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Generally, briefs are presented either as petitioner or respondent. They follow the rules of court associated with the U.S. Supreme Court or, if the competition is unique to a state, then to the state Supreme Court.

#### **STRUCTURE OF THE TOURNAMENT FOR ORAL ARGUMENT**

Most competitions require two competitors to make a team. That is to say that each team consists of a first and second speaker. The two speakers' scores are then totaled and compared with a combined score of the opposing team. The team with the higher aggregate score of both competitors is said to have "won the round."

Most tournaments are structured with preliminary rounds and elimination rounds. During preliminary rounds, the competitors are randomly paired. The competitors generally have to argue both petitioner and respondent. As a result, a minimum of two preliminary rounds is always recommended for a tournament, requiring that every competitor must face a petitioner's and a respondent's side of the argument. Scores are then tallied based upon the competitor's performance in each of the rounds. Each competition uses a variety of methods of scoring teams. Most use this head-to-head method to determine who won the round. The team then moves on to the next preliminary round. The second preliminary round is scored in a similar

fashion, and then each team is evaluated based upon the number of rounds it has won. Those competitors who have won both of their preliminary rounds have a "2-0 record." Teams that have won a preliminary round and lost a preliminary round have a "1-1 record." And obviously, those teams that have lost both their preliminary rounds have a "0-2 record."

Concern comes when teams with the same record have to be compared to each other. For example, if more than one team has won both its preliminary rounds, then they both have a "2-0" record. As a result, the way these "ties" are broken is based upon the aggregate number of speaker points. In the next section is the scoring sheet which has been used at various moot court competitions. The scores of each team from both preliminary rounds are aggregated and the highest scoring team is said to have the "most speaker points." Those teams with the same win-loss record are then compared against each other for a total number of "speaker points." Those teams with the higher number of speaker points are considered to have a "record."

### THE ELIMINATION ROUNDS

Once teams have been ranked by winning record and "speaker points," a finite number of teams is allowed to advance to the elimination rounds. During the elimination rounds, each team's total aggregate speaker points are compared to their opponents. That team with a greater aggregate number of speaker points prevails and moves on to the next elimination round. Elimination rounds continue until one final team is crowned the winner.

#### Power Protect

Many competitions will rank those teams that have moved from the preliminary rounds into the elimination rounds. The higher-ranked teams are generally paired against the weaker teams. This is called "power protect." Each team is given a rank based upon first, its win-loss record. Those teams with a "3-0 record" are all considered to be higher ranked than any team with a "2-1 record." Then each of the teams with the same records is ranked according to the total aggre-

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gate speaker points that it has received in the preliminary rounds. As a result, the highest ranked team will be one with a "3-0 record" and the most aggregate speaker points from the preliminary round. This highest-ranked team will then compete against the lowest rank.

Trophies are awarded to those teams who prevail at competition. However, other trophies are also generally awarded for individual performance of the competitors. While each moot court "team" consists of two competitors, many times an individual competitor will show significant skill during the competition. The individual's total speaker points are aggregated among the three preliminary rounds. Those competitors with the top ten total aggregate speaker points from the preliminary rounds are generally awarded "orator awards" for their individual performance.

The following table is the official judging ballot used at the American Collegiate Moot Court Association's national tournament. This same score sheet is also used at the many regional tournaments leading up to the national championship.

Table 5.1 Judging Ballot

| TEAM NUMBER _____   |               |                         |               |                     |  |
|---|---------------|-------------------------|---------------|---------------------|--|
| <b>AMERICAN COLLEGIATE MOOT COURT ASSOCIATION<br/>OFFICIAL BALLOT</b> |               |                         |               |                     |  |
| Round (circle): Prelim I   Prelim II   Prelim III                     |               |                         |               |                     |  |
| Round of Sixteen  | Quarter       | Semi                    | Final         |                     |  |
| POOR<br>Below 60  | FAIR<br>60-70 | <b>RANGE OF SCORING</b> |               | EXCELLENT<br>90-100 |  |
|   |               | AVERAGE<br>70-80        | GOOD<br>80-90 |                     |  |
| CONTESTANT<br>NAME:   | NAME _____    |                         |               |                     |  |

*Table continued on next page.*

Table 5.1 (continued)

| SCORE (1-100 per category)  | SCORE (1-100 per category) |
|---|----------------------------|
| <b>KNOWLEDGE OF SUBJECT MATTER:</b><br>Preparation on facts, law, and record; reasoning, organization; full use of time; etc.   |                            |
| <b>RESPONSE TO QUESTIONING:</b><br>Responsiveness to judges; authoritativeness; ability to think quickly and well and return to argument; etc.                                |                            |
| <b>FORENSIC SKILLS:</b><br>Manner which is relaxed, confident, believable, poised; eye contact; ability to speak without reading notes; grammar; vocabulary; inflection; etc. |                            |
| <b>COURTROOM DEMEANOR:</b><br>Professionalism; proper attire; respect toward the court; conversational approach, etc.   |                            |
| <b>TOTALS (4-400 points/speaker)</b>  | Total                      |
| Total   |                            |
| <b>COMBINED SCORE FOR TEAM:</b>   |                            |
| <b>COMMENTS:</b>  | <b>COMMENTS:</b>           |
| <hr/> <hr/> <hr/> <hr/>   | <hr/> <hr/> <hr/> <hr/>    |

## VII. CONCLUSION

Tournaments are the culmination of the full moot court experience. Benefits believed to be attributable to participation in moot court include: improved communication skills, enhanced critical thinking abilities under duress, improved legal research and writing skills, enhanced self-confidence and poise, and enhanced acceptance rates into law school.

One of the greatest benefits of undergraduate moot court is practical preparation for law school. Since the moot court experience will be repeated as part of continuing legal education, it is an invaluable tool in preparing students for their future.



# CHAPTER SIX

## Conclusion: Life After Moot Court

William D. Schreckhise

### INTRODUCTION

Having completed a moot court, instructors reading this book may want to know if it made any difference what their students learned, if it affected their motivation, and whether they actually liked working on the moot court. Students reading this book may want to know what their futures entail—specifically, what comes next in preparing for law school, attending law school, and what life consists of after law school.

This chapter is composed of two sections. The first section evaluates moot courts as a teaching tool. Instructors might find this section useful in gauging the effect the moot court had on their students (or to help instructors decide whether or not they would like to use a moot court in the first place). The second section focuses on what comes after the moot court in a student's career. Law school-bound undergraduates might want to skip to this section.

### EVALUATING MOOT COURTS AS A LEARNING TOOL

Although there are a number of things about moot courts that make them appealing to instructors, moot courts might not be for everyone. Moot courts can be a great deal of work for the instructor—an amount of work that more than likely exceeds the effort required to simply

prepare a series of lectures. The instructor needs to be very familiar with the case. More than that, however, the instructor will be required to first find a case (or write one up him or herself), assign groups, attend meetings with the groups, deal with intragroup conflict, round up judges, help the students with their briefs and oral arguments, confer with the judges, read briefs, and, in some cases, read judicial opinions.

The logistics of a moot court present their own difficulties. Instructors must design a system of assigning students to groups and/or groups to cases that in some way seems logical and fair to students. If instructors assign students to cases and groups by fiat, they more than likely will have to deal with very unhappy students at the end of the semester. Invariably, some of the students will not be able to meet with the rest of the students in their group because of work or class schedules. Some of the students will not carry their own weight, incurring the wrath of the other students, and the instructor will find him or herself in the unenviable position of mediator. Even though the Internet has made legal research far easier for undergraduates, instructors still need to show students the basics of legal research and assist those who have difficulties. Because students will more than likely be working in groups, it is up to the instructor to devise a fair method of evaluating the students if the students receive a grade for the moot court. The simple task of getting legal briefs from the teams to the judges and to the other teams can be a hassle, too.

However, some instructors may consider a moot court exactly what their class on constitutional law (or any other class for that matter) needs. Just as is the case with the students, instructors might find them extremely interesting. Because the instructor will more than likely be an important source of information for the students, he or she will become extremely familiar with the case—the extent of which will more than likely exceed their knowledge of any other case they have covered in their classes. Watching many of the students go from knowing very little (if anything) about constitutional law at the beginning of the semester, to presenting a detailed case (and perhaps writing a detailed brief) on a very technical area of the law, can be very rewarding for the instructor. The quality of the arguments and the students' knowledge of the subject matter will surprise many in-

structors. Students who have participated in a moot court very likely retain the material far better than those who have not.

In order to gain insight into the effectiveness of moot courts, students were given a questionnaire at the conclusion of two simulations held in the spring of 2002 and spring of 2003 in a constitutional law class at the University of Arkansas. The questionnaire contained items pertaining to the students' overall impression of the simulation, what impact the simulation had on their motivation in the course, and whether they thought they learned something they otherwise would not have learned.

Table 6.1 displays the combined results of selected items from the questionnaire given to the two groups. Overall, the students appeared to have found the moot court worthwhile. Over 94% of the students stated they learned something they would otherwise have not learned, 90.2% stated they thought the simulation made them think, 82% liked working on the simulation, and the same proportion did not think that it was boring. Nearly three-quarters of the students agreed they would have rather worked on the simulation than simply attended regular lectures. A majority of the students felt more motivated to learn more about the moot court topic and disagreed that the simulation was "simply more tedious work."

**Table 6.1: Tabular Measures for Selected Items**

| Item   | % Agree/Strongly Agree | N  |
|--|------------------------|----|
| I learned something about the topic I otherwise would not                          | 94.1                   | 51 |
| The simulation made me think   | 90.2                   | 51 |
| I liked working on the simulation  | 82.0                   | 50 |
| The simulation stimulated me to learn more about the topic                         | 62.7                   | 51 |
| The simulation made me want to learn more about other things covered in the course | 43.1                   | 51 |

*Table continued on next page.*

| Item  | % Disagree/<br>Strongly Disagree | N  |
|---|----------------------------------|----|
| The simulation made me feel<br>more comfortable participat-<br>ing in course lectures     | 33.3                             | 51 |
| The simulation was boring   | 82.4                             | 51 |
| Instead of doing the simulation, I<br>wish the instructor would<br>have just lectured     | 72.5                             | 51 |
| The topic for the simulation was<br>uninteresting   | 66.7                             | 51 |
| After the simulation, I felt less<br>motivated to learn more<br>about the course material | 58.8                             | 51 |
| The simulation just seemed like<br>more tedious work                                      | 56.9                             | 51 |

Some students may have found more value in the moot court than others. For example, a law school-bound political science major with a legal studies minor may find a moot court more interesting than a graduate school-bound English major. In order to assess this possibility, additional items were included on the questionnaire such as the students' major, minor, post-graduate plans, class standing (e.g., sophomore, junior), grade-point average (GPA), and gender. The items presented in Table 6.1 were collapsed into a single index. Each item was counted on the top half of the table the student marked "Agree" or "Strongly Agree" and marked "Disagree" or "Strongly Disagree" on the bottom half. Thus, if the student marked all "Strongly Agree" on the items on top portion of the table and "Strongly Disagree" on the items on the bottom half, he or she would have received a score of 11, the maximum score, reflecting a very positive overall impression of the moot court. The minimum score was 0.

The average index score for each subgroup is presented in Table 6.2. None of the subgroups' differences reached standard levels of statistical significance. On average, women had a slightly better impres-

sion of the simulation than did the men. Freshmen, sophomores, and graduate students reported to have gotten a bit more from the simulation than did their junior and senior counterparts. Students who were law school-bound and political science majors reported higher average scores, as did, surprisingly, students who were not legal studies minors. Students with the higher GPAs reported a more favorable overall impression of the simulation (with only a slight difference between those in the highest GPA category and the middle category). Again, any differences should be read with a heavy dose of caution as each of the differences failed to reach standard levels of statistical significance.

Table 6.2: Mean Index Scores by Group

|                                     | Group                         | N  | Mean<br>Index<br>Score | F     | Sig. |
|-------------------------------------|-------------------------------|----|------------------------|-------|------|
| Gender                              | Male                          | 24 | 7.20                   | 2.029 | .058 |
|                                     | Female                        | 24 | 8.25                   |       |      |
| Class                               | Freshmen<br>& Sopho-<br>mores | 4  | 8.50                   |       |      |
|                                     | Juniors                       | 18 | 7.00                   | .566  | .831 |
|                                     | Seniors                       | 22 | 8.09                   |       |      |
|                                     | Graduate<br>Students          | 6  | 8.33                   |       |      |
|                                     |                               |    |                        |       |      |
| Future Plans Include Law<br>School? | Yes                           | 22 | 8.03                   | 1.139 | .359 |
|                                     | No                            | 29 | 7.50                   |       |      |
| Political Science Major?            | Yes                           | 25 | 8.19                   | 1.955 | .066 |
|                                     | No                            | 26 | 7.40                   |       |      |

Table continued on next page.

|                      |              |    |      |       |      |
|----------------------|--------------|----|------|-------|------|
| Legal Studies Minor? | Yes          | 13 | 7.46 | 1.778 | .097 |
|                      | No           | 38 | 7.92 |       |      |
| GPA                  | Below 3.00   | 10 | 7.20 | .880  | .552 |
|                      | 3.00 to 3.50 | 21 | 8.00 |       |      |
|                      | 3.51 to 4.00 | 17 | 7.94 |       |      |

In order to determine whether there is anything about the conduct of the simulation that could impact students' impressions of the simulation, five-point Likert-type items (from Strongly Agree to Strongly Disagree) were included on the questionnaire that examined the students' attitudes toward such things as how they were graded on the simulation, to what extent their group worked together on the project, their individual attitudes toward working on groups, and whether they felt they had received adequate instructions for the simulation. Their index scores from the items in Table 6.1 (and reported for the subgroups in Table 6.2) were correlated with their responses for each of these items. As Table 6.3 reveals, students who thought the grading was fair, who felt they received adequate instructions for the simulation, and who like working in groups were more likely to have a favorable overall impression of the simulation. Perhaps surprisingly, there appears to be no discernable relationship between the amount the students thought their group worked together on the simulation and their overall impression of the simulation. Instructors should be sure to provide very clear instructions and devise a grading scheme students consider to be fair.

**Table 6.3: Correlations between Index and Selected Items**

|   |                     |        |
|---|---------------------|--------|
| The grading for the simulation was fair | Pearson Correlation | .636** |
|   | Sig. (2-tailed)     | .000   |
|   | N                   | .44    |

|   |                     |        |
|---|---------------------|--------|
| I like working in groups                | Pearson Correlation | .410** |
|   | Sig. (2-tailed)     | .003   |
|   | N                   | .50    |
|   |                     |        |
| We received adequate instructions       | Pearson Correlation | .351*  |
|   | Sig. (2-tailed)     | .011   |
|   | N                   | .51    |
|   |                     |        |
| My group worked together on the project | Pearson Correlation | .196   |
|   | Sig. (2-tailed)     | .173   |
|   | N                   | 50     |

\*\* Correlation is significant at the 0.01 level (2-tailed).

\* Correlation is significant at the 0.05 level (2-tailed).

Students who have completed a moot court probably found it to be a very worthwhile experience. They argued in front of the class one side of a case they had little or no knowledge of a few months (or even weeks) earlier. Although while preparing for the moot court it might seem implausible there is much to do after it was over, soon they should realize they have many things left to do, such as finishing their undergraduate degree. For some, future plans may also include finding a job or attending law school or graduate school. The remainder of this chapter is directed at those students whose plans include attending law school; however, other students whose plans may not lead them to law school may also find the remainder of this chapter informative.

### After the Moot Court: Now What?

Even though your undergraduate moot court experience may be over, the benefits continue to accrue. The following section addresses your future after moot court.

## Finishing Your Undergraduate Degree

Students who have participated in a moot court are probably at least juniors and have more than likely declared a major. However, if you have not declared a major and were wondering what is the *best* major for a student who is headed to law school, the answer is "whichever one you (or perhaps your parents, too) will be happy with." Law schools pride themselves on having a student body composed of students from a broad range of disciplines and do not favor students from any undergraduate major. You should major in something you enjoy that suits your aptitude. Regardless of the major you chose (or have chosen), it should be one that requires a substantial amount of writing and critical thinking since these skills will serve you very well in law school. If you are in a major that does not require a lot of writing, it is a very good idea to take elective courses that do. This is true even for students who already consider themselves superior writers.

