude and Irva have a “physical altercation,” and Irva admitted to them that Claude physically abused her. She was left at home alone for “long periods on a daily basis.”

Bobbie moved his mother out of Claude’s house the day after becoming her guardian. As Irva’s guardian, Bobbie sued to divorce her from Claude, seeking to prevent Claude’s waste of their marital assets without regard to Irva’s care and well-being. Bobbie alleged cruel and inhumane treatment and incompatibility as grounds for their divorce. Claude had provided no assistance toward Irva’s care since Bobbie moved her out, though he and Irva were still married.

The New Mexico court established and upheld Bobbie’s right as his mother’s guardian to file for her divorce, finding it to be in her best interests.

2 Id at 336–37.
3 Id. at 337. Claude is not Bobbie’s father. Id.
4 Id.
5 Id.
6 Id.
7 Nelson, 878 P.2d at 337.
8 Id.
9 Id.
10 Id. at 340–41 (the best interests determination was supported by circumstances involving spousal abuse and neglect, as well as evidence of her intention to divorce when previously competent).
11 Id. at 337.
only way to legally end her failed marriage was a claim made by her guardian. In a majority of states, Irva no longer had the right to sue for her own divorce, as her guardian had no power to bring that action for her.12

A growing minority of states allow a guardian to sue for divorce on behalf of a ward where not expressly barred or allowed by statute.13 If a ward is not lucky enough to live in one of those protective states, like Irva prior to her victory in the New Mexico Supreme Court, that person is helpless to change the situation if his or her competent spouse does not want a divorce. The incompetent, vulnerable spouse is trapped in an unwanted, potentially abusive, marriage.

In this Note, I propose that states dispense with the traditional majority rule. The likelihood of spousal abuse is far greater14 than the risk of divorce claims brought by delusional, but still volitionally competent, spouses. Additionally, court review of competence in divorce proceedings and in competence hearings provides multiple opportunities for the examination and protection of all parties’ interests. The bright-line bar on guardian divorce actions under the majority view denies opportunities to adjudicate and ensure equity between spouses whose relationship and power has dramatically changed.

In Section I, I briefly frame how my proposal fits within the range of options already enacted and illuminate what is possible and what is at stake. Section II explains the evolution and erosion of the majority rule ban on guardian divorce powers. Section III outlines some important distinctions about competence and the interplay of statute and constitutional concerns for divorce actions by incompetent persons. This provides the context needed to understand how the law has adapted to modern views of divorce and mental health, as detailed in Section IV. I will then illustrate the modern minority rule methods of evaluating guardian claims in Section V via Arizona’s solution, which combines the two analyses: “substituted judgment” and “best interests.”

12 David E. Rigney, Annotation, Power of an Incompetent Spouse’s Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make Compromise or Settlement in Such Suit, 32 A.L.R.5TH 673, at *3b (2008).


Admittedly, my proposition encompasses wide-ranging changes. I do not advocate expanding guardian divorce power without simultaneous review and modification of standards of proof and evidence regarding competence, which I address throughout. The effects of these intertwined factors must be considered en masse to address current deficiencies while minimizing new problems.

However, the doctrinal shift I advocate is already under way, driven by a continuing legal examination of the intersection of disparate views of competence, individual rights and responsibilities, and the appropriate roles and powers of guardians. It is also now strongly shaped by a larger national conversation about the nature, purpose, and right to marriage in its many evolving forms.

I. AN INCOMPETENT SPOUSE’S RIGHT TO DIVORCE IS PROTECTED

Wyoming and Alabama expressly protect not only a guardian’s power to sue for divorce, but also the power to marry their ward to a third party. These more unusual protection simplicitly acknowledge duties implicated by the transfer of a ward’s fundamental constitutional rights, protections, and obligations. These two states respect the delicate, highly individual nature of “incompetence” by refusing to draw a bright-line rule against legal action where facts and interests conflict uniquely among each set of parties. They provide the possibility of full protection for incompetent persons’ matrimonial right to leave or enter “the most important relation in life.”

The collision of this fundamental right with the increasingly frequent occurrence of mental illness and impaired agency that accompany our aging society demands these full efforts. Mental illness and disease do not universally

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15 Diane Snow Mills, “But I Love What’s-His-Name”: Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents, 16 J. AM. ACAD. MATRIM. L. 527, 551 (citing ALA. CODE § 26-2A-78(c)(5), and WYO. STAT. ANN. § 3-2-201(b)(vi) (amended 1998)).


17 “Between 1950 and 2006, the U.S. population roughly doubled, but the population over age sixty-five years tripled. By 2030—when all the ‘baby boomers’ will have reached age sixty-five years—the population age sixty-five to seventy-four years will have grown from six percent to ten percent of the total U.S. population. The susceptibility of elderly persons to mental problems is demonstrated by the finding that, in 2007, approximately four million persons aged sixty-five and over suffered from some type of mental disability.” Douglas Mossman & Amanda E. Shoemaker, Incompetence to Maintain a Divorce Action: When Breaking Up Is Odd to Do, 84 ST. JOHN’S L. REV. 117, 127 (2010).

18 “The denial of access to the judicial forum . . . touche[s] directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution.” Zablocki, 434 U.S. at 385 (1978) (citing United States v. Kras, 409 U.S. 434, 444 (1973)).
negate an adult’s full ability to determine the structure of their lives. Adults of wide-ranging mental capacity marry for a host of legally and morally valid reasons. Some do so out of deep monogamous love and in keeping with ancient religious traditions. Others marry to serve narrower but still crucial needs of companionship, care, and everyday survival. Undoubtedly, many people marry for all these reasons and more. In light of our evolving and hotly contested conceptions of marriage and civil unions, the law owes us nothing less than the possibility of retaining our full scope of rights as we age and adapt.

II. THE MAJORITY RULE BAN ON GUARDIAN DIVORCE POWER

A. The Evolution of the Ban

Traditionally, the legal intersection of competence and divorce was focused on competent spouses seeking to divorce incompetent spouses. Under common law, however, a spouse’s “insanity” was not a ground for divorce. States universally required that acts providing proper grounds occur before the onset of insanity. The typical rationale for this was derived from principles of equity:

To deny the law’s justice to the sane one because of the other’s insanity would be to cast in part on the former the burden which God had laid wholly on the latter. Divorce, where there is cause for it, is the plaintiff’s

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19 Nor do courts necessarily evaluate competency in toto; “[C]ourts now may make competence adjudications concerning specific incapacities—such as incompetence to make treatment decisions or to stand trial—rather than simple plenary adjudications about all legal capacities.” Mossman & Shoemaker, supra note 17, at 125.


21 Though some do not agree with this broader conception of marital purpose and rights; see, e.g., id.

22 E.g., Steed v. Steed, 181 P. 445 (Utah 1919). Most statutes and case law prior to the 1950s cordonned off marital and divorce rights in this manner and applied to persons termed “insane” or “morons,” as well as those suffering epilepsy; see, e.g., UTAH CODE ANN. § 30-1-2.1, (1963) (“Validation of marriage to a person subject to chronic epileptic fits who had not been sterilized.”). A notable exception is Massachusetts, which has protected the right of an incompetent person to sue for divorce since at least the nineteenth century; see, e.g., Garnett v. Garnett, 114 Mass. 379, 380 (1874) (citing statute allowing “a libel for divorce [to] be filed and prosecuted in behalf of an insane person”).