Most undergraduate students understand that good grades are very important to getting into law school. What many undergraduates do not realize is exactly how important they are. Some students might think they can compensate for a mediocre GPA with a wealth of volunteer or extracurricular activities. Although this might have been true in the past, this is becoming less and less the case today. If an admissions committee were comparing two students with the same GPAs and LSAT scores and the first student had considerable extracurricular activities listed on the application and the second had none, undoubtedly they would rate the first candidate higher. If the first candidate had a substantially lower GPA, undoubtedly they would give the second candidate the higher rating. In short, if your future plans include law school, remember that your grades come first. If you are happy with your grades, then you can make time for extracurricular activities.

### *The Law School Admissions Test*

Few things strike as much fear into the hearts of law school applicants as the Law School Admissions Test—for good reason.

will count as much, if not more, than your undergraduate GPA in determining whether you get into the law school of your choice. In fact, on average, law schools weight your LSAT score 50% more than they weight your GPA (Wightman 1995). However, with a little fore-knowledge and advance preparation, the LSAT can become less of a monster and more of a mere hurdle that must simply be cleared in order to get into law school.

The LSAT itself is composed of five sections, each lasting 35 minutes, although one of those five sections is an experimental unscored section (the test-taker will not know which one). One section measures reading comprehension, which generally consists of four passages (roughly 400 to 600 words) that you read and then answer five to eight reading comprehension-type questions after reading each of the passages. Another section focuses on your analytical reasoning abilities. This section consists of four conditions or statements. The test-taker is asked to determine relationships and answer four to seven questions for each. The LSAT consists of two additional sections of roughly 25 questions each, dealing with logical reasoning and a final section that is an unscored 30-minute essay portion, a copy of which is sent to each law school to which the individual applies (Borbrow 2002). The test is administered four times a year—February, June, October, and December—in most areas where there is a college or university (although the smaller the school, the more likely the test will be administered fewer than four times a year). Students should plan on taking the LSAT during the June session between their junior and senior years of college or, at the latest, the October session. Because it takes some time to get your LSAT score back, taking the test the following December will jeopardize getting your applications in on time. The registration fee for the LSAT is just over \$100. Registration is easy. To register, simply visit the Law School Admission Council's website at <http://www.lsac.org>.

A potential law school student has a number of options from which to choose when preparing for taking the LSAT. These include downloading sample LSAT exams from the Law School Admissions Council<sup>1</sup> website, numerous LSAT prep guides (available at most

<sup>1</sup> The LSAC is an organization that represents many of the law schools in the United States and is responsible for administering the LSAT.

book stores), computer-based test preps (also available at most book stores), and intensive study courses offered by companies such as Kaplan. Kaplan provides a number of options ranging from an online study course (\$499), a classroom course (\$1099) and private tutoring (\$3999), with a number of options in between. Whatever you choose, it is certainly a good idea to, at the *very least*, look at a practice LSAT exam so you know what to expect when you take it. The more rigorous the option, the more costly and time-consuming it will be for you. To date, no independent study has been conducted to assess the impacts the different preparation methods have on LSAT scores, and thus there is no guarantee doing *anything* will improve your score. However, as one student put it, the Kaplan course was worth it because it gave him peace of mind because he thought he had done all he could have done in order to prepare for the exam.

### *Law School Applications and Admissions*

When applying to law school, many undergraduate students have one or two schools they want to attend and to which they only apply. This is a mistake for a couple of reasons. First, you may not get into the law school you want to attend. If that was the only one to which you applied, then you will have to find something else to do for a year and apply again or apply to a different school altogether. Further, students with high GPAs and LSAT scores might have had a chance at getting accepted to an even better law school, but did not, simply because they failed to apply. It is a good idea to apply to *multiple* law schools—at least seven schools: three that you would be very happy to get into, two that are “back-ups” and two that are “long-shots.” To be sure, the cost of applying to law schools might discourage applicants from taking this route. On average, the combined cost of the school’s application fee, the fee your school charges you to send your transcripts, and the cost of the Law School Data Assembly Service (LSDAS) fee to send your application packets to each school will run you roughly \$75 per school to which you apply. However, the chance that you will get into a more prestigious school (and land a better job down the line) or get a better financial aid deal make

it worthwhile in the long run. This is true even if you wind up going to that one school you wanted to go to in the first place. You will at least know that that you kept your options open.

Most law schools require that you apply through the LSDAS, which is an on-line clearinghouse run by the LSAC through which all of your applications are sent. Your LSAT scores will automatically be included in your LSDAS file. You will be responsible for having your undergraduate transcripts and at least three letters of recommendation sent in. When you apply to a particular school, all of this information will be sent from your file to the law school's admissions office. For instructions on how to create a file for yourself, go to <http://www.lsac.org>.

When applying to law school, it is important that you ask people who can effectively evaluate your academic qualities to write you a letter of recommendation. Ask instructors you have taken courses from, especially those whom you have had for *multiple* courses. Eschew asking individuals who might have a higher profile than your professors but who cannot accurately gauge your abilities. A letter from a graduate student instructor who taught your junior English composition course and can shed light on your marvelous writing abilities will be a much better choice than a U.S. Senator with whom you interned for six weeks during the summer and who met you only once when you were having your picture taken with her.

After you have prepared for the LSAT, taken the exam, and completed your file with the LSDAS, you can now wait for the acceptance (or rejection) letters from the seven or more law schools. Most law schools in early spring will begin to contact individuals to inform them whether they have been accepted (usually late March to late April). Normally, law schools will first contact those applicants who clearly exceed the criteria for admissions to tell them they have been accepted. The remaining applicants are then ranked and put on a waiting list. As those individuals who have been accepted but decline to attend the school inform the school they will not attend, the school notifies the next person who has been "wait listed" that he has been admitted. Additionally, most law schools reserve a very limited number of seats in each incoming class for students who were not part of the original admissions process but whom the law school deems may

broaden the diversity (be it racial, life experience, or something else) of the incoming class.

Who gets accepted to law schools? In 1995, the average undergraduate GPA for first-year law students was 3.26 and the average LSAT score was 156 (Longley 1998a). Acceptance rates for law schools vary considerably from year to year, however, due in large part to the performance of the economy. Many recent college grads might view law school as a "safe haven" during times of economic slowdown. Thus, for example, in 1985, the rate of acceptance was 54%. During the economic slowdown in 1991, the rate dropped by almost half to 28% in 1991. When the economy picked up in 1995, the acceptance rate rose to 37% (Longley 1998a).

If you have been admitted to multiple law schools, you will be faced with a fortunate, but also potentially aggravating, choice: which law school do you decide to attend? How do you decide? The decision might not be an easy one. Do you attend the prestigious and more expensive Ivy League law school, or do you attend the more affordable, but less prestigious state school close to home? Whatever (and however) you decide, keep in mind the *long-term* costs and benefits that come with each law school. One thing to be very leery of is incurring too many student loans. Unlike most other postgraduate programs, law schools offer very little in the form of fellowships or teaching assistantships for law students. Universities have figured out that students will attend their law schools regardless of the immediate financial costs to do so, and, in the eyes of some, treat their law schools as "cash cows." Because of this, you will more than likely be expected to cover the cost of tuition and books on your own. Moreover, most schools discourage their first-year students (known as "1-Ls") from working at all. Law students rely heavily on loans to finance their education to the tune of \$40,000 on average per student by the time they graduate. Because many loan providers offer the option of paying off your loan in 30 years (as opposed to 10 years for the typical student loan), many law school graduates will be paying off their loans until after *their own children* have graduated from college (Cotts 1998). At the same time, a cheaper law school might not be a better choice because its graduates might not earn as much when they graduate. A good idea is to research the average debt load and average starting salary for each of the school's graduates. Even though

most students take into consideration the potential pay they can expect to receive when deciding which school to apply to (Longley 1998b), most forget about the debt they will incur along the way.

Another thing to keep in mind is that not everybody agrees on the quality of each law school. Most pre-law students are familiar with the rankings system—in which Yale University's law school consistently comes out on top, followed by the other prestigious law schools such as Harvard, University of Virginia, and Stanford. However, the LSAC has criticized the ranking system because it does not measure all aspects of the quality of a legal education and what constitutes a better school varies from person-to-person. Apart from the ranking of the school, you might also ask yourself other questions. Does the school have a strong clinical<sup>2</sup> program? Does it have faculty members who are willing to take on research projects with students and who are good teachers and not just prolific scholars? Does it have a strong alumni network that could help you in getting a clerkship or a job? A good idea is to ask individuals you might know who attend one of the schools you are considering what they think of their law school.

### Life in Law School

Most people in law school will be overwhelmed their first year. Students who were able to get by with minimal effort in their undergraduate programs will find themselves working *much* harder in law school. Reading loads of 500 pages per week for law school courses are not unheard of. Instructors are generally far more gruff than their counterparts who teach undergraduates. Instead of well-organized lectures full of definitions and background information, the professors' "lecture" will consist largely of simply asking individual members of the class questions about the cases, sometimes staying with the same terrified student for the entire class period. This "Socratic Method" is aimed at teaching the students to be prepared, to think on their feet and get students to see the underlying principles behind

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<sup>2</sup> A clinic is where second and third year law students get to represent individuals under the supervision of a law professor.

each of the cases read for that day. More than likely, you will be evaluated only once for each class—during final exam for that class which can go on for more than three hours. One bad day during finals week can ruin an entire semester. There is no grade inflation in law school, and bright students who work very hard can expect to receive a C+ in a class they thought they had done very well in. Students who did very well as undergraduates will likely be frustrated. One study found no relationship between undergraduate GPAs and first-year law school GPAs (Anthony et al. 1999, 6). After the first semester, rankings come out where you will be ranked against the 100 or so other students in your class. The rankings will decide who will get an internship with a law firm during the summer, and in most cases, who will be given a chance to work on the law school's law review the following two years. To add to the misery, during your first year, you will more than likely be taking a set list of classes—in other words, you will have very little freedom to pick courses that sound interesting to you.

Life for a 1-L is tough. The good news is that life gets better after your first year. You will have more flexibility to choose more interesting classes you wish to take during the second year. You probably will have adapted to the heavy workload. Professors will be a little less gruff with you. By the third year, you will be taking a number of courses that you got to choose to take. You will have a chance to participate in moot courts, mock trials, clinic, and a variety of activities that make law school seem far less demanding. Moreover, you will begin the interview process for landing a job when you graduate.

### *Life After Law School*

Most graduates of law school will go on to find a job. In 1993, fewer than 3% of those with law degrees could not find a job if they wanted one. Not all law school graduates will wind up working as a lawyer—in fact, 25% of law school graduates work outside of the law. The most popular non-legal fields for law school graduates are in executive management, finance, and legal education (i.e., law professors) (Baker 2001). Even though these individuals were not working as

lawyers, many agree that their training in the law was useful for their chosen occupation.

Law school graduates have a number of possible types of jobs open to them. Roughly 78% of practicing attorneys work in private practice. More and more, graduates from the more prestigious law schools are working in "mega-firms" which employ more than 100 attorneys and have offices in multiple cities. The work in these firms tends to be hard, with associates oftentimes working 70-hour weeks, but who earn well over \$100,000 their first year out of law school. About 23% of law school graduates working in private practice will take this route. However, just under half of all attorneys working in private practice are working for themselves as solo practitioners. About 9% of all attorneys will work directly for corporations as in-house counsel, and 11% will work in a variety of legal positions for government.<sup>3</sup>

After you completed law school and landed a job as an attorney, there will still be one very important hurdle that must be overcome before you can practice the law—passing the state bar exam.<sup>4</sup> It will require substantial preparation. Although it is a daunting task, 95% of all law school graduates will pass the bar within three years of graduating from law school (Baker 2001, 18). However, admission to the bar can still pose a serious obstacle for some, as four states prohibit individuals charged with a felony from being admitted to the bar (Corneille and Moeser 2000, 6). In an additional 25 states, a felony conviction is a serious impediment that requires applicants to convince the state in a hearing they are "of good moral character" or meet some other requirement before they will be admitted.

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<sup>3</sup> Recently, observers have noted there exists now "two hemispheres" in the practice of the law (Heinz and Laumann 1982). Those in the upper hemisphere graduated from the prestigious law schools, usually represent a few large corporations in large firms, and earn higher incomes. Those in the lower hemisphere graduated from less prestigious law schools, represent multiple clients (in a variety of different areas of the law), are in a smaller firm or in solo practice by themselves, and earn a lower income.

<sup>4</sup> It is important to note that roughly half of the states do not require students to attend law school before taking the bar (Corneille and Moeser 2000, 3). However, it has become very rare for an individual to pass the bar who has not attended law school.

## CONCLUSION

Moot courts can be a wonderful teaching tool for instructors. They engage students in "active learning." They require students to work on a specific problem, becoming experts on the topic. They are fun. Although they require a substantial amount of work, students seem to enjoy working on them. They can be an effective teaching tool that stimulates the students' thoughts and motivation. From the evidence presented in Table 6.2, there seems to be very little difference in the kind of students who get something out of them—attitudes toward the moot court do not differ significantly among male and female students, upper classmen and lower classmen, pre-law and non-pre-law students. As long as students believe the grading for the simulation was fair and received adequate instructions for the simulation, they will likely find the simulation to be worthwhile.

Life after the moot court will be a busy one for the law school-bound students. They will soon be taking the LSAT (if they have not already), applying to law school, and waiting to find out if they got into the law school they wanted to get into. That was the easy part. Three years of very challenging work lie in wait for them in law school, and preparation for an undergraduate moot court will become a distant and pleasant memory.

## RECOMMENDED READINGS FOR PRE-LAW STUDENTS

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## NOTES

political officeholder. I might have asked myself, "Do I really want to be seen sitting in a room with him?" A 1981 study of political campaign contributions by the National Institute of Political Research found that 54 percent of donors were uncomfortable with their contributions being reported. In 1985, the annual survey of 1,042 individuals showed 40.66 percent of respondents reporting similar discomfort. In 1986, 35 percent of respondents reported discomfort with their contributions being reported. In 1988, 36.3 percent of respondents reported discomfort with their contributions being reported. In 1990, 34.6 percent of respondents reported discomfort with their contributions being reported. In 1992, 34.3 percent of respondents reported discomfort with their contributions being reported. In 1994, 34.6 percent of respondents reported discomfort with their contributions being reported. In 1996, 34.6 percent of respondents reported discomfort with their contributions being reported. In 1998, 34.6 percent of respondents reported discomfort with their contributions being reported.

The most significant finding from this study was that 40 percent of respondents felt that their contributions had been misappropriated. This figure increased to 44 percent in 1990, decreased to 38 percent in 1992, and increased again to 41 percent in 1994. In 1996, 42 percent of respondents felt that their contributions had been misappropriated. In 1998, 42 percent of respondents felt that their contributions had been misappropriated. In 1998, 42 percent of respondents felt that their contributions had been misappropriated. In 1998, 42 percent of respondents felt that their contributions had been misappropriated.

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# APPENDIX ONE

## Important Legal Terms

Lewis Ringel

**Advisory Opinions:** One of the Brandeis Rules. The Supreme Court will not issue an opinion that advises government agents or branches as to the legality of a hypothetical government action.

**Affirm Precedent:** To uphold a prior decision or judgment. Often occurs when an appellate court sustains on appeal an opinion rendered by a trial court or a lower appellate court.

**Amicus Curiae:** Latin for “friend of the court.” A legal brief submitted to a court on the behalf of a party who is not a direct party to a legal proceeding but who will likely be affected by the proceeding and thus has an interest in how it is resolved.

**Appeal:** To formally challenge the legal validity of a court decision. An appeal to a criminal verdict does not question whether a judge or jury made mistakes as far as reviewing evidence and determining facts per se. Rather, an appeal questions the process through which the court rendered its decision. For instance, did the court err in how it interpreted the law or in how it selected a jury? Other appeals may ask if a law or policy of the state violates some higher body of law such as the Constitution.

**Appellant:** The party to a case who lost in a lower court and appeals that decision to a higher court. The appellant would be the first to speak in oral argument before an appellate court.

**Appellate Courts:** A court that rules on challenges to the validity of decisions made by lower courts. Appellate courts do not decide questions of innocence or guilt. Instead, they judge whether lower courts erred in how they applied or interpreted the law or how they followed rules of legal procedure.

**Appellee:** The party to a case who won in a lower court. The appellee would be the second to speak in oral argument before an appellate court.

**Apply:** In legal terms, to make relevant to or be governed by. Often this has the effect of limiting the state. For instance, the decision to apply the free press clause of the First Amendment to the states means that the states were not to enact laws or adopt policies that restricted the freedom of the press.

**Brandeis Rules:** A summary of U.S. Supreme Court rules, doctrines, and traditions found in a concurring opinion written by Justice Louis Brandeis in the case of *Ashwander v. TVA* (1937). The Brandeis Rules summarize the types of opinions that the Court will not issue as well as the types of cases that the Court will not decide. They represent the Court's efforts to limit its own powers of review. Under the Brandeis Rules, the Court will only decide cases that involve a controversy and for which the parties have standing. The Court will not decide political questions, it will not rule in cases that are moot, or which can be remedied in another fashion, nor will it issue advisory opinions, or declaratory judgments.

**Civil Law:** A specific series of rules and regulations that are meant to guide human behavior and settle disputes among individuals. The civil law, which dates to the Roman Empire, is legislature-made law and is presented in a legal code which, if strictly followed, would decide disputes just as the legislature intended.

**Common Law:** A loose collection of legal decisions that, taken together, form precedent for future cases. The common law, which dates to medieval England, is judge-made law and does not appear in any code.

**Concurring Opinion:** An opinion written by a judge who votes with the majority in a case but does not necessarily agree with the majority's rationale or methodology or all of its conclusions. A concurring opinion may be used to offer an alternative approach to similar cases in the future as was the case in Justice Robert Jackson's concurring opinion in *The Steel Seizure Case* (1952). A concurrence may also be issued to emphasize what a majority opinion does not do, as was evident in Justice Harry Blackmun's concurring opinion in *NLC v. Usury* (1976).

**Controlling Precedent:** The court decision from the past that is most relevant to how a subsequent court should decide a legal question. A controlling precedent would dictate how a court engaging in *stare decisis* would decide a current legal issue.

**Declaratory Judgments:** One of the Brandeis Rules. The Supreme Court will not advise persons of their rights. The Court will only rule on real cases and controversies when individuals have filed suits or have been brought to trial by the state.

**Defendant:** The party to a case who is sued or who is arrested and charged with a crime.

**Dicta:** Ideas expressed in a court opinion that are not essential to the decision rendered in that specific case. These often include a judge's view of a subject in general. The singular of *dicta* is *dictum*.

**Discretionary Functions:** Actions taken by government officials which are matters of judgment rather than requirements of the law. Such functions are not susceptible to writs of *mandamus*. They would include decisions about taxes or whether to veto a specific bill.

**Dissenting Opinion:** An opinion written by a judge who does not vote with the majority in a case. Dissents typically focus on the aspects of the majority's reasoning that the dissenter believes are wrong. Some dissents offer alternative approaches for how similar cases may be decided in the future.

**Distinguish Precedent:** To argue that the principle established by or the holding of a past decision is not controlling in a current legal controversy. This is done by demonstrating that a key aspect of the past case, such as the facts, is different from the facts of the present case. A common motivation for distinguishing is to avoid a precedent that, if applied, would damage an argument. Another motivation for distinguishing is to avoid breaking new legal ground by overturning precedent. Distinguishing allows a court to chart a new legal course without reversing any precedent. The court would simply find that the precedent and the present case were significantly different, and, thus, the new ruling did not overrule the past ruling because they did not address the same issue(s). In *Alden v. Maine* (1999), for instance, the Supreme Court limited the ability of citizens to sue states under federal statutes. In *Garcia v. SAMTA* (1985), the Court had affirmed a federal law that allowed citizens to sue a local transportation authority. Rather than reverse *Garcia*, *Alden* differentiated the facts of the two cases. Because *Garcia* involved a local agency and *Alden* involved a state, the Court reasoned its decision to limit Congress's ability to enable citizens to sue state governments did not necessarily limit its ability to enable citizens to sue local governments. A key point to keep in mind with respect to distinguishing is that the force or breadth of the precedent is not lessened with respect to the facts from which it was derived or to future cases that raise the same facts.

**Doctrine:** A set of principles that guide behavior. For instance, the Doctrine of Selective Incorporation provided a method for determining which liberties found in the Bill of Rights applied solely to Congress and which of these liberties applied to state and local governments.

**Doctrine of Mootness:** One of the Brandeis Rules. The Supreme Court will not decide a case if events have rendered its opinion no longer needed.

**Doctrine of Ripeness:** One of the Brandeis Rules. The Supreme Court will typically not issue a ruling unless the case is ready to be decided. All other legal or administrative remedies must be exhausted. It is

possible, however, in cases of emergency or when time is short, such as in *Bush v. Gore* (2000), that the Court will take the unusual step of deciding a case before a lower court is finished with its deliberations.

**Doctrine of Standing:** One of the Brandeis Rules. The Supreme Court will not address a case unless the plaintiff can demonstrate a real legal claim or right and that he or she is personally affected by the case.

**Due Process of Law:** Refers to legal processes or procedures that treat individuals in a fair manner.

**Equity:** The traditional power of judges at common law to, in the name of fairness and justice, offer relief to party in instances when the law does not prescribe any remedy.

**Ex Parte:** Latin phrase meaning "on the side of" or "on the application of." Often associated with requests from one side, such as a prisoner, for an appeal to a specific policy or a specific public act.

**Ex Post Facto Law:** Latin phrase meaning "after the fact." A law that retroactively makes a certain action a crime or retroactively increases the penalty that an individual convicted of a specific criminal act would face. Traditionally, to be deemed *ex post facto*, a law must be penal in nature; however, the Supreme Court, in *Fletcher v. Beck* (1810), held that a civil law that has a similar "effect" as an *ex post facto* law might in fact be considered to be an *ex post facto* law.

**Extend Precedent:** When a court interprets precedent to apply to a different set of facts or to achieve a result unintended by the court that issued the original precedent. For example, *Eisenstadt v. Baird* (1972) extended the Supreme Court's decision in *Griswold v. Ct* (1965) by recognizing a general right of marital reproductive privacy to promulgate a more general right of reproductive privacy that protected all persons.

**Federal Courts of Appeals:** Federal appellate courts created using Congress's powers under Article III of the U.S. Constitution. There

are 13 federal courts of appeals. These courts, which are just below the U.S. Supreme Court as far as the nation's judicial hierarchy goes, settle most federal appeals. Eleven of the courts of appeals serve multi-state regions known as circuits. The other two circuits exist to hear appeals that involve federal bureaucratic agencies or patent disputes and contract lawsuits filed against the United States. Federal courts of appeals judges serve life terms in good behavior.

**Federal District Courts:** Federal trial courts created using Congress's powers under Article III of the U.S. Constitution. There are over 600 federal district courts, each one serving a specific state. The number of federal district courts per state is determined by population. The larger states have more federal district courts than the smaller states. Every state is served by at least one federal district court. Federal district court judges serve life terms in good behavior.

**In Re:** Latin phrase meaning "in the matter of."

**Judicial Review:** The power of courts to find a law or policy invalid.

**Jurisdiction:** A court's authority to rule on a specific case or issue.

**Legal Brief:** A written summary of legal arguments that is submitted to a court by or, most commonly, on behalf of a specific party to a legal proceeding.

**Legal Facts:** The events that transpired between individuals, groups, or states that lead to a judicial proceeding.

**Legal Precedent:** A decision that influences how future cases that raise similar questions will be decided. A legal precedent becomes a part of the law that is reapplied when courts engage in *stare decisis*.

**Legislative Courts:** Special courts created using Congress's powers under Article I, Section 8 of the U.S. Constitution. Legislative courts provide technical expertise on specific subjects such as taxes, immigration, or military issues. Judges on such courts serve fixed terms.

**Limiting Precedent:** When a court revises existing precedent so that it still has the force of law but means less than it did in the past. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), for instance, the Supreme Court reaffirmed that abortion was a right protected by the U.S. Constitution. At the same time, *Casey* altered existing precedent under *Roe v. Wade* (1973) to expand both when the state could restrict access to abortion and the types of limits the state could place on women seeking to procure an abortion. In doing so, the Court narrowed the breadth of the *Roe* decision.

**Majority Opinion:** A formal or written opinion that presents a verdict in a court case and explains the rationale behind the majority's decision. Most commonly associated with appellate courts.

**Martial Law:** The absence of civilian law in favor of rule by military authorities.

**Narrow Opinion:** An opinion that is focused solely on the issue at hand and does not overturn any precedent or decide or address any extraneous questions. An opinion that is "narrow" seldom recognizes any new rights or affirms any sweeping government powers. For that reason, it is often the choice of a court that would prefer to keep its opinions limited in scope and reach.

**Overbreadth:** A regulation of a basic liberty that is too broad or too restrictive; one that goes beyond the government's needs or interests and restricts the people's rights in a way that is excessive.

**Overtun Precedent:** When a court rules that a past legal decision is no longer valid or correct. In doing so, the court reverses the past decision and replaces it with a new one. The Supreme Court's decision in *Brown v. Board of Education* (1954), in forbidding racial discrimination by state or local governments, repealed its previous ruling in *Plessy v. Ferguson* (1896), which had allowed the state to discriminate on the basis of race.

**Petitioner:** The party who requests a court to issue an order or an injunction.

**Plaintiff:** The party to a case who sues or brings charges against another party.

**Political Question Doctrine:** One of the Brandeis Rules. The Supreme Court will not decide questions that constitutionally are delegated to the political branches of the federal government. These include questions relating to Indian tribes, the validity of the enactment process of constitutional amendments, dates and duration of hostilities, questions relating to the Guaranty Clause of the U.S. Constitution, and foreign relations. For more on this doctrine see *Baker v. Carr* (1962).

**Real Legal Controversy:** One of the Brandeis Rules. The Supreme Court will not decide "friendly lawsuits" between parties who are merely curious about the law or cases that do not involve a party who has been wronged by another party. There must be a real issue or dispute involving an imminent danger presented.

**Remand:** To send a case back to a lower court for further proceedings in keeping with the higher court's ruling.

**Respondent:** The party who opposes the request of a petitioner.

**Stare Decisis:** Latin for "let the prior decision stand." This term refers to when a court decides a case or answers a legal question in the present in accordance with how it was decided in the past.

**Statute:** A law enacted by a legislature.

**Statutory Interpretation:** When judges read and give effect to statutes by applying them to the cases before them. Examples would include *Yates v. U.S.* (1957) or *Smith v. U.S.* (1993).

**Trial Courts:** A court that determines whether accused parties or persons are guilty or innocent of the charges against them. This is known as "trying facts."

**Writ of Certiorari:** Latin phrase for "to make more certain." Judicial order that instructs a lower court to send up the records of a specific case for review by a higher court. If the U.S. Supreme Court issues a writ of certiorari, it is agreeing to consider the appellant's case on appeal.

**Writ of Habeas Corpus:** A Latin phrase meaning "you have the body." There are several different writs of habeas corpus. They include court orders to free a prisoner who has been unfairly or illegally jailed, and a court order to a jailer brings a detained party before a court for due process.

**Writ of Mandamus:** Latin phrase for "we command." A court order instructing a government official to carry out some nondiscretionary function. Such would include delivering commissions or performing a nationwide census.

Leibniz's "matters of fact" were not the same as those that Hume believed to be given by the sense of touch alone. According to Leibniz, the matter of fact was a "relation of dependence" between two substances, and it was not a relation of dependence between qualities of perception and qualities of substance.

It is this difference in the concept of matter of fact that makes Hume's theory of causation problematic. A relation of dependence is not a relation of causation. In the case of Hume's example, the relation of dependence between the cause and effect is not a relation of causation. The cause does not bring about the effect. The cause is "begged" by the effect, and the effect is "begged" by the cause.

Thus, Hume's "dissertation" on causation fails to establish the connection between the cause and effect. It fails to establish the connection between the cause and effect because it fails to establish the connection between the cause and effect.

## Major Electronic Publishers

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Kimi King

Today, students studying the law have numerous electronic choices to peruse. Depending on the resources of your library, there should be multiple sources of electronic material that you may have access to for doing your research. It is not necessary that you learn all of them, because you will quickly find that many of the materials are duplicated within each of the databases. Instead, we suggest you experiment with the different sources to see what works the best for you, and then learn to become a professional at searching that database. For many of you, access to certain data sources is based on what your library has acquired.

The two major electronic publishers—LexisNexis Academic Universe and Westlaw—grew up in the 1970s as a response to a need attorneys had to access the most recent information available. Both of these organizations have transformed and grown radically, so that today they constitute the leading sources of commercial online legal databases. Each emphasizes U.S. law (including case law, statutes and regulations, legal texts, news, and other information), but within the last decade, both have increased their data for international and comparative law. Both are a “fee-based” service—you have to be a subscriber. Depending on the subscription service that your university or college has, you may or may not have access to some types of databases that are available to commercial users. Additionally, there are several CD-ROM materials that you may want to use depending on your library’s resources.

**LEXISNEXIS ACADEMIC UNIVERSE**

LexisNexis Academic Universe is another online legal source, provides news databases and law-related information from around the world. As a division of Reed Elsevier Inc., it is part of a mega-publishing company that includes other publishers such as Matthew Bender and Martindale-Hubbell. Material is updated daily, and it uses a search engine that relies on terms and connectors (Boolean search) and natural language (Freestyle), as well as a template that takes you through a guided search so you can tailor your research. Most of the information is provided through clicking on "tabs" specifying the material you need. We suggest that you rely on the "Guided Search" options where you can because this makes accessing the database much easier. Lexis is the law-related research side of the database, while Nexis allows you to conduct research in all major newspapers, journals, magazines and other sources. There is an on-line tutorial that walks you through sample searches according to the material you need to find.

**WESTLAW**

Westlaw is part of the West Group, which is a traditional publishing source and is well known for having developed the case reporter system that we use today. West Group was the first to develop the "key number" system, which allows you to find core legal issues and concepts through a "headnote" classification. The Canadian-based Thomson Corporation bought the American company in 1996. With Westlaw you can search using terms and connectors (also known as Boolean search strings), a template that guides you through the process, or with natural language called the WIN system (Westlaw is Natural). Before beginning your searches, you need to specify what directories you want to access. After you do this, the program takes you through a search through the utilization of point & click methods or pull-down menus. Westlaw also maintains an on-line tutorial that is helpful. We suggest you complete it before beginning your research.

**LEGALTRAC**

LegalTrac maintains almost a million articles from legal publications beginning in 1980, including academic law reviews, law journals, and materials from commercial publishers. You may use the "Subject Guide" search, which provides all the different substantive areas where you can search. Under each subject heading you will then find a set of articles that correspond to your subject area. You can then search within the different subject headings to suit your needs. LegalTrac also allows you to do a "relevance" search which relies on word variations in combination or alone. For example, say you wanted to research euthanasia, you might also search on physician-assisted suicide or right-to-die. LegalTrac allows you to take those word variations into consideration. You can also search on key word terms, rather than depending on the "subject" headings that you are given. Finally, under more advanced procedures you can search on combinations of items to help make your search more specific. Thus you can search by key word, journal or title name, author, or abstract to help you more quickly identify articles that are appropriate for you.

**LEGAL INFORMATION INSTITUTE**

This free, web-based resource is operated by the Cornell Law School and began in the 1990s to give comprehensive information about a broad range of legal issues. It also provides useful links to other legal reference resources, including non-legal sources that help with researching policy issues. The site also provides access to law reviews, abstracts, and full text articles, and professional information relevant to both law students and lawyers. The website also provides comprehensive information about the workload of the federal courts. It provides federal and state materials including U.S. Supreme Court opinions, state statutes, federal regulations, and state codes. You search for sources by key word or by topic listings that are provided. You should be sure to look through the search tips before beginning to do searches on the website because there is a great deal of information. Also included is a gallery of all U.S. Supreme Court Justices

throughout history with short biographical sketches as well as a useful glossary of legal terms.