23 “While it is true that neither a wife nor a husband may obtain a divorce from the other on the ground of insanity, or for acts committed during such insanity . . . , it is . . . the well-settled law of this state that a divorce may be obtained for acts occurring prior to the insanity and constituting cause for divorce, and that the mere subsequent insanity of the defendant will not defeat plaintiff’s right to a divorce, if it existed when the defendant became insane.” Steed, 181 P. at 446, (internal cite omitted) (citing Huston v. Huston, 150 S.W. 386 (Ky. 1912)).
right. If the defendant were sane, he could not prevent it; he has no election. Therefore it is not otherwise when he is insane.²⁴

To circumvent that doctrinal obstacle, plaintiffs invoked spousal cruelty, the most popular claim in divorces until the mid-twentieth century.²⁵

B. The Erosion of the Ban

Judges and lawyers eventually recoiled from divorce proceedings that had become more farce than fact, with scholars fearing for the respectability of the judicial system.²⁶ This push for legal realism was also driven by a broad social destigmatization of divorce from the 1960s onward.²⁷

Reflecting, in part, the reassessment of women’s rights and roles in American society generally, the divorce rate increased sharply in the 1960s²⁸ as the power relationship within marriages changed and social taboos against divorce lessened.²⁹ Divorce statutes, case law, and court rules of procedure and evidence adapted in kind. California passed the first no-fault divorce statute in 1970, and by the mid-1980s, the majority of states had adopted no-fault statutes and/or vastly broader grounds for divorce.³⁰

American views toward mental illness, incompetence, and insanity also evolved over that period, though certainly not in lockstep with changes in divorce law. Institutionalization of the mentally ill dropped sharply from the mid-1950s to the mid-1970s, and continues to drop to the present date.³¹ That shift partially reflects advances in, and acceptance of, more widespread use of pharmacological

²⁴ Steed, 181 P. at 447.
²⁵ Mossman & Shoemaker, supra note 17, at 130.
²⁷ “During the last third of the twentieth century, divorce became more common and much more socially acceptable. Between 1960 and 1981, the U.S. divorce rate increased from 2.2 to 5.3 per 1,000 persons. Rates have decreased steadily since, and in 2006, the divorce rate was 3.6 per 1,000 persons. However, this rate is still well above the 1960 rate, and the drop in divorce rates has been accompanied by a much lower marriage rate. Thus, over the last half-century, the probability that a marriage will end in divorce has doubled.” Mossman & Shoemaker, supra note 17, at 126 (internal cites omitted).
²⁸ Between 1960 and 1981, the U.S. divorce rate increased from 2.2 to 5.3 per 1,000 persons. Id.
²⁹ Id.
³⁰ Id. at 135.
³¹ “In 1955, when the total U.S. population stood at 166 million, approximately 550,000 persons were confined in public psychiatric institutions, often termed ‘state hospitals.’ Two decades later, this number had fallen to under 200,000, and today, fewer than 50,000 persons are committed to state and county psychiatric hospitals despite a near-doubling of the U.S. population over the same period.” Id. at 123–24 (internal cites omitted).
and outpatient treatment of mentally ill and injured persons. These changes have lead to the widespread expectation that illness of nearly every sort is to be managed and lived with, rather than fundamentally derailing one’s life. These changes in medicine and expectations also helped fuel the right-to-die and health-care surrogacy movements, which in turn have led legislatures and courts to broaden the power of guardians, including the divorce action power.

III. THE MURKY LEGAL BOUNDS OF INCOMPETENCE AND DIVORCE

These vast shifts in societal expectations regarding both divorce and competence demand that the relationship between the rights of those found incompetent and the powers vested in their guardians adapt in kind. To better understand and determine the structure of those relationships, however, we must briefly review where and how the law draws the boundaries of competence.

A. Statutory Definitions of Incompetence

Thirty-six states use probate codes to define adult incompetence that justify guardianship. These definitions of incompetence frequently use subjective and undefined conditions, requiring courts to find a person unable to “properly” manage one’s self or property, or exhibit “unusually bad judgment.”

These subjective definitions encourage a very risky disconnect of the expert testimony confirming the presence of mental illness or disease from any evidence that shows actual harm caused to a potential ward by such conditions. While expert diagnoses are probative, they are insufficient to show causation or likelihood of harm. Even accurate diagnoses do not preclude a ward’s functional control or competent agency, which are often maintained by effective compensating services, skills, or medications. Statutes using these vague terms thus create significant risk of improper loss of basic rights to a guardian.

Only a handful of states have passed statutes expressly ruling out factors including “age, eccentricity, poverty, or medical diagnosis alone” as sufficient to

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32 Id.
33 Id. at 125.
34 Metzmeier, supra note 26, at 959.
35 Mills, supra note 15, at 529.
36 Id. at 530 (citing DEL. CODE ANN. § 12-3901(A)(2) (1975–1996)).
37 Id. (citing UTAH CODE ANN. § 75-1-201 (18) (1953–1997)).
38 Eleanor Crosby & Rose Nathan, Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?, 16 QUINNIPIAC PROB. L. J. 249, 270 (2003). “Diagnostic procedures and medical opinions are relevant only to the extent they highlight the proposed ward’s functional abilities or limitations. If a medical diagnosis reveals a mental or physical disability and accompanying limitations, but the proposed ward’s basic needs and safety nonetheless are provided for, the ward’s adaptive functioning should preclude the need for a guardianship.” Id. (internal citations omitted).
39 Mills, supra note 15, at 532.
find incompetence. For example, Virginia and West Virginia statutes explicitly state that evidence of poor judgment alone does not suffice. Similarly, Arkansas and Kansas specify that a person may not be declared incompetent solely for relying on prayer for healing or coping, rather than using medical treatment.

B. Constitutional Concerns Affecting Incompetence and Divorce

Of course, case-specific adjudication of incompetence is not the sole determinant of a party’s rights and obligations. Federal and state constitutions, and corresponding case law and doctrine, also shape this analysis. For example, in Wahlenmeier v. Wahlenmeier, the Texas courts recognized the guardian divorce power as a necessary safeguard of the fundamental civil rights of a ward, which are expressly protected by the Texas Mental Health Code.

Similarly, divorce is part and parcel of the right to determine marriage in all its aspects, which itself is a fundamental right protected by the United States Constitution. As such, procedural due process protections guaranteed by the Constitution are required when invoking such a right. These include “the right to a hearing, the right to legal representation, the right to participate in the hearing, the right to confront and cross-examine witnesses, and the right to an adjudication by clear and convincing evidence.” At least one state code expressly states that these rights are not abridged where a person is adjudicated incompetent.