### **LOISLAW**

This is a paid fee (subscription service) that runs off a web-based search engine and includes case laws, statutory law, constitutions, administrative law, court rules, and state materials. It also has limited access to U.S. and foreign legal publications. You need to rely on a subject index and provide key word search delimiters. This is typically only available at law schools.

### **VERSUSLAW**

A fee-based service on the web that allows access to federal and state case law, legislation, and codes. The materials are somewhat limited but provide basic information. You can search in a full-text format or by using terms and connectors (Boolean search strings). Unless you are an undergraduate at a school that has a law library, this will probably not be available to you.

### **QUICKLAW**

Subscription-based online service that provides case law, primary and secondary legal materials, and other resources relevant for doing legal research on the United States, the United Kingdom, Canada, and the Commonwealth. There is also a general collection of treaties and international laws of all jurisdictions arranged by subject. There is also a wide variety of legal communication materials, including electronic newsletters analyzing specific issues, attorney and legal profession directories, and book reviews. Information is arranged through topic, so you have to use it according to subject and key word database. Law schools may have this resource, so if you are an undergraduate enrolled at such an institution, see if you can get access to it.

## APPENDIX THREE

# LexisNexis Shepard's Citations and Westlaw's KeyCite Citations

Kimi King

It is critical to your research that you know whether you are using "good" law that has not been overturned by another decision. Nothing can be more humiliating than extensively relying on a case, only to find out that it has been modified or, worse yet, overruled! Both of these "citable" services allow you to look up a case to find out if other cases have cited the one you are researching. You may also find that some cases cited by the services are also cases that assist you in formulating your argument. As a general rule, we suggest you rely on other primary and secondary sources to do the majority of your research, but then use the citator services to add to your informational base and to be sure that your case is current.

Every time a case is cited in any court opinion, both Shepard's and KeyCite make a note of the location the case is cited and summarize what the cite refers to and how it may negatively or affirmatively support the opinion. All of these citations are compiled according to the case cite as it appears in any court opinion and according to the federal circuit or state where the case was noted. Each of these services can also be used to trace all sorts of legal materials (including Constitutional provisions, statutes, codes, treaties, and court rules). You will probably rely on them mostly for finding out what other opinions have said about the case you may want to use.

LexisNexis Academic Universe maintains an online citator called Shepard's. There is a print version of Shepard's citator that most libraries maintain. Check with your library to see if it is accessible for

lower court opinions because the on-line version available to most undergraduate institutions includes only Supreme Court cases. Through this service you can verify the exact status of a case to ensure that you are using the most up-to-date materials. By looking at the Shepard's you can quickly find other cases that have cited your case and determine if you should examine those cases to assist you in your arguments.

In order to "Shepardize" your case, you need the full citation (volume, reporter, and page number). There is a form on Lexis that allows you to enter in the information and then returns all cases according to your specification according to "positive," "neutral," or "negative" treatment. Additionally, it provides you with a comprehensive list of all cases that have cited your case along with a graphic index to help you quickly identify problem areas. For example, a "stop sign" indicates that there is negative treatment of a case associated with other cases that have used it, and you can then look up those cases to see if they undermine or help you with your arguments. Negative treatment is indicated as "Overruled by, Questioned by, Superceded by, Revoked, Obsolete, or Rescinded." That way you can go to the "negative treatment" case and see how your case has been handled. Shepard's also uses the "yellow triangle" to indicate "caution," the green "+" meaning "positive treatment," and the blue "A" and "I" to provide additional analysis or information about how the case is used.

Westlaw also has an online case citator (KeyCite) that allows you to find out the current status of U.S. case law and federal legislation. The system has "flag" symbols that clarify the status of the law you are examining. As with Lexis, you need to have the exact citation format and use the KeyCite directory for searching on your case. The symbols for Westlaw are slightly different. For example, a "red flag" means that the case is no longer good law for one of the points presented, while a "yellow flag" indicates that there is some negative history associated with the law but that it has not been overruled or reversed. The "blue H" means that case has some history but that it is not negative. "Green C" indicates that there are citing references but that it is not necessarily negative or positive. Westlaw has additional symbols including the "depth of treatment green stars" which

"purple quotation marks" which tell you whether your case is quoted in the KeyCite case. One additional advantage to Westlaw is that most university accounts allow you to access lower federal and state codes and court decisions, along with administrative decisions. Again, check with your library to see what services are available to you.

Both LexisNexis Academic Universe and Westlaw rely on Boolean connectors for doing full-text searches. You will find when you access the sources that there is a menu that can walk you through Boolean search. This sheet is more of a quick reference guide to give you an idea of typical commonly used terms.

LexisNexis Academic Universe      Terms & Connectors

and

or

minus

inthesameorder

inthesameplace

within

near

within

prox

date

since

within

fulltext

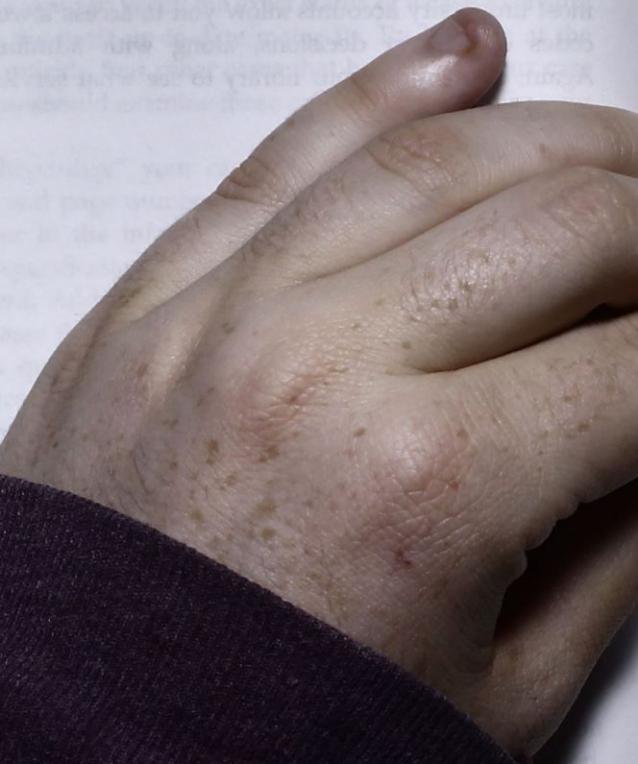
fulltext

search

beginning to take more "consciousness of how 'extra' role-taking might be experienced as a significant source of stress and conflict among older adults." Related to a sense of how older adults experience stress and conflict, another study found that older adults' responses to stressors were influenced by their "extreme sensitivity to social support and dependence on others" (Kane & Katz, 1993).

In order to "depersonalize" the self, older adults may choose to alter their self-concept (volume, tempo, and power) according to their social context. This "negative" transformation of the self, however, has the potential to have negative effects on one's self-esteem and self-worth. In addition, older adults with chronic illnesses may experience those difficulties more frequently than younger adults. By definition, older adults are more likely to be disabled, to have chronic diseases, and to be institutionalized. In addition, the social support available to older adults is often limited, and the quality of support may be poor.

It is important to note that the negative health outcomes associated with "overrole" or "overinvolvement" in the lives of others may not be limited to physical health problems but also include emotional and cognitive difficulties. For example, older adults who are "overinvolved" in the lives of others may experience depression, anxiety, and cognitive impairment (Kane & Katz, 1993). In addition, older adults who are "overinvolved" in the lives of others may experience social isolation, which has been linked to depression and cognitive impairment (Kane & Katz, 1993). In addition, older adults who are "overinvolved" in the lives of others may experience social isolation, which has been linked to depression and cognitive impairment (Kane & Katz, 1993).



## Common Boolean Terms and Connectors

Kimi King

Both LexisNexis Academic Universe and Westlaw rely on Boolean connectors for doing full text searches. You will find when you access the sources that there is a menu that can walk you through the search. This sheet is more of a quick reference guide to give you an idea of most commonly used terms.

### LexisNexis Academic Universe      Terms & Connectors

|   |             |
|---|-------------|
| and                                       | and         |
| or  | or          |
| phrase                                    | " "         |
| in the same sentence                      | ws          |
| in the same paragraph                     | wp          |
| with <i>n</i> terms of ( <i>n</i> =1-255) | w/ <i>n</i> |
| but not                                   | and not     |
| root expander                             | !           |
| universal character                       | *           |

Citations, Title, Source, Author, Text, Date functions done through the pull-down menu and not done in conjunction with full-text search as the case with Westlaw.

**Westlaw****Terms & Connectors**

|   |                 |
|---|-----------------|
| and   | &               |
| or  | (leave a space) |
| phrase  | " "             |
| in the same sentence                                  | /s              |
| in the same paragraph                                 | /p              |
| preceding within sentence                             | +s              |
| preceding within paragraph                            | +p              |
| with <i>n</i> terms of ( <i>n</i> =1-255)             | /n              |
| preceding within <i>n</i> terms of ( <i>n</i> =1-255) | +n              |
| but not   | %               |
| root expander   | !               |
| universal character                                   | *               |

**Fields**

|          |                                       |
|----------|---------------------------------------|
| Citation | CI()                                  |
| Title    | TI()                                  |
| Source   | SO()                                  |
| Author   | AU()                                  |
| Text     | TE()                                  |
| Date     | DA (Aft 00/00/00<br>and Bef 00/00/00) |

## APPENDIX FIVE

# Internet Legal Resources

Kim King

| Source                                  | Web Address   | Materials   |
|---|---|---|
| Internet Legal Resource Guide           | <a href="http://www.ilrg.com">http://www.ilrg.com</a>   | general site containing multiple sources  |
| Hieros Gamos                            | <a href="http://hg.org">http://hg.org</a>   | general site containing multiple sources  |
| FindLaw.Com                             | <a href="http://www.findlaw.com">www.findlaw.com</a>  | general site containing multiple sources  |
| Law Library Resource Exchange           | <a href="http://www.llrx.com">http://www.llrx.com</a>   | general site containing multiple sources  |
| Emory School of Law Reference Desk      | <a href="http://www.law.emory.edu/LAW/refdesk/toc.html">http://www.law.emory.edu/LAW/refdesk/toc.html</a> | general site containing multiple sources  |
| Legal Information Institute             | <a href="http://www.law.cornell.edu">http://www.law.cornell.edu</a>                                       | Cornell Law School data source for federal and state laws                                   |
| Federal Courts                          | <a href="http://www.uscourts.gov/">http://www.uscourts.gov/</a>   | gateway to all federal courts and opinions—official site                                    |
| State Courts                            | <a href="http://www.ncsconline.org/">http://www.ncsconline.org/</a>                                       | gateway to all state courts and opinions—official site                                      |
| Megalaw: The Lawyers' Window on the Web | <a href="http://www.megalaw.com/">http://www.megalaw.com/</a>   | general site containing multiple sources  |
| Library of Congress                     | <a href="http://www.loc.gov/">http://www.loc.gov/</a>   | gateway to government publications & lists of text-based sources for research—official site |
| U.S. Supreme Court site                 | <a href="http://www.supremecourtus.gov/">http://www.supremecourtus.gov/</a>                               | full text of opinions, rules, includes briefs & oral arguments                              |

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|   |   |  |
|---|---|--|
| U.S. Code site                            | <a href="http://www.gpoaccess.gov/usc/ode">http://www.gpoaccess.gov/usc/ode</a>                     | full text of U.S. codes—official site  |
| Thomas: Legislative Information           | <a href="http://thomas.loc.gov/home/thomas2.html">http://thomas.loc.gov/home/thomas2.html</a>       | Full text of federal bills from the 101st Congress on and some committee reports from the 104th Congress to the present. |
| Congressional Record                      | <a href="http://www.gpoaccess.gov/crcord/index.html">http://www.gpoaccess.gov/crcord/index.html</a> | official U.S. site to <i>Congressional Record</i>  |
| Electronic Code of Federal Regulations    | <a href="http://www.access.gpo.gov/ecfr">http://www.access.gpo.gov/ecfr</a>                         | complete set of current CFR—easy search if you have exact code   |
| Code of Federal Regulations               | <a href="http://www.access.gpo.gov/nara/cfr/">http://www.access.gpo.gov/nara/cfr/</a>               | search CFR by key words  |
| Federal Register                          | <a href="http://www.gpoaccess.gov/fr/index.html">http://www.gpoaccess.gov/fr/index.html</a>         | full text of <i>Federal Register</i> to back to 1995—official site   |
| The U.S. Government's Official Web Portal | <a href="http://www.firstgov.gov/">http://www.firstgov.gov/</a>                                     | U.S. official website that contains numerous government publications & law sources                                       |
| InfoUSA                                   | <a href="http://usinfo.state.gov/usa/infousa/">http://usinfo.state.gov/usa/infousa/</a>             | U.S. State Department web site containing access to multiple government publications & law sources                       |
| State & Local Government on the Net       | <a href="http://www.statelocalgov.net/">http://www.statelocalgov.net/</a>                           | gateway to state & local government websites   |
| The Founders' Constitution                | <a href="http://presspubs.uchicago.edu/founders/">http://presspubs.uchicago.edu/founders/</a>       | University of Chicago Press links to important Constitutional documents and materials                                    |

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## APPENDIX SIX

# How to Brief a Case

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Kimi King

Before briefing the case, read over it and focus on the substantive and procedural issues. What started the conflict, what action is being sought? What policy issues are at stake? Think about the type of proceeding (e.g., appeal from a summary judgment, judgment after trial, etc.) and the type of relief sought (e.g., damages, injunction, etc.). Be efficient in reading cases and writing briefs. This does not mean "skimming" a case, but it means recognizing which information should go where in your brief. Develop a system for quickly and precisely marking the case so that important passages are easily identified in a concise and accurate manner.

Remember that preparing briefs improves your legal reasoning skills. Briefs synthesize cases into basic points so you can quickly access information. Briefing requires that you study the essential facts and reasoning from the court's opinion and succinctly express them in your own words. This helps you develop a critical facet of legal reasoning—the ability to put complex matters into simple form. Use the court's terminology only if it helps you understand the case or there is a specific standard, test, or rule the court is articulating. Try to use your own language as if you were explaining it to a friend and avoid legal-ease. This enhances your understanding of the case. Remember, it is not a typing exercise but an exercise in critical thinking!

The first three or four briefs are the hardest—taking you about two hours at first, and about 45-60 minutes for the next few after that. Eventually briefs will take only 20-30 minutes (depending on the length of the original or the excerpt). You are thinking and writing in a completely different way, using words that you may have never heard before. As you

are more comfortable speaking and understanding the language, identifying issues, and moving quickly through sections, you will become more adept. If you come across words you do not understand, be sure to use an on-line legal source or *Black's Law Dictionary*.

Structure is essential to your briefs because it allows you to organize the arguments, so set your briefs up with the **facts; issue; reasoning; and holding**. Pay attention to the concurring and dissenting opinions so you can fully understand the case.

## FACTS

(7-9 sentences) A synopsis of the key case facts that deal with the conflict and how it came about. Structure this in a logical sequence of events. While some cases conveniently summarize the facts at the beginning, some cases require the facts be drawn from the entire opinion (including the concurring and dissenting opinions)! The facts are a short statement of the events and transactions that led to the initiation of the legal action. Some of the "facts" may be in dispute, and you should note this. Be sure to note which facts are *relevant*. Think about how it adds to understanding the case. Do not judge which facts are relevant until you read over the entire case, as the ultimate determination may turn on something that seems insubstantial.

Identify the role played by each party where relevant, and indicate whether they are the "plaintiff," "defendant," "appellant," "appellee," "respondent," or "petitioner," but also associate them by the name as it may appear in the title of the case. Bear in mind that the party presently seeking something from the court may not be the plaintiff and that sometimes only the cross-claim of a defendant is addressed. Confusing the parties can ruin your analysis and understanding. Be sure you know "who's suing whom" and pay attention to what laws are in conflict, or how different parties are relying on the same law but reaching different interpretations. Where possible cite the law in a way that you will remember it (memorizing numbers from statutes is often a waste of time).

### ISSUE

(1-2 sentences) A statement of the legal question answered by the case. For clarity, the issue is best if put in the form of a question with a "yes" or "no" answer. The issue is simply the rule of law handed down. Though the complexity of case issues varies, a concise, single-sentence question should sum it up. If a case presents more than one issue, express each issue separately in a single-sentence question, and number each issue accordingly (issue 1, issue 2, etc.).

The problem is discerning what is *the* issue raised in the case. A case will say it raises and then answers several questions. Typically, there are only one or two such questions before the court. A question or statement not central to resolving the controversy is addressed in language known as *obiter dictum* or "remarks by the way." Dicta are comments not necessary for the final disposition of the case, but such observations clarify and explain something about the appropriate rule of law. While you may incorporate this in the brief, do not place it with the issue. To find the issue, ask *who wants what* and then ask *why that party succeeded or failed to get it*. Then take the "why" and turn it into your "yes" or "no" question.

### REASONING

(3-12 paragraphs, but this will vary substantially according to the number of issues and case complexity) *This is the most important section of your brief and you should spend most of your time on it.* Note which justice is the author of the opinion, and think about the policy and legal issues at stake in the court's decision. What are the policy ramifications of a decision to favor one party over another? What rule of law is being clarified? Why is the court adopting one interpretation over other potential interpretations? How does the court reconcile the present decision with prior case law? Pay attention to the case law on which the court relies. How does it favor one party over another? Be sure to incorporate that case law into your brief to show the court's interpretation. How are cases distinguished that contradict the present decision? What cases are pivotal and most important? Create links between the interpretation and the decision to favor specific reasoning. What rule of law does the court favor and why?

The reasoning is the most difficult section to do, and you should go through it paragraph by paragraph. After each one, try to synthesize what was presented into a summary sentence. Only refer to cases that are critical to the court's decision because numerous cases will be cited. You want to highlight only the most important ones. You do not have to put the citation to the case, but try to put the year with it to keep track of how precedent has developed over time.

### **HOLDING AND DECISION**

(5-7 sentences) A succinct explanation of the rationale for the decision that tells you who wins and loses, and why, including the concise rule of law in two sentences. What is the general principle of law which the case illustrates? In distilling the reasoning, always include an application of the general rule or rules of law to the specific case fact. Bring to light the court's implicit justifications and reasons for the rule, the policy issues, and those critical factors that ultimately shape the case outcome. Be careful in selecting the rule of law. Cases typically present more than one legal ruling. How to find the decisive rule of law? If a particular legal ruling is only a step in the court's overall argument, then most likely it is not the decisive rule of law. A rule of law is decisive when the final conclusion or statement of the law determines why one party wins over the other.

### **CONCURRING & DISSENTING OPINIONS**

(5-7 sentences per opinion) A summary of the main points that compares and contrasts how and why the author of the opinion agrees, disagrees, or would like to clarify key points with the majority opinion. Confine the points to critical differences between the opinions that will help you remember strengths and weaknesses about the majority opinion. Remember that concurring and dissenting opinions are written because there is something "left unsaid" or "misrepresented" in the majority opinion.

## APPENDIX SEVEN

# Sample Case Brief: *Griswold v. Connecticut (1965)*

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Kimi King

### FACTS

Griswold, an Executive Director of the Planned Parenthood League of Connecticut, and a medical doctor were convicted under a state statute that made counseling of married persons who sought to take contraceptives a criminal offense. The state fined each defendant \$100 as accessory to the 1879 state statute prohibiting the dissemination of birth control to married persons. The defendants argued that the state law interfered with a right to privacy. The Court had previously heard a challenge to this same statute in *Poe v. Ullman* (1961) but had refused to hear the case because no one had yet been prosecuted.

### ISSUE

Is there a right to privacy in marital relationships implicit in the Constitution despite the absence of specific language to guarantee the right?

If so, where does this right emanate from within the Constitution?

## REASONING

(*Douglas*) There is an initial issue of whether the defendants can challenge this law because they are not one of the married couples seeking to protect the rights that have been violated by the state statute. Because the defendants are charged as accessories, they have the right to challenge the law—standing is granted.

The Bill of Rights contains penumbras that flow from the explicit guarantees. These penumbral rights give “life and substance” to the Amendments, and they guarantee “zones of privacy” for individuals. These privacy rights are implicit in the First Amendment’s right of association, the Third Amendment’s prohibition against the peacetime quartering of soldiers, the Fourth Amendment’s prohibition on unreasonable search and seizure, the Fifth Amendment’s self-incrimination Clause, and the Ninth Amendment’s reservation of unenumerated rights. All of these Amendments militate in favor of a principle that the Constitution protects individuals from governmental invasions by the state.

Prior Supreme Court precedent in *Meyer v. Nebraska* (1923) recognized that there are rights to marry, raise children, and attain information that is necessary for protecting liberty rights guaranteed through the Due Process Clause. The Court extended liberty rights to parents in *Pierce v. Society of Sisters* (1925) which invalidated a state law that required students to attend public schools. The Court struck down the law specifically because it interfered with parental rights to control their children’s education.

Applying those principles here, couples should be able to control decisions regarding birth control. Even though the right to privacy is not explicitly mentioned in the Constitution, it should be extended here as the right to an education was extended in *Meyer* and in *Pierce*.

Finally, these restrictions on the reach of a state’s power have been incorporated and apply to the states through the Fourteenth Amendment’s Due Process Clause. The statute interferes with the marital right to privacy and the relationship between couples and their physicians.

**Concurring**

(*Harlan*) The court should not focus on the specific provisions of the Bill of Rights but should rely exclusively on the Due Process Clause to find that this law violates the basic values that are "implicit in the concept of ordered liberty."

**Concurring**

(*Goldberg, with Brennan and Warren*) The Ninth Amendment is not an exclusively independent source of rights, but it does suggest that the list of rights in the first eight Amendments is not exhaustive. The right of privacy is "fundamental," and the state cannot justify its intrusion based on some slim idea that the purpose of the law is to protect marital fidelity. The Court's decision does not interfere with a state's proper regulation of issues such as adultery or fornication.

**Concurring**

(*White*) The Due Process Clause should be the test in determining whether a state has justified the need for a legitimate and substantial state interest. The standard under the Due Process Clause is whether the state has arbitrarily and capriciously applied its lawmaking function. Here the state has not shown a sufficient state interest, nor a causal connection between married persons engaging in extramarital sex and the prohibition on the dissemination of contraceptives.

**Dissent**

(*Black, with Stewart*) The law is offensive, but neither the Ninth Amendment nor the Due Process Clause should be used to invalidate it. The Court is using its own social values to subjectively determine whether the law should be struck down. It is impossible to determine

what fundamental rights are under the Court's holding, because the Court is simply trying to re-write the Bill of Rights. The only way to find whether a right to privacy exists is through a Constitutional Amendment.

### Dissent

(*Stewart, with Black*) This is an "uncommonly silly law," but the Due Process Clause should not be used because there was no claim that the law was vague nor that the defendants were denied any procedural rights. The Ninth Amendment simply restricts the federal government to a government of express and limited powers. What is even more ludicrous is that the Court finds a right to privacy, while the Constitution is silent on such an issue.

### HOLDING

The right of marital privacy, although not explicitly stated in the Bill of Rights, is one of the penumbral rights formed by certain other explicit guarantees. As such, the right to privacy is protected against state regulations that interfere with this right. Additionally, the law, as is it written, is overbroad and reaches beyond the legitimate scope of state power; it must be invalidated.

## APPENDIX EIGHT

# Quick Checklist for Oral Argument

Kimi King

- Do you have an outline of your argument reduced to 1-2 typed pages that sketches the key points of your case?
- Does your partner have a copy of your argument, and do you have a copy of his?
- Do you have a copy of all the cases, including the citations, that you rely on for your argument?
- Do you have a copy of the record so you can refer to it if called upon to do so?
- Do you have your key cases in mini-briefs on note cards?
- Have you gone over your case with co-counsel, discussed how to handle rebuttal, and divided the time for speaking?
- Do you have paper and pen to take notes on your opponent's case so you can respond directly to points that she makes?

## LITERATURE AND LINGUISTICS

VOLUME 35

- Editorial: The Journal of Linguistics and Literature  
and the Journal of English Language and Literature  
are merged into *The Journal of Literature and Linguistics*.  
The new journal will be published twice yearly.  
Subscription rates: \$10.00 per volume, \$5.00 per issue.  
Subscriptions should be sent to the publisher,  
John Wiley & Sons, Inc., 605 Third Avenue,  
New York, N.Y. 10016.  
Changes of address should be notified together  
with our latest label, and should be sent to the publisher.  
For advertising rates, prices of back numbers,  
and other information, apply to the publisher.

## APPENDIX NINE

# Things Someone Should Have Told You (but Probably Didn't)

Kimi King

1. Wear business attire, but be sure you are comfortable in the shoes and clothes you choose because you may have to walk distances to reach your scheduled "courtroom." Do not wear something for the first time to a competition or simulation. Be sure you know whether it is too tight, scratches, rubs, pulls, or whatever before you have to wear it for several hours!
2. As a general rule, courts tend to be conservative, so dress and look appropriate. The rule of thumb is, if you were a criminal defendant before the court, how would you want the judge and jury to perceive you? It is not fair, but you can be judged based on what you are wearing. When in doubt, ask your coach or professor about whether something is appropriate.
3. Keep hair and jewelry out of your way. Things that rattle on your body when you move or hair that gets in your eyes not only distracts you but the panel as well and diminishes your effectiveness by diverting attention from your argument.
4. Do not eat a big or greasy meal one to two hours prior to your presentation.

5. Have antacids, headache medicine, or cough drops with you in case you need them.
6. Take a watch (that does not beep) with you in case the bailiff does not have one. Take water with you into the room if none is provided, and if it is permitted. If not go to get a drink before you enter the room.
7. Turn off all cell phones, pagers, and beepers.
8. Use the bathroom before the round and limit fluid intake, especially those drinks with caffeine, an hour before your presentation.
9. Arrive at the "courtroom" at least 5-10 minutes early before your scheduled argument time. If the courtroom is empty, go in and sit at the appropriate counsel table.
10. Petitioner/Appellee sits on the left (as you are facing the bench), and Respondent/Appellant sits on the right. Be sure to put your names on the chalk/grease board, along with the number of minutes each person will be speaking (include rebuttal times if you are the Petitioner/Appellee).
11. Be sure to inform the bailiff about rebuttal time when he or she arrives. Ask the bailiff about time cards and in what increments the time cards will be given. You may also want to ask if the bailiff will stand up when time is up.
12. Ask the bailiff whether the judges are going to give you feedback immediately following the round in person, or whether the judges give comments only on the score sheet.
13. When the bailiff brings in the judges or the judges arrive on their own, stand up and stay standing until you receive a signal (nod) to sit down. The Petitioner should proceed directly

to the podium and wait for another signal or statement from the judge to begin.

14. Be sure that you do not know the judges or have a conflict of interest. When in doubt, have the bailiff check with the persons who are running the competition or simulation to be sure that the round can proceed.
15. When it is your turn to speak, go directly to the podium, place your notes on it, and await a signal or statement from the judge. Step back a couple of paces from the podium to let the judges know that you are awaiting their sign.
16. NEVER talk to your co-counsel while opposing counsel is presenting—write notes if you have to communicate. Do not make faces either—you look unprofessional when you do that! If opposing counsel speaks during your presentation, simply ignore them and keep being persuasive.
17. At competitions, NEVER identify what school you are from. If you are asked by the judges or the bailiff, inform the judges that you were instructed not to tell by your coach or professor.
18. In general, just take brief notes to the podium. If necessary, you may step back to your table during argument to get something (brief, copy of statutes, etc.).
19. Be yourself! Do not speak in a phony style or voice.
20. Do not be afraid to make concessions or indicate there are things that you do not know if you do not know them.
21. If you have tough questioning, do not give up. Hang in there and emphasize what you do know. Make a mental note that you will be more prepared the next time.

22. Do not tell the panel you are unprepared, cannot answer questions, or make excuses for why you are not performing well. Keep emphasizing the key points about your client's case.
23. Have fun with this! Oral argument should be an adrenaline rush, not an assignment from purgatory. Smile and enjoy the chance to show off how much you have learned.
24. Be confident, but not cocky and arrogant, about your argument. Remember to always look like you are winning and to use your best advocate tone of voice to persuade the court that you believe in your client's case.
25. Make sure you use all your time and use it effectively. If you are in the middle of answering a question and time is up, be sure to say: "I see my time is up. May I finish my response?" Briefly summarize, but keep it brief!
26. When you are done, say "Thank you, your honor(s)" and sit down.
27. At the end of the entire round of argument, stand up and walk over to shake the hands of your opponents. Always be gracious, no matter how difficult or nasty the round may have been.
28. If the judges are giving you feedback in the round, sit quietly until they do so. If not, thank everyone including opposing counsel for their time, gather your materials and leave the room. Do a quick check to be sure you have not left anything.
29. DO NOT discuss your round with others in the hallway. Wait until you have privacy and can speak where you cannot be heard. You can never know who might be listening.
30. In competition medal rounds, you should leave the room immediately and wait close to the room for the judges to bring

you back in. In the final round, when the judges stand, you should stand and stay standing until the judge leaves the room or comes down to greet you.

The following are sample cases used in school court procedures. Cases can be presented in a variety of forms. All will contain a fact pattern, as well as a position briefs relating how the case has reached the Supreme Court. Both sides and your sidebar regarding the brief may be presented in any number of ways.

The first case, *Dobbs v. Clegg*, was originally used at the National competition Case in 2003-04. The writer hypothesized a hypothetical as presented as a Circuit Court opinion. The writer explains its rationale followed by a question that does the same. Appended is a list of all allowable cases as well as the text of the rules and laws in question.

The second case, *Carrington v. Brazil*, was written by one of the authors for use in a classroom simulation. Rather than presenting the law in an Appeals Court opinion, the author provides the law through sample appellate briefs submitted to the Supreme Court.

Regardless of how the hypothetical is presented, it is critical that the facts as well as the law be factual and balanced. Neither side should be advantaged nor disadvantaged by being out of their control. Since students are rarely if ever allowed to choose their side in a case, the truth eventually the case is written, the better. In tournament competition, students are required to argue both sides of the case. The more one prepares, the more each side is often to win with the most that one can learn from the experience.



- usefulness of your argument. Don't forget to include some questions and/or anecdotes that will keep the audience interested, well informed, and engaged throughout your speech.
17. Above all else, Rule #2 of a speech should be an adrenaline-filled, exciting, informative, funny, witty, smile and enjoy the moment. You have learned.
18. As you conclude, keep your cool, and confident, about your argument. Remember to always look like you are winning and to use your best adjectives and/or stories to persuade the court that your side is the correct one.
19. Make sure you use all your time—and use it effectively. If you run out of time, don't panic; take a question and time is up, be sure to say, "Thank you very much. May I finish my response? Please, yes or no." Just keep it simple.
20. When you are finished, say "Thank you, your honor(s)" and sit down.
21. At the end of the unbroken series of arguments, stand up and walk over to shake the hands of your opponents. Always be gracious, no matter how difficult or noisy the round may have been.
22. When judges are giving you their verdicts, do not speak until they do so. If any of them asks for a break, do not request for their time. If you do, you will be given a quick check.
23. Do not let anyone see your results or your notes before the competition begins. You never know who has been watching.
24. Be a good sport. If you are lucky enough to win, congratulations! If you are not, then you have lost, but you have learned.

## APPENDIX TEN

# Sample Moot Court Cases

Paul Weizer and Lewis Ringel

What follows are sample cases used in actual moot court proceedings. Cases can be presented in a variety of forms. All will contain a fact pattern as well as a procedural history relating how this case has reached the Supreme Court. From there, the presentation regarding the law may be presented in any number of ways.

The first case, *DeNolf v. Olympus State University*, was used as the national tournament case in 2003-04. The entire hypothetical is presented as a Circuit Court opinion. The majority explains its rationale followed by a dissent, which does the same. Appended is a list of all allowable cases as well as the text of the relevant laws in question.

The second case, *Gusmano v. Bryant*, was written by one of the authors for use in a classroom simulation. Rather than presenting the law in an Appeals Court opinion, this method introduces the law through sample appellate briefs submitted to the Supreme Court.