The transition from the majority ban to the minority protection of guardian divorce power often rests on the need to conform statutes to these interwoven

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40 Id. at 530 (emphasis added) (citing WASH. REV. CODE ANN. § 11.88.010(1)(c) (West 1965–1990)).
41 Id. at 531–32.
42 Id.
43 Wahlenmeier v. Wahlenmeier, 750 S.W.2d 837,839 (Tex. App. 1988), aff’d. 762 S.W.2d 575 (Tex. 1988). The TEX. MENTAL HEALTH CODE ANN. § 5547-80(a), forming the basis of protection, reads: “ . . . every mentally ill person in this state shall have the rights, benefits, responsibilities, and privileges guaranteed by the constitution and laws of the United States and the constitution and laws of the State of Texas.” The court continued, “That provision concludes by providing that absent specific provisions of law to the contrary presented under special procedures, every person shall have, among other things, rights concerning domestic relations.” Wahlenmeier, 750 S.W.2d at 839.
44 Of course, the rights and definition of marriage are determined by the states, so long as the states do not infringe on the minimum protections accorded by the United States Constitution. This federalist marriage interplay has been in flux since Loving v. Virginia, 388 U.S. 1 (1967), which abrogated a state restriction on interracial marriage as violative of equal protection.
45 Crosby & Nathan, supra note 38, at 274 (citing Addington v. Texas, 441 U.S. 418 (1979) and Greene v. McElroy, 360 U.S. 474, 496–97 (1959)).
46 E.g., Persons alleged or determined to be incapacitated “shall not be deprived of any civil, political, personal or property rights without due process of law.” Id. at 252, (citing GA. CODE ANN. § 29-5-7(a) (2001) (later recodified as GA. CODE ANN. § 37-3-140 (2010)).
constitutional and statutory protections of right and procedure. While most courts reviewing these combined issues have adopted the minority view since 1970, such reviews depend on claims being brought. The court review process has taken forty years to play out in less than twenty states, as statutory silence and express bars against these actions create strong disincentives to litigate.

IV. EMERGING MODERN PROTECTIONS FOR GUARDIAN DIVORCE POWER

The majority of state statutory codes are silent on the right of divorce action by guardians, or by persons suffering mental impairment whose competence at the time of filing is not yet adjudicated. Currently, only eleven states have statutes expressly protecting the right of adult wards to bring divorce actions via their guardian.48

Amongst states with codes silent on this issue, at least thirteen states49 courts have disallowed any guardian’s right to sue for a ward’s divorce, with twenty-four having neither statutory protection nor relevant case law.50 Some of those states likely view this restriction as being in harmony with statutes limiting a guardian’s rights to those expressly stated within the guardianship agreement.51

Utah, for example, statutorily prefers limited guardianships,52 putatively preventing abuse of custodianship by guardians by preventing any power to act not


48 Rigney, supra note 12, at *3a and *4 (2008).


50 See Rigney, supra note 12, at *3c–d. New York and New Jersey have case authority both acknowledging and disallowing guardian divorce power.

51 See, e.g., UTAH CODE ANN. § 75-5-312(1): “A guardian of an incapacitated person has only the powers, rights, and duties respecting the ward granted in the order of appointment under Section 75-5-304.”

52 See UTAH CODE ANN. § 75-5-304(2): “Limited Guardianship Preferred: The court shall prefer a limited guardianship and may only grant a full guardianship if no other
expressly granted, including divorce actions. The burden of these restrictive limits, of course, is borne by wards needing unavailable protection from abuse and neglect.

Risk of custodial abuse can manifest where the guardian is related to his or her ward.53 A spouse, child, or other relative serving as guardian often has a vested interest in the ongoing use or ultimate dispersal of their ward’s assets.

Non-familial professionals also pose risks of guardianship abuse. Some scholars and practicing attorneys assert that these “arms-length” guardians often do not understand the values of their wards, and hence do not understand the choices the ward would have made while competent.54 There are also allegations of “frequent” antipathy to spouses (though the frequency is not concrete), creating a risk of inappropriate, or even spiteful, guardian divorce actions.55

Solutions advocated to prevent guardian abuses vary. One suggestion is to set the evidentiary standard for incompetence at the preponderance level.56 Lowering the standard of proof would place more persons within the scope of guardianship than would a clear and convincing threshold.57 Those primarily concerned with

alternative exists. If the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate.”

53 E.g., Familial guardians are favored by Utah even above a testamentary guardian chosen by the ward, including where a specific, nonfamilial guardian was chosen while still competent. See Utah Code Ann. § 75-5-311(4)(2010):

“Priorities: . . . [P]ersons . . . have priority for appointment as guardian in the following order: (a) a person who has been nominated by the incapacitated person, by any means [not written in specified form and signed], if the incapacitated person was 14 years of age or older when . . . executed and, in the opinion of the court, that person acted with sufficient mental capacity to make the nomination; (b) the spouse of the incapacitated person; (c) an adult child of the incapacitated person; (d) a parent of the incapacitated person, including a person nominated by will, written instrument, or other writing signed by a deceased parent; (e) any relative . . . with whom he has resided for more than six months prior to the filing of the petition; (f) a person nominated by the person who is caring for him or paying benefits to him. . . .”

54 Mills, supra note 15, at 555–57.
55 Id. at 555.
56 See, e.g., Mossman & Shoemaker, supra note 17, at 188 (suggesting the use of a preponderance standard in a model statute for determination of competence to maintain a divorce action).
57 Some courts “have found that the liberty interests at stake in guardianship are sufficiently similar to those in civil commitment, requiring comparable constitutional protections.” Crosby & Nathan, supra note 38, at 252, citing In re Guardianship of Reyes, 731 P.2d 130 (Ariz. Ct. App. 1986); Hedin v. Gonzales, 528 N.W.2d 567, 575 (Iowa 1995); In re Boyer, 636 P.2d 1085, 1092 (Utah 1981) (recognizing that although the deprivation of personal freedoms is greater in commitment cases and that differences exist in the extent of the curtailment of personal freedoms, the interests at stake in guardianship are not so different as to require a different standard of proof).
persons bringing inappropriate divorce actions due to mental illness short of the extent required to be found incompetent (i.e. delusional but still volitional) find a preponderance standard appropriate to address such a problem. This scenario, however, is quite rare.\(^{58}\) Placing more of these persons within the reach of guardianship, without the option of divorce brought by their guardians, would effectively strip that “preponderantly incompetent” ward’s rights, rather than transferring them to a competent guardian. The ward’s rights simply disappear.

Conversely and unsurprisingly, requiring a higher standard of proof to find incompetence lowers the number of adults declared incompetent. This might improve control of life (and litigation) decisions for those who have mental limitations but are still legally and functionally competent. By leaving more potential plaintiffs in the competent category via a clear and convincing standard of proof for incompetence, unnecessary delegation of rights to appointed, non-familial guardians is prevented, as is the “disappearance” of rights described above.\(^{59}\)

Neither of these evidentiary standards, however, would protect spouses once declared incompetent from the sorts of spousal abuse, neglect, abandonment, and “waste” of marital assets Irva Nelson suffered after the majority rule makes the right to a divorce disappear. At least 14 percent of all elder abuse comes from a spouse, making spouses the second largest category of elder abusers.\(^{60}\) While the minority rule will not guarantee protection in practice, only that further step of removing a bright-line bar to guardianship divorce will make real protection possible in all combinations of competence, incompetence, and guardianship. Moving more persons into guardianship by using a preponderance standard, without corresponding changes to guardian powers, only increases the number of vulnerable spouses locked within the marriage trap. By first removing the incompetent spouse’s right to file divorce on their own behalf, and then removing that ability from the recipient of a ward’s other rights—their guardian—spouses are left unassisted in their hostile or abusive marital relationship.

I support many changes that are commonly included in model statutes proposed to reform the determination of incompetence.\(^{61}\) However, establishing a clear and convincing standard for incompetence, rather than simple preponderance, is essential to comply with constitutional protections of substantive and procedural due process.\(^{62}\) The clear and convincing standard also favors the interest of equity

\(^{58}\) Mossman & Shoemaker, *supra* note 17, at 155. Despite a thorough search, only seven such cases were found to fit this narrow area of concern.

\(^{59}\) This includes due process rights, as discussed *supra* note 58.


\(^{61}\) Though not all such suggestions; for example, Mossman’s model statute includes provision for the arrest of a party if he or she refuses an evaluation ordered after the issue of competence is raised in a hearing (§ 3.2.3 pursuant to § 3.1), rather than simply dismissing the action (per § 3.2.2). Mossman & Shoemaker, *supra* note 17, at 189–90.

between spouses by leaving in place the power to divorce absent a clear showing of need for such an intervenor guardian.\textsuperscript{63} The full protection accorded by adopting this evidentiary standard is contingent, however, on the inclusion of express protection of guardian power to sue for a ward’s divorce, whether guardian powers are construed restrictively or liberally.\textsuperscript{64}

Reforming incompetence determination in isolation will not address the problem of “disappearing” rights. Nor would it provide a means to adjudicate the propriety of a guardian’s action for divorce on behalf of a ward. Fortunately, there is a viable system already in place that can help protect against spousal abuse, neglect, abandonment, or waste of assets; that can address concerns about the delicate balance of mental illness or disease and volitional capacity; and can also help prevent abuse by non-spousal guardians.

V. MINORITY RULE PROTECTIONS

Guardians are not simply empowered, but are \textit{required} by every state to act in the best interests of their wards. They can be required to defend their wards from civil suits, from criminal prosecution, and to enter and sever contracts and agreements on their ward’s behalf to provide for the ward’s well-being.\textsuperscript{65} States adopting the minority view, such as New Mexico in \textit{Nelson v. Nelson},\textsuperscript{66} and Arizona in \textit{Ruvalcaba v. Ruvalcaba},\textsuperscript{67} often interpret statutory powers of guardians as broadly illustrative, rather than exclusive or limiting.\textsuperscript{68} Indeed, guardian powers

\textsuperscript{63}``To provide a mentally competent spouse with [divorce] power in the absence of a corresponding power to the incompetent. . . (through a guardian) is to grant the competent spouse ‘absolute, final control over the marriage,’ leaving ‘an incompetent spouse completely at the mercy of the competent spouse. . . . Principles of equity demand equal treatment and equal access to the courts for all individuals, not just those who are sane (or who might be mentally incapacitated but simply have not been subjected to a competency hearing).” Mills, supra note 15, at 549.

\textsuperscript{64}If, for example, Mossman’s model statute was adopted with my proposed changes to burden of proof and express guardian divorce power, I would then strongly favor restrictive guardian power interpretations. See \textit{Utah Code Ann.} § 75-5-311(3), supra note 53. While I view the balance of interests as requiring the option of guardianship divorce claims, I share the more general concern about too easily stripping wards of most rights under general/liberally construed guardianships.

\textsuperscript{65}See, e.g., \textit{Va. Code Ann.} § 37.2-1026 (2010) (delineating guardian relationship to ward as fiduciary: “All actions or suits to which the incapacitated person is a party at the time . . . [or] . . . subsequently instituted shall . . . be prosecuted or defended . . . by the fiduciary. . . .”); \textit{Ariz. R. Civ. Proc.} 17(g) (2010) (a general guardian “may sue or defend on behalf of the . . . incompetent”).

\textsuperscript{66}878 P.2d 335, 341 (N.M. Ct. App.1994).


\textsuperscript{68}\textit{Nelson}, 878 P.2d at 340.
in such states form a comprehensive proxy for their ward, limited only by the mandate to place primacy on the ward’s values.\(^69\)

The Arizona court’s rule of assessing a guardian’s proxy acts in light of that comprehensive duty is a combination of the two main doctrines used by different states: “substituted judgment,” and the “best interests” of the ward. Each view, of course, has critics and supporters. Arizona’s solution provides the best balance achievable by requiring substituted judgment where ascertainable by the court, and a determination of best interests where the ward’s firm desires are not clear.\(^70\)

A. Substituted Judgment

Arizona’s substituted judgment view requires that clear and convincing evidence of a ward’s desire to divorce or remain married determine the court’s decision.\(^71\) Testimony from various parties, including the guardian, the competent spouse, other family members, and friends or other concerned third-parties may be entered.\(^72\) Allowing this testimony can be problematic, as it can require hearsay exceptions carrying attendant questions of probative value, verifiability, and vulnerability to conflicts of interest. Some critics would simply bar such testimony,\(^73\) broadly presupposing both that any probative value of such testimony is substantially outweighed by itself-serving character, and that this testimony is assuredly contrary to the incompetent spouse’s “true” intent and interests.\(^74\) This strict anti-hearsay view, however, is premised on judge’s inability to properly assess the credibility, reliability, or real interests and intents of parties and witnesses.

These tasks are, however, the very stuff of judging, particularly in competence or divorce hearings where the judge is also the trier of fact. Again, the anti-hearsay view displays its own bias: it assumes that the party to be wary of is


\(^{70}\) *Id.* at 300–01.

\(^{71}\) *Ruvalcaba*, 850 P.2d at 683. This “two-tiered” approach, applied in combination with a higher evidentiary requirement, is used in similar contexts elsewhere. See, e.g., FLA. STAT. § 765.401(b)(3) (addresses withholding life-prolonging treatment absent an advance directive: “Before exercising the incapacitated patient’s rights to select or decline health care, . . . a proxy’s decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient’s best interest.”).

\(^{72}\) *Ruvalcaba*, 850 P.2d at 682–83.

\(^{73}\) *See Mills, supra* note 15, at 554.

\(^{74}\) *See generally id.* at 553–55. Mills also assumes that an adult ward had a discernable, consistent intent while previously competent (let alone while losing competence partially or totally).
the non-spouse guardian, rather than the competent spouse.\textsuperscript{75} By restricting such probative evidence, the anti-hearsay proposition actually reduces the likelihood of confirming a ward’s previously competent beliefs and intent where they were not memorialized in writing or through prior deposition while competent.\textsuperscript{76} The advocated bar on probative hearsay, which could confirm previously expressed wishes and beliefs, would often defeat the goals of protecting a ward’s choice to divorce or remain married, and of individualized adjudication of competence.