Regardless of how the hypothetical is presented, it is critical that the facts as well as the law be fair and balanced. Neither side should be advantaged nor disadvantaged by things out of their control. Since students are rarely, if ever, allowed to choose their side in a case, the more even handedly the case is written, the better. In tournament competition, students are required to argue both sides of the case. This evens out disparities, but the more each side is given to work with, the more each side can learn from the experience.

THE SUPREME COURT  
OF THE UNITED STATES

No. 2003-328

**William DeNolf, Petitioner**

v.

**Olympus State University,  
Respondent**

On Writ of Certiorari to the  
United States Circuit Court of Appeals  
Seventeenth Circuit

**ORDER OF THE COURT ON SUBMISSION**

The petition for writ of certiorari to the United States Court of Appeals for the Seventeenth Circuit is granted for consideration of the following questions presented:

## Wool Coat Cases

July 2004 (part 1)

Commonly these cases happen in younger animals, but it is not uncommon for dogs starting to get older, or even very old, to develop similar lesions. These may affect any part of the body, but often occur on the head.

These cases develop rapidly, usually over a period of time, and are characterized by crusty, scaly, and crusting areas of skin. These areas are usually found on the head, neck, and trunk, but can also appear on the limbs and tail. The affected areas are often very sensitive to touch, and may cause the animal to scratch excessively.

The most common cause of these cases is a type of mite called Demodex. This mite is a normal inhabitant of the skin, but when it begins to multiply uncontrollably, it can cause significant problems.

Other causes include bacterial infections, such as *Staphylococcus aureus*, and viral infections, such as canine parvovirus. Fungal infections are also possible, but less common. In some cases, the underlying cause may be a reaction to a medication or a food allergy. In other cases, the cause may be unknown.

THE SUPREME COURT  
OF THE UNITED STATES

No. 2003-328

**William DeNolf, Petitioner**

v.

**Olympus State University,  
Respondent**

On Writ of Certiorari to the  
United States Circuit Court of Appeals  
Seventeenth Circuit

**ORDER OF THE COURT ON SUBMISSION**

The petition for writ of certiorari to the United States Court of Appeals for the Seventeenth Circuit is granted for consideration of the following questions presented:

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

(1) Whether a convicted sex offender has a constitutional right to privacy regarding the dissemination of information regarding that conviction;  
and,

(2) Whether the actions of the University deprive the petitioner of due process of the law as guaranteed by United States Constitution.

U. S. CIRCUIT COURT OF APPEALS  
SEVENTEENTH CIRCUIT

**William DeNolf,**  
**Plaintiff-Appellant**  
v.  
**Olympus State University,**  
**Defendant-Appellee**

No. CR-01-59-2

DeNolf  
Petitioner-Appellant  
v.

Olympus State University  
Defendant-Appellee

**OPINION**

Opinion by Judge Shanni Smith with Judge Allison Vowles concurring

Dissent by Judge Alyne Butland

Argued and Submitted August 20, 2003  
Decided August 28, 2003

## OPINION

*Smith, Circuit Court Judge*

Petitioner, William DeNolf, is a student currently registered full-time at Olympus State University. Yet, Mr. DeNolf has not taken a traditional route to higher education. DeNolf was involved in an incident following his high school graduation which derailed his college plans until today. At a graduation party, DeNolf, under the influence of an illegal substance himself, placed the drug Rohypnol, generically called flunitrazepam, into a drink of a sixteen-year-old high school classmate. After the woman lost consciousness, petitioner took her to an unoccupied bedroom in the house and proceeded to engage in sodomy and sexual intercourse with the victim.

As a result, he was charged with first-degree rape (Olympus G.L. 180, § 59), drugging a person for sexual intercourse (Olympus G.L. 272 § 3), and committing unnatural and lascivious acts with a minor (Olympus G.L. 272 § 35). DeNolf agreed to a plea agreement with the state. Owing to his complete lack of any prior criminal history as well as his young age, he pled guilty to the charge of committing unnatural and lascivious acts, while the other charges were dropped. DeNolf was sentenced to four years in prison. He has always admitted his wrongdoing in the matter and has expressed great remorse for his actions. Additionally, DeNolf has completed a drug abuse treatment program, and while in prison, found his religious calling. He began counseling other inmates about confronting substance abuse problems while in prison and has volunteered to assist in other programs upon his release. With good behavior factored in, DeNolf was released after serving two-and-one-half years. One of the conditions of his release stipulated that DeNolf must be employed or enrolled in a college or university full-time until such time as he would have completed his full sentence. In an attempt to resume his life, DeNolf enrolled at Olympus State University in September of 2002.

On October 11, 2000, Congress passed Public Law 106-386 § 1601, otherwise known as the Campus Sex Crimes Prevention Act. It was signed into law by the President two days later. This law requires sex offenders, when they register with the state, to indicate whether and where they are enrolled, employed, or volunteering on a college cam-

pus. By September 1, 2003, states must share that information with the relevant colleges, and the colleges must tell students, faculty members, and administrators where information on registered sex offenders can be obtained. The law also includes a provision amending the Family Educational Rights and Privacy Act of 1974 ("FERPA" 20 U.S.C. § 1232g) to give colleges the right to publish the registry information without getting prior consent from the named students.

While colleges wait for states to report to them, many have struggled with how they will present the information. The law requires only that colleges notify the public in some way that the updated registry of sex offenders exists and that they make the registry available for perusal. Most colleges have chosen to place printed copies of the registry in the campus police department and make its existence known either through the college's website or by mailing out pamphlets that direct students and others to its location.

Olympus State University, however, has gone a step further, making a place on its website for a list of sex offenders who work or are enrolled at the campus. At present, DeNolf is the only name listed. The listing includes a photograph of the petitioner as well as all registry information including such personal data as home and work addresses, date of birth, height, weight, hair and eye color, and a description of the offense for which DeNolf pled guilty. The University has also stated its intent, beginning with the Spring semester of 2004, to send individual notices to each student enrolled in classes with petitioner, informing them of his status and urging them to exercise caution on campus and in all campus activities.

Upon being informed that his name had been placed on the website, Mr. DeNolf brought suit in the U.S. District Court for Olympus, alleging that the notification provided for by the University violated his procedural and substantive due process rights under the U.S. Constitution. The District Court dismissed his case prior to the conduct of discovery on a motion for summary judgment. This appeal we consider today.

## I

The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders,

so long as the means of protection are reasonably designed for that purpose. It is apparent that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The laws at issue here are not retributive laws, but laws designed to give people a chance to protect themselves and their children. This is surely an interest of the highest order. The choice the Legislature made was difficult, for at stake was the continued apparently normal lifestyle of previously convicted sex offenders, some of whom were doing no harm and very well might never do any harm, as weighed against the potential molestation, rape, or murder by others of women and children because they simply did not know of the presence of such a person and therefore did not take the common sense steps that might prevent such an occurrence. The Legislature chose to risk unfairness to the previously convicted offenders rather than unfairness to the women and children who might suffer because of their ignorance. The evidence considered by the Legislature regarding the danger of sexual assault on college campuses was overwhelming. While one in eight men will be sexually assaulted (and 99.9% of that predation occurs by other men), one in three women will be raped in her life. Women are more likely to be raped during their high school and college years than at any other time in their lives. 500,000 women are raped every year. As the Senate hearings into the Violence Against Women Act point out, 50% of all women raped drop out of college or leave the job they were working at for at least 6 months to 1 year after the attack. The decision of the university to opt for more rather than less disclosure, on balance, was not a difficult choice to make and does not implicate any recognized liberty interest.

With respect to the privacy rights claim, petitioner has failed to demonstrate the existence of a legitimate privacy interest in preventing compilation and dissemination of truthful information that is already, albeit less conveniently, a matter of public record. Many courts have rejected similar privacy concerns and we see no reason to take issue with these rulings. See *Doe v. Kelley* 961 F. Supp. 1105 (1997) (upholding Michigan's distribution of similar personal information);

*Doe v. Poritz* 662 A. 2d 367 (1995) (upholding New Jersey's registration requirements for previously convicted offenders); *Paul P. v. Farmer* 227 F. 3d. 98 (2000) (upholding the public dissemination of home addresses against a privacy claim).

Further, the Supreme Court has never held that disclosure of personal information, even information that is embarrassing to an individual, is protected under the right of privacy. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. In the last term, the Supreme Court has upheld disclosure provisions that include an Internet registry website. *Connecticut Department of Public Safety v. Doe* 123 S. Ct. 1160 (2003).

Although the Campus Sex Crimes Prevention Act does not violate plaintiff's right to privacy under the Fourteenth Amendment, certain aspects of the law do implicate privacy interests. The government's strong interest in public disclosure, however, substantially outweighs plaintiff's interest in privacy.

## II

The petitioner's due process claims are similarly found wanting. The state of Olympus has an elaborate statute that establishes a three-tiered tracking system. The system varies considerably based upon the level of dangerousness of the offender. The statute provides for considerable information about the most serious sexual predators yet requires no community notification for minor offenders. Under Olympus law, a convicted sex offender is entitled to a hearing to determine the level of dangerousness posed to the public. DeNolf was never granted a hearing. However, federal law supercedes that issue.

The Campus Sex Crimes Prevention Act (Section 1601 of Public Law 106-386) is a federal law enacted on October 28, 2000, that provides for the tracking of convicted, registered sex offenders enrolled as students at institutions of higher education or working or volunteering on campus. The Act requires sex offenders already required to register in a State to provide notice, as required under State law, of each institution of higher education in that State at which the person is employed, carries on a vocation, or is a student. The Act further requires that state procedures ensure that this registration information

is promptly made available to law enforcement agencies with jurisdiction where the institutions of higher education are located and that it is entered into appropriate State records or data systems. These requirements are tied to state eligibility for certain types of federal grant funding and must be implemented through state law. The Act applies to all convicted sex offenders, regardless of the current level of dangerousness of the offender. Accordingly, regardless of the outcome of any state hearing to determine dangerousness, DeNolf would still fall under the federal reporting requirements.

Further, there is nothing a hearing can show that will remove petitioner from the reach of the Act. In cases such as *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), and *Goss v. Lopez*, 419 U.S. 565, (1975), the Court held that due process required the government to accord the plaintiff a hearing to prove or disprove a particular fact or set of facts. But in each of these cases, the fact in question was concededly relevant to the inquiry at hand. Here, however, the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under the Act. The law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.

Finally, the fact that attending college remains a condition of petitioner's early release does not change the circumstances. The intent of Congress was to apply the Campus Sex Crimes Prevention Act to all convicted sex offenders—regardless of their individualized circumstances. In upholding mandatory participation in a sexual abuse treatment program as a condition of release, the Supreme Court in *McKune v. Lile* 536 U.S. 24 (2002) held that sex offenders are a serious threat in this Nation. In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide. When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. There is no individualized reason to believe that petitioner will reoffend. However, there is every reason to believe that this Act will prevent many such offenses. Considering the staggering numbers presented, Congress is certainly permitted to address this problem.

It is so ordered.

**DISSENT**

*Butland, Circuit Court Judge:*

**I**

The Court today takes a very crabbed view of due process protections. While it is true that the Congress may have intended to include all sex offenders for reporting under the Campus Sex Crimes Prevention Act, the application of the Act today does little to accomplish its purpose. The stated purpose of the Olympus registration is "the protection of the public from...sex offenders...." While there is no statement of purpose contained in the Campus Sex Crimes Prevention Act, it would naturally appear to have a similar focus. However, requiring all convicted sex offenders to be subject to the draconian measures proposed by the respondent is far broader than necessary to accomplish that goal.

Olympus has chosen to focus the limited resources at its disposal on the most dangerous sexual predators. Olympus has also consciously chosen to withhold personal information from the community regarding sex offenders who, following a hearing, have been shown to no longer be a threat to the community. Federal law should not and cannot deprive petitioner of a hearing in this instance. Under Olympus law, all sex offenders are entitled to a hearing before any community notification takes place. While a hearing may seem pointless considering the terms of the federal law, a state is always free to provide greater due process protections for its citizens than the federal government. Olympus has chosen to provide additional protections to persons like petitioner. The federal Constitution is a floor, not a ceiling, when it comes to individual rights and freedoms.

The text of the federal law seems to suggest that Congress has considered exactly this type of circumstance. Consider the wording of the Act, "The Act requires sex offenders *already required to register in a State* to provide notice, *as required under State law*, of each institution of higher education in that State at which the person is...a student." Clearly, if the various state provisions regarding registration were to be preempted by the Act, there would be no need to mention state requirements at all.

Further, Olympus is not alone in providing additional due process protections. See *Roe v. Attorney General* 750 N.E. 2d. 897 (2001) (requiring individualized hearings as part of due process) and *Doe v. Attorney General* 715 N.E. 2d. 37 (1999) (finding Massachusetts State registration requirements and notification provisions to be unconstitutional in the absence of an individualized hearing to determine whether there is a present threat).

In this case, we have a clear example of a state-created liberty interest. For example, in *Hewitt v. Helms* 459 U.S. 460 (1983), the U.S. Supreme Court held that there exists a state-created liberty interest for prisoners to remain in the general population absent a hearing regarding reasons for removal. In *E.B. v. Verniero* 119 F. 3d. 1077 (1997) the Third Circuit Court of Appeals found that the Due Process Clause requires the state to hold individualized hearings to determine the level of dangerousness (and thus the appropriate tier) and at such a proceeding to shoulder the burden of justifying the classification and notification plan by clear and convincing evidence. See also *Artway v. Attorney General* 81 F. 3d. 1235 (1996). From these cases, it is apparent that a state-created liberty interest may provide for greater due process protections than similar federal laws. Olympus has chosen to provide hearings. Accordingly, DeNolf is entitled to, at a minimum, a hearing to demonstrate that he should fall into Tier I under Olympus law and thus should not be subject to community notification.

## II

The majority places much emphasis on the fact "that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." However, more is at stake here than mere injury to reputation. Petitioner, as a condition of release, is mandated to attend school. His standing in the university community will undoubtedly be adversely impacted by the sweeping Olympus notification plan. It is not a stretch of the imagination to consider that DeNolf may find it difficult to share notes with classmates, join a study group, or have close contact with a faculty advisor. He will be deprived of more than reputation. Petitioner will not receive the education that was intended as part of his early release program. In *Paul v. Davis* 424 U.S. 693 (1976) the U.S. Supreme Court, while finding no violation in that case,

did point out that only where the damage to reputation is coupled with another interest, such as employment, is procedural due process triggered. This idea of a "stigma plus" has been held to create a due process violation on many occasions. See *Fullmer v. Michigan* 207 F. Supp. 2d 650 (2002), and *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) as examples of this standard. To date, no court has considered whether the continuing legal obligations of persons designated as sex offenders, and the attendant criminal penalties for failure to comply, are a sufficient "plus" factor to alter the legal status of sex offender registrants in such a way that their constitutionally protected liberty interests are put in peril. It is clear here that we are dealing with more than just reputation. It would be ironic indeed if the state required persons such as petitioner to attend school only to deprive them of a fair chance to benefit from this educational opportunity.

### III

The court also gives very little consideration to the very real privacy interests at stake. While the Campus Sex Crimes Prevention Act does include an exception to the Family Educational Rights and Privacy Act of 1974 ("FERPA" 20 U.S.C. § 1232g), the privacy interests are no less real. In *United States v. Miami University* 294 F. 3d. 797 (2002), the Sixth Circuit Court of Appeals held that the Miami University student newspaper was not entitled to information regarding student disciplinary records. Citing FERPA, the court disallowed access. However, the court did not rely on FERPA alone, pointing out that "ten years before Congress enacted FERPA, the Supreme Court surmised that the First Amendment has a penumbra where privacy is protected from governmental intrusion" *Griswold v. Connecticut* 381 U.S. 479 (1965). Accordingly, certain students' privacy interests may find protection in the constitution. It is hard to imagine that student disciplinary records should receive greater protection than petitioner's life history. That loss of privacy can have very serious consequences for the community at large. In *E.B. v. Verniero* 119 F. 3d. 1077 (1997), the Third Circuit commented that vigilante justice occurs "with sufficient frequency and publicity" to justifiably induce fear within the offenders. Yet, vigilante violence is not solely a concern to those convicted of

sex crimes. Inaccurate information, wrong addresses, and misidentified individuals have also lead to attacks against completely innocent individuals. The confusion is often the result of erroneous information reported by the state. For example, the Texas sex offender website provides information regarding 20,000 registered offenders, and officials acknowledge the possibility of erroneous information. Before beginning a search on the Texas website, visitors must first read a disclaimer page. Shockingly, a random spot check of ten offenders' files on the Texas website in 1999 revealed that seven files contained errors, ranging from wrong addresses and inaccurate victim information to the reporting of wrong crimes altogether. Vigilantism from these programs has reached a nationwide level, yet few realize it stems from the notifications within their own backyards. By failing to correct the vast problems plaguing many notification methods, many states, including Olympus, are fueling a fire that needs extinguishing. It certainly does not need to include additional sex offenders that a hearing may determine pose no risk of future dangerousness.