This returns us to married wards relying solely on their guardian to bring an action for divorce in their best interest or via substituted judgment. Adult wards facing spousal abuse, neglect, abandonment, and waste of assets will sometimes be better off once divorced from a legally competent spouse who no longer loves, cares for, or provides for their vulnerable partner. For those persons, allowing the possibility of their guardian’s action for divorce where shown to reflect a ward’s previously competent beliefs and intent is equitable and humane.

\section*{B. Best Interest of the Ward}

The “best interest” evaluation is the other rubric applied by states to evaluate guardian acts. Arizona case law and procedure illustrates the tiered use of both the substituted judgment and best interest evaluations under its minority view of permissible guardian divorce actions.

Acting in a ward’s best interest is the charge of guardians generally, upon which guardians are evaluated. While it is certainly possible that a guardian could

\textsuperscript{75} This view is driven by a corresponding distrust of commonly vague statutes, rules, and methods of determining incompetence.

The clear message sent by many of the states’ guardianship statutes is that a determination of incompetency is often a matter of subjective judgment, that the individual is at the mercy of testimony by potentially interested persons, unscrupulous heirs, detached medical professionals, even the potential guardian himself/herself. . . . [S]tates imposing strict limitations on the type of evidence presented . . . and the types of behavior not constituting incompetency inspire greater confidence that an individual will not be divested of all personal and legal autonomy merely because of religious beliefs, isolated incidences of bad judgment, or old age.

Mills, \textit{supra} note 15, at 532. Unfortunately, the prevalence of spousal abuse, suffered by both incompetent and competent persons, is not acknowledged by anti-hearsay advocates. See Mills, \textit{supra} note 15. Competent spouses must certainly be considered as “potentially interested” and possibly “unscrupulous” persons in divorce proceedings in the same manner as heirs, medical professionals, and guardians.

\textsuperscript{76} The permutation of moving the bar of competence to a clear and convincing standard, while also barring probative hearsay evidence, would leave persons who are merely “preponderantly incompetent” unprotected in practice. Persons in this bracket, while retaining the right to seek a divorce, are far less likely to litigate that claim without guardian assistance or advocacy, due to their preponderant-level incompetence.
use a ward’s divorce proceeding to further selfish goals.\textsuperscript{77} Court proceedings can also reveal those abusive guardians for what they are. A thorough examination of all parties’ behaviors, statements, and interests as provided through a robust, adversarial process is more likely to prevent and detect guardian abuses than is a proceeding disallowing the testimony of other parties concerned with, and knowledgeable of, a ward that is otherwise totally dependent on their guardian’s (and their spouse’s) beneficence.

Arizona’s two-tiered search for substituted judgment, followed by an evaluation of best interest if no such judgment is found, is not perfect. By respecting an incompetent ward’s previously competent desire to remain married, is it still possible that a court will mistakenly condone spousal abuse, indifference or neglect, and provide reconciliation not in the ward’s best interest. Had the ward been able to foresee his or her own previously unimaginable serious neglect or abuse once consigned to a dependent state, strong past declarations to remain married may have changed. Conversely, it may also be true that though a judge might find that divorce is clearly in an abused and neglected ward’s best interest, that particular ward might never wish to divorce, regardless of need or suffering. The bonds of marriage, faith, and love are often that strong.

These difficult determinations regarding guardianships are not limited to the question of divorce. For decades, courts and legislatures have grappled with and granted guardians power over wards that are more personal and fundamental than the divorce power. For example, a guardian in Maine may withhold lifesaving treatment without court supervision, if in accordance with instructions from the ward when still competent.\textsuperscript{78} A New Mexico guardian may withhold lifesaving treatment if it can be justified as in the ward’s best interests.\textsuperscript{79} Additionally, with court approval, guardians in some states may consent to abortion, sterilization, psychosurgery, and removal of bodily organs; terminate parental rights; authorize experimental medical procedures; or deviate from a ward’s living will, medical power of attorney, or durable power of attorney.\textsuperscript{80} Florida grants guardians all the powers a ward could exercise had he or she not been adjudicated incompetent.\textsuperscript{81}

VI. CONCLUSION

A perfect system, one that discerns and ensures that a ward’s wishes are always acted upon and that a ward’s best interests are always met, is impossible. These two laudable goals are not universally commensurable. Taking the option of divorce off the table altogether, however, where legislatures have abdicated on the issue, is far worse than the minority view applied with an Arizona-style two-tier court evaluation. A ban encourages any and all parties that might consider abusing

\textsuperscript{77} For example, out of spite for the competent spouse. Mills, supra note 15, at 555.
\textsuperscript{78} Id. at 551–52 (citing ME. REV. STAT. ANN. § 18-A, 5-312(A)(2)).
\textsuperscript{79} Id. (citing N.M. STAT. ANN. § 45-5-312(3)).
\textsuperscript{80} Id.
\textsuperscript{81} Id.
their power over a ward to do so with license, and where this claim of relief is barred by the majority rule, to do so with impunity. The very least we owe those whose rights have been partly or wholly transferred to someone else, through no fault of their own, is the chance to live in dignity and safety when those who swore to care for them no longer do so.
ANCHORS AWEIGH:
REDEFINING BIRTHRIGHT CITIZENSHIP IN THE 21ST CENTURY

Ashley E. Mendoza*

I. INTRODUCTION

In the summer of 2006, facing deportation and having exhausted all legal reprievs, Elvira Arellano sought refuge at the Adalberto United Methodist Church in Chicago, Illinois.1 In 1997, Arellano entered the country illegally and had since given birth to a son, Saul, who was born an American citizen.2 After nine years in the United States, Arellano was faced with either taking her son back to the country she had left behind or leaving him here to fend for himself; Arellano refused to do either.3 “It’s wrong to split up families. I am fighting for my son, not myself.”4 Yet, anti-illegal immigration activists contend that she used her son to avoid deportation.5 In November 2007, despite her efforts to remain in the United States with her son, Arellano was deported back to Mexico, leaving young Saul behind.6

One of the most hotly debated issues today is illegal immigration. Not only are there problems securing the border from criminals and those smuggling drugs, but there is the additional problem of pregnant women entering the country illegally for the purpose of gaining American citizenship for their children. After one of these babies is born, the mother remains in the country unlawfully but now has a link to the United States and benefits from the child, who, like Saul, is born a United States citizen. Parents with citizen-children who choose to unlawfully remain in the United States are still subject to deportation.7 However, having a citizen-child allows the illegal parent to appeal to an immigration judge, claiming

2 Id.
3 Id.
4 Id.
7 Lino A. Graglia, Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy, 14 TEX. REV. L. & POL. 1, 3 (2009).
deportation would subject the citizen-child to “extreme hardship” and potentially deprive the child of the benefits associated with his/her citizenship.  

Benefits granted to a child born in the United States include Medicaid coverage and assistance under the Women, Infants, and Children Program (WIC), which provides food and nutrition vouchers for mothers and children. However, the illegal parents of citizen children are not eligible for Medicaid or other welfare benefits, and the children may not sponsor citizenship for others until they have reached the age of twenty-one; thus, the parents of the citizen-child have relatively little to gain from their child’s citizenship. Approximately 3.8 million illegal immigrants have at least one child who is a citizen. The high numbers of illegal immigrants who receive benefits undoubtedly burdens the already-strained welfare system. Sadly, these children, derogatorily termed “anchor babies,” have sparked intense debate regarding the interpretation and application of birthright citizenship under the 14th Amendment.

The purpose of this Note is to assert that while the judiciary may have historically misinterpreted the Citizenship Clause, there is still potential for reconciling past precedent with a modern solution to the “anchor baby” problem. One solution is to use a hybrid theory of domicile. This would use an “intent to stay” in conjunction with the traditional standard of the Citizenship Clause. Applying a hybrid theory of domicile as the standard for birthright citizenship would narrow the Citizenship Clause enough to remedy the “anchor baby” problem without requiring a constitutional amendment. Part II of this Note details the history of the 14th Amendment and the case law that has defined “subject to the jurisdiction thereof”; Part III discusses the relevant theories concerning birthright citizenship; and lastly, Part IV discusses potential remedies to the problem of abuse of birthright citizenship.

II. HISTORY AND INTERPRETATION OF THE 14TH AMENDMENT

While the abuse of birthright citizenship is a modern problem, the issue is rooted in the creation of the Civil Rights Act of 1866 and the 14th Amendment, and the conflict between their legislative history and the United States Supreme Court’s interpretations. The Citizenship Clause of the 14th Amendment reads “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction

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8 Id. Notably, “extreme hardship” is difficult to prove but forms the basis of a deportation appeal.
10 Id.
11 Id.
12 See, e.g., id.
thereof, are citizens of the United States, and of the state wherein they reside.” At first glance, the text appears straightforward, granting citizenship to all persons born within the territorial boundaries of the United States; however, the debate is centered on the phrase “subject to the jurisdiction thereof” and the Supreme Court’s interpretations of this language.

In the spring of 1866, the 39th Congress sought equality for the freed slaves. Despite President Andrew Johnson’s veto attempt, on April 9, 1866 Congress passed the Civil Rights Act of 1866 with the goal of protecting the civil rights of freed slaves and their families. The Civil Rights Act of 1866 declared that “all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” The goal of this language was to include African-Americans while excluding Native Americans, who were not considered to be under the jurisdiction of the United States.

Despite the successful passage of the Civil Rights Act of 1866, Congress remained doubtful of the Act’s ability to withstand judicial scrutiny. Out of fear that the Supreme Court would invalidate the Act, Congress sought to shield the legislation from invalidation by passing a constitutional amendment. The language of the 14th Amendment differed slightly from the Civil Rights Act of 1866, replacing “not subject to any foreign power, excluding Indians not taxed” with “subject to the jurisdiction thereof,” but the purpose behind the act and the Amendment was the same. The 14th Amendment was submitted to the states for ratification in the summer of 1866 and was completely ratified two years later in July 1868.

A. History of the Supreme Court’s Interpretation of the 14th Amendment

In the Slaughter-House Cases of 1872, the Supreme Court granted certiorari to interpret the relatively new 14th Amendment. Although the case’s focus on other provisions of the 14th Amendment (the Due Process and Privileges and Immunities clauses) the majority acknowledged that the purpose of the Amendment was to “establish the citizenship of the negro.” Moreover, the phrase

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13 U.S. CONST. amend. XIV, § 1.
15 Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27.
16 Id.
17 See Eastman, supra note 14, at 170–72.
19 Id.
20 See generally The Slaughter-House Cases, 83 U.S. 36 (1872).
21 Id. at 73.
“subject to the jurisdiction thereof” was intended to exclude the children of “ministers, consuls, and citizens or subjects of foreign states born within the United States.”

The dissenters in the *Slaughter-House Cases* acknowledged the Amendment’s purpose of reinforcing the constitutionality of the Civil Rights Act of 1866, which specifically excluded individuals who were subject to any other foreign power. The Court’s express exclusion of children of “citizens or subjects to foreign states born within the United States,” reflects an understanding that “subject to the jurisdiction thereof” encompassed more than being within the territorial boundaries of the United States.

Twelve years later in 1894, the Supreme Court addressed the issue of birthright citizenship. In *Elk v. Wilkins*, the Court held that although the petitioner, a Native American, was born in the United States and had subsequently severed his ties with his tribal sovereign, he was still not a natural-born citizen under the 14th Amendment. At the time of his birth, the petitioner’s parents were members of an Indian tribe, and therefore he was subject to the jurisdiction of the tribe and not the United States. Because the petitioner was not simultaneously subject to the jurisdiction of the United States at the time of his birth, he was not entitled to citizenship by birth.

To support the holding in *Elk v. Wilkins*, the majority analogized the status of the Native American with that of a foreign immigrant, saying “if [a Native American] individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.” This analogy suggests and reinforces the Court’s understanding that the exclusionary language of the Citizenship Clause applied to Native Americans and foreign immigrants in a parallel manner, as neither was subject to the complete jurisdiction of the United States.

In 1898, the Supreme Court decided the issue of birthright citizenship, but this time held contrary to *Elk v. Wilkins*. In *United States v. Wong Kim Ark*, the Court held that “a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the emperor of China, but have a permanent domicile and residence in the United States,” was a citizen by virtue of his birth in the country. The Court interpreted the Citizenship Clause to only exclude the

22 Id.; Eastman, *supra* note 14, at 173.
23 *Slaughter-House Cases*, 83 U.S. at 91 (Field, J., dissenting); Eastman, *supra* note 14, at 173.
24 *Slaughter-House Cases*, 83 U.S. at 73.
25 U.S. CONST. amend. XIV.
27 *Id.* at 101 (quoting Dred Scott v. Sanford, 60 U.S. 363 (1857)).
children of diplomats, who did not owe allegiance to the United States, and children of invading armies born within the U.S. borders during periods of occupation.\textsuperscript{29} The \textit{Wong Kim Ark} Court, however, did not directly address whether the children of \textit{illegal} immigrants are entitled to birthright citizenship by virtue of their birth on American soil.\textsuperscript{30} This narrow holding is the window through which the solution to the “anchor baby” problem should be sought.

\begin{center}
\textbf{B. Legislative History}
\end{center}

Based on the legislative intent surrounding the 14th Amendment, there is a strong argument that “subject to the jurisdiction thereof” was wrongly interpreted and thus, wrongly applied since the \textit{Wong Kim Ark} decision. The Civil Rights Act of 1866 explicitly excluded individuals who are “subject to any foreign power” and Congress supplemented this phrase with “Indians not taxed.”\textsuperscript{31} The existence of the second phrase is significant because it indicates that the provision’s denial of birthright citizenship included, but was not limited to Native Americans.\textsuperscript{32} It is largely undisputed that the language was also meant to exclude those within the borders of the United States “in the diplomatic service of a foreign country.”\textsuperscript{33} However, it is less clear whether this language was meant to apply to any other persons within the territory of the United States. The explicit exclusion of those “subject to any foreign power” implies that birthright citizenship was reserved only for those who, unlike the mothers of “anchor babies,” were subject to the jurisdiction of the United States in some way beyond mere territorial jurisdiction.