#### IV

Finally, the majority makes much of the recent U.S. Supreme Court decision in *Connecticut Department of Public Safety v. Doe* 123 S. Ct. 1160 (2003). While it is true that the Court did uphold a registration requirement with many of the same features as those challenged today, the two situations remain very different. There was nothing in the Connecticut statute at all regarding individualized hearings. There was nothing in the Connecticut statute stating the purpose of the law being to protect the public based on the dangerousness of the offender. Both situations exist in Olympus. The Olympus statute was narrowly tailored to address the concerns of the community while protecting the rights of the petitioner. To discard those facts in favor of the broad federal mandate does little to serve either the needs of the community or the purpose of the law.

**TABLE OF CASES AND AUTHORITIES**

- 1) *Artway v. Attorney General* 81 F. 3d. 1235 (1996)
- 2) *Connecticut Department of Public Safety v. Doe*  
123 S. Ct. 1160 (2003)
- 3) *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999)
- 4) *Doe v. Attorney General* 715 N.E. 2d. 37 (1999)
- 5) *Doe v. Kelley* 961 F. Supp. 1105 (1997)
- 6) *Doe v. Poritz* 662 A. 2d 367 (1995)
- 7) *E.B. v. Verniero* 119 F. 3d. 1077 (1997)
- 8) *Fullmer v. Michigan* 207 F. Supp. 2d 650 (2002)
- 9) *Goss v. Lopez*, 419 U.S. 565, (1975)
- 10) *Griswold v. Connecticut* 381 U.S. 479 (1965)
- 11) *Hewitt v. Helms* 459 U.S. 460 (1983)
- 12) *McKune v. Lile* 536 U.S. 24 (2002)
- 13) *Paul P. v. Farmer* 227 F. 3d. 98 (2000)
- 14) *Paul v. Davis*, 424 U.S. 693 (1976)
- 15) *Roe v. Attorney General* 750 N. E. 2d. 897 (2001)
- 16) *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)
- 17) *United States v. Miami University* 294 F. 3d. 797 (2002)

**THE CAMPUS SEX CRIMES PREVENTION ACT  
PUBLIC LAW 106-386 § 1601**

SEC. 1601. NOTICE REQUIREMENTS FOR SEXUALLY VIOLENT OFFENDERS.

(a) SHORT TITLE- This section may be cited as the "Campus Sex Crimes Prevention Act."

(b) NOTICE WITH RESPECT TO INSTITUTIONS OF HIGHER EDUCATION—

(1) IN GENERAL—Section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071) is amended by adding at the end the following:

(j) NOTICE OF ENROLLMENT AT OR EMPLOYMENT BY INSTITUTIONS OF HIGHER EDUCATION—

(1) NOTICE BY OFFENDERS—

(A) IN GENERAL—In addition to any other requirements of this section, any person who is required to register in a State shall provide notice as required under State law—

(i) of each institution of higher education in that State at which the person is employed, carries on a vocation, or is a student; and (ii) of each change in enrollment or employment status of such person at an institution of higher education in that State.

(B) CHANGE IN STATUS—A change in status under subparagraph (A)(ii) shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated information is promptly made available to a law enforcement agency having jurisdiction where such institution is located and entered into the appropriate State records or data system.

(2) STATE REPORTING—State procedures shall ensure that the registration information collected under paragraph (1)—

(A) is promptly made available to a law enforcement agency having jurisdiction where such institution is located; and

(B) entered into the appropriate State records or data system.

(3) REQUEST—Nothing in this subsection shall require an educational institution to request such information from any State.

(2) EFFECTIVE DATE—The amendment made by this subsection shall take effect 2 years after the date of enactment of this Act.

(c) DISCLOSURES BY INSTITUTIONS OF HIGHER EDUCATION—

(1) IN GENERAL—Section 485(f)(1) of the Higher Education Act of 1965 (20 U.S.C. 1092(f)(1)) is amended by adding at the end the following:

(I) A statement advising the campus community where law enforcement agency information provided by a State under section 170101(j) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(j)), concerning registered sex offenders may be obtained, such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address.

(2) EFFECTIVE DATE—The amendment made by this subsection shall take effect 2 years after the date of enactment of this Act.

(d) AMENDMENT TO FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974—Section 444(b) of the General Education Provisions Act (20 U.S.C. 1232g(b)), also known as the Family Educational Rights and Privacy Act of 1974, is amended by adding at the end the following:

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071) concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

#### **STATE OF OLYMPUS REGISTRY ACT**

The Olympus state legislature hereby finds that: (1) the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest to the government; (2) law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the existing lack of information known about sex offenders who live within their jurisdictions and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend, and prosecute sex offenders; (3) the system of registering sex offenders is a proper exercise of the commonwealth's police powers regulating present and ongoing conduct, which will provide law enforcement with additional information critical to preventing sexual victimization and to resolve incidents involving sexual abuse promptly; (4) in balancing offenders' rights with the interests of public security and safety, the release of information about sex offenders to law enforcement before the opportunity for an individual determination of the sex offender's risk of

reoffense is necessary to protect the public safety; (5) registration by sex offenders is necessary in order to permit classification of such offenders on an individualized basis according to their risk of reoffense and degree of dangerousness; (6) the public interest in having current information on certain sex offenders in the hands of local law enforcement officials, including prior to such classification, far outweighs whatever liberty and privacy interests the registration requirements may implicate. Therefore, the commonwealth's policy, which will bring the state into compliance with federal requirements, is to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act.

All persons convicted of a "sexually violent offense" are required to register annually by sending the following information to the state sex offender database: complete name, work address, home address, date of birth, height, weight, eye and hair color, description of convicted offenses, and current photograph. The state sex offender database shall supply this information to local law enforcement in the jurisdiction in which the offender resides.

Sexually violent offense, indecent assault and battery on a child; indecent assault and battery on a mentally retarded person; rape; rape of a child under 16 with force; assault with intent to commit rape; assault of a child with intent to commit rape; drugging persons for sexual intercourse; unnatural and lascivious acts with a minor; aggravated rape; and any attempt to commit a violation of any of the aforementioned sections or a like violation of the law of another state, the United States or a military, territorial, or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

The guidelines shall provide for three levels of notification depending on the degree of risk of reoffense and the degree of dangerousness posed to the public by the sex offender or for relief from the obligation to register:

- (a) Where the board determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a Level 1 designation to the sex offender. The police shall not disseminate information to the general public identifying the sex offender where the board has classified the individual as a Level 1 sex offender.
- (b) Where the board determines that the risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information, it shall give a Level 2 designation to the sex offender. The public shall have access to the information regarding a Level 2 offender.
- (c) Where the board determines that the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination, it shall give a Level 3 designation to the sex offender. Neighboring police districts shall share sex offender registration information of Level 3 offenders and may inform the residents of their municipality of a sex offender they are likely to encounter who resides in an adjacent city or town. The police or the board shall actively disseminate in such time and manner as such police department or board deems reasonably necessary.

**CLASSIFICATION AND HEARING.** (1) Upon review of any information useful in assessing the risk of reoffense and the degree of dangerousness posed to the public by the sex offender, including materials described in the board guidelines and any materials submitted by the sex offender, the board shall prepare a recommended classification of each offender. Such recommendation may be made by board staff members upon written approval by one board member; provided, however, that if the sex offender was a juvenile at the time of the offense, written approval must be given by a board member who is a licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of juvenile sex offenders.

Upon receiving registration data, the police department at which the sex offender registered, the sentencing court, or by any other means, the board shall promptly notify the sex offender of his right to

submit to the board documentary evidence relative to his risk of reoffense and the degree of dangerousness posed to the public and his duty to register. Upon reviewing such evidence, the board shall promptly notify such sex offender of the board's recommended sex offender classification, his duty to register, if any, and his right to petition the board to request an evidentiary hearing to challenge such classification and duty, his right to retain counsel to represent him at such hearing and his right to have counsel appointed for him if he is found to be indigent as determined by the board; provided, however, that such indigent offender may also apply for and the board may grant payment of fees for an expert witness in any case where the board in its classification proceeding intends to rely on the testimony or report of an expert witness prepared specifically for the purposes of the classification proceeding. Such sex offender shall petition the board for such hearing within 20 days of receiving such notice. The board shall conduct such hearing in a reasonable time according to the provisions of subsection (2). The failure timely to petition the board for such hearing shall result in a waiver of such right and the registration requirements, if any, and the board's recommended classification shall become final.

(2) If an offender requests a hearing in accordance with subsection (1), the chair may appoint a member, a panel of three board members, or a hearing officer to conduct the hearing, according to the standard rules of adjudicatory procedure or other rules which the board may promulgate, and to determine by a preponderance of the evidence such sex offender's duty to register and final classification. The board shall inform offenders requesting a hearing under the provisions of subsection (1) of their right to have counsel appointed if a sex offender is deemed to be indigent as determined by the board. If the sex offender does not so request a hearing, the recommended classification and determination of duty to register shall become the board's final classification and determination and shall not be subject to judicial review.

If the board, in finally giving an offender a Level 3 classification, also concludes that such sex offender should be designated a sexually violent predator, the board shall transmit a report to the sentencing court explaining the board's reasons for so recommending, including specific identification of the sexually violent offense committed by

such sex offender and the mental abnormality from which he suffers. The report shall not be subject to judicial review. Upon receipt from the board of a report recommending that a sex offender be designated a sexually violent predator, the sentencing court, after giving such sex offender an opportunity to be heard and informing the sex offender of his right to have counsel appointed, if he is deemed to be indigent shall determine, by a preponderance of the evidence, whether such sex offender is a sexually violent predator. An attorney employed or retained by the board may make an appearance, to defend the board's recommendation. The board shall be notified of the determination. A determination that a sex offender should not be designated a sexually violent predator shall not invalidate such sex offender's classification. Where the sentencing court determines that such sex offender is a sexually violent predator, dissemination of the sexually violent predator's registration data shall be in accordance with a Level 3 community notification plan; provided, however, that such dissemination shall include such sex offender's designation as a sexually violent predator.

THE SUPREME COURT  
OF THE UNITED STATES

No. 2003-437

**Geronimo Gusmano, Petitioner**  
**v.**  
**Natasha Bryant, Respondent**

**THE FACTS**

In January 2000, A. Natasha Bryant, a twenty-three-year-old graduate of the College of New Jersey, a small liberal arts college in south-central New Jersey located on 289 tree-lined acres, moved to Sacramento, California, to take a job as a lobbyist with a public interest lobby group committed to eradicating ATM bank fees. The group in question is known as BATM (pronounced "Bait-Umm"). Upon her arrival in Sacramento, Ms. Bryant rented a two-bedroom apartment on the first floor of a privately owned building in a residential section of town just a few blocks from the Capitol Building. The building contained four apartments including a basement unit. The landlord, Geronimo Gusmano, lived in a different section of town. Ms. Bryant's apartment had a kitchen, a bedroom, and a living room. The apartment was shaped like a rectangle with the east and west sides being the longer of the four sides. The northern portion of the apartment, which faced the street, included the front door and a small laundry room. The kitchen, which came with a gas stove and a microwave, but not a refrigerator, was located in the southern part of the apart-

ment.<sup>1</sup> The master bedroom ran the length of the western wall of the apartment. The bedroom included a sizeable walk-in closet and a bay window. Along the east side of the apartment was a smaller bedroom, which Ms. Bryant used as a study, which featured a large window, and the living room, which featured a fireplace and a large window with a base that Ms. Bryant could sit in and look out. To its west and south, the apartment bordered other apartments. To the east, it abutted a cul-de-sac. The windows of the study and the living room looked out on an asphalt play area where elementary and junior high school children played basketball, skipped rope, or played hopscotch. On the other side of the play area, several hundred feet away, was a church. By local ordinance law, the play area was a common, or public, area that belonged to Sacramento. A lover of horticulture, Ms. Bryant placed several plants in the bay window. When the weather was sunny, Ms. Bryant would leave her drapes open so the plants could get the sunlight. Ms. Bryant also frequently left the drapes open so that her dog, Jambalaya, could lie in the sun. On weekday evenings, Jambalaya would sit and watch for Ms. Bryant to return home from work. On weekday evenings, and on weekends, Ms. Bryant often sat in the window and read or watched the children play. An avid basketball fan herself, Ms. Bryant often yelled encouragement to the children, and on occasion refereed their games.

When Ms. Bryant first viewed the apartment, the walls in the study and the living room were decorated with wallpaper depicting various battle scenes from the Second World War [the previous tenant, a former Marine aviator, had selected the paper]. As a Quaker, she found the wallpaper in the study objectionable. Ms. Bryant requested that as a condition of renting the apartment that Mr. Gusmano remove the wallpaper and repaint the living room. Mr. Gusmano indicated that he did not object to Ms. Bryant replacing the wallpaper or painting the apartment, but that he did not have the time to do the work himself. The two agreed that Mr. Gusmano would pay for paint and new wallpaper if Ms. Bryant would do the

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<sup>1</sup> It is common in California for apartments to come without refrigerators. Some with BATM suspected that this was in some way part of a conspiracy to rule the world. Ms. Bryant had her doubts about such and, while she thought it odd, she purchased a used refrigerator.

work herself. No discussion occurred as to the new wallpaper or the paint except that Mr. Gusmano asked that Ms. Bryant not purchase a dark paint or any plaid wallpaper. No discussion of the kind of art Ms. Bryant might display occurred. Ms. Bryant signed a standard California lease and moved in early January 2000. The lease contained standard language that stipulated that Ms. Bryant would not break any laws. It did not discuss displaying artwork.

Ms. Bryant painted the living room white. On the walls, she hung several photographs, including one of her father, a mirror, and the New York skyline pre-September 11, 2001. There were also several reproductions of famous artwork by well-known artists. The most prominent of these was a reproduction of Henri Matisse's *Le Bonheur de vivre*<sup>2</sup> which Ms. Bryant purchased online.

For the study, Ms. Bryant chose light wallpaper that contained a light flower pattern. In the study she hung a photograph of Al Franken,<sup>3</sup> and four pieces of art ranging from three feet by five feet to four feet by four feet. Three of the pieces were photographs, while the fourth was a painting. Ms. Bryant hung the art on the wall facing the window. She did so because the north wall contained her desk and a closet ran along the south wall. The art depicted a variety of homo-erotic scenes and a G-string. The second woman, who is wearing a cheerleader's skirt, bobby socks, and saddle shoes, is nude from above the waist. The women are photographed from the side, thus there is no frontal nudity. *Photo B* was a black & white photograph depicting a sheep running toward twenty naked men. The men, running away from the sheep, are seen only from behind headed toward a cliff. Each man is wearing a Mel Gibson mask (backwards) and carrying a fifth of bourbon in one hand and a bicycle tire in the other.

<sup>2</sup> This painting, which covered 6 feet by 8 feet of canvas, is a depiction of "sheer pastoral joy" (Ingrid Schaffner, 1998. *The Essential Henri Matisse*. Harry N. Abrams, Inc: New York). "*Bonheur*" is French for "a good time" and the subjects, sixteen nude males and females in all, are doing just that. In the background six of the nudes dance in a circle, while one, standing near three goats, plays a flute, and two women stand with one draping her arm over the other. In the foreground, several nudes lounge on a grassy knoll, two, a male and female, are kissing.

<sup>3</sup> In 1999, Al Franken published a farce of what would happen if he were elected President of the United States. In *Why Not Me?*, Franken is elected president due to his opposition to ATM fees. Mr. Franken is not a member of BATM.