During the floor debates surrounding the adoption of the 14th Amendment, two of the key creators addressed concerns that the Citizenship Clause would grant citizenship to Native Americans.\textsuperscript{34} Both Lyman Trumbull and Jacob Howard expressly clarified that “subject to the jurisdiction thereof” meant subject to its “full and complete jurisdiction” and “not owing allegiance to anyone else.”\textsuperscript{35} Howard reasoned that because Native Americans still belonged to a tribe and owed allegiance to another sovereign, they did not qualify as “subject to the jurisdiction” under the Citizenship Clause.\textsuperscript{36} Similar to the Court’s rationale in \textit{Elk v. Wilkins}, this can be analogized to illegal immigrants, who are not within the “full and complete jurisdiction” of the United States, and who may also be considered “owing allegiance” to another sovereign. Despite this, the phrase “subject to the

\begin{footnotes}
\item[29] \textit{Wong Kim Ark}, 169 U.S. at 678–79; Eastman, \textit{supra} note 14, at 175.
\item[30] See generally \textit{Wong Kim Ark}, 169 U.S. 649 (addressing the children of immigrants legally living in the United States); Graglia, \textit{supra} note 7, at 3.
\item[31] Civil Rights Act of 1866 ch. 31 § 1, 14 Stat. 21.
\item[32] Id.
\item[33] \textit{Wong Kim Ark}, 169 U.S. at 682.
\item[34] Eastman, \textit{supra} note 14, at 172.
\item[35] Id.
\item[36] Id.
\end{footnotes}
“subject to the jurisdiction thereof” has been applied as to grant birthright citizenship to virtually any child born within the territorial boundaries of the United States.

In sum, the interpretation of the 14th Amendment is not consistent with the legislative intent surrounding its creation. Historical evidence suggests “subject to the jurisdiction thereof” was meant to limit birthright citizenship in a much more restrictive way than it has been applied. However, the Supreme Court’s narrow ruling in *Wong Kim Ark* creates an opportunity to remedy the “anchor baby” problem.

### III. RELEVANT THEORIES OF BIRTHRIGHT CITIZENSHIP

Many legal commentators argue that the interpretation of “subject to the jurisdiction thereof” in *Wong Kim Ark* was incorrect because the drafters of the Amendment intended “jurisdiction” to mean complete political jurisdiction, as was suggested by the *Slaughter-House Cases*, rather than the now orthodox interpretation of territorial jurisdiction. The two competing theories offer insight as to possible solutions for narrowing birthright citizenship. However, a hybrid theory of domicile could resolve the problem without requiring a drastic congressional action or a constitutional amendment.

Under the first theory, territorial jurisdiction, birthright citizenship can be acquired by simply being born within the borders of the United States and has nothing to do with parental citizenship, status, or political ties. The current interpretation of citizenship follows this theory. In contrast, under the second theory, referred to as “consensualist,” birthright citizenship is only granted to those within the complete political jurisdiction of the United States, which requires “allegiance to the sovereign,” in addition to being within the physical boundaries. According to the consensualist approach, to be within the complete political jurisdiction of the United States and therefore “not owing allegiance to anybody else,” one must renounce all allegiance to their original homeland and in turn, receive “reciprocal consent” of the community. The consensualist view is often used to justify efforts to deny birthright citizenship to the children of all illegal immigrants because although they may have been born within the territory of the United States, the parents, and thus the children, are not within the political community with the community’s mutual consent.

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38 Shawhan, *supra* note 37, at 1356.
39 *Id.* at 1356 (referring to this view also as “revisionist”).
40 *Id.* at 1355.
41 CONG. GLOBE, 39TH CONG., 1ST SESS. 2893 (1866).
42 Shawhan, *supra* note 37, at 1356.
43 *Id.*
While the consensualist view is based on statements made by Senator Lyman Trumbull during the drafting of the Civil Rights Act of 1866 and the 14th Amendment, critics of consensualism contend that the approach is inconsistent with one of Trumbull’s core elements of citizenship, domicile.\textsuperscript{44} In a letter to President Jackson summarizing the Civil Rights Act of 1866, Trumbull emphasized the importance of domicile in bestowing birthright citizenship.\textsuperscript{45} The letter said, “[t]he Bill declares ‘all persons’ born of parents domiciled in the United States, except untaxed Indians, are to be citizens of the United States.”\textsuperscript{46} Domicile, as defined in 1866, could be achieved by “moving to a nation or a particular place with the intention of making it one’s permanent residence.”\textsuperscript{47} From this emphasis, it has been inferred that Trumbull intended the words “not subject to any foreign power” to actually mean “of parents domiciled in the United States.”\textsuperscript{48} Additionally, accepting the inference that Trumbull intended domicile to be the standard for birthright citizenship upsets the consensualist logic: the fact that residency was not regulated in 1866 and could take place without any governmental consent negates the assertion that reciprocal community consent is required for birthright citizenship.\textsuperscript{49}

While no set amount of time was required to achieve domicile, the intent to permanently remain is significant in both historical and modern contexts.\textsuperscript{50} In a historical context, the intent to remain is significant because at the time of the 14th Amendment’s adoption, illegal immigration did not exist. Migration to the United States was encouraged, rather than criticized, and the intent to remain was the key distinction between ambassadors “in the diplomatic service of a foreign country” and foreigners who had migrated to the United States. Furthermore, due to the extreme modes and conditions of transportation, especially those of intercontinental travel, one who migrated to the United States with “the intent to permanently remain” had essentially renounced their original homeland and became “subject to the jurisdiction” of the United States, as opposed to one who was here temporarily, such as a foreign consul or minister. Therefore, children born of parents who were not domiciled in the United States were not “subject to the jurisdiction thereof” for citizenship purposes.\textsuperscript{51}

In a modern context, the intent to permanently remain is significant in a more formalistic way. The “intent to permanently remain” is still open for interpretation and could mean (1) achieving legitimate permanent residency status or other lawful status, or (2) living within the country with the intent to permanently

\textsuperscript{44} Id. at 1357.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Shawhan, \textit{supra} note 37, at 1357.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 1359.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 1358.
remain, whether illegal or not, as opposed to being a temporary visitor. The first interpretation would be more restrictive in that it would extend birthright citizenship only to children born of permanent residents, such as the parents in *Wong Kim Ark*. The second interpretation, a bare definition of domicile, would grant birthright citizenship to children born of any person in the United States who intended to remain, such as Saul Arellano. While both interpretations are in accordance with the holding of *Wong Kim Ark*, the second interpretation is unlikely to resolve the “anchor baby” problem, as it does not narrow birthright citizenship from its current application. On the other hand, the first interpretation of domicile, requiring permanent residency or some other lawful status, both narrows birthright citizenship in accordance with *Wong Kim Ark* and encourages those migrating to the United States to do so through legal channels.