In *Photo C*, a pair of naked women are skydiving. The women are holding a banner that reads "Lesbian Skydivers For George W. Bush!!!" In *Painting A*, two men, dressed in conservative business suits and top hats and carrying umbrellas, are walking, holding hands, in the rain. In the same painting, in the background, two women are having coffee at an outdoor café. The women are holding hands. Copies of *Fahrenheit 451* and *The Handmaid's Tale* are on the table. Behind them stands a waiter. He is dressed like Robin Hood and wears an Albert Einstein mask. He holds a tray in one hand and a gold pistol in the other. He is smoking a cigarette and is levitating.

Within a few days of Ms. Bryant moving in, Mr. Gusmano received complaints regarding the artwork from some of the parents of children who played in the cul-de-sac. In addition, the reverend at the church that abuts the play area, Anthony Comstock, complained to Mr. Gusmano about the artwork displayed in the study and the Matisse painting in the living room.<sup>4</sup> In early March 2000, the church sponsored a series of protests outside Ms. Bryant's apartment. The protestors carried signs reading such things as: "Pervert Go Home," "Close Your Damn Blinds—Stupid," "Down With Queer Art," and "Gusmano is Anti-Family." The protestors obtained a permit from the city and picketed single-file, back and forth, outside Ms. Bryant's east window in the early evening and on weekends. They did not block the street or the front door, nor did they interfere with passers by. They did, however, block much of the sidewalk and on occasion they did sing and chant.

In March, 2000 two of Gusmano's tenants, citing the protests, announced they would move out when their leases expired.<sup>5</sup> On April 5, 2000, Mr. Gusmano requested that Ms. Bryant close her blinds, or take the art down and replace it with art that was not obscene. Ms. Bryant refused both requests on the grounds that the art was not obscene and, even if it were, she alleged a right to possess such materials in her own home. She also noted that her plants would die

<sup>4</sup> Mr. Gusmano received several calls from citizens inquiring as to where they could buy similar art. Mr. Gusmano's response was: "The Republic of Gilead." Ironically, he was not far off. Ms. Bryant had purchased the artwork online from *Gilead's*, an art gallery in New Jersey owned and operated by Anthony Licari. Mr. Licari paid much of Ms. Bryant's legal bills.

<sup>5</sup> They did in fact move out in the summer of 2000. Their apartments remain vacant.

without sunlight. On April 8, 2000, Mr. Gusmano filed notice with the city that Ms. Bryant had broken her lease; he asked that the city police evict her on the grounds that her actions threatened the public welfare and damaged his property. Ms. Bryant obtained an injunction from a city judge against the eviction.

In June 2000, Mr. Gusmano, faced with losing business, asked a California Superior Court to use its powers of equity to order that Ms. Bryant either remove the art or close her blinds, or to find that she had violated her lease and evict her. The court refused to evict Ms. Bryant; however, it did order that she remove the artwork or close her blinds. Ms. Bryant appealed to an intermediate appellate court on the grounds that PL-205 provided for no such remedy. That court refused to rule. Ms. Bryant appealed to the California Supreme Court. That court, in a decision grounded in state and federal law, ruled in Ms. Bryant's favor. Mr. Gusmano appealed to the U.S. Supreme Court.

Sacramento nuisance ordinance PL-205, while forbidding citizens to use their places of residence for illegal activity, did not address displays of nudity except to require that citizens not expose themselves to the public. Concurrent to Gusmano's suit, Sacramento, citing PL-205, cited Ms. Bryant for speech that posed a "clear and present danger" to the public order and to the welfare of children and for possessing materials deemed obscene by state law. In September 2000, the California Supreme Court threw the citation out on the grounds that it violated Ms. Bryant's state and federal free speech rights. Sacramento applied for *certiorari* to the U.S. Supreme Court. The U.S. Supreme Court granted certiorari and combined the two cases.

#### LEGAL ARGUMENTS FOR THE APPELLANT GUSMANO

##### Bill of Rights Does Not Apply to Private Citizens

The U.S. Supreme Court has long since established that the civil liberties and civil rights guarantees provided by the U.S. Constitution do not apply to private citizens. *The Civil Rights Cases*, 109 U.S. 3 (1883). More to the point, the First Amendment does not provide a right to

speak on private land, or even quasi-public land. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

### Private Property

While property is not an absolute right, the U.S. Constitution provides for a general right of private property that, while admittedly not absolute, has been recognized as "fundamental" for generations. *Burlington & Quincy Railway Co. v. Chicago* (1897); *Nebbia v. New York*, 291 U.S. 502 (1924); *Barsky v. Board of Regents*, (1955); *Lynch v. Household Finance Corp.*, (1972); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). This property right provides individuals, as well as corporations, with significant control over how and for what purposes their property is to be used. *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Denver Area Educational Telecommunications Consortium, Inc.*, 116 S. Ct. 2374 (1996). Also see William Douglas, 1963. *Anatomy of Liberty*.

### Takings Clause

Under the Fifth Amendment to the U.S. Constitution "private property" shall not "be taken for public use, without just compensation." Protection against an unjust "taking" is a "fundamental" right. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). By tradition, courts have the authority to judge if compensation is "just" or if a "taking" has occurred. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). By the Court's own admission, it is difficult to define a "taking." *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). Essentially, the Court has done so in an "ad hoc" manner. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Historically, a "taking" is accompanied, or caused, by a state law or other regulation. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). At least one Justice, however, has found a jury award to be an action tantamount to an unjust taking. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), O'Connor, J., dissent-

ing. While no overt regulation exists, if State law, such judicial interpretation of the California Constitution, causes Appellant Gusmano to suffer property damages without compensation, it is urged that an unjust taking has occurred. Because federal law is supreme to State law, Appellant Gusmano's claims must triumph.

### Powers of Equity

California does not provide any remedy for this conflict. The U.S. Supreme Court, however, can use its power of equity to order the Appellee to close her blinds, or remove the art from her walls.

### Appellant Gusmano Is Not an Agent of the State

Mr. Gusmano is not a state agent nor a state employee. *Moose Lodge #107 v. Irvis*, 407 U.S. 163 (1972). Thus, the provisions of the Fourteenth Amendment, as well as the First Amendment, do not apply to him. *The Civil Rights Cases*, 109 U.S. 3 (1883).

### PruneYard Shopping Center v. Robins

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the U.S. Supreme Court affirmed a California Supreme Court's interpretation of its own constitution. This decision established that the California Constitution, Article I, Sections 2(a) and (3), provided a right to petition for redress of grievance in front of a supermarket on privately owned property. *Robins* is silent about any alleged right to subject others to offensive art. This is not the only factual difference. Because the facts of *Robins* and *Gusmano* do in fact differ, *Robins* is not the controlling precedent. Because *Robins* is not controlling, a decision affirming the appellant's case does not need to harm any precedent.

### **Appellant Gusmano's First Amendment Rights**

The State cannot force an individual to display specific messages on his/her property. *Wooley v. Maynard*, 430 U.S. 705 (1977). The courts are an instrument of the State. Furthermore, the State cannot compel an individual, a group, or a corporation to assume or express a specific belief. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornilla*, 418 U.S. 241 (1974); *South Boston Allied War Veteran's Council v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston*, 115 S. Ct. 2238 (1995).

### **LEGAL ARGUMENTS FOR THE APPELLANT SACRAMENTO**

#### **The Art Is Obscene and Poses a Clear and Present Danger**

Obscenity is not protected speech. *Roth v. U.S.* 354 U.S. 476 (1957). The art in question is obscene. *Miller v. California*, 413 U.S. 15 (1973). It poses a clear and present danger to the community.

#### **Time, Place, and Manner of Speech**

States can regulate the time, place, and manner of speech in a manner that is content-neutral. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This is true of regulations that limit the placement of "adult" movie houses and the type of entertainment that theaters can provide. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

### State Interest in Protecting the General Welfare

The state has an interest in protecting and promoting the health, public safety, decency, and general welfare of its citizens. *Davis v. Beason*, 113 U.S. 333 (1890); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The state can protect children from the ill effects of child pornography by criminalizing its production, its sale, or its possession. *New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968); and *Osborne v. Ohio*, 495 U.S. 103 (1990) respectively. The state can further forbid inappropriate speech that would psychologically harm children, such as prayer at public functions or sexual innuendo. *Lee v. Wiesman*, 505 U.S. 577 (1992); and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) respectively. Such includes regulations or actions that include entering the privacy of an adult's home. *Osborne v. Ohio*, 495 U.S. 103 (1990) and, especially, *Fort v. City of Miami* (1967). In addition, the state can proscribe speech that defames groups or classes of citizens who may view or hear offensive speech. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The art in this case is offensive to certain groups and can be banned.

### Hanging Obscene Art Is Action Not Speech

*Chaplinsky v. New Hampshire*, 315 U.S. 569 (1942) established that there is speech of "slight social value" that does not receive the full protection of the First Amendment. While the list of what constitutes speech of "slight social value" has diminished, it includes fighting words, speech that is lewd and obscene, and speech of a symbolic nature. Hanging art in an apartment is not pure speech; rather it combines speech and non-speech elements. Speech of such "slight social value" does not trigger strict scrutiny. *U.S. v. O'Brien*, 391 U.S. 367 (1968). Speech of "slight social value" is to be judged by either intermediate scrutiny or rational basis. In *Spence v. Washington*, 418 U.S. 405 (1974), the U.S. Supreme Court established that to qualify as symbolic speech, and thus trigger intermediate scrutiny, "there must be "a[n] intent to convey a particularized message" and there must be a "great [likelihood] that the message would be understood by those who viewed it." In this case, the appellee's actions fail *Spence*. Accord-

ingly, rational basis should be applied to the obscenity and public welfare laws in question. Such laws plainly satisfy the Test of Rationality.

## LEGAL ARGUMENTS FOR APPELLEE BRYANT

### Nature of the Speech in Question

The art in question does not meet the definition for obscenity set out in *Miller v. California*, 413 U.S. 15 (1973). Successive cases have altered *Miller* to require state rather than local standards and have clarified that the "average person" means not an ordinary person but a reasonable one. *Jenkins v. Georgia*, 418 U.S. 153 (1974) and *Pope v. Illinois*, 481 U.S. 497 (1987). Because the art in question does not involve any children, it cannot be banned under either *New York v. Ferber*, 458 U.S. 747 (1982) or *Osborne v. Ohio*, 495 U.S. 103 (1990). Relying on *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942) and *Beauharnais v. Illinois*, 343 U.S. 250 (1952), appellants argue that the speech in question is offensive and punishable. This assumes that such speech is of "slight social value" and, consequently, is not entitled to full First Amendment protection. Yet, the Court has held that speech that is offensive or harmful is protected speech that cannot be banned or suppressed without banning or suppressing all speech that is offensive or harmful. *Cohen v. California*, 403 U.S. 15 (1971); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Texas v. Johnson*, 491 U.S. 397 (1989); and *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) respectively. More to the point, non-obscene speech is entitled to no less protection than other forms of expression, no matter how coarse, vulgar, or distasteful it may be to some. *Mattel, Inc. v. MCA Records*, 28 F.Supp.2d 1120 (1998). California Penal Code s. 311(a) also requires that defining obscenity requires, in part, an element of appeal to the prurient interest, and that the matter must be taken as a whole in making this determination. The speech does not appeal to such an interest and judged as a whole is not obscene.

### No Clear and Present Danger

The art in question poses no clear and present danger to the children or to the community. That test, first enunciated in *Schenck v. U.S.*, 249 U.S. 47 (1919) and elaborated on in subsequent cases such as *Feiner v. New York*, 340 U.S. 315 (1951) and *Yates v. U.S.* 354 U.S. 298 (1957), envisions written or verbal expressions of a political rather than sexual nature. To pose a "clear and present danger," speech must either be a clear incitement to unlawful conduct, not advocacy of abstract doctrine, and that incitement to "imminent lawless action" must be "likely to incite or produce such actions" *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The burden on the government is to show that the danger is real, not just conjectural. *U.S. v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995).

### Privacy

Americans enjoy a right to privacy that extends to the home as well as their own body. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Moore v. East Cleveland*, 431 U.S. 494 (1977); and *Griswold v. Ct.*, 381 U.S. 479 (1965). The First Amendment to the U.S. Constitution guarantees the right to possess obscene materials in one's own home. *Stanley v. Georgia*, 394 U.S. 557 (1969).

### *Appellant's Free Speech Rights*

Appellant Gusmano argues that the State cannot force an individual to display specific messages on his/her property. For this appellant relies primarily on *Wooley v. Maynard*, 430 U.S. 705 (1977). This is in error. *Wooley* involved a State requirement that an individual display an ideological message on his property. There is no comparable State effort in the present case. Appellant Gusmano further avers that the State cannot compel an individual, a group, or a corporation to assume or express a specific belief. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *Miami Herald Pub-*

*lishing Co. v. Tornilla*, 418 U.S. 241 (1974); *South Boston Allied War Veteran's Council v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston*, 115 S. Ct. 2238 (1995). The facts of each of these cases can be distinguished and, as such, do not apply to Gusmano.

### **Fine Art Is Entitled to Full Protection of the First Amendment**

Fine art, be it movies, plays, paintings, ballet, or music, is entitled to the full protection of the First Amendment. *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 684 (1948), *Kinsley International Pictures Corp. v. S.U.N.Y.*, 360 U.S. 684 (1959), *U.S. Sound & Service, Inc. v. Brick Township* (3d Cir.) 126 F.3d 555, (1997) citing *Philips v. Borough of Keyport*, (3d Cir.) 107 F.3d 164 (1997). This list includes nude photographs. *Contemporary Arts Center v. Ney*, 735 F.Supp. 743 (1990). The proper test to be used is Strict Scrutiny. *Sable Communications of CA v. F.C.C.*, 492 U.S. 115 (1989). While the public's interest in promoting the general welfare and protecting children is compelling, evicting the Appellee or infringing upon her rights of privacy and expression is not essential to achieving the State's objective. Any censorship must be content neutral. *Simon & Schuster, Inc. v. NY State Crime Victims Bd.*, 502 U.S. 105 (1991); *Chicago Police v. Mosley*, 408 U.S. 92 (1972). While the government may have an interest in protecting children from exposure to "indecent material," a content-based regulation must use the least restrictive means for achieving that interest.

### **Equal Protection**

Appellee is unfairly singled out by Appellants because they do not approve of her taste in art and because they infer her sexual preferences [meaning that they deviate from what they believe to be normal] from her taste in art. This violates the equal protection clause of the Fourteenth Amendment as well as the equal protection clause of California Constitution [Art. I, Sec. 7 and Art. IV Sec. 16]. Singling Appellee out for special treatment because of the sexual content of her art constitutes an arbitrary and invidious classification based upon sexual preference. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *U.S. v.*

*Carolene Products, Inc.*, 304 U.S. 144 (1934); *Bowers v. Hardwick* (1986), 478 U.S. 186 (1986), Stevens, J., dissenting.

### California Constitution

*Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979) and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) established that there is a California right to engage in free speech on private property. California has independent and adequate grounds for its decision that must be respected by the U.S. Supreme Court. *Michigan v. Long*, 463 U.S. 1032 (1983).

### Application of Bill of Rights and the Civil War Amendments to the States and Private Persons

It is true that the Bill of Rights and the Civil War Amendments do not apply to private citizens. It is equally correct that an individual cannot hide behind such a legal technicality to deny another citizen a fundamental right such as life or liberty. In *Robins* the Court upheld the free speech rights of one party against the property rights of another. Appellee asks that the Court do so in this case. In addition, it is noted that there are ample state grounds that apply which make the application of the Bill of Rights and the Civil War Amendments to private citizen Gusmano unnecessary.

### Property and Takings Concerns

Property rights are not absolute. *Nebbia v. New York*, 291 U.S. 502 (1924). *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) and *Hudgens v. NLRB*, 424 U.S. 507 (1976) establish that the First Amendment does not provide a right to protest on quasi-public land, but they are silent about art in a private home. The facts of those cases and *Gusmano* are very different. The controlling case in this area is *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) and *Robins* clearly rejected the idea that

upholding free speech rights by the California judiciary constitutes an unjust "taking."

## Contributors

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