Although territorial jurisdiction and the consensualist view are well-known theories of birthright citizenship, a hybrid between the two theories, has been presented. The hybrid theory of birthright citizenship requires the parents’ lawful residency in the United States which is supported by the 14th Amendment’s legislative intent. Additionally it is consistent with the case law interpreting 14th Amendment. Application of the hybrid domicile standard reconciles original intent with the past interpretation to resolve the “anchor baby” problem.

IV. POSSIBLE REMEDIES AND RECONCILIATION

Based on the legislative intent surrounding the 14th Amendment, many legal commentators believe the *Wong Kim Ark* interpretation was incorrect and that it has resulted in extreme amplification and abuse of birthright citizenship. Such allegations have initiated discourse to resolve the “anchor baby” problem. Suggestions include Congressional action narrowing this interpretation, revision of the Citizenship Clause, or repeal of the 14th Amendment all together. However, the application of domicile as the standard for jurisdiction could circumvent the problem of abusive birthright citizenship without requiring drastic action or alteration of the Constitution.

A. Repeal of the 14th Amendment

As of recent, conservative politicians such as Jon Kyl and Lindsey Graham have suggested substantial revision or even complete repeal of the 14th Amendment.

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52 See United States v. Wong Kim Ark, 169 U.S. 649 (1898).
53 See, e.g., Eastman, supra note 14, at 174–76.
Amendment’s Citizenship Clause to deal with the “anchor baby” aspect of illegal immigration.55

However, the idea of repealing the entire 14th Amendment is drastic, unpopular and unwise. Hasty repeal of the 14th Amendment would create more problems than it would solve because it includes several other beneficial provisions such as the Equal Protection Clause, the Privileges and Immunities Clause, not to mention this Amendment determines how representatives to the House are selected.56 Further, it is highly unlikely that advocates of this action could muster the required votes to pass both houses of Congress, let alone three-fourths of the states, as is required to amend the Constitution.57 Repealing such an important part of our Constitution would be foolish and highly unlikely.

B. Revision of the 14th Amendment

Revision of the 14th Amendment, rather than a complete repeal, is a more mild suggestion but would still require a two-thirds vote in both chambers of Congress, as well as ratification by three-fourths of the states.58 While this proposition has attracted media attention and the support of some high-profile politicians such as John McCain, revision of the 14th Amendment has also been highly criticized as a radical proposal that would mark the first time in history that our Constitution has been amended to make it less egalitarian.59 Critics of such revision believe revising the Amendment is not worth the time and effort it would require, and the energy would be better spent reducing illegal immigration by other means.60 Although the ideas of constitutional repeal or revision appear unpopular and logistically unlikely, many still advocate for remedial action of birthright citizenship.

C. Congressional Action

Because those who believe the Citizenship Clause needs to be revised also believe the text was wrongly interpreted to begin with, another recommendation includes narrowing the interpretation of the words “subject to the jurisdiction

55 Kephart, supra note 54.
56 See U.S. CONST. amend. XIV.
58 U.S. CONST. art. V.
thereof” through legislative action pursuant to Congress’s plenary power to regulate immigration. Although Congress cannot dip below the constitutional minimum protections, it has the power to advise against interpretations by the Supreme Court that provide a broader grant of citizenship than is warranted by the Constitution’s text. Furthermore, *Wong Kim Ark* has been applied much broader than its actual holding, which only concerned birthright citizenship as applied to permanent residents who were living in the United States lawfully.

The Supreme Court has never heard a case dealing with birthright citizenship as applied to children of illegal immigrants; therefore, if Congress were to construe a narrower reading of the Citizenship Clause as applied to persons not considered permanent residents, it would not contradict any existing precedent. However, for all the same reasons previously discussed, the easiest solution to the “anchor baby” problem most likely lies in the hands of the Supreme Court.

### D. Application of the Domicile Standard by the Supreme Court

Given another opportunity to hear a birthright citizenship case, one dealing specifically with the children of an illegal immigrant, the Supreme Court could easily redefine the meaning of “subject to the jurisdiction” by distinguishing the matter from *Wong Kim Ark*. By applying a domicile requirement as the standard to obtaining birthright citizenship, the Supreme Court could rectify the misinterpretation of the Citizenship Clause without having to overturn the holding in *Wong Kim Ark*. The holding of *Wong Kim Ark* is in accordance with the domicile requirement because the parents in that case were considered permanent residents at the time of the plaintiff’s birth.

In deciphering the meaning of the 14th Amendment and its original purpose, the Supreme Court would likely start with the text of the 14th Amendment and the legislative intent. There is sufficient evidence to imply a narrower meaning of “subject to the jurisdiction” than solely being within the territorial boundaries of the United States. Applying the domicile standard, that is, requiring permanent residency or other lawful status, would narrow the meaning enough to exclude those who do not lawfully reside in the United States without imposing an unreasonable standard for birthright citizenship. Furthermore, because the domicile requirement would not directly contradict the holding of *Wong Kim Ark*, it would be fairly easy to implement this policy, especially in comparison to a constitutional amendment.

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62 *Id.*
64 *Id.*
65 *Id.*
The main issue for the Court would be interpretation of the phrase “intent to permanently remain” in the definition of domicile. Interpretation of this phrase would hinge on the word “permanent,” which could mean either to include persons who have achieved permanent residency status, or those who generally live here with the intent to remain. The latter is bound to be more controversial because it may not distinguish between those who are here lawfully from those who are not.

While the application of domicile does not rise to the level of amending the constitution nor may it completely resolve the issues of illegal immigration, it would likely receive a warm welcome from those members of Congress who have recently called for drastic measures, such as repeal of the 14th Amendment. Applying domicile as the standard would reserve birthright citizenship for those who have come to the United States through legal channels. In addition, those who illegally come to the United States for the purpose of attaining citizenship for their children would be deterred from doing so, as the incentive to do so would no longer exist. The “anchor baby” problem would essentially be resolved.

IV. CONCLUSION

As the illegal immigration debate continues, a narrower reading of birthright citizenship is urged. Because many believe the Citizenship Clause of the 14th Amendment was wrongly interpreted to begin with, suggestions such as revising or even repealing the 14th Amendment have been proposed. However, while many assert the Supreme Court’s holding in *Wong Kim Ark* is the foundation of the wrongful interpretation, it is likely that this holding will lead to the solution for narrowing birthright citizenship. Because the *Wong Kim Ark* Court only directly addressed whether immigrants holding permanent resident status were eligible for birthright citizenship, the ruling left open the possibility to restrict birthright citizenship from those in the country unlawfully or without permanent residency status. Furthermore, the application of domicile as the standard for birthright citizenship, as the drafters of the 14th Amendment suggested, would be in accordance with the holding of *Wong Kim Ark*, and would also resolve the birthright citizenship debate without amending the Constitution.

Unfortunately, for families like Elvira and Saul Arellano’s, none of the proposed solutions to narrowing birthright citizenship are likely to help their situation. But hopefully for families in the future, clarification of the Citizenship Clause may grant their children U.S. citizenship free and clear of the disparaging term “anchor babies” or claims of undeserved benefits.
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